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Sufficiently Judicial: The Need for a Universal Ethics Rule on Attorney Behavior in Legislative Impeachment Trials

Joshua E. Kastenberg
University of New Mexico, jkastenberg@unm.edu

ARTICLE

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Abstract. In assessing an ethics, rule-based prohibition against New Jersey governmental attorneys representing clients against the state for matters the state had previously assigned to them, the state supreme court noted: "In our representative form of government, it is essential that the conduct of public officials and employees shall hold the respect and confidence of the people."*

In the beginning of 2020, the United States Senate held an impeachment trial to determine whether former President Donald J. Trump had committed offenses forwarded by the House of Representatives. A U.S. Senate trial, much like state senate trials, is both judicial and political in nature.

Several senators and hundreds of state legislators are licensed attorneys. The rules of professional responsibility place great emphasis on attorneys complying with their oath of office. Such oaths, and the accompanying rules of decorum, apply to all judicial proceedings. However, during President Trump's U.S. Senate trial, at least two senators who are licensed attorneys openly promised they would not be impartial. Additionally, the impartial jury mandate precluded other senators from serving on a normal trial jury due to their previous comments, but that mandate was not applied in this case. This Article explores how legislative duties for lawyers intersect with professional obligations under the attorney ethics rules, and how the conduct of legislators who are admitted to the bar may undermine the legal profession. The Article also proposes a

* N.J. REV. STAT. § 52:13D-12 (2013).

draft ethics rule to apply to legislators who serve in judicial and quasi-judicial capacities that mandate compliance with oaths of office while simultaneously allowing participation in the legislative duties expected of an elected official.

Author. Prior to joining The University of New Mexico School of Law faculty, Professor Joshua Kastenberg had a twenty-year career as a lawyer and judge in the U.S. Air Force. He served as an advisor to the Department of Defense on cyber security and cyber warfare matters, twice deployed to Iraq, and oversaw the military's compliance with international law. In addition, he served as a prosecutor and defense counsel in over 200 trials and as a judge in over 200 trials.

Professor Kastenberg has been cited by *The Washington Post*, has appeared on Fox News, and has written over a dozen law review articles as well as four books. Prior to joining the faculty at The University of New Mexico School of Law, he taught graduate and undergraduate level courses in national security law and systems as well as legal history. Professor Kastenberg's interests are in the fields of criminal law and procedure, evidence, legal history, and judicial ethics.

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PROPOSED RULE: In any legislative proceeding in which a member of the bar is required to take a juror oath or if the proceeding is partially judicial in nature, the failure to uphold the duty of impartial justice or to refuse the oath shall be considered a breach of the norms of attorney conduct. The term "judicial" denotes all proceedings in which an oath of impartiality is administered to legislators or jurors. Nothing in this rule requires a legislator in such proceedings to recuse themselves from a proceeding because of political party affiliation, race, gender, religion, national origin, or sexual orientation.

A lawyer has often been called an "officer of the court" and is therefore subject to ethical standards not applicable to general society.[1] Concededly, the "officer of the court" concept has a checkered history in keeping applicants from entering the bar based on race, gender, citizenship status, religious affiliation, or political ideology.[2] Despite this history, the "officer of the court" concept remains important to the governance of the legal profession, as it promotes public confidence in the law.[3] This concept applies to all licensed attorneys, including those elected to Congress. However, legislators enjoy legal immunity for conduct occurring within a legislative function.[4] But, as noted throughout this Article, there is no

1. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1071–72 (1991) (stating during judicial proceedings attorneys' rights to free speech are "extremely circumscribed," and later referring to a lawyer as "an 'officer of the court'"); Nix v. Whiteside, 475 U.S. 157, 174 (1986) (stating lawyers are officers of the court and key components of the justice system); Hickman v. Taylor, 329 U.S. 495, 510 (1947) (referring to lawyers as officers of the court); Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994) ("Every lawyer is an officer of the court."); *see also* E.W. Timberlake, Jr., *The Lawyer as an Officer of the Court*, 11 VA. L. REV. 263, 263 (1924–25) (describing the role of an attorney as an officer of the court and oaths attorneys were bound by).

2. *See In re* Summers, 325 U.S. 561, 562 (1945) (discussing exclusion based on conscientious objection to military service in war and mentioning the importance of the issue in regard to civil rights); Bradwell v. Illinois, 83 U.S. 130, 131 (1872) (discussing exclusion on the basis of gender); *In re* Chang, 60 Cal. 4th 1169, 1169–70 (Cal. 2015) (discussing how a Chinese man was excluded from the California bar due to the Chinese Exclusion Act); Joshua E. Kastenberg, *Hugo Black's Vision of the Lawyer, the First Amendment, and the Duty of the Judiciary: The Bar Applicant Cases in a National Security State*, 20 WM. & MARY BILL RTS. J. 691, 748 (2012) (discussing an implied exclusion from the bar based on a disfavored political ideology).

3. *See In re* Gordon, 429 N.E.2d 1150, 1150–52 (Mass. 1982) (discussing an individual who was disbarred because of convictions of larceny and conspiracy and that if he were reinstated to the bar it "would diminish public confidence in the courts and the bar").

4. *See, e.g.*, Bogan v. Scott-Harris, 523 U.S. 44, 52 (1998) (citing Tenney v. Brandhove, 341 U.S. 367, 376 (1951)) (noting an absolute immunity for legislators existing under statute is supported by both history and reason).

protection from bar discipline while serving as a legislator; certainly, lawyers who disrupt judicial or administrative proceedings can face swift and substantial consequences.[5] Most recently, the conduct of two law school-educated, bar-admitted senators during the Senate impeachment trial of former President Donald Trump highlights the need for a rule of ethics tailored to legislators who serve on impeachment trials in the federal or state legislatures.

On December 14, 2019, Senator Lindsey Graham informed CNN News that he intended not to be a fair and impartial juror in the pending impeachment trial of President Trump.[6] Senator Graham graduated from the University of South Carolina School of Law and began his legal career as a military officer in the United States Air Force, Judge Advocate General's Corps.[7] After leaving active duty in 1989, he joined the South Carolina Air National Guard and later the Air Force Reserves in 1995.[8] Graham also served as a military judge on the United States Air Force Court of Criminal Appeals, but was disqualified from judicial service after a higher appellate court found his senatorial position incompatible with judicial assignments.[9] During the impeachment trial, Graham excused himself from the Senate floor when the House managers presented evidence showing Senator Graham's own impeachment standards, which he articulated during the impeachment of President Clinton.[10]

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5. *See* Sacher v. United States, 343 U.S. 1, 11 (1952) (establishing the grounds where a judge may impose punishment for contempt during a trial); Cooke v. United States, 267 U.S. 517, 533–34 (1925) (indicating an attorney's disparaging comments directed at a judge may result in the attorney being held in contempt); *In re* Terry, 128 U.S. 289, 302–03 (1888) (discussing courts' ability to punish disruptions through the contempt power).

6. Veronica Stracqualursi, *'I'm Not Trying to Pretend to Be a Fair Juror Here': Graham Predicts Trump Impeachment Will 'Die Quickly' in Senate*, CNN POL. (Dec. 14, 2019, 2:48 PM), https://www.cnn.com/2019/12/14/politics/lindsey-graham-trump-impeachment-trial/index.html [https://perma.cc/JPZ4-9L48].

7. *See Biography*, U.S. SENATOR SOUTH CAROLINA LINDSEY GRAHAM, https://www.lgraham.senate.gov/public/index.cfm/biography [https://perma.cc/4VL7-G5ZU] ("Graham compiled a distinguished record in the United States Air Force as he logged six-and-a-half years of service on active duty as an Air Force lawyer.").

8. *Id.*

9. *See generally* 10 U.S.C. § 866 (2019) (describing the role of a military Court of Criminal Appeals and its jurisdictional limits as well as its differing authority to hear certain cases on appeal from courts-martial). On Graham's disqualification, see *United States v. Lane*, 64 M.J. 1, 2, 7 (C.A.A.F. 2006).

