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A Search for Accountability: Judicial Discipline Under the Judicial Article of the 1970 Illinois State Constitution

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Three issues have arisen since the adoption of the 1970 Illinois State Constitution which may be viewed as bases for revision of the Judicial Article's section on judicial discipline.[1] All three issues were brought to the fore in a 1977 Illinois Supreme Court decision, *Harrod v. Illinois Courts Commission*.[2] The issues raised in this case have become focal points of attention regarding Illinois' system of judicial discipline and their resolution will do much to determine the future character of that system.

Article VI, the Judicial Article of the 1970 Constitution, created a two-tiered system for the administration of judicial discipline consisting of the Illinois Judicial Inquiry Board[3] (hereinafter the "Board") and the Illinois Courts Commission[4] (hereinafter the "Commission"). The Board investigates charges of judicial misconduct, and if a charge is substantiated by its investigation, acts as prosecutor during the hearing. That hearing is conducted before the Commission, the adjudicator of all charges of judicial misconduct.

Only six other states have two-tiered systems separating the investigative and prosecutorial functions (performed by the Illinois Board) from the decision-making function (performed by the Commission).[5] This separation of functions is seen as a way of avoiding conflicts of interest that may occur when one entity investigates,

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1. ILL. CONST. art. VI, § 15.

2. 69 Ill. 2d 445, 372 N.E.2d 53 (1977).

3. ILL. CONST. art. VI, § 15(b)-(d).

4. ILL. CONST. art. VI, § 15 (e)-(g).

5. Five of the states are Alabama, Ohio, Oklahoma, West Virginia and Wisconsin. Delaware "also conforms to this pattern, except it is a three-tiered system. . . ." M. COMISKY & P. PATTERSON, THE JUDICIARY: SELECTION, COMPENSATION, ETHICS, AND DISCIPLINE 153-54 (1987).

prosecutes, and rules on charges of judicial misconduct.[6] However, the other 44 states appear not to have found major conflict of interest problems with their unitary systems which have one organization performing all three functions.

Another unusual feature of the Illinois judicial discipline system is the extent to which the constitution limits state supreme court participation. Only two other states, Delaware and Oklahoma, do not provide for state supreme court involvement in their disciplinary systems.[7] In Illinois, this insulation of the judicial discipline system from the state's supreme court is explained as necessary to maintain public confidence in the integrity of the discipline system.[8] The underlying assumption is that the public doubts the credibility of a system to discipline judges which is an administrative entity within the judicial branch of government. However, forty-seven states give their supreme courts a role in judicial discipline by having them either rule directly on a complaint or review the merits of the decision of the body that made the initial ruling.[9]

The three issues raised by *Harrod* involve questions about the relationship between these two tiers of the discipline system and the Illinois Supreme Court under the 1970 Constitution.[10] The first issue is whether the Illinois Supreme Court has the authority to determine whether an action by either the Board or the Commission is beyond their authority under the Judicial Article.[11] The second issue focuses on identification of the standards to be used by the Board and the Commission in evaluating judicial conduct.[12] The third issue concerns what actions the Board and the Commission are permitted to take when they receive allegations of judicial misconduct based on the interpretation of a statute not yet clarified by an appellate court.[13]

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6. *See* Greenberg, *The Illinois "Two-Tier" Judicial Disciplinary System: Five Years and Counting*, 54 CHI.[-]KENT L. REV. 69 (1977); R. Cohn, *Comparing One- and Two-Tier Systems*, 63 JUDICATURE 244 (1979).

7. *See* COMISKY, *supra* note 5.

8. *See* Greenberg, *supra* note 6, at 73; Cohn, *supra* note 6, at 246-47.

9. *Id.* Some state supreme courts have ruled that they have an inherent power to discipline judges, short of removal. However, when the states' constitutions have been amended to include specific provisions for judicial discipline, the supreme courts have held that the constitutional provisions superseded the inherent powers. Cameron, J. *The Inherent Power of a State's Highest Court to Discipline the Judiciary*, 54 CHI.[-]KENT L. REV. 45 (1977); COMISKY, *supra* note 5.

10. People *ex rel.* Harrod v. Illinois Courts Comm'n, 69 Ill. 2d 445, 372 N.E.2d 53 (1977).

11. *Id.* at 457-62, 372 N.E.2d at 58-61.

12. *Id.* at 468-70, 372 N.E.2d at 63-64.

13. *Id.* at 471-73, 372 N.E.2d at 65-66.

The balance of this article will focus on the controversy surrounding the *Harrod* decision and examine the implications of these issues on the calling for another state constitutional convention.[14] As a foundation for that examination, Part I will summarize the evolution of judicial discipline in Illinois and describe in greater detail the current two-tiered discipline process. Part II will then consider and analyze the catalyst of the controversy, the *Harrod* decision.

I. HISTORY AND BACKGROUND

A. BEFORE 1964

The 1818 Illinois State Constitution provided two methods for the involuntary removal of a member of the state judiciary.[15] A judge could be removed from office for misdemeanors committed in office if a majority of the House of Representatives of the General Assembly voted to pass articles of impeachment, and two-thirds of the Senate voted to convict after sitting as the trier of fact and law on those articles of impeachment.[16] Alternatively, a judge could be removed from office for misconduct insufficient to warrant impeachment.[17] This method of removal required a resolution passed by a two-thirds vote of each house to remove a judge from office.[18] Both the impeachment and legislative removal provisions were continued in the 1848 Constitution.[19]

The 1870 Constitution continued the provision for impeachment[20] but modified the legislative removal provision. The modified provision allowed the General Assembly to remove a judge "for cause", after a hearing, upon a three-fourths vote of each house.[21]

The constitutional mechanism for impeachment was used only twice against state judges, once in 1832 and again in 1843. Both cases

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14. ILL. CONST. art. XIV, § 1(b) requires that the voters be given the opportunity to request a constitutional convention if, at the end of any twenty year period, one has not been called.

