The Procedures of Judicial Discipline

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THE PROCEDURES OF JUDICIAL DISCIPLINE

INTRODUCTION

The recently approved Canons of Judicial Conduct have generated much discussion of procedures for administration of the rules. Among the questions asked are the following: What standards should be applied to determine when a violation has occurred? What is the best procedural machinery? Is it necessary to change the traditional methods? How do we answer these questions within the framework of generally accepted interests, these being to protect litigants, promote court efficiency and preserve judicial independence?

It is not the purpose of this article to answer these questions, but rather to examine the procedures of judicial discipline, and the state and federal frameworks in which they operate. The article will focus on the role of the Code of Judicial Conduct, and the evolution of impeachment. The main thrust, however, will be in the following three areas: (1) whether the legislature has an inherent power to regulate judicial conduct; (2) whether the judiciary, usually the supreme court of the state, can control the conduct of judges; and (3) formal constitutional mechanisms that have been created—notably the California Commission on Judicial Qualifications.

Types of Conduct Involved

The types of conduct which have been determined to warrant control of some sort generally fall into one of two categories. The first category, involving acts of moral turpitude such as bribery, murder, and theft, is the most serious. Impeachment has traditionally been the remedy for this type of conduct, and the problem involved has been one of proof and not whether the act itself, if proved, warranted discipline. The second type of conduct involves either acts which violate the Code of Judicial Conduct, or other undesirable but legal acts. Examples are habitual drunkenness, laziness, senility, and physical or mental disability. The discipline of the latter type of

1. That is a warning against a heavy lunch for a judge who is going to be hearing arguments on a warm afternoon. There is a common story about the judge who dreamed he was trying a case and, when he woke up, he was! Hill, Sir Matthew Hale and Modern Judicial Ethics, 54 J. Am. Jud. Soc'y 280 (Feb. 1971).

2. On a continuum, five paradigmatic kinds of judicial misconduct may be
conduct is the subject of this article. The following excerpt from a sentencing proceeding will illustrate a form of this type of misconduct. Judge Chargin was censured by the California Supreme Court in the case of *In re Chargin* for the following performance:

The Hon. Gerald S. Chargin, Judge of the Santa Clara County (Cal.) Superior Court (Juvenile Department) made the following remarks in sentencing a Mexican-American boy on September 2, 1969.

**THE COURT:** "There is some indication that you more or less didn't think that it was against the law or was improper. Haven't you had any moral training? Have you and your family gone to church?"

**THE MINOR:** "Yes, sir."

**THE COURT:** "Don't you know that things like this are terribly wrong? This is one of the worst crimes that a person can commit. I just get so disgusted that I just figure what is the use? You are just an animal. You are lower than an animal. Even animals don't do that. You are pretty low.

"I don't know why your parents haven't been able to teach you anything or train you. Mexican people, after 13 years of age, it's perfectly all right to go out and act like an animal. It's not even right to do that to a stranger, let alone a member of your own family. I don't have much hope for you. You will probably end up in State's Prison before you are 25, and that's where you belong, any how (sic). There is nothing much you can do.

"I think you haven't got any moral principles. You won't acquire anything. Your parents won't teach you what is right

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identified, each possessing a different probability of affecting the impartiality of decision and each possessing a different degree of objectionable chilling effect. First, the judge may have decided a case in the outcome of which he held a personal interest. Second, he may have engaged in courtroom conduct unbefitting the dignity of his office. Third, the judge may have used his judicial office to influence some matter unrelated to a case before him, but in which he was personally interested. Fourth, he may have committed a crime reflecting to a greater or lesser extent on his general reputation for honesty or morality. Finally, the judge may have committed some indiscretion short of crime, and unrelated to the performance of his judicial function. It will be noted that the degree of objectionable chilling effect produced by vague prohibitions of each of the foregoing types of misconduct bears an inverse relationship to the probability that such misconduct will bias judicial decision. As a general rule, then, the more closely related misconduct is to the judicial function, the less specific need be the standards.

84 HARV. L. REV. 1002, at 1007-08 (1971) (Footnotes omitted).

or wrong and won’t watch out.

"Apparently, your sister is pregnant; is that right?"
The Minor's Father: "Yes."
The Court: "It's a fine situation. How old is she?"
The Minor's Mother: "Fifteen."
The Court: "Well, probably she will have a half a dozen children and three or four marriages before she is 18.

"The County will have to take care of you. You are no particular good to anybody. We ought to send you out of the county — send you back to Mexico. You belong in prison for the rest of your life for doing things of this kind. You ought to commit suicide. That’s what I think of people of this kind. You are lower than animals and haven’t the right to live in organized society — just miserable, lousy, rotten people.

