



Does the Constitution Grant Congress Authority to Enact a Code of Ethics for the Supreme Court?

Recent revelations of Justice Clarence Thomas' failure to disclose financial transactions have fueled a growing demand for Congress to introduce new ethical standards for the Supreme Court. This has ignited a spirited debate over whether the legislative branch possesses the constitutional authority to impose a code of conduct on the judiciary.

As with any analysis of whether a branch of the federal government possesses the authority for some proposed act, the first step is the text of the Constitution.



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Therefore, in determining whether Congress may establish ethics rules for the Supreme Court, I believe the solution requires a three-step analysis. Let's begin with Article I of the Constitution.

Article I, Section 2 declares that "The House of Representatives ... shall have the sole power of impeachment," whereas Section 3 of Article I grants to the Senate of the United States "sole power to try all impeachments." Think of it this way: The charging of an officer of the federal government with impeachable offenses is the responsibility of the House of Representatives, but the determination of the guilt or innocence of the accused is the responsibility of the Senate.

Now, you may be asking why, in an article about Congress' power to establish ethics rules for the Supreme Court, I am describing the impeachment process. The answer is simple, and it is found in Article II, Section 4, which reads:

The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment of, and conviction of, treason, bribery, or other high crimes and misdemeanors.

There can be no rational exemption of judges of the Supreme Court from the category called "civil officers of the United States"; thus, Congress has the power to impeach Supreme Court justices.

The last step in the inquiry is found in Article I, Section 8, wherein Congress is granted authority 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."

I imagine the mere sight of the specter of the much maligned, much misused "Necessary and Proper Clause" caused many of you to furrow your brow, worried that I'm about to stretch this so-called "elastic clause" to permit the exercise of a power that would otherwise be unconstitutional. No way.

First, let me lay out the correct, intended application of the Necessary and Proper Clause, as explained by James Madison and Thomas Jefferson. In asserting that Congress did not possess the constitutional



Written by [Joe Wolverton, II, J.D.](#) on June 16, 2023

authority to create a national bank, Madison wrote, referring to the Necessary and Proper Clause:

Its meaning must, according to the natural and obvious force of the terms and the context, be limited to means necessary to the end, and incident to the nature of the specified powers.

The clause is in fact merely declaratory of what would have resulted by unavoidable implication, as the appropriate, and as it were, technical means of executing those powers. In this sense it had been explained by the friends of the constitution, and ratified by the state conventions.

The essential characteristic of the government, as composed of limited and enumerated powers, would be destroyed: If instead of direct and incidental means, any means could be used, which in the language of the preamble to the bill, “might be conceived to be conducive to the successful conducting of the finances; or might be conceived to tend to give facility to the obtaining of loans.”

Thomas Jefferson, speaking on that same topic, said:

It has been much urged that a bank will give great facility, or convenience in the collection of taxes. Suppose this were true: yet the constitution allows only the means which are “necessary” not those which are merely “convenient” for effecting the enumerated powers. If such a latitude of construction be allowed to this phrase as to give any non-enumerated power, it will go to every one, for [there] is no one which ingenuity may not torture into a convenience, in some way or other, to some one of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one phrase as before observed. Therefore it was that the constitution restrained them to the necessary means, that is to say, to those means without which the grant of the power would be nugatory.

What does that have to do with a proposed code of ethics created by Congress and imposed on the Supreme Court?

David Adler of the Alturas Institute [explained](#) it this way in a recent article on this topic:

It [Congress] 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.

There seems to be little doubt that defining those “high crimes and misdemeanors” for which federal officers may be impeached could comfortably fit within the limits of the Necessary and Proper Clause, as laid out by Madison and Jefferson.

At this point, then, we follow the path through the powers delegated to Congress with regard to the Supreme Court, the steps of that path being:

1. Congress has sole power to impeach and to convict civil federal officers, including judges of the



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Supreme Court;

2. Article II, Section 4 establishes the constitutional basis for impeachment: treason, bribery, and other high crimes and misdemeanors;
3. Article I grants to Congress authority to make laws that are necessary and proper to carrying out their enumerated powers;
4. Impeaching judges is a power enumerated as belonging to Congress; and,
5. Establishing a code of ethics as a means of charging a Supreme Court judge with an impeachable offense could reasonably be considered necessary and proper to Congress' impeachment power.

Finally, such a code, should it ever be enacted, would more clearly establish the definition of "good behavior" of Supreme Court judges, perhaps preventing that post from being limited only by the life of the judge who occupies it.



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