

# REMOVAL OF JUDGES BY LEGISLATIVE ACTION

RESOLVED, that both houses of the Legislature hereby request the governor to remove, under the provisions of Article I of Chapter III of Part the Second of the Constitution, the Honorable Robert M. Bonin from the office of chief justice of the superior court.<sup>1</sup>

This joint resolution of the House and Senate of the Massachusetts Legislature was the major product of a special two-day session of that body which convened on July 31, 1978. On August 3, Massachusetts Governor Michael Dukakis accepted the resignation of the man he had only recently appointed to one of the most powerful positions in the state judiciary.<sup>2</sup> The Governor's action nullified the effect of the joint resolution but achieved the desired result. Legislative and public pressure which resulted in the overwhelming passage<sup>3</sup> of this resolution forced the Governor to abandon his own appointee. There was no evidence that Justice Bonin had committed any impeachable offenses.<sup>4</sup> The grounds for his removal were that he:

failed to conduct himself in a manner that promotes public confidence in the integrity and impartiality of the judiciary, engaged in extra-judicial activity which reflected adversely on his impartiality, interfered with the performance of his judicial duties, prejudiced the administration of justice and brought the judicial office into disrepute.<sup>5</sup>

This entire legislative action involved at its center a clause of the Massachusetts Constitution which directs the removal of judges of any state court by address of both houses of the legislature.<sup>6</sup>

Chief Justice Bonin's case in Massachusetts is illustrative, and perhaps symptomatic of the post-Watergate upsurge in closer scrutiny of the conduct of public officials in general, and especially of the state and federal judiciaries. Since the earliest days of our Republic, an independent judiciary has reserved to itself the power to pass judgement on the laws produced by the executive and legislative branches of government.<sup>7</sup> The framers of most state constitutions, however, found it necessary to include in their documents a check on what might have been unrestrained judicial power by allowing at least the legislative branch to exercise some degree of judgment over the conduct of the judiciary.

Traditionally, most states have empowered their legislatures to impeach judges and public officials.<sup>8</sup> Impeachment, however, is substantially a criminal

1. *Resolution of Address Requesting the Governor to Remove Robert M. Bonin from the Office of Chief Justice of the Massachusetts Superior Court* (House No. 6154), J. Mass. H.R., Extra Session 16 (1978).
2. By being allowed to resign, Chief Justice Bonin was spared the adverse effects of removal and was able to retain some measure of self-respect — and his pension.
3. The resolution was passed by the House of Representatives by a vote of 206-17 with 15 absent, and the Senate by 24-6 with 9 absent. J. Mass. H.R., *supra* note 1 at 17, and J. Mass. S., Extra Session 14-15 (1978).
4. The findings of the Massachusetts Supreme Judicial Court's investigation of Chief Justice Bonin's conduct can be found in *In re Bonin*, 378 N.E.2d 669 (Mass. 1978).
5. Letter from Governor Michael S. Dukakis to the Senate and House of Representatives (July 17, 1978); J. Mass. H.R., *supra* note 1, at 14.
6. The language of this clause is contained in the text accompanying note 18.
7. See note 24, *infra*.
8. Only five states do not provide for impeachment or any legislative power over the judiciary: Hawaii, Indiana, Missouri, North Carolina, and Oregon. These states vest the power to remove judges in other branches of government.

procedure, limited usually only to treason, bribery, and other high crimes and misdemeanors, and is resorted to only in the most extreme cases of misconduct.<sup>9</sup> The problem has remained as to the best method of dealing with conduct which, though less than impeachable, nevertheless falls short of the normal standard of conduct expected of members of the judiciary. Legislators especially have become keenly interested and increasingly sensitive to the problem of judicial misconduct which falls into this "gray area" between impeachable offenses and the standard of "good behavior."

The modern trend since 1960 has been the establishment of judicial qualification or discipline commissions, consisting of judges and members of the state bars, which are empowered to investigate charges brought against judges and to recommend appropriate disciplinary actions in those cases found to warrant them.<sup>10</sup> In the years since the first judicial qualifications commission was established in California, a total of forty-eight states have adopted some variation of this "California Plan."<sup>11</sup> Several states allow multiple methods of judicial discipline. Seven states empower the state supreme court, in its own right, to discipline and remove judges of lower courts.<sup>12</sup> Five states allow recall of elected judges.<sup>13</sup> Eighteen states continue to provide for removal of judges by the legislature.<sup>14</sup>

Despite the strong trend today toward allowing judges to police their own ranks, Chief Justice Bonin was called to account by the supposedly outmoded and useless method of "legislative address." This note will explore this and similar state constitutional provisions allowing discipline and removal of judges by legislative action. It will investigate their history and associated litigation, provide a comparison with the "California Plan," comment on the viability of this eighteenth century idea in the present day, and review briefly the current proposals for discipline of the federal judiciary. The question presented for consideration has been and will be debated for many years, since it is basic to the American concept of separation of powers: should the people (represented by the legislature) or the judges (through judicial discipline commissions) be the final arbiters of judicial conduct?

