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# SUPREME COURT LEAKS AND RECUSALS: A RESPONSE TO PROFESSOR STEVEN LUBET'S *SCOTUS ETHICS IN THE WAKE OF NFIB V. SEBELIUS*

Kevin Hopkins\*

*[P]eople know that something is wrong. They sense the imbalances, the unfairness in the justice system. They suspect that the playing field and the rules of the game favor the rich and powerful, but they may not know what to do about it.<sup>1</sup>*

## I. INTRODUCTION

Once upon a time, it would have been rare and almost unheard of to see a U.S. Supreme Court Justice give an interview on television or radio,<sup>2</sup> attend a public function, give a speech or lecture, accept a gift from an organization with a particular political bend, discuss a decided case while still sitting on the Court, or go on a friendly hunting trip with a person who is a party-litigant in a lawsuit pending before the Court.<sup>3</sup> Times have changed, however.

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\* Professor of Law, The John Marshall Law School, Chicago, IL. I am grateful to Associate Dean Jeremy Telman and members of the faculty at Valparaiso University Law School for the invitation to participate in the roundtable discussion at the 2012 Tabor Lecture in Legal Ethics. I am also grateful to the members of the Valparaiso University Law Review for providing great editorial assistance for this response. Lastly, I thank Professor Steven Lubet for writing such a timely and provocative article and for delivering a great lecture.

<sup>1</sup> RALPH NADER & WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* 193 (1996).

<sup>2</sup> On Sunday, January 13, 2013, CBS's 60 Minutes aired a recent interview of Supreme Court Justice Sonia Sotomayor with CBS Television Anchor Scott Pelley. See *Justice Sotomayor Prefers "Sonia from the Bronx,"* CBSNEWS (Jan. 13, 2013, 5:00 PM), <http://www.cbsnews.com/video/watch/?id=50138923n>. During the interview, Justice Sotomayor indicated that she had benefited from affirmative action, but was mindful and careful not to comment on *Fisher v. University of Texas*, the Court's recent affirmative action case. *Id.* See *Fisher v. Univ. of Tex.*, 132 S. Ct. 1536 (2012) (granting a petition for writ of certiorari to the U.S. Court of Appeals for the Fifth Circuit for review of the constitutionality of the University of Texas Law School admissions policies); *Fisher v. Univ. of Tex.*, 631 F.3d 213 (5th Cir. 2011) (considering the use of race in undergraduate admissions at the University of Texas).

<sup>3</sup> See Steven Lubet & Clare Diegel, *Stonewalling, Leaks, and Counter-Leaks: SCOTUS Ethics in the Wake of NFIB v. Sebelius*, 47 VAL. U. L. REV. 883, 889 (2013) (discussing numerous instances where the conduct of Justices have been questioned (e.g., the acceptance of gifts, outside speaking engagements, the accuracy of financial disclosure forms, recusal, confidentiality, etc.)); see also Kevin Hopkins, *The Politics of Misconduct: Rethinking How We Regulate Lawyer-Politicians*, 57 RUTGERS L. REV. 839, 908-910 (2005) (providing a detailed discussion of the ethical concerns raised when Justice Antonin Scalia

## 926 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 47]

The ethical conduct and behavior of members of the nation's highest court have been questioned by the public and the legislature on many occasions. For example, ethical concerns regarding the behavior of Supreme Court Justices have been raised in situations, just to name a few, where a Justice fails to recuse herself from participating in a decision when the Justice may have a personal stake in the outcome, such as holding stock in a corporation that is a litigant in a pending case before the Court,<sup>4</sup> where a spouse of a Justice has taken a highly publicized position against a highly contested and debated law that is slated for Supreme Court review,<sup>5</sup> or where a Justice has failed to recuse herself from participating in a case where she played an important if not key role in writing and advocating legislation that ultimately reaches the Court for constitutional review.<sup>6</sup>

As Professor Steven Lubet notes in his article, *Stonewalling, Leaks, and Counter-Leaks: SCOTUS Ethics in the Wake of NFIB v. Sebelius*, the ethical conduct of Supreme Court Justices has once again gained national attention. This time, however, the context for public outcry is due to actions of an in-house source who released confidential information to a member of the press concerning the voting behavior and the overall

