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The Inherent Power of a State's Highest Court to Discipline the Judiciary

James Duke Careron
THE INHERENT POWER OF A STATE’S HIGHEST COURT
TO DISCIPLINE THE JUDICIARY

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A proper balance must exist between the need for an independent judiciary and the need for discipline or removal of judges who, because of misconduct or disability, have become a threat to the integrity of the court or an embarrassment to the judicial system. The judiciary is a branch of government which by the nature of its duties often must check and defeat the popular will. It would not long remain independent if removal of judges from office was easily accomplished by the other popularly supported branches of government.1 Judicial independence, however, should not be used as a shield against judicial discipline. The American Bar Association’s Proposed Standards Relating to Judicial Discipline and Disability2 provide an effective method for judicial discipline through judicial removal and disability commissions while also serving to protect the independence of the judiciary. But judicial removal and disability commissions are not the exclusive methods of judicial discipline, and the Proposed Standards recognize that with a commission created by state constitution there are alternative methods and procedures for the discipline and removal of judges.

There are four basic methods of disciplining judges: (1) legislative discipline which generally is limited to impeachment but may also include removal by address;3 (2) public discipline, such as failure to reelect or retain judges in states having election of judges;4 (3) commission discipline where

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1. 84 HARV. L. REV. 1002, 1005 (1971).
2. AMERICAN BAR ASSOCIATION, PROPOSED STANDARDS RELATING TO JUDICIAL DISCIPLINE & DISABILITY (1977) [hereinafter cited as PROPOSED STANDARDS and referred to in the text as the Proposed Standards]. The PROPOSED STANDARDS are printed in the appendix.
3. Address is a form of removal by legislative action for conduct that does not warrant impeachment. In the few states that have judicial removal by address, it is seldom used.
4. Recall of judges is also used to remove judges in a few states. Recall is a method of removal where the power is either granted to or reserved by the people. Jones v. Harlan, 109 S.W.2d 251, 254 (Tex. Ct. App. 1937). Recall of judges was used in many states during the populist movement in the late nineteenth and early twentieth centuries. Arizona was required to remove the provision for recall of judges from its constitution before President Taft and Congress would approve statehood. After admission to the Union in 1912 the voters of Arizona approved a provision that again made recall a part of the Arizona Constitution. ARIZ. CONST. art. VIII, § 1 (1910, amended 1912). There is still a provision for recall in the Arizona Constitution today. ARIZ. CONST. art. VIII, § 1 (1910, amended 1912).
judicial removal and disability commissions have authority;\(^5\) and (4) judicial discipline through the exercise of the inherent power of a state's highest court.

The first three methods of judicial discipline are provided for by specific terms in state constitutions. The first, legislative discipline, is cumbersome and expensive and, therefore, is seldom used. The second, public removal, cannot be relied upon as a predictable method of discipline. This method has the additional defect of being, at times, a threat to the independence of the judiciary because it may remove judges for unpopular decisions rather than for misconduct.\(^6\) By contrast, the third method, commission discipline, is a fair and flexible method of judicial discipline which protects the independence of the judiciary. Further, judicial removal and disability commissions have a high degree of public and professional acceptance.

The fourth method of judicial discipline, exercise by a state's highest court of its inherent power, is the least recognized and the least used. This article will discuss the source and extent of such a court's inherent power.

