Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

IN RE COMPLAINT AGAINST JUDGE SHAPIRO

JUDICIAL ETHICS COMPLAINT

No. 09–68. Argued August 10, 2020—Decided August 17, 2020

Judge Jetpacksoup, referred to as Judge Shapiro was caught practicing law on an alternate account while in office. A judicial ethics complaint was filed against him, calling for him to be reprimanded or expelled. In response, Judge Shapiro admits to having practiced law on an alternate account and to also having participated in the destruction of the evidence of his wrongdoing. He expresses his regret and asks the Court not to expel him, indicating he would welcome a less severe form of punishment.

Held: Judge Shapiro shall remain suspended until the end of August 18th, 2020. Pp. 1–8.

(a) The facts of this case are not disputed. Judge Shapiro admits to his wrongdoing and acknowledges that some punishment is warranted. The Court agrees that some punishment is in order but concludes that expulsion would be unnecessarily severe in light of the actual wrongdoing committed by Judge Shapiro. Pp. 1–3.

(b) Suspension is a constitutionally legitimate form of punishment as an adjunct of this Court's expulsion power, when considered in its judicial context. Suspension is also the most appropriate form of punishment for Judge Shapiro's behavior. Pp. 3–8.

BORK, J., delivered the opinion of the Court, in which HOLMES, C. J., and PITNEY, THOMPSON, KAGAN, and JAY, JJ., joined. FRANKFURTER, J., filed an opinion concurring in the judgment in part and dissenting in part, in which STEWART and BUTLER, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 09–68

IN RE COMPLAINT AGAINST JUDGE JETPACKSOUP AKA JUDGE SHAPIRO

ON JUDICIAL ETHICS COMPLAINT

[August 17, 2020]

JUSTICE BORK delivered the opinion of the Court.

Judge Jetpacksoup, otherwise known as Judge Shapiro, admits to having "practiced law on an alternate account while a judge."[1] Under federal law, that is a "high misdemeanor."[2] The only question before us is what to do about it. We've considered the full context of this case and concluded that while some punishment is necessary, expulsion would be excessively harsh. Thus, we order that Judge Shapiro shall remain suspended until the end of August 18, 2020.

I

The facts of this case are straightforward and undisputed. And there is no question they merit punishment.

A

Judge Shapiro is a judge of the federal district court. At the same time he was serving as a federal judge, he "authored [and submitted] a dismissal motion on an alternative account."[3] His conduct was quickly discovered by his

[1] Tr. of Oral Arg. 5.
[2] 28 U. S. C. §454.
[3] Tr. of Oral Arg. 5.

colleagues on the district court, who matched the google drive account which uploaded the dismissal motion to the account he uses for his official judicial work. This matching was done using public metadata contained on the google drive document.

The other district judges submitted an ethics complaint to this Court, citing provisions of federal law which make the conduct of Judge Shapiro a "high misdemeanor."[4] They attached screenshots of the metadata to demonstrate that Judge Shapiro was in fact guilty.[5]

After Judge Shapiro became aware of the complaint, he submitted privacy claims to the web service that hosted the screenshots. These privacy claims resulted in the screenshots of the public metadata being removed. Judge Shapiro "brag[ged] . . . about it to [a] friend."[6] In his communication with his friend, he said he "want[ed] to see the expression of surprise" on congresspeople's faces "when they [tried to] present the evidence at committee."[7] The apparent objective of having the evidence removed was to obstruct the congressional investigation into his conduct.[8]

After these ethics proceedings began, legislation was introduced in Congress which would've had the effect of exonerating Judge Shapiro. While Judge Shapiro denies being involved in the authorship of the legislation, he admits to being "friends" with the responsible congressman.[9]

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[4] Complaint 1.

[5] *Ibid.*

[6] Tr. of Oral Arg. 4; see also *id.*, at 5 (Judge Shapiro confirming that this is what he did).

[7] J. A. 3.

[8] Judge Shapiro disputes this point. He insists that the reason for his filing of the privacy claim was a genuine interest in privacy. We don't have any reason to doubt his sincerity and thus don't rely on this detail in forming our judgment.

