

# THE ROLE OF CONGRESS IN ENFORCING SUPREME COURT ETHICS

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## I. INTRODUCTION

A recent and ongoing series of ethics scandals have plagued the Supreme Court, eroding the public's trust and exposing structural flaws that leave the Justices open to corruption.<sup>1</sup> These scandals have prompted public debate about Congress's role in reining in the ethical misconduct of the Justices, including a statement given by Justice Alito in an interview with the *Wall Street Journal* that "[n]o provision in the Constitution gives [Congress] the authority to regulate the Supreme Court—period."<sup>2</sup>

Notwithstanding Justice Alito's comment, as the Court itself has acknowledged, the structure of our Constitution authorizes Congress to regulate the ethical conduct of Supreme Court Justices. This is because while the Constitution places important power in the hands of the Court, it does not give the Court itself authority to wield that power by force or power of the purse. Instead, it is the public's collective acceptance of the Court's authority that is the linchpin of its power because public trust in the Court's decision-making process is critical to the acceptance of the *outcomes* of that process. For these reasons, the Constitution authorizes Congress to protect the judicial branch, including the Supreme Court, from corruption risks that would undermine public trust.<sup>3</sup> This means not just that Congress possesses the power to remove individuals whose misconduct warrants impeachment, but also that it is Congress's responsibility to put structures in place to prevent the compromise of the Court's decision-making process.

While the structure of the Constitution authorizes Congress to regulate Supreme Court ethics to protect the public's trust in the Court, it must do so in a manner that also respects another critical element of public trust in the judiciary: the Court's independence from improper interference from the other branches of government. But, contrary to the views of Justice Alito and others, merely because there are limitations on Congress's authority to regulate in this space, it does not follow that Congress has no authority to do so. Indeed, it is the idea that Congress has *no* role in protecting the Supreme Court against outside corruption

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1. See, e.g., Devan Cole, *Supreme Court Approval Rating Declines Amid Controversy Over Ethics and Transparency: Marquette Poll*, CNN (May 24, 2023, 5:01 AM), <https://www.cnn.com/2023/05/24/politics/supreme-court-approval-rating-poll-ethics-marquette/index.html> [https://perma.cc/9MRB-PAP9].

2. David B. Rivkin Jr. & James Taranto, *Samuel Alito, the Supreme Court's Plain-Spoken Defender*, WALL ST. J. (July 28, 2023, 1:57 PM), <https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7> [https://perma.cc/T6TL-QA4Q].

3. See *infra* Part II.B.1.

that is contrary to the constitutional design. Given the structure of the Constitution, Congress needs to protect both of these two types of judicial independence: independence from outside corrupting influences *and* independence from improper interference from the other branches.

To do this, Congress must focus not just on substantive ethics requirements—though they can and should be strengthened—but equally on designing and implementing an effective enforcement mechanism for ethics rules.

Right now, the Justices of the Supreme Court each police themselves individually on all ethics matters short of impeachable offenses or, perhaps, criminal bribery. Outside of those two areas, if a Justice examines the ethics rules and laws and concludes that they apply in a particular way to a particular situation, that is the final word on the matter. The bar for impeachment or a bribery conviction is, appropriately, quite high; given the serious repercussions of each for the Justice involved and for judicial independence, this high bar makes sense. However, that also leaves a wide range of potentially unethical conduct regulated only by the Justices' own discretion.

Common sense tells us that this is not a recipe for effective implementation of ethics rules. But even if we assume that the Justices can and should be trusted in this way, one of the traditional informal safeguards against abuses of power—transparency—is effectively unavailable because these decisions by the Justices about ethics questions, to the extent that they are being made, are largely undisclosed to the public and likely undisclosed even to the parties impacted or the Justice's colleagues. Even in situations where we do see Justices considering ethics issues and making decisions about how to address them, we often do not know how or why they decided the way they did because they simply announce the decision (“Justice X took no part in the decision being reported”<sup>4</sup>), leaving the public to guess at why, much less whether that decision was a reasonable one.

Process matters. A publicly known process with publicly disclosed outcomes would contribute strongly to the public's trust in the Court's ethics. Not only because a reasonable process gives some confidence in reasonable results, but because the public can see and understand that

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4. Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 642 (1987); see also Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 450 (2013) [hereinafter Frost, *Supreme Court Exceptionalism*]; *Hearing on Supreme Court Ethics Reform Before the S. Comm. on the Judiciary*, 118th Cong. 4 (2023) (statement of Amanda Frost, John A. Ewald Jr. Research Professor of Law, University of Virginia School of Law) [hereinafter Frost, *Senate Judiciary Committee Testimony*]; Craig Alan Smith, *The Appearance of Justice: A Historical Case Study Evaluating One Supreme Court Justice's Recusal Decisions*, in OPEN JUDICIAL POLITICS 223, 240 (Rorie Spill Solberg et al. eds., 2d ed. 2020).

there is a process even without assessing potential conflicts in particular cases and without having to read the mind and the intentions of individual Justices in a particular case. For an institution that heavily relies on public trust, perception is important.

While it is understandable that many would wish, both for practical and constitutional reasons, that the Justices would take these steps themselves—thus obviating concerns about a balancing between the Supreme Court’s independence from outside corrupting influences and its independence from Congress—recent history shows us that we simply cannot rely on the Justices collectively to do this effectively. The Supreme Court’s recent adoption of a “code of conduct”<sup>5</sup> demonstrates that, even with its best efforts, the Court is not capable of creating a sufficient system for itself; the system remains, exactly as it was before, entirely self-regulated, with each Justice policing their own ethics, largely outside the public eye and without any sense of how the Justices consider these issues. For example, since the Court passed its Code of Conduct last November, some Justices appear to be approaching recusal matters differently, routinely explaining their recusal decisions (at least when they do decide to recuse and note that recusal), but most Justices are still not explaining recusal decisions, even if the reasons are, it would appear, largely noncontroversial.<sup>6</sup>

The Justices explained in the introduction to the Code that they adopted it not in order to change anything about the rules that they say govern their conduct or the process by which ethics issues are addressed, but because they want to “dispel” the public “misunderstanding” that the Justices “regard themselves as unrestricted by any ethics rules.”<sup>7</sup> If this is a true reflection of the Justices’ assessment of the situation, then the misunderstanding here is the Court’s, and Congress must step in. It should do so not simply to nudge the Court itself into action, but to set appropriate standards and reasonable enforcement mechanisms. Without this, public trust in the Court’s decisions will continue to erode, with consequent damage to trust in the rest of the judicial system and, ultimately, the rule of law. No reading of the Constitution should countenance—or even seriously risk—such an outcome.

