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## Constitutional Revision - Judicial Removal and Discipline - The California Commission Plan for New Mexico

Joseph Michael Norwood

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## CONSTITUTIONAL REVISION— JUDICIAL REMOVAL AND DISCIPLINE— THE CALIFORNIA COMMISSION PLAN FOR NEW MEXICO?

No state which depends on courts to resolve conflicts among its citizens can tolerate unfit judges presiding over those courts.<sup>1</sup> As the New Mexico courts' case loads increase<sup>2</sup> and the New Mexico judiciary expands,<sup>3</sup> this fundamental point becomes increasingly pertinent.

Recognizing the need to maintain a fit judiciary, in 1967 New Mexico voters adopted a constitutional amendment providing for the discipline, removal and involuntary retirement of judicial officers.<sup>4</sup> Also, the New Mexico Constitutional Revision Commission has recommended retention of this provision in the new constitution and the adoption of other provisions which would aid in the maintenance of a fit judiciary.<sup>5</sup> The purpose of this Comment is to examine these provisions.

There are three general areas in which a judge may be deemed unfit to effectively discharge his duties:

. . . incompetence, involving lack of professional job skills; misconduct, involving failure to satisfy community standards of judicial deportment (private and public); and disability, involving any disqualifying condition related to health, whether physical, mental or emotional.<sup>6</sup>

An effective judicial system should dispose of incompetent, misbehaving or disabled judges without disrupting the judiciary's freedom from control by other branches of government,<sup>7</sup> or the confidence and

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1. "Knowing the constitution of the human animal, it can be assumed there have been, there are, and there will be instances among judicial officers of lack of fitness. Such cases are rare compared to the great preponderance of conscientious and able judges. Nevertheless, a suitable legal remedy is essential." Report of New Mexico Constitutional Revision Commission 89-90 (1967) [hereinafter cited as Commission Report].

2. A recent discussion of the nationwide problem of court congestion is found in 19 Syracuse L. Rev. 714 (1968).

3. The most recent judicial expansions in New Mexico were the 1965 constitutional amendment providing for a court of appeals. N.M. Const. art. 6, § 28, and the 1966 constitutional amendment providing for a magistrate court. N.M. Const. art. 6, § 26.

4. N.M. Const. art. 6, § 32.

5. The recommended provisions include: art. 4, § 22, and art. 6, §§ 12, 13, 15-17, 19. Commission Report 44-45, 85-91.

6. Braithwaite, *Removal and Retirement of Judges in Missouri: A Field Study*, 1968 Wash. U.L.Q. 378, 384 (1968).

7. "In 1616 James I removed Coke from the Chief justiceship of the King's Bench. Charles II removed judges for resistance to royal infringements of the supremacy of

respect the citizenry has in its judiciary, or the freedom of the individual judge "to exercise his office within his view of the law, without fear of repercussions merely because of those views."<sup>8</sup>

The ideal method of solving the problem of incompetent, misbehaving or disabled judges is to prevent such persons from ever reaching the bench. Indeed, the initial selection of judges is crucial because it is only then that incompetence involving lack of job skills can be effectively controlled. Allowing removal of an inept judge already in office threatens judicial independence. If judges could be removed because of repeated reversals, they might be hesitant to be creative or innovative. Freedom to exercise their duties within their view of the law would be limited.

Although the Missouri merit plan of judicial selection is not uncontroversial, it is arguably the most effective available method for selecting fit judges.<sup>9</sup> The New Mexico Constitutional Revision Commission has recommended the adoption of a constitutional provision modeled after the Missouri plan.<sup>10</sup> Essentially the plan is designed to insulate judicial selection from politics by providing for a commission which recommends qualified persons to the governor, who in turn appoints one of these to the available judicial post. Subsequent to his appointment a judge is periodically subject to approval or rejection by the electorate.

In practice this method of selection virtually assures life tenure for judges. Hence, even if a nominating commission together with the governor were so sage as never to select an unfit judge, they could not foresee whether the judge they select would remain fit through the whole of his tenure in office. Thus the Missouri plan, although a valuable asset in solving the problem of unfit judges, must be supplemented by procedures for disposing of judges who become unfit in office.

As previously noted, under the recommended Missouri judicial selection plan, a judge is periodically placed on the ballot unopposed, and the electorate is given the choice of retaining him in office or rejecting him. Thus, rejection at the polls might be an effective means of disposing of unfit judges without unreasonably disrupting judicial independence.

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the law. James II carried this to an extreme. At the Revolution of 1688 the Bill of Rights guaranteed judicial independence. Security of tenure of judges has been fundamental in the commonlaw world ever since." 5 R. Pound, *Jurisprudence* 397 (1959).

