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Opinion

The Supreme Court's ethics code amounts to 'You're not the boss of me'

By Ruth Marcus Associate editor | November 14, 2023 at 11:29 a.m. EST

It's better to have a code of conduct for Supreme Court justices than not to have one. That's the most that can be said for the document the justices issued Monday — belated, grudging and inadequate to the task of restoring the court's tattered reputation.

For the most part, the code would not have prevented, nor would it punish or otherwise address, the episodes that have so alarmed the public. Not Justice Clarence Thomas's acceptance of, and failure to disclose, luxury vacations and travel from Dallas billionaire Harlan Crow. Not his failure to recuse himself from Jan. 6-related cases despite his wife's involvement in challenging the election results. Not Justice Samuel A. Alito Jr.'s undisclosed travel to an Alaskan fishing lodge on the private jet of a hedge fund tycoon with business before the court.

I could go on, but you get the point. It's difficult, maybe even impossible, to legislate good judgment or prevent the culture of ingrained entitlement that these episodes expose. No code of conduct can substitute for common sense and a basic understanding of how unseemly these episodes appear to a public that believes justices shouldn't profit from their lofty positions or scoop up goodies not available to ordinary mortals.

But no code of conduct is meaningful without a mechanism for enforcement and accountability, which is completely absent from the new document. Lacking that, there is every reason to believe that this behavior will persist, that spotty and reluctant compliance with ethics and disclosure rules will continue, and that the court's reputation will suffer accordingly.

The new document bristles with the court's resentment at the position in which it finds itself — and it casts the blame on a misinformed public, not the justices themselves. “The absence of a Code,” it notes, “has led in recent years to the misunderstanding that the Justices of this Court, unlike all other jurists in this country, regard themselves as unrestricted by any ethics rules.”

There are a few nuggets of improvement buried within the document's 14 pages. For instance, Thomas's defenders justified his acceptance of tuition payments from Crow for his grandnephew — whom he was raising “as a son” — on the hyper-legalistic grounds that federal ethics rules did not cover this relationship and it was therefore not a “reportable gift.” The new code addresses that insupportable deficiency, providing that “a ‘member of the Justice's family’ means any relative of a Justice by blood, adoption, or marriage, or any person treated by a Justice as a member of the Justice's family.” This is good.

The code's split-the-difference treatment of justices' involvement in fundraising events for “law-related or other nonprofit organizations” is more questionable. It affirmatively permits justices to participate in such activities, clearing the way for episodes such as Thomas's

attendance at donor events for the conservative Koch network. This remains unwise and unnecessary.

At the same time, the code provides that justices “should not knowingly be a speaker, a guest of honor, or featured on the program of such event. In general, an event is a ‘fundraising event’ if proceeds from the event exceed its costs or if donations are solicited in connection with the event.” If taken seriously, that would seem to bar justices from speaking, as several have, at the annual Federalist Society dinner. If so, good on that, too.

The biggest omission is the glaring absence of accountability. This is a “you’re not the boss of me” code, up to each individual justice to self-administer — an approach that would be more tolerable had some justices not already proved themselves to be tone-deaf and negligent, or worse, in complying with the rules.

The court needs to safeguard its independence, so it is, admittedly, tricky to figure out how to craft an enforcement mechanism. But there are smart ways to set up a system that protects the judiciary without sacrificing accountability. One smart approach would be to establish a panel of judges, perhaps retired jurists, who could examine ethics complaints and issues of compliance. Another, as former Justice Department inspector general Glenn Fine has urged, would be an inspector general who could do the same.

But a code without oversight is mere window-dressing. First-year law students learn the word “precatory” — meaning “expressing a hope or wish.” For example, my will may express my desire that my children cooperate in the disposition of my assets. It is merely precatory, not binding. That is where the justices would like to leave their ethics code, as a hope or wish that they all behave appropriately. Experience teaches the inadequacy of that aspiration.