15. For a general discussion of the 1818 Illinois State Constitution and its successors, *see* G. BRADEN & R. COHN, THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS (1969); J. CORNELIUS, CONSTITUTION MAKING IN ILLINOIS, 1818-1970 (1972).

16. ILL. CONST. OF 1818, art. II, § 22-23.

17. ILL. CONST. OF 1818, art. IV, § 5.

18. *Id.*

19. ILL. CONST. OF 1848, art. III, § 27-28 (impeachment power); art. V, § 12 (1848) (reasonable cause insufficient to impeach).

20. ILL. CONST. OF 1870, art. IV, § 24.

21. ILL. CONST. OF 1870, art. VI, § 30.

involved allegations of misconduct by state supreme court justices and both resulted in acquittal.[22]

B. THE 1964 AMENDMENT

In 1964, the Judicial Article of the 1870 Constitution was revised extensively through a constitutional amendment approved by the voters in 1962.[23] The new Judicial Article departed from the older practice of placing the responsibility for judicial discipline in the legislature. The 1964 Amendment created a new commission, the Illinois Courts Commission, and gave it primary responsibility for judicial discipline in Illinois.[24] The new Commission included one member of the supreme court chosen by that court, two members of the appellate court chosen by the appellate court, and two judges from the circuit court chosen by the supreme court.[25] The Commission was convened by the supreme court upon its own order or at the request of the Senate. It operated under procedures set down by the supreme court.[26] After a hearing, the Commission had the authority to order a judge retired for disability, suspended without pay, or removed from office for cause.[27]

The 1964 Amendment of the Judicial Article did not refer to the 1870 Constitution's Article II provision authorizing impeachment. This left open the question of whether or not the new judicial

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22. Greenberg, *supra* note 6, at 70.

> In 1832 the Illinois House of Representatives voted articles of impeachment against Justice Theophilus W. Smith of the Illinois Supreme Court, charging him with "high misdemeanors." His trial before the Illinois Senate resulted in acquittal and a subsequent effort to remove him by address failed. In 1843 the Illinois House of Representatives voted articles of impeachment against Justice Browne of the Illinois Supreme Court and he, too, was acquitted by the Senate. The proceedings against Justice Browne were apparently the last attempt to remove an Illinois judge by impeachment.

Id. citing W. BRAITHWAITE, WHO JUDGES THE JUDGES 96-97 (1970); G. FIEDLER, THE ILLINOIS LAW COURTS IN THREE CENTURIES 1673-1973 314 (1973).

23. ILL. CONST. art. VI (1964). Because the amendment was approved by the voters in 1962 but did not take effect until 1964, it is referred to as either the 1962 Amendment or the 1964 Amendment. For a description of events leading up its adoption, *see* BRADEN & COHN, *supra* note 15; Flamm, *Retirement, Suspension and Removal of Judges Under the Proposed Judicial Article*, 46 ILL. B.J. 966 (1958); FLAMM, *Retirement, Suspension and Removal of Judges*, 50 ILL. B.J. 695 (1962 Supp.).

24. ILL. CONST. OF 1870 art. VI, § 18 (1964).

25. *Id.*

26. *Id.*

27. *Id.*

discipline section worked as an implied repeal of the 1870 impeachment provision with regard to the judiciary. In *Cusack v. Howlett*,[28] the Illinois Supreme Court ruled that an implied repeal had taken place.[29] They held that the power to remove judges had been taken from the legislative branch and placed solely within the judicial branch in 1964 with the creation of the Commission.[30]

C. THE 1970 PROVISIONS

The 1970 Constitution clarified the relationship between the judicial discipline structure and the impeachment process, and it also made large-scale changes in the 1964 discipline system.[31] Section 14 of Article IV reasserted the House of Representatives' power to conduct investigations pursuant to its ability to impeach all important executive and judicial officers.[32] The specific inclusion of judicial officers as subject to impeachment was intended to override the Illinois Supreme Court's decision in *Cusak v. Howlett*.[33] Impeachments are tried before the Senate and conviction requires a two-thirds vote of all Senators.[34]

The judicial discipline process was changed from a one-tier system, included within the judicial branch, to a two-tier system independent of the judicial branch. The new two-tier system includes the Illinois State Judicial Inquiry Board and the Illinois Courts Commission.[35]

Frank Greenberg, a member of the first Board convened, identified two factors that motivated the 1970 remodeling of the judicial discipline system.[36] First, he described the turmoil in 1969 surrounding

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28. 44 Ill. 2d 233, 254 N.E.2d 506 (1969).

29. *Id.* at 243-44, 254 N.E.2d at 511-12. For a discussion of this controversy, *see* D. Miller, 1970 ILLINOIS CONSTITUTION ANNOTATED FOR LEGISLATORS 36-37 (3d ed. 1987); BRADEN & COHN, *supra* note 15, at 374-75.

