2-1965

Removal of Judges- Federal and State

Jack E. Frankel

Follow this and additional works at: http://repository.uchastings.edu/publicity

Part of the Judges Commons, and the Legal Ethics and Professional Responsibility Commons

Recommended Citation
Available at: http://repository.uchastings.edu/publicity/8

This Article is brought to you for free and open access by the Judicial Ethics and the National News Council at UC Hastings Scholarship Repository. It has been accepted for inclusion in Publicity & News Clippings by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact marcusc@uchastings.edu.
REMOVAL OF JUDGES—Federal and State

by JACK E. FRANKEL

ONE WHO is convinced that the federal judiciary, both supreme and inferior, because they are appointed and hold office for life, are the greatest bulwark in the protection of individual right and individual liberty and the permanent maintenance of just popular government, must have a strong personal resentment against any member of that body who in any way brings discredit on the federal judiciary and weakens its claim to public confidence. I feel, therefore, no leniency or disposition to save the federal judges from just criticism and I am far from making light of serious charges against them or of defects that have cropped out from time to time. [William Howard Taft, September 2, 1913, 38 Amer. Bar Assoc. Reports 431.]

SINCE President Eisenhower's heart attack in his first term there has been debate about presidential inability and disability and also discussion on the topic of the health of public officers. Recent publications tell of Woodrow Wilson's incapacitation and the mental illness of James Forrestal, our first Secretary of Defense.

The nature of judicial service makes this question especially applicable to the administration of justice. Whether, as in the federal system, tenure is "during good behavior," (but as a practical matter, for life, Const. Article III, Section 1), or the office is elective, as in many states, it is generally true that in America a jurist's physical and mental condition are not subject to independent scrutiny once he assumes office. There is now no practical way to compel the removal or retirement of a federal judge for misconduct or inability to carry out the duties of his office due to a permanent physical or mental disability. This is also true with respect to the great majority of states.

Justice Samuel F. Miller of the United States Supreme Court, speaking before the New York State Bar Association, November 20, 1878, said,

On the other hand it must be confessed that the means provided by the system of organic law in America for removing a judge, who for any reason is found to be unfit for his office, is very unsatisfactory. . . . it is very certain that after the experience of nearly a century the remedy by impeachment in the case of the judges, perhaps in all cases, must be pronounced utterly inadequate. There are many matters which ought to be causes for removal that are neither treason, bribery, nor high crimes and misdemeanors. Physical infirmities for which a man is not to blame, but which may wholly unfit him for judicial duty, are of this class. Deafness, loss of sight, the decay of the faculties by reason of age,

1. Smith, When the Cheering Stopped; Rogow, James Forrestal: A Study of Personality, Politics, and Policy.
insanity, prostration by disease from which there is no hope of recovery—these should all be reasons for removal, rather than that the administration of justice should be obstructed or indefinitely suspended.  

There were a number of misfortunes in the United States Supreme Court in the Nineteenth Century, most of them contributing to Justice Miller's diagnosis.  

A Court historian wrote of Justice Henry Baldwin, who died in 1844, "Towards the close of his life his intellect became deranged and he was violent and ungovernable in his conduct on the bench."  

Justice John McKinley was frequently absent from his duties. At the Court memorial services in 1852 the Attorney General, John J. Crittenden, stated, "For many of the last years of his life he was enfeebled and afflicted by disease, and his active usefulness interrupted and impaired."  

**Prestige of Court Damaged**  

The prestige of the Court was damaged in a chain of events reverberating for years following Justice Robert Grier's feeble mental condition in 1868 when the Court was divided on the legal tender cases. Referring to Grier, Justice Miller, who was on the dissenting side, wrote, "We do not say that he did not agree to the opinion. We only ask, of what value was his concurrence and of what value is the judgment under such circumstances?"  

Justice Nathan Clifford's mind was impaired for several years during which he took part in the decisions. Justice Miller wrote in 1877 that "His mental failure is obvious to all the court," and in 1880 that, "His mind is a wreck."  

Justice Ward Hunt remained on the Court until 1882, three years after paralysis stopped all participation in Court work. According to Justice Stephen J. Field's biographer, in the latter stages of his Court service,  

His questions in the court room at times indicated that he had no conception of the arguments that were being made before him. It was reported that he voted on cases and then forgot how he had voted. Periods of clear perception were followed by others of dull stupor.  

In considering a remedy, Charles Evans Hughes observed, "The exigency to be thought of is not illness but decrepitude."  

