

## **Moving Towards an Impartial Judiciary: Recommendations to Prevent and Discipline Judicial Bias**

**By Alison Shlom**

### **I. Introduction**

The role of the judicial branch of the United States government is to interpret the meaning of laws, apply laws to individual cases, and decide if laws violate the Constitution.<sup>1</sup> Citizens expect, and the Judicial Conduct Code mandates, that judges arbitrate neutrally.<sup>2</sup> A paradox arises because judges are humans, yet remaining entirely neutral while assessing the persuasiveness of one argument against another is a near-impossible task for a human. Everyone has implicit biases; one's experiences and identity shape one's reactions to race, sex, religion, and age, for example.<sup>3</sup> However, society and the law expect judges to act outside of those implicit biases. When a judge fails to put aside his or her implicit bias in a ruling, a party may seek to hold him or her accountable. More often than not, parties do not seek to hold him or her accountable, and judges remain unpunished for bias in the courtroom.<sup>4</sup>

Judicial bias is tricky; a simple accusation is not sufficient to hold a judge accountable. After all, parties often label judges as unfair and biased any time a case is not decided the way

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<sup>1</sup> See U.S. CONST. art. III, §§ 1–2.

<sup>2</sup> See MODEL CODE OF JUDICIAL CONDUCT Canon 3(C)(1) (AM. BAR ASS'N 2011) (“A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned”).

<sup>3</sup> See Justice Michael B. Hyman, *Implicit Bias in the Courts*, 102 ILL. B.J. 40, 43 (2014).

<sup>4</sup> See David Pimentel, *The Reluctant Tattletale: Closing the Gap in Federal Judicial Discipline*, 76 TENN. L. REV. 909, 911 (2009) (“as a rule, . . . attorneys do not take the additional step of filing complaints against the judges, and whatever misconduct they may recount to each other rarely finds its way into the judicial disciplinary process”).

the party hoped it would.<sup>5</sup> Consequentially, public discourse is quick to blame unfavorable decisions on judicial bias.<sup>6</sup> Attorneys should be well-versed on the differences between unfavorable decisions and biased decisions. Unfavorable decisions are inevitable in nearly every case because the adversarial nature of litigation requires a winner and a loser, whereas biased decisions are unfair and prevent impartial justice. While attorneys would be unwise to report a judge based on a merely unfavorable decision, attorneys have an affirmative duty under Model Rule 8.3(b) to report judges who play favorites; evince racial, gender, or sexual orientation insensitivity or bias; or behave abusively or arbitrarily from the bench.<sup>7</sup> However, attorneys are often hesitant to act on this duty due to a variety of competing interests, such as the impact it may have on the attorney's relationship with the judge.<sup>8</sup> As a result, judicial bias goes unreported more often than not.<sup>9</sup>

This paper argues that the available avenues to hold a judge accountable for bias are insufficient to ensure impartial justice. First, Part II provides background information regarding the implications of elected and appointed judgeships, both of which inevitably bring politics and bias into the judicial system.<sup>10</sup> Part II also explains the rules and procedures intended to prevent judicial bias and the avenues that attorneys and their clients may pursue to prevent or punish judicial bias.<sup>11</sup> Next, Part III argues that elections and appointments result in a biased judiciary, that the existing rules and procedures fall short of holding judges accountable, and that the

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<sup>5</sup> *Talk of the Nation: Judicial Bias: What Crosses the Line?*, NPR (July 19, 2012, 1:00 PM), <https://www.npr.org/2012/07/19/157052848/laying-down-the-law-on-judicial-bias>.

<sup>6</sup> *Cf. id.*

<sup>7</sup> *See* Pimentel, *supra* note 4, at 911 (citing MODEL RULES OF PROF'L CONDUCT r. 8.3(B) (AM. BAR ASS'N 1983)).

<sup>8</sup> *Id.* at 928.

<sup>9</sup> *Id.*

<sup>10</sup> *See infra* Part II.

<sup>11</sup> *See id.*

existing process for sanctioning judicial misconduct is inconsistent to properly punish bias.<sup>12</sup>

Part IV proposes a variety of solutions, including (1) that the Model Code adopt a judge fitness provision, (2) that the Supreme Court adopt a code of conduct, (3) that the Judicial Code of Conduct protect attorneys who report judicial bias, and (4) that the Model Rules for Judicial Disciplinary Enforcement replace aspirational language with binding language for sanctions for misconduct.<sup>13</sup> Finally, Part V concludes that the current ethics system does not prevent judicial bias and that the best means to protect parties and attorneys is to amend the Model Code.<sup>14</sup>

## **II. Background**

### *A. The Implications of Elected and Appointed Judgeships*

Judges are elected or appointed, each of which brings politics into the courts. The only Constitutional parameter for federal judgeship nominations is “good behavior,” which is a broad and vague standard considering that federal judges serve for life.<sup>15</sup> In fact, the Supreme Court ruled in *Northern Pipeline Const. Co. v. Marathon Pipeline Co.* that under the Good Behavior Clause, “Article III judges shall enjoy life tenure, subject only to removal by impeachment,” which is exclusively in Congress’s power.<sup>16</sup> The discourse around judicial fitness is typically limited to removal, and no law otherwise provides further prerequisites for a judicial nominee or candidate.

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<sup>12</sup> See *infra* Part III.

