1993

Foreword: The Law of Federal Judicial Discipline and the Lessons of Social Science

Stephen B. Burbank
University of Pennsylvania Law School, sburbank@law.upenn.edu

Sheldon Jay Plager

University of Pennsylvania
Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 142 NOVEMBER 1993 NO. 1

FOREWORD: THE LAW OF FEDERAL JUDICIAL DISCIPLINE AND THE LESSONS OF SOCIAL SCIENCE

STEPHEN B. BURBANK†
S. JAY PLAGER‡

The papers that follow reflect work that their authors performed as consultants for the National Commission on Judicial Discipline and Removal (the "Commission"). The Commission was created by statute in late 1990,[1] and it submitted its report on August 2, 1993.[2] We were privileged to serve as members, and one of us as vice-chair, of the Commission.

This Foreword provides a welcome opportunity to discuss the work of the Commission, including the relationship between the research that was performed under its auspices and the findings, conclusions, and recommendations in its report. That report has much to offer policymakers concerned about the specific problems

† Robert G. Fuller, Jr., Professor of Law, University of Pennsylvania. Member, National Commission on Judicial Discipline and Removal.

‡ Circuit Judge, U.S. Court of Appeals for the Federal Circuit. Vice-Chair, National Commission on Judicial Discipline and Removal.

[1] *See* National Commission on Judicial Discipline and Removal Act, Pub. L. No. 101-650, § 408, 104 Stat. 5089, 5124 (1990).

[2] *See* NATIONAL COMM'N ON JUDICIAL DISCIPLINE & REMOVAL, REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL (1993) [hereinafter REPORT].

of federal judicial discipline. In addition, some of the research conducted for the Commission has implications for questions unrelated to that field. Finally, the Commission's modes and methods of work may shed light on questions regarding the use of social science research in public policy decision-making.

I. THE ORIGINS AND STATUTORY MANDATE OF THE COMMISSION

Until 1980, the law of federal judicial discipline was to a great extent the law of impeachment.[3] In the absence of any impeachment since 1936,[4] it was not unreasonable to ask whether the only constitutionally prescribed process for imposing discipline on Article III judges was adequate to serve the needs of a nation, and of a judiciary, quite different from that contemplated by the framers and ratifiers of the Constitution. Impeachment was not, of course, the only source of restraint against abuse of federal judges' constitutionally guaranteed independence. Yet, the other major formal legal restraint—the criminal law—had rarely been invoked against a federal judge.[5] Moreover, although the effectiveness of informal processes was often cited in response to critics of federal judicial discipline, the successes of those processes remained largely anonymous, while the failures remained on the bench.[6]

Politicians have been concerned about the difficulty of removing federal judges at least since Thomas Jefferson's failed attempt to make an example of Justice Chase.[7] Proposals to make removal easier, substantively and procedurally, whether by constitutional amendment or statute, are common throughout our history. They tend to cluster in periods of general institutional tension or specific experience with the impeachment process or its alternatives.[8] In the 1970s, the nation was chastened by the lessons of Watergate, one of which, dramatically highlighted, was the extraordinary

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[3] *See* REPORT, *supra* note 2, at 1-3.

[4] Judge Halsted Ritter of the U.S. District Court for the Southern District of Florida was impeached and removed from office in 1936. *See id.* at 30.

[5] *See id.* at 2, 72-73 (stating that before 1980 no federal judge was convicted of a crime committed while in office).

[6] *See id.* at 2-3; Stephen B. Burbank, *Procedural Rulemaking under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283, 291-92, 305 (1982).

[7] *See* WILLIAM H. REHNQUIST, GRAND INQUESTS 42-113 (1992).

[8] *See* REPORT, *supra* note 2, at 31-32; Stephen B. Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 KY. L.J. 643, 645-46 (1988).

demands of the impeachment process.[9] In addition, Congress was not unaware of the occasionally expressed doubts about the ability of the federal judiciary to keep its own house in order.[10]

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980[11] (the "1980 Act") was designed to help the judiciary deal fairly with problems of misconduct and disability not requiring the awesome power of impeachment, and to help Congress when proceedings under the Act revealed a need for the exercise of that power. The careful deliberations leading up to that compromise legislation had persuaded Congress that, particularly as the federal judiciary continued to grow, the traditional processes, essentially informal, for maintaining discipline within the judiciary would benefit from an explicit grant of formal authority to deal with cases of misconduct and disability. Congress reserved the ultimate power of removal for the few cases warranting that action.[12]

Such cases were not long in coming; the decade of the 1980s saw the federal prosecution of three Article III judges for offenses allegedly committed while in office, the first such prosecutions in our history.[13] Unfortunately, these cases also established another first (and second): a federal judge's refusal to resign after conviction and unsuccessful appeal.[14] Public outrage at the spectacle of a convicted and imprisoned federal judge continuing to draw salary and benefits was probably sufficient to prompt Congress to invoke the heavy artillery of impeachment.[15]

The experience was sobering. The mechanisms for assistance by the judiciary, established by the 1980 Act, were, if not formally irrelevant, then relevantly a formality.[16] Further, the House of

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[9] *See* REPORT, *supra* note 2, at 3, 30-31; Burbank, *supra* note 8, at 677-78.

[10] *See* Burbank, *supra* note 6, at 305.

[11] Pub. L. No. 96-458, 94 Stat. 2035 (codified at 28 U.S.C. § 372(c) (1988 & Supp. IV 1992)).

[12] *See* REPORT, *supra* note 2, at 3-4; Burbank, *supra* note 6, at 291-308.

[13] *See* REPORT, *supra* note 2, at 73-74. The three were Judge Alcee Hastings of the U.S. States District Court for the Southern District of Florida, Judge Harry Claiborne of the U.S. District Court for the District of Nevada, and Judge Walter Nixon of the U.S. District Court for the Southern District of Mississippi.

[14] *See id.* Judges Claiborne and Nixon refused to resign. More recently, Judge Robert Collins of the U.S. District Court for the Eastern District of Louisiana *did* resign after his conviction on three counts of bribery, conspiracy, and obstruction of justice was affirmed on appeal. The Judicial Conference had also certified to the House of Representatives its determination that consideration of impeachment might be warranted. *See id.* at 74.

