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Stop Me before I Vote for This Judge Again: Judicial Conduct Organizations, Judicial Accountability, and the Disciplining of Elected Judges

Alex B. Long
Oklahoma City University School of Law

"STOP ME BEFORE I VOTE FOR THIS JUDGE AGAIN": JUDICIAL CONDUCT ORGANIZATIONS, JUDICIAL ACCOUNTABILITY, AND THE DISCIPLINING OF ELECTED JUDGES

Alex B. Long[*]

* Assistant Professor of Law, Oklahoma City University School of Law. B.A., James Madison University; J.D., Marshall-Wythe School of Law, College of William & Mary.

I. INTRODUCTION

A commentator writing on the subject of judicial independence once suggested that "more sweat and ink have been spent on getting rid of judicial elections than on any other single subject in the history of American law."[1] Therefore, it should not have come as a shock to see several justices of the United States Supreme Court add further fuel to the fire in the Court's recent decision in *Republican Party of Minnesota v. White*.[2] In *White*, the Court, in a five-to-four decision, held that the Minnesota Supreme Court's canon of judicial conduct that prohibited candidates for judicial election from announcing their views on disputed legal or political issues violated the First Amendment.[3] Although the narrow issue in the case was the constitutionality of Minnesota's so-called "announce clause," the case raised broader and oft-debated issues concerning the tension between maintaining the impartiality and independence of judges while simultaneously subjecting them to the process of running for office every few years.[4]

Of particular interest is the fact that Justice O'Connor's concurring opinion is almost an exhortation to the states to abandon the practice of electing judges. Although she agreed with the majority's ultimate conclusion that Minnesota's announce clause was not narrowly tailored to serve Minnesota's interest in preserving impartiality or the appearance of impartiality, O'Connor wrote separately "to express [her] concerns about judicial elections generally."[5]

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1 Roy A. Schotland, Comment, LAW & CONTEMP. PROBS., Summer 1998, at 149, 150.

2 536 U.S. 765 (2002).

3 *Id.* at 788.

4 *See generally id.* at 792 (O'Connor, J., concurring) ("If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.").

5 *Id.* at 788 (O'Connor, J., concurring).

O'Connor then proceeded to recite a litany of concerns about the popular election of judges voiced by critics.[6]

O'Connor's opinion prompted Justice Kennedy in his concurrence to state that the Court "should refrain from criticism of the State's choice to use open elections to select those persons most likely to achieve judicial excellence."[7] For Kennedy, the proper way for states to ensure that an individual has the fitness to hold judicial office is not through the restriction of speech at the front end of a judicial officer's career during the campaign. Instead, states can more appropriately ensure fitness for office by regulating speech and conduct *during* the judge's term. According to Kennedy, states may legitimately enshrine definitions of fitness for office in codes of judicial conduct and "adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards."[8] However, "[d]eciding the relevance of candidate speech is the right of the voters, not the State."[9]

There are innumerable law review articles that critique the various methods used by the states in selecting their judges, and the vast majority begin with the assumption that popular election is the least desirable.[10] This is not one of those articles. Instead, this Article starts with the assumption that the popular election of judges is a given in many states and will continue to be so for some time to come. From that uncontroversial premise, it proceeds to explore Justice Kennedy's suggestion as to how such states can best achieve the difficult task of ensuring the existence of an ethical judiciary while simultaneously preserving the public's right to select its own judges.

The discipline of judges from office has always presented difficult challenges. For many citizens, judges are the embodiment of the judicial system. As such, it is natural that judges are held to a higher standard of conduct than other public officials.[11] On a practical level, discipline for judicial misconduct is essential to protect the public from corruption and abuse of power by judges.[12] On a broader level, judicial discipline is necessary to preserve the public's confidence in a competent and ethical judiciary.[13] Thus, judicial discipline serves not only to protect the public by deterring misconduct, it also serves to preserve

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6 *Id.* at 788-91 (O' Connor, J., concurring).

7 *Id.* at 795 (Kennedy, J., concurring).

8 *Id.* at 794 (Kennedy, J, concurring).

9 *Id.* (Kennedy, J., concurring).

10 *See infra* notes 29-37 and accompanying text.

11 *In re* Callanan, 355 N.W.2d 69, 73 (Mich. 1984).

12 *In re* Jenkins, 465 N.W.2d 317, 323 (Mich. 1991).

13 *In re* Loyd, 384 N.W.2d 9, 13 (Mich. 1986).

the public's trust in government by informing the judiciary and the public that judicial misconduct will not be tolerated.[14]

With the inception of judicial conduct organizations ("JCOs") in the 1960s, states devised an alternative to traditional methods of imposing discipline on members of the judiciary for misconduct. Instead of the "all or nothing" solution to the problem of judicial misconduct provided by impeachment and other forms of removal from office, JCOs are empowered to investigate charges of judicial misconduct and to impose or recommend a variety of sanctions, up to and including removal.[15] At the federal level, the Judicial Improvements Acts of 2002 (formerly the Judicial Councils and Judicial Conduct and Disability Act of 1980)[16] provides a similar mechanism for investigating complaints from the public concerning judicial misconduct, while limiting the ability to remove an Article III judge from office.

Although the vast majority of complaints of judicial misconduct are dismissed for lack of evidence of wrongdoing,[17] and most of the sanctions imposed for misconduct are less severe than removal from office,[18] removal through the JCO mechanism remains a viable option in most states. Since 1985, over two hundred state court judges have been removed from office.[19] Much of the focus to date has been on the threat to judicial independence that such sanctions pose.[20] However, in a country where the overwhelming majority of state court judges are selected or retained on the basis of popular election,[21] the removal of a judge from office can pose an equal threat to the underlying goal of popular elections – judicial accountability. Although there are various strains in the concept of judicial accountability, the principal argument advanced by supporters of a popularly elected judiciary is that the public should have the right to choose whom it wishes to serve as a judge.[22] Hence, the removal of an elected

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14 *In re* Gallagher, 951 P.2d 705, 715 (Or. 1998).

15 *See infra* notes 131-54 and accompanying text.

16 28 U.S.C.A. § 351-364 (West Supp. 2003) (repealing Judicial Councils and Judicial Conduct and Disability Act of 1980 § 3, 28 U.S.C. § 372(c) (2000)).

17 Mary Ellen Keith, *Judicial Discipline: Drawing the Line Between Confidentiality and Public Information*, 41 S. TEX. L. REV. 1399, 1404-05 (2000).

18 *See* Maria Dakolias & Kim Thachuk, *Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform*, 18 WIS. INT'L L.J. 353, 386 (2000) (citing the fact that only two hundred state court judges were removed from office between 1985 and 1995).

19 *Id.*

20 *See, e.g.*, Steven Lubet, *Judicial Discipline and Judicial Independence*, LAW & CONTEMP. PROBS., Summer 1998, at 59.

21 Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. TEX. L. REV. 1197, 1203 (2000).

22 *See infra* notes 46-78 and accompanying text.

judge from office potentially threatens to stand in opposition to the will of the people.

JCOs do not necessarily have to stand in opposition to the principle of judicial accountability, however. As this Article attempts to illustrate, in states that employ popular election as the primary means of selecting judges, JCOs and courts can serve as mechanisms for providing greater and more meaningful accountability. As background, Part II describes the conflicting goals of the judiciary: judicial independence and judicial accountability. As the focus of the Article is on elective judiciaries, Part II also attempts to describe the different conceptions of the meaning of "judicial accountability," while identifying the most common arguments in favor of popular election. Part III describes the various methods of imposing judicial discipline, paying particular attention to JCOs at the state level. Part IV discusses how the disciplinary mechanisms of JCOs square with the twin goals of judicial independence and judicial accountability, while paying particular attention to their effect in states that use popular election as the principal means of selecting judges. Specifically, it focuses on the features of removal mechanisms in some elective states that have the capacity to undermine the goal of judicial accountability. Finally, Part V suggests several ways that JCOs and courts in elective states can help produce a more informed electorate, thereby promoting the goal of judicial accountability that popular elections seek to accomplish.

II. THE TWIN GOALS OF JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY

A. *The Meanings of "Judicial Independence" and "Judicial Accountability"*

Judicial independence and judicial accountability are the twin goals of the judiciary. Although the two concepts are not necessarily mutually exclusive, they represent competing visions of a judge's proper role in a democratic government. In many ways, a government's decision as to the method for selecting its judges represents a value judgment as to how best to balance these competing visions.

1. Judicial Independence

Judicial independence is frequently referred to as one of the cornerstones of the legal system.[23] The term is usually described as the idea that judges should decide cases based upon the facts and law of a case and their own conscience, without fear of reprisal from other branches or the public at large.[24]

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[23] *See, e.g.*, JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS 8 (2d ed. 1995).

[24] *See* Lubet, *supra* note 20, at 67.

As the United States Supreme Court stated in *Bradley v. Fisher*[25] more than a century ago, judicial independence is the principle that "a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself."[26]

For champions of judicial independence, any force that threatens to improperly influence a judge's decision-making is a threat to the system of democratic government. As Alexander Hamilton and James Madison envisioned, the judiciary is positioned to serve as a check against the majoritarian forces of the executive and legislative branches.[27] Therefore, as the defenders of minority rights from the tyranny of the majority, it is imperative that judges remain as free as possible from the influences of the majority.[28]

Threats to judicial independence may take many forms. For champions of judicial independence, the most obvious threat comes from giving the electorate a direct voice in the selection of judges. Innumerable critics have decried the damaging influences that the popular election of judges has on judicial independence. The most common criticisms are that campaign contributions corrupt or at least give the appearance of corrupting the judiciary;[29] that judges may be inclined to shy away from making controversial decisions for fear of not being re-elected;[30] that popular elections produce less-qualified

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25 80 U.S. (1 Wall.) 335 (1871).

26 *Id.* at 347.

27 THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that an independent judiciary is "an essential safeguard against the effects of occasional ill humours in the society.").

28 *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694-97 (1995).

29 *See* Republican Party of Minn. v. White, 536 U.S. 765, 789 (2002) (O'Connor, J., concurring); Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, LAW & CONTEMP. PROBS., Summer 1998, at 79, 91 ("Even when the amounts of [campaign contributions from litigants and lawyers] are relatively small, the contributions look a little like bribes or shake-downs related to the outcomes of past or future lawsuits."); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 161-62 (1999) (finding a pattern for jury verdicts against out-of-state corporations to be markedly higher than against in-state corporations and that this pattern is more pronounced in states where judges are chosen through partisan elections than in states where judges are not elected); *Races Divided in Opinion on Courts Survey: Blacks Have Less Confidence in Judiciary Than Whites, Poll Finds. Most Believe Courts Protect Rights But Think Judges May Be Swayed by Politics*, L.A. TIMES, May 15, 1999, at A11 (reporting results from a 1999 survey by the National Center for State Courts finding that 81% of those surveyed believed that judges' decisions are influenced by political considerations and 78% agreed with the statement elected judges "are influenced by having to raise campaign funds.").

30 *See White*, 536 U.S. at 788-89 (O'Connor, J., concurring); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 759-60 (1995) (arguing that judicial independence is threatened when judges must decide capital cases when faced with election campaigns); Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an*

judges;[31] and that the electorate is simply unqualified to assess which candidate would make the better judge.[32]

In short, the champions of judicial independence urge that judges be kept as free as possible from the potentially damaging influence of the majority. This is not to say that supporters of judicial independence believe that there should be *no* controls over the judiciary or that judges should be completely isolated from the public. There are clearly some cases, such as a corrupt or insane judge, that warrant the ability to remove or control judges.[33] However, champions of judicial independence believe that the potential for danger is great when majoritarian forces have the power and ability to influence the decision-making of the countermajoritarian judiciary. As such, there need to be strict limitations on potential threats to the decisional independence of judges.

Those who place a premium on judicial independence typically argue in favor of methods of judicial selection that will, to the extent possible, insulate the judiciary from the prevailing winds of the majority. Appointment by the executive resulting in life tenure during good behavior is perhaps the most obvious example.[34] Recognizing that the electorate is unwilling to completely relinquish control over the judiciary, many states have instead adopted merit selection systems. Merit selection represents something of a compromise between preserving the independence of the judiciary and allowing some form of control by the electorate. The emphasis, however, is on independence.

First proposed by Albert M. Kales of the American Judicature Society in 1913, merit selection involves the selection of a judge by the governor from a list of candidates nominated by a commission consisting of appointed lawyers

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Era of Judicial Politicization, 72 NOTRE DAME L. REV. 1133, 1133-35 (1997) (warning of the threat to judicial independence when judges run in retention campaigns while having to decide cases involving such contentious issues as the death penalty, abortion, and ballot measures).

31 *See* EDWARD LAZARUS, CLOSED CHAMBERS 503 (1998) ("As practicing lawyers know, in aggregate, state court judges are just not as good as federal court judges."); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

32 *See* Daniel Burke, *Code of Judicial Conduct Canon 7b(1)(C): Toward the Proper Regulation of Speech in Judicial Campaigns*, 7 GEO. J. LEGAL ETHICS 181, 205-06 (1993) ("One of the most significant problems with judicial elections is that of an uninformed electorate. A great percentage of the voting public does not know who they vote for, why they vote for them, and what role the different levels of judges play."); Roger Handberg, *Judicial Accountability and Independence: Balancing Incompatibles?*, 49 U. MIAMI L. REV. 127, 132 (1994) ("[W]e, the public, are largely unaware of who our local judges are and how well they are performing their duties.").

33 *See* David P. Currie, *Separating Judicial Power*, LAW & CONTEMP. PROBS., Summer 1998, at 7, 10, 11; *see also* Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service — and Disservice — 1789-1992*, U. PA. L. REV. 333, 334 (1993) ("[J]udicial independence was probably not intended to trump judicial accountability for misbehavior.").

34 *See* Lubet, *supra* note 20, at 59 (arguing that "even the most concerted political or editorial attack on a federal judge cannot truly threaten the judge's independence" given the judge's life tenure during good behavior).

and non-lawyers.[35] Once appointed, the judge stands for continuation in office in a non-competitive retention election in which the judge must receive a certain percentage of votes in order to remain in office.[36] Proponents of merit selection argue that the system effectively preserves judicial independence by removing some of the corrupting influences of political campaigns. Although the voters in merit selection states still theoretically retain control over who sits on the bench, proponents argue that the non-competitive, "straight up or down" nature of retention elections helps divorce judges from the damaging influences of politics.[37] However, the use of such retention elections is seen by champions of judicial independence as harmful to a judge's independence because special interests may mobilize during a retention election to defeat a judge for his or her decisions on the bench.[38]

2. Judicial Accountability

For champions of judicial accountability, politics can never be removed from the selection process, nor should it be. Central to the idea of judicial accountability is the concept of a connection between the populace and the judiciary. Arguments in favor of judicial accountability take two forms, one weak and one strong.

