The Politics of Misconduct: Rethinking How We Regulate Lawyer-Politicians, 57 Rutgers L. Rev. 839 (2005)

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THE POLITICS OF MISCONDUCT: RETHINKING HOW WE REGULATE LAWYER-POLITICIANS

Kevin Hopkins*

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The Model Rules are premised on the fallacy of the monolithic attorney-client relationship . . . [E]ach rule purports to address an issue for all walks of lawyer, regardless of the nature of their practice [or non-practice] or of the clients they represent . . . Lawyers, however, are not all the same.1

INTRODUCTION

During the last century, the legal profession has experienced a drastic change in the roles and functions of its members. Its modern

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composition no longer consists solely of practicing lawyers, judges, and law professors but has steadfastly transformed to include an increasingly large number of lawyers who function in positions that fall outside the traditional practice of law. Today, it is commonplace to find practicing lawyers who have become either disillusioned with the routine nature of their practices or for countless other reasons, decide against practicing law upon passing the bar examination. There are numerous explanations for making this choice. Many lawyers leave the profession to seek non-legal employment in private or public sector jobs. For instance, a growing trend towards the legalization of many industries and professions has resulted in the creation of complex federal and state regulations that often require legal training and expertise to comply with and follow. Other lawyers remain in the practice of law but pursue additional professional degrees in order to obtain the flexibility to participate in dual practices. A growing number of lawyers leave the profession each year to enter into public service as public officials elected through the political process or appointed by federal or state executives.

2. See AT THE BREAKING POINT (A.B.A. ed., Airlie House 1991) (discussing an ABA study on career satisfaction and dissatisfaction) (noting several reasons for lawyer discontent with the practice of law such as long workdays, the emphasis on billable hours, the intensely competitive partnership struggle, disgruntled clients, and the strain of constantly enacting an adversarial role); see also Kevin Hopkins, Law Firms, Technology, and the Double-Billing Dilemma, 12 GEO. J. LEGAL ETHICS 95, 98-101 (1998) (discussing double-billing and the pressures placed on new associates in pursuing partnerships in law firms).

3. Lawyer dissatisfaction with the practice of law has prompted numerous publications by legal career counselors and programs sponsored by local bar associations to discuss non-legal career options. See, e.g., DEBORAH ABRON, WHAT CAN YOU DO WITH A LAW DEGREE? A LAWYERS' GUIDE TO CAREER ALTERNATIVES INSIDE, OUTSIDE, AND AROUND THE LAW (4th ed. 1999); HINDI GREENBERG, THE LAWYER'S CAREER CHANGE HANDBOOK: MORE THAN 300 THINGS YOU CAN DO WITH A LAW DEGREE (1998); see also Ilana DeBare, When the Boss Has Wrong Image of the Workers, S.F. CHRON., Dec. 1, 1997, at B1 (noting that other positions include legal head-hunting firms and the business world); John Murawski, D.C. Bar Panels on Career Change Pack 'Em In, LEGAL TIMES, Feb. 22, 1993, at 1 (noting that many lawyers seeking to change careers often consider positions in legal publishing and university administration).


5. As used in this Article, the term "lawyer-politician" is defined as a lawyer who has chosen the career path of public official as his or her primary occupation. As defined by the Supreme Court, a public official is one who is "among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." Rosenblatt v.
Although the majority of state and federal politicians are not lawyers, there has always been a close relationship between law and politics. Throughout American history, the legal profession has played an important role in the lives and careers of many politicians. Law schools have become the training grounds for many

Baer, 383 U.S. 75, 85 (1966). In Rosenblatt, the Supreme Court held that public officials are persons who occupy positions in government that are of such importance, that the public has an independent interest in their qualifications and performance beyond the general public interest in the qualifications and performance of all government employees. Id. at 86. Although the term is broad enough to encompass lawyers who operate in both federal and state policy-making positions that are executive and legislative in nature, it can also include lawyers who are elected to or nominated for offices that are judicial or quasi-judicial. The use of the term in this Article is limited to those lawyers who are elected or nominated to the federal executive policy-making position of President and Vice President and the federal judicial and quasi-judicial offices of Supreme Court Justice, Attorney General and Solicitor General.

6. See, e.g., Ryan Keith, Public Service or private practice? Lawmakers feel tug between legislature and legal practices, THE STATE JOURNAL-REGISTER (Springfield, IL), Aug. 14, 2000, at 7 (noting that nationally, the average percentage of lawyers in state legislatures was 16% in 1995, a decrease from 22% in 1976). The drop in the number of lawyers in the U.S. Congress fell from 58 percent in 1969 to 43 percent in 1999. Id. See also Allan Freedman, Lawyers Take a Back Seat in the 105th Congress, CONG. Q. WKLY. REP. 27, 29 (Jan. 4, 1997) (noting that approximately 40% of the members of the 105th Congress were lawyers).

7. For example, thirty of the fifty-six signers of the Declaration of Independence were judges or lawyers and thirty-one of the fifty-five members of the Continental Congress were lawyers. See Robert F. Boden, The Colonial Bar and the American Revolution 3 (1976); Mark C. Miller, The High Priests of American Politics: The Role of Lawyers in American Political Institutions 31 (1995). Lawyers also dominated the state conventions organized to ratify the Constitution. Miller, supra, at 31. More than half of the delegates at the Constitutional Convention were lawyers. See Harry W. Jones, Political Separation and Legal Continuity xiv (1976). Also, four of the five persons appointed by the Continental Congress to prepare the Declaration of Independence possessed legal training including Thomas Jefferson, the actual drafter. Id. at xiii. John Dickinson, a Philadelphia lawyer, prepared the initial draft of the Articles of Confederation. Id. John Jay and John Adams, both practicing lawyers during the colonial period, were the principal negotiators of the Treaty of Paris, an agreement that consolidated the independence of the United States and continues to be regarded as the "greatest diplomatic triumph of American history." Id.; see Definitive Treaty of Peace Between the United States of America and his Britannic Majesty, Sept. 3, 1783, 8 Stat. 80 (1867).

8. The legal profession often comes into play during several stages of the typical career of a politician. First, being a lawyer provides one with the flexibility to make his or her first run for office. Once in the political arena, the legal profession often acts as a way station between a lost election and the next campaign. Finally, the legal profession provides the politician with a place to retire after completing her responsibilities in public office. See The Rodent, On Law and Politics, 40 Orange County Lawyer 22, 22 (1998). For instance, lawyer Richard Nixon retreated back to the practice of law between serving as Vice President and running for governor of California in 1962. See Melvin Small, The Presidency of Richard Nixon 21 (1999). Mr. Nixon also practiced law after losing the gubernatorial election in 1962 and up
of the nation's leaders. While not a requirement for fulfilling the responsibilities of public office, a law degree is an attractive asset for politicians seeking federal and state elected offices and cabinet positions. Today, more attorneys run for and hold public office than members of any other profession. During the past decade alone, lawyers have held the governorships in approximately two-thirds of the states, and twenty-five out of forty-two U.S. presidents have been lawyers. Even at the state level, more legislators are selected from the ranks of lawyers than from any other profession.

Lawyer-politicians and dual practitioners confront interesting predicaments for purposes of professional regulation for conduct occurring outside the practice of law. Consider the following scenario as an illustration of the problems that can occur in applying the American Bar Association's ("ABA") Model Rules of Professional Conduct to the lawyer-politician:

Lawyer A has developed a distinguished family law practice. As a result of her advocacy of children's rights issues, she has become well known in her state and throughout the nation. Because of her recent notoriety in this area and in furtherance of her interests in children's rights, she leaves her law practice and decides to run for a vacant U.S. Senate seat in her state. She is successful. Several months prior to the election however, Lawyer A receives and accepts a multi-million dollar offer from a national publishing company to write her memoirs. The publishing company is a subsidiary of a larger parent corporation—a broadcasting company that will likely be adversely affected by upcoming Congressional legislation designed to establish a new television rating system to protect children from prime-time programs showing acts of violence and strong sexual content. Lawyer A is not covered under the Senate ethics rules until she takes office in January. Upon

until the time he ran for and was elected to the Presidency in 1968. See id. at 22.

9. See Miller, supra note 7, at 31-46 (noting that in the United States, lawyers have occupied the heads of the executive branches of both state and federal government, federal agencies, and the U.S. Congress); see also Freedman, supra note 6, at 29 (noting that approximately 40% of the members of the 105th Congress were lawyers); 51 Cong. Q. Almanac B-8 (1995) (noting that the legal profession was representative of the largest occupational group in Congress); James J. Brudney, Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?, 93 Mich. L. Rev. 1, 49 n.194 (1994) (noting the percentages of lawyers occupying past Congresses).

10. See Miller, supra note 7, at 31; see also Grutter v. Bollinger, 539 U.S. 306, 332 (2003) (noting that currently, persons with law degrees occupy approximately half of the state governorships, more than half of the seats in the U.S. Senate, and more than a third of the seats in the U.S. House of Representatives).

taking office, Lawyer A's previous acceptance of the book contract, on its face, would be appropriate and ethical despite the fact that her acceptance of the book contract could ultimately raise conflicts of interest concerns in violation of the Senate Ethics Rules. As expected, the House passes the legislation. Lawyer A, who is now a U.S. Senator, however, votes against the legislation. Believing that her book contract with the subsidiary company may have influenced her voting behavior, Senators from the opposing political party prompt the Senate Ethics Committee to hold hearings on the matter.

How should the Bar respond to Lawyer A's acceptance of the book contract and the current Senate investigation into the ethics of Lawyer A's voting? Technically, Lawyer A is bound by the Model Rules despite the reality that most of the rules, if not all of them, are inapplicable to her day-to-day operations as a government official. As a United States Senator, Lawyer A is not required to possess a law degree and law license. She does not represent clients in court proceedings, advise clients, or prepare legal documents. In short, her role and job function are no different than any non-lawyer employed in the same capacity. Thus, she is not engaged in the practice of

12. See SELECT COMM. ON ETHICS, U.S. SENATE, 108TH CONG., SENATE ETHICS MANUAL 97 (Comm. Print 2003), available at http://ethics.senate.gov/downloads/pdfiles/manual.pdf. Senate Rule 36 bans members of the Senate from receiving honoraria as a payment of money or anything of value for appearances, speeches or articles. Id. at 98. Assuming fair dealing between the Senator and publishing company, the rule exempts payments received for writings to be published as books. Id. at 100.

13. Senate Rule 37(2) provides that "[n]o [m]ember, officer, or employee shall engage in any outside business or professional activity or employment for compensation which is inconsistent or in conflict with the conscientious performance of official duties." See S.R. 37(2), reprinted in SELECT COMM. ON ETHICS, supra note 12. The legislative history for this provision notes that the rule was designed to prohibit any outside activities that could represent a conflict of interest or the appearance of one.

14. This example is modeled after the potential ethical concerns that were lodged against former First Lady and lawyer, Senator Hillary R. Clinton (D. N.Y.), on the eve of her induction into the United States Senate, after she had received one of the largest book publishing deals in the nation's history for her memoirs as the First Lady. See Linton Weeks, Hillary Clinton Seals $8 Million Book Deal; Memoir to Detail White House Years, WASH. POST, Dec. 16, 2000, at A01.

15. The Model Rules expressly refer to "lawyers holding public office" on only two occasions. See MODEL RULES R. 7.5(c) (providing that a law firm may not include "the name of a lawyer holding a public office . . . in the name of a law firm, or in any communications on [behalf of the firm] during any substantial period in which the lawyer is not actively and regularly practicing with the firm"); MODEL RULES R. 8.4 cmt. 5 (providing that "[l]awyers holding public office assume legal responsibilities going beyond those of other citizens" and noting that an "abuse of public office can suggest an inability to fulfill the professional role of [attorney]").
law. However, as a result of her bar membership, she can be subjected to an additional layer of discipline over and above her non-lawyer counterpart. In fact, recent incidents of discipline by state bar associations for acts of misconduct occurring outside the practice of law and committed by bar members holding high public office have ranged from suspension to disbarment.

Is there a legitimate rationale for treating the lawyer-politician who does not practice law any differently than the non-lawyer politician who has committed the same act of misconduct? The answer to this question is unclear under the current Model Rules. Legal scholars have also shied away from addressing this reoccurring issue. Although the primary goal of the drafters of the Rules was to

16. Defining the “practice of law” is not easy. For example, one commentator has defined the practice of law broadly to include “anything usually done by lawyers.” Alan Morrison, Defining the Unauthorized Practice of Law: Some New Ways of Looking at an Old Question, 4 NOVA. L.J. 363, 365 (1980). Courts, however, have provided a more specific definition. See R.J. Edwards, Inc. v. Hert, 504 P.2d 407, 416 (Okla. 1972) (defining the practice of law as “the rendition of services requiring the knowledge and the application of legal principles and technique to serve the interests of another with his consent”). Both commentators and the courts, however, have agreed that indicia of the practice of law will include the following:

(1) representation of parties before judicial or administrative bodies, (2) preparation of pleadings and other papers incident to actions and special proceedings, (3) management of such action and proceeding, and non-court related activities such as (4) giving legal advice and counsel, (5) rendering a service that requires the use of legal knowledge or skill, (6) preparing instruments and contracts by which legal rights are secured.

State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc., 514 P.2d 40, 45 (N.M. 1973). See also Morrison, supra, at 366-371 (noting that the cases and definitions of the practice of law can be categorized into three areas: “representation in court, drafting of legal documents, and giving legal advice. . .”); 7 AM. JUR. 2D, Attorneys At Law § 118 (1997) (noting that “the practice of law is not limited to conducting litigation [but will] include[] giving legal advice and counsel, rendering a service that requires the use of legal knowledge or skill, and preparing instruments and contracts by which legal rights are secured . . .”) (footnotes omitted).

17. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 336 (1974) [hereinafter Formal Opinion 336] (noting that a lawyer acting within her professional capacity or otherwise is bound by the applicable disciplinary rules of the Code of Professional Responsibility); In re Nixon, 385 N.Y.S.2d 305 (App. Div. 1976) (discussing disbarment actions taken against President Richard Nixon for his role in Watergate). In a more recent context, the disbarment proceedings against President Clinton was the third form of punishment against the President for giving false testimony in the Jones case. James Jefferson, Panel: Disbar Clinton; President’s ‘Serious Misconduct’ Cited, CHI. SUN-TIMES, May 23, 2000, at 1. The first punishment was the U.S. House impeachment with Senate acquittal; the second punishment was U.S District Court Judge Susan Webber Wright’s finding of contempt; and finally, the Arkansas Supreme Court’s recommended disbarment. Id.

18. Currently, there has been very little legal discussion or commentary on the regulation of lawyer-politicians under the Model Rules of Professional Conduct. See generally Nancy B. Rapoport, Presidential Ethics: Should A Law Degree Make A
provide a legal structure for the ethical practice of law, legal scholars have questioned the viability of a "one-size-fits-all"19 application of these rules to the unique features of many specialized practice areas.20 Specifically, they have suggested either a modification of the

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19. Although the Model Rules provide some guidance for lawyers who leave the practice of law to become government officers and employees, lawyers who work as government prosecutors, lawyers who work for organizations and corporations, and lawyers who are involved in law-related services, they do not provide specific guidance for lawyers disengaged from the practice of law or law-related activities. See, e.g., MODEL RULES R. 1.11 (discussing conflict of interest rules for lawyers resuming the practice of law after serving as officers and employees of the government); MODEL RULES R. 1.13 (discussing the role of lawyers representing corporate clients); MODEL RULES R. 3.8 (regulating the conduct of lawyers serving as government prosecutors); MODEL RULES R. 5.7 (discussing the responsibilities of lawyers participating in law-related services).

current ethics rules,\textsuperscript{21} or a separate code of ethics to accommodate for the unique differences inherent in specific areas of practice.\textsuperscript{22} The \textit{Model Rules} also raise similar concerns in failing to adequately recognize and accommodate the diverse roles assumed by non-practicing lawyers. A rethinking of the applicability of the \textit{Model Rules} in regulating the conduct of lawyer-politicians is both timely and appropriate in light of the Arkansas Bar Association’s recent dilemma of determining the appropriate disciplinary measure to be taken against former President William Jefferson Clinton for giving false and misleading deposition testimony in a sexual harassment case against him.\textsuperscript{23}

This Article evaluates the \textit{Model Rules}’ one-size-fits-all approach to regulating federal lawyer-politicians and examines a few of the political problems that can arise when courts and bar associations attempt to discipline these lawyers for unethical conduct committed while in office. The thesis of this Article is that applying the current ethics rules to the non-practicing lawyer-politician fails to acknowledge and to take into account the significant changes in the roles and functions of the modern lawyer. In regulating the conduct of lawyer-politicians, the \textit{Model Rules} fail to consider the specific and inherent federal constitutional safeguards governing the political

\begin{itemize}
\item \textsuperscript{23} See Jones v. Clinton, 36 F. Supp. 2d 1118, 1131-32 (E.D. Ark. 1999) (holding the President in contempt of court and ordering him to pay plaintiff’s reasonable expenses due to his willful failure to obey the court’s discovery orders); Pete Yost, \textit{Ark. Court Gives Clinton 30 Days to Respond to Legal-Ethics Complaints}, PHILA. INQUIRER, Feb. 11, 2000, at A28 (discussing the Arkansas Bar Association’s decision to proceed in disciplinary proceedings against President Clinton).
\end{itemize}
process and politicians. Finally, disciplinary actions against lawyer-politicians run the inherent danger of becoming entangled in the politics surrounding the alleged misconduct. Thus, partisan politics may ultimately affect the bar's ability to effectuate a fair and unbiased sanction. For these reasons, this Article proposes that bar associations adopt a legal-realist approach that considers specific contextual factors surrounding the lawyer's misconduct in determining when and how to regulate non-practicing lawyer-politicians.24

Part I discusses the lawyer-statesman ideology which continues to have an overriding influence in the discipline of lawyers. First, it considers the pivotal role that lawyers played in colonial America in helping to develop the new republic. It argues, however, that the recent changes in modern society such as the growing national trend towards increased governmental regulations and increased lawyer specialization have resulted in a steady decline in the need for the lawyer's historic and once critical role as a statesman. Thus, this section contends that as a result of these changes, a broader perspective of the roles played by lawyers is warranted and an over-reliance on the use of this one factor in lawyer disciplinary decision-making is impractical.

Part II provides an overview of the development of lawyer discipline in the United States. It briefly discusses the goals of discipline and the available sanctions for regulating the professional misconduct of lawyers along with the inherent and statutory powers of the courts and bar associations to regulate lawyers.

Part III looks at Comment 5 of Rule 8.4 (misconduct) of the Model Rules of Professional Conduct and its applicability to regulating the conduct of lawyer-politicians. This section begins by discussing the theory behind the current judicial application of Comment 525 to both practicing and non-practicing lawyers. It evaluates the application of the comment to lawyer-politicians and the soundness of the ABA's rationale for holding these lawyers to a higher level of accountability under its ethics rules. In doing this,

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24. Although I recognize the complexities in considering the larger issue of the regulation of non-practicing attorneys in general, my focus on the lawyer-politician is to create a common reference point that could be used to prompt a discussion of the larger but more general question of how to regulate the non-practicing lawyer.

25. In 2002, the ABA adopted many of the changes proposed by its Ethics 2000 Commission, a group charged with studying and evaluating the Model Rules of Professional Conduct. The changes included the addition and deletion of rules and the addition of several new subparagraphs and significant amendments within the existing rules. As a result of the changes, former Comment 4 of Model Rule 8.4 has been renumbered and is currently Comment 5 of Rule 8.4. See MODEL RULES OF PROFESSIONAL CONDUCT (1983) 5, 459 (amended 2002), reprinted in STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS (2003).
Part III examines the ABA's failed attempt to regulate the non-practicing areas of lawyers participating in dual practices as a foundation for evaluating its legitimacy and rationale for holding lawyer-politicians to a higher ethical standard than practicing lawyers who commit similar acts of misconduct.

Part IV considers the applicability of legal realism as a model in determining how and when to regulate the conduct of federal lawyer-politicians and considers a few of the constitutional and political considerations that justify a deviation from applying the current Model Rules to federal lawyer-politicians who commit acts of misconduct.26

Part V proposes that bar associations adopt a functional approach to regulating lawyer-politicians. This approach considers such variables as the office and job function of the lawyer-politician, the forum for the misconduct, the legal nature of the misconduct (e.g. criminal or civil), and the respective interests of the bar, judiciary and the political process in determining whether to discipline these lawyers for their actions or to defer discipline to other branches of government such as the executive branch, legislature or judiciary that may have a more significant interest in the lawyer-politician's actions. Part V concludes by advocating the creation of, and reliance upon, functional zones that consider these variables within the context of several areas of questionable or improper conduct.

I. THE RISE AND FALL OF THE LAWYER-STATESMAN

The quintessential role of the lawyer in American society has evolved over time from one of public contempt to a more respectable view of the lawyer as a statesman.27 The "lawyer-statesman" concept is a model of professional excellence that has single-handedly influenced and shaped the collective aspirations and identity of the modern lawyer. It is often referred to as the ultimate character trait for lawyers—one that combines both a generalized conception of the political virtues of statesmanship and the ordinary circumstances


27. See, e.g., MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876, at 39-40 (1976) (discussing the public hostility towards the bar at the time of the American Revolution); CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 4-10 (1911) (noting that throughout the Seventeenth Century, a lawyer was a person of discredit and suspicion and providing several reasons for the slowness in the change in public attitudes towards lawyers). Currently, public esteem for lawyers remains low. See W. William Hodes, Truthfulness and Honesty Among American Lawyers: Perception, Reality, and the Professional Reform Initiative, 53 S.C. L. REV. 527, 528 (2002); Dave Orrick, Survey says: Lawyers beat only media at bottom of public opinion, CHI. DAILY HERALD, June 14, 2002, at 1.
surrounding legal practice. The idea embraces such attributes as public service and the civic-mindedness associated with it, along with prudence and practical wisdom.

The notion of the lawyer as statesman, however, is broader than just a generalized belief that the virtues of prudence and public service are desirable attributes. It implies that these qualities have special importance and value to lawyers. Thus, legal scholars and practitioners have construed the concept to mean not only that the practical experiences of lawyers promote these qualities but also that their professional responsibilities require them.

Although bar associations and courts sometimes fail to expressly acknowledge the virtues of the lawyer-statesman idea, they often either consciously or unconsciously rely on the concept as a significant gauge in deciding when and to what extent discipline should be imposed upon practicing and non-practicing lawyers who commit professional misconduct. Whether such reliance is warranted, however, requires a review of the critical role played by lawyers during colonial society that fostered the growth and development of the lawyer-statesman idea and some of the recent societal changes that have contributed towards its decline.

A. The Lawyer in Colonial America

The lawyer's presence in colonial America prior to and shortly


29. See Kronman, supra note 28, at 109. Kronman notes that it is the lawyer's judgment or wisdom that is the most important value of the lawyer-statesman and argues that statesmanship is the “skill or excellence at making judgments about the public good.” Id. at 3, 87. See also Timothy J. Sullivan, The Legal Profession and its Future: Recapturing the Ideal of the Statesman-Lawyer, 32 U. Rich. L. Rev. 477, 478-79 (1998) (describing the lawyer-statesman as an idea that embodies three principle attributes: (1) the learned person who is broadly and deeply educated in both techniques and values; (2) the helper or counselor who can provide counsel to “the heart as well as to the head,” and (3) the civic leader who is capable of using lawyerly skills outside of the lawyer-client relationship to provide service to the community at-large).

30. See Kronman, supra note 28, at 109. See generally Sullivan, supra note 29, at 478-79; Rehnquist, supra note 28, at 553 (noting the significance of legal education and law practice in the development of the lawyer-statesman of colonial times).
after the Revolution was unwelcome by most of the colonists. There was great animosity towards lawyers and the organized bar during this period.31 Many of the early colonies had enacted statutes making the practice of law impractical or prohibited.32 Judges were appointed who had no legal training.33 The overwhelming majority of colonial lawyers were men who had received their only legal training through colonial clerkships and not through a system of formalized legal education.34 At times, even radical groups rioted against lawyers in protest to excessive litigation.35 By the eve of the American Revolution, however, the public's attitude towards lawyers began to change significantly.

The colonists' growing respect for and acceptance of lawyers

31. See ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 132 (1953) (noting the public hostility towards lawyers in England during the era of the Puritan Revolution and holding that "this hostility was exaggerated in the colonies"); id. at 233 (noting that public antagonism towards early bar associations was the result of such factors as a general belief in the right of every person to pursue the profession of his choice, the distrust of specialization and special training requirements, and the fear that professionalism might result in the creation of privileged and exclusive classes of individuals).

32. See, e.g., Richard B. Morris, The Legal Profession in America on the Eve of the Revolution, printed in HARRY W. JONES, POLITICAL SEPARATION AND LEGAL CONTINUITY 5-6 (1976) (discussing statutory provisions in colonial Virginia, South Carolina and Massachusetts that prohibited lawyers from receiving compensation for appearing on behalf of clients in courts). See also POUND, supra note 31, at 137 n.14 (citing Act VII of 1645, 1 Hening, 304 which acknowledged the multiplicity of troublesome lawsuits brought by the "unskillfulness and covetousness of attorneys" during this period and required that all "mercenary attorneys be wholly expelled from that office except as to cases already undertaken or depending").

33. Only a few of the colonial judges were men who had acquired formal legal education. See POUND, supra note 31, at 132 n.3. The limited number of colonial judges with legal education was the result of low salaries and the uncertainties of job tenure that discouraged young attorneys from seeking judgeships. See LORRETA A. NORRIS & LARRY M. BOYER, LIBRARY OF CONGRESS, AMERICAN COLONIAL COURTS AND LAWYERS: AN ANNOTATED BIBLIOGRAPHY (1976). Thus, the colonial courts provided little assistance in the creation of a trained and effective organized bar.

34. See JONES, supra note 32, at 11 (discussing the two possible routes to admission to the colonial bar: (1) formal legal training at the Inns of Court in England; and (2) apprenticeships with established attorneys). Because of the costs for study at the Inns of Court, many colonial parents chose to apprentice their sons as law clerks for practitioners. Id. See also PETER CHARLES HOFFER, LAW AND PEOPLE IN COLONIAL AMERICA 65 (1992). Thomas Jefferson, who had studied law under the mentorship of Judge George Wythe of the Virginia Court of Chancery, was himself an avid critic of the apprenticeship system and was instrumental in introducing more formal instruction in American legal training. See JONES, supra note 32, at 17. The fruits of his efforts resulted in the first law professorship at the College of William and Mary in 1779 which was held by Jefferson's mentor, George Wythe. Id.

35. See WARREN, supra note 27, at 214-18 (highlighting a few examples of the intense public outcries and riots in response to excessive litigation for debts and mortgage foreclosures shortly after the Revolution).
during this junction in history can be attributed to several things. First, at the end of the Seventeenth Century, many of the colonies had begun to establish official court systems to administer justice. These courts required formal legal training for persons acting as agents or advocates for litigation. By the Eighteenth Century, many colonial families with sufficient resources had begun to send their sons abroad to England to study law in the Inns of Court. In addition to their formal legal training, a significantly large proportion of lawyers during this period, unlike their predecessors, also had obtained general academic training and degrees from colonial and English universities and colleges, thus better preparing themselves to serve as lawyers and community leaders in any capacity.

Second, the colonies had established formal qualifications and rules for admission to the practice of law and for monitoring the professional responsibility of lawyers, thus fostering some sense of lawyer accountability. For example, in Massachusetts, New Hampshire, Pennsylvania and Maryland, where the colonies had adopted the traditional English approach to bar admission, every court possessed the power to admit lawyers to practice before it. In Rhode Island, Connecticut and Delaware, all courts of general

36. See Pound, supra note 31, at 144-45 (noting the establishment of court systems in the principle colonies of Virginia (1705), Massachusetts (1699), Maryland (1692), New York (1691), Pennsylvania (1722), New Jersey (1704), and South Carolina (1721)).

37. Id. at 145.

38. During the period from 1760 up to the Revolution, more than 100 lawyers were studying law in the Inns of Court. Id. at 157. Lawyers who were admitted by the Inns of Court were generally recognized as qualified to practice law in the colonies. Id. at 156-57.

39. A majority of the lawyers during the era of the Revolution were college graduates. See id. at 158. For example, in South Carolina, fifteen of the fifty-eight lawyers admitted to practice prior to the Revolution had received legal training in the Inns of Courts and a number had graduated from English and colonial universities. See id. at 153. Colonial colleges in existence during this period were: Harvard (1636), William and Mary (1696), Yale (1700), College of New Jersey (now Princeton) (1746), King's (now Columbia) (1754), College of Philadelphia (now University of Pennsylvania) (1756), Brown (1764), Queen's (now Rutgers) (1766), and Dartmouth (1769). Id. at 158.