30. *Cusack*, 44 Ill. 2d at 240-44, 254 N.E.2d at 509-12.

31. For an overview of the events leading up to the creation of the 1970 Constitution and its provisions, *see* L. PELEKOUDAS, THE ILLINOIS CONSTITUTION: FINAL REPORT AND BACKGROUND PAPERS, ASSEMBLY ON THE ILLINOIS CONSTITUTION (1962); E. GERTZ & J. PISCIOTTE, CHARTER FOR A NEW AGE: AN INSIDE VIEW OF THE SIXTH ILLINOIS CONSTITUTIONAL CONVENTION (1980).

32. ILL. CONST. art. IV, § 14. *See also* D. Miller, *supra* note 29, at 36-37.

33. *See supra* notes 29-30 and accompanying text.

34. ILL. CONST. art. IV, § 14.

35. ILL. CONST. art. VI, § 15. For an overview of the new discipline system see D. ROLEWICK, A SHORT HISTORY OF THE ILLINOIS JUDICIAL SYSTEM 30-31 (1976). *See also* notes 3-4 and accompanying text.

36. Greenberg, *supra* note 6, at 71-73.

charges of misconduct brought against the sitting Chief Justice of the Illinois Supreme Court and an Associate Justice of that court.[37] These charges led to the creation of an ad hoc commission to investigate the complaints, since the regular commission was viewed as too closely tied to the justices who were the subjects of the complaints.[38] According to Greenberg, the need for the special commission highlighted the problems of a judicial discipline system contained within the judicial branch and led to a loss of public confidence in the existing system.[39] The second factor contributing to the momentum toward changing the 1964 system was what Greenberg described as the state bar's "pervasive dissatisfaction" with the 1964 system.[40] That dissatisfaction included the feeling that the Commission was ineffective partially because it was convened only by order of the Illinois Supreme Court.[41]

The Board is the investigatory and prosecutorial arm of the discipline system created by the 1970 Constitution.[42] It is composed of two circuit court judges chosen by the supreme court, and four laypersons and three lawyers appointed by the governor. The nine members of the Board serve four-year terms, and they are limited to serving a total of eight years. The Board is permanently convened, and it has the authority to receive or initiate complaints against judges and to conduct investigations into those complaints.[43] If five members decide a complaint has merit, the Board may file a formal complaint with the Commission.

The Commission has five members including: one Illinois Supreme Court Justice chosen by that court, two appellate court judges chosen by the appellate court, and two circuit court judges selected by the Illinois Supreme Court.[44] Like the Board, the Commission is convened permanently. After notice and a hearing, the Commission can reprimand, censure, suspend without pay, or remove any judge found to have engaged in willful misconduct in office, persistently failed to perform his/her duties, or engaged in conduct "prejudicial to the administration of justice or that brings the judicial office into

37. *Id.* at 71.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 72.

42. The Board's composition and powers are covered in ILL. CONST. art. VI, § 15 (b) and (c).

43. ILL. CONST. art VI, § 15(c).

44. The composition and authority of the Commission is set out in ILL. CONST. art. VI, § 15(e)-(g) of the 1970 Constitution.

disrepute. . . .''[45] If the Commission determines that a judge is no longer physically or mentally able to perform, it may either suspend without pay or retire the judge.[46]

Three members of the Commission must agree on a particular decision.[47] The constitution explicitly states that decisions of the Commission are final.[48]

Most differences of opinion about the performance of the two-tiered system created in 1970 relate to one of the three issues raised in the *Harrod* case referred to above.[49] They include disagreement over: (1) the authority of the Illinois Supreme Court to consider allegations that either the Board or the Commission has acted beyond its authority under the Constitution; (2) the standards to be used in determining whether there has been actionable judicial misconduct; and (3) the authority of the Board and Commission when the alleged misconduct involves the interpretation of an arguably unclear statute.

II. *Harrod v. Illinois Courts Commission*[50]

A. THE *HARROD* DECISION

On December 3, 1976, the Commission ordered Judge Samuel Harrod III of the Eleventh Circuit Court suspended from his duties for one month, without pay.[51] The Commission was acting on a formal complaint filed with it by the Board charging Judge Harrod with "willful misconduct in office, conduct prejudicial to the administration of justice, and conduct that brought the judicial office into disrepute.''[52]

The Board alleged that the judge repeatedly violated Illinois Supreme Court Rule 61 (c)(18) which requires that, when sentencing, a judge follow the law and not impose sentences which are not authorized by law.[53] In a series of cases, Judge Harrod imposed sentences which included requirements that: (1) 26 male defendants

45. ILL. CONST. art. VI, § 15(e)(1).
46. ILL. CONST. art. VI, § 15(e)(2).
47. ILL. CONST. art. VI, § 15(f).
48. ILL. CONST. art. VI, § 15(f).
49. *See supra* notes 10-13 and accompanying text.
50. 69 Ill. 2d 445, 372 N.E.2d 53 (1977).
51. *Id.* at 451, 372 N.E.2d at 55-56.
52. *Id.* at 452, 372 N.E.2d at 56.
53. ILL. SUP. CT. R. 61(c)(18). The Illinois Constitution gives the Illinois Supreme Court the authority to adopt rules of conduct for state judges. ILL. CONST. art. VI, § 13(a).