<sup>13</sup> See *infra* Part IV.

<sup>14</sup> See *infra* Part V.

<sup>15</sup> U.S. CONST. art. III, § 1.

<sup>16</sup> See *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (holding that the Bankruptcy Reform Act’s broad grant of jurisdiction to bankruptcy judges violates Article III).

The Constitution empowers the President to appoint federal judges and the Senate to “consent” to those nominations.<sup>17</sup> Despite little guidance from the Constitution, the President has a strong incentive to choose appointees carefully to maintain his or her legacy.<sup>18</sup> Therefore, a president has priorities apart from choosing a judge who is most fit for the position. Presidents and the Senate understand that judges’ philosophies determine the policies that result from the courts’ decisions. Presidents and presidential candidates often declare their intention to appoint judicial nominees whose values and policies align most closely with their own.<sup>19</sup> For example, President George H. W. Bush promised to appoint pro-life Justices; Senator Kerry promised to appoint Justices who would not overturn *Roe v. Wade*; and President Clinton promised to appoint Justices who would support a constitutional right to privacy.<sup>20</sup> President Trump has opined that many of his administration’s cases have failed because they were presented before “Obama judges.”<sup>21</sup>

In particular, because Supreme Court Justices serve for life, Presidents want to leave their mark and are therefore heavily incentivized to choose Justices that tend to rule in favor of particular political policies. For example, newly-appointed Justice Kavanaugh tended to rule

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<sup>17</sup> The Constitution empowers the Executive to “nominate, and by and with the Advice and Consent of the Senate . . . Judges of the Supreme Court, and all other Officers of the United States.” U.S. CONST. art. II, § 2, cl. 2. Members of the Senate have the power to consent based on their political preferences.

<sup>18</sup> See Michael R. Dimino, Sr., *The Worst Way of Selecting Judges-Except All the Others That Have Been Tried*, 32 N. KY. L. REV. 267, 285 (2005).

<sup>19</sup> See *id.*

<sup>20</sup> See *id.* (citing *Roe v. Wade*, 410 U.S. 113 (1973)) (citing more examples of Presidents and President elects promising to appoint Justices with particular values).

<sup>21</sup> For a summary of the debate between President Trump and Chief Justice John G. Roberts Jr. of the United States Supreme Court on whether there are “Obama judges,” see Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks “Obama Judge,”* N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html>.

against wildlife protection as a judge in the lower courts and is likely to continue to do so as a Supreme Court Justice.<sup>22</sup>

Judicial elections similarly tether politics to the courts. The public, due to unfamiliarity with the legal system and the law, tends to vote for judges based on factors apart from merit, such as name recognition, ethnicity, and years of experience.<sup>23</sup> Though judges are ethically obligated to remain politically neutral, the Supreme Court has ruled on cases that permit lower court judges to express their views on disputed matters while running for election or reelection.<sup>24</sup> As a result, judicial candidates can make statements that suggest political promises in exchange for voter support.<sup>25</sup> Additionally, judicial candidates may accept campaign donations, which further commit or pressure the judge to rule a certain way once on the bench.<sup>26</sup> Furthermore, elected judgeships are not lifetime positions and therefore judges who are keen for reelection may be more responsive to the preferences of the median voter.<sup>27</sup> The late California Supreme Court Justice Otto Kaus once likened the dilemma of deciding controversial cases while facing reelection to finding a crocodile in one's bathtub when going to shave in the morning – “[y]ou

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<sup>22</sup> See generally William J. Snape, III, *A Pattern of Ruling Against Mother Nature: Wildlife Species Cases Decided by Justice Kavanaugh on the DC Circuit*, 19 *Sustainable Dev. L. & Pol'y* 4 (2018).

<sup>23</sup> See Dimino, *supra* note 18, at 267.

<sup>24</sup> See *Republican Party of Minnesota v. White*, 536 U.S. 765, 774 (2002) (holding that the “Announce clause” in Minnesota Supreme Court’s canon of judicial conduct, which prohibited candidates for judicial election from announcing their views on disputed legal or political issues, violated the First Amendment); see also *Talk of the Nation*, *supra* note 5 (clarifying that while judges may give their views on disputed matters, they “cannot make a pledge or promise as to how they will rule in a particular case or category of cases”).

<sup>25</sup> See *Talk of the Nation*, *supra* note 5.

<sup>26</sup> See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (ruling that Justice Benjamin should have recused himself from a case in which the appellant had donated substantially to Justice Benjamin’s close-call reelection campaign).

<sup>27</sup> See Dimino, *supra* note 18, at 272.

know it's there, and you try not to think about it, but it's hard to think about much else.”<sup>28</sup>

Elections may result in biases that represent the policies of the average citizen in a particular jurisdiction, but these are biases nonetheless.<sup>29</sup> The fundamental concepts of justice and fairness should not be tailored to locality.

### *B. Rules and Procedures Against Judicial Bias*

State and federal codes of conduct obligate state and federal judges to remain impartial. States may fully or partially adopt the American Bar Association (ABA) Model Code of Professional Conduct, which has itself adopted the Judicial Code of Conduct and otherwise prohibits bias in Rules 1.1, 2.2, and 2.3(A)–(B).<sup>30</sup> Model Rule 1.1 adopts the Judicial Code of Conduct, and Model Rule 2.2 requires that judges “uphold and apply the law” and “perform all duties of judicial office fairly and impartially.”<sup>31</sup> Furthermore, Model Rule 2.3(A) provides that “[a] judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.”<sup>32</sup> Model Rule 2.3(B) expands upon how a judge should perform duties “without bias or prejudice”:

A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.<sup>33</sup>

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<sup>28</sup> Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 Notre Dame L. Rev. 1133, 1133 (1997).