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5. CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. (U.S. SUP. CT. 2023).

6. Jordan Rubin, *Supreme Court Justices’ Recusal Explanations Fall Along Party Lines*, MSNBC (Feb. 20, 2024, 3:20 PM), <https://www.msnbc.com/deadline-white-house/deadline-legal-blog/supreme-court-justices-recusal-explanations-rcna139617> [<https://perma.cc/Q27T-MTV7>].

7. *Statement of the Court Regarding the Code of Conduct*, U.S. SUP. CT. (Nov. 13, 2023), [https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices\\_November\\_13\\_2023.pdf](https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf) [<https://perma.cc/4G5H-5863>].

In what follows, we will address one part of Congress's task: the creation of effective investigation and, in some situations, enforcement mechanisms for addressing Supreme Court ethics issues.

## II. CONGRESS'S CONSTITUTIONAL AUTHORITY TO REGULATE THE SUPREME COURT

### *A. History of Congressional Regulation of Judicial Ethics*

#### 1. Recusal

Since the Founding, Congress has regularly passed legislation governing the recusal of members of the judiciary. In 1792, Congress passed legislation requiring lower court judges to recuse themselves in cases in which they had a "financial interest" or "represented either party as counsel."<sup>8</sup> In 1821, Congress passed legislation mandating recusal when a judge's relationship to a party "rendered it improper" for the judge to hear the case.<sup>9</sup> In 1891, Congress passed legislation prohibiting judges from hearing appeals of cases they tried.<sup>10</sup> In 1911, Congress passed legislation requiring recusal when a judge had an "interest" in the case before them, had been of counsel or a material witness for either party, or when they were related or associated with a party or attorney to an extent that it was improper for them to hear the case.<sup>11</sup>

In 1948, Congress extended the 1911 law to apply to the Justices.<sup>12</sup> The change was a response to Justice Black's participation in a case argued by his former law partner and personal lawyer. Justice Robert Jackson, controversially, wrote a concurring opinion to a denial for rehearing in the case, in which he noted the absence of a statute prescribing the grounds on which a Justice must recuse.<sup>13</sup> Prior to the passage of the 1948 law, Justice Jackson also sent a public letter to Congress explaining his view of the circumstances of Justice Black's participation in the case;

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8. Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1223 (2002).

9. *Id.*

10. *Id.* at 1223-24.

11. *Id.* at 1224.

12. Smith, *supra* note 4, at 227 ("Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein." (quoting Act of June 25, 1948, ch. 646, § 455, 62 Stat. 908, 908 (1948) (current version at 28 U.S.C. § 455))).

13. *Jewel Ridge Coal v. United Mine Workers*, 325 U.S. 897, 897-98 (1945) (Jackson, J., concurring) (denying rehearing); *see also* Smith, *supra* note 4, at 224.

in it, he said that if such a non-recusal happened again while he was on the bench, his earlier opinion would “look like a letter of recommendation by comparison.”<sup>14</sup>

In 1974, Congress amended the 1948 law, replacing the “substantial interest” standard with a stricter, objective standard for recusal and additionally enumerating five specific instances in which Justices must also recuse.<sup>15</sup> The change was prompted by a series of high-profile ethics scandals, including Justice Rehnquist’s participation in *Laird v. Tatum*,<sup>16</sup> despite having given testimony to Congress on behalf of the Department of Justice regarding the applicable law,<sup>17</sup> and financial conflicts of interest raised during the unsuccessful nomination of Judge Clement Haynsworth Jr. to the Supreme Court.<sup>18</sup>

Today, federal law requires Justices to disqualify themselves “in any proceeding in which [their] impartiality might reasonably be questioned[;]” enumerates five specific instances in which recusal is warranted;<sup>19</sup> and requires that a Justice “inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.”<sup>20</sup>

## 2. Disclosure

In the last half century, Congress has passed bipartisan legislation mandating that Supreme Court Justices file financial disclosures. The 1978 Ethics in Government Act established financial disclosure reporting requirements for high-level government officials, including judges and Justices.<sup>21</sup> Additionally, the Ethics Reform Act of 1989 prohibits Justices from engaging in most outside employment, except teaching—and requires any compensation to be pre-approved by the Judicial Conference—and prohibits Justices from receiving gifts from anyone “whose interests may be substantially affected by the performance or

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14. 92 CONG. REC. 6722-25 (1946); see also Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203, 221 (1988); John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 634 (1947).

15. Bassett, *supra* note 8, at 1227 & nn.68-69.

16. 408 U.S. 1 (1972).

17. Stempel, *supra* note 4, at 594-98.

18. Bassett, *supra* note 8, at 1225.

19. 28 U.S.C. § 455(a)–(b).

20. *Id.* § 455(c).

21. See Ethics in Government Act of 1978, Pub. L. No. 95-521, § 202, 92 Stat. 1824, 1824-25 (1978) (codified as amended at 2 U.S.C. § 701); see also Frost, *Supreme Court Exceptionalism*, *supra* note 4, at 451.

nonperformance of the [Justices'] official duties."<sup>22</sup> The Ethics Reform Act of 1989 authorizes the Judicial Conference to issue rules or regulations implementing these provisions (although the regulations explicitly do not purport to bind Supreme Court Justices).<sup>23</sup>

In 2022, Congress passed the Courthouse Ethics and Transparency Act,<sup>24</sup> which requires Justices to file periodic transaction reports disclosing certain securities transactions and to report any purchase, sale, or exchange that exceeds \$1,000 in stocks, bonds commodities, futures, and other securities within forty-five days; directs the Administrative Office of the U.S. Courts to establish a searchable internet database of judicial financial disclosure reports; and mandates online publication of judicial financial disclosure reports.<sup>25</sup>

### 3. Limits on Extrajudicial Conduct

Separate from the codes of conduct governing Justices and lower federal judges, Congress has also passed legislation regulating the Justices' extrajudicial conduct. The Ethics Reform Act of 1989 placed limits on outside earned income and gifts for all federal officials, including federal judges and the Justices.<sup>26</sup> The Judicial Conference of the United States promulgated regulations under this law regarding gifts, outside earned income, honoraria, and outside employment.<sup>27</sup> Although the regulations did not apply to the Supreme Court, in 1991, the Court adopted a resolution agreeing to comply with the regulations.<sup>28</sup>

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22. See Ethics Reform Act of 1989, Pub. L. No. 101-194, § 303(a), 103 Stat. 1716, 1746-47 (codified as amended at 5 U.S.C. § 7353); *id.* § 601(a), 103 Stat. at 1760-61.

