

1988

Comments on Professor Burbank's Essay

Bradley C. Canon
University of Kentucky

Follow this and additional works at: <https://uknowledge.uky.edu/klj>



Part of the [Judges Commons](#)

[Right click to open a feedback form in a new tab to let us know how this document benefits you.](#)

Recommended Citation

Canon, Bradley C. (1988) "Comments on Professor Burbank's Essay," *Kentucky Law Journal*: Vol. 76: Iss. 3, Article 4.

Available at: <https://uknowledge.uky.edu/klj/vol76/iss3/4>

This Symposium Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Comments on Professor Burbank's Essay

BY BRADLEY C. CANON*

Professor Stephen Burbank's Essay, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, approaches a problem that is as old as the Constitution: how should federal judges, believed to be engaged in criminal activity, partial justice, or simply unable to perform rationally or effectively, be removed from office or at least from their judicial functions? Although the question is an old one, it is not a major one as constitutional issues go.

In the wake of the disputes between President Jefferson and the Federalists, culminating in Justice Samuel Chase's impeachment and acquittal in 1805, the main parameters of what constitute an impeachable offense have been commonly agreed upon, Gerald Ford's remark to the contrary notwithstanding. When the impeachment of Justice William O. Douglas was discussed in 1970, Ford, then the minority leader in the House of Representatives, said that an impeachable offense is whatever a majority in the House thinks it is. Nonetheless, when the House of Representatives has impeached judges, it has been because of serious breaches of judicial ethics, not on the basis of political disagreement.

Historically, the great majority of federal judges have been honest and at least reasonably able; consequently, serious consideration of removing them from their positions has occurred only very sporadically. The problem of easing out a judge who has become senile, or otherwise dysfunctional, has generally been handled informally and usually successfully, although not with-

* Professor of Political Science, University of Kentucky. B.A., Florida State University, 1959; Ph.D., University of Wisconsin, 1967. This is a revised version of remarks given at the *Kentucky Law Journal's* Symposium on Judicial Discipline and Impeachment, October 12, 1987.

out some resistance as the story of Justice Stephen J. Field illustrates.

Justice Field served on the Supreme Court for almost thirty-five years (1863-97), holding the record for longevity until Justice Douglas broke it in 1974. The story is that when Justice Field became semi-senile, the other members of the Supreme Court nominated Justice John Marshall Harlan I to approach Field about retiring. Harlan, knowing that Field had been given the same task back in 1869 when Justice Robert Grier's mental powers had waned and knowing that Field had done his job successfully, sought to disarm the aged Justice with candor. He aroused the slumbering Field in the robing room and reminded the old man about how he, Field, had set the stage for Grier's retirement. Right then, however, Field's mind was in one of its nimbler states. He became instantly alert and his eyes shone as he cried out, "Yes! And a dirtier day's work I never did in my life." So much for Harlan's effort. Even so—to make the point—a year later Field's colleagues were able to persuade him to step down.¹

The number of federal judges has increased dramatically in recent years. The number is now over 700, compared to under 300 only thirty years ago. Moreover, this number is likely to grow steadily as more and more laws involve the federal courts in new types of claims and as more and more inventive lawyers (or law school professors) devise ways to expand the scope of existing federal jurisdiction or to get cases into the federal courts.

The inevitable consequence is that the number of judges who commit crimes or other unseemly acts or who refuse to step down, despite disabilities, will increase. The cries for removing a particular judge from office, or at least from the judicial function, will become more frequent. The pressure will mount for a more efficient remedy.

It is not too soon to begin thinking about possible solutions. Certainly Professor Burbank's Essay is a well-reasoned review to this end. It does not give us a clear answer. Indeed, it raises more questions than it answers. Nevertheless, if you accept his basic assumptions, especially his assumption that the indepen-

¹ H. ABRAHAM, JUSTICES AND PRESIDENTS 152-53 (2d ed. 1985).

dence of the federal judiciary must not be compromised, Professor Burbank's Essay points out the difficulties with some proposed solutions and, in effect, eliminates them from further consideration. The Essay also effectively counteracts many of the constitutional "boogey men" that are raised against some of the more sensible proposals.

Professor Burbank is especially thorough in refuting the arguments that impeachment must precede criminal conviction and that a conviction should be considered a *per se* ground for impeachment. He is also wise in arguing against a hasty verdict on the utility of the 1980 Act. As misfeasance among federal judges is uncommon, and the Act has been operative for only six years, it thus has been put to few tests. At this point, it is simply too early to say how well the Act is working.

Professor Burbank discusses only in passing the solutions which might be derived from the manner in which states remove or discipline judges. I believe that some important lessons might be learned from scrutinizing their experiences. Of course, unlike federal judges, state judges are subject to some degree of electoral control in four-fifths of the states.² Still the vast majority of these judges are unopposed for re-election,³ and, in the nineteen merit plan states, judges run only against their own record.⁴ Moreover, they serve fairly lengthy terms, ranging mainly from six to fourteen years at the appellate level.⁵ As with the federal system, most states traditionally used only the impeachment option, with all of its attendant problems, to remove judges prior to electoral review.⁶ In recent years, however, nearly all states have found it desirable or useful to create new mechanisms to handle situations in which judges appear to be corrupt, disabled, or given to highly injudicious behavior.⁷

² H. GLICK, *COURTS, POLITICS, AND JUSTICE* 85 (2d ed. 1988).

³ See P. DUBOIS, *FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY* (1980).

⁴ H. GLICK, *supra* note 2, at 93.

⁵ COUNCIL OF STATE GOVERNMENTS, *BOOK OF THE STATES 1984-1985* 146-49 (1984) [hereinafter *BOOK OF THE STATES*].