<sup>29</sup> *See id.*

<sup>30</sup> MODEL RULES OF PROF'L CONDUCT r. 1.1, 2.2, 2.3 (AM. BAR ASS'N 1983).

<sup>31</sup> *Id.* r. 1.1, 2.2 (requiring that judges “comply with the law”).

<sup>32</sup> *Id.* r. 2.3(A).

<sup>33</sup> *Id.* r. 2.3(B).

Each state adopts its own version of a Judicial Code of Conduct, as does the Judicial Conference for federal judges.<sup>34</sup> Canon 3 of the Code of Conduct for United States Judges outlines that “a judge should perform the duties of the office fairly, impartially and diligently.”<sup>35</sup>

The United States Supreme Court Justices are the only judges that do not operate under any code of conduct. While the Senate has long pushed for laws to hold the Justices accountable, Congress has yet to pass a bill requiring accountability due to concerns about separation of powers.<sup>36</sup> The canon of formal guidelines that apply to lower court judges do not bind the Supreme Court Justices, yet the Justices may consult the guidelines.<sup>37</sup> Congress may impeach a Justice who violates Article II, but no other third party supervises Supreme Court Justices to ensure integrity, independence, and impartiality.<sup>38</sup> The lack of accountability is particularly difficult for the Supreme Court because parties cannot appeal a biased decision to a higher court.<sup>39</sup>

### *C. Steps to Prevent or Punish Judicial Bias*

Attorneys and their clients may pursue a variety of avenues to circumvent a biased decision or to hold a judge accountable for such misconduct. In theory, the rules and procedures to act against judicial bias are straightforward. In practice, however, all existing options fall short of effectively deterring judges from expressing their biases in their rulings.

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<sup>34</sup> See generally MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS'N 2011); CODE OF JUDICIAL CONDUCT FOR U.S. JUDGES (JUDICIAL CONFERENCE March 12, 2019).

<sup>35</sup> See CODE OF JUDICIAL CONDUCT FOR U.S. JUDGES Canon 3 (JUDICIAL CONFERENCE March 12, 2019).

<sup>36</sup> See Devin Dwyer, *House ethics bill would require Supreme Court to adopt code of conduct*, ABC NEWS (March 8, 2019), <https://abcnews.go.com/Politics/house-ethics-bill-require-supreme-court-adopt-code/story?id=61556981>.

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> See Talk of the Nation, *supra* note 5.

### *I. Preventative Actions Against Judicial Bias*

Parties have two ways to prevent bias. First, a party may file a recusal motion.<sup>40</sup>

Generally, a judge must disqualify himself or herself if he or she has a personal bias or prejudice concerning a party to the lawsuit or has personal knowledge of the facts that are disputed in the proceeding.<sup>41</sup> In federal court, 28 U.S. Code § 144<sup>42</sup> and § 455<sup>43</sup> provide methods to move for recusal of a federal judge who a party suspects of bias. Outside of federal court, state constitutions, court rules, and/or state statutes require judges to disqualify themselves where good cause for doing so exists.<sup>44</sup> The Supreme Court recently reviewed the standard for self-recusal in *Caperton v. A.T. Massey Coal Co.*, where a party in the case donated a substantial sum of money to the judge's reelection, and the judge refused to recuse himself from the case.<sup>45</sup> The Court concluded that the Fourteenth Amendment Due Process Clause provides an objective

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<sup>40</sup> In most American jurisdictions, a judge may only be disqualified “for cause,” and in some jurisdictions, recusal is constrained by the “duty to sit doctrine.” See Grounds for Recusal, JUDICIAL DISQUALIFICATION RESOURCE CENTER, <http://www.judicialrecusal.com/grounds-for-recusal/> (last visited March 28, 2019).

<sup>41</sup> See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009).

<sup>42</sup> “Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.” 28 U.S.C. § 144 (2012). The requirements for the affidavit are relatively accessible and straightforward. The party may file one affidavit and “state the facts and the reasons for the belief that bias or prejudice exists” at least ten days before the proceeding at which the court will hear it, “accompanied by a certificate of counsel of record stating that it is made in good faith.” *Id.*

<sup>43</sup> U.S. Code § 455(a) is a “catch-all provision” that broadly requires disqualification at the “appearance” of bias, and U.S. Code § 455(b) sets forth specific situations which require recusal is required. Attorneys are more likely, therefore, to bring disqualification motions under § 455(a) than § 455(b).

<sup>44</sup> For an explanation of each state’s requirements for recusal, see State Law Judicial Disqualification, JUDICIAL DISQUALIFICATION RESOURCE CENTER, <http://www.judicialrecusal.com/state-law-judicial-disqualification/> (last visited March 28, 2019).

<sup>45</sup> See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. at 872.

standard that does not require proof of actual bias.<sup>46</sup> This standard allows for the broad application of recusal and encourages judges to step down when an appearance of bias is present.

