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## Judicial Discipline and Removal in the United States

Federal Judicial Center



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## ABSTRACT

A sustained interest in new forms of judicial discipline and removal has existed in the United States for the last two decades. In that period, almost all of the states have established judicial branch commissions of judges, lawyers, and non-lawyers with the authority to investigate alleged judicial unfitness and to pursue a range of sanctions for dealing with it. There has also been steadily growing pressure on the federal government to establish a variation of such a commission to deal with alleged federal judicial unfitness. In addition, both federal and state statutes and constitutions have long provided several other judicial discipline mechanisms.

This article traces the origins of the several types of judicial discipline mechanisms available in both the federal and state systems, with a special focus on the currently popular commission mechanisms. The article also evaluates judicial discipline mechanisms according to a variety of criteria, including effectiveness, fairness, ability to protect judicial independence, and responsiveness to public needs.

In light of the current debate over the establishment of a federal judicial tenure commission, the article points to the significance and limitations of the argument concerning judicial independence in the federal system and also takes note of the difficulty in transferring mechanisms successful in one or more states to other states or the federal system.

JUDICIAL DISCIPLINE AND REMOVAL IN THE UNITED STATES

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I. INTRODUCTION

The freedom of judges to decide the cases before them with neither the fear of retribution, direct or indirect, nor the influence of favor, promised or inferred, is among the highest values underpinning the structure of American government. The impact of United States Supreme Court decisions on the economic and social life of the country, at times following five-to-four division within the Court, is familiar learning. The impact of other courts' actions must also be recognized, be they the decisions of state supreme courts,<sup>1</sup> or the rulings of single federal trial judges in fashioning relief for segregation in public schools, sex discrimination in police hiring practices, abuses in the management of correctional institutions, or impermissible concentrations of economic power. The impact of most state trial court decisions may be less dramatic, but these courts, by their number and the amount of litigation of which they dispose--far outshadowing the caseload of federal trial courts--play a pervasive role in the day-in and day-out application of legal principles to commercial and personal controversies.

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The analyses, conclusions, and points of view in this paper are those of the authors. On matters of policy, the Federal Judicial Center speaks only through its Board.

1. Brennan, "State Constitutions and the Protection of Individual Rights," 90 Harv. L. Rev. 489 (1977), and Howard, "State Courts and Constitutional Rights in the Day of the Burger Court," 62 Va. L. Rev. 873 (1976).

Because society relies heavily on voluntary compliance with judicial decisions and because enforcement of many such judgments is, in the ultimate, the responsibility of executive officials, the appearance of judicial independence, of decisions unaffected by fear or favor, is no less important than the reality. Compliance is likely to be grudging at best when those obligated to comply suspect that the decision reflects improper pressure by unseen forces or persons.

The United States has a dual court system; one court system is maintained by the national, or federal, government and another is an aggregate composed of the court systems of the various states. Both, to varying degrees, seek to assure both the real and apparent independence of the judiciary to decide cases without extraneous pressure. The federal scheme provides for tenure during "good behavior" and for removal only by a cumbersome process of impeachment and conviction requiring action by both houses of Congress. It is these protections that have been widely credited with making possible fidelity to the rule of law by federal trial judges who faced strident, and at times violent, local opposition to, for example, desegregation mandated as law by the Supreme Court. Indeed, the courts' statements of legal principles and their application in such situations have led at times to demagogic efforts to remove these protections by such requirements as periodic Congressional approval of judges' continued tenure in office.

There are, however, other values that must be protected to assure the proper functioning of any judicial system. A lazy judge, an alcoholic judge, or one who evidences the symptoms of senility, will rarely be able to handle

his caseload, and if he cannot perform his judicial functions, he can hardly promote, in litigants or the public, that confidence in the judiciary necessary for its effectiveness. Similarly troublesome is the judge who engages in questionable practices or is guilty of minor, not to mention major, offenses. The more complicated and cumbersome the provisions for disciplining judges or terminating judicial tenure, the more difficult it is to deal with these problems. And these problems have to a greater or lesser degree, beset all judicial systems in the United States.

Thus, fashioning a suitable mechanism for defining and dealing with judicial unfitness, and, where appropriate, for the discipline of judges, necessitates an accommodation between these two polar needs: the need to preserve judicial independence and the need to deal with the judge who cannot or will not properly discharge the functions of the office. Moreover, the problems of defining unfitness are subtle and complicated: what some may perceive as judicial incompetence--characterizing, for example, comments to witnesses and attorneys as rude or insensitive--others may perceive as conduct well within the bounds of discretion that judges must have for the effective movement of cases. How to accommodate this inevitable tension is a central question for the states and the federal government--and for those who use and observe the courts.

The convergence of four phenomena in the past several decades has served to increase the visibility of the problem in this country:

- There is a heightened demand for public accountability on the part of all public officials, including judges.

- Increasingly, courts are being inextricably involved in the economic and social life of the community, as cases are brought to them involving complex and controversial questions formerly left to other public and private institutions to resolve.<sup>2</sup> This increase in so-called "public law litigation" has prompted a corresponding increase in the demand for means to assure the judiciary's public accountability.
- By the same token, as judges have been expanding the scope of constitutional protections, often acting to protect rights where other branches of government have declined to act, there has been renewed emphasis on the value of judicial independence. Skepticism about increased judicial discipline reflects the view, expressed by one federal judge, that the judiciary contributes to democracy "precisely because, except in the most extreme cases, [it is] not politically accountable at all and, so [is] able to check the irresponsibility of those in power."<sup>3</sup>
- Increased judicial business has compounded the administrative problems of the courts, prompting a more complex administrative structure, and, with it, the presumption that judges are to some degree responsible to other judges for their administrative performance.

These developments place in bold relief the problem of dealing with judges who appear unfit for office--but of doing so in a manner that does not threaten the independence that is necessary for the judges' proper resolution of cases brought to them for decision and effective handling of their total caseload.

While the last two decades have witnessed the most intense and widespread interest in the discipline of judges, the subject has been of concern for more than two centuries. Indeed, the 1776 Declaration of Independence complained

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2. For analysis and discussion from a variety of perspectives, see Chayes, "The Role of the Judge in Public Law Litigation," 89 Harv. L. Rev. 1281 (1976); D. Horowitz, *The Courts and Social Policy* (1977); and Rifkind, "Are We Asking Too Much of Our Courts?" an address to the National Conference on Causes of Popular Dissatisfaction with the Administration of Justice 70 F.R.D. 96 (1976).

3. Kaufman, "Chilling Judicial Independence," 88 Yale L. J. 680 at 715 (1979).

that King George III, had "made Judges dependent on his Will alone, for the tenure of their offices and the amount and payment of their salaries."<sup>4</sup>

American history includes a number of striking efforts to remove federal judges, particularly Supreme Court justices, from office. In 1803, a faction of the political party of President Thomas Jefferson succeeded in impeaching United States Supreme Court Justice Samuel Chase (a Federalist appointed by George Washington) for clearly partisan conduct while serving in his ex officio capacity as circuit judge, presiding over trials of various anti-Federalists.<sup>5</sup> While Chase, the only Supreme Court justice to be impeached, escaped conviction, a Federalist trial judge named John Pickering did not. Pickering was hopelessly insane, but was clearly not guilty of "treason, bribery, or other high crimes and misdemeanors," the Constitutional grounds for impeachment. His removal foreshadowed the problems of having to rely solely on impeachment for judicial removal.

In current times, Justice Abe Fortas, a highly regarded jurist, as well as a confidant of President Johnson, resigned from the Supreme Court in May, 1969; at that time, it was virtually certain that a serious impeachment effort would be attempted. The press had reported that Fortas, three years earlier, had accepted--but eventually returned--a retainer for "legal research" from a family foundation tied to a person under indictment at the time in federal court. Whatever support Fortas might have had in the impeachment struggle was weakened because his unsuccessful nomination the preceeding summer to be

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4. For a discussion of judicial independence as a causal factor of the Revolution, see B. Bailyn, *The Ideological Origins Of The American Revolution* 105-08 (1968).

5. R. Ellis, *The Jeffersonian Crisis* 76-79 (1971).

chief justice had brought out the fact that he had conferred often, as an associate justice, with President Johnson, urging him to pursue the war in Vietnam; in addition, the nomination hearings crystallized conservative legislators' opposition to him for his civil liberties decisions. There have been more poignant moments, as when a delegation of justices in 1896 sought to encourage a senile Justice Stephen Field to resign, by asking him whether he recalled that 27 years previous he had borne the same unpleasant duty with respect to Justice Grier. Field's response: "Yes! And a dirtier day's work I never did in my life!"<sup>6</sup>

The federal judiciary may have provided the best known judicial removal efforts, but it has been in the 50 states and the District of Columbia--each with its own court system, the total number of judges vastly outnumbering the federal judiciary--that numerous approaches to judicial discipline and removal have been tried. Such "experimentation"<sup>7</sup> allows the opportunity for at least crude comparative analysis of various approaches to identifying and dealing with unfit judges. And although interest in the subject has existed for over 200 years, only within the last two decades has a judicial disciplinary mechanism emerged that seems to meet with any degree of approval, at least as regards the states, on the part of the judiciary, the bar, political

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6. The quotation is attributed to the first Justice Harlan; it is related by Chief Justice Hughes in *The Supreme Court of the United States* 75-76 (1928).

7. Justice Brandeis once observed that "one of the happy incidents of our federal system" is the fact that the various states can serve somewhat as "laboratories," trying out innovations on a limited scale to learn something of their costs and benefits. See New State Ice Co. v. Liebman, 285 U.S. 262 at 311, dissenting opinion (1932).

officials, and concerned observers. The mechanism, described in detail below, is a commission established within the court system that investigates, usually through its staff, complaints about judges. When the investigation warrants, the commission may recommend one of several sanctions; these recommendations are referred to a judicial body for ultimate disposition. Most of the 51 jurisdictions have adopted this "commission system" in one of its several variations, and it has been under consideration for the federal judiciary for almost fifteen years.

It is possible, though, to identify seven basic methods for judicial discipline and removal within the state and federal systems. Many jurisdictions have several types available on the statute books. These seven types include four "traditional" methods, which have long had constitutional or statutory sanction, but little use. All four vest authority in non-judicial agencies:

1. Removal by legislative impeachment and conviction. The federal system and almost all states have this provision.

2. Removal by legislative resolution, usually requiring concurrent two-thirds vote of both houses, or by the governor on address of the legislature by majority vote. At last count, twenty-eight states had formal provision for one or both of these methods.<sup>8</sup>

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8. W. Braithwaite, *Who Judges the Judges?* 12 (1971).

3. Removal by recall election triggered by a petition signed by a certain number or percentage of voters. As of 1976, seven states had constitutional provisions for recall of judges as well as other elected officials.<sup>9</sup>

4. Judicial elections in which judges may be challenged by candidates or in which voters are asked simply if judges should be retained in office.

Judicial elections--and their practical implementation--vary greatly among and within the states, but most of the states have some kind of provision for election of judges in at least some courts.<sup>10</sup> Elections are not typically considered instruments of "judicial discipline," since judges who must stand for election do so whether or not they are accused of wrongdoing. Elections do, though, provide voters a means of expressing displeasure with judges, especially those who achieve notoriety around election time.

More recently, at least three other procedures have been devised for judicial discipline and or removal, all basically within the judicial branch:

5. The commission system, noted above, which includes a commission that investigates charges and either conducts a formal hearing or presents the case to a second tier for adjudication. The adjudicating agency, be it the commission or a second tier adjudication body, usually does not actually discipline judges it finds guilty, but only recommends discipline to a standing judicial

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9. Fordham, "The Utah Recall Proposal," 1976 Utah L. Rev. 29 at 35 (1976). It may be that other states provide statutorily for recall, as Utah considered doing in 1976.

10. Election systems in the states are quite varied. These generalizations are drawn from information in the table "Final Selection of Judges," in Council of State Governments, 22 The Book of the States 1978-79, at 90-91 (1978).

body such as the supreme court. According to a 1978 American Judicature Society survey, 47 states and the District of Columbia had some variation of this model.<sup>11</sup>

6. A provision for a specially convened "court on the judiciary," which has no standing auxiliary investigative bodies. It would appear that this arrangement had a short life. It was established in New York in 1948, and abolished there 30 years later.<sup>12</sup>

7. Finally, the federal courts' system of decentralized judicial councils, which are administrative bodies composed of judges only, with disciplinary powers of sorts, but no removal power.

A point developed below bears mention here: regardless of the specific formal mechanisms that any jurisdiction has established for judicial discipline, it is likely that there will also be less formal means by which judges will try, usually in private, to have errant colleagues mend their ways or perhaps retire gracefully. These informal efforts to deal with judicial unfitness may well be influenced by the availability of formal mechanisms.

We turn now to treat judicial discipline and removal in the United States by examining the problem from three perspectives: (1) the organizational and historical setting for the various mechanisms on the American judicial scene; (2) the effectiveness of the mechanisms, and finally (3) the broader philosophical and conceptual considerations that judicial discipline and removal raise.

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11. I. Tesitor, *Judicial Conduct Organizations* 1 (1978).

12. See *infra*, at pp. 21ff.

## II. THE ORGANIZATIONAL AND HISTORICAL SETTING

### A. American Court Organization

The basic distinction in American court organization is between the small federal court system of the national government and the systems of courts in each of 50 states and the District of Columbia. Federal court jurisdiction is limited to cases arising under the U.S. Constitution or statutes, as well as certain suits between citizens of different states. To exercise this jurisdiction, there are over 500 federal trial judges, who sit in one of the 95 district courts, each with from 1 to 27 judges. There are about 135 intermediate appellate judges who sit on one of the eleven courts of appeals, each with jurisdiction over a geographic circuit that includes from one to 19 of the 95 districts.<sup>13</sup> Nine justices sit on the Supreme Court of the United States, whose chief judicial officer is the Chief Justice of the United States.

There are also three national special jurisdiction federal courts--the Court of Claims, the Customs Court, and the Court of Customs and Patent Appeals.