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accompanied Vice President Dick Cheney on a duck hunting trip only three weeks after the Court had agreed to hear arguments in *Cheney v. United States District Court*, 540 U.S. 1088 (2003)); David G. Savage, *Trip With Cheney Puts Ethics Spotlight on Scalia: Friends Hunt Ducks Together, even as the Justice Is Set to Hear the Vice-President's Case*, L.A. TIMES, Jan. 17, 2004, at A-1 (providing details of the Scalia-Cheney trip); David G. Savage & Richard A. Serrano, *Scalia Was Cheney Hunt Trip Guest; Ethics Concern Grows*, L.A. TIMES, Feb. 5, 2004, at A-12 (opining that as more details of the trip have emerged, the impartiality of Justice Scalia is in doubt). In a response to the *Los Angeles Times* inquiry, Justice Scalia stated:

Social contacts with high-level executive officials (including cabinet officers) have never been thought improper for judges who may have before them cases in which those people are involved in their official capacity, as opposed to their personal capacity. For example, Supreme Court Justices are regularly invited to dine at the White House, whether or not a suit seeking to compel or prevent certain presidential action is pending.

Savage, *supra*.

<sup>4</sup> See John Berlau, *Ruth Bader Ginsburg Fails to Recuse Herself*, INSIGHT MAG., July 28, 1997, at 12 (noting that Justice Ginsburg had failed to recuse herself in *Bankers Trust Co. v. Procter & Gamble Co.*, 516 U.S. 1041 (1996) and *Exxon Corp. v. Youell*, 516 U.S. 801 (1995), cases where her husband owned stock in one of the litigating companies).

<sup>5</sup> See Joan Biskupic, *Calls for Recusal Intensify in Health Care Case: Kagan, Thomas Questioned*, USA TODAY, Nov. 21, 2011, at 6A (noting concerns raised by House Democrats that Justice Thomas recuse himself from participating in the Court's review of the constitutionality of the Affordable Care Act because of his wife's vigorous and public opposition to the law).

<sup>6</sup> See *id.* (noting concerns raised by Republican Senator Mitch McConnell (R-Ky.) concerning Justice Elena Kagan's involvement while Solicitor General of the United States in the defense of the Affordable Care Act).

sentiments of members of the Court's minority in one of the most significant and controversial rulings of the year: *NFIB v. Sebelius* (the "Affordable Care Act").<sup>7</sup> Professor Lubet uses this leaking of significant and confidential information regarding the Court's deliberations in the Affordable Care Act case as a segue into what he believes is a much larger group of issues—those concerning Supreme Court ethics and regulation of the conduct of members of the Court, the need for the adoption by the Court of a comprehensive code of judicial conduct to govern the actions of the Justices, and the need for reform of the Court's recusal process and practices.<sup>8</sup>

Just like Professor Lubet, I also signed the nonpartisan letter that was drafted and sent by a group of law professors to the Chairman and Ranking Minority Members of the Senate and House Judiciary Committees, which called for the implementation of mandatory and enforceable rules to protect the integrity of the Supreme Court.<sup>9</sup> And just like Professor Lubet, members of academia, and the sponsors of H.R. 862,<sup>10</sup> I too believe that the adoption of ethics rules to govern Supreme Court Justices would provide greater transparency with regards to judicial decision-making at the Supreme Court level and consistency in practices such as recusal, and would bolster public confidence in the integrity of the Court. However, unlike Professor Lubet, I believe that the uniqueness of the Supreme Court and its role as contemplated by the Constitution's Framers will require, in many instances, deference by the legislative branch of the national government, even when the conduct by a Justice might otherwise raise significant ethical concerns.<sup>11</sup>

In my response, I briefly evaluate the validity of a few of Professor Lubet's comments and arguments addressing some of these issues, the viability of his suggestion for adopting a comprehensive code of judicial

<sup>7</sup> 132 S. Ct. 2566 (2012); see also Lubet, *supra* note 3, at 883–86.

