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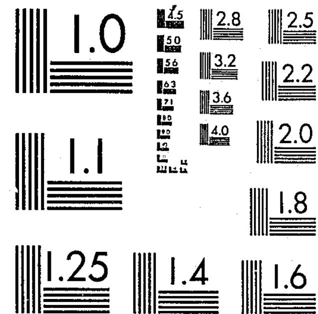

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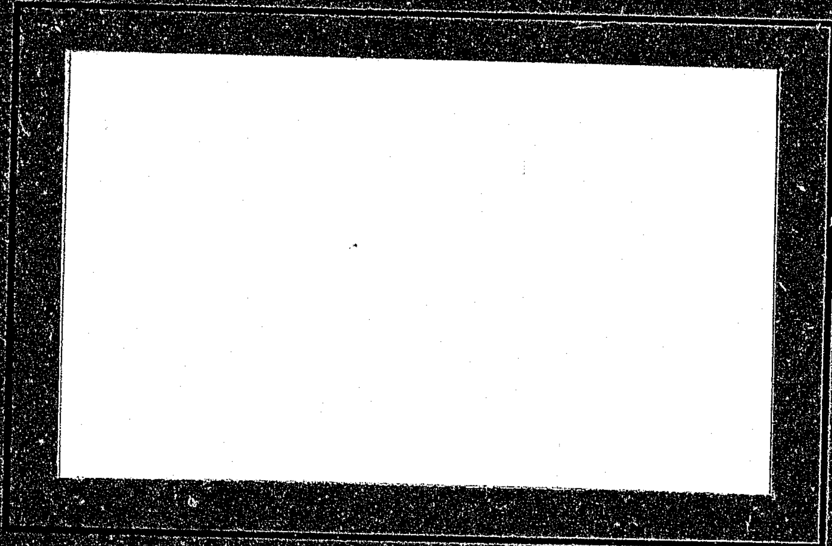

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Background Paper 81-8

JUDICIAL DISCIPLINE

U.S. Department of Justice
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ACQUISITIONS

JUDICIAL DISCIPLINE

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JUDICIAL DISCIPLINE

I

INTRODUCTION

During the past decade interest in political reform, including judicial reform, significantly increased. Citizens came to feel that public officials, including judges, were not being held accountable for many of their actions. Judges, many felt, were not applying the law uniformly. This concern led to mechanisms for judicial discipline. A New Jersey judge, for example, was suspended for 6 months for fixing his son's speeding ticket while applying the sanctions for speeding to others. People expect a judge to be impartial and to apply the law uniformly. Other public officials were expected to meet certain standards, so why not judges?

But impeachment and recall are cumbersome, expensive and ineffective methods of removing or disciplining a judge. In addition, both of these methods are reserved for flagrant abuses of power and were designed to be difficult to prevent undeserved harrassment of public officers. Removal from office is a severe sanction and is not applicable in most instances of judicial misconduct. Removal from office would probably not be the appropriate sanction for the New Jersey judge who fixed his son's speeding ticket.

Consequently, states began developing alternatives to impeachment and recall. In 1960, California established the first judicial discipline commission[1] to discipline judges who committed less than an impeachable offense. By 1980, all 50 states and the District of Columbia had established a discipline commissions.

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[1]California Commission on Judicial Qualifications (now Commission on Judicial Performance).

II

BACKGROUND

The oldest method of removing judges is executive action. In England, prior to the Eighteenth Century, judges held their offices at the king's pleasure. Those judges who tried to assert judicial independence did so at their own peril. This power, as one can imagine, was often used quite arbitrarily by the king. Today, this method of judicial removal has virtually disappeared in the United States.[2]

Impeachment, as mentioned earlier, is a cumbersome, lengthy and ineffective method of removing a judge. It requires both houses of the legislature to impeach and convict a judge and is usually reserved for flagrant abuses of power. In Nevada, a majority vote of the elected members of the assembly is required for impeachment and a vote of two-thirds of the elected senators is necesary for conviction.[3] No judge in Nevada has ever been impeached. In fact, only 12 times has a federal officer been impeached and only four times has impeachment resulted in conviction.