8. Note, *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, 41 N.Y.U.L. Rev. 149, 150 (1966).

9. See Braithwaite, *supra* note 6, at 391-92 n.42.

10. Commission Report 85-86. The basic provisions are modeled after Mo. Const. art. 5, § 29 and Mo. Sup. Ct. R. 10.

Election of judicial officers is within this nation's democratic tradition and does allow the electorate to exercise some control over the judicial branch of government, but relying on the electorate to dispose of unfit judges has inherent weaknesses.<sup>11</sup> First, under the Constitutional Revision Commission's recommended provision, magistrates face the electorate every four years, district court judges every six years, and court of appeals and supreme court judges every eight years.<sup>12</sup> The infrequency of these elections makes timely responses to incidents of unfitness difficult if not impossible. Second, the electorate is composed of party-affiliated laymen who are not familiar with reasonable standards of judicial performance, and are unqualified to ascertain when these standards may have been breached. As a result most judicial candidates who face the approval or rejection of the electorate unopposed are returned to office regardless of how unfit they may actually be.<sup>13</sup>

Because selection and electorate approval of judges are inadequate solutions to the problem of unfit judges, the Constitutional Revision Commission has recommended the adoption of three provisions which contribute directly to the retirement, discipline and removal of unfit judges: impeachment of judicial officers;<sup>14</sup> establishment of retirement benefits and a mandatory retirement age;<sup>15</sup> and the establishment of a commission to investigate judicial fitness and, in appropriate cases, to make recommendations to the supreme court for censure, removal or involuntary retirement.<sup>16</sup> The last of these three recommended provisions has already been adopted in New Mexico, with some revision, by constitutional amendment.<sup>17</sup> This Comment will discuss the provision in its adopted form.

A provision for impeachment of judicial officers is found in the United States Constitution and in most state constitutions including New Mexico's.<sup>18</sup> The recommended impeachment provision states that judicial officers are subject to impeachment by "a two-thirds vote of all the members of each house." The provision contains no limitation on the grounds for removal. In recommending the adoption of this impeachment provision in the proposed constitution, the

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11. Only one judge has been defeated in the first twenty-five years of the Missouri plan's use in Missouri. *Remedies for Judicial Misconduct and Disability*, *supra* note 8, at 171.

12. Commission Report 85-86.

13. See *Remedies for Judicial Misconduct*, *supra* note 11.

14. Commission Report 44, 87.

15. *Id.* at 90.

16. *Id.* at 87-89.

17. N.M. Const. art. 6, § 32.

18. U.S. Const. art. II, § 4; *e.g.*, Ala. Const. art. 7, § 173; Cal. Const. art. 4, § 17; La. Const. art. 9, § 1; N.M. Const. art. 4, § 36.

Constitutional Revision Commission stated: "This section, the commission feels, is a valuable safeguard toward insuring the integrity of the state judicial system,"<sup>19</sup> and that "it is a heavy piece of artillery in the legislative arsenal but should contain adequate safeguards to prevent partisan abuse. The two 2/3 provisions should provide satisfactory safeguards."<sup>20</sup> Nevertheless, impeachment has been often criticized as an obsolete and unsatisfactory procedure for removing unfit judicial officers.<sup>21</sup>

Under the present New Mexico Constitution the grounds for impeachment are, "crimes, misdemeanors and malfeasance in office."<sup>22</sup> There is no provision for impeachment of a judge on grounds of physical or mental disability. The recommended impeachment provision contains no limitation on the grounds for impeachment, but this change weakens the provision rather than improves it. Granting unlimited discretion to the legislature as to the grounds for impeachment creates a possible threat to judicial independence; it presents a danger that the judiciary may be open to control by the legislature and that judges may face reprisals for exercising their office within their view of the law.

An impeachment procedure is cumbersome, expensive, and difficult to complete. Legislators are not judges, and they may shun the responsibility of judging on the merits by voting on a partisan basis. Impeachment trials of federal judges have averaged sixteen days, and much of the evidence is presented to a virtually empty chamber.<sup>23</sup> That legislators would rather suffer an unfit judge than disrupt legislative activities is not an unreasonable possibility.

There are no established procedures granting an accused judge facing an impeachment trial the fundamental rights of due process of law to which he is entitled. The recommended provision states, "The legislature . . . shall provide by law procedures for the trial and removal from office, after conviction, of the officers . . . impeached."<sup>24</sup> It is possible that no implementing legislation in this area will be passed, and if implementing legislation is passed, it may not provide for adequate rules of evidence, or that it will not require the triers of fact to view all the evidence and hear all the witnesses presented.