10. *See* Bart Jansen & Nicholas Wu, *Democrats Use Lindsey Graham's Clinton Impeachment Speech in Trump Senate Trial*, USA TODAY (Jan. 23, 2020, 3:47 PM), https://www.usatoday.com/story/news/politics/2020/01/23/impeachment-trial-nadler-plays-clinton-trial-video-lindsey-graham/4555925002 [https://perma.cc/QDD6-3BUD] (reporting comments Senator Graham made on what

Senate Majority Leader Mitch McConnell graduated from the University of Kentucky College of Law, and briefly worked in the United States Department of Justice before pursuing his political career.[11] Notably, McConnell also once served in a quasi-judicial capacity at the county level.[12] Regardless, prior to the 2020 impeachment trial, he disavowed any intention of being an impartial juror and admitted he intended to coordinate with the White House.[13]

Prior to President Trump's first U.S. Senate impeachment trial, Chief Justice John Roberts administered an oath that called for a promise of impartiality, which both Senator Graham and Senator McConnell accepted.[14] Despite taking this oath, Senators McConnell and Graham never explained nor distanced themselves from their earlier statements. Additionally, other senators spent parts of the impeachment trial playing with fidget spinners, stress balls, and displaying conduct clearly evidencing a determination not to consider any evidence or arguments.[15]

Whatever the country might take from the conduct of elected legislators who decide not to comport with an oath administered by a judge or justice, the legislators who have been admitted to practice law undermine legal professionalism by flouting the duty demanded by this oath. Flouting the oath cannot boost the public's confidence in the law. Thus, a rule of accountability specific to the legislative process, as suggested above, should

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he felt was a "high crime"); Paul LeBlanc, *Democrats Play 1999 Video of Lindsey Graham Talking About Impeachment to Bolster Case Against Trump*, CNN POL. (Jan. 23, 2020 5:44 PM), https://www.cnn.com/2020/01/23/politics/impeachment-managers-lindsey-graham-video/index.html [https://perma.cc/LST2-JDBJ] (stating Senator Graham was absent from the Senate floor when Democrats played a 1999 video of him during the impeachment of President Bill Clinton).

11. *About Mitch McConnell*, MITCH MCCONNELL REPUBLICAN LEADER, https://www.republicanleader.senate.gov/about [https://perma.cc/7FTV-S8ZE].

12. *See id.* ("[McConnell] served as judge-executive of Jefferson County, Kentucky . . . ."); *see also* KY. REV. STAT. ANN. § 67.710 (West 2020) (describing the duties of a county judge-executive).

13. *See* Alexander Bolton, *McConnell on Impeachment: 'I'm Not Impartial About This at All'*, HILL (Dec. 17, 2019, 2:53 PM), https://thehill.com/homenews/senate/474946-mcconnell-on-impeachment-im-not-impartial-about-this-at-all [https://perma.cc/6SFL-AT3U] (reporting a statement by Senator McConnell: "I'm not an impartial juror").

14. *See, e.g.*, Rebecca Shabad et al., *Chief Justice John Roberts Swears in Senators for Trump's Impeachment Trial*, NBC NEWS (Jan. 16, 2020, 10:54 AM), https://www.nbcnews.com/politics/trump-impeachment-inquiry/house-managers-head-senate-present-read-articles-impeachment-trial-n1117001 [https://perma.cc/59J6-Y9RM] (reporting Chief Justice Roberts "asked the senators to 'solemnly swear' to 'do impartial justice'").

15. *See, e.g.*, Justine Coleman, *GOP Senator Provides Fidget Spinners to Senate Colleagues at Lunch*, HILL (Jan. 23, 2020, 1:44 PM), https://thehill.com/homenews/senate/479595-gop-senator-provides-fidget-spinners-to-senate-colleagues-at-lunch [https://perma.cc/4TBK-6AFM].

be viewed as a necessary consideration to maintain confidence in the bar, if not democracy. Such a rule hinges on whether an impeachment trial is judicial or partially judicial in nature as to render the duty of impartiality mandatory to all attorneys. As argued in this Article, all impeachment trials are sufficiently judicial in nature because a judge or justice administers an oath of impartiality before an impeachment trial commences.

This Article is divided into two sections. Section I is comprised of three parts which analyze the nature of both attorney oaths and juror oaths. It then expands on the "lore of the profession" standard as a basis for justifying a rule for attorney conduct in legislative-judicial proceedings. Section II provides three historic examples of contemporaneously publicized state impeachment trials to support the proposition that legislative trials have long been sufficiently judicial in nature for modern state supreme courts to independently adopt an ethics rule as suggested above. The first example is the 1871 impeachment trial of North Carolina's governor, William Woods Holden. This trial arose from Holden's attempts to ensure universal male suffrage in compliance with the Fifteenth Amendment of the United States Constitution. Next, the section describes the 1913 impeachment trial of New York's governor, William Sulzer, for fraud. Sulzer took office less than a month before facing impeachment. Finally, the section presents the 1917 impeachment trial of Texas Governor James Ferguson, along with a Texas Supreme Court decision unequivocally characterizing impeachment trials as judicial in nature.

Before proceeding, it is appropriate to note that elected officials, like judges, are subject to attorney discipline, but, unlike sitting judges, disciplined legislators and members of the executive branch may continue to serve in office even if disbarred.[16] Disbarment of elected officials has stood for the proposition that individuals in positions of political power are accountable for failing to uphold basic standards of integrity. A few examples demonstrate this proposition. First, in 1974, the Maryland Court of Appeals upheld the state bar disciplinary committee's decision to disbar

16. *See In re* Troisi, 504 S.E.2d 625, 630 & n.6, 634–35 (W. Va. 1998) (holding state lawyer disciplinary proceedings had no jurisdiction to discipline a judge who physically confronted a litigant until state formal judicial discipline processes removed the judge from the bench); Off. of Disciplinary Couns. v. Anonymous Att'y A, 595 A.2d 42, 42 (Pa. 1991) (footnote omitted) ("[T]he Judicial Inquiry and Review Board (JIRB) has exclusive jurisdiction to discipline Judicial officers for misconduct[.]"); *cf.* Bond v. Floyd, 385 U.S. 116, 136–37 (1966) (deciding state legislators retained their positions in the face of unpopular conduct).

former Vice President and state Governor, Spiro Agnew.[17] Agnew resigned from office prior to disbarment and pled *nolo contendere* to the crime of willful tax evasion in federal court.[18] He then unsuccessfully argued disbarment for the crime of tax evasion would be unduly harsh and suspension would be more appropriate.[19] Also, in 1976, the First Appellate Department of the Appellate Division of New York disbarred former President Richard M. Nixon.[20] Finally, following President William Clinton's impeachment, the Arkansas Supreme Court upheld the state disciplinary committee's recommendation to disbar him.[21]

The ethics rule proposed above recognizes there are fifty state constitutions and a U.S. Constitution, and therefore, fifty-one versions of impeachment trials. All fifty state constitutions contain articles related to the removal of state officers through impeachment, but there may be variances within each system. Unlike the U.S. Constitution, many state constitutions also enable removal from office through the popular vote recall provision.[22] However, in *Kinsella v. Jaekle*,[23] the Connecticut Supreme Court noted that "the power of impeachment under the state constitution must also be exercised in a manner consistent with the requirements of the federal [C]onstitution."[24] Thus, this Article analyzes both federal and state appellate court decisions to not only evidence a universality of standards but also the need for a universal rule.

17. Md. State Bar Ass'n v. Agnew, 318 A.2d 811, 817 (Md. 1974).

18. *Id.* at 811–12.

19. *Id.* at 813–814 (noting Spiro Agnew admitted to the crime of tax evasion but also argued disbarment was unduly harsh and suspension was a more reasonable punishment).

20. *In re* Nixon, 385 N.Y.S.2d 305, 307 (N.Y. App. Div. 1976).

21. Don van Natta, Jr., *Panel Advises That Clinton Be Disbarred*, N.Y. TIMES (May 23, 2000), https://www.nytimes.com/2000/05/23/us/panel-advises-that-clinton-be-disbarred.html [https://perma.cc/Z85P-8ZSD]; *President Would Drop High Court Privilege*, WASH. POST, Nov. 10, 2001, at A3.

22. For examples of recall actions filed in the states, see generally *In re* Proposed Recall Petition to Request the Recall of Walz, No. A20-0984 (Minn. Aug. 13, 2020); *In re* Boldt, 386 P.3d 1104 (Wash. 2017); Spence v. Terry, 340 N.W.2d 884 (Neb. 1983). *See also* Vikram David Amar, *Adventures in Direct Democracy: The Top Ten Constitutional Lessons from the California Recall Experience*, 92 CALIF. L. REV. 927, 927 (2004) (discussing the successful recall vote of former California Governor Gray Davis).

23. Kinsella v. Jaekle, 475 A.2d 243 (Conn. 1984).

24. *Id.* at 255.

