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The Case for Judicial Disciplinary Measures

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"In my younger and bolder days, I often asked a judge, 'Why don't you retire?' One judge, more than eighty years old, stated that he was holding on in order to protect his long-time law clerk, who at sixty was too old to get another job; another stated that he would not retire because he enjoyed the prestige of being a judge; one told me it was rumored that so-and-so would be appointed in his place and he did not intend to permit that; and another refused to retire because his wife's position in society would be jeopardized." So says Hon. J. Earl Major, former Chief Judge, Court of Appeals for the Seventh Circuit.¹

A judicial disciplinary procedure is a workable system for taking action concerning a judge for cause or disability. We include in our consideration physical and mental conditions which prevent the proper performance of judicial duties. Many in the legal profession object, consciously and unconsciously, to applying this concept to judges.

To some the very discussion of the subject is an adverse reflection on judicial integrity and character and gives the wrong impression. This has undoubtedly helped to prevent discussion in the past. Many judges today will resent an article such as this although all competent observers agree that only a small number of judges are potential candidates for disciplinary measures. Bar leaders realized some time ago that the image of the bar would be enhanced, not hurt, by taking steps to censure and disbar unworthy lawyers. Opening an avenue for correction is more satisfactory than refusing to acknowledge valid criticism.

What are other arguments against an effective disciplinary procedure?

—There is normal dislike to be subject to supervision of this character if it can be avoided.

—There is a view that apart from gross wrongdoing, amounting virtually to criminal conduct, judicial derelictions should not be the subject of sanctions and that the maintenance of ethical standards rests completely in the conscience of the judge.

—It has been argued that a disciplinary mechanism is an interference with the principle of judicial independence.

—It is contended that disciplinary machinery will harm innocent people by giving unscrupulous individuals and newspapers an excuse for unwarranted attack on judges and a club with which to gain personal advantage.

—Finally, it is argued that there are always other means for maintaining standards of conduct, i.e., bar association action, scrutiny by the public and the press, impeachment, legal opinions and decisions of higher courts, good court administration and the influence of judicial colleagues.

The tide has now turned against these contentions. It is now recognized that a modern court system needs effective removal and involuntary retirement procedures regardless of personal preferences to be completely free from a disciplinary authority. To maintain that a judge may be restrained in no way other than as his conscience prescribes is to restate the divine right of kings in a different guise.

We know that a hard working, well administered court carries with it a discipline of its own. We know that judges are naturally responsive to the considered opinion of their colleagues and higher courts just as they are jealous of their good reputation among fair-minded lawyers and citizens. We also know from experience that these mendsable ingredients of the judicial process leave many problems of fitness unanswered.

Legal scholars such as Albert Kales, writing in 1914, and Alexander Simpson, Jr., writing in 1916, knew that the essence of the solution was the creation of a procedure within the judicial branch. This path has impressive advantages:

—Maximum protection to judges from abuse and harassment is afforded;

—Relieving the legislature of responsibility to decide these questions, which are not legislative matters at all, allowed the best chance of handling them on their merits;

—An independent tribunal being freed from having to contend with a counterattack of “politics,” and ad hominem arguments from the accused and freed from fears of retribution and vengeance, could act forcefully and impartially, which is not the case with a bar association, prosecuting attorney, the executive branch, or a legislative committee.

The Citizens' Committee on the Courts, Inc., a high level group in New York, in successfully advocating a Court on the Judiciary, argued in 1947, “The first objective of this committee is the establishment of a practical system for the removal and retirement of judges ...” Underlining the need for this change had been the impeachment of a Brooklyn judge and his acquittal by the New York Senate after a two-and-a-half-month trial in 1939.

By November 1959 the dimensions of the problem were so well recognized that a national conference on court administration at a meeting in Chicago jointly sponsored by the American Bar Association, the Institute of Judicial Administration, Inc.,

2. Here is an example in the years before the existence of a disciplinary commission in California.

“Such conduct is not that of a legendary tyrant but of a living, functioning judge who apparently delights in exhibitions calculated to deprive the court of the complacency, the disinterestedness, the zeal for truth, the judicial calm and mien indispensable to the avoidance of prejudicial error. The pronouncements of his personal opinions upon counsel and witnesses impair their efficacy as well as that of the court. Similar behavior by Judge Burnell has been the subject of many reversals during the past 24 years (citation) without effecting a reform in his behavior or causing him to conform with orthodox judicial deportment. However, it is still error thus to conduct a trial.

and the American Judicature Society, was able to make these discerning and prescient recommendations.