[9] Tr. of Oral Arg. 9.

He also attests to "frequently" voice calling the congressman and to having foreknowledge of the legislation.[10] This isn't a separate offense, but merely another factor our decision must take into account.

B

Judge Shapiro's conduct merits some form of punishment. We don't consider what he did all that severe, but we can't let it go unaddressed.

To start, Judge Shapiro clearly violated federal law's prohibition on judges practicing law while in office. And when rules are violated, there must be a penalty. The third branch of government, like all others, "must function."[11] And if that means we "must have rules" and be "effectively managed," then so be it.[12] Congress's power to adopt the rule against the judicial practice of law "cannot any longer be seriously doubted."[13] Consequently, Judge Shapiro's decision to break that rule cannot go unpunished, lest we create a sense of impunity within the courts.

At the same time, expulsion is a severe remedy. Removal from office, "[i]n an ideal world, [would] be reserved for the worst of the worst."[14] And while Judge Shapiro's conduct warrants punishment, it doesn't demonstrate that he "can't be trusted to remain in public office."[15] We thus turn to possible alternatives.

II

The most obvious potential alternative is suspension. While this case was pending, we turned to suspension as an interim remedy. That action firmly established our power

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[10] *Ibid.*

[11] *Hastings* v. *Judicial Conference of the United States*, 593 F. Supp. 1371, 1380.

[12] *Ibid.*

[13] *Ibid.*

[14] *Kolibob* v. *United States*, 9 U. S. 104, 112.

[15] *Ibid.*

to issue suspensions of district court judges as an adjunct of our expulsion power for purposes of precedent. But we have not yet offered a legal justification for this power. Our authority stands on two legs.

This Court's power of judicial suspension is based on the combined force of (i) our expulsion power and (ii) our broad administrative powers under Article III.

A

The expulsion power transforms the dynamic within our court system and provides the foundation for suspension.

In real life, it should go without saying that this Court has no inherent disciplinary power over the lower court judges. Any such power must be conferred by statute. But our Constitution's Expulsion Clause reflects the framers' policy judgment that our courts work better when this Court has the capacity to provide for judicial discipline. We "have no commission" to second guess this policy choice.[16] Our duty is to give it real effect.

The granting of a power or duty "implies . . . all the authority necessary to make the grant effectual."[17] Indeed, any grant of "power carries with it all the usual, ordinary, and necessary means to effectuate the beneficial exercise of the power."[18] When the framers granted the expulsion power, which entailed a duty of judicial discipline, it can hardly be assumed they meant to deviate from this usual rule of thumb. The other powers needed to make the expulsion power an effective provision for judicial discipline are entailed in the grant of the expulsion power itself.

It is obviously "usual, ordinary, and necessary" that a person who has done something that merits consideration of expulsion may need to be restricted in their performance of judicial duties while the Court considers expulsion.

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[16] *Ibid.*

[17] *Pensacola Tel. Co.* v. *West*, 96 U. S. 1, 18.

[18] *Ventress* v. *Smith*, 35 U. S. 161, 169

B

Reference to state-level supreme courts that share the same power of removal confirms the existence of the suspension power, at least preliminary to an expulsion decision, and we see no reason to cabin that power to a preliminary context. If the Court has the power to suspend a judge preliminary to an expulsion decision, it makes sense that the Court could choose, *a fortiori*, to continue such a suspension for a fixed period of time instead of turning to the extreme option of expulsion.

1

As we've chronicled, "suspension falls within the ambit of the exercise of our constitutional authority" to expel.[19] And we, like other high courts, have never had a "tradition" of "refus[ing] to exercise judicial power when there was an established need for it and . . . no constitutional barrier to its exercise."[20] Life tenure presents no such barrier because "a suspended judge remains a judge and is merely denied the power to perform his judicial duties for a limited period of time."[21]

When discussing preliminary suspensions, there is no doubt as to "established need." When a judge has done something that raises the specter of expulsion, a temporary restriction is more than appropriate. The Constitution does not require we proceed zero-to-one-hundred where expulsions are concerned. Preliminary suspension allows this Court to fully review the case without the risk of an admin attack or other interim abuse of power by the judge under investigation.