23. 5 U.S.C. § 7353(b)(1); see also Frost, *Supreme Court Exceptionalism*, *supra* note 4, at 452 n.39.

24. Courthouse Ethics and Transparency Act, Pub. L. No. 117-125, § 2, 136 Stat. 1205, 1205 (2022).

25. *Id.*

26. Ethics Reform Act of 1989, Pub. L. No. 101-194, § 303(a), 103 Stat. 1716, 1746-47 (codified as amended at 5 U.S.C. § 7353); *id.* § 601(a), 103 Stat. at 1760-61. The Court of Appeals for the District of Columbia Circuit found that part of the law was unconstitutional as applied to executive branch employees on First Amendment grounds. *Nat'l Treasury Emps. Union v. United States*, 990 F.2d 1271, 1277-79 (D.C. Cir. 1993).

27. See Frost, *Supreme Court Exceptionalism*, *supra* note 4, at 451-52.

28. William H. Rehnquist, *Supreme Court Internal Ethics Resolution* (Jan. 18, 1991), <https://s3.documentcloud.org/documents/296686/1991-supreme-court-internal-ethics-resolution.pdf> [<https://perma.cc/E976-5UWR>].

*B. Congress's Constitutional Authority to Regulate SCOTUS Ethics  
(and Its Limitations)*

Congress has long exercised its constitutional power to hold the Supreme Court and its Justices to high ethical standards. It derives its authority to do so principally from the Necessary and Proper Clause, and that authority is limited by Article III and separation of powers principles.

1. Congressional Authority: Article III and the Necessary and Proper Clause

Article III of the Constitution says little about the structure and operation of the Supreme Court. Section 1 provides that “[t]he 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” and that “[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”<sup>29</sup> Section 2 authorizes Congress to pass regulations pertaining to the Supreme Court’s appellate jurisdiction.<sup>30</sup> And Section 3 concerns treason.<sup>31</sup>

As scholars have noted, these provisions are not “self-executing.”<sup>32</sup> While Article III safeguards against retaliatory or otherwise improper exercises of legislative power that would tread on Justices’ decisional independence through the grant of tenure to judges and Justices during good behavior; protection against diminution of their salaries; and authorization of removal from office only through impeachment and conviction, the Framers did not include enough in Article III to effectuate the judicial power. Instead, pursuant to Article I’s mandate that Congress “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States,” the Constitution entrusts Congress to pass all laws “necessary and proper” to carry forth Article III’s directive that there be a Supreme Court that exercises judicial power.<sup>33</sup>

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29. U.S. CONST. art. III, § 1.

30. *Id.* § 2.

31. *Id.* § 3.

32. Frost, *Supreme Court Exceptionalism*, *supra* note 4, at 457.

33. U.S. CONST. art. I, § 8; see John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 532 n.90 (2000) (“[T]he scope of ‘inherent’ executive and judicial authority is limited by the fact that Congress is given power to do what is necessary to make the



As a general matter, the Court has made clear that Congress's authority under the Necessary and Proper Clause is broad. In *McCulloch v. Maryland*,<sup>34</sup> the Court interpreted the Necessary and Proper Clause to encompass legislative means that are sufficiently related, or "conducive," to a constitutionally appropriate "end," not just those that are "absolutely indispensable to the existence of a granted power."<sup>35</sup> Chief Justice Marshall justified this expansive reading on the grounds that, when the American people gave the federal government "those great powers on which the welfare of a nation essentially depends," they also gave Congress authority "to insure, as far as human prudence could insure, their beneficial execution."<sup>36</sup>

In *Wayman v. Southard*,<sup>37</sup> the Court affirmed the propriety of Congress using its broad authority under the Necessary and Proper Clause to pass legislation to facilitate the exercise of judicial power.<sup>38</sup> There the Court ruled that the state legislature of Kentucky could not set procedures for federal courts in the state and instead found that Congress had the power to establish such rules under the Necessary and Proper Clause.<sup>39</sup> In so holding, the Court said:

That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by [the Necessary and Proper] clause, seems to be one of those plain propositions which reasoning cannot render plainer. The terms of the clause neither require nor admit of elucidation. The Court, therefore, will only say, that no doubt whatever is entered on the power of Congress over the subject.<sup>40</sup>

Since the first days of our democracy, Congress has exercised this authority to facilitate the exercise of judicial power by passing a variety of laws pertaining to judicial administration. For example, the first Congress enacted legislation that set the size of the Court, established the minimum number of Justices for a quorum, scheduled the Court's terms, granted the Court the authority to hire a clerk, and required the Justices

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executive and judicial powers function best.") (citing William 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,"* 36 OHIO STATE L.J. 788, 793-94 (1975)); see also *id.* at 532 ("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.").

34. 17 U.S. (4 Wheat.) 316 (1819).

35. *Id.* at 325, 415.

36. *Id.* at 415.

37. 23 U.S. (10 Wheat.) 1 (1825).

38. *Id.* at 5-6.

39. *Id.* at 49-50.