40. See id. at 145-46 n.49 (citing Reed, Training for the Public Profession of the Law, Bulletin 15 of the Carnegie Foundation for the Advancement of Teaching 67-68 (1921)). In Massachusetts, there were three levels of lawyers: lower court lawyers, superior court lawyers, and barristers. Id. at 148-149. "Only barristers were [allowed] to argue in the Superior Court[s], then the highest court." Id. at 150. To achieve the level of barrister, a lawyer was required to have at least three years of study under a preceptor. Id. This generally resulted in four years of practice as a lawyer in both the lower and superior courts. Id.
jurisdiction retained the authority to admit lawyers to practice.\textsuperscript{41} In South Carolina, Virginia, New York, New Jersey and North Carolina, the colonies had adopted a "principle of centralized control over" bar admission, one where control was vested in either the highest court of the colony or through a special examining board appointed by that court.\textsuperscript{42} Where control of bar admission into a jurisdiction was vested in the highest court of a colony, that court also possessed the powers to suspend or disbar lawyers for improper conduct.\textsuperscript{43}

Probably equally, if not more, significant in changing the public's attitude towards lawyers during this period were the serious social and legal issues resulting from the imminent political crisis that confronted the colonists on the eve of the Revolution and the colonial bar's response to it.\textsuperscript{44} The magnitude of this crisis alone necessitated the critical leadership skills and legal expertise possessed by the colonial lawyer in assisting the colonists in their secession from England and in establishing a new republic.

The colonial bar's contributions during the American Revolution were numerous. First, although often overlooked, lawyers were critical in shaping America's commitment to the "Rule of Law" and creating a legal framework for articulating the issues surrounding the Revolution.\textsuperscript{45} More specifically, the colonial lawyers were successful in convincing the colonists that rebellion against England was an appropriate legal recourse under the principle of Rule of Law which these lawyers believed was both embedded in and supported under English law.\textsuperscript{46} Because the political crisis was jurisprudential in nature, lawyers played key roles in defining and defending the

\textsuperscript{41} See id. at 146. Generally, bar admission in a court in any of these jurisdiction was sufficient for admission to practice before any other court in that respective jurisdiction. Id.

\textsuperscript{42} Id. at 146-47. For example, the South Carolina Supreme Court retained the power to control admission into the practice of law in South Carolina, while in Virginia, an examining board appointed by the highest court held the power to control bar admission. Id.

\textsuperscript{43} Id. at 147.

\textsuperscript{44} See Rehnquist, supra note 28, at 537 (noting that the lawyer-statesmen played crucial roles in the development of the United States during two significant periods: (1) the creation and adoption of the Constitution after the Revolutionary War; and (2) the decade leading up to the Civil War).

\textsuperscript{45} See Robert MacCrate, "The Lost Lawyer' Regained: The Abiding Values of the Legal Profession, 100 DICK. L. REV. 587, 588 (1995) (defining "Rule of Law" as law originating from the people, based on their consent, expressed through their chosen representatives and articulated in a written document).

\textsuperscript{46} See JONES, supra note 32, at xiv (pointing out that "ideas of constitutionalism, civil liberty and procedural due process" were embedded in English constitutional and legal tradition); see also BODEN, supra note 7, at 1, 7 (noting that the American Revolution started as one for the Rule of Law and members of the colonial bar were instrumental in characterizing the legal cause as one for the Rule of Law).
American position and in unifying the colonist around it.\textsuperscript{47}

Second, colonial lawyers also acted as watchdogs for the Colonies during this period. As a result of their legal training, they were able to successfully anticipate the future and detrimental impact of British statutes imposed upon the colonies and to counsel the colonists accordingly.\textsuperscript{48}

Third, colonial lawyers were instrumental in managing the Revolution by insuring that it would remain on track as a revolution for liberty under the law, and not one that would result in a lust for power such as a dictatorship or monarchy.\textsuperscript{49} For instance, as an imminent war with England approached, colonial lawyers took the lead in assisting the colonies in creating individual state governments to prevent against the possible threat of military dictatorship or a reign of terror that could have resulted from the void left by the collapse of British control of the colonies.\textsuperscript{50}

Finally, colonial lawyers provided critical leadership in the

\textsuperscript{47} See generally BODEN, supra note 7, at 7-30 (discussing the role of colonial lawyers in the American Revolution). Relying on the position taken by Sir Edward Coke, the late Chief Justice of England, colonial lawyers were vital in articulating the American position that law was not what Parliament stated that it was, but that there existed some higher law such as natural law that even the lawmakers were required to obey. Id. at 8. Chief Justice Coke held the position that “the powers of Parliament were circumscribed by fundamental common law principles.” Id. In short, his position was one that supported the supremacy of the British common, or constitutional, law which the colonists also believed was expressive of natural law. Id. This view of law and respect for law was the single underlying factor that made the creation of the Union possible. Id. at 18.

\textsuperscript{48} Id. at 14. Colonial lawyers recognized that the Declaratory Act, although later repealed, was an attempt by Parliament to preserve its control over the colonies by declaring that the colonies were subordinate to its legislation. Id. (citing to 6 Geo. III c. 12 (1766)). Their ability to anticipate the consequences of Parliamentary legislation permitted the colonial lawyers to articulate well-reasoned objections for each subsequent grievance. Id.

\textsuperscript{49} See id. at 22. For example, in 1776, Parliament issued a statute that allowed the King to assume the payment of judicial salaries in the colonies rather than continuing with the current process at that time of paying judges from the appropriations of the colonial legislature raised through local taxes. Id. at 23. After Parliament’s announcement that the five judges of the Boston Superior Court would have their salaries paid by the King under the statute, four of the five judges refused their salaries. Id. Chief Judge Peter Oliver, a Tory, accepted his salary and announced that he would never reject it. Id. When backlash towards Oliver developed, the colonial bar was quick to respond by instituting impeachment proceedings against him in the Massachusetts House of Representatives. Id. at 24. John Adams and other Boston lawyers played key roles in managing the impeachment proceedings which were modeled after the procedures used in the British House of Commons. Id.

\textsuperscript{50} Id. at 27. All of the colonies had created provisional state governments in some form prior to the declaring of their independence from England. Id. Eight state constitutions were completed and in operation by the end of 1776 while two additional constitutions were adopted by 1777. Id.
creation of the U.S. Constitution and other legal structures for the new federal and state governments.\textsuperscript{51} In addition to their leadership roles, these lawyers were actively engaged in the daily practice of law.\textsuperscript{52} However, they readily agreed to take time off from their established law practices to perform the important public service of creating the United States of America.\textsuperscript{53}

In short, the formal training that these college-educated lawyers brought to the bar, their impressive social credentials as established practitioners and their numerous acts of public leadership displayed during this critical period in American history, no doubt contributed to the elevation of the legal profession in the eyes of the public during the Eighteenth Century.\textsuperscript{54} Unfortunately, despite these contributions, the feelings of public distrust and dislike for lawyers that had plagued the legal profession prior to the Revolution quickly began to reappear.\textsuperscript{55}

\textit{B. The Decline of the Lawyer-Statesman}

Despite its continued pervasiveness as a model of professional excellence by bar associations, legal scholars and practitioners are swift to agree that in the eyes of the public the lawyer-statesman idea no longer carries with it the weight and prestige that it once did during the colonial period. Several reasons exist to explain the decline of the presence of the attributes of the lawyer-statesman in modern legal practice and in the eyes of the public.

\begin{itemize}
\item \textsuperscript{51} See \textit{supra} note 7 (discussing specific contributions of the colonial lawyers in the formation of the United States).
\item \textsuperscript{52} See \textit{Boden}, \textit{supra} note 7, at 5 (noting that the biographies of the lawyer-signers of the Declaration of Independence reveal that they were legal practitioners and not just lawyers in name only).
\item \textsuperscript{53} See \textit{id}. Because of their practical experience, colonial lawyers were able to provide both political acumen and sound jurisprudential insights that were instrumental in keeping the revolution on course. \textit{Id}. Although most of the colonial lawyers returned to their law practices upon completion of their service during this period, a few lawyers such as John Adams and Thomas Jefferson were called to even higher public service through the Office of the President of the United States. \textit{See id}.
\item \textsuperscript{54} See \textit{Jones}, \textit{supra} note 32, at 18. Ultimately, the fruits of the colonial bar's labor would culminate into the development of a system of government that would be envied throughout the world by the eve of the Twenty-First Century. \textit{Id}.
\item \textsuperscript{55} See \textit{Warren}, \textit{supra} note 27, at 212. Legal historians have attributed this revival of the previous sentiments of public contempt for lawyers to the loss of large numbers of the most reputable and older members of the bar who, being Royalists, either left the country or retired from the practice of law after the Revolution. \textit{Id}. at 212-13. This loss resulted in leaving the practice of law into the hands of a lower quality of lawyers and to the collapse of the social and financial structures of the nation resulting from the Revolutionary War that led to enormous public debt, increased taxation, and increased litigation brought by lawyers to collect on debts and mortgage foreclosures. \textit{Id} at 212-15.
\end{itemize}
One explanation for the declining role of the lawyer-statesman is the simple recognition that the political issues and exigencies that confronted the colonists and the colonial bar no longer exist today. As noted earlier, one significant distinction between colonial society in which the lawyer-statesman idea developed and flourished and modern American society was the nature and extent of the national crisis facing the colonists. Both the leadership and legal expertise provided by colonial lawyers were important and necessary contributions for assisting the colonists in establishing and developing a new and effective governmental structure to replace the former British control of the colonies after the war. However, the nation will never again confront such a national state of affairs of the magnitude present during the colonial period. The colonial bar’s historic and one-time role in the creation of the United States was limited solely for that specific period.

A second explanation can be attributed to the growth and the prominence of administrative agencies in American government. Although administrative agencies are not mentioned in the Constitution, they have become an important and powerful part of the federal and state governmental structure and have provided a greater opportunity for non-lawyer participation in modern lawmaking. Unlike during the colonial period where lawyers were essential in assisting the colonies in creating federal and state constitutions and other legislation, administrative agencies have become invaluable in assisting Congress and state legislatures in creating legislation because of their expertise and efficiency in the creation and administration of public and private regulations, and their independence from the influence of partisan politics. Consequently, the analytical and reasoning skills once monopolized and exercised by the lawyer-statesman during the colonial

56. See William Burnham, Introduction to the Law and Legal System of the United States 15 (West 2d ed. 1999). The first federal agency, the Interstate Commerce Commission, was established in 1887; the largest growth in federal administrative agencies occurred during the 1930s when Congress delegated significant powers to administrative agencies in order to assist in regulating the national economy and providing relief to victims of the Great Depression. Id. The unrestrained growth and transformation of federal legislative power to administrative agencies has often led some to refer to agencies as a “fourth branch” of government and the resulting government structure as the “administrative state.” See President’s Commission on Administrative Management, Report with Special Studies (1937), quoted in Alfred C. Aman, Jr. & William T. Mayton, Administrative Law 3 (West 2001) [hereinafter Aman & Mayton].

57. See generally supra note 7.

58. See Burnham supra note 56, at 193-94. For a good discussion of the delegation of congressional power to administrative agencies, see Aman & Mayton, supra note 56, at 9-11.
lawmaking process can now be found in the numerous state and federal bureaucrats who participate in agency rulemaking and adjudication.

Significant changes in the culture of law practice and in Twentieth Century legal education have also contributed to the decline of the lawyer-statesman.\textsuperscript{59} Today's consumers, unlike their colonial counterparts, demand both increased innovation and quicker responses for legal problem solving. As one would have expected, however, these increases in consumer demands and expectations have detracted from the legal-generalist stance that once characterized the members of the colonial bar and have resulted in an implied requirement and societal expectation of more lawyer specialization.\textsuperscript{60} Unfortunately, modern trends toward specialization in legal practice have resulted in fewer lawyers who hold themselves out as competent in more than one area of expertise.

In addition, a drastic shift away from the earlier prevailing notion of the practice of law as a learned and distinguished profession to the more general notion that the legal profession is no different than any other business or occupation has resulted in the promotion of the single-minded goal of personal wealth accumulation over the professional goal of public service.\textsuperscript{61} Today, many lawyers and law firms have retreated from the once sacred line that separated them and the legal profession from their clients. Because lawyers are evaluated primarily on their short-term financial performance as represented by the number of billable hours they submit and record, there is an enormous amount of pressure for lawyers to spend much of their time billing hours to meet and surpass the firm's yearly billing quotas and achieve partnerships.\textsuperscript{62}


\textsuperscript{60} See Posner, \textit{supra} note 59, at 6. Judge Posner contends that an attitude of lawyer specialization is prevalent throughout the modern legal profession and alludes that specialization has resulted in the creation of additional professional hierarchies even within the practice of law that have further contributed towards the demise of the generalist nature of the lawyer-statesman. \textit{Id.} For example, within the federal judiciary where most judicial work once was performed solely by the federal judges, much of the work today has been divided and reallocated amongst interns and externs, staff attorneys and law clerks, federal magistrates, and finally district judges, circuit judges, and Supreme Court Justices. \textit{Id.}

\textsuperscript{61} See POUND, \textit{supra} note 31, at 5 (discussing public service as an important characteristic that separated a profession from a trade or occupation); see also Sullivan, \textit{supra} note 29, at 479 (contending that the pursuit of money has driven the lawyer-statesman from the focal place in legal profession); Rehnquist, \textit{supra} note 28, at 556 (discussing the change in focus of modern lawyering from service to money).

\textsuperscript{62} See Hopkins, \textit{supra} note 2, at 98 (discussing the intense pressure placed on
Needless to say, the pressure to bill has virtually eliminated any quality time left over for participation in public affairs.63

The nature and formal structures of Twentieth Century legal education have also contributed to the demise of the lawyer-statesman. Contemporary legal education has become more institutionalized, time-consuming and demanding than during the previous century. Students desiring to become lawyers must now participate in rigorous educational programs that require numerous hours of legal studies and the passing of a state bar examination. This institutionalization of modern legal education has eliminated much of the emphasis and concentration on the development of those practical skills (e.g. logical reasoning and trial advocacy) that were essential for the successful lawyer-statesman of the past Nineteenth Century.64

Finally, the decline of the lawyer-statesman of yesterday can be attributed to changes in modern political campaigning.65 For example, the logical reasoning and oratorical skills taught during Nineteenth Century legal education were easily transferable to the “stump speeches and printed tracts” that dominated political campaigns during that period.66 However, as a result of the creation of mass communications such as widely-circulated newspapers, radio and television, modern political campaigning has placed less of an emphasis on these skills. Political campaigning is no longer the forensic battle that it once was but has evolved into a media fight where a candidate’s success is more heavily dependent upon successful marketing techniques.67

In short, the lawyer-statesman idea as conceptualized during the colonial period and applied today is simply more idealistic than

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63. See Rehnquist, supra note 28, at 556 (contending that the manner of organization of the modern legal profession has militated against a lawyer’s ability to spend large amounts of time in political activity of any kind including campaigning for public office or the drafting of speeches and position papers for such candidates).

64. Id. at 553. Chief Justice Rehnquist has argued that Nineteenth Century legal education prepared lawyers for public leadership by teaching them to deal logically and easily with ideas and to articulate and express their thoughts both verbally and in writing. Id.

65. Id. at 554-55.

66. Id. at 554. Chief Justice Rehnquist has contended that renowned lawyer-statesmen throughout American history were men who had succeeded in “the practice of law, the administration of high public office, and . . . with the spoken and written use of the English language.” Id. at 555.

67. Id. at 555.
practical. Although the concept is an admirable one, it is unreasonable to place an over-reliance on it when disciplining lawyers. Society has changed radically since colonial times and the need for the specific skills provided by lawyers during the founding of America has steadily declined. The role of the modern lawyer has had to readapt to these changes in order to survive. Consequently, the skills and resources necessary to meet these changes have made it much more difficult and at times even impossible for lawyers today to fully achieve and realize the attributes of the lawyer-statesman than at any previous period in the history of the legal profession.

II. THE REGULATION OF PRACTICING LAWYERS

Generally, the goals of lawyer discipline are threefold: (1) to protect the public;\(^{68}\) (2) to protect the administration of justice;\(^{69}\) and (3) to preserve the public confidence in the legal profession.\(^{70}\) In protecting the interests of the public and the profession, a primary concern of both the courts and the bar has been to provide the public with sufficient safeguards against "the objectionable activities of persons unfit to practice law ...."\(^{71}\) Similarly, in protecting the administration of justice, an important concern has been to protect the legal system from "lawyers who subvert the judicial process by misrepresenting the facts or law to the court, [commit or encourage] perjury, or ... engag[e] in conduct that unfairly interferes with the truth-seeking process of the courts or functioning of the legal system."\(^{72}\) Finally, in preserving the public's confidence in the legal profession, the courts and the bar have recognized that because of

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69. \textit{See, e.g.}, \textit{In re} Bourcier, 939 P.2d 604, 608 (Or. 1997); ABA STANDARDS, supra note 68, at Standard 1.1.

70. \textit{See, e.g.}, \textit{In re} Agostini, 632 A.2d 80, 81 (Del. 1993); \textit{In re} Addams, 579 A.2d 190, 199 (D.C. 1990). Although many courts often combine the disciplinary goal of preserving the public's confidence in the legal profession with the goal of protecting the administration of justice, some courts have noted that preserving public confidence in the legal profession may also entail the separate concern of preserving the professional status of lawyers. \textit{See, e.g.}, Emil v. Miss. State Bar, 690 So. 2d 301, 327 (Miss. 1997) (acknowledging a concern for the diminished status of lawyers and the need to preserve the dignity and reputation of the legal profession).

71. \textit{See In re} Attorney Discipline System, 967 P.2d 49, 65 (Cal. 1998) (quoting 1 B.E. WITKEN, \textit{CALIFORNIA PROCEDURE} § 623, at 737 (4th ed. 1996)). \textit{See also ABA STANDARDS}, supra note 68, Standard 1.1 (noting that a primary purpose of lawyer discipline is to protect the public and administration of justice from lawyers who have failed to or are unlikely to discharge their professional responsibilities to clients, the public and the legal profession).

the specific legal training of lawyers and their almost exclusive monopoly of the practice of law, the public has consistently viewed lawyers as the gatekeepers for access to the law and the courts.\textsuperscript{73} Thus, imposing appropriate sanctions on lawyers who act improperly helps to maintain the public support and respect for the law necessary for the effective operation of the legal system.\textsuperscript{74}

There are numerous sanctions available in disciplining lawyers. Although most courts and the bar probably would insist that the purpose of lawyer discipline is not to punish lawyers, many of the sanctions typically imposed fit within the classic definitions of punishment and can be supported by the traditional utilitarian justifications for criminal punishment: incapacitation, rehabilitation and deterrence.\textsuperscript{75} Sanctions falling within the incapacitation group are the most severe and are reserved for the worst types of lawyer misconduct. For instance, these sanctions usually include disbarment and suspension and are imposed not only as a means to discipline lawyers but also as a means to protect the public and the administration of justice by the temporary or permanent removal of the lawyer from the practice of law.\textsuperscript{76}

Sanctions designed to facilitate lawyer rehabilitation, however, provide less drastic alternatives to the removal from the practice of law. They are sufficiently flexible to take into account the increased

\textsuperscript{73} See id. This perception may be changing, however, as more states begin to relax their rules concerning the unauthorized practice of law to allow non-lawyers to perform services traditionally provided by lawyers, and as more persons in need of legal services turn to self-help measures. See generally Deborah L. Rhode, The Delivery of Legal Services by Non-Lawyers, 4 GEO. J. LEGAL ETHICS 209, 214-16 (1990) (noting the increased market for legal services provided by non-lawyers).

\textsuperscript{74} See In re Serstock, 432 N.W.2d 179, 185 (Minn. 1988) (acknowledging that severe sanctions are needed to restore the public's confidence in the legal system); In re Curran, 801 P.2d 962, 974 (Wash. 1990) (noting that stern disciplinary sanctions help to maintain public confidence in the legal system and enhance respect for the law).

\textsuperscript{75} See Levin, supra note 72, at 71 (arguing that legal sanctions fit within the classic definition of criminal punishment and can be supported by its traditional justifications); see also In re Ruffalo, 390 U.S. 544, 550-51 (1967) (noting that disbarment involves adversary proceedings of a quasi-criminal nature that require procedural due process); but see Ex Parte Wall, 107 U.S. 265, 288 (1882) (holding that disbarment proceedings are civil by nature); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 139-41 (1986) (discussing other available sanctions such as mandatory apologies, conservatorship, supervised practice, recertification, and the imposition of costs and fines). Although the non-utilitarian justification of retribution is not listed, the Arkansas Bar Association may have been influenced by this in deciding to take disciplinary action against President Clinton after his acquittal by the Senate during his impeachment. See Jefferson, supra note 17, at 1 (discussing the U.S. House impeachment of President Clinton with Senate acquittal).

\textsuperscript{76} See In re Ruffalo, 390 U.S. at 550 (noting that disbarment is designed to protect the public); Levin, supra note 72, at 20; WOLFRAM, supra note 75, at 129.
pressures under which lawyers practice and the relationship of those pressures to lawyer misconduct. Rehabilitative sanctions typically include such measures as probation and mandatory education in professional responsibility.\textsuperscript{77} Those sanctions falling within the deterrence category are the least restrictive and are designed to deter current and future lawyer misconduct by warning the violating lawyers, other lawyers, and the general public of both the blameworthiness of the violators conduct and the bar's disapproval of it.\textsuperscript{78} Deterrence sanctions typically include public and private censures.\textsuperscript{79}

Finally, most courts and bar associations consider several mitigating factors when determining the severity of the sanctions to impose for lawyer misconduct. For example, they may consider such factors as the absence of a prior disciplinary record or dishonest or selfish motive, the presence of personal or emotional problems, and a "timely and good faith effort to make restitution or to [correct] the consequences of the misconduct."\textsuperscript{80} They may also consider the violating lawyer's attitude towards the disciplinary proceeding, her character or reputation, the imposition of additional penalties or sanctions, remorse, and the remoteness of the prior acts of misconduct.\textsuperscript{81}

In the following sections, the Article will provide an overview of the development of the powers of the courts and bar in regulating the conduct of practicing lawyers. As one will see through the evolution of the bar's regulatory powers, the organized bar has not always lived up to its stated goals of protecting the public interest and the administration of justice. At times, the bar's regulatory powers have been used to protect and promote its own political interests.

\textit{A. The Powers of the Court and Bar}

Historically, the power to regulate the professional conduct of lawyers in the United States has consistently fallen within the hands

\textsuperscript{77} See Levin, \textit{supra} note 72, at 23; see also Segretti v. State Bar, 544 P.2d 929, 936-37 (Cal. 1976) (noting that the California Supreme Court routinely requires that during the period of suspension, a lawyer must take and pass the state's version of the multistate bar examination on professional responsibility); \textit{In re Barket}, 424 So.2d 751, 752 (Fla. 1982) (requiring that a suspended attorney pass all portions of the state bar examination prior to reinstatement).

\textsuperscript{78} See \textit{WOLFRAM, supra} note 75, at 126-28; Levin, \textit{supra} note 72, at 21-22.

\textsuperscript{79} See \textit{WOLFRAM, supra} note 75, at 126-28 (discussing private and public reprimands and admonitions).

\textsuperscript{80} ABA \textit{STANDARDS, supra} note 68, Standard 9.32 (discussing factors that may be considered in mitigation). \textit{See also} \textit{WOLFRAM, supra} note 75, at 119 (outlining factors that courts have used when determining the appropriate discipline for lawyer misconduct).

\textsuperscript{81} See ABA \textit{STANDARDS, supra} note 68, Standard 9.32.
of both judges and members of the organized bar. From as far back as the enactment of the Statute of Westminster in 1275, the conduct of lawyers has always been subjected to the jurisdiction of the courts in which they practiced. Even today, courts continue to order and impose sanctions such as fines and orders of contempt against lawyers who file frivolous claims or defenses in support of their clients' interests, use abusive trial tactics, and disregard or disobey court orders.

While the judiciary has always reserved the ability to regulate lawyers practicing within its tribunals, the formal regulation of lawyer conduct by the organized bar is a relatively recent phenomenon. Despite Alexis de Tocqueville's depiction of the bar in

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82. See Statute of Westminster I, 3 Edw., ch. 29 (1275). The Statute of Westminster I was directed at allegations of lawyer misconduct that included actions of extortion, bribery, deceit, collusion or malfeasance committed by lawyers in the Kings Court. Id.

83. See Ex parte Wall, 107 U.S. at 265. In Ex parte Wall, the Supreme Court held that a judicial proceeding to exclude an attorney from the practice of law was one within the proper jurisdiction of the court of which the lawyer practiced and did not violate the Constitution. Id. at 288-89. In reaching its conclusion, the Court noted that disciplinary proceedings are "not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them." Id. at 288. For a more detailed discussion of the inherent powers of courts to regulate lawyer conduct, see WOLFRAM, supra note 75, at 22-33.

84. See FED. R. CIV. P. 11 (providing for the striking of pleadings and the imposition of disciplinary sanctions by the court as a means to check abuses in the signing of pleadings); Leonard v. Northwest Airlines, Inc., 605 N.W.2d 425, 432 (Minn. Ct. App. 2000) (discussing Minnesota Rule of Civil Procedure 11, Minnesota's equivalent of Federal Rule of Civil Procedure 11, and noting that the Rule was designed to deter frivolous claims and defenses brought by lawyers or parties).

85. See, e.g., Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 52-55 (Del. 1994) (finding that a lawyer's conduct during the taking of a deposition was an abuse of discovery when the lawyer "improperly directed the witness not to answer certain questions; was extraordinarily rude . . . and vulgar" to opposing counsel, and obstructed opposing counsel from eliciting testimony necessary to assist the court in the case).

86. A court may find a lawyer in "contempt of court" for the disobedience or disregard of a court order or command of judicial authority. See, e.g., Chambers v. Nasco, Inc., 501 U.S. 32, 43 (1990) (noting that "[c]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates" (quoting Anderson v. Dunn, 6 Wheat. 204, 227 (1821))); Hodges v. Gray, 901 S.W.2d 1, 4 (Ark. 1995) (noting that "[t]he court's contempt proceedings are to preserve the power and dignity of the court, to punish for disobedience of orders, and to preserve and enforce the rights of the parties"). For a more recent example of the court's exercise of its power of contempt, see Jones v. Clinton, 36 F. Supp. 2d at 1131 which held lawyer and President William Clinton in contempt of court and ordered him to pay plaintiff's reasonable expenses due to his willful failure to obey the court's discovery orders.

87. Although evidence exists to indicate that the country's earliest bar associations
its early days as the "American aristocracy,"88 its prestige in the eyes of the public was low. For instance, during the 1830s to the end of the Civil War, public hostility towards bar associations was high, causing many of them to disappear.89 By 1875, the organized bar had begun to struggle in determining whether its purpose and focus should be geared towards commercialism or professionalism.90 The rise of commercialism in the practice of law ultimately began to create a fear in the minds of many members of the bar that the profession was quickly moving away from being a respected arm of the judiciary to just an ordinary trade association or occupation whose primary focus was to make money.91 The bar's success in acquiring professional status, however, involved a tradeoff. To secure a desirable position in the eyes of the public, the organized bar chose to set in place its own procedures for self-governance and regulation of its members.92 Consequently, in order to accomplish this, state and local bar associations began to adopt formal codes of ethics.

In 1887, the Alabama Bar Association adopted the first official ethics code.93 Shortly afterwards, the ABA appointed a committee to

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89. See POUND, supra note 31, at 208-09 (noting that the Detroit Bar Association held occasional meetings to discuss the issues of lawyer discipline for professional misconduct); WOLFRAM, supra note 75, at 34, 36 (noting that in their earliest form, bar associations began as eating clubs and social gatherings for lawyers).

90. The tension facing the early bar associations can be fully appreciated by reflecting on a discussion of the term "profession" by former Harvard Law School Dean Roscoe Pound. Dean Pound noted that the central attributes of a profession are organization, learning, and public service. See id. at 6. In comparing the commercial nature of a profession to that of an occupation or trade association, he notes that in a profession, "[g]aining a livelihood is incidental, whereas in a business or trade it is the entire purpose." Id. at 5; see also WOLFRAM, supra note 75, at 14-16 (discussing nine features that are commonly shared by most professions).

91. See HENRY S. DRINKER, LEGAL ETHICS 24-25 (Greenwood Press pub. 1980); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 12 (1908).


93. See DRINKER, supra note 91, at 23. After the adoption of the Alabama State Bar Association's Code of Ethics in 1887, bar associations in ten states followed suit and adopted their own codes that were modeled heavily after the Alabama Code. See id.; see also WOLFRAM, supra note 75, at 54 n.21. Even the ABA's Canons of Professional Responsibility in 1908 were significantly influenced by the Alabama Code of Ethics. See 33 ANN. REP. A.B.A. 56-57 (1908).
determine whether it also should create uniform ethical standards for its membership. In 1908, the ABA adopted the Canons of Ethics, its first formal ethics code, primarily as a response to a perceived threat of commercialism. Even after its adoption of the Canons, however, the ABA continued to demonstrate its concern with the ethics of legal practice by periodically appointing special committees to review the effectiveness of its rules. These committees were given the task of identifying problem areas in the rules and recommending appropriate revisions. In a response to the recommendations by one committee that the scope of the Canons be expanded and that sanctions be imposed to enhance their effectiveness, the ABA adopted the Model Code of Professional Responsibility in 1969.

Even after the adoption of the Model Code of Professional Responsibility, however, criticisms by practitioners along with changes in the legal system and Supreme Court decisions striking down the ABA's attempt to regulate fees and advertising prompted additional revisions of its ethics rules. As a response to these concerns and in furtherance of preserving its self-regulatory status, the ABA abandoned this code and in 1983 adopted the Model Rules of Professional Conduct.