[15] *See id.* at i, 5, 7.

[16] *See id.* at 4.

Representatives had no general rules for impeachment inquiries, and its precedents, hoary with age, did not cover a situation in which a federal officer had previously been convicted of a crime.[17] The Senate had general rules, but they were hoarier still,[18] and the situation of a prior conviction was deemed to be fraught with both constitutional significance and, as senators anticipated the future, considerable precedential risk.[19]

If the burdens of removing a previously convicted federal judge seemed onerous, the burdens attending the impeachment and removal of Judge Alcee Hastings, who had been acquitted by a jury, were excruciating. Here, the 1980 Act was helpful, indeed probably essential, to the impeachment process, since it was action taken by a judicial council under the Act that precipitated the impeachment.[20] But the proceedings in the House and Senate were protracted and, given the prior acquittal and charges of racism, highly charged.[21]

And so it was that concerns about the difficulty of removing federal judges once again prompted calls for reform. And again, some of the reform proposals took the form of constitutional amendments, while others were couched in statutory form. Many of the proposals were addressed only to the most serious perceived problems of the recent impeachments, arising in cases involving a prior felony conviction. However, a few of the proposals either suggested a broader agenda by covering all of federal judicial discipline or explicitly avowed such an agenda by disparaging the judiciary's efforts at self-regulation under the 1980 Act.[22]

One of the proposals concerning reform of the impeachment process did not advance a solution but rather called for a comprehensive study. Originally suggested by Senator Robert Dole in response to the Claiborne impeachment trial, the idea was adopted, expanded and refined by Congressman Robert Kastenmeier in his capacity as chair of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee.[23] The lead author of the 1980 Act, Congressman Kastenmeier

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[17] *See id.* at 38-39; Burbank, *supra* note 8, at 677-79.

[18] *See* REPORT, *supra* note 2, at 49-50; Burbank, *supra* note 8, at 685.

[19] *See* Burbank, *supra* note 8, at 691 n.232.

[20] *See* REPORT, *supra* note 2, at 4.

[21] *See id.* at i, 73, 78.

[22] *See id.* app. I; Burbank, *supra* note 8, at 644-45, 660.

[23] *See* Burbank, *supra* note 8, at 699-700; Stephen B. Burbank, *Is it Time for a National Commission on Judicial Independence and Accountability?*, 73 JUDICATURE 176,

ensured that Congress kept its promise of vigorous oversight of the implementation of that legislation.[24] Such oversight was instrumental in reform by the judiciary of the rules promulgated to govern proceedings under the Act, and led to statutory amendments in 1988[25] and 1990.[26] The 1990 legislation also included a subtitle establishing the National Commission on Judicial Discipline and Removal.[27]

As provided in its authorizing legislation, the Commission consisted of three members appointed by the President Pro Tempore of the Senate, three by the Speaker of the House of Representatives, three by the Chief Justice, three by the President, and one by the Conference of Chief Justices of the States of the United States.[28] Its duties were:

> (1) to investigate and study the problems and issues involved in the tenure (including discipline and removal) of an article III judge;
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> (2) to evaluate the advisability of proposing alternatives to current arrangements with respect to such problems and issues, including alternatives for discipline or removal of judges that would require amendment to the Constitution; and

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227 (1990) ("applaud[ing] Title II of H.R. 1620, which contemplates . . . the sort of broad-ranging contextual study by a national commission that [the author has] proposed").

[24] *See* 126 Cong. Rec. 28,612 (1980) (statement of Rep. Kastenmeier); *id.* at 28,093 (statement of Sen. DeConcini).

[25] *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 403(c), 102 Stat. 4642, 4651 (1988).

[26] *See* Judicial Discipline and Removal Reform Act of 1990, Pub. L. No. 101-650, § 402, 104 Stat. 5122, 5122-23.

[27] *See supra* text accompanying note 1.

[28] *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 411, 104 Stat. 5089, 5125.

Commission members appointed by the President Pro Tempore of the Senate were: Sen. Howell T. Heflin of Alabama, Sen. Arlen Specter of Pennsylvania, and Frank M. Tuerkheimer, Professor of Law, University of Wisconsin; by the Speaker of the House of Representatives: Rep. Hamilton Fish, Jr., of New York, former Rep. Robert W. Kastenmeier of Wisconsin, and Stephen B. Burbank, Professor of Law, University of Pennsylvania; by the President of the United States: Charles J. Cooper, Esq., Deputy Assistant Attorney General John C. Harrison, succeeded by Beth Nolan, Associate Counsel to the President, and Stephen L. Carter, Professor of Law, Yale University; by the Chief Justice of the United States: Circuit Judge S. Jay Plager, Senior Circuit Judge Levin H. Campbell, and Roger C. Cramton, Professor of Law, Cornell University; by the Conference of Chief Justices: Chief Justice Gordon R. Hall of Utah. *See* REPORT, *supra* note 2.

(3) to prepare and submit to the Congress, the Chief Justice of the United States, and the President a report . . . .[29]

Originally required to submit its report containing findings, conclusions, and recommendations not later than one year after the date of its first meeting,[30] the Commission received additional funding,[31] and an extension[32] that permitted it to submit its final report on August 2, 1993.

II. THE COMMISSION'S RESEARCH PROGRAM

The first official meeting of the Commission, held at the end of January 1992,[33] was a two-day retreat away from offices and, within reason, telephones. The purpose was to canvass, for the benefit of all commissioners, the world of judicial discipline and removal, and to define preliminarily the broad subjects that should be addressed. Members of the Commission reported on the different possible topics. The second day concluded with a discussion of information needs and potential research projects revealed by the canvass, upon which future recommendations could be based.

The Commission benefitted enormously from having members knowledgeable in each of the areas of major concern. Two commissioners were intimately familiar with the workings of the 1980 Act (one was chair of the Judicial Conference committee administering the Act); others had served or were serving in Congress and had first-hand experience with the impeachment process; still others had held senior positions in the executive branch, including the Justice Department. One commissioner was personally knowledgeable about the disciplinary systems of the states. The chair of the Commission was a former House member who for some years had chaired the House Subcommittee on Courts, Intellectual Property, and the Administration of Justice.