40. *Id.* at 22.

to ride circuit.<sup>41</sup> The fact that the first Congress believed it had the authority to regulate the Court in these ways is strong evidence of constitutionality, considering many members of the first Congress also drafted the Constitution.<sup>42</sup> As noted above, Congress has continued to regulate these aspects of the Court, and more, to this day.<sup>43</sup>

Critically, as evinced by the acts of the first Congress, Congress's authority under the Necessary and Proper Clause to facilitate the exercise of judicial power encompasses the power to pass not only laws pertaining to judicial administration but also those that uphold the Court's judicial integrity by protecting the quality of its decision-making. The first Judiciary Act contained a provision requiring that the Justices take a separate oath in addition to that required of all federal officials under Article VI of the Constitution.<sup>44</sup> While the Article VI oath merely requires all federal officials to support the Constitution, this congressionally mandated oath specifically required the Justices to carry out their duties impartially no matter the status of the parties before the Court, which is the primary goal of ethics legislation.<sup>45</sup> Indeed, the statutory oath provided:

I, \_\_\_\_\_, do solemnly swear or affirm that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as \_\_\_\_\_, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God.<sup>46</sup>

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41. See *Stuart v. Laird*, 5 U.S. 299, 307-09 (1803) (upholding constitutionality of law requiring Justices to ride circuit).

42. See Frost, *Supreme Court Exceptionalism*, *supra* note 4, at 458 n.77.

43. See 28 U.S.C. §§ 671–675; § 1; § 2; § 453; § 2109; see also Michael Stokes Paulsen, *Checking the Court*, 10 N.Y.U. J.L. & LIBERTY 18, 91-93 (2016) (“This power includes the power to prescribe rules of practice, procedure, evidence, proof, standards of review, standards of appeal, legal capacity and standing, judicial ethics, choice of law, and even ‘rules of decision’ governing judicial decision of cases, so long as the rules Congress prescribes are not *themselves* substantively unconstitutional, and so long as Congress does not remove from the courts the actual power of independent judgment in a particular matter within its jurisdiction—the core judicial power of ascertaining governing law and applying it to specific cases—or exercise a form of legislative-quasi-‘appellate’ review of specific judicial decisions.”) (emphasis in original).

44. An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 8 (1789).

45. Frost, *Senate Judiciary Committee Testimony*, *supra* note 4, at 4.

46. *Text of the Oaths of Office for Supreme Court Justices*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/oath/oathsofoffice.aspx#:~:text=From%201789%20until%201861%2C%20this,%C2%A7%203331> [https://perma.cc/WM7K-KWB2] (Aug. 10, 2009).

Judicial ethics expert Amanda Frost also suggests that the quorum requirement in the first Judiciary Act protected judicial integrity, in that it safeguarded against rogue or unilateral decision-making on the Court.<sup>47</sup>

Laws safeguarding the integrity of the Court’s decision-making, such as the one requiring an oath, fall under Congress’s authority under the Necessary and Proper Clause to facilitate the exercise of the judicial power because, as the branch of government that “has no influence over either the sword or the purse; . . . but merely judgment[,]”<sup>48</sup> the power of the Court’s decisions depends upon the respect that the public accords them. That respect, in turn, depends upon the Justices acting in ways that reassure the public that they are carrying out their duties in an impartial manner. As Judge Luttig recently explained, Congress has the authority to prescribe ethical standards for the Court in order to preserve “the power of the Supreme Court,” which “is ultimately dependent on the respect that its judgments command . . . by constitutional design.”<sup>49</sup>

It is for this reason that the Court has, in many contexts, described “judicial integrity” as a “state interest of the highest order.” In *Williams-Yulee v. Florida Bar*,<sup>50</sup> which involved a First Amendment challenge to the Florida Code of Judicial Conduct’s prohibition on judicial candidates personally soliciting campaign funds, the Court explained:

The judiciary’s authority . . . depends in large measure on the public’s willingness to respect and follow its decisions. As Justice Frankfurter once put it for the Court, “justice must satisfy the appearance of justice.” It follows that public perception of judicial integrity is “a state interest of the highest order.”<sup>51</sup>

And in *Caperton v. A.T. Massey Coal Co.*,<sup>52</sup> a case concerning judicial recusal, the Court similarly reasoned: “The power and the prerogative of

47. Frost, *Supreme Court Exceptionalism*, *supra* note 4, at 460-61.

48. THE FEDERALIST NO. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009).

49. Letter from J. Michael Luttig to Members of the Senate Judiciary Comm. 2 (May 2, 2023), <https://www.politico.com/f/?id=00000187-d9a8-d5cb-a7a7-ddea09530000> [https://perma.cc/UQZ8-ECTV] (“The nation should never have reason to question the ethical conduct of the Supreme Court. . . . [T]here should never come the day when the Congress of the United States is obligated to enact laws prescribing the ethical standards applicable to the non-judicial conduct and activities of the Supreme Court of the United States, even though it indisputably has the power under the Constitution to do so[.]”); *see also* Frost, *Senate Judiciary Committee Testimony*, *supra* note 4, at 13 (“Regulating judges’ and [J]ustices’ ethical conduct does not pose a risk to the federal courts’ decisional independence. . . . To the contrary, such legislation bolsters the power and prestige of the third branch of government[.]”).

50. 575 U.S. 433 (2011).

51. *Id.* at 445-46 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954); *Caperton v. A.T. Massey Coal Co., Inc.* 556 U.S. 868, 889 (2009)).

52. 556 U.S. 868 (2009).

a court . . . rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order."<sup>53</sup>

To the extent the Supreme Court has discussed the outer bounds of Congress's authority under the Necessary and Proper Clause to pass Supreme Court ethics legislation, it has been clear that Congress's authority to pass ethics legislation goes beyond what is minimally required by the Constitution to preserve fairness in individual judicial proceedings. In *Caperton*, the Court reversed a decision of the West Virginia Supreme Court of Appeals on the grounds that the failure of one of the judges—who had received \$3 million in campaign donations from the CEO of A.T. Massey Coal—to recuse violated the Due Process Clause of the Constitution. The Court explained, “[i]t is axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due process.’”<sup>54</sup> In doing so it incorporated into the Due Process Clause a common law rule requiring recusal when a judge has “a direct, personal, substantial, pecuniary interest[.]”<sup>55</sup> Critically, however, the Court also plainly stated that “[t]he Due Process Clause demarks only the outer boundaries of judicial disqualifications. *Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today.*”<sup>56</sup>

Lower court precedent also affirms Congress's authority. In a constitutional challenge to one piece of ethics legislation Congress has passed, the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, a district court judge reasoned that the statute

represents a legitimate exercise of Congress's “necessary and proper” power to effectuate . . . judicial power. By redefining the composition of the Judicial Councils and enhancing and perfecting their inherent authority, Congress was in no respect intruding upon judicial independence. Rather, it was simply recognizing the need to give the courts reasonable means to put the judiciary's own house in order.<sup>57</sup>

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53. *Id.* at 889 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring)).