<sup>8</sup> See generally Lubet, *supra* note 3; see also 28 U.S.C. § 455 (2006) (discussing disqualification of justices, judges, and magistrate judges).

<sup>9</sup> See Letter from 138 Law Professors to the House and Senate Judiciary Comms. (Mar. 17, 2011), available at [http://www.afj.org/judicial\\_ethics\\_sign\\_on\\_letter.pdf](http://www.afj.org/judicial_ethics_sign_on_letter.pdf) (providing the letter to Chairmen and Ranking Minority Members regarding the adoption of a comprehensive code of judicial ethics for Supreme Court Justices).

<sup>10</sup> See H.R. 862, 112th Cong., 1st Sess. § 3 (2011) (establishing procedures for recusal of Supreme Court Justices). House Bill 862 was introduced by Congressmen Chris Murphy (D-Conn.) and Anthony Weiner (D-N.Y.). *Id.* The Bill would apply the Judicial Conference's *Code of Conduct* to Supreme Court Justices and would give the Judicial Conference the ability to enforce the *Code of Conduct* when violated by a Justice. *Id.* § 2.

<sup>11</sup> See CHIEF JUSTICE JOHN ROBERTS, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY (Dec. 31, 2011), <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf> (making a case for not adopting a comprehensive code of judicial ethics on the grounds of the uniqueness of the Supreme Court).

conduct to govern members of the Court, and his ideas for reforming the Court's recusal process. I conclude by sharing a few of my own thoughts and suggestions on these important issues.

## II. THE SUPREME COURT AND THE CONSTITUTION

Article III, Section 1 of the United States Constitution provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.<sup>12</sup>

The U.S. Supreme Court is the only federal court specifically mandated under Article III of the Constitution.<sup>13</sup> Justices sitting on the Court have assumed as their major responsibilities the task of assuring state and federal government compliance with the Constitution and other federal laws, along with the task of acting as a check on the exercise of powers by the executive and legislative branches of the national government.

In *Federalist No. 78*, Alexander Hamilton stated that the judiciary branch was "designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."<sup>14</sup> As noted by Hamilton, the Court was created primarily as a check on the executive and legislative branches of the national government for the protection of the people.<sup>15</sup> The Framers believed that to best protect the people the judicial offices required a cloak of permanent tenure in order to create the independent spirit in judges essential for the faithful performance of the duties of that role.<sup>16</sup>

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<sup>12</sup> U.S. CONST. art. III, § 1.

<sup>13</sup> *Id.*

<sup>14</sup> THE FEDERALIST NO. 78, at 404 (Alexander Hamilton) (George W. Carey & James McClellan eds., Liberty Fund 2001).

<sup>15</sup> *Id.* at 406-07.

<sup>16</sup> *Id.* at 407; *see also* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59-60 (1982) (holding that a fundamental principle enunciated in the Constitution is that the "[j]udicial Power of the United States' must be [placed] in an independent Judiciary" and that the Constitution provides "clear institutional protections for that independence," such as the salary and tenure provisions of Article III of the Constitution). Supreme Court

Article III, Section 2 of the Constitution states:

The Judicial Power shall extend to all Cases, in Law and Equity, arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Land under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.<sup>17</sup>

Article III of the Constitution provides the Supreme Court with original jurisdiction to adjudicate cases affecting ambassadors, other public ministers and consuls, and those in which a state is a party.<sup>18</sup> Additionally, the Constitution provides that in all other cases the Court has appellate jurisdiction both as to law and fact with such exceptions and regulations as created by Congress.<sup>19</sup>

While Article III of the U.S. Constitution provides for the creation of the Supreme Court, it is silent with regards to what specific disciplinary actions are available when a Justice commits conduct unbecoming of good behavior while in office. The Impeachment Clause of the Constitution, however, empowers Congress to impeach and remove from office all civil officers of the United States for conviction of treason, bribery, or other high crimes and misdemeanors.<sup>20</sup> Because Supreme Court Justices are civil officers of the United States, the Constitution makes impeachment and removal from office the only political check available to the legislative branch for regulating the behavior of Supreme Court Justices.<sup>21</sup>

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Justices and other federal judges serve life-time tenures unless their conduct falls below the “good behaviour” threshold contemplated by the Framers. U.S. CONST. art. III, § 1.