Disability should be determined by a standing commission on which the judiciary is represented. ... There is a need for a less cumbersome method to bring about the discipline or removal of a judge of any federal, state or local court whose conduct has subjected or is likely to subject the court to public censure or reproach or is prejudicial to the administration of justice.

The most urgent need is for methods to deal with judicial conduct of a nature not warranting or requiring removal.

The ultimate responsibility for disciplinary action or removal should rest in the highest court of the state. That responsibility and the power to discharge it should be recognized and clearly defined.

Provision should be made for the initiation and investigation of complaints before presentment of formal charges, and precautions should be taken for the protection of all persons involved."

The Joint Committee for the Effective Administration of Justice spearheaded by the American Judicature Society was able to focus the citizen's vital concern in good judicial administration in several state conferences attended by lawyers, judges and laymen which regularly include judicial discipline in their deliberations. Such a conference was held April 16, 17 and 18, 1964, in Austin, under the auspices of the State Bar of Texas. There was emphatic agreement that effective procedures for discipline were needed.

Later in the year at the annual judges meeting, Chief Justice Robert W. Calvert called for action. He described the situation shortly after:

"I would not be misunderstood. I know of no corrupt judges in Texas, and I do not suggest that our judiciary is shot through with incompetence. Ninety-nine per cent of our judges are intelligent, industrious, competent and dedicated. ...

It is the judges who make up the one per cent who cloud our image; it is they from whom we must rescue our integrity. We must rescue it from those few who think they can discharge their public and official obligations with a 24-hour work week, those who believe a judicial salary is only a subsidy for sideline business activities, those who think that judicial office is only a quiet place of retirement for the lawyer who is battle-worn and tired of it all."

With the support of leading judges and lawyers the Texas legislature passed a constitutional amendment which, after approval by the voters in November 1965, established a commission along the lines of the California plan.

An impressive voice was recently heard when the broadly-based 27th American Assembly meeting April 29 to May 2, 1965, at Arden House, Harriman, New York, produced a statement of recommendations under the title, "The Courts, The Public and The Law Explosion." One of the recommendations was titled, "involuntary retirement and removal."

Cumbersome procedures, e.g., impeachment, should be supplemented by effective machinery for the investigation of complaints against judges and for the removal of those found unfit or guilty of misconduct in office. The commission plan of judicial removal adopted by constitutional amendment in California in 1960 seems admirably designed for these purposes and is worthy of adoption in other states.

August 12, 1965, meeting in Miami, the American Bar Association House of Delegates approved a study of problems related to the discipline and removal of judges to be undertaken by the American Bar Foundation.

What does a judge who has lived under a commission plan of discipline think? Superior Judge Thomas N. Healy of Fair-
field, California, has never been a member of the California commission and so his observations titled, Judicial (Dis)qualifications, are those of an "outsider." Excerpts follow:

Judge Wrath was peevish to the point of terrorizing all who came before him. Appellate reviewers repeatedly denounced his abusive and prejudicial misconduct, all to no avail....

Inoffensive, but ineffective, was Judge Dormant, who dozed through most hearings. Countless files on submitted matters accumulated dust in his closet. His disinterest in case and calendar created backlogs which caused colleagues at the bench and counsel before the bar to fume and fret....

The infirmities of advancing years and successive disabling attacks had reduced Judge Fourscore to a pitiful caricature of his former self, literally unable to comprehend, let alone concentrate....

Judge Elsewhere was able, but not often in court. His many investments and private employments required most of his time and attention, despite reiterated pleas by his brethren on the bench that he bear more of a judicial hand....

The foregoing are fictional, but founded in fact. They illustrate some of the problems — uncommon, yet intolerable — which in California now receive scrutiny by our Commission on Judicial Qualifications. Established by constitutional amendment in 1960, this body consists of five judges appointed by our supreme court, two lawyers appointed by our integrated state bar, and two lay members appointed by the governor. Its function is to investigate and conduct proceedings, whenever warranted, against any judge for such causes as willful misconduct, persistent failure to perform duties, habitual intemperance, or permanent disability of a nature to seriously interfere with judicial performance.