Federal judges enjoy tenure during good behavior and relatively liberal retirement provisions. By law, the President appoints all federal judges with the consent of a majority of the Senate; consent is rarely withheld. Consistently, over 90% of any President's judicial appointments have been of his own political party, and party officials (especially the senators of the President's party from the state in which the judgeship in question is

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13. These figures include 152 judgeships created by recent legislation, P.L. 95-486, 92 Stat. 1629, 95th Cong., 2d sess., 1978. Over half of these new judgeships had not been filled at the time of this writing.

located) are active in the selection process. The Department of Justice reviews and monitors the selection process. In the last two years, President Carter has directed the use of commissions of lawyers and non-lawyers to recommend candidates for court of appeals vacancies, and many senators, in response to congressional and presidential urgings,<sup>14</sup> have established commissions to advise them on judgeship candidates to recommend to the president. For the last thirty years, the American Bar Association has played an informal but prominent role in reviewing candidates.

Currently the only formal method of removing a federal judge from office is impeachment by the House of Representatives and conviction by the Senate. The threat of impeachment may deter improper behavior by judges and, in extreme cases, its potential invocation may induce resignation, as appears to have been the case with Justice Fortas. In the almost 200 years of the federal judiciary, however, only 54 judges and one justice have been officially investigated for possible impeachment, leading to nine impeachments. There have been four convictions, the most recent in 1936.<sup>15</sup>

Jurisdiction of the dual court system is somewhat complicated, but basically federal courts have jurisdiction over five kinds of cases: (1) those in which the United States is a party, and (2) those involving foreign officials. In civil matters, if more than \$10,000 is involved, they may also hear (3) cases with parties from different states, and (4) cases involving the

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14. P.L. 95-486, id. at Sec. 7 required that the President promulgate waivable standards for selection of district judges by "merit."

15. See statement of Senator Nunn. Hearings before a Subcommittee of the Senate Judiciary Committee on S. 1423, 95th Cong., 1st sess., at 32 (1977).

United States Constitution and federal laws. In addition, federal courts hear what are called (5) "federal specialties," such as patent, copyright and bankruptcy matters.

The state courts share jurisdiction with federal courts in categories (3) and (4), and they exercise exclusive jurisdiction in all other cases. Only those state court decisions involving the federal Constitution and laws may be appealed to the federal courts.

Over 75% of state judges are in limited or special jurisdiction courts;<sup>16</sup> a survey early in the decade identified over 14,000 separate court systems in the states.<sup>17</sup> In all but three states, the judges serve--not on the federal model of good behavior--but for fixed terms to which they are usually eligible for re-selection. Selection methods vary within and among the states; popular election is still common, although increasingly states are adopting gubernatorial appointment of judges from lists supplied by nominating commissions of bench, bar, and general public.

There is also variation in the states' methods of judicial discipline and removal. While all states provide for impeachment or other forms of

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16. According to a 1971 survey by the U. S. Bureau of the Census, there were 23,073 judgeship positions in the state court systems. U. S. Department of Justice, Law Enforcement Assistance Administration, National Survey Of Court Organization 6 (1973). A more recent survey of general jurisdiction trial judges identified 5,637, as compared to the 4,929 identified earlier. Council of State Governments, State Court Systems (1976).

17. National Survey id. at 8. A "court system" is defined in the survey as a court or courts comprising an administrative unit. One "court system" could include several discrete courts, under the administrative authority of one chief judge.

legislative removal, most have complemented these traditional procedures with the inquiry commissions noted above, which can recommend sanctions or removal by a standing or specially convened court.<sup>18</sup>

#### B. The Growth of Judicial Administrative and Disciplinary Structures

What are the current structures and methods of judicial discipline and removal and how have they evolved? While we focus on formal methods, our concept of judicial discipline and removal comprehends as well the numerous informal and behind-the-scenes efforts to remove judges or to alter their behavior. These may be conditioned by formal procedures--for example, threatening a judge with impeachment if he will not resign. Or discipline may be effected by the creative use of one or more of the instruments available to those who administer the courts. For example, a chief judge may try to "penalize" judges by assigning them to remote places of holding court. The chief judge of a federal circuit court related "a problem with a judge, a temporary problem. I called him up and I said, 'You are temporarily assigned to a certain place,' and he said, 'Court is never held there,' and I said, 'That is why.'"<sup>19</sup> A chief judge of a state trial court recounted his

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18. There is also periodic interest in limiting the absolute judicial immunity judges enjoy from suits based on actions taken on the bench, but it appears doubtful that the doctrine will be changed in the near future. See Stamp v. Sparkman, 435 U.S. 349 (1978). For a review, see Note, "Immunity of Federal and State Judges from Civil Suit--Time for Qualified Immunity?" 27 Case Western Reserve L. Rev. 727 (1977).

19. Chief Judge Richard H. Chambers, Ninth Circuit, in Hearings Before a Subcommittee of the Senate Judiciary Committee on S. 3055, 3060, 3061, 3062, 90th Cong., 2d sess. at 249 (1968). Chief circuit judges, by statute, "may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit." 28 U.S.C. §292(b). Although the colloquy from which Judge Chambers' statement is drawn does not make clear that this is the statutory provision on which was he relying, the incident is noted simply as an illustration of how provisions not intended for disciplinary purposes might nevertheless be so used.

experience with a judge who "sits on the bench an average of an hour and a half to two hours a day . . . he has no sense of shame in the sense of what his brother judges say about it, and yet nearly all of us have attempted to talk to him, and it doesn't bother him . . . I have sent him some very distasteful cases in the hope that by this way I would make him more amenable to doing his share of the workload."<sup>20</sup>

These informal methods are pervasive, albeit difficult to identify for purposes of analysis. Any serious effort to understand and to reshape the methods of discipline and removal must take account of them.

#### 1. State Courts

In the first part of the nineteenth century, there developed a strong trend to limit state judges to fixed terms,<sup>21</sup> and, around mid-century, to require them to gain and retain office through popular election.<sup>22</sup> This trend reflected a desire to curb judges' disregard for popular opinion in their

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20. Judge William I. Murray, Orange County California Superior Court, Hearings Before a Subcommittee of the Senate Judiciary Committee on Judicial Fitness, Pt. 2, 89th Cong., 2d sess., at 204-05 (1966).

21. The state constitutions adopted in the latter part of the eighteenth century reflected diverse approaches to judicial selection and tenure.

See Ziskind, "Judicial Tenure in the American Constitution: English and American Precedents," 1969 S. Ct. Rev. 135.

22. There are various sources for the history of state judicial selection and tenure. See, for one presentation, Jacob, "The Courts as Political Agencies: An Historical Analysis," in 7 Tulane Studies in Political Science 19-20 (1962). A good summary is in A. Ashman and J. Alfini, The Key to Judicial Merit Selection: The Nominating Process, 7-10 (1974).

decision making, although it reflected in some instances as well popular exasperation with legal procedures and frustration with crowded dockets and leisurely judges.

In this climate, there was little reason to look for additional methods of disciplining and removing judges. Removal from office by impeachment and conviction in the legislature was then, like now, commonly provided by statute or constitution. During the transition to more popularly oriented governments, impeachments of judges who had come to office under former regimes were evidently prevalent, but as judicial elections came increasingly to make judges more popularly accountable, impeachments are said to have subsided.<sup>23</sup>

At the start of the twentieth century, there began a period of intense and sustained interest in improving state courts. It was, however, not until much later--the 1940s--that there was any significant attention to the creation of new methods of judicial discipline and removal. It is not difficult to explain the lack of interest in the first four decades in new forms of judicial discipline and removal: the early court reformers, fearful of judicial elections and frightened by the perceived influence of partisan politics on judges, were most concerned with elevating the quality of the bench through new means of judicial selection and by providing judges secure tenure. Indeed, the one exception to the general lack of interest in new

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23. L. Friedman, *A History of American Law*, 325 (1975); see for the experience of one state, Ely, "'That no office whatever be held during life or good behavior': Judicial Impeachments and the Struggle for Democracy in South Carolina," 30 *Vand. L. Rev.* 167 (1977).

judicial discipline methods was the adoption in some states of statutory or constitutional provisions for recall elections of public officials,<sup>24</sup> including judges; this development only heightened the concern over protecting judicial independence. Thus, in 1914, for example, Roscoe Pound and others bemoaned the "conditions of tenure and modes of selection which preclude the type of lawyer best fitted from going on the bench, and prevent the influence of the bar from being felt as it should be in the selection of judges."<sup>25</sup> Promotion of the judicial "merit selection" system--devised by Northwestern University law professor Albert Kales and revised by English political scientist Harold Laski<sup>26</sup>--became the basic concern of court reformers in general, and in particular, of the American Judicature Society, created in 1913 "to promote the efficient administration of justice."

Not only did the early twentieth century reformers worry mainly over partisan interference with judicial independence, but they also assumed that the centralized court management systems they proposed would deal with whatever problems of judicial incompetence might exist after "merit selection" replaced popular elections. Thus, Kales argued, complaints that a merit-

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24. These are special referendum elections, triggered by petitions of a certain number or percentage of voters, to determine whether a certain official should be removed from office. See Fordham, *supra* note 9.

25. Eliot, Storey, Brandeis, Rodenbeck and Pound, "Preliminary Report on Efficiency in the Administration of Justice" to the National Economic League, in R. Wheeler and H. Whitcomb, *Judicial Administration: Text and Readings* 48 at 49 (1977).

26. See Ashman and Alfini, *supra* note 22 at 10ff. The "merit plan," the cause of heated battles but few victories until mid-century, provides for panels of judges, lawyers and non-lawyers to recommend slates of judicial candidates, from which governors appoint judges, who then stand in periodic retention elections running only on their records (rarely unsuccessfully).

selected judge had behaved in an "arbitrary or distasteful manner" should be brought to "a duly constituted body of fellow judges who hold a position of power and authority. . . ."27 The unstated assumption was that reliance on such a body for judicial discipline was preferable to reliance on the legislature. This assumption carried the germ of an idea that would flourish a half-century later: that the responsibility to deal administratively with errant or incapacitated judges belongs to the third branch.<sup>28</sup>

Kales' basic approach stemmed naturally from the early reformers' commitment to a hierarchially organized and tightly administered unified court system. A 1917 "Model Judicial Act" proposed by the American Judicature Society<sup>29</sup> followed the disciplinary recommendation proffered by Kales four years earlier. Indeed, it paraphrased his suggestion that one element of a properly organized, unified court system was a judicial council with "the power to remove from office any judge other than the chief judge, and to reprove [non-chief judges] either privately or publically, or transfer [them]

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27. Kales, "Methods of Selecting and Retiring Judges in a Metropolitan District," in *Reform of Administration of Justice* 52 *The Annals* 1 at 11 (1913). See also a 1914 speech by Kales, reprinted posthumously as "Methods of Selecting and Retiring Judges," 11 *J. Amer. Jud. Soc'y.* 133 (1928).

28. Whether this idea was born in the early twentieth century, or merely resurfaced then, is a troublesome question. Proponents of the federal judicial discipline commission (discussed below at pp. 43ff) argue that the framers of the Constitution anticipated that judges could be removed by their brother judges as well as by impeachment, while opponents argue that, when the Constitution was written, impeachment was understood as the sole available means for judicial removal. Compare R. Berger, *Impeachment: The Constitutional Problems* 122-80 (1973) with Kurland, "The Constitution and the Tenure of Federal Judges: Some Notes from History," 36 *U. Chi. L. Rev.* 665 (1969) and Ziskind, *supra* note 21.

29. See "The Statewide Judicature Act," 1 *J. Am. Jud. Soc'y.* 101 (1917).

to some other division of the court for inefficiency, incompetence, neglect of duty, lack of judicial temperment, or conduct unbecoming a gentleman and a judge." Procedures were provided: once written charges were filed, the judge would have a hearing before any discipline would be imposed.<sup>30</sup>

It soon became apparent that rigidly hierarchical court organization with strong rule-making and disciplinary powers was an abstraction that local judges and politicians would not accept and legislatures would not provide. Thereupon reformers promoted advisory judicial councils, usually with no authority for discipline or anything else; they have generally fallen into disuse.<sup>31</sup> Finding a means for judges to deal with other judges' misconduct stayed low on the reformers' list of priorities,<sup>32</sup> appearing only occasionally<sup>33</sup> until some interest surfaced in the 1940s and began to develop strength in the 1960s.

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30. Kales, *supra* note 27.

31. Wheeler and Jackson, "Judicial Councils and Policy Planning: Continuous Study and Discontinuous Institutions," 2 *Just. Sys. J.* 121 (1976).

32. As early as 1920, another "model judicial article" to unify the courts--proposed by the National Municipal League and distributed by the American Judicature Society--omitted discipline and removal from the council's function, preferring instead to rely on removal by two-third's vote of both houses of the legislature, a plan whose "conservative use [in Massachusetts] proves that it is no source of danger." Draft Judiciary Article, 3 *J. Amer. Jud. Soc'y.* 135 at 141 (1920).

33. For example, a proposed new constitution for New York, rejected by the voters in 1938, would have authorized the highest judicial body in the state to remove or retire other judges. See Gasperini, Anderson, & McGinley, "Judicial Removal in New York: A New Look," 40 *Ford. L. Rev.* 1 at 11 (1971). A decade later New York did adopt a special Court on the Judiciary, since abolished.

See also the discussion of the 1939 creation of federal judicial councils, *infra* at pp. 32ff, and Shartel, "Federal Judges--Appointment, Supervision, and Removal--Some Possibilities Under the Constitution," 28 *Mich. L. Rev.* 485, 723, 870 (1930).

Court reformers in the 1930s, 1940s and well beyond, continued to perceive judicial elections for short terms as the major threat to the quality of the judiciary. If mechanisms for disciplining and removing judges received any attention it was because of the desire, expressed in the federal context, to "forestall worse remedies, like recall, election of federal judges for short terms, and other popular nostrums. . . ."34 The so-called "Minimum Standards of Judicial Administration," adopted in 1937 and 1938 by the American Bar Association, contained only one recommendation concerning the state judicial office: merit selection.<sup>35</sup> While the commentary did note that the "matter of removal is considered by many as of little less importance than original selection,"<sup>36</sup> the primary concern of the ABA and others was to make removal difficult, one aspect of their interest in defending judicial independence in an era of attacks on the federal courts' anti-New Deal decisions.<sup>37</sup> A 1943 review of "Nation-Wide Progress in Judicial Administration" focused on judicial selection and praised states for improving judicial retirement benefits, but contained no reports of developments in the area of judicial discipline or removal.<sup>38</sup>

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34. Shartel, *supra* note 33 at 485.

