

declining confidence in the Supreme Court⁵ and the Court's faltering legitimacy⁶ have, in turn, fueled calls for court reform.⁷ In response, scholars have proposed several measures to reform the Court.⁸ In 2021, President Biden also addressed the court reform debate by creating the Presidential Commission on the Supreme Court of the United States.⁹

The Court's legitimacy is further threatened by its lack of a formal written Code of Conduct.¹⁰ Supreme Court Justices, unlike all other judges in the United States, are not bound by a formal code of conduct.¹¹ The absence of a code of conduct allows Justices to engage in ethically dubious behavior¹² that is prohibited for lower court judges.¹³

This Note argues that the Ethics in Government Act of 1978 (EGA)¹⁴ serves as precedent for congressional intervention with judicial transparency and can be used to strengthen the Court's legitimacy. Part II of this Note discusses the origins of the Court's legitimacy dilemma. Part III examines court reform through the adoption of a Code of Conduct for the Supreme Court and provides a summary of the arguments for and against this approach. Part IV explains how the EGA serves as precedent for congressional intervention, examines how the EGA can be used to require additional disclosures from Justices, and suggests amendments that Congress can enact to strengthen the Court's legitimacy. Part V concludes.

II. THE SUPREME COURT'S LEGITIMACY DILEMMA

The Supreme Court's legitimacy has been increasingly questioned in recent years.¹⁵ This threatens the Court's power and authority because, unlike the Legislative and Executive branches, which hold the power to make

10. See Johanna Kalb & Alicia Bannon, *Supreme Court Ethics Reform: The Need for an Ethics Code and Additional Transparency*, BRENNAN CTR. FOR JUST. (Sept. 24, 2019), https://www.brennancenter.org/sites/default/files/2019-09/Report_2019_09_SCOTUS_Ethics_FINAL.pdf [<https://perma.cc/TR4B->

Court nominations changed on April 2017 when Democrats used a filibuster to block President Trump's nominee, Neil Gorsuch.²⁷ Senate Majority Leader Mitch McConnell invoked the "nuclear option" after Republicans' attempt to end the Democratic filibuster using a cloture motion failed in a 55-45 vote.²⁸ In a 52-48 party-line vote, Republicans reduced the threshold for advancing Supreme Court nominations from 60 votes to a simple majority of 51 votes.²⁹ The "nuclear option" allowed Republicans to successfully invoke cloture with a simple majority of 55 votes³⁰ and ultimately confirm Neil Gorsuch. This nomination faced backlash, with some critics arguing that Republicans used "underhanded tactics" to fill a "stolen seat."³¹

The "stolen seat" criticism stems from the underhanded tactics

Court Justice by having the newly elected President fill the vacancy.³³ Senate Republicans changed their view after Justice Ginsburg's death.³⁴ Just one week before the 2020 presidential election, Republicans supported and confirmed Trump's third nominee, Amy Coney Barrett, by a slim majority.³⁵ Critics argued that the Republican Party undermined the nomination process by employing "hypocritical" tactics to confirm Barrett.³⁶ The controversy was fueled by the fact that Barrett's nom

University of Louisville with then-Senate Majority Leader Mitch McConnell to give a speech.⁴⁷

Justice Clarence Thomas' impartiality was questioned when he refused to recuse himself from a case involving a challenge to the Affordable Care Act, despite his wife actively campaigning against the law,⁴⁸ and when he accepted expensive gifts and significant donations from Harlan Crow, a major conservative donor.⁴⁹ Additionally, Justice Antonin Scalia famously refused to recuse himself in a case where Vice President Dick Cheney was a pa cSenatION

former President Obama about the Court in a State of the Union address.⁶² Justices have also been criticized for accepting expensive gifts and lavish trips.⁶³ The Justices' financial disclosure reports revealed that eight sitting Justices enjoyed extravagant, privately-sponsored international trips.⁶⁴ The Supreme Court's legitimacy depends on its perception as a fair and unbiased institution. This expectation is directly questioned when Justices behave in ways that appear partisan or accept expensive gifts from organizations with strong political views.

III. JUDICIAL CODE OF CONDUCT

All state and federal judges in the United States are subject to some Judicial Code of Conduct.⁶⁵ However, the Code does not apply to Supreme Court Justices, nor has the Supreme Court adopted a written Code of Conduct.⁶⁶ As a result, Supreme Court Justices are the only judges in the United States that are not bound by a formal Code of Conduct.⁶⁷ This section will discuss the Judicial Code of Conduct and summarize the prominent arguments supporting and opposing an ethics code for the Supreme Court.

A.

issues such as integrity, independence, impartiality, permissible extrajudicial activities, and the avoidance of or even the appearance of impropriety.⁶⁹ Federal judges are bound by the Code of Conduct and must abide by it.⁷⁰ Though the Code itself does not enforce federal judges' conduct, violations can be subject to investigation and sanction under the Judicial Conduct and Disability Act of 1980.⁷¹

The code consists of five canons. Canon 1 states, "[a] judge should uphold the integrity and independence of the judiciary."⁷² Under Canon 2, "[a] judge should avoid impropriety and the appearance of impropriety in all activities."⁷³ Canon 3 asserts that "[a] judge should perform the duties of the office fairly, impartially and diligently."⁷⁴ According to Canon 4, "[a] judge may engage in extrajudicial activities that are consistent with the obligations of judicial office."⁷⁵ Finally, Canon 5 stipulates that "[a] judge should refrain from political activity."⁷⁶

Although Supreme Court Justices consult the Code of Conduct, the 76al judges are bound by Conduct,

considering an ethics code for the Supreme Court.⁷⁹ However, the Court has yet to adopt a Code of Conduct.⁸⁰

B. Arguments for and Against a Code of Conduct for the Supreme Court

Public approval and confidence in the Supreme Court have fallen to new lows.⁸¹ This is partially due to the politicization of the Supreme Court Justices' nomination process and Justices' behavior off the bench. Proponents and opponents have argued extensively on whether the Supreme Court should be required to adopt a formal Code of Conduct. Those in favor of imposing a Code of Conduct on the Supreme Court are primarily concerned with the Court's legitimacy. The proposals fall into two categories: (1) a code adopted by the justices themselves or (2) a statutory code imposed by Congress.

