A Historical Look at Judicial Discipline

Edward J. Schoenbaum

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol54/iss1/2

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.
A HISTORICAL LOOK AT JUDICIAL DISCIPLINE

EDWARD J. SCHOENBAUM*

Justice demands that lawyers, litigants and the public have confidence and trust in the judges who administer justice. As a consequence, there has been a concern throughout history with the honesty, courage and independence of the judiciary. This concern has been reflected in the universal requirement that judges be selected through methods that will assure they have those indispensable qualities. Judges are only human, however, and the methods of selection do not always guarantee their continued good behavior. To ensure the impartial administration of justice, fair and effective means of disciplining unfit judges are essential.

A variety of methods have historically been employed to cause the removal of judges, both as a deterrent to misconduct and as a remedy for purifying the judicial system of those few whose conduct warrants removal. While some disciplinary approaches have proven ineffective and have fallen into disuse, the procedures of others have been modified to meet changing problems and entirely new methods have been developed to combat the problem of judicial misconduct. This article will examine the various methods in their historical context and evaluate their use and effectiveness at the present time.

The traditional methods for encouraging judges to live up to “good behavior” standards through threat of removal include: (1) executive action; (2) address; (3) impeachment; (4) recall; (5) defeat at election; (6) bar association action; (7) removal by judicial action; and (8) action by a permanent judicial disciplinary commission. Most early methods of judicial discipline (executive actions, address, impeachment, recall, defeat at election, and bar association action) have been replaced for a variety of reasons, including the unfair nature of their procedures, prohibitive cost, ineffective-

* Assistant Professor, Sangamon State University; Director of Training, Center for Legal Studies, Sangamon State University; Former Director of Programs and Services, American Judicature Society; J.D., Case-Western Reserve University.

1. As far back as Moses there is evidence of great concern about a judge’s fitness for office. “Moreover thou shalt provide out of all the people able men, such as fear God, men of truth, hating covetousness; and place such over them to be rulers . . . and let them judge the people at all seasons. . . .” Exodus 18:20-21. In Deuteronomy Moses wrote:
ness, and the limited nature of grounds for removal. This article will show 
that since the struggle to develop effective means of disciplining judges has 
been an evolutionary process, new methods of judicial discipline have 
grown out of reactions to the most perceived weaknesses of the preceding 
methods.

There can be little doubt that improvements in judicial discipline and 
removal methods have been the most readily accepted court reform in 
America today. It is the hope of the author that an examination of each of 
these systems will lead to a better appreciation and understanding of the past 
and future of judicial discipline and will aid in developing more effective 
means of handling judicial misconduct in order to promote public confi-
dence in the courts.

EXECUTIVE ACTION

The oldest method for removing judges is through executive action. In 
most of the principal countries of the world, the chief executive officer at 
some time in history had the power to remove judges. In England, for 
example, prior to the eighteenth century, judges with few exceptions held 
their offices at the King’s pleasure. Before the passage of the Act of 
Settlement in 1700, whenever a King died it was likely that all judges 
would be replaced by new judges appointed by the new monarch.

The absolute control exercised by the Crown over the judiciary fre-
quently resulted in friction between the King and his judges. Despite the 
threat of executive removal, declarations of judicial independence were 
often voiced from the bench. For example, a great confrontation occurred 
when King James directed the judges to stay the action in the Case of the 
Commendams until they consulted with him. After the judges refused to

And I charged your judges at that time saying Hear the causes between your 
brethren, and judge righteously between every man and his brother, and the stranger 
that is with him. Ye shall not respect persons in judgment; but ye shall hear the small 
as well as the great; ye shall not be afraid of the face of man; for the judgment is 
God’s; and for the cause that is too hard for you, bring it unto me, and I will hear 
it. . . .

I Deuteronomy 16:7. Moses also wrote “[T]hou shalt not wrest judgment; thou shalt not respect 
persons, either take a gift; for a gift doth blind the eyes of the wise and pervert the words of the 
righteous.” I Deuteronomy 16:19. Lord Hale wrote in rules for his judicial guidance: “Things 
necessary to be continually had in remembrance: (1) That in the administration of justice I am 
entrusted for God, the king of the country; and therefore that it be done, 1st uprightly; 2ndly, 
deliberately; 3rdly resolutely.” American Judicature Society, Handbook for Judges 21 (D. 

(1936).

3. See, e.g., Shartel, Federal Judges—Appointment, Supervision, & Removal—Some 
cited as Federal Judges].

4. 12 & 13 Will. 3, C. 2, § 3 (1700).

5. See Federal Judges, supra note 3, at 881-82.

6. See text accompanying note 7 infra.

stay the matter, they were asked by the King if they would obey a similar order in the future. Chief Justice Coke again refused, replying "that when that case should be, he would do that should be fit for a judge to do."8 Although Sir Coke's statement certainly reflects the kind of independence a judge should have to properly protect the rights of all, those judges who endeavored to remain independent did so at their own peril. Royal influence was grossly abused and honest and fearless judges like Sir Coke were arbitrarily removed.9

The widespread abuse that accompanied judicial discipline by executive action resulted in almost universal withdrawal of the judiciary from executive domination. The English Parliament was the first to recognize the shortcomings of executive action as a means of judicial discipline and to remove its judges from unfettered executive control. In 1700, immediately after the close of the reign of the last of the Stuart kings, Parliament passed the Act of Settlement10 which made the judiciary independent of the executive. The Act provided "that judges' Commissions be made Quamdiu se bene gesserit, that is for so long as they conduct themselves well, and their salaries ascertained and established; but upon the Address of both Houses of Parliament, it may be lawful to remove them."11

Although the Act of Settlement freed the English judiciary of executive domination, its provisions did not extend to the many judges who sat on benches throughout her colonial empire. In the American colonies, for example, it was still common practice prior to the War for Independence for the judges' tenure to be at the King's pleasure.12 In fact, this was mentioned as one of the grievances against the Crown and Parliament in the Declaration of Independence.13 In forming our government, the framers of the Constitution sought to avoid the abuses of executive action in giving the President the authority to appoint federal judges for life during good behavior.14 Removal, however, was given to the legislative branch through impeachment.15

Today in the United States, removal of judges by executive action as a method of judicial discipline has virtually disappeared. Some vestiges, however, remain. In Hawaii, the Governor still has the power to remove judges, but only after the Commission on Judicial Qualifications has made a

8. See M. McNamara, 2000 Famous Legal Quotations 283 (1967).
10. 12 & 13 Will. 3, C. 2, § 3 (1700).
13. "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."
15. Id. art. I, § 3, cl. 6.
recommendation that such action be taken. In Delaware and Maine the Governors can remove by not reappointing a sitting judge to a new term. The use of executive action in these states, however, is the exception and not the rule.

In summary, executive removal of judges had the advantage of speed, but the disadvantage of too many judges being removed for the wrong reasons. The arbitrary way in which many executives tried to exert improper control over this separate and independent branch of government led to the almost universal withdrawal of this power over the judiciary. The legislative branch of government endeavored to develop better ways of handling judicial discipline.

For the sake of proper administration of justice, it is fortunate that judges are no longer removed at the whim of a king or other executive. This has helped judges to become more independent and courageous in basing their judgments on the law, rather than on political favor.

ADDRESS TO THE EXECUTIVE

The English Parliament, by the passage of the Act of Settlement in 1700, developed Address to the Executive to put a check on the power of the executive to remove judges. As a result of the Act of Settlement, the English monarch could still remove judges, but only after both Houses of Parliament thought such action was necessary.

Address is merely a formal request to the executive by both houses of the legislative body (usually by a vote greater than a majority) requesting him to perform some act, i.e., to effect a judge's immediate removal from office. The power to remove by address is broader than impeachment and is provided as a means for removal of judges deemed unworthy to sit on the bench even though their conduct does not warrant impeachment. There is no trial, nor does the judge in question have a right to present a defense, as he does in a trial of impeachment. He is, however, entitled to notice and has a right to be heard. Address to the executive is not provided for in the United States Constitution and although it had been authorized as a means of removing judges in twenty-eight states by 1922, it has been seldom used.