Proponents of the weak conception of judicial accountability use the term to describe the idea that the people must remain connected to the judiciary in the general sense and that judges must remain connected to the rule of law. As the judiciary is a co-equal branch of government, the electorate has a right and an interest in having knowledge of, and access to, the workings of the judiciary. As such, it is essential that judges not become too isolated from the concerns of the people whom the laws were made to protect. As John P. Sahl puts it, "[a] judiciary that is too separate from the democratic order may interfere with democratic commitments to majority rule."[39] Along those same lines, even strong proponents of judicial independence acknowledge the need to maintain some checks on judicial behavior. The continued vitality of the judiciary depends in no small measure on the public's confidence that judges are ethical and

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[35] John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837, 843-44 (1990).

[36] *Id.*

[37] *Id.* at 856-57.

[38] *See generally* Maute, *supra* note 21, at 1218 (citing, as an example, Justice Penny White of Tennessee who was defeated by special interest groups opposed to her vote on a death penalty case).

[39] *See* John P. Sahl, *Secret Discipline in the Federal Courts — Democratic Values and Judicial Integrity at Stake*, 70 NOTRE DAME L. REV. 193, 249 (1994) (internal quotations and citations omitted).

that justice is being dispensed fairly and impartially.[40] Thus, there must be some way of keeping the reins on "runaway judges" or "lawless judges who exceed their authority."[41] Therefore, the weak conception of judicial accountability recognizes that "[j]udicial independence is not an absolute value"[42] and that some connection between the public and the judiciary is necessary to prevent the perception that the judiciary is an untouchable cabal deciding cases on the flip of a coin.[43] To a certain extent, this weak conception of accountability means that, to justify the independence granted to them, judges must demonstrate their accountability to the rule of the law.[44]

In contrast, the strong conception of judicial accountability does not limit itself to mere connectedness in the general sense between the judiciary and the people. Instead, for proponents of the strong conception of judicial accountability, true accountability involves the people having a direct voice in who dispenses justice. Whereas the idea of judicial independence stresses independence from popular repercussions in judicial decision-making, the strong conception of judicial accountability proffered by Philip L. Dubois and others stresses the notion that it is perfectly proper for judges to feel such repercussions for their decisions.[45] And the best means of making judges feel those effects is through popular election.

Arguments in favor of popular election take two main forms. First, supporters of an elective judiciary view the role of judges in a somewhat different fashion than in the traditional sense. The classical conception of a judge's role is that of a non-political actor. Under this conception, judges are "legal technicians," applying the law in a neutral fashion and exercising little discretion.[46] In short, judges are legal experts, and they perform a function entirely different than that of other elected officials. Proponents of the strong view of

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[40] *See* Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) ("The Court's authority — possessed of neither the purse nor the sword — ultimately rests on sustained public confidence in its moral sanction.").

[41] Currie, *supra* note 33, at 11, 14.

[42] Sahl, *supra* note 39, at 230.

[43] *See generally* Van Tassell, *supra* note 33, at 334 ("[W]e value holding judges accountable for behavior deviating from high standards of probity in order to ensure, among other things, public confidence in the judiciary . . . .").

[44] *See* Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625, 644 (1999); *see also* Carrington, *supra* note 29, at 80 ("[C]ourts, to merit their independence, must be faithful to democratic law; they must obey the law as made by legislative bodies or set forth in reasonably explicit provisions of constitutions ratified by a democratic process.").

[45] Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. 31, 38 (1986) (special edition).

[46] PHILIP L. DUBOIS, FROM BALLOT TO BENCH 22-23 (1980) (describing the classical view of the role of a judge).

judicial accountability largely reject this conception of the judicial role. For supporters of the strong conception of accountability, judges are invested with considerable discretion in their decisions and are more active in the policymaking process than proponents of the classical view of judging acknowledge. Like members of the other two branches, judges are, in effect, policymakers and hence political actors.[47] Like other policy makers, judges allocate values in their decisions.[48] Although recognizing a distinction between the role of a judge and the role of legislators and executives, this conception of the judicial role emphasizes that "judges frequently are able to develop common law, to interpret statutes and administrative regulations, and to adjudicate constitutional disputes — all opportunities which allow judges explicitly to veto, legitimize, or reinforce public policies."[49]

Thus, because of their impact on public policy, not only should judges be "connected" to the electorate by being "sensitive and responsive to the political, economic, social, moral and ethical views held by a majority of citizens," they should be held accountable for their responsiveness (or lack thereof) by being made to stand for election.[50] In order to ensure this responsiveness, regular and periodic elections are essential; otherwise, "the public's real ability effectively to revise or reverse disfavored policies by replacing those who promulgated them" would be thwarted.[51]

The second argument in favor of popular election is really a response to a criticism of electing judges. One of the main criticisms of popular election of judges is that elections simply do not provide a mechanism for ensuring the popular control over the judiciary that supporters argue is essential.[52] Critics of popular election charge that voter disinterest, the lack of any real discussion between candidates as to substantive issues, and the fact that incumbents often

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47 *Id.* at 23; David Adamany & Philip Dubois, *Electing State Judges*, 1976 WIS. L. REV. 731, 768.

48 Dubois, *supra* note 45, at 38.

49 DUBOIS, *supra* note 46, at 24. *See generally* Republican Party of Minn. v. White, 536 U.S. 765, 784 (2002) ("Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well.").

50 Dubois, *supra* note 45, at 34; *see also* Adamany & Dubois, *supra* note 47, at 768; Ray M. Harding, *The Case for Partisan Election of Judges*, 55 A.B.A. J. 1162, 1163 (1969) ("Because of the great authority vested in judges it must be accepted as a fact that they formulate public policy. It seems logical, therefore, that judicially determined political policies should and must conform to the will of the people."). *See generally* Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 533-35 (1998) (defining accountability as the requirement that public officials stand periodically for election, but arguing that "accountability is best understood, not as a utilitarian means to achieve maximum satisfaction of popular preferences, but as a structural feature of the constitutional architecture, the goal of which is to protect liberty.").

51 Adamany & Dubois, *supra* note 47, at 768.

52 DUBOIS, *supra* note 46, at 28 (noting this criticism).

run unopposed prevent voters from exercising any control over policy.[53] As such, elections are incapable of producing any real judicial accountability.[54] This is particularly true of non-partisan elections, in which voters are denied even the cue that a party label might provide in making their selections.[55]

Supporters of popular election typically respond in one of two ways. Some, such as Dubois, contend that such arguments are based on incomplete information and/or an outdated and unrealistic view of the purpose of elections. Dubois generally concedes that voters are not competent to choose between judges on the basis of specific qualifications or policy stands.[56] However, the same argument applies with equal force to *any* elected official.[57] Instead, elections are beneficial for other reasons, including the legitimacy they provide.[58] For Dubois, "elections should not be evaluated in terms of their role in permitting the citizenry to directly control public policy . . . ."[59] Instead, voters influence policy in more indirect ways. At the front end, voters attempt to shape policy by selecting candidates whom they believe share their fundamental interests and values.[60] As such, they look for cues that may reflect such beliefs. In the case of partisan elections, a judge's identification of political party is a fairly reliable indicator of a particular belief structure.[61] In the case of non-partisan elections, voters look for other cues, such as endorsements.[62] For Dubois, partisan elections are preferable because "party labels identify, in a general way, the kinds of policies voters can expect from individual judges on the bench wearing each label."[63] Therefore, party labels can provide a means for genuine accountability by providing a mechanism that allows voters to affix responsibility for the general direction of policy once an official is in power.[64] Once a judge is in

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53 *Id.* at 32-33.

54 *Id.*

55 Adamany & Dubois, *supra* note 47, at 775; Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 26 (1995).

56 DUBOIS, *supra* note 46, at 30, 35.

57 Dubois, *supra* note 45, at 41; *see also* DUBOIS, *supra* note 46, at 30 ("Elections should not be evaluated in terms of their role in permitting the citizenry to directly control public policy, something they are neither equipped nor disposed to do.").

58 *See* DUBOIS, *supra* note 46, at 30.

59 *Id.*

60 Dubois, *supra* note 45, at 41.

61 Adamany & Dubois, *supra* note 47, at 776; Dubois, *supra* note 45, at 44.

62 Dubois, *supra* note 45, at 45.

63 DUBOIS, *supra* note 46, at 35.

64 *Id.* at 96.

office, voters can shape policy by rewarding or punishing the judge for the decisions the judge has made.[65]

Other proponents of the strong conception of judicial accountability eschew the reliance on party labels and instead simply argue that the electorate is as qualified to select judges as it is to select members of the executive and legislative branches. For example, on the subject of popular election of judges, a justice of the West Virginia Supreme Court of Appeals has stated:

> The "merit-selection" arguments against popular judicial elections in essence ask: what does a dishwasher know of judging? But one might as well ask, what does a dishwasher know of governmental budgeting, or of foreign policy? Perhaps not much. Yet it is the key to our system that we entrust the selection of key public officials to our citizenry in general, rather than to elites with purportedly superior knowledge and training.[66]

Even though voters may lack knowledge about specific policy or legal issues, some supporters of popular election argue that voters are just as capable of assessing a candidate's record for such qualities as "honesty and integrity, competence and ability, intelligence and industriousness, and most importantly, fairness and judicial temperament" as they are those attributes in legislative and executive candidates.[67]

No matter what their justifications, supporters of the strong conception of judicial accountability are ultimately forced to confront the argument of opponents that popular election produces a less-qualified judiciary.[68] Supporters of popular election typically respond with research suggesting that methods of judicial selection make very little difference in terms of the quality of the bench. Addressing the charge that an elective system is unlikely to attract qualified candidates, some have concluded that there is little evidence to support the argument that qualified lawyers are any more reluctant to run for judgeship in a partisan election than they are to submit their names in appointive systems or to be considered for a merit plan nomination.[69] Indeed, supporters of popular election sometimes point to the fact that several studies have found little, if any, appreciable difference in the quality of the judiciary in elective versus appointive states.[70] Therefore, if popular election of judges produces the same quality

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65 *Id.*

66 Larry V. Starcher, *Choosing West Virginia's Judges*, W. VA. LAW., Oct. 1998, at 20.

67 Tyrie A. Boyer, *Erosion of Democracy*, 49 U. MIAMI L. REV. 139, 140 (1994).

68 *See supra* note 31 and accompanying text.

69 *See* CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE 71 (1997).

70 *See* DUBOIS, *supra* note 46, at 17 ("It is exceedingly difficult if not impossible . . . to verify

in the judiciary as does merit selection or appointment, and if judges are deciding matters of vital public policy from the bench, popular election is entirely defensible in the eyes of supporters. Dubois goes a step further, arguing that even if it is admitted that partisan elections do not produce a judiciary of the same quality as other methods, "it may just be a sacrifice that must be offered in exchange for the achievement of institutional accountability."[71]

For proponents of the strong conception of judicial accountability, objections to popular election of judges also have an element of elitism to them. Unlike with merit selection, where nominating committees "must insist that every candidate be 'squeaky clean' in order to avoid any embarrassment to themselves or to the Governor," with popular elections, voters are able to make a more reasoned selection by looking at the entire record of a judicial candidate.[72] For supporters of popular election, voters are perfectly capable of deciding whether "to forgive small transgressions" or whether a candidate's past ethical breaches disqualify that candidate from judicial office and do not need the paternalism of appointed nominating commissions.[73]

Another objection to merit selection made by supporters of the strong conception is that the method by which the nominating commissions are appointed is inherently political and subject to influence by the legislature, the governor, or the bar.[74] As a result, the nominating process can just as easily be the result of a backroom swap, a kowtowing to the wishes of the governor, or an attempt to foist a particular candidate upon the governor as it is a nomination

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or refute the assertion that the merit plan improves the quality of the bench."); Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228, 235 (1987) ("[W]e find that selection systems have no important impact on selecting judges with different or superior credentials for office . . . ."); Melinda Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 428 (1992) ("Empirical research on the effects of judicial selection processes has been quite consistent in finding that methods of judicial recruitment does not affect either the quality of the bench or judicial outcomes."), *quoted in* SHELDON & MAULE, *supra* note 69, at 73; John M. Scheb, II, *State Appellate Judges' Attitudes Toward Judicial Merit Selection and Retention: Results of a National Survey*, 72 JUDICATURE 170, 170-71 n.8 (1988) (concluding that there is little evidence that selection systems produce judges with superior judicial credentials). *See generally* DANIEL R. PINELLO, THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME-COURT POLICY: INNOVATION, REACTION, AND ATROPHY 135 (1995) (concluding that "the decisions from the legislatively selected benches are laconic, prosaic, and sterile."); Starcher, *supra* note 66, at 18 (arguing in favor of elective systems and citing some of the authorities above).

71 DUBOIS, *supra* note 46, at 249.

72 Boyer, *supra* note 67, at 142.

73 *Id.*

74 Luke Bierman, *Preserving Power in Picking Judges: Merit Selection for the New York Court of Appeals*, 60 ALB. L. REV. 339, 357 (1996) ("The adoption of merit selection for the New York Court of Appeals can be attributed to the political leadership and organized bar seeking to maintain their longstanding influence in selecting judges when confronted with losing that role because of independent popular impulses in an electoral system."); Maute, *supra* note 21, at 1235.

truly based on merit.[75] As the members of nominating commissions are appointed, the accountability of judges to the electorate is further weakened.[76] Furthermore, proponents of the strong view argue that although merit selection pays lip service to the notion of judicial accountability, in reality there is little accountability, as there is little need for a sitting judge to explain and defend his policies since there is no opponent in retention elections.[77]

In short, for advocates of the strong conception of accountability, no matter what method of selection is used, the selection of judges is inherently a political process.[78] As judges are policy makers, the politics of who sits on the bench should be the politics of the electorate rather than a select few.

B. And the Winner Is?

The arguments for and against each selection method have been repeated ad nauseam in academic literature. Supporters of each position are effectively able to undercut the other side's position to the point where one is left with the uneasy conclusion that each selection method is equally flawed or, at best, that one is only slightly less satisfactory than the others.[79] Critics of popular election argue that there is no true accountability in judicial elections because voter turnout is low and the voters who vote do so with little information.[80] Critics of appointive systems or merit selection charge that such systems are elitist and deny voters a say in vitally important matters.[81] Indeed, the issue in

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[75] DUBOIS, *supra* note 46, at 11; Maute, *supra* note 21, at 1235. *See generally* Starcher, *supra* note 66, at 19 ("I disfavor a politics that gives the choice of judges to a select few, behind closed doors.").

[76] *See* Boyer, *supra* note 67, at 144.

[77] Adamany & Dubois, *supra* note 47, at 769; *see also* DUBOIS, *supra* note 46, at 18 ("Without a self-interested challenger to bring to light the professional failings of a sitting judge, re-election is virtually assured.").

[78] *See* LAWRENCE BAUM, AMERICAN COURTS: PROCESS AND POLICY 128-30 (3d ed. 1994) (arguing that merit selection of judges has not removed politics from the process of selecting judges); Dorothy W. Nelson, *Variations on a Theme — Selection and Tenure of Judges*, 36 S. CAL. L. REV. 4, 32-33 (1962) (arguing that the process of allowing a governor to appoint judges is a political process); Webster, *supra* note 55, at 3 n.9 ("The process of picking a person to be a judge is woven into the political fabric and is, by any definition, a political process.") (quoting Daniel J. Meador, *Some Yins and Yangs of Our Judicial System*, 66 A.B.A. J. 122, 122 (1980)).

