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UNCHECKED AND UNBALANCED: ETHICAL LOBBYING REFORM AND THE SUPREME COURT OF THE UNITED STATES

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I would like this work to be considered for the Bryce Harlow Foundation "best paper" award.

If you ask the average American to describe a "lobbyist," chances are good that you'll receive a well-intentioned diatribe about corporate interests and the influence of money in politics. And while practitioners are quick to point out that the profession involves much more than evil, opaque, backroom maneuvering, the truth is that there are unarguably many, *many* ethical and legal considerations that lobbyists must bear in mind at virtually all times as they go about their business. These issues extend far beyond the policymaking process, as well; even the highest court in the land faces moral quandaries on an almost daily basis (as unwelcome as the thought may be, even our Supreme Court justices are capable of unprincipled behavior).

Our Founding Fathers intended the Supreme Court of the United States (colloquially referred to as simply the Supreme Court) to sit well outside party lines. But that originalism fails to satisfactorily define or explain our current political landscape – a landscape in which anyone with just a few thousand dollars to spare can buy access to our nine Supreme Court justices, and a landscape in which those justices themselves are legally bound by no code of ethics but their own personal morality.

In the following pages, I first define the problem at hand: the enigmatic, uncurbed influence activists and corporate actors currently wield over the Supreme Court of the United States, and the Court's ability to channel its own influence into judicial or political action. I then discuss the goals of both past and current reform efforts – outlining actualized and proposed changes to our current status quo – before exploring, in-depth, several relevant attempts at executing this reformation. Next, I provide a comprehensive analysis of the impact of these activities. I conclude with a brief, concluding summary of the issue, including recommendations for future reformative action.

Unchecked and Unbalanced: Judicial Lobbying and the Supreme Court

Justices of the Supreme Court are, under federal law, required to recuse themselves from adjudicating any cases with which they may have a personal or professional conflict of interest. But – as many reform activists and legal experts have noted throughout the years – this language is vague enough that it is open for broad interpretation; moreover, there is virtually no way to hold a justice accountable for failure to recuse themselves from any case whatsoever.[1] In practice, Supreme Court justices rarely disqualify themselves – unlike lower court judges, these guardians of our judicial system are not replaceable, so any recusal actually changes the number and partisan makeup of the court vis-à-vis whatever specific decision is at hand.

If, though, our Supreme Court justices treat this federal guidance as functionally optional, that behavior then has severe consequences for the integrity of the institution itself. It opens the door for opaque, underhanded political maneuvering – without any risk of real punishment, justices are free to conduct their personal and professional business as they see fit, whether that means accepting millions of dollars in honoraria from advocacy organizations or blatantly partying with activists and corporate actors. And that behavior has become much more egregious in recent years, according to Public Citizen Government Affairs Lobbyist Craig Holman. "Now with the stories of throwing money at the feet of these Supreme Court justices, bankrolling the Supreme Court Historical Society…a luxury vacation to a Texas ranch paid for by the owner of the Texas ranch, who had a case pending before the Supreme Court," Holman says, "That's all a form of influence peddling."[2]

[1] Kalb and Bannon, "Supreme Court Ethics Reform: The Need for an Ethics Code and Additional Transparency."
[2] Craig Holman, interview by Nicholas Shereikis.

Still, the issue has never truly attracted enough attention to provoke change. "It's never directly been a subject of our classes, that the Supreme Court doesn't have a code of ethics," says Jessica Mayes, a student attorney at the Jacob Burns Community Legal Clinics at The George Washington University Law School. "I was lucky to have a professor that took the time to at least point out that there are special interest groups that lobby the justices, at least post-Roe."[3] In academia, at least, it seems the freedom of our Supreme Court exists unquestioned.