35. See Report of the Special Committee on Judicial Selection and Tenure, 62 ABA Rept. 893-97 (1937) and Vanderbilt, *Minimum Standards of Judicial Administration* (1949).

36. Report of the Special Committee, *id.* at 895.

37. *Id.*, 893-94.

38. "Nation-Wide Progress in Judicial Administration," 27 J. Am. Jud. Soc'y. 17 at 18 (1943).

By the late 1940's, however, problems of judicial unfitness again became the subject of at least limited comment. In 1949, Judge Jerome Frank, the prominent legal realist, insisted that the bench could tolerate "public reference" to "judicial dishonesty," because one could say "unequivocally that but a very few scamps manage to get on the bench." Frank also asserted "that the best way to avoid unfairness to the vast majority of judges is to oust the few rascals,"<sup>39</sup> although he mentioned no specific means to that end. In the same year, Arthur Vanderbilt, reviewing the implementation of the ABA's 1937-38 "Minimum Standards," took occasion to mention, albeit briefly, an item he had omitted a decade earlier--the problems of "removal of unfit judges from office" and "retirement of judges because of age, illness, etc."<sup>40</sup>

Two developments that Vanderbilt reported in 1949 were important in the evolution of a generally accepted mechanism for judicial discipline and removal. One was the New Jersey experience, the other that of New York. In 1947, New Jersey adopted a new constitutional judicial article, noted chiefly for its provisions unifying certain of the state courts under the central authority of the chief justice. Consistent with the principal behind Kales' 1913 proposal,<sup>41</sup> it authorized the supreme court, inter alia, to remove general, and some special, jurisdiction trial judges "for such causes and in such manner as provided by law."<sup>42</sup> Some years later, because the legislature consistently refused to pass implementing legislation, the court made the

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39. J. Frank, *Courts on Trial* 241 (1949).

40. Vanderbilt, *supra* note 35.

41. The proposal is discussed above at pp. 16ff.

42. N.J. Const. Art. VI, sec. 6, para. 4.

American Bar Association's Canons of Judicial Ethics binding on the judges of the state and thus used its bar disciplinary authority to discipline judges. (Implementing legislation, however, was passed in 1970.<sup>43</sup>) The New Jersey Administrative Office of the Courts, the first such state office in any real sense and today one of the largest, was available to provide staff assistance in the investigation and processing of complaints, and in 1974, the Supreme Court established by rule an Advisory Committee on Judicial Conduct to assist it further.

Second, a 1948 amendment to the New York Constitution provided for the special convening of a "Court on the Judiciary" to adjudicate complaints of judicial misconduct. The amendment had been urged by Governor Dewey and was adopted against the background of 10 years of gubernatorial efforts to deal with corrupt judges.<sup>44</sup> This special court would consist of the chief judge and the next senior judge of the Court of Appeals, the State's highest appellate court, as well as judges from the four geographic divisions of the intermediate appellate courts. The Court could be convened on request of the chief judge, the governor, any of the presiding judges of the intermediate appellate court, or a member of a special state bar committee authorized to make such a request.

The New Jersey system has been described as one among several effective systems in the states, its effectiveness attributed to the Supreme Court's determination to make available procedures work, and to the staff assistance

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43. N.J. S.A. 2A: 1B-11. See Braithwaite, *supra* note 8 at 38-40.

44. Gasperini et al., *supra* note 33 at 11-15.

of the Administrative Office.<sup>45</sup> The New York provision for the Court on the Judiciary has not been regarded as effective--indeed it has been repealed. What is important is the impetus these two efforts in the 1940s gave to the principle that judicial discipline should reside in the judiciary.

In 1960, California further bolstered that principle when it created a Commission on Judicial Qualifications, later renamed the Commission on Judicial Performance.<sup>46</sup> The Commission is composed of five judges selected by the supreme court, two lawyers selected by the state bar, and two non-lawyers selected by the governor. The Commission receives complaints, closes those found to be unmeritorious, and resolves minor problems without publicity or reference to any other body. The staff, which consists of one lawyer and clerical assistants, is authorized to close cases it finds to be groundless or beyond its purview (including those involving the legal merits of case decisions). The great majority of complaints filed do not go beyond the staff level. The Commission itself conducts hearings on cases it finds to be more serious, and, when warranted, it may refer the judge who is the object of the complaint to the Supreme Court, which, after a hearing, may remove or censure the judge.

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45. See Braithwaite, *supra* note 8 at 160-67.

46. For a review of the evolution of the California system through the 1976 change in name and authority, see Note, "Judicial Discipline in California: A Critical Re-evaluation," 10 Loyola (Los Angeles) L. Rev. 192 (1976). California had long sought some additional disciplinary mechanism, as detailed in Frankel, "Judicial Conduct and Removal of Judges for Cause in California," 36 S. Calif. L. Rev. 72 (1962).

The constitutional amendment adopted in 1960 provided for removal and involuntary retirement as the only sanctions, and the only grounds for invoking them were willful misconduct, failure to perform duties, intemperance, or permanent disability.<sup>47</sup> In 1966, the Constitution was further amended to allow the Court to censure judges as well as to remove or retire them. Also, an additional grounds for discipline was specified--"conduct prejudicial to the administration of justice bringing the judicial office into disrepute"--this to allow some discipline of judges who had not committed acts that justified relieving them of their office. In 1976, the Commission was authorized to issue private admonitions.<sup>48</sup> The first removal of a judge was in 1973, pursuant to a recommendation of the Commission, for repeated lewd and prejudicial behavior on the bench,<sup>49</sup> and since then, two additional judges have been removed and two, including a supreme court justice, have been retired involuntarily. In addition, however, 68 judges have voluntarily resigned or retired while under investigation, and it is plausible to attribute this in some large measure to the fear of a forced removal.<sup>50</sup>

The California plan, although not without criticism, appears to enjoy a reputation as the fairest and most effective method of judicial discipline for state court systems. Its formal characteristics--distinct investigative,

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47. Cal. Const., Art. VI, sec. 18, Cal. Stats. 1961, ch. 564.

48. See Note, *supra* note 46.

49. Geiter v. Commission on Judicial Qualifications, 10 Cal. 3rd 270 (1973).

50. These data are from a table provided by the Commission, "Cases Coming Before the Commission on Judicial Performance (Formerly Qualifications)," (undated) including data for 1961-77.

adjudicative, and sanctioning functions, which are clearly assigned to identified permanent units--have been widely adopted since the 1960 California constitutional amendment. Forty-seven states and the District of Columbia have created similar systems for discipline or removal of all or most judges by a third branch agency, with provision for standing investigation and adjudicatory bodies. Six states acted quickly to adopt the California prototype, making the change between 1960 and 1966. Twenty-one acted between 1967 and 1972, and 21 have acted since 1973.<sup>51</sup> The various components of judicial discipline were created by constitutional provision in 21 states, by statute or a combination of statutory and constitutional provisions in 17 states, and by court rule in concert with constitutional or statutory provisions in nine states.<sup>52</sup> (Because a state has adopted the formal characteristics of the California system does not mean, of course, that it has the more subtle characteristics that are credited with making the California system effective, such as the quality of the staff and the commitment of the commission members.)

#### Causes for Growth of Commission Systems

What has brought about this rapid change among the states? There appear to be two broad causes.

One cause--specific to individual states and reflected in national attitudes--was the series of judicial scandals that achieved widespread publicity

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51. These data are drawn from the results of a survey reported in Tesitor, supra note 11.

52. Id.

in the 1960s and 1970s. It is hard to say whether judicial misbehavior simply increased during this period or whether prosecutors and journalists became more willing or eager to expose it; perhaps there was a combination of the two. In any event, the scandals created pressure to strengthen judicial disciplinary mechanisms. In the mid-1960s, for example, four former members of the Oklahoma Supreme Court were convicted of bribery and tax evasion, several after having been impeached, or having resigned to avoid impeachment.<sup>53</sup> In 1966, Oklahoma provided by constitutional amendment for a Court on the Judiciary, and by a 1974 statute also adopted a Council on Judicial Complaints for preliminary investigatory work.<sup>54</sup> In Texas, a constitutional amendment bolstering the authority of a judicial discipline commission established in 1965 was preceded by a scandal involving the financial misdoings of a member of the state supreme court.<sup>55</sup>

A second factor that caused states to add commissions to their judicial disciplinary mechanisms in the 1960s and 1970s was the widespread interest in changing the form of court organization. Commissions came into being because the commission system had become incorporated into the standard prescriptions for a "model" judicial system. As noted above, earlier state court organiza-

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53. Note, "Court Scandal in the Oklahoma Supreme Court," 20 Okla. L. Rev. 417 (1967). These state developments occurred, moreover, roughly at the same time federal Judge Stephen Chandler of Oklahoma was having his disputes with the Tenth Circuit Council, discussed *infra* at 36ff. Although the cause of the latter dispute was in no way similar to the state judges' criminal behavior, both incidents presumably lent mutual reinforcement to the public view that things were amiss in the courts.

54. Tesitor, *supra* note 11 at 13.

55. "Texas Broadens Powers of Its Judicial Discipline Commission," 61 *Judicature* 291 (1978). The constitutional amendment gave the Commission on Judicial Conduct the authority to suspend a judge pending the outcome of an inquiry.

tion standards, such as those promulgated by the ABA in 1938 and 1962, had said little if anything about new methods of judicial discipline. By the mid-1960s, attention had shifted. The American Assembly, a non-profit organization that debates and develops recommendations on various public issues, called for supplementing impeachment with other removal methods.<sup>56</sup> In 1965 the American Bar Association House of Delegates urged a study of state judicial discipline, which was published in 1971.<sup>57</sup> In 1978, the American Bar Association approved Standards Relating to Judicial Discipline and Disability Retirement, which had been developed by its Appellate Judges' Conference and its Standing Committee on Professional Discipline.<sup>58</sup>

Thus, in 1963, a commentator on the "judicial selection and tenure" provisions in the ABA's 1962 Model State Judicial Article had written that removal was "less controversial and perhaps less vital" than the elimination of judicial elections.<sup>59</sup> By 1973 the pattern had changed: a series of scandals helped foster a general interest in state judicial discipline and removal, and the commission system had come to be seen as a safe but effective means to that end.

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56. See Item 7, "Involuntary Retirement and Removal," in Recommendations of the Twenty-Seventh American Assembly on the Courts, the Public and the Law Explosion," 49 J. Am. Jud. Soc'y. 18 (1965).

57. See Braithwaite, *supra* note 8.

58. American Bar Association, Joint Committee on Professional Discipline, Standards Relating to Judicial Discipline and Disability Retirement (Approved Draft, 1978).

59. Garwood, "Judicial Selection and Tenure: The Model Act Provisions," 47 J. Amer. J. Soc'y. 21 at 22 (1963).

As a result, states considering revision of court organization were likely to include a judicial discipline and removal commission. This happened in Georgia in 1972; a constitutional amendment proclaimed the state courts to be unified and provided specifically for a Judicial Qualifications Commission.<sup>60</sup> During a sustained effort in 1972 to reorganize Alabama courts a judicial discipline commission was created, basically on the California model, and, in turn, replaced the next year by a two-tiered Judicial Inquiry Commission and Court on the Judiciary with appeal to the Supreme Court.<sup>61</sup> In 1975, the passage of a new judicial article unifying the Kentucky state courts also brought about a Judicial Retirement and Removal Commission.<sup>62</sup> In 1977, New York voters amended their constitution to provide for "merit selection" of the highest state court judges,<sup>63</sup> as well as a unified system of court administration, and a Commission on Judicial Conduct. The provision for the ad hoc Court on the Judiciary was repealed.<sup>64</sup> New York seems to reflect the emergence of a national consensus over the problem of judicial unfitness and the desirability of adopting a constitutionally mandated, and permanently staffed, commission of judges and non-judges to deal with it.

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60. Ga. Const. Art. 6, Sec. 13, Para. 3.

61. See Cole, "Discipline, Removal, or Exoneration of Alabama Jurists," 5 Cumberland-Samford L. Rev. 214 (1974).

62. Ky. Const. Sec. 121.

63. This change followed a bitter electoral contest to fill the office of chief judge of the court in 1973; see Nejelski, et al. Where Do Judges Come From? (1976).

64. Text and summary of the three amendments provided by Office of Court Administration, New York State.

## 2. The Federal Courts

While the federal courts have also developed ways to deal with judicial unfitness, the problem has been generally regarded as of much smaller proportions and the response thus far has been much less formal than in the state courts. Rather than specifically created tenure commissions, the federal courts have relied on established agencies of federal judicial administration to provide a framework within which judges can deal with alleged incapacity or errant behavior of their colleagues. In large measure, such dealings are informal and without publicity. (As in the states, impeachment has been rarely used.)

Thus, to understand judicial discipline and removal in the federal courts, it is necessary to provide a brief overview of the evolution of two major, statutorily created, agencies: (1) a national body, the Judicial Conference of the United States, which is staffed by the Administrative Office of the United States Courts; and (2) judicial councils, which are responsible for the administration of the eleven regional circuits.

