Campbell Law Review

Volume 40
Issue 2 *Spring Symposium 2018*

Article 5

2018

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Carolyn A. Dubay

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CAROLYN A. DUBAY*

ABSTRACT

Promoting and protecting public confidence in government institutions is central to continued faith in the rule of law. As a result, when personal scandals or internal failures threaten public trust in government institutions, policy makers have been quick to respond with new measures to increase accountability for misconduct. In the twentieth century, the Watergate scandal of the early 1970s led to significant changes in accountability for misconduct by high-level public officials and in the legal profession generally. For judges, in the years just prior to Watergate, high-profile scandals involving federal judges also led to significant changes in the regulation of judicial conduct. Since the 1970s, however, the types of ethical challenges faced by all public officials have become more complex in the digital age.

This Article explores some of the most common ethical issues facing judges as they interact in the digital world, from the use of social media to Internet research. To put the emerging judicial ethics rules relating to the use of social media and the Internet in context, this Article lays the foundation for preserving public confidence in the courts through discussion of the three core values of judicial ethics—independence, integrity, and impartiality—and how judicial ethics enforcement evolved in the post-Watergate era with the introduction of independent judicial enforcement agencies. Looking to recent disciplinary actions by these agencies involving judicial use of social media and a wave of concern over independent Internet research, this

* Carolyn A. Dubay is the Executive Director of the North Carolina Judicial Standards Commission. She dedicates this article to the memory of Judge Doug Parsons, a member of the Commission from 2014 to 2017. The views, ideas, and research contained in this article are attributable to the author alone and do not reflect the position or work product of the Judicial Standards Commission.

Article posits that prophylactic rules regarding social media use by judges are not necessary to maintain public trust and confidence in the courts. Instead, resort to and strict enforcement of the existing rules that require judges at all times to embrace the core values of independence, integrity, and impartiality are both sufficient and adaptable enough to be applied to the variety of disciplinary issues that can arise when judges engage with the digital world.

INTRODUCTION

James Madison observed in Federalist No. 51, "If men were angels, no government would be necessary."[1] By design, therefore, our federal and state constitutions separated government functions and created independent

1. THE FEDERALIST NO. 51 (James Madison).

institutions, including the judiciary, to protect the people from the danger of political power consolidated in a single person or faction.[2] For this system to function properly, the public must have confidence that those institutions will act with integrity, fairness, and efficiency. The task of promoting and protecting that public confidence is challenging under any circumstances but becomes especially difficult when scandals arise or when politicians attempt to delegitimize the institutions empowered to hold them accountable. As Abraham Lincoln rhetorically asked a group of students in 1838: "[W]hy suppose danger to our political institutions?"[3] Lincoln then ominously warned of threats to our democracy from "men of ambition and talents" and "possessed of the loftiest genius" who would not appreciate or value the limits on political power embedded in the Constitution.[4] According to Lincoln, the success of our constitutional democracy depends on a citizenry that is united, well-educated, and "attached to the government and laws."[5] In other words, the public must be educated about the importance of the rule of law and must have confidence in the ability of our government institutions to protect the rights and principles of the Constitution.

Since Lincoln's speech in 1838, public confidence in government institutions has waxed and waned.[6] Calculated political attacks, personal scandals, and the internal failures of institutions themselves have threatened public trust in the integrity and fairness of public officials at all levels of government. At the same time, high-profile political scandals have periodically led to significant changes in the way public officials are held accountable for misconduct. In the twentieth century, the Watergate scandal led to the enactment of the federal Ethics in Government Act,[7] which reshaped and challenged the role of the independent prosecutor in

2. *Id.* ("[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.").

3. Abraham Lincoln, *Address Before the Young Men's Lyceum of Springfield, Illinois* (Jan. 27, 1838), *in* 1 THE COLLECTED WORKS OF ABRAHAM LINCOLN 108, 113 (Roy P. Basler ed., 1953).

4. *Id.* at 114.

5. *Id.* To build this attachment to a system of government and laws, Lincoln also urged constant education on the importance of the rule of law: "Let reverence for the laws . . . be taught in schools, in seminaries, and in colleges;—let it be written in Primmers, spelling books, and in Almanacs;—let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice." *Id.* at 112.

6. *See Beyond Distrust: How Americans View Their Government,* PEW RES. CTR. (Nov. 23, 2015), https://perma.cc/GC26-FYVF (detailing polling on public trust in government since 1958).

7. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 5 U.S.C. app. §§ 101–505 (2012)).

investigating alleged misconduct in the Oval Office.[8] The scandal also spurred significant changes in ethics requirements for public officials and professional standards for lawyers.[9]

Like officials in the political branches of government, federal and state judges are not immune from scandal and public criticism. Even so, and as Francis Bacon mused in his 1612 essay *Of Judicature,* "The place of justice is an hallowed place . . . [which] ought to be preserved without scandal and corruption."[10] Holding individual judges accountable for misconduct raises special concerns, however. Without a doubt, maintaining public confidence in the administration of justice demands judges be disciplined for misconduct, but at the same time, the competing need for judicial independence demands an accountability process that is free from political influence. As Alexander Hamilton warned in Federalist No. 78, "[A]ll possible care is requisite to enable [the judiciary] to defend itself" from attacks by the political branches of government.[11] Even today, judicial leaders are quick to respond to concerns about misconduct in the judiciary in order to protect public confidence in the courts and stave off political intervention into the sensitive area of judicial discipline.[12] For the judiciary,

8. *See generally* Constance O'Keefe & Peter Safirstein, Note, *Fallen Angels, Separation of Powers, and the Saturday Night Massacre: An Examination of the Practical, Constitutional, and Political Tensions in the Special Prosecutor Provisions of the Ethics in Government Act*, 49 BROOK. L. REV. 113, 115–24 (1982) (discussing use of special prosecutors and events leading up to the independent prosecutor provisions of the Ethics in Government Act of 1978); *see also* Morrison v. Olson, 487 U.S. 654, 696–97 (1988) (rejecting constitutional challenge to the independent counsel provisions in the Ethics in Government Act of 1978); Mark Stencel, *Watergate 25: The Reforms*, WASH. POST (June 13, 1997), https://perma.cc/2NFM-E3SZ (discussing the numerous "good government" and campaign finance reforms that followed the Watergate scandal).

9. Tom Goldstein, *Watergate Stirs New Look at Lawyers' Self-Policing*, N.Y. TIMES, May 29, 1974, at 85 (noting that re-examination of legal ethics began with the American Bar Association in 1970, but Watergate brought the conduct of government lawyers into the spotlight, especially with G. Gordon Liddy, John Dean, and Spiro Agnew); *see also* Mark Hansen, *1965–1974: Watergate and the Rise of Legal Ethics,* A.B.A. J. (Jan. 2015), https://perma.cc/MSV7-U46J (noting that lack of training on legal ethics prior to Watergate could have contributed to the issues with the lawyers involved in the scandal) (quoting John W. Dean III as saying, "In 1972, legal ethics boiled down to: 'Don't lie, don't cheat, don't steal[,] and don't advertise"). After Watergate, ABA-accredited law schools were required to teach legal ethics, the Multistate Professional Responsibility Exam (MPRE) was introduced, and ethics became a regular part of continuing legal education (CLE). Hansen, *supra.*

10. SIR FRANCIS BACON, OF JUDICATURE (1612), *reprinted in* THE ESSAYS OF FRANCIS BACON 251, 255 (Mary Augusta Scott ed., 1908).

11. THE FEDERALIST NO. 78 (Alexander Hamilton).

12. *See, e.g.*, C.J. JOHN G. ROBERTS, JR., 2017 YEAR-END REPORT ON THE FEDERAL JUDICIARY 11 (2017) (announcing working group to address sexual misconduct by federal judges amid scandal involving claims of sexual harassment by Judge Alex Kozinski); *see also*

therefore, the ethical rules and compliance frameworks that developed in the post-Watergate era are markedly different from the regulatory structure for other public officials.

Looking to the present-day challenges to sustaining public confidence in government institutions, including the courts, the circumstances have changed dramatically since the 1960s. The types of ethical challenges faced by all public officials have become more complex in the digital age. As the business of government (and the courts) increasingly goes digital, and as we communicate electronically through email, texts, and social media more often, the ability for sensitive, embarrassing, or confidential information to be shared instantly with others poses new challenges for maintaining public trust in the government. Sometimes, nefarious actors, such as Julian Assange and his "transparency" organization WikiLeaks, publish leaked or hacked information. Other times, public officials themselves engage with platforms such as Twitter or Facebook to share information, political commentary, or other news. The language in these communications has become increasingly raw, outrageous, and politically charged.

This Article examines how judicial policy makers and disciplinary agencies have responded to the threat to public confidence in the courts arising from social media and Internet use by judges. As in other contexts, expectations of the conduct of judges are drastically different than expectations of political actors. For example, while a politician can tweet insults, make wild accusations, and use vulgar language, a judge who uses offensive and undignified language in a tweet or on Facebook, or who engages in a public feud with other officials through social media, could potentially face disciplinary action.[13] Similarly, while the digital frontier has offered exceptional opportunities for access to information on the Internet, judges continue to be bound by the strictures of the adversarial system that prohibit judges from conducting their own research on disputed factual issues.[14]

To put these judicial ethics rules in context, Part I of this Article lays the foundation for preserving public confidence in the courts through strict adherence to three core values—independence, integrity, and impartiality. It

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infra note 102 and accompanying text (discussing the Breyer Report on implementation of the federal Judicial Conduct and Disability Act). A common threat to the federal courts is the creation of an Inspector General to oversee the courts. *See* Diane M. Hartmus, *Inspection and Oversight in the Federal Courts: Creating an Office of Inspector General*, 35 CAL. W. L. REV. 243, 254 (1999) (noting that the creation of an Inspector General accountable to Congress to police the federal courts "raises questions involving the separation of powers doctrine and the effect such an office might have on judicial independence").

13. *See infra* notes 109–17 and accompanying text.

14. *See infra* Section II.B.

then examines how these core values were shaken by the judiciary's own "Watergate" moment in a scandal involving Supreme Court Justice Abe Fortas and the significant changes in judicial ethics enforcement that followed. Part II then details how contemporary judicial enforcement agencies and judicial ethics advisory committees have confronted the potential threats to public confidence in the courts arising from the Internet-based conduct of judges. Looking to recent disciplinary actions involving social media and a wave of concern over independent Internet research, this Part evaluates how this conduct undermines the core values of independence, integrity, and impartiality in the judiciary. Part III then posits that while some states have adopted prophylactic rules regarding social media use by judges, such restrictions may do more harm than good and thus are a disproportionate response to the potential threats to public trust in the courts arising from such conduct. Instead, resort to and strict enforcement of the existing rules that require judges at all times to embrace the core values of independence, integrity, and impartiality are both sufficient and adaptable enough to be applied to the variety of disciplinary issues that can arise when judges engage with the digital world.