have their hair cut; (2) 15 probationers leave their drivers' licenses in the custody of the court clerk in return for cards identifying them as on probation; and (3) three defendants convicted of illegally transporting alcohol collect cans and bottles along highways.[54] In addition, the judge had refused to grant bail to one defendant charged with driving while intoxicated. Harrod did so on the grounds that, when arrested, the defendant was out on bail awaiting trial on two other counts of the same offense.[55]

In his response to the Board's complaint, Judge Harrod argued that his creative sentencing was within his judicial discretion under state statute.[56] That statute states:

> (a) The conditions of probation and of conditional discharge shall be that the person:
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> (1) not violate any criminal statute. . .; and
>
> (2) make a report to and appear in person before such person or agency as directed by the court.
>
> (b) The Court may *in addition to other conditions* require that the person:
>
> [10 permissible conditions are given].[57]

According to Judge Harrod, the sentences referred to in the Board's complaint were within his interpretation of the statute's phrase "in addition to other conditions". Specification of these other conditions, he argued, was left to the discretion of the sentencing judge. Furthermore, he pointed out that this particular statute had yet to be interpreted by an appellate court which was the body with the authority to review his interpretation.[58]

With regard to the case in which he had denied bail, Harrod cited supporting precedent.[59] Based on these two premises, Harrod argued that his actions were reviewable through the regular appellate process and were not within the authority of either the Board or the Commission.[60]

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54. *Harrod*, 69 Ill. 2d at 452-53, 372 N.E.2d at 56.

55. *Id.* at 453, 372 N.E.2d at 56.

56. *Id.* at 453-54, 372 N.E.2d at 57.

57. ILL. REV. STAT. ch. 38, para. 1005-6-3 (1973) (emphasis added).

58. *Harrod*, 69 Ill. 2d 445, 453-54, 372 N.E.2d 53, 57 (1977). An appeal of one of Judge Harrod's haircut sentences was pending before the Court of Appeals. *See* People v. Dunn, 43 Ill. App. 3d 94, 356 N.E.2d 1137 (1976).

59. People *ex rel.* Hemingway v. Elrod, 60 Ill. 2d 74 (1975) *cited in Harrod*, 69 Ill. 2d at 454, 372 N.E.2d at 57.

60. *Harrod*, 69 Ill. 445, 454, 372 N.E.2d 53, 57 (1977).

The Board responded that Article VI, section 15 of the 1970 Constitution gave both the Board and Commission the authority to examine any judicial authority to examine any judicial conduct which might, in their interpretation:

[1] represent "willful misconduct in office,"
[2] be "prejudicial to the administration of justice," or,
[3] bring "the judicial office into disrepute."[61]

In the Board's view, Harrod's sentencing behavior fit all three descriptions of misconduct. It offered two possible constructions of the sentencing statute, both at odds with the one presented by Judge Harrod.[62] The Board found that the "other conditions" referred to in the statute were the two conditions listed in the statute's preceding paragraph, not conditions beyond those enumerated in the statute.[63] Alternatively, the other conditions could be ones not enumerated but of a type similar to those listed.[64] Under either construction, the Board found Harrod's sentences beyond the authority of the statute.[65] In addition, the Board argued that the appealability of these sentences was not relevant to the question of whether they also constituted grounds for judicial discipline.[66]

After a hearing, the Commission agreed with the Board's conclusions that (1) the fact that the sentence could be appealed was irrelevant; and (2) they had the authority to act whenever judicial conduct met the three constitutional conditions cited by the Board.[67] The Commission, however, dismissed the part of the complaint dealing with the denial of bail and also disagreed with the Board's interpretation of the statute, offering yet another interpretation. The Commission's interpretation was a modification of the Board's second alternative. The "other conditions" permitted were those which were: (1) of a type similar to those enumerated; (2) "directed toward rehabilitation;" (3) "reasonably related" to the offense for which the defendant was being sentenced; and (4) "not unduly restrictive of personal liberties".[68] The Commission offered this interpretation de-

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61. *See* ILL. CONST. art. VI, § 15(c) for the authority of the board; ILL. CONST. art. VI, § 15(e) for that of the Commission.

62. *Harrod*, 69 Ill. 2d 445, 455, 372 N.E.2d 53, 57 (1977).

63. *Id.* at 455, 372 N.E.2d at 57.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 456, 372 N.E.2d at 58. *See supra* notes 45-46 and accompanying text for discussion of the constitutional conditions.

68. *Harrod*, 69 Ill. 2d 445, 456, 372 N.E.2d 53, 58 (1977).

spite the fact that, during the time between the Board's ruling and the Commission's ruling, an appellate court had ruled only that the other conditions had to be related to the defendant's crime.[69]

Based on its construction of the statute, the Commission dismissed the charges involving those defendants ordered to pick up bottles and cans.[70] However, it held that the sentences involving the haircut orders and confiscation of drivers' licenses were without legal authority and, therefore, constituted judicial misconduct meriting discipline.[71] Judge Harrod was suspended from office, without pay, for one month.[72]

Ten days after the Commission filed its final order, Judge Harrod requested a rehearing and a stay pending that rehearing. Both requests were denied. Judge Harrod then petitioned the Illinois Supreme Court for permission to file for a writ of *mandamus* ordering the Commission to expunge his record. That petition was granted.[73]

The first point addressed by the Supreme Court in acting on Judge Harrod's petition was its jurisdiction to do so. The Board and Commission argued that the Commission's order was not reviewable because section 15(f) of article VI of the 1970 Constitution states: "The decision of the Commission shall be final."[74] While the court agreed that it lacked the power to review the Commission's decision on the evidence in a case, it ruled that it did have the authority to question whether the Commission had exceeded its constitutional authority.[75] The Court found this power in a series of provisions in the state constitution which combine to make that court "the final arbiter of the Constitution".[76]

The second point addressed by the court in *Harrod* involved the question of which standards are to be used by the Board and Commission when assessing judicial conduct. The Board's position was that it had the authority to examine conduct which may violate either the Standards of Judicial Conduct created by the Illinois Supreme

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69. People v. Dunn, 43 Ill. App. 3d 94, 96, 356 N.E.2d 1137, 1138 (1976).