### The Judicial Conference

The federal courts were affected by the same dynamic that shaped the course of court administration change in the states. The leading exponent for change in the federal system was William Howard Taft, who became chief justice in 1921. Shortly thereafter, to provide some minimal level of docket supervision, he convinced Congress to create the Conference of Senior Circuit Judges, comprising the chief judges (or senior judges as they were then called) of each of the nine circuits then in existence. It met annually, chaired by the chief justice.<sup>65</sup> Taft found it disconcerting that one judge might exhaust himself "attempting to get through an impossible docket,"

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65. 42 Stat. 837 at 838.

while another would "let the arrears grow in a calm philosophical contemplation of them as an inevitable necessity that need not cause him to lie awake nights."<sup>66</sup>

The nature of the court system that Taft wanted to administer must be kept in mind in assessing the administrative and supervisory mechanism that he proposed. In the year he became chief justice, there were fewer than 100 federal trial judges in the entire country, and only 33 intermediate appellate judges.<sup>67</sup> Because they were perceived as a somewhat elite corps of jurists, little need was seen for a formal system for dealing with the rare cases of judicial misconduct and unfitness that arose. Impeachment by Congress, of course, remained available in theory at least, as a "last resort" remedy in cases serious enough to demand the attention of that body.

The Conference, purely advisory in its early years, has been renamed the Judicial Conference of the United States and now consists of the chief justice as chairman, and the chief judge of each federal circuit, a district judge elected from each circuit, and chief judges of two special jurisdiction courts. (Two bankruptcy judges will be added to the Conference in the fall of 1979.) Working through an extensive committee system, the Conference's responsibilities are to prepare procedural rules for the federal court system;

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66. Taft, "Possible and Needed Reforms in the Administration of Civil Justice in the Federal Courts," 6 J. Am. Jud. Soc'y. 37 (1922).

67. These figures were determined by a count of the judges listed in the prefatory pages of 269 Federal Reporter, published in 1921.

to present and comment on legislation affecting federal judicial administration; to prepare plans for the temporary assignment of judges, and to "submit suggestions to the various courts in the interest of uniformity and expedition of business."<sup>68</sup> The Administrative Office of the United States Courts, created in 1939 under the general supervision of the Judicial Conference,<sup>69</sup> exercises the personnel, budgetary, and management authority that constitutes the actual administration of the courts.

Pursuant to these statutory authorizations, the Conference has prescribed numerous policies for the federal courts, and has also promulgated ethical standards for federal judges and other personnel. A 1940 directive told judges not to hire relatives as law clerks or secretaries, and in 1963, the Conference declared that judges not serve on the boards or staffs of for-profit corporations.<sup>70</sup> While the Conference may prescribe ethical standards, a former Chairman of the Conference's Court Administration Committee expressed "considerable doubt that the Conference had any legal authority to regulate

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68. 28 U.S.C. 331. These latter duties are basically unchanged versions of the 1922 statutory language. P.L. 67-298, sec. 2; 42 Stat. 838 (1922). Under statute, the Supreme Court promulgates rules of procedure, which take effect unless Congress vetoes them within ninety days. However, under the law, the Conference recommends rule changes to the Court, and in fact the Court's role consists largely in passing on the Conference's proposed rules. The Conference, in turn, relies on a Standing Committee on Rules of Practice and Procedure, which is served by advisory committees on civil rules, criminal rules, appellate rules, and others created for special circumstances.

69. 53 Stat. 1223; 28 U.S.C. 601 et seq.

70. P. Fish, *The Politics of Federal Judicial Administration* 236-37 (1973).

the conduct of the judges."<sup>71</sup> Although it regulates office and personnel expenditures through the Administrative Office, thus dealing indirectly with certain types of conduct, for the most part the Conference must rely for compliance with ethical standards on judges' deference to hierarchy and on informal cajoling. In 1969, the Conference promoted voluntary compliance with outside income reporting rules that it adopted in the wake of the Fortas incident; like other Conference rules, they did not apply to the immediate source of the concern over judicial ethics,<sup>72</sup> the Supreme Court.

Furthermore, the Conference in 1973 made applicable to federal judges the bulk of the Code of Judicial Conduct adopted by the American Bar Associa-

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71. Judge Robert Ainsworth, in Hearings Before a Subcommittee of the Senate Judiciary Committee on the Judiciary Reform Act(s), S. 1506-16, 91st Cong. 1 & 2d sess., 10 (1970). See also, Fish, *supra* note 70.

72. The Conference modified its original and very stringent rules, in part because the American Bar Association was revising its Code of Judicial Conduct, which the Conference later adopted. \* See Report of the Proceedings of the Judicial Conference of the United States, November, 1969, at 52 (1969). It adopted a provision that judges would file confidential, semi-annual reports whenever they earn over \$100 in one economic quarter in outside income. In 1973, the requirement was extended to bankruptcy judges and magistrates. A 1978 statute requiring high public officials to report financial holdings and income--92 Stat. 1836, 5 U.S.C. 201, administered for the judiciary by the Judicial Conference--replaced the earlier Judicial Conference requirement. As of this writing, a federal district court has temporarily enjoined enforcement of the statute as it applies to the judiciary. Duplantier et al v. U.S., Civil No. 79-1735, Section C (E. D. La., May 15, 1979). The Justice Department has filed a motion with the Fifth Circuit Court of Appeals to vacate the order.

tion.<sup>73</sup> The Conference's Advisory Committee on Judicial Activities, created in 1969, advises judges on the proper interpretation of the Code and on other ethical matters and a Joint Committee on the Code of Judicial Conduct advises the Conference on the continuing process of adapting the Code to the particular characteristics of the federal judiciary.<sup>74</sup>

To repeat, compliance with the Conference's ethical directives is in the end voluntary. Thus the semi-annual summary of the Conference proceedings merely listed those "Judicial Officers who have not . . . filed reports of extra-judicial income"<sup>75</sup> pursuant to the Conference's directive. The number refusing to file, however, was miniscule, varying from 9 to 12 (less than 2% of all federal judges) each year since the reports were first required in 1970.<sup>76</sup>

#### The Federal Judicial Councils: Decentralized Administration

Although the Conference sets national administrative direction, since 1939 its policy has been to rely for regular administrative and disciplinary oversight of federal judicial administration on a "system of decentral-

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73. Report of the Proceedings of the Judicial Conference of the United States, March, 1973, at 10 (1973).

74. A Conference-authorized explanation of Judicial Conference activity in recent years is "A Review of the Activities of the Judicial Conference Committees Concerned with Ethical Standards in the Federal Judiciary, 1969-76," 73 F.R.D. 247 (1977).

75. These reports were received by the Conference's Review Committee, established for that purpose in 1970. See e.g., Report of the Proceedings of the Judicial Conference, September, 1978, at 53 (1978).

76. See, "A Review of the Activities," supra note 74 at 260.

ization"<sup>77</sup> resting on regional administrative bodies rather than the national conference. The 1939 statute that created the Administrative Office of the United States Courts also authorized a judicial council in each circuit<sup>78</sup> as the regional governing bodies of federal judicial administration.<sup>79</sup> These judicial councils have been viewed by the Judicial Conference as vested with the authority and the responsibility for discipline in the federal system.

The circuit's judicial council is composed of all active judges of the court of appeals in that circuit. The judicial councils' mandate includes making all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." According to the statute, "district judges shall promptly carry into effect all orders of the judicial council."<sup>80</sup> The judicial councils have been assigned at least 19 specific statutory duties<sup>81</sup> and the Judicial Conference has published administrative guidelines for their activities.<sup>82</sup>

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77. Hearings before a Subcommittee of the Senate Judiciary committee, 76th Cong. 1st sess on S. 188, April 4-5, 1939, at 20, cited in "Powers, Functions and Duties of Circuit Councils," Report of the Proceedings of the Judicial Conference of the United States at 8 (1974).

78. 53 Stat. 1223-24; 28 U.S.C. 332.

79. See generally, S. Flanders and J. McDermott, Operation of the Federal Judicial Councils (Federal Judicial Center, 1979).

80. 28 U.S.C. 332(d).

81. For example, they are to approve district court plans for random jury selection, 28 U.S.C. 1863(a) and requests for additional temporary court reporters, 28 U.S.C. 753(g), both cited in "Powers, Functions and Duties" supra note 77 at 10.

82. Including the admonition that the councils shall stay regularly informed of the status of the district courts' dockets, prisoners awaiting trial, and juror utilization. See "Powers, Functions, and Duties of the Circuit Councils," supra note 77 at 8-9.

The councils are presumed to be disciplinary as well as administrative bodies, but their disciplinary authority as well as their actual power to effect changes in judges' behavior are both open to question. Their disciplinary powers come primarily from the use--real or threatened--of two statutory provisions. One contains the almost-never-invoked authority to certify that a district or circuit judge is eligible to retire on the grounds of physical or mental capacity but refuses to do so.<sup>83</sup> Certification is to the President, who may appoint another judge; the certified judge loses all seniority, and presumably would not be assigned any judicial business by his court. It would appear that this provision has actually been invoked no more than one or two times.<sup>84</sup> In addition, several councils have threatened to use the provision, leading in one case to a judge's undertaking a cure for excessive drinking, and in another to a judge's taking senior status.<sup>85</sup>

The more important council disciplinary provision is the rather broad declaration quoted above that the councils "shall make all necessary orders for the effective and expeditious administration of the business of the courts

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83. 28 U.S.C. 372(b).

84. In 1966, the Chairman of the Judicial Conference's Court Administration Committee reported that 28 U.S.C. 372(b) had been used only once, and then when the incapacitated judge himself requested the certification because he had not served ten years and thus were he to certify his incapacity (under 28 U.S.C. 372(a), he would have retired on half pay, whereas if the Council certified his incapacity, he would receive full pay in retirement. See Hearings before a Subcommittee of the Senate Judiciary Committee, on Judicial Fitness, part 1, 10-11 (89th Cong., 2d sess., 1966). In 1978, Chief Judge Irving Kaufman reported that he was "able to find only two instances in which [28 U.S.C. 372(b)] has been employed." Kaufman *supra* note 3 at 709 n. 155. It is not clear whether "employed" means "invoked" or simply threatened.

85. See Flanders and McDermott, *supra* note 79 at 31-32.

within its circuit."<sup>86</sup> Regarding this provision, the Judicial Conference stressed in a 1974 formal statement that "[m]onitoring the substance of judicial decisions is not a function of the judicial council," and that the council should not infringe on any judges' "independence . . . to decide cases before them and to articulate their views fully."<sup>87</sup> The Conference also reiterated, however, its position of 1961 that the councils' statutory responsibility "for the effective and expeditious administration of the business of the courts within its circuit" includes a disciplinary function. The statutory duty, the Conference said:<sup>88</sup>

extends not merely to the business of the courts in its technical sense (judicial administration), such as the handling and dispatching of cases, but also to the business of the judiciary in its institutional sense (administration of justice), such as the avoiding of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system, from the actions of a judge or other person attached to the courts.

According to the chairman of the committee that drafted these words, they are meant to "avoid 'emphasis . . . on disciplining judges, although they do make clear the duty of councils in this respect and provide for guidance in this most sensitive area.'"<sup>89</sup>

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86. Supra note 80.

87. "Powers, Functions, and Duties," supra note 77 at 8.

88. Id.

89. Letter from Judge J. Skelly Wright to Judge Frank Battisti, Sept. 24, 1973, quoted in Battisti, "An Independent Judiciary or an Evanescent Dream?" 25 Case W. Res. L. Rev. 711 at 733-34 (1975).

Several commentators make a persuasive case that the provision's legislative history shows clear council authority to deal with disciplinary problems.<sup>90</sup> In addition, council members report numerous examples where instances of judicial unfitness--such as intemperance or physical disability--were called to their attention and the problems resolved by one form or another of persuasion, cajoling, or threats.<sup>91</sup> Federal Judicial Center researchers who conducted a survey of council operations reported that they "searched for complaints that had been 'swept under the rug,' and found none."<sup>92</sup> They did find, however, a general lack of understanding on the part of district and circuit judges, as well as attorneys, of the extent of council authority to take disciplinary action.<sup>93</sup>

#### The Chandler Case

One cause of this lack of understanding may be the only Supreme Court case dealing directly with the authority of the councils, Chandler v. Judicial Council of the Tenth Circuit (1970).<sup>94</sup> In some ways the impact of this case on the climate of the courts is more significant than is warranted by the

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90. See e.g., Fish, "The Circuit Councils: Rusty Hinges of Federal Judicial Administration," 37 U. Chi. L. Rev. 203 (1970), Burger, "The Courts on Trial," 22 F.R.D. 71, and Harlan, J., concurring in Chandler v. Tenth Circuit Judicial Council, 398 U.S. 74 at 89 (1970). See also Battisti, *supra* note 89 suggesting arguments calling for repeal of 28 U.S.C. 332(d) (at 714ff) because of its "paternalistic intermeddling" (at 720).

91. See Flanders and McDermott, *supra* note 79 at 30-34.

92. *Id.*, 30-31.

93. *Id.*, 33-34.

94. 398 U.S. 74 (1970).

the precise holding. Chandler is widely perceived as a weak statement of the power of the councils to expedite the performance of judicial business by taking corrective action with respect to errant judges. At first blush, this appears strange indeed, for the Judicial Council of the Tenth Circuit, which had been sued by Judge Chandler, not only prevailed in the Supreme Court, but it prevailed basically on grounds urged on its behalf in that court. Nothing in the majority opinion can be read as affirmatively derogating the powers of a council, and Chief Justice Burger, writing for the Court, included a forceful statement of the need for "some management power,"<sup>95</sup> with a concomitant obligation on the part of the individual judge to abide by reasonable procedures.<sup>96</sup>

At the root of the difficulty was the procedural posture of the case as it reached the Supreme Court. The majority complained that it was asked by Judge Chandler to allow a petition for a prerogative writ in a case that offered "no record, no petition for relief addressed to any agency, court or tribunal of any kind other than this Court, and a very knotty jurisdictional problem as well."<sup>97</sup> The four justices who constituted the majority concluded that regardless of whether or not the Supreme Court had jurisdiction, "plainly petitioner has not made a case for the extraordinary relief of mandamus or prohibition."<sup>98</sup> Thus, they found no need to resolve the jurisdictional issue.

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95. Id. at 85.