9. Judge Samuel S. Smith of Florida's Third Judicial Circuit was impeached by the Florida House and convicted overwhelmingly by the state senate on September 15, 1978, on grounds of conspiracy to possess and sell marijuana which had been seized as contraband by state authorities. This was the first successful impeachment and removal of a judge in Florida history. See Prendergast, *State Secrets*, Nat'l L.J., October 21, 1978, at 12, col. 1.
10. See Shoenbaum, *A Historical Look at Judicial Discipline*, 54 Chicago-Kent L. Rev. 1, 19-22 (1977).
11. In Illinois, Kentucky, Nevada, and New Mexico, removal of a judge can be accomplished by the commission itself. In most other states, however, the commission can only recommend, with the actual removal power being vested in another institution:
  - a. *By the state supreme court*: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Virginia, West Virginia, and Wyoming;
  - b. *By the legislature*: South Carolina, Tennessee;
  - c. *By the governor*: Hawaii.
- Alabama, Delaware, and Oklahoma employ a Court of the Judiciary. Ohio and Vermont use an ad hoc commission of judges appointed by the state supreme court. The Wisconsin commission is limited to recommending removal solely for disability. See Tesitor, *Judicial Conduct Organizations* (1978).
12. Alabama, Alaska, Connecticut, Indiana, Kansas, New Jersey, and Texas.
13. Arizona, California, Nevada, North Dakota, and Wisconsin. In Ohio a petition signed by 15% of electors in the preceding gubernatorial election can force a court or jury trial of charges against a judge. See *The Council of State Governments, State Court Systems*, Table 9 (rev. 1978).
14. See text accompanying notes 18-24 for these states' provisions. Since several states allow a variety of methods of judicial removal and discipline, the aggregate total here is greater than fifty.

## STATE CONSTITUTIONAL PROVISIONS

Of the dwindling number of states which authorize legislative removal of judges,<sup>15</sup> ten continue to require the centuries-old form of "Resolution of Address" in which the legislature petitions the executive for the removal of the offending judge: Arkansas, Connecticut, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, South Carolina, Texas, and Wisconsin.<sup>16</sup> Eight others do not specifically require this form, and consider the legislative action final in the removal of a judge: Michigan, Nevada, New York, Ohio, Rhode Island, Tennessee; Utah, and Washington.<sup>17</sup>

The Massachusetts constitution contains the simplest provision, requiring only that "the Governor, with the consent of the council, may remove them [judges] upon the address of both houses of the legislature."<sup>18</sup> Only the constitutions of Maine and Rhode Island join that of Massachusetts in requiring a simple majority of both houses to remove a judge. The Washington constitution requires a three-fourths majority of both houses to effect removal.<sup>19</sup> All other constitutions require a two-thirds majority.

The scope of these constitutional provisions ranges from complete legislative discretion to detailed proscriptions. Arkansas, Connecticut, and Rhode Island join Massachusetts in not restricting the grounds required for removal.<sup>20</sup> The constitutions of Maine, Maryland, Mississippi, Nevada, New Hampshire, New York, Ohio, South Carolina, Texas, Utah, and Wisconsin provide for specification of charges, proper notice, and right of representation and defense.<sup>21</sup> Michigan, Mississippi, Nevada, New Hampshire, South Carolina, Tennessee, Texas, and Washington require that the offense which constitutes the grounds for removal be insufficient to sustain an impeachment.<sup>22</sup> The Texas constitution specifies that "address" be used only in cases of "willful neglect of duty, incompetence, habitual drunkenness, oppression in office, or other reasonable cause."<sup>23</sup> By contrast, the Rhode Island constitution merely states that "each judge shall hold his office until his place be declared vacant by a resolution of the general assembly to that effect."<sup>24</sup> The common thread among these diverse provisions is that judges and public officials serve during their "good behavior" and that, through the power to remove, it is the legislature which determines the limits and character of that behavior.

15. In 1925, a total of 29 states provided for removal of judges by the legislature. See Shartel, *Retirement and Removal of Judges*, 20 J. Am. Jud. Soc. 133, 146, note 61 (1936).

16. For these provisions see text accompanying notes 18-24, *infra*.

17. In New Jersey, although the state supreme court has the sole power of removal (N.J. Const. art. 6 § 6, para. 4.4), statutory authority allows a majority vote of either house of the legislature to institute a removal proceeding. N.J. Stat. Ann. § 2A:1B-3 (West).

18. Mass. Const., pt. 2d, c. 3, art. 1.

19. Wash. Const., art. 4, § 9.

20. Ark. Const., art. 15, § 3; Conn. Const., art. 5, § 2; R.I. Const., art. 10, § 4.

21. Me. Const., art. 9 § 5; Md. Const., art. 4, § 4; Miss. Const., art. 4, § 53; Nev. Const., art. 7, § 3; N.H. Const., pt. 2d, art. 73; N.Y. Const., art. 6, § 23(c); Ohio Const., art. 4, § 17; S.C. Const., art. 15, § 3; Tex. Const., art. 15, § 8; Utah Const., art. 8, § 11; Wis. Const., art. 7, § 13.

22. Mich. Const., art. 6, § 25; Miss. Const., art. 4, § 53; Nev. Const., art. 7, § 3; N.H. Const., pt. 2d, art. 73; S.C. Const., art. 15, § 3; Tenn. Const., art. 6, § 6; Tex. Const., art. 15, § 8; Wash. Const., art. 4, § 9.