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19. Commission Report 87.

20. *Id.* at 45.

21. See, e.g., Blackmar, *On the Removal of Judges: The Impeachment Trial of Samuel Chase*, 48 J. Am. Jud. Soc'y 183 (1965); Note, *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, 41 N.Y.U.L. Rev. 149 (1966); Frankel, *Removal of Judges—Federal and State*, 48 J. Am. Jud. Soc'y 177 (1965).

22. N.M. Const. art. 4, § 36.

23. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 70 (1967).

24. Commission Report 44.

Another criticism of impeachment is the difficulty of finding lawyers or judges who are willing to initiate an impeachment investigation against a misbehaving judge. An impeachment may jeopardize the confidence and respect of the state's citizens in the judiciary as an institution. Also, considering the rarity of convictions, there is a possibility of reprisal by the misbehaving judge if he is not convicted. Finally, the remedy of impeachment is inflexible, and while the problem of an unfit judge must be met, the remedy of impeachment may be too harsh.

Impeachment is not so valueless that it should not be included in the New Mexico Constitution. Indeed, impeachment is an important element in the context of a system of checks and balances among the three branches of state government. But in the context of effectively disposing of unfit judges impeachment must be supplemented by other provisions.

The second provision recommended by the Constitutional Revision Commission which contributes directly to the maintenance of a fit judiciary is a retirement provision. The recommended retirement provision states: first, that the legislature is empowered to specify a mandatory retirement age which shall not be under sixty-five; and second, that "[p]rovision shall be made by the legislature for the payment of pensions to justices, judges and magistrates and their widows."<sup>25</sup> In the interest of flexibility, the Commission has recommended that the responsibility of establishing a satisfactory judicial retirement plan be placed in the legislature. But a discussion of the importance of an adequate judicial retirement plan to the maintenance of a fit judiciary is useful in the context of the enabling legislation which this provision contemplates.

Under existing New Mexico law there is no mandatory retirement age for judges; thus, no fit judge is retired merely because he has reached an arbitrary age. Only guesses can be made about the number of aging disabled judges continued in office under the present system of indefinite tenure, but a reasonable assumption can be made that the likelihood of a given judge being disabled probably increases in direct proportion to his age. The recommended judicial retirement provision appropriately empowers the legislature to determine at what age the risk of retaining disabled judges outweighs the risk of retiring competent judges.

Retirement benefits for judges are presently established by statute. There are three ways a judge may qualify for "an annual retirement allowance during the remainder of his life in the amount of fifty per

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25. *Id.* at 90.

cent (50%) of the average salary received during the last three years in office prior to the time of retirement."<sup>26</sup> 1) by having served as a judge a minimum of ten years and attaining the age of sixty-four while in office; 2) by having served as a judge a minimum of sixteen years and attaining the age of sixty while in office; and 3) by having served a minimum of ten years as a judge and voluntarily seeking a certification of his incapacity to carry on the duties of his office due to physical or mental disability.<sup>27</sup> The fifty per cent salary cut and the minimum service requirement provisions of this plan may not only prevent it from having a positive effect on maintaining a fit judiciary, but probably cause it to impede effective removal of disabled judges from office.

Most New Mexico judges are not wealthy. To resist voluntarily taking a fifty per cent cut in salary would be natural, even in the face of a physical disability. Also, under any plan whereby disabled judges may be involuntarily retired for disability, those who enforce the plan may be reluctant to request or compel a disabled judge to take a large salary cut. These same circumstances are applicable to the minimum service requirement. A disabled judge will be reluctant to retire until he has met the requirement, and those who enforce a compulsory retirement plan will be reluctant to request or compel a disabled judge to retire before he has met the requirement. The ideal would be to allow a disabled judge to retire at full salary or a generous percentage of his salary, with no minimum service requirement.<sup>28</sup> "A workable compromise might be to base the amount of the pension on the length of service, but have a minimum pension available to all."<sup>29</sup>

But a generous retirement plan is not a complete or adequate solution to the problem of unfit judges on the bench. Even if a disabled judge is not faced with poor retirement pay, he still may be reluctant to disengage himself from his career. "For many people, retirement suggests inactivity, purposelessness, a feeling of no longer being use-

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26. N.M. Stat. Ann. § 5-5-24 (Supp. 1967).