**WHAT IS INHERENT POWER?**

Courts throughout history have exercised powers never expressly bestowed upon them, but which pertain to their own survival as courts. Such power is sometimes described as "implied," "essential," "incidental," or "necessary." It is most often described as "inherent."\(^7\) This power is essential to the existence, dignity and operation of a court, particularly the state's highest court. Such power is impliedly given when a court is created.\(^8\) The power is implied because it is indispensable if a court is to perform the duties specifically assigned to it. The Wisconsin Supreme Court described the existence of inherent power when it stated:

> When the people by means of the Constitution established courts, they became endowed with all judicial powers essential to carry out the judicial functions delegated to them. . . . But the Constitution makes no attempt to catalogue the powers granted. . . . These powers are known as incidental, implied, or inherent powers, all of which terms are used to describe those powers which must necessarily be used by the various departments of government, in order that they may efficiently perform the functions imposed upon them by the people.\(^9\)

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5. These commissions are a recent innovation and function in more than forty states. *Hearings on S. 1110 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. 172-73 (1976).*

6. *E.g.,* Archie Simonson, a Wisconsin judge, was unseated in a recall election after stating that there was a connection between women's clothing and rape. Chicago Tribune, Sept. 8, 1977, at 1, col. 2.


8. *Id.*

The term "inherent power" also includes that power which the courts have traditionally exercised even though the reason for the exercise of such power may be lost in history.

It is the premise of this article that a state's highest court, as the court most concerned with the operation of a state's judicial system, has the inherent power to supervise the conduct of judges both on and off the bench when such conduct affects the administration of justice. This inherent power has its source in the common law, in the separation of powers of the three branches of government, in the supervisory power of the state's highest court, in the power of the court to promulgate standards of judicial ethics or conduct, and in the power of the court over the conduct of members of the bar.  

**Sources of Inherent Power**

**Historical**

The United States Constitution, as well as the constitutions of forty-nine states, was written in light of the English constitutional experience. Further, the common law of England at the time of this country's independence formed the basis of American common law.

In England judges holding office "during good behavior by patent from the King" were removable by writ of scire facias from the King's Bench, and persons holding lesser offices were subject to proceedings in the court in the nature of quo warranto. Although these two actions were used where the term of a judicial appointment had expired, they were mainly for violations of good behavior.

The King's Bench could also impose discipline less severe than removal from office. As Professor Berger notes:

By virtue of its 'general Superintendency over all inferior Courts,' King's Bench could punish judges of lesser courts by Attachment for Contempt 'for acting unjustly, oppressively, or irregularly,' 'for any practice contrary to the plain rules of natural Justice.... as for denying a Defendant a Copy of the Declaration against him.... or for compelling a Defendant to give exorbitant bail' and 'putting the Subject to unnecessary Vexation by colour of a judicial Proceeding wholly unwarranted by Law.' 'The Court of King's Bench, by the Plenitude of its Power, exercises a Superin-

11. A possible exception is Louisiana which based its constitution on the civil law of France.
14. *Id.* at 882-83.
tendency over all inferior Courts, and may grant an Attachment against the Judges of such Courts for oppressive, unjust or irregular Practices, contrary to the obvious Rules of Natural Justice.\textsuperscript{15}

At the time the United States became a separate nation, the King’s Bench, which was independent of Parliament and the King, exercised its power to discipline and remove judges. In fact, the judges who were appointed for good behavior insisted on having the protection of scire facias proceedings in the court when they were threatened with removal. When Sir John Walter incurred the displeasure of Charles I in 1628 and was asked to surrender his patent, he refused to do so on the ground that he should be removed only if scire facias determined that he had violated the ‘‘good behavior’’ requirement.\textsuperscript{16} As Professor Berger has pointed out:

Thus a highly placed judge affirmed that his office could be forfeited for misbehavior in a scire facias proceeding. At a time when impeachments were humming around the heads of Charles’s ministers, Chief Baron Walter wisely preferred trial by judges to the political ordeal of impeachment. In 1672, Charles II, following the example of his father, tried to dismiss Sir John Archer, a Justice of Common Pleas, a court which ranked with King’s Bench. Justice Archer also ‘‘refused to surrender his patent without a scire facias.’’ Both the Walter and Archer cases were cited in 1692 before Chief Justice Holt and his associate Justices by Serjeant Levinz, who had himself been a Justice; and Holt made the significant remark that ‘‘our places as Judges are so settled, only determinable upon misbehavior.’’\textsuperscript{17}

Although scire facias is not used in the United States, quo warranto has been used to discipline a judge.\textsuperscript{18} Just as the King’s Bench had the power to impose judicial discipline and removal, so, too, the American courts have this power unless it is specifically limited by the state constitutions.