94. See Drinker, supra note 91, at 24; A.B.A. Reports 680 (1907).
95. See Drinker, supra note 91, at 24-25.
97. See Freedman, supra note 96, at 129.
98. See ABA Spec. Comm. on Eval. of Ethical Stands., Code of Professional Responsibility (Final Draft, July 1, 1969). The Model Code was a significant departure from the Canons. It consisted of nine sections with each section containing a Canon, Ethical Considerations, and Disciplinary Rules. Id.
99. See infra notes 112, 116 and accompanying text; see also Justice Department Dismisses Antitrust Suit against ABA, 64 A.B.A. J. 1538, 1541 (1978). The ABA's Code of Professional Responsibility was plagued by major criticisms even before its adoption in 1969. For example, critics of the Code argued that it had been corrupted by revisions during the drafting period, thus eliminating the opportunities to make it more responsive and clearer to the realities of modern practice. See Wolfram, supra note 75, at 60. Others argued that the Code failed to provide sufficient guidance on issues facing practitioners. Id.
100. See Gillers & Simon, supra note 25. As of fall 2002, approximately 44 states and the District of Columbia had adopted all or significant portions of the Model Rules of Professional Conduct. A few states such as California and Maine have adopted their...
B. The Exercise of Self-Regulation

An important characteristic of a profession is the need to develop its cultural identity and social authority. Unlike many occupations, a valuable and distinguishing asset of a profession is the power of self-regulation. Self-regulation provides a profession with the ability to articulate its own view of the world and to define the role that it will play in society. Many professions in the United States have long enjoyed the freedom of self-regulation and the concept has continued to develop and flourish right alongside of the more traditional forms of government regulations, rather than being displaced by them.

In theory, the rationales behind professional self-regulation for lawyers are often benevolent in nature. First, self-regulation can provide a basic level of protection for consumers of legal services. Implicit in the concept is the noble belief that lawyers will consider and protect the interests of their clients and the general public, and will place these interests above their own. As a justification for this rationale, some lawyers have argued that self-regulation can raise the quality or lower the costs of services in areas in which non-professionals, due to their lack of knowledge and training, have been ineffective in achieving those goals. Second, self-regulation can be used to limit or terminate the practices of the incompetent members of a profession long before market forces begin to work. Finally, it can be used to set standards of excellence or at the very least, uniformity amongst professionals so that inadequate service will be discouraged and minimized.

From the standpoint of the modern legal profession, the necessity for self-regulation is relatively straightforward. The organized bar has contended that public confidence in lawyers is critical for the proper functioning of the legal profession, and

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102. See, e.g., JOSEPH V. REES, HOSTAGES OF EACH OTHER: THE TRANSFORMATION OF NUCLEAR SAFETY SINCE THREE MILE ISLAND 1-2 (1994) (noting that some industries have enjoyed a long history of self-regulation while others have adopted standards of self-regulation in response to public crises affecting the organization or in anticipation of government regulation of the specific industry).

103. See POUND, supra note 31, at 5-6. See also MODEL RULES, supra note 1, at pmbl. ¶ 12 (noting that the legal profession has a responsibility to insure "that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar").


105. Id.

106. Id.
therefore, effective self-regulation is necessary to preserve public faith in the integrity of the administration of justice and to maintain the profession's reputation for trustworthiness.107 Because of the complexities of the legal profession, lawyers themselves are in the best position to observe and police the misconduct of fellow lawyers.108 Many legal scholars, however, have criticized the principle of self-regulation. They have contended that "[t]he heritage of Bar associations, like that of all trade organizations, rests initially in self-interest and protectionism rather than any noble spirit of public service."109 Reflections on several actions taken by the Bar in the past provide some support for this contention.

The bar's exercise of its power of self-governance, however, has not always been legitimate. Historically, the organized bar has shared the popular "religious, racial, and national prejudices of middle-class Americans."110 For example, from their inception up to

107. See, e.g., State ex rel Okla. Bar Ass'n v. Raskin, 642 P.2d 262, 267 (Okla. 1982); Gregory Dunbar Soule, Note, Attorney Misappropriation of Client's Funds: A Study in Professional Responsibility, 10 U. MICH. J.L. REFORM 415, 420 (1977). Currently, public regard for lawyers is in decline. One major factor contributing to this decline is the numerous lawyer involvements in public scandals over the last few decades such as Watergate, Iran-Contra, the savings and loan crisis during the 1980s; judicial hearings for Supreme Court nominees Robert Bork and Clarence Thomas; and the numerous continued scandals that marred the Clinton Administration. See also United States v. Haldeman, 559 F.2d 31, 51 (D.C. Cir. 1976) (noting the conviction of former Attorney General John Mitchell and other top Nixon advisors); George H. Brown, Financial Institutions Lawyers as Quasi-Public Enforcers, 7 GEO. J. LEGAL ETHICS 637 (1994) (discussing the role of lawyers in the collapse of savings and loan institutions); Jill Abramson, Culture of Scandal Turns Inquiry into an Industry, N.Y. TIMES, Apr. 26, 1998, at 22.

108. See David C. Olsson, Reporting Peer Misconduct: Lip Service To Ethical Standards Is Not Enough, 31 ARIZ. L. REV. 657, 658 (1989) (arguing that "[t]he complexity of the profession makes it desirable, perhaps even necessary, that the legal profession be regulated by lawyers themselves").

109. See Timothy P. Terrell & James H. Wildman, Rethinking "Professionalism," 41 Emory L.J. 403, 409 (1992); see also Richard L. Abel, Taking Professionalism Seriously, 1989 ANN. SURV. AM. L. 41, 41 (arguing that occupations commonly invoke the term "profession" for such self-serving purposes as the advancement of social status, protection as a shield from moral accountability, and a justification for restrictive practices); Lester Brickman, ABA Regulation of Contingency Fees: Money Talks, Ethics Walks, 65 FORDHAM L. REV. 247, 250 (1996) (arguing that self-regulation permits professionals to "extract higher rewards for their services and avoid sanctions that would be part of societally-imposed regulatory schemes").

the early decades of the 20th Century, bar associations used the power of self-regulation to dampen the internal competition between lawyers for clients, and to minimize and eventually eliminate the outside competition in performing legal services by non-lawyer professionals. During the Great Depression, bar associations promulgated and adopted minimum fee schedules in response to a fear that competition for diminishing business would lower the prices for legal services. Consequently, lawyers who charged below the minimum fee schedule were subject to discipline by their respective state bar associations.

In response to the growing public and political concerns over the spread of Communism during the Cold War era, the ABA took an active and public role in recommending that state bar associations expel all members with Communist Party affiliations or those who advocated a Marxist-Leninist doctrine. In addition, the ABA took a "guilt by representation" stance towards those lawyers who insisted upon representing clients affiliated with the Communist Party. This unfortunately resulted in "provid[ing] a hunting license for [state] bar associations to punish those who strayed from the

111. See RICHARD L. ABEL, AMERICAN LAWYERS 112-26 (1989). Bar associations have also used the power of self-regulation as a means of "control over the production of the producers" of legal services. Id. at 112. Today, however, the Association of American Law Schools has superseded the profession as the controller of the number of producers of legal services while state courts, legislatures, and administrative agencies have replaced the profession as the principle controllers of the production by the producers. Id. at 125.

112. Id. at 124-25. Minimum fee schedules were enacted to prevent attorneys from price-cutting. Id. This restriction continued until 1975 when the Supreme Court invalidated the practice as a violation of The Sherman Act. See Goldfarb v. Va. State Bar, 421 U.S. 773, 791-92 (1975). For other examples of abuses by the bar in attempting to curtail business competition, see generally, In re Griffiths, 413 U.S. 717 (1973) (holding that it is a violation of the Fourteenth Amendment Equal Protection Clause to exclude a person from the practice of law solely on the basis of national citizenship) and Supreme Court of Va. v. Friedman, 487 U.S. 59 (1988) (holding that it is unconstitutional for a state to impose a state domicile requirement as a precondition for being admitted into the bar).

113. See STANLEY I. KUTLER, THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR 152-55 (1982) (discussing the 1949 Smith Act prosecution of Communist Party leaders in America and the ABA's role in influencing state bar associations to disfavor all members affiliated with the Communist Party or representing clients with such affiliations). The ABA's public stance followed Attorney General and former U.S. Supreme Court Justice Tom Clark's admonition made during this period in a 1946 speech before the Chicago Bar Association. Clark's speech specifically noted the rise of Communism and Fascist groups and warned lawyers to be careful in their choices of clients and causes. Id. at 153-54. For a more detailed discussion of the organized bar's behavior during the Cold War era, see AUERBACH, supra note 110, at 232-62.

114. See KUTLER, supra note 113, at 152-55.
prescribed line of orthodoxy.\textsuperscript{115}

By the middle of the 20\textsuperscript{th} Century, the ABA and local bar associations had begun to promulgate rules that prohibited lawyer advertising.\textsuperscript{116} Although the practice of lawyer advertising was generally widespread during the start of the century, enforcement of bans on lawyer advertising became more frequent during the Depression when opportunities for providing legal services were greatly diminished.\textsuperscript{117} The elite and prominent lawyers, who had already established ongoing relationships with their corporate clientele, supported the prohibition on the belief that it would enhance the profession's image while not significantly affecting their own promotional activities.\textsuperscript{118} As a means to secure client loyalty, large firms encouraged their partners to accept positions as board members for their corporate clients.\textsuperscript{119}

Non-elite lawyers, however, were significantly affected by the bans. Their clients were mainly individuals with sporadic, yet distinct, needs for legal services. Their only means to attract potential clients was by joining organizations whose members might need legal representation, running for public office, or registering with lawyer referral services.\textsuperscript{120}

During the latter part of the century, bar associations had begun to create substantial barriers for lawyers seeking specialization in specific practice areas as another way to reassert control over the market for lawyers during a time of increased demand for legal services.\textsuperscript{121} Elite lawyers, who were typically associated with large, highly specialized law firms, favored the bar's move towards formalization of specialty practices. Non-elite lawyers, who were typically associated with smaller general practice oriented law firms,

\textsuperscript{115} See id. at 154.

\textsuperscript{116} See ABEL, supra note 111, at 119. In 1977, the Supreme Court invalidated all total bans on lawyer advertising as a violation of the First Amendment. See Bates v. State Bar, 433 U.S. 350, 382-83 (1977).

\textsuperscript{117} See ABEL, supra note 111, at 125.

\textsuperscript{118} The founders of the ABA in the 19th century were prominent and successful business lawyers of old American stock whose goal was to create an exclusive organization consisting of the best men of the bar. See Amy R. Mashburn, Professionalism As Class Ideology: Civility Codes and Bar Hierarchy, 28 VAL. U. L. REV. 657, 669 & n.56 (1994) (quoting John A. Matzko, "The Best Men at the Bar": The Founding of the American Bar Association, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 75 (Gerald W. Gawalt ed., 1984)). By the end of the century, the organized bar was controlled by upper class white males who had attended elite law schools and who worked in large big-city law firms. See ABEL, supra note 111, at 208-11; Mashburn, supra, at 674.

\textsuperscript{119} See ABEL, supra note 111, at 119, 125.

\textsuperscript{120} See id. at 120.

\textsuperscript{121} See id. at 122, 125.
opposed it. Despite the bar’s unsuccessful attempts at regulating attorney fees and legal advertisements, however, specialization requirements have survived as a legitimate exercise of the bar’s power of self-governance. A few of the obstacles to acquiring specialist status include the requirements of competency examinations, significant trial experience, peer review, and continuing legal education.

In the aftermath of the lawyer-dominated Watergate scandal during the 1970s, the organized bar quickly recognized that a continuing and major threat to its self-regulatory nature was the negative image of lawyers in the eyes of the public. As a response to the sharp decline in the public image of lawyers, and as a general reminder of the value of self-regulation as a means to avoid government regulation, the drafters of the Model Rules of Professional Conduct expressly incorporated into its ethics code, specific language discussing its privilege of self-regulation and indicating that this feature alone should be a sufficient reason for members of the bar to act ethically. Finally, in addition to periodic and continual revisions of its code of ethics, the organized bar has developed high-profile educational programs and a legal ethics component of the bar examination in an attempt to rekindle public confidence in the profession and to preserve its self-regulatory character.

III. THE REGULATION OF NON-PRACTICING LAWYERS, LAWYER-POLITICIANS AND DUAL PRACTITIONERS

Although the Model Rules are silent with regards to expressly regulating the conduct of non-practicing lawyers and dual practitioners, the ABA and state bar associations have consistently advocated a one-size-fits-all approach to regulating the conduct of

122. See Model Rules, supra note 1, R. 7.4 (permitting a lawyer to indicate her areas of specialty in communications about her services).

123. See Abel, supra note 111, at 123.

124. Lawyer involvement in the Watergate scandal during the 1970s was notorious. See, e.g., United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976) (en banc) (discussing the convictions of former Attorney General John Mitchell and several other lawyers for conspiracy, obstruction of justice, and perjury); In re Nixon, 385 N.Y.S.2d at 306 (discussing the alleged and substantiated criminal charges against President Richard Nixon for his involvement during the Watergate cover-up); Jay Sterling Silver, Professionalism and the Hidden Assault on the Adversarial Process, 55 Ohio St. L.J. 855, 867-68 (1994) (noting that the public perception that lawyers are "greedy and unprincipled" could very well result in a "public outcry for government intervention").

125. See Model Rules, supra note 1, pmbl. ¶ 10 (providing that the continued enjoyment of the privilege of self-regulation alone is a paramount reason to act ethically).

126. See Silver, supra note 124, at 868-69.
non-practicing lawyers despite the nature or function of their jobs. For example, in 1974 and during the aftermath of the Watergate scandal, the ABA issued Formal Opinion 336, which held that a lawyer, whether acting in her professional capacity or otherwise, was bound by the applicable disciplinary rules of the Code of Professional Responsibility.127 Even before 1974, state bar associations adopting versions of the ABA ethics codes had consistently demonstrated their ability to discipline both practicing lawyers and non-practicing lawyers alike for misconduct occurring outside the practice of law.128

Currently, state bar associations have relied on Model Rule 8.4 as the legal basis for disciplining lawyers who commit crimes that reflect adversely and directly on honesty, trustworthiness, or fitness to practice law, or who engage in acts that involve dishonesty, fraud, deceit or misrepresentation.129 They have also construed the rule to provide a basis for regulating misconduct in areas remote from the practice of law such as other types of criminal behavior,130 business

127. See Formal Opinion 336, supra note 17. In 1974, the Code of Professional Responsibility was the ABA’s primary disciplinary code.

128. See, e.g., In re Wilson, 216 N.E.2d 555, 557 (Ind. 1966) (disbarring a lawyer who, while serving as a member of the city council, received several thousand dollars from construction companies and other companies doing business with the city when the companies had performed no actual services); In re Chernoff, 26 A.2d 335, 339 (Pa. 1942) (disbarring a lawyer found “guilty of soliciting bribes and extortion in connection with his position as detective in [the] coroner’s office”).

129. See MODEL RULES, supra note 1, R. 8.4 (stating that “[i]t is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . ”).

130. See, e.g., In re Nevill, 704 P.2d 1332, 1333, 1338 (Cal. 1985) (disbarring a lawyer convicted of voluntary manslaughter for killing his wife); People v. Lowery, 894 P.2d 758, 758, 761 (Colo. 1995) (suspending a lawyer for sexually harassing employees at his law office); In re Christie, 574 A.2d 845, 851, 854 (Del. 1990) (suspending a lawyer for showing pornographic films to a minor); In re Sandbach, 546 A.2d 345, 347 (Del. 1988) (suspending an attorney for failing to pay income taxes); In re Goffe, 641 A.2d 458, 463-64, 468 (D.C. 1994) (disbarring a lawyer for fabricating charitable deductions used for income tax purposes); In re Runyon, 491 N.E.2d 189, 190 (Ind. 1986) (disbarring a lawyer when the lawyer was convicted of possession of unlicensed firearms and after forcing himself into his ex-wife’s home with a machine gun); Kentucky Bar Ass’n v. Dunn, 965 S.W.2d 158, 159-60 (Ky. 1998) (suspending a lawyer for six months after being arrested on two occasions for driving under the influence of alcohol); Louisiana State Bar Ass’n v. Bensabat, 378 So. 2d 380, 382 (La. 1979) (disbarring an attorney convicted of conspiracy to import and possess cocaine); Attorney Grievance Comm’n v. Painter, 739 A.2d 24, 32 (Md. 1999) (disbarring a lawyer for repeated acts of violence committed towards his wife and children); In re Discipline of Peters, 428 N.W.2d 375, 383 (Minn. 1988) (publicly reprimanding a law school dean for sexually harassing four employees, two of whom were law students); In re Margrabia, 695 A.2d 1378, 1381 (N.J. 1997) (imposing a three-month suspension of an attorney found guilty of simple assault of his wife); In re Magid, 655 A.2d 916, 918-19 (N.J. 1995) (publicly reprimanding a lawyer convicted under the state domestic
and employment activities,\textsuperscript{131} and political activities to the extent that they suggest a serious deficiency in those qualities deemed relevant to the practice of law.\textsuperscript{132}

In the following subsections, the Article considers the application of Comment 5 of \textit{Model Rule} 8.4 to lawyer-politicians and dual practitioners. As one will see, a review of the state precedent applying Comment 5 and the ABA's lack of any legitimate rationale for prohibiting lawyers from participating in dual practices further support the premise that a one-size-fits-all approach to regulating lawyer-politicians is unwarranted.

\textbf{A. Lawyer-Politicians and the High Bar for Public Service}

The \textit{Model Rules} are silent with regards to providing direct and expressed directives for the regulation of lawyer-politicians. The ABA, however, has indirectly indicated an intent to regulate these professionals under Comment 5 of \textit{Model Rule} 8.4.\textsuperscript{133} Comment 5 provides:

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\text{[l]awyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and}
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\textsuperscript{131} See, e.g., Allen v. State Bar, 570 P.2d 1226, 1229-30 (Cal. 1977) (disciplining a lawyer for the intentional deception of a bank officer); \textit{In re Hadzi-Antich}, 497 A.2d 1062, 1065 (D.C. 1985) (publicly censuring a lawyer for submitting false information in a resume sent to a law school-prospective employer); \textit{In re Canter}, Nos. 95-831-O-H, 96-868-O-H, 96-908-O-H, and 96-910-O-H (Disciplinary District of the Bd. of Prof'l Responsibility of the Supreme Court of Tennessee, Feb. 25, 1997) (suspending a lawyer for one year from the practice of law for sending an e-mail advertisement to more than five or six thousand Internet groups and thousands of other e-mail lists in an attempt to solicit new clients for the lawyer's immigration practice); \textit{In re Cahill}, 579 N.W.2d 231, 232 (Wis. 1998) (suspending a lawyer for six months following misdemeanor convictions for acts involving the deception of a hotel innkeeper and writing bad checks); \textit{In re Disciplinary Proceedings Against Scruggs}, 475 N.W.2d 160, 162-63 (Wis. 1991) (suspending a lawyer for submitting a fraudulent law school transcript in order to obtain employment in the legal profession and for repeatedly making false statements concerning its validity after its fraudulent nature had been discovered).


\textsuperscript{133} See \textit{MODEL RULES}, supra note 1, R. 8.4 cmt. 5; see also supra note 25 (discussing the renumbering of former Comment 4 to Comment 5).
officer, director or manager of a corporation or other organization.  

The legislative history behind Comment 5 is virtually nonexistent. Although the comment was included in the final draft copy of the Model Rules in January 1980, no additional discussions for this comment exist in the draft or ABA archives as to its purpose and reason for inclusion. What is known, however, is that the comment first surfaced in the aftermath of the Watergate cover-up where former President Richard Nixon and several other lawyers holding high public offices and positions were convicted of conspiracy, obstruction of justice, and perjury.  

Jurisdictions that have applied and relied on Comment 5 in disciplining lawyer misconduct have emphasized the importance of insuring that the public have complete confidence in the integrity and impartiality of the American legal system and have held that lawyers holding public office are held to a higher standard of conduct primarily because of their "(1) professional and (2) public trustee responsibilities." In explaining these responsibilities, the courts have concluded that "[l]awyer insensitivity to ethical impropriety . . . is one of the primary sources of [a] lack of public confidence in the bar," and that the problem is exacerbated when lawyers holding important public offices commit ethical violations. They have held that ethical misconduct committed by lawyers holding public office is more egregious primarily because of the betrayal of the public trust attached to the office and have attempted to neutralize any further erosions of public confidence in lawyers by responding more aggressively towards unethical activity committed by lawyers holding important public offices.

134. See Model Rules, supra note 1, R. 8.4 cmt. 5.  
136. See United States v. Haldeman, 559 F.2d 31, 51 (D.C. Cir. 1976) (discussing the criminal charges against former Attorney General John Mitchell and several other lawyers for their involvement in Watergate); In re Nixon, 385 N.Y.S.2d at 306 (discussing disbarment proceedings against lawyer and former President Richard Nixon).  
137. See, e.g., Committee On Legal Ethics v. Roark, 382 S.E.2d 313, 318 (W. Va. 1989) (applying Comment 5). See also In re Olson, 300 N.W. 398, 400 (Minn. 1941) (noting that a public office is a public trust "created for the benefit of the public, not for the benefit of the incumbent"); State ex rel. Neb. State Bar Ass'n v. Douglas, 416 N.W.2d 515, 529-30 (Neb. 1987) (noting that "[i]n the United States, public officers have been characterized as fiduciaries and trustees, charged with honesty and fidelity in administration of their office and execution of their duties"); Graf v. Frame, 352 S.E.2d 31, 38 (W. Va. 1986) (emphasizing the need to insure the public's confidence in the integrity and impartiality of the legal system).  
138. See Graf, 352 S.E.2d at 38.  
139. White, 428 S.E.2d at 560. See also Sanders v. Miss. State Bar Ass'n, 466 So. 2d 352 S.E.2d 31, 38 (W. Va. 1986) (emphasizing the need to insur...
An examination of ABA history and state precedent in applying Comment 5 indicates several significant points. First, the closest discussion available to possibly explain the drafters’ intent for including the comment is found in the history surrounding the ABA’s failed but controversial attempt to regulate the dual practice of law and accounting. During this controversy, the ABA specifically articulated its rationale for prohibiting lawyers from participating in multiple professions.140

Second, state judicial precedent is not helpful in supporting the rationale for holding lawyer-politicians as contemplated in this Article to a higher standard than other citizens for disciplinary purposes.141 Instances of professional misconduct committed by lawyers holding public offices are rarely found in reported cases. In the cases reporting such misconduct, state courts in general have applied Comment 5 in situations where the misconduct occurred while the lawyer holding a public-elected office functioned in a quasi-judicial role (e.g. county attorney or state prosecutor).142 The

891, 893 (Miss. 1985) (recognizing that lawyers are not well loved in American society and finding that the lack of public confidence in the bar is exacerbated when lawyers holding important public offices commit ethical violations); Douglas, 416 N.W.2d at 550 (distinguishing between government and private attorneys and holding that the conduct of government attorneys is required to be more circumspect because they are invested with the public trust and more visible to the public). The court in Douglas concluded that improper conduct by a government attorney was more likely to harm the entire system of government in the eyes of the public. Id.

140. See infra Part III.B (for a detailed discussion of the regulation of dual practitioners).
141. See supra note 5 (defining the term “lawyer-politician”).
142. See, e.g., In re Swarts, 30 P.3d 1011, 1013-19, 1032 (Kan. 2001) (disciplining lawyer holding office of county attorney for numerous counts of misconduct committed during the prosecution of several cases); In re Kraushaar, 997 P.2d 81, 88 (Kan. 2000) (disciplining lawyer holding office of county attorney after notarizing a signature on a quit claim deed that was not signed in his presence and for fraudulent submission of expense reports); In re Kraushaar, 907 P.2d 836, 840 (Kan. 1995) (disciplining lawyer holding office of county attorney for conflict of interest for representing a mother in a child neglect hearing when he had a statutory duty to prosecute “child in need of care” cases); Ky. Bar Ass’n v. Profumo, 931 S.W.2d 149, 149-51 (Ky. 1996) (disciplining lawyer holding dual office of attorney and executor of an estate for collecting an illegal or excessive fee, failing to disclose information required by law, and accepting employment presenting a potential conflict with the lawyer’s personal financial and business interests); Sanders, 466 So. 2d at 893-94 (disciplining lawyer holding dual office of county attorney and private practitioner for accepting private employment in a civil matter with knowledge that it would create a conflict of interest in his ability to perform the duties of county attorney); Lawyer Disciplinary Bd. v. Jarrell, 523 S.E.2d 552, 561 (W. Va. 1999) (disciplining lawyer holding office of county prosecutor for initiating contact with a criminal defendant outside of the presence of counsel, knowingly disobeying an obligation of a tribunal, and failing to disclose in a court hearing that a plea bargain had been offered and accepted but not yet reduced to writing); White, 428 S.E.2d at 561 (disciplining lawyer holding office of county
precedent reveals only a few occasions when the rule was applied to lawyer-politicians.143

Finally, even if the primary reason for disciplining and holding lawyer-politicians who commit professional misconduct to a higher standard than practicing lawyers committing similar ethical violations is to preserve the integrity of the bar in the eyes of the public, then the Bar and the courts have been unsuccessful in achieving this. Currently, public esteem for lawyers remains in a state of steady decline.144 Recent public opinion polls have shown public respect for lawyers slipping below that for politicians and journalists and even approaching the levels of the public's contempt for automobile salesmen and the news media.145 Legal scholars have attributed this decline to such factors as the public's overall belief that lawyers are dishonest and the public's dismay with other manifestations of lawyer behavior such as evasion, obfuscation, misdirection, loophole lawyering, and a willingness to advance frivolous claims and defenses.146

Additionally, even when imposing such severe disciplinary


144. See id.; see also Orrick, supra note 27, at 1 (discussing a recent ABA public opinion poll for lawyers and reporting that Americans viewed lawyers near the bottom and only above the news media in public opinion rankings).

145. See Chris Guthrie, The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering, 6 HARV. NEGOT. L. REV. 145, 169 (2001) (referencing survey data suggesting a widespread public sentiment that lawyers are dishonest and unethical); Hodes, supra note 27, at 528-29 nn. 3-4.
actions as suspension or disbarment on the practicing attorney who violates the ethics rules, the public is often left with no easy way to discover the lawyer's misconduct after she is reinstated and permitted to resume her former legal practice. For example, legal notices informing of public reprimand and disbarment of attorneys are often published in specialized journals, legal newspapers or bar reports and only a few states publish notices of their disciplinary actions in laymen newspapers.\footnote{147} When disciplinary actions are litigated and appealed through the justice system, appellate review of bar association actions are reported in state case-law reporters thus making them more difficult to access by non-lawyers. Aside from this, attorney listings in legal directories such as Martindale-Hubbell fail to reference any disciplinary actions taken against an attorney such as suspension from the practice of law or reinstatement after disbarment.\footnote{148} Consequently, the chances that a non-lawyer seeking legal representation would stumble across information regarding prior disciplinary actions taken against an attorney would be slim and the very lack of access to such information would likely result in the undermining rather than the promotion of public confidence in the legal system.

\textbf{B. Regulating Dual Practitioners: The Lawyer-Accountant Dilemma}

The ABA's regulation of dual practitioners for misconduct committed while functioning in their non-legal roles has raised similar issues to those that often arise in the regulation of lawyer politicians.\footnote{149} As discussed below, the ABA ultimately abandoned its attempt to prohibit the dual practice of law and accounting after finding no legitimate reasons under the ethics rules to prohibit it.

147. See ABA Compilation of Lawyer Disciplinary Procedures 1 Q 59 I (1996) (unpublished). A few states refuse to publish notice of public reprimands in any form. Id. In Kentucky, however, disciplinary rulings are available to the public on the Supreme Court's website. Kentucky Supreme Court Opinions, http://www.kycourts.net/Supreme/SC_Opinions.shtm (last visited Aug. 24, 2005). In addition, the public can access information concerning the status of individual members of the Kentucky Bar Association (e.g. good standing, disbarment, etc.) by using the Lawyer Locator service of the Legal Resources file on the Bar Association's website. Lawyer Locator, http://www.kybar.org/Default.aspx?tabid=26 (last visited Sept. 9, 2005). Finally, Kentucky requires that the disciplinary board of the bar transmit "notice of all public discipline imposed against a lawyer, transfers to or from disability inactive status, and reinstatements to the National Discipline Data Bank maintained by the American Bar Association." KY. SUP. CT. R. 3.150(7).


149. A dual practitioner is one who is simultaneously employed in both the practice of law and another profession.
On February 24, 1961, the Professional Ethics Committee of the ABA issued Opinion 297, an opinion expressing the ABA's view on the ethical concerns of dual practitioners in law and accounting to practice both professions, and whether dual practice was in the best interest of the public. The Opinion was clear as to the results that it intended to accomplish—to prevent dual practitioners licensed in law and accounting to practice in both professions. Although Opinion 297 addressed four separate aspects of the lawyer-accountant relationship, it specifically prohibited the dual practice of law and accounting and required that the person qualified as both a lawyer and an accountant would have to choose between holding herself out as a lawyer or as an accountant. As a justification for this position, the Professional Ethics Committee noted that holding oneself out as a dual practitioner was "self-touting and a violation of Canon 27."

In explaining its reasoning, the Committee noted that the lawyer-accountant who held herself out as an accountant was prevented from practicing law primarily because it believed the lawyer would use her activities as an accountant as a way to fuel her law practice. In reaching its conclusion, the Committee stated that the controlling factor to be considered when determining whether the dual practitioner was practicing law while holding herself out as an accountant was whether the activity at issue was one that would constitute the practice of law when engaged in by a person holding herself out as a lawyer. The Committee was quick to indicate, however, that the lawyer-accountant would not violate the Canons of Ethics when she merely made use of and applied accounting principles while performing legal services.

