"Ensuring an Impartial Judiciary"

Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights

U.S. Senate Committee on the Judiciary

June 14, 2023

Prepared Testimony of Jennifer L. Mascott

Assistant Professor of Law & Co-Executive Director of the C. Boyden Gray Center, George Mason University's Antonin Scalia Law School

Dear Chairman Whitehouse, Ranking Member Kennedy, and Members of the Subcommittee,

Thank you for the invitation to testify about constitutional separation of powers questions related to the role of Congress in regulating the federal judiciary.[1] This statement reflects much of the prepared statement that I provided to the subcommittee in May 2022 just prior to the leak of the *Dobbs* opinion, as a focus on that deep breach of Supreme Court confidentiality overtook the discussion of Chairman Whitehouse's proposed legislation in the May 2022 subcommittee hearing.

My areas of academic expertise include constitutional law, separation of powers, federal courts, and legal interpretation. Previously I served as an Associate Deputy Attorney General and a Deputy Assistant Attorney General in the Office of Legal Counsel at the Department of Justice. I am a Public Member of the Administrative Conference of the United States and Vice Chair of the American Bar Association's Subcommittee on Constitutional Law and Separation of Powers.

My testimony will focus on the constitutional and statutory roles of Congress and the federal courts in structuring, authorizing, and carrying out

[1] This analysis represents my personal scholarly views as an academic and does not reflect any official position on behalf of my state government employer, the Scalia Law School of George Mason University.

the exercise of judicial power under Article III of the U.S. Constitution.[2] The Article III judiciary has a critical role to play in the resolution of concrete cases and controversies through the application of the rule of law.[3] Congress has a constitutional role in regulating and establishing the jurisdiction and structure of federal courts through its Article I authority to establish inferior federal tribunals and to make "necessary and proper" Laws for "carrying into execution" the judicial power.[4] That role is more constrained with respect to the federal "supreme Court," whose existence the Constitution explicitly specified and mandated.[5]

A number of legal scholars have observed that Congress's regulation of the federal judiciary must have a necessary and proper relationship to the exercise of federal judicial power as Congress's power to legislate regarding Article III courts derives from its authority to establish tribunals to carry out the discrete judicial power to resolve cases and controversies.[6] In contrast to other Article I, Section 8 congressional powers like the authority to regulate interstate and foreign commerce that Congress has the discretion to carry out as it sees fit, scholars have indicated that the discretionary aspects of the exercise of judicial power are to be left by Congress to the judiciary.[7] As a

---

[2] *See* U.S. Const. art. III, section 1 ("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.").

[3] *See* U.S. Const. art. III, section 2.

[4] *See* U.S. Const. art. I, section 8 (vesting in Congress the powers to "constitute Tribunals inferior to the supreme Court" and 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").

[5] *Compare* U.S. Const. art. III, section 1 ("shall be vested in one supreme Court"), *with id.* ("may from time to time ordain and establish").

[6] *See, e.g.*, Amy Coney Barrett, *Procedural Common Law*, 94 Va. L. Rev. 813, 839-46 (2008) (suggesting that there may be a certain core constitutional minimum of supervisory authority that courts must maintain over their operations that Congress would lack the authority to regulate even if it had the political will to do so); Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 Const. Commentary 191 (2001); David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. Rev. 75 (1999).

[7] *See* David E. Engdahl, Intrinsic Limits of Congress' Power Regarding the Judicial Branch, 1999 BYU L. Rev. 75, 101-02 (1999). Moreover, as a matter of historical practice, dating back to the first federal Congress the House and Senate authorized federal courts to devise their own procedural rules subject to significant discretion. *See, e.g.*, Rules Enabling Act of 1934; Judiciary Act of 1789, section 17 ("And be it

coequal branch of government, the federal judiciary is not subordinate to Congress and independently maintains its constitutionally vested judicial authority.[8]

Evident from the constitutional text, that discrete role within the federal structure is significantly distinct from the role of the executive and legislative branches charged with formulating and carrying out federal policy requirements. Given this constrained and constitutionally limited role, the Article III judiciary is the one federal branch whose members are not directly selected by an electoral process. The independent operation of the judiciary and the protection of its members through life tenure and salary protection mean that the judiciary properly exists independent of a number of the public accountability and transparency requirements that the Constitution and federal statutes apply to Congress and the executive.

For example, in contrast to the U.S. House and Senate, the constitutional text does not subject the federal judiciary to mandatory disclosure requirements. Article I, section 5 of the U.S. Constitution requires Congress to keep and publish a journal of its proceedings and to publicly record votes upon the request of one-fifth of its members that are present. The Article III judiciary is not subject to similar requirements, given the absence of any role of the public in the continuing selection of already-appointed members of the federal judiciary who are charged with the apolitical resolution of cases and controversies. Federal courts are not charged with the creation of new legislation and policy binding the American public, so the Constitution does not impose public records requirements on the judiciary like those imposed on Congress.