**Separation of Powers**

Based upon the separation of powers among the three equal branches of government, a state’s highest court possesses inherent power to discipline judges. To deny a state’s highest court the power to discipline members of the judiciary would be to deny such a court equality with the other two branches. The basic idea behind separation of powers is that the three great branches of government must be separate, coordinate and equal.\textsuperscript{19} Each branch must be free to function without restriction, supervision or interference by the other two branches.\textsuperscript{20}

\textsuperscript{16} Id. at 1480.
\textsuperscript{17} Id. at 1481 (citations omitted).
\textsuperscript{18} E.g., State ex rel. Saxbe v. Franks, 168 Ohio St. 338, 154 N.E.2d 751 (1958) (municipal judge was disbarred and then removed from office via quo warranto).
\textsuperscript{19} Humphrey’s Ex’r v. United States, 295 U.S. 602, 629-30 (1934).
The separation of powers doctrine implies that each branch of government has inherent power to "keep its own house in order," absent a specific grant of power to another branch, such as the power to impeach. This theory recognizes that each branch of government must have sufficient power to carry out its assigned tasks and that these constitutionally assigned tasks will be performed properly within the governmental branch itself.

In writing the United States Constitution, the framers rejected executive removal of the judiciary. The constitutional fathers also rejected legislative removal, such as bills of attainder, bills of pains and penalties, and address, and kept only impeachment, which is a cumbersome and awkward method of legislative removal. They were not as afraid of judicial power as they were of executive and legislative power. As Justice Traynor once noted, "the events from 1775 to 1790 convinced the colonists that an unchecked legislature was potentially as tyrannical as an unchecked king. . . . Such men as John Adams and James Madison were as much on guard against elective despotism as executive despotism."

Although the founding fathers rejected executive removal and limited legislative removal to impeachment, they did not similarly restrict a court's common law power of judicial discipline. The Supreme Judicial Court of Massachusetts, for example, asserting its power to inquire into the conduct of a judge, proclaimed its source of power to be "the inherent common law and constitutional powers of [the] court." Through the exercise of its inherent power, that court also established by court rule a Committee on Judicial Responsibility. The rule establishing this committee states in part:

On its own motion, or on complaint by any person, the Committee shall inquire into and investigate the alleged physical or mental incapacity of any judge; allegations or misconduct or maladministration in office, willful or persistent failure to perform duties, habitual intemperance or other conduct prejudicial to the administration of justice that brings the judicial office into disrepute; and any alleged act which may violate the Code of Judicial Conduct (Rule 3:25). On completion of any inquiry or investigation which

25. If a sentence was less than death, it was called a bill of pains and penalties. Id.
26. See note 3 supra.
27. Traynor, supra note 22, at 1273 (citation omitted).
cannot be dealt with fairly and properly on an informal basis, the Committee shall recommend an appropriate disposition of the matter with a statement of its reasons and shall forward its final recommendation to this court for its consideration and further action, if any.\textsuperscript{30}

Just as the legislative branch has the power to judge the qualifications of its own members and to discipline them, the judiciary, through the state's highest court, has the power to discipline members of the judicial branch. The state's highest court has this power because it is responsible for the judicial branch and because the power has not been granted to either of the other two branches.