"There is nothing we can do with you. You expect the County to take care of you. Maybe Hitler was right. The animals in our society probably ought to be destroyed because they have no right to live among human beings. If you refuse to act like a human being, then, you don’t belong among the society of human beings."

Mr. Lucero: [Public Defender, representing the defendant]
"Your Honor, I don’t think I can sit here and listen to that sort of thing."
The Court: "You are going to have to listen to it because I consider this a very vulgar, rotten human being."
Mr. Lucero: "The Court is indicting the whole Mexican group."
The Court: "When they are 10 or 12 years of age, going out and having intercourse with anybody without any moral training — they don’t even understand the Ten Commandments. That’s all. Apparently, they don’t want to.

"So if you want to act like that, the County has a system of taking care of them. They don’t care about that. They have no personal self-respect."
Mr. Lucero: "The Court ought to look at this youngster and deal with this youngster’s case."
The Court: "All right. That’s what I am going to do. The family should be able to control this boy and the young girl."
Mr. Lucero: "What appalls me is that the Court is saying that Hitler was right in genocide."
The Court: "What are we going to do with the mad dogs of our society? Either we have to kill them or send them to an institution or place them out of the hands of good people because that’s the theory — one of the theories of punishment is if they get to the position that they want to act like mad dogs, then, we have to separate them from our society."
"Well, I will go along with the recommendation. You will learn in time or else you will have to pay for the penalty with the law because the law grinds slowly but exceedingly well. If you are going to be a law violator — you have to make up your mind whether you are going to observe the law or not. If you can't observe the law, then, you have to be put away."

Possible Sources of Control

If control over the judiciary is to be achieved, the initial determination must be the source of control. Three sources have been employed for the exercise of control.

The first is by constitutional provision. The oldest and most accepted constitutional sources are impeachment, recall, address and resolution, with impeachment the best known of the four. Since 1960 another source has been available — The Commission on Judicial Qualifications. The Commission was pioneered in California and has been adopted in thirty-five states.5

The second source of control is by legislative act. This involves the adoption of a code of judicial conduct and a legislative plan for enforcement. A full discussion of legislative control will appear later in the article. The two primary criticisms are interference with the independence of the judiciary,6 and violation of the separation of powers doctrine. Will the Constitution allow one branch of government to control the acts of members of another branch?

The third source is from the judiciary itself, and Wisconsin is the recognized leader in this area.7 The main criticism concerns public confidence. Can judges properly and fairly discipline other judges?

6. Indicative of this conflict is Canon 1 of the Code of Judicial Conduct of the American Bar Association (1972):

   A Judge Should Uphold the Integrity and Independence of the Judiciary. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

I. CODE OF JUDICIAL CONDUCT

This article is not the proper forum for examination of the substantive rules of the Code of Judicial Conduct, but a synopsis of the development of the Code and its predecessor, the Canons of Judicial Ethics, is necessary.

As originally adopted in 1924 by the ABA, the Canons covered both the judicial and nonjudicial activities of judges. Twenty-two of the first thirty-four Canons dealt with the performance of the judges’ official duties. The remainder concerned nonjudicial activities.

The Code of Judicial Conduct was adopted by the ABA in 1972 after three years of research and drafting by a special committee of the ABA. The new Code has just seven Canons, but, in general, it has answered many questions in a reasonable and updated manner. The drafting committee also suggested that each jurisdiction establish its own system for judicial discipline.

8. The members of the Special Committee are: Chairman, Roger J. Traynor, Chief Justice of California Supreme Court, retired; Vice Chairman, Whitney North Seymour, former president of the American Bar Association, American College of Trial Lawyers, and the Association of the Bar of the City of New York; Associate Justice Potter Stewart of the United States Supreme Court; Judge Irving R. Kaufman, United States Court of Appeals for the Second Circuit, New York City, past President, Institute of Judicial Administration; Chief Judge Edward T. Gignoux, United States District Court, Portland, Maine; Associate Justice, James K. Groves, Supreme Court of Colorado; Judge Ivan Lee Holt, Jr., Circuit Court of Missouri, St. Louis, Missouri, former Chairman, American Bar Association Section of Judicial Administration; Judge George H. Revelle, Superior Court of King County, Washington, former executive committee member, National Conference of State Trial Judges; William L. Marbury, past President, Maryland State Bar Association, Walter P. Armstrong, Jr., Tennessee, Chairman of the American Bar Association Standing Committee on Ethics and Professional Responsibility; E. Dixie Beggs, Florida, former member of the American Bar Association Board of Governors, former Chairman of the Fellows of the American Bar Foundation; Robert A. Leflar, former Dean and now Distinguished Professor of Law, University of Arkansas Law School, former Associate Justice, Supreme Court of Arkansas; W. O. Shafer, Texas, former President of the State Bar of Texas, former Chairman of the National Conference of State Bar Presidents; Edward L. Wright, Arkansas, former President of the American Bar Association, former Chairman of the American Bar Association Special Committee on Evaluation of Ethical Standards, which developed the Code of Professional Responsibility. The Reporter for the Committee was Professor E. Wayne Thode, University of Utah College of Law; Professor Geoffrey C. Hazard, Jr., of Yale University Law School serves as Consultant to the Committee. Thode, REPORTER’S NOTES TO CODE OF JUDICIAL CONDUCT (1973).