23. Tex. Const., art. 15, § 8.

24. R.I. Const., art. 10, § 4. Only one instance of the use of this rather unique device has been recorded. In 1786, the Superior Court of Rhode Island ruled a statute unconstitutional (the first recorded instance of this in the United States, a precursor of *Marbury v. Madison*). In a fit of legislative pique, the lawmakers attempted to impeach the court. The impeachment effort failed, but the judges of the court somehow failed re-election at the next session. See 1 Cooley, *Constitutional Limitations* 335, note 1 (8th ed. 1927).

As noted before, however, the current prevailing movement in the field of judicial discipline is toward adoption, by either constitutional amendment or statute, of the "California Plan". This plan has its origins in a project of the California Joint State Bar-Judicial Council and was adopted as an amendment to the California Constitution in November, 1960.<sup>25</sup> The plan established a Judicial Qualifications Commission (later renamed the Commission on Judicial Performance by amendment in 1966) which was authorized to investigate and conduct proceedings, subject to review by the state supreme court, against any judge when there was evidence of willful misconduct in office, persistent failure to perform judicial duties, habitual intemperance in the use of either alcohol or drugs, or conduct prejudicial to the administration which brings the judicial office into disrepute.<sup>26</sup> Membership in the Commission is comprised of two judges from the court of appeals, two judges of the superior courts, and one judge of a municipal court, each appointed by the state supreme court. Additionally, two members of the state bar and two private citizens are appointed to the commission by the Governor.<sup>27</sup> These commissions, no matter what form they may take in the several states,<sup>28</sup> effectively allow the state judiciaries to police their own ranks without recourse to the other branches of state government. Thus, the judges are truly independent and answerable only to their brethren for their conduct.

### HISTORICAL CONTEXT

Although the "California Plan" is a fairly recent development, legislative power over judicial conduct has a considerable history. The antecedents of today's constitutional provisions lie in the British Parliament's Act of Settlement of 1700 which provided that "judges' commissions be made *quamdiu se bene gesserint* [during their good behavior] . . . but upon the address of both houses of Parliament it may be lawful to remove them."<sup>29</sup> This law provided Parliament with a balance to the King's appointment and removal powers over the British judiciary, who had previously served solely at the pleasure of the Crown. The power of address remained undetermined and unexercised until the case of Mr. Justice Fox of the Court of Common Pleas of Ireland arose. Petitions for his removal by address on the ground of oppression in office were introduced in both Commons and Lords in 1804,<sup>30</sup> but the case was not disposed of until 1806.<sup>31</sup> The House of Commons tabled the petition<sup>32</sup> and the House of Lords ended the proceeding by moving to adjourn the matter to a date when it would not be in session,<sup>33</sup> thereby avoiding the issue. During the debates on the motion in Lords, it was argued that the power of removal

25. J.E. Frankel, *Removal of Judges: California Tackles an Old Problem*, 49 A.B.A.J. 166, 168 (1963).

26. Cal. Const., art. 6, § 18(c).

27. Cal. Const., art. 6, § 8.

28. See note 11.

29. Act of Settlement, 12 & 13 William 3, c. 2, § 3 (1700).

30. 2 Parl. Deb. H.L. (1st ser.) 476-8 (1804); 2 Parl. Deb. H.C. (1st ser.) 533-9 (1804).

31. 7 Parl. Deb. H.L. (1st ser.) 752-772 (1806).

32. 2 Parl. Deb. H.C. (1st ser.) 880 (1804).

33. 7 Parl. Deb. H.L. (1st ser.) 772 (1806).

by address had been intended to apply solely when a judge was physically incapacitated from performing the duties of his office, or when he had been tried and convicted of a serious offense in another forum.<sup>34</sup> The inconclusive ending of this case provided little definition to the procedure of address in England, but the provision for removal of judges by address was included in the subsequent constitutions enacted for the Dominions of the British Commonwealth.<sup>35</sup>

A clause permitting removal of federal judges by address of Congress was proposed by John Dickinson of Delaware for inclusion in the United States Constitution during the Convention of 1787,<sup>36</sup> but was soundly rejected by the delegates, with even Delaware voting against.<sup>37</sup> With the benefit of over forty years of hindsight, Justice Story commented in 1833 that:

To have made judges, therefore, removable, at the pleasure of the president and congress, would have been a virtual surrender to them of custody and appointment of the guardians of the constitution. It would have been placing the keys of the citadel in possession of those against whose assaults the people were most strenuously endeavoring to guard themselves.<sup>38</sup>

After the passage of over 190 years, this controversy still rages.<sup>39</sup>

The Massachusetts Constitution of 1780, written principally by John Adams, was the first state constitution to include the address procedure which was applied specifically to the judiciary in addition to the general provision for the impeachment of public officers before the state senate.<sup>40</sup> Despite several attempts to remove or modify the original language of the clause, even by so great a personage as Daniel Webster,<sup>41</sup> it has survived intact to the present day.<sup>42</sup>

The Massachusetts legislature, unlike its counterparts in the other states, has been quite willing to use its power of removal over the last two centuries. It was exercised several times in removing minor justices and justices of the peace in the late eighteenth and early nineteenth centuries. In three instances, however, the legislature was successful in removing justices of the higher courts, prior to its removal of Chief Justice Bonin. Mr. Justice Bradbury of the Supreme Judicial Court was removed in 1800 on the grounds of incurable illness and refusal to resign.<sup>43</sup> In 1858, in a clearcut abuse of power, the legislature removed Judge Charles G. Loring, who was simultaneously Judge

34. *Id.* at 760-5.