96. Id.

97. Id. at 88.

98. Id. at 89.

The remaining three justices were all of the view that the Supreme Court did indeed have jurisdiction, but two of them (Justices Black and Douglas) dissented on the ground that the council had acted unconstitutionally. And the dissenters wrote in the harshest terms, speaking of the "monstrous practices that seem about to overtake us,"<sup>99</sup> and warning that "the hope for an independent judiciary will prove to have been no more than an evanescent dream."<sup>100</sup>

Only Justice Harlan, who concurred in the denial of the writ but did not join the majority opinion, agreed with the position of the Solicitor General of the United States, who appeared, amicus, to argue that the Supreme Court did indeed have jurisdiction and that the action of the Council should be affirmed. In short, it was not so much what the majority did as what it did not do, not so much what it said as what it did not say, that created the doubts concerning the powers of the councils. At a minimum, it could not be denied that the Supreme Court had chosen to avoid an unequivocal affirmation of the powers of the councils. A common reaction on the part of circuit judges, compelled less by logic than by circumstances, was that prudence might well dictate caution on the part of circuit councils faced with similar situations in the future.<sup>101</sup> Compounding all of this was the fact that members of the Council were obliged to meet the expenses of their attorney from personal funds. We turn to the facts of Chandler.

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99. Id. at 141 (Douglas, J.).

100. Id. at 143 (Black, J.).

101. This reaction is reported in, e.g., Flanders and McDermott, *supra* note 79 at 29, n. 44.

The case involved the efforts, begun in 1965, of the Judicial Council of the Tenth Circuit to take away the cases assigned to Judge Stephen Chandler. Judge Chandler had been appointed in 1943 to the District Court for the Western District of Oklahoma and served as chief judge from 1956 to 1969. The Council was concerned about what it regarded as serious backlogs in his court, and by the fact that he had been the defendant in civil or criminal suits and the object of several requests, which he denied, that he disqualify himself from hearing certain cases because of alleged bias toward the parties.

In December, 1965, the Council ordered that Judge Chandler take no further action in any case then pending before him and that no new cases be assigned to him until otherwise ordered. Judge Chandler promptly initiated proceedings in the United States Supreme Court challenging the action of the Council on the ground that it unconstitutionally deprived him of his judicial office. There then followed, in rapid succession, a series of procedural maneuvers and substantive changes that resulted in a new order by the Council, vacating its previous order and allowing Judge Chandler to retain the cases already assigned to him, but providing that no new cases be assigned to him. Chandler joined his colleagues on the district court in a formal submission to the Council that the latter order was "agreeable under the circumstances,"<sup>102</sup> but at the same time he persisted in his effort to persuade the Supreme Court to hold that very order beyond the powers of the Council. A "remarkable litigation posture for a lawyer to assert in his own behalf," the Supreme Court observed in its opinion.<sup>103</sup>

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102. The council may determine the assignment of cases only if the district judges cannot agree on the rules for such an assignment among themselves. 28 U.S.C. §137.

103. Supra note 94 at 88.

As must already be clear, this was hardly the ideal case for the development and articulation of the constitutional and statutory powers of the circuit councils. Yet another, more serious, procedural problem faced the Court, that of jurisdiction. The Supreme Court's jurisdiction, with exceptions not here relevant, is by constitutional limitation exclusively appellate. Its power to issue prerogative writs is, as a corollary, limited to situations in which it acts in aid of its appellate jurisdiction, broadly defined as including present and prospective jurisdiction, but limited nonetheless. But appellate jurisdiction, however broadly it might be defined, turns by definition on some judicial act below. Was the Council's action judicial action? The Chief Justice and those joining in his opinion avoided the question: even if they had jurisdiction, the record before them was hardly one calling for an extraordinary remedy in aid of Judge Chandler.<sup>104</sup> One can understand and indeed sympathize with the desire of the Court to avoid the "knotty jurisdictional problem" while yet recognizing that a decision so narrowly based could hardly be perceived as a ringing vindication of the powers of the councils to deal with errant judges.

The ringing rhetoric came primarily from those opposed to the authority asserted on behalf of the councils. Such rhetoric preceeded the Supreme Court decision, and continues to this day. And rhetoric has a life of its own and an impact beyond the narrow confines of the case that evokes it.

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104. "Whether the Council's action was administrative action not reviewable in this Court, or whether it is reviewable here, plainly petitioner has not made a case for the extraordinary relief of mandamus or prohibition." *Id.* at 89.

Judge Chandler, the year before the Council's first order, had publicly warned that the "judicial reform movement is tending too far in the direction of subordinating the administrative authority of the trial judge" and called for vigorous resistance to "present and proposed systems of supervision and control of judges."<sup>105</sup> Justices Black and Douglas, asserting that "[j]udges are not fungible,"<sup>106</sup> found the council's action not only unconstitutional but a dangerous harbinger of possible further efforts to control judges' independent decision-making. A district judge commenting on the case stressed that trial judges (especially federal trial judges) "are regularly in close personal contact with controversial issues, emotional settings, and volatile personalities . . . and if they are to perform their duties effectively, must be substantially immune from intimidation, no matter what the source."<sup>107</sup> Likewise, Justices Douglas and Black worried in their Chandler dissent that a Judicial Conference Resolution--which would have prohibited outside activity by judges unless approved by the respective judicial council as, among other things, in the "public interest"<sup>108</sup>--was antithetical to an independent

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105. Chandler, "The Role of the Trial Judge in the Anglo-American Legal System," 50 A.B.A.J. 125 at 129-30 (1964).

106. Supra note 94 at 137.

107. Battisti, supra note 89 at 744.

108. Report of the Proceedings of the Special Meeting of the Judicial Conference of the United States, June, 1969 at 42. This resolution was superseded on November 1, 1969, Report of the Proceedings of the Judicial Conference of the United States, November, 1969 at 51; see also, supra note 94 at 138 note 5, Douglas, J., dissenting. The reporting requirements eventually established are described supra in note 72.

judiciary. They worried that the "public interest" that might control would be the "public interest" of "judges who have not been educated in the needs of ecology and conservation [or] who still have a 'plantation' state of mind and relegate many minorities to second-class citizenship."<sup>109</sup>

As already noted, one result of the Court's failure to resolve fully what Justice Douglas rightly called "the liveliest, most controversial contest involving a federal judge in modern United States history"<sup>110</sup> has evidently been a view among some council members that they cannot rely on the Supreme Court's support should disagreements produce similar confrontations. Others, however, regret Chandler for a different reason. They argue that because the Tenth Circuit Council was unable to resolve its differences with Judge Chandler without a judicial contest, Chandler made more difficult the largely successful behind-the-scenes resolution of disputes with obstreperous judges or the firm but gentle suggestions that intemperate judges had best change their behavior.

#### Legislative Proposals for Federal Judicial Discipline

The Congress, sparked by the Chandler affair and similar incidents has, over the years, entertained various legislative proposals to complement impeachment as a formal means of disciplining or removing federal judges. The long and laborious impeachment and conviction in 1936 of Judge Halsted Ritter prompted such proposals, and the notoriety of the Chandler incident helped spark another wave of interest in such legislation. Thus, in the 1960s, bills

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109. Supra note 94 at 139-40.

110. Id. at 130.

were submitted in succeeding Congresses by Senator Joseph Tydings, Chairman of the Senate Judiciary Subcommittee on Improvements in Judicial Machinery.<sup>111</sup>

In the 1970s, in the wake of the Supreme Court's final action in the Chandler case, and in response to other allegations of judicial misbehavior such as those leveled at the late federal Judge Willis Ritter of Utah, Senator Sam Nunn introduced legislation similar to that of Senator Tydings. The Nunn proposal, with modifications, was co-sponsored in the 95th Congress by Senator Dennis DeConcini, who chairs the subcommittee formerly chaired by Tydings.<sup>112</sup>

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111. See Hearings on S. 3055, S. 3060, S. 3061, S. 3062 before the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee 90th Cong. 2d sess., 1968.

112. The lineage of these proposals are discussed in Wallace, "Must We Have the Nunn Bill?" 51 Ind. L. J. 297 at 302-07 (1976), and in the statement of former Senator Tydings in Hearings Before the Senate Judiciary Committee on S. 1423, 95th cong., 1st sess., 1977 at 61ff.

The Judicial Conference of the United States first approved the Nunn bill, "in principle," in 1975, although it also approved several suggested revisions. (See Report of the Proceedings of Judicial Conference of the United States, March 1975, at 4-5). However, various revisions in the proposals as introduced in succeeding Congressional sessions, and concern by the Conference that its limited, "in principle," approval was misunderstood, has led the Conference to go on record as disapproving any proposal that would allow for the removal of a judge from office by means other than impeachment, and to explore instead whether the disciplinary powers of the circuit councils could be strengthened. Report of the Proceedings of the Judicial Conference of the United States, September, 1978, p. 50. The Conference, at its March 1979 meeting, reaffirmed this position, and directed the judicial councils to establish formal mechanisms for handling complaints. See Statement of Honorable Elmo B. Hunter before the Senate Judiciary Subcommittees on the Constitution and on Improvements in Judicial Machinery, concerning S. 295, S. 522, and S. 678, Title I, parts C & E, May 8, 1979. (mimeo). The Conference's March, 1979 Resolution is below:

1. The Judicial Conference of the United States expresses its approval of the following principles to be reflected in any legislation dealing with procedures for inquiries into the conduct of Federal judges:

(a) Removal of an Article III judge from office by any method other than impeachment as provided in Article I of the Constitution would raise grave constitutional questions which should be avoided.

(b) The primary responsibility for dealing with a complaint against a United States judge should rest initially with the chief judge of the

The Nunn-DeConcini bill passed the Senate in 1978,<sup>113</sup> the first time in several decades that any form of the proposal has succeeded in either

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circuit as presiding judge of the Judicial Council, who may dismiss the complaint if it is frivolous or relates to the merits of a decision or procedural ruling, or may close the complaint after assuring himself that appropriate corrective action has been taken.

(c) Any complaint not dismissed or closed by the presiding judge should be referred to a committee appointed by the presiding judge, consisting of an equal number of circuit and district judges and the presiding judge.

(d) The joint committee should report its findings and recommendations to the Judicial Council, which should take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit.

(e) The Judicial Council may, in its discretion, refer a complaint and the Council's recommended action to the Judicial Conference of the United States.

(f) If the Judicial Council concludes that grounds for impeachment may exist, it should transmit the record upon which its conclusion is based to the Judicial Conference of the United States; the Judicial Conference shall then determine whether, in all the circumstances, the matter should be referred to the House of Representatives.

2. The Judicial Conference recommends that the Judicial Councils of the several circuits, at their earliest opportunity, consider the formulation and promulgation of rules of procedure for the receipt and processing of complaints against judges in accordance with the principles expressed in paragraph 1; such rules and regulations should be announced in such manner as to assure that the public and the bar will be informed.

3. The Chairman of the Court Administration Committee and the members of the Executive Committee of the Conference are directed (1) to review and revise, in accordance with the principles stated in paragraph 1, the Court Administration Committee's proposed amendments to 28 U.S.C. Sec. 332, and (2) to transmit the revised proposed amendments to all members of the Conference for their approval. Following approval by the Conference, the Chairman of the Court Administration Committee, if called upon by the Congress to testify upon pending legislation, is authorized to inform the Congress that, if legislative action is to be taken, the Conference recommends amendments to 28 U.S.C. Sec. 332 as approved by the Conference in accordance with this paragraph.

4. All previous Judicial Conference resolutions or comments upon legislation dealing with the conduct of Federal judges are superseded by this resolution.

113. Roll call vote on S. 1423 reported at 124 Congressional Record S. 14782 (Sept. 7, 1978).

house.<sup>114</sup> It did not reach a floor vote in the House of Representatives, but has been introduced in the 96th Congress in the identical form that it passed the Senate in 1978.<sup>115</sup>

The Nunn-DeConcini bill, currently S. 295, has varied substantially as it has evolved, but the prototype is clearly the state judicial disciplinary commissions, except that the membership of the proposed federal commission would be restricted to federal judges. S. 295 would establish a Judicial Conduct and Disability Commission with one judge elected from each of the circuits, and one member selected collectively by the three special courts. The Judicial Conference itself would select an Executive Director for the Commission, and the staff would receive complaints alleging judicial unfitness, with the power to dismiss those involving the merits of a judge's substantive or procedural rulings, "and complaints relating to the condition or conduct of a judge which is not connected with his judicial office or which does not prejudice the administration of justice by bringing the judicial office into disrepute."<sup>116</sup> Complaints not dismissed by the staff would be forwarded to committees authorized in each of the circuits, which would be required, within specified time limits, either to recommend dismissal or further investigation to the Commission, or request more time to iron out the problem on its own. The Commission, in turn, could investigate the complaint pursuant to circuit committee recommendation. It would then either dismiss

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114. See Wallace, *supra* note 112 at 303.

115. S. 295, 96th Cong. 1st sess. (1979).

116. *Id.* Sec. 383(a).

the complaint or recommend a hearing before still another body that the bill would authorize, a body called the Court on Judicial Conduct.

This court would be composed of a member of the Judicial Conference, selected by the Conference as presiding officer, and six other members of the Conference selected by the presiding officer. It would be an Article III court, with the authority either to retire involuntarily the judge complained against, remove the judge from office, censure the judge, or dismiss the complaint. The ground for removal or censure, as stated in S. 295, is behavior "inconsistent with the good behavior required by article III, section 1 of the Constitution," which the bill defines as including, but not limited to, "willful misconduct in office, willful and persistent failure to perform duties of the office, habitual intemperance, or other conduct prejudicial to the administration of justice that brings the judicial office into disrepute."<sup>117</sup> The aggrieved judge, or the Commission, would be able to seek review of the Judicial Conduct Court's decisions by certiorari to the Supreme Court. The Court on Judicial Conduct would not be empowered to remove or censure a justice of the Supreme Court, but it could recommend censure or impeachment to the House of Representatives.

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117. Supra note 115 at Sec. 388. Article III, section 1 of the Constitution provides that federal judges "shall hold their offices during good behavior." This provision has promoted extensive debate over whether the impeachment process provided for by Article I, section 3 and Article II, section 4 is the sole means of determining that a judge is to be removed from office for violating the good behavior standard. Article II, section 4 provides that "all civil offices of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. One interpretation of, and introduction to, the relevant literature may be found in Kaufman, supra note 3.

