University of Richmond Law Review

Volume 43 | Issue 1 Article 18

11-1-2008

Guarding the Guardians: Judges' Rights and Virginia's Judicial Inquiry and Review Commission

Jeffrey D. McMahan Jr.
University of Richmond School of Law

COMMENT

GUARDING THE GUARDIANS: JUDGES' RIGHTS AND VIRGINIA'S JUDICIAL INQUIRY AND REVIEW COMMISSION

"Quis custodiet ipsos custodes" [1]

I. INTRODUCTION

The headline read, "Pants-Dropping, Coin-Flipping Incidents Cost Virginia Judge His Job."[2] From the small town of Wise, Virginia, across the nation, and even across the Pacific Ocean to Australia,[3] the story of Judge James Michael Shull filled the ninety-second sound bytes of the twenty-four-hour news machine. Among other affronts, Judge Shull allegedly twice ordered a woman to remove her pants in court.[4] Of course, Judge Shull defended his actions by noting that he never ordered the woman to remove her pants, but that she offered to do so in order to prove the existence of a disputed wound; Judge Shull claimed he first declined her offer, but then he later allowed it when alternative evidence was unavailable.[5] Nevertheless, this portion of the facts was absent from the media coverage of the story. In the end, Judge Shull was removed from office when the Supreme Court of Virginia found that Judge Shull violated the judicial canons.[6]

---

1. JUVENAL, SATIRES, VI, 347–48.

2. Larry O'Dell, *Pants-Dropping, Coin-Flipping Incidents Cost Va. Judge His Job*, ABC NEWS, Nov. 2, 2007, http://abcnews.go.com/TheLaw/wireStory?id=3812541.

3. *Drop-Pants Judge Ruled out of Court*, SUNDAY TIMES (PERTH, AUSTL.), Nov. 4, 2007, at 42.

4. Judicial Inquiry & Review Comm'n v. Shull, 274 Va. 657, 662, 651 S.E.2d 648, 651 (2007).

5. *Id.* at 663–64, 651 S.E.2d at 652.

6. *Id.* at 675–76, 651 S.E.2d at 658–59. Jude Shull has since opened his own practice

The story of Judge Shull is just one example of judicial impropriety. Other instances include the stories of Alcee Hastings, a federal judge impeached for accepting over $150,000 in bribes in exchange for favorable treatment at sentencing;[7] Harold Cobb Maurice, who was removed from the bench for misappropriating confiscated weapons and alcohol for personal use and illegal sale;[8] and Robert Restaino, a Niagara Falls City Court Judge who was removed after he jailed forty-six people in his courtroom because each failed to claim responsibility for a cell phone that rang during court proceedings.[9] In response to such judicial misconduct, private citizens have formed several watchdog groups to combat and report impropriety from the bench.[10] And, although the occurrence of judicial misconduct is rare, history shows it is the rare disaster that must be planned for; thus, all states, including the District of Columbia, have created governmental agencies charged with investigating allegations of judicial misconduct.[11]

This comment examines the governmental entities created to investigate judicial misconduct, with a focus on Virginia's Judicial Inquiry and Review Commission, and addresses practical and constitutional issues arising from their formation and exercise of duties. Part II briefly discusses Virginia's history of removing judges from the bench and punishing improper judicial conduct.

---

and spoke candidly about the events leading to his suspension, his feelings about the suspension, and his life since being removed from the bench. *See* Daniel Gilbert, *Ousted Judge Reflects on His Bench Time*, BRISTOL HERALD COURIER, May 25, 2008, http://www.tricities.com/tri/news/local/consumer/article/James_Michael_Shull_doesnt_see_himself_as_one_of_the_gang/9952.

7. Ruth Marcus, *Senate Removes Hastings*, WASH. POST, Oct. 21, 1989, at A1.

8. Tom Campbell, *Judge James M. Shull Removed from Bench*, RICH. TIMES-DISPATCH, Nov. 3, 2007, at A1.

9. *Judge Removed over Cell Phone Jailing*, ABC NEWS, Nov. 27, 2007, http://abcnews.go.com/TheLaw/wireStory?id=3922077.

10. *See, e.g.*, Black Robed Hooliganism, http://www.blackrobedhooligans.blogspot.com (last visited Oct. 10, 2008); Center for Judicial Accountability Home Page, http://www.judgewatch.org (last visited Oct. 10, 2008); Corruption, Fraud and Judicial Misconduct Home Page, http://injusticexposed.blogspot.com (last visited Oct.10, 2008); Judicial Abuse Home Page, http://judicialmisconduct.blogspot.com (last visited Oct. 10, 2008); Redress Home Page, http://www.redressinc.org (last visited Oct. 10, 2008); Truth in Justice Home Page, http://www.truthinjustice.org (last visited Oct. 10, 2008). In fact, judicial impropriety was the basis of a book entitled *The Benchwarmers*, which discusses "shortcomings of the judiciary." JOSEPH C. GOULDEN, THE BENCHWARMERS 19 (1974); *see also* MAX BOOT, OUT OF ORDER (1998); WILLIAM THOMAS BRAITHWAITE, WHO JUDGES THE JUDGES? (1971).