I. JUDICIAL INDEPENDENCE AND PUBLIC CONFIDENCE: TWO SIDES OF THE SAME COIN

The North Carolina Constitution provides that "frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty."[15] For the judiciary, those fundamental principles include the basic tenet that a judge should decide cases independently and impartially and at all times act with absolute integrity. More than any other institution, these core values must not only be observed subjectively through the actual conduct of each individual judge but also objectively through consideration of the public's perception of the judge's conduct and its impact on public confidence in the fair administration of justice. For this reason, it is often said in assessing the conduct of judges that perception is reality.[16] And while there is no comparable Watergate, Whitewater, or WikiLeaks scandal challenging the judiciary (at least in terms of media coverage), history has shown that, at times, judges too are no "angels,"[17] and certain scandals and

15. N.C. CONST. art. I, § 35.

16. *See, e.g.*, Liteky v. United States, 510 U.S. 540, 565 (1994) (Kennedy, J., concurring) (noting common proposition that "[i]n matters of ethics, appearance and reality often converge as one").

17. *See supra* note 1 and accompanying text.

events have pushed forward much-needed reforms in how judges are held accountable for misconduct.[18]

A. The Trouble with Definitions: What is Public Confidence in the Judiciary?

For the judiciary, public confidence in the administration of justice is an ongoing concern. To quote Honoré de Balzac, "To distrust the judiciary marks the beginning of the end of society."[19] As a result, maintaining and measuring public confidence in the courts features prominently in public polling, strategic planning, judicial education, operational and procedural policies, and ethical regulations for judges.[20] The problem with "public confidence" as a goal of policy making in the courts is that it is hard to define and measure.[21] Without a precise definition of what public confidence means or how it can be measured, the regulation of judicial conduct has traditionally focused on maintaining public confidence through enforcement of specific rules that promote the three core values for judicial conduct: independence, impartiality, and integrity.[22]

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18. *See* ROBERTS, *supra* note 12; *cf.* Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1167 (1996) (commenting that various high-profile cases have caused concern that "post-Watergate cynicism is finally catching up with the judiciary").

19. Arthur Selwyn Miller, *Public Confidence in the Judiciary: Some Notes and Reflections*, 35 L. & CONTEMP. PROBS. 69, 69 (1970).

20. *See, e.g.*, N.C. COMM'N ON THE ADMIN. OF LAW & JUSTICE, FINAL REPORT: RECOMMENDATIONS FOR STRENGTHENING THE UNIFIED COURT SYSTEM OF NORTH CAROLINA 65–80 (2017) (detailing recommendations of the Public Trust and Confidence Committee and public polling on confidence in the courts); Hon. James L. Buckley, *The Constitution and the Courts: A Question of Legitimacy*, 24 HARV. J.L. & PUB. POL'Y 189, 189–90 (2000) (citing polls used by the ABA Commission on the Separation of Powers and Judicial Independence and noting "significant deterioration in public support for the judiciary").

21. Miller, *supra* note 19, at 73 (noting that because our society is pluralistic, public confidence in the judiciary has to be assessed according to which group is being discussed and how much esteem its members hold for different types of courts at different times).

22. *See* Gregory C. Pingree, *Where Lies the Emperor's Robe? An Inquiry into the Problem of Judicial Legitimacy*, 86 OR. L. REV. 1095, 1107–08 (2007) (arguing that proper judicial conduct, which the author terms "judicial legitimacy," is best understood through specific examples of misconduct that make the notion concrete). *See generally* Dep't of Int'l Econ. & Soc. Affairs, Seventh U.N. Cong. on the Prevention of Crime & the Treatment of Offenders, Basic Principles on the Independence of the Judiciary at 58, U.N. Doc. A/Conf.121/22/Rev.1 (Aug. 26–Sept. 6, 1985) (setting forth basic universal principles that judiciaries should be independent and should act impartially and that members of the judiciary must have integrity).

1. Judicial Independence

The concept of "judicial independence" has been central to our constitutional structure since Alexander Hamilton forcefully wrote in Federalist No. 78 that the "complete independence of the courts of justice is peculiarly essential in a limited Constitution."[23] For society to be governed by the rule of law, judges must be able to apply the law dispassionately, free from any fear of retribution or a need to curry favor. Even in the state courts, where judges are often elected and less insulated from the political process, the independence of the judiciary continues to be a key feature in judicial ethics regulation.[24] Indeed, the preamble to the North Carolina Code of Judicial Conduct begins: "An independent and honorable judiciary is indispensable to justice in our society, and to this end and in furtherance thereof, this Code of Judicial Conduct is hereby established."[25] Judges must be both actually independent—free to decide cases without fear of political backlash—and *perceived* to be independent. As Justice Stephen Breyer observed, justice is done when judges "are perceived by everyone around them to be deciding according to law, rather than according to their own whim or in compliance with the will of powerful political actors."[26] In other words, justice must not only be done, "it must also be seen to be done."[27]

2. Integrity

In addition to acting independently, every judge must possess and be perceived to possess the highest "integrity." For judges, "[a]bove all things,

23. THE FEDERALIST NO. 78 (Alexander Hamilton). Although judicial independence was seen by Hamilton as necessary to protect the rights and freedoms guaranteed to all parties under the Constitution, Hamilton also asserted that judicial independence was equally important to ensuring vindication of the "private rights of particular classes of citizens." *Id.* In both public law and private law disputes, therefore, judicial independence is an essential component of the rule of law.

24. *See, e.g.*, Vincent R. Johnson, *The Ethical Foundations of American Judicial Independence*, 29 FORDHAM URB. L.J. 1007, 1007–14 (2002) (discussing the role of judicial ethics rules in enforcing judicial independence, even where structural protections for judicial institutions are not as strong as those embodied in the federal judiciary).

25. N.C. CODE OF JUDICIAL CONDUCT pmbl. (N.C. SUP. CT. 2015).

26. Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 996 (1996).

27. *See* Miller, *supra* note 19, at 79; *see also* R v. Sussex Justices, *ex parte* McCarthy, [1923] All ER 233 at 234 (relating to a question of conflicts between a clerk of the justices and the attorneys for a defendant, Lord Chief Justice Hewart wrote: "[I]t is not merely of some importance, but of fundamental importance, that justice should both be done and be manifestly seen to be done.... [N]othing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.").

integrity is their portion and proper virtue."[28] Justice Kennedy put it simply when he wrote that "[j]udicial integrity is, in consequence, a state interest of the highest order."[29]

The problem with the concept of integrity, as with judicial independence, is that it is difficult to reduce to a definition or measurable qualification. Chief Justice John Roberts remarked in one opinion that "[t]he concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record. But no one denies that it is genuine and compelling."[30] Even as expressed in the North Carolina Code of Judicial Conduct, for example, the ethical rules are broad and fail to give integrity a precise definition.[31] While integrity can have many meanings, in judicial ethics it is focused on ensuring that the personal misconduct or dishonesty of one judge does not taint a particular case or public opinion about the entire judiciary because "even one rotten judicial apple can go far toward spoiling the entire judicial barrel."[32]

3. *Impartiality*

The third core value necessary to maintaining respect for the rule of law is the concept of "impartiality." Although not quite as vague as the concepts of independence and integrity, judicial impartiality is also susceptible to varying interpretations.[33] The late Justice Antonin Scalia identified three aspects of impartiality in the important Supreme Court decision *Republican Party of Minnesota v. White*.[34] First, he suggested that the root meaning of impartiality is simply "the lack of bias for or against either *party* to the proceeding."[35] Bias in favor of or against a party implicates due process by undermining the fairness of the proceeding.[36] Judicial ethics rules attempt to prevent bias against parties in court proceedings in various ways, such as

28. BACON, *supra* note 10, at 252.

29. Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).

30. Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1667 (2015).

31. *See, e.g.*, N.C. CODE OF JUDICIAL CONDUCT Canon 1 (N.C. SUP. CT. 2015) (requiring judges to personally observe appropriate standards of conduct to uphold the integrity of the judiciary); *id.* Canon 2 (requiring judges to avoid "impropriety").

32. Miller, *supra* note 19, at 70.

33. *See* Pingree, *supra* note 22, at 1122 (discussing difficulty defining impartiality and neutrality in judicial decision making).

34. *White*, 536 U.S. at 775–84. The *White* decision is a landmark case in judicial ethics law because it marked the first time that a judicial ethics restriction was struck down on First Amendment grounds.

35. *Id.* at 775.

36. *See id.*

by prohibiting gifts from parties to the judge, ensuring that judges do not have a financial interest in the outcome of a case, and requiring disqualification where the judge is related to a party or lawyer in the case or stands to benefit financially from the outcome of the case.[37]

The second and third aspects of impartiality identified in *White* are similar and function as two sides of the same coin. On the one side, Justice Scalia writes that impartiality could be defined as "[a] judge's lack of predisposition regarding the relevant legal issues in a case."[38] He rejects that definition, however, because "it is virtually impossible to find a judge who does not have preconceptions about the law."[39] On the other side of the coin, even where a judge has preconceptions about specific legal issues, Justice Scalia writes that impartiality is reflected in the "openmindedness" or willingness to at least "consider views that oppose [the judge's] preconceptions."[40] He notes that being open-minded toward legal arguments presented by the parties, or at least appearing to be open-minded, is a desirable quality in the judiciary.[41]

Concerns about open-mindedness are reflected in judicial ethics rules that prohibit judges from making in-court statements or public comments that exhibit predetermination as to who should win a case pending before the judge; they also inhere in other rules that prohibit a judge's involvement in extra-judicial activities that suggest favoritism to certain groups of litigants.[42] With these varying interpretations in mind, at a minimum impartiality demands that judges not only refrain from hearing any cases in which there is an actual conflict of interest but also that they regulate their out-of-court comments and activities to ensure they are perceived to be open-

37. *See, e.g.*, N.C. CODE OF JUDICIAL CONDUCT Canon 5(C)(4)(c) (N.C. SUP. CT. 2015) (prohibiting gifts from parties); *id.* Canon 5(C)(3) (requiring judges to manage "financial interests to minimize the number of cases in which [the judge] is disqualified"); *id.* Canon 3(C) (listing different bases for disqualification, such as prior service as a lawyer in the case, knowledge of disputed evidentiary facts, relation to a party or lawyer in the case, and the like).

38. *White*, 536 U.S. at 777.

39. *Id.*

40. *Id.* at 778.

41. *Id.*

42. *See, e.g.*, N.C. CODE OF JUDICIAL CONDUCT Canon 3(A)(6) (N.C. SUP. CT. 2015) ("A judge should abstain from public comment about the merits of a pending proceeding . . . ."); *id.* Canon 4 ("A judge . . . may engage in the following quasi-judicial activities, if in doing so the judge does not cast substantial doubt on the judge's capacity to decide impartially any issue that may come before the judge . . . ."); *see also* CHARLES GARDNER GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 4.07[2], at 4-21 (5th ed. 2015) ("[J]udicial comments or remarks made out-of-court but in regard to court proceedings are not indicative of improper bias unless they are so extreme that they show that a judge has become close-minded about a pending case.").

minded and willing to entertain a variety of legal arguments despite their own preconceptions about the legal issues before them.