There are by now two other legislative proposals for augmenting federal judicial disciplinary authority. One is an element in a package of federal court proposals (S. 678) sponsored by Senators Kennedy and DeConcini,<sup>118</sup> and the other, S. 522, was introduced by Senator Bayh.<sup>119</sup> These latter two proposals differ sharply from the Nunn-DeConcini bill, and indeed differ among themselves in significant ways; moreover, further refinement can be expected as the legislative process continues. The major differences separating Nunn-DeConcini from the more recent proposals deserve amplification.

Unlike the Nunn-DeConcini proposals, the Kennedy-DeConcini and Bayh proposals would establish no additional agencies, nor would they authorize the removal of judges from office. Instead, these proposals direct the various judicial councils to receive complaints about judges (or undertake their own review of possible misbehavior). In addition, they expressly authorize a variety of sanctions that the councils may impose, including a request for voluntary retirement (waiving the length of service required to receive pension requirements), public or private censure, or recommending to the Judicial Conference that that body in turn advise the House of Representatives that impeachment proceedings are warranted. These latter two proposals appear to be basically consistent with the resolution on judicial discipline legislation adopted in March, 1979, by the Judicial Conference of the United States.<sup>120</sup>

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118. S. 678, 96th Cong., 1st sess., sec. 141 (1979).

119. S. 522, 96th Cong., 1st sess., (1979).

120. See statement of Judge Elmo B. Hunter, *supra* note 112 at 23ff. The resolution is reprinted at note 112.

That resolution also directs the councils to establish committees to investigate complaints about judicial unfitness not dismissed by the chief judge; a provision for such committees is also found in S. 522, but not in S. 678.<sup>121</sup> An important element of the Judicial Conference Resolution is the requirement that circuit plans be published and disseminated. Some councils had established such committees before the Conference had acted.<sup>122</sup> The Judicial Conference resolution would also provide for review of council actions, if requested, and authorize the Conference to recommend impeachment proceedings to the House of Representatives.

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121. S. 522 supra note 119 at Section 332, subsection (q)(4).

122. For example, the Ninth Circuit council announced in December, 1978 a procedure it established whereby complaints would be filed with the chief judge, who could dismiss the complaint as frivolous or unrelated to the merits of the case, or close it after assuring himself that appropriate action was taken. Otherwise, the complaint would be referred to a three-judge committee for investigation and recommendation. The Tenth Circuit Council has adopted a similar procedure, and, at this writing, other circuits are acting to implement the Conference resolution.

### III. EVALUATING METHODS OF JUDICIAL DISCIPLINE AND REMOVAL

We turn to analyze the criteria by which to evaluate the four traditional and three more recently-devised methods of judicial discipline and removal.<sup>123</sup> We begin by considering the several objectives that a discipline and removal procedure might reasonably be expected to meet: legality, ability (as a practical matter) to take action, protection of judicial independence, fairness to the accused judge, and public accountability. These objectives have rarely been precisely stated and thus measures of effectiveness are vague at best.

Legality--Few of the formal methods of discipline and removal currently in use seem to be under serious legal attack or question. This may be because the methods come largely by way of constitutional provision or amendment. This does not mean, of course, that the provisions are not debated as to their wisdom. In the federal system, the legality of various proposals for change have been hotly contested, and even the statute providing a disciplinary role for judicial councils has not been free from challenge, at least as vague and overbroad.<sup>124</sup>

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123. See supra at pp. 7ff for a summary description.

124. The dissenting Justices in the Chandler case, supra note 94, while not addressing directly the constitutionality of the vaguely worded 28 U.S.C. 332(d), asserted that "there is no power under our Constitution for one group of federal judges to censor or discipline any federal judge and no power to declare him inefficient and strip him of his power to act as a judge." Id. at 137. Yet, these latter two acts are essentially what the Council attempted to do to Judge Chandler under 28 U.S.C. 332(d). See also Flanders and McDermott, supra note 79 at 33 ("too many district and circuit judges . . . assume [council powers] are unconstitutional") and, for concern that the statute is vague and overbroad, see Battisti, supra note 89 at 714-15.

Ability to Take Action--A satisfactory mechanism must not be so cumbersome or complicated or protracted that it becomes a theoretical remedy rather than a realistic means of dealing with real problems. That a mechanism is legal does not mean that it is necessarily effective. Various forms of legislative removal, for example, are authorized in every state, but the number of judges thus removed is so miniscule that it seems quite arguable that some judges who should have been removed have not been.

If informal mechanisms are judged simply in terms of their activity--more specifically, the number of judges disciplined, removed, or who retired while an investigation was in progress--the commission system clearly appears more effective than were the ad hoc courts on the judiciary, or are the traditional methods of impeachment, legislative resolution, address or recall. The New York Court on the Judiciary, for example, was convened rarely in its 30 year history.<sup>125</sup> Probably fewer than 50 state judges have been removed from office by impeachment or legislative address to the governor in the last 100 years.<sup>126</sup> Relatively few judges appear to lose office through elections,

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125. As of 1973, it had been convened six times, American Judicature Society, *Judicial Disability and Removal Commissions, Courts, and Procedures*, xxiii (1973), and it was convened at least one more time, in a case involving a judge of the highest appellate court in the state; see Goldstein, *infra* at note 128.

126. Data on impeachments are hard to find, but those who have probed primary or secondary sources report finding very few recorded instances. See, e.g., Swain, "The Procedures of Judicial Discipline," 59 *Marquette L. Rev.* 196 (1976) and Braithwaite, *supra* note 8.

especially retention elections,<sup>127</sup> and recall elections have apparently been even less productive of judicial removal. It does bear mention, though, that in the last two years, judges have been removed by each of these methods, suggesting perhaps that the same impetus for judicial accountability that has led to the creation of commissions in almost all states has helped to reactivate methods for which the commissions are touted as replacements.<sup>128</sup>

Nevertheless, by contrast to the decades of relative inaction by most traditional disciplinary mechanisms, in the California Commission's 19 years of existence, four judges have been removed or involuntarily retired, and an

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127. Supporting the conventional wisdom, an analysis of the retention elections held in 1972 in eleven states, involving 308 judges, revealed that only 4 had been turned out of office, and some incumbents were retained despite "not qualified" evaluations by unofficial bar polls; "Merit Retention Elections in 1972," 56 *Jud.* 252 (1973).

128. One example is a recently successful effort to recall a Wisconsin state judge who had left an impression in remarks from the bench that he regarded rape as a normal reaction to a sexually permissive attitude in his community.

In 1978, the Florida legislature impeached and convicted a judge for using his judicial authority to enrich himself in a scheme to sell contraband drugs; the Governor refused to accept the judge's pre-conviction resignation, offered in an attempt to save his pension. The Massachusetts legislature directed the removal on address of the chief judge of the state's court of general jurisdiction, who was accused of financial and patronage improprieties and showing favoritism by attending a dinner sponsored by litigants whose case would be heard by a judge to be assigned by the chief judge in question. The Governor accepted his resignation. See Prendergast, "Judging Judges and Removing Them," *The National Law Journal*, at 12, October 2, 1978.

Finally, the New York Court on the Judiciary, in its last year of existence, publically censured a judge of the state's highest appellate court, the first instance of such an action. See Goldstein, "Fuchsberg Censured for Trading in New York Notes During Appeals," *New York Times*, March 17, 1978 at 1.

additional 68 retired or resigned while they were under investigation.<sup>129</sup> An American Judicature Society survey of 38 jurisdictions with disciplinary commissions found, in one twelve-month period, 65 retirements or resignations during or after formal commission hearings, although 30 of those were in one state, New York. (The survey did not report removals, but it did report 89 instances in which commissions made disciplinary recommendations to the supreme court or a special disciplinary court, 55 of those from New York.<sup>130</sup>)

Why, among formal mechanisms, does the commission system seem to produce so many more removals, retirements, and resignations than the more traditional methods? Obviously, it is not because judges become unfit only after commissions are created. Nor does it appear that the commission system is grossly more unfair than other systems, forcing judges out of office for unjustified reasons. At the least, the literature on the operation of the various state commissions gives little evidence of this concern, and indeed, one recent review of the commission in California chided it for insufficient vigor, labelling it as no more than "a modest and commendable beginning."<sup>131</sup>

Two plausible--and to a degree compatible--explanations for the widely divergent records of accomplishment present themselves. The first is that the commission system is in fact more effective than other formal disciplinary

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129. See the law review note cited above at note 46.

130. Tesitor, *supra* note 11 at 30-31.

131. *Supra* note 46 at 235.

mechanisms. By this we mean that it acts upon legitimate complaints where other mechanisms do not. One reason it is more effective is that it has the staff to receive and investigate complaints. Also, commissions typically have available to them a wider range of sanctions--from a private censure to a recommendation for removal by a judicial body. Traditional methods provide only "all or nothing" remedies. Because removal from office ("all") is usually too extreme a sanction, they usually achieve "nothing." Finally, since the commission can operate largely out of the glare of publicity, it has more avenues available to it in pursuing complaints that otherwise might be dropped. Where preliminary investigation would seem to merit it, it is relatively simple for the commission, acting through its staff, to address a formal letter of inquiry to a judge complained against; this gentle private nudge would be much harder to achieve in the publicity surrounding impeachment. In addition, judges confronted in private with strong evidence of impropriety may resign or retire quietly, to protect their reputations and perhaps their pensions, or because they were in any event contemplating retirement. Faced with a public charge, however, they might feel compelled to fight for public vindication.

We turn to a second explanation for the more impressive public record of judicial discipline in jurisdictions with commissions when compared to the record in non-commission jurisdictions. It is simply this: the discipline that is achieved and publicly recorded by a commission may, in other jurisdictions, be achieved informally with no published record. It is especially important to consider the merits of this explanation when weighing the need for a federal judicial discipline commission. Proponents of such a commission

put great stock in the clearly meager effects of the impeachment process, noting that only four federal judges have actually been removed from office by that process and drawing the conclusion that "it is unreasonable to assert that a mere four Federal judges have misbehaved or been disabled in our history."<sup>132</sup> What is clearly needed, they argue, is "specific statutory language . . . which would authorize disciplinary action in the case of a misbehaving judge;"<sup>133</sup> (presumably, they mean language in addition to 28 U.S.C. 372(b), the rarely-employed provision authorizing councils, in effect, to retire a disabled judge involuntarily).<sup>134</sup>

Yet, before additional authority to remove a judge from office is created--given the subtle dangers that may entail<sup>135</sup>--it is well to assess the federal judiciary disciplinary system in its totality. That totality is a system that includes within it the impeachment and involuntary retirement provisions (and whatever threats they provide), the authority of the judicial councils, the appellate review function, the case assignment power, the relatively liberal retirement provisions that federal judges enjoy, and the informal ties by which judges can encourage, condemn or rebuke their colleagues. Proponents of major change in this system--either a constitutional amendment

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132. Senator Nunn, introducing S. 295, in 125 Cong. Rec. S. 899, 96th Cong., 1st sess., 1979. In addition, at least one or two judges have been involuntarily retired because of disability; see supra note 84.

133. Id.

134. See text supra at p. 34.

135. See infra at pp. 71ff.

authorizing judicial removal by additional unspecified means<sup>136</sup> or the Nunn-DeConcini commission<sup>137</sup>--have dismissed the importance of informal processes because they "ha[ve] weaknesses"<sup>138</sup> or because they are not thought to ensure adequate disciplinary action.<sup>139</sup> Several federal judges have also questioned the effectiveness of informal procedures.<sup>140</sup>

In a recent study, however, the Federal Judicial Center assessed the operation of the judicial councils through extensive discussions with circuit and district judges and other personnel, and through examination of council reports and other documents. On that basis the researchers concluded, contrary to the expectations that one might have based on the conventional wisdom,<sup>141</sup> that "it is in the area of handling complaints about judge behavior

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136. Berkson and Tesitor, "Holding Federal Judges Accountable," 61 *Judicature* 443, 458 (1978)

137. Nunn, *supra* note 132.

138. Berkson and Tesitor, *supra* note 136.

139. Nunn, *supra* note 132.

140. Judge Tone, of the Seventh Circuit Court of Appeals, writing in a case involving a mandatory retirement age for state judges, may have had federal councils in mind when he claimed that "[i]nformal pressures to retire are scarcely more effective [than a "cumbersome individualized removal procedure"], since the reluctance of judges to ask a colleague to step down is usually exceeded only by his reluctance to do so." Trafelet v. Thompson, 47 *Law Week* 2635 at 2636 (1979).

Judge Lumbard has specifically asserted the councils' impotence, relying on several specific examples, in Lumbard, "The Nunn Bill: A Way to Ensure Judicial Accountability," 61 *Judicature* 477 (1978).

The common view is expressed in Professor Fish's oft-cited article, the tenor of which is indicated by its title, "The Circuit Councils: Rusty Hinges of Federal Judicial Administration," *supra* note 90, in which, at 223, he describes the councils as "pillars of passivity." Other criticisms of the councils are summarized in Flanders and McDermott, *supra* note 79 at 8-10.

141. Flanders and McDermott, *supra* note 79 at 28-31.

that the councils have been most effective. . . . Despite considerable probing, we uncovered no clear instances in which councils had failed to act effectively (apart from previously known instances, such as those involving the late Judge Willis W. Ritter, and Judge Stephen S. Chandler)."<sup>142</sup>

It is, of course, difficult to quantify the effectiveness of the network of formal and informal arrangements that constitute the federal judicial disciplinary system. As Flanders and McDermott point out, focusing on the councils, "there is no record of stunning achievement in this area; for the most part, there is no record at all. Congress established a system that relies on informal action. Because it has been informal, there is little or no record of council action."<sup>143</sup> It is important, however, to note how very few instances of federal judges' retiring or resigning because of the opportunities of their colleagues would approximate the published California record. For example, in 1977, the Commission reported that two California judges left the bench involuntarily or while under investigation; this was in a system of 1,178 authorized judgeships. A single instance among the approximately 500 judges in the federal system would be roughly equivalent. The comparable figures in 1978 are five for California and two federal judges.<sup>144</sup> All this,

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142. Id. at 28-29 (emphasis in original).

