

# Ethical Issues, the President and the Supreme Court

by Francesco Duranti

**Abstract:** *Questioni etiche, il Presidente e la Corte Suprema.* – In the second part of President Biden’s term, judicial ethics has been one of the central issues at stake, especially after a series of allegation of misconducts by some Supreme Court Justices, bringing the question related to separation of powers and reform of the US Supreme Court proposed by President Biden back to the center of the constitutional debate.

**Keywords:** Judicial Ethics; US Supreme Court Reform; President Biden; Separation of Powers

## 1. Introduction

In the spring of 2023, following a series of media reports and investigations,<sup>1</sup> Supreme Court’s Justices judicial ethics emerged as a central and very delicate issue in the American constitutional landscape.

Thus, also the second part of President Biden’s term<sup>2</sup> was marked by enormous pressure around the Supreme Court and the process of US apex Court’s reform became the most important institutional proposal of President Biden.<sup>3</sup>

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<sup>1</sup> On April 6, 2023, ProPublica revealed that Justice Thomas had joined billionaire c Harlan Crow on undisclosed luxury trips for more than two decades: see J. Kaplan et al., *Clarence Thomas and the Billionaire*, ProPublica (Apr. 7, 2023), <https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-giftscrow>. On April 25, 2023, Politico reported that in 2017, Justice Gorsuch sold a forty-acre property to Brian Duffy, the chief executive of major law firm Greenberg Traurig: see H. Przybyla, *Law Firm Head Bought Gorsuch-Owned Property*, Politico (Apr. 25, 2023), <https://www.politico.com/news/2023/04/25/neil-gorsuch-colorado-property-sale-00093579>. On June 20, 2023, ProPublica reported that in 2008, Justice Alito took a luxury fishing trip to a remote corner of Alaska, stayed at the King Salmon Lodge and he flew to the lodge for free aboard a private jet owned by Republican megadonor Paul Singer: J. Elliot et al., *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, ProPublica (June 20, 2023), <https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court>.

<sup>2</sup> For a complete analysis of the relationship between the judiciary and the President in the first part of the Biden’s term, see particularly A. Baraggia, *Reshaping the US Judiciary in times of polarization: Biden’s Judicial nominations and Supreme Court reform*, in *DPCE online*, Special Issue: *The American Presidency after two years of President Biden* (G.F. Ferrari ed.), 2023, 97-108.

<sup>3</sup> On July 29, 2024, President Biden announces “bold” plan to reform the Supreme Court, introducing term limits for Supreme Court Justices and a binding Code of

## 2. Judicial ethics and US Supreme Court Code of Conduct

The spring and summer of 2023 brought the issue of ethics of Supreme Court Justices to the forefront in a manner and form unknown even to the recent past.<sup>4</sup>

The public has been deeply affected by media inquiries and watchdog groups that have highlighted problems of misbehaviors on the part of some members of the Court in their accepting benefits of various kinds (travel, stays, reimbursements, etc.) from benefactors belonging to groups, associations or corporations that had matters submitted (or potentially to be submitted) to the Court's scrutiny.

All this made of paramount importance the issue of the need of a Code of Conduct also for Supreme Court Justices, which until then did not already exist, as the *Code of Conduct for United States Judges*<sup>5</sup> – in force for all members of the federal judiciary – was not even to be applied to them.<sup>6</sup>

In the annual report prepared for 2011, Chief Justice Roberts warns of the need to clarify the reasons why a Code of ethics conceived for lower federal court judges cannot also apply to the Supreme Court.

According to Chief Justice Roberts, “The Code of Conduct, by its express terms, applies only to lower federal court judges. That reflects a fundamental difference between the Supreme Court and the other federal courts. Article III of the Constitution creates only one court, the Supreme Court of the United States, but it empowers Congress to establish additional lower federal courts that the Framers knew the country would need. Congress instituted the Judicial Conference for the benefit of the courts it had created. Because the Judicial Conference is an instrument for the management of the lower federal courts, its committees have no mandate to prescribe rules or standards for any other body”.<sup>7</sup>

Outside of the Code of Conduct for United States Judges, some statutes impose ethical requirements also on the Supreme Court Justices.