B. Promoting Public Confidence in the Courts Through Enforceable Ethical Rules

If the three core values of independence, integrity, and impartiality are essential to preserving public confidence in the judiciary, and consequently the rule of law, and if these concepts themselves are vague and undefinable, then how can they be applied in a meaningful way to regulate the conduct of judges? This difficulty may explain why there were few concrete and enforceable ethics rules governing the federal and state judiciaries prior to the 1970s.[43] Similarly, there were few mechanisms at the federal or state level other than impeachment to discipline judges for misconduct.[44] As Justice Kennedy noted in his concurring opinion in *White*:

> To comprehend, then to codify, the essence of judicial integrity is a hard task .... That should not dissuade the profession. The difficulty of the undertaking does not mean we should refrain from the attempt. Explicit standards of judicial conduct provide essential guidance for judges in the proper discharge of their duties and the honorable conduct of their office. The legislative bodies, judicial committees, and professional associations that promulgate those standards perform a vital public service.[45]

The focus on codifying the core values of independence, integrity, and impartiality as enforceable judicial ethics rules began with the American Bar Association's adoption of the 1924 Canons of Judicial Ethics, which served as the primary set of ethical standards for judges.[46] Like many ethics reforms, including the reforms that followed Watergate, the ABA promulgated the Canons to address a specific scandal: a federal judge had served as Baseball Commissioner during the infamous Black Sox Scandal of the 1919 World Series.[47]

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43. *See infra* notes 46–47 regarding the Canons of Judicial Ethics.

44. GEYH ET AL., *supra* note 42, § 1.05, at 1-17 to -18 ("Until the middle of the twentieth century, judicial misconduct in the United States was dealt with primarily through the traditional procedures of impeachment, address, or recall."); *see also id.* § 1.04, at 1-10 to -11 (noting that members of Congress began to advocate for greater federal regulation of judicial conduct in the wake of the Justice Fortas incident and other controversies at the Supreme Court in the 1960s).

45. *White*, 536 U.S. at 793–94 (Kennedy, J., concurring).

46. Miller, *supra* note 19, at 71 (lamenting that the lack of defined ethical standards was creating a problem in public confidence in the courts because the 1924 Canons were aspirational and there were scant statutory rules governing judicial conduct).

47. *See* Jon P. McClanahan, *Safeguarding the Propriety of the Judiciary*, 91 N.C. L. REV. 1951, 1961–62 (2013); Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety,*

The problem with the Canons, however, was that they were nothing more than the ABA's general guide for judicial conduct and only included a blend of vague, hortatory goals coupled with a few specific restrictions.[48] Even with the development of the Canons, and although most states had adopted them,[49] there was no formal code of conduct for federal judges, who were instead governed by federal law, Supreme Court precedent, and guidance from the Judicial Conference of the United States.[50] To compound this problem, few states before the middle of the twentieth century had any disciplinary mechanisms other than impeachment to hold judges accountable for judicial misconduct.[51] The federal courts had no formal process to accept complaints about judicial misconduct until 1980.[52]

1. The Development of the ABA's Model Code of Judicial Ethics

By the 1960s, the void in judicial ethics enforcement had become apparent amidst the growing public distrust of government institutions. Even before government ethics came into the spotlight when the Watergate scandal broke in 1972,[53] the United States was already facing significant challenges in maintaining faith in democracy and the rule of law. The Vietnam War and the Civil Rights Movement were causing mass demonstrations and civil unrest, and the country was reeling from the assassinations of President John F. Kennedy, Jr., Martin Luther King, Jr., and Bobby Kennedy. At the same time, the Supreme Court under the leadership of Chief Justice Earl Warren continued to draw stringent criticism

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and the Proposed New ABA Judicial Code, 34 HOFSTRA L. REV. 1337, 1351 (2006) (discussing the role of federal judge Kenesaw Mountain Landis as Commissioner of Baseball at the time of the World Series scandal in motivating adoption of the 1924 Canons).

48. GEYH ET AL., *supra* note 42, § 1.03, at 1-5.; *see also* Rotunda, *supra* note 47, at 1351–52 (citing John F. Sutton, Jr., *A Comparison of the Code of Professional Responsibility with the Code of Judicial Conduct*, 1972 UTAH L. REV. 355, 355–56).

49. GEYH ET AL., *supra* note 42, § 1.04, at 1-10.

50. *See, e.g.*, Joshua Kastenberg, *Chief Justice William Howard Taft's Conception of Judicial Integrity: The Legal History of* Tumey v. Ohio, 65 CLEV. ST. L. REV. 317, 324 (2017) (citing Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278–79, which prohibited judges from serving in cases where they had a financial interest in the case).

51. *See* GEYH ET AL., *supra* note 42, § 1.05, at 1-17 to -18 (noting that prior to the 1960s, few states had procedures in place other than impeachment, address, and recall to deal with judicial misconduct).

52. See *infra* notes 99–101 and accompanying text for a discussion of the federal Judicial Conduct and Disability Act of 1980.

53. Carl Bernstein & Bob Woodward, *FBI Finds Nixon Aides Sabotaged Democrats*, WASH. POST, Oct. 10, 1972, at A1.

from conservatives objecting to decisions on social issues such as the rights of criminal defendants and desegregation.[54]

In the midst of this upheaval and intense focus on the Supreme Court, a high-profile judicial scandal involving Justice Abe Fortas, coupled with contemporaneous problems with other federal judges,[55] sharpened the focus of politicians on how best to discipline judges (especially those appointed by presidents of the opposite party).[56] Justice Fortas's close relationship to President Lyndon Johnson brought into the spotlight the lack of any ethical rules to protect the perception of judicial independence. Ever since Chief Justice John Jay declined to provide legal advice to President George Washington,[57] justices and judges have been expected to maintain at least the appearance of functional separation from the executive branch. Nevertheless, as one author noted, prior to the scrutiny of Justice Fortas's relationship with President Johnson, "the principle that members of the Supreme Court should refrain from partisanship was unsettled at best."[58]

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54. *See* Miller, *supra* note 19, at 90 ("[T]he majority of the Justices of the Warren Court have been accused of such 'derelictions' as 'coddling criminals' and 'protective subversives—in other words, of applying some dual standard of justice.").

55. *Id.* at 78–81 (discussing various incidents involving Supreme Court Justices and other federal judges who caused ethics concerns prior to the Justice Fortas scandal, including issues with investments (Judge Clement Haynsworth), problems with Justices serving as advisors to presidents (in addition to Justice Fortas, Justices Frankfurter, Vinson, and Brandeis served in such capacity), problems associated with outside executive service (Justice Roberts serving on the Pearl Harbor Commission, Chief Justice Warren leading the investigation of the Kennedy assassination, and Justice Jackson's involvement in the Nuremberg trials), and public speeches on controversial matters (Judge Friendly and Judge Skelly Wright)).

56. *See* Richard K. Neumann, Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 260 (2007). According to Neumann, 1968 also marked the beginning of "an era in which impeachment [of judges and justices] could be used as a partisan political weapon in a long and not-yet-ended struggle" for control of the Supreme Court. *Id.*; *see also id.* at 269–72 (describing the efforts to impeach Justice William O. Douglas in 1970).

57. *See* Letter from Supreme Court Justices to George Washington (Aug. 8, 1793), *in* 13 THE PAPERS OF GEORGE WASHINGTON 392–93 (Christine Sternberg Patrick ed., 2007) ("The Lines of Separation drawn by the Constitution between the three Departments of Government—their being in certain Respects checks on each other—and our being Judges of a court in the last Resort—are Considerations which afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to; especially as the Power given by the Constitution to the President of calling on the Heads of Departments for opinions, seems to have been *purposely* as well as expressly limited to *executive* Departments.").

58. Gerard N. Magliocca, *The Legacy of Chief Justice Fortas*, 18 GREEN BAG 2D 261, 261 (2015); *see also id.* at 268–69 n.39 (noting that in the wake of the Justice Fortas scandal and the focus on ethical rules to promote the appearance of judicial independence, the Supreme Court adapted its practices and protocols to address the public perception of

Several Supreme Court Justices had served as advisors to presidents or on federal commissions, and Justice Robert Jackson famously left the Supreme Court temporarily to serve as the chief prosecutor at the Nuremberg Trials.[59] In the politically charged, hyper-partisan 1960s, however, Justice Fortas's relationship with President Johnson was more problematic. Among other things, Justice Fortas participated in policy meetings in President Johnson's war cabinet during the Vietnam War and advised him on other important policy decisions.[60]

Political concerns about Justice Fortas's relationship to President Johnson came to a head after Chief Justice Earl Warren announced his retirement in early 1968 in an effort to have President Johnson name his replacement before the 1968 presidential election. President Johnson nominated Justice Fortas for Chief Justice, which created a political showdown in the Senate and ultimately led to a filibuster.[61] In addition to political opposition to Justice Fortas based on his relationship with President Johnson, it was discovered during the confirmation process that Justice Fortas was receiving a large teaching stipend (equal to 40% of his judicial salary) to teach a summer course at a Washington, D.C. law school.[62] With these issues swirling around Justice Fortas's nomination, it became clear that he would not receive enough support in the Senate for confirmation, and his nomination was eventually withdrawn.[63]

After the debacle of Justice Fortas's failed nomination in 1968, and with his name already in the political crosshairs, another scandal broke in May 1969 when *Life* magazine published an article entitled "Fortas of the Supreme Court: A Question of Ethics" with the subtitle "The Justice . . . and the Stock Manipulator."[64] Aided by Justice Fortas's political enemies in the Nixon Administration, the article contained an exposé on Justice Fortas's relationship with financier Louis Wolfson, who had been convicted of securities fraud and was being represented by Justice Fortas's former law

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separation of powers, such as by refraining from clapping during the President's State of the Union Address).

59. *See* Miller, *supra* note 19, at 78 (noting that Justices Frankfurter, Vinson, and Brandeis had served in advisory roles and had close relationships with presidents and that other Justices faced problems associated with outside executive service).

60. *See, e.g.*, Magliocca, *supra* note 58, at 266.

61. *See* Neumann, *supra* note 56, at 261–62 (describing confirmation process and filibuster in the Justice Fortas nomination).

62. *See Filibuster Derails Supreme Court Appointment*, U.S. SENATE, https://perma.cc/6TEZ-MQ5A.

63. *See id.*

64. *See* William Lambert, *Fortas of the Supreme Court: A Question of Ethics*, LIFE, May 5, 1969, at 32, 32–33.

firm.[65] Curiosity regarding Justice Fortas's connection to Wolfson was heightened after the Supreme Court issued an order on April 1, 1969 denying review in Wolfson's case and noting that Justice Fortas had recused himself and not participated in the decision.[66] The *Life* article uncovered the fact that Wolfson's family foundation had paid Justice Fortas $20,000 while he was serving as an Associate Justice, allegedly in return for the advice Justice Fortas was providing relating to various charitable, educational, and civil rights projects.[67] Wolfson also had allegedly invoked his friendship with Justice Fortas as part of his defense strategy and to gain support for a presidential pardon from President Johnson.[68] It was also reported that Justice Fortas had personally visited with Wolfson to discuss the federal securities investigation in the early stages of the allegations.[69] Justice Fortas resigned from the Supreme Court shortly after the *Life* article was published.[70]

Although Justice Fortas's conduct was not the only event that served as the impetus for much-needed change in judicial ethics enforcement,[71] the

65. *Id.* at 33–34; *see also* Neumann, *supra* note 56, at 262–66 (describing involvement of the Department of Justice and the Nixon Administration in research for the *Life* article to find grounds to impeach Justice Fortas).

