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Judicial Ethics and Supreme Court Exceptionalism

AMANDA FROST*

ABSTRACT

In his 2011 Year-End Report on the Federal Judiciary, Chief Justice John Roberts cast doubt on Congress's authority to regulate the Justices' ethical conduct, declaring that the constitutionality of such legislation has "never been tested." Roberts' comments not only raise important questions about the relationship between Congress and the Supreme Court, they also call into question the constitutionality of a number of existing and proposed ethics statutes. Thus, the topic deserves close attention.

This Essay contends that Congress has broad constitutional authority to regulate the Justices' ethical conduct, just as it has exercised control over other vital aspects of the Court's administration, such as the Court's size, quorum requirement, oath of office, and the dates of its sessions. The Essay acknowledges, however, that Congress's power to regulate judicial ethics is constrained by separation of powers principles and the need to preserve judicial independence. Furthermore, legislation directed at the Supreme Court Justices in particular must take into account the Court's special status as the only constitutionally required court, as well as its position at the head of the third branch of government. Although these are important limitations on Congress's power, existing and proposed ethics legislation fall well within them.

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I. INTRODUCTION

In his mild-mannered way, Chief Justice John Roberts has set the stage for a constitutional conflict between Congress and the Supreme Court. Roberts' 2011 Year-End Report on the Federal Judiciary focused on judicial ethics, a subject that has been much in the news lately.¹ In the course of that year, several of the Justices were publicly criticized for their alleged involvement in political fundraisers;² acceptance of gifts³ and travel expenses paid for by groups with political viewpoints;⁴ failure to report a spouse's employment;⁵ and, most controversially, refusal to recuse themselves from the constitutional challenges to the health care reform legislation despite alleged conflicts of interest.⁶ Existing laws already cover some of this claimed misconduct, and the spate of negative publicity inspired the introduction of new federal legislation that would further regulate the Justices' behavior.⁷ Roberts' Year-End Report acknowledged these

1. 2011 Year-End Report on the Federal Judiciary (Dec. 31, 2011), available at <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

2. See, e.g., Jeff Shesol, Op-Ed, *Should the Justices Keep their Opinions to Themselves?*, N.Y. TIMES, Jun. 28, 2011, at A23 (describing Justice Alito's attendance at the American Spectator's fund-raising dinner, where he had previously given the keynote address, and Justices Thomas's and Scalia's attendance at political strategy meetings hosted by the conservative Koch brothers); R. Jeffrey Smith, *Professors Ask Congress for an Ethics Code for Supreme Court*, WASH. POST, Feb. 23, 2011 (describing public interest group's criticism of Justices Thomas and Scalia for attending political events hosted by the Koch brothers); Nan Aron, Op-Ed., *An Ethics Code for the High Court*, WASH. POST, Mar. 13, 2011 (same).

I do not take a position on the merits of these allegations of unethical conduct by the Justices, in part because some of the facts underlying these claims are in dispute. The allegations are noted here only to support the point that the Justices' ethical conduct is regularly the subject of public debate, which in turn supports calls for congressional oversight.

3. See Mike McIntire, *Friendship of Justice and Magnate Puts Focus on Ethics*, N.Y. TIMES, June 19, 2011, at A1 (describing real estate magnate Harlan Crow's gifts to Justice Thomas and his wife, as well as his financial support for projects in which they have an interest).

4. See Editorial, *The Justices' Junkets*, WASH. POST, Feb. 21, 2011, at A14 (criticizing Justices Breyer, Ginsburg, and Sotomayor for taking foreign trips paid for by organizations with "liberal agendas").

5. See Jeffrey Toobin, *Partners*, NEW YORKER, Aug. 29, 2011, at 41 (reporting that in January 2011, Justice Clarence Thomas amended several of his financial disclosure forms because he failed to record his wife's employment).

6. See, e.g., Editorial, *The Supreme Court's Recusal Problem*, N.Y. TIMES, Dec. 1, 2011, at A38 ("Liberals in Congress have called for Justice Clarence Thomas to recuse himself from the review of the health care reform law because his wife, Virginia, has campaigned fervently against it. Conservatives insist that Justice Elena Kagan should remove herself from the case because, they claim, as solicitor general she was more involved in shaping the law than she lets on."); Toobin, *supra* note 5, at 41 (reporting that in February 2011, 74 members of Congress "called on Thomas to recuse himself from any legal challenges to President Obama's health-care reform, because his wife has been an outspoken opponent of the law").

7. See Smith, *supra* note 2, at 41 (describing the controversies regarding the Justices' political activities and reporting that Representative Chris Murphy was planning to introduce legislation to address the problem); see also Erich Lichtblau, *Democrats Seek to Impose Tougher Supreme Court Ethics*, N.Y. TIMES, Sep. 8, 2011, available at <http://thecaucus.blogs.nytimes.com/2011/09/08/democrats-seek-to-impose-tougher-supreme-court-ethics/?scp=4&sq=ginsburg%20ethics%20%22supreme%20court%22&st=cse>; Robyn Haig Cain, *Rep. Slaughter Wants a Supreme Court Code of Ethics*, Mar. 9, 2012, available at http://blogs.findlaw.com/supreme_court/2012/03/rep-slaughter-wants-a-supreme-court-code-of-ethics.html (describing a letter signed by Representative

accusations of impropriety, as well as the legal framework that governs in this area.⁸ Then, in a shot across Congress's bow, he stated that the Court had "never addressed" Congress's constitutional authority to prescribe ethics rules for the Supreme Court⁹—which many took to be a broad hint that, at least in the Chief Justice's view, Congress lacks that authority.¹⁰

To be sure, the Chief Justice was careful to note that his "judicial responsibilities preclude [him] from commenting on any ongoing debates about particular issues or the constitutionality of any enacted legislation or pending proposals."¹¹ But he went on to say that the "Court has never addressed whether Congress may impose [ethical] requirements on the Supreme Court,"¹² and noted that the constitutionality of the recusal statute in particular has "never been tested."¹³ With those words, Roberts put the nation on notice that Congress's authority to regulate the Justices' ethical conduct is an open question.

The Chief Justice's Report raises serious questions about the constitutional status of existing ethics legislation, as well as the Supreme Court Justices' willingness to abide by laws that at least some of them may consider to be invalid, and thus non-binding.¹⁴ His comments also cast doubt on the constitutionality of the Supreme Court Transparency and Disclosure Act of 2011—a bill pending at the time of the Report's publication that would subject the Justices to investigation and possible sanctions for ethics violations, and require external review of an individual Justice's recusal determinations.¹⁵ Although the Report has provoked vociferous responses from those on either side of the issue,¹⁶ thus

Louise Slaughter and thirty other members of Congress calling on the Supreme Court Justices to adopt a formal code of ethics).

8. 2011 Year-End Report on the Federal Judiciary, *supra* note 1, at 5.

9. *Id.* at 6 ("The Court has never addressed whether Congress may impose [financial reporting requirements and limitations on the receipts of gifts and outside earned income] on the Supreme Court. The Justices nevertheless comply with those provisions."); *see also id.* at 7 ("As in the case of financial reporting and gift requirements, the limits on Congress's power to require recusal have never been tested.")

10. Nan Aron, HUFFINGTON POST, Jan. 4, 2012, *John Roberts On Ethics: Move Along, Nothing to See Here*, http://www.huffingtonpost.com/nan-aron/john-roberts-on-ethics-mo_b_1184164.html (Chief Justice Roberts' report "inferred" that "no one can make rules for [the Supreme Court]"). *See, e.g.*, William Yeomans & Herman Schwartz, *Roberts to America: Trust Us*, POLITICO, http://www.politico.com/news/stories/0112/71895_Page3.html ("Roberts' discussion may also reflect the astonishing view in his annual report that legislative limitations on a justice's activities are unconstitutional.") (last visited March 16, 2013).

11. 2011 Year-End Report on the Federal Judiciary, *supra* note 1 at 3.

12. *Id.* at 4.

13. *Id.* at 7.

14. After stating that the constitutionality of ethics legislation is an open question, Roberts went on to declare that the "Justices nevertheless comply with these provisions." *See id.* at 6. However, his basis for this assertion is unclear.

15. Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Cong. (2011), *available at* <http://www.govtrack.us/congress/bill.xpd?bill=h112-862>. The proposed law is described in more detail in Part II.A.6.

16. *See, e.g.*, Editorial, *Judicial Ethics and the Supreme Court*, N.Y. TIMES, Jan. 6, 2012, at A24; Eric J. Segall, Op-Ed, *An Ominous Silence on the Supreme Court*, L.A. TIMES, Feb. 12, 2012, at 26; Editorial, *Umpires in Black: Roberts Says the High Court is up for the Big Game*, PITT. POST-GAZETTE, Jan. 5, 2012, at B4;

far there has been little academic analysis of the constitutional issues involved.¹⁷

This Essay seeks to fill that gap. As is true for most constitutional questions, Congress's authority to regulate the Justices' ethical conduct turns not just on the Constitution's text, but also on its structure, the original understanding, and longstanding tradition in this area.¹⁸ Accordingly, the Essay examines the relevant text of Articles I and III of the Constitution to locate the source of Congress's authority to enact laws regulating the Justices' ethical conduct, as well as constraints on any such power, and then discusses the history of Congress's oversight and administration of the Supreme Court Justices' ethical conduct. As part of this analysis, the Essay considers whether Congress is more constrained when regulating the ethical conduct of Justices on the U.S. Supreme Court than judges serving on lower federal courts, as the Chief Justice seemed to suggest in his Report.

The Essay is structured as follows: Part II provides an overview of existing and proposed ethics legislation and briefly describes the constitutional objections to that legislation, particularly as applied to the Supreme Court. Part III analyzes the Constitution's text and structure to determine the scope of, and limits on, Congress's authority to regulate the Supreme Court Justices' ethics. Although the Constitution requires that there be a Supreme Court, it did not make that institution self-executing, and thus Congress was empowered by the Necessary and Proper Clause to enact legislation implementing the judicial power. For example, vital matters such as the Court's size, the dates of its sessions, and even the words of the oath each Justice takes before ascending to the bench are all set by federal legislation. Ethics statutes, which promote the effective and legitimate exercise of the "judicial power," fall well within Congress's broad legislative authority over the Court's administration and operation. That said, Congress's power to regulate the Supreme Court's ethical conduct is limited by separation of powers concerns, such as the need not only to preserve judicial independence, but also to demonstrate respect for the Court's status as the head of a co-equal branch

Editorial, *The Recusal Question*, L.A. TIMES, Jan. 3, 2012, at 14; David G. Savage, *Chief Justice: Each Colleague Decides on Merits for Recusal*, CHI. TRIB., Jan. 2, 2012, at 13; Sherrilyn Ifill, *The Chief Strikes Out*, Concurring Opinions (Jan. 4, 2012, 12:14 PM), <http://www.concurringopinions.com/archives/2012/01/sherrilyn-ifills-the-chief-strikes-out.html>.

17. See Arthur D. Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*, 60 U. PITT. L. REV. 189, 190 (2007) (noting that the regulation of judicial ethics "has received little attention from academics"). One exception is a recent article by Louis Virelli, which argues that Congress lacks the authority to regulate recusal of Supreme Court Justices, but which does not address the constitutionality of other types of ethics legislation. See Louis J. Virelli, III, *The (Un)constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181.

18. Depending on one's theory of constitutional interpretation, some of these sources for ascertaining constitutional meaning are more significant than others. See, e.g., Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673 (1999) (explaining why he puts more emphasis on constitutional text than the framers' or ratifiers' intent). Because my goal in this essay is to raise all the reasonable arguments on either side of the issue, I canvass all the mainstream sources typically used by courts and commentators when attempting to ascertain constitutional meaning.

of government.¹⁹ Part III describes how these constitutional principles serve both to empower and restrain Congress when it seeks to regulate the Justices' ethical conduct. Part IV examines the history of congressional-Court interactions regarding judicial ethics, which further bolsters this Essay's claim that Congress has the constitutional authority to regulate the Justices' ethical conduct, albeit within limits.

Two caveats are in order. First, the Essay addresses Congress's constitutional authority to regulate the Justices' ethical conduct, and does not discuss in any detail the costs and benefits of such legislation. Constitutional questions are frequently raised by opponents of such legislation, derailing the policy questions that are also worthy of attention. Hopefully, this Essay will help to clear away the obstacles that have too often prevented a full and frank discussion of whether such legislation would prove beneficial.