I. THE NATURE OF THE JUROR OATH AND ATTORNEY ETHICS

In 1982, in *Smith v. Phillips*,[25] the Court examined a relationship between juror bias and the taking of an oath.[26] *Smith* arose from a New York state murder conviction in which a juror, during the course of the trial, applied for an investigator position with the district attorney whose subordinates were prosecuting the case.[27] The Court noted that while the appeal arose through the stricter *habeas* standard for state conviction appeals, the remedy for state and federal convictions appeals raising claims of juror bias generally should result in a post-trial hearing, not an inelastic rule requiring reversal of a verdict.[28] Nonetheless, the Court stated the prosecution's failure to disclose the juror's conduct did not deprive the respondent of his right to a fair trial.[29]

Smith was not the Court's last word on investigating juror bias. In 2016, the Court, in *Pena-Rodriguez v. Colorado*,[30] held the jury's deliberative processes are not sacrosanct to the point of precluding judicial review when there is evidence of juror bias in terms of race or another protected class.[31] Claims of juror prejudice now enable a post-conviction hearing in which a judge may inquire into the conduct of jurors during deliberations.[32]

As a general rule, there is no judicial appeal from an impeachment trial, so the only means of ensuring proper legislative conduct are political—or more precisely electoral—in nature. This is because in 1993, in *Nixon v. United States*,[33] the Court determined the Constitution foreclosed appellate review of federal impeachment trials.[34] Thus, any discussion of the proposed rule must consider the nature of juror oaths, attorney oaths, and the broader question of attorney ethics precisely because the enforcement of attorney ethics may be the only means of ensuring compliance with a juror oath in an impeachment trial.

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25. Smith v. Phillips, 455 U.S. 209 (1982).

26. *See id.* at 217 n.7 (examining the importance of a juror's oath when examining a juror's testimony for bias).

27. *Id.* at 210–12.

28. *Id.* at 214–16.

29. *Id.* at 221.

30. Pena-Rodriguez v. Colorado, 580 U.S. ___, 137 S. Ct. 855 (2017).

31. *Cf. id.* at 866, 869 (deciding the Court could further inquire into jury deliberations when a juror clearly indicates he relied on racial animus or stereotypes in convicting a criminal defendant).

32. *See id.* at 858 (holding the trial court may consider evidence of a juror's statement if a juror clearly indicates the jury convicted the criminal defendant after relying on racial animus or stereotypes).

33. Nixon v. United States, 506 U.S. 224 (1993).

34. *Id.* at 226.

A. *The Juror Oath*

A juror's oath to impartially assess the evidence and not determine a verdict until a judge sends the jury into deliberations is a fundamental part of trials in the United States.[35] Moreover, this oath, whether in the preselection process or after empanelment, is a signatory statement of a juror's promise to be impartial and not render a judgment until all of the evidence and arguments have been presented.[36] In *United States v. Turrietta*,[37] the United States Court of Appeals for the Tenth Circuit presented a helpful analysis for discerning the intersection of juror oaths and attorney ethics.[38] *Turrietta* arose from a federal conviction issued by an unsworn jury, in which the defense counsel realized the federal judge had empaneled the jury without swearing the jury to an oath.[39] The defense counsel intentionally withheld objection until the jury issued their verdict.[40] The Tenth Circuit determined the defense counsel's failure to object compounded the error of an unsworn jury in the proceeding.[41] Although the Tenth Circuit did not find the judge's failure to swear the jury abridged Turrietta's constitutional rights and placed much of the blame on Turrietta's defense counsel, they reaffirmed that juror oaths are historically and

35. For commentary on the importance of juror oaths, see People v. Cooper, 809 P.2d 865, 903 (Cal. 1991) ("When a person violates his oath as a juror, doubt is cast on that . . . person's ability to otherwise perform his duties."); Redish v. State, 525 So. 2d 928, 930 (Fla. Dist. Ct. App. 1988) (citing United States v. Young, 470 U.S. 1, 5–6 (1985)) (indicating the prosecution should not try to influence the jury by evoking the jurors' oath); Culpepper v. State, 209 S.E.2d 18, 18 (Ga. Ct. App. 1974) ("Trial court's failure to swear jury to try prosecution for possession of marijuana constituted reversible error."); State v. Martin, 255 N.W.2d 844, 846 (Neb. 1977) (stating it is essential that a jury be sworn for proceedings in a criminal case to be valid); People v. Bestle, 197 N.Y.S.2d 820, 823 (Herkimer Cnty. Ct. 1960) (indicating the trial court should have declared a mistrial upon realizing the jury had not been sworn); Howard v. State, 192 S.W. 770, 771 (Tex. Crim. App. 1912) ("[T]he jury must be sworn in the particular case as prescribed by the statute."). *But see* People v. Morales, 570 N.Y.S.2d 831, 833 (N.Y. App. Div. 1991) (refusing to follow *Bestle*); Commonwealth *ex rel.* Tate v. Banmiller, 143 A.2d 56, 56 (Pa. 1958) (permitting jurors to be sworn individually instead of as a body).

36. For commentary on juror impartiality, see State v. Vogh, 41 P.3d 421, 428 (Or. Ct. App. 2002) (citing State v. Barone, 986 P.2d 5, 17 (Or. 1999)) (indicating a jury's oath is significant in ensuring a defendant receives a fair trial by an impartial jury); Dyson v. State, 722 So. 2d 782, 785 (Ala. Crim. App. 1997) ("The failure to administer the oath to the jury renders the jury's verdict a nullity."); State v. Block, 489 N.W.2d 715, 715 (Wis. Ct. App. 1992) (stating a "juror's oath is an integral element" of a defendant's constitutional right to have his guilt determined by an impartial jury).

37. United States v. Turrietta, 696 F.3d 972 (10th Cir. 2012).

38. *See generally id.* (explaining the limits of a court to nullify a guilty verdict when defendant's counsel strategically withholds an objection to the failure of the trial court to swear in the jury).

39. *Id.* at 974–75.

40. *Id.* at 976.

41. *Id.*

contemporaneously important to the concept of a fair trial.[42] In essence, there was no evidence in *Turrietta* of juror misconduct, but the case indicates there is an onus on counsel to ensure jurors are sworn to an oath, thereby making it less likely misconduct will occur.

In 2008, the Maryland Court of Appeals, in *Harris v. State*,[43] determined an unsworn jury constituted a fundamental defect in a criminal trial, and unlike in *Turrietta,* the conduct of defense counsel in failing to object was not a factor in deciding to overturn the defendant's conviction for vehicular manslaughter.[44] Maryland's justices held the oath of impartiality is a fundamental part of lawfully constituted trial.[45] However, the importance of the juror oath is not a new concept. In 1920, the Mississippi Supreme Court issued a decision similar to *Harris* in which that court, upon reversing a verdict, determined a jury's failure to undertake an oath rendered them "little more than mere spectators."[46]

There should be little doubt that a juror who intentionally violates his or her oath is liable for criminal prosecution. For example, in *State v. Sammons*,[47] the Wisconsin Court of Appeals determined that when a citizen performs jury service after taking an oath, the juror becomes a public official under the law for the duration of a trial.[48] In this way, a juror oath and juror misconduct are functionally related.

Further demonstrating these concepts, in the 2008 case of *People v. Hoffler*,[49] the New York Appellate Division determined that the failure to give a proper oath to be qualified as an impartial juror prior to voir dire constituted a fundamental defect to the fairness of the superseding trial.[50] Citing *State v. Saybolt*,[51] a 1990 Minnesota Court of Appeals decision,

42. *See id.* at 979–80, 985 ("The oath has been integral to the factfinding process since ancient times, and there is no disputing Turrietta's assertion that it was an accepted feature of a properly constituted jury at common law . . . . Given that the oath predated the development of the modern jury system, it is difficult to imagine the jury gaining legitimacy as a factfinding body without a swearing requirement.").

43. Harris v. State, 956 A.2d 204 (Md. 2008).

44. *See id.* at 204, 207, 212 (holding, despite the timely objection issue, a sworn jury is a fundamental right of defendants in criminal trials).

45. *See id.* at 211 (citing State v. Barone, 986 P.2d 5, 17 (Or. 1999)) (stating the tribunal is not lawfully constituted if jurors do not take the oath).

46. Miller v. State, 84 So. 161, 161–62 (Miss. 1920).

47. State v. Sammons, 417 N.W.2d 190 (Wis. Ct. App. 1987).

48. *Id.* at 191.

49. People v. Hoffler, 860 N.Y.S.2d 266 (N.Y. App. Div. 2008).

50. *Id.* at 271.