The separation of powers doctrine, however, has had the practical effect of limiting the common law power of the court to permanently remove a judge from office. The power of impeachment has been viewed as conferring the exclusive power of removal from office upon the legislature.\textsuperscript{31} For example, when the Supreme Judicial Court of Massachusetts adopted by court rule the Committee on Judicial Responsibility, it was quick to note:

The Supreme Judicial Court's action does not confer on the Committee or the Court any power to remove a judge from office for either incapacity or misconduct. In the absence of an amendment to the Massachusetts Constitution, these powers are variously reserved to the Legislature, the Governor, and the Executive Council. The Court's action does, however, provide a systematic and consistent procedure for the receipt and processing of complaints against judges.\textsuperscript{32}

This view of the impeachment power has not been shared by some commentators. Both Professor Shartel\textsuperscript{33} and Stewart A. Block\textsuperscript{34} assert that the impeachment power granted to Congress does not necessarily negate judicial forms of removal.

The American courts, however, have not interpreted impeachment power in the way suggested by commentators like Professor Shartel. While it appears there is a common law historical basis for removal of judges by a jurisdiction's highest court, no cases exist where a court has removed a judge from office based on the court's inherent power to discipline a judge. The New Hampshire Supreme Court expressed what appears to be the opinion of the American courts when it stated: "Candor compels the

\textsuperscript{30} Id.
\textsuperscript{32} Office of the Executive Secretary, Supreme Judicial Court, Boston, Mass., Press Release (Feb. 2, 1977).
\textsuperscript{33} Shartel, \emph{supra} note 13, at 891-98.
\textsuperscript{34} LIMITATIONS OF ARTICLE III, \emph{supra} note 21.
recognition, at the very outset, that the judiciary has no power of impeach-
ment. . . . The judiciary has not been granted the removal power by this
method, either by the constitution or the common law."35 This is not to say
that American courts could not be so empowered even though the state
legislature retains the power of impeachment. A state's constitution may
give the courts that power. The Louisiana Constitution, for example, grants
the legislature the power of impeachment and also grants the Louisiana
Supreme Court power to remove a judge of a court of record for any of the
causes specified in the impeachment articles.36 The Texas Constitution at
one time gave the state supreme court the right to remove a judge upon
petition of ten lawyers who practiced in the judge's court.37 The Indiana
Constitution also provides for removal by the state supreme court.38

Nonetheless, even if only the legislature can remove a judge by way of
impeachment, absent constitutional provision to the contrary, a state's
highest court still has the inherent power to discipline short of removal. In
discussing this issue, the Wisconsin Supreme Court stated:

These statements mean only that, when a judge is removed, he
must be removed by the constitutional method. They do not say
that sanctions short of removal are constitutionally defective.
Also, in those jurisdictions where censure, contempt, and suspen-
sion have been employed as sanctions by the judiciary, there was
a constitutional provision vesting in the legislature the power to
remove judges. In spite of this, other supreme courts have held
that they could impose these other sanctions short of outright
removal.39

The furthest a court has gone in this regard is to disbar a judge and thereby
remove a requirement for his continuation in office. Thus, although the
American courts do not generally recognize a power to remove judges from
office where that power is constitutionally reserved to the legislature, this has
not affected their inherent power to impose discipline short of removal from
office.

Supervisory Power

The supervisory power gives a state's highest court the power to
oversee the administration of justice in inferior courts. Inherent in this
power is the power to supervise the actions of the officers and personnel of

35. In re Mussman, 112 N.H. 99, 100, 289 A.2d 403, 404 (1972); Cf. In re Colorado Bar
36. LA. CONST. art. V, § 25 (1921, amended 1974); see Standley v. Jones, 201 La. 549, 9
So. 2d 678 (1942).
37. In re Laughlin, 153 Tex. 183, 265 S.W.2d 805 (1954); TEX. CONST. art. V, § 6 (1891,
repealed 1949).
38. State v. Dearth, 201 Ind. 1, 164 N.E. 489 (1929); IND. CONST. of 1851, art. 7, § 11.
the judicial system in order to protect the integrity of the judicial system. Professor Shartel has stated:

[T]he Supreme Court already possesses supervisory authority over inferior federal judges. . . . The Court of King's Bench in England, representing the King as the fountain of justice, always asserted and still asserts supervisory authority over the conduct of inferior judges. With this precedent in mind, it can fairly be said that supervisory authority is a common law attribute of a superior, or at least of a supreme, court; it can be said that supervisory authority is an inherent part of supreme judicial power; it can be said that the exercise by our Supreme Court of supervisory authority over the conduct of inferior judges requires no other warrant in the Constitution than the grant to it of the supreme judicial power.  