Second, it is worth acknowledging that the Court itself may have the final say on these constitutional questions if litigants or government institutions seek to enforce ethics regulation against sitting Justices. In other words, unlike most separation of powers cases, this is an issue on which the very individuals with a *personal* stake in the matter may ultimately decide the constitutional issue. Human nature being what it is, the Justices may find such legislation hard to swallow, whatever the merits of the constitutional arguments in its favor.²⁰ More importantly, even if Congress has the authority to enact such legislation, it may be preferable as a matter of both policy and precedent for the Court to regulate itself.²¹ Thus, the best course of action going forward would be to convince the Court that it should take the lead in regulating the ethical conduct of its members to protect its own reputation, which would diminish the need for Congress to do so. Whatever one's views of Congress's constitutional authority in this area, one thing is clear: If the Supreme Court policed itself, Congress would not need to do so.

19. Judicial independence is a component of the separation of powers, though the two concepts are not identical. See Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 32 (1998) ("Although separation and independence are not synonymous, structural separation among the branches cannot be maintained unless each branch is independent enough to prevent the other two from usurping its powers, for which reason some measure of independence may be inherent in a system of separated powers.").

20. Cf. Amanda Frost, *Keeping Up Appearances: A Process Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 538 (2005) (describing judges' tendency to narrowly construe recusal statutes). Thus far, however, the Justices comply with most of the ethical requirements imposed on them by Congress most of the time. See *infra* Part IV.B.

21. See, e.g., Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 212 (1993) ("As scholars have noted, the existence of authority to devise mechanisms other than impeachment for judicial discipline does not itself prove that instituting those other mechanisms is desirable."); Editorial, *Trust and the Supreme Court*, N.Y. TIMES, Feb. 20, 2012, at A18 ("The court should embrace sensible ethics rules . . . on its own.").

II. OVERVIEW OF ETHICS LEGISLATION

This Part surveys the current and proposed legislation regulating judicial ethics, and then describes potential constitutional problems raised by congressional regulation of the Justices' ethical conduct. Although much of the discussion focuses on Congress's power to regulate the ethics of *all* Article III judges, some scholars claim that the Supreme Court's special constitutional status imposes additional constraints on Congress.

A. FEDERAL LEGISLATION REGULATING JUDICIAL ETHICS

1. RECUSAL STATUTES

In 1792, Congress passed the first statute requiring lower federal court judges to recuse themselves under certain circumstances.²² Over the years, Congress repeatedly modified and broadened the law, but continued to limit its application to judges on the "inferior" courts. It was not until 1948 that Congress expanded the law to include the Justices.²³

Today, three different statutes govern recusal of federal judges, of which only Title 28, Section 455 of the United States Code applies to the Supreme Court.²⁴ That statute requires "[a]ny justice, judge, or magistrate judge of the United States" to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned," as well as for other listed grounds, such as bias or prejudice, personal participation in the case, pecuniary interest, or a family connection to a lawyer or party to the case.

When a party to litigation asks a judge on a lower federal court to step aside, that judge usually decides the question for herself, though she is free to refer the matter to another judge on the same court.²⁵ If she does not recuse herself,

22. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278-79 (1792).

23. Act of June 25, 1948, ch. 646, § 455, 62 Stat. 869, 908 (codified as amended at 28 U.S.C. § 455 (1992)). Congress did not discuss this change at any length in the legislative history. The only mention of the decision to include the Justices in the recusal statute comes in the House Report, which simply describes the amended language. See H.R. Rep. No. 80-308 at A53 (1947) ("Section 24 of title 28, U.S.C., 1940 ed., applied only to district judges. The revised section is made applicable to all justices and judges of the United States.").

24. Section 144 of Title 28, which applies only to district court judges, requires the recusal of a judge who has a "personal bias or prejudice in the matter." A third statute, Section 47 of Title 28, provides that "[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him." Although this statute applies only to lower court judges, Supreme Court Justices generally recuse themselves from cases they heard or decided when sitting on the lower courts. For example, Chief Justice Roberts recused himself from *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), presumably because he had served on the panel of the D.C. Circuit that issued the decision in which certiorari had been granted.

25. See *In re United States*, 158 F.3d 26, 34 (1st Cir. 1998) (noting that "a trial judge faced with a section 455(a) recusal motion may, in her discretion, leave the motion to a different judge," though "no reported case or accepted principle of law compels her to do so . . .").

Chief Justice Roberts observed that a "court normally does not sit in judgment of one of its own member's recusal decisions in the course of deciding a case." 2011 Year-End Report on the Federal Judiciary, *supra* note 1,

however, the party can appeal that decision to a higher court or seek en banc review—although admittedly doing so is difficult as a practical matter.²⁶ Nonetheless, there is at least the potential for review of a district or circuit judge's decision to remain on a case.²⁷ The same is currently not true for the Justices on the U.S. Supreme Court. Although there are no written rules governing recusal procedures, the longstanding practice has been for each Justice to decide for him or herself whether to step aside, usually without issuing any explanation.²⁸ Conceivably, a litigant could ask the entire Supreme Court to review a Justice's decision not to recuse him or herself,²⁹ but none has ever done so.³⁰

at 8. Although typically a district court judge decides for him or herself whether to recuse, on occasion district court judges have referred that question to another judge on the same court. *See, e.g.,* *Bradley v. Milliken*, 426 F. Supp. 929 (E.D. Mich. 1977); *United States v. Zagari*, 419 F. Supp. 494, 497 (N.D. Cal. 1976). Furthermore, a litigant who loses a motion asking a circuit court judge to recuse may also seek rehearing before a new panel or a rehearing *en banc*. *See* Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 *BROOK. L. REV.* 589, 639 (1987). Thus, in contrast to the Supreme Court, it is not unprecedented in the lower courts for the recusal decision to be made by another judge on that court.

26. If a trial court denies a motion to recuse, the moving party may seek interlocutory review by petitioning for a writ of mandamus. Most circuits make such interlocutory review hard to obtain by "placing a heavy burden on the movant." Federal Judicial Center, *Recusal: Analysis of Case Law under 28 U.S.C. §§ 455 & 144*, 69 (2002). A party may also appeal the trial judge's refusal to recuse after final judgment, but this is an exceedingly expensive and inefficient method by which to try to obtain a new trial before a new judge.

27. *See supra* note 25.

28. In a letter responding to inquiries by Senators Patrick Leahy and Joseph Lieberman, Chief Justice Rehnquist stated that "[t]here is no formal procedure for court review of the [recusal] decision of a justice in an individual case. That is so because it has long been settled that each justice must decide such a question for himself." *See* David G. Savage, *High Court Won't Review Scalia's Recusal Decision*, *L.A. TIMES*, Jan. 27, 2004, at A12.

29. In *Cheney v. United States District Court for the District of Columbia*, 541 U.S. 913 (2004), the Sierra Club filed a motion seeking the recusal of Supreme Court Justice Antonin Scalia. Alan Morrison, who served as lead counsel for the Sierra Club, was planning to file a second motion asking the entire Court to review Justice Scalia's decision to remain on the case if Scalia did not respond to the initial recusal motion. *See* E-mail from Alan Morrison, Lerner Family Associate Dean for Public Service Law, The George Washington University Law School, to author (Oct. 2, 2012, 4:23 PM EST) (on file with author). Shortly before the oral argument, however, Justice Scalia filed a 21-page opinion in which he explained his reasons for refusing to recuse himself. *Cheney*, 541 U.S. at 916, 923 (Scalia, J., mem.)

30. The Supreme Court's decision to hear a constitutional challenge to the Patient Protection and Affordable Care Act prompted questions about whether Justices Clarence Thomas and Elena Kagan should recuse themselves from the case. Section 455 of Title 28 requires a Justice to disqualify herself if her "impartiality might reasonably be questioned," or if she "participated as counsel, advisor or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." Some Members of Congress called for Justice Thomas to recuse himself because his wife was paid to lobby against that statute, which they contend casts doubt on Justice Thomas' ability to remain impartial. *See* Toobin, *supra* note 5, at 41 (reporting that in February 2011, 74 members of Congress "called on Thomas to recuse himself from any legal challenges to President Obama's health-care reform, because his wife has been an outspoken opponent of the law"). Others asserted that Justice Kagan should step aside, arguing that she "participated as counsel" or "advisor" on the legislation while serving as Solicitor General. *See The Supreme Court's Recusal Problem*, *supra* note 6, at A38; Segall, *supra* note 16. However, none of the litigants filed a motion seeking the recusal of either Justice, and neither recused themselves.

2. THE ETHICS IN GOVERNMENT ACT OF 1978

The Ethics in Government Act of 1978 requires most high-level federal officials in all three branches of the federal government to file annual reports in which they publicly disclose aspects of their finances, such as their outside income, the employment of their spouses and dependent children, investments, reimbursements for travel-related costs, gifts, and household liabilities.³¹ Any person who “knowingly and willfully” falsifies such a report, or fails to file a report, is subject to civil and criminal penalties.³² The Act applies to all federal judges, including Supreme Court Justices.³³ Judges and Justices alike are required to file their disclosure forms with the Judicial Conference of the United States³⁴—the administrative and policy-making body for the federal courts³⁵—and with the clerk of the court on which the judge or Justice sits.³⁶ Those reports are then made publicly available. The Act also requires the Judicial Conference to refer to the Attorney General any person who the Conference “has reasonable cause to believe has willfully failed to file a report or has willfully falsified or willfully failed to file information required to be reported.”³⁷

3. THE ETHICS REFORM ACT OF 1989

The Ethics Reform Act of 1989 placed strict limits on outside earned income and gifts for all federal officials, including federal judges. Judges and Justices are prohibited from most outside employment with the exception of teaching, for which any compensation must be pre-approved by the Judicial Conference.³⁸ In addition, they may not accept honoraria for an appearance, speech, or article, though reimbursement for travel expenses is permitted. Finally, the Act bars

31. 5 U.S.C. app. 4, § 102 (2012).

32. 5 U.S.C. app. 4, § 104(a).

33. 5 U.S.C. app. 4, § 101(f)(11).

34. 5 U.S.C. app. 4, § 103(h)(1)(B).

35. Congress created the Judicial Conference of the United States in 1922 to assist in the administration of the federal judiciary. The Chief Justice chairs the Judicial Conference, and its members include the chief judge of each of the 13 federal circuits as well as a district court judge from each regional circuit and the chief judge of the Court of International Trade. *See* 28 U.S.C. § 331.

36. 5 U.S.C. app. 4, § 103(a).

37. 5 U.S.C. app. 4, § 104(b). In January 2011, Justice Thomas amended his annual financial disclosure reports going back several years because he failed to report his wife’s consulting work for a Michigan college and for the Heritage Foundation. Letter from Clarence Thomas, Justice, U.S. Supreme Court, to Committee on Financial Disclosure (Jan. 21, 2001), SCRIBD, *available at* <http://www.scribd.com/JWatchDC/d/74643732-Clarence-Thomas-Financial-Disclosure-Report-for-clarence-thomas-disc-amend-01212011>. In a letter accompanying the amendment, Justice Thomas explained that the omission was inadvertent. *Id.*

38. *See* Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 5 U.S.C. app. 7 § 502(a)(5)).

judges and Justices from receiving gifts from anyone whose “interests may be substantially affected by” the performance of their duties.³⁹

4. THE JUDICIAL COUNCILS REFORM AND JUDICIAL CONDUCT AND DISABILITY ACT OF 1980

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980⁴⁰ (“Judicial Conduct and Disability Act”) authorizes anyone to file a complaint alleging that a judge “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.”⁴¹ Complaints are then reviewed by the Chief Judge of the Circuit, who may dismiss them, conclude the proceedings after finding that “appropriate corrective action has been taken” or that “action on the complaint is no longer necessary,” or appoint a committee of district and circuit court judges to investigate further.⁴² The committee is required to submit a report of its investigation to the judicial council of the circuit⁴³—a pre-existing administrative body headed by the Chief Judge of the Circuit and made up of an equal number of district and circuit judges from that circuit⁴⁴—which may conduct a further investigation, dismiss the complaint, or take action to “assure the effective and expeditious administration of the business of the courts.”⁴⁵ The “possible action” the council may take includes a public or private censure of the judge, an order that no further cases be assigned to the judge for a “time certain,”⁴⁶ or a request that the judge voluntarily retire.⁴⁷ Finally, the council may refer the matter to the Judicial Conference of the United States, which in turn can recommend impeachment to the House of Representatives.⁴⁸

The Act applies to circuit judges, district court judges, bankruptcy judges, and magistrate judges, but not Supreme Court Justices.⁴⁹ The Supreme Court Transparency and Disclosure Act of 2011, pending at the time that Roberts wrote his annual report, would change that by placing the Justices under a similar,

39. 5 U.S.C. § 7353(a)(2) (2011). The statute authorizes the Judicial Conference to adopt rules and regulations implementing these provisions, and to make “reasonable exceptions” to the gift restrictions when “appropriate.” *Id.* at § 7353(b)(1).

40. Pub. L. No. 96-458, 94 Stat. 2035 (1988).

41. 28 U.S.C. § 351(a) (2006).