Additionally, in some cases, a party may use the ordinary procedural tool of the right to a jury trial to circumvent a judge's bias.<sup>47</sup> Requesting a jury trial could be a strategic choice that avoids a biased decision by a judge.<sup>48</sup> The parties may use their discretion as to whether the finder of fact in the case should be jury members rather than the judge. A party that requests a jury trial allows an otherwise biased judge to remain with his or her reputation intact. While this may preserve a good relationship between the judge and the attorneys, jury trials are an expensive and risky option for parties.

## 2. *Actions to Overcome and/or Discipline Judicial Bias*

If the parties do not request a jury trial and the judge reaches a biased decision, a party may file an appeal based on the alleged bias to hold that judge accountable. Oftentimes, a judge's bias results in poor reasoning; therefore, a party would argue the merits of the case. While this is a helpful action in lower courts, the appellate process is limited because a party may not appeal a Supreme Court decision.

Alternatively, a party may file a complaint against a judge suspected of bias with the jurisdiction's Commission on Judicial Conduct or equivalent governing body. In fact, under Rule 8.3(b), attorneys have an affirmative duty to report judicial misconduct.<sup>49</sup> An attorney who

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<sup>46</sup> See *id.* at 881 (requiring a mere "potential for bias" for self-recusal).

<sup>47</sup> See U.S. CONST. amend. VI.; FED. R. CIV. P. 38 (citing U.S. CONST. amend. VII).

<sup>48</sup> The founders wrote that juries could offer a "security against corruption." FEDERALIST NO. 83 (Alexander Hamilton); see Cassandra Burke Robertson, *Judicial Impartiality in A Partisan Era*, 70 Fla. L. Rev. 739, 772 (2018).

<sup>49</sup> MODEL RULES OF PROF'L CONDUCT r. 8.3(B) (AM. BAR ASS'N 1983). In some states, attorneys have the sole responsibility to protest the election or appointment of judges based on a lack of fitness. See, e.g., NEW YORK LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY Canon 8-6 ("It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial

has observed judicial bias has a duty to file a complaint with the state judicial conduct commission.<sup>50</sup> However, the jurisdiction of state judicial conduct commissions does not extend to reviewing the merits of a judge's decision, whether that be an incorrect finding of fact, misapplication of the law, or abuse of his or her discretion.<sup>51</sup>

As with arguing any allegation, a party must use evidence of bias to support its appeal or complaint. It is possible to achieve success with an appeal against a judge with court transcripts, audio recordings, letters, and eyewitness testimony. For example, in *State v. Kemble*, the Supreme Court of Kansas looked to the trial court transcript where the judge injected herself into a direct examination of a child witness.<sup>52</sup> When the child testified that she could not remember something, the judge insisted, "You know, it's not telling the truth if you say I don't remember, and you do remember."<sup>53</sup> The Supreme Court of Kansas ruled that the judge's statements to the witness improperly crossed the line of advocating for the prosecution.<sup>54</sup>

### III. Analysis

#### A. *Election and Appointment Methods Fail to Eliminate Unfit Judges from the Bench, Which Results in a Biased Judiciary.*

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fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication").

<sup>50</sup> Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 HOFSTRA L. REV. 1245, 1245–46 (2004).

<sup>51</sup> *Id.*

<sup>52</sup> *State v. Kemble*, 291 Kan. 109, 115 (2010) ("the trial judge must strive to have the trial conducted in an atmosphere of impartiality and should refrain from remarks or conduct that may injure a litigant").

<sup>53</sup> *Id.* at 117.

<sup>54</sup> *See id.* at 121.

The politics of judgeship elections and appointments detrimentally impact the public's right to impartial justice. Any sort of expressed penchant for a policy is paradoxical to a judge's duty to remain impartial. Both elections and appointments reward the biases inherent to political discussions, which results in a bench of inflexible judges. There is no true vetting process for preventing an unfit judge on the bench and therefore no way to ensure that a judge can remain impartial despite his or her political ties.<sup>55</sup> For appointees, there is no standard test for competency apart from the president and Congress's discretion.<sup>56</sup> For elected judges, there is no test for competency apart from the sometimes-uninformed opinion of voters, who may be unaware of the candidates' merits or otherwise prioritize their own philosophies.<sup>57</sup> Judicial Codes of Conduct require judges to rule impartially, yet appointed and elected judges are more likely to abide by their perceived commitments to the president who nominated them or the political party that supported them.<sup>58</sup>

Another issue that arises through judicial appointment is the permanency and apparent lack of accountability of United States Supreme Court Justices. Supreme Court Justices are not bound to a Code of Conduct other than the Constitution's requirement that they exhibit "good behavior."<sup>59</sup> They can only be removed for "treason, bribery or other high crimes and

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<sup>55</sup> *See id.*

<sup>56</sup> In some jurisdictions, a commission recommends appointees to the President. For example, in the District of Columbia, the Judicial Nomination Commission review applicants per the requirements in D.C. Code § 1-204.33 and recommend to the President three persons for possible nomination for each vacancy on the District of Columbia courts. *See Learn about the DC Court System and Application Process*, JUDICIAL NOMINATION COMMISSION <https://jnc.dc.gov/page/learn-about-dc-court-system-and-application-process> (last visited April 17, 2004).

<sup>57</sup> Dimino, *supra* note 18, at 272.