66. Lambert, *supra* note 64, at 33.

67. *Id. See also* Neumann, *supra* note 56, at 264–65 (describing Justice Fortas's acceptance of the consulting fee from the Wolfson Foundation).

68. Lambert, *supra* note 64, at 33. (*Life* commented that while Wolfson's name-dropping "was done without [Justice Fortas's] knowledge," it did "not change the fact that his acceptance of the money, and other actions, made the name-dropping effective.").

69. In a January 23, 1977 article for the *Washington Post*, famed journalist Bob Woodward (who broke the Watergate scandal with Carl Bernstein), reported that Wolfson had secretly recorded a conversation with Justice Fortas after Justice Fortas resigned and just after Wolfson was released from prison in 1970. *See* Bob Woodward, *Fortas Tie to Wolfson Is Detailed*, WASH. POST, Jan. 23, 1977 (detailing revelations in a secretly recorded conversation between Wolfson and Justice Fortas, including reference to a letter that Wolfson wrote to Justice Fortas seeking help in obtaining a presidential pardon from President Johnson). According to the transcript of that conversation, during his tenure on the Supreme Court, Justice Fortas was "heavily involved in advising Wolfson on legal difficulties he had with the Securities and Exchange Commission." *Id.* "[A]t one point, Fortas agreed to intervene directly with the SEC chairman on the case." *Id.* Woodward's article also revealed that Justice Fortas had convinced Wolfson not to release letters they had exchanged, including one in which Wolfson sought Justice Fortas's help to get a pardon from President Johnson. *Id.*

70. *See* Neumann, *supra* note 56, at 262–63.

71. *See* Miller, *supra* note 19, at 78–81. *See also* Kastenberg, *supra* note 50, at 330–31 (describing how Chief Justice Taft, who chaired the ABA committee that drafted the Canons of Judicial Ethics, faced criticism for an annuity he was granted under the will of Andrew Carnegie and continued to receive after becoming Chief Justice); Neumann, *supra* note 56, at

scandal and hyper-partisanship in 1968 and 1969 proved pivotal in the development of enforceable judicial ethics rules in the United States. It became apparent that the Canons of Judicial Ethics did not adequately address the problem of judicial misconduct, especially when it related to a judge's extra-judicial activities and outside income.[72] The intense political scrutiny and renewed focus on impeachment also caused the ABA and judicial reformers across the country to consider alternative mechanisms to address judicial misconduct to avoid politicized impeachment processes.[73] Consequently, like the post-Watergate ethics revolution in the federal government, a small but significant revolution in judicial ethics occurred in the late 1960s and early 1970s.

The ABA's efforts culminated on August 16, 1972, when it replaced the Canons with the Model Code of Judicial Conduct, which emphasized the hope that "all jurisdictions [would] adopt this Code and establish effective disciplinary procedures for its enforcement."[74] In the context of the unprecedented fall of public confidence in government institutions in the 1960s, the 1972 Model Code also openly embraced the idea that maintaining public confidence in the courts depended not only on avoiding actual misconduct but also on avoiding even the appearance of impropriety on and off the bench:

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.[75]

269–70 (describing an annuity and compensation received by Justice William O Douglas for work on a non-profit foundation).

72. *See* Miller, *supra* note 19, at 72 (noting that the Judicial Conference of the United States, the governing council of the federal judiciary, issued guidelines in 1969 to limit outside activities of federal judges, although the guidance was rescinded after Chief Justice Warren left office and attention on the Justice Fortas scandal waned).

73. *See* ARTHUR H. GARWIN ET AL., ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 4 (3d ed. 2016) ("The intent of the Code is to preserve, and not to undermine, judicial independence. . . . The Code helps maintain judicial independence through its guarantee that judges will generally not be disciplined for mere errors of law in their decisions." (internal citations omitted)); *see also* Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911, 916 (2006) (defining judicial accountability as ensuring proper enforcement of rules of conduct rather than political accountability for unpopular decisions).

74. E. WAYNE THODE, AM. BAR ASS'N, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 5 (1973).

75. *Id.* at 8.

With its focus on the appearance of impropriety, the 1972 Model Code thus created a far-reaching basis for finding misconduct by judges.[76] By 1990, forty-seven states had adopted a code of judicial conduct based in whole or in part on the 1972 Model Code.[77] The ABA Model Code was revised in 1990 and 2007, and the ABA continues to consider and adopt new rules or comments to guide its application.[78]

2. *The Problem of Enforcement*

Beyond adopting specific ethical guidelines for judges in the ABA Model Code, the more difficult question—and one of the main failings of the Canons—was the lack of an appropriate enforcement mechanism. The question of how to hold judges accountable for misconduct while preventing undue interference with the courts has vexed the country since its founding. Alexander Hamilton recognized in Federalist No. 78 that "[t]he benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and .... Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts."[79] Even so, concerns about protecting judicial independence led to a system that allowed for judicial discipline only through impeachment.[80] As Hamilton remarked in Federalist No. 79, impeachment for misconduct was "the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution [sic] in respect to our own judges."[81] The Founding Fathers specifically rejected removal of judges for incompetence out of concern that

76. *See generally* MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS'N 1972). This significant change in conceptualizing misconduct was not universally adopted in all states, with some—such as North Carolina—later removing such language. *See* McClanahan, *supra* note 47, at 1959–60 (discussing the removal of the standard from the North Carolina Code of Judicial Conduct). Finding ethical violations to arise from a mere appearance of improper conduct, even where none occurred, has also been the subject of criticism as a basis for judicial discipline because of its vagueness. *See, e.g.*, Hon. Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914, 1936–50 (2010) (examining whether this standard is too vague to be applied in accord with due process); Pingree, *supra* note 22, at 1126–27 (discussing the problem of making an "appearance of impropriety" standard concrete and enforceable); Rotunda, *supra* note 47, at 1343–44; *see also* George D. Brown, *The Ethics Backlash and the Independent Counsel Statute*, 51 RUTGERS L. REV. 433, 466–67 (1999) (describing the criticism of the "ethics establishment" pursuing vague assertions of improper conduct).

77. *See* GEYH ET AL., *supra* note 42, § 1.03, at 1-6.

78. *See* GARWIN ET AL., *supra* note 73, at xi–xiii.

79. THE FEDERALIST NO. 78 (Alexander Hamilton).

80. GEYH ET AL, *supra* note 42, § 1.05, at 1-19.

81. THE FEDERALIST NO. 79 (Alexander Hamilton).

such a provision "would be more liable to abuse, than calculated to answer any good purpose."[82]

In the wake of the Justice Fortas scandal and the resurgence of politically motivated impeachment efforts,[83] and with impeachment of state court judges rare, slow, and political,[84] the ABA and judicial reformers began to focus on alternatives to impeachment to enforce judicial ethics rules. Prior to 1972, a few states had experimented with alternatives to impeachment, such as special courts that could remove judges or other ad hoc procedures for judicial discipline.[85] In 1960, California established the first permanent independent judicial conduct commission to investigate complaints of judicial misconduct and to impose sanctions on judges short of removal from office.[86] After the promulgation of the 1972 Model Code and its call to the states to adopt appropriate enforcement mechanisms,[87] the judicial conduct commission model gained traction and was adopted in all fifty states and the District of Columbia shortly after the close of the 1970s.[88]

3. *Judicial Ethics and Enforcement in North Carolina*

Like many states prior to the Justice Fortas scandal and the Watergate era, North Carolina had no formal code of conduct for judges, and the "slow and cumbersome" process of impeachment was the only way to remove or discipline a judge of the General Court of Justice.[89] In the context of the nationwide attention to judicial ethics issues, in 1969 the North Carolina General Assembly reconstituted the North Carolina Courts Commission to consider reforms in the courts relating to judicial discipline and removal.[90] In its 1971 final report, the Courts Commission recommended that North Carolina adopt the independent judicial conduct commission model started

82. *Id.* Hamilton further explained that any ground short of insanity, mental infirmity, or lack of ability would not generally be sufficient for removal of federal judges from office. *Id.*

83. *See* Neumann, *supra* note 56, at 260–72.

84. The North Carolina Courts Commission noted that no North Carolina judge had been removed by impeachment since 1868. *See* STATE OF N.C. COURTS COMM'N, REPORT OF THE NORTH CAROLINA COURTS COMMISSION TO THE NORTH CAROLINA GENERAL ASSEMBLY 19 (1971) [hereinafter COURTS COMMISSION REPORT]; *see also* JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 139–40 (2d ed. 2013).

85. *See* GEYH ET AL., *supra* note 42, § 1.05, at 1-18.

86. *Id.*

87. *See* THODE, *supra* note 74.

88. *See* GEYH ET AL., *supra* note 42, § 1.05, at 1-18.

89. ORTH & NEWBY, *supra* note 84. District court judges, whose positions were created in 1967, could not be impeached and could be removed from office only for misconduct or mental or physical incapacity. COURTS COMMISSION REPORT, *supra* note 84.

90. COURTS COMMISSION REPORT, *supra* note 84, at 2.

in California.[91] In recommending the creation of a judicial conduct commission, the Courts Commission considered carefully the topic of judicial discipline, noting that it is "a very sensitive one" given concerns about protecting judicial independence.[92] The Courts Commission ultimately recommended the judicial conduct commission model because it allows all three branches of government and the State Bar to appoint members to an independent commission to consider complaints and recommend discipline but allows "the judiciary to police its own ranks, with any decision to censure, remove or retire coming from the supreme court."[93]

In response to the Courts Commission Report, the General Assembly began the process of implementing its recommendations, which required a constitutional amendment to authorize the legislature to create a statutory alternative to impeachment for judicial misconduct.[94] In tandem with that amendment, the General Assembly passed the Judicial Standards Commission Act, which created an independent judicial conduct commission effective January 1, 1973.[95] Shortly thereafter, the North

91. *See id.* at 27–30.

92. *Id.* at 20; *see also* N.C. State Bar v. Tillett, 794 S.E.2d 743, 752 (N.C. 2016) (Martin, C.J., concurring) (noting that the Judicial Standards Commission was created to "balance the need for judicial independence with the need for judicial accountability").

93. COURTS COMMISSION REPORT, *supra* note 84, at 26.

94. Act of June 14, 1971, 1971 N.C. Sess. Laws 488 (amending article IV, section 17 of the North Carolina Constitution upon approval by a majority of voters in the 1972 general election); N.C. CONST. art. IV, § 17(2); *see In re* Peoples, 250 S.E.2d 890, 921 (N.C. 1978) ("Both [the Judicial Standards Commission Act] and the constitutional amendment authorizing this legislation were conceived and ratified together. Both bills were enacted by the General Assembly within three days of each other in June 1971. The statute by its terms was to become effective on January 1, 1973 provided the voters of the State approved." (internal citations omitted)); *see also In re* Martin, 245 S.E.2d 766, 771 (N.C. 1978) ("The Judicial Standards Commission Act, which defines the role of this Court in the censure and removal of judges, was enacted on 17 June 1971, nearly seventeen months prior to the ratification of the amendment to Article IV which authorizes removal of judges other than by impeachment. The effective date of the Act, however, was made contingent upon the ratification of the amendment.").