<sup>17</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>18</sup> *Id.* § 2, cl. 2; 28 U.S.C. § 1251 (2006).

<sup>19</sup> U.S. CONST. art. III, § 2, cl. 2.

<sup>20</sup> *Id.* § 2, cl. 5.

<sup>21</sup> *See id.* art. II, § 4. Other constitutional checks available to Congress with regards to Supreme Court Justices are its power to control the size of the Court, thus affecting the number of Justices required to constitute a quorum and the qualifications for serving as a Justice. *See* Louis J. Virelli III, *The (Un)Constitutionality of Supreme Court Recusal Standards*,

Consequently, if the Court were to adopt its own code of conduct (as will be discussed later) to use as guidance or as the sole governing authority for making decisions that involve potential ethical concerns (e.g., recusal, gifts, conflicts of interests, bias, etc.), the code would be, at best, only aspirational and would have no authoritative or practical effect on the individual Justices. As discussed earlier, attempting to discipline a Justice for breach of an ethics code provision, short of conduct that would constitute an offense sufficient to impeach and remove the Justice from office (e.g., criminal actions brought against a sitting Justice), would run contrary to the Framers' intent for the independence of the Court and the "clear institutional protections for that independence" as provided for under the Constitution.<sup>22</sup>

Finally, as noted by Professor Lubet and legal scholars, any ethics code and its enforceability against the Justices would be subject to judicial review by the Court.<sup>23</sup> Consequently, the Court would have the final say in determining the constitutionality of any legislation, such as H.R. 862, that would require the Court to adopt and adhere to the *Code of Conduct for United States Judges* ("*Code of Conduct*"), notwithstanding the fact that such a code would directly affect the Court's own self-interest.

### III. THE NEED FOR A COMPREHENSIVE CODE OF JUDICIAL CONDUCT TO GOVERN SUPREME COURT JUSTICES

In his paper, Professor Lubet persuasively argues that the Supreme Court should adopt a comprehensive code of conduct primarily to let the public know what to expect from the Justices.<sup>24</sup> In support of this argument, he references both the letter submitted by law professors across the country to the Chairman and ranking members of the U.S. Senate and House Judiciary Committees, which requested the Justices adopt mandatory and enforceable rules to protect the integrity of the Court, and H.R. 862 ("*Supreme Court Transparency and Disclosure Act of 2011*"), which would require that the *Code of Conduct* be applicable and

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2011 WIS. L. REV. 1181, 1221 (2011) (discussing several constitutional arguments made in support of congressional involvement in the Supreme Court recusal process).

<sup>22</sup> See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982) (noting that the Constitution provides clear institutional protections for the independence of the Court); see also *Hopkins*, *supra* note 3, at 908-10 (discussing Supreme Court discipline and the Scalia-Cheney duck hunting trip).

<sup>23</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803) (upholding judicial review of decisions of the executive and judicial branches as a proper function of the Court under the Constitution); see also Lubet, *supra* note 3.

<sup>24</sup> See Lubet, *supra* note 3, at 890-91.

enforceable against Supreme Court Justices.<sup>25</sup> As additional support for this position, Professor Lubet evaluates and critiques the response given by Chief Justice Roberts in his *2011 Year-End Report on the Federal Judiciary*, a response addressing recent public pressure and criticisms lodged against the Court regarding its lack of a comprehensive code of conduct and the Court's recusal process.<sup>26</sup>

Professor Lubet correctly notes that the lower federal courts have adopted the *Code of Conduct*, one that is similar to the ABA's *Model Code of Judicial Conduct*, which has been adopted by the various states.<sup>27</sup> He acknowledges that Supreme Court Justices may encounter issues and situations that would never arise for federal and state court judges.<sup>28</sup> However, he embraces the view that this fact alone provides little reason for the Court's refusal to adopt and abide by a comprehensive code of judicial conduct.<sup>29</sup> Professor Lubet concludes and implies, like many others, that because the lower federal and state courts have adopted and are subject to codes of judicial conduct, then it is reasonable and logical that the Supreme Court act similarly and accordingly.<sup>30</sup>