As soon as reports of misbehavior, unusual procrastination, inexcusable discourtesy, vindictiveness, absenteeism, disability, etc., are called to the Commission's attention they are reviewed to see if further consideration is warranted. The judge in question may receive a letter setting forth the practice, impropriety or incapacity charged, and requesting an explanation. A preliminary examination may be conducted, with a formal hearing possibly to follow. A recommendation for the removal or retirement of the judge can be submitted to our Supreme Court. Strict confidentiality applies until the time such a recommendation is so filed....

How have California judges reacted to the omnipresence of such a supervisory authority? For us the system is no longer a novelty, but a proven fact of judicial life. Extensive probings evoke no indications of misgiving or regret. Contrariwise, the Commission's existence keeps us mindful that we are ministers of the law, not masters of it....

Under the California practice the letter procedure is a part of the investigatory function but is only undertaken after careful consideration and when there is an apparent credible dereliction or condition of some significance calling for explanation.

The judge's reply may be completely satisfactory in which case the confidential file will so show and be closed, or the reply or perhaps failure to reply may show the necessity for further investigation and may ultimately lead to removal proceedings.

Another possibility is that the allegations while valid are not grave enough to justify taking further action and there may be reason to think there will be an improvement. Sometimes there may be reason to accept the plea, "I didn't do it but I'll see it doesn't happen again."

Depending upon circumstances the closing of the matter can be conditioned upon the cessation of the impropriety. If the situation warrants, and only occasionally should this be necessary, the matter can be held and then re-checked before closing.

None of this is foolproof but it does provide an avenue so that discipline in a very positive way can be a factor in the improvement of the judicial machinery. To what extent a commission chooses to function in that sphere rests in the discretion of its members.

6. 4 Trial Judges' Journal 3, (July 1965) ; 5 Municipal Court Review 21 (Sept. 1965).
Following are statistics on the operation of the Commission for the two years 1964 and 1965. During this period over 1,000 judges were holding office.

Complaints (Including those on the Commission’s own motion) 152
Inquiries (Matters in which some check was made or additional information acquired) 70
Judge Contacted (Reporting allegations to and requesting explanations from the judge by letter or personal interview) 47
Resignation or Retirement 10

United States Senator Joseph D. Tydings of Maryland on October 15, 1965, outlined some topics to be taken up by the Subcommittee on Improvements in Judicial Machinery, of which he is chairman. Concerning “Fitness of Federal Judges,” Senator Tydings said,

We must also remember, Mr. President, that no system of judicial selection, no matter how intelligently designed and administered, can be infallible. There must be an effective method of removing a judge if, once in office, he turns out to be unfit by reason of physical or mental incapacity, inefficiency or corruption. I do not mean to suggest that such situations are common or widespread in our Federal judicial system. But the fact is that they have existed and continue to exist...

What is needed at this point, Mr. President, is a broad study of all causes for which it may be desirable to remove a judge from office. Perhaps different causes necessarily require different methods of removal, but we should draw on our past experience in the Federal system and on the experience of the several states, in order to determine whether this is so. It seems to me, Mr. President, that the most serious short-coming at present is that there is no single body which can receive and investigate complaints against Federal judges. This means that such complaints come to a variety of offices, already overworked and lacking the staff and expertise to make a fair evaluation, and, of course, without any power to take appropriate action. As a result, charges are bandied about in the press on the basis of incomplete information. This is unfortunate for judges, the judicial system and the public. Not only should the public have an opportunity to have legitimate complaints considered, but a judge should have an opportunity before a proper tribunal to clear himself from unfounded charges, and the judiciary should not unnecessarily suffer the disrespect that unfounded charges often produce.

Therefore, one possibility which our Subcommittee intends to consider very seriously is the establishment of an independent commission to deal with judicial fitness at all stages from nomination through removal, with jurisdiction to receive complaints, investigate cases, and make recommendations to the appropriate decision-making authorities. The existence of such a body might go far to improve judicial performance, to eliminate irresponsible and unfounded charges against the judiciary, and consequently to raise the stature of the Federal courts in the eyes of the public.