At the Attorney General's Conference on Court Congestion and Delay in Litigation held June 16 and 17, 1958 in Washington, D.C., United States Court of Appeals Judge Warren E. Burger spoke about,  

...keeping the federal judiciary staffed with men and women who possess the physical
and mental vigor which is indispensable to an effective system of justice. . . . I would not presume to say how many United States judges now in active service are not physically able to perform their work adequately, but every observer knows that there are more than a few.12

The possible consequences of the absence of a workable removal method were starkly revealed in the United States Court of Appeals for the Third Circuit a generation ago. Judge Joseph Buffington, who by 1935 had become senile, signed decisions actually written by a dishonest colleague, Judge J. Warren Davis.13 Joseph Borkin in The Corrupt Judge published in 1962 details the separate venal courses of Davis, Martin T. Manton of the United States Court of Appeals for the Second Circuit, who was convicted and sent to prison in 1940, and Albert W. Johnson, United States District Judge for the Middle District of Pennsylvania. Davis left office in 1941 and Johnson in 1945, both after prosecution started. Complaints against Johnson’s official con-

JACK E. FRANKEL is executive secretary of the Commission on Judicial Qualifications of the State of California. This is a modified version of an article appearing currently in the Pennsylvania Bar Association Quarterly.

totally unprotected. This applies to both federal and state courts.

Cataloguing the normal remedies refutes their suitability and effectiveness.

Can a judge’s family, colleagues or physician be relied upon to safeguard the public interest?

Is it an answer that a trial judge with impaired faculties can be reversed on appeal, or an appellate judge can be overruled by his colleagues?

If the office is elective, how can the voters make a significant evaluation, especially if there is no election when the issue arises?

Is there anyone familiar with this topic who will argue that the traditional Anglo-American legislative procedures of address and impeachment are anything but hopeless except for grievous wrongdoing?

**The Last Two Impeachments**

The last two impeachments of federal judges which so patently showed the defects in the few such cases ever brought were: Harold Louderback, U. S. District Judge for the Northern District of California—impeached and acquitted, 1933; Halsted L. Ritter, U. S. District Judge for Southern District of Florida—impeached and convicted, 1936. Hatton W. Sumners, who was Chairman of the Judiciary Committee of the House of Representatives in the 1930’s, wrote,

The Senators are busy legislators, not Judges. Whether or not a Judge is guilty of bad conduct, for which under the Constitution he loses his right to hold office, is a justifiable question. The attempt to have the Senate properly try these removal cases, called impeachments, utterly fails.16

According to Sumners, who had been one of the House Managers in the Louderback impeachment, that case “resulted in the greatest farce ever presented. At one time only three Senators were present and for ten days we presented evidence to what was practically an empty chamber.”17 Regarding the Ritter impeachment, he observed “there were 56 votes for conviction and of those 56 votes only five were of the same political party as the Judge being tried.”18

A 1938 Harvard Law Review Note summarized the problem this way,

Impeachment as a method of removing federal judges has been the subject of long-standing dissatisfaction. Open to all the objections to legislative justice, impeachment has been periodically censured as partisan, ineffectual, unduly cumbersome, and overly expensive.19

Ninety years before Justice Miller addressed the New York State Bar Association Alexander Hamilton argued against compelling retirement of judges.

The want of a provision for removing the judges on account of inability has been a subject of complaint. But all considerate men will be sensible that such a provision would either not be practised upon or would be more liable to abuse than calculated to answer any good purpose. The mensuration of the faculties of the mind has, I believe, no place in the catalogue of known arts. An attempt to fix the boundary between the regions of ability and inability, would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good. The result, except in the case of insanity, must for the most part be arbitrary; and insanity, without any formal or express provision, may be safely pronounced to be a virtual disqualification.20

If Hamilton’s principal concern was to place the judiciary on an equal footing with the other two branches of government and to protect the judiciary from outside attack, a plan of removal relying on the judiciary itself could not be criticised for

---

18. Supra note 16.
20. Federalist No. 79.
permitting legislative or executive interference.

Alexander Simpson, Jr., probably the leading scholar on federal impeachments, put it this way in 1916.

It is not to be lost sight of that the judicial department was intended to be not only a coordinate but also an independent branch of the government, as far removed as possible from the control of the other branches; and that impeachment of judicial officers by Congress was only permitted because no other or better way of protecting the public from the derelictions of their judges had been devised. . . .