35. 63 & 64 Vict., c. 12, § 72 (Austr. Const.); British North America Act, 30 & 31 Vict., c. 3, § 99 (Can. Const.). See also Ireland Const. of 1937, art. 34, § 4.

36. Mr. Dickinson sought to place the words, "provided that they may be removed by the Executive on the application by the Senate and House of Representatives," after "good behavior" in U.S. Const., art. 3, § 1. See Madison, Notes of Debates in the Federal Convention of 1787, 536 (Ohio U. ed. 1966).

37. *Id.* at 537.

38. 3 Story, Commentaries on the Constitution of the United States, § 1618, p. 485 (1970 reprint).

39. See Proposals for Discipline of the Federal Judiciary, *infra* at 150.

40. Grinnell, *Removal by Address in Massachusetts and the Action of the Legislature on the Petition for the Removal of Mr. Justice Pierce*, 7 Mass. L.Q. 17, 17 (1922).

41. At the Massachusetts Constitutional Convention of 1819-21, Mr. Webster supported an amendment to require a two-thirds majority of both houses for removal and proposed another allowing proper notice and defense to the address procedure. Although adopted by the Convention, the proposals were soundly rejected by popular vote. See N. Hale, *Journal of Debates and Proceedings in the Convention of Delegates Chosen to Review the Constitution of Massachusetts* 214-20 (Boston 1821).

42. See 1 Debates in the Massachusetts Constitutional Convention, 1917-1919, 911-1031 (1920) for additional attempts to change this article.

43. L.A. Frothingham, *A Brief History of the Constitution and Government of Massachusetts*, 32-39 (1916).

of Probate of Suffolk County and a U.S. Commissioner, for his actions in the latter capacity in enforcing the highly unpopular Fugitive Slave Law.<sup>44</sup> The removal of Judge Joseph M. Day, Judge of Probate of Barnstable County, in 1882, led to the only judicial determination of both the nature and proceeding of removal by address in *Commonwealth v. Harriman*.<sup>45</sup> The removal of Chief Justice Bonin in August, 1978, was the first successful exercise of the power of removal by address by the Massachusetts legislature in the twentieth century.<sup>46</sup>

Although the Massachusetts legislature has used its power of removal regularly and successfully to punish errant judges, other states have found the exercise of this power difficult at best.<sup>47</sup> In Arkansas, for example, removal by address has been attempted only three times, each time without result. In 1843, the legislature investigated Supreme Court Associate Justice Thomas J. Lacy and Chief Justice Daniel Ringo as the first step in formulating a resolution of address. The resolution died in committee. A resolution of address successfully passed the Arkansas House requesting the removal of Judge Elias Harrell, Judge of the Eighth Judicial Circuit, in 1867. Two weeks later, the judge was impeached by the state senate and no further action was taken toward the joint resolution of address required by the state constitution. The latest attempt to exercise this power resulted from an unpopular decision in a narcotics case by Judge Henry B. Means, Judge of the Seventh Judicial District. After a series of hearings, a legislative committee concluded that there were sufficient grounds on which to base a resolution of address, but recommended against removal since the judge had announced his retirement in the meantime.<sup>48</sup>

#### JUDICIAL DEFINITION

Although the exercise of the power of removal by address has been rare, rarer still has been the occurrence of litigation to provide a firm foundation for the principle that judges can be made subject to the control of the legislature. This is not to say, however, that some judicial poaching on the legislative preserve has not occurred. In Tennessee, the state supreme court held that judges could not be removed by address solely because they had no work.<sup>49</sup> In Michigan, the state supreme court held that it could use its injunctive powers to prevent a judge from exercising the powers of his bench when the legislature had refused to act on the court's recommendation for the judge's removal by address.<sup>50</sup> The Massachusetts Supreme Judicial Court suddenly

44. Such abuses of the removal power were not limited to Massachusetts. From 1816 it was common practice in New Hampshire for one political party to remove by address all judges appointed by their opponents as the first order of business on gaining control of the legislature. This practice was halted by a "gentlemen's agreement" in 1901 which has been complied with to the present day. See Upton, *The Independence of the Judiciary in New Hampshire*, 1 N.H. B.J. 28 (July, 1959).

45. 134 Mass. 314 (1883).

46. Indeed, it was only the fourth successful removal by address in the United States in this century. During the period 1900-25, three judges were removed by address in Virginia. See W.T. Braithwaite, *Who Judges the Judges?* 12 (1971).

47. At least three of the states which allow legislative removal of judges have never done so: Connecticut, Texas, and Wisconsin. See Mignone, *Judging the Judges of the Superior Court in Connecticut*, 51 Conn. B.J. 372 (1977); Note, *Selection and Discipline of State Judges in Texas*, 14 Houston L. Rev. 672, 692 (1977); Note, *Judicial Discipline, Removal and Retirement*, 1976 Wis. L. Rev. 563, 566.

48. S. Smith, *Impeachment, Address, and the Removal of Judges in Arkansas, An Historical Perspective*, 32 Ark. L. Rev. 253, 259-62 (1978).