[79] *See generally* Carrington, *supra* note 29, at 114 ("The best of the various unsatisfactory ways of selecting high court judges is probably that prescribed in the Constitution of the United States."); Maute, *supra* note 21, at 1198-2001 (describing criticisms of the various methods and stating the author's opinion that she is "adamantly ambivalent" about merit selection).

[80] *See, e.g.*, Maute, *supra* note 21, at 1205.

[81] *See* Dubois, *supra* note 45, at 32. *See generally* Carrington, *supra* note 29, at 107 ("[T]he people are rightly reluctant to confer on a professional elite the responsibility for deciding such questions as whether there is a right to live or a right to die.").

Republican Party of Minnesota v. White[82] illustrates the dilemma that each state faces in choosing a particular method of judicial selection: how best to balance the competing goals of judicial independence and judicial accountability.[83]

Thankfully, it is not the purpose of this Article to declare once and for all which selection method is the best and whether states should value judicial independence or accountability more highly. Instead, for background purposes, it seems wise to simply say that on a practical level there is no clear-cut "winner" in the debate over judicial independence versus judicial accountability. On the federal level, the Constitution clearly places the premium on judicial independence. The life tenure granted to Article III judges during good behavior clearly reflects a desire to insulate judges from popular sentiments. The state level is fairly evenly divided. Over thirty states use popular elections to select some or all of their appellate and/or general jurisdiction trial court judges.[84] Of these, somewhere around twenty-one states use partisan or non-partisan elections as the principal means of selecting their judges, a handful allow the governor or legislature to appoint judges, and the rest employ merit selection at least on some levels.[85] According to one estimate, approximately 87% of state court judges are selected or retained on the basis of popular election, but 80% of all judicial offices are initially filled by appointment to complete unexpired terms.[86]

Despite the fairly even split at the state level between appointment and election, there is general agreement among legal academics who have written on the subject of judicial selection that popular election is, on the whole, a poor method of selecting judges. Although writers have not hesitated to note the shortcomings of all of the methods of judicial selection, popular election is typically singled out for particular criticism.[87] In addition to the numerous arguments against popular election mentioned above,[88] the most relevant for purposes of this Article is the argument that popular election produces more ethi-

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82 536 U.S. 765 (2002).

83 *See supra* note 4 and accompanying text.

84 *See White,* 536 U.S. at 792 (O'Connor, J., concurring) (citing AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2002)); Roy A. Schotland, *2002 Judicial Elections and State Court Reforms, in* THE BOOK OF STATES 2003, at 233, 235 (2003).

85 Maute, *supra* note 21, at 1202-10. Given the fact that some states employ different methods for selecting appellate judges and general jurisdiction judges, it is difficult to assign an exact figure on the number of states that primarily employ partisan or non-partisan selection. For purposes of this Article, the following states are classified as states that use elections as the principal means of judicial selection: Alabama, Arkansas, Georgia, Idaho, Illinois, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Texas, Washington, West Virginia, and Wisconsin.

86 *Id.* at 1203.

87 *See* Schotland, *supra* note 1, at 150.

88 *See supra* notes 29-32 and accompanying text.

cally challenged judges than do other selection methods.[89] Although supporters of popular election point to studies purportedly demonstrating no discernible difference in the quality of appointed versus elected judiciaries and argue that competitive elections provide a method for removing "despotic, lazy, incompetent, or dishonest judges,"[90] the majority of academics continue to disagree. Some have argued that the electoral process, on the whole, has not been an effective method of judicial discipline because voters are more likely to vote out judges for unpopular decisions than for ethical infractions.[91] Even when opponents of popular election do not specifically raise ethical concerns, they assert that popular election is not as effective as other forms of judicial selection at screening out unqualified candidates.[92]

Despite the numerous objections to elective judiciaries, it seems safe to conclude that they will remain a reality in many states for the foreseeable future. Convincing voters that the initial selection of judges should be placed in the hands of the governor or an appointed commission instead of the people is a tough sell. In attempting to bring about change to an elective system, supporters of merit selection or appointment are ultimately forced to confront the arguments of those in favor of popular election that the people's right to vote will be taken away and placed in the hands of an elite.[93] As such, many in power are reluctant to lend their names to a cause that faces the struggle of convincing the voters to relinquish their power to select judges. Because elected judges will probably remain a fixture in the states for the foreseeable future, commentators must devote attention to ensuring that elective judiciaries remain at least as ethical on the whole as their appointive counterparts.

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89 *See* MAX BOOT, OUT OF ORDER 196-97 (1998) (detailing examples of judicial misconduct and adding that "[i]t's no coincidence that virtually all the examples of misconduct in this chapter involve states that pick their judges through partisan election."); Maute, *supra* note 21, at 1226 (noting the claim of those in favor of merit selection that "discipline for judicial misconduct almost invariably involves elected, not appointed judges.").

90 Boyer, *supra* note 67, at 143.

91 Randy J. Holland & Cynthia Gray, *Judicial Discipline: Independence with Accountability*, 5 WIDENER L. SYMP. J. 117, 125 (2000); Sambhau N. Sankar, Comment, *Disciplining the Professional Judge*, 88 CAL. L. REV. 1233, 1251 (2000).

92 *See, e.g.*, Maute, *supra* note 21, at 1237 ("[M]erit selection clearly does a better job than elections at eliminating unqualified candidates . . . .").

93 *See* Carrington, *supra* note 29, at 106; *see also* John D. Felice & John C. Kilwein, *Strike One, Strike Two: The History of and Prospect for Judicial Reform in Ohio*, 75 JUDICATURE 193, 199 (1992) (detailing the defeat of Ohio's proposed switch to merit selection in 1987 and attributing much of the defeat to the arguments of opponents that the people's "right to vote" would be taken away through merit selection).

III. JUDICIAL CONDUCT ORGANIZATIONS AND THE DISCIPLINE OF JUDGES

A. *Traditional Methods of Judicial Discipline and Removal*

Historically, institutionalized options for disciplining judges were limited. Judges have always faced various forms of informal pressure on their behavior, such as the appellate process, informal collegial pressures, and the fear of criminal prosecution. However, traditionally there have been only a handful of formal institutions and procedures designed specifically to regulate the conduct of judges.[94] By the second half of the twentieth century, however, federal and state governments began experimenting with ways to provide for greater variety in the discipline of judges.

1. Judicial Discipline at the Federal Level

Reflecting their strong views on the value of judicial independence, the framers of the United States Constitution provided for only one explicit method of disciplining federal judges — impeachment.[95] Impeachment is, by design, a cumbersome and time-consuming process.[96] As such, it has generally only been employed in cases of egregious judicial misconduct. Only thirteen federal judges have been impeached by the House of Representatives in the nation's history, and only seven of those were convicted by the Senate.[97] Five of these convictions came in the twentieth century, and the judges in each instance were charged with offenses that, if committed, would have constituted crimes.[98]

One of the shortcomings of impeachment is that it provides for an "all-or-nothing" solution to the problem of judicial misconduct.[99] In an effort to provide for less severe forms of judicial discipline than removal from office, Congress passed the Judicial Councils and Judicial Conduct and Disability Act of 1980.[100] In 2002, the portion of the Judicial Councils and Judicial Conduct and Disability Act of 1980 dealing with judicial misconduct was repealed and recodified as amended by the Judicial Improvements Act of 2002.[101] The sub-

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94 Sahl, *supra* note 39, at 208.

95 U.S. CONST. art. II, § 4.

96 Warren S. Grimes, *Hundred-Ton-Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 UCLA L. REV. 1209, 1210 (1991).

97 MARY L. VOLCANSEK, JUDICIAL IMPEACHMENT 1 (1993).

98 Grimes, *supra* note 96, at 1214-15.

99 *See* MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 6 cmt. (1994); MARVIN COMISKY & PHILIP C. PATTERSON, THE JUDICIARY — SELECTION, COMPENSATION, ETHICS AND DISCIPLINE 206 (1987).

100 Pub. L. No. 96-458, 94 Stat. 2035 (codified at 28 U.S.C. §§ 331, 332, 372, 604 (2000)).

101 28 U.S.C.A. § 351-364 (West Supp. 2003) (repealing Judicial Councils and Judicial Conduct and Disability Act of 1980 § 3, 28 U.S.C. § 372(c) (2000)).

stance of the two acts is largely the same. Under the Judicial Improvements Act of 2002, any person may file a complaint against an Article III judge who has allegedly engaged in "conduct prejudicial to the effective and expeditious administration of the business of the courts, or . . . [who] is unable to discharge all the duties of the office by reason of physical or mental disability."[102]

Upon receiving a complaint, the chief judge of the judicial circuit reviews the complaint and decides whether to dismiss out of hand or refer the complaint to a judicial committee for investigation.[103] After the committee conducts its investigation, it files a report with the judicial council of the circuit, which may urge voluntary retirement, order that no new cases be assigned to the judge on a temporary basis, or privately or publicly censure the judge if warranted.[104] If the council finds that the judge might have engaged in conduct that would be grounds for impeachment, it can refer the matter to the Judicial Conference of the United States, which has the authority to certify to the House of Representatives that impeachment may be warranted.[105] Notably, however, the Act specifically provides that "in no circumstances may the council order removal from office of any judge appointed to hold office during good behavior."[106]

Despite the legislative history of the Judicial Councils and Judicial Conduct and Disability Act, which indicates that Congress was primarily concerned about improving judicial accountability and supplementing the impeachment process,[107] the history of the judicial councils regarding disciplinary action against judges has largely been one of inaction.[108] One author has concluded that the fact that the vast majority of complaints are dismissed "raises serious questions about judges' willingness to judge other judges."[109] Others have attacked the highly restrictive confidentiality requirements of the Act.[110] John P. Sahl argues that the Act's "broad shroud of secrecy," ostensibly designed to preserve judicial independence by shielding judges from public complaints that may damage their reputation, promotes judicial independence to the exclusion of promoting judicial accountability.[111] Sahl argues that in their pre-

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102 *Id.* § 351(a).

103 *Id.* § 353(a)(1).

104 *Id.* §§ 353(c), 354(a)(2).

105 *Id.* §§ 354(b)(2), 355(b)(1).

106 *Id.* § 354(a)(3)(A).

107 Sahl, *supra* note 39, at 211.

108 Carol T. Rieger, *The Judicial Councils Reform and Judicial Conduct and Disability Act: Will Judges Judge Judges*, 37 EMORY L.J. 45, 93-94 (1988).

109 *Id.* at 94.

110 *See* Sahl, *supra* note 39, at 246.

111 *Id.*

sent form, the confidentiality requirements damage the public's perception of judicial self-regulation and further isolate the judiciary from the public.[112]

2. Judicial Discipline at the State Level

Virtually all states provide for the removal of judges through the impeachment process.[113] The same problems that plague impeachment at the federal level apply to the states as well. The time-consuming nature of the process and the possibility of political intrigue make impeachment appropriate only in the most egregious cases of judicial misconduct.[114] Indeed, the drawbacks of impeachment may be even more pronounced at the state level than at the federal level. Most state legislatures convene for only several months out of the year. The impeachment process, including the trial phase, effectively forces a legislature to shut down all other business and devote all of its time and energy to the matter of impeachment.[115] Already pressed for time, state legislatures are forced to cease their policymaking duties and invest considerable time in impeachment proceedings, all for the task of deciding whether to remove one judge from office.

In addition, in some states, grounds for impeachment are limited to conduct connoting illegality.[116] Thus, the impeachment process has been criticized for not reaching conduct that is legal but is "nevertheless indicative of unfitness to hold judicial office."[117] Not surprisingly, like at the federal level, impeachment at the state level is a relatively rare occurrence.[118]

Although at various times throughout the nation's development the individual states have had disciplinary options in addition to impeachment, these other options contained many of the same shortcomings. Address is a method of removal by which a state legislature makes a formal request to the governor that a judge be removed from office even though the judge's conduct may not rise to the level of an impeachable offense.[119] Although address provides for no formal

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112 *Id.* at 246-49.

113 Holland & Gray, *supra* note 91, at 121.

114 SHAMAN ET AL., *supra* note 23, at 26.

115 *See* COMISKY & PATTERSON, *supra* note 99, at 206. *See generally* VOLCANSEK, *supra* note 97, at 4 (noting that impeachment of judges in the states "has been a failure 'in all but the most egregious cases,' largely because it encroaches on the legislative agenda."); Grimes, *supra* note 96, at 1225-27 (discussing the time-consuming and expensive nature of impeachment trials at the federal level).

116 COMISKY & PATTERSON, *supra* note 99, at 206.

117 *Id.*

118 *See In re* Disciplinary Proceedings Against Turco, 970 P.2d 731, 737 (Wash. 1999) ("No Washington judge has ever been impeached or removed by the legislature.").

119 Edward J. Schoenbaum, *A Historical Look at Judicial Discipline*, 54 CHI-KENT L. REV. 1, 4 (1977).

methods of investigating misconduct, a judge is entitled to notice and has a right to be heard.[120] Address was authorized as a means of removing judges in twenty-eight states by 1922,[121] but by 1982, the number had dropped to nineteen.[122] Today, the process of address is rarely utilized where it still exists.[123] Historically, voters could also remove judges through the process of recall. Through this process, the submission of a petition signed by a required percentage of registered voters triggers a recall vote.[124] Historically, recall was a cumbersome procedure that was only used in the most flagrant cases of judicial misconduct.[125] In addition, recall has been criticized as a means of discipline because, although voters are able to express their desires as to a judge's continued tenure in office, there is no hearing and formal adjudication of charges of misconduct.[126] In short, the procedures of address and recall contain many of the same disadvantages as impeachment and have been used sparingly.[127] Like impeachment, where the procedures of address and recall still exist, they exist mainly as a theoretical basis for the removal of state judges (California's recent experiment in the gubernatorial context notwithstanding).

Another method of discipline is the election process itself. Although typically thought of as a way for voters to express their displeasure with the policies promulgated by an elected official, elections can also serve as a way for voters to express their disapproval of an official's behavior in office. Thus, voting can be a form of discipline in its own right.[128] Several factors make elections inefficient as the primary means of discipline. First, if the opponents and even some supporters of popular election are correct, voters do not routinely base their decisions in judicial elections on specific pieces of information.[129] As such, some have suggested that the disciplinary function of elections is limited because judges are rarely voted out of office for ethical infractions.[130] Another factor undercutting the ability of popular election to serve as an effective disciplinary mechanism is the fact that most elections only take place once every

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120 *Id.*

121 *Id.*

122 VOLCANSEK, *supra* note 97, at 4.

123 Holland & Gray, *supra* note 91, at 122; Schoenbaum, *supra* note 119, at 4-5.

124 Schoenbaum, *supra* note 119, at 8.

125 *Id.*

126 COMISKY & PATTERSON, *supra* note 99, at 209.

127 SHAMAN ET AL., *supra* note 23, at 6.

128 *See In re* Disciplinary Proceedings Against Turco, 970 P.2d 731, 740 (Wash. 1999) ("The ultimate discipline, if any, for [off the bench misconduct] would emerge at the next election.").