17. DEL. CONST. of 1897, art. IV, §§ 3, 3.7.
22. Id. at 146.
23. "Address to the executive has become a largely theoretical device..." Removal & Discipline, supra note 20, at 164.
The desuetude of address to the executive as a viable means of judicial discipline is due in no small degree to the inherent limitations of the legislative branch. The legislature is often too involved with the regular law making activities to stop for such a procedure. In addition, the usual legislative procedures do not easily lend themselves to the type of fact finding which is characteristic of a trial and most legislators are not prepared to assume the unfamiliar role of a judge in an area with which they have little understanding. Too often, the vote would reflect partisanship rather than an objective conclusion based solely on the evidence.

In short, address to the executive as a means of disciplining judges is superior to executive removal because of the restraint which it places upon the executive. However, the fact that it lacks formal methods for investigating misconduct or conducting fair hearings still remains. These shortcomings, in addition to its aura of partisanship, prevent address from being a truly effective method of disciplining judges.

**IMPEACHMENT**

The use of impeachment as a disciplinary tool was first seen in the later part of the fourteenth century when the House of Commons prosecuted the most powerful and highest officers of the Crown before the House of Lords. Originally a method implemented by Parliament to remove the King's high officers who had misled him, legislative action by way of impeachment and removal became the method most commonly authorized in the early history of the United States for dealing with judicial misconduct.

Impeachment is a criminal proceeding against a public officer, before a quasi-political court, instituted by a written accusation called "articles of impeachment." In an impeachment there is a specification of charges voted by the lower house of the legislature. The charges are then tried in the upper house, which sits for this purpose as a court. Removal by the upper house usually requires a two-thirds vote.

Impeachment is ineffective, cumbersome, and when used has often been perverted. When impeachment has been used against judges, the reasons for its use have often included political retaliation. The effort to

25. See generally Impeachment of Judges, supra note 19; Removal & Discipline, supra note 20, at 163.
26. See, e.g., U.S. Const. art. I, § 2, cl. 5.
27. See, e.g., id. art I, § 3, cl. 6.
28. Twelve federal judges have been impeached by the House of Representatives but only one has ever been removed by the Senate. Removal by impeachment has been very rare in the states as well. In Illinois, for example, there have been two attempts (both in the 1840's) to remove judges by impeachment, but both were unsuccessful. See W. Braithwaite, Who
impeach United States Supreme Court Justice Samuel Chase reveals the extent to which this method of judicial discipline can be abused. Justice Chase, a signer of the Declaration of Independence and the Maryland representative to the Continental Congress, had charges pressed against him which suggested that he was an arrogant, impatient judge who held firm and arbitrary personal opinions. While other judges had engaged in similar conduct, their misfeasance was ignored and Justice Chase was singled out for impeachment, a development no doubt due to the fact that the formers' views were more politically palatable to Congress. The political manner in which that impeachment trial proceeded established a precedent in the struggle for independence of the judiciary. The Senate did not remove Justice Chase and held that impeachment should be reserved for serious causes.

The impeachment procedure's potential for abuse is also evidenced in the unsuccessful attempt to impeach Chief Justice Earl Warren in the mid-1950's. Demands for the removal from office of the Chief Justice of the United States Supreme Court were heard from some sectors of the public not because of any criminal or improper conduct, nor even because of a violation of judicial ethics, but simply because of a dissatisfaction with some of the Court's decisions. Through the slogan "Impeach Earl Warren," resentment that the Supreme Court was unduly favorable to Communists, that it had taken prayer out of the public schools, or that it had been guilty of an usurpation of legislative power was expressed.

Certainly the founding fathers did not consider the handing down of unpopular decisions grounds for impeachment. Such a broad interpretation of the term "impeachable offense" would be inimical to the independence which the founders sought to bestow upon the judiciary. The public reaction to the decisions of the Warren Court, however, led to broad congressional interpretations of "impeachable offense;" so broad, in fact, that under such interpretations the rendering of unpopular decisions may indeed be grounds for impeachment. For example, former President Gerald R. Ford, while Republican leader of the House of Representatives, said that "an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the [Senate] considers to be sufficiently serious to require removal of the accused from office."

A legal memorandum,

30. Id. at 185-86.
HISTORICAL LOOK AT JUDICIAL DISCIPLINE

dum which later appeared in the special subcommittee on House Report 920 of the House Committee on Judiciary concluded "[i]t is the conscience of Congress—acting in accordance with the constitutional limitations—which determines whether conduct of a judge constitutes misbehaviour requiring impeachment and removal from office." Clearly, a more objective look at "good behavior" and a less capricious procedure which would operate more fairly are preferable to that standard.

Not only is impeachment a method of judicial discipline which is subject to severe abuse but it is also rather ineffective. Justice Samuel F. Miller of the United States Supreme Court commented on its ineffectiveness as a remedy before the New York State Bar Association in 1878:

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 cases of the judges, perhaps in all cases, must be pronounced utterly inadequate. There are many matters that ought to be causes for removal that are neither treason, bribery, nor high crimes and misdemeanors. Physical infirmities for which the 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, insanity... these should all be reasons for removal, rather than that the administration of justice should be obstructed or indefinitely suspended.

Despite its limitations, the process of impeachment does have some obvious advantages over other methods of judicial discipline. Perhaps the greatest benefit of impeachment, however, has been derived from its shortcomings. Impeachment's ineffectiveness, potentiality for abuse, and awkward requirement that the legislature sit as a court created an awareness of the legislatures' inability to handle effectively problems of judicial conduct. The importance of keeping the judiciary free of improper executive or legislative influence dictated that better methods of disciplining the judiciary be found. Thus, the defects in the impeachment process contributed directly to the development of newer, more effective methods of judicial discipline.

In short, impeachment is an all or nothing approach. The impeached judge is either removed or not punished at all. Since impeachment is ineffective and cumbersome, it needs to be supplemented by more effective methods for handling judicial misconduct. It is, however, somewhat effec-

32. SPECIAL SUBCOMM. ON H.R. REP. 920 OF HOUSE COMM. ON THE JUDICIARY, LEGAL MATERIALS ON IMPEACHMENT, 91st Cong., 2d Sess. 23 (1970).
33. 2 N.Y. ST. B. A. REP. 40 (1878) (emphasis added).
34. There is a trial on specific charges, there is a separation between the charging body (House of Representatives) and the body that makes the removal decision (Senate).
RECALL

Another method of judicial discipline which has had only historical significance was recall. Sanctioned by some state constitutions, recall is a procedure by which judges and certain other public officials may be removed from office by means of a special vote of the electorate. The process begins by submission of a petition, signed by a certain percentage of qualified voters, requesting that the recall proposition be placed on the ballot. While the recall of judges was adopted in Oregon in 1908, in California in 1911, in Colorado, Arizona and Nevada in 1912, and in Wisconsin in 1926, it has been used sparingly. In fact, recall of judges has been even more rare than impeachment or address, with the last one prior to 1977 occurring in California in 1932.

One of the disadvantages of recall as a method of judicial discipline is that it is likely to occur in only flagrant cases of judicial misconduct. There are no regular means for screening complaints or investigating misconduct. In addition, gathering signatures on a recall petition is quite expensive and, to be successful, lawyers would be required to publicly take a strong stand without any assurance that the judge would be removed and would not retaliate against them.

On the other hand, recall gives the judiciary independence from the other branches of government and gives the authority to remove directly to the voters. While theoretically there might seem to be an advantage in giving people control over their public officials, in reality such a practice may have been detrimental. The threat of recall may have caused some judges to decide cases according to popular opinion rather than on the law.

35. Despite the fact that many of the methods of judicial discipline discussed in this article have seemingly fallen into disuse, they are still available for implementation when the need arises. For example, in September of 1977 a Wisconsin judge was removed from office by the first recall vote in Wisconsin history. This was the first time a judge had been recalled in the United States since 1932. See note 43 and accompanying text infra.