<sup>58</sup> *See id.* at 287 (explaining that Senate sometimes requires commitment of nominees regarding certain issues before confirming the nominee).

<sup>59</sup> *See* U.S. CONST. art. III, § 1.

misdemeanors."<sup>60</sup> The lack of formal rules necessarily puts the Supreme Court at risk because judicial accountability cannot be ensured. Supreme Court Justices are some of the most powerful people in the country, yet are only held accountable in the most extreme cases.<sup>61</sup> Such power allows for bias to slip through the cracks in the highest court in the United States. The House of Representatives has tried multiple times to pass a bill for a Supreme Court Code of Conduct, and every time Senate has blocked the bill.<sup>62</sup>

*B. The Existing Rules and Procedures for Misconduct Fail to Hold Judges Accountable.*

In practice, all existing options fall short of effectively deterring judges from expressing their biases. Despite the rules, judicial bias is overlooked.<sup>63</sup> Anecdotally, there is an imbalance between the type of judicial misconduct alleged and the subsequently imposed sanctions.<sup>64</sup> Most often, parties move for recusal or appeal a case on the merits rather than seek sanctions because attorneys prioritize their responsibility to their clients over their responsibility to protecting judicial integrity. Attorneys represent their clients to the best of their ability, but neither recusal nor appeal addresses the underlying issue of bias in the judiciary. Further, case law demonstrates that filing a complaint of judicial misconduct does not serve the best interests of an attorney's

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<sup>60</sup> U.S. CONST. art. II, § 4.

<sup>61</sup> See Michael P. Seng, *What Do We Mean by an Independent Judiciary?*, 38 Ohio N.U. L. Rev. 133, 134 (2011) (listing examples of misconduct that the Supreme Court Justices have not been held accountable for).

<sup>62</sup> See *id.* at 141 (noting that there is no recusal procedure for Justices on the Supreme Court).

<sup>63</sup> See Talk of the Nation, *supra* note 5.

<sup>64</sup> Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 Iowa L. Rev. 1213, 1253 (2002) (proposing the adoption of a modified peremptory challenge approach to appellate judicial disqualification due to the inconsistent application of recusal and disqualification criteria, among other reasons).

client because it does not affect the outcome of the case.<sup>65</sup> There is a fine line between legal error and judicial bias.

*1. Formal Complaints Are the Most Effective Means of Changing Judge Behavior*

Judicial recusal is a readily available, yet ultimately flawed method for attorneys to attempt to avoid a biased judge. There are many downsides that ultimately make it a risky choice. While some judges may understand the attorney's arguments and agree to recuse themselves, a failed recusal would create an "elephant in the room" for the entirety of the proceedings.<sup>66</sup> A scorned judge may be even more likely to express bias against the attorney's client, or animus toward the attorney during the proceeding, which could affect the perceptions of a jury as well.<sup>67</sup> Recusal is a means to potentially avoid bias in a case. However, there is a risk of rejection, and the judge is not held accountable for his or her bias.

If a motion to recuse fails, a party may appeal a biased ruling, but this is an insufficient process for penalizing judicial bias. Ultimately, if a losing party appeals a case, it is likely that any bias is apparent through the judge's poor reasoning, and the appellate court would discredit the holding based on its merits. Thus, it would be unnecessary to spend the resources necessary to additionally pursue a claim of bias. On appeal, there is no penalty for misconduct, and the judge may continue to use his or her bias in cases to come.

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<sup>65</sup> See, e.g., *In re Charge of Judicial Misconduct or Disability*, 137 F.3d 650, 651 (D.C. Cir. 1998) (noting that a judicial misconduct proceeding is not an appropriate avenue by which to challenge the propriety of a judicial decision).

<sup>66</sup> Some judges may disagree with a recusal motion and refuse to disqualify themselves. See *Talk of the Nation*, *supra* note 5.

<sup>67</sup> See *id.*

2. *The Model Code Does Not Protect Attorneys and, Therefore, Attorneys are Unmotivated to File Formal Complaints*

The most effective means for correcting judicial bias, in theory, should be through formal complaint. After all, Model Rule 8.3(b) is well-crafted and strongly states an affirmative duty for attorneys to report judicial misconduct.<sup>68</sup> However, in practice, the obligations under Rule 8.3(b) are typically outweighed by the attorney's personal interest in maintaining cordiality with the court and their duty to represent the client's interest to the best of the attorney's ability.

First and foremost, attorneys recognize the importance of a good relationship with a judge in front of which they frequently argue.<sup>69</sup> Attorneys work for years to earn the good graces of judges. Therefore, it is against every sensibility to risk one's relationship with a judge with the negative impact a complaint would have on future cases. An attorney may further risk his or her reputation among other judges as well.

In practice, filing an ethical complaint against a judge may be adverse to a client's interest because it may make the judge angry and cause the judge to be less sympathetic to the client's arguments.<sup>70</sup> A judicial complaint will not always help a client's interest and may end up significantly damaging it.<sup>71</sup> This sacrifice creates an especially frustrating practical and ethical

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<sup>68</sup> MODEL RULES OF PROF'L CONDUCT r. 8.3(B) (AM. BAR ASS'N 1983).

<sup>69</sup> See ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 205–06 (2008) (“If [the court remembers you] as fair-minded, reliable, and trustworthy ... they will be more likely to grant discretionary review in a case ... and when you appear to argue, the credibility you have developed will give you a leg-up”).