In an effort to further clarify aspects of Opinion 297, the ABA's Standing Committee on Professional Ethics issued Formal Opinion 305. Formal Opinion 305 explained that even though the lawyer-accountant was licensed in two professions, she could act in her capacity as an accountant only if, or when, she was not engaged in

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151. See id.
152. Id.
153. Id. See also MODEL CODE OF PROF'L RESPONSIBILITY Canon 27 (dealing with direct or indirect advertising by lawyers).
154. See OPINION 297, supra note 150.
155. See id.
156. Id. The Opinion provided no examples to demonstrate the application of this principle to the lawyer-accountant. Id.
157. ABA Comm. on Prof'l Ethics and Prof'l Responsibility, Formal, Op. 305 (1962) [hereinafter FORMAL OPINION 305].
the practice of law. Interestingly, the American Institute of Certified Public Accountants ("AICPA") expressed no position on the matter. In an opinion issued by its Committee on Professional Ethics, the AICPA stated that the practice of law was not inconsistent with or incompatible with the practice of public accounting.

Despite these opinions, the dual practice of law and accounting continued to grow. Colleges and universities continued to offer dual degree programs while state licensing boards and bar associations continued to grant licenses with full knowledge that the practitioner had been previously licensed in another profession. Although most state bar associations remained neutral on the issue, several openly disagreed with the ABA's position. A few bar associations even attempted to eliminate the dual practices of particular dual licensees. Legal practitioners also began to speak out publicly on the topic and to question the bar's ability to make decisions in favor of its own self-interest without considering the versatility of its members or the concerns of other professions.

In light of the controversy surrounding the ABA's exercise of its power of self-regulation and its inability to sufficiently justify a total prohibition against the dual practice of law and accounting under its ethics rules, the ABA soon retreated from its earlier position. In June of 1972, the Committee on Ethics and Professional Responsibility issued Formal Opinion 328. This opinion superseded all previous ones concerning the dual practice of law and accounting and held that a lawyer would not necessarily be subjected to discipline for

158. Id.
160. See id. at v.
161. See id. at 14.
162. Id.
163. See, e.g., Copal Mintz, Rigidity of Ethics, N.Y. L. J., Mar. 4, 1966. Lawyer Mintz questioned both the bar's authority to make decisions in favor of its own self-interest without taking into consideration how its decision would affect members of other professions, and how the bar or an accountant association could prevent the simultaneous practice of law and accounting when the practitioner had satisfied the appropriate licensing requirements. See also Arthur J. Levy & W.D. Sprague, Accounting and Law: Is Dual Practice in the Public Interest?, 52 A.B.A. J. 1110, 1110-16 (Dec. 1966). Levy, a member of the House of Delegates of the ABA and Chairman of its Committee on Professional Relations, and Sprague, a member of the Council and Chairman of the Committee on Relations with the Bar of the AICPA, expressed their lack of concern with the practicing lawyer who used her accounting training to be a better lawyer or the practicing accountant who used her legal training to be a better accountant. Id. at 1110.
164. ABA Comm. on Prof'l Ethics and Prof'l Responsibility, Formal, Op. 328 (1972) [hereinafter FORMAL OPINION 328] (discussing the status of dual practice as a lawyer and as a certified public accountant).
practicing in both professions simultaneously as long as she complied with the requirements of the rules of ethics.\textsuperscript{165} Formal Opinion 328 further explained that justifications such as the inherent difficulties for a lawyer to devote sufficient time to keep abreast of current developments in two occupations, the potential misleading of the public as a result of the lawyer's dual titles, and allegations that the "second occupation constituted indirect solicitation and served as a feeder to the [lawyer's] law practice," were unsupportable under the applicable code of professional responsibility.\textsuperscript{166}

The ABA noted that a greater ethical difficulty would be encountered, however, in addressing the question of whether the legal ethics rules might apply to conduct occurring while the lawyer functioned in her role as an accountant. In considering this issue, the ABA resorted back to a basic application of the concept of what it means to be engaged in the practice of law. For example, the ABA explained that if the "second occupation was so law-related that the work of the lawyer in [her non-legal] occupation involve[d,] inseparably, the practice of law, then it would consider the lawyer to be engaged in the practice of law" while functioning within that occupation.\textsuperscript{167} Accordingly, it then concluded that the dual practitioner would be "held to the standards of the bar while conducting the second occupation."\textsuperscript{168}

In defining law-related activities, the ABA cited with favor, an opinion issued by the Committee on Professional Ethics of the New York State Bar Association that distinguished between a second non-law-related occupation "such as the operation of a shopping center, retail store or manufacturing plant, and other . . . occupations" that it deemed as law-related "such as marriage counseling, accountancy, labor relations consulting, the operation of an insurance agency, a real estate brokerage office, or a loan or mortgage brokerage office."\textsuperscript{169} Finally, the ABA concluded that lawyers who were engaged in law-related occupations would almost inevitably participate to some extent, in the practice of law, despite the fact that laypersons could perform the same activity without engaging in the practice of law. It emphasized, however, that a lawyer would be subject to the ethics rules when performing those services while functioning in her role as a lawyer.\textsuperscript{170}

\textsuperscript{165.} See id.  
\textsuperscript{166.} Id.  
\textsuperscript{167.} Id.  
\textsuperscript{168.} Id.  
\textsuperscript{169.} Id. (citing N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Opinion 206 (1971)).  
\textsuperscript{170.} Id. (citing ABA Comm. on Prof'l Ethics, Op. 57 (1932)) (noting that in carrying on law-related occupations and professions, the lawyer will inevitably engage in the practice of law, despite the fact that the activities if performed by a non-lawyer would
The Bar's failed attempt at prohibiting the dual practice of law and accounting is instructive for several reasons. First, it provides still another instance of an exercise of self-regulation by the ABA that could not be supported under its ethics rules. Second, it explains the ABA's reasons as to when it believed that conduct and activities performed in a lawyer's non-legal capacity would be subject to regulation under the legal ethics codes. Finally, the ABA in reliance on an opinion issued by the New York Bar Association, considered the concept of "law-related activities" and expressly indicated its willingness to defer the regulation of the lawyer who functioned either solely as an accountant or when functioning in the dual profession of law and accounting, when the function of her role as an accountant did not involve her participation in law-related activities.  

IV. LEGAL REALISM AND LAWYER-POLITICIANS

A. Legal Realism and the Model Rules

Legal realism has had a tremendous influence on American law and legal education for more than seventy years. It is a legal philosophy widely attributed to Justice Oliver Wendell Holmes and law professors Karl Llewellyn and Jerome Frank and has had an important impact on how lawyers and judges view their legal roles in society. Legal realism is a descriptive theory about the nature of...
judicial decision-making, one which contends that judges when deciding a case, first exercise unfettered discretion in reaching a result based upon their own personal tastes and values and later rationalize their decisions with appropriate legal rules and reasoning to support them.\textsuperscript{173}

From an academic standpoint, legal realism developed as a challenge to the Langdellian case method of teaching in legal education, a teaching pedagogy that originated at the Harvard Law School and spread to law schools throughout the country.\textsuperscript{174} Upon its inception, legal realists began to criticize the case method's emphasis on studying appellate opinions as the only method for teaching law students how to identify general legal principles. Their primary concern with the case method was that it strove to isolate rules and principles of law believed to be critical for judicial decisions from their proper context in society.\textsuperscript{175}

In critiquing the common law decision-making process of the United States, legal realists have argued that judges actually make law rather than attempt to hide this fact under the guise that they do not make law but only discover and rely on an already existing body of law when creating their decisions. They have embraced the notion that the content of the law in a judicial opinion is "affected by all manner of social, political, economic, historical and other trends in thinking that operate either consciously or unconsciously through the judge making it."\textsuperscript{176} In short, they believe that the law is problems was later embraced and adopted by the legal realist movement. See Gerald R. Ferrera, Ethics in Legal Education: An Augmentation of Legal Realism, 18 PEPP. L. REV. 893, 898-99 (1991).


175. Id. Christopher Columbus Langdell was the dean of Harvard Law School between 1870 and 1895. Dean Langdell viewed law as a science that could be better taught as a system of rules and principles. He looked to appellate cases for these rules and later collected and organized the rules for publication into casebooks. His approach in using the case-method of teaching law quickly spread throughout the United States. Id. For a good discussion of Langdell and the case method of teaching, see W. Burlette Carter, Reconstructing Langdell, 32 GA. L. REV. 1 (1997).

176. See BURNHAM, supra note 56, at 42. Legal realists believe that "[s]ocial context, the facts of the case, judges' ideologies, and professional consensus critically influence individual judgments and patterns of decisions over time." Joseph William Singer, Legal Realism Now, 76 CAL. L. REV. 465, 470 (1988) (reviewing KALMAN, supra note 174). A few of the common principles shared amongst legal realists are that: (1) the empirical reality of the application of rules rather than formal rules constitute legal reality; (2) the goals and policies are important in understanding the law and its reasoning; (3) the law is what law-related officials do and in order to predict how they will react requires a knowledge of legal doctrine, past precedent, social trends and relevant science; and (4) understanding, predicting and advocating for certain legal results requires taking a craft-like approach to the law. Richard O. Brooks, Legal
indeterminate and is influenced by many sociological and contextual dynamics.

As a result of the significant challenges by the legal realists to the dominant but formalistic attitudes and approaches to law used by judges during early American legal history, many jurists and law professors today have begun to view law more pragmatically. For instance, more judges have embraced and accepted the notion that law cannot be considered solely in a vacuum and such external factors as social experience, public policy, and morality can and do play vital roles in fully understanding and appreciating the law.177 Additionally, it is common for law professors to discuss public policy considerations and ramifications in explaining and rationalizing judicial decisions despite the fact that many continue to embrace the formalistic Langdellian teaching methodology.178

Although discussions concerning legal realism often focus on the role of the judge in legal decision-making, its underlying premise advocating the consideration of contextual factors and the social realities before applying legal concepts, however, has both relevance and merit to regulating lawyers who perform roles and functions that fall outside of the parameters of the Model Rules for two significant reasons. First, nineteenth century ethics rules emerged during a period where the prevailing view was that lawyers as a group were homogeneous and monolithic. The drafters of the early ethics codes envisioned the lawyer as a practitioner, one whose primary if not sole job function was to represent clients in litigation or to offer legal counsel. Consequently, current and earlier versions of the ethics codes were designed to regulate the behavior of the practicing lawyer and spent no time distinguishing between even the different legal tasks performed by practicing lawyers.179 Contemporary expansions in the roles and functions of lawyers and evidence indicating that

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177. See Grutter, 539 U.S. at 327 (concluding that “[c]ontext matters when reviewing race-based governmental actions under the Equal Protection Clause”); see also Gomillion v. Lightfoot, 364 U.S. 339, 343-44 (1960) (emphasizing that “in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts”).

178. See Singer, supra note 176, at 473-74 (discussing several ways in which legal realism has influenced law teaching).

most lawyers today specialize along with increased diversification in clients seeking legal services, however, have steadily negated this traditional view of the lawyer for purposes of professional regulation. These expansions have ultimately lead the ABA and state bar associations to create and incorporate into their ethics codes additional context-specific rules to account for a few of the differences that exists amongst legal practitioners.180

Second, since their inception, both current and earlier versions of the ABA legal ethics codes were based also on the presumption that the ethics rules would be applied uniformly to all lawyers without considering any distinctions between the different types of lawyers, their clients or their activities. At one time, bar disciplinary committees acting on behalf of state supreme courts were vested with the sole responsibility for enforcing these ethics rules. This is no longer the case. Formal codes of professional conduct do not comprise the sole source of the rules and regulations governing the various aspects of legal practice. For example, in addition to being regulated by state disciplinary codes, legal practitioners may be subject to judicial sanctions for improper conduct occurring within a court proceeding181 and the professional conduct rules contained in various governmental regulations.182

In short, disciplinary bodies during the past few decades have become increasingly concerned with such factors as job function and context when applying the Model Rules. They have begun to accept that context is important and principles of legal realism can offer both a reasonable and responsive nexus to bridging current gaps in

180. The Model Rules recognize that even practicing lawyers operate in different legal capacities with divergent responsibilities. See, e.g., MODEL RULES R. 1.13 (discussing the role of lawyers representing corporations and governmental organizations); MODEL RULES R. 3.7 (regulating the conduct of lawyers serving as both advocate and witness in the same trial); MODEL RULES R. 3.8 (regulating the conduct of lawyers serving as government prosecutors); MODEL RULES R. 5.1 (discussing the responsibilities of partners, managers and supervisory lawyers for the activities of subordinate lawyers); MODEL RULES R. 5.7 (regulating the activities of lawyers participating in law-related services).

181. See Fed. R. Civ. P. 11(b), (c) (allowing federal courts to impose sanctions against a lawyer who acts in bad faith when signing, filing, or submitting a pleading).

the ethics rules when dealing with lawyers who function within specialized legal practice areas.

Legal scholars have also advocated the use of context as a means to reconcile the present disconnect in applying the Model Rules to every practicing lawyer. For instance, Professor David Wilkins at Harvard has considered the application of legal realism principles to account for the vagueness of the Model Rules when applied to the different legal roles and functions performed by practicing lawyers. In an attempt to bridge the gap and to make the ethics rules more responsive, Professor Wilkins has suggested the adoption of a "middle-level" approach to regulating the activities of the practicing lawyer. Utilizing a contextual-analytical approach similar in theory to that attributed by legal realists to judicial decision-making, Professor Wilkins has argued that bar associations and courts should take into consideration five broad categories of factors designed to encompass not only the realities but also the distinctions of modern legal practice: task, subject matter, status, lawyer and client. He has explained that the first set of factors such as "task (for example, litigation versus counseling), subject matter (for example, civil versus criminal), and status (for example, plaintiff versus defendant) - highlight differences in the roles that practicing lawyers play and the procedural and substantive contexts in which they are asked to play them." He has noted that the final two categories such as "lawyer (for example, sole practitioner versus large firm) and client (for example, individual versus corporate) - refer to differences among those performing and consuming legal services." Professor Wilkins has concluded that the factors of subject matter and status have become standard features in constructing the current system of lawyer regulation and several leading proposals for its reform.

Even a contextual approach to regulating practicing lawyers has its problems. A move towards a pure contextual-based system of regulation would deny the fact that some common features still exist amongst the roles of practicing lawyers or in the practice of law.

183. See Wilkens, Legal Realism, supra note 26, at 516; see generally supra note 20 (listing additional articles addressing the conflict between the Model Rules and specific areas of practice and suggesting the consideration of context).
184. See Wilkens, Legal Realism, supra note 26, at 517. See also David B. Wilkins, Making Context Count: Regulating Lawyers After Kaye, Scholer, 66 S. Cal. L. Rev. 1145, 1154-56 (1993) (considering the categories of subject matter and task in evaluating the arguments used by the Office of Thrift Supervision ("OTS") to justify its enforcement practices against the Kaye, Scholer law firm for alleged violations of OTS and Federal Home Loan Bank Board regulations and Kaye, Scholer's defense).
185. Wilkens, Legal Realism, supra note 26, at 517.
186. Id.
187. Id.
188. See David B. Wilkins, How Should We Determine Who Should Regulate
denying this truth, adopting a contextual approach to legal ethics would run the risk of either further subdividing the profession into little empires where distinct groups of practitioners would fight over ethics for their own self-interest or would create a totally decentralized system of lawyer regulation.189 Finally, utilizing any context-based approach to regulating practicing lawyers would first require a determination of which specific “contextual differences among particular lawyers, clients, and regulatory settings are relevant and for which purposes.”190

These concerns tend to be minimal, however, when one considers whether to apply a contextual approach to regulating the non-practicing lawyer-politician. By definition, lawyer-politicians are not engaged in the day-to-day practice of law. Because of a lack of common areas of overlap in the job functions of the legal practitioner and the lawyer-politician, the potential for the creation of additional subdivisions and tension in the application of the current ethics rules regulating legal practitioners is nil. Consequently, the only major concern remaining in applying a contextual approach to regulating lawyer-politicians is to determine the specific factors to be selected, their relevance and justification.

In the following subsections, the Article examines a few of the safeguards inherent in the Constitution and political process that justify a deviation from the current one-size-fits-all approach when regulating the conduct of federal lawyer politicians.

B. Constitutional and Political Considerations Requiring a Departure from the Status Quo When Regulating Federal Lawyer-Politicians

1. Disciplining Lawyer-Politicians Under the Model Rules May Upset the Proper Balance of Powers Required by Federalism

"Federalism" is a constitutional principal that involves a distinctive territorial division of powers along with legal and political mechanisms to settle inter-level disputes.191 It is a term used to describe the American structure of government: a system where

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189. See id.
190. Id. See also Martha Minow & Elizabeth V. Spelman, In Context, 63 S. CAL. L. REV. 1597 (1990) (considering the problems in determining which contextual factors are relevant and for which purposes).
political power is constitutionally allocated and divided vertically between the federal and state governments and where each entity is provided with substantial functions. In short, federalism is "a device for dividing decisions and functions of government." 

"Federalism" does not appear in the text of the Constitution and there is much disagreement in defining it. The Framers of the Constitution's selection of a federalist form of government was a compromise that was designed both to insure the existence of a strong central government, which was lacking under the Articles of Confederation, and to accommodate and protect the interests of the existing state governments. Although historical exigencies significantly influenced the creation of American Federalism, its viability has rested upon its functionality. For instance, a strong national government has the capacity to handle problems that extend beyond the boundaries and interests of the individual states while the state governments have the capacity and are much more equipped to focus on the specific impact that a problem may have in a limited geographical or economical area.

192. See BERNARD SCHWARTZ, CONSTITUTIONAL LAW: A TEXTBOOK 45 (2d ed. 1979), Schwartz describes the main features and elements of American federalism as:

(1) a union of autonomous states; (2) the division of powers between the Federal government and the states; (3) the direct operation of each government, within its assigned sphere, upon and within its territorial limits; (4) the provision of each government with the complete apparatus of law enforcement; and (5) federal supremacy over any conflicting assertion of state power

Id. See also BLACK'S LAW DICTIONARY 612 (6th ed. 1990) (defining federalism as including the "interrelationships among the states and relationship between the states and the federal government").


194. The Articles of Confederation were the first governing instrument for the thirteen American States after their independence from England. They were drafted in 1777 and ratified by the states in 1781. Under this plan of government, each state retained its sovereignty, freedom and independence while expressly delegating only a few powers to the national government. WALKER, supra note 191, at 39-40; see also Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 COLUM. L. REV. 1, 3 (1988) (discussing the Framers' rationale for a federal system of government).

195. KERMIT L. HALL, FEDERALISM: A NATION OF STATES ix (Kermit L. Hall ed., Garland Publishing 1987) (1987) (providing that the Federalist delegates to the 1787 Constitutional Convention were concerned with finding a way of "accommodating existing state governments while enhancing the authority of the new central government").

196. See William G. Bassler, The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources?, 48 RUTGERS L. REV. 1139, 1165 (1996) (noting, in arguing against a federal cause of action, that "[s]ince all of the states have domestic violence statutes, an existing legal infrastructure with the capacity to deal with the problem of domestic violence is now in place").
The Supreme Court has recognized that federalism has both sociopolitical and economic benefits and has stated that "the principal benefit of the federalist system is a check on the abuses of government power." 197 The Framers believed that such a constitutionally mandated balance of power between the states and the federal government would reduce the risk of tyranny and abuse from either and thus protect individual liberties. 198

Inherent in the concept of federalism is political accountability and responsibility. Federalism allows both the national and state governments to check the abuses of the other by providing citizens with the ability to switch their confidence between each distinct government and to use each as a means of redress if either invades or abuses their rights. 199 Thus, it is one of the Constitution's structural safeguards of liberty and acts as a double security to protect the rights of the people. 200 In order for the double security to be effective, however, the Constitution requires that there must be a proper

197. Gregory v. Ashcroft, 501 U.S. 452, 458 (1990). In Gregory, the Court noted that a federalist structure of joint sovereigns provides several additional benefits, "[i]t assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society . . . ." Id. For a more detailed discussion of the sociopolitical and economic benefits of federalism, see RALPH A. ROSSUM, FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY 78-79 (2001); Dennis M. Cariello, Federalism For the New Millennium: Accounting For the Values of Federalism, 26 FORDHAM URB. L.J. 1493, 1558-66 (1999); Richard H. Fallon, Jr., The "Conservative" Paths of the Rehnquist Court's Federalism Decisions, 69 U. CHI. L. REV. 429, 440-41 (2002); Merritt, supra note 194, at 3-10; but see LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 289 (4th ed. 2001) (discussing several of the problems with federalism such as its costliness, lack of efficiency, and complexity).

198. See Gregory, 501 U.S. at 458-59 (citing THE FEDERALIST No. 28, at 180-81 (Alexander Hamilton), No. 51, at 323 (James Madison) (Clinton Rossiter ed. 1961)).


200. See THE FEDERALIST No. 51, at 270 (James Madison). In discussing his vision of the structural form of government for the new republic, Madison stated:

[i]n the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence, a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.

Id.
balance between the powers of the state and federal governments. A proper balance of powers "helps to ensure that citizens are able to hold . . . state [and] federal officials "accountable for their actions and that those "officials will be responsive to the needs of their respective [constituencies]."

Because the starting point rather than the final answer to every inquiry into questions of federalism is the text of the Constitution, one must first look to the literal language of the Constitution and the underlying postulates behind the specific grants of authority that limit and control the powers of the federal and state governments.

The constitutional boundaries for a federalism analysis revolve around two primary provisions: the Supremacy Clause and the Tenth Amendment. At one end of the spectrum, the Supremacy Clause provides the national government with a decided advantage in determining the delicate balance of powers between the state and federal governments. It declares that the Constitution and the laws and treaties of the United States constitute the supreme law of the land and its effect is to provide a federal preemption of all state and local laws that conflict with any federal laws. At the other end, the Constitution is clear in indicating that the federal government is one of limited powers and in leaving most of the responsibilities and

202. Squire, supra note 199, at 880. See also FTC v. Ticor Title Ins. Co., 504 U.S. 621, 636 (1992) (noting that "[f]ederalism serves to assign political responsibility, not to obscure it"); United States v. Lopez, 514 U.S. at 577 (Kennedy, J., concurring) (discussing federalism and noting that the inability of citizens to hold the appropriate branch of government accountable "is more dangerous even than devolving too much authority to the remote central power"); Cariello, supra note 197, at 1560 (noting that "modern scholars recognize [that an] increase in responsiveness [is] one of the greatest values of decentralized government").
203. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 547 (1985) (stating that "[b]ehind the words of the constitutional provisions are postulates which limit and control").
204. U.S. CONST. art. VI, § 2. The Supremacy Clause provides:
[this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
Id.
205. U.S. CONST. amend. X. The Tenth Amendment provides: "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Id.
206. See U.S. CONST. art. VI, §2; see also Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210-11 (1824) (holding that otherwise valid state laws must give way to federal laws in which they conflict); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 435 (1819) (holding that a state tax that interfered with the function of the federal government violated the Supremacy Clause).
powers to the states in the absence of an express delegation or prohibition of power to the national government.207

Disciplining lawyer-politicians under the Model Rules may upset the proper balance of powers required under federalism when the lawyer-politician holds the high-level executive office of President or the judicial office of Supreme Court Justice and his or her conduct falls within the constitutionally protected spheres of activities peculiar to those offices such as pardons, foreign affairs and the independence and autonomy provided to members of the Supreme Court. The following subsections discuss how principles of federalism might be circumvented when state courts and bar associations discipline federal lawyer-politicians for conduct falling within the discretionary leeway provided for high-level executive and judicial officers under the Constitution.

(a) Presidential Pardons

Presidential pardons offer relief from harsh judgments, biases, and prejudices in the operation and enforcement of criminal laws and penalties.208 In Knote v. United States, the Supreme Court adopted the following definition of "pardon":

[a] pardon is an act of grace by which an offender is released from the consequences of his offence, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offence, and restores to him all his civil rights. In contemplation of law, it so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position.209

207. See U.S. CONST. art. VI, §2.
209. Knote v. United States, 95 U.S. 149, 153 (1877). Although it is settled that a presidential pardon restores basic civil and political rights such as the right to vote, testify in court proceedings, and to run for public office, legal scholars and judges have differed concerning the full effect of a pardon. See G. Sidney Buchanan, The Nature of a Pardon Under The United States Constitution, 39 OHIO ST. L.J. 36, 61-62 (1978); Samuel Williston, Does a Pardon Blot Out Guilt?, 28 HARV. L. REV. 647, 653 (1915) (contending that a pardon removes disqualifications resulting from the conviction of a crime but would not prevent a subsequent disqualification for character resulting from the pardoned offense). Modern courts have followed one of three approaches when determining the effect of a presidential pardon. One approach is rooted in earlier Supreme Court precedent and provides that a pardon eliminates both the conviction and guilt of the defendant and restores the defendant to the position that he or she would have been in prior to committing the offense. See Ex parte Garland, 71 U.S. (4 Wall.) 333, 380-81 (1866); accord United States v. McMurrey, 827 F. Supp. 424, 425-26
Article II of the Constitution provides that "[t]he President... shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." Historically, the pardon power was intended to function both as a check on the legislative and judicial branches of the federal government by providing the President with a means to soften the punishments issued by Congress and the federal judiciary. It was

(S.D. Tex. 1993), aff'd sub nom. United States v. Hamilton, 48 F.3d 149 (5th Cir. 1995); State ex rel. Sokira v. Burr, 580 So. 2d 1340, 1344-45 (Ala. 1991). A second approach is that a pardon eliminates the conviction but does not wipe out the underlying guilt of the offense. See Burdick v. United States, 236 U.S. 79, 91, 94 (1915) (acknowledging that the acceptance of a pardon implies a confession of guilt); Carlesi v. New York, 233 U.S. 51, 59 (1914) (implying that a pardon does not necessarily wipe out the fact of guilt if it has been established by a previous conviction); Lettsome v. Waggoner, 672 F. Supp. 858, 864 (D.V.I. 1987) (a pardon does not provide a court with the power to expunge a criminal record); FED. R. EVID. 609(c) and accompanying NOTES OF COMMITTEE ON THE JUDICIARY H. R. REP. No. 93-650 (1973), reprinted in 1974 U.S.C.C.A.N. 7075, 7085 (providing that evidence of a prior conviction cannot be used to impeach a witness who has been pardoned for a specific offense but only if the pardon was granted for the defendant's rehabilitation or innocence). Finally, some courts have held that a pardon neither eliminates the conviction nor the guilt of the defendant. See United States v. Noonan, 906 F.2d 952, 956, 960 (3d Cir. 1990) (holding that a pardon does not eliminate a conviction or wipe out the record of a conviction); Gurleski v. United States, 405 F.2d 253, 266 (5th Cir. 1968) (same); Dixon v. McMullen, 527 F. Supp. 711, 718 (N.D. Tex. 1981) (holding that a pardon does not wipe out the fact that the offense occurred and does not wash away the guilt of the offense); Kellogg v. State, 504 P.2d 440, 441 (Okla. Crim. App. 1972) (same). Although Supreme Court cases post Ex parte Garland imply that a pardon would not eliminate the guilt of a conviction, the Court has neither expressly overruled nor spoken against its broad statement of the effect of a pardon articulated in Garland.

210. U.S. CONST. art. II, § 2, cl. 1. The form of a pardon can include such actions as: remittal of fines and forfeitures, reprieves, grants of amnesty to a group of offenders, commutation of sentences, and general grants of pardons prior to convictions. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 4.5 (2d ed. 2002); EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984 at 180-89 (5th rev. ed. 1984); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-10, at 719-20 (3d ed. 2000); see also NAT'L GOVERNORS' ASS'N CENTER FOR POLICY RESEARCH, GUIDE TO EXECUTIVE CLEMENCY AMONG THE AMERICAN STATES 164 (1988) (discussing survey results indicating the types of clemency available in each state). Finally, a presidential pardon may be absolute or conditional. See, e.g., Proclamation No. 4483, 3 C.FR. 4 (1977) (discussing President Jimmy Carter's full, complete and unconditional pardon of Vietnam draft evaders); Proclamation 4311, 10 WKLY. COMP. PRES. DOC. 1103 (Sept. 13, 1974) [hereinafter Proclamation 4311] (discussing President Gerald Ford's full and absolute pardon of Richard Nixon for all crimes committed during the Watergate cover-up); Schick v. Reed, 418 U.S. 256, 266 (1974) (noting that a pardon may be conditional as long as the condition does not offend the Constitution).

211. See THE FEDERALIST No. 74, at 385-86 (Alexander Hamilton) [hereinafter FEDERALIST No. 74] (defending the pardon power as a check on legislative motive); see also Daniel T. Kobil, The Quality of Mercy Strained: Wresting the Pardoning Power from the King, 69 TEX. L. REV. 569, 613 (1991) (noting that the pardon power acts as a check on the judicial system by allowing the President to commute a prison term on...
also intended as a means for furthering the public welfare.212

The pardon power is plenary and is applicable to all who have been accused or convicted of offenses against the federal government. It permits the President to offer and grant pardons for any reason whatsoever and does not require the President to provide justifications for his actions.213 Textually, the Pardons Clause restricts the President's powers to grant pardons in only three ways. First, the act to be pardoned must constitute an offense against the United States.214 Second, the act must not be the subject of

the grounds of a perceived injustice or prejudice in a prisoner's conviction).