Specifically, the *United States Code* requires all federal judges, including Supreme Court Justices, to recuse themselves from cases under particular circumstances such as when they “have a personal bias or prejudice

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Conduct for the Supreme Court: <https://www.whitehouse.gov/briefing-room/statements-releases/2024/07/29/fact-sheet-president-biden-announces-bold-plan-to-reform-the-supreme-court-and-ensure-no-president-is-above-the-law>.

<sup>4</sup> For an overview, see A. Dondi, *Qualche rapida impressione sul Giudiziario statunitense in prospettiva di legal ethics*, in *DPCE online*, 4/2023, 3221-3228; R. Bizzarri, *Un codice etico per la Corte Suprema? Indipendenza e imparzialità dei Justices tra obblighi di trasparenza, ricasazione e amici curiae*, in *Riv. dir. comp.*, 2023, 3, 56-134.

<sup>5</sup> 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. The Code finds application for federal judges in district courts, including bankruptcy and magistrate judges and appellate courts, as well as judges in the *Court of International Trade* and the *Court of Federal Claims*. Later it was also adopted by the *Tax Court*, the *Court of Appeals for Veteran Claim* and by the *Court of Appeals for the Armed Forces*.

<sup>6</sup> A. Frost, *Judicial Ethics and Supreme Court Exceptionalism*, in 26 *Geo. J. Legal Ethics* 443 (2013).

<sup>7</sup> J.G. Roberts, Jr., U.S. SUP. CT., *2011 Year-end Report on the Federal Judiciary* 4 (2011), <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

concerning a party” or “a financial interest in the subject matter in controversy”.<sup>8</sup>

Congress, through the *Ethics in Government Act* of 1978 and the *Ethics Reform Act* of 1989, also directs high ranking officials in all three branches to file annual financial disclosure reports and observe limits on the acceptance of gifts. The Judicial Conference has also issued regulations concerning statutory reporting and gift acceptance.

Following the above-mentioned intense spring and summer season of questionable ethics conduct of its members, the Supreme Court finally adopted its first code of ethics, namely the *Code of Conduct for Justices of the Supreme Court of the United States* (SCOTUS CODE) on November 13, 2023.<sup>9</sup>

In a brief introductory statement regarding the SCOTUS CODE, the Court wrote that the “Justices are promulgating this Code of Conduct to set out succinctly and gather in one place the ethics rules and principles that guide the conduct of the Members of the Court. For the most part these rules and principles are not new: The Court has long had the equivalent of common law ethics rules, that is, a body of rules derived from a variety of sources, including statutory provisions, the code that applies to other members of the federal judiciary, ethics advisory opinions issued by the Judicial Conference Committee on Codes of Conduct, and historic practice. The absence of a Code, however, has led in recent years to the misunderstanding that the Justices of his Court, unlike all other jurists in this country, regard themselves as unrestricted by any ethics rules. To dispel this misunderstanding, we are issuing this Code, which largely represents a codification of principles that we have long regarded as governing our conduct”.

The new SCOTUS CODE sets forth five ethical canons and accompanying commentary adopted by the Supreme Court, which will guide the Justices in executing their judicial duties. The five canons are:

1. “A Justice Should Uphold the Integrity and Independence of the Judiciary”
2. “A Justice Should Avoid Impropriety and the Appearance of Impropriety in All Activities”
3. “A Justice Should Perform the Duties of Office Fairly, Impartially, and Diligently”
4. “A Justice May Engage in Extrajudicial Activities that Are Consistent with the Obligations of the Judicial Office”
5. “A Justice Should Refrain from Political Activity”.<sup>10</sup>

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<sup>8</sup> 28 U.S.C. § 455(b)(1). This Code does not provide a clear enforcement mechanism to challenge a Justice’s failure to recuse, giving each Justice autonomy to decide whether they will recuse themselves from a particular case. While most federal judges’ failure to recuse in response to a motion or *sua sponte* is appealable, there is no appellate court with the power to assess a Supreme Court Justice’s failure to recuse. Thus, the Justices’ recusal decisions are almost always made without public explanation and are unreviewable.

<sup>9</sup> Published in the official website of the Court [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)

<sup>10</sup> The Congressional Research Service provided a brief summary: Canons 1 and 2 are broadly worded and are accompanied by brief notes explaining that each Justice should

The SCOTUS CODE and the *Code of Conduct for United States Judges* are nearly identical, both in structure and substance, with different explanatory notes.