Professor Lubet's assessments and conclusions are reasonable and facially valid. Chief Justice Roberts has noted that the Court does not have to adopt a comprehensive code of ethics as its "definitive source of ethical guidance," primarily because it already considers not only the *Code of Conduct* applicable to lower federal court judges, but also other sources such as judicial opinions, treatises, scholarly articles, and disciplinary decisions when deciding ethical issues.<sup>31</sup> However, as Professor Lubet specifically points out, these sources are equally available to and utilized by lower federal and state court judges, yet this has not prevented those judges from establishing and attempting to follow a uniform and comprehensive ethics code.<sup>32</sup>

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<sup>25</sup> *Id.* at 887-88; see also *supra* notes 9-10 (discussing H.R. 862 and letters by law professors to ranking members of the Senate and House Judiciary Committees).

<sup>26</sup> See Lubet, *supra* note 3, at 887-91 (discussing Chief Justice Robert's *2011 Year-End Report on the Federal Judiciary* and recusal challenges made during deliberations in *NFIB v. Sebelius*, 132 S. Ct. 2566).

<sup>27</sup> CODE OF CONDUCT FOR UNITED STATES JUDGES (2011), available at <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx#>; ABA MODEL CODE OF JUDICIAL CONDUCT (2011), available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2011\\_mjcj\\_table\\_of\\_contents.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2011_mjcj_table_of_contents.authcheckdam.pdf).

<sup>28</sup> See Lubet, *supra* note 3, at 890-91.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> ROBERTS, *supra* note 11, at 5.

<sup>32</sup> Lubet, *supra* note 3, at 888.



## 932 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 47]

I agree with Professor Lubet on this point. Justice Roberts's defense for refusing to consider the value to be gained by adopting a comprehensive code for the Court is very weak and simplistic. Even the Chief Justice acknowledges that the *Code of Conduct* plays the same role for the Justices as it does for other federal judges by providing guidance on acceptable and unacceptable conduct.<sup>33</sup> Although he suggests that there is no need to adopt a specific code of conduct for the Court, there seems to be no compelling reason provided in his annual report not to. Because of the nature and the types of cases which are heard and decided by the Court each year and the fact that the ramifications of those decisions most often extend well past the litigants, the Court's adoption of its own code would serve as an additional reminder to the public that the Justices too are mindful of the need to be impartial when deciding all cases and would help to insure that their decisions are free from the constraints of politics and outside influences.<sup>34</sup>

In further defense of the Court's refusal to adopt a comprehensive ethics code, Chief Justice Roberts notes that the *Code of Conduct* "cannot answer all questions" and "does not adequately answer some of the ethical considerations unique to the Supreme Court."<sup>35</sup> I agree with Professor Lubet who correctly concludes that this would be the case, however, for all judges who seriously strive towards justice, fairness, and judicial integrity. Like any code of conduct, the *Code* followed by the lower federal courts could be tweaked, revised, or altered to take into consideration the special and unique ethical issues that arise in the Supreme Court.

I also agree with Professor Lubet that it is the decision by the Court to adopt a comprehensive code of conduct, and not so much as to what that code would look like or actually include, that is really important. No one code could encompass every possible ethical dilemma that a judge may have to confront on any given day during her tenure on a

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<sup>33</sup> ROBERTS, *supra* note 11, at 5.

<sup>34</sup> See, e.g., *Arizona v. United States*, 132 S. Ct. 2492 (2012) (reviewing the constitutionality of an Arizona statute designed to address the growing number of unlawful aliens in the state); *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012) (reviewing the constitutionality of the Affordable Care Act); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (reviewing the district court's certification of a half million plaintiffs in a class action suit); *McDonald v. City of Chi.*, 130 S. Ct. 3020 (2010) (reviewing the constitutionality of a City of Chicago ordinance placing a ban on possession of handguns); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (reviewing the constitutional limits on electioneering communications and holding that the First Amendment prohibits government from restricting independent political campaign expenditures by corporations and unions); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding the affirmative action admissions policies at the University of Michigan Law School).