10. For a look at how the Code is doing generally, see 57 J. AM. JUD. SOC’Y 321 (Feb.
The purpose of the new Code is best expressed in the following quote from an article by Dean McKay, Dean and Professor of Law at New York University School of Law:

Chief Justice Roger Traynor, speaking to the Second Circuit Judicial Conference in September 1970, said that the ABA Committee on Standards of Judicial Conduct does not aspire to rewrite the Ten Commandments, to annotate the seven deadly sins, or to prescribe a legislative code to forbid judges from hijacking planes, trains, buses, or other means of transport in interstate commerce. More prosaically, efforts to define standards of judicial conduct should not even be regarded as attempts to legislate morality. The problem is not one of coercing recalcitrant judges with the whip of threatened sanctions. The objective of improved standards is rather to provide guidance for judges who wish to conform to standards that will enlarge public confidence in the judicial process. Judge Irving Kaufman hit the right note, also speaking at the Second Circuit Judicial Conference, when he suggested that a code of judicial conduct asks judges to submit "to ethical dialogues rather than to penal directives."11

II. IMPEACHMENT

Under the Federal Constitution the House has the sole power of impeachment,12 and the Senate has the sole power to try all impeachments.13 A judge may be removed from office on impeachment for conviction of treason, bribery, or other high crimes and misdemeanors.14 The Constitution, however, also allows judges to keep their jobs through good behavior.15 The problem arises in interpreting the apparent conflict between "other high crimes and misdemeanors" and "good behavior." Either there is a gap here or "good behavior" reaches all the way to "high crimes and misdemeanors." President Ford stated, as a Congressman, that impeachment is whatever the House says it is.16 The questions remain, how effective can

impeachment be as a means of judicial discipline, and is it meant to be the sole means — particularly in the federal system?\footnote{17}

The last two impeachments in the federal system were dismal failures. The two men involved were Harold Lauderback, U.S. District Judge for the Northern District of California, impeached and acquitted in 1933; and Halstead Ritter, U.S. District Judge for the Southern District of Florida, impeached and convicted in 1936.

Natton Sumners, who was Chairman of the House Judiciary Committee at the time of both impeachments, stated:

... Senators are busy legislators, not Judges. Whether or not a Judge is guilty of bad conduct, for which under the Constitution he loses his right to hold office, is a justifiable question.\footnote{18}

He further stated that the Lauderback case was the greatest farce ever presented. At one time only three Senators were present, and most of the time the chamber was practically empty.

In the Ritter case, fifty-six votes were cast for impeachment, and of the fifty-six, only five were of the same political party as Ritter.

Presently forty-six states have impeachment provisions covering judges.\footnote{19} As of 1960, in forty of the forty-five states having such provisions, only nineteen removals and three resignations resulted from impeachment proceedings.\footnote{20}

The same problems that have occurred in the use of impeachment at the federal level are involved at the state level. Impeachment is generally ineffective, and for that reason other methods have supplanted it. Its use is now mainly restricted to cases of criminal corruption, where it is still quite effective in forcing resignation. The main reason for the ineffectiveness of impeachment is that legislators are not equipped to assume the role of judges in areas in which they have had limited contact. The procedure of the legislature, as a body, does not readily lend itself to the type of fact finding which is character-

\footnotesize{\begin{itemize}
  \item 19. 84 HARv. L. REV. 1002, 1008 n. 32 (1971).
\end{itemize}}
istic of a trial. Because there is no mechanism for the preliminary gathering of evidence or review of complaints, only cases that achieve the level of public scandal are likely to be considered.

