COMMENT: JUDICIAL ACCOUNTABILITY AND DISCIPLINE

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Professor Steven Lubet of Northwestern University School of Law correctly observes that the primary point of friction between judicial independence and accountability is at the state level.[1] Federal judges are not immune from accountability concerns, but those concerns are mitigated by the fact that federal judges serve with life tenure and can be removed from office only by impeachment. We judges in state courts deal with accountability issues more frequently and are more sensitive to them because we are only one election cycle away from unemployment. The judicial disciplinary process and the specter of politically motivated misconduct allegations against state judges poses another important challenge to judicial independence.

I view the issue of judicial independence and accountability on three interdependent levels: political accountability, decisional accountability, and behavioral accountability. Political accountability includes selection, tenure, and the extent to which judges are accountable to the other branches of government for appropriations, definition of jurisdiction, and other issues related to the terms and conditions of our service in the judiciary.

Decisional accountability concerns the manner in which judges are held accountable for rulings and decisions. While this principally takes place through appellate review, it also includes academic criticism of judicial actions. However, I question the extent to which most state court judges are concerned about academic reaction to their work. Most voters, including the lawyers who vote, do not read law review articles and case notes. I do not know of any judicial election campaigns that have featured scholarly reviews of a judge's decisions. Thus, apart from appellate review, decisional accountability occurs mainly in two sensitive places: legislative power to appropriate funding for the courts being manipulated in response to unpopular decisions and rulings, and media criticism of judicial decisions and rulings by politicians and at the grassroots level.

Behavioral accountability involves judicial conduct made the subject of disciplinary proceedings. Although appellate review occasionally includes criti-

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This comment is adapted from Judge Griffen's remarks at the conference at which the papers in this volume were presented. The conference, entitled *Bulwarks of the Republic: Judicial Independence and Accountability in the American System of Justice*, was held in Philadelphia in December 1998.

1. *See* Steven Lubet, *Judicial Discipline and Judicial Independence*, 61 LAW & CONTEMP. PROBS. 59 (Summer 1998).

cism of judicial behavior and, on rare occasions, has resulted in sanctions such as reassignment of a case to another judge due to misbehavior, bias, or prejudice, judicial disciplinary proceedings outnumber these situations.

I am particularly concerned about the interplay between decisional and behavioral accountability in the context of judicial disciplinary proceedings. For example, Senator Robert Dole called for the impeachment of Judge Harold Baer of the Southern District of New York after the judge suppressed evidence of cocaine seized by New York City police officers. The Clinton White House suggested that Judge Baer's resignation would be sought if he did not reverse the ruling. Naturally, Judge Baer reversed himself. Similarly, former Justice Penny White of the Tennessee Supreme Court faced virulent opposition following an opinion reversing a homicide conviction; the criticism resulted in her defeat in a retention election. Character assassination and demagoguery have been targeted at judges who vote to overturn convictions in capital cases, against judges who are viewed as "soft on crime," against judges who are castigated as either enemies of the unborn or a woman's right to choose abortion, and against judges who rule in favor of unpopular causes. The attacks are likely to intensify as more litigation is being shifted to state courts.

Judges are sitting ducks when attacked because of our decisions. While Judge Baer enjoyed life tenure, that did not preclude the possibility that he could have been made the subject of a judicial disciplinary complaint. Had such a complaint been made, it would, one hopes, have been summarily dismissed because it involved a matter that was subject to appellate review. Nevertheless, Judge Baer would have been forced to spend personal funds, take time away from his court duties, and suffer the distraction of press reports about the pending complaint.

I agree, therefore, with Professor Lubet that the most serious threat to the judicial independence of state court judges is the imposition or threat of sanctions based on a judge's decision.[2] If the California Commission on Judicial Performance files a formal charge against Justice Anthony Kline of the California Court of Appeals based upon a dissenting opinion, Justice Kline could potentially be removed from the bench for stating his good faith views about the law. Such a use of judicial disciplinary proceedings clearly poses the danger that judges must yield to what Professor Lubet terms "a judicial orthodoxy."[3]

State court judges have always been mindful of the potential for political defeat due to public displeasure with our rulings and opinions. Now we must also contend with the prospect of defending ourselves in disciplinary proceedings based on allegations that our rulings and opinions demonstrate misconduct in office. Nothing prevents a political officeholder, political opponent, interest group, or disgruntled litigant from filing such charges. When and if they are filed, the targeted judges must finance their defenses with personal funds. They cannot engage in fundraising efforts to underwrite the cost of defending their

2. *See id*. at 65-71.
3. *Id*. at 67.

conduct. Additionally, the fact that charges are pending against a judge can be used in campaign material by opponents or in retention elections. If I may appropriate the marvelous metaphor used by the late Justice Otto Kaus of the California Supreme Court (mentioned by Professor Gerald Uelmen in his article on maintaining the independence of state supreme courts in an era of judicial politization[4]), the specter of judicial disciplinary proceedings arising from decisional conduct is another "crocodile in the bathtub" that is hard not to think about as we state judges shave or put on our makeup. It is even harder not to think about when one realizes that one must take a shower or bath. For sitting ducks, crocodiles in the bathtub are more than causes for intellectual reflection.

I am now reading two powerful books: Taylor Branch's *Pillar of Fire*, the second part of his trilogy on the civil rights era during the King years, and Juan William's *Thurgood Marshall: American Revolutionary*. One striking feature in both books is that although state court judges had the first opportunities to provide relief for civil rights violations, they almost never granted relief. What comes through these works is a picture of state court judges who were timid, unimaginative, and, in some instances, even disdainful of the arguments put forward by those who attacked racial segregation in our nation. If the fear of electoral defeat alone can produce such timidity, I cannot pretend that the prospect of being charged with misconduct and forced to finance one's defense will not add to it. I do not summarily dismiss the notion that judicial disciplinary proceedings will become the favored stalking ground against judges who render unpopular decisions.

It is time to provide public financing for the defense of judicial misconduct allegations based on decisions and opinions. Instead of employing counsel at their own expense, judges should be reimbursed from state funds, particularly when judges are exonerated or when the complaints are dismissed as improperly lodged. We must put our money behind our rhetoric about judicial independence. I hope that this symposium can be a starting point in that process, and I appreciate the opportunity the symposium presents for such an appeal.

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4. See Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997).