95. Judicial Standards Commission Act, 1971 N.C. Sess. Laws 517. As amended, article IV, section 17(2) of the North Carolina Constitution now provides that

> [t]he General Assembly shall prescribe a procedure, in addition to impeachment and address set forth in this Section, for the removal of a Justice or Judge of the General Court of Justice for mental or physical incapacity interfering with the performance of his duties which is, or is likely to become, permanent, and for the censure and removal of a Justice or Judge of the General Court of Justice for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

N.C. CONST. art. IV, § 17(2).

Carolina Supreme Court adopted the state's first official Code of Judicial Conduct on September 26, 1973.[96] The North Carolina Code of Judicial Conduct, like that of many states, is based very closely on the 1972 ABA Model Code with some minor deviations and as amended from time to time.

As in the states, the federal courts moved quickly in the 1970s to adopt the substantive standards for judicial ethics suggested by the 1972 ABA Model Code. The Judicial Conference of the United States[97] adopted the Code of Conduct for United States Judges on April 5, 1973, although to this day Justices of the United States Supreme Court are not bound by the Code and are subject only to federal law and internal policies with respect to substantive ethics rules.[98] To enforce the new federal code of judicial conduct, Congress did not follow the independent conduct commission model. Instead, Congress enacted the Judicial Conduct and Disability Act of 1980,[99] which allows the federal judiciary to be entirely self-policing.[100] From time to time, and often under the threat of congressional action to intervene more aggressively into the arena of judicial accountability, the federal courts have evaluated and strengthened the process for reviewing complaints of federal judicial misconduct.[101]

96. N.C. CODE OF JUDICIAL CONDUCT (N.C. SUP. CT. 1973); *see In re* Nowell, 237 S.E.2d 246, 252 (N.C. 1977) ("Specific guidelines for judicial officers of North Carolina are to be found in the North Carolina Code of Judicial Conduct, adopted by this Court on 26 September 1973 and published in 283 N.C. 771. . . . The General Assembly intended the North Carolina Code of Judicial Conduct to be a guide to the meaning of the [Judicial Standards Commission Act].").

97. 28 U.S.C. § 331 (2012); *see also Governance & the Judicial Conference*, U.S. CTS., https://perma.cc/QZM8-TDW6.

98. Congress has, however, from time to time considered bills applying the Code to Supreme Court Justices. *See* Scott Bomboy, *Why the Supreme Court Isn't Compelled to Follow a Conduct Code*, NAT'L CONST. CTR.: CONST. DAILY (July 15, 2016), https://perma.cc/N7ZD-SUPM.

99. *See* Judicial Conduct and Disability Act, 28 U.S.C. §§ 351–364 (2012). *See generally Judicial Conduct & Disability*, U.S. CTS., https://perma.cc/LDW9-86GG (describing the process for filing a complaint against a federal judge for misconduct or disability).

100. *Cf., e.g.*, COURTS COMMISSION REPORT, *supra* note 84, at 25–26.

101. *See, e.g.*, HON. STEPHEN BREYER ET AL., THE JUDICIAL CONDUCT & DISABILITY ACT STUDY COMM., IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980, at 5 (2006) (summarizing conclusions on a study of whether federal courts were effectively evaluating complaints of misconduct under the Judicial Conduct and Disability Act, especially "high-visibility cases—those . . . that have come to the attention of (or have been filed by) members of Congress."); *see also* ROBERTS, *supra* note 12 (addressing sexual harassment in the judiciary and establishing a working group to consider the issue).

II. BEYOND WATERGATE: PUBLIC CONFIDENCE IN THE COURTS IN THE DIGITAL AGE

With the rules and framework for judicial accountability in place after the 1970s ethics revolution, courts and judicial policy makers have continued to struggle with how to effectively maintain and promote public confidence in the courts in changing times. In the twenty-first century, one of the biggest policy challenges for courts across the country has been the proliferation of technology. The advent of the Internet has presented countless benefits for the administration of justice. Such benefits include electronic filing, electronic case management, improved public outreach, and increased accessibility through online forms and resources for litigants and lawyers. At the same time, the efficiency of communicating through electronic means, the ease of sharing information instantly through social media, and the accessibility of vast amounts of information on virtually every topic have created new landmines that could explode into controversies that weaken public confidence in the courts.

Threats to public confidence in the administration of justice in the digital world differ from the embarrassment and national security concerns that arise from cybersecurity breaches in other government institutions. And, while cybersecurity in the courts is an important concern,[102] danger to public confidence in the administration of justice is perhaps more serious and far more likely to arise from the conduct of judges as they interact in the digital world. Judges are not immune from the general human desire to share personal news and opinions with others on social media or to satisfy curiosity through quick resort to Internet research. Moreover, in states that elect their judges, the use of social media and the Internet is a necessity to reach donors and voters.

In this context, two of the most difficult and controversial issues for judicial ethics regulation in the twenty-first century are (1) how to regulate a judge's use of social media (for professional, political, and personal reasons) and (2) how to monitor a judge's natural curiosity (or even prurient interests)[103] through quick searches on the Internet. As set forth below,

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102. *See Information Systems and Cybersecurity—Annual Report 2016*, U.S. CTS., https://perma.cc/LF9N-QP45 (describing efforts in the federal courts to address cybersecurity risks); *see also* Brian McLaughlin, *Cybersecurity: Protecting Court Data*, PA TIMES (May 26, 2017), https://perma.cc/6VMF-KKLC (describing cyberattacks in both the Minnesota and federal courts).

103. *See, e.g.*, Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), https://perma.cc/J4UE-SFQL (describing an incident where Judge Kozinski asked a female law clerk to come into his office "and pulled up pornography on his computer, asking if she thought it was photoshopped or if it aroused her sexually").

unlike ethical pitfalls of the past, these two new frontiers pose complex problems because both offer benefits to the judge and the administration of justice while at the same time exposing judges to criticism that could increase distrust of the judiciary.

A. Testing Judicial Restraint: Limits on the Use of Social Media

Digital communication has not only taken the lives of private citizens by storm—elected officials, too, have increasingly found the use of email and social media beneficial for reaching supporters and informing the public about policies or other events occurring in their institutions. But, as communication today takes place more often electronically rather than through phone calls or private conversations, it is easy to imagine the myriad forms of "smoking gun" evidence that could bring down a political career. A new political scandal is just a screenshot away from every Facebook post,[104] email,[105] or text.[106] In social media in particular, the countless ways in which statements and even emotions can be made visible to others has created a number of potential ethics and personnel problems in the public sector. For example, in *Bland v. Roberts*, the Fourth Circuit held that the thumbs up emoji indicating that a Facebook user "likes" a political campaign is symbolic expression and political speech protected by the First Amendment.[107] In *Bland*, an elected sheriff thus faced potential constitutional liability for taking negative employment action against a department employee who liked his opponent's campaign page.[108]

Likewise, judicial disciplinary agencies and judicial ethics advisory committees have increasingly been confronted with potential threats to public confidence in the courts arising from the social media conduct of judges. The range of misconduct occurring on social media includes ex parte

104. *See, e.g.*, Lindsey Bever & Marwa Eltagouri, *Ohio Governor Candidate Apologizes for Boasting of Sexual History with Approximately 50 Very Attractive Females*, WASH. POST (Nov. 18, 2017), https://perma.cc/3W7Q-B3XY, (discussing the Facebook post of Ohio Supreme Court Chief Justice and gubernatorial candidate William O'Neill relating to his past sexual history).

105. *See, e.g.*, Jo Becker, Adam Goldman & Matt Apuzzo, *Emails Disclose Trump Son's Glee at Russian Offer*, N.Y. TIMES, July 12, 2017, at A1 (discussing release of Donald Trump, Jr.'s emails with a Russian lawyer during his father's 2016 presidential campaign).

106. *See, e.g.*, Alan Feuer, *Texts Live On, but That's Often Forgotten in Politics*, N.Y. TIMES, Aug. 12, 2016, at A20 (detailing cases where political scandals emerged after text messages were revealed).

107. Bland v. Roberts, 730 F.3d 368, 386–88 (4th Cir. 2013).

108. *Id.*

communications with parties or witnesses,[109] inappropriate sexual conduct,[110] racially charged statements,[111] inappropriate campaign or political conduct,[112] or various other kinds of improper or undignified behavior.[113] Each of these situations implicates the three core values in judicial ethics—impartiality, independence, and integrity. To address these problems, some states have adopted strict limits on the social media activity of judges, while others have been more flexible and have adapted existing ethical rules to evaluate conduct on the Internet.[114] The ABA Center for Professional Responsibility and a number of state judicial ethics advisory bodies have also issued ethics advisory opinions applying the existing judicial ethics canons to internet use by judges.[115] In North Carolina, the Judicial Standards Commission has not issued a formal advisory opinion on

109. *See, e.g.*, Public Reprimand of Hon. B. Carlton Terry, Jr., Inquiry No. 08-234 (N.C. Judicial Standards Comm'n April 1, 2009) (sanctioning judge for communicating on Facebook with an attorney appearing before him about the case).

110. *See, e.g.*, Archer, Case No. 47 (Ala. Court of the Judiciary Aug. 8, 2016) (disciplining judge for Facebook contact with litigant that led to sexual relationship).

111. *See, e.g.*, Amended Public Reprimand and Order of Additional Education of Hon. James Oakley, CJC No. 17-0320-CO (Tex. Comm'n on Judicial Conduct May 8, 2017) (disciplining judge for posting racially insensitive comments on Facebook regarding a murder suspect).

112. *See, e.g.*, *In re* Callaghan, 796 S.E.2d 604 (W. Va. 2016) (disciplining judge for posting misleading flyers on his personal and campaign Facebook page).

113. *Cf. In re* Slaughter, 480 S.W.3d 842 (Special Court of Review of Tex. 2015) (finding that judge did not violate state ethics rules when commenting on an ongoing criminal trial before her, despite recommendation of state judicial conduct commission).

114. *See* Hon. Craig Estlinbaum, *Social Networking and Judicial Ethics*, 2 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 2, 6 (2012) (referring to these frameworks as the restrictive approach and the integrative approach); *see also id.* at 17–21 (citing Florida, Massachusetts, and Oklahoma as states with tight restrictions on social media use for judges but also noting that Florida has eased some of its initial restrictions); Samuel Vincent Jones, *Judges, Friends, and Facebook: The Ethics of Prohibition*, 24 GEO. J. LEGAL ETHICS 281, 288–93 (2011) (describing same and discussing ethics opinions from various states on the issue). *But see* John G. Browning, *Why Can't We Be Friends? Judges' Use of Social Media*, 68 U. MIAMI L. REV. 487, 489–90 (2014) (suggesting an alternative approach to the integrative or restrictive approach that would account for the practical realities that judges can and do interact through a number of modes of social discourse).