But now it's not just academics, experts, and practitioners noticing this morally questionable behavior. *The Atlantic* ran a feature-length article in May 2022 in response to the early leak of the Dobbs opinion that overturned Roe v. Wade, arguing that the Supreme Court needs a binding code of ethics to restore integrity and transparency lest the American people lose faith in the institution entirely.[4] *Insider* and *The New York Times* both ran stories on the issue even more recently, mapping the ways in which sponsors of the Supreme Court Historical Society have used their status to purchase access to events attended by justices,[5] and the ways in which those relationships have occasionally evolved into private friendships – even, in at least one reported instance, using these connections to preview pending court decisions. [6] Further investigations into these dynamics revealed that in many cases, donors traded cash for face time with the very Supreme Court justices responsible for deciding cases to which their companies or organizations were named parties.[7]

[3] Jessica Mayes, interview by Nicholas Shereikis.
[4] Bauer, "The Supreme Court Needs an Ethics Code."
[5] Becker and Tate, "A Charity Tied to the Supreme Court Offers Donors Access to the Justices."
[6] Long and Newsham, "How Anti-Abortion Activists, Corporate Bigwigs and Conflicted Parties Co-Opted a Little-Known Society to Buy Priceless Access to the Supreme Court."
[7] Becker and Tate, "A Charity Tied to the Supreme Court Offers Donors Access to the Justices."

If this sounds like a problem to you, it's because it is – and it gets worse. Because as Fix the Court Executive Director Gabe Roth is quick to point out, judicial lobbying is also a cyclical problem. "The judicial lobbying that I'm most worried about is the lobbying done by the justices, their emissaries, and the Judicial Conference and the Administrative Office [of the U.S. Courts] themselves," says Roth. "The judiciary has one of the most effective lobbying arms in all of Washington in terms of trying to stop ethics bills, or stop conflict of interest bills, or stop…the Open Courts Act."[8] In other words, not only are third-party interests exploiting the lack of a legally binding Supreme Court code of ethics to directly lobby justices on any number of issues, but our justices themselves are using their own political cache to influence the passage of legislation that could affect their systems of operation.

Ultimately, our Supreme Court justices are functionally free to do whatever they want, however ethically reprehensible it may be to the American people – and we have no way to hold them accountable bar impeachment (as Roth puts it, "we're not going to get 67 senators to agree on anything besides naming post offices these days").[9] And lobbyists are similarly relatively free to interact with the highest court in our land as they deem appropriate, without facing any true consequences for their actions. It's an enormous oversight in our system of checks and balances that is slowly eroding public trust in our legal system, and one that many throughout the years have attempted (unsuccessfully) to resolve.

Goals of Reformation: Principles and Transparency

If the identified problem in question is the seemingly limitless agency of the Supreme Court to behave as it wants (including in its engagements with informal activists and lobbyists),

[8] Gabe Roth, interview by Nicholas Shereikis.
[9] Gabe Roth, interview by Nicholas Shereikis.

then the primary goal of any reform movement is simple: regulation. Of course, there are many diverse proposals that fall under this umbrella objective – Fix the Court advocates for approximately six "fixes," including cameras in courtrooms, term limits for justices, and timely and transparent financial disclosures – but the desired outcome remains relatively the same no matter the methods in which reformists attempt to hold the Supreme Court accountable for its behavior.[10]

Historically, most campaigns attempting to mitigate the power of the Supreme Court have focused on one particular policy proposal: the implementation of a legally binding code of ethics for Supreme Court justices. It's a notion that reform advocates have been floating for years, and one that resurfaces irregularly in national conversation about the issue – and in fact, it's doing so again now, as the American Bar Association's House of Delegates just recently approved a resolution urging the Supreme Court to adopt a code of conduct comparable to the code that currently governs lower-court judiciary.[11]

It's no secret that there are often many paths to success in achieving any objective; it would require much more space than we have in this single analysis to explore the breadth and scope of the entire judicial ethics reform movement. Luckily, however, it feels perfectly acceptable for us to focus exclusively on our primary goal of establishing a binding code of ethics for the Supreme Court given its inarguable prominence in national conversation on and debate over the issue.

[10] Gabe Roth, interview by Nicholas Shereikis.
[11] Joan Biskupic, "Supreme Court under Fresh Pressure to Adopt Code of Ethics."