27. N.M. Stat. Ann. § 5-5-24 & -24.2 (Supp. 1967).

28. "A Federal judge is eligible for voluntary retirement at full salary at the age of 65 or 70, depending upon the number of years he has served on the bench. He may retire for disability at any time and receive full salary if he has served 10 years or half salary if he has served less than that time, but he must secure a certificate of disability from the chief judge of his circuit. A judge also may be involuntarily certified as disabled by a majority of the members of the judicial council of his circuit. The certificate is presented to the President, who then may appoint an additional judge to the court. The retired judge may continue in office at full salary, but he loses all seniority." The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 71 (1967); See 28 U.S.C. §§ 371(b), 372(a), (b) (1958).

29. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 72 (1967).

ful or needed."<sup>30</sup> Also, retirement plans are basically designed to accommodate disabled or aging judges; they are not designed to aid in the disposition of misbehaving judges. A retirement plan should be complemented by a provision for the involuntary retirement of disabled judges, and for the removal or discipline of misbehaving judges. Such a provision has been adopted in New Mexico by constitutional amendment.<sup>31</sup>

The proposed section basically provides for a nine-member judicial standards commission. The commission is empowered to receive complaints, make confidential investigations, order a hearing or request three special masters appointed by the supreme court to take evidence and report their findings to the commission, and, in appropriate cases, recommend discipline, removal or retirement to the supreme court. Until a recommendation is made to the supreme court all procedures followed by the commission are confidential. When a recommendation is made to the supreme court, "[t]he Supreme Court shall review the record of the proceedings on the law and facts and may permit the introduction of additional evidence, and it shall order the discipline, removal or retirement as it finds just and proper or wholly reject the recommendation."<sup>32</sup>

The New Mexico amendment is modeled after a California constitutional amendment adopted in 1960.<sup>33</sup> The plan has been welcomed there as an effective means of disposing of unfit judges without interfering with judicial independence.<sup>34</sup> Although the present New Mexico amendment is basically sound, its particulars should be examined so that possible weaknesses can be exposed and corrected when the provision is incorporated into the new constitution. A discussion of the particulars will be facilitated by dividing the plan into three general areas: the composition of the commission, the causes for which a judge may be removed, disciplined or retired, and the procedures which the commission must follow.

Under the present provision the majority of the commission consists of five laymen, and the remainder consists of members of the legal profession, two judges and two lawyers. This differs from the California plan, where the majority of the commission is composed of members of the legal profession, five judges and two lawyers, and where laymen's views are represented by two citizens.<sup>35</sup> New Mexico may have erred in deviating from the California provision in that

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30. Braithwaite, *supra* note 6, at 395.

31. N.M. Const. art. 6, § 32.

32. *Id.*

33. Cal. Const. art. 6, § 18.

34. Frankel, *Judicial Discipline and Removal*, 44 Tex. L. Rev. 1117 (1966).

35. Cal. Const. art. 6, § 8.



judges are now threatened by control by persons outside their profession, and the New Mexico judiciary may resent and resist the commission. In the interest of judicial independence it is important that judges be given the task of policing themselves.

One of the advantages of the commission is its ability to act unofficially and informally. The very existence of the commission with its power to recommend discipline or removal may act as a deterrent to the occasional recalcitrant judge and judicial absence.<sup>36</sup> By placing the commission in the hands of laymen, the commission's ability to informally discipline judges or informally procure their voluntary retirement may be inhibited. Members of any profession resent control by those who may not fully appreciate professional difficulties.

There is presently no provision for compensation of commission members or payment of commission expenses. Perhaps the addition of a provision such as the one found in the Texas commission plan would be wise: "Commissioners shall receive no compensation for their services as such. The Legislature shall provide for the necessary expense for the operation of the Commission."<sup>37</sup>

The commission may make a recommendation to the supreme court in specific categories of judicial unfitness. The commission may recommend that a judge be involuntarily retired "for disability seriously interfering with the performance of his duties, which is, or is likely to become of a permanent character."<sup>38</sup> This provision is consistent with judicial independence in that it prevents involuntary retirement for temporary or slight physical or mental incapacities which could be used as sham reasons to dispose of a politically or personally undesirable judge.

The commission may recommend that a judge be disciplined or removed "for willful misconduct in office or willful or persistent failure to perform his duties or habitual intemperance."<sup>39</sup> The words "misconduct in office" and "failure to perform his duties" may appear overly broad, but in the context of the Canons of Judicial Ethics of the American Bar Association they are sufficiently narrow to put judges on notice as to their meaning.<sup>40</sup> Note, however, that discipline and removal can be recommended only for misconduct related to official acts. Apparently, even if a judge's private behavior is so

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36. For a discussion of the commission's informal disciplinary power see Burke, *Judicial Discipline and Removal: The California Story*, 48 J. Am. Jud. Soc'y 167 (1965).