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[29] Judicial Improvements Act of 1990, § 410, 104 Stat. at 5124-25.

[30] *See id.* § 415, 104 Stat. at 5127.

[31] *See* Act of Oct. 6, 1992, Pub. L. No. 102-395, tit. III, 106 Stat. 1828, 1858.

[32] *See* Act of Sept. 23, 1992, Pub. L. No. 102-368, tit. I, 106 Stat. 1117, 1118.

[33] Although the Act creating the Commission was approved on December 1, 1990, the members of the Commission were not all appointed until the fall of 1991. There was then a period of delay caused by the fact that the statute left to the Commission the selection of the chair from among its membership, but did not provide any mechanism for calling an initial meeting of the group to organize itself and select the chair. The problem was solved when the two judge members convened an organizational caucus in December 1991, at which time the chair (Robert Kastenmeier) and vice-chair (Judge S. Jay Plager) were elected.

Although only two of the thirteen commissioners were members of the federal judiciary, they actively sought to ensure that the concerns of the judiciary, as an institution, were kept before the Commission. Finally, each of the federal appointing authorities had included a distinguished academic lawyer as one of its three appointees, and the vice-chair, now a judge, had been a law professor and law school dean.[34]

This first meeting was followed by an all-day meeting late in March of 1992 at which the heads of organizations with expertise in various related subject matter areas discussed the work of their organizations.[35] A substantial portion of the remainder of the second meeting was devoted to a discussion of the Commission's research program, this time focused by a five-page outline designated "Information Needs and Research Projects."[36] The outline had been prepared by the staff under the direction of what by this time had become the Commission's research working group, those commissioners with particular research experience and interests who volunteered to take an active role in this aspect of the Commission's work. This meeting also began the process of identifying and selecting the consultants who would conduct the Commission's research.

In addition to the regular meetings of the Commission, the research working group met separately several times.[37] These meetings proved very valuable. The first was held in June 1992, shortly after the Commission had agreed upon the initial group of consultants to be employed to undertake the research program. The Commission's working group invited the consultants to attend a full day of discussions. This permitted the consultants to learn about the scope of each other's planned work, and gave the commissioners and the consultants an opportunity to ensure that there was a clear understanding about what was expected, and the time frame for completion of the work.

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[34] For biographies of Commission members, see REPORT, *supra* note 2, at 191-96.

[35] The participants included the State Justice Institute (David Tevelin, Executive Director), the Twentieth Century Fund Task Force on Federal Judicial Responsibility (Prof. A. Leo Levin, Chair), and the American Judicature Society (Dr. Frances Zemans, Executive Director).

[36] *See* Memorandum from Michael J. Remington to Members of the National Commission on Judicial Discipline and Removal (Mar. 17, 1992) (on file with authors).

[37] It was the policy of the Commission to invite all commissioners to all meetings, including those of the research working group.

Between meetings, the Commission members of the research working group were available to provide informal consultation with consultants and staff regarding the research program.[38] Later in the course of the Commission's work, the research group met to review the progress of the various studies, and to resolve questions arising out of the inevitable overlaps and gaps that emerged. As a result, the Commission identified and engaged additional consultants, including several law firms who assisted pro bono.[39]

The Commission's early identification of issues and topics, reflected in the "Information Needs and Research Projects" outline,[40] proved to be both comprehensive and insightful. Revised but once following the first public hearing in May 1992, the outline became the guiding document for the Commission's one and a half years of work. The outline not only served to identify the topics to be included in the report, but it identified the questions for which the Commission needed answers—answers that were not necessarily available in the extant literature.

For example, a fundamental question regarding the judiciary's self-regulation under the 1980 Act was how the current system operated. To answer this, the Commission needed to know: (1) who are the complainants? (2) who are the complained-about judges? (3) what is the nature of the complaints? (4) how many problem cases are there? and (5) could empirical trends and regional differences be identified? Obviously, answers to these questions would not be found in the statutes or in the literature that focused on the history and scope of the statutory plan.[41] These data, it was hoped, could then be used to answer normative questions such as: (1) how well does the system operate? (2) can the system be improved? and (3) do current data collection methodologies and reporting procedures adequately serve the needs of policymakers?

The outline also reflected early recognition of the role and importance of less formal processes for constraining undesirable judicial conduct. Included were questions regarding judicial socialization, the exercise of peer pressure, enforcement of the

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[38] In addition to the consultants, the Commission was assisted by a small, full-time staff, headed by Director Michael J. Remington and Deputy Director William J. Weller.

[39] For biographies of Commission consultants and a full list of those providing assistance, see REPORT, *supra* note 2, at 198-210.

[40] *See supra* text accompanying note 36.

[41] *See* Burbank, *supra* note 8, at 660-61.

Canons of Ethics, and judicial willingness to submit to the hierarchy of appellate court supervision. Answers to these questions would require opinion research, and the outline specifically called for determining the views of the circuit chief judges who play a pivotal role in administering the system.

The Commission's interest in empirical studies was not limited to the administration of the 1980 Act. On the contrary, similar questions were asked, and empirical research methodologies designed and pursued, for each of the other major areas of inquiry: the separate roles of the House of Representatives and the Senate in impeachment proceedings, and the responses of the congressional leadership to the demands the Constitution places upon them; and the role and behavior of the executive branch in its prosecutorial function, its interaction with the Congress in impeachment activities, and in the link between the appointment and disciplinary processes. The work product of these studies is publicly available in two volumes of Commission research papers.[42]

In addition to recognizing the importance of empirically based data, the Commission recognized the need to have answers to an array of legal questions. These issues ranged from the details of the statutorily provided benefits package of federal judges and the relevant Canons of Judicial Ethics, to the statutes and rules governing the processes of discipline (by the judiciary) and removal (by the Congress). Running through many of these, and defining the parameters of all, were the understandings of the governing constitutional provisions.

The Commission's early discussions revealed the pervasiveness of the constitutional issues. The choice was between having the consultants for each discrete topic area address a subset of the relevant constitutional questions, or consolidating the most important of these questions into one comprehensive study by a single consultant, to which the Commission and the other consultants could refer as needed. The decision was made to pursue the latter course, although one exception to that decision emerged. While the Commission's work was in progress, the Supreme Court granted review in the case of *Nixon v. United States*.[43] In this case a recently impeached and removed judge challenged the Senate's

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[42] *See* RESEARCH PAPERS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL (1993) [hereinafter RESEARCH PAPERS].