<sup>70</sup> *Id.*; see also MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 3 (AM. BAR ASS'N 2008) (“A client's interests often can be adversely affected by the passage of time or the change of conditions. . . Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.”).

<sup>71</sup> See Samuel K. Benham, *Judicial Purgatory: Strategies for Lawyers*, 58 Drake L. Rev. 585, 593 (2010).

dilemma, and the lawyer must weigh the client's potential suffering and a judge's wrath.<sup>72</sup> The Model Rules contradict each other because the lawyer must consider how to represent his or her client's interests.

Furthermore, an attorney may witness and endure a genuine violation of the Judicial Code of Conduct but be reluctant to report. Many attorneys would prefer to remain anonymous in the formal complaint process, but the formal complaint process discourages anonymous complaints.<sup>73</sup> The attorney's identity may be important to provide sufficient evidence to prove misconduct, and judges have a right to confront their accusers under the Sixth Amendment.<sup>74</sup>

Attorneys observe judicial behavior more closely than any others in the legal system and are more likely to be fully aware of misconduct. However, attorneys do not typically file complaints against judges. Whatever misconduct attorneys notice rarely finds its way into the judicial disciplinary process.<sup>75</sup>

*C. Existing Sanctions for Judicial Misconduct Fail to Consistently Punish Bias*

Even when an attorney follows Rule 8.3(b) and files a report, the most serious misconduct does not seem to result in the most severe sanctions. The most severe penalty for violating the Judicial Code of Conduct is removal from judicial office.<sup>76</sup> However, judges most often get away with a milder punishment, such as a short suspension.<sup>77</sup> Cases highlighted by the

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<sup>72</sup> *See id.*

<sup>73</sup> The complaint process asks complainants to provide contact information and sign the complaint. Judicial Conference of the United States, Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 6(d) (2008). These rules are binding for the federal judiciary and provide greater detail for the judicial complaint process.

<sup>74</sup> *See Pimentel, supra* note 4, at 951 (citing U.S. Const. amend. VI.).

<sup>75</sup> *Id.* at 911.

<sup>76</sup> *See id.* at 916.

<sup>77</sup> *See, e.g.,* Tracey Read, *Cuyahoga judge Daniel Gaul receives stayed license suspension*, THE NEWS-HERALD (Oct. 7, 2010), [https://www.news-herald.com/news/cuyahoga-judge-daniel-gaul-receives-stayed-license-suspension/article\\_ab10cc0a-dc44-556a-9095-561d90f33778.html](https://www.news-herald.com/news/cuyahoga-judge-daniel-gaul-receives-stayed-license-suspension/article_ab10cc0a-dc44-556a-9095-561d90f33778.html).

media in which judges lose their seats on the bench are the exception, not the rule, and these cases hardly represent cases of misconduct, but rather cases of felony.<sup>78</sup>

In practice, inconsistent enforcement forgives judicial bias. A popular podcast called *Serial* exposed the explicit bias of the controversial Judge Daniel Gaul of the Cuyahoga County Common Pleas Court, and the lack of punishment for his misconduct in an episode called “You’ve Got Some Gauls.”<sup>79</sup> Judge Gaul has a reputation for using racist language in the courtroom and regularly imposing unreasonable and even unconstitutional sentences.<sup>80</sup> Eight years before the podcast episode aired, the Ohio Supreme Court suspended the judge's license for six months for comments he made during a 2007 assault case.<sup>81</sup> However, the Ohio Supreme Court stayed his suspension so long as he met certain conditions.<sup>82</sup> Among other controversial and perhaps unconstitutional rulings, Judge Gaul ordered a defendant not to have another child out of wedlock.<sup>83</sup> The Ohio Supreme Court hoped that suspension would change Judge Gaul's conduct, but it did not. The podcast episode recorded multiple hearings in front of Judge Gaul in which he continued to demonstrate extreme and overt biases. In September 2018, Sarah Koenig, the host of the podcast, mused, “As long as the voters keep voting for him then, he’s going to keep on keeping on. And he’s right. Yes, there’s the appeals court and the discipline board. But

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<sup>78</sup> Cf. Pimentel, *supra* note 4, at 957 n.66.

<sup>79</sup> *Serial: You’ve Got Some Gauls* (Sept. 18, 2018), <https://serialpodcast.org/season-three/2/youve-got-some-gauls>; see Darren Sweeney, *Popular podcast puts focus on election of judges*, FOX 8 CLEVELAND (Sept. 26, 2018, 06:17 AM), <https://fox8.com/2018/09/26/popular-podcast-puts-focus-on-election-of-judges/> [hereinafter *Serial*].

<sup>80</sup> *See id.* (“Koenig reported that Gaul often calls black male defendants ‘brother’ and ‘dude.’ He also uses terms like ‘baby mama’”).

<sup>81</sup> Read, *supra* note 77.