Interest in suitable and effective methods of judicial discipline is growing. In 1965 several state legislatures passed measures designed to establish procedures for judicial discipline. Judge Major’s statement at the beginning of this article as well as recent developments emphasize the urgency.

—in 1964 a probate judge in one state who appointed his wife as appraiser and sent other fees her way took the position in the words of a high official of that state “that he is immune from any form of discipline.”

—Two long and costly Florida impeachment trials were held in recent years, one in which the judge was accused of awarding lucrative fees to lawyer friends and the other in which the judge was charged with harassing lawyers with contempt rulings. Neither was convicted. Justice Stephen C. O’Connell of the Florida Supreme Court noted in a St. Petersburg speech that the two judges were acquitted “although observers, and many senators participating, have stated that in both cases the judges were guilty of conduct that merited censure or discipline, but not the harsh remedy of removal from office accompanied by disqualification to hold any other office.” He urged a method for dealing with miscon-
duct of a judge that does not warrant or require removal. The legislature in 1965 approved a commission patterned after California’s, which will go to the voters for adoption this year.

—The refusal of a Baltimore circuit judge in 1964 to resign in the face of a claim by five judges of his “incapacity to deal with the responsibilities of his office” led to a somewhat similar constitutional amendment to be voted on in Maryland this year. A California-type plan also will be voted on in 1966 in Nebraska, while a new Ohio statute provides for a commission appointed by the state supreme court to hear complaints against judges.

—The governor of one state in 1965 objected to active and open participation by judges in his state in partisan politics and noted that the state supreme court had urged compliance with the relevant canon of ethics by all members of the state judiciary. The governor declared, “Disregarding this recommendation, a small minority continues to openly engage in partisan politics. Obviously this could have an eroding effect upon the quality and objectivity of justice that is dispensed.” He pointed out that this “clouds the excellent judicial system of this state” and it “reduces the stature and prestige of the judicial branch.”

—In Oklahoma bribery and corruption of two Supreme Court justices fueled the passage by the Oklahoma Legislature of a “Court on the Judiciary” plan. In the spring of 1965 one resigned and one was impeached, the latter after a 30-year judicial career and not until the age of 74.

—In December 1965 a leading Western newspaper carried an item that a judge in the area (unnamed but apparently a Federal trial judge) was under the care of a psychoanalyst due to his inability to decide cases. The procrastination was notorious in the legal community for many years.

—In testifying before the Tydings subcommittee on February 15, 1966, about the inadequacy of existing removal measures, American Bar Association spokesman Bernard G. Segal told of a federal district judge who had refused to resign even though a stroke had reduced his maximum attention span to one hour a day. He also said that such examples could be multiplied.

—When the Sixth Circuit U. S. Court of Appeals in Cincinnati by unanimous resolution called on U. S. District Judge Mel G. Underwood to retire the Judge declared in June 1965, according to the Cleveland Plain Dealer, “The resolution doesn’t mean anything. They have no authority to remove me, and they’ve found that out. I told them to go to hell, and you may quote me on that if you like.”

Sitting as a Judicial Council, four judges of the Tenth Circuit U.S. Court of Appeals signed an order December 13, 1965 which was filed December 27, 1965 reading in part as follows:

From a review of the entire situation pertaining to Judge Chandler the Judicial Council finds that Judge Chandler is presently unable, or unwilling, to discharge efficiently the duties of his office; . . .

It was then ordered that “until the further order of the Judicial Council, the Honorable Stephen S. Chandler shall take no action whatsoever in any case or proceeding now or hereafter pending” in the district. In acting the council relied on a statute authorizing it to “make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit.” [28 U.S.C. § 332] Judge Chandler’s petition to the U. S. Supreme Court was denied.

Judge Underwood finally retired. Further ramifications of the Chandler case are still being explored. However, these two cases involving the federal judiciary and receiving wide publicity raise many questions and heighten current interest in developing reasonable disciplinary procedures.

The bar and the bench should take the lead in the movement to develop fair but realistic judicial disciplinary and involuntary retirement procedures.