54. *Id.* at 876 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

55. *Id.* (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

56. *Id.* at 889-90 (emphasis added) (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986)).

57. *Hastings v. Jud. Conf. of U.S.*, 593 F. Supp. 1371, 1380 (D.D.C. 1984), *aff'd in part, vacated in part*, 770 F.2d 1093 (D.C. Cir. 1985) (holding, in relevant part, that it was premature to reach constitutional questions when the district court rendered its decision).

The Supreme Court has also confirmed that Congress's necessary and proper power extends to providing for the internal operation of the federal courts. For instance, in the 1965 case *Hanna v. Plumer*,<sup>58</sup> the Court held that the Federal Rules of Civil Procedure governed service of process in a case involving diversity of citizenship, reasoning, "the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts[.]"<sup>59</sup> In affirming the constitutionality of the 1934 Rules Enabling Act, which authorizes the Court to create general rules of practice and procedure and rules of evidence, the Court in *Sibbach v. Wilson & Co.*<sup>60</sup> made clear that "Congress has undoubted power to regulate the practice and procedure of federal courts[.]"<sup>61</sup> And in addressing a challenge to the constitutionality of congressionally created Circuit Judicial Councils in *Chandler v. Judicial Council of the Tenth Circuit*,<sup>62</sup> the Supreme Court saw "no constitutional obstacle preventing Congress" from creating Councils vested with the "authority to make 'all necessary orders for the effective and expeditious administration of the business of the courts within [each] circuit.'"<sup>63</sup>

## 2. Congressional Limitations: Article III and the Separation of Powers

Congress's authority, while broad, is not unbounded. As noted above, Article III shields the decisional independence of the Justices from improper acts of Congress by guaranteeing the Justices a salary for life and removal only through the high bar of impeachment and conviction. Article III thus prevents Congress from passing ethics legislation—or any legislation—to impede specific Justices from exercising their decisional independence in hearing cases.

General separation of powers principles that govern the relationship between Congress and the Executive Branch also impose limitations on congressional regulation of the Supreme Court. Under the Court's separation of powers jurisprudence, Congress may not legislate in a way that

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58. 380 U.S. 460 (1965).

59. *Id.* at 472; *see also* *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941).

60. 312 U.S. 1 (1941).

61. *Id.* at 9.

62. 398 U.S. 74 (1970).

63. *Id.* at 86 n.7 (alteration in original).

either aggrandizes Congress's power or encroaches upon the constitutional prerogatives of another branch of government.<sup>64</sup>

In *Mistretta v. United States*,<sup>65</sup> the Court applied this limiting principle to a congressional statute concerning the judicial branch in a manner that helpfully delimits Congress's authority to pass ethics legislation. The case concerned a constitutional challenge to a criminal sentence imposed pursuant to the Sentencing Guidelines promulgated by the United States Sentencing Commission, an independent agency in the judicial branch created by the Sentencing Reform Act of 1984.<sup>66</sup> Among other claims, the petitioner brought a separation of powers challenge to Congress's creation of the Sentencing Commission on the theories that (1) the Commission's location in the judicial branch was improper because it does not exercise judicial power; (2) its composition (judges and non-judges) undermines the integrity of the judicial branch; and (3) giving the President the power to appoint and remove commissioners undermines the independence of the judicial branch.<sup>67</sup>

The Court rejected each of these theories, upholding the Commission. But in doing so, it clarified that while the Constitution requires that each branch of government be "free from the control or coercive influence, direct or indirect, of either of the others," the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct.<sup>68</sup> Rather, under the Framers' "flexible" understanding of separation of powers, "the greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch."<sup>69</sup> Accordingly, the Court articulated a general principle coming out of this tradition that balances the need to preserve each branch's power with the reality that doing so sometimes requires "some degree [of] comingl[ing] [of] the functions of the Branches"<sup>70</sup>:

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64. See *Mistretta v. United States*, 488 U.S. 361, 382 (1989) ("It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.' Accordingly, we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch." (citations omitted) (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

65. 488 U.S. 361 (1989).

66. *Id.* at 362, 368, 370-71.

67. *Id.* at 383-84.

68. *Id.* at 380 (citation omitted) (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935)).

69. *Id.* at 381.

70. *Id.* at 382.

In cases . . . involving the Judicial Branch, we have expressed our vigilance against two dangers: first, that the Judicial Branch neither be assigned nor allowed “tasks that are more properly accomplished by [other] branches,” . . . and, second, that no provision of law “impermissibly threatens the institutional integrity of the Judicial Branch.”<sup>71</sup>

Ethics legislation that imposes stronger prophylactic measures by regulating extrajudicial conduct and creating procedures for the investigation and enforcement of that regulation is not an aggrandizement of Congress’s authority. By implementing an investigatory and enforcement mechanism, Congress is not seeking to exercise the judicial power. Rather, it is seeking to *preserve* the Court’s judicial power by protecting its integrity and the public’s perception of that integrity.

Nor does ethics legislation threaten the Court’s institutional integrity. Congress has passed legislation to regulate ethics in the federal judiciary, including on the Supreme Court, since the first Congress. As noted above, the first Judiciary Act contained a provision requiring that the Justices take a separate oath in addition to that required of all federal officials under Article VI of the Constitution.