51. State v. Saybolt, 461 N.W.2d 729 (Minn. Ct. App. 1990).

New York's appellate judges noted a juror oath is more than a formality.[52] However, New York's judges missed an important point raised by the Minnesota Court of Appeals. In *Saybolt*, Minnesota's judges determined the oath is also emblematic of a "duty to act in accordance with the law at all stages of trial."[53]

Finally, as the New Jersey Superior Court notes, a juror's oath is also a key component of assuring the integrity of a grand jury proceeding, which is often considered to have a hybrid executive-judicial function.[54] As a result, when one or more members of a grand jury are unable to uphold their oath, the grand jury may be considered void.[55]

B. *Attorney Oath*

The attorney oath reflects more than entry into the profession of law; it symbolizes that an attorney, according to the Maryland Court of Appeals in 1973, "embraces moral standards that are more stringent than those applicable to others."[56] Likewise, the Minnesota Supreme Court stressed the importance of the attorney oath and the charge to protect the judicial process.[57] In 2002, the Colorado Supreme Court affirmed that a district attorney who uses deception in the performance of his or her duties fails to uphold the oath of being a "guardian[] of the law," while "play[ing] a vital role in the preservation of society."[58] In 2011, the Florida Supreme Court revised Florida's oath of admission to require new entrants to swear to civility and fairness in dealing with opposing counsel, their clients, and

52. *Hoffler*, 860 N.Y.S.2d at 271 (citing *Saybolt*, 461 N.W.2d at 737). The court goes on to further discuss the impossibility of quantifying the error of not swearing a jury under the harmless error doctrine because one cannot know how a jury would have assessed the evidence if the jury was not placed under oath. *Id.* at 272.

53. *Saybolt*, 461 N.W.2d at 737 (quoting People v. Pribble, 249 N.W.2d 363, 366 (Mich. Ct. App. 1976)).

54. *See In re* Monday Grand Jury Panel of Monmouth Cnty. Vicinage 9, 963 A.2d 388, 391 (N.J. Super. Ct. Law Div. 2008) (citing United States v. Williams, 504 U.S. 36, 47 (1992)) (recognizing a grand jury is a buffer between the government and the people and it is the judge's responsibility to call a grand jury together and administer their oath).

55. *See id.* at 395 (referencing jurors who responded during voir dire that they were tainted by news stories and could not uphold their oaths as grand jurors and later finding the matters heard by the grand jury panel were void).

56. Bar Ass'n v. Marshall, 307 A.2d 677, 682 (Md. 1973).

57. O'Connor v. Johnson, 287 N.W.2d 400, 405 (Minn. 1979).

58. *See In re* Pautler, 47 P.3d 1175, 1176, 1178 (Colo. 2002) (indicating an attorney who engages in purposeful deception violates his high ethical and moral duty as an attorney).

witnesses.[59] Perhaps the South Carolina Supreme Court articulated the importance of adhering to the attorney oath most poignantly, declaring when an attorney "engage[s] in conduct tending to pollute the administration of justice . . . [the attorney] demonstrate[s] an unfitness to practice law."[60]

The Delaware Supreme Court provides a usable example of the enforcement of the attorney oath in *In re Favata*.[61] The justices reaffirmed the principle that an attorney is an officer of the court and is thus expected to show honesty and an adherence to standards essential to maintaining fair trials.[62] Favata, a prosecuting attorney employed by the state, had made false statements to a tribunal and was disruptive during a capital murder trial.[63] Notably, he disparaged defense witnesses and used a "mafia" term that had a tendency to chill their testimony.[64] In part because Favata was found to have "engaged in conduct . . . prejudicial to the administration of justice," the court determined a suspension from the practice of law was the only appropriate remedy.[65]

The following examples present situations indicating state bars often believe elected officials who hold law licenses must also adhere to the attorney oath. For instance, following Senator Harrison A. Williams's (D-NJ) federal conviction arising out his involvement in the ABSCAM scandal, the New Jersey Supreme Court disbarred him in 1982.[66] In 1994,

59. *In re* the Florida Bar, 73 So. 3d 149, 150 (Fla. 2011).

60. *See In re* Hall, 509 S.E.2d 266, 268 (S.C. 1998) (referring to the attorney-respondent's conduct in this case).

61. *See generally In re* Favata, 119 A.3d 1283 (Del. 2015) (providing a good overview of the attorney oath).

62. *Id.*; *see also In re* Favata, No. 2205 Disciplinary Docket No. 3, 2015 Pa. LEXIS 2540, at *1 (Pa. 2015) (holding, as a matter of reciprocity, Favata was also suspended from practice within Pennsylvania for six months); Debra Cassens Weiss, *Former Prosecutor is Suspended for Demeaning Remarks, False Denial About Snitch Threat*, ABAJOURNAL (July 29, 2015, 7:49 AM), https://www.abajournal.com/news/article/former_prosecutor_is_suspended_for_demeaning_remarks_about_defendant_false [https://perma.cc/AB3C-6MZN] (discussing the facts leading to Favata's suspension from practice).

63. *In re* Favata, 119 A.3d at 1284–85.

64. *See id.* at 1286–88 (discussing the term "*Omerta*" is used as a mafia code of silence).

65. *See id.* at 1291, 1293 (overturning the administrative board's initial recommendation that a reprimand to Favata would serve the interests of justice).

66. *See generally In re* Williams, 97 N.J. 712 (N.J. 1984); *In re* Williams, 88 N.J. 652 (N.J. 1982); Joseph F. Sullivan, *Kean Said to Pick Businessman for Senate Seat Held by Williams*, N.Y. TIMES (Apr. 9, 1982), https://www.nytimes.com/1982/04/09/nyregion/kean-said-to-pick-businessman-for-senate-seat-held-by-williams.html [https://perma.cc/Q2UC-PRVB]; Bennett L. Gershman, *Abscam, the*

the Kentucky Supreme Court upheld the suspension of Congressman Carroll Hubbard's (D-KY) bar license after it was determined he had obstructed a Federal Election Commission investigation.[67] In 1995, the Florida Supreme Court suspended Congressman Lawrence J. Smith (D-FL) after he was found guilty of federal income tax evasion and giving false statements to the Federal Election Commission.[68] One year later, the Georgia Supreme Court disbarred former Representative Patrick Swindall (R-GA) after he had been convicted in federal court for committing perjury before a grand jury.[69]

C. *Lore of the Profession*

In 1985, the United States Supreme Court recognized, in *In re Snyder*,[70] the concept of "the lore of the profession," often "embodied in codes of professional conduct" had a direct application to the practice of law.[71] In this decision, authored by Chief Justice Warren Burger, the Court reinstated an attorney whom the Chief Judge of the Eighth Circuit Court of Appeals suspended from practice.[72] The attorney, Robert Snyder, whom the United States District Court for the District of North Dakota had appointed to represent indigent defendants, challenged the appellate court's reduction in his repayment invoice.[73] On April 13, 1984, the appellate court determined Snyder's complaint regarding repayment was "totally disrespectful to the federal courts and to the judicial system," and "his refusal to demonstrate a sincere retraction of his admittedly 'harsh' statements [were] sufficient to

Judiciary, and the Ethics of Entrapment, 91 YALE L.J. 1565, 1571–73 (1982) (discussing the ABSCAM scandal, an FBI sting operation that led to the conviction of many highly-placed individuals).

67. *See generally* Hubbard v. Ky. Bar Ass'n, 878 S.W.2d 13 (Ky. 1994) (holding Hubbard's guilty plea to conspiracy to impede the Federal Election Commission, obstruction of justice, and theft of government property warranted his resignation and disbarment). *See* Hubbard v. Ky. Bar Ass'n, 66 S.W.3d 684, 685 (Ky. 2001) (reinstating Carroll Hubbard to the Kentucky bar in 2001 following the recommendation of the Character and Fitness Committee).

68. *See generally* Fla. Bar v. Smith, 650 So. 2d 980 (Fla. 1995) (holding Smith's conviction warranted a three-year suspension).

69. *See generally In re* Swindall, 468 S.E.2d 372 (Ga. 1996) (holding Swindall's convictions for perjury warranted his disbarment).

70. *In re* Snyder, 472 U.S. 634 (1985).

71. *Id.* at 645.

72. *See generally id.* (discussing the Eighth Circuit's denial of an en banc hearing for reinstatement, which resulted in the court not considering Mr. Snyder's motion to have Chief Judge Donald P. Lay recused from taking part in the matter since he had previously ordered Snyder to apologize to the court); *see also Matter of* Snyder, 734 F.2d 334, 341 (providing additional background in the Snyder case).