[43] 112 S. Ct. 1158 (1992), *granting cert. to* Nixon v. United States, 938 F.2d 239 (D.C. Cir. 1991).

use of a committee of senators, under Senate Rule XI, to take evidence in his impeachment trial. Given the prospect of a Supreme Court decision of this issue, the Commission determined to omit it from the scope of the constitutional-issues study, and arranged to have the case monitored by a separate consultant.

III. THE ROLE OF LEGAL RESEARCH IN THE COMMISSION'S WORK

The editors have included in this selection of Commission studies the paper prepared by the consultant on constitutional issues, Professor Peter Shane.[44] Working within the framework of current interpretative approaches to the Constitution, but not enslaved by any of them, Professor Shane provided a thoughtful and balanced analysis of the major constitutional questions. Of the various constitutional issues that Professor Shane addressed, the most important by far for the Commission's work was whether the impeachment process is the exclusive constitutionally permissible means to remove an Article III judge from office.

If the Constitution would permit a statutory removal mechanism, proposals for creation of such a mechanism[45] would avoid a serious practical and political obstacle: the necessity of a constitutional amendment. The Commission was aware of statutory proposals for dealing with cases involving federal judges previously convicted of serious crime. It also knew that statutory removal had adherents who believed that the impeachment process is simply too cumbersome for all but the most important federal officers. If, on the other hand, removal from office by means other than impeachment were unconstitutional, adding an alternative removal mechanism would involve the costs, including the risks and uncertainties, of a constitutional amendment.[46]

In concluding that the impeachment process is the exclusive mechanism for the political branches to remove an Article III judge that is consistent with the Constitution, Professor Shane relied on the language of that document, its contemporaneous interpretation

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[44] *See* Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209 (1993). An earlier version of the author's research paper is published in 1 RESEARCH PAPERS, *supra* note 42, at 1.

[45] For a brief description of some of the statutory removal mechanisms that have been proposed, see REPORT, *supra* note 2, at 157-61.

[46] For a description of some of those costs, see *id.* at 6-7; Burbank, *supra* note 8, at 648-49.

by the framers and ratifiers, and on certain structural considerations.[47] Although he deemed discipline through judicial self-regulation an issue requiring a different interpretative approach,[48] he reasoned that the explicit textual attention to removal might well be found to set "categorical limits to those sanctions that might be imposed through other means."[49] In addressing both aspects of the removal question, Professor Shane had the benefit of one of two Commission studies[50] of a 1790 bribery statute,[51] a statute that has often been cited in support of the constitutionality of removal by means other than impeachment.[52] Those studies strongly suggest that the 1790 statute should not be read to effect a removal from current office (as opposed to disqualification from holding future office) and, moreover, that it would not be so read by the Supreme Court.[53]

In turn, the Commission's conclusion that removal of federal judges "by means other than impeachment and conviction would be unconstitutional"[54] was influenced not only by Professor Shane's cogent analysis and the work done on the 1790 statute, but also by the discussion and debate of Professor Shane's draft report by nationally recognized authorities in the field at a roundtable sponsored by the Commission.[55] In addition, in response to the work of the Commission, the American Bar Association undertook a reexamination of its previous support for a statutory removal mechanism.[56] The ABA's Task Force on Judicial Removal concluded that the previous support had either ignored or paid inadequate

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[47] *See* Shane, *supra* note 44, at 105-14.

[48] *See id.* at 115-16.

[49] *Id.* at 131.

[50] *See id.* at 121 n.64 (citing Elizabeth B. Bazan, *Disqualification of Federal Judges Convicted of Bribery—An Examination of the Act of April 30, 1790 and Related Issues*, *in* 2 RESEARCH PAPERS, *supra* note 42, at 1285, 1307).

[51] *See* Act of Apr. 30, 1790, ch. IX, 1 Stat. 112, 117 (codified as amended at 18 U.S.C. § 201(b)(2) (1988)). The 1790 Act provided that a federal judge convicted of taking a bribe could be imprisoned and "disqualified to hold any office of honour, trust or profit under the United States." *Id.*

[52] *See, e.g.*, Michael J. Gerhardt, *The Constitutional Limits to Impeachment and its Alternatives*, 68 TEX. L. REV. 1, 68-69 (1989); Shane, *supra* note 44, at 120.

[53] *See* Bazan, *supra* note 50; Jerome M. Marcus, *The 1790 Statute and Control of a Judge's Tenure in Office*, *in* 2 RESEARCH PAPERS, *supra* note 42, at 1321; Shane, *supra* note 44, at 120 n.64; *see also* Burton v. United States, 202 U.S. 344 (1906) (finding that a similarly worded statute did not automatically require removal of a senator).

[54] REPORT, *supra* note 2, at 20.

[55] *See id.* at iv.

[56] *See* Task Force on Judicial Removal, American Bar Assoc., Report of the American Bar Association Task Force on Judicial Removal 2 (Feb. 1993) (on file with authors).

attention to the constitutional issues, which it regarded as very serious, and recommended a reversal of the previous position. The ABA's House of Delegates accepted the Task Force's recommendation; the official position of the Association does not now support changes in the removal mechanism by statutory enactment.[57]

As noted above, the Commission recognized the importance of the question of the constitutionality of the Senate's use of a committee to gather evidence in an impeachment trial. The authority for that mode of proceeding dated to an amendment to the Senate Rules in 1935, but the new rule, Rule XI, was not used until the impeachment trial of Harry Claiborne in 1986, when Rule XI was also amended. It was used again for the impeachment trials of Alcee Hastings and Walter Nixon.[58] On each occasion, the constitutionality and fairness of taking evidence before twelve senators under Rule XI was challenged in the Senate, and the challenges were renewed in federal court.[59] Soon after the Commission began work, the Supreme Court granted Nixon's petition for certiorari to consider whether the Senate's use of Rule XI was justiciable and, if so, whether it was constitutional.[60]

Rule XI represents one of the few changes in the Senate's Rules since they were initially formulated for the impeachment trial of President Andrew Johnson in 1868.[61] It was avowedly intended to enable the Senate to conduct impeachment trials more efficiently and also, it was hoped, more fairly.[62] The half century that passed before it was first employed only increased concerns about the burdens of impeachment trials on the Senate.[63] Furthermore, the perceived burdens of the three impeachment trials that had the

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[57] *See* REPORT, *supra* note 2, at 20 (noting the Association found that "'no significant benefit would be realized by adding statutory removal from office to the methods of discipline under the [1980] Act, especially in light of the serious constitutional question whether article III judges may be removed by means other than impeachment'") (quoting *Judicial Discipline and Removal*, Policy Statement of the American Bar Association (adopted Feb. 1993)).