42. 28 U.S.C. §§ 352, 353 (2006). Either the complainant or the judge may petition for review of the Chief Judge’s final order under section 352 by the judicial council for the circuit.

43. 28 U.S.C. § 353(c).

44. 28 U.S.C. § 332(a) (2006). By statute, each circuit must establish a judicial council which “shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit.” 28 U.S.C. § 332(d)(1) (2006).

45. 28 U.S.C. § 354(a) (2006).

46. 28 U.S.C. 354(a)(2) (2006).

47. 28 U.S.C. 354(a)(2)(B)(ii) (2006).

48. 28 U.S.C. 355(b) (2006).

49. 28 U.S.C. 351(d)(1) (2006) (defining “judge” as “circuit judge, district judge, bankruptcy judge, or magistrate judge”).

though not identical, level of oversight for alleged ethics violations.⁵⁰

5. THE *CODE OF CONDUCT FOR UNITED STATES JUDGES*

The *Code of Conduct for United States Judges* is not a federal statute, but rather a set of ethical guidelines adopted by the Judicial Conference in 1973 to guide the conduct of federal judges.⁵¹ The *Code* is connected to the Judicial Conduct and Disability Act, however, in that violations of the *Code* can be cause for complaint, investigation, and sanction under the Act.⁵² Like the Act, the *Code* excludes the Supreme Court Justices.⁵³

The *Code* lays out a set of ethical principles to protect the “integrity and independence of the judiciary.”⁵⁴ Its five canons are broadly worded. For example, Canon 2 instructs judges to “avoid impropriety and the appearance of impropriety,” and Canon 3 requires them to “perform the duties of the office fairly, impartially, and diligently.” Although the *Code* is at times more specific—for instance, declaring that a judge “should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin”—it of course cannot address every ethical dilemma facing judges. The Judicial Conference has authorized its Committee on Codes of Conduct to issue advisory opinions about the *Code* “when requested by a judge to whom this *Code* applies.”⁵⁵ These advisory opinions provide further guidance for judges seeking to avoid ethics problems.

The *Code*’s primary purpose is to provide judges with “guidance” on ethical matters. Nonetheless, its canons are not optional; federal judges who violate the *Code* may be subject to investigation and sanction. Commentary to Canon 1 of the *Code* explains that the *Code* “may . . . provide standards of conduct for application in proceedings under the . . . Judicial Conduct and Disability Act of 1980,” although that commentary also cautions that “[n]ot every violation of the Code should lead to disciplinary action.”⁵⁶

50. For further description of the bill, see *infra* Part II.A.6.

51. *Code of Conduct for United States Judges* (2009), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf>.

52. See *Code of Conduct for United States Judges* at 2-3, Canon 1 cmt.

53. See *Code of Conduct for United States Judges* at 2-3 (“The Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges.”).

54. See *Code of Conduct for United States Judges* at 2-3, Canon 1.

55. *Code of Conduct for United States Judges* at 1-2, Introduction.

56. *Code of Conduct for United States Judges* at 3, Canon 1 cmt. Several of the Justices have publicly stated that they follow the *Code of Conduct*, even though it does not apply to them. See Eileen Malloy, *Supreme Court Justices Already Comply with Ethics Rules*, Kennedy, Breyer Say, 79 U.S. L. WKLY. 2389, 2389 (Apr. 19, 2011). In his 2011 Year-End Report, Chief Justice Roberts asserted that “[a]ll Members of the Court do in fact consult the Code of Conduct in assessing their ethical obligations,” despite the fact that it is not binding. 2011 Year-End Report on the Federal Judiciary, *supra* note 1, at 4. As others have noted, however, some of the Justices’ extra-judicial activities appear inconsistent with the *Code*. For instance, Justices Scalia and Thomas were

6. THE SUPREME COURT TRANSPARENCY AND DISCLOSURE ACT OF 2011

On March 1, 2011, Representative Christopher Murphy introduced the Supreme Court Transparency and Disclosure Act of 2011 (hereinafter “Murphy Bill”), which would impose additional ethics obligation on Supreme Court Justices to bring them into parity with judges on the lower courts.⁵⁷ Although the Murphy Bill was never referred to the full House for a vote, its contents have nonetheless inspired debate over Congress’s power to regulate the Justice’s ethical conduct.⁵⁸

The Murphy Bill provides that the *Code of Conduct for United States Judges* “shall apply to Supreme Court justices to the same extent as it applies to circuit and district court judges.” The Bill then delegates to the Judicial Conference the responsibility to “establish procedures modeled after the procedures set forth in [the Judicial Conduct and Disability Act of 1980]” for “review[ing] and investigat[ing]” a complaint that a Justice of the Supreme Court has violated the *Code of Conduct*, and then taking “further action, where appropriate . . . with respect to such complaints.”⁵⁹

The Bill also creates new procedures to govern the Justices’ recusal decisions under Title 28, Section 455 of the United States Code. The Justices must publicly state their reasons for recusing themselves or, alternatively, their basis for denying a party’s motion seeking recusal. The Bill also requires the Judicial Conference of the United States to “establish a process” by which a Justice’s refusal to recuse is reviewed by “other justices or judges of a court of the United States”—a group that includes retired Justices and senior judges—who “shall decide whether the justice with respect to whom the motion is made should be so

allegedly speakers at a fundraising event for the Federalist Society, which is at odds with the Code provision stating that a judge “may not be a speaker, a guest of honor, or featured on the program” of a fundraiser. *See A Question of Integrity: Politics, Ethics, and the Supreme Court*, ALLIANCE FOR JUSTICE, <http://www.afj.org/connect-with-the-issues/supreme-court-ethics-reform/federalist-society-fundraiser.pdf> (last visited March 16, 2013); *see also* Andrew Rosenthal, *Step Right Up. Buy Dinner with a Justice*, TAKING NOTE, (Nov. 10, 2011, 4:30 PM), <http://takingnote.blogs.nytimes.com/2011/11/10/step-right-up-buy-dinner-with-a-justice/>. Justice Ruth Bader Ginsburg has spoken at events sponsored by the National Organization for Women, and Justice Stephen Breyer has attended the Renaissance Weekend, *see* Shesol, *supra* note 2, an event closely associated with Bill and Hillary Clinton. Attendance at either event could be viewed as violating the Code’s requirement that judges “refrain from political activity.” *See The Justices’ Junkets*, *supra* note 4, at A14 (criticizing Justices Breyer, Ginsburg, and Sotomayor for taking foreign trips paid for by organizations with “liberal agendas”). Citing these activities, Members of Congress and numerous newspaper editorials and op-eds have called for the Justices to agree to be bound by the *Code of Conduct* or variations on it. *See* Letter from Richard Durbin, et al., U.S. Senators, to John Roberts, Chief Justice of the United States (Feb. 13, 2012), *available at* <http://www.afj.org/connect-with-the-issues/supreme-court-ethics-reform/letter-to-supreme-court-2-13-12.pdf>; *see also* Editorial, *Judicial Ethics and the Supreme Court*, *supra* note 16, at A24; Aron, *supra* note 2.

57. Supreme Court Transparency and Disclosure Act of 2011, *supra* note 15.

58. *See, e.g.*, 2011 Year-End Report on the Federal Judiciary, *supra* note 1 (taking note of the pending legislation); Virelli, *supra* note 17, at 1205 n.140 (questioning the constitutionality of the pending legislation).

59. Supreme Court Transparency and Disclosure Act of 2011, *supra* note 15.

disqualified.”⁶⁰

The legislation is unusually open-ended, giving the Judicial Conference discretion to establish procedures for reviewing complaints regarding the Justices’ conduct and Justices’ refusal to recuse themselves. For example, theoretically the bill would allow the Judicial Conference to assign a single district court judge the power to “review” a Supreme Court Justice’s refusal to recuse—an unseemly and potentially unconstitutional arrangement. On the other hand, it would also permit the Judicial Conference to delegate review of the recusal decision to the entire Supreme Court sitting *en banc*—a procedure on much stronger constitutional footing.⁶¹ Thus, if the Murphy Bill were to become law as written, its constitutionality could turn on the Judicial Conference’s methods of implementation.

B. CONSTITUTIONAL OBJECTIONS TO ETHICS LEGISLATION

The constitutionality of the ethics laws described above has never been addressed by the U.S. Supreme Court.⁶² Although a few critics—including some of the Justices themselves⁶³—have raised constitutional concerns about applying ethics laws to the Supreme Court, there has been no focused academic analysis of Congress’s authority to regulate the Justices’ ethical conduct.

No one doubts that Congress has constitutional authority to enact legislation regarding at least some aspects of judicial administration, including judicial ethics, under its Article I authority to make all laws “necessary and proper” to carry out its constitutional mandate.⁶⁴ But its powers are not unlimited. Congress must not legislate in ways that undermine the separation of powers, and in particular in ways that threaten judicial independence, which are constitutionally enshrined values.⁶⁵ Furthermore, Congress may be more constrained when it comes to regulating the ethical conduct of U.S. Supreme Court Justices. Unlike the lower federal courts, the Supreme Court’s existence is mandated by the Constitution, and it sits atop the judicial hierarchy. Congress therefore lacks the power to control the jurisdiction and structure of the Supreme Court to the same

60. *Id.*

61. See *infra* Part III.B.

62. Judge Stephen Chandler challenged the constitutionality of a similar disciplinary system in place in 1970 under which the Judicial Council of the Tenth Circuit barred him from hearing new cases, but the Court sidestepped the issue. See *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 77 (1970).

63. Justice Anthony Kennedy recently testified before Congress that Congress would encounter a “constitutional problem” were it to attempt to make the *Code of Conduct* binding on the Justices because it would be “structurally unprecedented for district and circuit court judges to make rules that Supreme Court judges have to follow.” See Malloy, *supra* note 56, at 2389; see also 2011 Year-End report on the Federal Judiciary, *supra* note 1, at 6-7.

64. U.S. CONST. art. I, § 8.

65. U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

degree it does the lower federal courts, and cannot alter the Court's position at the head of the judicial department. A few scholars argue that some of the provisions in the existing and proposed ethics legislation transgress these boundaries, and a few Justices have suggested that they share this view.

These constitutional questions regarding Congress's authority to regulate the Justices' ethical conduct are worthy of closer analysis than they have thus far received in the academic literature. Parts III and IV will address these issues, elaborating on them and responding to them with reference to the Constitution's text and structure, as well to the original understanding and longstanding practice.

III. CONGRESS'S CONSTITUTIONAL AUTHORITY TO REGULATE THE SUPREME COURT JUSTICES' ETHICAL CONDUCT

The text of the Constitution is a useful starting point for thinking about Congress's power to regulate the Justices' ethical conduct, but it provides no easy answers. The Constitution is a remarkably spare document, and Article III, which establishes the federal judiciary, is no exception. The three short sections of that Article contain almost no discussion of how federal courts are to exercise the "judicial Power," leaving many gaps to be filled by reference to constitutional structure, original intent, and longstanding practice.

Section 1 of Article III states: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The second and final sentence of Section 1 provides that judges on both the "inferior" and "supreme" courts "shall hold their Offices during good Behavior" and prohibits Congress from reducing their compensation. Section 2 describes the subject matter of the "Cases" and "Controversies" that federal courts are empowered to hear. Section 2 then lists those few categories of cases that fall within the Supreme Court's original jurisdiction and states that the Supreme Court shall have appellate jurisdiction over all other categories of cases "with such Exceptions, and under such Regulations as the Congress shall make."⁶⁶ That is all Article III has to say about the structure and activities of the judicial branch.

Further information about the relationship between Congress and the courts can be found in Article I, which provides that Congress has the authority to "constitute Tribunals inferior to the supreme Court."⁶⁷ Also relevant is Congress's Article I power to make Laws "which shall be necessary and proper" for executing its powers.⁶⁸ Finally, Congress can remove federal judges, like other

66. The third and final section of Article III defines the crime of treason and describes how it shall be adjudicated, and thus is not relevant to the topic of this Essay.

67. U.S. CONST. art. I, § 8.

68. U.S. CONST. art. I, § 8.

federal officers, through the impeachment process.⁶⁹

As this brief overview suggests, the Constitution leaves many important questions unanswered about Congress's power to enact legislation affecting the federal courts. Nonetheless, some textualist arguments can be marshaled in favor of Congress's power to regulate the Justices' ethical conduct, albeit within limits.

A. THE SOURCES OF CONGRESS'S CONSTITUTIONAL AUTHORITY TO REGULATE THE JUSTICES' ETHICS

1. NECESSARY & PROPER CLAUSE

Congress's authority to enact ethics legislation, like its power over judicial administration more generally, is rooted in the Constitution's implicit assumption that Congress would play a major role in effectuating the Supreme Court's exercise of judicial power. In contrast to the executive and legislative branches, the judicial branch is not self-executing, and thus the political branches had to take action for it to come into being.⁷⁰ Article III leaves vital questions about the Supreme Court's daily activities unanswered, such as the size of that Court and the dates of its sessions. As a textual matter, then, Congress's power to manage the federal courts arises from the gaps in Article III, coupled with its Article I authority to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States."⁷¹ These sources of authority justify a wide range of legislation concerning judicial administration, including the ethical conduct of the judges and Justices who serve on those courts.