73. *In re* Snyder, 472 U.S. at 636.

demonstrate to th[e] court that he [was] not . . . fit to practice law in the federal courts."[74] In a unanimous decision, with Justice Harry Blackmun not participating, the Court determined Snyder's objections to the limited payment of expenses was, in fact, disrespectful to the judiciary, and that federal courts had long possessed the power to disbar attorneys.[75] However, because Snyder's objections to the recoupment of expenses, even in the view of the appellate court, possessed a degree of merit, and because a single rude letter in that context did not support the suspension from practice, it was therefore unmerited.[76] It is noteworthy that the Ohio State Bar Association and several of the largest law firms in Bismarck sided with Snyder.[77] In essence, Snyder's adherence to the demands of being defense counsel upheld the lore of the profession and protected his position in the legal profession.

Justice Burger's mention of "the lore of the profession" in the *Snyder* case provides a critical delineation of a lawyer's duty to the law.[78] That is, a lawyer must act with regard to how his or her conduct may affect the reputation of the law.[79] Courts have upheld the term "lore of the profession" as a standard of mandatory deportment against objections that the term is unconstitutionally vague.[80] A lawyer who encourages a client to

74. *Id.* at 637, 641 (emphasis omitted). The Eighth Circuit's opinion also stated: "All courts depend on the highest level of integrity and respect not only from the judiciary but from the lawyers who serve in the court as well. Without public display of respect for the judicial branch of government as an institution by lawyers, the law cannot survive. . . ." *Id.* at 641.

75. *Id.* at 642–43, 647 ("All persons involved in the judicial process—judges, litigants, witnesses, and court officers—owe a duty of courtesy to all other participants.").

76. *Id.* at 646–47.

77. *See, e.g.*, Linda Greenhouse, *Court Reinstates Angry Lawyer, 33*, N.Y. TIMES (June 25, 1985), https://www.nytimes.com/1985/06/25/us/court-reinstates-angry-lawyer-33.html [https://perma.cc/7AZQ-VJFE] (indicating the Ohio State Bar Association supported Snyder by filing a brief on his behalf, and seven of Bismarck's largest law firms joined to handle Snyder's appeal to the Supreme Court free of charge).

78. *See In re* Snyder, 472 U.S. at 645 (indicating "the lore of the profession" provides insight into actions that qualify as attorney misconduct).

79. The *Snyder* opinion states:

> Read in light of the traditional duties imposed on an attorney, it is clear that "conduct unbecoming a member of the bar" is conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice. More specific guidance is provided by case law, applicable court rules, and "the lore of the profession," as embodied in codes of professional conduct.

Id. at 645.

80. *Cf.* Howell v. State Bar of Tex., 843 F.2d. 205, 208 (5th Cir. 1988) (upholding a disciplinary scheme that drew meaning from court rules, case law, and the "lore of the profession").

undertake an action so the lawyer can represent the client in a subsequent proceeding may violate the lore of the profession standard. An attorney who repeatedly fails to file timely motions as set by a trial court violates the lore of the profession standard.[81] The Connecticut Court of Appeals set a more pointed example of a violation of the standard in *Chief Disciplinary Counsel v. Zelotes*.[82] That court determined an attorney who engaged in a sexual relationship with a married client and then encouraged the married client to obtain a divorce violated the lore of the profession standard.[83]

A final example demonstrates how the lore of the profession holds attorneys to a higher behavioral standard. In *Attorney Grievance Commission v. Alison*,[84] the Maryland Court of Appeals determined that lawyer Stewart Alison committed misconduct by mistreating court personnel and abusing a private citizen he believed had been on a date with his estranged wife.[85] In another incident, Alison tried to effectuate a specious citizen's arrest against his wife.[86] Later, he got into an altercation with court deputies when he appeared on contempt charges.[87] The appellate court, in upholding Alison's suspension, conceded his language may have been within the First Amendment's ambit, but attorneys were nonetheless held to a standard higher than other members of society.[88] The state appellate court found, in essence, the requirement for attorneys to adhere to a higher standard is critical to the lore of the profession.[89] As a postscript, in 1998 Alison was once more disbarred for filing frivolous lawsuits.[90]

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81. *See, e.g.*, *In re* Kestenband, 366 F. App'x 305, 311 (2d Cir. 2010) (determining Kestenband's failures to timely file motions constituted "neglect and lack of diligence" sufficient to justify a sanction).

82. Chief Disciplinary Couns. v. Zelotes, 98 A.3d 852 (Conn. App. Ct. 2014).

83. *Id.* at 384, 401.

84. Att'y Grievance Comm'n v. Alison, 565 A.2d 660 (Md. 1989).

85. *See id.* at 661–64 (describing, first, an incident where Alison tried to stop a man named Emerick with his vehicle, ultimately resulting in his arrest, then describing incidents where Alison verbally abused court clerks).

86. *Id.* at 661–62. Other misconduct included attempting to have his wife prosecuted for forgery on scant evidence, harassment, and hindering a police officer. *Id.* at 662–63.

87. *Id.* at 663.

88. *See id.* at 665–66 (commenting Alison's speech, "ran afoul of the reasonable, necessary, and content-neutral restrictions imposed upon attorneys by the Maryland Rules of Professional Conduct").

89. *See id.* at 666–67 (stating conduct like Alison's "breeds disrespect for the courts and for the legal profession," and urging respect and decorum are essential in the legal profession).

90. Tanya Jones, *Md. Court of Appeals Suspends the License of Bel Air Lawyer*, BALT. SUN (May 21, 1998), https://www.baltimoresun.com/news/bs-xpm-1998-05-21-1998141129-story.html [https://perma.cc/URR8-7KDZ]. *See generally* Michael Olesker, *Trouble Seems to Just Follow Bel Air Lawyer*, BALT. SUN (March 30, 1995), https://www.baltimoresun.com/news/bs-xpm-1995-03-30-

While a legislator who violates an oath to conduct fair and impartial justice in an impeachment trial does not have a specific client, the legislator-lawyer's pretrial promise of an acquittal may be said to have altered the lawyer's duty to the "lore of the profession," similar to the above examples.

II. HISTORIC IMPEACHMENT TRIALS

Whether a state bar's authorities should review violations of attorney oaths in the impeachment trial process hinges, somewhat, on the history of impeachment trials in the United States. The Connecticut legislature's impeachment of Governor John G. Rowland in 2004 provides some guidance to assessing the judicial nature of legislative trials.[91] On January 26, 2004, the Connecticut House of Representatives created the Select Committee of Inquiry which issued a subpoena to Governor Rowland in the course of its investigation into his conduct, but he objected to complying with the state legislature in a state district court.[92] The district court ruled against him and the Connecticut Supreme Court upheld the ruling.[93] In doing so, the state supreme court reaffirmed the principles announced in the 1984 opinion, *Kinsella v. Jaeckle*,[94] which held there are two avenues for a limited judicial review of impeachment proceedings and trials.[95] The first avenue is for actions that fall outside of the legislature's constitutional impeachment authority, and the second avenue is to determine whether "egregious and otherwise irreparable violations of state or federal constitutional guarantees [are] being or had been committed" by the legislature.[96]

In *Kinsella*, which arose from the attempted impeachment of a trial judge,[97] the Connecticut Supreme Court provided a useful, albeit brief, historical analysis of impeachment operating as a quasi-judicial function.[98] According to the state's justices, in the seventeenth century, the British

1995089092-story.html [https://perma.cc/UA35-LMDP] (describing incidents including another frivolous lawsuit Alison filed against an attorney in order to harass him).

91. *See generally* Off. of the Governor v. Select Comm. of Inquiry, 858 A.2d 709 (Conn. 2004) (holding an impeachment proceeding may be subject to judicial review under certain circumstances).

92. *See id.* at 714–16 (explaining the governor filed a suit seeking to quash the subpoena, which was then litigated through the courts).

93. *Id.* at 712 n.1, 714–15.

94. Kinsella v. Jaekle, 475 A.2d 243 (Conn. 1984).

95. *Off. of the Governor*, 858 A.2d at 718–19 (citing *Kinsella*, 475 A.2d at 243).

96. *See supra* note 95.

97. *Kinsella*, 475 A.2d at 245.

98. *See id.* at 249–53 (developing a timeline leading to modern impeachment trials).