36. See Table I for a listing of those states in which recall is still available as a means of judicial discipline.

37. ORE. CONST. art. II, § 18.
38. CAL. CONST. art. XXIII, § 1.
39. COLO. CONST. art. XXI, § 1.
40. ARIZ. CONST. art. 8, pt. 1, § 1.
41. NEV. CONST. art. 2, § 9.
42. WIS. CONST. art. XIII, § 12.
43. MEYER, SELECTED REFERENCES ON THE INITIATIVE, REFERENDUM & RECALL, 69-87, 93-94 (1912). See also Frankel, Judicial Conduct & Removal for Cause in California, 36 S. CAL. L. REV. 72, 75 (1962). In September 1977, a Wisconsin judge was defeated in a special recall election, the first in Wisconsin history. The judicial misconduct which led to the submission of
and justice. This danger undoubtedly contributed to the diminution of recall as a viable method of judicial discipline.

**Removal by Popular Vote**

Removal by popular vote developed during the era of Jacksonian Democracy. Until that time, judges were appointed by either the executive or legislative branch of government. Mississippi was the first state to elect all its judges and by the time of the Civil War twenty-four of the thirty-four states had an elective judiciary.

Removal by popular vote, such as in defeat for reelection or renomination, has been altogether unsuccessful in disposing of unfit judges for various reasons. First, the notion that all public officials, including judges, should be elected necessarily carries with it the danger that good judges may be removed from office through the electoral processes. In fact, it seems that all too often competent judges have been defeated under the various reelection procedures. Secondly, removal by popular vote has introduced a great evil into the judicial system—the political campaign for judicial office. Such a campaign requires raising substantial amounts of money, usually from lawyers who practice before the judge. In the 1973 election for Chief Judge of the New York Court of Appeals, for example, the campaign cost over one million dollars. One candidate alone spent over $600,000.4

While this particular political campaign for judicial office was said to have created greater citizen interest in court modernization, there seem to be few other advantages of having an elected judiciary. In most instances, the electorate simply does not obtain enough information to intelligently decide upon a candidate's qualifications. In addition, in major metropolitan areas many people fail to vote in judicial contests and many of those who do vote a straight party ticket. This usually results in the election of candidates who are chosen behind closed doors by the slatemakers of the dominant party. Too often, such candidate selection is based on party service, campaign contributions, and criteria other than the qualifications necessary to be a good judge. Furthermore, when a judge is forced to think of political consequences, he is tempted to shirk his responsibility and avoid a just decision that is politically unpopular. The worst of judges may run a superb campaign and be reelected.

Despite the disadvantages of an elected judiciary, there are twenty-

---

seven states where some or all of the judges are elected by the voters.\textsuperscript{45} There are twelve other states where judges are initially appointed but must run in a noncompetitive election on their records.\textsuperscript{46} There are also two states where judges are initially elected against an opponent but, after once winning an election, then run on their record.\textsuperscript{47}

All of the methods of judicial discipline mentioned above have a number of weaknesses. The methods discussed thus far are likely to result in removal only in flagrant instances of misconduct and, even then, are subject to improper political influences. Additionally, these methods lack basic standards of a fair process. In an effort to improve disciplinary effectiveness, the following methods of discipline evolved.

**THE INCREASE OF BAR ASSOCIATION INVOLVEMENT**

As a result of the deficiencies inherent in the above political disciplinary methods, leaders of the bench and bar sought more effective and fair methods of investigating, holding hearings, and presenting evidence against judges which would result in their removal for cause. The state bar associations, in particular, felt strongly that judges as lawyers should live up to the canons of ethics of the bar. Consequently, they developed means of disbar-

\textsuperscript{45} Alabama, ALA. CONST. art. 6, § 153; Arkansas, Ark. CONST. art. 7, §§ 6, 17, 29, 38; California, CAL. CONST. art. VI, §§ 3, 4a, 6, 8, 11; Florida, FLA. CONST. art. V, § 15; Georgia, GA. CONST. §§ 2-3103, -3202, -3603, 24-1702; Idaho, IDAHO CONST. art. V, §§ 6, 11; Illinois, ILL. CONST. of 1970, art. VI, § 12; Kentucky, KY. CONST. § 117 (effective Jan. 1, 1976); Louisiana, LA. CONST. art. V, § 22(A); Michigan, Mich. CONST. art. 6, §§ 2, 8, 12, 16; Minnesota, MINN. CONST. art. VI, § 7; Montana, MONT. CONST. of 1972, art. VII, §§ 5, 8; Nevada, NEV. CONST. art. 4, §§ 3, 5; New Mexico, N.M. CONST. art. VI, §§ 4, 12, 26, 28; New York, N.Y. CONST. art. VI, §§ 2a, 6c, 9, 10a, 12b, 13a, 15a, 17d; North Carolina, N.C. CONST. art IV, § 16; North Dakota, N.D. CONST. §§ 91, 93 (amended 1976); Ohio, OHIO CONST. art. IV, § 6 (amended 1973); Oregon, ORE. CONST. art. VII, § 1 (amended 1910); ORE. REV. STAT. § 252.010 (1975); Pennsylvania, PA. CONST. art. V, § 13(a); South Dakota, S.D. CONST. art. V, § 7 (amended 1972); Tennessee, TENN. CODE ANN. § 17-103 (1955); Texas, TEX. CONST. of 1876, art. V, §§ 2, 4, 6, 15, 18; Washington, WASH. CONST. art. IV, §§ 3, 5; West Virginia, W. VA. CONST. art. VIII, §§ 2, 10, 23; Wisconsin, WIS. CONST. art. VII, §§ 4, 7, 9, 14, 15.

In addition, the following states have provisions by which the Governor fills vacancies, with the help of a judicial nominating commission, but the judge so appointed must run in a competitive election at the end of the term. California, CAL. CONST. art. VI, § 26; Florida, FLA. CONST. art. V, § 11(a); Idaho, IDAHO CONST. art. IV, § 6; IDAHO CODE § 1-2102(3) (Cum. Supp. 1977); Kentucky, KY. CONST. § 118(1) (effective Jan. 1, 1976); Montana, MONT. CONST. art. VII, §§ 8, 11; Nevada, NEV. CONST. art. 6, § 4; New York, N.Y. CONST. art. VI, § 21; North Dakota, N.D. CONST. § 97 (amended 1976); Pennsylvania, PA. CONST. §§ 13(b), (d), 14 (amended 1975); South Dakota, S.D. CONST. art. V, § 7 (amended 1972).

\textsuperscript{46} See, e.g., Alaska, ALAS. CONST. art. IV, §§ 4, 5, 6; ALAS. STAT. §§ 22.05.070, 22.05.100 (supreme court); 22.10.090, 22.10.150 (superior court); 22.15.160, 22.15.195 (district court); Arizona, ARIZ. CONST. art. VI, §§ 3, 12, 37, 38 (amended 1960); ARIZ. STAT. § 12-120.01 (Supp. 1957-1977); Colorado, Colo. CONST. art. VI, §§ 20, 25; Colo. REV. STAT. § 13-4-104 (1973). Other states in which the judges are initially appointed but later run on their own records are Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, Oklahoma, Utah, and Wyoming.

\textsuperscript{47} Illinois and Pennsylvania.
ring lawyers and judges who were no longer fit to practice law or to hold the important public office of judge.

Five states, Missouri, Ohio, Utah, Virginia and Wisconsin, attempted to develop a procedure whereby the bar association took on responsibility for dealing with problems of disability or discipline of judges. In none of these jurisdictions, however, was the bar association given final authority to discipline a judge. The bar associations were only authorized to make recommendations to a body (either the legislature or the state’s highest court) charged with the actual power to discipline. Nonetheless, the procedures provided by each state bar association are worthy of some discussion.

In 1938 the Supreme Court of Appeals of Virginia promulgated rules to integrate the Virginia state bar. The rules provided that the grievance committee of the state bar had the duty to receive complaints of improper conduct on the part of judicial officers of Virginia and that each committee member should report to his committee any improper conduct which may come or be brought to his attention.

Thirteen years later, in 1951, the Utah legislature followed Virginia’s lead in leaving matters of judicial discipline to the state bar association and added a provision to Utah’s State Bar Integration Act providing that the state bar board of commissioners had the power to make or cause to be made an investigation into all “unethical, questionable, or improper conduct of members of the bar holding judicial office.” The provision also gave the state bar board of commissioners the authority to recommend action to the legislature with respect to such judicial misconduct.