The other methods, similar to impeachment, which need only be mentioned are: (1) resolution, which involves no trial but two-thirds vote of both houses; (2) address, in which the majority of both houses ask the Chief Executive to remove him; and (3) recall, where removal is by special election.21

Arizona has an unusual statute worthy of mention:

An office shall be deemed vacant from and after the occurrence of any of the following events before the expiration of a term of office: . . . Conviction of a felony or an offense involving a violation of his official duties.22

The Arizona Supreme Court found the statute consistent with the impeachment section of the Constitution.23 The court refused to hold that impeachment was the exclusive method of removal, but did hold that impeachment proceedings must comply with constitutional provisions.24

III. LEGISLATIVE POWER TO REGULATE JUDICIAL CONDUCT

While the legislatures of most states have the power of removal, it is derived not from the legislatures’ inherent powers, but from the constitution of the particular state. Controversy has arisen concerning the argument that since the legislature has the right to establish inferior courts, it also has the power to set up standards of judicial qualifications, and to establish a system of discipline and removal of judges.25 Opponents of this position argue that this would breach the separation of powers principle — the right of the judiciary to be free of control by another branch and the right of judges to carry out their

24. For a discussion of informal mechanism for removal, see Note, Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges, 41 N.Y.U. L. Rev. 149, 167-170 (1966). Briefly, these include contacts among judges, contacts within the Bar Association and the press or media pressure which can be brought to bear.
constitutional responsibilities without legislative or executive interference.²⁶

A number of cases have held that the impeachment clause is not the exclusive means of removal. The most noteworthy of these cases is the United States Supreme Court case of Myers v. United States.²⁷ Myers, which applied to executive officials, held that the President, acting alone, could remove an official even though that person had been approved by the Senate. The key language that the proponents cite is the "good behavior" language in Article III. Since "good behavior" is something less than "high crimes and misdemeanors," it suggests that a lesser standard is applicable to judges than executive officials, and that because this standard is outside the purview of impeachment, it should be applied by Congress. In fact, legislation having as its basis Article III, Section 1, of the United States Constitution, was introduced early in 1975 by Senator Nunn. The legislation would establish a Council of Judicial Tenure.

A contrary view was taken by the Utah Supreme Court in In re Woodward.²⁸ The court found the actions of a legislative commission that controlled the juvenile courts and could remove judges for cause an unconstitutional infringement upon the judiciary. The court stated: "Judges, in the constitutional sense, as is the case with a juvenile court judge, are amenable only to the constitutional sanctions for removal."²⁹

Perhaps more on point than Myers is the interesting case of Chandler v. Judicial Council of the Tenth Circuit.³⁰ Chandler, a federal judge in Oklahoma, was prevented from hearing any cases by the refusal of the Judicial Council of the Tenth Circuit to permit assignment of cases to him.³¹ In an unenlight-

²⁷ 272 U.S. 52 (1926).
²⁹ Id. at 340, 384 P.2d at 113.
³² 28 U.S.C. § 332 states:

The chief judge of each circuit shall call, at least twice in each year . . . a council of the circuit judges for the circuit, in regular active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall attend all sessions of the council.

The council shall be known as the Judicial Council of the circuit.

The chief judge shall submit to the council the quarterly reports of the
tening opinion by Chief Justice Burger, the Court held that Chandler had not pursued all remedies within the Council’s structure. Burger implied, however, that there could be no legislative control of good behavior.1

IV. JUDICIAL CONTROL BY THE JUDICIARY

About thirty state supreme courts have adopted either the Canons or similar ethical standards.3 In other states the Canons have been adopted by state bar associations, judicial conferences or merely by groups of judges.4 In his opinion in the Chandler case, Justice Douglas stated:

An independent judiciary is one of this Nation’s outstanding characteristics. Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge. He commonly works with other federal judges who are likewise sovereign. But neither one alone nor any number banded together can act as censor and place sanctions on him. Under the Constitution the only leverage that can be asserted against him is impeachment. . . . [T]here is no power under our Constitution for one group of federal judges to censor or discipline any federal judge. . . .

It is time that an end be put to these efforts of federal judges to ride herd on other federal judges. This is a form of “hazing” having no place under the Constitution. Federal judges are entitled, like other people, to the full freedom of the First Amendment. If they break a law, they can be prosecuted. If they become corrupt or sit in cases in which they have a personal or family stake, they can be impeached by

Director of the Administrative Office of the United States Courts. The Council shall take such action thereon as may be necessary.

Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.