70. *Harrod*, 69 Ill. 2d 445, 456, 372 N.E.2d at 58.

71. *Id.* at 456-7, 372 N.E.2d at 58.

72. *Id.* at 456-57, 372 N.E.2d at 58 (1977). One member of the Commission dissented on the grounds that they did not have jurisdiction since the sentences were within Harrod's judicial discretion. *Id.* at 457.

73. *Id.* at 474, 372 N.E.2d at 66.

74. *Id.* at 457, 372 N.E.2d at 58.

75. *Id.* at 457-58, 372 N.E.2d at 58-59.

76. *Id.* Three constitutional provisions were relied on: the separation of powers provision, ILL. CONST. art. II, § 1; and the provisions specifying the court's judicial authority and jurisdiction, ILL. CONST. art. VI, §§ 1 and 4, respectively.

Court or the standards determined by the Board to fall within the Constitution's reference to willful misconduct, prejudicial or disreputable conduct.[77]

The court rejected the Board's argument. The Judicial Article of the 1970 Constitution gives the supreme court the authority to set rules of conduct for state judges.[78] According to the court, the framers of that article intended for those standards to be the exclusive basis for the operation of the disciplinary system created in section 15.[79] The court said that the language in article VI, section 15 about willful misconduct and prejudicial or disreputable conduct was not intended to provide the Board or Commission with the authority to create their own standards of judicial conduct independent of those established by the court.[80] Instead, that language was intended to guide the Board and Commission in deciding whether a judge's violation of one of the supreme court's rules was more than "a technical violation", and thus, justification for discipline.[81] In addition, the terms used in the constitutional provisions regarding willful misconduct are so broad that, as standards for judicial conduct, they would be subject to attack as overly broad.[82] Therefore, only conduct violative of the Supreme Court's Standards for Judicial Conduct can provide grounds for Board or Commission action.[83]

The third point made by the court in the *Harrod* case dealt with the question of what the Board and Commission were to do with allegations of judicial misconduct predicated on an interpretation of an arguably unclear statute which had yet to be clarified by an appellate court.[84] The court rejected the contention that because a judge's action was appealable, it was beyond the jurisdiction of the judicial discipline system. However, they agreed with Judge Harrod, "that to maintain an independent judiciary mere errors of law or simple abuses of judicial discretion should not be the subject of discipline. . . ."[85] Nonetheless, the court stated that judicial discretion has limits. One of these limits is the supreme court rule prohibiting

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77. *Id.* at 463, 372 N.E.2d at 61. The constitutional language referred to by the Board is found in ILL. CONST. art. VI, § 15 (c).

78. ILL. CONST. art VI, § 13(a).

79. *Harrod*, 69 Ill. 2d 445, 463-70, 372 N.E.2d at 61-64.

80. *Id.* at 468, 372 N.E.2d at 63.

81. *Id.* at 468, 372 N.E.2d at 63-64.

82. *Id.* at 469, 372 N.E.2d at 64.

83. *Id.*

84. *Id.* at 471-73, 372 N.E.2d at 65-66.

85. *Id.* at 471, 372 N.E.2d at 65.

sentences not authorized by law.[86] Therefore, "where the law is clear on its face," a judge who repeatedly issues sentences not authorized by law can be brought before the judicial discipline system.[87]

Since the Board had charged Harrod with a violation of a relevant supreme court rule, the Board was within its authority.[88] However, that authority does not extend to the interpretation of "statutory ambiguities."[89] Such interpretations are solely within the power of the judicial branch.[90] The court pointed out that, if the Board or Commission could interpret an unclear statute and discipline a judge for acting contrary to its interpretation, and if an appellate court had issued a different interpretation of the same statute, then the judge would be in a no-win situation. Any action taken would subject that judge to either reversal on appeal or to judicial discipline.[91] In a concluding paragraph, the court summarized its ruling:

> The function of the Commission is one of fact finding. Its function in this case was to apply the facts to the *determined* law, not to determine, construe, or interpret what the law should be. We find that the Commission exceeded its constitutional authority when, in determining whether [Judge Harrod's] orders were without authority of law, it applied its own independent interpretation and construction of [the statute]. . . .[92]

The Supreme Court granted Judge Harrod's petition for *mandamus*, declared his suspension void, and ordered the Commission to expunge it from the records.[93]

B. THE IMPACT OF THE *HARROD* DECISION

The response to the court's opinion in *Harrod* was mixed. Fred Greenberg, then a member of the Board, wrote the major critique of the opinion and charged that the court had unconstitutionally deprived the Board and Commission of their independence from the judiciary.[94] Taking a different perspective, Francis Morrissey wrote supporting