129 *See supra* note 32 and accompanying text.

130 *See, e.g.*, COMISKY & PATTERSON, *supra* note 99, at 151; Holland & Gray, *supra* note 91, at 125; Sankar, *supra* note 91, at 1251.

few years. Although voters may theoretically be able to remove a corrupt or unethical judge when the judge stands for re-election, citizens are at the mercy of a corrupt or lawless judge up until the time the judge is forced to stand for re-election. Therefore, elections cannot serve as a way of disciplining lawless judges in the interim period between election and re-election.

B. Judicial Conduct Organizations

Recognizing the drawbacks of these disciplinary methods, several states began looking for alternatives that would allow them to discipline judges without necessarily having to remove them from office. In 1960, California created the first permanent state commission charged with regulating judicial conduct.[131] By 1981, all fifty states and the District of Columbia had such organizations in place.[132] These state judicial conduct organizations are charged with investigating, filing, and prosecuting complaints about judicial misconduct and, in the majority of states, recommending sanctions to the state's highest court or imposing such sanctions themselves.[133] Such organizations typically consist of a mixture of judges, lawyers, and non-lawyers.[134] In most states, the judicial members are chosen by other members of the judiciary, the non-lawyers are chosen by the governor, and the lawyers are chosen by a variety of selectors, including the governor, the legislature, and the judiciary.[135]

One feature that distinguishes judicial conduct organizations from other methods of judicial discipline is the recognition that not every instance of judicial misconduct merits removal from office. The primary function of a state JCO is to enforce that state's code of judicial conduct.[136] The ABA's Code of Judicial Conduct recognizes a wide variety of judicial misbehavior. As such, states employ a plethora of phrases to describe the possible bases for action by JCOs. Some of the most common grounds are "willful misconduct in office," "willful and persistent failure to perform judicial duties," "conduct prejudicial to the administration of justice that brings the judicial office into disrepute," and "violation of the applicable code of judicial conduct" or "canons of judicial conduct."[137] Canon 2A of the ABA's Code of Judicial Conduct is sweeping in its

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131 SHAMAN ET AL., *supra* note 23, at 7.

132 *Id.*

133 Jeffrey M. Shaman, *State Judicial Conduct Organizations*, 76 KY. L.J. 811, 811-12 (1988).

134 Holland & Gray, *supra* note 91, at 127.

135 COMISKY & PATTERSON, *supra* note 99, at 155.

136 Holland & Gray, *supra* note 91, at 125.

137 COMISKY & PATTERSON, *supra* note 99, at 165. Other grounds include "habitual intemperance," "conviction of a felony" or other crime that calls into question a judge's fitness for judicial office, "disability that seriously interferes with" the performance of duties, incompetence, and corruption in office. *Id.* at 165-74; Holland & Gray, *supra* note 91, at 125.

scope: "A judge shall respect and comply with the law and shall act *at all times* in a manner that promotes confidence in the integrity and impartiality of the judiciary."[138] Therefore, JCOs are empowered to discipline judges for misbehavior on the bench and related to the judge's duties, and for misbehavior off the bench unrelated to the judge's duties.

As judicial misconduct may take many forms, not all of which necessitate removal from office, most JCOs have a variety of sanctions at their disposal short of removal. Depending on the individual state, most state JCOs are empowered to impose or recommend a variety of sanctions, including private admonition, reprimand, or censure; public reprimand or censure; suspension; the assessment of costs or fines; and the imposition of limitations or conditions upon the judicial office.[139] Nearly all JCOs are also empowered to remove a judge from office or recommend removal.[140]

The jurisdiction of state judicial conduct organizations extends to judges of general trial courts, intermediate and appellate courts, and state supreme courts.[141] All state JCOs are authorized to investigate complaints concerning judicial misconduct and most possess extensive investigatory power, including broad subpoena power.[142] If the investigation reveals some basis for believing misconduct has occurred (typically upon a finding of probable cause),[143] the panel may file and prosecute formal charges.[144]

The majority of states employ a "one-tier" system, in which the JCO holds hearings, makes findings of fact, and either imposes sanctions or recommends sanctions to the state's highest court.[145] In most one-tier states, the state's highest court is responsible for the final disposition of cases and has *de novo* review powers.[146] In multi-tier states, investigative and adjudicative functions of the JCO are bifurcated.[147] After a panel investigates a complaint and files and prosecutes formal changes, a special select panel or special court adjudicates the formal charges.[148] In some of the multi-tier states, the sanction deci-

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138 MODEL CODE OF JUDICIAL CONDUCT Canon 2A (1990) (emphasis added).

139 Holland & Gray, *supra* note 91, at 132; Shaman, *supra* note 133, at 814.

140 Holland & Gray, *supra* note 91, at 132; Shaman, *supra* note 133, at 814.

141 Shaman, *supra* note 133, at 814.

142 *Id.* at 814-15.

143 *See, e.g.*, WIS. STAT. ANN. § 757.85(5) (West 2002).

144 *Id.*

145 Shaman, *supra* note 133, at 811-12.

146 *Id.*

147 Two-tier states include Alabama, Delaware, Illinois, Ohio, Oklahoma, Pennsylvania, West Virginia, and Wisconsin. Holland & Gray, *supra* note 91, at 128 n.80.

148 Shaman, *supra* note 133, at 812.

sion of the select panel or special court is reviewable by the state's highest court, whereas in others, the decision is not subject to review.[149]

There is considerable variation among the states as to the level of confidentiality involved in JCO proceedings. Investigatory proceedings are confidential in all states.[150] However, in a majority of states, complaints concerning judicial misconduct become public upon a finding by the JCO that there is indicia of misconduct warranting a formal hearing.[151] Generally, at that point, the public may obtain access to at least some of the records associated with the complaint and may attend the formal hearing.[152] In a slightly smaller number of states, proceedings become public after the conclusion of a formal hearing and after the JCO has recommended disciplinary action.[153] In a few states, confidentiality provisions remain in place until after sanctions are actually imposed.[154]

IV. HOW JUDICIAL CONDUCT ORGANIZATIONS SQUARE WITH NOTIONS OF JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY

The creation of the Judicial Councils and Judicial Conduct and Disability Act at the federal level and JCOs at the state level was seen as an attempt to promote greater judicial accountability.[155] Not surprisingly, there has been concern in some quarters that their existence can improperly threaten judicial independence.[156] In states that select their judges through popular election, JCOs pose an additional theoretical threat: a threat to judicial accountability. Paradoxically, by attempting to improve accountability by creating entities with the power to discipline judges by removing them from office, states have empowered JCOs to potentially undo the will of the electorate.

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149 COMISKY & PATTERSON, *supra* note 99, at 153.

150 Holland & Gray, *supra* note 91, at 129.

151 Keith, *supra* note 17, at 1404; Bryan E. Keyt, *Reconciling the Need for Confidentiality in Judicial Disciplinary Proceedings with the First Amendment*, 7 GEO. J. LEGAL ETHICS 959, 961 (1994).

152 *See, e.g.*, N.C. GEN. STAT. § 7A-377(a) (2002) (providing that notice, complaint, answer, and other pleadings are not confidential upon a finding that formal proceedings should be instituted and that formal hearings are public).

153 Keyt, *supra* note 151, at 962.

154 *Id.*

155 *See* Lubet, *supra* note 20, at 60; *supra* note 107 and accompanying text.

156 *See* Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 700 (1980).

A. *Effect of JCOs in Appointive and Merit Selection States*

At the federal level and in states that employ an appointive or merit selection system to select their judges, the goal of judicial independence takes precedent over the goal of judicial accountability. Although appointed judges certainly have fewer ties to the public than do judges in merit selection states, because retention elections are non-competitive and incumbent judges are rarely defeated (at least where the judge has not incurred the wrath of a particular interest group), accountability to the electorate is still fairly low in merit selection states.[157] Therefore, the creation of JCOs can be seen as a way of increasing accountability while attempting to preserve a judge's independence.

1. The Effect on Judicial Independence

At the federal level, the judicial disciplinary mechanism poses only a limited direct threat to judicial independence because Article III judges enjoy life tenure and may only be removed through the impeachment process.[158] Admittedly, federal judges may still face the specter of public censure or temporary suspension, and these forms of discipline have the potential to impact a judge's decisional independence much in the same way as public calls for impeachment or resignation by elected officials.[159] However, although federal judges who hold office during good behavior may suffer the embarrassment of a public censure at the hands of a judicial council, unless they have committed an impeachable offense, they can rest assured that they will remain in office if they so choose. As such, the threat to judicial independence posed by the Act is somewhat limited.

At the state level, however, most JCOs have the power to remove a judge from office or recommend removal in addition to their power to publicly censure a judge (or recommend such action) or to take or recommend similar types of discipline. Moreover, most state judges do not enjoy life tenure and are subject to reappointment or retention elections after a number of years. Thus, the removal power enjoyed by JCOs could potentially serve as a greater threat to judicial independence.

In practice, however, the types of actions for which judges are normally disciplined rarely pose much of a threat to judicial independence. For one, judges are usually only removed after repeated instances of misconduct on the

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157 *See* DUBOIS, *supra* note 46, at 18.

158 *See* Lubet, *supra* note 20, at 59.

159 *See generally* Wendell L. Griffen, *Judicial Accountability and Discipline*, LAW & CONTEMP. PROBS., Summer 1998, at 75, 76 (discussing the case of Judge Harold Baer, who, after a controversial decision, faced calls for impeachment by Senator Robert Dole and a suggestion from the Clinton White House that Baer resign).

bench or repeated and flagrant misbehavior off the bench.[160] More importantly, much of the JCO caseloads seem to involve bad *behavior* on the part of judges, rather than bad *decision-making*. The essence of judicial independence is that a judge should be free to decide a case based on the judge's view of the law and the judge's conscience.[161] A quick reading of state appellate court decisions concerning disciplinary investigations by JCOs suggests that most of the bases for disciplinary actions taken by JCOs simply do not touch on this concern. As Steven Lubet has pointed out, there is little concern that JCOs pose any threat to judicial independence when they take disciplinary measures against judges for

> using his office to coerce the payment of a debt to his daughter, fixing traffic tickets (or attempting to), or attempting to recruit litigants as Amway sales representatives to the judge's own financial benefit. Nor would fairness and impartiality be threatened when a judge faces discipline for vulgar sexual harassment (or worse), public intoxication, or interference with law enforcement.[162]

The distinction between disciplining a judge for misconduct and disciplining a judge for faulty decision-making is crucial. For example, abusive behavior by a judge toward attorneys,[163] civil litigants,[164] criminal defendants,[165] witnesses,[166] or jurors[167] may involve a judge's decision as to how to run his or her courtroom, but it has little relation to the judge's function of applying the law to the facts of a case that the goal of judicial independence seeks to protect.

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160 MARY L. VOLCANSEK ET AL., JUDICIAL MISCONDUCT 109 (1996) [hereinafter VOLCANSEK, JUDICIAL MISCONDUCT].

161 *See supra* note 24 and accompanying text.

162 Lubet, *supra* note 20, at 62.

163 *See, e.g., In re* Bennett, 267 N.W.2d 914 (Mich. 1978) (suspending judge for one year for regularly employing obscenities in dealing with attorneys, including calling one attorney a "dumb ass" in front of the attorney's client).

164 *See, e.g., In re* Stevens, 645 P.2d 99 (Cal. 1982) (ordering public censure of judge who made racist remarks about African-American litigants in the presence of litigants).

165 *See, e.g.*, McCartney v. Comm'n on Judicial Qualifications, 526 P.2d 268 (Cal. 1974) (ordering public censure of judge who, *inter alia*, called a criminal defendant "a liar, a cheat, and a deadbeat.").

166 *See, e.g., In re* Judicial Disciplinary Proceedings Against Gorenstein, 434 N.W.2d 603 (Wis. 1989) (suspending judge for two years for, *inter alia*, impugning the competence of an expert witness in court).

167 *See, e.g.*, Gonzalez v. Comm'n on Judicial Qualifications, 657 P.2d 372 (Cal. 1983) (removing judge for conduct toward veniremen, including asking an African-American venireman who was a grocery store clerk, "What is the price of watermelon per pound?").

Occasionally, judges are disciplined for actions that are tangentially related to decision-making; however, even here, discipline is usually only imposed when a judge has abandoned or overstepped the judicial role. For example, failing to decide motions at all involves an abdication of the judge's decision-making function.[168] Similarly, engaging in *ex parte* communications with one of the litigants may aid a judge in the decision-making process, but such action can result in, or at the very least create the appearance of, the failure to provide a forum free from bias.[169]

The most direct threat that JCOs pose to judicial independence is when they take disciplinary action against judges based on the actual content of judges' decisions.[170] Even here, the record produces mixed results as to the threat posed by JCOs. There is almost universal agreement that legal error should rarely serve as the basis for disciplinary proceedings.[171] Isolated legal errors can be corrected on appeal or through mandamus. Indeed, several states specifically provide that the JCO may not take action against a judge for making findings of fact, reaching a legal conclusion, or applying the law as the judge understands it in the absence of fraud, corrupt motive, or bad faith.[172] Instead, judges have generally faced sanctions for legal errors in only three situations.[173] First, some judges have been removed or otherwise disciplined for committing egregious legal error, such as the routine failure to advise defendants of their constitutional right to an attorney or pronouncing defendants guilty without informing them of the charges they face.[174] Second, judges have been removed or otherwise disciplined for the commission of a continuing pattern of legal error.[175] Finally, judges have been removed or otherwise disciplined for the commission of legal error in bad faith, i.e., with a specific intent to use the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of judicial authority.[176]

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168 *See, e.g*, Miss. Comm'n on Judicial Performance v. Spencer, 725 So. 2d 171 (Miss. 1998) (removing judge for, *inter alia*, failing to dispose of 334 pending cases at the time complaint was filed).

169 *See, e.g.*, Judicial Inquiry & Review Bd. v. Fink, 532 A.2d 358 (Pa. 1987) (removing judge from office where judge contacted defendant, without notice to the plaintiff, and suggested a defense motion, which the judge subsequently granted at a hearing).

170 *See* Lubet, *supra* note 20, at 65.

171 *See, e.g., In re* Barr, 13 S.W.2d 525, 544 (Tex. 1998).

172 *See, e.g.*, ARK. R.P. JUD. DISCIP. & DISABILITY COMM'N 9B.

173 *See In re Barr*, 13 S.W.2d at 544.

174 *See, e.g.*, McGee v. State Comm'n on Judicial Conduct, 452 N.E.2d 1258 (N.Y. 1983).

175 *See, e.g.*, Miss. Comm'n on Judicial Performance v. Byers, 757 So. 2d 961 (Miss. 2000) (publicly reprimanding judge for a series of legal errors and abuses of power).

176 *See In re Barr*, 13 S.W.2d at 545.