Some, including Justice Alito, have suggested that the Constitution’s creation of “one supreme court” means that Congress cannot regulate the Supreme Court in the way it does all others.<sup>72</sup> But this argument lacks textual, historical, and logical support. As Professor Frost explains, “Most commentators agree that [this language] 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[,]”<sup>73</sup> but regulating judicial ethics does not create a second Supreme Court. Harvard Law Professor Emeritus Laurence Tribe adds, “[T]here is nothing about the separation of powers or the system of checks and balances that undergirds it to suggest that the Justices of the

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71. *Id.* at 383 (alteration in original) (quoting *Morrison v. Olson*, 487 U.S. 654, 680-81 (1988); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986)).

72. See Rivkin & Taranto, *supra* note 2; see also Michael Macagnone, *Senate Panel Splits on Power to Force Supreme Court Ethics Code*, ROLL CALL (May 2, 2023, 3:23 PM), <https://rollcall.com/2023/05/02/senate-panel-splits-on-power-to-force-supreme-court-ethics-code> [<https://perma.cc/2QZH-PXBH>]; Thomas Jipping, *Senate Democrats’ Supreme Court “Ethics” Bill Is Really About Disapproval of Rulings*, HERITAGE FOUND. (July 13, 2023), <https://www.heritage.org/courts/commentary/senate-democrats-supreme-court-ethics-bill-really-about-disapproval-rulings> [<https://perma.cc/VV5N-28S3>].

73. Frost, *Supreme Court Exceptionalism*, *supra* note 4, at 472; accord 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, 107-12 (2011).

Supreme Court ought to be especially immune to the very same rules of conduct that apply to the judges of the lower courts.<sup>74</sup>

As scholars have shown, the Founders intentionally left Article III vague and intended for it to evolve over time through congressional action.<sup>75</sup> Congress has regulated numerous aspects of judicial administration at the high court since ratification of the Constitution, including by requiring the Justices to take an oath—a form of ethics regulation. And Congress has long regulated the Supreme Court just like other courts in many ways, notwithstanding the textual distinction in Article III between “one supreme court” and the other courts that Congress is charged with creating.

### III. RECENTLY PROPOSED ETHICS INVESTIGATION AND ENFORCEMENT MECHANISMS

In recent years, Congress has considered several different mechanisms to address perceived failures in enforcement of ethics rules in the U.S. Supreme Court and/or in the federal judiciary as a whole. Broadly speaking, these mechanisms would create or direct the judiciary to create a formal body within the judicial branch to receive and, in some cases, investigate ethics complaints against Supreme Court Justices.

One set of objections to at least some of these bills has been that they exceed Congress’s authority under the Constitution<sup>76</sup> or are at least “in significant tension with the Constitution’s core protection for the independent judiciary . . . .”<sup>77</sup> An examination of the actual mechanisms considered, however, reveals legislation that seeks to respect and preserve the independence of the federal judiciary, including the Supreme

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74. Letter from Laurence H. Tribe, Carl M. Loeb Univ. Professor Emeritus, Harvard L. Sch., to Sen. Richard J. Durbin, Chair, U.S. Senate Comm. on the Judiciary 2 (Apr. 30, 2023), <https://s3.documentcloud.org/documents/23794573/senate-judiciary-committee-hearing.pdf> [<https://perma.cc/5KUF-LS97>]. In Tribe’s view, Congress’s power to regulate Supreme Court ethics resides in the Necessary and Proper Clause. *Id.* at 3.

75. Barry P. McDonald, *Eight Justices Are Enough*, N.Y. TIMES (May 26, 2016), <https://www.nytimes.com/2016/05/26/opinion/eight-justices-are-enough.html> [<https://perma.cc/JD9L-ZT8R>]; Michael L. Wells & Edward J. Larson, *Original Intent and Article III*, 70 TUL. L. REV. 75, 102-03 (1995).

76. Rivkin & Taranto, *supra* note 2 (“[Justice Alito] notes that . . . ‘No provision in the Constitution gives them the authority to regulate the Supreme Court—period.’”).

77. “*Ensuring an Impartial Judiciary*”: Hearing on S.359 Before the Subcomm. on Fed. Cts., Oversight, Agency Action, and Fed. Rts. of the S. Comm. on the Judiciary, 118th Cong. 4 (2023) (statement of Jennifer L. Mascott, Assistant Professor of L. & Co-Exec. Dir., C. Boyden Gray Ctr., George Mason Univ.’s Antonin Scalia L. Sch.), <https://www.judiciary.senate.gov/imo/media/doc/2023-06-14%20PM%20-%20Testimony%20-%20Mascott.pdf> [<https://perma.cc/A4YC-AGMD>].



Court, and that is well within the bounds of Congress's authority under the Constitution.

### *A. Office of Inspector General*

In each Congress from 2009 to 2017, Senator Chuck Grassley introduced a bill<sup>78</sup> that would have created an Office of Inspector General inside the federal judiciary “to investigate alleged misconduct in the judicial branch, including the Supreme Court; to conduct and supervise audits and investigations; and to prevent and detect waste, fraud, and abuse.”<sup>79</sup> As Senator Grassley explained in his remarks introducing the bill in 2017, establishing an office that would “assist the Judiciary with its ethical obligations” is important because, in his view, “[e]nsuring a fair and independent judiciary is critical to our Constitutional system of checks and balances.”<sup>80</sup> He further expressed the view that “the current practice of self-regulation of judges with respect to ethics and the judicial code of conduct has time and time again proven inadequate” and that creating “[a]n independent watchdog for the federal judiciary . . . will not only help ensure continued public confidence in our federal courts and keep them beyond reproach, it will strengthen our judicial branch.”<sup>81</sup>

The office in Senator Grassley's proposed bills would have authority to investigate misconduct among all federal judges, including Supreme Court Justices, and would be required to report at least annually to both Congress and the Chief Justice of the Supreme Court. The Inspector General would also have explicit responsibility to refer potentially criminal matters to the Department of Justice, but would explicitly *not* be allowed to “investigate or review any matter that is directly related to the merits of a decision or procedural ruling by any judge, justice, or court” or to “punish or discipline any judge, justice, or court.”<sup>82</sup>

Inspectors general are well-established and generally well-regarded features of many parts of the executive branch. While there are some-

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78. Judicial Transparency and Ethics Enhancement Act of 2006, S. 2678, 109th Cong. (2006); Judicial Transparency and Ethics Enhancement Act of 2007, S. 461, 110th Cong. (2007); Judicial Transparency and Ethics Enhancement Act of 2009, S. 220, 111th Cong. (2009); Judicial Transparency and Ethics Enhancement Act of 2011, S. 348, 112th Cong. (2011); Judicial Transparency and Ethics Enhancement Act of 2013, S. 575, 113th Cong. (2013); Judicial Transparency and Ethics Enhancement Act of 2017, S. 2195, 115th Cong. (2017).