[58] *See id.* at 50-51.

[59] *See* Hastings v. United States, 802 F. Supp. 490, 500 (D.D.C. 1992), *vacated and remanded*, 1993 WL 81273, at *1 (D.C. Cir. Mar. 2, 1993), *dismissed*, 1993 WL 439810, at *2 (D.D.C. Oct. 21, 1993); Nixon v. United States, 744 F. Supp. 9, 10 (D.D.C. 1991), *aff'd*, 938 F.2d 239 (D.C. Cir.), *aff'd*, 113 S. Ct. 732 (1993).

[60] *See supra* text accompanying note 43. The Court acted on February 24, 1992, approximately one month after the Commission's first meeting.

[61] *See* REPORT, *supra* note 2, at 49-50; *supra* text accompanying note 18.

[62] *See* REPORT, *supra* note 2, at 51.

[63] *See id.* at 50-51.

benefit of Rule XI committees were a major factor in the Commission's creation.[64]

If the Supreme Court were to hold the constitutional question in *Nixon* justiciable and to hold further that the Senate could not constitutionally take evidence through a committee, the implications for the Commission's work would be momentous. Not only would the full Senate be required to take evidence, such a holding would cast doubt on the viability of other possible changes in the Senate's (and the House's) rules and practices to make impeachment trials more efficient. As a result, the case for alternative removal mechanisms, even if requiring a constitutional amendment, would be measurably strengthened.

The Commission, therefore, thought it very important to have the benefit of the Supreme Court's decision in *Nixon* before making its final findings, conclusions, and recommendations. Given the Court's schedule of arguments and the time usually required for decision, that seemed unlikely in light of the statutory requirement that the Commission submit its report within a year after it began work.[65] This was an additional, and very powerful, argument for the Commission to seek an extension of that date, which was secured.[66] In the meantime and in order not to delay its work, the Commission operated on the assumption that the Court either would affirm the court of appeals' ruling that the issue was not justiciable[67] or would sustain the constitutionality of Rule XI. That assumption permitted the Commission to consider additional changes in congressional rules and practices[68] and a strategy for reform that could be compared to reform by means of constitutional amendment. The wisdom of proceeding in this manner was

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[64] *See id.* at i-iii, 4-5.

[65] The statute creating the Commission required that it submit its report "not later than one year after the date of its first meeting." National Commission on Judicial Discipline and Removal Act, Pub. L. No. 101-650, § 415, 104 Stat. 5124, 5127 (1990). The Commission's first meeting was held in January 1992. *See supra* text accompanying notes 30-33.

[66] *See supra* text accompanying note 32.

[67] *See* Nixon v. United States, 938 F.2d 239, 246 (D.C. Cir. 1991), *aff'd*, 113 S. Ct. 732 (1993).

[68] *See* REPORT, *supra* note 2, at 37-49, 53-60. Among the more important of the changes recommended is that the "Senate apply issue preclusion to matters necessarily determined against a judge in a prior criminal trial except in unusual circumstances." *Id.* at 59. The Commission took seriously the independent duty of Senators and Representatives to interpret and apply the Constitution. *See id.* at 11.

confirmed when the Court, in January 1993, held that the issue was not justiciable.[69]

The answers to these two questions of law—whether impeachment is the only valid mechanism for removal from office, and the scope of Congress's power to control impeachment proceedings—were critical to the Commission's work because they profoundly affected both the size and shape of the landscape available for reform under existing constitutional arrangements.

The Commission's conclusion, consistent with Professor Shane's study, that the impeachment process is the exclusive means to remove an Article III judge from office, coupled with the lesson of *Nixon* that most aspects of impeachment proceedings are beyond judicial review, strongly suggested that the best strategy for reform of the discipline and removal system was to make existing arrangements more efficient, with due regard to the rights and interests, including the independence, of the judge. In the end, the Commission preferred that strategy to the uncertainties and risks attendant upon attempts to replace existing arrangements by constitutional amendment.

IV. THE ROLE OF EMPIRICAL RESEARCH IN THE COMMISSION'S WORK

In preparing its work plan, the Commission was aware that, although there was an extensive literature on the constitutional issues relating to federal judicial discipline, little was known about many other matters important to its work. These matters included the practices and procedures of the House and Senate, from the initial responses to complaints through formal impeachment proceedings, and the administration of the 1980 Act by the federal judiciary. The Commission was also aware that the dearth of inquiry on such matters extended to empirical investigation of the system of federal judicial discipline in all its forms.

The lack of useful information concerning many problems and issues of federal judicial discipline was sufficient reason for the Commission to consider the potential and limitations of empirical work under its auspices. It was not the only reason, however. At least one of the proposals for reform before the Commission's creation was explained by resort to demonstrably erroneous factual

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[69] *See Nixon*, 113 S. Ct. at 732.

assertions concerning the administration of the 1980 Act.[70] Moreover, apart from the value of empirical investigation in casting light on the operation of the existing mechanisms, it seemed important for a body that had been created to advise policymakers to have a good sense of the views of those affected by the relevant issues.[71]

In considering with its consultants the scope and nature of the research to be undertaken, the Commission confronted two especially difficult problems in addition to those inherent in the enterprise. First, the time available for the preparation and administration of suitable protocols and instruments and for the evaluation of research results was very short. Decisions about research had to be made when it was not clear that the Commission would secure an extension of time to file its final report; even with the extension, completing the research in time to make it useful to the Commission was a daunting challenge. Second, a number of areas of interest to the Commission might not in fact be capable of empirical study because critical information relating to them might be treated as confidential by its custodians, whether or not such treatment was required by law.