The main difference between the SCOTUS CODE and the one that applies to lower court judges is its treatment of recusal.<sup>11</sup>

The Commentary accompanying the Code explains that the Justices must be warier of recusing themselves because they cannot be replaced when they do. Thus, the Commentary explains that the Code's provision on recusal "should be construed narrowly".

Another major difference is related to the lack of an effective enforcement instrument: the SCOTUS CODE "is not binding, both because it leaves determinations of propriety entirely up to individual Justices and because it does not outline any mechanism for enforcing the code or sanctioning misconduct".<sup>12</sup>

Thus, this "lack of enforcement presents a unique opportunity for Congress to step in and create an external enforcement mechanism for the newly imposed Code of Conduct".<sup>13</sup>

### 3. President Biden's reform proposals on judicial ethics

Since his very first days in office, President Biden has been considering possible reforms on the Supreme Court by establishing a special Commission to examine them.

The President created the Commission in April 2021, and it submitted its report in December 2021.<sup>14</sup>

The Commission analyzed four broad areas for potential action: the composition and size of the Court, term limits, changes affecting the role of

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"maintain and observe high standards of conduct" [Canon 1] and "should not allow family, social, political, financial, or other relationships to influence official conduct or judgment." [Canon 2B.] Canon 3[B(2)] governs disqualification, laying out circumstances in which Justices should recuse themselves from participating in cases because their impartiality might reasonably be questioned. Canon 4 allows Justices to speak, write, and teach about the law and engage in other extrajudicial activities, subject to certain limitations. Canon 5 provides that Justices should not engage in political activities, such as holding a leadership role in a political organization, endorsing candidates for political office, political fundraising, making campaign contributions, and running for elected office: J.R. Lampe, *Cong. Res. Serv.*, LSB 11078, *The Supreme Court adopts a Code of Conduct 1-2* (2023).

<sup>11</sup> The SCOTUS Code also provides that the "rule of necessity may override the rule of disqualification" (Canon 3B). This strongly implies that the rule of necessity has some relation to the need to minimize tie votes on the Court, reinforcing the Justices' duty to sit. That condition is particularly relevant because there is no replacement for the Supreme Court or a Supreme Court Justice.

<sup>12</sup> *Developments in the Law—Judicial Ethics*, in 137 *Harv. L. Rev.* 1677, 1690 (2024).

<sup>13</sup> J.J. Sample, *The Supreme Court and the Limits of Human Impartiality*, 52 *Hofstra L. Rev.* 579, 587 (2024).

<sup>14</sup> A. Baraggia, *Reshaping the US Judiciary in times of polarization: Biden's Judicial nominations and Supreme Court reform*, *supra*, note 2.

the Court in the constitutional system and the internal practices and procedures of the Supreme Court.<sup>15</sup>

On this final fourth area, the Commission considered extensively also the topic of judicial ethics, delving into the issue of the Supreme Court's code of conduct and the various possible mechanisms for its adoption and binding force.

The discussion of whether the Court should adopt a code of conduct has included a further discussion about whether the Justices should be subject to a disciplinary framework as well.<sup>16</sup>

After the internal adoption of SCOTUS CODE in November 2023, the issue of enforcement mechanisms of it remains an open question.

On July 29, 2024, President Biden – recalling recent ethics scandals involving some Justices of the Supreme Court that have caused the public “to question the fairness and independence that are essential for the Court to faithfully carry out its mission to deliver justice for all Americans” – announces a plan to reform US Supreme Court, including a binding Code of Conduct, to restore trust and accountability to the Court.<sup>17</sup>

President Biden believes that “Congress should pass binding, enforceable conduct and ethics rules that require Justices to disclose gifts, refrain from public political activity, and recuse themselves from cases in which they or their spouses have financial or other conflicts of interest. Supreme Court Justices should not be exempt from the enforceable code of conduct that applies to every other federal judge”.<sup>18</sup>

In the past, the constitutionality of the ethics laws enacted by the Congress has never been addressed by the Supreme Court.<sup>19</sup>

Among legal scholars, 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.

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<sup>15</sup> *Presidential Commission on the Supreme Court of the United States*, Final report (December 2021).