49. *McCully v. State*, 102 Tenn. 509, 53 S.W. 134 (1898).

50. *Ransford v. Graham*, 374 Mich. 104, 131 N.W.2d 201 (1964). Original findings in *In re Graham*, 366 Mich. 268, 114 N.W.2d 333 (1962).

discovered that its inherent constitutional powers over the state judiciary and statutory powers of general superintendance over the administration of all courts of inferior jurisdiction authorized it to prevent an inferior court judge, found guilty of misconduct, from exercising the powers of his office.<sup>51</sup> Chief Justice Bonin's case re-established the primacy of the legislature in this area.<sup>52</sup>

The earliest judicial comments on removal by the legislature are found in the dicta of cases decided on other grounds, usually concerning the separation of powers among the three branches of government. In an 1839 decision, the Arkansas Supreme Court discussed, in dicta, that state's address clause:

The legislative, executive, and judicial departments are all responsible for an abuse or usurpation of power in the mode pointed out by the constitution . . . Should the judiciary corruptly assume powers not belonging to that department, or should they, from interested motives, and for wicked and nefarious purposes, refuse to exercise powers expressly enjoined by the constitution, then the judges are liable to an impeachment for malpractice or misdemeanor in office, and for reasonable cause, which does not furnish sufficient ground for impeachment, the Governor may, upon the joint address of two-thirds of both Houses of the Legislature, remove them from office. The judges are then held responsible to the people through the Legislature in two ways: First, by impeachment for malpractice or misdemeanor in office; and, secondly, by address for any gross, flagrant, and palpable impropriety of official conduct, not amounting to corruption.<sup>53</sup>

Interestingly, the author of this passage was the same Justice Lacy whom the Arkansas Legislature would attempt to remove by address only four years later.

The only case whose central issue involved the removal of a judge by the legislature as a disciplinary measure is the previously mentioned *Commonwealth v. Harriman*, in which Judge Day attempted to regain his bench by resort to a *quo warranto* proceeding. Judge Day, the plaintiff, represented *pro forma* by the Attorney General of the Commonwealth, argued that the English precedents and prior exercise of the power by the legislature required the interpretation of the address clause of the Massachusetts constitution as applying solely to cases involving physical and mental disability, and not to cases of misconduct or maladministration, in which impeachment was the sole remedy.<sup>54</sup>

In his historic decision, Chief Justice Morton of the Supreme Judicial Court rejected this contention and held that the power of the legislature to remove a judge was unrestricted by any other clause of the constitution. He further stated:

51. *In re DeSaulnier*, 360 Mass. 787, 279 N.E.2d 296 (1972).

52. The Massachusetts Supreme Judicial Court voted to censure Chief Justice Bonin, using its newly discovered powers. The legislature removed him. See *In re Bonin*, *supra* note 4.

53. *Hawkins v. The Governor*, 1 Ark. 570, 592-3 (1830).

54. *Harriman*, *supra* note 45, at 318-9.

When we consider the origin and history of the provision, the obvious and natural meaning of its language, and the uniform practical construction which has been given to it, we are forced to the conclusion that the intention of the people was to entrust the power of removal of a judicial officer to the two coordinate branches of the government [executive and legislative] without limitation or restriction.<sup>55</sup>

This same standard was applied to the removal of a public officer by the legislature in Maine in *Moulton v. Scully*.<sup>56</sup> Although the majority in this case held that all matters of procedure concerning a removal were necessarily left to the discretion of the legislature, Judge Haley, in a lengthy dissent, argued that the legislature had no constitutional mandate to act in a judicial capacity and, in effect, were depriving Moulton of his office without due process of law. He declared that Moulton:

was entitled to have . . . the charges against which he was to be given an opportunity to defend himself . . . The charges should be so specific that he may know what testimony to produce at the hearing. If charges are drawn that the officer sought to be addressed cannot tell what evidence to adduce to disprove them and the Legislature and court hold the charges sufficient, they in effect hold that the provisions [*i.e.*, jurisdictional requirements] of the Constitution are of no effect.<sup>57</sup>

#### RETENTION OF LEGISLATIVE REMOVAL

The recent actions involving legislative removal of judges in Massachusetts and Arkansas have rekindled the arguments for and against keeping such provisions in state constitutions. Several of these arguments have been laid to rest over the years, but, surprisingly, many questions remain unresolved. The underlying consideration in this area has been expressed eloquently by one commentator:

Supervision of the judiciary poses a unique problem which may be expressed as a tension between the need for judicial independence on the one hand, and judicial legitimacy on the other. While it is the democratic function of the legislature and the executive to effectuate the will of the majority as it changes from time to time, it is the unique responsibility of the judiciary to resist the majority will in so far as it deviates from established principles of legal decision . . . . But the necessity for this independence creates a strong tension. All democratic institutions must ultimately be legitimated by public acceptance. Respect for and obedience to law cannot be expected unless the exercise of judicial power is accepted as legitimate. Since the judiciary must often function to defeat majority will in individual cases, it is all the more important that the institution apply general rules impartially. If the public is to believe in the impartiality and generality of the judicial process as a process, absolute confidence must exist in the honesty and rationality of individual judges. On this confidence, the legitimacy of the entire institution rests.<sup>58</sup>

55. *Id.* at 328.