Congress. But I search the Constitution in vain for any power of surveillance which other federal judges have over those aberrations.\textsuperscript{35}

This is a federal case and is not binding on the states. The courts in Florida, Louisiana and Nevada, however, have held that while a judge is an attorney, member of the bar and subject to removal from the bar, a court may not remove him from judicial office.\textsuperscript{36} This presents the interesting question of whether disbarment alone would be enough to remove a judge since he would no longer be a member of the bar, a requirement for office. Some courts have held that a judge is no longer an attorney or member of the bar,\textsuperscript{37} while New Jersey's Supreme Court held that since membership in the bar is required to hold judicial office, upon disbarment a judge is disqualified.\textsuperscript{38}

The Colorado Supreme Court has taken the most emphatic position by stating that the supreme court and the grievance committee of the bar association are without authority to institute or conduct disciplinary proceedings of any kind. This is true even in the extreme case in which a judge might admit violation of law or the commission of an act involving moral turpitude and dishonorable conduct, because the constitution dictates the remedy of impeachment.\textsuperscript{39}

An Oklahoma case has held that a judge is beyond the disciplinary power which the courts wield over attorneys, and therefore, a judge cannot be disbarred for conduct which violates the Canons.\textsuperscript{40} The Louisiana court held in \textit{State v. O'Hera}\textsuperscript{41} that under a constitutional provision allowing for removal for gross misconduct, a violation of a Canon is not enough. Massachusetts held to the contrary in \textit{In re DeSaulmier}:\textsuperscript{42}

We now rule that this court has jurisdiction to impose appropriate discipline upon a member of the bar, who is also a

\begin{footnotes}
\item[36] \textit{In re Proposed Disiplinary Action}, 103 So. 2d 632 (Fla. 1958) and \textit{In re Watson}, 71 Nev. 227, 286 P.2d 254 (1955).
\item[37] \textit{See State Bar v. Superior Court}, 207 Cal. 323, 278 P. 432 (1929).
\item[38] \textit{In re Mattera}, 34 N.J. 259, 168 A.2d 38 (1961).
\item[41] 352 La. 540, 211 So. 2d 641 (1968).
\end{footnotes}
judge, for misconduct or acts of impropriety, whether such acts involve his judicial conduct or other conduct. This, we hold, even though, because he is a judge, he is not permitted to engage in the practice of law. 43

In a more recent Iowa case, 44 the supreme court held that it could not suspend or remove any judge of an inferior court. This action is left solely to the people at an election or to the legislature in an impeachment. The court limited its power to censure. It should be pointed out that the pending adoption of a "Commission" system may have affected the outcome of the case.

A controversial case in this area is Cosack v. Hawlett. 45 In the wake of accusations of judicial impropriety, the House of Representatives of the Illinois General Assembly authorized the creation of a special investigating committee. In Cosack, the Circuit Court of Cook County enjoined the committee from expending any funds. The Illinois Supreme Court affirmed, holding that the committee violated the separation power clause of the state constitution. 46 The court held that the legislature could only investigate for legislative purposes, and that its authority had been exceeded. It further held that the Governmental Ethics Act was unconstitutional as applied to judges. 47 This case indicates that unless the legislature has removal power, it does not have the authority to establish and enforce standards of judicial conduct.

And finally, there are some decisions which adopt the view that a judge can be disciplined as an attorney only for conduct involving moral turpitude or providing grounds for disbarment. 48

The opposite position is represented by those cases finding an implied authority for the supreme court to discipline. The most recent assertion of this right was In re Code of Judicial Ethics. 49 The Supreme Court of Wisconsin adopted its own code, holding:

43. Id. at 274 N.E.2d at 456.
44. In re Municipal Court of Cedar Rapids, 188 N.W.2d 354 (Ia. 1971).
45. 44 Ill. 2d 233, 254 N.E.2d 506 (1959). For a complete examination, see 84 Harv. L. Rev. 1002 (1971).
46. Ill. Const., art. III.
48. In re Spriggs, 326 Ariz. 262, 284 P. 521 (1930); In re Wehrman, 327 S.W.2d 743 (Ky. 1959); and Petition of the Board of Commissioners of the State Bar of New Mexico for Instructions, 65 N.M. 332, 337 P.2d 400 (1959).
49. 36 Wis. 2d 252, 153 N.W.2d 873 (1967).
We hold this court has an inherent and an implied power as the supreme court, in the interest of the administration of justice, to formulate and establish the Code of Judicial Ethics accompanying this opinion. It governs judicial acts of a judge in his official capacity and certain personal conduct which interferes or appears to interfere with the proper performance of his judicial conduct. This power, inherent in the supremacy of the court and implied from its expressed constitutional grants of supervisory power, embraces all members of the judiciary including members of this court not only because they are lawyers but also because they are judicial officers in a court system constituting the judicial branch of the state government with a solemn duty to perform their judicial duties well.50

In December of 1971 the Supreme Court of Wisconsin took one more step by passing the Implementing Rules of the Code of Judicial Ethics.51 The court adopted a nine member Commission very similar to the commissions on judicial qualifications found in many other jurisdictions. Although the jurisdiction for removal goes beyond the Commission to the supreme court, the Commission interprets the Code, and this would seem to be the basis for any removal. While similar in nature, scope, and duties, the two commission types derive their existence from different sources. Wisconsin’s Commission is from the supreme court and California’s Commission is from the constitution of that state.