79. S. 2195.

80. 163 CONG. REC. S7892 (daily ed. Dec. 6, 2017) (statement of Sen. Chuck Grassley).

81. *Id.* at S7892-93 (statement of Sen. Chuck Grassley).

82. S. 2195 §§ 1024(e), 1025(c).

times constitutional questions about specific features of their operation, such as questions about when Congress may prohibit a President from firing an inspector general,<sup>83</sup> the basic idea that Congress has authority under the Necessary and Proper Clause and the Appointments Clause of Article II to create inspector general offices within executive branch agencies is largely not disputed. By analogy, then, the Appointments Clause would also permit Congress to create an inspector general within the judicial branch and “vest the Appointment . . . in the Courts of Law.”<sup>84</sup> And within the separation of powers framework articulated in *Mistretta* and discussed above, an inspector general whose powers are limited to investigating Supreme Court Justices and reporting to other bodies with their own, separate constitutional authority (such as Congress’s impeachment power and the Justice Department’s civil and criminal enforcement authority), it is clear that such a body could not reasonably be described as exercising judicial authority or undermining the integrity of the judicial branch. Just as inspectors general protect against waste, fraud, and abuse in the executive branch, so too they could *uphold* the integrity of the judicial branch.<sup>85</sup>

#### *B. House of Representatives Supreme Court Complaints Review Committee*

Legislation introduced in 2022 and again in 2023 by Senator Elizabeth Warren and Representative Pramila Jayapal would take a somewhat different approach to facilitating ethics enforcement in the judiciary.<sup>86</sup> The bills<sup>87</sup> would direct the Judicial Conference of the United States, the federal judiciary’s administrative arm, to establish procedures for receiv-

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83. TODD GARVEY, CONG. RSCH. SERV., R46762, CONGRESS’S AUTHORITY TO LIMIT THE REMOVAL OF INSPECTORS GENERAL 11-13 (2021); Andrew C. Brunsten, *Inspectors General and the Law of Oversight Independence*, 30 WM. & MARY BILL RTS. J. 1, 44-47 (2021).

84. U.S. CONST. art. II, § 2, cl 2.

85. We note that a bicameral group of congressional Democrats appears to have introduced a bill along these lines in the current Congress. See Press Release, Rep. Ilhan Omar, Reps. Omar, Raskin, and Stansbury Push for Supreme Court Accountability with New Legislation (Apr. 19, 2024), <https://omar.house.gov/media/press-releases/repsoamar-raskin-and-stansbury-push-supreme-court-accountability-new> [https://perma.cc/X56G-Z4FF]. Although a complete analysis is not possible without reviewing the text, we think it likely that similar principles would apply to a similarly structured bill.

86. See Press Release, Sen. Elizabeth Warren, Senator Warren, Representative Jayapal Reintroduce the Judicial Ethics and Anti-Corruption Act (June 8, 2023), <https://www.warren.senate.gov/newsroom/press-releases/senator-warren-representative-jayapal-reintroduce-the-judicial-ethics-and-anti-corruption-act> [https://perma.cc/3J3K-CYQT].

87. Judicial Ethics and Anti-Corruption Act of 2022, S. 4177, 117th Cong. (2022); Judicial Ethics and Anti-Corruption Act of 2022, H.R. 7706, 117th Cong. (2022); Judicial Ethics and Anti-Corruption Act of 2023, H.R. 3973, 118th Cong. (2023); Judicial Ethics and Anti-Corruption Act of 2023, S. 1908, 118th Cong. (2023).

ing complaints about a Supreme Court Justice's potential ethics violation.<sup>88</sup> The bills would also create a new standing committee within the House of Representatives, the "Supreme Court Complaints Review Committee," which is "[f]or the purpose of assisting the House of Representatives in carrying out its responsibilities under" the Constitution's impeachment clauses.<sup>89</sup> The committee would receive and review complaints against Supreme Court Justices, including those referred by the Judicial Conference, and could use Congress's authority to investigate the complaints and ultimately refer the matter to the House's Committee on the Judiciary.<sup>90</sup> The Judiciary Committee would then consider further investigation or the opening of an impeachment inquiry on an expedited basis.<sup>91</sup>

The constitutional basis for this legislation is also strong. The Judicial Conference, a well-established administrative arm of the federal courts, already has statutory authority to receive complaints about non-Supreme Court federal judges.<sup>92</sup> The statute then requires that the Judicial Conference refer such complaints to the chief judge of the relevant circuit, who then reviews and acts upon the complaint, without further involvement of the Judicial Conference.<sup>93</sup> Presumably, Supreme Court Justices are excluded from this statutory scheme at least in part to avoid lower court judges passing judgment on them; however, under this proposal the Judicial Conference is simply referring the complaint to another body that indisputably *does* have such authority (here, the House of Representatives, under its Impeachment Clause power). This ministerial obligation would not conflict with the separation of powers.

### C. Judicial Investigation Panel

Representative Hank Johnson and Senator Sheldon Whitehouse, in bills introduced in 2022 and 2023, would take yet another approach to ethics enforcement for Supreme Court Justices: the bills would direct the Supreme Court to establish a process to receive complaints and to automatically refer them to a "judicial investigation panel, which shall be composed of a panel of [five] judges selected randomly from among the

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88. Press Release, Sen. Elizabeth Warren, *supra* note 86.

89. S. 4177 § 10(b); H.R. 7706 § 10(b); H.R. 3973 § 10(b); S. 1908 § 10(b).

90. S. 4177 § 10(i)(1)(C); H.R. 7706 § 10(i)(1)(C); H.R. 3973 § 10(i)(1)(C); S. 1908 § 10(i)(1)(C).

91. S. 4177 § 11; H.R. 7706 § 11; H.R. 3973 § 11; S. 1908 § 11.

92. 28 U.S.C. § 351(a), (d)(1).