In 1945, Missouri established a Committee on Retirement of Judges and Magistrates which was empowered by supreme court rule to investigate complaints and to make recommendations for action against judges found to be too old or infirm to serve effectively. A Judicial Retirement Committee, created in 1954 by a resolution adopted by the Board of

49. Id. for a thorough discussion of the attempts by state bar associations to deal with judicial discipline, see Brand, The Discipline of Judges, 46 A.B.A.J. 1315, 1316-17 (1960).
50. UTAH CODE ANN. §§ 78-51-1 to 51-44 (1953).
51. Id. § 78-51-13.
53. Effective Jan. 1, 1972, this committee is now known as the Commission on Retirement, Removal and Discipline.
Governors of the Missouri State Bar,\textsuperscript{56} played a key role in the Missouri removal procedure and operated as a mechanism that activated the Committee on Retirement of Judges and Magistrates.\textsuperscript{57} After a complaint was received by the Judicial Retirement Committee, the members\textsuperscript{58} of that committee conducted an informal preliminary investigation by talking to attorneys who practiced before the judge, checking court records, and speaking to court officers. When the investigation revealed that a judge was no longer fit to serve, one or two of the Missouri bar committee members spoke to the judge privately and suggested his retirement, presenting him with evidence that pointed to his disability. About a month after the first visit, the judge’s physician, friends, and relatives were advised of the committee’s intentions and encouraged to discuss the problem with the judge. They were also encouraged to urge the judge’s retirement. If that persuasion failed, and the judge was unwilling to retire, the committee could then file an information with the Committee on Retirement of Judges and Magistrates.\textsuperscript{59} Once an information was filed with this committee, formal proceedings against the judge could be commenced.\textsuperscript{60}

Although the Missouri Bar’s Judicial Retirement Committee did not have the authority to deal with misbehavior of judges in the early years of its operation,\textsuperscript{61} it nonetheless met moderate success in obtaining the removal of disabled jurists. By 1966, approximately twenty judges had voluntarily retired as a result of the Judicial Retirement Committee’s persuasion.\textsuperscript{62} Formal complaints were made in only two instances.\textsuperscript{63}

Effective January 1, 1957, a rule of the integrated Wisconsin bar gave to the discipline committees in the local districts a duty to receive complaints against judges as well as against lawyers, to make appropriate investigations and reports, and to make recommendations to the board of governors of the state bar.\textsuperscript{64}


\textsuperscript{58} The committee consists of seven lawyers appointed by the president of the state bar association. See Removal of Judges, supra note 57, at 403.

\textsuperscript{59} Mo. Sup. Ct. R. 12.03 (now Mo. Sup. Ct. R. 12.06(a) (1972)). The Commission on Retirement, Removal and Discipline comprised of two citizens who are not members of the Missouri bar, two lawyers, one judge of the court of appeals and one judge of a circuit court. Mo. Sup. Ct. R. 12.01.

\textsuperscript{60} Mo. Sup. Ct. R. 12.03 (now Mo. Sup. Ct. R. 12.06(b) (1972)).

\textsuperscript{61} See Removal & Discipline, supra note 20, at 166 & 165 n.69. The Missouri Supreme Court Rules now give the Commission on Retirement, Removal and Discipline the power to discipline judges for misbehavior involving moral turpitude. See note 55 supra.

\textsuperscript{62} See Removal & Discipline, supra note 20, at 166.

\textsuperscript{63} Id.

Also effective January 1, 1957, the rules of the Ohio Supreme Court were amended to provide for the creation of a Board of Commissioners on Grievances and Discipline. They empowered the board to receive, entertain, inquire, take proofs, make findings, and submit recommendations to the court concerning complaints of alleged misconduct and disbarment of any attorney, counselor at law, or judge. The board was given exclusive jurisdiction over all complaints and grievances, but they were to report their findings to the Ohio Supreme Court.

The advantages that judicial discipline by bar association action had over other disciplinary methods were to some extent due to the fact that the respective state bar associations had a real concern with judicial conduct. Certainly, the lawyers who comprised the state bar association were concerned with both fair procedures and with having an honest and competent judiciary. It is not surprising that the methods they selected for disciplining judges reflected these concerns. In addition, judicial discipline by bar association action had practical advantages. The state bar associations could readily adapt their procedures from lawyer grievances to the needs of judicial investigations. As a result the same people could develop expertise in both of these related areas.

At the same time, methods in which the bar associations were given authority to discipline judges were unsatisfactory “for the obvious reasons that the members of the grievance committees being practicing lawyers are hesitant to present and try charges against their judges.” The Florida Supreme Court, to avoid the danger of bar control over judges, recently held in *Florida Bar v. McCain* that a sitting judge is not subject to discipline by the bar until his tenure as a judge ends. Nevertheless, judicial discipline through bar association action was an improvement over earlier disciplinary methods and the procedures developed during this time played an important role in the evolution of the court commission method for disciplining and removing judges that is prevalent today.

**REMOVAL BY SPECIAL JUDICIAL ACTION**

One method of removing unfit judges which is both fair and effective is removal by special judicial action. It is the method used in Europe and has been combined with the new commissions in most of the states.

66. *Id.*
67. *Id.*
69. 320 So.2d 712 (Fla. 1976).
70. *See text accompanying notes 111-132 infra.*
Under the English common law, a judge could be removed from office in three ways. One of the ways was by the court through a process known as scire facias, which was a suit to repeal the letters patent by which the judge held his office.\(^7\) In England, judges were appointed for life during good behavior. Since the position was conditioned upon good behavior, it could be forfeited\(^7\) by a breach of the condition annexed, \textit{i.e.}, by misbehavior.\(^7\)

Since the office could be lost for misbehavior, the power to remove from that office had to exist somewhere and it was placed in the court.

Scire facias proceedings could be instituted by the attorney general in the court of King's Bench. The court was asked to repeal the letter patent by which the person held his office upon showing that he had breached the good behavior condition. If the court was satisfied that the alleged misconduct constituted a breach of the condition, it ordered "[t]hat the said letters patent' be revoked, cancelled, vacated, disallowed, annulled, void and invalid, and be together had and held for nothing; and also that the enrolment [sic] thereof be cancelled, quashed and annulled. . . .\(^7\)"

Even though scire facias has never been employed in England for removal of a superior court judge,\(^7\) it has been used for forfeiture of other offices held during good behavior.\(^7\) The frequent reference in Parliament to scire facias as a proper course for removing a superior judge leaves no doubt that it was available for removing superior court judges.\(^7\)

At common law an officer holding office during good behavior could also be removed from office either upon criminal conviction for a misdemeanor in the exercise of his official duties or for an offense which, though unconnected with his official duties, was in itself so infamous as to render him unfit to hold public office.\(^7\) Criminal conviction resulted in the repeal of the patent by which the office was held and entitled the Crown to seize the office without further proceedings in the form of scire facias.\(^7\)

\(^72\). The life tenure was not abridged but declared vacant for nonperformance of the condition on which it was originally conferred.
\(^76\). Recorders holding office during good behavior who had been removed without scire facias could challenge their removal by an application for mandamus to restore them to office. Either scire facias or quo warranto could be employed for effecting forfeiture of office or revocation of grant. \textit{See Lord Bruce's Case}, 93 Eng. Rep. 870 (K.B. 1728).
\(^77\). \textit{See Impeachment of Judges}, supra note 19, at 1479-83.
\(^79\). 5 J. Comyns, \textit{Digest of the Laws of England} 215 (5th ed. 1822). By the Act of Settlement and by 1 Geo. 3, c. 23 (1760), the patent of a judge would be repealed in consequence
A third method used in England to discipline judges is found in the power of the Lord Chancellor, acting alone, to remove county judges for misbehavior or inability. He has had that power ever since the system of county courts was established in 1888.\textsuperscript{80}

England was not the only European country to provide for judicial discipline through judicial action. France and Germany had similar arrangements. In 1883, a very explicit statute was passed in France which provided that no judge of the \textit{tribunaux civils}, the \textit{cours d' appel}, or the \textit{Cour de Cassation} may be removed or suspended except by the \textit{Cour de Cassation} sitting en banc.\textsuperscript{81} As to retirement for disability, a judicial council consisting of the president of the \textit{Cour de Cassation} and six counsellors elected by that court had jurisdiction.\textsuperscript{82} A judge was always entitled to a hearing.\textsuperscript{83} In Germany, article 104 of the Constitution of 1919 provided "[[j]udges of the ordinary courts shall be appointed for life. They shall not, without their consent, be permanently or temporarily removed from office, or transferred to another place, or sent into retirement, except under and by force of a judicial determination, made according to the forms, and based upon the reasons which are prescribed by the law."