37. Tex. Const. art. 5, § 1-a.

38. N.M. Const. art. 6, § 32.

39. *Id.*

40. American Bar Association, *Canons of Professional and Judicial Ethics* (1968); for a discussion of the problem of standards for judicial removal and discipline see Note, *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, 41 N.Y.U.L. Rev. 149 (1966).

grossly unprofessional as to reduce the respect and confidence of New Mexico citizens in the judiciary as an institution, the commission would be unable to take official action. Perhaps the solution to this problem is again found in the Texas commission plan which provides that a judge may be removed "for willful or persistent conduct, which is clearly inconsistent with the proper performance of his said duties or casts public discredit upon the judiciary or administration of justice."<sup>41</sup>

Under the recommended provision, when a judge is involuntarily retired he is entitled to the same retirement benefits as if he voluntarily retired; when a judge is removed from office his salary ceases from the date he is ordered removed. In view of these consequences, perhaps it might be wise to reconsider whether New Mexico should treat "habitual intemperance" as grounds for removal and discipline or whether "habitual intemperance" should be treated as a disability.

The last general area of discussion is the procedures to be followed by the commission. There are six procedural provisions: 1) the commission is given the power to investigate and recommend; 2) the commission's investigations are to be confidential; 3) the supreme court may review law and facts; 4) no act of the commission is valid unless concurred in by a majority of its members; 5) a judge who is a member of the commission or the supreme court cannot participate in any proceeding involving his own retirement; and 6) "[t]he commission shall promulgate regulations establishing procedures for hearings under this section."<sup>42</sup> In general, these procedures are designed to protect the public from unfit judges without interfering with either the integrity of individual judges or the independence of the judiciary as an institution. However, there are ways in which these procedures might be improved.

The commission is given the power to investigate, but there is no provision specifying the means in which an investigation is to be initiated. Presumably, the commission is to follow the same procedure as California, where the practice is to accept any written complaint without regard to form from any person.<sup>43</sup> The complaint is privileged;<sup>44</sup> it can be summarily dismissed or followed up depending on its merits. Nevertheless, to be certain that the commission is open to all complaints, and to aid in publicizing to New Mexico litigants that they can take some form of action against a misbehaving judge,

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41. Tex. Const. art. 5, § 1-a.

42. N.M. Const. art. 6, § 32.

43. Burke, *supra* note 36.

44. N.M. Const. art. 6, § 32.

it might be advisable to consider the incorporation of language similar to that found in the Texas provision :

The Commission shall keep itself informed as fully as may be of circumstances relating to misconduct or disability of particular Justices or Judges, receive complaints or reports, formal or informal, from any source in this behalf and make such preliminary investigations as it may determine.<sup>45</sup>

Also, concerning the commission's investigative power, some language making the attendance or testimony of witnesses and production of documents enforceable by contempt proceedings is probably necessary to make this power meaningful.

Finally, although it is doubtful that the commission would establish rules of procedure which would deprive a judge under investigation of due process of law, it is at least possible. Again, perhaps Texas has found a solution to this potential problem by providing that the rules of procedure before the commission :

. . . shall afford any judge against whom a proceeding is instituted to cause his retirement due process of law for the procedure before the Commission, Masters and the Supreme Court in the same manner that any person whose property rights are in jeopardy in an adjudicatory proceeding is entitled to due process of law, regardless of whether or not the interest of the judge remaining in active status is considered to be a right or a privilege. Due process shall include the right to notice, counsel, hearing, confrontation of his accusers, and all such other incidents of due process as are ordinarily available in proceedings whether or not misfeasance is charged, upon proof of which a penalty may be imposed.<sup>46</sup>

No one provision regarding the maintenance of a fit judiciary is sufficient to that task. To be most effective in keeping the New Mexico judiciary at peak efficiency, several well-integrated provisions are necessary. First, only the most qualified judicial candidates should reach the bench. Second, there must be a generous retirement plan which not only substantially reduces unfit judges' reluctance to voluntarily retire, but, more importantly, reduces the complainants', the judicial standards commission's, and the supreme court's reluctance to force an unfit judge to retire. Finally, there must be a procedure by which unfit judges can be effectively and economically disposed

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45. Tex. Const. art. 5, § 1-a.

46. *Id.*

of without interfering with judicial independence. The present New Mexico judicial standards commission plan provides such a mechanism. Because the plan is young it is not without faults. But the framework is sound, and the faults can be corrected.

JOSEPH MICHAEL NORWOOD