In each of these instances, the need for judicial accountability to the law overrides the potential abstract concerns over the damage to judicial independence that the imposition of sanctions might cause.[177] As the Supreme Court explained in *Bradley v. Fisher*[178] over a century ago, ultimately the purpose of preserving judicial independence is not to protect judges, but to protect the public's interest in having a judiciary capable of deciding matters without fear of consequences.[179] A judge who routinely deprives defendants of important constitutional rights or intentionally ignores clear and established precedent undermines the core value of judicial independence.[180] Similarly, a pattern of consistent legal errors suggests that a judge lacks competence and cannot be trusted to exercise the functions of the judicial office for the benefit of the public.[181] Sanctions in such cases serve as a way of holding the judge accountable to the rule of law, and if the judge cannot live up to that standard, the judge does not merit his or her independence.[182]

2. The Effect on Judicial Accountability

In appointive and merit selection states, JCOs do little to undermine the goal of judicial accountability. Indeed, as mentioned, one of the reasons behind passage of the Judicial Councils and Judicial Conduct and Disability Act and the creation of JCOs in the first place was to add a measure of accountability to systems that placed a premium on judicial independence.[183] In theory, JCOs can only improve judicial accountability in appointive and merit selection states.

In the case of disciplinary measures short of removal, JCOs help improve judicial accountability in at least two ways. First, in appointive states,

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177 *See generally id.* at 553 (stating that lawless judicial conduct is "as threatening to the concept of government as is the loss of judicial independence.").

178 80 U.S. (1 Wall.) 335 (1871).

179 *Id.* at 349 n.16.

180 *See generally In re* Hammermaster, 985 P.2d 924, 936 (Wash. 1999) ("Judicial independence does not equate to unbridled discretion to . . . disregard the requirements of the law, or to ignore the constitutional rights of defendants.").

181 Lubet, *supra* note 20, at 72; *see also In re* Conduct of Schenck, 870 P.2d 185, 209 (Or. 1994) ("Removal from office is appropriate where . . . a series of misconduct calls into question the judge's competence and integrity.").

182 There are, of course, more complicated cases, such as the case of Justice J. Anthony Kline of the California Appellate Court, who dissented in a case on the ground that he was unwilling as a matter of conscience to apply controlling precedent. *See* Lubet, *supra* note 20, at 65-67; Sankar, *supra* note 91, at 1233-36. In response, the California Commission on Judicial Performance (CCJP) charged Kline with willful misconduct in office. Eventually, the CCJP withdrew its charge. Sankar, *supra* note 91, at 1236. Actions such as Justice Kline's seem to embody the very principles underlying the importance of judicial independence on the one hand, while, on the other, could be seen as a refusal to perform the role of a judge.

183 *See supra* note 107 and accompanying text.

public access to the disciplinary process of JCOs is a way of ensuring greater accountability in the sense of preventing the courts from appearing as an unregulated oligarchy. Although citizens are incapable of using the information gleaned from the disciplinary process to directly effectuate the removal of a sitting judge, the instigation of complaints by members of the public and participation in the actual disciplinary process by non-lawyers help to keep the public connected to their judiciary. The availability of information concerning the disciplinary process can be a way of improving the public's perception of judicial self-regulation and increasing the trust the public places in the judiciary.[184] Second, in merit selection states, citizens can actually take the information made available by JCOs concerning a disciplinary matter and use it to effectuate change.[185] In theory, the electorate can factor the disciplinary measures taken by a JCO against a particular judge into their decision as to whether the judge should be retained. Thus, supporters of both the weak and strong views of judicial accountability should have little problem with disciplinary actions short of removal taken by JCOs in appointive or merit selection states.

Similarly, supporters of both views of judicial accountability have little to complain about regarding the removal of judges by JCOs in appointive or merit selection states. As mentioned, for proponents of the weak view of judicial accountability, accountability is, in some respects, simply a concomitant of judicial independence.[186] If a judge ceases to perform his or her function and behaves in a lawless or unethical manner, the public trust has been violated and some measure of accountability is necessary. Thus, removal of a judge for violating that trust squares nicely with the weak conception of judicial accountability. For proponents of the strong view of accountability, the removal of judges for misconduct also should merit no strong objections because the public's role in selecting judges has already been eliminated or weakened in appointive and merit selection states, so any steps toward connecting the public with the judiciary should meet with little disapproval.

B. Effect of JCOs in Elective States

In states that employ partisan or non-partisan elections to select their judges, the goal of judicial accountability takes precedent over the goal of judicial independence. In cases of lesser forms of discipline, such as public censure or reprimand, JCOs do not necessarily undermine the goal of judicial accountability. However, when JCOs remove a judge from office or recommend removal, to some extent they work at cross purposes with popular elections in promoting accountability.

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184 *See* Sahl, *supra* note 39, at 248.

185 *See infra* notes 238-40 and accompanying text.

186 *See supra* notes 42-44 and accompanying text.

1. The Effect on Judicial Independence

For some of the same reasons described previously, JCOs pose minimal danger to the goal of judicial independence in elective states. For one, as mentioned, most of the disciplinary matters addressed by JCOs do not implicate judicial functions associated with judicial independence.[187] For another, in elective states, the decision has already been made that the goal of judicial independence should be somewhat subordinate to the goal of judicial accountability. As such, popular elections pose a far greater threat to decisional independence than does the threat of discipline imposed by JCOs.

2. The Effect on Judicial Accountability

a. Potentially Damaging Effects

The effect of JCOs on the goal of accountability is somewhat more complicated. The power of most JCOs to remove judges from office or to recommend such action to the state's highest court could be expected to offend proponents of the strong view of judicial accountability in several ways. First, in all states with elective judiciaries, at least some members of JCOs are appointed by the governor, the legislature, the state's highest court, or some combination thereof.[188] Thus, as is the case with nominating commissions in states that employ merit selection to select their judges, the removal of judges in elective states is set into motion by individuals who are unaccountable to the electorate.

In some elective states, unelected JCO members actually impose sanctions, including removal from office.[189] Moreover, in a few elective states, a JCO's imposition of the sanction of removal cannot be rejected. For example, in Alabama, the Supreme Court can review the record of the proceedings of the Court of the Judiciary, but if the record shows by clear and convincing evidence that the charge or charges have been committed, the Supreme Court lacks the authority to reduce or reject the sanction imposed by the Court of the Judici-

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187 *See supra* notes 161-76 and accompanying text.

188 *See* ALA. CONST. amend. 328; ARK. CONST. amend. 66; GA. CONST. art. VI, § 7; ILL. CONST. art. IV, § 15; KY. CONST. § 121; LA. CONST. art. V, § 25, MICH. CONST. art. VI, § 30; MISS. CONST., art. VI, § 177A; MONT. CONST. art. VII, § 11; NEV. CONST. art. VI, § 21; N.Y. CONST. art. VI, § 22; TEX. CONST. art. 5, § 1-A; IDAHO CODE § 1-2101(1) (Lexis 2002); MINN. STAT. ANN. § 490.15 (West 2002); N.C. GEN. STAT. § 7A-375 (2002); N.D. CENT. CODE § 27-23-02 (2002); PA. CONS. STAT. ANN. § 2102(a) (West 2002); WASH. REV. CODE ANN. § 2.64.020 (West 2002); WIS. STAT. ANN. § 757.83(1) (West 2002); OHIO GOV'T JUD. R. III; W. VA. R. JUD. DISCIP. P. 1.3.

189 *See* ALA. CONST. amend. 581, § 6.18(a); ILL. CONST. art. IV, § 15(e); N.Y. CONST. art. VI, § 22; PA. CONST. art. V, § 18(b)(5); NEV. REV. STAT ANN. § 1.4653 (Michie 2002); KY. SUP. CT. R. 4.020(1)(b).

ary.[190] In Illinois, unelected members of the Illinois Courts Commission decide the appropriate sanction to apply to elected judges, including up to removal, and their decision is unreviewable.[191] Thus, in these states, the same types of arguments against entrusting the selection of judges to a group of unelected "elites"[192] can just as easily be leveled against entrusting the removal of elected judges to unelected JCOs.

This concern over entrusting the power to initiate removal proceedings to non-elected officials dovetails nicely with the main concern over allowing JCOs to remove or recommend removal of judges: the potential disfranchisement of voters. In elective states, voters have been given the right to decide whom they wish to serve as judges. When JCOs and state supreme courts remove elected judges from office, they are undoing that choice. In the words of one state supreme court judge, "[i]t is not a light thing for this Court to assume the power to say to [the voters], 'You have lawfully elected this judge, but we have determined that he cannot serve you.'"[193] The removal mechanisms of JCOs may improve accountability in the sense of providing a check on the power of the judiciary, but they may threaten accountability in the sense of allowing the voters to hold judges accountable for their behavior.

There are clearly cases in which a judge's misbehavior is so severe that it actually damages the judicial system and unquestionably warrants removal. Likewise, there are clearly cases where the majority of voters, if they were aware of the charged misconduct, would almost certainly be in favor of removing a sitting judge. However, the difficulty arises in cases where the damage to the system or the will of the voters is not quite so clear. In some cases, reasonable minds could differ as to whether a judge's offense was so egregious as to undermine the judicial system. Similarly, a majority of voters might not view certain types of judicial misconduct as justifying removal and would be willing to overlook such misconduct in the next election, whereas lawyers and judges might conclude that the same behavior warrants removal.[194] If a JCO and state supreme court are not on the same page with the voting public in these kinds of instances, the removal mechanism of JCOs carries with it the potential to undermine the public's right to choose.

In this respect, JCOs and reviewing courts in elective states face a quandary similar to that of legislators during the impeachment process. Regardless of whether it is a legislature removing a judge through the impeachment

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190 Boggan v. Judicial Inquiry Comm'n of State, 759 So. 2d 550, 555 (Ala. 1999).

191 ILL. CONST. art. VI, § 15; Pincham v. Ill. Judicial Inquiry Bd., 681 F. Supp. 1309, 1320 (N.D. Ill. 1988), *aff'd*, 872 F.2d 1341 (7th Cir. 1989).

192 *See supra* notes 72-76 and accompanying text.

193 *In re* Hardy, 240 S.E.2d 367, 375 (N.C. 1978) (Lake, J., concurring in part and dissenting in part).

194 *See generally* Boyer, *supra* note 67, at 142 (stating that the electorate is willing "to forgive small transgressions").

process or a JCO or supreme court removing a judge through the disciplinary process, removal raises difficult questions as to when it is appropriate to undo the results of a democratic election. During the Clinton impeachment, for example, the White House and numerous academics argued that impeachment would allow the legislature to nullify the will of the majority.[195] Although some have questioned this view of impeachment,[196] the removal of an elected official raises serious concerns regarding the public's will, particularly in instances like the Clinton impeachment where a majority of Americans apparently believed that President Clinton's conduct did not merit removal.[197] In the case of elected judges, the concerns may be even more pronounced as, unlike presidents, judges are elected by a direct vote of the people.

Moreover, the differences in the roles played by judges and officers of the other two branches makes the removal of elected judges an even thornier issue. There is a general consensus that in order to impeach an elected official, the charged conduct must somehow seriously undermine the government and compromise the accused's ability to govern.[198] In the classic case, the charged misconduct involves an abuse of the public trust made possible by the powers of office.[199] In other words, there is some nexus between the official's misconduct and his official duties.[200] As the divergence of opinion as to whether President Clinton had committed such an offense illustrates, this is certainly an imprecise standard for an officer of the executive branch.[201] However, the job require-

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195 *See* Jonathan Turley, *Senate Trials and Functional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1, 6 n.13 (1999).

196 *See id.* at 7.

197 Kathleen M. Sullivan, *Madison Got It Backward*, N.Y. TIMES, Feb. 16, 1999, at A2.

198 *See* Susan Low Bloch, *A Report Card on the Impeachment: Judging the Institutions that Judged President Clinton*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 143, 149; *id.* at 149 n.34 (citing Laurence H. Tribe, *Rule of Law v. Rule of Life*, BOSTON GLOBE, Nov. 16, 1998, at A15).

199 Michael J. Gerhardt, *Putting the Law of Impeachment in Perspective*, 43 ST. LOUIS U. L.J. 905, 913 (1999) (stating that the "great majority" of commentators have concluded that an impeachable offense is one that is a "political crime," i.e., an abuse of power that "could only be committed by public officials by virtue of the public offices" they hold); *see also id.* at 921 (referring to this as the "paradigmatic case"). *See generally* Jack N. Rakove, *Statement on the Background and History of Impeachment*, 67 GEO. WASH. L. REV. 682, 687 (1999) ("[T]he examples the delegates used to describe acts warranting impeachment . . . all confirm that they were thinking primarily, indeed exclusively, about failure to perform the duties of office or a misuse of its powers, in ways that manifestly endangered the general public good."); Cass R. Sunstein, *Impeachment and Stability*, 67 GEO. WASH. L. REV. 699, 702 (1999) ("The clear lesson of [early constitutional debates] is that . . . the Founders were thinking, exclusively or principally, of large-scale abuses of distinctly public authority.").

200 Gerhardt, *supra* note 199, at 921.

201 During a hearing before the House Judiciary Committee, the committee heard testimony from a number of constitutional experts on the question of impeachment. Of these, seven believed President Clinton had committed an impeachable offense, and eight believed that the accusations

ments of a judge are fundamentally different than those of offices in the other branches. Impartiality, for example, is a prerequisite for the exercise of judicial powers. Therefore, distinctions between a judge's private life and his public duties may become blurred. In addition, judges, unlike presidents, are said to have a duty to embody or symbolize the law. Thus, in the words of Richard Posner, even a judge's "relatively minor crimes gravely undermine the system of legal justice." [202] Thus, the impeachment standard may cast a wider net concerning the types of impeachable offenses for judges than it would other elected officials.[203]

The situation is made more confusing in the case of elected judges because the standards for removal of judges and other public officers through impeachment and removal of judges through the JCO mechanism are not always one and the same. Some states limit grounds for impeachment to matters of illegality, whereas JCOs almost uniformly have the power to remove or recommend the removal of judges for a host of reasons having nothing to do with illegal conduct, including violations of a code of judicial conduct.[204] In some cases, such as the acceptance of bribes, removal would be proper through both the impeachment process and JCO-initiated action.[205] However, in some instances, it is debatable whether conduct constituting a removable offense through the JCO process would also constitute an impeachable offense (at least if the same conduct had been committed by other public officers).

For example, in Wisconsin, all civil officers are subject to impeachment "for corrupt conduct in office, or for crimes and misdemeanors . . . ."[206] However, judges in Wisconsin face the possibility of removal through the JCO mechanism for conduct that extends beyond corruption or illegality, including

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either did not rise to the level of impeachable offenses or did not warrant impeachment. Bloch, *supra* note 198, at 150 n.36.

202 RICHARD POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 104 (1999).

203 *See generally* MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS 106-07 (1996) (suggesting a higher behavioral standard for judges than for executive officers); Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 684 (1999) ("[L]eading scholars appear to agree that a special impeachment standard is appropriate for members of the federal judiciary . . . ."). Not surprisingly, the nation's history contains several instances where federal judges have been impeached for offenses that seemingly would have little to do with their official duties. *See* Gerhardt, *supra* note 199, at 917 (noting the conviction and removal of Judge John Pickering for public drunkenness and blasphemy); *id.* at 923 (noting the impeachment and removal of federal district judge Harry Claiborne for income tax evasion).