What is notable about the disciplinary procedures in England, France, and Germany is that there must be a judicial determination before a judge can be removed, suspended, or retired. In each case, the judge is entitled to a hearing and may present evidence in his behalf. The American Judicature Society, which has long advocated better methods for handling complaints against judges,\textsuperscript{85} recognized that the European method of disciplining of any crime proved against him before a jury, as a breach of the tenure by which he held his office, \textit{quamdiu se bene gesserint} becoming void on any proof of crime. 14 \textsc{Parl. Deb.} (2nd ser.) 660 (1826).

\textsuperscript{80} See \textit{Federal Judges, supra} note 2, at 876; County Courts Act, 1888, 51 & 52 Vict., c. 43, § 15; \textsc{Halsbury's Laws of England} 147 (2d ed. 1933).

\textsuperscript{81} Law of Aug. 30, 1883, art. 14; \textsc{Glasson et Tissier, Traité de Procédure Civile} sec. 50, 51 (1925) (Fr.). See \textit{Federal Judges, supra} note 2, at 876 n.15; \textsc{Shartel, Retirement \\& Removal of Judges}, 20 \textsc{J. Am. Jud. Soc'y} 133, 139 (1936).

\textsuperscript{82} \textit{Federal Judges, supra} note 2, at 876 n.15.

\textsuperscript{83} Id.

\textsuperscript{84} \textsc{Anschutz, Die Verfassung Des Deutschen Reichs, Von II, August 1919} (Ger.). See \textit{Federal Judges, supra} note 2, at 876 n.15; \textsc{Shartel, Retirement \\& Removal of Judges}, 20 \textsc{J. Am. Jud. Soc'y} 133-39 (1936).

\textsuperscript{85} As early as 1914, Professor Albert Kales, who served as the first director of research for the American Judicature Society, wrote:

\textsc{It is, however, a grave mistake to suppose that judges exercise their judicial power in a distasteful and arbitrary manner merely because they hold for life or during good behavior. An arbitrary or disagreeable course of action by a judge arises principally from the fact that he is subject to no authority which can receive complaints against him and act upon those complaints by way of private or public criticism and correction of the judge. The best protection against arbitrary and disagreeable actions by judges is a duly constituted body of fellow judges who hold a position of superior power and authority to whom complaints as to the conduct of judges may be brought and who may investigate those complaints and exercise corrective influence.}
judges through judicial action fostered respect for the judiciary, which as a whole is indispensable to a democratic form of government. Consequently, in 1917 the American Judicature Society proposed the model state-wide judicature act. Section 78 of this model statute created a judicial council composed of the chief justice and of the other appellate and presiding judges. In section 107, this council was given authority "[t]o remove from office any judge of the General Court of Judicature, except the Chief Justice and the associate justice of the Supreme Court division of the Court of Appeal, for a. inefficiency, b. incompetency, c. neglect of duty, d. lack of judicial temperment, e. conduct unbecoming a judge."

Action in several American states, notably Nebraska, Oregon, Alabama, New York, Louisiana, New Jersey, and Michigan, reflected the European trend toward judicial removal of public officers as well. For example, under the 1875 Nebraska Constitution, when impeachment charges were voted against a supreme court justice by both houses of the legislature in joint convention, a hearing was held before all of the district judges of the state.

Prior to 1910, a quasi-criminal prosecution had been a method of removal of all public officers in Oregon. A constitutional amendment of that year provided that "public officers shall not be impeached; but incompetency, corruption, malfeasance or delinquency in office, may be tried in the same manner as criminal offenses, and judgment may be given by dismissal from office, and such further punishment as may have been prescribed by law." Under the 1901 Constitution of Alabama, the supreme court could remove judges, other than a supreme court justice, for "[w]illful neglect of duty, corruption in office, incompetency or intemperance . . . as unfit the officer for the discharge of such duties, or any offense involving moral turpitude" after the attorney general or five taxpayers in the judge’s district gave specific charges.


Later, Herbert Harley, the first executive secretary of the American Judicature Society, wrote in an editorial comment:

> There has been until now a great gap in the material we have possessed as a basis for improving judicial conduct. We have been almost universally deprived of a means of dealing with a judge whose powers are waning . . . [i]t is naturally a judicial function to determine when the removal of a judge is essential to the good of the service. Experience proves the folly of leaving the decision either to the judge himself or to the electorate.


87. *Id.* at 113.
88. *Id.* at 151.
89. NEB. CONST. of 1875, art. III, § 17.
90. ORE. CONST. art. VII, § 6.
91. ALA. CONST. of 1901, § 174; ALA. CODE tit. 41, §§ 178, 180-82, 201; State *ex rel.*
The Louisiana Supreme Court, under the Constitution of 1921, was also given the power to try judges (including justices of the Louisiana Supreme Court) for various kinds of misconduct after suit was filed by the attorney general on request of the Governor, twenty-five citizens and taxpayers, or one-half of the attorneys residing in the judge's district. If the charge was against a member of the supreme court, judges would be assigned from the Louisiana Courts of Appeal in order of their seniority until a full seven member court was formed.

In 1947, the New York Constitution authorized a new approach to judicial removal. A special Court on the Judiciary could be convened by the chief judge on his own motion or on the written request of the Governor, a presiding justice of the appellate division of the supreme court, or by a majority of the executive committee of the New York State Bar Association. After the Court on the Judiciary was convened, but before a hearing on charges for removal for cause, notice of charges and the date of the scheduled trial was sent to the Governor, president of the senate, and speaker of the assembly. If a member of the legislature preferred the same charges in the legislature, the judge did not have to answer to the Court on the Judiciary and proceedings were stayed pending legislative determination. Although the Court on the Judiciary was authorized in 1947, it did not have its first meeting until 1959, and the second was not until August 16, 1962.

New Jersey, in its Constitution of 1947, also attempted to set up a better method of disciplining judges. However, the legislature did not pass implementing legislation until 1970. Under the New Jersey procedure, a removal proceeding could be instituted by a majority of either house of the legislature, by the Governor, Attorney Gen. v. Pratt, 192 Ala. 118, 68 So. 255 (1915). The Texas procedure is similar to that of Alabama. The Texas Supreme Court can act against a district court judge when there is written presentation upon the oaths of 10 lawyers practicing in the court before that judge. TEX. CONST. art. XV, § 6. See In re Laughlin, 153 Tex. 183, 265 S.W.2d 805 (1954). 92. LA. CONST. art. IX, §§ 1, 5. See LA. SUP. CT. R. XVII; Stonley v. Jones, 197 La. 627, 2 So.2d 45 (1941).
93. LA. CONST. art. IX, § 4.
94. N.Y. CONST. art. VI, § 9-a (1947) (current version at N.Y. CONST. art. VI, § 22 (1962)).
95. N.Y. CONST. art VI, § 22d.
96. Id. § 22e.
97. Id.
99. N.J. CONST. of 1947, art. VI, § 6, ¶ 4; art. VII, § 3.
100. N.J. STAT. ANN. §§ 2A:18-1 to -11 (West Cum. Supp. 1977-1978). Because of that unfortunate experience, it seems that either constitutional amendments should be self-executing or that the supreme court be empowered to implement a judicial discipline amendment through its rulemaking power.
or by the supreme court sua sponte. 101 Trial is before the supreme court en banc, or before three justices or judges (or a combination of the two) as designated by the chief justice. 102