93. *Id.* § 352.

chief judge of each circuit of the United States.”<sup>94</sup> The panel would then review and potentially investigate each complaint and could make recommendations to the Supreme Court for the Court to take action, including dismissing the complaint, taking disciplinary action, or making changes to its existing rules and procedures. Notably, if the panel does *not* recommend dismissal of the complaint, then it must publish a report of its findings and recommendations within thirty days of having presented those findings to the Supreme Court.<sup>95</sup>

While under this proposal lower court judges are more involved in the complaint review process, the judges themselves still do not actually exercise any sanctioning power over the Justices; their recommendations go to the Supreme Court itself, which then takes action as it decides appropriate. Indeed, when it comes to enforcement of state judicial codes of conduct, structures like this that bifurcate the prosecutorial and adjudicatory aspects of ethics enforcement are widely used to regulate high court justices: typically, some combination of lower court judges; appointees from other branches of government; and members of the bar or the public review complaints and make recommendations for discipline, and state supreme courts justices usually—though not always—serve as the “final arbiters” of judicial misconduct.<sup>96</sup>

#### *D. Designated Complaint Recipient*

Senators Angus King and Lisa Murkowski introduced a bill<sup>97</sup> in 2023 that would take a similar approach to setting up a process for addressing ethics issues in the Supreme Court. Their bill would direct the Supreme Court to “designate an individual, including an employee, to process complaints containing allegations” that a Justice has violated federal law or the Court’s code of conduct, or has engaged in conduct that is otherwise “prejudicial to the administration of justice[.]”<sup>98</sup> The bill states that a Justice “may confer with” this designated complaint recipient “on the obligations of the [Justice]” under the code of conduct or

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94. Supreme Court Ethics, Recusal, and Transparency Act of 2023, H.R. 926, 118th Cong. § 2(a) (2023); Supreme Court Ethics, Recusal, and Transparency Act of 2023, S. 359, 118th Cong. § 2(a) (2023); *see* Supreme Court Ethics, Recusal, and Transparency Act of 2022, H.R. 7647, 117th Cong. § 5(a) (2022); Supreme Court Ethics, Recusal, and Transparency Act of 2022, S. 4188, 117th Cong. § 5(a) (2022).

95. H.R. 926 § 2(a).

96. Charles Gardner Geyh, *Judicial Ethics and Discipline in the States*, STATE CT. REP. (Dec. 14, 2023), <https://statecourtreport.org/our-work/analysis-opinion/judicial-ethics-and-discipline-states> [<https://perma.cc/VU67-FZEP>]; *see also* *Judicial Discipline Proceedings Involving State Supreme Court Justices*, JUD. CONDUCT REP., Spring 2023, at 14, 14.

97. Supreme Court Code of Conduct Act, S. 1290, 118th Cong. (2023).

98. *Id.* § 2(c)(1)(A)–(B).

the recusal statute.<sup>99</sup> The bill would also require the designated complaint recipient to “publish on the website of the Supreme Court of the United States a report that describes . . . the complaints [received]” and “any steps taken to remedy the alleged conduct.”<sup>100</sup> It then provides that the Marshal of the Supreme Court, “after consultation with the Chief Justice [and the designated complaint recipient],” can use Court funds to commission assistance in investigating the complaint.<sup>101</sup>

As a constitutional matter, it appears that this approach would be on sound footing in that the complaint recipient would also be performing a largely ministerial task, facilitating the internal operations of processes that, presumably, the Supreme Court already does or can use to address ethics and other issues.<sup>102</sup>

#### IV. CONCLUSION

It is clear that Congress has not settled on a single approach to the problem of how to design an effective process for addressing ethics issues in the Supreme Court. From a pure policy perspective, each of the approaches reflected in the legislation described above has advantages and disadvantages.

However, none of them come anywhere close to either aggrandizing Congress’s power or threatening the institutional integrity of the judicial branch. None of the enforcement mechanisms would allow Congress to exercise judicial power. The bills would authorize various entities to investigate the Justices and make referrals and recommendations for further action to be taken by the Court or the House (which has constitutional authority to investigate Justices under its impeachment power), but they in no way confer upon Congress the authority to decide cases and controversies or interfere with the Court’s ability to do so. Nor do any of the enforcement mechanisms attack the Court’s integrity: the

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99. *Id.* § 2(c)(2).

100. *Id.* § 2(c)(3). Though the text does not specify when this publication should occur, it appears that the intent of the Senators is that the report would be annual. *See* Press Release, Sen. Angus King, King, Murkowski Introduce Bill Requiring Supreme Court to Create a Code of Conduct (Apr. 26, 2023), <https://www.king.senate.gov/newsroom/press-releases/king-murkowski-introduce-bill-requiring-supreme-court-to-create-a-code-of-conduct> [<https://perma.cc/R8GB-XQ87>] (“This person will be required to publish an annual report—posted on the Court’s website—describing the information and complaints they received and actions taken to remedy the conduct.”).

101. S. 1290 § 2(c)(4).

102. For example, the Marshal of the Supreme Court was assigned to investigate the apparent leak of a draft opinion in the 2022 case *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022). OFF. OF THE MARSHAL OF THE SUP. CT. OF THE U.S., MARSHAL’S REPORT OF FINDINGS & RECOMMENDATIONS (2023), [https://www.supremecourt.gov/publicinfo/press/Dobbs\\_Public\\_Report\\_January\\_19\\_2023.pdf](https://www.supremecourt.gov/publicinfo/press/Dobbs_Public_Report_January_19_2023.pdf) [<https://perma.cc/5KAE-9A59>].

bills primarily aim to expose corruption that, if left unaddressed, would itself threaten the Court's integrity and, by extension, its power. Rather, they follow in the long tradition of congressional action under the Necessary and Proper Clause that facilitates and protects the judiciary's independence. Whatever other actions Congress takes in response to the erosion of public confidence that currently plagues the Supreme Court, its steps to bring a reasonable process and transparency to Supreme Court ethics appear to be on rock-solid constitutional ground.