As mentioned earlier, another disciplinary approach involves the judge’s status as an attorney. The reasoning is that since the supreme court controls the bar in the state, and the bar can discipline all attorneys, the supreme court can discipline the judge as an attorney.

The Oregon Supreme Court adopted this line of reasoning.52 In support of its argument of the binding effect of the Canons, the court cited an earlier Oregon case which held:

The rules promulgated by this court concerning professional and judicial ethics are not merely pious exhortations. They were established to be obeyed and they create rights corre-

50. Id. at 254, 153 N.W.2d at 874.
51. 52 Wis. 2d vii, 193 N.W.2d 481 (1971).

The court, however, said that although the Canons of Judicial Ethics are binding upon judges, the only method for removal would be pursuant to the Oregon Constitution. In reference to the independence of the judiciary, the court stated:

... [T]his court yields to none in its conviction that the judiciary must be free of partisan or other influences prejudicial to the impartial administration of justice. But we are not prepared to hold that independence carries with it a license to violate the law or the rules of professional conduct which in this state have the force of law insofar as the internal discipline of the legal profession is concerned. There is no divine right of judges to flout the law.

V. Formal Constitutional Mechanism

The trend in recent years has been to constitutionally endow the judiciary itself with procedural self-discipline powers either in the supreme court or in a court constituted specially to hear and decide cases of judicial misconduct. The court is backed by a formal mechanism, the most common of which is the Commission of Judicial Qualifications developed in California.

A. The California System

By 1974, thirty-five states had adopted a Commission on Judicial Qualifications patterned after California. California’s Commission was established by constitutional amendment in 1960. It has nine members — five judges, two lawyers and two laymen. Under the constitution its purpose is to investigate complaints concerning willful misconduct, willful failure to perform duties, habitual intemperance and disability likely to become permanent. If the Commission believes that removal or retirement is warranted, it recommends such action to the supreme court. The Commission can decide to remove

53. 241 Or. at ____, 405 P.2d at 528.
54. Id.
55. See also Braithwaite, Judicial Misconduct and How Four States Deal With It, 35 LAW & CONTEMP. PROB. 151 (1970).
57. CAL. CONST., art. VI, § 8.
58. Id.
the judge’s rights to hold office, withhold a pension, or demand retirement. The Commission’s practice has been to hold meetings every two months, or whenever warranted.

A complaint can come from a variety of sources — litigants, lawyers, judges, public officials, and bar associations. The complainant may remain anonymous. All proceedings and names are kept confidential by law until a recommendation is made to the supreme court for removal, retirement or censure.

The complaint is examined by the staff. Those designated prima facie frivolous or invalid are marked “closed by staff” without further action. All complaints are reviewed by the full Commission. For those complaints deemed prima facie valid, the executive secretary is directed to investigate. If his investigation finds factual basis in the complaint, the judge is notified.

Several different courses of action may be pursued following the initial investigation. The Commission may simply write a letter of notification and hope the judge responds satisfactorily. In cases of minor misconduct, it may write a “Staff Inquiry Letter” informally stating the charges and requesting an explanation. Upon satisfactory explanation, the case is closed. It may write a letter of reprimand, accepting a no-contest plea coupled with a promise that the act will not be repeated.

If none of the foregoing are acceptable or warranted, then a full investigation is commenced and action may be recommended to the supreme court. It is hoped that at this point the judge will resign, since the action becomes public information. In fact, most of the judges will have resigned by this time. It was not until October of 1973, thirteen years after its founding, that the Commission sought and received an order removing a judge. The following news clipping in *Judicature* recounts:

On October 25, 1973, for the first time in its history, the California Supreme Court unanimously ordered removal of a judge from office. Los Angeles Municipal Court Judge Leland W. Geiler has been taken off the bench for willful misconduct and conduct prejudicial to the administration of justice.

The high court’s opinion was based on a recommendation by the nine-member Commission on Judicial Qualifications which serves as the California constitutional body empow-

ered to investigate unfit or disabled judges. Findings of misconduct included "crude behavior, vulgar language, uncouth references to bodily functions, and lustful and profane remarks" by Judge Geiler. The court held that it was immaterial that the conduct in question was probably not unlawful. It also described Geiler's interference between public defenders and their clients as the "most insidious kind of official lawlessness."