204 *See supra* notes 136-38 and accompanying text.

205 *See* COMISKY & PATTERSON, *supra* note 99, at 206, 214 (listing bribery as a specific basis for impeachment in some states and stating that such conduct always results in removal by JCOs).

206 WIS. CONST. art. VI, § 1.

"willful violation of a rule of the code of judicial ethics."[207] In Washington, judicial officers may only be impeached for "high crimes or misdemeanors, or malfeasance in office."[208] Yet, in *In re Disciplinary Proceedings Against Turco*,[209] Washington's Commission on Judicial Conduct recommended that a judge be removed from office for striking or pushing his wife to the floor in a public setting — conduct that simply violated Washington's Canons of Judicial Conduct.[210] It is certainly questionable whether such conduct, if committed by an executive officer, would qualify as a "high crime or misdemeanor" or "malfeasance in office." Although the Washington Supreme Court ultimately rejected the recommendation to remove Judge Turco, elected judges in other states face the specter of removal as a result of JCO proceedings for conduct that might not be sufficient to serve as the basis of impeachment proceedings.[211]

Another accountability concern is the danger, inherent in the removal of any elected official from office, that politics may be at the heart of the attempt to remove. One of the concerns of the impeachment process has always been that the process is subject to political intrigue.[212] Some have argued that, at the federal level, a stricter standard of judicial behavior is justified because partisan politics are more likely to play a role in the impeachment of elected presidents than in the impeachment of appointed judges.[213] Ignoring for a moment the calls for the impeachment of federal judges that occasionally ensue as a result of a controversial decision,[214] this justification evaporates when applied to elective judiciaries. Indeed, the concern over faction and politics might arguably be greater in the JCO context given the fact that there are fewer members of such commissions to convince of the need for removal than there are state legislators to convince of the need for impeachment, and the fact that at least some of the

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207 WIS. STAT. ANN. § 757.81(4) (West 2002).

208 WASH. CONST. art. V, § 2.

209 970 P.2d 731 (Wash. 1999).

210 *Id.* at 736.

211 *Compare* MICH. CONST. art. II, § 7 (listing impeachment grounds as "corrupt conduct in office or for crimes or misdemeanors") *with In re* Seitz, 495 N.W.2d 559 (Mich. 1993) (removing judge for abusing contempt power, *maintaining hostile attitude toward employees*, willfully neglecting docket, and refusing to respond to requests from judicial agency). *Compare* MONT. CODE ANN. § 5-5-401 (2002) (listing impeachment grounds as "felonies and misdemeanors or malfeasance in office") *with* Harris v. Smartt, 57 P.3d 58 (Mont. 2002) (rejecting recommendation of removal from office and instead suspending judge without pay for accessing sexually explicit websites at work), *vacated in part on other grounds*, 68 P.3d 889 (Mont. 2003).

212 *See* Michael J. Gerhardt, *Impeachment Defanged and Other Institutional Ramifications of the Clinton Scandals*, 60 MD. L. REV. 59, 74 (2001) [hereinafter Gerhardt, *Impeachment Defanged*].

213 *See* POSNER, *supra* note 202, at 104.

214 *See* Gerhardt, *Impeachment Defanged*, *supra* note 212, at 74 (noting the calls for the resignation of Judge Harold Baer).

members of such commissions are themselves appointed by elected officials. If, as some have charged, politics are at play during the selection process,[215] it seems reasonable to conclude that the potential exists for politics to enter into the equation during the removal process.

Given the potential encroachment on the public's right to choose posed by JCOs, the uncertain standards for the impeachment and removal of judges, and the ever-present danger of political intrigue, one might expect to see some other limitations on the ability of JCOs to remove or recommend the removal of judges from office in elective states. However, West Virginia is the only state that employs popular elections as the principal means of selecting most of its judges that denies its JCO the power to remove a judge from office or recommend removal for misconduct.[216] Although West Virginia's Judicial Hearing Board is authorized by statute to involuntarily retire a judge because of "advancing years and attendant physical or mental incapacity" and to recommend a variety of sanctions for misconduct to the Supreme Court of Appeals,[217] the state constitution provides that a "justice or judge may be removed only by impeachment" in accordance with provisions of the constitution.[218]

One might also expect to find some expressed reluctance on the part of high courts in elective states to remove an elected judge based on the findings or recommendations of JCOs. Indeed, from time to time, an opinion from an elected appellate court expresses some reluctance about removing an elected judge from office for misconduct; however, such reluctance is only infrequently voiced. There are a handful of decisions that express the view that when a judge is charged with misconduct during a prior term and has been re-elected despite such misconduct, the public has forgiven the judge and removal is, therefore, inappropriate.[219] The rationale for such decisions is that the public is "the ultimate judge and jury in a democratic society . . . ."[220] However, most courts that have considered the issue have rejected this "forgiveness doctrine" either outright or on the grounds that it only applies where the misconduct was a matter of

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215 *See supra* note 74-76 and accompanying text.

216 ALA. CONST. amend. 581, § 6.18; ARK. CONST. amend. 66; GA. CONST. art. VI, § 7; ILL. CONST. art. VI, § 15; KY. CONST. § 121; LA. CONST. art. V, § 25; MICH. CONST. art. VI, § 30; MISS. CONST. art. VI, § 177A; MONT. CONST. art. VII, § 11; NEV. CONST. art. VI, § 21; N.Y. CONST. art. VI, § 22; PA. CONST. art. V, § 18; TEX. CONST. art. 5, § 1-a; W. VA. CONST. art. VIII, § 8; WIS. CONST. art. 7, § 11; IDAHO CODE § 1-2102(4) (Lexis 2002); MINN. STAT. ANN. § 490.16 (West 2002); N.C. GEN. STAT. § 7A-376 (2002); N.D. CENT. CODE § 27-23-02 (2002); WASH. REV. CODE ANN. § 2.64.055 (West 2002); WIS. STAT. ANN. § 757.89 (West 2002); OHIO GOV'T JUD. R. III.

217 W. VA. R. JUD. DISCIP. P. 4.12.

218 W. VA. CONST. art. VIII, § 8.

219 *See* State *ex rel.* Turner v. Earle, 295 So. 2d 609, 615 (Fla. 1974); *In re* Bailey, 490 N.E.2d 818 (N.Y. 1986); *In re* Carrillo, 542 S.W.2d 105, 110 (Tex. 1976).

220 *In re Carrillo*, 542 S.W.2d at 110.

public knowledge at the time of re-election or where the state constitution or applicable statute limits the authority of the JCO to prevent the judge from holding future office.[221] Indeed, most decisions from state appellate courts removing a judge from office based on the decisions or recommendations from JCOs contain no mention of the tension between maintaining an ethical judiciary and undoing the decision of the electorate.

Occasionally, supreme courts in states with elective judiciaries do acknowledge the dilemma they face in removing a judge who has been elected. The Supreme Court of Washington, for example, devoted considerable time to this problem in *In re Disciplinary Proceedings Against Turco*, the case involving the judge accused of striking or pushing his wife to the ground in public.[222] Recognizing that one of the goals of sanctions is to preserve public confidence in the administration of justice, the court indicated that there are some types of misbehavior that are better left to be dealt with by the electorate.[223] Although some extrajudicial conduct might be reprehensible, sanctions are only appropriate for behavior that "affect[s] the judge's integrity or ability to judge impartially," in other words, where "there is an articulable nexus between the extrajudicial conduct and the judge's duties."[224] In other cases, the public should be left to decide whether a judge is worthy of sitting on the bench, lest the court intrude on the public's right to choose its elected officials. According to the Supreme Court of Washington, "[b]oth the Commission on Judicial Conduct and this Court must, therefore, take care to respect and observe the people's categorical right to choose their own judges, and to avoid interfering with that right except for manifest violations of the Code of Judicial Conduct."[225]

Opinions such as *Turco*, however, are relatively rare. From time to time, state supreme courts expressly note the tension between the goals of imposing judicial discipline and respecting the public's right to choose its judicial officers,[226] and in some cases a judge's history of re-election seems to be a miti-

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221 *See In re* Martin, 275 S.E.2d 412, 423 (N.C. 1981); Jeffrey M. Shaman, *Judicial Ethics*, 2 GEO. J. LEG. ETHICS 1, 14 (1988).

222 970 P.2d 731 (Wash. 1999).

223 *Id.* at 740.

224 *Id.*

225 *Id.*

226 *See In re* Inquiry Concerning a Judge No. 94-70, 454 S.E.2d 780, 783 (Ga. 1995) (Benham, J., dissenting) ("When a judge has been elected by the people, removal from office is tantamount to impeachment; therefore, the violations of the Code of Judicial Conduct should be proved by 'clear and convincing' evidence."); *In re* Huckaby, 656 So. 2d 292, 298 (La. 1995) ("[R]emoval of a duly elected member of the judiciary is a serious undertaking which should only be borne with the utmost care so as not to unduly disrupt the public's choice for service in the judiciary."); *In re* Hardy, 240 S.E.2d 367, 375 (N.C. 1978) (Lake, J., concurring in part and dissenting in part) ("It is not a light thing for this Court to assume the power to say to the people of North Carolina, 'You have lawfully elected this judge, but we have determined that he cannot serve you.'"); *In re* Lowery, 999 S.W.2d 639, 662 (Tex. 1998) (addressing whether removing an elected judge from

gating factor against removal.[227] However, as a percentage of the total number of decisions to remove sitting judges in states that elect their judges, such comments are relatively rare. By and large, most courts rarely mention the tension between the goals underlying removal from office and the goals of popular elections, and their decisions are generally indistinguishable from decisions in appointive or merit-selection states.

b. Mitigating Factors

Nearly all states that elect their judges, therefore, see some role for JCOs to play in the removal process. Despite the anti-democratic tendencies of JCOs, several factors offset concern as to their impact on judicial accountability under the strong conception of that term. First, in the majority of states that employ partisan elections as the primary means of judicial selection, JCOs are only empowered to recommend, not impose, the sanction of removal.[228] Although a number of states authorize their JCOs to impose *lesser* forms of discipline,[229] the members of the state's highest court, who, by and large, are elected,

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office would disenfranchise the voters); *In re* Disciplinary Proceedings Against Kaiser, 759 P.2d 392, 401 (Wash. 1988) (noting that courts "should be slow to overturn the results of an election and deprive the people of the right to elect our judges" and that the sanction of removal "should be sparingly applied"). *See generally In re* Miera, 426 N.W.2d 850, 859 (Minn. 1988) (rejecting JCO's recommended sanction of removal, suspending judge for one year without pay, and stating that the citizens of the judge's county "are in a position to evaluate to his performance" and "can remove him by ballot if they determine we have been too lenient.").

[227] *See* McCullough v. Comm'n on Judicial Performance, 776 P.2d 259 (Cal. 1989) (listing the fact that judge had twice been elected as a mitigating factor); *In re* Skinner, 690 N.E.2d 484, 486 (N.Y. 1997) (imposing censure, instead of removal, in part because judge "has for nearly four decades been the elected choice of the voters to hold the office, . . . with no evidence of any prior complaints regarding his judicial service."). *See generally* Idaho Judicial Council v. Becker, 834 P.2d 290, 294 (Idaho 1992) (rejecting JCO recommendation of removal because removal "would deprive the judicial system of an experienced judge who was elected by the voters" and "who can be a good judge if he can control his addiction to alcohol. . . ."); Miss. Comm'n on Judicial Performance v. Byers, 757 So. 2d 961, 973 (Miss. 2000) (rejecting JCO recommendation of removal because the judge had "already been removed by the people of her electoral district."); *In re* Starcher, 457 S.E.2d 147, 152 (W. Va. 1995) (Neely, J., dissenting) (dissenting to imposition of stricter sanction than recommended by JCO and noting that judge was so popular in his county "that he will be a judge until the day he voluntarily decides to retire or the Lord decides to call him home.").

[228] ARK. CONST. amend. 66; GA. CONST. art. VI, § 7; LA. CONST. art. V, § 25; MICH. CONST. art. VI, § 30; MISS. CONST. art. VI, § 177A; MONT. CONST. art. VII, § 11; TEX. CONST. art. 5, § 1-a; WIS. CONST. art. 7, § 11; IDAHO CODE § 1-2102(4) (Lexis 2002); MINN. STAT. ANN. § 490.16 (West 2002); N.C. GEN. STAT. § 7A-376 (2002); N.D. CENT. CODE §§ 27-23-01, -02 (2002); WASH. REV. CODE ANN. § 2.64.055 (West 2002); WIS. STAT. ANN. § 757.85 (West 2001); OHIO GOV'T JUD. R. III.

[229] *See, e.g.*, WASH. REV. CODE ANN. § 2.64.055 (empowering Commission on Judicial Conduct to admonish, reprimand, or censure judge and providing that commission may recommend suspension or removal to state supreme court).

possess the removal power. Thus, at least in theory, the electorate can hold the elected members of the reviewing court accountable for their decision to remove a judge. If the unelected members of a state JCO had unreviewable authority to remove a judge, JCOs would be incapable of ensuring accountability under the strong conception of that term and would, in fact, have the authority to weaken judicial accountability.[230] Indeed, as the National Commission on Judicial Discipline and Removal has stated, placing the power of removal in the hands of elected officials is essential to ensuring some form of accountability: "Judging whether the public trust has been violated or the power granted by the people misused is fundamentally a political decision, one that should be made by officers who answer to the voters."[231]

Second, judges are usually removed only for the most egregious conduct.[232] In most instances of removal, a judge's misconduct is either extreme, involves a pattern of misbehavior suggesting willful disregard of the law or incompetence, or involves a combination of both.[233] Therefore, it seems safe to conclude that, in most cases, judges who are removed through the JCO process would have been defeated in a re-election contest, had the public been aware of the misconduct, or impeached, had the legislature gotten around to it and the state constitution allowed such action.

In this sense, many of the removals that take place through the JCO process simply provide a more efficient method of removing unethical judges than do the impeachment and election processes.[234] If a JCO lacks the power to

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230 *See generally* Sankar, *supra* note 91, at 1258 (arguing that on the federal level, the Judicial Councils and Judicial Conduct and Disability Act cannot truly vindicate accountability as "only the public or its politically elected representatives can do that.").

231 Charles Gardner Geyh, *Highlighting a Low Point on a High Court: Some Thoughts on the Removal of Pennsylvania Supreme Court Justice Rolf Larsen and the Limits of Judicial Self-Regulation*, 68 TEMP. L. REV. 1041, 1074 (1995) (quoting REPORT OF THE NAT'L COMM'N ON JUDICIAL DISCIPLINE & REMOVAL 23 (1993)).

232 *See* HEARINGS OF THE NAT'L COMM'N ON JUDICIAL DISCIPLINE & REMOVAL 727 (June 24, 1993) (Statement of Frances Zemans, President, American Judicature Society), *cited in* Geyh, *supra* note 231, at 1074.