Besides being ineffective, recall of a judge is also expensive because of the cost of obtaining the required number of signatures. In 1970, the voters of Nevada made it more difficult to recall a supreme court justice by increasing the number of signatures required for a recall petition to 25 percent of all those voting in the preceding general election.[4] Before 1970, the requirement was 25 percent of those voting for the particular office. As with impeachment, a Nevada judge has never been recalled.

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[2]The governors of Maine and Delaware can remove a judge by not reappointing him to a new term.

[3]Nevada constitution, article 7, § 1.

[4]Nevada constitution, article 2, § 9.

In some states, including Nevada, judges can also be removed by legislative address. In Nevada, supreme court justices and district judges can be removed "for any reasonable cause" by a vote of two-thirds of the elected members in each house of the legislature.[5] Again, no judge in Nevada has ever been removed by legislative address.

Because of the shortcomings of impeachment, recall and legislative address, the judicial discipline commission was developed to handle judicial misconduct.

III

THE ISSUES

The establishment of judicial discipline commissions was not easy. The concept of a discipline commission for judges was highly controversial when first proposed. The issues surrounding the development of the commissions continues to affect their proceedings. This is especially true concerning the issue of confidentiality.

Proponents of discipline commissions argued that some judges were arrogant, abused the public trust and applied power arbitrarily. They recognized the need to correct judicial misconduct and felt that impeachment and recall no longer acted as a deterrent to misconduct. They also recognized the independence of the judicial branch but not the complete independence of judges from public control. They pointed out that the judicial branch is not completely independent of the other branches. In many states judges are appointed and their salaries are set by the legislature.

They also argued that election of judges was not the best method to hold judges accountable. Elections frequently resulted in expensive campaigns for judicial office.[6] The

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[5]Nevada constitution, article 7, § 3.

[6]During the 1973 campaign for chief judge of the New York Court of Appeals, for example, the candidates spent a total of $1 million.

money required to finance an expensive campaign often comes from attorneys who then appear before that judge. Also, many voters are unfamiliar with the issues and the candidates in a judicial campaign.

Opponents argued that an independent judiciary was more important than the removal of a few misbehaving judges. Because the judges are unaccountable, they are able to check the irresponsibility of others in power. Easier removal processes would mean the loss of independence. The proceedings of the discipline commissions, some argued, would simply become witch hunts, aimed at independent judges who are not ideologically in step with their colleagues.

Opponents also argued that self-policing of the profession would make removal and discipline of judges easier because it would be done without public embarrassment of the judge. The American Bar Association adopted a Code of Judicial Conduct in 1972 and Standards Relating to Judicial Discipline and Disability Retirement in 1978. Using these tools, the profession could regulate judicial misconduct.

IV

NEVADA'S COMMISSION ON JUDICIAL DISCIPLINE

The Nevada commission on judicial discipline was established in 1976.[7] It too was a product of the era of political reform and the California commission served as the model.

The commission investigates and, if necessary, adjudicates complaints made against a supreme court justice or district judge. Anyone can file a complaint with the commission.

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[7]Assembly joint resolution 16 was passed by the 1973 and 1975 legislatures and then ratified by the voters at the 1976 general election. (Nevada constitution, article 6, § 21)

The commission investigates the complaint and then holds a preliminary hearing to determine the validity of the complaint. The complaint is either dismissed or a formal hearing is ordered. Following the hearing, the commission can impose a disciplinary sanction against the justice or judge.[8] The commission's action can be appealed to the state supreme court.

The membership of the commission includes: (a) two justices or judges appointed by the supreme court; (b) two members of the state bar, appointed by the bar; (c) three persons who are not members of the legal profession, appointed by the governor. Members serve a 4-year term and cannot be a concurrent member of the commission on judicial selection.