115. *See, e.g.*, ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 462 (2013) (discussing judges' use of electronic social networking media); ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 478 (2017) (discussing independent factual research by judges via the Internet). For a list of advisory opinions and disciplinary orders relating to social media use by judges, see Cynthia Gray, *Social Media and Judicial Ethics: Part I*, 39 JUD. CONDUCT REP. 2 (2017), CYNTHIA GRAY, NAT'L CTR. FOR STATE COURTS, SOCIAL MEDIA AND JUDICIAL ETHICS (2017), and MICHAEL CROWELL, UNC SCHOOL OF GOV'T, JUDICIAL ETHICS AND SOCIAL MEDIA (2015).

the issue of judges' social media use.[116] As such, North Carolina judges must be guided by the more general rules that are intended to promote impartiality, independence, and integrity in the judiciary.[117]

One of the most problematic aspects of a judge's use of social media is how to evaluate social media connections and content in deciding whether the judge's digital relationship to someone requires recusal when that person appears before the judge. Under both the ABA Model Code and the North Carolina Code of Judicial Conduct, a judge should not preside over a case if the circumstances suggest that the judge's impartiality might reasonably be questioned.[118] This inquiry is generally focused on whether the judge has a relationship to the parties and lawyers appearing in the case.[119] With the advent of social media, the potential universe of personal relationships (or connections) has exponentially increased the risk of conflicts and appearances of bias that have challenged public confidence in the judiciary in new and profound ways. This is particularly true in states where judges are elected. Campaigns use social media to connect with as many people as possible in the community, including lawyers. Because the "root meaning" of impartiality is focused on whether the judge may favor a party or lawyer in the case because of a personal relationship,[120] and because it is often easy to ascertain who is digitally connected to a judge on social media, public

116. Although not an interpretation of the North Carolina Code of Judicial Conduct, the North Carolina State Bar has issued a formal ethics opinion under the Rules of Professional Responsibility that a lawyer may accept a LinkedIn invitation from a judge, reasoning that social and professional interactions between lawyers and judges online should be evaluated in the same way as other personal interactions with a judge. *See* N.C. State Bar, 2014 Formal Ethics Op. 8 (2015).

117. There are very real concerns about public confidence in the courts every time a judge decides to use Facebook, Twitter, LinkedIn, or some other social media platform. In all of these contexts, the most applicable provisions of the North Carolina Code of Judicial Conduct (which is based on the 1972 Model Code of Judicial Conduct, with some exceptions) are as follows: Canons 1 and 2(A) (requiring judges to personally uphold public confidence in the independence, integrity, and impartiality of the judiciary); Canon 2(B) (prohibiting conveying the impression that another person is in a special position to influence the judge); Canon 3(A)(4) (prohibiting ex parte communications with parties and lawyers); Canon 3(A)(6) (restricting the freedom of judges to make public comments about the merits of a pending proceeding); Canon 3(C) (providing for disqualification based on connections to the parties, lawyers, and witnesses or where the judge's impartiality may reasonably be questioned); and Canons 4 and 5 (regulating extra-judicial conduct, such as active assistance in fundraising for charitable organizations). *See* N.C. CODE OF JUDICIAL CONDUCT (N.C. SUP. CT. 2015).

118. ABA MODEL CODE OF JUDICIAL CONDUCT r. 2.11 (AM. BAR ASS'N 2007) (relating to disqualification); N.C. CODE OF JUDICIAL CONDUCT Canon 3(C) (N.C. SUP. CT. 2015) (identifying rules for disqualification).

119. ABA MODEL CODE OF JUDICIAL CONDUCT r. 2.11 (AM. BAR ASS'N 2007); N.C. CODE OF JUDICIAL CONDUCT Canon 3(C) (N.C. SUP. CT. 2015).

120. Republican Party of Minn. v. White, 536 U.S. 765, 775–76 (2002).

confidence in the impartiality of judges is potentially undermined every time that "friend" or "connection" appears before the judge. Indeed, it is not uncommon for judicial conduct commissions to receive complaints from litigants who learn (usually after losing their case) that the judge is social media friends with opposing counsel.

Courts across the United States are split on whether disqualification is required based on a social media connection, at least where there are no other indicia of a close personal relationship or communications about the case that would otherwise require recusal. The outcome in these cases often turns on whether state ethics opinions allow judges and lawyers to be connected on social media at all.

For example, in a Florida case, where state judicial ethics opinions prohibit social media connections between judges and lawyers, a trial judge's decision not to disqualify was reversed by the appeals court because the judge was Facebook friends with the prosecuting attorney.[121] Conversely, in a Tennessee case, where state judicial ethics opinions have not prohibited such connections, an appellate court upheld the decision of the trial judge not to recuse in a criminal case where the judge was Facebook friends with a confidential informant witness.[122] Similarly, in a Texas case, the appellate court upheld the decision of a trial judge not to recuse in a case where he was Facebook friends with the father of the victim, even though the father sent unsolicited private messages on Facebook to the trial judge regarding leniency in the matter.[123] The court reasoned that the social media connection was tenuous and existed in relation to the social media sites for the judge's and the other party's political campaigns; further, the judge had taken immediate steps to advise the father not to communicate with him on Facebook about the case and notified the parties of the content of the communication.[124] On the other hand, in North Carolina, where social media connections between lawyers and judges are not per se prohibited, a district court judge was still disciplined for communicating with an attorney via Facebook about the case while the attorney was appearing before him.[125]

Beyond disqualification based on social media connections, a bigger threat to public confidence in the courts comes from inappropriate social media content posted by judges. More so than mere connections on social media, the content of a judge's post can potentially implicate a judge's

121. Domville v. State, 103 So. 3d 184, 186 (Fla. Dist. Ct. App. 2012).

122. State v. Forguson, No. M2013-00257-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 134, at *35–36 (Feb. 18, 2014).

123. Youkers v. State, 400 S.W.3d 200, 204–05 (Tex. App. 2013).

124. *Id.* at 206–07.

125. *See* Public Reprimand of Hon. B. Carlton Terry, Jr., Inquiry No. 08-234, at 3–4 (N.C. Judicial Standards Comm'n April 1, 2009).

independence, integrity, and impartiality. As such, in this area in particular, treatment of judges is markedly different from other public officials not subject to strict conduct rules or regulations.

The content of posts or likes, and even inappropriate comments by followers on a judge's social media page, raise concerns that members of the public will see the judge as being biased, lacking integrity, or otherwise being apt to make decisions based on politics and personal opinions rather than the facts and law.[126] Judges who have ventured onto their social media pages to comment on controversial issues, or who comment on their own cases, are especially at risk of disciplinary action. For example, in a noteworthy case in Texas, the Texas Commission on Judicial Conduct publicly reprimanded Burnet County Judge James Oakley for making an inappropriate comment on his personal Facebook page suggesting that it was time for "a tree and a rope" for an African American man accused of killing a San Antonio police officer.[127] At the time the public reprimand was issued, the Commission had received 18 separate written complaints about the Facebook post.[128] In addition to racially charged content, judges have also been disciplined for sexually inappropriate behavior through social media. Alabama Probate Judge Leon Archer was suspended without pay for 180 days after he sought out a young woman on Facebook who had been a litigant in his court and later exchanged sexually explicit private messages with her.[129]

Personal feuds that play out on social media can also lead to judicial discipline. In yet another Facebook controversy involving a judge, Kentucky Judge Olu Stevens was suspended for ninety days without pay after the judge, in a series of Facebook posts, accused the local prosecutor of racism in jury selection, commented on his reasoning for the sentencing in the case, accused the victims in the case of instilling a fear of black men in their five-year-old child, and criticized the local defense bar for not supporting him in challenging the jury practices of the prosecutor's office.[130]

In an age of "tweet storms" and hyper-partisan feuds among politicians, these cases highlight the stark differences in the treatment of judges

126. *See* Jones, *supra* note 114, at 296–302 (discussing Code of Judicial Conduct provisions promoting impartiality, independence, and the threat of "friending" and posting comments on social media).

127. Amended Public Reprimand and Order of Additional Education of Hon. James Oakley, CJC No. 17-0320-CO, at 2 (Tex. Comm'n on Judicial Conduct May 8, 2017).

128. *Id.*

129. *See* Archer, Case No. 47, at 2, 6 (Ala. Court of the Judiciary Aug. 8, 2016).

130. Stevens (Ky. Judicial Conduct Comm'n Aug. 8, 2016). *See* Jason Riley, *State Officials Suspend Louisville Judge Olu Stevens for 90 Days Without Pay*, WDRB (Aug. 8, 2016, 5:35 PM), https://perma.cc/5BNU-UA75.

compared to other public officials when it comes to outrageous social media conduct. They also demonstrate how dramatically standards and practices in judicial ethics enforcement have changed since the judicial reforms following the Justice Fortas scandal. It is difficult to imagine public confidence in the judiciary in the social media age with only the aspirational goals of the Canons in place and no formal mechanisms to address judicial misconduct other than impeachment.

It is also critical to continue to address the concerns of citizens regarding social media use by judges, especially where it reinforces existing problems in the public's perception about the unfairness and politicization of the courts. For example, a recent poll in North Carolina regarding public confidence in the courts showed that many respondents perceived that wealthy, white citizens with lawyers receive better treatment in the courts than low-income litigants, pro se parties, or non-white or non-English speaking people.[131] The election of judges on partisan ballots and the ensuing need to raise campaign funds and publicly declare party loyalty has also consistently undermined public confidence in the independence of courts.[132] Social media conduct that raises concerns about partisanship, racism, or favoritism toward lawyers (especially those who are perceived as social friends) compounds the perception that judges do not decide cases fairly and that political affiliation or outside relationships rather than facts and law determine outcomes in cases. Once again, perception is reality in the realm of judicial ethics.

B. Independent Internet Research and the Fake News Conundrum

If the temptation for judges to use social media is not enough, the vast amount of information now available on the Internet has proved to be both a blessing and potential curse for judges. In the field of judicial ethics, a concern that has been drawing significant attention in the ABA and academia

131. N.C. COMM'N ON THE ADMIN. OF LAW & JUSTICE, *supra* note 20, at app. B 35; *see also* ELON UNIV. POLL, STATE COURTS OCTOBER 29–NOVEMBER 2, 2015, at 4, https://perma.cc/T7G5-PE4Z (finding that 76.2% of respondents believed people without a lawyer are treated somewhat or far worse than represented litigants, 46.2% of respondents believed that African American litigants are treated somewhat or far worse than other litigants, and 63.8% believed that low-income people are treated somewhat or far worse than other litigants).

132. *See* DAVID B. ROTTMAN ET AL., NAT'L CTR. FOR STATE COURTS, CALL TO ACTION: STATEMENT OF THE NATIONAL SUMMIT ON IMPROVING JUDICIAL SELECTION 7 (2002) ("[J]udicial election campaigns pose a substantial threat to judicial independence and impartiality, and undermine public trust in the judicial system."). *See generally* SARA MATHIAS, AM. JUDICATURE SOC'Y, ELECTING JUSTICE 13–62 (1990) (discussing common problems in the election of judges, including an uninformed electorate, problematic judicial campaign materials, improper political activity by judges, and campaign finance issues).

(if not in judicial disciplinary commissions) is the extent to which judges independently research factual and policy information on the Internet to help decide a case. While the ability of a judge to research factual information may not seem problematic to outsiders, it does pose significant problems in an adversarial legal system designed to restrain the exercise of judicial power and make the parties entirely responsible for the introduction of evidence. As one scholar put it:

> [T]he adversarial ideal is inextricably connected to the popular view that courts should play a limited role in a democratic society; it both ensures that courts do not exceed their proper role and provides them with a means of filling that role well.[133]

When research and fact-finding occur on the Internet, outside of the record, the adversarial process falters, as neither side has a voice in objecting to the veracity or credibility of whatever "facts" the judge finds online.[134] The lack of adversarial testing when a judge draws his or her own conclusions from factual information found on the Internet is also concerning in the "fake news" era when the provenance of information on the Internet may be questionable.