The Constitution contains no information about how the Supreme Court would exercise the judicial power as a practical matter.⁷² Nor does it explicitly give the federal courts the power to control their internal operating rules, as it does for the House and Senate.⁷³ Accordingly, the first Congress was constitutionally empowered—perhaps even obligated—to enact legislation settling these crucial logistical and administrative matters.⁷⁴ As Professor James Pfander has observed,

69. U.S. CONST. art. I, § 2, cl. 5; § 3, cl. 6.

70. RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 20 (6th ed. 2009).

71. U.S. CONST. art. I, § 8. Congress's control over the lower federal courts is further bolstered by its Article I, section 8 authority to "constitute Tribunals inferior to the Supreme Court." This provision, of course, cannot provide any constitutional authority for Congress's regulation of the U.S. Supreme Court.

72. In contrast, the Constitution provides that Congress must "assemble at least once in every Year" on the "first Monday in December, unless they shall by Law appoint a different Day." U.S. CONST. art. I, § 4. The Constitution also establishes that a majority of the members of each House must be present to constitute a quorum. U.S. CONST. art. I, § 5.

73. "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." U.S. CONST. art. I, § 5.

74. See EDWARD S. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 209 (Harold W. Chase & Craig R. Ducat eds, 14th ed. 1978) ("Although a Supreme Court is provided for by the Constitution, the organization

Article III “leaves Congress in charge of many of the details” necessary to implement federal judicial power, and “Article I confirms this perception of congressional primacy by empowering Congress to make laws necessary and proper for carrying into execution the powers vested in the judicial branch.”⁷⁵ In short, federal legislation brought the Supreme Court into being, and such laws must therefore be well within Congress’s power under the Necessary and Proper Clause.⁷⁶

The first Congress readily assumed this authority when it enacted the Judiciary Act of 1789, which established the federal court system.⁷⁷ The Act created a Supreme Court consisting of a Chief Justice and five associate Justices, established a quorum of four, and provided that the Court would meet at the “seat of government” twice a year, commencing the first Monday in February and the first Monday in August.⁷⁸ It even covered mundane details of judicial administration, such as granting the Court the authority to hire a clerk of the Court.⁷⁹ Congress also mandated that Supreme Court Justices do double-duty as circuit court judges; in addition to meeting in the nation’s capital as the Supreme Court, each Justice was required to travel the country to hear cases in his dual capacity as circuit court judge. For more than 100 years, the Justices accepted Congress’s

of the existing Court rests on an act of Congress.”); FALLON ET AL., *supra* note 70, at 20 (“The judiciary article of the Constitution was not self-executing, and the first Congress therefore faced the task of structuring a court system . . .”); JAMES E. PFANDER, *ONE SUPREME COURT 2* (2009) (Article III “creates a framework for the federal judiciary and leaves Congress in charge of many of the details.”); Edward A. Hartnett, *Not the King’s Bench*, 20 CONST. COMMENT. 283, 284 (2003) (“Until an Act of Congress spelled out such specifics, there would be no Supreme Court . . .”); WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC 25* (1995) (“[The] Constitution created only the bare bones of a federal judicial system and left many details to be fleshed out by the legislative, executive, and judicial branches.”).

If Congress had not enacted legislation establishing the Supreme Court, the Court might nonetheless have come into existence had the President nominated a Chief Justice who was then confirmed by the Senate. Thus, congressional legislation was perhaps not required to establish the Supreme Court, though such legislation was surely envisioned by the Framers, as evidenced by the First Judiciary Act.

75. PFANDER, *supra* note 74, at 2. See John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 532 (2000) (“Congress’s necessary and proper power is precisely the power to provide those rules that will enable the other two branches to do their jobs more effectively.”).

76. See generally William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS. 102 (1976).

77. See generally An Act to Establish the Judicial Courts of the United States, ch. 20, 1 STAT. 73 (1789). The First Judiciary Act has special constitutional significance because it was enacted by a Congress composed of the Framers’ contemporaries, including a number of the Framers themselves. Accordingly, that Act is “widely viewed as an indicator of the original understanding of Article III.” FALLON ET AL., *supra* note 70, at 21. If nothing else, then, the Act reveals that the First Congress assumed it had the constitutional authority to regulate the day-to-day operations of the Supreme Court.

78. *Id.*

79. *Id.*

authority to force them to perform this onerous, and sometimes dangerous, task.⁸⁰

Congress continues to control by legislation most of the areas over which it initially assumed authority in 1789. For example, federal laws currently in place authorize the Justices to hire librarians, marshals, clerks, law clerks, and secretaries to assist them in their work.⁸¹ The size of the Court,⁸² quorum requirements,⁸³ dates of the Court's sessions,⁸⁴ and oath of office⁸⁵ all continue to be set by statute. A federal statute even purports to control the outcome of a case should the Court foresee the absence of a quorum for two Terms in a row. Under such circumstances, the Court must issue an order affirming the lower court's judgment, which shall "have the same effect" as an affirmance by an equally divided Court—that is, no precedential effect at all.⁸⁶ Almost everyone accepts Congress's broad authority to enact legislation affecting the day-to-day operations of the Court.

Congress's control over judicial administration generally provides important context for its authority over judicial ethics specifically. If the Constitution had spelled out the details of the Supreme Court's operation, or delegated to the Court the power to establish its own internal operating rules, then perhaps Congress would not have the authority to enact ethics legislation—or, for that matter, *any* legislation regarding judicial administration. But the Supreme Court is not an isolated institution intended to operate entirely free from the political branches—to the contrary, it has always depended on the political branches to lay out the parameters governing its exercise of judicial power. Ethics legislation is not *sui generis*, but rather is simply one particular category of legislation within the broader field of judicial administration—a field in which Congress has always played a major role. Congress's authority over judicial ethics is less surprising once one realizes that Congress has long assumed the power to regulate many important aspects of the Court's daily activities.

2. OBJECTIONS

Opponents of ethics laws might argue, however, that legislation setting the Court's size and the dates on which it is to hold its sessions are necessary for the Court to function, but laws regulating ethics are not. Although ethics rules might promote and enhance the Supreme Court's reputation, they are not as vital to the

80. See *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (rejecting a constitutional challenge to law obligating Supreme Court Justices to sit as circuit judges); see also *CASTRO*, *supra* note 74, at 55 (describing circuit riding as a "physically arduous task that [the Justices] found irksome").

81. See, e.g., 28 U.S.C. §§ 671-675 (2012).

82. 28 U.S.C. § 1 (2012).

83. *Id.*

84. 28 U.S.C. § 2 (2012).

85. 28 U.S.C. § 453 (2012).

86. 28 U.S.C. § 2109 (2012). Congress's power over the rules of precedent is hotly debated. See, e.g., *Harrison*, *supra* note 75.

Court's exercise of judicial power as those regarding membership and meetings dates. Furthermore, once the Court was up and running, it could write its own code of ethics if it so chose, and thus Congress had no reason to take such action on the Justices' behalf.

The problem with these arguments is that they prove too much. Congress has enacted many statutes that are not essential to the Court's very existence—such as laws dictating the oath of office for new Justices⁸⁷ and the responsibilities of circuit Justices⁸⁸—without any Justice raising a constitutional complaint. Furthermore, as soon as the first Supreme Court was confirmed and began to meet regularly it could have taken charge of *all* aspects of its administration, including its composition and the dates of its sessions, and yet no one argues that Congress's administrative authority over the Court began and ended with the Judiciary Act of 1789.⁸⁹ Accordingly, Congress does not lack the authority to regulate the Justices' ethical conduct just because the Justices could conceivably assume that responsibility for themselves.⁹⁰

Skeptics might also question whether Congress's authority under the Necessary and Proper Clause to regulate judicial administration supports more intrusive regulation of the Justices' ethical conduct. But a closer look reveals that even the more mundane housekeeping measures share the same purpose as the ethics legislation discussed in Part II: to ensure that the Court's exercise of judicial power is both effective and legitimate.⁹¹ For example, the quorum requirement protects the Court as an institution from being co-opted by a

87. 28 U.S.C. § 453 (2012).

88. 28 U.S.C. §§ 42, 43 (2012).

89. See, e.g., PETER GRAHAM FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 20-21 (1st ed. 1973) (“The separation of powers doctrine could conceivably have provided the federal courts with a rationale for developing inherent plenary power over their own procedures and administration. But instead, judges and their allies looked then, and would continue to look, to Congress for enabling legislation.”). The Justices of course do exercise significant control over the procedures by which they hear cases. The point is not that the Court has no authority to manage its own internal operations, but rather that Congress has significant authority in this area as well.

90. U.S. CONST. amend. V. Furthermore, the Fifth Amendment provides an additional source of legislative authority over judicial ethics. Ethics statutes not only enhance the reputation of the Court, they also protect litigants' Fifth Amendment right not to be deprived of life, liberty, or property without due process of law. An essential component of due process is the right to have one's case heard by an impartial decision maker. Rules restricting gifts and outside income, prohibiting the Justices from engaging in political activities, mandating disclosure of their finances, and requiring them to recuse from cases in which they have an actual or perceived bias directly serve these purposes.

91. See, e.g., Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 45 *MERCER L. REV.* 835, 846 (1995) (“Settled constitutional practice demonstrates that [judicial] independence is consistent with Congress's exercise of its authorization, appropriation, and oversight powers, as well as its authority to regulate judicial rulemaking, internal disciplinary procedures, and general administrative operations.”) (footnotes omitted); Stephen B. Burbank, *The Past and Present of Judicial Independence*, 80 *JUDICATURE* 117, 122 (1996) (noting that “[f]or most of our history the federal courts had no central organization and were dependent on the political branches not only for budget allocations but for administrative support,” which, he argues, supports the constitutionality of legislation affecting the administration of the federal courts).

small subset of Justices. Likewise, laws enabling the Justices to hire law clerks and librarians directly support the Justices' ability to research legal questions and write reasonable and just opinions resolving cases. Similarly, ethics legislation seeks to protect the quality of judicial decision-making, as well as the reputation of the judiciary itself, by mandating that the Justices avoid potential conflicts of interest.

Indeed, some laws long viewed as purely administrative seek to control judicial behavior in much the same way that ethics legislation does. For example, Congress requires all newly confirmed Justices to "solemnly swear" that they will "administer justice without respect to persons, and do equal right to the poor and to the rich" and "faithfully and impartially discharge and perform all the duties incumbent upon them before taking their place on the Court."⁹² The purpose of requiring the Justices to take this oath is to promote fair and impartial judicial decision-making, which is the same goal fostered by laws requiring recusal and restricting the Justices from accepting gifts and outside income. In other words, it is hard to argue that Congress lacks authority to enact laws concerning the Justices' ethical conduct and yet at the same time concede that Congress can control vital administrative matters such as the Court's staff size and the words of the oath, because these laws all serve the same purposes and intrude in similar ways on the Court's exercise of judicial power.

More specifically, Congress's authority to mandate recusal procedures and standards for the Justices is supported by its uncontested power to establish both the total number of Justices who will sit on the Court and the number that constitutes a quorum of that Court. Some Justices and commentators have argued that the Supreme Court cannot, or should not, be subject to the same recusal standards as the lower courts because recused Justices cannot easily be replaced, leading to the possibility that a recusal will bar the Court from hearing a case because of a lack of quorum, or that the recusal will effectively operate as a vote against the Petitioner both at the certiorari stage and then on the merits.⁹³ Another

92. 28 U.S.C. § 453.

93. See, e.g., Statement of Recusal Policy (1993) (statement signed by seven of the Justices on the Court at the time, which outlined their policies regarding recusal and declared more generally that they should not recuse themselves "out of an excess of caution" because "[e]ven one unnecessary recusal impairs the functioning of the Court."); *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 541 U.S. 913, 915-16 (noting that possibility of a tie vote and the fact that recusal operates as a vote against petitioner); *Laird v. Tatum*, 409 U.S. 824, 837 (1972) (memorandum of Rehnquist, J., denying motion to recuse) ("There is no way of substituting Justices on this Court as one judge may be substituted for another in the district courts. There is no higher court of appeal which may review an equally divided decision of this Court, and thereby establish the law for our jurisdiction."); 2011 Year-End Report on the Federal Judiciary, *supra* note 1, at 9 (The "Supreme Court consists of nine Members who always sit together, and if a Justice withdraws from a case, the Court must sit without its full membership."). But see Lisa T. McElroy & Michael C. Dorf, *Coming Off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81 (2011) (discussing the constitutional and policy concerns raised by a proposal to allow retired Justices to sit by designation in place of recused Justices).

concern is that recusal will lead to affirmance by an evenly divided court, preventing the Court from setting precedent on the matter. But these outcomes, even if not ideal, are surely *constitutional*. Congress initially staffed the Court with only six Justices, then expanded and contracted its membership over the next eighty years before finally settling on its present size of nine in 1869.⁹⁴ These changes in the Court's membership raise some of the same issues that a recusal of one of the nine would create today. Yet no one claims that Congress transgressed constitutional limits on its authority over the Court by altering the Court's size permanently, further supporting Congress's authority to mandate recusal for actual or perceived conflicts of interest.