A judge can be removed or retired for five reasons: (a) willful misconduct; (b) willful or persistent failure to perform the duties of his office; (c) habitual intemperance; (d) advanced age which interferes with the performance of his judicial duties; and (e) a mental or physical disability which prevents the proper performance of his judicial duties and which is likely to be permanent in nature.

The state supreme court is responsible for establishing the rules of conduct for the commission. The court is to establish rules concerning: (a) the confidentiality of the proceedings before the commission, except a decision to censure, retire or remove a justice or judge; (b) grounds for censure; and (c) conduct of investigation and hearings.

The commission has received a total of 69 complaints. The most recent case before the commission involved three supreme court justices. Following a formal hearing in Reno, the commission dismissed the charges against them.

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[8]Nevada, New York, Kentucky and the District of Columbia are the only jurisdictions that allow the commission to impose a disciplinary sanction.

V

APPROACHES USED BY OTHER STATES: VARIATIONS ON THE SAME THEME

A majority of states have established discipline commissions similar to the one in California. These are known as unitary commissions which means that one body investigates and adjudicates each complaint.

There are eight[9] states which have a "two-tier" system. This means that one body receives and investigates complaints and a separate body adjudicates each case when probable cause for disciplinary action or removal exists.

VI

CONFIDENTIALITY OF THE PROCEEDINGS

The issue of confidentiality proceedings of the discipline commission is an extension of the argument for an independent judiciary. In Nevada, the issue of confidentiality became even more relevant during the recent case mentioned earlier concerning the supreme court. The charges against the three justices were dismissed by the commission. Presumably the commission had valid reasons for dismissing the charges but the public does not know that.

Proponents of open proceedings argue that judges hold a public trust and should be held accountable for their actions. If a judge violates that trust, the public has the right to know what disciplinary actions were taken and the reasons for them. The real purpose of the judicial discipline commission is to maintain public confidence in

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[9]Alabama, Delaware, Hawaii, Illinois, New Jersey, Oklahoma, West Virginia and Wisconsin.

the judiciary. The most stringent set of ethical standards is of little value unless the public is convinced that the standards are uniformly and vigorously enforced.

Proponents of confidentiality argue that a judge's reputation needs to be protected from frivolous accusations. They also argue that confidentiality protects the anonymity of a complainant, especially an attorney.

A majority of states require the proceedings of the discipline commissions to be confidential. Increasingly, however, states which have adopted the California plan have begun to open the formal disciplinary proceedings to the public. Kansas and North Dakota recently did so. Most proponents of open proceedings recognize the importance of confidentiality during the investigatory process, but when the formal proceedings begin they do not recognize the need for conducting confidential hearings.

Without open proceedings, there is really no way to evaluate whether or not the commission is performing its job. In addition, other public officers are subject to considerable public scrutiny and accountability. The proponents of open proceedings have often quoted Edmund Burke: "Where mystery begins, justice ends."

VII

SUGGESTED READING

(Available in the research library)

Greenberg, Frank. "The Illinois 'Two-Tier' Judicial Disciplinary System: Five Years and Counting," Chicago-Kent Law Review, 54 (1977), pp. 69-115.

Ketler, Richard K. "Toward a Disciplined Approach to Judicial Discipline," Northwestern University Law Review, 73 (October 1978), pp. 503-32.

Schoenbaum, Edward J. "A Historical Look at Judicial Discipline," Chicago-Kent Law Review, 54 (1977), pp. 1-27.

Tesitor, Irene A. Judicial Conduct Organizations (Chicago, IL: American Judicature Society, 1980).

Todd, John J. and M. L. Proctor. "Burden of Proof, Sanctions and Confidentiality," Chicago-Kent Law Review, 54 (1977), pp. 177-99.

Winters, Glen R., ed. Judicial Discipline and Removal (Chicago, IL: American Judicature Society, 1973).

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