On June 5, 1959, the Supreme Court of Michigan adopted rules prescribing procedures for the discipline of judicial officers. 103 The rules recite that they were adopted pursuant to the powers of the supreme court over the judiciary of Michigan for the purpose of enabling the circuit courts to exercise their powers of supervisory control of all inferior courts and tribunals, subject to superintendence and review by the supreme court. 104 They provided that the chief justice of the supreme court may, with or without a request, cause an investigation to be made by the court administrator into the affairs of any such court or tribunal or into the personal practices of any judicial officer. 105 If, after the investigation, the chief justice found there was reasonable cause to believe the judicial officer was guilty of misconduct, the chief justice could either authorize that a petition be filed in the supreme court by the court administrator 106 or transfer jurisdiction to the circuit court in the county in which the court of the accused was located. 107 If the accused was a member of the Michigan bar, the supreme court could designate three circuit judges to conduct and hear the proceedings. 108 If after the hearing the accused was subject to impeachment or removal from judicial office and the court found there were sufficient grounds for such action, the court could then make an appropriate recommendation to the legislature or the Governor. 109

All of these approaches by the states recognized the judiciary’s authority to handle problems of judicial discipline and disability. This judicial power to remove judges bears a close relationship to common law power to declare forfeitures of office through scire facias. If the judge was not living up to the public trust and performing his duties as required, he could be removed upon such a judicial determination and his office forfeited. It seems quite possible for the legislature to recognize this established common law jurisdiction and to confer authority to remove officials for sufficient causes on the supreme court by statute. However, many feel that this

101. Id. § 2A:1B-3.
102. Id. § 2A:1B-7. See Removal & Discipline, supra note 20, at 191-93, for a discussion of the New Jersey procedures before the 1970 implementing legislation.
105. MICH. GEN. Ct. R. 930.2(1).
106. Id. 930.3(1).
107. Id. 930.4(1).
108. Id. 930.4(3).
109. Id. 930.8(3).
falls under the court's inherent power of supervision of the administration of justice, and thus needs no legislative recognition.\textsuperscript{110}

Judicial action as a means of disciplining judges, like any other method of judicial discipline, has both positive and negative aspects. One advantage of the judiciary handling judicial discipline and removal is that it places responsibility for such matters with those who are the most concerned about the rights of judges and the respect of the judiciary—the judges themselves. Clearly, the judicial branch of government has the most at stake in making sure that judges maintain their independence from improper interference, whether it be from the executive, the legislature, the bar or the public. At the same time, judges have to guard their own reputations. If one judge is dishonest, it reflects upon the whole judiciary. It seems that both judicial independence and the integrity of the judiciary can be adequately protected if judges are allowed to discipline themselves. In addition, there are procedural advantages to judicial discipline through judicial action. The judiciary has established procedures for conducting trials, hearing evidence, hearing both sides of an issue, and making factual determinations and conclusions of law.

The disadvantage of this method of discipline is that it is totally conducted by judges. Fears have been voiced that judges would have a tendency to whitewash misconduct by their colleagues if the responsibility of discipline were left to them alone.

Overall, judicial removal by judicial action seems to be a better procedure than the earlier methods for balancing the competing interests of judicial independence with accountability. The advantages of the method outweigh the disadvantages and through its implementation, progress has been made in the development of more effective methods for disciplining judges.

THE EVOLUTION OF THE PERMANENT JUDICIAL DISCIPLINARY COMMISSION

It is often said that the best way to handle judicial misconduct is through a judicial proceeding within the judicial branch. The newest commissions given the task of disciplining the judiciary, however, are a hybrid. Although judges still have the final say and removal is by judicial action, lawyers and non-lawyers have been added to almost all of the commissions\textsuperscript{111} to counter the appearance of a whitewash on the part of the judiciary. The adding of lawyers and especially non-lawyers to the commis-

\textsuperscript{110} See Cameron, The Inherent Power of a State's Highest Court to Discipline the Judiciary, 54 CHI. KENT L. REV. 45 (1977).

\textsuperscript{111} The only exception is Ohio, where lawyers serve at the commission level and judges impose the discipline. OHIO SUP. CT. Rs. V (1), VI (6).
sions has been the distinguishing feature from earlier methods of judicial discipline and has proven very effective.

This new method of handling cases of judicial misconduct and disability through a permanent judicial disciplinary commission was first adopted by California voters in 1960 as an amendment to the California Constitution.\(^{112}\) In 1966\(^{113}\) and again in 1976,\(^{114}\) the California Constitution was amended to correct deficiencies revealed by experience with the original plan.\(^{115}\) Presently, grounds for discipline by the Supreme Court of California exist when:

- the judge pleads guilty or no contest or is found guilty of a crime punishable as a felony under California or federal law or of any other crime that involves moral turpitude under that law . . . for action . . . that constitutes wilful misconduct in office, persistent failure or inability to perform the judge’s duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.\(^{116}\)

Even though it was thirteen years before the California Commission removed its first judge by action of the supreme court,\(^{117}\) it was very active in obtaining results indirectly after proceedings were initiated against judges. Some judges have chosen to retire or resign upon being confronted by the California Commission instead of contesting California Commission proceedings. In the first few years of the Commission’s existence, twenty judges voluntarily retired as a result of Commission investigation and discussion with the judge.\(^{118}\)

The philosophy in California has been and still is that the main purpose of this disciplinary commission is to bring about the removal or retirement

\(^{112}\) The amendment created the Judicial Qualifications Commission. CAL. CONST. art. VI, § 1b (1960). A 1976 amendment changed the name of this commission to the Commission on Judicial Performance. CAL. CONST. art. VI, § 8 [hereinafter referred to in the text as the California Commission]. See note 115 infra.

\(^{113}\) See note 115 infra.

\(^{114}\) Id.

\(^{115}\) The amendment of 1966 gave the supreme court the power to censure a judge. CAL. CONST. art. VI, § 18 (c)(2). Some observers have speculated that this occurred because in Stevens v. Commission on Judicial Qualifications, 61 Cal. 2d 886, 393 P.2d 709, 39 Cal. Rptr. 397 (1964), the Supreme Court of California may have felt Judge Stevens deserved discipline rather than removal but did not believe it had the necessary authority to act short of removal. The 1976 amendment changed the name from the Commission on Judicial Qualifications to the Commission on Judicial Performance. CAL. CONST. art. VI, § 8. It also gave the power of reprimand to the commission (id. art. VI, § 18 (c)), and established a substitute supreme court to impose discipline anytime a member of the supreme court was charged (id. art. VI, § 18(e)). This court was to be chosen by lot from among the members of the California Court of Appeals. Id. See note 124 infra.


\(^{117}\) Geiler v. Commission on Judicial Qualifications, 10 Cal. 3d 270, 515 P.2d 1, 110 Cal. Rptr. 201 (1973).

\(^{118}\) See Removal & Discipline, supra note 20, at 176 & n.92.
of judges who are unfit to serve. As a consequence, anyone can notify the California Commission when they have information about a judge's misconduct or a disability. Initially, the executive secretary of the California Commission screens each complaint to see if on its face the complaint falls within the California Commission's jurisdiction. If the complaint is within its jurisdiction, the California Commission will make a preliminary investigation of the incident. If the California Commission decides to proceed, it notifies the judge and attempts to have the judge correct his misbehavior. At times, the California Commission holds a formal but confidential hearing before a panel of three masters. The report of the masters is then reviewed by the California Commission, and after it makes its findings it may recommend to the supreme court that the judge be disciplined, removed or retired. Under the 1976 amendment, whenever a case involves a member of the supreme court, the recommendation for removal or retirement results in an automatic substitution of appellate court judges chosen by lot to decide the matter, instead of the supreme court justices.

Since 1960, most of the states have created new disciplinary procedures, and have patterned them after the California hybrid approach. However, there are five basic variations.

Thirty-one states follow what is known commonly as the "commission plan." There are a number of varieties in terms of the size of commission and various operating procedures but basically all have a permanent com-

119. Many complaints are sent in from disgruntled litigants and are actually substitutes for appeal. The California Commission has no jurisdiction over these kinds of complaints and notifies the complainant of that fact. The California Rules of Court refer to these kinds of complaints as "unfounded or frivolous." CAL. CT. R. 904(a).