<sup>35</sup> ROBERTS, *supra* note 11, at 5.

court. However, the Supreme Court's adoption of a comprehensive code would help to guarantee greater uniformity, consistency, and integrity in its handling of these unique concerns.

An important concern that Professor Lubet spends very little time addressing, however, is the constitutionality of his proposal that the Court adopt a code of conduct. Such a proposal could raise a significant constitutional issue if the adoption of a code of conduct is legislatively mandated (as contemplated by the drafters of H.R. 862) or self-imposed by the Court. A legislatively mandated code, as contemplated by the drafters of H.R. 862, would pose serious constitutional problems.<sup>36</sup>

As Chief Justice Roberts has indicated, Article III of the Constitution creates only one court that is the Supreme Court of the United States, and it empowers Congress to establish additional lower federal courts.<sup>37</sup> Although it is within Congress's power to create the Judicial Conference and provide direction to this entity, the Conference and its members would have no constitutional authority to prescribe rules and standards for the Supreme Court.<sup>38</sup> Under the nation's governmental structure, the judiciary is the body that normally creates rules that govern its operation—not the legislature. Introducing and enacting legislation designed to require that the Supreme Court adopt and comply with the *Code of Conduct* would run afoul of Article III's mandate that the "judicial Power of the United States" be vested in one Supreme Court, the Framers' intent to create the independence necessary for the Court to act as the check on both branches of the national government, and the separation of powers envisioned by the Framers when they created the legislative, executive, and judicial branches of our governmental structure.<sup>39</sup> Finally, any legislative action purporting to require the Court to adopt the *Code of Conduct* would be subject to judicial review by the Court.<sup>40</sup>

#### IV. SUPREME COURT RECUSAL PRACTICE

Lastly, Professor Lubet argues that the Court's current recusal practices are in need of reform.<sup>41</sup> He contends that the Court's long-standing practice when considering a party's request for recusal or an

<sup>36</sup> See *supra* note 10 (discussing H.R. 862).

<sup>37</sup> U.S. CONST. art. III, § 1, cl. 1.

<sup>38</sup> *Id.*; see also ROBERTS, *supra* note 11, at 4 (referencing Article III's provision providing Congress the ability to create lower federal courts and its power to create the Judicial Conference).

<sup>39</sup> U.S. CONST. art. I, § 1; U.S. CONST. art. III, § 1.

<sup>40</sup> See *supra* note 23 and accompanying text (discussing judicial review).

<sup>41</sup> Lubet, *supra* note 3, at 891-902.

## 934 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 47]

individual Justice's decision to step down from participating in a case based upon personal bias—such as previous involvement in the litigation prior to his or her appointment to the bench or other conflicts—has been one that is secretive and left entirely to the Justice in question.<sup>42</sup> He argues that the Supreme Court's recusal process is inconsistent and problematic.<sup>43</sup> Unlike lower federal and state courts where recusal decisions may be reviewed by higher courts or the chief judge, the Supreme Court has no review process in place.<sup>44</sup> Finally, as a possible solution against individual decision-making by the Justices on the issue of recusals, Professor Lubet suggests that the Court could adopt a process that would require either full Supreme Court review on the issue of disqualification of a member Justice or a more radical process that might require retired Justices and senior circuit court judges to participate in a Justice's denial of a recusal motion.<sup>45</sup>

Section 455 of Title 28 of the U.S. Code provides direction and guidance for lower-ranking federal court judges in determining whether a judge's impartiality might reasonably be compromised, thus requiring the judge to recuse herself from the proceeding.<sup>46</sup> The statute requires disqualification, for example, where a judge's impartiality might

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<sup>42</sup> *Id.* at 894–95.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 895–97.