233 *See In re* Judge No. 491, 287 S.E.2d 2, 3 (Ga. 1982) (removing justice of the peace after plea of nolo contendere to charges of aiding and abetting her mother-in-law in fraudulently obtaining welfare benefits); *In re* Field, 576 P.2d 348, 354 (Or. 1978) (removing judge for general incompetence, disregard for constitutional rights of defendant, and general inability to cope with pressures of office); *In re* Bates, 555 S.W.2d 420, 436 (Tex. 1977) (removing judge for receipt of bribe); *In re* Complaint Against Raineri, 306 N.W.2d 699, 700-01 (Wis. 1981) (per curiam) (removing judge after three felony convictions, including false declarations before a grand jury and threatening a grand jury witness).

234 This argument applies to removal of lower court judges, not necessarily to removal of judges on a state's court of last resort. As mentioned, most states allow judges to appeal JCO decisions to the state's highest court or give that court authority to adopt or reject the recommendation of a JCO. *See supra* notes 189-91 and accompanying text. If the judge in question is a lower court judge, this method of removal is preferable to impeachment or reliance on popular elections for the reasons stated *infra*. However, when the judge in question sits on the state's

remove a judge or recommend removal, it would be exceedingly difficult in most cases to remove from office a judge who has abandoned the judicial role. As most judges stand for re-election only once every few years, elections do a poor job of preventing an unethical sitting judge from flaunting the law, abusing litigants, and generally undermining public confidence in the judiciary in the interim. Thus, one of the goals of imposing discipline on judges would be thwarted. In addition, as voters typically cast their votes in judicial contests lacking specific information about judges, and as many judges run unopposed, voters are unlikely to be able to remove a judge based on instances of prior misconduct unless the misconduct has been highly publicized.[235] Although Dubois argues that party labels provide an effective mechanism for voters to make decisions regarding judicial policy,[236] party labels do absolutely nothing to inform voters about a judge's record of ethical or unethical conduct on the bench. Thus, in terms of providing accountability for judicial misconduct, elections do not do a particularly good job. JCOs can help compensate for this weakness.

Finally, given the role of a judge in constitutional government and the weaknesses of other disciplinary measures, the anti-democratic aspects of JCOs are simply features of the organizations that may have to be tolerated in order to protect the public and promote trust in the judiciary. Even the most ardent supporters of the popular election of judges acknowledge that judges are not merely "politicians in robes."[237] Despite their inherent policymaking powers, judges occupy a position of enormous trust. As such, the discipline, including occasional removal, of judges is essential to preserving the public's respect for the judiciary.

In short, the JCO removal process may, in some respects, stand in opposition to the strong conception of judicial accountability; however, it does promote accountability in the sense that it helps ensure that judges remain accountable to the law which they were elected to apply. As elections and other removal methods are generally ill-equipped to effectuate this goal, JCOs need to have the ability to recommend the removal of judges, subject to review by an appellate court. The trick is in devising a workable standard as to when removal is appropriate.

Furthermore, the ability of JCOs to impose or recommend lesser sanctions, such as public reprimand, censure, or suspension, is entirely consistent with any notion of judicial accountability. If it is true that "judges are elected in

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highest court, "a system of judicial discipline in which the ultimate disciplinary body is the court on which the miscreant judge sits inevitably creates an apparent, if not a real, conflict of interest." Geyh, *supra* note 231, at 1050. Geyh argues compellingly that impeachment is the best method for dealing with such cases. *Id.* at 1075.

235 *See* COMISKY & PATTERSON, *supra* note 99, at 209.

236 *See supra* notes 61-65 and accompanying text.

237 DUBOIS, *supra* note 46, at 24.

a climate of nearly total voter ignorance,"[238] then the fact that a judge has been publicly reprimanded for judicial misconduct can be a potentially valuable source of information for voters. The public at large may have difficulty understanding why a judge might be justified (or correct) in voting to overturn a death penalty conviction or upholding a damage cap in a medical malpractice case; however, the public is quite capable of making a rational decision as to whether to re-elect a judge who has been censured for abusing litigants in open court. In non-judicial contests, voters cast their ballots based on a variety of information about candidates, including the character of a candidate. Thus, without active enforcement of the rules of judicial conduct and dissemination of information concerning any disciplinary action taken against a particular judge, the voting public may be denied information that it might find quite relevant in making its decision about a judge.

Thus, JCOs can potentially serve as a tool for better educating the public about the qualifications of the judges it elects. A more informed electorate can make more informed decisions about who it elects, thus strengthening one of the weakest arguments of those in favor of popular election of judges.[239] In addition to improving the electoral process, JCOs can also serve as an important check on the power of runaway judges, thus better keeping judges connected to the public and the rule of law.[240]

V. HOW JCOS CAN IMPROVE ACCOUNTABILITY

In order to balance the goals of promoting ethical conduct within the judiciary, respecting the right of voters to choose their own judges, and promoting true accountability, JCOs and reviewing courts in elective states must work together while being mindful of their respective roles.

A. *Aggressive Enforcement of Ethical Rules and Supreme Court Imposition of Sanctions*

Perhaps the most obvious method of improving accountability through the use of JCOs is to insist that they aggressively and competently enforce a state's ethical rules for judges. Some state JCOs, such as New York's Commission on Judicial Conduct, have developed a reputation for aggressive enforce-

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238 Geyh, *supra* note 231, at 1064 (quoting Pennsylvania Supreme Court Justice Bruce Kaufman).

239 *See generally* DUBOIS, *supra* note 46, at 22 (calling for strict enforcement of the Code of Judicial Conduct to reduce some of the concerns over the effect of popular elections on judicial independence); Boyer, *supra* note 67, at 143 (arguing in favor of popular election and opining that Florida's Judicial Qualification Commission's record "has not been impressive").

240 *See generally* Sahl, *supra* note 39, at 248 (arguing that a disciplinary process that is more open to public review would "prevent the courts from becoming less accountable to or separate from the public.").

ment of their state's ethical rules.[241] Others, such as the Illinois Court Commission, have developed a reputation for laxness and inaction.[242] Although it is probably true that the majority of complaints received by JCOs are filed by litigants who were simply displeased by a judge's ruling,[243] if the public is to feel that judges are accountable, JCOs must have the resolve to take action in those cases where there is clear evidence of misconduct.

Aggressive enforcement of ethical rules should not mean, however, that JCOs have the ability to impose the sanction of removal themselves. As the members of JCOs are unelected, providing them with the authority to remove elected judges, as some states do,[244] threatens the purpose of allowing the voters to choose their judges in the first place. Although, from an efficiency standpoint, it makes sense to allow a JCO to recommend or impose lesser sanctions while providing for review by the state's highest court, a decision to remove an elected judge should come from the elected members of the state's highest court.[245] Therefore, the sanction of removal in elective states should only come from other elected individuals, whom the public can, at least in theory, hold accountable for the decision.

State legislatures can also tighten up the language in state constitutions or statutes that authorize JCOs to discipline judicial misconduct by imposing a uniform standard for removal and impeachment. One solution might be to define the standards for impeachment differently for judges than for other elected officials. Given some of the shortcomings of this approach, including its potential effect on judicial independence[246] and the difficulty in defining what constitutes an impeachable offense, such a solution is unrealistic. However, there is no reason why a state could not amend its constitution or authorizing statute to empower JCOs to recommend removal only where a violation of the applicable code of judicial conduct would amount to an impeachable offense. Although JCOs and legislatures would still be dealing with an amorphous concept, at least the concepts would be one and the same. JCOs could then make recommendations for removal based upon whatever common history or understanding there is within a state with respect to what constitutes an impeachable offense. As

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241 VOLCANSEK, JUDICIAL MISCONDUCT, *supra* note 160, at 109.

242 *See id.*; *see also* BOOT, *supra* note 89, at 21 (citing Illinois Court Commission low discipline rate). *See generally* Boyer, *supra* note 67, at 143 (stating that the record of Florida's Judicial Qualification Commission "particularly with reference to despots on the bench, has not been impressive.").

243 Keith, *supra* note 17, at 1405.

244 *See supra* notes 189-92 and accompanying text.

245 This is also the approach recommended by the ABA Center for Professional Responsibility and State Justice Institute. *See* MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 6 cmt. (1994).

246 *See* Redish, *supra* note 203, at 684-85; *see also* Gerhardt, *Impeachment Defanged*, *supra* note 212, at 73-76 (noting other problems with this approach).

mentioned, some states make a violation of the applicable rules of judicial conduct a basis for JCO discipline.[247] Although any violation of such rules could be the basis for discipline, not all merit removal. Regardless of how a state chooses to define a removable offense, the standard should be the same for impeachment by the legislature and removal by a JCO. At least by articulating that removal is only appropriate where a violation of a rule would also amount to an impeachable offense, states could help ensure that JCOs fulfill what was originally thought to be one of their main functions: serving as a more efficient substitute for legislative impeachment or other forms of discipline. By allowing JCOs to recommend removal only for impeachable offenses and then subjecting such recommendations to judicial review, states could provide a more efficient means of removing judges while still ensuring some public accountability.

For their part, state supreme courts need to be cautious about imposing the sanction of removal in cases of elected judges. Regardless of the method of judicial selection employed by a state, removal is appropriate only in cases of severe misconduct. No matter how a judge is selected, the removal of a judge from office for anything less than conduct that severely undermines public confidence in the judiciary and demonstrates unfitness to hold office poses a threat to judicial independence.[248] In states that allow the electorate to select its judges, the power to remove a judge can also threaten the favored goal of accountability. Various commentators have offered different standards for what constitutes an impeachable offense[249] and this Article does not attempt the almost impossible task of articulating such a standard. However, any standard will almost certainly involve some reference to preserving the integrity of the judiciary and will seek to determine if there is some articulable nexus between the charged conduct and the judge's duties.[250] If the public is to remain confident that its electoral choices matter while simultaneously retaining confidence in the integrity of the judiciary, any removal decision should be informed by the twin goals of judicial accountability and judicial independence.

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247 *See supra* note 99 and accompanying text.

248 *See generally* MODEL RULES OF JUDICIAL DISCIPLINARY ENFORCEMENT R. 6 cmt. (stating that removal "is appropriate when the respondent's misconduct demonstrates that the respondent is unfit to hold judicial office.").

249 *See* GERHARDT, *supra* note 203, at 107 ("actions [that] undermine confidence in the judge's neutrality and impugn the integrity of the judicial process"); Paul E. McGreal, *Impeachment as a Remedy for Ethics Violations*, 41 S. TEX. L. REV. 1369, 1389-91 (2000) (arguing that political activity is per se impeachable and other impeachment decisions should be made by reference to disbarment standards).

250 *Cf. In re* Disciplinary Proceedings Against Turco, 970 P.2d 731, 740 (Wash. 1999).

B. *Providing Meaningful Information for the Public to Assess*

1. Allowing Meaningful Access to JCO Hearings and Records

One of the most damning criticisms of the popular election of judges is that elections are incapable of ensuring the accountability they seek to promote because the electorate is largely ignorant about the judges it selects.[251] If the popular election of judges is to provide any kind of true accountability, the electorate must be able to make informed decisions about judicial candidates. Although most citizens are at a disadvantage when it comes to selecting judges based on the relative lack of information available to them, citizens do have the ability to decide how a judge's past behavior in office bears on his or her qualifications to hold future office.[252] The results of a JCO disciplinary proceeding are a tangible piece of information that can potentially be quite relevant to the electorate. Therefore, states that employ popular elections as the primary means of selecting judges need to allow the public reasonable access to the results of a disciplinary investigation and to any adjudicatory hearings.

However, allowing such access may create the potential for conflict. There clearly exists a tension between the public's need to know about alleged instances of judicial misconduct and a judge's interest in privacy.[253] On the one hand, if the public is completely shut out of the disciplinary process and has only limited access to disciplinary proceedings, it may soon come to question the legitimacy of the process.[254] On the other, judges are understandably fearful of the prospect that the mere fact that a complaint is pending before a JCO could be used against the judge by a campaign opponent.[255] The tension is particularly acute in a climate where judicial candidates are increasingly willing to employ questionable, if not downright misleading, attack ads during the campaign.[256]

Over the years, there has been a trend among the states to allow greater openness concerning JCO proceedings.[257] As previously mentioned, in a slight majority of states, the finding of a JCO of some indicia that misconduct has occurred and the subsequent filing of formal charges makes the charges against the judge public.[258] At this point, at least some of the records associated with the

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251 *See supra* note 32 and accompanying text.

252 *See supra* p. 38 and accompanying text.

253 Keith, *supra* note 17, at 1399.

254 Keyt, *supra* note 151, at 963.

255 Griffen, *supra* note 159, at 77.

256 *See* George Lardner, Jr., *Speech Rights and Ethics Disputed in Judicial Races*, WASH. POST, Oct. 8, 2000, at A13 (detailing Alabama Supreme Court race).

257 Keyt, *supra* note 151, at 982.

258 *See supra* notes 151-52 and accompanying text. In some states, charges become public before the actual filing of formal charges. For example, in Arkansas, any action taken by the

charges also are available to the public.[259] However, a slight minority of states maintain the confidential nature of the proceedings until *after* a JCO holds a formal hearing and recommends or imposes sanctions.[260] Thus, the public remains unaware of the fact that a complaint has been filed against a judge, that the JCO has found that there exists some reason to believe that the charges of misconduct are credible, and of any of the underlying factual record until after the JCO has already determined that misconduct has occurred. The majority of elective states fall into the more open first category;[261] however, at least four maintain confidentiality until after the JCO has held a formal hearing and imposed or recommended discipline.[262]

In *Landmark Communications, Inc. v. Virginia*,[263] the United States Supreme Court held that the First Amendment's freedom of speech and freedom of the press guarantees prevented the criminal prosecution of a newspaper that had published truthful information regarding confidential proceedings of the Virginia Judicial Inquiry and Review Commission.[264] The newspaper truthfully reported that a particular judge was under investigation for misconduct, but that no formal charges had been filed.[265] Under the Virginia statute, all papers filed with and proceedings before the Commission, including the name of the judge under investigation, were confidential prior to the filing of formal charges; upon the filing of formal charges, the records of the proceedings before the Commission lost their confidential character.[266] In reversing the conviction of the newspaper, the Court cited as a major purpose of the First Amendment the protection of "free discussion of governmental affairs"[267] and opined that "the law gives

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Judicial Discipline and Disability Commission after investigation of a complaint, regardless of whether the charges are groundless, is communicated to the judge and becomes public. *See* ARK. R.P. JUD. DISCIP. & DISABILITY COMM'N 7.

259 *See supra* note 152 and accompanying text.

260 *See supra* notes 153-54 and accompanying text.

261 *See* ALA. CONST. amend. 581, § 6.17(b); ILL. CONST. art. VI, § 15(c); PA. CONST. art. V, § 18(b)(5); MONT. CODE ANN. § 3-1-1121 (2002); NEV. REV. STAT. ANN. § 1.4683 (West 2002); WASH. REV. CODE ANN. § 2.64.111 (West 2002); WIS. STAT. ANN. § 757.93 (West 2002); ARK. R.P. JUD. DISCIP. & DISABILITY COMM'N 7; GA. R. JUD. QUAL. COMM'N 20(a); KY. SUP. CT. R. 4.130; MICH. CT. R. 9.222; MINN. BD. JUD. STDS. R. 5; N.C. JUD. STDS. COMM'N R. 4; N.D.R. JUD. CONDUCT COMM'N 6; OHIO GOV'T JUD. R. III (2002); TEX. R. REMOVAL OR RETIRE. JUDGES 10(a)(1); W. VA. R. JUD. DISCIP. P. 2.7.