<sup>16</sup> The Justices are not subject to the complaint and discipline framework that applies to other federal judges. The *Judicial Conduct and Disability Act* of 1980 allows for any person to file a complaint against a federal judge alleging that the judge “engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts” or “is unable to discharge all the duties of office by reason of mental or physical disability”. However, the *Judicial Conduct and Disability Act* excludes the Justices from its reach.

<sup>17</sup> The White House - Fact Sheet: *President Biden Announces Bold Plan to Reform the Supreme Court and Ensure No President Is Above the Law*, *supra*, note 3. President Biden reform proposal is dedicated also to introducing term limits for Justices, because “the United States is the only major constitutional democracy that gives lifetime seats to its high court. Term limits would help ensure that the court's membership changes with some regularity. That would make timing for court nominations more predictable and less arbitrary. It would reduce the chance that any single presidency radically alters the makeup of the court for generations to come. I support a system in which the president would appoint a justice every two years to spend 18 years in active service on the Supreme Court”.

<sup>18</sup> *Id.*

<sup>19</sup> J.G. Roberts, Jr., U.S. SUP. CT., *2011 Year-end Report on the Federal Judiciary* 4 (2011), *supra*, note 7, at 6.

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”.<sup>20</sup>

As well known, 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 out from office. Article III provides judges with life tenure and protection against reduction in compensation, and the only mechanism for removing federal judges is – according to Article II – impeachment and conviction for “treason, bribery, or other high crimes and misdemeanors”.

Justices and other opponents of congressional ethics enforcement stresses the special status of the Supreme Court as a constitutionally created body, in contrast to lower federal courts, which are created by Congress.<sup>21</sup>

But Congress – according to the Necessary and Proper Clause of Article I – has enacted, over the years, statutes by expanding and contracting the size of the Supreme Court, establishing and adjusting procedural rules, and even regulating the oath that Justices take when assuming office.

In this vein, “using the Necessary and Proper Clause in combination with some of the below powers, Congress can act today to enforce existing ethical rules, rather than attempt to empower itself via new legislation. The constitutional structure explains why Congress could act and why its previous legislation, including acts requiring financial disclosures and barring outside income and gifts, validly applies to the Court”.<sup>22</sup>

Other scholars argue that impeachment is the only mechanism by which Congress can regulate the Supreme Court, to the exclusion of other statutes, even criminal ones.<sup>23</sup>

But impeachment “is a blunt tool for Congress in attempting to enforce ethical rules at the Court. Despite its bluntness, it has a strong basis in the Constitution, thus offering a legitimate toehold for Congress to enter the fray. However, given the polarization in the legislature, the difficulty of impeachment proceedings, and the post-hoc nature of the remedy, it does not offer the most practical avenue for ethics regulation”.<sup>24</sup>

It remains to be seen if the Congress could assure, as proposed by President Biden, “a binding code of conduct for the Supreme Court (...) The court’s current voluntary ethics code is weak and self-enforced. Justices should be required to disclose gifts, refrain from public political activity and recuse themselves from cases in which they or their spouses have financial or other conflicts of interest. Every other federal judge is bound by an enforceable code of conduct, and there is no reason for the Supreme Court to be exempt”.<sup>25</sup>

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<sup>20</sup> A. Frost, *Judicial Ethics and Supreme Court Exceptionalism*, *supra*, note 6, at 455.

<sup>21</sup> On argument, see L.L. Levenson, *The Word is “Humility”: Why the Supreme Court Needed to Adopt a Code of Judicial Ethics*, in 51 *Pepp. L. Rev.* 515 (2024).

<sup>22</sup> *Developments in the Law—Judicial Ethics*, *supra*, note 12, at 1694.

<sup>23</sup> For an overview, see C.G. Geyh, *The Supreme Court Code of Conduct: Will it Make a Difference?*, forthcoming 86 *University of Pittsburgh L. Rev.* (2024).

<sup>24</sup> *Developments in the Law—Judicial Ethics*, *supra*, note 12, at 1696.