212. In defending the pardon powers as a means to promote the public welfare, Alexander Hamilton noted:

in seasons of insurrection or rebellion there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth . . . . The dilatory process of convening the legislature or one of its branches, for the purpose of obtaining its sanction, would frequently be the occasion of letting slip the golden opportunity.

See FEDERALIST No. 74, supra note 211, at 386. In 1868, President Andrew Johnson granted a universal amnesty and pardon for members of the Confederacy who had participated in the Civil War. Armstrong v. United States, 80 U.S. (13 Wall.) 154, 155 (1871) (quoting Proclamation No. 15, 15 Stat. 711 (1868)). The express purpose of the proclamation was "to secure permanent peace, order, and prosperity throughout the land, and to renew and fully restore confidence and fraternal feeling among the whole people . . . ." Id.; see also Stephen L. Carter, The Iran-Contra Pardon Mess, 29 HOUS. L. REV. 883, 887 (1992) (contending that President Gerald Ford's pardon of President Richard Nixon after his resignation from office for the crimes that Nixon may have committed during the Watergate scandal could be supported on the grounds that the national interest would be better served by enabling Nixon to avoid prosecution that would have inevitably resulted in numerous legal proceedings and would have continued to fuel a national obsession with Watergate); Bob Cohn, Anatomy of a Pardon: Why Weinberger Walked, NEWSWEEK, Jan. 11, 1993, at 22-23 (discussing President George Herbert Walker Bush's justification for his 1992 pardon of participants in the cover-up of the Iran-Contra scandal as a means to heal the nation from a lingering scandal and to protect patriotic public servants from an overzealous independent counsel).

213. The Constitution provides the President with the sole and complete discretion in granting or denying a pardon. Current federal regulations governing the submission, consideration, and granting of pardons are advisory in nature and serve only as internal guidelines for Department of Justice personnel conducting investigations of petitions and supporting documentation for pardons. See 28 C.F.R. §§ 0.35-0.36, 1.1-1.11 (2003); see also U.S. DEPT. OF JUSTICE, U. S. ATTORNEY'S MANUAL: STANDARDS FOR CONSIDERATION OF CLEMENCY PETITIONS § 1-2.112 (2002), available at http://www.usdoj.gov/pardon/petitions.htm [hereinafter STANDARDS FOR CLEMENCY] (discussing objective criteria used to assess an application for pardon such as: (1) the applicant's post-conviction conduct, character, and reputation; (2) the seriousness and length of time that has passed since the offense; (3) the applicant's acceptance of responsibility, remorse, and atonement; (4) official recommendations and reports; and (5) any specific need for relief).

214. Under principles of federalism, the President lacks the authority to grant pardons for offenses against the states. See, e.g., Ex parte Grossman, 267 U.S. 87, 113 (1925) (holding the pardon power was designed to operate upon offenses against the
impeachment proceedings. Finally, the pardonable act must be committed prior to the grant of pardon.

Generally, the presidential pardon power is exclusive and congressional attempts to limit it have been unsuccessful. From a practical standpoint, the exercise of the pardon power is subject only to those individual constraints that each President has placed upon himself. For example, the President, with the aid of the Justice Department, will make the final determination whether to grant a pardon based upon the factors that he or she deems important, including political ones. However, legal scholars have observed several societal checks on its abuse. First, the President may be impeached and removed from office for corruptly granting clemencies. Second, if an incumbent President grants a controversial pardon prior to a re-election, the President may suffer public rebuke at the polls. Third, if the President is at or near the

United States as distinguished from those against the states); Carlesi v. New York, 233 U.S. 51, 59 (holding a presidential pardon for a crime against the United States does not restrict the power of a state to punish crimes subsequently committed by a defendant).

215. The Pardon Clause impeachment exception borrows from British precedent and prevents the President from nullifying congressional proceedings to remove executive or judicial officials through impeachment. See Kobil, supra note 211, at 585-88 & n.108 (citing 2 WILLIAM BLACKSTONE, COMMENTARIES 399-400) (providing an historical development of the impeachment exception under British law).

216. See id.

217. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 626-27 (Max Farrand ed., Yale Univ. Press 2d ed. 1937) (1911) [hereinafter RECORDS OF THE FEDERAL CONVENTION] (noting that a proposal that sought to require Senate approval of presidential pardons was rejected overwhelmingly by the members of the 1787 Constitutional Convention); see also Schick, 419 U.S. at 266 (holding that the pardon power "flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress"); Ex parte Garland, 71 U.S. at 381 (holding that Congress could not restrict the consequences of a pardon through legislation); United States v. Klein, 80 U.S. (13 Wall.) 128, 148 (1871) (holding that the Constitution does not allow Congress to change the effect of a pardon).

218. See 28 C.F.R. §§ 0.35-0.36, 1.1-1.11 (2004) (describing the Justice Department's role in assisting the President in reviewing petitions for clemency and providing investigation into matters deemed relevant in support of the petition); STANDARDS FOR CLEMENCY, supra note 213.


220. See TRIBE, supra note 210, § 4-10, at 721. This check, however, will likely be ineffective for a President who grants a controversial pardon during the final hours of his closing term in office.

221. See id.; see also Carter, supra note 212, at 887 (noting that the "wrath or approbation of the voters is one of the very few checks on the pardon power that exist"). For example, President Gerald Ford lost the 1976 election for presidency to
end of his or her term at the time of granting a pardon, the President may be fearful that a controversial pardon could lead to a disreputable placement in the nation's history. Finally, a presidential pardon will be invalid if it violates any other constitutional provisions.

Federalism concerns will arise if a state bar association or court attempts to discipline a lawyer-President for professional misconduct when the President grants a controversial pardon. The basis for disciplinary action under Rule 8.4 of the Model Rules of Professional Conduct could be as simple as an assertion that the President abused the powers entrusted to him or her under the Constitution or that the President has violated the public trust by granting a pardon that could not be legally or morally justified. For example, on the eve of the competition of his last term in office, lawyer-President William Clinton granted 140 pardons and 36 commutations of prison sentences, several of which were impossible to defend or political in nature. The most infamous pardon recipient was billionaire fugitive Marc Rich who fled from the U.S. and renounced his citizenship when faced with charges of tax fraud and illegal trading in oil with Iran at a time when Iran had seized the U.S. embassy and held American citizens as hostages. Other questionable pardon recipients included Roger Clinton, the president's brother, who was pardoned from his conviction for conspiring to distribute cocaine and Susan McDougal, who was pardoned from her conviction of bank

Jimmy Carter after granting a controversial pardon to former President Richard Nixon. See Proclamation 4311, supra note 210.

222. See Tribe, supra note 210, § 4-10, at 721-22.

223. The Supreme Court has exercised judicial review of the constitutionality of certain aspects of the clemency powers. See, e.g., Schick, 419 U.S. at 266 (upholding the President's ability to attach a condition on a pardon when the condition did not violate the Constitution); Burdick v. United States, 236 U.S. 79, 93-94 (1915) (balancing the clemency power against a defendant's Fifth Amendment right against self-incrimination as a witness in a related criminal proceeding); Knote, 95 U.S. at 154-56 (holding that a pardon must not affect the constitutional rights of others and could not be used to contravene the appropriations powers reserved to Congress under Article I of the Constitution).


225. See Aaron Lucchetti et al., Open for Business: While Marc Rich Was Fugitive, Firm Dealt with Pariah Nations, WALL ST. J., Feb. 23, 2001, at A1 (noting that after Marc Rich had fled from the country, he and his business partner continued to engage in oil and other trading through non-U.S. subsidiaries with countries that had supported terrorism or engaged in human rights abuses). Shortly after pardoning Mr. Rich, President Clinton indicated his remorse. See also Jonathan Alter, Life is Fleeting, Man, Newsweek, Apr. 8, 2002, at 43 (noting that President Clinton admitted that the Rich pardon had damaged his reputation and was "terrible politics").
fraud and who had been jailed for contempt for refusing to testify concerning President Clinton's knowledge of and alleged participation in fraudulent financial transactions in connection with a failed Whitewater land development corporation in which the President and Susan McDougal were partners.226

As discussed earlier, in evaluating a federalism claim, the initial inquiry involves a review of the text of the Constitution and the underlying postulates behind the specific grants of authority. The Constitution expressly gives to the President the plenary power to grant reprieves and pardons for offenses against the United States. It provides no restrictions on the President's exercise of the pardon powers. Although the only real check on the abuse of the pardon powers is impeachment from office by the citizenry, even the grant of a controversial or questionable pardon would remain intact.227 In addition, the Supremacy Clause of the Constitution provides the federal government with an advantage in determining the proper balance and limits of powers between the national and state governments. Under it, state laws or actions in conflict with federal constitutional provisions or law are invalid.

State bar associations have consistently exercised an ability to discipline both practicing lawyers and non-practicing lawyers for misconduct occurring outside the practice of law. However, under the

226. See Amy Goldstein & Susan Schmidt, Clinton's Last-Day Clemency Benefits 176; List Includes Pardons for Cisneros, McDougal, Deutch and Roger Clinton, WASH. POST, Jan. 21, 2001, at A1; see also Gregory C. Sisk, Suspending the Pardon Power During the Twilight of a Presidential Term, 67 MO. L. REV. 13, 16 (2002) (contending that many of the pardons granted by President Clinton were the result of political influence by the President's former lawyer, large financial contributors and the President's brother-in-law); Whitewater. The dandy vanishes, ECONOMIST, Mar. 14, 1998, at 26. The Clinton pardons fueled a congressional investigation that led to the publication of an advisory report issued by the Government Reform Committee of the U.S. House of Representatives that concluded the President had ignored the applicable standards governing the exercise of the clemency power and to subsequent investigations by the Justice Department concerning whether any of the pardons were granted in exchange for financial contributions to democratic party concerns. See Dale Russakoff, Clinton Cleared in New Square Pardon Case; U.S. Attorney in New York Probing Other Pardons, WASH. POST, June 21, 2002, at A7. Currently, all investigations have failed to affect the legitimacy of President Clinton's exercise of the pardon power or any of the pardons issued.

227. See RECORDS OF THE FEDERAL CONVENTION, supra note 217, at 626-27 (noting the Framer's rejection of a proposal to require Senate approval of Presidential pardons); FEDERALIST No. 74, supra note 211, at 385-86 (implying the Framers' consideration and rejection of a proposal that presidential pardons for the crime of treason should require the assent of the legislature); see also William Duker, The President's Power to Pardon: A Constitutional History, 18 WM. & MARY L. REV. 475, 525 n.258 (1977) (noting that one of the counts of impeachment against President Andrew Johnson was for "corruptly us[ing] the pardoning power") (quoting Cong. Globe, 39th Cong., 2d Sess. 320 (1867)).
balance of powers articulated by the Framers and provided for under the Pardon Clause of the Constitution, any attempt by a state bar association to discipline a lawyer-President for granting controversial pardons as was the case during President Clinton's final hours in office would result in destroying or circumventing the constitutional powers granted to the President and would violate the Supremacy Clause. Bar discipline in this instance would run afoul of the Framers' intent to provide the chief executive officer of the national government with the exclusive and unlimited ability to grant reprieves and pardons as a check on punishments issued by Congress and the federal judiciary. Consequently, should the lawyer-President decide to resume the practice of law at the end of his term in office, any consideration by a state bar association of his exercise of the pardon powers as a factor in determining his fitness to practice law would violate principles of federalism.

(b) Foreign Policy and Presidential War Powers

The Framers of the Constitution entrusted matters pertaining to foreign policy exclusively to the national government by virtue of its sovereignty and expressly provided for a mutual sharing of powers between the Executive and Legislative branches of government during wartime. The Constitution grants to the President the

228. See supra note 204 (discussing the Supremacy Clause). See also Bates v. State Bar of Ariz., 433 U.S. 350, 382-83 (1977) (invalidating state bar association total bans on lawyer advertising as a violation of the First Amendment); Goldfarb v. Va. State Bar, 421 U.S. 773, 791-92 (1975) (invalidating state bar association actions that required minimum fee schedules as a violation of The Sherman Act). The discretion and protections provided to the President to grant even controversial pardons, however, would not shield the President from impeachment and removal from office along with subsequent criminal liability for bribery when the President accepts financial contributions in exchange for granting a pardon. See U.S. Const. art. I, § 3, cl. 7 (providing for criminal process to be brought against public officials after impeachment and removal from office); U.S. Const. art. II § 4 (providing for impeachment and removal from office if a public official is convicted of treason, bribery, or other high crimes and misdemeanors). Accord RECORDS OF THE FEDERAL CONVENTION, supra note 217, at 639 (Statement of George Mason, Sept. 15, 1787) (discussing George Mason's concern that the Constitution provided the President with the unbridled power to grant pardons even to those whom he had secretly instigated to commit crimes thus preventing the discovery of the President's guilt); id. at 626 (Statement of James Wilson, Sept. 15, 1787) (reassuring the delegates that if the President is a party to the guilt he can be impeached and prosecuted).

229. See supra note 211 and accompanying text.

230. See Zschernig v. Miller, 389 U.S. 429, 432 (1968) (holding that foreign affairs is an area that "the Constitution entrusts to the President and Congress"); Hines v. Davidowitz, 312 U.S. 52, 63 (1941) (holding that "the federal government is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties"); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (holding that "the powers to declare war... to make treaties [and] to maintain
power to conduct certain diplomatic and military affairs. Article II, sections 2 and 3 of the Constitution provide that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, . . . when called into the actual service of the United States" and empower the President to make treaties with other nations and to appoint and receive both ambassadors and other public ministers with the advice and consent of the Senate. Article I, section 8 specifically provides Congress with the power to declare war.

Although the Constitution entrusts the power to declare war to Congress and empowers the President to supervise the military operations of all congressionally declared war, United States history provides many instances in which the President has ordered and executed the use of military force abroad without gaining congressional approval in advance. Harvard Law Professor Laurence Tribe contends that the executive use of military force even prior to congressional acquiescence would likely be appropriate in instances where the force is necessary to defend the United States at home or to defend its military forces abroad from attack. For instance, in diplomatic relations with other sovereignties . . . would have vested in the federal government as necessary concomitants of nationality"; see also War Powers Resolution of 1973, H.R.J. Res. 542 § 2(a), 87 Stat. 555 (adopted over presidential veto on Nov. 7, 1973) (noting the Framers envisioned that the collective judgment of both the Congress and President would apply when deploying U.S. troops into hostile situations).

231. U.S. CONST. art. II, § 2, cl. 1, 2; § 3. Historical records and Supreme Court precedent suggests that the President has the exclusive responsibility for announcing and implementing military policies. For example, a comment by Alexander Hamilton during the development of the Constitution suggests that the Framers believed that providing the President with the authority of Commander in Chief of the Army and Navy was no more than empowering the President to act as the “first general and admiral of the confederacy” as opposed to the powers entrusted to the British King during that same period such as declaring war and raising and regulating of fleets and armies, powers that later were entrusted by the Constitution to the Legislative branch. See THE FEDERALIST No. 69, at 357 (Alexander Hamilton) (George W. Carey and James McClellan eds., 2001) [hereinafter FEDERALIST No. 69]. See also Ex parte Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring) (noting that the President’s powers as Commander in Chief affected only the command of the military forces and operations).

232. U.S. CONST. art. I, § 8, cl. 11. See TRIBE, supra note 210, § 4-3, at 638 n.6 (citing Alexander M. Bickel, Congress, the President and the Power to Wage War, 48 CHI.-KENT L. REV. 131, 132 (1971)). In one draft of the Constitution, the language “provided that Congress should have the power to ‘make war.’ The phrase was [later] changed to ‘declare war’ in order to ensure that . . . any ongoing war would not be [constrained] by the need for consensus over tactics and strategy.” Id.

233. See TRIBE, supra note 210, § 4-6, at 659 (citing 2 THE RECORDS OF THE FEDERAL CONVENTION, supra note 217, at 318-319) (noting that the Framers had contemplated that the President, even without prior congressional approval, might use force to repel sudden attacks). Accord War Powers Resolution of 1973, supra note 230 (providing the President as Commander-in-Chief with the ability to introduce the
the *Prize Cases*, the Supreme Court upheld as a legitimate exercise of executive power, President Lincoln's blockade of southern seaports following the attack on Fort Sumter in April 1861 and the organization of the Confederacy by southern states that had seceded from the nation. In reaching its decision, the Court acknowledged an inherent power, derived from the Commander in Chief Clause, to defend against an invasion by a foreign nation or rebellion by the States even without prior congressional approval of the use of military force and ultimately held that the use of such power to handle internal insurrection or invasion posed a political question and therefore, was not subject to judicial review. In arriving at its decision, the Court noted that the President was empowered to respond by military force where the United States had been invaded by a foreign nation or by the individual States organized in rebellion.

Despite the fact that presidential authority to wage defensive war has been widely accepted, there is no evidence to suggest or imply that the Framers contemplated the use of military force in absence of congressional approval to defend against sudden attacks upon allies or in the anticipation of an enemy attack on the United States. Professor Tribe attributes a lack of consideration for these concerns to the Framers' limited view of the role of the military during that period. For example, in the Eighteenth Century, a direct attack on the United States by a foreign enemy was probably the only exigency that would have required instantaneous military action. Consequently, the Framers could have reasonably envisioned that Congress would have the ability to evaluate the available military response to such an emergency in sufficient time when an attack was imminent.

The presidential war powers, however, are not only defined by the text of the Constitution but also by the underlying postulates

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military into hostilities in times of national emergencies created by an attack on the United States, its territories, or its armed forces). Professor Tribe contends that even if executive use of military force was beyond the scope of the powers vested in the Commander in Chief Clause, the action "might still be justified as a necessary concomitant of [national] sovereignty." See Tribe, *supra* note 210, § 4-6, at 659.


235. *Id.* at 668, 670-71. *Accord* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 28-29 (1827) (upholding the constitutionality of an act of Congress in 1795 providing the President with the ability to call forth the military as he deemed necessary to repel an invasion or imminent danger of invasion against the United States).


237. *See Tribe*, *supra* note 210, § 4-6, at 659-660. *But see* Martin, 25 U.S. (12 Wheat.) at 29 (stating that "[o]ne of the best means to repel invasions is to provide the requisite force for action, before the invader himself has reached the soil").

238. *See Tribe*, *supra* note 210, § 4-6, at 659-60.
behind the textual provisions along with the customary practices and exercises of political power by the President during specific periods in history. Professor Tribe has reasoned, and rightly so, that in a nuclear age such as the present, waiting for congressional approval prior to committing military force in anticipation of an enemy attack rather than for an actual attack "might prove too costly a procedural luxury." The President, and not Congress, is in the better position to know the "conditions which prevail in foreign countries" during wartime. Because the President is the "sole organ of the federal government in the field of international relations," he is privy to confidential sources of information generally unavailable to Congress. The Constitution empowers the President to appoint agents in the form of diplomatic, consular and other officials who are capable of ascertaining and providing the President with the highly sensitive information necessary to assist him in determining the appropriate actions to be taken by the national government with respect to matters concerning situations in foreign countries and the effect of those actions upon U.S. foreign relations. Finally, the Constitution provides the President with the exclusive authority to determine when an exigency has arisen that is of a sufficient magnitude to require the use of military force to defend against it. In light of the President's superior knowledge in the area of foreign relations, his ability to respond more swiftly in emergency situations than Congress and the current actual threat of damage and destruction to the United States and its citizens from the use of nuclear and other weapons of mass destruction, requiring the President as Commander in Chief of the military to obtain

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239. See Henry P. Monaghan, Presidential War-Making, 50 B.U. L. Rev. 19, 25-31 (Special Issue 1970) (contending that history and modern practice has legitimized the practice of presidential war-making). But see Raoul Berger, War-Making By The President, 121 U. Pa. L. Rev. 29, 54-58 (1972) (criticizing the "adaptation by usage" doctrine, a label that Berger contends is designed to legitimize the "disagreeable claim that the President [can], by his own practices, revise the Constitution" or disrupt the constitutional balance of powers provided for under a constitutional separation of powers between the branches of the national government).

240. See Tribe, supra note 210, § 4-6, at 659-660. This reasoning would also apply to the modern realities surrounding the use of chemical and biological warfare. Accord Bickel, supra note 232, at 132 (contending that in modern time it is reasonable that the President not only have the power to repel attacks but also to "respond to the threat of attacks against the United States" or its military "when instant action is of the essence").


242. Id.

243. Id. See also supra note 230 and accompanying text.

244. See Martin, 25 U.S. (12 Wheat.) at 30 (noting that every obstacle to an efficient and immediate compliance with a military order issued by the President after deciding that an exigency has arisen would tend to jeopardize the public interest).
congressional approval prior to deploying armed forces to defend against such threats would likely have grave and devastating consequences.

Just as disciplining a lawyer-President for professional misconduct for an abuse of the pardon powers will violate the delicate balance of powers attributed to the federal and state governments under principles of federalism, disciplining of the lawyer-President for conduct resulting from the exercise of the war powers given to the President under the Constitution would have a similar result. A brief discussion of a recent exercise of the executive war powers by President George Walker Bush might be helpful to illustrate the nature of the problem. During the State of the Union address in January 2003, President George Bush asserted that the Iraqi government, under the leadership of Saddam Hussein, had purchased uranium from Africa for the production of weapons of mass destruction, that Iraq possessed such weapons and implied that Iraq's possession of these weapons was related in some manner to Osama bin Laden's al-Qaida terrorist network. Based upon these assertions and false intelligence information provided to the President by high-level national security officials and British intelligence reports, the President received the approval of Congress to conduct a pre-emptive war against Iraq in order to defend against a serious and imminent threat of a domestic attack posed by Iraq's possession and production of nuclear and other weapons of mass destruction. Although U.S. military forces were successful in


removing Saddam Hussein from office, they have been unsuccessful in locating any weapons of mass destruction.\textsuperscript{248}

Since the end of the war with Iraq, evidence has surfaced to indicate that a key portion of President Bush's State of the Union message was both false and known by senior administration officials to be false.\textsuperscript{249} As a result, the news media and some members of Congress have questioned whether President Bush used false pretenses to lure the nation into an unwarranted war against Iraq and if so, whether a manipulation or deliberate misuse of national security intelligence information, if proven, would constitute a "high crime" under the Constitution's Impeachment Clause.\textsuperscript{250}

President Bush is not a lawyer and the recent public concerns surrounding his alleged failure to disclose accurate national security information to Congress in support of its approval and declaration of war against Iraq have yet to be fully investigated. However, this scenario provides still another situation in which federalism concerns may arise if a state bar association or court were to discipline a lawyer-President for acting in a similar manner. The basis for bar discipline under the \textit{Model Rules} could be the assertion that the lawyer-President who either manipulates or falsifies national security intelligence information relied on by Congress in determining whether to declare a preemptive war against a foreign nation has committed acts of professional misconduct and has violated the public trust placed in the highest political office in the country.\textsuperscript{251}

\textsuperscript{248} See Wise, \textit{supra} note 246, at B1. As of the date for completion of this Article, former chief weapons inspector David A. Kay has definitively concluded that Iraq had no significant stockpiles of chemical or biological weapons when the U.S. invasion of Iraq began last March. \textit{See} Douglas Jehl & David E. Sanger, \textit{The Struggle For Iraq: Intelligence; Powell's Case, a Year Later: Gaps in Picture of Iraq Arms}, N.Y. TIMES, Feb. 1, 2004, § 1, at 1. In response to Kay's conclusion, President Bush had considered whether to order an investigation into the intelligence failure. \textit{Id.}

\textsuperscript{249} See U.S. \textit{CONST.} art. II, § 3 (requiring the President to provide to Congress information on the State of the Union); Stewart, \textit{supra} note 246, at F1 (noting that senior administration officials were aware at the time of the President's January 2003 State of the Union address that key information including a British intelligence report that was provided to and relied on by the President was false).

\textsuperscript{250} See Nichols, \textit{supra} note 246, at 13; Kornblut, \textit{supra} note 246, at A1. Under the Constitution, the President is subject to impeachment and removal from office if he is convicted of treason, bribery, or other high crimes and misdemeanors. U.S. \textit{CONST.} art. II, § 4; \textit{THE FEDERALIST} No. 69, \textit{supra} note 231, at 356.

\textsuperscript{251} See \textit{MODEL RULES} R. 8.4(c) (providing that a lawyer commits professional misconduct when he or she engages in "conduct involving dishonesty, fraud, deceit or misrepresentation"). \textit{See also} Philip Gourevitch, \textit{Comment, Might and Right}, \textit{NEW YORKER}, June 16 & 23, 2003, at 70 (asserting the analogy that "in a country where the previous President's lies about consensual adulterous relations were considered
Under the Supremacy Clause, the national government possesses a decided advantage over the States in its handling of activities related to the war powers provisions of the Constitution. As discussed earlier, the Framers of the Constitution exclusively entrusted matters pertaining to foreign policy such as the declaration of war and decisions concerning the use of military force to the national government. The Constitution and modern military practices have empowered the President as Commander in Chief to supervise military operations during wars that have been both congressionally approved prior to the deployment of military forces and those where prior congressional approval is lacking as long as Congress eventually acquiesces to the President’s conduct or when the use of force is necessary to defend the nation from attack at home or its military forces abroad. Implied in this grant of power is the discretion to determine when an exigency has arisen and is of sufficient magnitude that the use of force is required. Finally, in the current age of weapons of mass destruction, it is both logical and reasonable to expect the federal judiciary and Congress to continue to defer to the judgments of the President in deploying military forces against foreign nations even in anticipation of attacks rather than actual attacks because of the severe consequences that could result from a failure to act expeditiously.

Bar discipline of a lawyer-President when it pertains to his exercise of the presidential war powers proscribed under the Constitution and interpreted by the federal courts and modern practices would seriously run afoul of the Framers’ intent to empower the national government with the exclusive power to act on behalf of the nation in the area of foreign affairs and international relations. It would also run contrary to the powers delegated to the President as the Commander in Chief of the military such as the authority to make critical decisions as to when the use of military force is necessary to defend the nation against attacks by foreign nations and internal rebellions by the States. Consequently, the magnitude of the discretion provided to the President under the Constitution would logically shield a President from political recourse even when the President has erred with regards to assessing the urgency and severity of a threatened attack on the United States. In short, bar discipline of the lawyer-President in

ground for impeachment, truthtelling about the gravest affair of state—the waging of war—must stand as a paramount value’); Jefferson, supra note 17, at 1 (noting the Arkansas State Bar Association disbarment proceedings against President William Clinton for giving false testimony in Jones v. Clinton).

252. See supra notes 204-06 and accompanying text.


254. See Curtiss-Wright Export Corp., 299 U.S. at 319 (holding that the President is
this instance or judicial inquiry into matters of foreign affairs would not only circumvent the Constitutional authority delegated to the President to make such decisions but also wholly disregard both the realities of the serious dangers present in an age of nuclear, chemical and biological warfare, and the legitimate need to deploy military force even in the anticipation of the threat of danger associated with weapons capable of mass destruction.255

(c) Supreme Court Discipline

In Federalist No. 78, Alexander Hamilton commented that the judiciary branch was "designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."256 In essence, Hamilton viewed the Supreme Court, the sole federal Court expressly contemplated by the Framers at that time of the creation of the Constitution, to serve primarily as a check on the executive and legislative branches of the national government for the protection of the people.257 According to Hamilton, to best protect the people the judicial offices required a cloak of permanent tenure in order to create the independent spirit in judges essential for the faithful performance of the duties of that role.258 He believed that temporary judicial offices "would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with

the constitutional representative of the United States as it relates to foreign nations and that he is responsible solely to the Constitution for his conduct); Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) (stating that "[t]he conduct of foreign relations . . . is committed by the Constitution to . . . the 'political' departments of the government, and the propriety of what may be done in the exercise of such power is not subject to judicial inquiry"); Martin, 25 U.S. (12 Wheat.) at 32 (noting that the remedy for presidential abuse of the war powers in determining when to call forth the military "if it should occur, is to be found in the constitution itself").

255. An elimination of bar discipline for an abuse of the presidential war powers as suggested in this scenario would not result in an absolute shield from public accountability. As noted earlier, a deliberate manipulation and falsification of national security information in order to gain Congressional approval for a declaration of war may constitute conduct sufficient for impeachment and removal of the President from office. See supra text accompanying note 251. See also U.S. CONST. art. I, § 3, cl. 7 (providing for criminal process to be brought against public officials after impeachment and removal from office).

256. See THE FEDERALIST No. 78, at 404 (Alexander Hamilton) (George W. Carey and James McClellan eds., 2001) [hereinafter FEDERALIST No. 78].