This supervisory power should be distinguished from the appellate power of the court. An appellate court's review function exercises a form of discipline because judges may be reversed and mild rebukes may be administered. However, the power to discipline judges based upon the supervisory power is unlike that based on this power to review cases. Acting in an appellate capacity, the court reviews cases for correctness. In a supervisory capacity, however, the court is acting regardless of the correctness of any particular case. Inherent in the supervisory power of the state's highest court is power to discipline the judges as well as to supervise the operation of the courts. The Wisconsin Supreme Court invoked its supervisory powers when it required judges to file an annual financial disclosure. In so doing the court stated:

In addition to the inherent power of this court, we find an additional source of authority for this court's promulgation of the Judicial Code and of Rule 17 in the power which is reasonably implied from this court's express constitutional authority to exercise 'a general superintending control over all inferior courts.' This power of superintending control is 'unlimited in extent . . . undefined in character . . . [and] unsupplied with means and instrumentalities.' . . . The superintending power is as broad and as flexible as necessary to insure the due administration of justice in the courts of this state.

Power to Regulate Judicial Ethics

Some courts have exercised their inherent power through the adoption of codes of judicial conduct. Forty-six states have adopted the American

40. Shartel, supra note 13, at 731-32 (citations omitted).
41. In re Kading, 70 Wis. 2d 508, 519-20, 235 N.W.2d 409, 414 (citations omitted).
42. Not all states agree. Oklahoma, for example, has held that the Canons of Judicial Conduct are persuasive but not mandatory. Nix v. Standing Comm'n on Jud. Performance of Okla. Bar Ass'n, 422 P.2d 203 (Okla. 1966). Louisiana has held that the Canons of Judicial Conduct do not, of themselves, have the force and effect of law. In re Haggerty, 257 La. 540, 211 So. 2d 641 (1968).
Bar Association’s Canons of Judicial Conduct. After adopting the Canons, state courts have then claimed the power to enforce them. Actually, the power to adopt and enforce such canons was always in existence, but the process of adopting canons of conduct first, and then enforcing them, is often more palatable to both the courts and the public.

In 1967, the Wisconsin Supreme Court adopted a Code of Judicial Ethics and stated:

We hold this court has an inherent and an implied power as the supreme court, in the interest of the administration of justice, to formulate and establish the Code of Judicial Ethics accompanying this opinion. It governs judicial acts of a judge in his official capacity and certain personal conduct which interferes or appears to interfere with the proper performance of his judicial conduct. This power, inherent in the supremacy of the court and implied from its expressed constitutional grants of supervisory power, embraces all members of this court not only because they are lawyers but also because they are judicial officers in a court system constituting the judicial branch of the state government with a solemn duty to perform their judicial duties well.

The same court, in 1972, adopted rules for the implementation of the Code of Judicial Ethics including the establishment of a judicial commission.

Adoption and enforcement of a canon of judicial conduct has the advantage of giving notice to the judges of the standard of conduct expected of them. It also has the advantages of public support of a court’s actions in enforcing what is generally agreed to be an exemplary standard for judges. Politically, this method may be one of the easiest and most acceptable ways of exercising a court’s inherent power in the area of judicial discipline.