Reformation: Attempts at Accountability

It may seem appallingly negligent on the part of our Founding Fathers to allow the Supreme Court to rule virtually unchecked and unbalanced. It's likely, however, that the error lays less in conscious malice than it does in simple naiveté – our justices are supposed to be insulated from partisan bickering by an appointment process involving presidential approval, Senate confirmation, and a guaranteed lifetime of service. Unfortunately, this model of our federal government has long failed to reflect our actual political culture and environment. And though many have attempted to resolve the issue throughout the years, we have yet to see any meaningful movement toward holding our Supreme Court justices accountable for their actions.

Despite repeated efforts beginning as early as 1973, the United States Congress has so far failed to impose conduct guidelines on the Supreme Court in any manner whatsoever.[12] Attempts to extend the Code of Conduct for U.S. Judges – which currently applies to all federal judges except those of the Supreme Court – to the highest judicial institution in the land have proved fruitless, facing opposition not only from adversarial lawmakers but from the justices themselves. In 2011, Chief Justice Roberts wrote in his end-of-year report that he believed Congress lacked the constitutional power to force a code of ethics on the Supreme Court. "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," Roberts wrote. "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."[13]

[12] Scott Bomboy, "Why the Supreme Court Isn't Compelled to Follow a Conduct Code."
[13] Simon Lazarus, "Bipartisan Supreme Court Reform Is Not a Pipe Dream."

Despite this clear challenge to congressional power, Democratic legislators still attempted to reintroduce a Supreme Court ethics bill in 2013, in 2015, and in several years following that, often in response to discrepancies in justices' financial disclosure as well as unreported trips sponsored by partisan advocacy organizations. This type of legislation has never made it past a subcommittee referral, however, at least partially due to Republican accusations that Democrats advanced the legislation solely to stifle the conservative-leaning institution's influence over our national culture and political system.[14]

Of course, we have seen some marginal success in pressuring the Supreme Court to adopt a code of basic ethics. "There are certain aspirational documents that have been introduced over the years [to establish a code of ethics for the Supreme Court]," says Roth. "In 1991 from Rehnquist, and another one from 1993. And those documents are still…applicable and seen as court policy today."[15] But however well-intentioned these resolutions may be, they lack the one thing necessary to successfully hold the Supreme Court and its members accountable: enforceability. However restrictive it may seem, any self-imposed policy is only credible per the personal willingness of our nine justices to adhere to it – and that means that despite these minimal efforts to restore credibility to Supreme Court, we still lack any true mechanism for ensuring our justices behave in a morally appropriate or proper manner.

Arguably the most meaningful contemporary attempt at Supreme Court ethics reform is the evolved Supreme Court Ethics Act. Reintroduced in our last Congress by Senator Chris Murphy (D-CT) and Representative Hank Johnson (D-GA), respectively, this bill would "require the Supreme Court of the United States to promulgate a code of ethics," citing a 2009 opinion

[14] Simon Lazarus, "Bipartisan Supreme Court Reform Is Not a Pipe Dream."
[15] Gabe Roth, interview by Nicholas Shereikis.

from Justice Anthony Kennedy stating that Congress does in fact have limited power over the highest court in the land.[16] Still in the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet, however, it looks unlikely to gain enough momentum for passage in at least the immediate future. "It's starting to look long-term," says Holman, "Under this court, we're not going to see it. And this court might be around for a long time."[17]

Failure: The Impact of the Reform Movement

It feels safe to say that attempts at imposing a code of conduct on the Supreme Court have been, so far, wildly unsuccessful. Between challenges from the justices of the Supreme Court themselves over issues of constitutionality and partisan blowback facing legislative sponsors of reform legislation, we have yet to see any real progress made on this issue.