The court did conclude, however, that Geiler's conduct did not amount to moral turpitude, dishonesty or corruption. Consequently, although his removal was ordered, Geiler was not disbarred from the practice of law.  

A few sentences from the Commission's 1969 Report help explain the operation.

In the course of 1969 the Commission received 155 complaints of which 46 were deemed to justify further inquiry or investigation. In 28 instances there was a communication with the judge involved informing him of the reported information and requesting his response. When indicated, a thorough investigation was made. A number of times the Commission concluded that some conduct or act or practice by the judge appeared unsatisfactory or questionable and the judge was so advised. Usually the conduct was corrected and this terminated the proceeding. On four occasions during the year resignations or retirements were submitted while a matter was pending before the Commission.

Since judicial removal proceedings are quasi-penal, a judge under investigation is entitled to the protections afforded by the accepted standards of due process. These include the right to retain counsel and the production and examination of witnesses. The doctrine of res judicata and double jeopardy have been held not applicable to Commission proceedings. The Fifth Amendments rights have also been generally held not to apply, but this is not universally true.

The most vexatious problem confronting the states that

64. In re Kelly, 238 So. 2d 565 (Fla. 1970).
have adopted the Commission system is the standard of proof necessary for discipline. The split is between "clear and convincing" and "substantial." The majority of the states have adopted the standard of clear and convincing, while a minority require only substantial evidence.

Although the Commission has apparently worked very effectively, there are also some problems. In some states the Commission has no power to reprimand. If the Commission may recommend only removal or retirement, there may be a great deal of activity which deserves discipline, but not removal, and is therefore going unchecked. In fact, it is not unreasonable to assume that most of the objectionable conduct warrants something less than removal.

Another problem is the inability of the Commission to effect a judge's permanent disqualification from judicial office. In 1954, a judge in Texas was removed by the state supreme court but was subsequently reelected.

A third problem concerns public criticism of the Commission since prosecution and adjudication are pursued in the same organizational context. As it operates in California and other states, however, it does seem to have a good system of checks and balances. The Commission has an unsalaried and diversified membership. In California, five of the Commission's members are elected officials, and a majority are judges. Perhaps most importantly, it has a full time executive secretary and staff.

The Commission's main strength is its ability to force resignation. In its first nine years of operation (1961-1969), the California Commission received an average of one hundred complaints a year, of which about two-thirds were unfounded or outside Commission jurisdiction. During this nine year period, fifty judges resigned or retired during Commission investigation of their performance or conduct. Its ability to force resignation, however, is directly related to the effectiveness of its threat of removal. Therefore, frequent reversal by an appellate court could substantially reduce its effectiveness.

70. See Discipline and Removal of the Judiciary in Arizona, 1973 Law and Social Order 85.
B. The New York System

New York's system is worthy of discussion, if only because of its complicated nature. New York has five methods of removal or discipline. The Court on the Judiciary is the most noteworthy, but all five deserve mention.

Impeachment, N.Y. CONST. art. VI, § 25, has existed in New York since 1777 and has been used once, in 1872 (judge removed), 4 C. LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK 605 (1906). Removal by concurrent resolution of the two houses of the legislature, N.Y. CONST. art. VI § 23a, has never been used. The procedure whereby a judge can be removed "for cause" by two-thirds vote of the senate upon recommendation of the governor has been used four times, once in 1866 (judge acquitted), twice in 1872 (one judge removed, the other acquitted), and most recently in 1939 (judge acquitted).\footnote{71}

A third method for removal in New York is the Judicial Conference, which is responsible for supervising the court system. The Administrative Board of Judicial Conference is composed of the Chief Judge of the Court of Appeals and the presiding justices of the four Appellate Divisions' departments.\footnote{72} The Conference may remove any judge "for cause" and any member may call the Conference together.

There are several criticisms of the Judicial Conference. It has no central clearinghouse of potential complaints, there is no guarantee of confidentiality, and the elected officials involved are subject to political pressure.

The Appellate Division of the Supreme Court may also remove judges from the lower Supreme Court.\footnote{73} While this procedure has never been used, its very presence may have been responsible for resignations.

The best known procedure is the Court on the Judiciary, established by constitutional amendment in 1948.\footnote{74} The membership of the court is the Chief Judge, Senior Associate Judge of the Court of Appeals, and one justice from each of the four departments of the Appellate Division of the Supreme Court. These four members are selected by a majority of the justices.