**Power Over the Bar**

That a state’s highest court has the power to control who may be admitted to the bar is not seriously questioned today. Most states, by their constitution, require that a judge of a court of record be a member of the bar. The court which has the power to disbar an attorney can, of course, disbar a judge and thereby remove a requirement for continuing in office. The Massachusetts Supreme Judicial Court has stated that the power to discipline a judge was based at least partially on “the power of [the] court to maintain and impose discipline with respect to the conduct of all members of the bar, either as lawyers engaged in practice or as judicial officers. . . .” According to the New Jersey Supreme Court:

44. Hereinafter referred to in the text as the Canons.
46. This was done in anticipation of a constitutional amendment authorizing removal or suspension of judges. In re Code of Judicial Ethics, 52 Wis. 2d vii, 191 N.W.2d 923 (1972).
The question then is whether from all of the foregoing, it should be inferred that the disciplinary power may not be invoked because the judicial office would be lost as a consequence of disbarment. The answer is that if membership at the bar is required for continuance in judicial office, the requirement is completely consistent with the exercise of the disciplinary power. Far from denying that power, the prescription would confirm it, for in demanding that the incumbent continue to measure up to the high standards of the profession, reliance is necessarily placed upon the continued exercise of the disciplinary power by the agency vested with it. Hence if judicial office should be lost in the wake of disbarment, that consequence would be precisely what the Constitution contemplated.

Not all states agree with that philosophy. Some courts, possibly because of reluctance to allow the members of the bar to sit in judgement of a judge, have held that the bar has no jurisdiction to disbar a sitting judge. Georgia and Michigan both have held that disbarment of a judge does not automatically result in removal from office. Tennessee has held that a judge may be disbarred only after removal by impeachment. Nevertheless, the sensitivity of the courts to a "trial" of sitting judges by attorneys should not deter a state's highest court from using disbarment as a means of judicial removal. Since the courts have the power to disbar, they have, in effect, the power to discipline a judge for conduct which would call for attorney discipline. A state's highest court may be required to resort to this method of removal when the legislature will not impeach and the state's constitution does not provide for a judicial removal commission.

INHERENT POWER AND THE PROPOSED STANDARDS

The Proposed Standards recognize the inherent power of the courts in the field of judicial discipline. For example, Standard 1.1 states "The power to discipline judicial officers is inherent in the state's highest court." The Proposed Standards also designate the areas in which courts have such inherent power. For example, Standard 1.1 notes the power to recom-

49. See, e.g., Alabama State Bar ex rel. Steiner v. Moore, 282 Ala. 562, 121 So. 2d 404 (1968); In re Colorado Bar Ass'n, 137 Colo. 393, 325 P.2d 932 (1958); In re Investigation of Circuit Judge, 93 So. 2d 601 (Fla. 1957); In re Meraux, 202 La. 736, 12 So. 2d 798 (1943); In re Board of Comm'rs of State Bar, 65 N.M. 332, 337 P.2d 400 (1959).
51. Schoolfield v. Tennessee Bar Ass'n, 209 Tenn. 304, 353 S.W.2d 401 (1961), rehearing denied. See also In re Alonzo, 284 Ala. 733, 223 So. 2d 585 (1969).
52. But see In re Kapcia, 389 Mich. 306, 205 N.W.2d 436 (1973), where the Michigan Supreme Court held that the Judicial Tenure Commission was without authority to remove a judge for conduct which resulted in a "loss or suspension of a license to practice law." Id. at 309, 205 N.W.2d at 439.
53. PROPOSED STANDARDS, supra note 2, at No. 1.1 (emphasis added). See appendix.
mend impeachment of a judicial officer. Anyone, of course, may recommend that impeachment proceedings be brought; however, the state’s highest court may, in addition, set up a procedure for investigating a derelict judge and recommending his impeachment when necessary. Some states provide for this power, though it is not necessarily specified as impeachment. For example, the constitutions of Michigan and Illinois at one time provided that their supreme courts could recommend to the legislature removal of a judge. In fact, however, this was a form of removal by address with each state’s highest court making the recommendation.

