

May 2, 2023

The Honorable
Members of the Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Chairman Durbin, Ranking Member Graham, & Members of the Senate Judiciary Committee:

I was invited by this Committee to elaborate on my public statements and views as to whether the Supreme Court should be bound to ethical standards of conduct. I am honored to do so.

Because of the reverence in which I hold the Supreme Court and the respect in which I believe all Americans should hold the Supreme Court, I have long held these views.

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The Supreme Court of the United States is a sacred institution in America, by command of the Constitution of the United States.

As the guardian of the Constitution and protector of the Rule of Law in America, the Supreme Court is entitled to, and deserving of, abiding respect. Quite unlike its two coordinate branches of government, the Supreme Court is peculiarly and uniquely dependent upon respect, because respect for the Court is ultimately the source of the Court's "judicial Power." This, too, is by purposeful design of the Constitution.

As Alexander Hamilton explained the three branches of government and their respective powers in Federalist No. 78: "The judiciary [in contrast to the Executive and the Legislature] has no influence over either the sword or the purse;

no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”

The only power the Supreme Court has is its mere judgment, and at that, it must depend for the efficacy of that mere judgment upon the respect and good faith of the Executive and the Executive’s power to execute the laws. The Supreme Court depends upon the respect and good faith of the Congress of the United States, as well. And each, the Congress and the Executive, depend upon the respect and good faith of the Supreme Court. In this way do the three branches of government depend and interdepend upon each other.

This is all toward the end of saying that the “judicial Power,” the power of the Supreme Court, is ultimately dependent on the respect that its judgments command, or not, from the American People. It depends on the respect of the American People, as opposed to any other, because as Alexander Hamilton also explained in Federalist No. 78, the will and the power of the American People -- the former expressed and the latter delegated by the People in the Constitution to their government -- are superior to the wills and the powers of all three, the Legislature, the Executive, and the Judicial, branches of government.

Accordingly, the Supreme Court’s power is greater or lesser as respect for its judgments by the American People waxes and wanes, ebbs and flows. This, too, is by constitutional design.

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The Supreme Court is obligated under the Constitution to jealously preserve, protect, and defend its “independence” and its “judicial Power” from encroachment by the Legislature and the Executive, just as each, the Legislature and the Executive, is obligated to jealously preserve, protect, and defend, its independence from the other two branches of government.

Because the Supreme Court is obliged to preserve and protect the “judicial Power” that has been conferred upon it by the American People, the Court has no higher obligation than continually to assure and reassure the American People in every way both necessary and possible that the Court and its judgments are deserving of the abiding respect that the Court and its judgments are to be accorded.

The respect in which the Supreme Court is held by the American People is a function of both the respect that the Court's judgments command and the respect that the Court earns by virtue of the manner in which it comports itself publicly and privately in the course of discharging its solemn judicial duties. It is the Supreme Court's duty to acquit itself in the discharge of its judicial responsibilities so as to continually assure and reassure the American people that its judgments are deserving of respect. It is also the duty of each and every man and woman upon whom is conferred the privilege to serve on the Supreme Court to conduct themselves in their non-judicial conduct and activities in such a manner that they are individually deserving of respect -- indeed, beyond reproach, not only in fact, but also in appearance. This, at all times and places, in both public and in private.

The continuing obligation of the Supreme Court to ensure faith, respect, and confidence in the Court assumes a continuing need to reexamine itself as faith, respect, and public confidence in the Court ebbs and flows, which public confidence in the Court has historically done and can be expected to do in the future. This continuing obligation to assess itself -- to look in the mirror at itself if you will -- exists irrespective of whether the ebbs and the flows are believed to be justified by the Court.

Nothing less than all of this is required of the Supreme Court in order that it be able always to preserve, protect, and defend the sanctity of the institution of the Supreme Court, and thereby be able always to preserve, protect, and defend the sanctity of the Constitution of the United States against all enemies, foreign and domestic.

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The nation should never have reason to question the ethical conduct of the Supreme Court. It is the responsibility of the Supreme Court, and of each Justice who serves on the Court, to ensure that there never even be such a question raised.

Thus, there should never come the day when the Congress of the United States is obligated to enact laws prescribing the ethical standards applicable to the non-judicial conduct and activities of the Supreme Court of the United States, even though it indisputably has the power under the Constitution to do so, but paradoxically, does not have the power to require the Court to prescribe such standards for itself.

But if that day were ever to come, it would hardly be a constitutional crisis or anything of the sort. The non-judicial conduct and activities of the Supreme Court are subject to law, just like every other citizen's conduct and activities are subject to the law. Much of the Justices' non-judicial conduct and activities are of course subject to law today.

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Respectfully, the Congress should not want, or want to have, to prescribe ethical standards of conduct for the Supreme Court. By the same token, respectfully, the Supreme Court should not want Congress to prescribe ethical standards for the Court, either. For its part, the Supreme Court should want, without quibble, to subject itself to the highest possible professional and ethical standards that would render the Court beyond reproach, because such would ensure to the fullest extent possible that the Court is always beyond reproach in its non-judicial conduct and activities.

The Supreme Court should want to lead by the example that only it can set. It should want to conduct itself in its non-judicial activities in all ways such that it is beyond reproach. Indeed, such that it is beyond all reproach.

For, to whatever extent the Court does not subject itself to the highest possible professional and ethical standards -- or only grudgingly does so -- to an even greater extent does it depreciate not only its power to preserve, protect, and defend the institution of the Supreme Court, it also depreciates its power to preserve, protect, and defend the Constitution of the United States, which is the high charge that the American People have bestowed upon the Supreme Court.

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Whether the Supreme Court is subject to ethical standards of conduct or not is emphatically not a partisan political issue and must not become one. But just as emphatically, the issue of the Court's ethical standards of conduct does not present a constitutional question, much less one of any constitutional moment.

This is not to say that the issue and question of whether the Supreme Court should be bound to ethical standards in its non-judicial conduct and activities is not important. It is unquestionably important. It is even of surpassing importance. But it ought not be thought of as anything more -- and certainly nothing less -- than the housekeeping that is necessary to maintain a Republic.

Lest the Congress and the Supreme Court ill serve the nation in the course of attempting to resolve the constitutionally fraught question before them, they should together address the question with the solemnity and wisdom that the question deserves and requires. If they do but this, they will almost assuredly conclude that the answer they seek is the answer they both should want.

Respectfully,

J. Michael Luttig