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86. *See supra* notes 53-57 and accompanying text.
87. *Harrod*, 69 Ill. 2d 445, 472, 372 N.E.2d at 65.
88. *Id.* at 470, 372 N.E.2d at 64.
89. *Id.* at 473, 372 N.E.2d at 65-66.
90. *Id.* at 473, 372 N.E.2d at 65-66.
91. *Id.* at 473, 372 N.E.2d at 66.
92. *Id.* at 473, 372 N.E.2d at 66 (emphasis in original).
93. *Id.* at 474, 372 N.E.2d at 66.
94. *See generally* Greenberg, *supra* note 6.

the court's decision.[95] Morrissey had participated in preparing the amicus brief the Illinois Judges Association filed in the *Harrod* case. The decision was commented on by two Michigan scholars who used the issues raised in *Harrod* as the basis for their argument that the Illinois system is inherently flawed.[96]

Before examining the commentators' contrasting perceptions of the *Harrod* decision and the conclusions that can be drawn from them, it is important to note the difficulty of objectively assessing the performance of any system of judicial discipline. The difficulty lies in the nature of the problem the systems are created to solve. That problem, judicial misconduct, is similar to other forms of deviant behavior in its resistance to objective measurement. Before the amount of judicial misconduct in a system can be measured, judicial misconduct itself must be defined. The *Harrod* case provides an example of the difficulty of reaching agreement on such a definition. The Board saw Judge Harrod's haircut, drivers' license, and bottle-and-can sentences as judicial misconduct. They also saw the denial of bail decision as misconduct.[97] The Commission saw only the haircut and drivers' license sentences as misconduct.[98] The Illinois Supreme Court, and presumably Judge Harrod, saw none of the sentences as misconduct.[99]

Even if some consensus on the definition of judicial misconduct could be reached, measurement difficulties would remain.[100] Since misconduct can be the subject of punishment, or at least social and professional stigmatization, judges are not likely to openly admit to it. Perceptions of members of the bar and judiciary regarding the amount of judicial misconduct tend to be unreliable, because these perceptions are influenced by personal grudges, partisan and ideological differences, differences of opinion about specific cases, and unsubstantiated anecdotes. Official records of disciplinary commissions may also be an unreliable measure, reflecting the efficiency of a commission rather than the extent of the problem.

Given these difficulties in assessing how much judicial misconduct plagues Illinois, predictions about the impact *Harrod* will have on the

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95. *See* Morrissey, *The Illinois Courts Commission and Judicial Independence: Judicial Disciplinary Proceedings in the Wake of Harrod*, 59 CHI. B. REC. 188 (1978).

96. *See* Gillis & Fieldman, *Michigan's Unitary System of Judicial Discipline: A Comparison with Illinois' Two-Tier Approach*, 54 CHI.[-]KENT L. REV. 117 (1977); *cf.* R. Cohn, *Comparing One- and Two-tier Systems*, 63 JUDICATURE 244 (1979).

97. *See supra* notes 53-56 and accompanying text.

98. *See supra* notes 68-72 and accompanying text.

99. *See supra* notes 57-60 & 84-92 and accompanying text.

100. Schoenbaum, *A Historical Look at Judicial Discipline*, 54 CHI.[-]KENT L. REV. 1 (1977).

effectiveness of the Board and Commission must be viewed as speculative. Similarly, one needs to approach with caution the question of whether the discipline section of the Judicial Article of the 1970 Illinois Constitution should be amended in response to *Harrod*. Consideration of this question will be divided into three parts reflecting the three issues raised and decided in *Harrod*.

1. *The Final Authority*

In *Harrod*, the Illinois Supreme Court ruled that it had the constitutional obligation to address the question of whether either the Commission or the Board had exceeded its authority under the Judicial Article.[101] Such a power is part of the court's role as the final arbiter of the state constitution. That role includes the responsibility to consider whether any organ of state government has acted *ultra vires*. Section 15(f) of the judicial discipline section of the constitution states: "The decision of the Commission shall be final".[102] The court did not view this provision as prohibiting any judicial examination of Commission action. Rather, that section was viewed as prohibiting judicial review of the evidence used by the Board and Commission and the substance of the rulings they made on that evidence.

On the other hand, the Board, the Commission, and Frank Greenberg argued that section 15(f) clearly prohibits *any* judicial examination of the rulings of the Commission. Greenberg criticized the court's ruling on this point as "judicial review in the guise of policing constitutional boundaries," and a "means of constitutional policymaking or 'amending' the constitution."[103] He viewed the effect of this behavior as "the reassertion by the supreme court of judicial control over the system."[104] Such control, according to Greenberg, led to the problems with the one-tier system created by the 1964 amendment which produced wide-spread dissatisfaction among the bar and a loss of public confidence in that system.[105]

In describing the evolution of the current Illinois system, Greenberg observed that partisan involvement in judicial elections made it especially important that the judicial discipline system be totally independent of the state judiciary.[106] He therefore finds the supreme court's assertion of the power to review questions regarding the scope of the Board's and Commission's authority troubling.

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101. *Harrod*, 69 Ill. 2d 445, 457-58, 372 N.E.2d 53, 58-59 (1977).
102. ILL. CONST. art. VI, § 15(f).
103. Greenberg, *supra* note 6, at 106.
104. *Id.* at 105.
105. *Id.* at 71.
106. *Id.* at 76-77.