257. See id. at 406-07.

258. Id. at 407 ("That inflexible and uniform adherence to the rights of the constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.").
utility and dignity."259

Hamilton and the Framers envisioned that the most important and essential requirement in creating the independence necessary for the operation of the Supreme Court was a tenure provision that would allow federal judges to serve during "good behavior."260 This significant safeguard found its way into Article III of the Constitution, which provides for the creation of the United States Supreme Court and other inferior federal courts that Congress may deem necessary and allows judges to hold office during good behavior.261 The tenure and salary provisions of Article III were not only designed to provide federal judges with the maximum freedom from possible coercion or influence by the Executive or Legislative branches of the national government but serve other institutional values as well.262 The Framers believed that an independent judiciary was a critical feature of the new government and provided clear institutional protections for that independence in the Constitution.263

259. Id.
260. Id. at 401-02, 408. See also RECORDS OF THE FEDERAL CONVENTION, supra note 217, at 66-67 (noting "[t]he Judiciary hold their places not for a limited time, but during good behavior.").
262. Toth v. Quarles, 350 U.S. 11, 16 (1955). See also N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59 (1982) (holding that the primary value of the tenure and salary provisions of Article III was "to ensure the independence of the [federal] judiciary from the control of the Executive and Legislative Branches of government"); United States v. Will, 449 U.S. 200, 217-18 (1980) (acknowledging that the independence of the judiciary from external pressures is a highly valued element of our constitutional system). The tenure and salary provisions serve additional institutional values as well. For example, judicial independence from the political forces of the Executive and Legislative branches promotes public confidence in judicial decisions by helping to secure a steady, upright and impartial administration of the laws. See THE FEDERALIST No. 78, supra note 256, at 402 (advising that the "general liberty of the people can never be endangered from [the judiciary]" because it controls only society's judgment, not its power or economics). In addition, "the guarantee of life tenure insulates" federal judges from improper influence from both the other branches of government and their judicial colleagues and therefore "promotes judicial individualism." N. Pipeline Const. Co., 458 U.S. at 59 n.10. See also Irving R. Kaufman, Chilling Judicial Independence, 88 YALE L.J. 681, 713 (1979) (arguing that judicially enforced discipline against fellow judges would be detrimental to judicial individualism).
263. See N. Pipeline Const. Co., 458 U.S. at 60 (holding that a fundamental principle enunciated in the Constitution is that the "judicial power of the United States must be [placed] in an independent [j]udiciary" and that the Constitution provides "clear institutional protections for that independence"). For example, when discussing a motion on the floor at the Constitutional Convention that would have allowed for the removal of Supreme Court Justices by the Executive on the application by the Senate and House of Representatives, delegate James Wilson (Pa.) commented that "[t]he Judges would be in a bad situation if made to depend on every gust of faction which
The U.S. Supreme Court is the only federal court specifically mandated by the Constitution. Today, Justices sitting on the Court have assumed as their primary responsibilities the tasks of assuring state compliance with the Constitution and other federal laws and acting as a check on the exercise of powers by the Executive and Legislative branches of the national government. As Hamilton and the others had imagined, Supreme Court Justices are appointed for lifetime tenures.264

While Article III provides for the creation of the Supreme Court, it is silent with regards to specific disciplinary actions available when a Supreme Court justice commits professional misconduct or other conduct unbecoming of good behavior while in office. However, the Impeachment Clause of the Constitution empowers Congress to impeach and remove from office all civil officers of the United States for conviction of treason, bribery, or other high crimes and misdemeanors.”265 It empowers the House of Representatives to begin impeachment proceedings against a civil officer of the United States and the Senate to try all impeachments.266 By constitutional design, Supreme Court Justices are civil officers of the United States thereby making impeachment the only political check on the Judicial Branch by the Legislature.267
Although legal commentators agree that the Framers viewed impeachment as the sole political mechanism for federal judicial discipline,268 some believe that the Framers left open the question of whether there could be judicially dependent mechanisms for discipline of federal judges short of impeachment such as criminal actions brought against a sitting judge for misconduct while in office or judicial self-regulation.269 Proponents of this viewpoint have taken an "originalist" approach to interpreting the Constitution, one that attempts to discern the resolution of specific constitutional issues according to the Framers' expectations regarding those issues.270 They have relied primarily on Article I, Section 3 of the Constitution, which holds that public officials convicted under impeachment are also subject to indictment, trial, judgment, and punishment under the criminal law and several U.S. Circuit Court of Appeals decisions allowing for the prosecution of federal judges for misconduct while in office.271 Opponents of this viewpoint, on the other hand, have taken a "textualist" approach, one that focuses primarily on a review of the plain text of the Constitution for answers. Consequently, the opponents have contended that the literal text of the Constitution does not expressly authorize any other means for disciplining Article III judges short of impeachment and removal from office.272 On October 15, 1980, Congress settled the question concerning judicial self-regulation of lower-level Article III judges through its approval and adoption of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 ("Judicial Conduct and Disability Act").273

268. See RECORDS OF THE FEDERAL CONVENTION, supra note 217, at 428-29 (indicating that the Constitutional Convention firmly defeated a proposal to allow the removal of judges by the Executive and Legislative Branches).

269. See Shane, supra note 267, at 223-42.

270. See id. at 211, 233.


272. See Shane, supra note 267, at 211, 233-34.

The Judicial Conduct and Disability Act provides that any person alleging that a federal judge other than a Supreme Court Justice "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" can file a complaint with the clerk of the federal Court of Appeals for the respective circuit. Under the Act, the clerk of the circuit court is required to forward the complaint to both the chief judge of the circuit and the targeted judge. After reviewing the complaint, the chief judge has the discretion to either dismiss the complaint or to create a panel of judges to investigate the allegation. Upon conclusion of the panel's investigation, the panel is required to file a report with the judicial council of the circuit. The judicial council may either dismiss the complaint, perform additional investigation into the matter or issue several disciplinary sanctions including the refusal to assign cases to the targeted judge for a temporary basis or the issuance of a private or public censure.

The council may also refer a complaint to the Judicial Conference of the United States along with the record of any associated proceedings and its recommendations for appropriate action. Upon receiving a complaint, the Judicial Conference can...
exercise any of the powers available to the judicial council.\textsuperscript{280} If the Judicial Conference determines that impeachment is warranted, however, it is required to transmit its decision along with the record of the proceedings to the U.S. House of Representatives.\textsuperscript{281} Finally, all orders and determinations including denials of petitions for review made by a chief judge, a judicial council or the Judicial Conference are final and not subject to any additional judicial review aside from those provisions for review that are expressly contained in the Act.\textsuperscript{282}

A major purpose of the Judicial Conduct and Disability Act was to create a mechanism and a set of procedures within the judicial branch of government to evaluate and respond to complaints against federal judges.\textsuperscript{283} In creating the Act, Congress placed the authority for implementing federal judicial self-regulation exclusively in the hands of Article III judges, both providing for initial investigatory proceedings against a judge to be commenced by one panel of such judges and for review by a different panel. Congress's primary intent in designing the process in this manner was to protect Article III judges from the chilling effects of unnecessary complaints on judicial independence.\textsuperscript{284}

The Judicial Conduct and Disability Act specifically omits Supreme Court Justices from its list of federal judges that are subject to discipline by the judicial councils of the several circuits and the Judicial Conference of the United States.\textsuperscript{285} Congress has provided
two reasons for this omission. First, Congress believed that the high public visibility of Supreme Court Justices would make it more likely that impeachment could and would be used to cure egregious violations.\textsuperscript{286} Second, Congress believed that it would be unwise to empower the Judicial Conference, an entity that is chaired by the Chief Justice of the Supreme Court to sit on cases involving the highest-ranking judges in the U.S. judicial system.\textsuperscript{287} In short, Congress believed that subjecting Supreme Court Justices to the provisions of the Act would result in diluting the importance and independence of the Supreme Court within the nation's justice system.\textsuperscript{288}

Federalism concerns can arise in situations where a state bar association attempts to discipline a sitting U.S. Supreme Court Justice for acts of professional misconduct short of offenses worthy of impeachment. Technically, because most judges today are lawyers and are licensed by their respective state bar associations, a bar association would have the ability to regulate the conduct of judges as well as its other members.\textsuperscript{289} Recognizing the unique differences between the roles of judges and practicing lawyers and the various ethical concerns confronted by each, the ABA promulgated and adopted the \textit{Model Rules of Judicial Conduct}.\textsuperscript{290} Under Canons 2 and 3 of the judicial conduct rules, disciplinary actions can be taken against a judge when he or she behaves with impropriety or the appearance of impropriety or fails to disqualify him or herself in a proceeding in which the judge's impartiality could reasonably be questioned.\textsuperscript{291} Additionally, disciplinary actions may be warranted

\begin{itemize}
\item \textsuperscript{286} See H.R. REP. No. 96-1313, at 10 n.28.
\item \textsuperscript{287} See id. See also 28 U.S.C. § 331 (2000) (specifying the composition and responsibilities of the Judicial Conference of the United States).
\item \textsuperscript{288} See H.R. REP. No. 96-1313, at 10 n.28.
\item \textsuperscript{289} See supra notes 127-32 and accompanying text (discussing the bar's ability to regulate both practicing and non-practicing lawyers who violate provisions of the ethics rules).
\item \textsuperscript{290} See MODEL CODE OF JUDICIAL CONDUCT (2002), reprinted in \textsc{John S. Dzienkowski, Professional Responsibility Standards, Rules & Statutes} (West 2003) [hereinafter MODEL CODE OF JUDICIAL CONDUCT]. The \textit{Model Code of Judicial Conduct} was formerly adopted in 1972 and replaced the \textit{Canons of Judicial Ethics} adopted in 1924. Nearly all states, as well as the District of Columbia, adopted codes of judicial conduct modeled after the 1972 ethics code. In 1990, the ABA revised its 1972 version of the \textit{Model Code of Judicial Conduct}. Currently, approximately 20 jurisdictions have adopted new codes of judicial conduct based on the 1990 ABA \textit{Model Code of Judicial Conduct}. See id. at 621-22.
\item \textsuperscript{291} See MODEL CODE OF JUDICIAL CONDUCT, supra note 290, Canons 2(A)-(B), 3(E)(1)(c), Canon 2(A) provides: "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and
when a judge accepts a gift that is excessive in value in order to avoid the questions that could be raised concerning the judge's impartiality and the integrity of the judicial office. A brief discussion of recent ethical issues involving Supreme Court Justices Antonin Scalia and Ruth Bader Ginsburg may be useful in illustrating the nature of the political predicament that a state bar association could face when a Supreme Court Justice commits professional misconduct.

On January 5, 2004, Supreme Court Justice Antonin Scalia and his daughter accompanied Vice President Dick Cheney as the Vice President's guests on a duck-hunting trip in southern Louisiana. Justice Scalia, an avid hunter and a longtime friend of Vice President Cheney, traveled with the Vice President on a small government jet that served as Air Force Two to a private camp owned by Wallace Carline, a local oil industry businessman and mutual friend of Scalia and Cheney. Ironically, the trip occurred only three weeks after the Supreme Court had agreed to hear arguments in Cheney v. United States District Court, an appeal from a lower court ruling requiring the Vice President to turn over documents detailing specific names of the private individuals who had met with and assisted the members of the Administration's energy task force in developing a

impartiality of the judiciary." See id. Canon 2(A). Canon 2(B) provides: "[a] judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. . ." See id. Canon 2(B). Finally, Canon 3(E)(1)(c) provides:

[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: . .(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse . .has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.

See id. Canon 3(E)(1)(c).

292. See id. Canon 4(D)(5)(d) cmt. 1. Canon 4(D)(5)(d) provides that "[a] judge shall not accept, . . . a gift, bequest, favor or loan from anyone except for: . . . (d) a gift from a relative or friend, for a special occasion, such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship. . ." Id. Canon 4(D)(5)(d); but see id. 4(D)(5)(e) (noting that a gift from a close personal friend may be allowed when the friend's appearance or interest in a case would require the disqualification of a judge under Canon 3(E)).


national energy policy.296

The Cheney-Scalia trip quickly attracted the attention of the national media. On January 17, 2004, the public learned of the trip through an article published in the Los Angeles Times.297 In a formal response to an inquiry made by the Los Angeles newspaper regarding the hunting trip, Justice Scalia acknowledged that he was one of a party of nine who had hunted at the camp with the Vice President although he did not believe that his impartiality could be reasonably questioned as a result of this trip.298

As one might have expected, Justice Scalia's conduct and remarks sparked congressional inquiries in both the Senate and

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296. See Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group, 219 F. Supp. 2d 20, 24 (D.D.C. 2002), aff'd, In re Cheney, 334 F.3d 1096 (D.C. Cir. 2003), cert. granted, 124 S. Ct. 958 (2003). Judicial Watch, Inc. involved two law suits brought by the Sierra Club and Judicial Watch, a Washington-based legal foundation, seeking to discover information concerning the nature of the role oil companies and other corporate interests had played in the deliberations that led to the Administration's national energy policy. See Judicial Watch, Inc., 219 F. Supp. 2d at 25. The Vice President refused to disclose the records of the National Energy Policy Development Group that he chaired and filed a motion to dismiss the Judicial Watch and Sierra Club complaints. Id. at 25-26. After hearing arguments by the parties, the District Court denied the defendant's motion to dismiss the plaintiffs' request for discovery of information pertaining to the energy policy development process and the participants involved, and directed the parties to develop a proposed discovery plan. Id. at 26, 27.

The defendants appealed the District Court judgment and filed a petition for a writ of mandamus seeking an order that would vacate the District Court discovery orders, direct the District Court to decide the case on the basis of the administrative record, and direct the court to dismiss the Vice President as a defendant. See In re Cheney, 334 F.3d at 1096. The District of Columbia Court of Appeals dismissed the appellants' petition for mandamus and granted the appellee's motion to dismiss the appeal. Id. at 1109. Shortly afterward, lawyers for the government requested Supreme Court review of the case on grounds that the lower court ruling against the Vice President constituted an intrusion into Executive Branch authority. See Savage and Serrano, supra note 293, at A-1. On December 15, 2003, the Supreme Court granted a writ of certiorari to hear the case. See Cheney, 540 U.S. at 1088. On June 24, 2004, the Court vacated the judgment of the D.C. Court of Appeals and remanded the case back to the Court of Appeals to reconsider the mandamus petition. Cheney v. United States Dist. Ct., 124 S. Ct. 2576, 2592-93 (2004) (holding that the Vice President and other members of the national energy task force were not required to assert executive privilege before the Separation of Powers arguments raised in the defendants' petition could be considered).

297. See Savage, supra note 293, at A-1.

298. See id. In a response to the Los Angeles Times inquiry, Justice Scalia stated: [s]ocial contacts with high-level executive officials (including cabinet officers) have never been thought improper for judges who may have before them cases in which those people are involved in their official capacity, as opposed to their personal capacity. For example, Supreme Court Justices are regularly invited to dine at the White House, whether or not a suit seeking to compel or prevent certain presidential action is pending.

Id.
House and prompted national discussions concerning the need for increased judicial accountability for Supreme Court Justices.299 Ranking Judiciary Committee member Patrick J. Leahy (D-Vt.) and ranking Governmental Affairs Committee member Joseph I. Lieberman (D-Conn.) sent letters to Chief Justice William Rehnquist requesting information regarding Supreme Court “canons, procedures and rules’ on the recusal of justices” in cases in which their impartiality could be questionable.300 In a response to these inquiries, Chief Justice Rehnquist stated that there was no formal procedure for in-house review by the Court of the “decision of a justice in an individual case” and that it was “ill-considered” for the senators to suggest that Justice Scalia recuse himself in the pending case involving the Vice President and the White House energy policy group. 301

A review of a similar ethical conflict faced by Justice Ruth Bader Ginsburg during her early tenure on the Court may also be helpful in understanding the serious ethical problems that result when a Supreme Court Justice acts improperly. During July 1997, the public learned that Associate Justice Ruth Bader Ginsburg had participated in more than twenty cases before the Supreme Court in which her husband owned stock in one of the litigating companies.302 Since 1995, Justice Ginsburg had either failed to disqualify or recuse herself from cases that involved and affected eight companies included in her husband Martin Ginsburg’s rollover individual retirement account (“IRA”).303 Ironically, two other Justices who held stock in the same companies as her husband recused themselves in cases that involved and affected eight companies included in her husband Martin Ginsburg’s rollover individual retirement account (“IRA”).304 During the 1995-

303. See id. Martin Ginsburg owned between $15,001 and $50,000 worth of shares in NYNEX, American Home Products, Exxon, General Electric, American International Group, Procter & Gamble, and Johnson & Johnson, and approximately $15,000 or less in AT&T when Justice Ginsburg participated in Supreme Court review of cases that may have affected the value of his investment portfolio. Id.
304. See id. According to the Washington Times, Justice Ginsburg had recused herself from two cases during the 1995-96 term. Id. at 13. During that period, Justice Sandra Day O'Connor had recused herself in eight cases involving AT&T and Justice Stephen Breyer had disqualified himself in American Home Prods. Corp. v. Johnson & Johnson, 516 U.S. 1067 (1996), a case in which he owned stock in both of the
96 Supreme Court term, Justice Ginsburg had recused herself in only two cases, the third-lowest number of recusals of any Justice, even though she and her husband had held more common stock than almost all of the other justices. An analysis conducted by Judicial Watch, a Washington-based legal foundation, concluded that some of the cases in which Justice Ginsburg had voted during that period could have substantially affected the value of her husband’s stock. For example, Justice Ginsburg had heard arguments and voted in the Court’s decisions in *Bankers Trust Company v. Procter & Gamble Company*, a complex securities fraud case and *Exxon Corporation v. Youell*, both of which had the potential to significantly affect the value of Procter & Gamble and Exxon Corporation stock.

Although a failure to recuse herself in order to avoid the potential for a conflict of interest could affect her ability to be promoted later to the higher office of Chief Justice of the Supreme Court, Justice Ginsburg faced no immediate reprimand by either her state bar association or the federal judiciary primarily because the Judicial Conduct and Disability Act expressly excludes Supreme Court Justices from discipline. Justice Ginsburg’s conduct also sparked congressional inquiries and raised concerns for increased judicial accountability for Supreme Court Justices. However, it was insufficient to prompt Congress to establish a formal process for the investigation and discipline of sitting Supreme Court Justices who engage in conduct deemed unethical but insufficient for adversarial companies. *Id.*

305. Justice Ginsburg and her husband owned more common stock than all of the other justices except for Breyer and O’Connor. *Id.*

306. *Id.*


309. For a detailed account of even more egregious ethical violations committed by a Supreme Court Justice, see LAURA KALMAN, ABE FORTAS: A BIOGRAPHY (Yale University Press 1990) and BRUCE ALLEN MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE (William Morrow and Company, Inc. 1988). While on the Supreme Court, Justice Fortas not only engaged in improper business dealings and consultations with Louis Wolfson, a financier who was later indicted and convicted for conspiring to violate the securities laws, but also engaged in improper ethical conduct by continuing to serve as a White House advisor where he communicated with and advised President Lyndon Johnson on matters ranging from executive and judicial appointments to social and foreign policy. See KALMAN, *supra*, at 293-318, 359-66.

310. See *supra* notes 285-88 and accompanying text (discussing the Judicial Conduct and Disability Act’s exclusion of Supreme Court Justices and congressional intent for this exclusion). Similar to Justices Scalia and Ginsburg, Supreme Court Justice Abe Fortas was never disciplined by the bar in any manner and continued to practice law even after his resignation from the Court for ethical indiscretions. See KALMAN, *supra* note 309, at 385-91, 398-400.
impeachment.\footnote{311}

Bar discipline of a sitting Supreme Court Justice would encroach upon the specific powers afforded to the national government for dealing with judicial misconduct committed by members of the Court, thus frustrating the delicate balance of powers required under principles of federalism.\footnote{312} Article III of the Constitution specifically mandates the establishment of the Supreme Court as the highest judicial tribunal in the nation.\footnote{313} In creating the Court, the Framers believed that independence and autonomy of the Justices was essential and critical for creating a branch of government capable of acting as an effective check on the Executive and Legislative branches. To insure the presence of these features, Article III provides for lifetime tenures for Justices of the Court with the only limitation being that they are to serve in good behavior. The sole political check provided under the Constitution for an abuse by a Supreme Court Justice of the good behavior limitation is impeachment and removal from office by Congress.

The Constitution is silent with regards to judicially dependent mechanisms of discipline for conduct short of that necessary to subject a Supreme Court Justice to impeachment except that it expressly provides that a public official can be subject to criminal proceedings for crimes committed while holding office. Although Congress has sanctioned and authorized judicial self-regulation of lower Article III judges, it too has recognized the uniqueness and the critical role of the Supreme Court in both the national government structure and the hierarchy of the nation's judicial system. To preserve the dignity and independence of the Court, Congress specifically exempted Supreme Court Justices from regulation by the Judicial Conference of the United States in any manner.\footnote{314}

There would be several problems with allowing either the Judicial Conduct and Disability Act or any separate legislation to regulate the conduct of Supreme Court Justices. First, any attempt to hold the Justices accountable under the current Act would result

\footnote{311. See John Berlau, Ginsburg's Ethical Lapse May Affect Other Justices, INSIGHT, Aug. 27, 1987, at 32. Although impeachment would be the only political means for disciplining members of the Supreme Court, this seemingly would not prevent members of the Court from agreeing to judicial self-regulation. See id. (referring to a statement by Toni House, the Court's public information officer at that time, regarding the existence of in-house procedures to prevent conflicts of interest similar to those arising from Justice Ginsburg's conduct). See also supra notes 268-79 and accompanying text (discussing judicial self-regulation and the Constitution).}

\footnote{312. See supra notes 191-207 and accompanying text (discussing federalism).}

\footnote{313. U.S. CONST. art. III.}

\footnote{314. See supra notes 285-88 and accompanying text. But see United States v. Lee, 106 U.S. 196, 220 (1882) (stating that "[a]ll the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it").}
in vesting the review of their conduct in the hands of panels consisting of lower court judges, a process that would result in a direct dilution of the powers of the Court and one that would be facially inconsistent with the role of the Court.\textsuperscript{315}

Second, applying the Act to Supreme Court Justices would also create an inherent conflict of interest where the ultimate review of judicial council decisions would lie with the Judicial Conference of the United States, an entity that is chaired by the Chief Justice of the Supreme Court.\textsuperscript{316} Consequently, the Chief Justice could participate in deliberations and decisions involving judges who are not only colleagues but also the highest-ranking judges in the nation.

Third, even if Congress were to enact a separate and specific statute pertaining to the discipline of Supreme Court Justices, the statute would be subject to judicial review by the Supreme Court.\textsuperscript{317} Although the Court has upheld the constitutionality of the Judicial Conduct and Disability Act, which regulates the conduct of lower Article III judges, the Court would have the final voice in determining the constitutionality of any newly enacted statute notwithstanding the fact that the legislation would directly affect the Court's own self-interest.\textsuperscript{318}

Finally, subjecting Supreme Court Justices to discipline by state bar associations would result in circumventing the cloak of protection awarded to the Justices under the Constitution, which evidences the Framers' intent to insulate the Justices from discipline for conduct short of the magnitude of an impeachable offense. The allowance for state bar discipline in this situation would have the illogical effect of creating a process where bar associations and lawyers, each of which are subject to the rulings of the Court, retain the power to punish the conduct of the ultimate guardians of the Constitution, a power specifically reserved to Congress through its powers of impeachment and removal. Such a process would frustrate and dilute not only the delicate balance of powers between the national and state governments required under federalism, but also the proper respect afforded to this structure by the Supremacy Clause.

\textsuperscript{315} See Shane, supra note 267, at 236.
\textsuperscript{317} See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803) (upholding judicial review of decisions of the Executive and Judicial Branches as a proper function of the Court under the Constitution).
\textsuperscript{318} This would not be the case if the Constitution were amended to specifically provide for the discipline of Supreme Court Justices.
2. Disciplining Lawyer-Politicians Under the Model Rules May Disrupt Principles of Federal-State Comity

"Comity" is a term that evades a precise definition and one that is often included in discussions of federalism. In general, legal commentators and courts have referred to comity as "a blend of courtesy and expedience." In its broadest sense, however, comity refers to a policy of mutual respect, deference, and recognition by political entities (e.g. nations, states, or courts of different jurisdictions) for legislative, executive and judicial acts. Although there is no legal obligation by a sovereignty to recognize or apply the laws of another, a decision to apply the laws of a foreign sovereignty is generally based on considerations of utility and mutual convenience.

Principles of comity have been applied in several distinct circumstances. In the international sphere, comity has been used by one nation as a means for recognizing and affirming the laws and judicial actions of a foreign nation. From a domestic standpoint, state and federal policymakers have used principles of comity to justify a state's recognition and respect for the statutes and court proceedings of a sister state. Finally, in the judicial context, judges

319. See Younger v. Harris, 401 U.S. 37, 43-44 (1971) (explaining that comity refers to a system that recognizes both state and national interests, with minimal interference by the federal government). Although the Court often has equated the two terms, legal commentators contend that federalism is a broader concept that includes the notion of comity. See Jeffrey M. Shaman and Richard C. Turkington, Huffman v. Pursue, Ltd.: The Federal Courthouse Door Closes Further, 56 B.U. L. REV. 907, 910 n.29 (1976).

320. See Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc., 412 F.2d 577, 578 (1st Cir. 1969).

321. See Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) (providing a classic definition of comity with respect to international sovereignties); see also BLACK'S LAW DICTIONARY 261 (7th ed. 1999).


323. See Hilton, 159 U.S. at 163-64. In Hilton, the Court, although recognizing that the laws of a foreign nation had no legal effect on the laws of the United States, provided the following definition of comity:

"[c]omity", in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Id. See also JOSEPH STORY, COMMENTARIES ON THE CONFLICTS OF LAWS 37 (1834) (defining "comity of nations" as the "extent of the obligation of the laws of one nation within the territories of another").

324. See, e.g., U.S. CONST. art. IV, § 1. The Full Faith and Credit Clause of the
have used and applied the term as a means to further federal-state harmony by promoting a policy of federal court abstention in state judicial proceedings where federal laws and rights are at issue.\footnote{Steffel v. Thompson, 415 U.S. 452, 460-61 (1974) (relying on principles of comity in holding that federal courts give effect to the principle that both state and federal courts have equal "responsibility . . . to guard, enforce and protect" the rights guaranteed by the Constitution). See also Younger, 401 U.S. at 45 (holding that a suit "seeking to enjoin state prosecution under a recently enacted state law that allegedly interfered with . . . interstate commerce" was improperly brought in federal court); Fay v. Noia, 372 U.S. 391, 416-20 (1963) (relying on considerations of comity with respect to the relations between coordinate judicial systems and holding that federal review can occur only after the orderly completion of state court proceedings).}

Although an early application of comity in the United States centered on the relations between sovereign nations as opposed to judicial functions, its modern usage has focused largely on the judicial realm, where it has been utilized by judges as a vehicle to further attitudes of respect and deference between federal and state courts in proceedings involving federal laws and rights. For instance, in discussing the interplay between equity, comity and federalism, the Court in \textit{Younger v. Harris} held that federal courts should generally refrain from enjoining ongoing state criminal prosecutions except in those rare instances in which the state court proceeding would fail to provide a federal plaintiff with the necessary vehicle for vindicating his or her constitutional rights.\footnote{Younger, 401 U.S. at 41.}

In \textit{Younger}, the appellee-defendant was indicted in a California state court and charged with the violation of the California Penal Code.\footnote{Id. at 38.} He filed a complaint in the federal district court requesting that the court enjoin the district attorney from prosecuting him, and

\begin{quote}
\textit{Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." Id. Implied in this constitutional provision is the principle of comity. For example, comity provided the legal foundation behind the leading American federal slavery cases, as well as many of the state cases, as federal and state courts undertook the task of harmonizing the laws of the several states in disputes involving the interstate transit of African slaves. See Jonathan A. Bush, \textit{The First Slave (And Why He Matters)}, 18 CARDOZO L. REV. 599, 620-27 (1996) (discussing the use of comity in leading federal slavery cases); see also PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 4 (1981) (contending that interstate comity in the context of American Slavery was "indispensable in a union of states, for if states refused to recognize and enforce each other's laws, interstate relations would collapse and the Union would flounder"); Joel R. Paul, \textit{Comity in International Law}, 32 HARV. INT'L L.J. 1, 12 (1991) (contending that Lord Mansfield and Justice Story saw comity as a principle that allowed both "free and slave states to coexist"). The Framers too were mindful of the need to create harmony between the states regarding issues of importation and migration of African slaves. See U.S. CONST. art. IV, § 2, cl. 3 (requiring the delivery and return of fugitive slaves to their legal owners).}
\end{quote}
alleging that both the criminal proceeding and the state code provision inhibited him from exercising his rights of free speech and press under the First and Fourteenth Amendments.\textsuperscript{328} The federal district court held that the penal code provision was "void for vagueness and overbreadth in violation of the First and Fourteenth Amendments" and restrained the district attorney from any further prosecution of the defendant.\textsuperscript{329} Pursuant to 28 U.S.C. section 1253, the district attorney appealed the judgment directly to the Supreme Court.\textsuperscript{330} The Supreme Court, however, reversed the district court judgment on grounds that it violated "the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances."\textsuperscript{331} In recognizing the need for respecting the appropriate balance of powers between the federal and state governments under principles of federalism, the \textit{Younger} Court considered both principles of comity and federalism and explained the interplay between the two concepts.\textsuperscript{332}

In the context of federal-state judicial proceedings, the Court affirmed that comity was simply a proper respect for state functions, and that this respect would entail both "a recognition of the fact that the [United States] is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best" if it allowed state governments and institutions to perform their separate functions without interference by the national government.\textsuperscript{333} The Court then expounded upon the interplay of principles of comity and federalism by referring to the concept "Our Federalism," a slogan that originated from the profound debates and discussions that occurred at the time of the Constitutional Convention.\textsuperscript{334} In discussing the meaning of "Our Federalism," the Court was quick to note that it did not mean that there should be a "blind deference to States' Rights" nor the "centralization [or vesting] of control over every important issue in our National Government and its courts."\textsuperscript{335} Specifically, the Court believed that "Our Federalism" represented a political "system in which there is sensitivity to the legitimate interests of both State and

\textsuperscript{328} See id. at 39.