<sup>82</sup> Judge Daniel Gaul essentially received a warning of a six-month suspension of his law license, with certain conditions. *See id.*

<sup>83</sup> *See Serial*, *supra* note 79.

really, every six years, it's the voters who have the final say."<sup>84</sup> In the words of Judge Gaul, "I'm not racist or wrong in any way because nobody has ever successfully complained about me or removed me from my job yet."<sup>85</sup> Judge Gaul's statement suggests that the threat of real repercussions would change his behavior. Following the episode, despite a close race against a black female candidate who is "calm, measured, and ardent about the need for change and for bringing new perspectives to the bench," Judge Gaul prevailed and will maintain his place on the bench for another six-year term.<sup>86</sup>

Judge Daniel Gaul's case is an extremely overt example of bias persevering in the judicial system. Judge Gaul's punishment was unacceptable considering the racist tenor of his comments. While Judge Gaul received a stayed suspension, Judge Michael S. Williams lost his seat on the bench in a California family court over petty theft.<sup>87</sup> Judge Williams stole two business card holders, worth between \$30 and \$50 each.<sup>88</sup> When the media publicized his misconduct, Judge Williams resigned. The Ohio Supreme Court imposed a forgiving sanction for Judge Gaul's bias, whereas Judge Williams agreed to resign before his case before the California Supreme Court heard his case.<sup>89</sup> There is an inconsistency regarding how states address and sanction judicial misconduct.

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<sup>84</sup> *See id.*

<sup>85</sup> *Id.*

<sup>86</sup> Wanda C. Jones for Cuyahoga County Common Pleas Court, Jan. 6 term: endorsement editorial (Sep 20, 2018),

[https://www.cleveland.com/opinion/2018/09/wanda\\_c\\_jones\\_for\\_cuyahoga\\_cou.html](https://www.cleveland.com/opinion/2018/09/wanda_c_jones_for_cuyahoga_cou.html).

<sup>87</sup> Press Release, Comm'n on Judicial Performance, Judicial Performance Comm'n Issues Decision and Order Imposing Pub. Censure of Judge Michael S. Williams Pursuant to Stipulation (July 17, 2012) (on file with author).

<sup>88</sup> *Id.*

<sup>89</sup> *See id.*

Another recent case of judicial bias involved Judge Vance D. Day of the Marion County Circuit. The Oregon Supreme Court suspended Judge Day for three years without pay for his explicit bias toward same-sex couples because he declined to perform same-sex marriages in 2014.<sup>90</sup> Judge Day offered to perform marriage ceremonies to opposite-sex couples and deliberately discriminated against same-sex couples.<sup>91</sup> Bias was not Judge Day's only downfall—in 2015, the Commission on Judicial Fitness and Disability found “clear and convincing evidence” for a total of eight of thirteen counts of violating the ethics code.<sup>92</sup> Judge Day appealed to the Supreme Court of the United States to defend his religious freedom, but the Court refused to hear the appeal.<sup>93</sup> These examples demonstrate the inconsistency of sanctions for judicial misconduct, which in turn does little to promote impartiality in the judiciary.

#### **IV. Recommendations**

Due to the competing interests of the attorneys in the best position to identify and act on judicial bias, multiple solutions may be necessary to confront judicial bias. Possible tactics include preventative measures to ensure that only competent judges are placed on the bench in the first place and that impartiality is encouraged once judges are on the bench. Other tactics include amending the Model Rules for Judicial Discipline Enforcement to encourage disciplinary measures that hold judges accountable.

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<sup>90</sup> See Gordon Friedman, *Vance Day misconduct hearings begin*, STATESMAN JOURNAL (Nov. 9, 2015: 12:37 PM), <https://www.statesmanjournal.com/story/news/politics/2015/11/09/vance-day-misconduct-hearings-begin/75454280/>.

<sup>91</sup> *Id.*

<sup>92</sup> *See id.*

<sup>93</sup> See *Suspended Oregon Judge Vance Dar strikes out at U.S. Supreme Court*, OREGONLIVE (Oct. 9, 2018), [https://www.oregonlive.com/pacific-northwest-news/2018/10/suspended\\_oregon\\_judge\\_vance\\_d.html](https://www.oregonlive.com/pacific-northwest-news/2018/10/suspended_oregon_judge_vance_d.html).

A. *Clarify Judicial Competence and Adopt a Judge Fitness Provision to the Model Code*

The judicial nomination and election systems are inherently political, and meaningful Constitutional reform will take time.<sup>94</sup> In the meantime, a more immediate solution would be to clarify judicial competence by adding a judge fitness provision to the Model Code, which would then become a prerequisite to taking the bench.

In its current form, the Model Code provides no true prerequisites to determine that a judicial nominee or candidate is competent in the law. Model Code of Judicial Conduct Rule 2.5 requires competence, yet competence is not defined for this Rule as it is for Model Rule of Professional Conduct 1.1 for lawyer representation of a client.<sup>95</sup> Rule 1.1 explains that “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation” while Rule 2.5 does not define competence.<sup>96</sup> I propose that the ABA amend Model Code of Judicial Conduct Rule 2.5 to define competence and read as:

(A) A judge shall perform judicial and administrative duties, competently and diligently. *Competent performance requires the legal knowledge, impartial consideration, and preparation reasonably necessary for the performance.*<sup>97</sup>

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<sup>94</sup> See Ryan T. Becker, *The Other Nuclear Option: Adopting A Constitutional Amendment to Furnish A Lasting Solution to the Troubled Judicial Confirmation Process*, 111 PENN ST. L. REV. 981, 1006 (2007) (encouraging discussion regarding a Constitutional amendment to reform the judicial nomination process).

<sup>95</sup> Compare MODEL CODE OF JUDICIAL CONDUCT r. 2.5(A) (AM. BAR ASS'N 2011) (“A judge shall perform judicial and administrative duties, competently and diligently”), with MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 1983) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation”).