Standard 1.1 also authorizes the state’s highest court to discipline a judge as an attorney. This includes the power to disbar a judge and, thereby, remove a prerequisite to the holding of judicial office. In those instances where there is no judicial removal and disability commissions and the legislature will not act, the state’s highest courts may be forced to take this action to insure the integrity of the judicial branch.

The Proposed Standards further provide less harsh disciplines such as suspension with salary. This sanction is frequently necessary when a judge has been charged with a serious crime and it would be inappropriate for him to continue in office while the verdict was pending. Other forms of discipline which a state’s highest court may invoke to preserve the orderly judicial process include censure, reprimand, and administrative sanctions such as transfer and reassignment of duties. These lesser sanctions are most effective when the conduct does not warrant removal but is serious enough to merit some form of discipline. A state’s highest court should be quick to use its inherent power to impose these sanctions where there is no judicial removal and disability commission to provide for the lesser forms of discipline.

Finally, the Proposed Standards recognize the power of a state’s highest court to take emergency action. Use of this power would be appropriate, for example, where a judge is charged with a felony. The judge then should be suspended immediately by the state’s highest court until such time as the judicial removal and disability commission or the supreme court itself can act further.

54. Id.
55. Shartel, supra note 13, at 872 n.6. See Ransford v. Graham, 374 Mich. 104, 131 N.W.2d 201 (1964), where the Michigan Supreme Court shared a form of removal by address with the state legislature.
56. PROPOSED STANDARDS, supra note 2, at No. 1.1. See appendix.
57. Id.
58. The Ohio Supreme Court, after the bar had recommended disbarment, suspended a judge until the matter could be determined by the court. Cincinnati Bar Ass’n v. Heitzler, 31 Ohio St. 2d 187, 287 N.E.2d 632 (1972).
59. PROPOSED STANDARDS, supra note 2, at No. 1.1. See appendix.
60. Id.
It should be pointed out, however, that even though the Proposed Standards clearly recognize the inherent power of courts to act in the field of judicial discipline, where properly functioning judicial discipline commissions exist, the courts should defer to them. Recognizing the value of deferring to such commissions, the Commentary to the Proposed Standards states that where there is a constitutional provision for a judicial removal and disability commission, the court should not exercise its inherent power unless it is absolutely necessary. At least three reasons mandate such an approach. First, the judicial removal and disability commission serves the function of discipline and probably can perform better than a state's highest court. Second, there should be public support for the commission's actions because it is created by the state's constitution. Interfering with its operation could undermine that support and respect. Third, since a state's highest court usually acts as the review body for a judicial disciplinary commission, it can exercise its review function with far less difficulty if it defers to the commission in the first place.

POWER OF THE FEDERAL JUDICIARY TO DISCIPLINE

Most authorities, including the Justices of the United States Supreme Court, agree that impeachment is the sole method of disciplining a federal judge. Justices Douglas and Black have maintained that judicial sanctions interfere with the independence of the federal judiciary and cannot be tolerated:

An independent judiciary is one of this Nation's outstanding characteristics. Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge. He commonly works with other federal judges who are likewise sovereign. But neither one alone nor any number banded together can act as censor and place sanctions on him. Under the Constitution the only leverage that can be asserted against him is impeachment. There is no power under our Constitution for one group of federal judges to censor or discipline any federal judge. It is time that an end be put to these efforts of federal judges to ride herd on other federal judges. This is a form of 'hazing' having no place under the Constitution. Federal judges are entitled, like other people, to the full freedom of the First Amendment. If they break a law, they can be prosecuted. If they become corrupt or sit in cases in which they have a personal or family stake, they can be impeached by Congress. But I search the Constitution in vain for any power of surveillance which other federal judges have over those aberrations.