The Commission approached problems of confidentiality with respect for the interests of the three branches and of individuals but with determination to seek appropriate compromises that would permit pursuit of these important lines of inquiry. In those instances in which access proved impossible in the time available and the issue was deemed important, the Commission made recommendations for study by an entity with access to the confidential information.[72] Fortunately, in those areas most critical to the Commission's work, compromise was reached on access to the confidential information needed, enabling its consultants for the first time rigorously to evaluate the experience under the 1980 Act.[73]

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[70] *See* Burbank, *supra* note 8, at 660.

[71] For a description of the questionnaires prepared by Commission consultants for this purpose, see REPORT, *supra* note 2, at 140.

[72] *See, e.g., id.* at 63 ("The Commission recommends that the Senate review its confirmation proceedings involving judges prosecuted since 1980 to determine whether those proceedings were thorough and whether they revealed any problems suggesting a danger of misconduct by the nominees. The Senate review should be forward-looking, designed to avoid problems in the future."); *see also id.* at 82 (encouraging similar executive branch review); Burbank, *supra* note 8, at 658-59 (suggesting such inquiries).

[73] *See infra* note 75 and accompanying text.

The serious time limitations required that the Commission and its consultants design empirical research with appropriate limits on scope and breadth. Even so, the Commission successfully employed an array of types of empirical research, often bringing multiple methods to bear on a single issue or set of issues.[74] The editors of the *Law Review* have included in this collection of Commission studies two articles that give a good sense both of the techniques of empirical research employed by the Commission's consultants and of the impact of that research on its findings, conclusions, and recommendations.

Working under the auspices of the Commission and the Federal Judicial Center, Jeffrey Barr and Thomas Willging conducted the first rigorous study of experience under the 1980 Act ever undertaken.[75] As a result of the patient efforts of Judge Levin Campbell, a member of the Commission, and with the assistance of Judge William Schwarzer, the Director of the Center, Barr and Willging were given access to the complaints filed in the eight circuits included in their sample, as well as to the orders and any accompanying memoranda disposing of those complaints.[76] In addition, Barr and Willging had available all of the national statistical information compiled pursuant to the Act, and they conducted detailed interviews with circuit chief judges and others involved in the Act's administration.

Recognizing that the effectiveness of the 1980 Act had been a matter of controversy, the Commission employed another consultant, Professor Richard Marcus, to work cooperatively with Barr and Willging but to draw his own conclusions.[77] The confidence with which the Commission made findings, conclusions, and recommendations about the 1980 Act was attributable in large part to the high level of agreement among its consultants concerning both the achievements and the problems of the 1980 Act.

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[74] For a discussion of the use of multiple methods of research and their advantage over single methods, see Ilene Nagel et al., *Methodological Issues in Court Research: Pretrial Release Decisions for Federal Defendants*, 11 SOC. METHODS & RES. 469 (1983).

[75] *See* Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25 (1993). An earlier version of the authors' research paper is published in 1 RESEARCH PAPERS, *supra* note 42, at 477.

[76] *See* Barr & Willging, *supra* note 75, at 31.

[77] *See* Richard L. Marcus, *Who Should Regulate Federal Judges, and How?*, *in* 1 RESEARCH PAPERS, *supra* note 42, at 363. Professor Marcus's paper has also been published at 149 F.R.D. 375 (1993).

One of the most interesting aspects of the Barr and Willging research was the suggested causal connection between the problematic dismissals identified in the sample and the practices of chief judges both in employing qualified staff assistance and in preparing orders and accompanying memoranda.[78] This information directly contributed to two of the Commission's recommendations.[79]

The other example of the Commission's empirical work that the editors have included in the articles published here is a study by Professor Charles Geyh.[80] Professor Geyh had a difficult assignment but also one of the most important. The success of informal disciplinary mechanisms had been touted before the 1980 Act was passed, and its sponsors expected them to continue to play a major role even after a formal complaint procedure was in place.[81] Yet, defining the universe of informal mechanisms, let alone evaluating their effectiveness, is no easy task. Professor Geyh took a broad view of "judicial discipline," including in the category of informal approaches everything from peer pressure to appellate review.[82] For the purpose of evaluation, the possibilities for empirical investigation of many of these approaches were limited, because, as one chief judge observed, "you don't keep score."[83]

Working in collaboration with the Commission's consultants on the operation of the 1980 Act, Professor Geyh devised a questionnaire for present and former chief judges.[84] The responses to the questionnaire, it was hoped, would provide useful information about, among other things, the frequency and perceived comparative effectiveness of the various mechanisms for informal discipline. Based in part on those responses, Professor Geyh's analysis proved important to the Commission's findings and conclusions about the current importance of informal approaches to discipline and the impact of the 1980 Act on informal resolutions.[85] Those findings

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[78] *See* Barr & Willging, *supra* note 75, at 40-42, 160-61.

[79] *See* REPORT, *supra* note 2, at 103 (recommending, among other things, that "chief judges seek assistance from qualified staff in reviewing complaints and preparing orders"); *id.* at 108-09 (recommending preparation of nonconclusory supporting memoranda for dispositions dismissing complaints or concluding proceedings on the basis of corrective action taken).

[80] *See* Charles G. Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243 (1993). An earlier version of the author's research paper is published in 1 RESEARCH PAPERS, *supra* note 42, at 713.

[81] *See* REPORT, *supra* note 2, at 113.

[82] *See* Geyh, *supra* note 80, at 246-47.

[83] REPORT, *supra* note 2, at 113.

[84] The questionnaire is reprinted in Geyh, *supra* note 80, app.