<sup>96</sup> MODEL CODE OF JUDICIAL CONDUCT r. 2.5(A); MODEL RULES OF PROF'L CONDUCT r. 1.1.

<sup>97</sup> The proposed language is italicized.

Furthermore, a fitness prerequisite would refine the judiciary to those who are able to judge impartially.<sup>98</sup> Judges who are fit can put their implicit biases aside to arbitrate neutrally.<sup>99</sup> The Model Rules are already structured for easy adoption of a judicial fitness provision because attorneys already have an affirmative duty to report judges who show a lack of fitness.<sup>100</sup> I propose that the ABA amend the Model Code of Judicial Conduct by adding a new Canon 5 which reads: “A Candidate For Judicial Office Shall Be a Licensed Attorney in Good Standing With Any State Bar.” Such a provision would ensure that the judicial candidate is competent in the law and otherwise fit as an attorney.

*B. Hold Supreme Court Justices Accountable*

Supreme Court Justices are not immune to expressing bias on the bench, yet the rules that govern judicial misconduct for lower court judges do not apply to the Justices. Congress either needs to use its power of checks and balances to pass legislation that requires a code of conduct, or the Supreme Court itself could move to adopt a code.

Every level court except for the Supreme Court has a higher supervisory court. At a minimum, a successful code of conduct for Supreme Court Justices would name a supervisory body to the Justices or explain how each Justice will be supervised by his or her peers. The code of conduct could otherwise follow the Model Code for Judicial Conduct.

*C. Protect Attorneys Who Report Judicial Bias*

Reporting judicial misconduct is the most effective avenue to ensure an impartial judiciary. However, an attorney who witnesses and endures a genuine violation of the Judicial

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<sup>98</sup> Cf. Dimino, *supra* note 18, at 294 (explaining that politics reduces the fitness of elected judges because merit is not a primary concern for voters).

<sup>99</sup> See Hyman, *supra* note 3, at 47 (encouraging awareness of implicit bias to ultimately eliminate judicial bias).

<sup>100</sup> MODEL RULES OF PROF'L CONDUCT r. 8.3(B).

Code of Conduct may be reluctant to report because the formal complaint process discourages anonymous complaints. The ABA should amend the Model Rules of Professional Conduct to protect attorneys willing to sign a formal complaint. I propose that the ABA amend Rule 8.3(B) to read:

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority *and may do so anonymously*.<sup>101</sup>

This is an imperfect option, but it would encourage attorneys to report judicial misconduct, and several states including Louisiana and Texas already allow anonymous, unsigned complaints.<sup>102</sup>

#### *D. Establish Sanction Guidelines*

The sanctions requirements under the current Model Rules for Judicial Discipline Enforcement are merely aspirational. The rules outline the grounds for discipline and the sanctions; however, rather than obliging sanctions, Section II Rule 6(2) states: “These sanctions *may* be imposed upon a respondent who has committed misconduct.”<sup>103</sup> Therefore, even the most minor sanction of a deferred discipline agreement is optional. At a minimum, I propose that the ABA amend Rule 6(2) to read: “These sanctions *shall* be imposed upon a respondent who has committed misconduct.”<sup>104</sup>

Furthermore, the commentary for Rule 6(2) discourages removal by impeachment.<sup>105</sup>

This notion merely confirms and encourages those who review judicial misconduct to forgive the

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<sup>101</sup> The proposed language is italicized.

<sup>102</sup> Benham *supra* note 71, at 602.

<sup>103</sup> See MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT § II Rule 6(2) (emphasis added).

<sup>104</sup> The proposed amendment is italicized.

<sup>105</sup> *Id.* (“Removal by impeachment is the least desirable method of judicial discipline. It is an all-or-nothing approach. The impeachment process is subject to political considerations and it is expensive, cumbersome and ineffective. However, the availability of impeachment as a sanction serves as a check not only upon the judiciary, but upon the judicial discipline and incapacity process as well”).

judges rather than seek sanctions. The commentary explains the implications of impeaching; however, I propose that to amend the commentary to open up the potential for impeachment by adding: “Impeachment shall be used when a judge’s misconduct shows that he or she lacks the required fitness to perform his or her judicial and administrative duties impartially.”

## **V. Conclusion**

The founding fathers intended a neutral judiciary and the Model Code has slowly moved in this direction.<sup>106</sup> Amendments to the Model Code only recently prohibited sexual harassment, demonstrated bias against sexual orientation, and membership to discriminatory clubs such as Augusta National.<sup>107</sup> However, the judicial system is far from ensuring impartial justice.

An ideal judicial system would be entirely neutral. It would encourage the election and appointment of fit judges who are aware of implicit bias and set it aside to arbitrate neutrally. When implicit bias becomes express, attorneys should be protected and motivated to report such misconduct. Once an attorney reports the bias, the culpable judge should receive a predictable and fair sanction. This standard is the framework of the American legal system—we look to case precedent for guidelines of punishments and sanctions that are predictable and fair. The same standard should apply to judicial misconduct. A judicial system with these changes would provide all people the opportunity to receive impartial justice.

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<sup>106</sup> See Robertson, *supra* note 48, at 772.

<sup>107</sup> See Talk of the Nation, *supra* note 5.