<sup>25</sup> Joe Biden: *My plan to reform the Supreme Court and ensure no President is above the law*, The Washington Post, July 29, 2024

#### 4. Judicial ethics and Code of conduct in the European constitutional heritage

The Council of Europe's (CoE) Action Plan to strengthen the independence and impartiality of the judiciary states that "only an independent and impartial judiciary can provide the basis for a fair and just resolution of legal disputes, particularly those between the individual and the State. In this context, it is recalled that all Member States have committed themselves under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms to ensure access to independent and impartial courts and tribunals, whenever rights or obligations are at stake or criminal charges have to be determined; and in respect to which the European Court of Human Rights has developed an extensive body of case law. (...) It is of paramount importance that the independence and impartiality of the judiciary exists in fact and are guaranteed by law, and that public confidence in the judiciary, where it has been lost, could be restored and maintained".<sup>26</sup>

At European Union level, the Rule of Law Report 2020 considered that "effective judicial systems are essential to upholding the rule of law. Independence, quality and efficiency are the defined parameters of an effective justice system, whatever the model of the national legal system and the tradition in which it is anchored. (...) The independence of national courts is fundamental to ensuring such judicial protection".

Judges and prosecutors occupy a fundamental place in the legal system: the way they conduct themselves has a direct impact on public confidence and the administration of justice. Therefore, they have a duty to maintain the highest ethical behavior.

There are international standards – in particular, the *Bangalore Principles of Judicial Conduct*<sup>27</sup> – that provide guidelines on the ethical conduct of judges.

The European Commission for Democracy through Law (better known as Venice Commission) in several opinions considered the issue of judicial ethics and code of conduct for judges.<sup>28</sup>

Although there are countries in Europe and beyond that have achieved high standards of judicial conduct without adopting a code of conduct or

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<https://www.washingtonpost.com/opinions/2024/07/29/joe-biden-reform-supreme-court-presidential-immunity-plan-announcement/>.

<sup>26</sup> CoE *Action Plan to strengthen the independence and impartiality of the judiciary*, CM (2016)36 Final.

<sup>27</sup> In July 2006, the United Nations Economic and Social Council (ECOSOC) adopted a resolution recognizing the Bangalore Principles as representing a further development of, and as being complementary to, the 1985 United Nations *Basic Principles on the Independence of the Judiciary*. ECOSOC invited States to encourage their judiciaries to take into consideration the Principles when reviewing or developing rules with respect to judicial conduct. The Bangalore Principles are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to offer the judiciary a framework for regulating judicial conduct. Six core values are recognized: Independence, impartiality, integrity, propriety, equality and finally competence and diligence.

<sup>28</sup> European Commission for Democracy through Law (Venice Commission), *Compilation of Venice Commission Opinions and Reports concerning Judges*, CDL-PI(2023)019, Strasbourg, 18 July 2023.

ethics for judges, “the Council of Europe recommends that a code be adopted. Such a code, or in other words a statement of standards of professional conduct, should also not be seen as a piece of legislation or other provisions of a legal nature, and it should be the judges and their organisation(s) that take the responsibility for the implementation of such a code”.<sup>29</sup>

The Venice Commission also recall, in several opinions, that the purpose of a code of ethics is entirely different from that achieved by a disciplinary procedure and “using a code as a tool for disciplinary procedure has grave potential implications for judicial independence (...) Judges may be held accountable accordingly for their unethical conduct by appropriate institutions, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge (...) In order to avoid the suppression of the independence of a particular judge on the basis of general and sometimes vague provisions of a code of ethics, sanctions have to rely on explicit provisions in the law and should be proportionate to and be applied as a last resort in response to recurring, unethical judicial practice”.<sup>30</sup>

## 5. Conclusions

If the voluntary adoption on November 13, 2023, of SCOTUS CODE is the evidence that the Supreme Court is not entirely indifferent to public pressure, the lack of novelty of its contents, the completely discretion with which judges can apply its principles and rules, and the failure to adopt a strong enforcement mechanism unveil the possibility that, behind the SCOTUS CODE, lies a merely symbolic initiative that disregards full accountability for past transgressions, which, in the Justices’ words, amount to a mere “misunderstanding”.<sup>31</sup>

Indeed, the only, simple, purposes the Supreme Court indicates for the future consist of instructing Court officers to undertake an examination of best practices, drawing in part on the experience of other federal and state courts.

It remains to be seen if next President and next Congress could have the power to return – with innovative, effective, solutions – on the delicate issue of judicial ethics.

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<sup>29</sup> *Id.* at 54-55.

<sup>30</sup> *Id.* at 54-55.

<sup>31</sup> *Scotus Code, Statement of the Court regarding the Code of Conduct*, at 1.