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[19] *In re Coffey's Case*, 949 A. 2d 102, 193–194 (N. H. 2008). State supreme courts who possess the power to "remove . . . judge[s]" have likewise found a subsumed power to "suspend." *In the Matter Turco*, 137 Wn. 2d 227, 249 (Wash. 1999),

[20] *Coffey*, *supra*, at 194.

[21] *Matter of Ross*, 428 A. 2d 858, 868 (Me. 1981).

2

There is no reason to draw the line at the termination of the preliminary context. There is no rational reason for the Court to be bound to terminate a preliminary suspension with a decision either to expel or not.

We've established the legality of preliminary suspensions and it's easy to imagine the value in permitting this Court to gradually phase out such a suspension after the conclusion of proceedings in lieu of an expulsion upon a conclusion that some punishment is warranted. Judge Shapiro himself has expressed his preference for a narrower punishment than expulsion.[22]

The legality of extending a suspension for a reasonable fixed period past our resolution of an ethics complaint is clear.

C

Where we see clarity, however, JUSTICE FRANKFURTER sees question marks.

In his dissenting opinion, he cites the Congressional Expulsion Clause, which says: "Each House may . . . punish its Members for disorderly behavior, and, with the Concurrence of two thirds, expel a Member."[23] He reasons that the framers, in writing this clause, didn't understand "expel" to encompass anything other than expulsion (or they wouldn't have separately granted the power to "punish . . . for disorderly behavior") and so *our* power to expel can't possibly encompass suspension.[24] In making this argument, JUSTICE FRANKFURTER overlooks a few things.

To start, while we normally assume that in a legal document "identical words used in different parts . . . are in-

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[22] Tr. of Oral Arg. 13 (Judge Shapiro explaining that he "would welcome any result that meant [he] could continue being a district court judge").

[23] Art. I, §5, cl. 2.

[24] *Post*, at 1–2.

tended to have the same meaning," we don't make that assumption for no reason.[25] The consistent-usage canon is based on the common sensibility that when a person writes a document, especially a legal document, they will probably avoid confusion by choosing their words carefully and remaining consistent. But "as [with] countless othe[r]" laws, the Constitution wasn't written entirely by one person and thus isn't a "*chef d'oeuvre* of legislative draftsmanship."[26]

Importantly, the Congressional Expulsion Clause the dissenting opinion references was drafted in 1789, while the Judicial Expulsion Clause we rely on was drafted only a few years ago. The consistent-usage canon has some relevance, but it's one thing to assume a single writer consistently used one meaning of a word in their writings over the span of a year, and something completely different to assume different writers over the span of more than 250 years used that same meaning in *their* writings. We can't just invoke a canon and ignore all other context. On the contrary, actually, "the presumption of consistent usage *readily yields* to context."[27]

Regardless, our argument isn't even that the word "expel" on its own contains the power to suspend. We've seen that the power to suspend is an implied "*adjunct* of our expulsion power."[28] And that's only clear once we factor in "our broad administrative powers under Article III."[29] The dissenting opinion's consistent-usage argument doesn't address the meat of our reasoning.

III

We've determined that punishment is warranted here,

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[25] *Environmental Defense* v. *Duke Energy Corp.*, 549 U. S. 561, 574.

[26] *Utility Air Regulatory Group* v. *EPA*, 573 U. S. ___, slip op. 14.

[27] *Id.*, at slip op. 15 (emphasis added; internal quotation marks removed).

[28] *Supra*, at 3 (emphasis added).

[29] *Supra*, at 4.

but that expulsion would be too extreme and we've determined that a reasonable suspension is a constitutionally legitimate form of punishment. Thus, we order that Judge Shapiro shall remain suspended until the end of August 18, 2020.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 09–68

IN RE COMPLAINT AGAINST JUDGE JETPACKSOUP AKA JUDGE SHAPIRO

ON JUDICIAL ETHICS COMPLAINT

[August 17, 2020]

JUSTICE FRANKFURTER, with whom JUSTICE STEWART and JUSTICE BUTLER join, concurring in the judgment in part and dissenting in part.