Parliament became fearful of trends James I and Charles I exhibited toward monarchal absolutism.[99] In response, Parliament determined the House of Commons could investigate malfeasance or corruption of cabinet ministers[100] and bring any charges to the House of Lords.[101] The House of Lords, in turn, became "a court for great men and great causes."[102] The Connecticut Supreme Court, in reviewing this history and its impact on the United States' constitutional provision, concluded while "the [impeachment] process is obviously adjudicative, and the sanctions imposed inescapably penal, it is not a purely judicial function."[103] In essence, the state's justices determined an impeachment trial is a legislative process serving a judicial function.

In contrast to the Connecticut court, on March 9, 1988, the Arizona Supreme Court declined, in *Mecham v. Gordon*,[104] to enjoin the state legislature's upper house from convening a court of impeachment against Governor Evan Mecham.[105] Article VIII of the Arizona constitution specifies an impeachment process similar to the United States Constitution.[106] However, similar to several other state constitutions, Arizona's constitution also enables citizens to recall public officers, which, in effect, permits a constituency-wide vote to remove an elected official from public office.[107] While Mecham faced an impeachment trial, he also confronted a recall effort and a grand jury investigation into fraud

99. *Id.* at 251 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 213–14 (Chitty 1842)).

100. *See supra* note 99.

101. *Id.* at 251 (citing 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 380 (3d ed. 1922)).

102. *Id.*

103. *Id.* at 252.

104. Mecham v. Gordon, 751 P.2d 957 (Ariz. 1988).

105. *Id.* at 958.

106. The Arizona constitution gives the lower house (the Arizona House of Representatives) the "sole power of impeachment." The provision goes on to state:

> All impeachments shall be tried by the senate, and, when sitting for that purpose, the senators shall be upon oath or affirmation to do justice according to law and evidence, and shall be presided over by the chief justice of the supreme court. Should the chief justice be on trial, or otherwise disqualified, the senate shall elect a judge of the supreme court to preside.

ARIZ. CONST. art. VIII, pt. 2, § 1 (West, Westlaw through the Second Regular Session of the Fifty-Fourth Legislature). The Arizona constitution also specifies: "No person shall be convicted without a concurrence of two-thirds of the senators elected." *Id.* § 2.

107. *See generally id.* pt. 1 (West, Westlaw through the First Regular Session of the Fifty-Fifth Legislature) (addressing the recall of public officers).

allegations.[108] In seeking an injunction against the impeachment trial, Mecham argued the impeachment trial resulted in statewide publicity that would render the subsequent judicial trial bereft of due process.[109] He also argued the impeachment trial could compel him to give testimony the prosecution could use against him in a criminal trial.[110] Although the state's high court ruled against Mecham, it issued a decision contextualizing an impeachment trial's judicial nature. The justices observed that "nomenclature aside, trial in the Senate is *not* the equivalent of a criminal trial within the judicial system."[111] In that light, Arizona's justices determined an impeachment trial in the state senate was a "uniquely legislative *and* political function," rather than a judicial one.[112] Although *Mecham* appears to be apart from the historical norm, the Arizona Supreme Court did not entirely dismiss potential judicial intervention in the political process of state impeachment trials.

A. *North Carolina, 1870: The Impeachment of Governor William Holden*

In 1870, North Carolina's governor, William W. Holden, was brought before the state's high court of impeachment.[113] In the words of an early scholar, Holden was not a traditional Reconstruction governor Southerners would have labelled a "carpetbagger."[114] He was born in North Carolina, owned a local newspaper, and had supported Democratic political theories.[115] During the Civil War, he disclaimed secession and remained

108. *See* Paula D. McClain, *Arizona "High Noon": The Recall and Impeachment of Evan Mecham*, 21 POL. SCI. & POL'Y 628, 628 (1988) ("Evan Mecham was the first governor in United States history to be confronted with a recall, impeachment and criminal indictment simultaneously."); *see also Arizona Governor Granted Delay of Grand Jury Inquiry Into Loan*, N.Y. TIMES, Nov. 4, 1987, at A16 (indicating a grand jury investigated Governor Mecham for failing to report a $350,000 loan he received that was potentially tied to gubernatorial appointments).

109. *Mecham*, 751 P.2d at 959–60. *Compare* Sheppard v. Maxwell, 384 U.S. 333, 362–63 (1966) (holding pretrial publicity could threaten a trial's fairness), *with* Phx. Newspapers Inc. v. Jennings, 490 P.2d 563, 566–67 (Ariz. 1971) (declining to apply *Sheppard* to preliminary hearings).

110. *Mecham*, 751 P.2d at 959–60.

111. *Id.* at 961 (emphasis in original).

112. *Id.* at 962. *But see id.* at 963 (stating constitutional rights "will be vindicated by the judicial system when and where necessary").

113. *See generally* Cortez A.M. Ewing, *Two Reconstruction Impeachments*, 15 N.C. HIST. REV. 204 (1938) (discussing Governor Holden's impeachment).

114. *Id.* at 204.

115. *Id.* at 204–05; *see also* William C. Harris, *William Woods Holden: In Search of Vindication*, 59 N.C. HIST. REV. 354, 356–60 (1982) (describing how, after Fort Sumter, Holden declared his support for southern independence).

pro-Union.[116] On May 29, 1865, President Andrew Johnson appointed Holden as the state's governor, but in the fall of that year Holden was defeated in the state's first post-Civil War election.[117] Later, in 1868, Holden was elected as governor, but he offended white North Carolina citizens when he worked to ensure newly enfranchised Black citizens were able to participate in state government and by his efforts to protect their right to vote.[118] After ordering the state's militia to combat a rising Ku Klux Klan and resisting a judge's order to produce over one hundred arrested Klansmen, the legislature adopted an impeachment resolution against Holden in December 1870.[119] The general nature of the articles of impeachment had to do with Holden's arresting the Klansmen without bringing them to trial.[120] The lower house's vote was explainable because in August 1870, the state's elections were favorable to the Democrats, and Holden, a Republican, then faced a legislature more likely to remove him.[121]

As an example of the national interest in the impeachment trial, the *Chicago Tribune* reported Holden had tried to "terrify the opposition that a political victory would be certain," but the "people through the [s]tate generally resented the high-handed proceedings and elected a [l]egislature so overwhelmingly opposed to the [g]overnor that it [was] more than likely his impeachment [would] be followed by conviction and deposition."[122] In contrast, the *Philadelphia Inquirer*, disparagingly called the impeachment a "political diversion."[123]

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116. Ewing, *supra* note 113, at 205–06 (noting early in the war Governor Holden moved from supporting secession to seeking reunification with the North).

117. *See* Harris, *supra* note 115, at 357–58 ("Diehard Confederates . . . seethed with resentment at Holden's appointment.").

118. *See* Ewing, *supra* note 113, at 206 (recounting the struggle between the Union League, which worked to promote Black voting rights, and various organizations that opposed them); Jim D. Brisson, "*Civil Government was Crumbling Around Me": The Kirk-Holden War of 1870*, 88 N.C. HIST. REV. 123, 123 (2011) (indicating Holden aimed to guarantee Black rights during his tenure as governor).

119. Ewing, *supra* note 113, at 207–12. In March of 1870, Holden declared Alamance County was in a state of insurrection and declared martial law. Ewing, *supra* note 113, at 208–09.

120. *See* Brisson, *supra* note 118, at 157–58 (describing the articles of impeachment against Governor Holden).

121. *See id.* at 157–58 (discussing how, after the midterm elections, Conservatives hastily initiated impeachment proceedings against Holden); Harris, *supra* note 115, at 360 (noting when the conservative Democrats swept into office, they immediately called for Holden's impeachment and removal); Ewing, *supra* note 113, at 210–211 (describing how the August 1870 election resulted in a decisive Democratic win).

122. *Impeachment of Governor Holden*, CHI. TRIB., Dec. 29, 1870.

123. *Political Complications*, PHILA. INQUIRER, Dec. 13, 1870, at 4.

On December 23, the state legislature's upper house organized into a "court of impeachment," and the state's Chief Justice Pearson, became its presiding officer.[124] Justice Pearson administered an oath requiring the senators to impartially assess the evidence before rendering a decision.[125] He then ruled on a motion to grant Holden a delay to prepare a defense against the impeachment articles.[126] The senate trial included Holden's son-in-law, who had been elected to the state senate, and the remaining so-called "carpetbag[ger]" senators serving as jurors.[127] However, elected Democratic party legislators, who vehemently opposed racial equality, comprised the majority of the senate.[128] For nearly three months, the Senate heard testimony and determined the large numbers of murders committed by the Klan, including a fellow state senator's execution, did not justify Holden's declaration of martial law.[129] Pearson determined it was improper to rule on motions, but he advised on the admissibility of documents to prove Holden's alleged "animus" and his motive in declaring martial law.[130] Pearson's ruling granting a delay and providing legal guidance to the state legislature while it sat as a jury evidences the judicial nature of an impeachment trial.