Some scholars contend that even if Congress has the authority to regulate the ethics and recusal standards for lower the federal courts, that authority does not extend to the U.S. Supreme Court. (And Chief Justice Roberts appears to agree, though the statements in his 2011 Year-End Report were intriguingly cryptic on this point.⁹⁵) Admittedly, Congress's authority to create or abolish the lower federal courts gives it more leeway over the structure and subject matter jurisdiction of those courts than it has over the Supreme Court, which is a constitutionally-required institution. That said, it is hard to see how this distinction strips Congress of power over the Justices' ethical conduct. As just discussed, the Necessary and Proper Clause enables Congress to enact legislation to facilitate the federal courts' exercise of judicial power. The fact that the Supreme Court is constitutionally required means that Congress cannot eliminate or disempower it completely, but does not affect Congress's power under the Necessary and Proper Clause to enact legislation enabling it to function effectively.

3. CONCLUSION

In sum, Article III's silence, coupled with Congress's authority under the Necessary and Proper Clause, empowers Congress to enact legislation to regulate judicial ethics, just as it enables Congress to enact legislation concerning the Court's size, meeting dates, and other vital administrative matters. That said, Congress's power over the Supreme Court's internal operations is not unlimited.⁹⁶ As discussed further below, Congress's authority over the administration of the Court, including the Justices' ethical conduct, is limited by the need to

94. See FALLON ET AL., *supra* note 70, at 27.

95. See generally 2011 Year-End Report on the Federal Judiciary, *supra* note 1.

96. See U.S. CONST. art. III, § 1.

protect the Court's decision-making from external interference and preserve its position atop the judicial hierarchy.⁹⁷

B. LIMITS ON CONGRESS'S POWER TO REGULATE JUDICIAL ETHICS

Although Congress has constitutional authority to regulate judicial ethics, its powers are constrained by other constitutional values, such as the separation of powers and the need to preserve judicial independence. This Part describes the constitutional constraints on Congress's powers to establish ethical rules for federal judges generally, and for Supreme Court Justices in particular.

1. SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE

The Constitution protects federal judges' *decisional* independence—that is, their ability to issue judicial decisions free from fear that their compensation will be diminished or that they will be forced from office.⁹⁸ This principle is derived in part from the fact that the Constitution established three separate and co-equal branches of government. More specifically, Article III provides judges with life tenure and protection against reduction in compensation, and the only mechanism for removing federal judges is impeachment and conviction for “Treason, Bribery, or other high Crimes and Misdemeanors.”⁹⁹ As Alexander Hamilton explained in Federalist No. 79, the purpose of these provisions is to ensure that judicial decision-making is insulated from political branch influence.¹⁰⁰ Accordingly, congressional regulation of judicial ethics must respect these boundaries.

However, the constitutional protection provided for judicial decision-making does not mean that the judiciary as an *institution* enjoys complete autonomy.¹⁰¹ To the contrary, as previously discussed, Congress has significant authority under the Necessary and Proper Clause to regulate the federal judiciary's subject matter jurisdiction, budget, structure, size, and even the dates and locations of its sessions. Congress may exercise some control over the judiciary through these mechanisms, even if it must be careful to avoid interfering with judges' decisions

97. Cf. PFANDER, *supra* note 74, at xiv (“Article I also constrains the political branches by requiring respect for the Court's position at the top of the federal judicial department.”).

98. John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 965 (2002) (“Everyone agrees that we need ‘decisional independence,’ meaning judges’ ability to adjudicate facts and interpret law in particular cases ‘free from any outside pressure: personal, economic, or political, including any fear of reprisal.’”) (quoting Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 566 (1996)).

99. U.S. CONST. art. II, § 4.

100. See THE FEDERALIST NO. 79, at 109 (Alexander Hamilton) (Edward Bourne ed., 1901).

101. Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation*, 78 IND. L.J. 153, 160 (2003) (“[T]he judicial independence the Constitution gives to the third branch is counterbalanced by powers the Constitution delegates to the first branch to promote judicial accountability.”); Ferejohn & Kramer, *supra* note 98, at 975.

in specific cases.¹⁰²

The ethics legislation described in Part II does not directly conflict with the Constitution's Good Behavior and Compensation Clauses. No such argument could reasonably be made with respect to financial reporting or limitations on outside gifts and income.¹⁰³ Nor are laws requiring judges to recuse themselves from specific cases in which they have a conflict of interest equivalent to permanent removal from the bench. The disciplinary measures permitted under the Judicial Conduct and Disability Act, although serious, do not violate these textual limits on Congress's authority over the courts.¹⁰⁴

But are such ethics statutes at odds with the *purpose* of the Good Behavior and Compensation Clauses, and with separation of powers principles generally? Conceivably, these facially-neutral laws could be administered so as to influence judicial decision-making, thereby undermining the Constitution's goal of ensuring judicial independence. For example, an appellate court might vote to disqualify a district court judge from a high-profile case because the appellate judges object to her judicial philosophy rather than because they believe she has any recusal-worthy conflict under Title 28, Section 455 of the United States Code. Or a committee of judges investigating an allegation of misconduct under

102. See Geyh, *supra* note 101, at 163 (describing the decisional independence/institutional dependence dichotomy).

103. Six federal judges challenged the constitutionality of the Ethics in Government Act's financial reporting requirements shortly after the law was enacted, in part on the ground that penalty for failing to file would unconstitutionally diminish their salary. The Fifth Circuit rejected all of their arguments, and the Supreme Court denied their petition for a writ of certiorari. See *Duplantier v. United States*, 606 F.2d 654 (5th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981). The leading treatise on judicial ethics states, "Following this holding, the validity of financial disclosure statutes seems certain." JAMES A. ALFINI ET AL., *JUDICIAL CONDUCT AND ETHICS* § 8.02A (4th ed. 2007).

104. There is some debate whether the provision permitting significant caseload suspensions might come close to an attempt to remove a judge without impeachment. The Judicial Conduct and Disability Act permits the circuit judicial council to order that no further cases be assigned to a judge for a "time certain" if the committee thinks it necessary to "assure effective and expeditious administration of the business of the courts." 28 U.S.C. § 354(a). Judge Stephen Chandler challenged the constitutionality of the disciplinary system in place in 1970 under which the Judicial Council of the Tenth Circuit barred him from hearing new cases, but the Court sidestepped the issue. See *Chandler*, 398 U.S. at 77. Thus, the constitutionality of such indefinite suspensions remains an open question.

However, the Supreme Court's own practice supports the constitutionality of such suspensions. In 1975, seven of the Justices agreed that they would not assign the writing of any opinions to Justice William Douglas or issue a judgment in any 5-4 decision in which he was in the majority because they feared he had become mentally incompetent. See Letter of Oct. 20, 1975, *reprinted in* DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE* 463-65 (Free Press 1998); see also See ROSS E. DAVIES, *The Reluctant Recusants*, 10 *GREEN BAG* 79, 89-90 (2006) (describing the incident and concluding that the "constitutionality of what amounts to collusive compulsory informal secret recusal is an open question, but the raw fact that the Court has engaged in this form of self-management is not") (internal footnote omitted).

Nonetheless, taking cases away from an Article III judge for any significant period of time comes uncomfortably close to the constitutional line. Thus, this provision of the Judicial Conduct and Disability Act should not be extended to the Supreme Court. Aside from this one provision, however, the ethics laws do not come close to conflicting with the letter of the Good Behavior and Compensation Clauses.

the Judicial Conduct and Disability Act might penalize a judge for his votes in previous cases rather than because they found the judge had engaged in misconduct. If legislation like the Murphy Bill becomes law, some of those who are unhappy with the outcome of the Supreme Court's decisions are sure to file ethics complaints, without regard to whether the Justices violated their ethical obligations. Although Article III judges are less likely to manipulate ethics laws to influence judicial decision-making than their political branch counterparts,¹⁰⁵ it is certainly possible.¹⁰⁶ Does this risk of abuse place the constitutionality of these laws in doubt?

The answer must be no. The possibility that a neutrally-worded law could be administered in an unconstitutional manner is a problem that afflicts legislation regulating *any* aspect of the federal judiciary. As previously discussed, federal legislation controls many aspects of judges' and Justices' lives, ranging from the number of administrative assistants they can hire, to courtroom security, to the budget for office supplies. All of these laws are written in neutral terms and yet could conceivably be manipulated to penalize judges for their decisions. Surely Congress is not barred from enacting such legislation simply because it could be misused in this way.¹⁰⁷ Of course, Congress cannot seek to control the outcomes of cases in the guise of regulating judicial ethics. But as long as such legislation is neutral in its application—applying to all judges and Justices, and to all litigation—it does not undermine the decisional independence protected by the Constitution.¹⁰⁸

Finally, it is worth noting that separation of powers generally, and judicial independence in particular, are constitutional values that protect all Article III

105. See, e.g., RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 134-35, 174 (1973) (arguing that statutes providing for judicial self-regulation are constitutional because they do not give Congress power to sanction judges); Shane, *supra* note 21, at 240 (noting that the threat to judicial independence from judicial self-regulation is limited by the "traditions and training of the federal judiciary, as well as the institutional caution invariably exhibited in all systems of self-regulation").

106. See, e.g., Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 76-77 (1989) ("[T]o be meaningful, article III's [Good Behavior and Compensation Clauses] must protect judges not only collectively from other branches, but also individually from harassment by other judges."); see also *Chandler*, 398 U.S. at 141-43 (Black, J., dissenting) (arguing that judicial self-discipline can be abused).

107. Cf. Harrison, *supra* note 75, at 540 ("To say that a power may be misused, however, is by no means to say that it does not exist. All power is subject to misuse, and virtually any government function can be carried out irresponsibly."). See Geyh, *supra* note 99, at 160-61 (discussing the potential constitutional limits on Congress's power to retaliate against federal judges' for their decisions); see also Martin H. Redish, *supra* note 18, at 69, (discussing the potential constitutional limits on legislation reducing support staff or other judicial resources).

108. Cf. Charles G. Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911, 919 (2006).

judges, not just the Justices on the Supreme Court.¹⁰⁹ Thus, any independence-based limits on Congress's authority to legislate regarding recusal and judicial misconduct apply equally to legislation affecting all three existing tiers of the federal judiciary. The conclusion that Congress is barred from regulating any aspect of judicial ethics is hard to square with the decades-old (and in some cases, centuries-old) ethics legislation.¹¹⁰

2. THE IMPEACHMENT CLAUSE

Applying the interpretive principle of *expressio unius est exclusio alterius*, the Constitution's express grant of the power of impeachment to Congress could be read as an implied bar on Congress's authority to use any other method to sanction Article III judges or remove them from individual cases.¹¹¹ If a Supreme Court Justice violates an ethical norm, such as sitting on a case in which she has a conflict of interest, some scholars argue that the Constitution provides one remedy—impeachment—and nothing short of that is permitted.¹¹² The Framers may have hoped or assumed that the threat of impeachment would keep judges and Justices in line, allowing Congress to remove bad apples and at the same time barring Congress from interfering with the exercise of judicial power.¹¹³

Judicial discipline is not equivalent to impeachment, however. Publicly reprimanding a judge, or even temporarily suspending a judge from receiving new cases, is not equivalent to permanently removing a judge from the bench. Thus, the negative implication from the Impeachment Clause prohibits stripping judges of their judicial power permanently through any method short of

109. See U.S. CONST. art. III, § 1; see also Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 221 (1985) (asserting that all Article III judges have "structural parity" because they all benefit from life tenure and protection against salary reduction).

110. See *infra* Part IV (discussing the history of congressional regulation of judicial ethics).

111. The Latin phrase *expressio unius est exclusio alterius* means the "expression of one is the exclusion of another." This canon of interpretation is most often invoked in statutory interpretation, in which it is cited for the proposition that a legislature's decision to include specific items in a statute suggests that it meant to *exclude* items not mentioned.