[85] *See* REPORT, *supra* note 2, at 6, 113-21, 123-24 (discussing informal approaches

and conclusions, in turn, were critical to the Commission's conclusion that a significant cost of a centralized disciplinary system for the federal judiciary, such as had been recommended on state models, would be the loss of effectiveness of informal approaches to misconduct and disability.[86]

Taken as a whole, the studies of the operation of the 1980 Act persuaded the Commission that Congress's goals are being well served but that there is room for improvement.[87] Those studies also uncovered many of the areas in which the Commission concluded that such improvements might profitably be made. Moreover, together with the work done on informal approaches to discipline, the Commission's research on the 1980 Act provided a firm factual foundation for the conclusion that improvements in the existing system would be preferable to adoption of a wholly different system, whether by statute or by constitutional amendment.[88]

The Commission's studies of experience under existing formal and informal mechanisms did not, however, answer the question whether some number of meritorious complaints never enter the system. For that, it relied on surveys conducted by the Justice Research Institute[89] and other information available through testimony and interviews. These sources persuaded the Commission that fear of retaliation prevents some lawyers and litigants, particularly repeat players, from filing complaints under the 1980 Act. Moreover, the surveys demonstrated that there is a disturbing level of ignorance about the Act among virtually every group surveyed. These findings led the Commission to recommend that additional steps be taken to educate lawyers, judges, court personnel, and members of the public about the 1980 Act, and that mechanisms be

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to discipline within the judiciary).

[86] *See id.* at 124. The other major cost of a central enforcement authority that concerned the Commission related to judicial independence. *See id.*

[87] *See id.* at 6-7, 123-24.

[88] *See id.* at 6-7, 22-25, 123-24. Professor Lempert states: "The fact that a decision would be the same without the research that legitimates it, does not . . . mean that the decision would have been the same had the research results been different." Richard Lempert, *"Between Cup and Lip": Social Science Influences on Law and Policy*, 10 LAW & POL'Y 167, 197 n.12 (1988).

[89] *See* William K. Slate, II, *Analysis and Report: Surveys of Knowledge and Satisfaction of Federal Judicial Discipline and Removal Mechanisms and Processes*, *in* 2 RESEARCH PAPERS, *supra* note 42, at 959, 1021 ("Though a majority of judges profess satisfaction with the present judicial complaint system, there is an acknowledgement on the part of judges (and attorneys and clerks as well) that valid complaints are not filed.").

established to assist in presenting serious complaints to chief judges without fear of retaliation.[90]

In sum, although the empirical research conducted under the Commission's auspices was, of necessity, constrained by the time available, the number and variety of methods employed were impressive and the impact of the research results on the Commission's findings, conclusions, and recommendations was pervasive.

V. THE ROLE OF HISTORICAL RESEARCH IN THE COMMISSION'S WORK

In considering social science methodologies that might advance its search for understanding of the processes and practices of federal judicial discipline and socialization, the Commission recognized that an important dimension of understanding can be provided by historical research, particularly research that seeks data similar to those available through other forms of empirical research, and from which policy judgments can be made.

One of the troubling questions confronting the Commission concerned the causes for and implications of the current spate of impeachments of sitting federal judges. Specifically, was this evidence of a general decline in judicial ethics and behavior perhaps mirroring what many see as a general deterioration of public morals? Should we expect a continuation of a pattern of prosecutions of judges and a concomitant need for removal by impeachment? Uncomfortable questions about which to speculate; difficult questions for which to find answers.

The Commission sought perspective from history. Familiar were the tales of the handful of judges whose public disgrace was recorded in the pages of congressional records.[91] Less familiar but nonetheless a part of the lore were the cases of certain judges caught in the meshes of their own misconduct, but who escaped impeachment by resigning.[92] Missing was a full historical account of *why* federal judges have left the bench, and especially the circumstances of premature resignations. Knowledge of this sort might provide insight into whether the recent prosecutions and impeachments were symptoms of an alarming change in judicial

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[90] *See* REPORT, *supra* note 2, at 99-102.
[91] *See id.* at 29-30.
[92] *See* Burbank, *supra* note 8, at 653-54.

behavior, or an unfortunate coalescence of essentially random but statistically predictable events.

The editors have included the historical study completed for the Commission by Professor Emily Field Van Tassel,[93] who was serving at the time as Associate Historian with the Federal Judicial History Office of the Federal Judicial Center. Professor Van Tassel used as the central focus of her study the 190 judges who, over the last 200 years, resigned from the bench for stated reasons other than age or health. She employed various sources, basing her conclusions on aggregated data as well as on the actions and claims of individual judges. Her study and its conclusions were important aids to the Commission in assessing the causes for the recent troubling events, and the likelihood of them being repeated. The Commission, viewing these events in their historical context, was better able to make recommendations regarding the relationship of prosecution to removal,[94] the importance of close cooperation between prosecutors and Congress,[95] and the motivations that would lead a judge under current circumstances to prefer a public impeachment over a quietly negotiated resignation.[96]

Professor Van Tassel's study is also an example of research that, although conducted for the purposes of the Commission, has implications for policy questions, or other potential uses, unrelated to federal judicial discipline. Thus, her work casts light on the extent to which financial considerations have influenced resignations, both recently and over time.[97]

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[93] *See* Emily F. Van Tassel, *Resignations and Removals: A History of Federal Judicial Service–and Disservice–1789-1992*, 142 U. PA. L. REV. 333 (1993). An earlier version of the author's research paper is published in 2 RESEARCH PAPERS, *supra* note 42, at 1137.

[94] *See* REPORT, *supra* note 2, at 72-79.

[95] *See id.* at 79-81.

[96] *See id.* at 76-77 (sentencing policy), 114-18 (employment benefits).

[97] *See* Van Tassel, *supra* note 93, at 355-64. It is not the only such example, however. Note also the work of Professor Dan McGill, a Commission consultant, whose lucid exposition and analysis of the pension and other (noncompensation) benefits of federal judges may be the first understandable account of such matters ever written. It should be read by judges and policymakers alike. *See* Dan M. McGill, *Disincentives to Resignation of Disciplined Federal Judges in the Benefits Package of the Federal Judiciary*, *in* 2 RESEARCH PAPERS, *supra* note 42, at 1221.