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124. Ewing, *supra* note 113, at 215.

125. *See* 1 TRIAL OF WILLIAM W. HOLDEN, GOVERNOR OF NORTH CAROLINA, BEFORE THE SENATE OF NORTH CAROLINA ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 21, 25 (1871) [hereinafter 1 TRIAL OF WILLIAM W. HOLDEN] (providing names of the senators sworn and the oath used in the trial). The oath taken read: "I __ swear truly and impartially to try and determine the charges in the Articles of Impeachment exhibited against William W. Holden, Governor of the State of North Carolina, under the Constitution and laws thereof according to the evidence: So help me God." *Id.* at 25.

126. *Id.* at 23–24.

127. Ewing, *supra* note 113, at 221. Ewing noted: "Criticism is sometimes offered against permitting relatives and other close friends of the respondent to act as members of the impeachment court, but eligibility to sit in the [S]enate automatically entitles one to a place on the court." *Id.*

128. *See* ERIC ANDERSON, RACE AND POLITICS IN NORTH CAROLINA, 1872–1901: THE BLACK SECOND 3 (1981) (indicating the Democratic party supported the Ku Klux Klan and impeached Governor Holden for his opposing the Klan); DEBORAH BECKEL, RADICAL REFORM: INTERRACIAL POLITICS IN POST-EMANCIPATION NORTH CAROLINA 76 (2011) ("[The] Conservative Party . . . did not have the two-thirds majority in the senate" required to impeach Governor Holden, but the party gained the majority upon "disput[ing] the elections of several Republican senators").

129. BECKEL, *supra* note 128, at 72–73, 76–77 (describing Klansmen's vicious attacks, including the murder of Senator John W. Stephens, and how Governor Holden was impeached for his declaration of martial law and opposition to the Ku Klux Klan).

130. *See* 1 TRIAL OF WILLIAM W. HOLDEN, *supra* note 125, at 158–60, 256 (describing how Chief Justice Pearson allowed the admittance of evidence to prove Governor Holden's motives).

B. *New York, 1913: The Impeachment of William Sulzer*

In 1913, New York's legislative branch, with nine of the state's court of appeals judges participating, removed Governor William Sulzer through New York's constitutional impeachment procedures.[131] Almost contemporaneously, a University of Virginia Law Review author observed Sulzer's impeachment trial was "one of the greatest trials in our country's history" and it "exceeded in importance and interest that of Justice Chase and closely rivaled that of President Johnson."[132]

The 1777 New York constitution established an impeachment process in which the assembly—the state legislature's lower house—possessed the power of impeachment.[133] If the legislature forwarded one or more articles of impeachment to the state senate, the senators, along with the state's supreme court judges, would sit on a court of impeachment.[134] The original state constitution was replaced in 1821, and again in 1846,[135] but the newer constitutions did not appear to greatly alter the trial procedure—the main modification to the impeachment process included removing the terms "mal and corrupt," and "high crimes and misdemeanors" as the bases for impeachment.[136] The newer constitutions also only required the lower

131. *See* Stuart G. Gibboney, *Some Legal Aspects of the Impeachment of William Sulzer*, 1 VA. L. REV. 102, 105 (1913) (indicating nine members of the court of appeals—which consisted of three judges from the New York Supreme Court sitting as a part of that court—participated in the court of impeachment); John R. Dunne & Michael A.L. Balboni, *New York's Impeachment Law and the Trial of Governor Sulzer: A Case for Reform*, 15 FORDHAM URB. L.J. 567, 567, 581 (1986) (indicating, though the New York constitution included an impeachment standard, at the time of Governor Sulzer's impeachment in 1913 the standard was unclear and imprecise, which resulted in the New York legislature exhibiting broad impeachment powers).

132. Gibboney, *supra* note 131, at 102. One of the major issues raised during the impeachment, not addressed in this Article, is that Sulzer argued the state impeachment provision only applied to misconduct occurring while in office, and he was charged with misconduct that occurred prior to the gubernatorial inauguration. *Id.* at 105.

133. N.Y. CONST. of 1777, art. XXXIII. The assembly and senate together form the New York state legislature. *Id.* art. II.

134. *Id.*. art. XXXII. There were actually two courts convened under article XXXII, but they appear to be duplicative. One court convened for the actual trial, and a second court—comprised of the members of the first court—served as a court of errors. *Id.*

135. *See* Dunne & Balboni, *supra* note 131, at 580 (describing the constitutional standards used in the 1821 and 1846 constitutions).

136. *See id.* at 577–78, 577 n.92, 581 (stating the delegates at the New York Constitutional Convention of 1846 removed "the 'mal and corrupt' and 'high crimes and misdemeanors' language from the constitution," which led to an "absence of a clear and precise constitutional standard defining impeachable acts" during the impeachment of Governor Sulzer).

house to vote by a simple majority to forward an article of impeachment to the state senate.[137]

Sulzer was first elected to the New York Assembly in 1889, and four years later rose to become speaker of the state's lower house.[138] In 1894, New York's Tenth Congressional District's voters elected Sulzer to the house of representatives, and in 1910 he became the chairman of the New York House Foreign Relations Committee.[139] Sulzer's downfall is explainable by quickly reviewing New York's political history. In 1910, New York's progressive Democrats gained the legislature and governor's office in an election sweep, and it was the first time in sixteen years that a Democrat Party candidate, John Dix, became governor.[140] However, two years later Sulzer, with the support of progressives including President Woodrow Wilson and New York's Tammany Hall machine, replaced Dix as the party's gubernatorial candidate in an intraparty fight.[141] Dix's supporters were angry at his intraparty replacement, and state Republicans were willing to ally with Dix to remove Sulzer.[142]

Shortly after the 1912 election, the legislature discovered Sulzer violated state law by failing to report thousands in political contributions.[143] Moreover, there was evidence that some of the monies collected to finance Sulzer's campaign went into his personal account and into a secret trust fund account with a brokerage firm.[144] The New York Assembly impeached Sulzer by a vote of seventy-nine to forty-five.[145] In October 1913, the New York Senate, while serving as a court of impeachment, found Sulzer guilty

137. *See id.* at 576 (indicating the constitution of 1821 reduced voting requirements to impeach a public official from two-thirds majority to a simple majority vote of the assembly).

138. Robert F. Wesser, *The Impeachment of a Governor: William Sulzer and the Politics of Excess*, 60 N.Y. HIST. 407, 409 (1979).

139. *Id.*

140. DAVID R. BERMAN, GOVERNORS AND THE PROGRESSIVE MOVEMENT 163 (2019).

141. *Id.*; *see* MATTHEW L. LIFFLANDER, THE IMPEACHMENT OF GOVERNOR SULZER: A STORY OF AMERICAN POLITICS 117 (2012); Wesser, *supra* note 138, at 410–11 (describing how Sulzer gained President Wilson's and Tammany Hall's support, which helped him win the race for governor).

142. *Cf.* Wesser, *supra* note 138, at 411 ("[T]he Democratic euphoria of 1912 could not mask the doubt and misgivings that many harbored toward Sulzer."); *id.* at 414 (stating Sulzer's campaign theme "was interpreted as an attack on the Tammany-dominated regime of . . . Dix").

143. *Id.* at 431.

144. *Id.*

145. *Two Claim to Be Governor of New York State*, S. BEND NEWS-TIMES, Aug. 14, 1913, at 1; *see* Jack O'Donnell, *The Story of NY's Only Gubernatorial Impeachment*, CITY & STATE N.Y. (Mar. 3, 2021), https://www.cityandstateny.com/articles/opinion/commentary/story-nys-only-gubernatorial-impeachment.html [https://perma.cc/VZ7M-N3E9] (providing a breakdown of members of the Assembly who voted for and against impeachment).

under three impeachment articles regarding false statements on election finances, perjury in swearing his statements were accurate, and suppressing evidence.[146] One of the major issues in the trial arose as a result of the continued service of several senators who initially investigated Sulzer and then sat in judgment of him.[147] The presiding Judge Edgar Montgomery Cullen resolved the challenge in ruling "there is this marked distinction between a challenge to a juror and a challenge to a judge . . . . At common law, nothing disqualifies a judge from sitting, except direct interest in the case."[148] In 1914, in *People ex rel. Robin v. Hayes*,[149] the Supreme Court of New York, Appellate Division characterized the impeachment trial as partly judicial in deciding Sulzer had no power to issue a pardon after the assembly forwarded impeachment articles to the state senate.[150] It is clear, then, that while the state impeachment trial process permitted senators and judges to serve regardless of party or prior activity, the impeachment trial process itself was considered judicial, rather than legislative.