112. Shane, *supra* note 21, at 220 ("[I]t is suggested that all politically controlled disciplinary mechanisms short of impeachment are precluded by implication because any such mechanisms would undermine the value of judicial independence that the [Good Behavior and Compensation Clauses] are intended to protect."); *id.* at 223 ("A number of commentators assert that the arguments demonstrating the exclusivity of impeachment as a political device for judicial discipline exclude any possibility of judicial discipline through judiciary-dependent devices such as prosecution or judicial self-regulation."); Virelli, *supra* note 17, at 1211 ("The constitutional principles at stake similarly support a literal reading of the Impeachment Clauses that would exclude unmentioned remedies like recusal.").

113. See, e.g., *Chandler*, 398 U.S. at 141-42 (Black, J., *dissenting*) ("[N]o word, phrase, clause, sentence, or even the Constitution taken as a whole, gives any indication that any judge was ever to be partly disqualified or wholly removed from office except by the admittedly difficult method of impeachment by the House of Representatives and conviction by two-thirds of the Senate."). *But see* *McBryde v. Comm. to Review Cir. Council Conduct and Disability Orders of the Judicial Conference of the United States*, 264 F.3d 52, 64-65 (D.C. Cir. 2001) (rejecting Judge McBryde's argument that the impeachment clause precludes all other methods of disciplining judges).

impeachment, but should not be read to bar milder forms of discipline.¹¹⁴

Expressio unius arguments are often suspect, particularly in constitutional interpretation. The Constitution failed to spell out many aspects of the federal judiciary's organization and operation, and yet no one questions Congress's power to legislate on at least some matters that affect the day-to-day operations of the federal courts, including the U.S. Supreme Court.¹¹⁵ The Constitution is a broadly-worded document sketching out the framework of the United States government; it was never intended to address every question that could arise regarding the relationship between the branches. In other words, despite the Constitution's silence on these questions, it is understood that Congress must play an active role in the administration of the federal courts.¹¹⁶ With this as the background rule, the impeachment clause should not be read as an implied bar to all legislation regarding judicial ethics.¹¹⁷

Furthermore, the impeachment-or-nothing argument is dangerous for jurists and for litigants, and thus it is hard to imagine that by including impeachment the Framers meant to prohibit all other forms of discipline. For example, a judge might commit a minor ethical violation—failing to report a spouse's employment, for example—which would be troubling, but would not rise to the level of serious misconduct for which impeachment has always been reserved.¹¹⁸ If the only method of regulating judicial misconduct were impeachment, Congress might resort to this ultimate sanction more often than the Framers intended, and more often than would be healthy for judicial independence.¹¹⁹ Alternatively,

114. See, e.g., *McBryde*, 264 F.3d at 67 ("In short, the claim of implied negation from the impeachment power works well for removal or disqualification. But it works not at all for the reprimand sanction, which bears no resemblance to removal or disqualification . . .").

115. See, e.g., Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 357 n.140 (2006) ("Congress is indisputably authorized to engage in some regulation of the federal courts.")

116. See *supra* Part II.A.

117. See, e.g., *McBryde*, 264 F.3d at 65 (stating that the Impeachment Clause should not be read to bar methods of judicial discipline that fall short of removal).

118. See Stephen Shapiro, *The Judiciary in the United States: A Search for Fairness, Independence, and Competence*, 14 GEO. J. LEGAL ETHICS 667, 680 (2001) ("At both the federal and state level, impeachment has proved to be an unwieldy and insufficient method of disciplining judges."); see also *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 95 (1970) ("But if one judge in any system refuses to abide by such reasonable procedures [regarding the effective administration of the courts] it can hardly be that the extraordinary machinery of impeachment is the only recourse."); Edward D. Re, *Judicial Independence and Accountability: The Judicial Council's Reform and Disability Act of 1980*, 8 N. KY. L. REV. 221, 253 (1981) ("That impeachment is cumbersome and unwieldy, and is no real deterrent to aberrant behavior, may perhaps be best demonstrated by our national experience.").

119. Federal Judge John Pickering was impeached and convicted in 1804. Although Pickering was "hopelessly insane," he had not committed "treason, bribery, or other high crimes and misdemeanors," which are the only constitutional grounds for impeachment. As experts on federal judicial administration observed, "[Pickering's] removal foreshadowed the problem of having to rely solely on impeachment for judicial removal." See Russell R. Wheeler & A. Leo Levin, *Judicial Discipline and Removal in the United States*, Federal Judicial Center Staff Paper 5 (1979), available at [http://www.fjc.gov/public/pdf.nsf/lookup/judidisc.pdf/\\$file/judidisc.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/judidisc.pdf/$file/judidisc.pdf).

Congress might refrain from taking any action, leaving judges free to engage in serious, but not impeachment-worthy, offenses without fear of consequences. Either way, the result would diminish the courts' legitimacy in the eyes of the public—a result at odds with the Framers' goals.¹²⁰

Litigants would also suffer in a regime in which impeachment was the only method of disciplining a Justice. Due process demands an impartial judge¹²¹; impeachment is a *post hoc* remedy that will do nothing to alleviate the due process violation suffered by a litigant whose case was decided by a biased decision-maker. Recusal statutes are a means of removing biased or incompetent judges before harm is done, which impeachment cannot do.¹²²

3. JUDICIAL HIERARCHY

The Constitution states that the judicial power “shall be vested in one supreme Court.” The creation of the lower federal courts is left to Congress's discretion, and the Constitution declares that those courts are “inferior to” the Supreme Court. Thus, the Supreme Court is the only constitutionally required Court, and it sits atop the federal judiciary.

Arguably, the Court's special status constrains Congress's power to enact ethics legislation in two ways. First, Congress must show proper respect for the Court's role at the head of a co-equal branch of government; and second, Congress cannot disrupt the constitutionally-required hierarchy that places the Supreme Court above the “inferior” courts.¹²³ For these reasons, some scholars have expressed doubts about Congress's power to regulate Supreme Court Justices' ethical conduct, particularly if such legislation would give lower federal court judges the power to discipline the Justices.¹²⁴

a. Status

The Supreme Court's status does not pose an obvious obstacle to federal legislation regulating the Justices' ethical conduct as *individuals*. Most ethics

120. *But see* Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535, 1535-36 (2012) (arguing that Congress should use various indirect constitutional tools, such as impeachment, to “influence the Justices' recusal practices”).

121. *See, e.g.*, *Ward v. Vill. of Monroeville*, 409 U.S. 57, 61-62 (1972) (finding a violation of the Due Process Clause where the decisionmaker had a financial interest in the proceeding); *Goldberg v. Kelley*, 397 U.S. 254, 271 (1970) (“[A]n impartial decisionmaker is essential.”).

122. Virelli suggests that litigants seek to recuse biased Justices pursuant to the Due Process Clause. *See* Virelli, *Congress, the Constitution, and Supreme Court Recusal*, *supra* note 120, at 1604-05. But the Court's current practice is to allow each Justice to decide for him or herself whether recusal is required, which demonstrates that the Court has not been sensitive to the Due Process concerns raised by recusal requests.

123. A few scholars argue that the lower federal courts are not constitutionally required to be subordinate to the Supreme Court. For further discussion of this debate, *see infra* note 125.

124. *Cf. Shane, supra* note 21, at 236 (stating that the “argument for maximum judicial independence is fairly compelling at the Supreme Court level.”).

regulation applies to the Justices' conduct off the bench, and not to the Supreme Court as an institution. For example, existing ethics legislation bars judges and Justices from engaging in political activity and from taking money or gifts from parties with matters before the court—that is, extra-judicial activities. Although these laws are intended to protect the legitimacy of judicial decisions, they do not directly regulate exercise of the judicial power.

Because these laws seek to regulate the behavior of judges and Justices off the bench, the Court's status would appear to be irrelevant. As a constitutional matter, Article III judges are treated alike, in that they all benefit from the same life tenure and compensation guarantees, and they all exercise the same "judicial Power." In fact, Justices can and do serve as judges on the lower courts. In other words, the Supreme Court's special constitutional status as an *institution* does not translate into special constitutional status for the Justices.

Unlike most other ethics legislation, recusal laws do apply to the Supreme Court Justices acting in their judicial capacity, and thus directly raise the question whether Congress can regulate the head of a co-equal branch of government. However, the Constitution does not bar Congress from enacting legislation seeking to safeguard the executive and judicial branch's exercise of their constitutional authority. Rule of law concerns, and the principle that "no man is above the law," justifies ethics legislation affecting all federal officials in all three branches of government. In fact, the financial disclosure requirements that apply to Supreme Court Justices also require annual disclosures by the President and Vice-President of the United States. Thus, there is no constitutional basis for concluding that Congress lacks the power to regulate the conduct of Supreme Court Justices simply because of their position at the head of the federal judiciary.

b. Hierarchy

Article III specifies that there shall be "one supreme Court" and describes all other Article III courts as "inferior."¹²⁵ Most federal courts scholars conclude from this language that the lower courts must be subordinate to the Supreme Court and that Congress cannot enact legislation that would disrupt this

125. U.S. CONST. art. III, § 1. The Constitution also grants the Supreme Court "appellate Jurisdiction" to review the judgments of "inferior" courts, which places these inferior courts in a subordinate position to the Supreme Court on at least those matters over which the Supreme Court can review and reverse them. See James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1518–19 (2001); see also JAMES E. PFANDER, *supra* note 72, at xii ("Apart from creating one 'supreme' court with supervisory authority, the Constitution takes care to ensure that all other adjudicative bodies remain inferior to that one court . . . Inferiority means that the courts and tribunals in question must remain subject to the oversight and control of the Supreme Court."). However, Congress's power to make "Exceptions" to the Supreme Court's appellate jurisdiction undermines the Supreme Court's power over the "inferior" courts. See Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 276 (1992) (stating that Article III's Exceptions and Regulations Clause "plainly diminishes the extent to which the Supreme Court is hierarchically dominant over the inferior courts.").

relationship. For example, James Pfander argues that this language bars Congress from completely insulating lower federal court decisions from Supreme Court review.¹²⁶ Similarly, Evan Caminker contends that “inferior” courts are constitutionally obligated to follow the decisions of their superiors, rendering vertical *stare decisis* a constitutional requirement that cannot be overridden by federal legislation.¹²⁷

If the inferior courts must remain subordinate to the Supreme Court, then arguably Congress cannot assign the lower federal court judges a supervisory role over the Justices’ ethics. The Murphy Bill delegated to the Judicial Conference of the United States the authority to “establish procedures” to “review” and “investigate” complaints against the Justices, and to take “further action where appropriate.” It also gave the Judicial Conference the authority to “establish a process” by which a Justice’s refusal to recuse herself is reviewed by “other justices or judges of a court of the United States.” The Judicial Conference is chaired by the Chief Justice, but its membership consists of judges on the circuit and district courts. If one adopts the strictest reading of the supreme/inferior dichotomy by concluding that it requires that lower courts be subordinate to the Supreme Court, and that it bars judges on those courts from policing the Justices’ ethical conduct, then the Murphy Bill’s delegation of authority to the Judicial Conference raised constitutional questions.¹²⁸

To avoid this potential constitutional problem, the best practice would be for the Justices to sit in judgment of each other’s alleged ethical violations. Although hierarchical purists might argue that the Judicial Conference has no authority to require the Justices to follow those rules because that would upend the

126. PFANDER, *supra* note 74, at xii.

127. See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 832-34 (1994). A few scholars disagree, however, asserting that the supreme/inferior dichotomy refers not to the lower courts’ subordinate status, but rather to their restricted geographic and subject matter jurisdiction, which would allow Congress to elevate the lower courts over the Supreme Court on at least some matters. See, e.g., David E. Engdahl, *What’s in a Name? The Constitutionality of Multiple “Supreme” Courts*, 66 IND. L.J. 457 (1991) (“The same legislative branch that pyramided the judiciary may refashion it however political wisdom directs, without doing violence to the Constitution.”); Hartnett, *supra* note 72, at 314 (observing that the “supreme” and “inferior” language may not mean that the lower courts are subordinate to the Supreme Court, but rather may refer to “breadth of geographic and subject matter jurisdiction”); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1180 n.139 (1992) (noting that “supreme” and “inferior” were probably used to distinguish between courts “subject to narrow geographic and subject matter constraints” and those without such constraints). See also Barrett, *supra* note 113, at 344-53 (2006) (summarizing the academic debate on this question and concluding that the Constitution is unclear).