262 *See* MISS. CONST. art. VI, § 177A; IDAHO CODE § 1-2103A (Lexis 2002); N.Y. JUD. LAW § 44 (Consol. 2002); LA. SUP. CT. R. XXIII, § 23.

263 435 U.S. 829 (1979).

264 *Id.* at 838.

265 *Id.* at 831.

266 *Id.* at 830 n.1, 832 n.2.

267 *Id.* at 838.

'[j]udges as persons, or courts as institutions . . . no greater immunity from criticism than other persons or institutions.'"[268]

In reaching its conclusion, however, the Court noted several goals of the various confidentiality requirements concerning judicial disciplinary proceedings. Among the goals are the encouragement of the filing of complaints and the willing participation of relevant witnesses; the protection of judges from injuries resulting from the publication of unexamined and unwarranted complaints; and the maintenance of confidence in the judiciary as an institution by avoiding premature announcement of groundless claims of judicial misconduct.[269] In addition, the Court suggested that the confidentiality requirements could facilitate the work of the commissions by giving a judge the opportunity to resign voluntarily or retire without the necessity of a formal proceeding in cases where removal would be warranted. The requirements could also further the goals of the commission by giving a judge the opportunity to be made aware of minor complaints which may appropriately be called to his attention without public notice in cases where the alleged misconduct is not of the magnitude to warrant removal or even censure.[270] Thus, the Court acknowledged the tension between the public's right to know and the valid purposes behind some confidentiality requirements.

Although the Court's holding was fairly limited,[271] its reasoning tends to support the idea that the public has a strong interest in receiving information concerning judicial disciplinary proceedings, at least after formal charges have been filed by the commission. This interest is arguably even stronger where the public has placed the judge on the bench and where one day it may be called upon to decide whether the judge should remain there.

Perhaps even more important than the right to examine information concerning disciplinary proceedings is the right of members of the public to view such proceedings themselves. Several commentators have argued in favor of First Amendment right of access to post-investigative proceedings concerning

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268 *Id.* at 839 (quoting Bridges v. California, 314 U.S. 252, 289 (1941) (Frankfurter, J., dissenting)).

269 *Id.* at 835.

270 *Id.* at 836.

271 According to the Court, the narrow issue to be addressed on appeal was "whether the Commonwealth of Virginia may subject persons, including newspapers, to criminal sanctions for divulging information regarding proceedings before a state judicial review commission which is authorized to hear complaints as to judges' disability or misconduct, when such proceedings are declared confidential by the State Constitution and statutes." *Id.* at 830. The Court did not address "a State's power to keep the Commission's proceedings confidential or to punish participants for breach of this mandate," nor did it address whether a "constitutionally compelled right of access for the press to those proceedings" existed. *Id.* at 837. Also, it refused to address whether "truthful reporting about public officials in connection with their public duties is always insulated from the imposition of criminal sanctions by the First Amendment." *Id.* at 838. Although the Court held that the clear and present danger test applied by the Virginia Supreme Court was inappropriate, it failed to articulate a clear test of its own. *See* Keyt, *supra* note 151, at 974.

the discipline of judges.[272] The rationale for such a right stems from the line of Supreme Court cases following *Globe Newspaper Co. v. Superior Court*.[273] In *Globe*, the Court articulated several justifications for permitting public access to criminal trials that relate directly to the goal of accountability. According to *Globe*, allowing public access to criminal trials helps "to ensure that [the] constitutionally protected 'discussion of government affairs' is an informed one."[274] Public access to criminal trials "fosters an appearance of fairness, thereby heightening respect for the judicial process" and "permits the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government."[275]

Several obstacles exist to recognizing such a constitutional right in the case of judicial disciplinary proceedings, however. First, the *Globe* line of cases deals only with criminal trials. Several courts have suggested that judicial disciplinary proceedings are not sufficiently analogous to fit within this mold.[276] Compounding the problem is the fact that one of the chief justifications for recognizing a right of access to criminal trials in *Globe* was the fact that, even predating the Constitution, criminal trials had been open to the public, thus creating a presumption of openness.[277] In contrast, JCOs are relatively recent creations, and their proceedings have historically lacked the same type of openness as exists in criminal trials.[278]

Even if a right of access to judicial disciplinary proceedings is not constitutionally mandated, it is certainly desirable in elective states, at least in the post-investigative phase. Currently, JCO formal hearings are confidential in at least four states that use elections as the primary means of selecting judges.[279] Public attendance at post-investigative judicial disciplinary proceedings would not only serve the goal of accountability in the sense of keeping the public con-

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272 *See* Eugene Cerruti, *"Dancing in the Courthouse": The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 323-34 (1995); Comment, *A First Amendment Right of Access to Judicial Disciplinary Proceedings*, 132 U. PA. L. REV. 1163, 1181-83 (1984).

273 457 U.S. 596 (1982) (holding that Massachusetts statute that closed trials in cases of alleged sexual offenses against minors violated constitution); *see* El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147 (1993) (recognizing a right of access to pretrial proceedings in criminal trials); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (recognizing a right of access to *voir dire* examinations in criminal trials).

274 *Globe*, 457 U.S. at 605.

275 *Id.* at 606.

276 First Amendment Coalition v. Judicial Inquiry and Review Bd., 784 F.2d 467, 472 (3d Cir. 1986); Bradbury v. Idaho Judicial Council, 28 P.3d 1006, 1014 (Idaho 2001), *cert. denied*, 534 U.S. 1115 (2002).

277 *See Globe*, 457 U.S. at 605.

278 *See Bradbury*, 28 P.3d at 1014.

279 MISS CONST. art. VI, § 177A; IDAHO CODE § 1-2103A (Lexis 2002); N.Y. JUD. LAW § 44 (Consol. 2002); LA. SUP. CT. R. XXIII, § 23.

nected to the judiciary, it would also promote the ultimate goal of allowing the public to be more informed about their judicial candidates and to make more intelligent decisions. Indeed, the Model Rules for Judicial Disciplinary Enforcement created by the ABA Center for Professional Responsibility and State Justice Institute require that all proceedings (except those related to a judge's incapacity) shall be open to the public after the filing and service of formal charges.[280] Such a rule strikes the proper balance between the public's right to know and a judge's interest in confidentiality. As the commentary explains, "[o]nce the formal charges have been filed and served, there is no longer a danger that the charges are frivolous."[281] Once a JCO has determined that probable cause exists to proceed with formal hearings, the public has a very real interest in judging for itself the seriousness and credibility of the charges against a judge. This interest is particularly compelling where the public is called upon to decide whether the judge should be returned to the bench.

Limiting the electorate's access to disciplinary proceedings concerning those whom the electorate has placed its trust can only weaken the public's trust in the administration of justice. The perception exists in some quarters that JCOs are reluctant to expose judges publicly.[282] Although a judge may have valid privacy concerns about having relatively minor instances of judicial misconduct memorialized on paper, which rival candidates can potentially use to their advantage during a campaign, such is the price of holding an elective office of such great public trust. Popular elections carry with them certain drawbacks, and states that employ popular elections as the principle means of selecting judges have already made the decision that these drawbacks do not outweigh the relative benefits of allowing the public to choose. Thus, if the public is to feel confident that judges are not above the law and is to make a more informed decision, it must have the relevant facts in front of it.

2. Educating the Public

Although greater access to disciplinary proceedings is a laudable goal, the benefits of such access can only be realized if members of the electorate actively seek out information concerning such proceedings. While members of the public should certainly not be unduly limited in their ability to seek out information concerning the disciplinary process, such information should be more readily available to them. In this regard, JCOs and reviewing courts are perfectly positioned to better educate the public about the general purposes of judicial discipline as well as individual cases of judicial misconduct.

For their part, JCOs can help improve accountability in states that use elections to select their judges by increasing their educational efforts. Perhaps

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280 MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 11(A)(2) (1994).

281 *Id.* at cmt. 27.

282 VOLCANSEK, *supra* note 97, at 109.

the most obvious method of keeping the public informed is through the publication of annual reports designed for consumption by the public.[283] For example, Texas' State Commission on Judicial Conduct is required by law to develop and distribute plain-language materials to judges and the public, including a description of the commission's responsibilities, the types of conduct that constitute judicial misconduct, the types of sanctions issued by the commission, and the commission's policies and procedures relating to complaint investigation and resolution.[284] In addition, the commission is required to routinely provide to entities that provide education to judges information relating to judicial misconduct resulting in sanctions.[285] By widely distributing such reports, JCOs not only can be proactive in their attempts to deter future judicial misconduct, they can also better educate the public about instances of judicial misconduct and the purposes of judicial discipline generally.

Another way JCOs and courts can improve accountability is by clearly and fully explaining the basis for any judicial disciplinary action taken against a judge. Voters need to be able to understand the basis for any disciplinary action taken against a judicial candidate. Written opinions serve as a way for a court to explain to lawyers, future litigants, and the public at large why it has taken a particular action. Although the primary readers of judicial opinions are, of course, lawyers, written opinions can also serve as a way to keep the public informed about and connected with the courts. As Frances Kahn Zemans has stated, judges can use their written opinions as an opportunity to "explain the public policy value" of their decisions and to convince the reader of the soundness of the ruling.[286] Such action not only helps to legitimize judicial decisions, it can also educate the public.

In the case of disciplinary proceedings against judges in elective states, courts and JCOs need to recognize that their primary audience is not so much members of the bar, but the public at large. If part of the purpose of judicial discipline is to ensure public confidence in the judiciary, the public needs to be able to comprehend the reasons for a decision to impose a particular sanction. As such, the reasoning behind a decision must be complete and it must be stated in language that is understandable.[287] Although it is virtually impossible for courts to craft bright line rules for choosing between different forms of sanctions, judicial disciplinary opinions present a perfect opportunity for JCOs and courts to educate the public not only about the importance of maintaining an ethical judiciary, but about the relative gravity of the offense with which a judge

283 *See generally* Robert J. Martineau, *The Educational Role of Judicial Conduct Organizations*, 63 JUDICATURE 227, 229 (1979) (arguing that JCOs can play an important educational role through the publication of such reports).

284 TEX. GOV'T CODE ANN. § 33.007 (Vernon 2002).

285 *Id.* § 33.008.

286 Zemans, *supra* note 44, at 642.

287 *Id.*

is charged. Where the judicial misconduct at issue is relatively minor in nature, the court can take steps to make this fact clear. Where the misconduct is more severe, courts can explain exactly why the judge's conduct is unacceptable. In either case, the public is in a better position to make a more informed decision about a judge's qualifications.

As far as the courts themselves are concerned, candor in written opinions can go a long way toward promoting judicial accountability.[288] Not only can complete and forthright opinions educate the public about judicial candidates, they can also serve to improve public confidence in the judiciary.[289] The perception that judges protect their own is only exacerbated when courts write cryptic opinions in their decisions concerning judicial discipline and omit information that might be relevant to a voter. All too often the fact that a judge resigned from office during the pendency of disciplinary proceedings or was defeated in a re-election bid results in an opinion by the reviewing court that is completely lacking in detail as to the alleged misconduct or the reasons behind the JCO's action or recommended action.[290] Similarly, courts will sometimes declare further proceedings against a former judge moot because the judge has resigned or was defeated.[291]

Although such actions are understandable as an attempt to avoid "piling on" a disgraced judge, such actions do a disservice to the goals of judicial discipline and to the voters of the state. In order to promote the goal of reassuring the public that certain types of judicial misconduct will not be tolerated, some public comment by the reviewing court is necessary. As the Michigan Supreme Court stated:

> When a judge charged with misconduct removes himself from judicial office to avoid the notoriety and ignominy incident to disciplinary proceedings and the possibility of sanctions, censure, if deserved, may be essential to "the preservation of the integrity of the judicial system," especially if that integrity has been critically undermined, because the alternative, silence, may be construed by the public as an act of condonation.[292]

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288 Bruce M. Selya, *The Confidence Game: Public Perceptions of the Judiciary*, 30 NEW ENG. L. REV. 909, 914 (1996).

289 *Id.*

290 *See, e.g., In re* Bayles, 399 N.W.2d 394 (Mich. 1986) (publicly censuring judge after JCO had recommended removal and judge had lost re-election bid, but failing to discuss any of the charges against judge).

291 *See, e.g., In re* Blanda, 624 So. 2d 431 (La. 1993) (declaring disciplinary proceedings moot after judge resigned and failing to address JCO's findings and recommendation).

292 *In re* Probert, 308 N.W.2d 773, 776 (Mich. 1981).

Moreover, unless a court is empowered to impose sanctions in addition to removal, such as permanently enjoining a judge from holding future office or declaring the judge ineligible for retirement benefits, the fact that a judge has resigned or been defeated does not necessarily mean that the matter is moot.[293] If nothing prevents a former judge from running for office again, the misconduct at issue is arguably capable of repetition. It is certainly not unheard of for a judge who has resigned or has been removed from office to seek judicial office again.[294] Thus, although it may be impossible to remove a judge who has already removed himself from office or whom the voters have removed, at a minimum, public censure, accompanied by an explanation of the charges and the reasoning behind the censure remains an appropriate option.[295]

VI. CONCLUSION

The popular election of judges and judicial misconduct are two realities of the judiciary that will exist for the foreseeable future. JCOs and courts must take steps to ensure that the reduction of instances of the latter does not unnecessarily intrude on the goals of the former. By and large, the removal mechanism of state JCOs has not unnecessarily undermined the public's right to choose in states that employ judicial elections. Indeed, in many instances, removal of a judge from office via the recommendation of a JCO is simply a more efficient manner of dealing with judicial misconduct than traditional methods of judicial discipline. As the history of disciplinary proceedings illustrates, the removal of judges through the JCO process has not proven a significant threat to the goal of judicial independence, nor has it unduly infringed on the goal of judicial accountability.

In states with elective judiciaries, courts and JCOs can also be a potentially powerful force toward promoting greater accountability. If courts and JCOs are to reach their full potential in this regard, however, states must be willing to allow the public to have reasonable access to their proceedings. Although a certain degree of confidentiality in judicial disciplinary proceedings is essential, the public has a particularly strong interest in such proceedings in states where judges are elected. Through their findings and written opinions, courts and JCOs can help educate the voting public about the qualifications of a judge and the judiciary as a whole.

By taking steps to keep the public informed about the results of judicial misconduct investigations, JCOs and reviewing courts can not only help ensure the continuation of an ethical judiciary, but help offset some of the weaknesses inherent in the system of popular election of judges.

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293 *See In re* Sherrill, 403 S.E.2d 255, 257 (N.C. 1991).

294 *See* Ky. Judicial Conduct Comm'n v. Woods, 25 S.W.3d 470 (Ky. 2000).

295 *See In re Probert*, 308 N.W.2d at 776.