In this case, Judge Jetpacksoup is accused of practicing law on an alternate account. Judges are prohibited from practicing law by statute. Disobeying this not only puts Judge Jetpacksoup in an awkward position to pass judgment on defendants, but it also could permanently damage the reputation and trust of this institution. What he did is undisputed, and I concur in the Court's judgement to hold him to account. The Court, acknowledging Judge Jetpacksoup's honesty and remorse, set out to find a punishment that is less severe than expulsion. It is important to note that the majority is correct in their hunch that expulsion is not the only option. There are other actions the court can explore. For example, a censure would be acceptable. This type of punishment is what I would recommend in this case. We are not empowered, however, to suspend judges.

The Constitution grants the Supreme Court with the power to "expel . . . members of the federal district Court provided two thirds of the Court vote in favor." U. S. Const., amend. XVII. The majority argues that there is some secret, vague suspension power hidden in the word "expel." But the Framers already had a beautiful framework to include a suspension power exhibited in the Congressional Expulsion Clause: "Each House may . . . *punish its Members*

for disorderly behavior, and, with the Concurrence of two thirds, expel a Member." U. S. Const., art. I, §5, cl. 2 (emphasis added). Does "expel" stand mightily and broad before the Supreme Court only to blush and constrict in the face of Congress? Were the Framers just being redundant? Of course not! "Expel" does not mean "suspend"; it means "expel."

For support, the majority has to reach all the way to a New Hampshire Supreme Court opinion, and still fails to find supporting case law. The majority almost literally turns *In re Coffey's Case* on its head. In that case, the question was not whether the New Hampshire Supreme Court could suspend judges. It was whether they could suspend judges indefinitely, effectively expelling those judges (and perhaps encroaching on the New Hampshire legislature's power to impeach judges since the New Hampshire Constitution, unlike the U. S. Constitution, did not grant the judiciary with the power to expel). Our equivalent would be whether we could temporarily expel judges; neither side argues this, and the case is thus inapplicable.

Their analysis of *In the Matter Turco* is similarly mislead. The Pennsylvania Constitution, under which Judge Ralph Turco was suspended, explicitly states that a "judge . . . may be suspended, removed from office or otherwise disciplined for . . . misconduct in office." *In the Matter Turco*, 137 Wn. 2d 227, 242 (Wash. 1999). The question in that case was whether Judge Turco could be suspended for misconduct (pushing his wife to the floor in public) not performed in the course of his official duties. This case is taken out of context and similarly inapplicable.

With no case law, the majority contends that the wording of the Constitution just should not matter since, in the Congressional Expulsion Clause, "expel" was said in 1789 and, in the Judicial Expulsion Clause, "expel" was said in 2018. In 1755, "expel" was defined as "to throw out; eject." A Dictionary of the English Language: A Digital Edition of the

1755 Classic by Samuel Johnson. In 2018, "expel" was defined as "to force out; eject." Merriam-Webster Dictionary (2018). I am unable to find the tiny mouse hole "expel" scurried through.

Even despite this, the majority's assertion still would not be correct. While their argument may work for amendments to the United States Code, which the Congress modifies directly from the real-life version, it fails when applied to the Constitution. Both clauses were revised to fit the needs of our roleplay society and were enacted at the exact same time. The Congressional Expulsion Clause was also amended both in function and style. Our Framers were meticulous, and I doubt they would have allowed two contradicting definitions of the word "expel" to coexist but meanwhile amend "behaviour" to "behavior" just eight words earlier.

The Framers put the ball in Congress's court to determine whether the Supreme Court should have the power to suspend judges, or if it would be unwise to allow a judge the Supreme Court determined to be unethical to continue to adjudicate cases.

The majority's expansion of the language is not rooted in the Constitution and puts this Court's policy preferences on clear display. It is not our prerogative to promote our "ideal world." *Kolibob* v. *United States*, 9 U. S. 104, 112 (2020).

I respectfully dissent from the Court's decision to suspend Judge Jetpacksoup.