The absence of constitutional reporting mandates for the federal judiciary from the constitutional text does not itself prohibit the statutory creation of such requirements. But the imposition of any legislative

---

further enacted, That all the said courts of the United States shall have power . . . to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States.").

[8] *See, e.g.*, U.S. Const. art. III, section 1 ("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.").

reporting, ethics, and recusal requirements must properly and necessarily relate to the carrying out of judicial power.[9]

The current draft of the Supreme Court Ethics, Recusal, and Transparency Act would require the Supreme Court and the Judicial Conference to provide for a public notice and comment period when modifying judicial rules of conduct.[10] This requirement is unwise and inconsistent with the federal judiciary's role to adjudicate cases independent of political headwinds and considerations. In addition, the participation of the public in crafting judicial codes would be unwieldy and burdensome and ultimately hamper the functioning of the currently independent judiciary.

The draft legislation's provisions to permit individual members of the public to file ethics complaints contending that individual Supreme Court justices have violated federal law raise similar concerns.[11] Such a mechanism is in significant tension with the Constitution's core protection for the independent judiciary through lifetime tenure and salary protections and the constitutionally prescribed, and carefully tailored, impeachment procedures to address judicial misconduct.[12]

In addition, the proposed Act's provisions subjecting Supreme Court justices to the review and supervision of members of lower federal courts raise significant separation of powers and constitutional accountability concerns, along with the disruption they would likely pose to the operation of the federal judiciary.[13] In his landmark work on constitutional interpretation and structure, *Intratextualism*, Yale Law Professor Akhil Amar explains the position of "inferior" federal tribunals in relation to the Supreme Court and observes that by its terms the Constitution subordinates such tribunals to a federal supreme court.[14] Similar to the Constitution's reference to "inferior" federal officers, the Article I and Article III references to "inferior" federal tribunals connote bodies that are under their superior, the federal supreme tribunal. Reporting, ethics, and recusal codes that subject Supreme Court

---

[9] *Cf.* U.S. Const. art. I, section 8 (Necessary and Proper Clause).

[10] *See, e.g.*, proposed 28 U.S.C. § 365.

[11] *See, e.g.*, proposed 28 U.S.C. § 367.

[12] *Cf.* U.S. Const. art. I, section 2, clause 5; *id.* art. I, section 3, clauses 6-7; *id.* art. II, section 4 (impeachment provisions).

[13] *See, e.g.*, proposed 28 U.S.C. § 1660.

[14] *See* Akhil Reed Amar, *Intratextualism*, 112 Yale L.J. 747, 748-49, 759-60, 806-07 (1999).

justices to review by subordinate actors are outside the constitutionally permissible federal structure and in tension with the constitutional text.

Finally, as a policy matter, it is not clear why Congress should impose burdensome reporting and procedural requirements on the Supreme Court. Evidence suggests that the Article III judiciary currently is a solidly stable and well-functioning branch of federal government. The number of seats on the Supreme Court has been steady for more than 150 years, over the past 10 terms at least 35 percent of the Court's judgments in merits cases have been unanimous,[15] and the Court's decisions are transparent in the level of detailed explanation that the Court provides in written opinions when it resolves orally argued cases. President Biden began his Administration with an effort to probe whether the Supreme Court needs significant reform, and the president's reform commission saw no unified mandate to urge far-reaching reform, advising instead that many of the suggested structural changes to the Court that the Commission evaluated would "offer uncertain practical benefits."[16]

If Congress nonetheless determines to regulate the practice and exercise of federal judicial power, enactment of legislation related to the subject matter jurisdiction of federal courts and their remedial authority would be more impactful and more consistent with historical federal practice than the generation of new reporting and recusal requirements.[17] Congress could also legislate with more specificity when enacting federal law to provide even greater clarity about the federal policies it is authorizing, thereby avoiding the impetus for courts to apply the discretionary canons and interpretive tools that statutory ambiguity often purportedly triggers. Further, the tension of significantly powerful, non-electorally responsive federal courts would be alleviated if the federal government reduced its sphere of governance across the board, permitting more space for individual states and local communities to govern and operate.

---

[15] *See* Statistical Analysis on Unanimity, SCOTUSblog, *available at* https://www.scotusblog.com/wp-content/uploads/2021/07/Final-Stat-Pack-7.2.2021.pdf.

[16] *See* Presidential Commission on the Supreme Court of the United States, Draft Final Report at 7–8 (Dec. 2021), *available at* https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf.

[17] *Cf.* Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALABAMA L. REV. 1 (2019); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017).