

JURISPRUDENCE

## Why Won't John Roberts Accept an Ethics Code for Supreme Court Justices?

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Chief Justice John Roberts waits for the arrival of former U.S. President George H.W. Bush at the U.S. Capitol rotunda on Dec. 3, 2018. Jabin Botsford—Pool/Getty Images

The first bill introduced this year in the Democratic-controlled House of Representatives had nothing to do with the border wall, the government shutdown, the troops in Syria, or other issues that have dominated recent headlines. Instead, the “[For the People Act](#)”—or HR 1—is devoted to government integrity, covering voting rights, campaign finance reform, and ethical standards. Among many potentially controversial and complex provisions, there is one that stands out for its simplicity: requiring the adoption of an ethics code for the U.S. Supreme Court. The fact that SCOTUS justices are the only nine judges in the United States

who do not have a written code of ethics is not just a symbolic problem, but a very meaningful one that requires just this sort of legislative solution.

The current Code of Conduct for United States Judges, first adopted in 1973 and based on the American Bar Association's Model Code of Judicial Conduct, covers every member of the federal judiciary except Supreme Court justices. Likewise, every state has adopted some version of the ABA code. There's a reason every other judge in the country has a code of ethics by which they must abide: Ethics issues arise constantly at all levels of the judiciary; in the absence of a written code, both judges and the public are left in the dark about how to address and resolve them.

Supreme Court justices also face ethics questions. Is it permissible for justices to provide anonymous leaks to the press about their private conferences? May they criticize political candidates, speak at meetings of partisan legal organizations, or raise funds for charities? May they vacation with litigants in the middle of a pending case or comment on legal issues or proceedings in lower courts? May clerks and court staff be assigned to work on the justices' private books and memoirs? These are not hypotheticals. At least one justice has engaged in each of these activities in past years, and there is no definitive code of conduct that prohibits them.

Chief Justice John Roberts addressed the anomaly of the missing ethics code in his 2011 Year-End Report on the Federal Judiciary, acknowledging that the lower courts' code is a good "starting point" for ethics inquiries. Nonetheless, he asserted that there is "no reason" to adopt a SCOTUS code because members of his court consult a wide variety of other sources for guidance. In addition, Roberts noted that current iterations of the judicial code do "not adequately answer some of the ethical considerations unique to the Supreme Court," and that "no compilation of ethical rules can guarantee integrity."

The chief justice's observations are all reasonable, but they do not begin to justify the absence of a Supreme Court code. Nearly all of his explanations apply with equal force to every other court in the U.S., and yet those courts have, without exception, adopted written codes. It is true, of course, that no "compilation" of rules can guarantee compliance, but the same could be said for all other codes, ranging from the Bill of Rights to the Ten Commandments. He is right that existing judicial codes do not address issues "unique to the Supreme Court," but that is why the proposed legislation allows "provisions that are applicable only" to SCOTUS justices.

Democrats have repeatedly introduced legislation requiring the Supreme Court to adopt an ethics code, but the previous Republican House leadership never allowed it to come to the

floor. Although the confirmation of Supreme Court justices has become increasingly rancorous, judicial ethics ought to be a nonpartisan issue. A written code would apply equally to liberal and conservative justices, thus covering Justice Ruth Bader Ginsburg's disparagement of then-candidate Donald Trump in the months before the 2016 election as well as Justice Samuel Alito's appearance at a fundraiser for the right-leaning Claremont Institute. Both incidents would have violated specific ethics rules for every other U.S. judge, but not for the justices. Ginsburg eventually apologized for what she called "ill-advised" comments and promised to be "more circumspect" in the future; Alito declined to comment.

Supreme Court justices have life tenure and cannot be subject to sanctions, short of impeachment, so the purpose of a SCOTUS code would not be punishment or even enforcement. Consequently, the For the People Act requires only the promulgation of ethics standards so that the justices can be held accountable for their conduct in the court of public opinion. In the most extreme circumstances, a documented ethics violation could be relevant to a potential impeachment proceeding, as has been the case with lower court judges. But even without such a drastic and improbable situation, there is value in transparency. It is only fair to let the public know what ethics standards we should expect from the nine most powerful judges in the nation. ▀

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