The basis Greenberg gave for his concern implies that the method by which state judges reach office somehow reduces their capacity to act objectively regarding charges of judicial misconduct. However, the members of the Commission are all judges themselves. They have been selected by the same process as have the judges who may come before them on charges of misconduct and those on the supreme court. The judges sitting on the Commission are appointed to those seats by other judges. It is difficult to understand why the supreme court's exercise of the power to review questions about the scope of the Commission's authority contaminates the integrity or independence of a system of judicial discipline already comprised of members of the judicial branch.

If there were a compelling need to keep the judicial discipline system *totally* independent of the state judiciary, it would be reasonable to advocate an amendment to the Judicial Article clarifying section 15(f) and overruling the *Harrod* decision on this point. Yet, even if the need for this independence were conceded, such an amendment might create a different problem. If the supreme court had no authority to rule on whether the Board or the Commission exceeded their authority under the constitution, what checks would there be on the Board's and Commission's behavior? If they became the sole interpreters of their constitutional mandate, to whom would they be accountable should they exceed that mandate?

The only apparent checks on their behavior would be the possibility of further constitutional amendment or the opportunity to defeat judges sitting on the Commission at their next judicial election.[107] These are the same checks available now to limit potential supreme court abuses of authority. Hence, the controversy over the supreme court's authority to review the scope of the Commission's authority can be reduced to a question of whom should be left relatively unaccountable—the Illinois Supreme Court or the Commission.

2. *Standards of Judicial Conduct*

In *Harrod*, the supreme court ruled that Section 13 of the 1970 Judicial Article gave them exclusive authority to adopt rules of

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107. Since members of the Commission are selected by their colleagues on their respective courts, it is possible that they could be removed by those colleagues for exceeding their authority. However, such a possibility is not mentioned in the Judicial Article, and therefore probably would require a decision of the supreme court to ensure its legitimacy. Such a possibility is not much of an alternative to judicial review as a check on Commission power since its use would lead right back to the question of the supreme court's authority to interpret § 15.

conduct governing the judiciary.[108] Neither the Board nor the Commission could develop independent standards for use in judicial misconduct cases.

The opposite position was taken by the Board and Commission in *Harrod*.[109] Greenberg supported the view of the Commission and the Board, calling the court's decision "unworkable and an invasion of the independence of the judicial discipline system".[110] He argued that the information available on the deliberations of the drafters of the 1970 Judicial Article showed no evidence that they intended the rules created by the supreme court under Section 13[111] to be the *only* rules of conduct applicable. According to Greenberg, if that had been their intent, there would have been no need for the listing of criteria in section 15. That section lists reasons (i.e., willful misconduct, and prejudicial or disreputable conduct) the Commission may use to invoke available sanctions for judicial misconduct. In *Harrod*, the Board and Commission used the criteria as bases for their actions.

This second issue seems to be somewhat of a tempest in a teapot. Perhaps it is an extension of the battle for "territory" that lies at the heart of the reviewability issue. The scope of the supreme court's rules under Section 13 is sufficiently broad to include most incidents of even the more innovative forms of judicial misconduct. The Board and Commission had no trouble tying Judge Harrod's behavior to a section of the court rules. Their additional insistence that he violated the criteria in Section 15 added nothing of substance to their accusations, since the way in which they alleged he violated the Section 15 requirements was by violating a specific supreme court rule.

Greenberg advocated allowing both the Board and Commission to develop independent standards for judicial conduct through a case-by-case definition of the content of the criteria in Section 15.[112] In *Harrod*, the court observed that given the general nature of the Section 15 provisions, such an approach would be vulnerable to attack for being sufficiently vague as to deprive judges of notice of the standards to which they are held.[113] Additionally, under Greenberg's approach, the Board and Commission would be granted total immunity from judicial review and free to define the content of the provisions in Section 15. The Board and Commission would thus

108. *Harrod*, 69 Ill. 2d 445, 462-64, 372 N.E.2d 53, 61 (1977).
109. *Id.* at 463, 372 N.E.2d at 61.
110. Greenberg, *supra* note 6, at 110.
111. ILL. CONST. art. VI, § 13.
112. Greenberg, *supra* note 6, at 86-88.
113. *Harrod*, 69 Ill. 2d 445, 468-69, 372 N.E.2d 53, 64 (1977).

become the final arbiters of judicial misconduct, free to expand or reject the supreme court rules which are authorized by the constitution.

3. *Judicial Discipline and Statutory Interpretation*

The third issue dealt with in the *Harrod* decision seems the most vexing and the one most in need of some constitutional modification. That issue involves the authority of the Board and Commission when alleged judicial misconduct involves an ambiguous statute not yet interpreted by an appellate court.

Judge Harrod asserted that the creative sentences he imposed which led to the Board's complaint were within the discretion granted him by the state statute. That statute, defining the conditions judges can impose on probationers, included a variety of specific conditions and the phrase "in addition to other conditions".[114] Judge Harrod saw the sentences as permissible "other conditions". An appeal, involving the question of whether the statute authorized these exercises in judicial ingenuity, was pending before the state court of appeals at the time of the Board's and Commission's actions.[115] Both the Board and Commission issued their own interpretations of the statute. The appellate court eventually issued an opinion containing an interpretation of the statute which differed from both the Board and Commission interpretations. The supreme court relied on the appellate court interpretation.