143. Id. at 27-28.

144. The table below presents the activity of the California Commission for five year intervals since 1962, and for 1978.

of course, is without regard to the problems of comparing federal and state judges. Nor does it consider whether any additional California judges were persuaded by their colleagues to resign or retire, lest a complaint be filed with the Commission, triggering a staff inquiry. Indeed, informal persuasion by colleagues might be strengthened where a commission exists, making the threat to file a formal complaint more effective than in the federal system. In any event, the illustration is not intended to provide precise comparisons of discipline under the California and federal systems, but simply to illustrate the very significant problem of magnitude as it affects the visibility of an informal system of discipline in a judiciary of limited size.

To repeat, however, measuring the effectiveness of the various mechanisms for federal judicial discipline is a multi-faceted task. The carefully reached conclusions of the Federal Judicial Center report that no complaints

TABLE 1  
Complaints and Actions Taken By California Commission in Selected Years\*

Year	Judgeships Authorized	Complaint Filed	Inquiries (Some Kind of Investigation)	Judge Contacted	Admonishments	Resignation or Retirement	Public Discipline
1962	907	95 (10.5%)	23 (2.5%)	NA		4 (.4%)	0
1967	969	101 (10.4%)	48 (4.9%)	33 (3.4%)		5 (.52%)	0
1972	1,115	213 (19.1%)	64 (5.7%)	49 (4.4%)		2 (.18%)	0
1977	1,178	217 (18.4%)	53 (4.5%)	52 (4.4%)	8 (.68%)	1 (.08%)	1 (.08%) (involuntary retirement)
1978	1,192	274 (22.9%)	72 (6%)	59 (4.9%)	--	3 (.25%)	2 (.16%) (involuntary retirement; public censure)

Percentage shown is of total authorized judgeships.

\*(Source: Compiled from California Commission on Judicial Qualifications/Performance Report 1972, 1977; 1978 and "Cases Coming Before the Commission on Judicial Performance (formerly Qualifications)" (providing data 1961-1977). Authorized judgeships for 1962 and 1967 were provided by California Administrative Office of the Courts.

In 1977, the Commission first used its new authority to issue private but official admonishments to judges; see supra p. 23. Eight were issued, that year, which would correspond to about three instances of federal judges', through the councils or otherwise, admonishing errant fellow judges.

brought to the councils' attention had been "swept under the rug" does not necessarily dispose of complaints not called to the councils' attention. The Judicial Center researchers realized this, and acknowledged that "[m]ost lawyers do not know of the existence of section 332 powers, or how to invoke them;" they recommended establishing circuit committees, well-publicized, to receive and handle such complaints.<sup>145</sup> Anyone who has listened to a frank discussion between judges and lawyers, in which federal judges defend the effectiveness of the judicial councils, will hear lawyers respond in frustration with one or more examples of judges whose behavior is rude, insensitive, or even prejudicial--judges who are not being admonished and corrected.<sup>146</sup>

Moreover, not all observers in a position to know concede the effectiveness of the councils to deal with more serious matters that presumably have been called to their attention. The comments of Griffin Bell on this matter are not without significance. Bell became United States Attorney General in January 1977. He was a Judge of the United States Court of Appeals for the Fifth Circuit, and thus a member of that circuit's judicial council, from 1961 to 1976, when he returned to the private practice of law. Shortly after he left the bench, Bell gave a guarded endorsement of a forerunner to S. 295, recommending a federal judicial discipline council "on a standby basis and to

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145. Flanders and McDermott *supra* note 79 at 34. See also note 112, *supra*.

146. See, for example, the statement of Senator Hatch in debate over S. 1423: "As a trial lawyer who has tried innumerable jury trials, all kinds of non-jury trials, in almost all [federal] courts in at least two states, I have found a lot of abuses in the judiciary that nobody does anything about." 124 Cong. Rec. S14766, 95th Cong., 2d sess. (1978). One of these states was Utah, and the judge in question was the late Willis Ritter, the object of numerous complaints. Senator Hatch did not identify the other state, but, like Utah, all states of the inter-mountains west have comparatively few federal judges.

be used as a last resort. . . . Most matters would be handled by the Judicial Council and there would be little left for the Council on Tenure to do."<sup>147</sup> After seven months as Attorney General, he testified on a similar bill and said that he had "come to realize that we seriously need this legislation--more so than I ever thought before. . . I do not want to go into the details [of various judges who need disciplinary action] but I will certify that I will do whatever I have to do to impress the Committee of the serious need for some form of judicial disability legislation."<sup>148</sup>

#### Protection of Judicial Independence

The major fear associated with judicial disciplinary systems is that they will be used to punish judges for unpopular judicial decisions, that they cannot be effectively confined to the behavioral problems for which they are established. There is another point, related to and yet distinct from, the use of disciplinary procedures to punish judges for unpopular decisions. It is the widespread concern that the ready availability of such procedures and the risk that they will be used for such purposes will "chill the independence" of judges. Whether or not well-founded, the fear is a real one and has been repeated often. At the very least, it may be that judges will be more circumspect and indirect in what they say in opinions, even if decisions are unaffected. It bears mention that in our legal system opinions serve an

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147. Hearings before a Subcommittee of the Senate Judiciary Committee on S. 110, 94th Cong. 2d sess., 140 (1976).

148. Hearings before a Subcommittee of the Senate Judiciary Committee on S. 1423, 95th Cong., 1st sess. 89 (1977).

important, didactic function in many areas of public concern: an example is seen in the judicial statements concerning ending various forms of discrimination.

Impeachment, of course, could be a vehicle for venting partisan or ideological antagonisms against a judge, and on occasion, its use has indeed been threatened for this purpose. However, judges, and others, appear to have concluded that as a matter of reality impeachments pose minimal threat of removal.

Elections require a different analysis. Unlike an impeachment trial, which requires an extraordinary set of events to come into being, elections occur regularly, and it may well be that at least some judges, as the appointed time for the election draws near, act, or at least speak, with a view to the election.<sup>149</sup> The very purpose of elections, of course, is to promote accountability, and such accountability is surely desirable as far as it concerns promptness, civility, and the like. Elections may also have been intended to promote judges' fidelity to the values of the citizenry before whom they stand in elections. It is, however, a fine line at best between this type of accountability and the unhappy practice of rendering decisions with an eye to the election rather than to the governing principles of law. The evidence is substantial that few judges lose office in elections, but

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149. Indeed, currently pending before the California Commission on Judicial Performance is a charge that some members of the California Supreme Court withheld a controversial decision interpreting the state's gun control law out of fear that its release, days prior to the referendum election required of the recently appointed Chief Justice, could tilt the heated contest to produce a negative vote. One news report out of many on this matter is Cannon, "Election Campaign Racked California High Court." Washington Post, July 1, 1979, A-20.

studies have not examined, as far as we know, the degree to which judges seek to ensure retention of their office by timidity in applying the law.

There is little published evidence that commission systems, as they have operated in the various states, are the objects of serious charges that they threaten judges' legitimate independence to apply the law as the law dictates.

#### Fairness to the Accused Judge

Fairness to one accused of judicial unfitness must encompass both procedural and substantive fairness. We begin with problems of procedure.

The subject rarely comes up as to impeachment proceedings, simply because they are used so rarely. When impeachment is invoked, of course, the procedural problems are serious, because the proceedings operate in a partisan atmosphere; in that atmosphere, it is probable that some legislators will be tempted to vote impeachment for behavior not specified in the charge before them. Other conditions could further frustrate objective and careful consideration of the evidence presented or the arguments made: the triers of fact, like an impatient jury, are obviously preoccupied with other matters and anxious to have done with the enterprise, and furthermore, unlike a jury, there is no constraint against leaving the chamber during the course of the hearings.

Elections, whether for recall or regularly scheduled, do not even purport to afford the type of procedural fairness associated with a judicial or quasi-judicial proceeding. Indeed, their operational dynamics can only be properly judged by other standards.

Understandably, in the context of judicial discipline, procedural fairness is most commonly used to measure the operation of the various commission systems and such other analogous proposals as discipline by the

federal judicial councils. Procedural fairness includes such obvious elements as the opportunity to confront evidence and argue inferences. A procedurally fair system, in this context, is also one designed to protect against unwarranted release of unfounded charges and adverse information. To whatever extent any disciplinary system, judicial or otherwise, should be sensitive to the risk of such release is a matter of particular significance in the judicial context, given the strong tradition precluding judges from rebuttal in the public forum. This is particularly true when the charges are based on the judge's action in a judicial context. The judge's personal interest aside, there is a public interest in avoiding publicity for unfounded charges, which may create a certain unease on the part of litigants who must entrust their case to his fairness--especially since by the nature of the judge's function, half the litigants who appear before him must lose.

Commission plans typically provide for notice to a judge--with opportunity to respond to the charge--whenever a complaint is deemed to merit explanation. Indeed, one review of the various state commissions' procedures concludes that at least some "have provided substantive and procedural protections beyond those guaranteed by the federal constitution and statutes."<sup>150</sup> This same writer criticized the model disciplinary standard adopted by the

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150. Stern, "Judicial Rights and the Rise of State Misconduct Commissions," 1 National Law Journal, No. 24 at 27 (Feb. 26, 1979).

American Bar Association in February, 1978,<sup>151</sup> for recommending that state commissions provide accused judges the right to subpoena witnesses and records prior to a decision to serve charges, and a pretrial hearing at which the judge may attempt to convince the commission not to file charges. These were characterized as "two unprecedented procedures" which would have an adverse impact on the effectiveness of commissions, "by delaying the procedures and perhaps providing a basis for intimidating witnesses."<sup>152</sup>

To what degree do the various judicial disciplinary techniques provide substantive fairness? Substantive fairness is determined largely by the standards that are applied. There have been some efforts to formalize a code of judicial conduct. The American Bar Association first published its Canons of Judicial Ethics in 1924. In 1972, the ABA promulgated a new Code of Judicial Conduct and eighteen states make its violation grounds for discipline, removal or retirement.<sup>153</sup> The most common behavioral standards applicable to judges include willful misconduct in office; willful and/or persistent failure to perform judicial duties; conduct that brings the judicial office into disrepute; violation of the Code of Judicial Conduct; incompetence; habitual intemperance; physical or mental disability that

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151. The standards are in American Bar Association, Joint Committee on Professional Discipline, Standards Relating to Judicial Discipline and Retirement," Sections 4.14 and 4.18. This discussion is in Stern, supra note 150. Evidently, there is some confusion, due to a typographical error, whether the ABA intended to recommend a pre-trial "hearing" or a "meeting;" see Stern, supra note 150 at n. 36.

152. Stern, supra note 150.

153. Tesitor, supra note 11 at 4.

seriously interferes with performance of judicial duties; conviction of a felony; and commission of an offense involving moral turpitude.<sup>154</sup> The ABA Code has also been adopted, with modifications, by the Judicial conference of the United States to apply to federal judges.<sup>155</sup>

Because disciplinary mechanisms usually measure judges' behavior against standards embodied in statutes or constitutions, it is difficult to evaluate disciplinary systems themselves according to the standard of substantive fairness. Rather, one who would evaluate the substantive fairness of any particular system should do so on an individual case-by-case basis, where the system and the standards that it applies, as interpreted in that jurisdiction, can be examined. However, some general comments are in order.

First, it bears notice that loosely defined standards against which the conduct of judges is to be measured create a risk of basic unfairness. One pervasive standard--"conduct bringing the judicial office into disrepute"--may be subject to uneven application and even provide a basis for a complaint about conduct not previously thought subject to discipline.<sup>156</sup> On the other

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154. *Id.* Table 2 at 16-19.

155. See *supra* at pp. 73-74.

156. It seems unlikely that those applying such a standard share a firm perception of what it means. In fact, one student commentator has argued that judicial disciplinary commissions have no business applying symbolic tests such as "conduct unbecoming a judge." This view is based on the difficulty of ascertaining public perceptions of such conduct and the threat posed to judicial independence by disciplining judges for unorthodox or unpopular decisions. Discipline is warranted only for conduct that "reflects adversely on their capacity for impartial decisionmaking." Ketler, "Toward a Disciplined Approach to Judicial Discipline," 73 *Northwestern L. Rev.* 503, 511 (1978).

It has also been urged that the several federal judicial councils ought to be limited in their function to matters of judicial administration in the

hand, a catalog of disciplinable misdeeds can hardly be expected to be exhaustive, nor is it likely to represent a particularly edifying statement of what what is disciplinable conduct.

Second, in light of these problems, it would appear that jurisdictions that are able to achieve effective judicial discipline through informal means will be able to function with a less precise definition of behavioral standards. Mutual trust and internalized norms of fairness and propriety are likely to be able to guide the process more fairly than can published standards, whose application is the subject of publicity and perhaps distortion. We stress again, however, that jurisdictions will vary in their ability to achieve effective judicial discipline through informal means.

#### Assuring Public Satisfaction

A final measure for evaluating disciplinary mechanisms is their ability to provide adequate assurances to the public and to the bar that judicial unfitness is in fact being dealt with. It might appear that this criterion is really no different from the "ability to take action" standard discussed at some length above. The two factors are, however, distinct. Debate over

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narrow sense and should be assigned no role with respect to discipline as such. To bring this somewhat vague distinction down to specifics, a council might, for example, appropriately deal with a judge's intemperance as it affects his ability to dispose of his caseload, but should have no jurisdiction to issue reprimands or otherwise to chastise, punish, or castigate a judge for past acts, or even for activity, perhaps technically criminal, within the confines of his own house, that in no way affects his judicial performance. Such a position would avoid any questions of proper procedure where a council and a judge were effectively in an adversary relationship.