⁶ See H. JACOB, *JUSTICE IN AMERICA* 127-28 (4th ed. 1984). A few states traditionally removed judges by "legislative address" in which the legislature votes to remove a judge. *Id.* at 128.

⁷ See *BOOK OF THE STATES*, *supra* note 5, at 154-61. Arkansas is now the only state that relies solely on impeachment for removal of judges. *Id.* at 156.

In 1960, California established a Commission on Judicial Performance, which subsequently became the model for similar commissions in about two-thirds of the states. These commissions usually consist of a mixture of judges and attorneys and frequently also include lay persons. They receive complaints about judges, investigate their validity, may hold public or closed hearings, and, when warranted, will recommend actions such as censure, suspension, retirement, or removal. The recommendation almost always goes to the state supreme court, which is empowered to take final action.⁸ When a complaint is lodged against a supreme court justice, lower court judges, often chosen by lot, consider the recommendation.⁹ A somewhat different mechanism, used in about eight states, is to have a court consider such complaints directly. A special court consisting of judges from various levels of the judicial system or the state supreme court may have this duty.¹⁰

One may argue that these commissions or courts will be hampered by an inherent reluctance on the part of judges to curb their errant brethren for many of the same reasons that physicians are allegedly unwilling to act against their peers. For this reason, commissions that contain a majority of nonjudges are probably preferable to commissions or courts composed solely of judges; however, judges also have a strong stake in maintaining judicial integrity at a high level of visibility. The continuation of serious improprieties will diminish the public's respect for all judges. Perhaps complaints establishing marginal cases of ethical violations or disabilities may produce censure or no action rather than removal, but judges are unlikely to tolerate serious misconduct or misfeasance in office. The commission or court mechanisms, certainly less dramatic than impeachment, may also assist in getting judges to leave voluntarily. In California, for example, the commission removed three judges and censured six in the first seventeen years of operation, but fifty-

⁸ See P. STOLZ, *JUDGING JUDGES* 98 (1981). In Tennessee, the recommendation goes to the legislature. See *BOOK OF THE STATES*, *supra* note 5, at 161.

⁹ This can get quite messy. See the account of complaints against several members of the California Supreme Court in P. STOLZ, *supra* note 8.

¹⁰ See generally Culver & Cruikshanks, *Judicial Misconduct: Bench Behavior and the New Disciplinary Mechanisms*, 2 *St. C. J.* 3, 3-6, 30-38 (1978).

seven judges resigned during the commission's investigation.¹¹ Certainly the ponderous weapon of impeachment cannot be brought to bear on the judiciary anywhere near as often.

These self-policing mechanisms have the advantage of retaining judicial independence. Neither the legislative nor the executive branch is involved. Judges need not fear that those in the political branches, who soon must face the electorate, will seek their removal for the main offense of rendering an unpopular decision. While the commission plan provides for infusion from attorneys and (presumably knowledgeable) laymen, commission members do not serve at the voters' sufferance and certainly should appreciate the need for judicial independence. In any event, eliminating political or ideological bias completely is impossible when one group of persons sits in judgment of another person who makes public decisions. All we can do is structure the process to minimize the likelihood of bias. Having judges sit in judgment of another judge is probably as close as we can come.

A constitutional amendment will almost certainly be necessary to institute a workable and efficient system of judicial self-policing among federal judges. Currently, the only means of removal now sanctioned by the Constitution is impeachment by the House of Representatives¹² and conviction by the Senate.¹³ Given the constitutional provision that judges shall serve for "good Behaviour,"¹⁴ any other removal mechanism is immediately constitutionally suspect.

While Professor Burbank stresses the transaction costs of adopting constitutional amendments, I am not so sure that the costs will necessarily be all that high. Amendments that essentially involve governmental "housekeeping" provisions can be adopted with inexpensive transaction costs. This happened in approving both the twentieth amendment (changing the starting date for presidential and congressional terms)¹⁵ and the twenty-fifth amendment (providing for succession to the presidency and

¹¹ H. STUMPF, *AMERICAN JUDICIAL POLITICS* 186 (1988).

¹² U.S. CONST. art. I, § 2, cl. 5.

¹³ *Id.* at art. I, § 3, cl. 6.

¹⁴ *Id.* at art. III, § 1.

¹⁵ *Id.* at amend. XX.

the vice-presidency under various conditions).¹⁶ Both amendments were adopted after the weaknesses of the earlier structures were "brought home" to political leaders and the public by the long interregnum between Franklin Roosevelt's election and inauguration as the nation's economy came apart and the need for more complete succession provisions in the wake of President Kennedy's assassination.

I cannot confidently say that placing some variety of judicial self-policing structure into the Constitution will be easy. Indeed, at the present time, it probably would not be. The difficulties would not be those that face forces trying to secure the adoption of amendments that arouse great political or emotional intensity, such as one prohibiting abortions or a restoration of organized prayer in the public schools. Rather, they would be the difficulties attendant upon elite and public apathy—a "who cares?" "what's the problem?" reaction.

Nevertheless, this indifference may decline, and interest in easier ways of disciplining federal judges correspondingly may rise if the 1980 Act does not function well. A few more impeachment trials—or even threats of them—in the next decade or two may convince Congress that the existing process is too cumbersome and too time-consuming. Similarly if a significant number of unworthy judges stay on the federal bench because of the inefficiency of impeachment and the futility of lesser sanctions, the public may be ready for a change. When and if these occur, the adoption of a constitutional amendment, changing the process by which federal judges can be removed and disciplined, may occur with minimal transaction costs. Until then, we must wait for the 1980 Act to take its course and hope for the best.

¹⁶ *Id.* at amend. XXV.