128. Justice Anthony Kennedy recently testified before Congress that Congress would encounter a “constitutional problem” were it to attempt to make the *Code of Conduct* binding on the Justices because it would be “structurally unprecedented for district and circuit court judges to make rules that Supreme Court judges have to follow.” See Malloy, *supra* note 56, at 2389; see also Shane, *supra* note 21, at 236 n.106 (arguing that it would be “incongruous” to “allow judges whose work is routinely reviewed by the Supreme Court . . . to discipline the justices reviewing them”).

subordinate position the Constitution intended for the inferior courts,¹²⁹ that view is hard to defend. But the constitutionally-obligated hierarchy does not bar the Judicial Conference from playing a role in creating the ethics rules that the Justices would be required to follow. The Judicial Conference is an administrative body, not a court, and it consists of judges from all three levels of the federal judiciary, including the Chief Justice who serves as its chair. Granting it authority to establish ethics rules for the Supreme Court should have no effect on the subordinate status of the inferior courts.¹³⁰

4. "ONE SUPREME COURT"

The first sentence of Article III states that the judicial power shall be vested in "one supreme Court." Some interpret this clause to mean that one *indivisible* Supreme Court must decide all the cases and controversies that come before it,¹³¹ which would raise constitutional doubts regarding any legislation that required outside review of a Justice's refusal to recuse him or herself.¹³² For example, the Murphy Bill provided that the Judicial Conference must "establish a process" by which a single Justice's decision not to recuse him or herself would be reviewed by "other justices or judges of a court of the United States," including retired or senior Justices, and then delegated to the Judicial Conference discretion over the composition of the panel. Such a two-tiered decision-making process—and one that results in the composition of a new "Supreme Court" for the purpose of reviewing the single Justice's recusal decision—violates a narrow reading of the Constitution's mandate that there be only one Supreme Court.

The "one supreme Court" language has never been the subject of litigation

129. See Malloy, *supra* note 56, at 2389 (reporting that Justice Kennedy testified before Congress that it would be constitutionally problematic to require the Justices to follow ethical rules created by district and circuit courts).

130. In fact, the Justices are already required to file annual reports disclosing their incomes and obligations to the Judicial Conference, which then bears the responsibility of reporting to the Attorney General if a Justice fails to file a report or files a report containing false information. 5 U.S.C. app. 4, § 104(b).

131. See, e.g., Letter from Chief Justice Hughes to Senator Wheeler (Mar. 21, 1937), reprinted in 81 CONG. REC. 2813, 2815 (1937) ("The Constitution does not appear to authorize two or more Supreme Courts or two or more parts of a Supreme Court functioning in effect as separate courts."); Ross E. Davies, *A Certain Mongrel Court: Congress's Past Power and Present Potential to Reinforce the Supreme Court*, 90 MINN. L. REV. 678, 680 (2006) (stating that "the Framers did indeed read 'one supreme Court' to mean 'one [indivisible] supreme Court'—a single body consisting of all of its available and qualified members to conduct its business."); Cf. 2011 Year-End Report of the Federal Judiciary, *supra* note 1, at 9 (asserting that there is "no higher court to review a Justice's decision not to recuse in a particular case," which is a "consequence of the Constitution's command that there be only 'one supreme Court.'").

132. Russell Wheeler, *What's So Hard About Regulating Supreme Court Justices' Ethics?—A Lot*, BROOKINGS INST. (Nov. 28, 2011) (stating that the "one supreme Court" requirement might bar review of a single Justice's recusal decision), available at www.brookings.edu/research/papers/2011/11/28-courts-wheeler; Virelli, *supra* note 17, at 1205 n.140 (stating that proposals to allow lower court judges to review Supreme Court recusal decisions have "significant constitutional problems . . . including Article III's mandates that there be only 'one supreme Court,' and that Congress have power to create only 'inferior courts.'").

or even much close academic scrutiny, and thus its contours remains hazy.¹³³ Most commentators agree that it prohibits Congress from establishing multiple Supreme Courts populated by different sets of Justices, all empowered to issue decisions binding on the nation as a whole.¹³⁴ Far less clear is whether this language bars the Court from breaking into subdivisions to decide cases or components of cases,¹³⁵ or whether it would prohibit the entire Court from reviewing the decision of one or more of the Justices, particularly on a matter that was separate from the merits (such as recusal).

In fact, the Court has a long history of empowering a single Justice to make decisions on preliminary or ancillary matters that continues to this day, suggesting that the Court itself has never read the “one supreme Court” requirement as an obstacle to this practice. For example, a single Justice can decide whether to grant an extension of time to file a petition for a writ of certiorari,¹³⁶ order a stay of a lower court’s decision,¹³⁷ issue a writ of habeas corpus,¹³⁸ or recuse him or herself.¹³⁹ These are all collateral issues, but they can nonetheless be significant to the litigants and to the outcome of a case.¹⁴⁰

Although a single Justice’s decision often stands as the final word on the matter, a party may ask another Justice or the full Court to review the decision. Supreme Court Rule 22 provides that the “party making an application [to an individual Justice] . . . may renew it to any other Justice, subject to the provisions

133. See Daniel M. Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. CIN. L. REV. 1159, 1197 (2008) (Noting that the “one supreme Court” requirement suggests that there are limits on Congress’s ability to structure the Court’s decision-making, but further observing that the “constitutional text . . . neither indicates what the extent of the ‘judicial power’ is nor how much delegation of the Supreme Court’s powers would go too far.”) (internal footnote omitted).

134. See, e.g., EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 2-3 (9th ed. 2007). *But see* Byron R. White, *Challenges for the U.S. Supreme Court and the Bar: Contemporary Reflections*, 51 ANTITRUST L.J. 275, 281 (1982) (“Rather than one Supreme Court, there might be two, one for statutory issues and one for constitutional cases; or one for criminal and one for civil cases.”).

135. Tracey George and Chris Guthrie recently proposed doing just that to enable the Supreme Court to hear a greater number of cases, and they assumed that doing so would not violate the “one supreme Court” requirement. In their view, dividing the Court into panels would not create more than one Supreme Court, since each panel would be a stand-in for the full Court. They point out that the courts of appeals currently sit in three-judge panels to hear most cases, and yet each circuit is still viewed as a single court despite these congressionally-mandated subdivisions. Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts of Appeals Image*, 58 DUKE L.J. 1439 (2009).

136. 28 U.S.C. § 2101(c).

137. 28 U.S.C. § 2010(f).

138. 28 U.S.C. § 2241(a) (“Writs of habeas corpus may be granted by the Supreme Court [or] any justice thereof . . .”). In practice, however, individual Justices always refer matters regarding habeas to the full Court. See GRESSMAN ET AL., *supra* note 132, § 17.15 at 884-85, § 11.3 at 662.

139. See S. Ct. R. 22 (describing the process by which a party makes an application to a single justice).

140. See Gonen, *supra* note 134, at 1161. Moreover, in 1802 Congress assigned to a single justice the power to decide matters arising during the Court’s August session—a practice that continued for thirty-seven years without constitutional objection. Ross Davies gives fascinating discussion of this “rump” Court in his article, *A Certain Mongrel Court: Congress’s Past Power and Present Potential to Reinforce the Supreme Court*, 90 MINN. L. REV. 678 (2006).

of this Rule.”¹⁴¹ When renewed applications do occur, they are usually referred to the full Court, perhaps to avoid the awkward situation in which one Justice essentially reverses the decision of a colleague.¹⁴² Although it is rare for the full Court to overturn a single Justice’s decision,¹⁴³ it is not unprecedented, particularly if there has been a change in circumstances.¹⁴⁴

The long practice by which a single Justice makes decisions for the Court, which may then be reviewed by the *en banc* Court, is at odds with an interpretation of the “one supreme Court” language requiring that the Court make decisions as a single, indivisible entity. One way around the problem is to characterize the decision of a single Justice as tentative rather than a final decision by “the Court.” Today, when a Justice decides not to recuse him or herself, that decision is final, and thus is usually considered a decision by the Supreme Court itself. If the recusal question is reviewable by the rest of the Court, however, then the single Justice’s decision not to step aside should more accurately be viewed as a preliminary assessment rather than a final, binding decision of the Court. Thus, the one and only Supreme Court decision in the case would be that of the *en banc* Court. In fact, the leading treatise on Supreme Court practice describes *all* decisions by individual Justices in these terms, explaining that when an individual Justice grants or denies motions, those decisions are

[N]ot a final resolution of the merits of any case or controversy pending before the Court . . . [but rather] are merely preliminary steps toward invoking the ultimate power of the “one supreme Court” to resolve a case or controversy that is properly before the Court for final disposition.¹⁴⁵

In short, the requirement that there be “one supreme Court” suggests that the

141. S. Ct. R. 22.4. However, such renewals are “disfavored.”

142. *See, e.g., Holtzman v. Schlesinger*, 414 U.S. 1316, 1316 (1973) (Douglas, J., in chambers) (stating that referrals of renewed applications to the full Court “is the desirable practice to discourage ‘shopping around’”). *Holtzman* involved just such a back-and-forth between individual Justices issuing conflicting in-chambers decisions. Congresswoman Elizabeth Holtzman filed suit seeking to enjoin the United States from bombing Cambodia. The district court issued an injunction, which was then stayed by the Second Circuit. Holtzman then appealed to Justice Marshall to vacate the stay, which he declined to do. *Holtzman*, 414 U.S. 1304 (Marshall, J., in chambers). Holtzman then renewed her application with Justice Douglas, who issued a stay, noting that “while the judgment of my brother Marshall is not binding on me, it is one to which I pay the greatest deference.” *Id.* at 1317. The Solicitor General then applied to Justice Marshall once again. Marshall again stayed the district court’s decision, and noted that he had been in communication with the other members of the Court, all of whom agreed with him. *Id.* at 1321, 1322 (Marshall, J., in chambers). Justice Douglas dissented from that decision, arguing that only a quorum of the Court had the power to reverse his decision and that “seriatim telephone calls cannot . . . be a lawful substitute.” *Id.* at 1323. These events are described in more detail in Gonen, *supra* note 134, at 1177-79.

143. *See also Rosenberg v. United States*, 346 U.S. 273, 286 (1953) (observing that although the court has “made no practice of vacating stays issued by single Justices . . . reference to this practice does not prove the nonexistence of the power; it only demonstrates that the circumstances must be unusual before the Court, in its discretion, will exercise its power”).

144. *Rizzo v. Goode*, 421 U.S. 902 (1975).

145. GRESSMAN ET AL., *supra* note 135, at 3.

best practice is to require that a single Justice's decision not to recuse him or herself be open to review by the full Court.

Of course, another way to reconcile practice with the Constitution's text is to conclude that the language should not be read so narrowly—a position taken by a number of scholars.¹⁴⁶ After all, we consider each federal court of appeals to be a single court, even though those judges decide most cases in three-judge panels that can then be reviewed by the entire court *en banc*.

Accordingly, the Judicial Conference would be on fairly safe constitutional ground were it to delegate to the full Court the power to review a single Justice's refusal to recuse him or herself from a pending case. Certainly, it would be difficult to argue that this practice violates the Constitution's "one supreme Court" mandate when the Court's own Rules permit applications to individual Justices followed by full Court review of that Justice's decisions.¹⁴⁷

The harder question is whether the Constitution would permit a panel that included lower federal court judges or retired Justices to review an individual Justice's refusal to recuse, as the Murphy Bill would have allowed (but not required). Professors Michael Dorf and Lisa McElroy addressed a closely related problem in their article describing potential roles for retired Justices.¹⁴⁸ Although they do not read the "one supreme Court" language to prohibit retired Justices from substituting for recused Supreme Court Justices in specific cases, they point out that even if it did, Congress could get around that problem through legislation manipulating the Supreme Court's appellate jurisdiction. Congress has the power under Article III to make "Exceptions" to the Court's appellate jurisdiction, and thus it can take away matters that would permissibly fall within the Court's subject matter jurisdiction, assigning those cases to lower courts.¹⁴⁹ The Constitution permits active and retired Justices to sit on lower courts.¹⁵⁰ Thus, Congress could enact a jurisdictional statute that eliminates most of the Supreme Court's appellate jurisdiction and reassigns those cases to a new court made up entirely of active Supreme Court Justices.¹⁵¹ (The same nine Justices would also continue to sit as the Supreme Court, but now the Supreme Court's jurisdiction would consist only of those few cases over which the Constitution grants the Supreme Court original jurisdiction, and perhaps a small number of cases within their appellate jurisdiction to avoid any argument that the Exceptions Clause does not permit Congress to strip the Supreme Court of *all* of its appellate jurisdiction.) Because this new court would technically be an "inferior" court, the

146. See, e.g., George & Guthrie, *supra* note 136; see also McElroy & Dorf, *supra* note 93, at 111 (labeling such an interpretation as "highly formalistic").

147. See S. Ct. R. 22.

148. See McElroy & Dorf, *supra* note 93, at 109.

149. U.S. CONST. art. III, § 2, cl. 1.

150. In fact, a similar arrangement existed for many years when the Justices were required to sit on circuit courts whose decisions could be reviewed by the entire Supreme Court.