And this reformative failure is evident not only in the lack of current legislation on the books, but also in the flagrantly unprincipled behavior of many of our current Supreme Court justices that flies in the face of common-sense ethical considerations. From Justice Ruth Bader Ginsburg's acceptance of the Berggruen Prize for Philosophy & Culture, worth a cool one million dollars, to the opaque nature of Justice Clarence Thomas' financial disclosure statements,[18] our justices have for years now escaped close scrutiny. Investigations into the Supreme Court Historical Society emphasize this issue,[19] as does Thomas' refusal to recuse himself from adjudicating cases involving the events of January 6, 2020 (following revelations of his wife's involvement).[20] "Ginni is highly involved in the whole Trump 'Big Lie,'" Holman

[16] 117th Congress, "H.R.4766 - Supreme Court Ethics Act."
[17] Craig Holman, interview by Nicholas Shereikis.
[18] Kim Geiger, Washington Bureau, "Clarence Thomas Failed to Report Wife's Income, Watchdog Says."
[19] Becker and Tate, "A Charity Tied to the Supreme Court Offers Donors Access to the Justices."
[20] Totenberg, "Legal Ethics Experts Agree: Justice Thomas Must Recuse in Insurrection Cases."

says, “And, you know, you’ve got to believe that Ginni and Clarence talk…judging from Clarence’s rulings.”[21]

It’s also worth noting that imposing a code of conduct on the Supreme Court is a matter of overturning status quo, which is always exceptionally difficult no matter the area of concern. “My sense is that no one [in the legal community] is really that concerned about it,” Mayes says, “It’s very much become the status quo and a lot of older legal professionals don’t even necessarily seem to think the lack of ethics and the lobbying are concerning.”[22]

Honesty Is the Best Policy: Recommendations for Ethical SCOTUS Reform

Our Founding Fathers intended the Supreme Court of the United States to operate independently of partisan politics. Unfortunately, this idealistic concept has been lost in practice – and without a binding code of ethics for our Supreme Court justices, the institution and its members act with impunity, working with outside parties (e.g., lobbyists) to further personal agendas and priorities. Congress has attempted to pass reformative legislation for several decades to curb this unchecked agency, so far without much luck; resolutions passed by the Supreme Court itself to address the issue are upheld only by the justices’ voluntary inclinations to adhere to them. Ultimately, if left unregulated, the Supreme Court risks losing key public faith in its authority as the highest law in the land and causing immeasurable damage to both our federal government and national political culture.

If precedent signals that there is much work to be done before we have any chance whatsoever of imposing a legally binding code of conduct on the Supreme Court, it’s at least a positive sign that the issue is once again at the forefront of national political conversation. “The

[21] Craig Holman, interview by Nicholas Shereikis.
[22] Jessica Mayes, interview by Nicholas Shereikis.

justices are discussing implementing a code [of ethics]," Roth says. "Kagan mentioned it in a hearing in 2019 – she said the justices were working on it – and the reporting [now] is that there's a draft outline of what topics should be discussed in it. And it's an ongoing conversation…so maybe something will come of that."[23]

But Roth isn't optimistic that the Supreme Court will suddenly decide to regulate itself in a meaningful way, given that it is still led by rational actors with their own self-interests at heart. Instead, the most plausible mechanism for this action seems to involve the passage of the newly introduced Supreme Court Ethics Act, which would enable the Judicial Conference to finally address the matter with the blessing of the United States Congress. The latest iteration of this legislation contains a key stipulation that the Judicial Conference could create different provisions for "different categories" of judges or justices, effectively answering previously vocalized concerns from Chief Justice Roberts that the members of the Supreme Court have unique concerns different than those of lower court federal judges.[24] It may be our best bipartisan chance at actually implementing this type of legislation.

The Supreme Court of the United States is broken. It functions, rather than independently, as a corrupted extension of our partisan political system, operating and making decisions with virtually no accountability mechanism in place to ensure that our justices work toward the nation's best interests – and activists, corporate actors, and lobbyists alike have all learned to exploit this oversight to their advantage. If we want any hope at restoring the authority, credibility, and integrity of the Supreme Court, it is urgently critical that we hold them to a legally binding code of ethics – today, tomorrow, and forever.

[23] Gabe Roth, interview by Nicholas Shereikis.
[24] 117th Congress, "H.R.4766 - Supreme Court Ethics Act."

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