Judge J. Clifford Wallace of the Ninth Circuit has discussed the various elements of the concept of judicial administration in "Judicial Administration in a System of Independents: A Tribe with Only Chiefs," 1978 *Brig. Yg. L. Rev.* 39 at 54ff (1978).

judicial discipline frequently reveals a special concern that charges of unfitness will be "swept under the rug," that judges will protect their own. This worry explains why proponents of the state judicial discipline commissions lay great stress on the need for the bar and the general public to be represented on the commissions, and, according to the American Judicature Society, all but three of the 47 commissions it surveyed had "public members," as well as attorneys.<sup>157</sup> Consequently, to what degree do the various judicial disciplinary mechanisms allow the public to be involved in the process or, in the alternative, contain procedures to provide public assurances that the system really works?

The gap between form and substance is perhaps particularly great in this area. Legislative or electoral removal--in which the voters or their "elected representatives" participate formally--would seem on the face of it, to provide the greatest measure of popular participation. The actual dynamics of electoral or legislative politics, however, mean that there is relatively little popular participation in the critical decisions, such as slating of candidates, which usually determines who is elected. There is greater likelihood that unfit judges will be disciplined or removed--and the public interest served--by mechanisms in which formal popular participation is reduced. Legislative removal is exceedingly rare, and removal after elections is, proportionately, not much more frequent, although, as noted, having judges stand for election may produce subtle and unseen bending to perceived popular preferences. The disuse of elections was illustrated by the comments of a

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157. See Tesitor, *supra* note 11.

chief judges in a state court who observed, almost as an afterthought when discussing various informal methods by which he attempts to deal with unfit judges, that "conceivably, someone can run against an incumbent judge here. We come up in superior court every six years. It has been a long time to my personal knowledge since anyone was beaten in an urban county, and I am not sure it could be done in Orange County, but if the conduct were bad enough and people were disturbed enough. . . ."158

The commission plan has some elements of popular participation. Anyone may file a complaint; the American Judicature Society found that 63% of the complaints filed with the commissions it surveyed in a sample period were filed by litigants, and about 13% were by non-litigating citizens, with less than one-percent by court watching groups.<sup>159</sup> There are, to be sure, "public" representatives on almost all the commissions, although the ability of such members to represent one or more "public interests" is subject to question.<sup>160</sup> Moreover, while the details of all actions are not made public, complainants are notified of the outcome of their complaints and records of staff

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158. Supra note 20 at 207.

159. Tesitor, supra note 11 at 6.

160. While there has been no study of the actual dynamics of removal commission operations, lay members on judicial selection commissions are generally considered to be highly susceptible to influence by judges and others perceived as more knowledgeable. Moreover, public members by definition, cannot represent all groups with a stake in the matter. For an analysis of the public members' role on a state judicial selection commission, see R. Watson and R. Downing, *The Politics of Bench and Bar* (1969). For comment on the more recent federal experience with nominating panels, see Fish, "Questioning Judicial Candidates: What Can Merit Selectors Ask?" 62 *Jud.* 9 (1978).

inquiries and resignations by judges under investigation are published. Thus, while they have less "public participation" than such systems as elections or legislative inquiries, commissions discipline more judges than impeachment or other traditional methods and, since they publish the relevant data, they may arguably be viewed as providing a greater assurance to the public that discipline is indeed being meted out.

In this context, informal systems, such as the largely behind-the-scenes activities in the federal courts, can have two major problems. First, would-be complainants have no knowledge of how and where to express their grievances. Second, while the public may have a general feeling that there are problems on the bench, it normally has little knowledge that specific problem cases have been identified and dealt with. In other words, the barrier to public satisfaction is not in the action taken but in the lack of communication about those actions. The defects can be remedied, albeit within limits. For example, the Judicial Conference of the United States recommended in March, 1979 that each of the circuits consider the "promulgation of rules of procedure for the receipt and processing of complaints against judges."<sup>161</sup> Such promulgation is unlikely to accomplish the whole task. It is not to be expected that the public can be easily educated to the causes of dissatisfaction that should be immune from discipline--e.g., unpopular decisions--and the areas properly in the cognizance of judicial discipline. Explaining why judges were or were not disciplined, however, presumably would serve an educational role.

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161. The text of the Conference Resolution is printed supra in note 112.

#### IV. SUMMARY AND CONCLUSIONS

##### Accounting for Contemporary Developments

Amidst the mass of detail, the innumerable variants in process and procedure, the diverse provisions and proposals, one critical, central fact remains clear: for at least two decades, there has been and continues at the present time, consistent and recurring interest in new formal mechanisms of judicial discipline. During the last two decades, almost all the states have adopted one form or the other of a judicial discipline and tenure commission, complementing or replacing traditional and rarely used mechanisms such as impeachment. The decade-long Congressional effort to create a similar commission for the federal judiciary intensified in the 95th Congress, when the Senate passed the Nunn-DeConcini bill, which has been reintroduced in 1979, as have various other bills. In addition, several federal judicial councils promulgated more formal procedures than heretofore existed, and, the Judicial Conference recommended that all councils give prompt consideration to formalized procedures for handling complaints alleging judicial unfitness.

What accounts for these developments? Several possible explanations can be suggested. First, judicial systems are now perceived as complex and interdependent institutions when once they were regarded as small, simple aggregations of virtually autonomous judges. As a corollary, it has been recognized that complete autonomy and freedom from oversight is neither possible nor desirable as governing principles for judicial systems.

A second explanation for the growth in new judicial disciplinary mechanisms has been the centralization of judicial administrative authority. This

centralization reflects a view that the administration of the judicial system should not be left to individual judges, or even individual courts. As far back as the 1913 proposals by Albert Kales for centralized management of municipal judicial systems, one finds the notion that dealing with the unfit judge is an integral element of centralized management. While this notion has only resurfaced recently, and in a form different from that articulated by Kales, centralized disciplinary mechanisms have come to be viewed as a standard element of centralized administrative authority.

The momentum generated by the two phenomena discussed above must be viewed as yet a third cause for the widespread adoption of judicial disciplinary mechanisms. The desirability of such mechanisms has become part of the conventional wisdom of court reform, and all the more salient a part since other staples of the century's court reform movement--such as the commission plan for selection, court administrators, or judicial rule-making--have been largely achieved. Any state considering a change in its judicial system in the last ten years could not have ignored the strong sentiment to join other states that had created judicial discipline commissions. This same momentum has affected the debate over the creation of a federal judicial discipline commission: if almost all the states have provided for such a commission, it is asked, why should not the federal government?

That state judicial tenure commissions, and disciplinary activity on the part of federal judicial councils, have now become the status quo is an especially significant fact with respect to new judges. Individuals new to the state judicial arena will not regard the tenure commission as a change to

be viewed with skepticism, but as "a proven fact of judicial life," as one California judge put it.<sup>162</sup> Judicial discipline commissions are in the same category as centralized rules committees, court administrators, and, in some states, centralized personnel or budgetary systems. They no longer represent changes that judges might have resisted when originally proposed. Instead, they are standing elements of the judicial system that new judges are likely to accept when they arrive on the scene. This acceptability serves to enhance their effectiveness.<sup>163</sup>

#### The Central Considerations

Our review of the development and operation of judicial disciplinary mechanisms suggests to us some normative principles that we think must be addressed as any jurisdiction considers how to ensure the quality of its judiciary by creating a means to deal with charges of judicial unfitness. The focal point for that debate is now in the Congress of the United States as it addresses the question for the federal judiciary. Below we discuss four normative considerations worthy of special attention:

-- the importance, and the limits, of the obligation to preserve judicial independence;

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162. Healy, "Judicial (Dis)qualifications," 4 Trial Judges Journal 3 (July, 1965), quoted in Frankel, "The Case for Judicial Disciplinary Measures," 49 J. Amer. Jud. Soc'y. 218 at 221.

163. For a discussion of the impact this phenomenon may have on federal judges' receptivity to disciplinary efforts by the judicial councils, see Cook, "Perceptions of the Independent Trial Judge Role in the Seventh Circuit," 6 Law and Soc. Rev. 615 (1972).

-- the need to preserve the best qualities of informal methods to deal with problem judges;

--the need to provide assurance that the system will indeed respond to legitimate complaints; and

--the need to conform any system to the characteristics of the jurisdiction in question.

The first principle and the most obvious is the obligation to preserve the independence necessary for judges properly to perform the judicial task. It is the "first principle" for good reason. Especially in the federal system, judges are often thrust into bitter social controversies; indeed, a major purpose of our federal judicial system has come to be protecting fundamental national values against deep-seated local interests and parochial prejudices. It must be remembered that federal judges have been faced, and in the future are likely to be faced, with recalcitrant litigants, many of whom are in high positions. This fact is revealed in the long battles to implement the Brown decision,<sup>164</sup> not to mention other examples too fresh in mind to require recounting. In one sense, how a federal judge copes with such problems involves simply a series of judicial acts immune from censure or discipline. More realistically, however, a judge's course of action involves more than formal orders and judgments; inevitably, it includes what some may choose to perceive as personal bias or lack of judicial temperament. At the least, the record is clear that respected judges have asserted their conviction that

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164. Brown v. Board of Education, 347 U.S. 483 (1954), 349 U.S. 294 (1955). The first Brown decision held that school segregation mandated by state law was unconstitutional; the second Brown decision provided guidance on the courts' role in putting the doctrine into effect.

formal mechanisms established to discipline judges may have a chilling effect on a judge's independent decision-making simply because of the possibility of censure, however mild, by colleagues. The possibility of such censure cannot be lightly dismissed; indeed, it could result simply because such colleagues have not been able to distinguish between their distaste for judicial decisions, underlying attitudes, or even a judge's personal idiosyncrasies.<sup>165</sup> Additionally, disciplinary mechanisms may become vehicles for nuisance complaints. Such complaints could be framed to come within a commission's jurisdiction, and although groundless, could have the potential of sapping the vitality of a fiercely independent judiciary.<sup>166</sup>

A caveat is in order. It is important to take care to distinguish reasoned appeal to the need to preserve judicial independence from less justifiable references to this principle. "Judicial Independence" is not a talismanic phrase that justifies a veto of any and all proposals for new disciplinary mechanisms. Sometimes it appears to be no more than an automatic reflex: the assertion of the need for such independence seems at times to be used as a tactical ploy to hide other, less reasonable objections to a par-

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165. See Kaufman, *supra* note 3 at 710ff, and Battisti, *supra* note 89 at 39. In his Chandler dissent, Justice Douglas wrote: "Some of the idiosyncrasies [of judges] may be displeasing to those who walk in more measured, conservative steps. But those idiosyncrasies can be of no possible constitutional concern to other federal judges." 398 U.S. 140-41.

166. A committee of the Association of the Bar of the city of New York suggested that public confidence in the judiciary could well be diminished, rather than enhanced, if, under a Judicial Tenure Council such as proposed by Senator Nunn, "aggrieved litigants are responsible for a proliferation of personal complaints against judges." Ass'n. of the Bar of the City of New York, Committee on Federal Legislation, *The Removal of Federal Judges Other than by Impeachment* at 21 (1977).

ticular proposal. Cheapening the argument in this way is unfortunate, for it clouds the issue and makes it more difficult for sponsors of proposals to appreciate insidious threats to such independence that may in fact exist.

We turn to the second governing principle: judicial discipline mechanisms must harness and preserve the best qualities of informal methods of dealing with problem judges. Formal mechanisms with triggers so sensitive as to preclude the operation of these informal devices will drain the system's total capacity to achieve effective judicial discipline. Particularly when formal mechanisms cast a judge and his colleagues in an adversary role, with the procedural corollaries that implies, they serve to abort informal processes that could have been more effective and less burdensome to the system itself. In short, the effective administration of the judicial system should continue to benefit from--and place reliance in--the capacities of individual judges to alert colleagues to problems of their behavior, or of their physical or mental condition, that must be dealt with, although often by measures less drastic than retirement or resignation.

Third, public accountability is a fundamental value in a democracy, which no well-structured judicial disciplinary mechanism can disregard. The public generally--and litigants and the bar in particular--deserve assurances that the system will respond in some way to complaints about judicial unfitness, be they allegations of criminal behavior, chronic alcoholism, or simply chronic rudeness or insensitivity. One federal judge, whose judicial career stands as a vindication of the need for secure tenure, recently observed that "'judicial

independence must incorporate some notion of accountability . . . judges must not retreat to strict constructionism' when considering the matter of their independence."<sup>167</sup>

Recognition of the importance of this principle is seen in the 1978 public announcement by two federal circuit councils of committees to hear complaints, and the Judicial Conference's March, 1979 resolution that all councils should consider establishing such committees, with publicized procedures. Similarly, the Nunn-DeConcini, Kennedy-DeConcini, and Bayh legislation to change federal judicial disciplinary procedures all contain provisions designed to achieve greater public awareness of the existence of formal bodies available to receive complaints. Of course, public accountability demands no more than that the system respond in a manner befitting the complaint. Some judicial behavior, while annoying, is best tolerated as a cost of preserving judicial independence. At the very least, an important consideration for any judicial disciplinary mechanism is to identify the threshold of pettiness that provides the best accommodation possible between the principles of judicial independence and public accountability.

Fourth and finally, the mechanisms of judicial discipline for any jurisdiction must be conditioned to the particular characteristics of the jurisdiction in question. This is a point worthy of emphasizing in this context, even if it appears to do no more than restate the obvious. Any time that a legislative proposal, drawn on the experience of another jurisdiction, goes through

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167. Chief Judge Frank Johnson, Jr., as quoted in "Judicial Independence Once More an Issue," 65 Amer. Bar Assn. J. 342 (1979).

the often-laborious stages of drafting, redrafting, comment, compromise, and passage, the legislature has been obedient to the principle suggested above. This process, however, is time-consuming and involves meticulous care. The realities are that judicial administration matters do not always compete successfully with numerous other matters for legislative attention. Thus, the fact that a particular mechanism for judicial discipline has proven successful in one or more states does not mean it should be adopted in the federal system--or other states--without careful scrutiny. Are there, for example, substantial differences in the situation in the states and the federal system to warrant different procedures and different processes? In many cases, there are substantial differences, as in judicial selection, secure tenure, size of the judicial system, and the nature of the judicial task. The questions are not rhetorical, and the comparisons can be difficult indeed.

Only when the governing principles have been considered, analyzed, and balanced in the context of a particular jurisdiction can one hope to have developed an optimal system of judicial discipline.



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