1. Supreme Court Self-Adopted Code of Conduct

Justices seem to be aware that the public is increasingly viewing the Court as a politicized institution and have publicly acknowledged the Court's legitimacy.⁸² While some Justices defend the Court's legitimacy,⁸³ others seem to agree with the public's perception of the Court.⁸⁴

79. Robert Barnes, *Supreme Court Justices Tell Congress They Are Not Considering Televised Hearings*, WASH. POST (Mar. 7, 2019, 6:39 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-justices

Scholars argue that the Court should adopt its own Code of Conduct to send a clear message that the nation's highest justices are still committed to the integrity and independence of the judicial branch.⁸⁵ Moreover, if the Court adopts a Code of Conduct rather than having Congress impose one, this could strengthen confidence and trust in the Court. It would demonstrate that the Justices are cognizant of the perception of bias and impropriety and are committed to accountability.⁸⁶ Additionally, proponents argue that all other state and federal judges are bound by an ethics code, whereas the Justices, who sit on the nation's highest court, are not.⁸⁷ This negatively affects the public perception of the Supreme Court. Since Justices have already stated that they consult the Code of Conduct and are committed to certain values, a self-adopted Code should be relatively uncontroversial and could increase the Court's legitimacy.⁸⁸

2. Congressionally Imposed Code of Conduct

Second, proponents of imposing a Code of Conduct on the Supreme Court argue that if the Court fails to adopt its own Code of Conduct, Congress has the constitutional authority to impose one on the Court. Proponents argue that congressional intervention would not violate the Constitution or raise separation of powers issues, but opponents question Congress's authority to enact such ethics legislation.⁸⁹

Professor Amanda Frost argues that Congress has the authority to enact ethics legislation on the Supreme Court based on its powers under the Necessary and Proper Clause of Article I.⁹⁰ Professor Frost contends that the vague language of Article III, combined with the fact that the judicial branch is not self-executing⁹¹ like the executive and legislative branches, gives

personal preferences." Jennifer Rubin, Opinion, *Elena Kagan to her Colleagues: You're Not the Supreme Court Has Lost Legitimacy*, *Washington Post* (2015), <https://www.washingtonpost.com/news/energy-environment/wp/2015/07/27/elena-kagan-to-her-colleagues-youre-not-the-supreme-court-has-lost-legitimacy/>.

others argue that the existing mechanisms are sufficient. Although the constitutionality of congressionally enacted ethics legislation on the Court is

A. *Background to Ethics in Government Act of 1978*

The EGA was adopted after the Watergate scandal, as a response to perceived governmental corruption.¹²⁰ The Act aims “to preserve and promote the accountability and integrity of public officials” and federal government institutions.¹²¹ The statute seeks to promote accountability and integrity through transparency by requiring financial disclosures¹²² and imposing limitations on outside earned income and employment.¹²³

First, the EGA seeks to foster accountability and integrity within the Supreme Court because Section 109 specifically includes Supreme Court Justices within its definition of judicial officers who must comply with the requirements and provisions of the statute.¹²⁴ The EGA limits the Justices’ outside earned income and outside employment, as well as the gifts and honoraria they may receive.¹²⁵ Additionally, under the statute’s requirements, Justices must file annual financial disclosure statements with the Judicial Conference stating the source, amount, and identity of specified categories of financial interests.¹²⁶ Thus, the EGA specifically seeks to increase transparency not only within the judicial branch but also within the Supreme Court.

The EGA also provides a mechanism for enforcing violations. Unlike a self-imposed written Code of Conduct, which would be self-regulating,¹²⁷ judicial officers who willfully fail to file or falsify their financial disclosure statements are subject to referral to the Attorney General and may face civil penalties under the EGA.¹²⁸ The statute thus imposes strict requirements and penalties for judicial officers who fail to comply with its requirements. Some critics argue that there are no real repercussions to a Justice’s violation of the EGA, pointing to Justice Thomas as the prime example.¹²⁹ For thirteen years,

120. Krystal Walker & Rebecca Mayer, *A Brief History on the Formation of Government Ethics and Its Importance to the Rule of Law*, 67 DEP’T OF JUST. J. FED. L. & PRAC. 125, 128 (2019).

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Justice Thomas failed to report his wife's earnings under the statute's mandatory financial disclosures, which are signed under penalty of perjury.¹³⁰ Justice Thomas later amended his financial disclosures and claimed he had misunderstood his reporting responsibilities, but critics were skeptical of his misunderstanding claims.¹³¹ Justice Thomas was never referred to the Attorney General, nor did he face civil penalties for this

updated. Critics argue that despite EGA's enforcement provisions, the statute is insufficient to deter Justices' unethical behavior.¹⁴¹

authority to statutorily impose a Code of Conduct on the Supreme Court. Even if the Court adopts or is made to adopt a Code of Conduct, Congress should still step in and regulate Justices' questionable ethical behavior and participation in partisan events. Congress should amend the EGA to impose stricter disclosures and tighten ethical rules because it would strengthen the Court's legitimacy by promoting transparency and credibility. Additionally, the EGA has the added benefit of enforcement that a self-adopted code lacks. Justices serve lifetime appointments, but lifetime appointments are meant to insulate Justices from political pressure, not to immunize unethical behavior.