56. 111 Me. 428, 89 A. 944 (1914).

57. *Id.* at 957. The jurisdictional requirements may be found in Me. Const., *supra* note 21.

58. Note, *Recent Cases, Courts — Judicial Removal*, 84 Harv. L. Rev. 1002, 1005 (1971).

Subjecting judges to the control of the legislature infringes on the judiciary's traditional independence of the other branches of government which supposedly allows them freedom to make controversial decisions in the interest of justice. Granting the removal power to a legislature, it is argued, subjects judges to the political whims of a majority of state legislators. In the deliberations on the fate of Judge Bonin, the minority warned:

Confidence in the judiciary will be best preserved not by ousting judges against whom the public may be aroused, but by preserving the long range independence of the judiciary. To remove the Chief Justice of the Superior Court to correct a perceived "loss of confidence" would be for the legislature to forego the independence of judgement [*sic*] and preservation of the separation of powers which is required by the constitution of Massachusetts.<sup>59</sup>

These same arguments were made at the Federal Constitutional Convention of 1787<sup>60</sup> and at the Massachusetts Constitutional Convention of 1820.<sup>61</sup> The nature of the removal authority opens it to possible abuse by hostile legislators, as has been mentioned previously.<sup>62</sup> In Chief Justice Bonin's case, the House Minority report on the resolution of address admonished the representatives that "the legislature should not be prepared to sacrifice any individual to appease the public clamor."<sup>63</sup> Modern day critics of legislative removal point to alternatives, such as the various "California Plan" commissions, and to the keen awareness among judges themselves that they must accept responsibility for "keeping their house in order" which render this type of judicial discipline unnecessary, archaic and anachronistic.

On the other hand, the history of the exercise of the power of legislative removal tends to refute many of the objections concerning the possibility of abuse. One commentator has suggested that "the manner in which the powers have been exercised by the legislature . . . since 1780 has justified its continued existence."<sup>64</sup> In *Harriman*, Chief Justice Morton found that:

In confiding to the two coordinate branches of government this important and exceptional power of removing the judiciary, the people found a sufficient protection to the substantial independence of the judicial department in the constitutional guaranties thrown around it, in the fact that the removal can only be made by the concurrent action of both houses of the Legislature and of the Governor and Council, all of whom are directly answerable to the people at frequently recurring periods, and in the trust and confidence they may rightfully repose in their servants and agents that in the exercise of any power committed to them they will act in obedience to their oaths of office, and in the spirit of the fundamental principles of the Constitution.<sup>65</sup>

In both the Bonin case in Massachusetts and the Means case in Arkansas, the respective legislatures recognized their responsibility to use their powers wisely. In speaking to the special session in Massachusetts, retiring Representative James Segel reminded his colleagues:

59. Joint Committee on the Judiciary, *Minority Report Relative to the Matter of Chief Justice Robert M. Bonin*, J. Mass. H.R. *supra* note 1, at 12.

60. Madison, *supra* note 36, at 537.

61. Hale, *supra* note 41, at 214.

62. See notes 24 and 44.

63. Joint Committee on the Judiciary, *supra* note 59, at 13.

64. Grinnell, *supra* note 40, at 18.

65. *Harriman*, *supra* note 45, at 329.

We . . . have a responsibility not to use such a powerful instrument recklessly. We must not disregard the normal independence of the branches or the necessity of an independent, strong, and secure judiciary. In this particular instance, we must not remove merely because it may be politically popular at the moment . . . we must not act merely because powerful people and institutions have demanded . . . removal. Rather we should consider the charges . . . and only then should we consider if it is in the public interest that . . . he should be removed.<sup>66</sup>

From a practical point of view, removal of judges by legislative action provides a flexible procedure for handling those cases in which the grounds for removal fall short of those required to sustain a lengthy and complicated impeachment procedure. The "California Plan" commissions may prove to be more efficient in handling large numbers of charges against judges,<sup>67</sup> but often times these great numbers, requiring an ever-burgeoning bureaucracy to process them, are the direct result of the ease with which these complaints and charges may be filed.<sup>68</sup> Judges are thus forced to devote valuable bench time to defending themselves against what is often a plethora of spurious charges brought before the commissions by those who have failed to find relief in appellate procedures. Removal by the legislature provides a middle ground between the commissions and impeachment in which judicial misconduct which falls into the "gray areas" may be dealt with appropriately. The greatest advantage of legislative removal is that abuses of the removal power by legislators can be quickly remedied at the next election.

Should the legislatures be permitted to hold such extraordinary power over a supposedly independent judiciary? Does the conduct of the various legislatures in exercising this power justify its continued retention in state constitutions? After reviewing the arguments, the answer seems clearly to be in the affirmative to both questions. Such a power in the hands of the legislature is a necessary check on the otherwise unbridled power of the judicial branch and reinforces the concept of balancing the separate powers of the executive, legislative, and judicial branches of government. The inherent give and take of the legislative process is sufficient to act as a brake on abuses of the procedure, with the hearings required providing adequate due process protection to those subjected to the procedure. Abuses of the procedure can be cured relatively quickly by the vote of those who must wield the ultimate power in these matters, the people:

There is no other body to whom we can defer our decisions. Unlike elected officials, who must submit their fate to an electorate every two years, a judge sits until the age of seventy without submitting himself to any judgment whatsoever. Action by this House is essential if a judge is to be called into account . . . . If we don't act in cases concerning elected officials, the public can shortly get rid of them. If we don't act in cases concerning judges, no one else has the right or the opportunity.<sup>69</sup>

66. Segal, Statement to the Massachusetts House of Representatives 3 (July 31, 1978). Copy on file with *Journal of Legislation*.