The supreme court described the untenable situation that could develop if the Board and Commission were allowed to interpret vague statutes and use these interpretations as the bases for charges of judicial misconduct.[116] Judges could be faced with one interpretation coming from higher courts in the judiciary and a different interpretation coming from the judicial discipline bodies. A judge would have the choice of acting in accord with the disciplinary bodies' interpretation and having his/her decision over-turned on appeal, or acting in accord with the appellate court interpretation and being open to charges of judicial misconduct. The *Harrod* decision prevents that dilemma from developing by prohibiting the commission from applying its own interpretation.[117]

Francis Morrissey noted that after the Board filed its complaint against Judge Harrod, a number of state trial judges, who had been

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114. ILL. REV. STAT. ch. 38, para. 1005-6-3(b) (1973).
115. People v. Dunn, 43 Ill. App. 3d 94, 356 N.E.2d 1137 (1876).
116. *Harrod*, 69 Ill. 2d 445, 473, 372 N.E.2d 53, 66 (1977).
117. *Id.* at 472, 372 N.E.2d 65.

interpreting the statute as Judge Harrod had, changed their sentencing behavior and limited themselves to the conditions enumerated in the statute.[118] He argued that this chilling of judicial discretion ran counter to the intent of the legislature in drafting the statute.

The problem raised by this third issue is not so much with what the court decided, but rather more with finding out precisely when this part of the *Harrod* decision applies in future cases.

It is settled by *Harrod* that the Board and Commission cannot interpret vague statutes and use their interpretations as bases for charges. That seems to imply that if a complaint about judicial conduct is received and it involves such a statute, both the Board and the Commission must wait for appellate interpretation before proceeding with the complaint. Given the case loads of higher courts in Illinois, the wait could be considerable. Meanwhile, the Commission would be unable to protect the public from a judge engaging in such conduct. Further, some question exists about when it is safe to assume that the appellate process has run its course. For example, *Harrod* involved a statute interpreted by the court of appeals. In a future case, perhaps with a closely divided appellate court, would the Board and Commission be able to act when the court of appeals issued its interpretation, or would they have to wait to see if the supreme court chose to consider the matter? If the case raised federal questions, would the Board and Commission need to wait for possible United States Supreme Court action?

Perhaps a thornier aspect of this problem is the determination of when a statute is sufficiently vague to bring the *Harrod* rule into effect. John Gillis and Elaine Fieldman argue that the difficulty of separating issues of legal interpretation from issues of judicial discipline is a primary weakness of the Illinois system.[119] They argue that this overlap will occur with sufficient frequency so that conflict is inevitable in a judicial discipline system like Illinois' which prohibits the supreme court from making determinations on the merits of complaints.

Statutes are not the only potential source of this sort of conflict. Constitutions also require interpretation. Following *Harrod*, questions arose about the extent to which judges charged with judicial misconduct are protected by procedural and substantive guarantees in the constitution. For example, the case of Judge Elward[120] involved the

118. Morrissey, *supra* note 95, at 197.

119. Gillis & Fieldman, *supra* note 96, at 130.

120. *In re* Elward, 1 Ill. Cts. Com. 114 (No. 77-CC-1 1977).

question of whether his right of free speech prohibited charging him with judicial misconduct based on allegedly misleading campaign advertisements.[121] The Board found no constitutional bar and filed a formal complaint with the Commission. The Commission held that Judge Elward's advertisement was protected speech.[122]

III. CONCLUSION

Given the segregation of Illinois' Supreme Court from the judicial discipline system, such questions of interpretation are likely to provoke future controversy even if the Board, the Commission, and the Illinois Supreme Court put a great deal of effort into avoiding unnecessary conflict. Their history of interaction leaves little room for optimism on that score. One means of avoiding a future filled with ongoing battles would be a constitutional amendment creating and legitimizing a process by which the Board and/or Commission could request the equivalent of a supreme court advisory opinion when a complaint of judicial misconduct rests on the interpretation of an unclear statute or a constitutional question. It may be best to include a provision to settle this controversy in any amendment which may be proposed on the topic of judicial selection, since many of the sources of concern related to concerns raised by the current selection and retention articles of the 1970 Constitution. For example, much of the concern expressed by Greenberg centers on the impact election-related partisanship may have on the integrity of the judicial discipline system.[123] The issue in *Elward* concerned judicial ethics in campaigns and is an area where the Illinois Supreme Court and the Board and Commission are likely to clash in the future. All three issues raised by *Harrod* are tied closely to concerns about selection and retention. In fact, the three issues may be surrogates for concerns about the ethical complications created by the partisan election of state judges. Therefore, focusing reformist attention on modification of the selection and retention provisions of the 1970 Constitution may be more productive in the

121. Judge Elward's lawyers in his judicial discipline case have written an article supportive of the contention that the constitutional right of freedom of speech gives judicial candidates a great deal of discretion in choosing the content of their campaign advertisements: D. Reuben and L. Ring, *Judges Have Rights, Too*, 59 CHI. B. REC. 220 (1978). Rubin Cohn, a member of the Judicial Inquiry Board filing the complaint against Judge Elward delivered an intense critique of the Commission's decision in *Judicial Discipline in Illinois - A Commentary on the Judge Elward Decision*, 59 CHI. B. REC. 200 (1978).

122. *Judges Have Rights, Too*, 59 CHI. B. REC. 220, 222 (1978).

123. Greenberg, *supra* note 6.

long term than merely modifying the judicial discipline article in response to the issues raised in *Harrod*. If the concerns raised by judicial partisanship were removed, the Illinois Supreme Court and the disciplinary Board and Commission may be able to evolve a mutually acceptable interpretation of those sections of the judicial discipline article which are now the source of controversy.