

Federal Courts Should Do Judicial Ethics California-Style

Systems already exist that could be extended or borrowed to address the risks that arise from exempting the nation’s highest court from rules that apply to every other state and federal judge, according to Nanci Nishimura of Cotchett, Pitre & McCarthy and David Carrillo of the California Constitution Center at Berkeley Law.

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By Nanci E. Nishimura and David A. Carrillo | September 14, 2023 at 08:54 PM

Federal courts have recently come under fire over their perceived lack of strong and enforceable ethical standards. The actions of some U.S. Supreme Court members have prompted questions about what disclosures should be required for federal judges, what conflict-of-interest rules should apply and generally how the federal bench can ensure appropriately neutral arbiters. Here in California we’re wondering why this is a problem for them: The state courts long ago adopted systems of judicial ethics and rigorously enforce those rules with effective judicial discipline. Nothing stops the federal judiciary from doing the same—and they should.

The issue with federal judicial ethics is twofold: The U.S. Constitution limits the sanctions on federal judges, and many of those sanctions only apply to the lower courts. Members of the federal bench are “officers of the United States” under Article II, section 2, and under Article III, section 1 they “hold their offices during good behaviour, and shall ... receive for their services, a compensation, which shall not be diminished during their continuance in office.” Those constitutional protections limit the available discipline options. Some attempts have been made, but they are arguably anemic.

The federal judiciary has long maintained a seemingly robust code of ethics and conduct for federal judges, since the Code of Conduct for United States Judges was initially adopted in 1973, now codified here. But that ethical code is nonbinding, and the discipline process is complex. Perhaps that explains why, as the Federal Judicial Center notes, there have been “only 15 judicial

impeachments in U.S. history, and only eight U.S. judges have been convicted and removed.”

And even that nonbinding ethical code does not apply to the high court justices. If it’s difficult to discipline any federal judge, when the underlying rules don’t even apply it’s harder still. Thus, only one high court justice (Samuel “Old Bacon Face” Chase) has ever been impeached, and none have ever been removed (Abe Fortas resigning doesn’t count).

Congress has taken notice of the ethics gap. On July 20, 2023, the Senate Judiciary Committee voted to advance the Comprehensive Supreme Court Ethics, Recusal, and Transparency (SCERT) Act, which would impose new rules for financial disclosures and require the justices to adopt a binding ethics code. A recent Wall Street Journal opinion piece quoted Justice Samuel Alito’s response to the SCERT Act as: “No provision of the Constitution gives them [Congress] the authority to regulate the Supreme Court—period.”

Justice Alito is mistaken. Congress has several ways to regulate the Supreme Court. For example, under Article I, section 8 Congress has the power “to 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, or in any Department or Officer thereof.” And Article III, section 2 grants Congress an express role in shaping judicial branch procedures and conduct with the power to shape the court’s jurisdiction “under such regulations as the Congress shall make.”

Congressional power to regulate the courts is unquestioned: Congress wrote the oath that the justices take, the Supreme Court’s term starts on a date set by federal statute, and in 1948 Congress required all federal judges to recuse themselves from deciding cases in which “their impartiality might reasonably be questioned.” The high court never complained when in 1978 Congress required federal judges to file financial disclosure forms, or in 1989 when Congress imposed limits on outside income and gifts for federal judges, or in 2022 when Congress amended the ethics rules to mandate that federal judges disclose their stock transactions.

The least the high court could do is adopt and enforce an ethical code, as the states do. Every state has a disciplinary commission with oversight of its respective judicial officers. For example, California's Code of Judicial Ethics is enforced by the California Commission on Judicial Performance. This authority was mandated by constitutional amendment in 1960, when the commission was established as the first independent agency in the United States authorized to investigate and discipline judicial misconduct. It now oversees more than 1,800 active and former judges, commissioners, and referees. In 1994, Proposition 190 increased transparency and diversity by opening commission proceedings to the public and making six of the commission's 11 seats public members.

The California commission's mandate is "to protect the public" from judicial misconduct. Judges receive due process: Complaints are received in writing and may be anonymous, all complaints are investigated, and misconduct must be found by a preponderance of the evidence in an adversary proceeding with the judge represented by counsel. If the commission orders formal proceedings, the charges and supporting documents are made available for public inspection, and any hearing on the charges is also public.

To be fair, California's judges are state officials who lack the constitutional protections of their federal counterparts, so California has far greater leeway here. Yet Justice Alito's separation-of-powers concern is a red herring: It requires no act of Congress (or rule change by the federal Judicial Conference) for the high court to adopt by minute order the Code of Conduct and make its disciplinary process apply it to its justices. Complaints could be reviewed up the chain starting with a chief circuit judge chosen by lot, and proceeding on the same path from there.

It is precisely in this context of ethics and discipline that the judiciary should be self-governing—by rigorously self-policing. Systems already exist that could be extended or borrowed to address the risks that arise from exempting the nation's highest court from rules that apply to every other state and federal judge. And applying those rules to the high court abolishes the pernicious "rules for thee but not for me" perception that can only harm the appearance of fairness. It's time for the high court to invoke the maxim of jurisprudence that judicial discipline should be self-discipline.

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