\footnote{71. Braithwaite, Judicial Misconduct and How Four States Deal With It, 35 Law & Contemp. Prob. 151, n. 30 at 159 (1970).}
\footnote{72. N.Y. JUDICIARY LAW, § 210(1) (1968).}
\footnote{73. N.Y. CONST., art. VI, § 22i.}
\footnote{74. N.Y. CONST., art. VI, § 22.}
in each department whenever the court convenes. The court has statewide jurisdiction and is empowered to remove judges from office for cause, and to retire judges for mental or physical disability upon the concurrence of four or more of its members. It can appoint attorneys in each case, summon witnesses and documents, make its own rules of procedure and grant immunity. Any matter, however, except a disability case, can be preempted by the initiation of a disciplinary proceeding in the legislature.

In almost thirty years the court has only been convened three times. It has no permanent staff or a form of continuous meeting, and it meets only upon call.

CONCLUSION

In dealing with judicial discipline, there is an inherent conflict between the necessity of maintaining the independence of judges, and the necessity of having a public which accepts individual judicial determinations as legitimate. Judges are in a unique position in our political system. They are required to be apolitical yet they must, at times, make political decisions which may be contrary to the will of the majority.

The problem becomes one of maintaining the confidence in the decision making process as a whole while keeping the independence of the judiciary intact by shielding it from external pressure. This need for a proper balance cannot be underscored enough. If emphasis were given only to maintaining legitimacy at the cost of independence, only reputation, not honesty in fact, would be at issue. These two terms, though not mutually exclusive, do not necessarily coexist. On the other hand, to stress complete independence in its purest state would risk the loss of public acceptance of the system's legitimacy, upon which the effectiveness of the system depends.

75. N.Y. CONST., art. VI, § 22a, 22b. 76. N.Y. CONST., art. VI, § 22c. 77. N.Y. CONST., art. VI, § 22f. 78. N.Y. CONST., art. VI, § 22e. 79. First, In the Matter of Sobel, 8 N.Y.2d (a) (Ct. on the Judiciary, 1960). Next, In the Matter of Osterman, 13 N.Y.2d (a) (Ct. on the Judiciary, 1963), cert. denied, 376 U.S. 914 (1964) and Matter of Friedman, 12 N.Y.2d (a) (Ct. on the Judiciary, 1963). 80. It may be called by the Chief Judge of Court of Appeals, the Governor, the Executive Committee of the State Bar Association, or any presiding Judge of the Appellate Division.
The goal, therefore, is a system which strikes a balance between independence and the need for achieving honesty and a good reputation in fact. The system cannot be overly subject to political control, nor can it be overly subject to judicial control. It must strive to strike a balance between the two. While the pitfalls of a system which is run by non-judicial appointees are obvious, there is also an inherent illegitimacy in the public’s mind of a system of judicial self-scrutiny.

This reasoning also applies to a system that derives its authority from a source other than the jurisdiction’s constitution. If the disciplinary process derives its power from the supreme court, the self-discipline problem arises. Although such a system has worked quite well in some states, including Wisconsin, in a time of great public outcry against a particular judge it could be the subject of criticism. The Cosack case is an illustration of this problem. Such criticism is what the judiciary should work to avoid. Again, honesty in fact is not being questioned here.

Discipline by legislative fiat, absent specific constitutional authority, would pose a serious threat to the independence of the judiciary. The importance of an independent judiciary demands affirmative action by the judiciary for implementation of disciplinary procedures. As mentioned earlier, such action could be unconstitutional. If such a holding were made, the judiciary would subject itself to undeserved and unnecessary criticism for so holding.

The system must have a continuous staff to give it consistency and substance in the public’s eyes, and for day-to-day functioning. For this reason the New York ad hoc approach has proven to be unacceptable. Practicing attorneys, as well as the public, are not properly served by the committee. The system must also have the ability to act quickly and confidentially.

It should also be noted that the problems of judicial discipline cover a wide range — from major felonies and corruption to courtroom discourtesy and incompetence. A complete system operating effectively must have a procedure to deal with these problems. It should have at its disposal a wide range of disciplinary actions from private rebuke or reprimand to public reprimand or censure to suspension and termination of service.

In applying these guidelines to the procedures which have been examined in this article, California’s system on judicial qualifications is the best available. Impeachment, recall, etc., seems to be too costly, too susceptible to creating a public spectacle and unsuited to handle today’s problems. New York’s system seems too elusive, not practical to handle the day-to-day problems, and like impeachment may only be called into play for the big cases, leaving a rather large gap in the system. While Wisconsin’s system may work well procedurally, and there is no reason to believe that it is not honest in fact, it seems to be too susceptible to public criticism.

While the traditional independence of judges has been, and still is, held to be sacred, I believe this article has shown that it is not necessarily threatened by disciplinary machinery; and, in fact, can be well served by it.

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