CONCLUSION

Professor Richard Lempert has advanced the hypothesis that both the use of social science research in legal decision-making and the form of such use largely depend on three considerations: (1) the type of user (i.e., legislature, agency, or court); (2) the type of research (i.e., synthesis of extant research or original study); and (3) research-user interaction (i.e., commissioned or freelance research).[98] We believe that the work of the National Commission sheds additional light on the issue explored by Professor Lempert: "[H]ow the influence of social science scholarship on legal activity reflects the characteristics of both the research available for utilization and the legal institutions that are its potential consumers."[99]

In supporting his hypothesis Professor Lempert observed that, whereas legislatures are more likely to commission research syntheses than specific research projects, the opposite is true of administrative agencies.[100] He observed further that "[c]ommissioned research is likely to be used, if it is used at all, only by the agency that commissioned it."[101] Noting both a widely shared opinion that social science research is not used to any appreciable extent by policymakers and substantial evidence to the contrary, Professor Lempert sought a reconciliation in the notion of "use."[102] Thus, those who believe that policymakers do not use social science make demands that are, he argues, rarely realistic or wise, expecting a directly traceable influence of research results on a decision. Such expectations fail to account for "the range of

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[98] *See* Lempert, *supra* note 88, at 167-69.

[99] *Id.* at 168. Lempert continues:

> Understanding how governmental agencies, be they administrative agencies, legislatures or courts, come to use information of all kinds and learning how they use different kinds of information in their decision making tasks, is crucial to understanding how laws are generated and have their effects. Also the suggestion that references to social science may have a legitimating function touches on another core socio-legal concern. Thus, the question of how law and social science research and other social science research is used is itself a law and social science question.

Id. at 195.

[100] *See id.* at 172 ("Legislatures seek syntheses more often than studies, but among the operating agencies the pattern is different.").

[101] *Id.* at 177.

[102] *See id.* at 179-81 ("The most promising way of effecting such a reconciliation focuses on what different people mean by the word 'use.'").

considerations that properly affect governmental decisions"[103] or for the fact that decisions rarely issue from a "single authoritative decision maker."[104] Social science is used, and more often has impact, in "shap[ing] the terms in which policy-making proceeds, often without the decision maker knowing it," performing what Professor Lempert calls "a conceptual or enlightenment"[105] function.

The National Commission did not have the power to make any legally binding decisions, and in that sense it does not fit within Professor Lempert's typology of users. It was, however, a governmental agency directed by statute to make policy recommendations that, from the perspective of Commission members, were the functional equivalent of agency decisions. At least some of these recommendations are likely to generate new law.[106]

To the extent that the Commission is like an administrative agency for this purpose, its extensive use of social science research is not surprising. The Commission was atypical in this respect only because adjudicatory procedure was a major focus of its efforts, and decisions about adjudicatory procedure are not often made with the benefit of social science research.

Particularly in recent years, the lawmaking structure and procedures that result in Federal Rules of Civil Procedure have resembled the administrative process, but there is little evidence of use of social science research, synthetic or original, for either instrumental or enlightenment purposes in that process.[107]

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[103] *Id.* at 182-83.

[104] *Id.* at 183 ("[T]his image of the single authoritative decision maker is almost as misleading as the image of the unambiguous, authoritative study.").

[105] *Id.* at 183 (citations omitted).

[106] Congress's creation of the Commission and its direction that the Commission "investigate and study" federal judicial discipline illustrate another role of social science discussed by Professor Lempert:

> [S]ocial science may serve as a substitute for decision-making in that instead of resolving a difficult problem, a policy-maker may decide simply to study it further–perhaps hoping that pressures to resolve the problem or to resolve it in a particular direction will go away–which sometimes happens.

Lempert, *supra* note 88, at 184; *see also supra* text accompanying notes 22-23.

[107] *See, e.g.*, Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. (forthcoming 1994); Laurens Walker, *A Comprehensive Reform of Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 487 (1993) ("The Civil Rules were amended . . . at least eighteen different times between 1939 and 1991, and my review of that amendment process reveals only one or two instances when the Committee abandoned the rationalistic approach and sought an empirical predicate for decision." (footnote omitted)).

Among the factors affecting use discussed by Professor Lempert, one that may help to explain this phenomenon is "the costs (often in time) of acquiring research."[108] In addition to the structural characteristics he mentions, one might add professional predisposition (or absence thereof) to social science research[109] and the perceived potential impact of uncongenial findings on the discretion, and hence the power, of decision-makers.[110]

What might be thought surprising is the extent to which the Commission made direct use of research findings. In fact, however, the Commission's experience supports Professor Lempert's hypothesis, because the research in question was commissioned, and it was original research conducted with specific information needs in mind, the potential relevance of which had been identified in advance.[111]

In remarking the Commission's direct use of social science research results, we do not mean to undervalue the enlightenment function that consultants' studies served in informing its deliberations. Moreover, it is important to stress that, as we have pointed out, many of those studies contain information that is relevant, both directly and conceptually, to public policy in areas other than federal judicial discipline.[112]

Professor Lempert qualified his observation about the limited use of commissioned research, quoted above,[113] by suggesting "that it is possible for a commissioned study to be so publicized that it diffuses in much the same way as influential freelance research

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[108] Lempert, *supra* note 88, at 185.

[109] Lawyers (including academic lawyers) generally have little training in or exposure to social science research. Still relatively few law schools around the country have any significant number of faculty members with professional credentials in social science disciplines. This situation may change as schools incorporate in the basic curriculum courses or training in law and social science methodology. *Cf.* Stephen B. Burbank, *Introduction: "Plus Ça Change...?"*, 21 U. MICH. J.L. REF. 509, 512-13 (1988) (observing barriers to empirical work by legal academics). For examples of the use of social science research in several other legal contexts, see Ilene Nagel et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353 (1988); Ilene Nagel et al., *Empirical Research and the Shareholder Derivative Suit: Toward a Better-Informed Debate*, LAW & CONTEMP. PROBS., Summer 1985, at 137; S. Jay Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681 (1966).

[110] *See* Burbank, *supra* note 107.

[111] *See* Lempert, *supra* note 88, at 169-70, 177-78, 179-83.

[112] *See supra* text accompanying note 97.

[113] *See supra* text accompanying note 101.

does."[114] The articles in this issue of the *University of Pennsylvania Law Review* represent some of the best work done for the National Commission on Judicial Discipline and Removal. Their publication here, as well as in the official papers of the Commission, gives us hope that they will have the influence they deserve.

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[114] Lempert, *supra* note 88, at 196 n.8.