Others have suggested, however, that there exist alternate methods for

61. Id. at COMMENTARY accompanying No. 1.1.
removal or discipline of federal judges besides impeachment. Professor Shartel\(^6\) contends that the common law judicial discipline proceedings were not affected by the separation of powers doctrine in the United States Constitution.\(^6\) He argued that the doctrine did not stand in the way of removal of judges by judicial action even though it impliedly abolished every executive and legislative method of removing judges except impeachment.\(^6\)

The view that there are alternatives to impeachment has fueled legislative attempts to establish alternate means for disciplining or removing federal judges. In the past all such attempts have been rejected allegedly because of doubts as to the constitutionality of the bills. Nevertheless, at present there is a proposal before Congress entitled the "Judicial Tenure Act" which was introduced by Senator Sam Nunn of Georgia in 1975.\(^6\) In introducing this proposed act, Senator Nunn stated:

My bill will provide an alternative removal procedure. This legislation is not intended in any way to displace the right of Congress to impeach judges under the Constitution. It is just another removal mechanism. This bill is based on the constitutional premise that the independent judicial bench, as the exclusive holder of federal judicial power, has the inherent power to enforce the standard of conduct required of its members. It provides machinery to implement this power.\(^6\)

It is this writer's contention that the Supreme Court of the United States does possess the same inherent powers of judicial discipline as do the state courts. The federal legislature is empowered to create courts inferior to the United States Supreme Court\(^6\) and to restrict the jurisdiction of the judicial branch.\(^6\) That legislative ability does not carry with it the power to limit the Court in the exercise of its historic common law power and powers inherent and implied by both the separation of powers and the grant of supervisory power.

It is incongruous that the United States Supreme Court, which has been bold and activist in decision-making and in protecting individual rights, has been timid in the exercise of its inherent right to keep the federal judiciary free from scandal. A court, which by its nature must make unpopular decisions, cannot withstand judicial conduct which generates suspicion and

\(^{63}\) Shartel, supra note 13 at 723, 870.
\(^{64}\) Id. at 899.
\(^{65}\) Id.
\(^{66}\) See Battisti, supra note 23, at 727-32, for an extensive discussion of this bill and previous legislative proposals. See also Nunn, Judicial Tenure, 54 CHI.-KENT L. REV. 29, 36-39 (1977).
\(^{68}\) U.S. CONST. art. 3, § 1.
contempt and makes its decisions less acceptable to the public. Judicial independence cannot be used as an excuse to ignore judicial misconduct.

**CONCLUSION**

Thomas Jefferson once stated that everyone in public life should be answerable to someone. 70 Judges are no exception. 71 The Proposed Standards rightfully emphasize the creation and operation of judicial removal and disability commissions. This emphasis is appropriate and necessary since judicial removal and disability commissions are the most efficient and acceptable way to provide a framework of judicial discipline which also will protect the independence of the judicial system. It should not be forgotten, however, that without a judicial removal and disability commission, a state’s highest court possesses broad inherent powers in this field, powers which should be exercised when necessary. As the New Jersey Supreme Court has stated:

The people of New Jersey, in adopting our present Constitution, reposed in the New Jersey Supreme Court . . . exclusive responsibility for the making of rules concerning practice and procedure in the courts thereby created, and for the admission and discipline of those admitted to the practice of law. The constitutional voice of the people thus vested in the Supreme Court a responsibility to ‘keep the house of the law in order,’ and this responsibility obviously extended to the conduct of judges as well as attorneys in practice. 72

Failure to exercise the inherent powers of a state’s court, particularly in the field of judicial discipline, invites legislative encroachment. This is a far greater threat to the independence of the judiciary than is the exercise of self-discipline by the judicial branch of government. The Proposed Standards go a great distance in stating what the law should be concerning judicial removal and disability commissions. They also delineate the inherent powers of a state’s highest court in the field of judicial discipline. Thus, the Proposed Standards should be a good guideline for judges and a useful tool for each state’s highest court.

70. See generally Thomas Jefferson Then and Now (J. Wise ed. 1943).
71. See Traynor, supra note 22, at 1279 n.21.