67. New York's Commission on Judicial Conduct considered 950 complaints against judges in 1978. See Stern, *Judicial Rights and the Rise of State Misconduct Commissions*, Nat'l L.J., February 26, 1979, at 25, col. 1.

68. It must be pointed out, however, that the California discipline commission did not recommend removal of a judge for the first thirteen years of its existence. See *Geiler v. Commission on Judicial Qualifications*, 10 Cal.3d 270, 515 P.2d 1 (1973).

69. Segel, *supra* note 66, at 17.

## PROPOSALS FOR DISCIPLINE OF THE FEDERAL JUDICIARY

For over ten years, Congress has been struggling with the problem of federal judicial "gray area" misconduct. Unlike the state constitutions, the federal constitution allows only one form of judicial discipline, impeachment, and restricts it to cases involving "treason, bribery, or other high crimes or misdemeanors."<sup>70</sup> The standard of conduct for federal judges is simply "good behavior"<sup>71</sup> which is common to the state constitutions. The 96th Congress has seen three plans developed for dealing with the federal judiciary. The Judicial Tenure Act, S. 295, was introduced by Senators Nunn of Georgia and DeConcini of Arizona on January 31, 1979.<sup>72</sup> The Judicial Council Amendments and Discipline Act of 1979, S. 522, was introduced on March 1, 1979 by Senators Bayh of Indiana and Matthias of Maryland.<sup>73</sup> An omnibus court reform bill containing provisions for judicial disciplinary procedures is in preparation and is expected to be introduced shortly.<sup>74</sup>

The Judicial Tenure Act, S. 295, provides for the establishment of a Judicial Conduct and Disability Commission consisting of one judge from each judicial circuit and one judge from the special courts (Court of Claims, Customs Court, etc.).<sup>75</sup> This commission would be empowered to screen and investigate complaints against federal judges involving willful misconduct in office, willful and persistent failure to perform judicial duties, habitual intemperance, and conduct prejudicial to the administration of justice.<sup>76</sup> If the complaint is found to contain sufficient evidence of misconduct, it would be forwarded to a hearing before a Court on Judicial Conduct and Disabilities, consisting of seven members of the Judicial Conference of the United States.<sup>77</sup> This Court could censure, involuntarily retire, or remove from office any judge whose misconduct warrants such discipline.<sup>78</sup> Any decision of this court would be subject to review by the Supreme Court of the United States.<sup>79</sup>

The Judicial Discipline Act, S. 522, empowers the judicial councils of each circuit<sup>80</sup> to investigate complaints of judicial misconduct. Initial screening of complaints is performed by the chief judge of the circuit who would refer it to the full judicial council for hearing if evidence is sufficient.<sup>81</sup> The judicial council would have only the authority to request voluntary retirement, to relieve temporarily from judicial duties, or to censure any judge found to be guilty of misconduct<sup>82</sup> which could "interfere with or impair the effective, expeditious, and fair administration of the business of the courts or the just determination

70. U.S. Const., art. 2, § 4.

71. U.S. Const., art. 3, § 1.

72. S. 295, 96th Cong., 1st Sess., 125 Cong. Rec. S899 (1979). This bill is identical to S. 1423, introduced in the 95th Congress, which died in committee.

73. S. 522, 96th Cong., 1st Sess., 125 Cong. Rec. S1960 (1979).

74. The Federal Courts Improvement Act of 1979 was introduced on March 15, 1979, by Senators Kennedy and DeConcini. S. 678, 96th Cong., 1st Sess., 125 Cong. Rec. S 2874 (daily ed. Mar. 15, 1979) (remarks of Sen. Kennedy). See also Burke, *Senate Split Over Proposals to Discipline Federal Judges*, Nat'l L.J., March 5, 1979, at 6, col. 2.

75. S. 295, *supra* note 72, § 381(b)(1).

76. *Id.*, § 388(b).

77. *Id.*, § 385(a).

78. *Id.*, § 385(d)(1). This system is similar to a system long in use in New York and a few other states (see note 11). Details of New York's Court of the Judiciary can be found in Braithwaite, *supra* note 46, at 56-67. New York discarded this system in 1977.

79. *Id.*, § 1259.

