

South Dakota Newspapers, #40
Ann Volin, Dave Bordewyk
"We the People."
June 7, 2023

Why Congress May Impose Ethics Code on Supreme Court Justices

David Adler

Rising calls for Congress to enact new ethical standards for the Supreme Court, sparked by recent revelations that Justice Clarence Thomas failed to disclose financial transactions, have generated a debate on whether the legislative branch possesses constitutional authority to impose a code of conduct on the judiciary.

The divide is familiar. With some prominent exceptions, Republicans object to the creation of an ethics code, invoking separation of powers concerns and asserting interference with judicial power and activity. Democrats argue that ethics standards represent an effective means of protecting the nation from judicial misconduct and potential conflicts of interest that may influence the Justices.

This debate would be better informed by an understanding of two constitutional provisions that authorize congressional enactment of an ethics code for Supreme Court Justices. In short, the Necessary and Proper Clause vests in Congress the authority to enact an ethics code as a means of exercising its power under the Impeachment Clause.

The Impeachment Clause—Article II, section 4—grants to Congress the sole authority to determine whether the acts of the President, Vice-President and "all civil officers," including federal judges and

Justices, warrant impeachment. Offenses justifying impeachment fall into the familiar categories of treason, bribery, and high crimes and misdemeanors.

In Federalist 65, Alexander Hamilton described impeachments as a "bridle in the hands of the legislature." In 1833, Justice Joseph Story, the most scholarly of Justices, paraphrased the impeachment practice in England, from which the Framers of the Constitution borrowed in creating the Impeachment Clause. Story wrote that "judges and other magistrates have not only been impeached for bribery, and acting grossly contrary to the duties of their office, but for misleading their sovereign by unconstitutional opinions and for attempts to subvert the fundamental laws, and introduce arbitrary power."

The Framers' drafting of the Impeachment Clause was influenced by the long, drawn-out impeachment trial of Warren Hastings, which was underway as delegates sat in Philadelphia. The trial was spearheaded by Edmund Burke, champion of the colonists' revolution against England.

Burke asserted that Hastings had governed "arbitrarily" because he was "a giver and receiver of bribes. In short, money is the beginning, the middle, and the end of every kind of act done by Mr. Hastings." Hastings was being impeached as well for "governing arbitrarily," the classic impeachable offense and for "betraying the trust" of the public which, Burke explained, meant he was guilty of "abusing power."

The constitutional authority of Congress to articulate, define, measure and ultimately punish acts deserving of impeachment is not different than the exercise of its power to legislate on many other constitutionally granted powers, including interstate commerce, war, foreign affairs and collection of taxes,

each of which has been facilitated by use of the Necessary and Proper Clause.

The Necessary and Proper Clause—Article I, section 8, paragraph 18—vests in Congress broad authority “to make Laws which shall be necessary and proper” to execute its powers “and all other Powers vested by this Constitution in the Government of the United States.” In context, the “Sweeping Clause” affords Congress the authority to enact an ethics code for Supreme Court Justices.

In the landmark case *McCulloch v. Maryland* (1819), Chief Justice John Marshall wrote the Court’s unanimous opinion upholding the congressional law creating a national bank under the Necessary and Proper Clause for the purpose of enforcing its power to “lay and collect taxes.” The Constitution makes no mention of a national bank, but Marshall said it is for Congress to identify the means it wishes to employ to carry out its authority to lay and collect taxes.

Congress enjoys the same discretion under the Impeachment Clause. It is free to choose the means—creation of an ethics code—for identifying parameters of conduct, including details of what behavior is prohibited. Congress has an institutional interest in enforcing its catalogue of constitutional powers governing impeachment and clearly has the authority to insist on reporting requirements and financial disclosures by Supreme Court Justices. The legislative imposition of such duties assists Congress in determining the commission of bribery, betrayal of trust and arbitrary behavior.

Some have asserted that congressional imposition of a code of ethics violates separation of powers and interferes with the exercise of judicial power. A code of ethics, however, has no direct impact on the Court’s disposition of cases before it. The Court, in *Morrison*

v. Olson (1988), upheld against the claim of interference with executive power the Ethics in Government Act, which created an independent counsel. Chief Justice Rehnquist held that no separation of powers concern existed since the law did not interfere with the "core duties" of the president. Similarly, a legislatively drafted ethics code represents no interference with the exercise of judicial power.

Unless those who object to a code of ethics for Supreme Court Justices also object to a code for federal district court judges, there is no clear reason why lower court judges should be subject to more rigorous principles of behavior than members of the highest court in the land. To place in the Supreme Court the ultimate authority to say what the law is, without accountability for its behavior beyond the Impeachment Clause, is to ignore the value of accountability and invite corruption.