The ethical issues surrounding outside Internet research by judges have different applications when considering the work of trial judges and appellate judges. For trial courts, who may serve as the finders of fact (unless it is a jury trial), the general rule is that judges may not conduct independent research on "adjudicative" facts personal to the parties or litigation, although they may research and cite "legislative facts" relative to legal research and analysis.[135] Even when taking judicial notice of an incontestable fact, there is often a requirement to give notice and an opportunity to be heard.[136]

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133. Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 13 (2011).

134. David H. Tennant & Laurie M. Seal, *Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case?*, 16 PROF. LAW., no. 2, 2005, at 2, 14–16 (describing concerns of judicial use of the internet as raising questions of accuracy, fairness and permanency of materials found at one time).

135. Gorod, *supra* note 133, at 39–40 (describing "adjudicative facts" as those specific and relevant to the parties and the issues to be decided, whereas legislative facts deal with general information, such as important background information, legislative history, or generalized data and studies); *see also* Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131, 149–53 (2008) (describing history of and meaning of adjudicative versus legislative facts). *But see* RICHARD A. POSNER, REFLECTIONS ON JUDGING 136–37 (2013) (describing four categories of "facts" in litigation—adjudicative facts, legislative facts, incontestable facts that can be judicially noticed, and background facts).

136. *See, e.g.*, Thornburg, *supra* note 135, at 158 (noting that while a judge may take judicial notice of facts not subject to reasonable dispute, the Federal Rules of Evidence

Trial judges who have sought out information on the Internet about the parties are particularly in danger of disciplinary action or reversal. For example, the North Carolina Judicial Standards Commission publicly reprimanded a judge for visiting the website of the mother in a custody dispute and then citing a poem he found there in the custody hearing.[137] The public reprimand concluded that the judge's independent Internet research implicated all of the core values of the judiciary, including failing to personally observe appropriate standards of conduct to promote public confidence in the integrity, independence, and impartiality of the courts.[138] Similarly, in *NYC Medical & Neurodiagnostic, P.C. v. Republic Western Insurance*,[139] an appellate court reversed a trial judge's decision to dismiss a case based on his independent Internet research into the defendant's business operations in New York.[140]

When appellate judges independently research factual issues on the Internet, the issues are different and several. Independent research by appellate judges is not a new problem. One early article on the topic found that in one state supreme court's opinions, 40% of the empirical research cited in the court's opinions derived from independent research by justices and not through presentation by the parties during the fact-finding process in the trial courts.[141] More recently, Justices of the United States Supreme Court have faced scrutiny and criticism for citing facts found through online resources or presented in amicus briefs rather than found in the record from the trial court where facts are subjected to the adversarial process and notice provisions.[142] As Justice Scalia pointed out in his dissenting opinion in *Sykes*

provide that the parties have the right to respond to any judicially noticed facts and may appeal the issue of whether judicial notice is appropriate).

137. Public Reprimand of Hon. B. Carlton Terry, Jr., Inquiry No. 08-234, at 2–3 (N.C. Judicial Standards Comm'n April 1, 2009).

138. *Id.* at 4.

139. NYC Med. & Neurodiagnostic, P.C. v. Republic W. Ins., 798 N.Y.S.2d 309 (N.Y. App. Div. 2004).

140. *Id.* at 313.

141. Thornburg, *supra* note 135, at 138 (citing THOMAS B. MARVELL, APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM 174 (1978)).

142. *See, e.g.*, Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1906 (2016) (noting the Supreme Court's "new hunger for information outside the record" that can be found in amicus briefs); Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1260–61 (2012) (discussing how "[s]ocial science studies, raw statistics, and other data are all just a Google search away" from the Justices and their law clerks and that such legislative facts are often cited in Court opinions or raised at oral argument).

v. United States, "Supreme Court briefs are an inappropriate place to develop the key facts in a case."[143]

The problem of judicial use of Internet resources by appellate judges is also particularly intractable because it is generally not subject to review in the way that a trial court order citing an Internet resource (even if judicially noticed) could be appealed. Given the extraordinary rise in the number of amicus briefs filed in the Supreme Court, which often contain non-vetted "expert" factual opinions,[144] there is an opportunity for Internet resources of dubious provenance to make their way into judicial decision making without adversarial testing. Moreover, "facts" on websites can change. For example, Chief Justice John Roberts was recently criticized for citing information from an Arizona state website during oral argument and later having to note in the opinion itself that the website information had changed.[145]

The controversy involving independent Internet research has also gained traction in part because of the attention given to the issue by Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit. For example, in *Rowe v. Gibson*, which involved a pro se prisoner claiming deliberate indifference to his medical needs, Judge Posner, in the majority opinion, referenced various websites, including Wikipedia and WebMD, to provide background facts on the medical condition and medications in issue, as well as to evaluate the propriety of the prison doctor's treatment and the doctor's professional background and reputation.[146] In defending his resort to Internet research to determine whether summary judgment in favor of the prison was appropriate, Judge Posner cited two primary concerns. First, he

143. Sykes v. United States, 564 U.S. 1, 31 (2011) (Scalia, J., dissenting) ("We normally give parties more robust protection, leaving important factual questions to district courts and juries aided by expert witnesses and the procedural protections of discovery. An adversarial process in the trial courts can identify flaws in the methodology of the studies that the parties put forward; here, we accept the studies' findings on faith, without examining their methodology at all." (citation omitted)).

144. *See* Larsen & Devins, *supra* note 142, at 1921 (discussing the belief among the Supreme Court that "one could not win a Supreme Court case without assembling a portfolio of 'Brandeis briefs' from historians, social scientists, physicians, and other individuals who could impart their expertise to the Court as amici.").

145. *See* Dahlia Lithwick, *Supreme Court Year in Review*, SLATE (June 27, 2011, 6:17 PM), https://perma.cc/3BCE-GYLP (noting a problem that arose when Chief Justice Roberts cited a state website for information during oral arguments regarding the state's reason for adopting certain campaign finance restrictions when the website was later changed to identify a different reason for the legislation—a point that was raised in the Chief Justice's opinion).

146. Rowe v. Gibson, 798 F.3d 622, 623 (7th Cir. 2015). When discussing the possible credibility of information found on corporate websites, Judge Posner also noted that "[i]t might be thought that a corporate website . . . would be a suspect source of information. Not so; the manufacturer would be taking grave risks if it misrepresented the properties of its product." *Id.* at 626.

argued that strict adherence to the adversarial process is not always beneficial to serve the interests of justice, especially in cases involving pro se litigants.[147] Second, he asserted that the types of facts he researched on the Internet were not necessarily adjudicatory facts requiring the presence of a testifying witness.[148] In a strong dissent, Judge David Hamilton noted that

> The ease of research on the internet has given new life to an old debate about the propriety of and limits to independent factual research by appellate courts. . . . By any measure, however, using independent factual research to find a genuine issue of material, adjudicative fact, and thus to decide an appeal, falls outside permissible boundaries.[149]

With the contentious debate among judges about the ethical propriety of searching the web for factual information useful to a case, the issue of outside independent research on the Internet has become a major concern for the American Bar Association. Under Rule 2.9(C) of the ABA Model Code of Judicial Conduct, "[a] judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed."[150] The comment to this rule makes clear that the prohibition extends to information available electronically.[151] Additionally, the American Bar Association also issued a rare judicial ethics opinion interpreting the Model Code of Judicial Conduct specifically to address independent research on the Internet, even when seeking to judicially notice a fact. As stated in Formal Opinion 478:

> [A] judge should not gather adjudicative facts from any source on the Internet unless the information is subject to proper judicial notice. Further[,] . . . judges should not use the Internet for independent fact-gathering related to a pending or impending matter where the parties can easily be asked to research or provide the information.[152]

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147. *Id.* at 630 ("It is heartless to make a fetish of adversary procedure if by doing so feeble evidence is credited because the opponent has no practical access to offsetting evidence.").

148. *Id.* at 628. Judge Posner described a number of scenarios where he felt Internet research of facts is appropriate, such as web searches for background information and facts that can be judicially noticed. *Id.* Even so, Judge Posner wrote:

> When medical information can be gleaned from the websites of highly reputable medical centers, it is not imperative that it instead be presented by a testifying witness. Such information tends to fall somewhere between facts that require adversary procedure to determine and facts of which a court can take judicial notice . . . .

Id. *See also* Posner, *supra* note 135, at 134–43 (discussing the benefits of Internet use by judges to research facts and background information in decision making).

149. *Id.* at 638 (Hamilton, J., dissenting).

150. ABA MODEL CODE OF JUDICIAL CONDUCT r 2.9(C) (AM. BAR ASS'N 2007).

151. *Id.* r 2.9 cmt. 6.

152. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 478, at 11 (2017).

When considering how independent Internet research by judges threatens the core values of independence, integrity, and impartiality in the judiciary, the harm is sometimes less obvious than when a judge makes profane or outrageous statements on social media or communicates with attorneys through Facebook. Even so, the proliferation of information available instantly on the Internet raises significant concerns about maintaining public trust and confidence in the judiciary. Internet research of facts, like all forms of independent factual research by judges, is considered a form of ex parte communication because it occurs outside the presence of the parties and without an opportunity to cross-examine or object to its use. Reliance on independent Internet research, like all ex parte communications, is prohibited because it can "undermine the adversarial system, threaten fairness of the proceeding, and create an appearance of bias and impartiality."[153] With respect to the core value of impartiality, the curious judge may wish to Google a party or find background information only to stumble upon unfavorable information that could explicitly or implicitly prejudice the judge towards a litigant or lawyer.[154] Similarly, a judge may develop strong opinions or conclusions on disputed factual issues germane to the case when researching "background" information regarding an issue presented to the court for adjudication.[155]

Another significant problem with independent Internet research by judges is that it is harder to police and deter. Unlike social media use, which makes a judge's conduct visible to a broad number of people, it is difficult to discover when a judge visits a website to gather information about a party or a case unless the information is noted in open court[156] or cited in an opinion.[157]

Like all challenges facing the courts, however, the judiciary and the legal profession have shown institutional prerogatives to quickly address internal problems that can draw negative political or media attention. This responsiveness is premised not only on a consistent desire to maintain public confidence in the judiciary but also a concomitant desire to preserve judicial independence. With both the high-profile nature of social media misconduct and the low-profile nature of independent Internet research, the courts and the ABA have demonstrated an ongoing commitment to preservation of the

153. GARWIN ET AL., *supra* note 73, at 195.

154. *See supra* note 35 and accompanying text (discussing the "root" meaning of impartiality as a lack of bias against a party).

155. *See supra* note 40–42 and accompanying text (discussing the importance of "open-mindedness" as a component of impartiality).

156. *See* Public Reprimand of Hon. B. Carlton Terry, Jr., Inquiry No. 08-234 (N.C. Judicial Standards Comm'n April 1, 2009).

157. *See supra* notes 146–49 and accompanying text (discussing *Rowe* decision).

independence, integrity, and impartiality of the courts through advisory opinions, rule changes, working groups, and, when warranted, disciplinary actions against judges.