80. Current duties and authority of the circuit judicial councils are found in 28 U.S.C. § 332.

81. S. 522, *supra* note 73, § 332(g)(3).

82. *Id.*, § 332(g)(8).

of litigation within that circuit."<sup>83</sup> All council decisions would be reviewable by the Supreme Court of the United States.<sup>84</sup> Reportedly, the omnibus court reform bill to be introduced by Senator Kennedy will contain provisions similar to S. 522 with the exception that decisions of the judicial councils would be appealable to the Judicial Conference of the United States.<sup>85</sup>

The Judicial Tenure Act, in granting the power of removal to a new judicial body, would effectively bypass the removal powers of Congress. This would apparently be contrary to the Constitution's mandate that Congress shall have the "sole power of impeachment."<sup>86</sup> Since an alternate means of removing judges had been proposed and rejected by the Convention of 1787,<sup>87</sup> it would seem that the drafters' intent was that impeachment would be the only allowable method of removal of judges. On the other hand, the Judicial Discipline Act, in seeking to minimize the impact of any judicial disciplinary machinery on the independence of the judiciary, does not seem to provide a strong enough remedy for cases of blatant judicial misconduct falling short of grounds for impeachment.<sup>88</sup>

No matter which form the new judicial disciplinary machinery may take, if any,<sup>89</sup> the common flaw in all proposals thus far is the reliance on judges being judged by their fellow judges, none of whom are accountable for their actions to any other branch of government. Especially in this post-Watergate era, this raises an inherent suspicion in the public's mind as to the adequacy of the remedy to be obtained from such a procedure. Perhaps now is the time to take a serious second look, Justice Story's comments notwithstanding, at Mr. Dickinson's proposal of 1787.<sup>90</sup>

### CONCLUSION AND PROPOSAL

Is there a simple system of judicial discipline which would be able to deal efficiently and fairly with all manner of judicial misconduct, yet remain fully accountable to the people? Obviously, most judges maintain high ethical standards and take an active interest in ensuring that their fellow judges adhere to similar standards. True, also, is the fact that most of today's legislators take their jobs seriously and are less susceptible to the "steamroller" tactics of yesteryear. Thus, those behind the current rapid movement toward "commission" type judicial discipline systems should be mindful of the proper role that the legislative branch plays in judicial discipline as a part of the system of checks and balances which have been so long a part of our governmental and constitutional heritage. Perhaps the answer may lie in a form of compromise which involves the "commission," the executive, the supreme court, and the legislature in a single structured system.

83. *Id.*, § 332(g)(2).

84. *Id.*, § 332(g)(9).

85. Burke, *supra* note 74. Current authority and duties of the Judicial Conference of the United States are found in 28 U.S.C. § 331.

86. U.S. Const., art. 1, § 2.

87. *See* note 36.

88. In 1966, the Judicial Council of the Tenth Circuit attempted to relieve a district court judge of his judicial duties, with inconclusive results. *See Chandler v. Judicial Council*, 398 U.S. 74 (1969), *reh. den.* 399 U.S. 937 (1970).

89. For an investigation into the proposition that the U.S. Supreme Court could find, as did the Massachusetts Supreme Judicial Court (*see* note 51), that it possesses disciplinary authority in its supervisory capacity over federal courts or by common law, *see* Note, *Removal of Federal Judges — Alternatives to Impeachment*, 20 Vand. L. Rev. 723 (1967).

90. *See* text accompanying notes 36-7.

In such a system, a judicial discipline commission composed of an equal number of judges, appointed by the chief justice of the supreme court, and private citizens, not necessarily members of the state bar, appointed by the governor, would provide initial screening and investigation of complaints of judicial misconduct. Based on the findings of the commission, the complaint would be dismissed if found to be groundless, frivolous, or a collateral attack on a judicial decision. If the commission finds substantive evidence of misconduct, however, the complaint would be forwarded to either the supreme court or the legislature. After a proper hearing, the supreme court could mete out punishment consistent with its supervisory powers, but short of removal. If misconduct sufficiently serious to warrant removal from office is found, the complaint would be forwarded to the legislature for hearings on a resolution of address or for impeachment proceedings. Removal, if warranted, would be recommended to the governor by majority vote of both houses of the legislature. If a resolution of address fails to receive a majority in any house, the case would then be passed to the supreme court for review and appropriate disciplinary action. Impeachment, if necessary, would be handled in accordance with current constitutional provisions. Sufficient due process safeguards should be incorporated into each stage of the proceedings to ensure that the rights of all parties are well-protected. Any private citizen or branch of government would be able to bring a complaint against a judge, but the sole entry point for all complaints would be limited to the judicial discipline commission.

This theoretical system allows the judiciary to police its own integrity without interference from either the legislature or executive, thus guaranteeing continued judicial independence. The system also recognizes the inherent supervisory and disciplinary powers of the supreme court, yet does not remove the legislature, the representatives of the people, from consideration of the most serious cases of misconduct. In addition, the existence of a judicial discipline commission, as sole entry point for complaints, provides a buffer between the judiciary and the people. The lapse of time inherent in the investigative process would serve to defuse popular passions and allow legislators, if necessary, to consider the removal of a judge relatively free from political pressure. Although such a system would not answer all the criticisms of judicial discipline systems currently employed by the several states, it could unite all of the competing institutions with an interest in judicial discipline in a properly compartmented structure with a common objective.

Those states which have removed the legislative branch from their judicial discipline systems should take this opportunity to reconsider the legitimate role of the people's representatives in any such system. States which maintain some form of judicial discipline commission, yet allow legislative removal of judges, should seriously consider restructuring the functions of these competing institutions. This competition, with its inherent capacity for abuse, could be channelled into a unified structure with the common goal of ensuring fair, efficient, and accountable handling of incidents of judicial misconduct. This goal, so often sought yet rarely achieved in the current systems, can be attained. With the suggested system, it is possible for the people *and* the judges to fairly and efficiently judge the judges.

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