\textsuperscript{329} See id. at 40.

\textsuperscript{330} See id. Section 1253 allows for the direct appeal to the Supreme Court from an order granting or denying an interlocutory or permanent injunction in a civil action required by an act of Congress to be heard and determined by a district court of three judges. See 28 U.S.C.S. § 1253 (Lexis-Nexis 2001).

\textsuperscript{331} Younger, 401 U.S. at 41.

\textsuperscript{332} Id. at 44.

\textsuperscript{333} Id.

\textsuperscript{334} Id.

\textsuperscript{335} Id.
National governments . . . .” 336

As illustrated in Younger, issues of comity and federalism naturally intersect. When they cross, both the national and state governments are required to respect and be sensitive to the legitimate interests and policies of each other. The respect traditionally afforded to legitimate state interests under principles of comity, however, must yield when important federal interests are at stake. 337 In the following subsections, the Article explores the national and common law policies of granting immunity to executive, legislative and judicial officials from civil liability for conduct committed within the functions of their positions in government. Principles of federal-state comity will be obstructed when bar disciplinary boards and courts fail to acknowledge and respect the historic protections granted to politicians under immunity.

(a) Public Official Immunity

Immunity is the exemption from liability provided to one who has committed a legal wrong. In civil actions, immunity shields an actor from liability under circumstances where the public interest is greater served by allowing the wrongdoer to evade liability at the expense of those injured by her tortious conduct. 338 The immunity provided to public officers originated from the public policy “considerations that generated the doctrine of sovereign” or governmental immunity, a doctrine that evolved during a period in English history when two generally recognized principles concerning the liability of the monarch were controlling: that it was “a contradiction of the sovereignty” of the King “to allow him to be sued as of right in his own courts,” and later “that the King could do no wrong.” 339 The immunity historically provided to the King was

336. Id. In further explaining the role of the national government within the “Our Federalism” interplay, the Court noted the national government, although anxious to vindicate and protect federal rights and interests, “always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.” Id.

337. See, e.g., United States v. Gillock, 445 U.S. 360, 373 (1980) (holding that a Tennessee evidentiary privilege afforded to members of the state legislature for their legislative acts must yield when balanced against the need of enforcing federal criminal statutes).


339. Scheuer v. Rhodes, 416 U.S. 232, 239 (1974). RESTATEMENT (SECOND) OF TORTS Ch. 45A, at 394 (1979). See also DOBBS, supra note 338; 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 231 (2d ed. 1879) (providing that the doctrine holding that the King could do no wrong was created for the benefit of the people and therefore could not be exerted to their prejudice).
eventually extended to his servants and ministers as they carried out the King's commands. 340 The parliamentary system of early England, however, had barred the extension of this protection to his officials when their actions were illegal and outside of the scope of carrying out the King's commands. 341 Upon severing their ties with England, the American colonies soon replaced the King with the creation of a national and state government system. Once established, the newly created government took over the functions of the monarch and inherited his immunity. 342

Public official immunity in America has been the product of constitutional provisions, the legislative and judicial processes, and the common law. Today, the protection from liability historically provided to the King has been broadened to include public officials functioning within the three branches of American government and is designed to facilitate and insure their effective administration. Public officials, however, are provided only with immunity from the consequences of discretionary decisions that fall within the general scope of their official authority. They are not protected from liability for decisions and actions that are not permitted under the authority granted to their offices. 343

The policy concern for extending immunity to these public officers is rooted in the injustice of subjecting public officers to liability when the function of their offices require the exercise of discretion and the danger that the threat of future liability would deter a public official's willingness to execute the duties of her office with the independent judgment necessary to protect the public. 344 Because a threat of personal liability may inhibit a public official's performance of her duties, American courts have provided public officials with either an absolute or qualified immunity. 345

340. See Restatement (Second) of Torts § 895(D) cmt. a (1979).
341. Id.
342. See Scheuer, 416 U.S. at 239 (explaining that "the common law soon recognized the [need for] permitting [government officers] to perform their official functions free from the threat of law suits for personal liability"); Restatement (Second) of Torts Ch. 45A (1979); Dobbs, supra note 338.
343. See Clinton v. Jones, 520 U.S. 681, 692-93 (1997) (explaining that "[the principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct.").
344. See Scheuer, 416 U.S. at 240; see also Restatement (Second) of Torts § 895D cmt. b (1979) (noting that "public officers and employees would be unduly hampered, deterred and intimidated in the discharge of their duties, and as a result undesirable shackles would be imposed upon agencies of government, if those who act improperly or even exceed the authority given them were not protected in some reasonable degree by being relieved from private liability.").
In the following subsections, the Article briefly discusses the types of immunity generally provided to public officers within the executive, legislative and judicial branches and the policy concerns for shielding these employees from civil liability. Two important considerations in determining whether to grant immunity in specific instances are the nature of the conduct by the public official in question and the important societal interest to be furthered by extending protection from liability. As a result of a lesser public interest at stake in actions for civil damages as compared to criminal proceedings, absolute immunity is not extended where judicial action is necessary to serve a broader public interest such as the need to vindicate the public good in ongoing criminal prosecutions.346

(b) Scope of Immunity

In general, absolute immunity has been granted to protect Executive Branch officials, the adjudicative functions required by judges and the legislative process.347 Public officials will receive absolute immunity from liability when their job functions and duties are of such importance that as a matter of policy, the public would be better served by allowing them to avoid being burdened with the threat of future lawsuits.348 Providing complete immunity to these officers forestalls an atmosphere of intimidation that could conflict with the ability to perform their designated job functions in a principled fashion.349

The Supreme Court has applied a functional approach in determining whether a public official's conduct is deserving of absolute immunity.350 Generally, public officials will receive absolute immunity when they are required to exercise significant discretion in

347. See Forrester, 484 U.S. at 224-25.
348. See Long, supra note 345, at 295. See also Jones, 520 U.S. at 693-94 (citing Nixon v. Fitzgerald, 457 U.S. at 752 n.32, and explaining that giving the President absolute immunity "was to avoid rendering the President 'unduly cautious in the discharge of his official duties'"). Generally, absolute immunity is provided to protect the adjudicative functions required by judges and aspects of both the legislative process and criminal prosecutions.
349. See Ferri v. Ackerman, 444 U.S. 193, 203 (1979) (explaining "[t]he societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity").
350. See Forrester, 484 U.S. at 224 ("Running through our cases, with fair consistency, is a 'functional' approach to immunity questions other than those that have been decided by express constitutional or statutory enactment.").
the performance of their official duties.\textsuperscript{351} Under a functional approach, "immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches."\textsuperscript{352} It requires a court to consider the nature of the functions entrusted to the public official in order to assess the effect that exposure to specific liability would likely have on the appropriate exercise of those functions.\textsuperscript{353} Immunity protection under this approach extends no further than its justification warrants.\textsuperscript{354}

Public officials who exercise lesser degrees of discretion in the performance of their duties are normally given only qualified immunity. Providing qualified immunity from liability in this instance is a compromise. It is a means for balancing several competing interests: the importance of providing a damage remedy to protect the rights of those individuals who have been injured by a public official's conduct, the need to provide some level of protection for those public officials whose position requires an exercise of their discretion, and the public interest in encouraging the vigorous exercise of official authority.\textsuperscript{355} The Court has applied an objective test when determining whether a public official's conduct warrants a qualified immunity. Under this test, public officials will be liable for conduct that they either knew or should have known would violate the statutory or constitutional rights of others.\textsuperscript{356} In situations where the officials' job functions legitimately require actions in which clearly established rights of others are not implicated, however, courts have held that the public interest may be better served by allowing the official to act with independence and without the fear of legal consequences.\textsuperscript{357}

\textsuperscript{351} See Butz v. Economou, 438 U.S. 478, 506 (1978) ("We consider here . . . the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.").

\textsuperscript{352} Forrester, 484 U.S. at 227.

\textsuperscript{353} Id. at 224.


\textsuperscript{355} Id. at 807.

\textsuperscript{356} See Wyatt v. Cole, 504 U.S. 158, 166-67 (1992) (discussing qualified immunity and the objective standard used by the Court). The Wyatt Court held qualified immunity is only appropriate when the public official's conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 166 (quoting Harlow, 457 U.S. at 818). The Court has applied a two-part test in determining when qualified immunity is inappropriate. Saucier v. Katz, 533 U.S. 194, 201 (2001). First, a court must determine whether the alleged facts, if taken in the light most favorable to the plaintiff, demonstrate that the public official's conduct has violated a constitutional right. Id. If so, a court must then decide whether the right at issue was clearly established at the time of the violation. Id.

\textsuperscript{357} See Harlow, 457 U.S. at 819 (citing Pierson v. Ray, 386 U.S. 547, 554 (1967)).
(i) Executive Immunity

Presidential immunity is rooted in both the national government structure and the Supreme Court's interpretation of the duties and responsibilities of the President under the Constitution. Because the Presidency did not exist during most of the development of the common law, judicial inquiries concerning presidential immunity have centered on a review of the policies and principles implicit in the nature of the Presidency and the restraint mandated by the separation of powers required by the Constitution.\(^\text{358}\) Although not expressly provided for in the literal language of the Constitution, the separations of powers doctrine is implied in its construction.\(^\text{359}\) As a result of the expressed structural divisions of the Executive, Legislative and Judicial branches of government contained in the Constitution, courts have exercised deference and restraint from infringing upon the President's exercise of the powers and functions specifically given to him under the Constitution.\(^\text{360}\)

Due to the President's unique position in the constitutional scheme, he is given absolute immunity from civil liability for acts within the outer perimeter of his official responsibilities.\(^\text{361}\) The Framers envisioned that the President would be disciplined by the constitutional mechanisms of impeachment and removal from office.\(^\text{362}\)

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358. *Nixon*, 457 U.S. at 748. For example, Article II, § 1 of the Constitution provides that “[t]he executive Power shall be vested in a President of the United States . . . .” U.S. CONST. art. II, § 1. This provision “establishes the President as the chief constitutional officer of the Executive Branch” and entrusts the President “with supervisory and policy responsibilities” involving discretion and sensitivity. *Nixon*, 457 U.S. at 750. Other constitutional powers vested in the President include the enforcement of federal law, the carrying out of foreign affairs, and the management of the Executive Branch. See U.S. CONST. art. II, § 3 (requiring the President to enforce federal laws); U.S. CONST. art. II, § 2, cl. 1; (requiring the President to act as Commander in Chief of the Army and Navy); U.S. CONST. art. II, § 3 (allowing the President to enter into treaties and to appoint and receive ambassadors). See supra Part IV.B.1(b) (discussing in greater detail the President's constitutional powers in the areas of foreign policy and war).

359. See generally *Buckley v. Valeo*, 424 U.S. 1, 120-23 (1976). In general, the separation of powers doctrine precludes any single branch of the federal government from encroaching upon the powers entrusted to the other branches by the Constitution to such an extent that the encroached upon branch is unable to perform its constitutionally mandated duties. See id. at 122 (“[T]he checks and balances that [the Framers] had built into the tripartite Federal Government [w]as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”).

360. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962) (stating that courts should refrain from hearing and ruling in cases involving political questions—issues that fall within the powers and domain of the Legislative and Executive branches of the federal government).

361. See *Nixon*, 457 U.S. at 749, 756; *Clinton*, 520 U.S. at 693-94.
rather than by private lawsuits for civil damages arising from his
official acts. The President, however, remains subject to the laws for
purely private actions.\textsuperscript{362}

A primary concern for granting the President absolute immunity
for his official acts was to avoid requiring the President to be “unduly
cautious in the discharge of his official duties.”\textsuperscript{363} Full immunity
protection provides the President with the flexibility necessary to
deal fearlessly and impartially with the public-at-large.\textsuperscript{364} Because
the decision to provide absolute immunity to the President is not
based upon his identity but upon the particular functions of his
office, federal courts have been cautious in extending absolute
immunity to all Executive Branch employees. For example, absolute
immunity is not required for either the President’s personal aides or
lower-level cabinet officers, nor is it required for the highest
executive officials in state governments.\textsuperscript{365} Finally, although the
special functions of some public officers might require absolute
immunity, federal officials seeking absolute immunity from personal
liability must bear the burden of showing that public policy requires
it.\textsuperscript{366}

(ii) Judicial Immunity

Judicial immunity is the common-law protection from civil
liability extended to the judicial process.\textsuperscript{367} It has been a settled
doctrine in the English judicial system for centuries and one that has
continued to survive today in American courts.\textsuperscript{368} Judicial immunity
first appeared during medieval times as a mechanism for inhibiting
collateral attacks on English court decisions and was helpful in
establishing appellate procedure as the standard process for

\textsuperscript{362} See Clinton, 520 U.S. at 696.
\textsuperscript{363} Id. at 693-94 (quoting Nixon, 457 U.S. at 752 n.32).
\textsuperscript{364} Id. at 693 (“The societal interest in providing such public officials with
the maximum ability to deal fearlessly and impartially with the public at large has long
been recognized as an acceptable justification for official immunity.”) (quoting Ferri,
444 U.S. at 203).
\textsuperscript{365} See, e.g., Butz. v. Economou, 438 U.S. 478, 507 (1978) (holding that high
federal officials of the Executive Branch were entitled only to qualified immunity);
were only entitled to qualified immunity). But see Spalding v. Vilas, 161 U.S. 483, 498-
99 (1896) (holding that executive department heads such as the Postmaster General
required absolute immunity from suits arising from official acts when engaged in the
discharge of duties imposed upon them by law).
\textsuperscript{366} See Butz, 438 U.S. at 506.
\textsuperscript{367} See Bradley v. Fisher, 80 U.S. 335, 347 (1871) (citing Chancellor Kant who
observed that judicial immunity has a “deep root in the common law”).
\textsuperscript{368} See id. at 347.
American judges have long enjoyed absolute immunity from liability for damages arising from acts committed within their jurisdiction primarily because threats of personal liability would provide powerful incentives for judges to refrain from rendering judgments likely to incite lawsuits against them. As a result of the important societal interests in providing judges with the freedom to perform their functions with independence and without the fear of legal consequences, the protections provided to judges extend even when they are "accused of acting maliciously and corruptly..." However, because immunity is defined by the functions it protects and not the person to whom it attaches, absolute immunity will extend only to judicial functions and not to the administrative, legislative, or executive functions routinely performed by judges. In light of the important societal concerns in providing public officials with the maximum ability to function with independence and impartiality, the immunity given to judges has been extended to other participants in the judicial system such as prosecutors, grand jurors, petit jurors, advocates, and witnesses.

372. See Forrester, 484 U.S. at 227, 229-30 (refusing to extend absolute immunity to a judge for demoting and dismissing a court employee because the judge's decision was not a judicial act). See, e.g., Ex parte Virginia, 100 U.S. 339, 348 (1879) (refusing to extend judicial immunity to a county judge charged in a criminal indictment with discriminating on the basis of race in selecting trial jurors for the county's courts); Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 734-36 (1980) (finding that although the Virginia court and its members were immune from suit when acting in their legislative capacity, the court and its chief justice were properly held liable when acting in their enforcement capacities with respect to promulgating a code of conduct for attorneys).
373. See Butz v. Economou, 438 U.S. 478, 509 (1978) (citing Yaselli v. Goff, 275 U.S. 503 (1927)) (referencing common law precedent "extending absolute immunity to party participants in the judicial process..."); Ferri v. Ackerman, 444 U.S. 193, 202-03 (1979) (discussing the extension of immunity to various federal officers including judges, prosecutors, and grand jurors by virtue of their office). Courts that have extended judicial immunity to prosecutors have noted that judges, prosecutors and grand jurors exercise discretionary judgment on the basis of evidence presented to them. Because of the functional comparability of the judgments of prosecutors and grand jurors to those of judges, they are sometimes referred to as "quasi-judicial" officers and their immunities as "quasi-judicial." See Imbler v. Pachtman, 424 U.S. 409, 420 n.17 (1976).
(iii) Legislative Immunity

Legislative immunity is the privilege of legislators to be free from arrest and civil process for statements made or actions taken in legislative proceedings. The doctrine grew out of the political struggles of England in the Sixteenth and Seventeenth Centuries where actions and statements made in Parliament against the Crown were deemed seditious and worthy of prosecution. The prosecutions of members of Parliament for such unpopular conduct directed towards the Crown ultimately lead to the creation of statutory safeguards protecting the freedom of speech and debates in Parliament. As the American Colonies severed ties with the Crown, the immunity from arrests and civil actions for speech secured by Parliament was incorporated into the American government structure.

Today, members of the legislature enjoy absolute immunity from civil actions for statements or conduct within the sphere of legitimate legislative activity. The privilege is designed to shield legislators from those deterrents that could inhibit the discharge of their legislative duties and will extend only to those activities that fall within the legislative activities of Congress. Additionally, because the privilege is for the public good and not for private indulgence, it is not destroyed by claims that a legislator's actions are prompted by improper motives. Finally, absolute immunity will be provided to persons or entities acting on behalf of the legislature such as

375. See id. (citing 1 Wm. & Mary, Sess. 2, c. II; Stockdale v. Hansard, 9 Ad. & El. 1, 113-14 (1839)).
376. Id. at 372-73. See Articles of Confederation, art. V (providing that "Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress. . ."). U.S. CONST. art. I, § 6 (providing that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place"). The Framers believed that providing a legislator with the fullest liberty of speech would enable him to "discharge [the] public trust with firmness and success." Tenney, 341 U.S. at 372 (citing II Works of James Wilson 38 (Andrews ed. 1896)).
377. See Tenney, 341 U.S. at 376-77, 379. Members of the legislature, however, "may not . . . acquire power by an unwarranted extension of privilege." The Supreme Court has not hesitated to uphold the rights of private litigants when it has found that Congress has acted outside its legislative role. See id. at 377. See, e.g., Kilbourn v. Thompson, 103 U.S. 168, 196-200 (1880); Marshall v. Gordon, 243 U.S. 521, 545-46, 548 (1917) (refusing to extend the legislative privilege to the Sergeant-at-Arms of the House of Representatives for executing an arrest warrant issued by the House in a contempt proceeding when the House did not have the power to punish for the acts committed by the appellant).
378. See Tenney, 341 U.S. at 377. See also Fletcher v. Peck, 6 Cranch 87, 10 U.S. 87, 130 (1810) (holding that it is not consonant with the national government structure "for a court to inquire into the motives of legislators").
THE POLITICS OF MISCONDUCT

V. A FUNCTIONAL APPROACH TO REGULATING LAWYER-POLITICIANS

Applying the Model Rules to lawyer-politicians fails to acknowledge and account for the significant changes in the roles and functions of the modern lawyer and the constitutional safeguards inherent in the political process. In addition, as the nation witnessed during the impeachment hearings of lawyer-politician President William Clinton, bar disciplinary actions against these lawyers often risk the danger of becoming entangled in the politics and biases of the decision-makers. As a way to insure that lawyer-politicians are provided with the necessary independence to perform their public duties while protecting the administration of justice and the integrity of the bar, the Article advocates the adoption and use of a functional approach in determining when to discipline lawyer-politicians for misconduct occurring outside the practice of law.

Bar associations or courts should consider three significant factors when utilizing and applying a functional approach: (A) office (position held or job function of the lawyer-politician at the time of the misconduct), (B) forum or place where the misconduct occurred (e.g. within or outside the parameters of the office) and (C) nature of the misconduct (e.g. civil or criminal) along with the prevailing respective interests of the political process, the judicial system and the bar in the discipline of lawyer-politicians who commit acts of misconduct within court proceedings or while serving in public office.

The factors of office and forum are relevant primarily because

379. See Tenney, 341 U.S. at 378-79 (extending absolute immunity to legislative committees as long as the committees do not exceed the bounds of legislative power). Cf. Kilbourn, 103 U.S. at 196-200 (refusing to extend immunity to the Sergeant-at-Arms of the House of Representatives because the House acted outside its legislative role).

380. For example, a legitimate issue to be addressed in the Clinton disbarment proceeding would have been the severity of punishment and whether disbarment would have been disproportionate to the punishment that the bar had meted out to other lawyers who may have provided false testimony while under oath. The Arkansas Bar disciplines approximately 100 lawyers each year and disbarment has been used almost exclusively in cases involving the theft of client monies. See Neil A. Lewis, Clinton is Angry and Dispirited Over Disbarment Fight, Friends Say, N.Y. TIMES, Sept. 10, 2000, at 1-22.

381. See supra notes 68-78 and accompanying text (discussing the judiciary, bar and public interests behind lawyer discipline).

382. The functional approach suggested in Part V is rooted in both the legal-realist approach to lawyer discipline, advocated and followed by many disciplinary boards within the past few decades, and in the functional approach adopted by courts in extending absolute immunity to public officials. See supra Parts IV.A., IV.B.2(b) (discussing legal realism and absolute immunity).
politicians within the executive, legislative and judicial branches of the federal and state governments have long enjoyed absolute or complete immunity from civil liability for acts committed within the discretion of their position as a way to provide them with the necessary autonomy to function without the fear of subsequent legal consequences. The nature of the misconduct is relevant because of the different degrees of public interest at stake in civil and criminal cases. For example, courts have consistently declined to extend immunity to executive, legislative, and judicial officers for criminal conduct or criminal deprivations of constitutional rights.

Although bar associations generally operate as arms of the state judiciaries, the respective interests of these entities can and often do differ. Therefore, in evaluating the respective interests of the bar, the judiciary, and the political process in regulating the conduct of lawyer-politicians, Part V separates the important and mutually shared interests of bar associations and the judiciary in lawyer disciplinary actions—such as the protection of the public from unfit lawyers and the preservation of both the reputation and integrity of the legal profession—from the essential judicial interest in the administration of justice through the mechanisms and procedures of the judicial process. Finally, in evaluating the political interest at stake, Part V considers the important public interest in providing public officials with the necessary autonomy to perform the discretionary functions of their jobs.

Additionally, the variables and competing interests must be

383. See supra Part IV.B.2(b)(i)-(iii) (discussing executive, legislative and judicial immunity).


387. See supra text accompanying notes 68-74. See generally United States v. Gonsalves, 691 F.2d 1310, 1315-16 (9th Cir. 1982) (recognizing the judiciary's interest in the fair administration of the criminal justice system); United States v. DiBernardo, 552 F. Supp. 1315, 1324 (S.D. Fla. 1982) (recognizing that “[t]he untainted administration of justice is certainly one of the most cherished aspects” of the courts). See also In re Lock, 54 S.W.3d 305, 311 (Tex. 2001) (noting the bar's responsibility to impose appropriate discipline in order to protect the public from “unfit attorneys and to improve the reputation and integrity of the legal profession”).

388. See supra text accompanying notes 344-51 (discussing the policy behind extending immunity to public officials).
evaluated within a specific ethical context. For example, the variables could be evaluated within the following ethical situations: (1) questionable or improper conduct falling within the function and parameters of the public office, (2) criminal conduct; (3) improper conduct committed within judicial proceedings; and (4) improper conduct committed while functioning in lawyer roles. The following chart and subsequent discussions explain the mechanics of a functional approach to disciplining federal lawyer-politicians.

**Illustration I**

**FUNCTIONAL ZONES**

<table>
<thead>
<tr>
<th>ZONE I</th>
<th>QUESTIONABLE OR IMPROPER CONDUCT COMMITTED WITHIN THE FUNCTIONS OF OFFICE</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Legislative/Executive/Judicial</td>
<td></td>
</tr>
<tr>
<td>• Alleged misconduct occurs within function of job/duties</td>
<td></td>
</tr>
<tr>
<td>• Misconduct civil in nature</td>
<td></td>
</tr>
</tbody>
</table>

* Political Process (highest interest—e.g. public trust and accountability, and constitutional safeguards)

** Judicial (lowest interest—e.g. administration of justice)

*** Bar (qualified interest—e.g. protecting the integrity of the bar)

<table>
<thead>
<tr>
<th>ZONE II</th>
<th>CRIMINAL CONDUCT</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Legislative/Executive/Judicial</td>
<td></td>
</tr>
<tr>
<td>• Misconduct occurs within or outside the function of job/duties</td>
<td></td>
</tr>
<tr>
<td>• Misconduct criminal in nature</td>
<td></td>
</tr>
</tbody>
</table>

* Political Process (lowest interest—e.g. no protection (immunity) or constitutional safeguards for unofficial or criminal conduct)

** Judicial (highest interest—e.g. administration of justice)

*** Bar (qualified interest—e.g. protecting the integrity of the bar)
**ZONE III**

**IMPROPER CONDUCT COMMITTED WITHIN JUDICIAL PROCEEDINGS**

- Legislative/Executive/Judicial
- Misconduct occurring outside the function of job/duties and within a judicial or quasi-judicial proceeding
- Misconduct either criminal or civil in nature (e.g. perjury, obstruction of justice)

* Political Process (lowest interest—e.g. absence of concerns for public trust and accountability, and constitutional safeguards)

** Judiciary (highest interest—e.g. administration of justice)

*** Bar (qualified interest—e.g. protecting the integrity of the bar)

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**ZONE IV**

**QUESTIONABLE OR IMPROPER CONDUCT COMMITTED WHILE FUNCTIONING IN LAWYER ROLES**

- Quasi-judicial
- Misconduct occurs within or outside the function of job/duties and within or outside a judicial or quasi-judicial proceeding
- Misconduct civil or criminal in nature (e.g. civil wrong or crime)

* Political Process (highest—e.g. public trust and accountability, and constitutional safeguards, and lowest—e.g. no protection (immunity) or constitutional safeguards for unofficial or criminal conduct)

** Judiciary (highest interest—e.g. administration of justice)

*** Bar (highest interest—e.g. fitness to practice law and protecting the integrity of the bar)

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A functional approach in regulating lawyer-politicians has several advantages over the current one-size-fits-all approach to regulating most lawyer conduct under the *Model Rules*. First, using a functional analysis in disciplining lawyer-politicians would begin the process of acknowledging and accounting for the vast differences in the roles and functions of practicing and non-practicing lawyers. Additionally, inherent in a functional approach to regulating lawyer-
politicians is the consideration and inclusion of specific constitutional safeguards designed to protect public officials when carrying out the discretionary functions of high public offices in the Executive, Legislative and Judicial branches of the national government. Thus, applying a functional approach in this instance would eliminate the need for amending the current ethics rules or creating a separate code of ethics for non-practicing lawyers who serve as public officers.

Second, because of the general biases inherent in human nature, a functional approach to disciplining lawyer-politicians could help to eliminate or neutralize the inevitable opportunities for bias, prejudice or political allegiances that can arise during the disciplinary process. For example, after the announcement of the Arkansas Bar Association’s decision to initiate disciplinary proceedings against President Clinton for his conduct in Jones v. Clinton, eight out of fourteen members of the disciplinary panel had recused themselves from participating in the proceedings primarily because they had either business or personal relationships with the President. In reality, the recusals of these panel members undoubtedly contributed to the creation of an Arkansas Bar Association disciplinary panel that could much more easily conclude that disbarment proceedings should begin against the President. Because of the intense political atmosphere in similar situations involving misconduct committed by high-ranking lawyer-politicians, disciplinary panels consisting primarily or exclusively of members with political affiliations adverse to the national party of the lawyer-politician under review could result in biased decision-making. At the very least, such panels could create an appearance of unfairness in the proceedings.

Third, a functional approach would have cost-saving benefits. The creation of a process where the interests of the bar are weighed against other competing interests, such as those of the judiciary and the political process, would likely result in the deferral of discipline by the bar, in many cases, to those entities that possess an equal or

389. See supra notes 110-20 (discussing instances in which the ABA’s exercise of its powers of self-governance has been influenced by the popular religious, racial and national prejudices of middle-class America).
390. See Don Van Natta, Jr., Panel Advises That Clinton Be Disbarred, N.Y. TIMES, May 23, 2000, at A-1 (noting that eight members of a fourteen member disciplinary panel had recused themselves from hearing the President’s case on the basis that they had either business or personal relationships with the President); I Fought the law..., THE ECONOMIST, May 27, 2000 (noting that eight members of the Arkansas Bar Association’s disciplinary committee on professional conduct had recused themselves in the name of unbiased justice). See Lewis, supra note 380, at 1-22 (noting that several judges of the Circuit Court had also recused themselves from consideration for presiding over the Clinton disbarment proceedings because they had been active in Arkansas politics).
greater interest in the discipline of the lawyer-politician. Consequently, the bar would be spared the costs, expenses and time for conducting a separate and independent investigation into some disciplinary matters. In addition, a deferral of power in disciplinary cases where the respective competing interests are higher than the bar's own interest could help to minimize current public perceptions and criticisms that bar discipline is too often repetitive, excessive, and disproportionate to the actual conduct committed by the lawyer-politician.391

Finally, utilizing a functional approach could help to facilitate even greater public respect for the judicial system. For instance, deferring the discipline of the lawyer-politician to the political process or to the judiciary in cases where the bar's interest in the matter is minimal would create the opportunity for an even greater level of public accountability because such a deferral would provide the public with a genuine opportunity to witness and monitor the disciplinary process. Currently, bar disciplinary proceedings in all cases are closed to the public and once a disciplinary decision has been made, members of the public often experience difficulties in determining what if any discipline of the attorney was actually taken.392 In the remaining subsections, this Article discusses the applicability of the variables and competing interests discussed above within the context of four categories of questionable or unethical behavior.