120. The investigation at this stage is relatively informal. See Removal & Discipline, supra note 20, at 180-81.


122. Id. at 912. Justice Marshall McComb, age 82, was recommended for removal or retirement on the grounds that he suffered from a "disability that seriously interferes with the performance of his duties or is likely to become permanent." CAL. CONST. art. VI, § 18(e). Within the past years, California Supreme Court Justice Marshall McComb, age 82, was recommended for removal or retirement on the grounds that he suffered from a "disability that seriously interferes with the performance of his duties or is likely to become permanent." CAL. CONST. art. VI, § 18(e)(1). Justice McComb was retired by the supreme court under these new provisions on May 2, 1977. See McComb v. Commission on Judicial Performance, 19 Cal. 3d Spec. Trib. Supp. 1, 564 P.2d 1, 138 Cal. Rptr. 459 (1977).

123. Table I lists the fifty states and the District of Columbia, the name of the commission and the year it was established. It also shows whether the commission was established by constitutional amendment, legislation, or by the highest court of the state through decision or rule of court.
mission composed of judges, lawyers and non-lawyers that investigates, conducts hearings and recommends imposition of discipline to the highest court of the state.\textsuperscript{126} In two jurisdictions, the commissions themselves impose the discipline but the respondent judge has the right to judicial review.\textsuperscript{127} There are eight jurisdictions that have two separate bodies to process judicial discipline matters.\textsuperscript{128} The key to this approach is that a separate board or commission conducts the investigation and a different body, \textit{e.g.}, a court commission (as in Illinois) or a court on the judiciary (as in Alabama, Delaware, New York and Oklahoma) takes testimony and imposes the discipline after the initial committee or commission has brought charges against a judge. There are five jurisdictions which have a commission or committee charged with investigating judicial misconduct. These commissions differ from the others because for removal purposes the legislature must proceed under impeachment provisions. The highest courts in those jurisdictions only impose discipline short of removal.\textsuperscript{129} Finally in two jurisdictions, the supreme courts have recognized their inherent power to discipline judges in court decisions.\textsuperscript{130}

Thus, there are a total of forty-eight jurisdictions (forty-seven states plus the District of Columbia) where the judiciary is involved in judicial discipline. The three states that still rely solely on impeachment are Maine, Mississippi and Washington and it appears that this situation will soon change. Bills have been introduced in both Maine and Mississippi in 1977 that would establish such commissions, and a new judicial article is in the legislature in the state of Washington. Given this trend, it seems foreseeable that in the not too distant future every state will use a method of discipline which combines action by a permanent judicial disciplinary commission with actual removal by judicial action.

\textsuperscript{126} Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington and Wyoming. See Table I.

\textsuperscript{127} The Supreme Court of Nevada may review decisions of Nevada’s commission, and a special court appointed by the Chief Justice of the United States Supreme Court reviews decisions on appeal from the District of Columbia Judicial Tenure Commission. D. C. CODE § 11-1529(a) (1973).

\textsuperscript{128} Alabama, Delaware, Hawaii, Illinois, New York, Ohio, Oklahoma, West Virginia. (In fact, West Virginia has a trifurcated system. There is a commission for investigation, a board for hearing, and review in the highest court of West Virginia.)

\textsuperscript{129} Arkansas, Massachusetts, Rhode Island, South Carolina and Tennessee fall into this category. Each has a commission either created by statute (Arkansas, Rhode Island, and Tennessee) or supreme court rule (Massachusetts and South Carolina).

\textsuperscript{130} New Hampshire and Vermont. In 1977 the New Hampshire legislature created a committee to assist the supreme court.
CONCLUSION

The author hopes that this brief historical sketch will assist others in the future to compare the modern methods of judicial discipline with those of the past. It is clear that all of the existing mechanisms for handling problems of judicial discipline and disability have benefited from the experiences of those before them. The present hybrid systems, developed because of a dissatisfaction with earlier ineffective methods of judicial discipline, will continue to grow and change as they meet the demands of the future. The American Bar Association’s Proposed Standards Relating to Judicial Discipline and Disability are just one example of the unceasing effort to compile the best experiences and thought to encourage further improvements. Further experimentation will undoubtedly occur, with the various jurisdictions adapting standards to their unique situations.

Those who are concerned with improving methods of judicial discipline must not, however, lose sight of the forest for the trees. Disciplinary procedures that are effective and efficient may in fact be inimical to the dispensation of justice. Rufus Choate, at the Massachusetts Constitutional Convention in 1853, said that a judge:

shall know nothing about the parties, everything about the case. He shall do everything for justice; nothing for himself; nothing for his friends; nothing for his patrons; nothing for his sovereign. If, on one side is the executive power, and the legislature and the people—the sources of his honors, the givers of his daily bread—and on the other an individual nameless and odious, his eye is to see neither, great nor small; attending only to the “trepidations of the balance.”

The independence of the judiciary envisioned by Mr. Choate will never be attained so long as judges are subject to removal on insubstantial or capricious grounds. While means of judicial discipline must be available to protect the citizenry from abuse by biased and arbitrary judges, those sanctions must never be applied to preclude a judge from deciding cases in accordance with his understanding of the law and the dictates of his own conscience. It is to this end that all who are concerned with the effective and efficient removal of judges must strive.

131. For all of the constitutional and statutory provisions, rules of procedure, and cases up to 1973, see AMERICAN JUDICATURE SOCIETY, JUDICIAL DISABILITY & REMOVAL COMMISSIONS, COURTS & PROCEDURES (G. Winters & R. Lowe, ed. 1973). For summaries of cases up to 1976, see AMERICAN JUDICATURE SOCIETY, RESOURCE MATERIALS FOR FIFTH NATIONAL CONFERENCE OF JUDICIAL DISCIPLINARY COMMISSIONS (E. Schoenbaum, ed. 1976).