It is evident, therefore, that any plan for the removal of incompetent judges which reduces to a minimum the influence of the legislative and executive departments of the government upon the judiciary, will be a benefit to the public if it adequately protects the public from the continuance in office of those who are unfit for theem therefor.21

Possibility of Constitutional Remedy

Legal writers have thoughtfully examined the need as well as the possibilities for a remedy under the Constitution.22 Some have maintained that since the House of Representatives has "the sole power of impeachment" (Article I, Section 2 (5)) and the Senate has the "sole power to try all impeachments" (Article I, Section 3(6)), the power to remove civil officers by impeachment (Article II, Section 4) is exclusive so any change requires an amendment.23 Others have concluded that legislation would be constitutional as civil officers are presently removable in ways different from impeachment, and that the "necessary and proper" clause of the Constitution permits legislative implementation of the existing "good behavior" tenure.24 Both positions have merit although any action by statute would be opposed as unconstitutional and probably prevent debate on the merits. Representative Summers, strongly influenced by his first-hand knowledge of the unsatisfactory nature of impeachments, and with the support of the American Bar Association, did his best to bring about a change in 1940 but the bill was not enacted.25

The need has long been recognized. Retirement benefits, not always adequate, are now much better, at least for federal judges.26 Action should be taken in the state and federal jurisdictions although the unique standing of the United States Supreme Court would probably require its exemption. The Judicial Conference of the United States could service an effective procedure in the federal courts.27

Chief Justice Phil S. Gibson of the California Supreme Court, deeply concerned about the lack of an effective means of removing unfit judges, called upon the State Bar of California and the Judicial Council to study the question. Although some judges strenuously objected, a constitutional amendment was prepared and adopted at the November, 1960 election by a wide margin, thus establishing the Commission on Judicial Qualifications.28

25. 26 Amer. Bar Assoc. J. 760; 65 Amer. Bar Assoc. Reports 78; 27 Amer. Bar Assoc. J. 552; Supra note 16.
Under the comprehensive California plan a permanent tribunal, whose work is confidential by law, may check on allegations, request medical reports, conduct investigations, hold hearings, and make findings on the questions of misconduct, intemperance, failure to perform duties and permanent disability all as part of an orderly, effective, judicial procedure to determine judicial fitness. In a contested case a recommendation goes to the State Supreme Court for review and decision. The Commission, consisting of five judges appointed by the Supreme Court, two lawyers appointed by the State Bar, and two citizens appointed by the Governor, was guided as chairman in its formative years by A. F. Bray, a distinguished California appellate judge. Members receive no compensation; expenses are minimal. Several terminations in judicial service have come about as a result of Commission action.

**Better Standard of Ethics with California Commission**

The evidence is unmistakable that the very existence of the Commission procedure has led to better standards of ethics and performance among the California judges. Governor Edmund G. Brown, when asked early in 1964 to evaluate the Commission's operations, had this to say,

I am a firm believer in a strong and independent judiciary, but I am an equally firm believer in the fact that a man should not continue to hold judicial office when by his conduct or physical condition he has demonstrated his unfitness to do so.

The law has been in effect for slightly over three years now, and I am convinced that it is a tremendous success. It is beyond argument that the operations of the Commission have had a marked effect in raising the already high level of our California judiciary, and I feel that as the Commission continues to operate this effect will be multiplied.

Misbehavior of judges is so rare that we have largely neglected to provide the machinery to deal with those cases which do occur. New York's Court on the Judiciary met August 13, 1962 to consider charges against a Brooklyn trial court judge, and again May 25, 1963 for charges against a New York Court of Claims judge. In the first instance the judge was found to have abused his office through unethical and improper conduct, including obstructing and interfering with a court inquiry (which led to the suspension from practice of the judge's brother, his former law partner). In the other case the judge refused to cooperate in an investigation of corruption in the State Liquor Authority and would not sign a waiver of immunity, which he had a right to do as a citizen, but which the court decided meant he could not retain his judicial office. Each time, after a fair hearing, removal was ordered about six months after the Court convened. The citizens of New York were thus assured of the integrity of their judiciary. This could only result in the few states with suitable machinery for dealing with questions involving possible judicial misconduct.

Thus, we have convincing precedents in California and New York of a sensible solution for unfitness in American courts, a solution that does not encroach on the judicial prerogative. Under the aegis of its own branch, the judiciary can enlarge its capability while increasing in stature.

---

29. Stevens v. The Commission on Judicial Qualifications 61 AC 572 (1964). An order for removal can only be made by the Supreme Court. Uncontested matters are concluded by retirement or resignation.