151. McElroy & Dorf, *supra* note 93, at 111.

“one supreme Court” language would not bar review of a Justice’s refusal to recuse herself by a specially constituted recusal court that included lower court judges and retired Justices. Admittedly, this is an inelegant workaround, but it demonstrates that review of a Justice’s decision not to recuse herself by judges who are not currently sitting on the Supreme Court can be reconciled with even the narrowest interpretation of the “one supreme Court” language.

In short, legislation mandating review of a Justice’s decision not to recuse herself can be implemented in a variety of ways to satisfy the “one supreme Court” requirement. The safest course would be for Congress to assign the recusal question to the full Court to resolve, ensuring that a single Justice does not have sole discretion to decide that sensitive question. Whatever the policy implications of such a practice, it would pass constitutional muster.

C. CONCLUSION

The text of the Constitution does not speak directly to Congress’s authority to regulate the Justices’ ethical conduct. Nonetheless, the Constitution does provide the sources of Congress’s constitutional authority to enact ethics legislation while suggesting important limits on that authority. Most of the ethics legislation summarized in Part II fits comfortably within Congress’s authority under the Necessary and Proper Clause to establish the Court’s structure and daily operations, including ethics rules. That said, there are a few provisions of the Judicial Conduct and Disability Act, as well as the Murphy Bill, which raise some constitutional questions, and thus their application to the Supreme Court should be avoided.¹⁵² Moreover, Congress must take care to craft legislation that avoids undermining the Justices’ constitutionally-protected independence, as well as the Court’s status as the preeminent court in the federal judiciary.¹⁵³

The Constitution’s text and structure alone are not the last word on constitutional meaning, however. Longstanding practice also plays an important role in arriving at constitutional meaning. The history of Congress’s regulation of the Justices’ ethical conduct is addressed below in Part IV.

IV. THE HISTORY OF CONGRESSIONAL REGULATION OF JUDICIAL ETHICS

Congress has long assumed the power to regulate judicial ethics, including the ethical conduct of Supreme Court Justices. “[T]radition” is an “important source of constitutional insight”¹⁵⁴ and is frequently cited by courts and commentators as support for practices that otherwise lack a clear textual basis.¹⁵⁵

152. See *supra* notes 64 to 150 and accompanying text.

153. See *supra* notes 64 to 150 and accompanying text.

154. See Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 178 (2003).

155. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (“In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before

Accordingly, Congress's longstanding practice regarding the regulation of judicial ethics is an essential element of the constitutional analysis.

Aside from the Murphy Bill, the legislation described in Part II has existed for many decades: Recusal statutes have been in place for over two-hundred years; judges have been required to publicly disclose their household finances for over thirty years; judges have been subject to gift and outside income limitations for over twenty years; and judges have been statutorily subject to investigations and sanctions for ethical violations for over thirty years.¹⁵⁶ Furthermore, criminal laws have long been applied to federal judges prior to, and even in the absence of, impeachment.¹⁵⁷ Federal judges, including Supreme Court Justices, can be convicted and incarcerated for committing crimes, and thus effectively removed from the bench, without first being impeached (though the two penalties typically go hand in hand).¹⁵⁸ As these statutes demonstrate, Congress has long assumed it has the authority to regulate the Justices' ethical conduct, and the Justices appeared to concur, at least until Chief Justice Roberts' 2011 Year-End Report raised new questions.

Over the decades that these laws have been in existence, the Justices have diligently filed their financial disclosure forms,¹⁵⁹ abided by income and gift restrictions, and written opinions in which they acknowledge being bound by the

questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by s. 1 of Art. II.") (Frankfurter, J., concurring). Cf. Stephen B. Burbank, *The Architecture of Judicial Independence* 72 S. CAL. L. REV. 315, 320 (1999) ("[T]he verdict of history has confirmed some understandings about federal judicial independence that cannot fairly be imputed to the language of the Constitution alone.").

156. See *supra* Part II.A.

157. Scholars debate whether the Constitution permits criminal prosecution in advance, or in lieu, of impeachment. Compare Shane, *supra* note 21, at 225-232 (concluding that "the founders probably did not intend impeachment and conviction to be prerequisites to criminal prosecution") and Gerhardt at note 106, at 29, with Robert S. Catz, *Removal of Federal Judges by Imprisonment*, 18 RUTGERS L.J. 103, 116-18 (1986). Although the Supreme Court has not ruled in this issue, a number of circuit courts have concluded that a federal judge may be prosecuted without first being impeached. See, e.g., *United States v. Claiborne*, 727 F.2d 842, 845 (9th Cir. 1984) ("[T]he Constitution does not immunize a sitting federal judge from the process of criminal law."); *United States v. Isaacs*, 493 F.2d 1124, 1142 (7th Cir.) (holding that life tenure does not immunize federal judges from criminal prosecution), *cert. denied*, 417 U.S. 976 (1974). There is also some evidence that the Framers did not view the power to impeach as a prohibition against criminal prosecution. In 1795, the House of Representatives chose not to impeach Judge George Turner after being informed by the Attorney General that the Judge would be prosecuted. See Warren S. Grimes, *Hundred-Ton-Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 UCLA L. REV. 1209, 1217 n.43 (1991).

158. See Stephen B. Burbank & S. Jay Plager, *Forward: The Law of Federal Judicial Discipline and the Lessons of Social Science*, 142 U. PA. L. REV. 1, 3 & n.13 (1993) (describing criminal prosecutions of three federal judges in the 1980s); see also *United States v. Claiborne*, 727 F.2d 842, 845 (9th Cir. 1984) ("[T]he Constitution does not immunize a sitting federal judge from the process of criminal law.").

159. See Judicial Watch, <http://www.judicialwatch.org/courts/us-supreme-court/> (collecting the financial disclosure reports filed by the Supreme Court Justices) (last visited March 16, 2013).

recusal statute,¹⁶⁰ all without questioning the constitutionality of these laws. On the relatively rare occasions when Justices have failed to meet the requirements of the law, they have subsequently corrected their mistakes rather than deny that Congress has authority to make them do so.¹⁶¹ The longstanding existence of legislation regulating the Justices' ethical conduct, together with the Justices' compliance with these laws, supports the conclusion that this legislation is within Congress's constitutional authority.

Admittedly, however, Congress has hesitated to apply some of the more intrusive ethics and disability legislation to Supreme Court Justices. Congress first enacted legislation mandating recusal of lower federal court judges in 1792, but did not extend that statute to the Supreme Court Justices until 1948.¹⁶² The Judicial Conduct and Disability Act still does not apply to the Justices. Likewise, Congress authorized judges on the lower federal courts to set ethical standards for each other, but has not required the Supreme Court to follow the resulting *Code of Conduct*. One scholar contends that the historic exclusion of the Justices from some ethics and recusal legislation suggests that Congress lacks authority to regulate Supreme Court Justices as it does judges on the inferior courts.¹⁶³

Congress has never acknowledged such a limit on its authority, however. Rather, Congress has explained its decision to exclude the Justices from some of its legislation regulating judicial ethics on policy grounds. For example, the House Report accompanying the Judicial Conduct and Disability Act states that the legislation does not apply to the Justices because the "high public visibility of Supreme Court Justices makes it more likely that impeachment can and should be used to cure egregious situations."¹⁶⁴ In other words, the Report concluded that the Justices' public prominence reduced the need for ethical oversight, but never

160. See, e.g., 2011 Year-End Report on the Federal Judiciary, *supra* note 1, at 7 (referring to 28 U.S.C. § 455 as the "governing statute" for Supreme Court recusal determinations); *Laird v. Tatum*, 409 U.S. 824, 825 (1972) (Rehnquist, J., mem.) (referring to 28 U.S.C. § 455 as the "governing statute" for Supreme Court recusal determinations); *Microsoft Corp. v. United States*, 530 U.S. 1301, 1301 (2000) ("Title 28 U.S.C. § 455 sets forth the legal criteria for disqualification of federal magistrates, judges, and Supreme Court Justices."); *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 916, 923 (2004) (Scalia, J., mem.) (repeatedly referring to 28 U.S.C. § 455 as binding on Supreme Court Justices); Statement of Recusal Policy, reprinted in RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION, App. D, at 1101-03 (2d ed. 2007) (citing 28 U.S.C. § 455).

161. For example, when Justice Thomas filed an amended financial disclosure report in January 2011, he explained that he had "inadvertently omitted" information about his wife's employment for several years due to a "misunderstanding of the filing instructions." See Letter from Clarence Thomas, Justice, U.S. Supreme Court, to Committee on Financial Disclosure, *supra* note 37.

162. Act of June 25, 1948, ch. 646, § 455, 62 Stat. 869, 908 (codified as amended at 28 U.S.C. § 455 (2012)). Prior to 1948, the recusal laws applied only to district court judges. Nothing in the legislative history explains the reason for expanding the law to apply to appeals court judges and Supreme Court justices.

163. See Virelli, *supra* note 17, at 1200-02 (noting that Congress waited 150 years before extending the recusal statute to the Supreme Court Justices, and arguing that this delay has constitutional significance). Cf. Shane, *supra* note 21, at 236 n.106 (citing Congress's exclusion of the Supreme Court from the Judicial Conduct and Disability Act in support of his conclusion that it would be constitutionally "incongruous" to allow lower court judges to play a role in disciplining Justices on the Supreme Court).

164. H.R. Rep. No. 96-1313, 96th Cong., 2d Sess., at 10 n.28 (1980).

suggested that Congress lacked the power to do so if it wished.

The House Report further states that it would be “unwise to empower an institution such as the Judicial Conference, which actually is chaired by the Chief Justice of the United States, to sit on cases involving the highest ranking judges in our judicial system” because doing so might “dilute[]” the “independence and importance” of the Supreme Court. Although the reference to judicial “independence” has constitutional overtones, Congress’s use of the term “unwise” suggests it was making a policy choice and not acknowledging a constitutional limit on its powers over the Court. In any case, it is hard to see how the constitutionally-enshrined guarantee of judicial independence limits Congress’s power to regulate the Justices’ ethical conduct but not the conduct of lower court judges. As discussed in Part III, the judicial independence guaranteed by the Constitution’s life tenure and salary protections covers all Article III judges; Supreme Court Justices have no special or additional claim to independence.¹⁶⁵

* * *

Congressional regulation of the federal courts will always raise hard constitutional questions about the need to balance legislative power with judicial independence. Legislation concerning the Supreme Court Justice’s ethical conduct is a particularly sensitive topic, and one that Congress should approach with caution. Chief Justice Roberts’ Year-End Report has elevated these questions in importance, demanding that legislators, jurists, and academics think carefully about the limits on congressional authority to dictate the behavior of Supreme Court Justices. Hopefully, this Essay will contribute to that discussion.

V. CONCLUSION

This Essay concludes that Congress has broad, but not unlimited, authority to regulate the Supreme Court Justices’ ethical conduct. The source of Congress’s power is derived from the fact that Article III mandates the existence of a Supreme Court, but then leaves the creation of that Court up to Congress,

165. U.S. CONST. art. III, § 1. *See also* Amar at note 109, at 221 (asserting that all Article III judges have “structural parity” because they all benefit from life tenure and protection against salary reduction). *But see* Shane, *supra* note 21, at 236-38 (arguing that the Supreme Court merits greater independence because it is the only constitutionally required Court and because of its status as the head of the federal judiciary).

The Justices’ relationship to the Judicial Conference, which is responsible for investigating and sanctioning unethical conduct under the Act, differs in important ways from that of lower federal court judges. The Judicial Conference is chaired by the Chief Justice, but the rest of its members are district and circuit court judges. Accordingly, the dilution of the Supreme Court’s “independence and importance” that concerned the House Committee might stem not from congressional regulation of the Justices’ ethical conduct per se, but rather from oversight by lower court judges. If so, the problem could be solved by allowing the Justices themselves to investigate and sanction each other, rather than delegating that task to the Judicial Conference. As noted earlier, this option is available under the Murphy legislation. For further discussion of the constitutional implications of allowing lower court judges to investigate and sanction Supreme Court Justices, *see supra* Part III.B.5.

triggering Congress's authority to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States."¹⁶⁶ Congress brought the Supreme Court into existence by enacting legislation that set its size and the dates of its sessions, among other vital matters. Ethics legislation is part and parcel of Congress's power to establish and administer the federal court system. Congress' authority over the Supreme Court is cabined, however, by the judiciary's constitutionally enshrined judicial independence and by the need to preserve the Supreme Court's role at the head of the third branch of government. That said, Congress has considerable leeway to regulate the Justices' ethics, just as it has long exercised authority to decide other vital administrative matters for the Court.

166. U.S. CONST. art. I, § 8, cl. 18. Congress's control over the lower federal courts is further bolstered by its authority to "constitute Tribunals inferior to the Supreme Court." U.S. CONST. art. I, § 8, cl. 9. But this provision of course cannot provide any constitutional authority for Congress's regulation of the U.S. Supreme Court.