C. *Texas, 1917: The Impeachment of James Ferguson*

In 1917, the Texas state senate conducted an impeachment trial against Governor James Ferguson. When, in 1913, Ferguson entered the Democratic primary for the governorship, he was an almost unknown businessman with no prior political office.[151] Elected governor in 1914, Ferguson had not advanced beyond the sixth-grade and employed Jeffersonianism- and Jefferson Davisism-style governance.[152] The genesis of his impeachment began with Ferguson's assertion of control over the University of Texas when he tried to secure the dismissal of six professors

146. *See, e.g.*, LIFFLANDER, *supra* note 141, at 305–08.

147. 1 PROCEEDINGS OF THE COURT FOR THE TRIAL OF IMPEACHMENTS, THE PEOPLE OF THE STATE OF NEW YORK BY THE ASSEMBLY THEREOF AGAINST WILLIAM SULZER, AS GOVERNOR 18 (J. B. Lyon Co. 1913).

148. *Id.* at 44.

149. People *ex rel.* Robin v. Hayes, 149 N.Y.S. 250 (N.Y. App. Div. 1914).

150. *See id.* at 253–54 (indicating Sulzer's powers and duties as governor passed from him to Martin H. Glynn at the moment the articles of impeachment were adopted).

151. *See* Jessica Brannon-Wranosky & Bruce A. Glasrud, I*ntroduction: James Edward "Farmer Jim" Ferguson's Impeachment and Its Ramifications*, *in* IMPEACHED: THE REMOVAL OF TEXAS GOVERNOR JAMES E. FERGUSON 1–2 (Jessica Brannon-Wranosky & Bruce A. Glasrud eds., 2017) (describing the unlikely success James E. Ferguson experienced in his run for the governorship).

152. Cortez A.M. Ewing, *The Impeachment of James E. Ferguson*, 48 POL. SCI. Q. 184, 184–85 (1933).

as well as the university president.[153] As one scholar points out, Ferguson was an anti-prohibitionist, opposed women's suffrage, and made enemies of progressives in the state, so the political fight over the dismissal of professors became a proxy for an alliance of legislators to seek impeachment.[154] In February 1917, a state senator introduced a resolution calling for an investigation into Ferguson, but the legislature tabled the resolution.[155]

In July 1917, a grand jury indicted Ferguson for embezzlement, misapplying public funds, and diverting public funds.[156] On August 23, 1917, the Texas House of Representatives voted eighty-one to fifty-two to impeach Ferguson[157] and passed twenty-one articles to the Texas Senate.[158] One of the articles arose from Ferguson's refusal to explain the source of a $156,000 loan, and another article was a result of his appropriating over $5,000 for his personal use.[159] The remaining articles alleged a combination of abuses of power as well as misappropriation of monies, though not all for personal gain.[160] Ferguson demurred to the articles and specifically answered each one, denying the alleged facts and claiming he was not guilty of the alleged misconduct.[161] The trial included the calling of witnesses as well as public rulings on objections by the senate

153. *See* Frederic A. Ogg, *Impeachment of Governor Ferguson*, 12 AM. POL. SCI. REV. 106, 113 (1918) (describing Ferguson's animosity toward the University of Texas faculty); John A. Lomax, *Governor Ferguson and the University of Texas*, 28 SW. REV. 11, 13 (1942) (naming the six professors discharged from the university and indicating Ferguson also demanded the discharge of the university president); Ewing, *supra* note 152, at 186 ("Ferguson demanded the dismissal of six faculty members.").

154. *See* Lewis L. Gould, *The University Becomes Politicized: The War with Jim Ferguson, 1915–1918*, 86 SW. HIST. Q. 255, 260, 271 (1982) (reporting how Ferguson promised to veto prohibition legislation, but a group of prohibition and women's suffrage supporters staged a coalition that was too powerful for Ferguson). *See generally* John R. Lundberg, *The Great Texas Bear Fight: Progressivism and the Impeachment of James E. Ferguson*, *in* IMPEACHED: THE REMOVAL OF GOVERNOR JAMES E. FERGUSON, *supra* note 151 (chronicling Ferguson's volatile history with the University of Texas and describing various Texas political factions which banded together to oppose and impeach Governor Ferguson).

155. Ewing, *supra* note 152, at 187.

156. *Gov. Ferguson, Texas, Indicted on Nine Counts: Action by Grand Jury Follows Rumors of Impeachment*, CHI. DAILY TRIB., July 28, 1917, at 1; *Governor Ferguson of Texas Indicted: Impeachment Bill to Be Introduced Next Week—He Comes out for Third Term*, N.Y. TIMES, July 28, 1917, at 9.

157. *Texas House Votes to Impeach Governor: Orders Committee to Draw Bill of Charges, and Executive May Leave Office Today*, N.Y. TIMES, Aug. 24, 1917, at 7.

158. *Governor of Texas Has Been Suspended; Impeachment Ordered: Board of House Managers Presents 21 Articles to the Senate, Charging Official Misconduct to Ferguson*, ATLANTA CONST., Aug. 25, 1917, at 1.

159. *Id.*; Ewing, *supra* note 152, at 199–200.

160. *See* Ewing, *supra* note 152, at 199–201 (describing the articles of impeachment).

161. *Id.* at 201–02.

itself.[162] One day before the senate entered its findings against Ferguson, he attempted to resign, but the trial concluded with the issuance of a guilty verdict against the governor, and an accompanying sentence prohibited him from holding any state political office again.[163]

In 1924, the Texas Supreme Court heard an appeal from a voter's lawsuit which challenged the placement of Ferguson's name on a Democratic party primary ballot.[164] Ferguson sought to be elected to the governor's office once more in spite of the prohibition against his serving in public office.[165] Ferguson argued the verdict and sentence were unconstitutional because he had resigned prior to the Texas Senate issuing a verdict.[166] Ferguson also claimed that because the legislature had to be called into a special session, it was not constitutional to investigate or prosecute him under the state constitution.[167] Finally, he also argued the sentence was criminal in nature and therefore violated the state constitution because a court of law did not impose it.[168] The Texas Supreme Court first noted the impeachment process in the state's lower house operated akin to a grand jury, then characterized the impeachment trial as "clearly judicial as to make argument on the point almost superfluous."[169] In other words, the Texas Supreme Court specifically noted the impeachment court was judicial in nature.

III. CONCLUSION

Although in egregious situations, such as the promise to disregard an oath, one can conclude an ethics norm has been already breached, there is a fundamental principle that attorney disciplinary rules, like criminal law, must not be vague and must place members of the bar on notice. At the same time, no ethics rule should be designed to hamper a legislator in the performance of his or her duties, even when those duties include advocacy

162. *Id.* at 202.

163. *Id.* at 205–207.

164. Ferguson v. Maddox, 263 S.W. 888, 888 (Tex. 1924).

165. *See id.* at 888–89 ("The defendant Ferguson, after admitting his candidacy and his efforts and purpose to get his name placed upon the Democratic ticket, answered denying his alleged ineligibility, and averring that said judgment was and is void, and ineffectual to disqualify him . . . .").

166. *Id.* at 889.

167. *Id.*

168. *Id.*

169. *Id.* at 890. Shortly after, the court also noted that, on receipt of the impeachment articles, the state senate "under the mandate of the [c]onstitution, resolves itself into a court for the trial of the charges, and it may and must continue this trial until the matter is disposed of by final judgment." *Id.* at 891.

for unpopular or noxious causes. Yet an impeachment trial is sufficiently judicial to merit a rule such as proposed above. Such a rule, if enacted by the bar associations of each of the fifty states, will reinforce the sanctity of the judicial oath as well as the importance of the attorney oath. Bar discipline against a legislator might be deemed a political weapon, but the proposed rule, as noted above, does not require a legislator to vote for specific outcome; nor does the rule require recusal based on party affiliation. The rule is designed to inform lawyers who become legislators that in the rare instance of an impeachment trial, the code of attorney ethics demands they comport to the expectations of behavior required of all attorneys. In doing so, this rule will serve as a means against further erosion of respect for the law.