<sup>45</sup> *Id.*; H.R. 862, 112th Cong., 1st Sess. § 3(a)(2)–(b) (2011). Section 3(a)(2) through (b) of H.R. 862 provides:

- (a)(2) DENIAL OF DISQUALIFICATION MOTION—If a justice of the Supreme Court denies a motion brought by a party to a proceeding before the Court that the justice should be disqualified in the proceeding under section 455 of such title, the justice shall disclose in the public record of the proceeding the reasons for the denial of the motion.
- (b) PROCESS FOR DETERMINING RECUSAL—The Judicial Conference of the United States shall establish a process under which, if a disqualification motion has been denied as described in subsection (a)(2) and the party making the motion seeks further review of the motion, other justices or judges of a court of the United States (as defined in section 451 of title 28, United States Code), among whom retired justices and senior judges eligible for assignment under section 294 of title 28, United States Code, may be included, shall decide whether the justice with respect to whom the motion is made should be so disqualified.

*Id.*

<sup>46</sup> See 28 U.S.C. § 455(a) (2006) (“Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”).

reasonably be questioned.<sup>47</sup> Although the statute on its face includes the term “justice,” which is defined to include the Chief Justice and the Associate Justices of the Supreme Court,<sup>48</sup> the Supreme Court has not spoken on the constitutionality of this statute. Consequently, the Court’s actions have implied that the statute, with respect to lower federal court judges, would be an appropriate exercise of congressional powers.

Although Chief Justice Roberts has stated that the *Code of Conduct* applies only to lower federal court judges, he has indicated that the Justices follow the same general principles respecting recusal as other federal judges, but the application of those principals may differ depending on the unique circumstances of the Supreme Court.<sup>49</sup> As previously discussed, Article III gives Congress the power to create additional lower federal courts, and the Judicial Conference of the United States was established for the sole benefit of those federal courts.<sup>50</sup> Consequently, the Judicial Conference’s Committee on Codes of Conduct has no power to mandate or prescribe rules or standards for any other body.<sup>51</sup> Justice Roberts acknowledges, however, that the Court has internally agreed to apply the disqualification standards of the *Code of Conduct* imposed upon lower federal court judges in the areas of financial disclosures and limitations on gifts and outside income.<sup>52</sup>

On March 1, 2011, House of Representative Members Chris Murphy and Anthony Weiner introduced the Supreme Court Transparency and Disclosure Act of 2011, a bill designed to require that the *Code of Conduct* be applied to the Justices of the Supreme Court and to articulate a set of formal procedures for the recusal of Justices.<sup>53</sup> House Bill 862 would require that: (1) the *Code of Conduct* for federal judges apply to the Justices of the U.S. Supreme Court to the same extent as it would apply to circuit and district court judges; (2) the Judicial Conference establish procedures for handling complaints alleging that a Justice has violated the *Code of Conduct* and take appropriate actions with respect to those complaints; (3) Justices who disqualify themselves disclose the reason for the disqualification in the public record of the proceeding; (4) Justices who deny a motion for disqualification brought by a party against the Justice under § 455 of Title 28 of the U.S. Code disclose the reasons for denial of the motion in the public record of the proceeding; and (5) the

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<sup>47</sup> See *id.* § 455(b) (providing a list of circumstances for which disqualification would be required).

<sup>48</sup> See 28 U.S.C. § 451 (2006).

<sup>49</sup> ROBERTS, *supra* note 11, at 5.

<sup>50</sup> See *supra* note 12.

<sup>51</sup> ROBERTS, *supra* note 11, at 4.

<sup>52</sup> *Id.* at 6.

<sup>53</sup> See *supra* note 10.

## 936 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 47]

Judicial Conference establish a formalized process for addressing review of a Justice's denial of a disqualification motion lodged against the Justice.<sup>54</sup>

Once again, imposing or mandating legislatively created procedures or rules to govern Supreme Court recusals runs afoul of Article III's mandate that the power of the judicial branch shall be vested in "one" Supreme Court.<sup>55</sup> Similar to the promulgation of judicial codes of conduct, decisions regarding recusals fall within the constitutional parameters of the judicial branch of our national government.<sup>56</sup> Clearly, the Court has the ability to decide upon the process that it will use for handling recusals.<sup>57</sup> Thus, a legislatively imposed requirement that the Court adopt the *Code of Judicial Conduct of United States Judges*, as would be the case under H.R. 862, would trigger separation of powers concerns as outlined in Article III of the Constitution.<sup>58</sup>