A. Questionable or Improper Actions Committed Within the Functions of Office (Zone I)

Zone I includes situations where the public office held by the lawyer-politician is one that is executive (e.g. President or Vice President), legislative (e.g. Senator or Representative) or judicial (e.g. Supreme Court Justice), the misconduct or questionable behavior committed by the politician has occurred within the function of the duties of the office, and the misconduct or questionable behavior is civil in nature. For example, Zone I would include such actions as the lawyer-Senator who votes on legislation in which she may have a pecuniary stake in the outcome,393 a lawyer-President who grants a questionable pardon or abuses the foreign affairs powers,394 and a

391. See, e.g., Jefferson, supra note 17, at 1 (discussing three forms of punishment taken against President Clinton for giving false testimony in the Jones case).

392. See supra note 147 and accompanying text (discussing a few of the hurdles facing the public when attempting to discover attorney discipline by the bar).

393. See supra text accompanying notes 12-14 (referring to an example of a possible conflict of interest concern lodged against lawyer-politician Senator Hillary R. Clinton (D-N.Y.) on the eve of her induction into the Senate).

394. See supra text accompanying notes 224-29, 245-55 (discussing as an example
Supreme Court Justice who commits an act of professional misconduct short of an impeachable offense.395

As discussed earlier in this Article, public official immunity is a policy that is firmly rooted in both the Constitution and common law.396 Federal and state judiciaries have continued to recognize it as a necessary protection against subsequent legal liability for controversial actions taken by the politician that fall within the discretionary functions of the public office.397 The doctrine of federalism would prevent any state agency or institution from obstructing the constitutional latitude provided to these officers in the performance of their official duties while the political doctrine of comity would require state government organizations to recognize and respect the statutes, judgments and policies of the national government. Thus, a bar association's failure to acknowledge and respect the discretion provided to a lawyer-Senator while functioning within the legislative decision-making process, the lawyer-President while exercising his constitutionally given pardon and foreign affairs powers or a Supreme Court Justice who commits an act of misconduct that does not rise to the level of an impeachable offense, would patently violate and evade the proper balance of powers between the federal and state governments required under the Constitution and the respect for each sovereign under the political doctrine of comity.

In assessing the competing concerns, the interest of the political process to provide public officials with the necessary freedom to perform their job functions in a principled fashion without the fear of lawsuits is at its highest. Unlike the legal practitioner, the lawyer-politician is not engaged in the practice of law but functions solely as a public servant. Neither does her conduct threaten the effective administration of justice. Her position and job responsibilities are not law-related as defined by the ABA.398 The interest of the judiciary is at its lowest since the questionable or improper conduct at issue has

395. See supra text accompanying notes 293-309 (discussing Justice Antonin Scalia's duck hunting trip with Vice President Cheney within a few days after the Supreme Court granted *certiorari* to hear arguments in a case involving the Vice President and Justice Ruth Bader Ginsburg's ethical indiscretion in participating in decisions involving corporate parties in which her husband owned stock in one of the litigating companies).

396. See supra Part IV.B.2(a) (discussing the history of public official immunity).

397. See *Forrester*, 484 U.S. at 223 (noting that because the threat of personal liability for damages can inhibit government officials in the proper performance of their duties, various forms of immunity from civil actions were created).

398. See MODEL RULES R. 5.7(a), (b) (defining law-related activities).
occurred within the functions of her office and not within the context of a judicial proceeding. Finally, because the lawyer-politician is not engaged in the daily practice of law, the concerns of the bar is limited to preserving the integrity and reputation of the legal profession and must yield to the important safeguards inherent in the Constitution and the political process for insuring public accountability.

Because the lawyer-politician's activities under Zone I would be constitutionally protected and not subject to subsequent civil lawsuits, they would also be protected against disciplinary actions by bar associations as long as the conduct falls within the discretionary functions of the office and are civil in nature. Similar to the functional approach taken by courts when applying immunity to public officers, this would be the case even when the lawyer-politician acts with an improper motive. For instance, in cases where absolute immunity is provided to executive, legislative and judicial officers, the motives underlying any actions taken within the authority of their positions are irrelevant and do not nullify the privilege.399

In short, factual situations that fall under Zone I would require state bar associations to refrain from any attempt to discipline the federal lawyer-politicians at issue and to defer to the disciplinary measures provided by the Constitution and the political process for misconduct committed by public officials serving within the executive, legislative and judicial branches of the national government.400 The Framers envisioned that these checks and safeguards would be sufficient to police the important public interests in holding public officials accountable for their actions while providing these officers with the freedom to effectively execute the functions of their position.

399. See Nixon, 457 U.S. at 756 (noting the broad areas of the President's discretionary responsibilities and holding that an inquiry into the motives of the President could be highly intrusive); Pierson, 386 U.S. at 554 (holding that absolute immunity provided for judges "applies even when the judge is accused of acting maliciously and corruptly"); Tenney, 341 U.S. at 377 (holding that the absolute immunity provided for legislators is not destroyed by the claim of unworthy purpose and that courts are not the place for inquiries concerning legislative motive).

400. See, e.g., Clinton, 520 U.S. at 695 (noting that the President is not immune from liability for unofficial actions and could be subject to impeachment); Tenney, 341 U.S. at 378 (noting that self-discipline and the voters are the ultimate mechanisms for discouraging or correcting improper legislative conduct resulting from dishonest or vindictive motives); Bradley, 80 U.S. (13 Wall.) at 350 (noting that judges of the superior courts who act maliciously, corruptly, arbitrarily or oppressively can be held accountable to the public by the political sanctions of impeachment, suspension or removal from office). See supra text accompanying notes 218-22 (discussing the political checks for an abuse of the presidential pardon powers).
B. Criminal Conduct (Zone II)

Zone II covers situations where the public office held by the lawyer-politician is one that is executive (e.g. President or Vice President), legislative (e.g. Senator or Representative), or judicial (e.g. Supreme Court Justice), the misconduct or questionable behavior committed by the public official has occurred either within or outside the functions of the office, and the misconduct is criminal. For example, Zone II would include the lawyer-President who attempts to obstruct a criminal investigation or conceal evidence relating to the unlawful activities of his staff\textsuperscript{401} and the lawyer-Vice President who commits federal income tax evasion.\textsuperscript{402}

Because the societal interest in granting immunity to public officials in order to provide them with the necessary autonomy to effectively carry out the functions of their positions is not a concern when the lawyer-politician acts in her unofficial or private capacities, the interest of the political process under Zone II is at its lowest level. Thus, it is insignificant in the analysis. Public officials have never enjoyed absolute or qualified immunity protection for their unofficial acts or criminal conduct. For instance, under the Constitution, the President is not protected from liability for his unofficial acts and is subject to trial, impeachment and removal from office for criminal conduct.\textsuperscript{403} Neither are judges who commit crimes shielded from criminal liability.\textsuperscript{404}

The judiciary interest in protecting the administration of justice, however, is at its highest. Inherent in the American legal system is the notion that no man is above the law. All public officials are

\textsuperscript{401}. See In re Nixon, 385 N.Y.S. 2d at 305, 306-307 (N.Y. App. Div. 1976) (discussing the disbarment of lawyer-President Richard Nixon for his involvement in the commission of several crimes during the Watergate investigation). President Nixon was disbarred for obstructing an FBI investigation of the "unlawful entry into the headquarters of the Democratic National Committee" and for improperly concealing and encouraging others to "conceal evidence relating to unlawful activities of members of his staff and of the Committee to Re-elect the President." See id. at 306.

\textsuperscript{402}. See Md. State Bar Assoc., Inc. v. Agnew, 318 A.2d 811, 812 n.2, 813 (Md. 1974) (discussing the conviction of lawyer-Vice President Spiro T. Agnew in the U.S. District Court for federal income tax evasion and his subsequent disbarment). In Agnew, the Maryland Court of Appeals held that the respondent's act of willful tax evasion was a crime of moral turpitude involving fraud and dishonesty, and constituted "conduct prejudicial to the administration of justice." Id. at 813, 815.

\textsuperscript{403}. See Clinton, 520 U.S. at 696; see also Proclamation 4311, supra note 210, at 1103 (noting President Gerald Ford's pardon of President Richard M. Nixon after Nixon's resignation from office for all crimes that Nixon may have committed during the Watergate cover-up).

\textsuperscript{404}. See supra note 271 (discussing cases permitting the prosecution of sitting federal judges for breaking the law in addition to the political disciplinary measures of impeachment and removal from office).
creatures of the law and are obligated to obey it.405 The literal language of the Constitution preserves criminal prosecution for all persons guilty of committing crimes.406 Lawyers and laypersons are no different in this respect. Both groups are responsible for obeying the law and will be subjected to legal recourse for violating the criminal and civil laws of the country.

Finally, the bar's interest under Zone II is limited. The Model Rules were developed with an eye towards the legal practitioner. From an ethical standpoint, the practicing lawyer would be subject to professional discipline only when she violates or attempts to violate the lawyer ethics rules.407 For instance, in discussing the liability of the practicing lawyer for criminal conduct, Rule 8.4(b) and (c) prohibit the lawyer from committing criminal acts that reflect adversely on her "honesty, trustworthiness or fitness" to practice law.408 It also prohibits a lawyer from engaging in conduct that is "prejudicial to the administration of justice."409 In explaining these rules, Comment 2 of Rule 8.4 notes that the professional discipline of the practitioner is limited to offenses that indicate a lack of those characteristics relevant to law practice.410 For example, offenses involving fraud and the willful failure to file an income tax return would be sufficient to prompt disciplinary actions under Model Rule 8.4. In addition, offenses involving violence, dishonesty or serious interference with the administration of justice would also provide grounds for bar discipline.411

Given that the lawyer-politician is not engaged in the practice of law or law-related activities, the bar's primary interest in her fitness for practice is not directly implicated. However, protection of the reputation and integrity of the legal profession, a secondary yet important goal of lawyer discipline, has been repeatedly drawn into the national spotlight when high-ranking government officials with law licenses commit crimes.412 In fact, this was the case both during

405. See Lee, 106 U.S. at 220 (holding that no man is so high that he is above the law and that "all officers of the government," despite their rank, "are creatures of the law" and must obey it).

406. See U.S. Const. art. I, § 3, cl. 7 (providing that "the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law").

407. See Model Rules, R. 8.4 cmt. 2 (noting a traditional distinction between illegal conduct that reflected adversely on fitness to practice law and offenses involving moral turpitude).

408. Id. R. 8.4(b), (c).

409. Id. R. 8.4(d).

410. Id. cmt. 2

411. Id.

412. See, e.g., Agnew, 318 A.2d at 815 (holding that "[a] willful and serious malefaction committed by a lawyer-public servant brings dishonor to both the bar and
and after the impeachment hearings of lawyer-President William Clinton for providing false deposition testimony during a civil lawsuit against him and prior to the resignation and pardon of lawyer-President Richard Nixon for the crimes he committed during the Watergate cover-up.\textsuperscript{413}

The legal profession has long enjoyed the freedom of self-regulation. Autonomy from government intervention, however, has carried with it corresponding obligations to insure that its members act ethically. If the legal professions' ability to govern itself indeed has been successful in insuring the public confidence in the legal system, which is required to preclude government intervention and regulation, then the bar's ability to discipline its members who hold high public offices for misconduct, even when the lawyer is not engaged in the practice of law, would be necessary to preserve its self-regulatory status.\textsuperscript{414} Undoubtedly, high-profile incidents such as the lawyer-President who obstructs a criminal investigation or the lawyer-Vice President who commits tax invasion are newsworthy events that are of legitimate concern to the public. Consequently, they fall within the responsibilities of the press for reporting.\textsuperscript{415} Unfortunately, these events are the most likely to attract public scrutiny and to shape public attitudes towards lawyers and the legal profession. A failure by the bar to address these matters in a manner sufficient to alleviate public concerns for justice could have grave consequences for the future of its self-regulatory status. Given that the judiciary and the bar possess the greatest interests for imposing discipline for conduct falling within Zone II and the absence of any significant political interest, disciplinary sanctions and punishments imposed by the courts and bar associations for criminal conduct would be warranted and required.

\begin{footnotesize}
\begin{enumerate}
\item See President Would Drop High Court Privilege, WASH. POST, Nov. 10, 2001, at A3 (referencing President Clinton and the Arkansas Bar Association's agreement for a five-year suspension of the President's law license, in lieu of disbarment, for providing false and misleading testimony in a sexual harassment lawsuit against him). See also In re Nixon, 385 N.Y.S.2d at 307 (holding that President Nixon's criminal conduct in obstructing the administration of justice, while holding "the highest public office [in the] country and in a position of trust," warranted disbarment).
\item See supra text accompanying notes 144-48 (suggesting that the legal profession has been unsuccessful in its attempt to preserve the integrity of the bar in the eyes of the public). Misconduct most likely to attract public scrutiny would include offenses involving violence, dishonesty or serious interference with the administration of justice.
\item See Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975) (noting that the commission of crime and prosecutions resulting from it, along with judicial proceedings arising from the prosecutions, are events of legitimate concern to the public and fall within the responsibility of the press for reporting).
\end{enumerate}
\end{footnotesize}
C. Improper Conduct Committed Within Judicial Proceedings (Zone III)

Zone III includes situations where the public office held by the lawyer-politician is one that is executive (e.g. President or Vice President), legislative (e.g. Senator or Representative), or judicial (e.g. Supreme Court Justice), the misconduct has occurred outside the functions of the office but within a judicial proceeding, and the misconduct would warrant either civil or criminal sanctions by a court. Specifically, Zone III would include such conduct as the lawyer-politician who, while acting as a party or witness in a lawsuit, provides false and misleading testimony during discovery or who commits other acts of contempt during trial.416

Given that public officials do not enjoy immunity protection for unofficial or private conduct, the public interest in granting immunity to lawyer-politicians for conduct falling within Zone III is again at its lowest level and thus insignificant for the analysis. However, because the misconduct under this zone occurs within the context of a judicial proceeding, the judiciary’s interest in promoting the orderly administration of justice is at its highest. Both federal and state courts possess the inherent supervisory power to insure that justice is administered efficiently and fairly in civil and criminal cases.417 The legal basis for the exercise of this authority is two-fold: to preserve the integrity of the judicial process and to avoid any fundamental unfairness in the administration of justice.418 In the execution of these objectives, the supervisory power provides courts with the ability to implement remedies for violations of the rights of parties, to preserve judicial integrity by insuring that convictions and judgments are the products of strict compliance with evidentiary and procedural rules, and to formulate remedies to deter illegal conduct.419 For instance, under its supervisory powers, a court has

416. See Jones v. Clinton, 36 F. Supp. 2d 1118, 1131-32 (E.D. Ark. 1999) (holding President William Clinton in contempt of court and ordering him to pay plaintiff’s reasonable expenses when he willfully provided false and misleading deposition testimony in a sexual harassment lawsuit against him).


418. United States v. Wilson, 614 F.2d 1224, 1227 (9th Cir. 1980) (quoting United States v. Chanen, 549 F.2d 1306, 1313 (9th Cir. 1977)).

the authority to exclude impermissibly obtained evidence, to dismiss wrongfully obtained indictments, and to discipline attorneys and parties for acts of contempt committed during judicial proceedings. Additionally, in civil cases, both federal and state courts possess statutory authority to impose sanctions for civil contempt.

Finally, because the lawyer-politician under Zone III does not practice law, the bar's interest is qualified and limited solely to protecting the reputation and integrity of the legal profession. As discussed earlier under Zone II, the activities of high-ranking lawyer-politicians who commit criminal acts are newsworthy and attract intense public scrutiny of lawyers and the legal profession. Similar to the media's important role of reporting on crimes for the benefit of the public, it also functions as an overseer in keeping the public informed and abreast of judicial activities. For example, an important function of the press is "to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." Generally, media reports of crimes and judicial proceedings involving lawyer-politicians have had an adverse effect on the reputation of lawyers and the legal profession. This was the case a few years ago when lawyer-President William Clinton provided false and misleading deposition testimony in a sexual harassment lawsuit against him during his final term in office. Because of the importance of the office of the Presidency, President Clinton was immediately thrust into the eyes of the public by the news media, which prompted numerous public discussions on bar discipline and the integrity of the legal profession at-large. In such instances, it is critical that the bar have the ability to sanction its members in order to minimize the inevitable public outcry for state intervention and regulation of the legal profession that would result if the bar failed to

420. See, e.g., McNabb, 318 U.S. at 340-41 (referencing the court's power to exclude impermissibly obtained evidence); United States v. Williams, 504 U.S. 36, 46 (1992) (referencing the courts power to dismiss impermissibly obtained indictments); Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (noting the inherent powers of courts to punish for contempt).


422. See supra Part V.B.


424. See supra notes 23, 404 and accompanying text.

impose some level of discipline.

In light of the absence of any significant political concerns and the significant interests of the judiciary and the bar for imposing discipline on lawyer-politicians falling within Zone III, discipline by the courts and bar for misconduct during court proceedings would also be appropriate and required.

D. Questionable or Improper Conduct Committed While Functioning in Lawyer Roles (Zone IV)

Finally, Zone IV covers situations where the high public office held by the lawyer-politician is quasi-judicial (e.g. Attorney General or Solicitor General), the misconduct or questionable behavior committed by the politician has occurred within the functions of the office, and the conduct is civil or criminal in nature. For instance, Zone IV would include a U.S. Attorney General or Assistant Attorney General committing acts of conspiracy, perjury and obstruction of justice while in office or shortly after leaving office. It would also include the U.S. Solicitor General who in confessing to an error made in arriving at a lower court judgment that favored the United States, does so strategically in order to avoid Supreme Court review of an issue that she fears would be decided against the Government on the merits rather than to further the efficient administration of justice. Finally, Zone IV would cover the Solicitor General who either misrepresents the law or facts in briefs submitted to the Court or who compromises the independence and integrity of the office by allowing political actors and special interest groups to dictate her positions before the Court.

The U.S. Attorney General and Solicitor General are the highest-

426. See David M. Rosenzweig, Note, Confession of Error in the Supreme Court by the Solicitor General, 82 GEO. L.J. 2079, 2082, 2095-96 (1994) (discussing strategic confessions of error). A confession of error occurs when the Solicitor General "admits to the Supreme Court that a lower court has committed an error in a case decided in favor of the Government." Once a confession is made, the Solicitor General can request that "the Court reverse the judgment or... argue either that the judgment should stand despite the error or that the case does not warrant review under the Court's standards for granting certiorari." Id. at 2080. There are several categories of cases in which Solicitor Generals have confessed error: (a) errors of law, fact, and procedure; (b) violations of Justice Department prosecutorial discretion policies; and (c) confessions of error made strategically to avoid Supreme Court review and decision on the merits of an issue. Id. at 2092-101.


ranking lawyers in the country. Although Executive Branch positions, these offices are quasi-judicial in nature and primarily involve conducting and managing all litigation on behalf of the United States government in cases before the Supreme Court. Lawyers seeking these positions must be appointed by the President and confirmed by the Senate.

When examining the competing interests that are involved in disciplining federal lawyer-politicians, the interest of the political process in providing the public official with the autonomy necessary to effectively carry out the functions of the office is once again at its highest. The law is settled with respect to granting immunity from civil liability to the Attorney General while performing the duties of her office. Because the roles of the Attorney General and Solicitor General are very similar to the role of the prosecutor, the Attorney General has enjoyed immunity from civil liability for exercising discretion when performing the duties and responsibilities imposed upon her by law. The absolute immunity given to the Attorney General in exercising her prosecutorial functions is based upon the same considerations that underlie the common law immunity provided to judges and grand jurors acting within the functions of their duties. In addition, the Attorney General has enjoyed qualified immunity for conduct involving lesser degrees of discretion as long as her actions do not violate the clearly established statutory

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429. The Judiciary Act of 1789 required the Attorney General to personally conduct all suits in the Supreme Court in which the United States was a party. See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93. In 1870, as a result of an increase in the volume of litigation and other duties of the Attorney General, Congress created the office of the Solicitor General in order to relieve some of the Attorney General's responsibilities. See Rex E. Lee, William O. Douglas Lecture: The Advocate's Role in First Amendment Jurisprudence, 31 GONZ. L. REV. 265, 271-72 (1995). Currently, the Solicitor General assists the Attorney General in the performance of her duties and is authorized to conduct government litigation before the Supreme Court except when the Attorney General directs otherwise. See 28 U.S.C. §§ 505, 518(a) (2005). The Attorney General, however, retains the power to overrule any decisions made by the Solicitor General or to argue any case in the Supreme Court. Id. § 518(b).

430. See 28 U.S.C. §§ 503, 505. In addition to these officers, the President has the authority to appoint with the advice and consent of the Senate, an Associate Attorney General and ten Assistant Attorney Generals. See 28 U.S.C. §§ 504(a), 506.

431. See Imbler, 424 U.S. at 422-23 (citing Yaselli v. Goff, 12 F.2d, 396, 406 (2d Cir. 1926), aff'd, 275 U.S. 503 (1927) (holding that the special assistant to the Attorney General enjoyed absolute immunity in the performance of the duties imposed upon him by law)). Accord McCarthy v. Mayo, 827 F.2d 1310, 1314-15 (9th Cir. 1987). See also supra note 366 (discussing the quasi-judicial nature of prosecutors and the policies for extending immunity to prosecutors and grand jurors).

432. See Imbler, 424 U.S. at 422-23. These considerations include the concern that the harassment of unjustified litigation would not only create a distraction of the prosecutor's attention from her public duties but also result in a possible compromise in the exercise of her independent judgment. Id.
or constitutional rights of others.433

In light of the immunity provided to the Attorney General and Solicitor General, a Solicitor General's strategic confession of an error made by a lower court judgment in favor of the government in order to avoid Supreme Court review and reversal on the merits of the case or her potential compromise of the integrity and independence of her office by allowing the President or special interest groups to dictate or influence her legal positions in cases pending in the Supreme Court would fall within the discretionary parameters of the respective offices. Thus, these actions would be immune from subsequent civil ramifications. As discussed earlier under Zone I, principles of federalism would prohibit the state judiciary or bar association from intruding upon the constitutional latitude provided to public officials such as the Attorney General and Solicitor General while carrying out their official duties and responsibilities. This would be the case even when the actual motives underlying their conduct are improper.434 Finally, principles of comity would require state judiciary and bar associations to recognize and respect the national policy of granting immunity to public officials.435

Under Zone IV, the judiciary's interest in protecting the administration of justice remains at its highest when the lawyer-politician's conduct is criminal. First, it is generally recognized in both the United States and England that lawyers are officers of the court who perform fundamental roles in the administration of justice.436 As an officer of the court, a lawyer can require a person to cease whatever she may be doing and to appear as a witness in a court proceeding or for depositions and other pretrial processes that can be conducted outside a courtroom.437 Additionally, lawyers are given the authority to "sign writs and subpoenas... [and to] administer oaths."438 Second, because immunity only operates to shield the lawyer-politician from subsequent civil liability when performing the functions of her office, she remains subject to liability

433. See Dalrymple v. Reno, 334 F.3d 991, 997 (11th Cir. 2003) (holding that former Attorney General Janet Reno, in her supervisory capacity, enjoyed qualified immunity from civil liability for the alleged misconduct committed by federal law enforcement agents in the carrying out of an Immigration and Naturalization Service administrative arrest warrant for the seizure and return of six-year-old Elian Gonzalez back to his natural father). See supra text accompanying notes 363-64 (discussing qualified immunity).
434. See supra note 409 and accompanying text.
435. See supra Part IV.B.2. (discussing comity and public official immunity).
and punishment for her criminal actions. Third, the federal judiciary possesses both the inherent and statutory powers to insure that justice is efficiently administered in judicial proceedings. Thus, the U.S. Attorney General or Assistant Attorney General who commits crimes such as conspiracy, perjury or obstruction of justice while in office or shortly afterwards, or who misrepresents the law or facts in briefs submitted in a federal court will always be subject to punishment under both federal and state criminal law and the judiciary's supervisory and statutory powers to discipline a party or attorney for improper conduct during judicial proceedings.

Finally, the bar's interests in protecting the public from unfit lawyers and preserving the reputation and integrity of the legal system are also at their highest under Zone IV. The Model Rules where primarily created to assist the legal practitioner in resolving ethical problems arising from conflicts between her responsibilities to clients, the legal system and her individual interest in remaining ethical while earning a respectable living. The lawyer ethics rules are directly applicable and controlling when the Attorney General and Solicitor General conduct and manage the legal representation of the United States in the federal courts.

For instance, the Model Rules specifically provide that a lawyer has committed professional misconduct when she commits criminal acts that reflect adversely on her fitness to practice law or when she engages in conduct that is prejudicial to the administration of justice. In addition, it is unethical for a lawyer functioning in the role of a prosecutor to prosecute a charge that she knows is not supported by probable cause. Finally, lawyer ethics rules require the legal practitioner to demonstrate candor towards a court by refraining from making an intentional false statement of fact or law to a court. Thus, under principles of federalism, the bar would be required to forego any discipline of the U.S. Solicitor General for a confession of an error made in arriving at a lower court judgment that favors the United States even when done primarily to avoid

439. See supra Part V.B. (discussing public officials and criminal liability).

440. See supra notes 427-30 and accompanying text (discussing the court's supervisory powers). See also FED. R. CIV. P. 11(b)(2), (c)(2) (providing federal courts with the authority to issue sanctions against an attorney for advocating a pleading where the claims, defenses and other legal contentions contained within the pleading are unwarranted by existing law).

441. See MODEL RULES, Preamble ¶ 9 (noting that a function of the Model Rules is to assist legal practitioners in resolving the ethical conflicts that arise from the nature of law practice).

442. See supra notes 409-11 and accompanying text (discussing the ability of the court to discipline attorneys).

443. See MODEL RULES, R. 3.8 (a).

444. See id. R. 3.3(a).
Supreme Court review and likely reversal if the issue were decided on the merits. The bar, however, would retain its ability to discipline the Attorney General and Solicitor General for misrepresentations of law or facts in briefs submitted in the federal courts.\textsuperscript{445}

In addition, the bar's interest in protecting the reputation and integrity of the legal profession is also triggered when lawyer-politicians holding the public offices of Attorney General and Solicitor General commit crimes or unethical conduct in the representation of the United States in the federal courts. Lawyers who hold the highest legal offices in the nation are certainly newsworthy and capable of attracting major media coverage. Unfortunately, the negative media publicity surrounding the improper conduct committed by these lawyers usually results in tremendous public scrutiny of all lawyers and the legal profession. Thus, it is critical that bar associations have the ability to sanction their members in a manner that is both effective and sufficient to address these concerns.

Because of the constitutional protection provided to public officials when exercising the discretionary functions of their offices, the judiciary and bar's interest under Zone IV in disciplining lawyer-politicians who function in the positions of Attorney General and Solicitor General must yield to the more important public interest in providing these officers with immunity from civil liability. This is not the case, however, when the officer acts outside the authority of the office or when her conduct is criminal. In such instances, the political interest in insuring that public officials have the necessary freedom to function in their positions without the constant fear of civil liability for their actions is at its lowest. Therefore, in the absence of any significant political concerns, the important interests of the judiciary in promoting the administration of justice and the bar's dual interest in protecting both the public from unfit lawyers and the reputation and integrity of the legal system would not only permit but require discipline by the courts and bar for conduct falling within Zone IV.

CONCLUSION

Legal realism has become increasingly important in lawyer disciplinary matters today. Its value continues to be recognized by members of the Academy, judges, and even the Supreme Court when considering and applying the rule of law to specific legal issues and controversies. Just as law cannot be effectively studied or applied in a vacuum, this too is the case when applying lawyer ethics rules.

\textsuperscript{445} See id. R. 8.4(d) (providing that it is professional misconduct to engage in conduct that is prejudicial to the administration of justice).
Currently, persons with law degrees occupy approximately one half of the state governorships, more than half of the seats in the United States Senate and more than a third of the seats in the House of Representatives. Yet, the Model Rules have been construed to govern lawyers from all walks of life without considering or accounting for the diverse roles and functions performed by modern lawyers and the competing public and professional interests that arise when non-practicing lawyers commit improper conduct. A one-size-fits-all approach to regulating high-ranking federal officials who possess law licenses fails to respect and account for several of the inherent safeguards governing public officials and the political process. A failure to recognize and consider these unique protections can raise serious constitutional concerns.

Politicians are creatures of political parties and too often the victims of partisan politics. As society has witnessed during periods surrounding improper conduct committed by high-ranking public officials such as the lawyer-President, lawyer-Vice President, and Supreme Court Justices, bar disciplinary actions or discussions can and often run the inherent risks of becoming dominated by the prevailing political viewpoints and biases of society and the respective decision-makers. One remedy for addressing this concern is to create a more standardized procedure for applying discipline to lawyer-politicians. Adopting a functional approach that requires decision-makers to consider the specific contextual factors surrounding the alleged misconduct along with the various competing interests of those entities that share a significant nexus to the lawyer-politician when determining whether to impose discipline on him or her would eliminate many of the opportunities for the inevitable political influences and personal biases that often enter into the decision-making process. Additionally, taking a functional approach to regulating lawyer-politicians could provide a way to bridge the present gap that exists in applying the Model Rules to these lawyers and therefore, eliminate the need to propose either the adoption of additional amendments to the current ethics rules or the creation of new and separate ethics codes.

Finally, a functional approach to regulating lawyer-politicians who commit misconduct could help in restoring the public's respect and confidence in the legal profession as it would encourage bar associations to defer and forego discipline in instances where the disciplinary measures imposed by either the political process or the federal judiciary would serve the same or similar purpose.