III. LESSONS FROM THE WATERGATE ERA: PROMOTING PUBLIC CONFIDENCE IN THE COURTS IN A DIVIDED COUNTRY

When looking back at the tremendous impact of the Watergate scandal on the development and use of independent prosecutors and the increased focus on legal ethics, it is easy to forget that this same period of time saw monumental changes in how judges are held accountable for misconduct in office. These changes, and the reforms necessitated by Watergate, took place amidst a background of extraordinary political and social division, much as we see today.[158] Writing in the late 1960s and lamenting the lack of adequate rules and mechanisms to discipline judicial misconduct, Professor Arthur Miller noted that maintaining public confidence in the courts is especially important when the judiciary "is required to act at a time when polarization is occurring over a number of fundamental goals of the American people, and . . . during a period of the most rapid social change in history."[159] Prompted by the civil unrest, social revolution, and scandals of the 1960s and 1970s, palpable concerns about continued confidence in the courts as a bedrock of the rule of law translated into extraordinary changes in the substantive rules of judicial ethics and accountability.

Like the 1960s and 1970s, the politics and social changes of today have sparked widespread feelings of division and distrust in our government institutions. Social media and the Internet have fueled that divide while also providing extraordinary advances in efficiency in government and greater communication. In such times, public confidence in the independence, integrity, and impartiality of the courts is especially important. Although comprehensive ethical guidelines and effective enforcement mechanisms cannot entirely insulate the judiciary from political and public criticism, the norms of judicial ethics must constantly be adapted to address emerging problems that threaten public confidence in the courts. What Watergate and the Justice Fortas scandal teach us, however, is that not all responses to particular ethics problems are effective in deterring political intervention in the sensitive field of judicial discipline or generally bolstering the perception

158. *See, e.g.*, Joseph P. Williams, *A Year to Be Forgotten*, U.S. NEWS (July 22, 2016, 6:00 AM), https://perma.cc/8BE8-8H9F (comparing political strife, civil rights, and war protests of 1968 to the present-day movement of Black Lives Matter, the deeply partisan political divide, and the controversial nature of Donald Trump's campaign and populist rhetoric).

159. Miller, *supra* note 19, at 76.

of fair and impartial courts. At the same time, the response to the Justice Fortas scandal also shows the imperative in addressing judicial misconduct in ways other than government ethics restrictions. To date, the courts, the ABA, and the legal profession have been quick to address problems in the courts, not just in the area of social media and the Internet, but in other areas such as the election of judges[160] and the problem of implicit bias.[161] From these considerations, several lessons emerge in evaluating appropriate responses to ethical issues arising from social media and Internet use by judges.

First, judges must willingly accept that the restrictions on their conduct on and off the bench are going to be much more burdensome than those imposed on other public officials.[162] This is true even in jurisdictions that elect their judges. In exchange for the respect, power, and authority that come with the robe, judges must understand that public perception of their behavior can impugn the public's overall confidence in the independence, impartiality, and integrity of the judiciary. As Justice Ruth Bader Ginsburg wrote in her dissent in *Republican Party of Minnesota v. White*,

> [J]udges perform a function fundamentally different from that of the people's elected representatives. Legislative and executive officials act on behalf of the voters who placed them in office . . . . Unlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide "individual cases and controversies" on individual records, neutrally applying legal principles . . . .
>
> A judiciary capable of performing this function, owing fidelity to no person or party, is . . . an essential bulwark of constitutional government, a constant guardian of the rule of law.[163]

Accordingly, there are compelling reasons for putting strict limitations on how judges interact on social media platforms or utilize information found on the Internet in the adjudicatory process. As discussed in Part II, those

160. *See supra* note 132 and accompanying text.

161. *See, e.g.*, N.C. COMM'N ON THE ADMIN. OF LAW & JUSTICE, *supra* note 20, at 68 (citing polling data showing that a large percentage of respondents believe that African Americans and non-English-speaking people receive worse treatment in the courts than white people); JERRY KANG, NAT'L CTR. FOR STATE COURTS, IMPLICIT BIAS: A PRIMER FOR COURTS 6 (2009) ("It is the primary responsibility of the judge and other court staff to manage this complex and bias-rich social situation to the end that fairness and justice be done-and be seen to be done."). *See generally* Chris Guthrie, Jeffrey J. Rachlinski & Hon. Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (discussing an empirical study of implicit bias in the courts and suggestions for steps to address these impulses).

162. *See* THODE, *supra* note 74.

163. *See* Republican Party of Minn. v. White, 536 U.S. 765, 803–04 (2002) (Ginsburg, J., dissenting) (citations omitted).

activities can easily affect a judge's impartiality, call into question a judge's integrity, or otherwise undermine faith in the fairness of the administration of justice. Thus, while hyper-partisan or shocking language on social media may be the new norm in political rhetoric, and while using dubious information from the Internet may play a role in supporting political goals or campaigns, such conduct for judges must continue to be strictly regulated.

Second, as in the post-Justice Fortas context, the judiciary and the legal profession must quickly address internal problems to protect judicial independence and avoid political responses to perceived judicial misconduct. At the same time, however, courts and judicial policy makers must be careful not to act too hastily to adopt prophylactic or unworkable rules that unduly burden legitimate judicial conduct or social interaction. For example, in dealing with the contemporary threats to public confidence in the administration of justice arising in the digital age, some states moved quickly to adopt draconian restrictions on social media use.[164] Rather than entirely restrict a judge's use of social media to connect with their communities, which includes lawyers, the focus of judicial ethics regulation is more appropriately placed on fostering *responsible* use of technology. This includes using social media in a way that minimizes conflicts of interest, avoids ex parte communications, and refrains from inflammatory or inappropriate commentary that calls into question the integrity or impartiality of the judge as an individual or the courts as a whole.

Third, judicial ethics rules relating to social media and the Internet should not deter judges from stepping into the digital frontier. Social media engagement and technology can have many benefits for enhancing public understanding of the courts.[165] The use of social media in particular, is extremely useful because of the "unprecedented need for judges to respond with educational efforts that will ameliorate the public's misconceptions about the justice system and strengthen its commitment to an independent judiciary."[166] Judges may also need to use social media to effectively campaign for judicial office. Encouraging judges to interact with technology is also increasingly important as courts transition to e-courts and other digital platforms to promote efficiency and transparency. We also cannot ignore the fact that we live in an age where young people, and future judges, interact electronically in ways that are hard to understand by the older generations that can often dominate judicial policy making, which is already by its nature

164. *See supra* note 114 and accompanying text.

165. *See, e.g.*, Justice Barbara A. Jackson, *To Follow or Not to Follow: The Brave New World of Social Media*, 53 JUDGES J., no. 4, 2014, at 12 (arguing for greater user of social media by judges, but cautioning that restraint in posting and use of best practices are necessary to ensure a judge is not perceived as biased based on the content of social media posts).

166. CYNTHIA GRAY, STATE JUSTICE INST., WHEN JUDGES SPEAK UP 1 (1998).

restrained and cautious. Attracting talented, smart, and tech-savvy lawyers to the bench is, therefore, another consideration that must be taken into account in developing rules that regulate social media and internet use by judges.

Finally, without embracing Judge Posner's full-throated support for increased Internet research by appellate judges, judicial policy makers should take note of the serious impact that the rise of pro se litigation has on public confidence in the courts. Unlike the 1960s and 1970s, today more and more people are choosing to represent themselves in court,[167] which has caused a host of issues for the administration of justice. Among other things, this has created a strong perception that the poor and those without attorneys are not treated fairly. As noted in a poll included in the Final Report of the North Carolina Commission on the Administration of Law and Justice, 76% of respondents believed that self-represented litigants receive worse or far worse treatment in the courts than litigants with lawyers.[168] This dismal figure harkens to an observation by Professor Arthur Miller about the state of the judiciary in the pre-Model Code days of the late 1960s: "[I]n our adversary system of justice wherein truth is secondary to the skill and connections of the advocate—the logical culmination of this ethic, on a person-to-person level, is that the weak are seen as the natural and just prey of the strong."[169] Social media activity by judges can exacerbate the feeling of weakness and unfairness for the rising number of pro se litigants in the courts, especially as the bench and bar become more visibly interconnected through LinkedIn, Facebook, and other platforms. Similarly, pro se litigants facing represented opponents may have significant disadvantages in gathering evidence electronically (or otherwise) or, conversely, in presenting the electronic evidence that they do have. At the same time, judges must avoid overreaching to try to "help" such litigants (for instance by researching factual issues on the Internet for them), which could be prohibited as the practice of law and would be unfair to the opposing party.

Looking back at the post-Watergate era, the modern rules of judicial ethics and judicial disciplinary structures were implemented during a period of unprecedented attention to ethics in government. Even so, the ethical rules of the 1970s and today reflect continued commitment to the three core values of the judiciary—independence, integrity, and impartiality. While specific rules have been adopted over the ensuing decades to address particular problems, a less restrictive approach to social media and the Internet is

167. *See* MADELYNN HERMAN, NAT'L CTR. FOR STATE COURTS, PRO SE STATISTICS (2006) (compiling data and statistics from state court systems showing percentage of pro se litigants rising over time).

168. See N.C. COMM'N ON THE ADMIN. OF LAW & JUSTICE, *supra* note 20, at 68.

169. Miller, *supra* note 19, at 86 (quoting E. CLEAVER, SOUL ON ICE 85 (1968)).

preferable. An approach that balances the realities of modern communication with rules that focus on restricting the type of conduct or statements that threaten the integrity, impartiality, or independence of the particular judge is more likely to yield positive results for public confidence in the courts than harsh digital restrictions. In particular, regulated use of the Internet under existing standards of judicial ethics is more likely to comport with First Amendment protections, accommodate judges who must campaign for office, enhance judicial outreach to younger generations, promote the use of new technologies to improve case management and administration, and otherwise attract and retain new judges who rely on social media and other technologies in their personal and professional lives.

CONCLUSION

At the end of the day, each new challenge in the area of judicial ethics since Watergate has been addressed with rules that continue to promote the core values necessary to preserve public confidence in the courts. As modes of communication change and norms of civil discourse disintegrate, we must continue to demand restraint, fairness, and excellence in our judiciary. As put by William Taft not long before he became Chief Justice of the United States:

> The proper discharge of the difficult duties of courts requires as judges men of great ability, wide experience, profound learning, independence and force of character, of nice discriminating judicial quality, and with the statesmanlike perception of the distinction between those fundamental principles of law that must be constantly maintained and preserved in any useful system of government and of the casual and temporary rules of human conduct that may be changed from time to time as conditions change . . . .[170]

Heeding Taft's words, "the casual and temporary rules of human conduct"[171] that judges have faced from the 1960s to today must always yield to the fundamental principles of independence, integrity, and impartiality. Whether such conduct includes receiving annuities and other outside compensation from organizations, maintaining a close and public relationship with the President, or connecting with potential voters and lawyer friends on the Internet, all such activity must be subject to the restraints on judicial conduct that are necessary to maintain public confidence in the rule of law and allow the federal and state judiciaries to continue to take the leading role in judicial discipline.

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170. William Howard Taft, *The Attacks on the Courts and Legal Procedure*, 5 KY. L.J. 3, 8 (1916).

171. *Id.*