Furthermore, imposing the requirements of H.R. 862 or similar legislative provisions requiring the creation of review panels consisting of lower federal courts, such as the chief judge of the court of appeals and members of U.S. district courts, or having the Chief Justice of the Supreme Court evaluate a Justice's decision to recuse herself when requested by a litigant in a proceeding or a Justice's individual decision to recuse herself from participating in a proceeding, would not only create the awkward situation of placing members of the lower courts in the position to review a Supreme Court Justice's recusal decision, but also having the Chief Justice of the Supreme Court review and make decisions as to whether an individual Justice would or should have to recuse herself.<sup>59</sup> Each of these scenarios infringe upon the Court's powers under Article III and the independence envisioned by the Framers when they created the Constitution. Lastly, under its powers of judicial review, the Court would have the final say with regards to the constitutionality of any legislative enactment requiring it to act similarly to lower federal court judges when determining disqualification or when ruling on recusal motions by litigants.

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<sup>54</sup> H.R. 862, 112th Cong., 1st Sess. (2011).

<sup>55</sup> See *supra* notes 12-13 and accompanying text (discussing Article III of the U.S. Constitution).

<sup>56</sup> U.S. CONST. art. III, § 1.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See Savage, *supra* note 3, at A-12 (discussing Vice President Dick Cheney's hunting trip with Justice Antonin Scalia). In defending Justice Scalia's actions, the late Chief Justice William Rehnquist stated that there were no formal procedures for in-house review by the Court of the decisions of a Justice in an individual case and that it was ill-considered for the Senators to suggest that Justice Scalia recuse himself in the pending litigation. *Id.*

## V. CONCLUSION

Professor Lubet has raised a badly needed dialogue on the Supreme Court's lack of a comprehensive code of conduct and its failure to act consistently with regards to handling ethical issues that arise before it.<sup>60</sup> As noted by Professor Lubet, the Chief Justice's reasoning in support of the Court's decision not to adopt a code, or to create more transparency with regards to the current recusal process, is unpersuasive at best.<sup>61</sup> Yes, the Supreme Court is in a unique position under the Constitution, and legislation designed to require the Court to adopt the *Code of Conduct* would raise serious constitutional issues. This, however, does not or should not prevent the Court from adopting and promulgating its own code of conduct.

As noted by the Chief Justice, a code of conduct is "designed to provide guidance to judges."<sup>62</sup> As Professor Lubet concludes, the adoption of a comprehensive code by the Court is simply the right thing to do.<sup>63</sup> It would tend to create greater transparency regarding the Court's handling of ethical concerns and greater consistency amongst the Justices when dealing with issues such as recusal. Finally, the Court's adoption of its own code of conduct would begin the process of removing much of the secrecy that currently exists with respect to the Court's recusal and disqualification practices—secrecy that so often creates public outcry when members of the Court act in ways that create the appearance of impropriety.

As evidenced in the Chief Justice's report, the Court does care about the public's perception of the integrity of its members.<sup>64</sup> Thus, my suggestion to Professor Lubet and others who care about fairness and the integrity of the Court would be to continue to keep these important ethical issues in the public eye. As discussed previously, although a legislatively mandated code or requirement that the Court adopt a code of conduct could be problematic, applying public pressure on the Court to adopt its own code would be both feasible and appropriate. If the public letter submitted by law professors to high-ranking members of the House and Senate Judiciary Committees was sufficient to prompt the Chief Justice to respond officially, then what would be the effect of letters from state supreme court and lower court judges requesting the Court to adopt a code of ethics and to rethink its current recusal and

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<sup>60</sup> See generally Lubet, *supra* note 3.

<sup>61</sup> *Id.*

<sup>62</sup> ROBERTS, *supra* note 11, at 4 (citation omitted).

<sup>63</sup> Lubet, *supra* note 3, at 904-05.

<sup>64</sup> See generally ROBERTS, *supra* note 11.

938 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 47

disqualification process? The Court's response and answer to this important question might very well be surprising.