132. AMERICAN BAR ASSOCIATION, PROPOSED STANDARDS RELATING TO JUDICIAL DISCIPLINE AND DISABILITY (1977).

<table>
<thead>
<tr>
<th>State</th>
<th>Name of Board, Commission or Court</th>
<th>Date of Establishment</th>
<th>Constitutional Revisions Date</th>
<th>Topics</th>
<th>Other Methods of Removing Judges</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>(1) Jud. Inquiry Comm'n</td>
<td>12/27/73</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>(2) Ct. of the Jud.</td>
<td>12/27/73</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Alaska</td>
<td>Comm'n Jud. Qualifications</td>
<td>8/27/68</td>
<td>9/13/71</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Arizona</td>
<td>Comm'n Jud. Qualifications</td>
<td>11/3/70</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Comm'n²</td>
<td>1977</td>
<td>None</td>
<td>None</td>
<td>Recall, impeachment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Impeachment, recall, election</td>
</tr>
<tr>
<td>Colorado</td>
<td>Comm'n Jud. Qualifications</td>
<td>1/17/67</td>
<td>None</td>
<td>None</td>
<td>Election, impeachment</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Comm'n of Jud.</td>
<td>11/2/76</td>
<td>None</td>
<td>None</td>
<td>Impeachment, address</td>
</tr>
<tr>
<td>Delaware</td>
<td>Del. Ct. on the Jud.</td>
<td>4/24/69</td>
<td>None</td>
<td>None</td>
<td>Impeachment</td>
</tr>
<tr>
<td>D.C.</td>
<td>Comm'n Jud. Disabilities &amp; Tenure</td>
<td>N.R.</td>
<td>7/29/70</td>
<td>None</td>
<td>Impeachment by Congress</td>
</tr>
<tr>
<td>Florida</td>
<td>Jud. Qualifications Comm'n</td>
<td>1966</td>
<td>None</td>
<td>Twice</td>
<td>N.R.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Substitute court</td>
<td>Impeachment, suspension by Gov.²</td>
</tr>
<tr>
<td>Georgia</td>
<td>Ga. Jud. Qualification Comm'n</td>
<td>3/30/72</td>
<td>None</td>
<td>None</td>
<td>Impeachment</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Comm'n Jud. Qualification</td>
<td>None</td>
<td>7/14/69</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Illinois</td>
<td>(1) Jud. Inquiry Board</td>
<td>7/1/71</td>
<td>None</td>
<td>None</td>
<td>Impeachment</td>
</tr>
<tr>
<td></td>
<td>(2) Ill. Courts Comm'n</td>
<td>7/1/71</td>
<td>None</td>
<td>None</td>
<td>N.R.</td>
</tr>
<tr>
<td>Indiana</td>
<td>Comm'n Jud. Qualification</td>
<td>1/1/72</td>
<td>1/1/72</td>
<td>None</td>
<td>Impeachment</td>
</tr>
<tr>
<td>Iowa</td>
<td>Comm'n Jud. Qualifications</td>
<td>11/7/72</td>
<td>1/1/74</td>
<td>None</td>
<td>Impeachment</td>
</tr>
<tr>
<td>Kansas</td>
<td>Comm'n Jud. Qualifications</td>
<td>1/1/74</td>
<td>None</td>
<td>None</td>
<td>Impeachment, nominating comm. on showing of dis-</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Comm'n on Retirement &amp; Removal</td>
<td>11/4/75</td>
<td>None</td>
<td>None</td>
<td>Address, impeachment</td>
</tr>
<tr>
<td>State</td>
<td>Commission</td>
<td>Date Created</td>
<td>Date Implemented</td>
<td>Year Impacted</td>
<td>Action Description</td>
</tr>
<tr>
<td>---------------</td>
<td>----------------------------------</td>
<td>--------------</td>
<td>-------------------</td>
<td>---------------</td>
<td>-------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Maine</td>
<td>None</td>
<td></td>
<td></td>
<td></td>
<td>Impeachment, taxpayers' suit</td>
</tr>
<tr>
<td>Michigan</td>
<td>Jud. Tenure Comm'n</td>
<td>8/6/68</td>
<td>None</td>
<td>None</td>
<td>Address, impeachment Impeachment, removal</td>
</tr>
<tr>
<td>Minnesota</td>
<td>State Board on Jud. Standards</td>
<td>None</td>
<td>7/1/71</td>
<td>1973, 1974</td>
<td>Compulsory retirement; removal</td>
</tr>
<tr>
<td>Mississippi</td>
<td>None</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Missouri</td>
<td>Comm'n Retirement, Removal, &amp;</td>
<td>1/1/72</td>
<td>1/1/72</td>
<td>None</td>
<td>Impeachment</td>
</tr>
<tr>
<td></td>
<td>Discipline of Judges</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Montana</td>
<td>Jud. Standards Comm'n</td>
<td>6/6/72</td>
<td>7/1/73</td>
<td>None</td>
<td>N.R.</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Neb. Comm'n Judicial Qualifications</td>
<td></td>
<td></td>
<td>None</td>
<td></td>
</tr>
</tbody>
</table>


1. (Alabama) Appeal may be taken to supreme court.
3. (California) Six-year Statute of Limitations.
4. (Florida) Suspension is applicable to county judges only; must be confirmed by senate.
5. (Maine) Bill introduced in legislature that would create a commission.
6. (Michigan) For reasonable cause not sufficient for impeachment.
7. (Mississippi) Bill introduced in legislature that would create a commission.
8. (Missouri) Supreme Court rule procedure.
<table>
<thead>
<tr>
<th>State</th>
<th>Name of Board, Commission or Court</th>
<th>Date of Establishment</th>
<th>Constitutional Revisions Date</th>
<th>Constitutional Revisions Topics</th>
<th>Other Methods of Removing Judges</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nevada</td>
<td>Comm'n on Jud. Discipline</td>
<td>11/2/76</td>
<td>None</td>
<td>None</td>
<td>Impeachment</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>None</td>
<td></td>
<td>None</td>
<td>None</td>
<td>Impeachment, removal by Gov.</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Advisory Comm. on Jud. Conduct</td>
<td>1947</td>
<td>7/23/74⁹</td>
<td>None</td>
<td>Removal initiated by either House of Rep. or Governor</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Jud. Standards Comm'n</td>
<td>11/7/67</td>
<td>3/68</td>
<td>None</td>
<td>Impeachment</td>
</tr>
<tr>
<td>New York</td>
<td>State Comm'n Jud. Conduct Court on Jud.</td>
<td>9/1/76 (effective) 1947</td>
<td>6/6/74</td>
<td>N.R.</td>
<td>N.R.</td>
</tr>
<tr>
<td>No. Carolina</td>
<td>Jud. Standards Comm'n</td>
<td>1/1/73</td>
<td>1/1/73</td>
<td>None</td>
<td>Impeachment</td>
</tr>
<tr>
<td>No. Dakota</td>
<td>Comm'n Jud. Qualifications</td>
<td>11/5/74</td>
<td>3/27/75</td>
<td>None</td>
<td>Impeachment</td>
</tr>
<tr>
<td>Ohio</td>
<td>Bd. of Comm'n on Grievances &amp; Discipline</td>
<td>By sup. ct. rule 1972</td>
<td></td>
<td>N.R.</td>
<td>By government of bar</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Ct. on the Jud. Appellate Division</td>
<td>5/3/66</td>
<td>N.R.</td>
<td>None</td>
<td>Impeachment by Senate</td>
</tr>
<tr>
<td>Oregon</td>
<td>Jud. Fitness Comm'n</td>
<td>None</td>
<td>1967</td>
<td>1976</td>
<td>Sup. ct. has sole removal power.</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Jud. Inquiry &amp; Review Bd.</td>
<td>4/23/68</td>
<td>None</td>
<td>None</td>
<td>Impeachment</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Comm'n on Jud. Tenure &amp; Discipline</td>
<td>None</td>
<td>5/8/74</td>
<td>None</td>
<td>Impeachment</td>
</tr>
<tr>
<td>So. Dakota</td>
<td>Comm'n Jud. Qualifications</td>
<td>11/7/72</td>
<td>7/1/73</td>
<td>None</td>
<td>N.R.</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Jud. Standards Comm'n</td>
<td>None</td>
<td>4/27/71</td>
<td>None</td>
<td>Only legislature has power to remove; comm'n can only recommend impeachment by legislature, address to Governor, petition to sup. ct.</td>
</tr>
<tr>
<td>Texas</td>
<td>Jud. Qualifications Comm'n</td>
<td>11/19/65</td>
<td>6/14/67 amended 6/8/71 &amp; 9/1/75</td>
<td>11/70</td>
<td>Put all cts. under comm'n; granted power of censure</td>
</tr>
<tr>
<td>State</td>
<td>Organization</td>
<td>Event Date</td>
<td>Action Date</td>
<td>Reason</td>
<td>Result</td>
</tr>
<tr>
<td>-----------</td>
<td>--------------------------------</td>
<td>-------------</td>
<td>--------------</td>
<td>-----------------</td>
<td>----------------</td>
</tr>
<tr>
<td>Utah</td>
<td>Comm'n Jud. Qualifications</td>
<td>11/5/68</td>
<td>5/13/69</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Vermont</td>
<td>Vt. Supreme Court</td>
<td>None</td>
<td>4/9/74</td>
<td>Sup. Ct. decision</td>
<td>None</td>
</tr>
<tr>
<td>Virginia</td>
<td>Jud. Inquiry &amp; Review Comm'n</td>
<td>7/1/71</td>
<td>3/16/71</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Washington</td>
<td>None¹⁰</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>West Virginia</td>
<td>Jud. Inquiry Comm'n</td>
<td>Nov. 1974</td>
<td>Through sup. ct. r. in 1976</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>Jud. Rev. Bd.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Jud. Comm'n</td>
<td>4/5/77</td>
<td>1/1/72</td>
<td>N.R.</td>
<td>N.R.</td>
</tr>
<tr>
<td>Wyoming</td>
<td>Jud. Supervisory Comm'n</td>
<td>3/31/73</td>
<td>3/31/73</td>
<td>None</td>
<td>None</td>
</tr>
</tbody>
</table>

9. (New Jersey) Supreme court rule.