11. *See* American Judicature Society, State Judicial Conduct Organizations Summary, http://www.ajs.org/ethics/eth_conduct-orgs.asp; *see also* MARVIN COMISKY & PHILIP C. PATTERSON, THE JUDICIARY—SELECTION, COMPENSATION, ETHICS, & DISCIPLINE (1987); IRENE A. TESITOR & DWIGHT B. SINKS, JUDICIAL CONDUCT ORGANIZATIONS (2d ed. 1980).

Part III summarizes Virginia's Judicial Inquiry and Review Commission, its constitutional mandate, statutory creation, administrative process, and the judicial interpretations by the Supreme Court of Virginia. Part IV identifies challenges, both practical and constitutional, facing Virginia's Judicial Inquiry and Review Commission and offers suggestions for its improvement with particular emphasis on judges' rights and the powers of the Judicial Inquiry and Review Commission. Part V concludes the comment.

II. A HISTORY OF CHECKING THE JUDICIARY

Judicial integrity and independence thrives when a judge can make decisions without fear of retribution from the other branches of government via removal, censure, salary alterations, or the like.[12] Nevertheless, because human beings—subject to human frailties—occupy every branch of government, America has always provided for the removal of judges from the bench—just as it has always provided for the removal of a President, members of Congress, and other elected officials from office. With respect to Virginia's judiciary, the election of judges serves as the first line of defense against improper judicial conduct: the General Assembly elects judges for a term, and they are subject to reelection every twelve, eight, or six years.[13] Yet, judicial misconduct in the interim may create the need to remove a judge from the bench before his or her reelection. The Constitution of Virginia provides for such a process via impeachment.[14]

The first Constitution of Virginia in 1776 provided for the impeachment of judges by the House of Delegates with a trial for removal by the Court of Appeals.[15] This impeachment process was maintained in Virginia's 1830 constitution, but the trial of a judge was moved to the Virginia Senate.[16] Additionally, the new constitution provided a second option for removing a judge from the bench without conducting a trial where both houses of the

12. *See generally* W. Hamilton Bryson, *Judicial Independence in Virginia*, 38 U. RICH. L. REV. 705 (2004).

13. VA. CONST. art. VI, § 7; *see also* Bryson, *supra* note 12, at 712 ("This system of judicial selection provides a political check on the judiciary by the legislature.").

14. VA. CONST. art. IV, § 17.

15. VA. CONST. (1776).

16. VA. CONST. art. III, § 13 (1830).

General Assembly approved such an action by a two-thirds vote.[17] This latter method was abolished in 1971 when the Constitution of Virginia again changed, but impeachment by the House of Delegates with prosecution by a two-thirds vote of the Senate remained.[18]

Though the means of removing a judge by impeachment has always existed in Virginia, the practice of doing so is rare. No Virginia supreme court justice or court of appeals judge has ever been impeached.[19] Also, although impeachment proceedings against judges of Virginia's lower courts have been sporadically initiated, only twice has such a proceeding been successful—once in 1903, and again in 1908.[20] The dearth of judicial impeachments may mean one of two things: Virginia judges are some of the most elite in the nation and strictly adhere to the judicial canons, or impeachment "is politically and procedurally cumbersome."[21] While Virginia certainly can opine as to her myriad professional and perspicacious jurists, the latter is as likely to be true because it is easier for the legislature to allow the few "unworthy or incompetent judge[s] to finish [their] term[s] of office and then not re-elect" them.[22]

The passage of House Bill 475[23] in 1942 and its attempted application in *In re Carney*[24] illustrates an effort by the Virginia legislature to circumvent the impeachment process—most likely in response to its cumbersome requirements. Section five of House Bill 475 granted the Supreme Court of Appeals of Virginia the power to conduct a hearing to determine whether a judge is competent to remain in office.[25] This power could be invoked only after the court found reasonable cause to believe a judge suffered from "an illness or disability, mental or physical, . . . render[ing] such judge . . . permanently incapacitated or incompetent to dis-

17. *Id.* art. V, § 6.
18. VA. CONST. art. IV, § 17.
19. Bryson, *supra* note 12, at 713.
20. *Id.* at 713–14.
21. *Id.* at 715.
22. *Id.*
23. H.B. 475, Va. Gen. Assembly (Reg. Sess. 1942) (enacted as Act of Apr. 6, 1942, ch. 441, 1942 Va. Acts 705).
24. 182 Va. 907, 30 S.E.2d 789 (1944).
25. H.B. 475.

charge the duties of his office."[26] If the court found that the judge was permanently unable to perform the duties of his office as a result of the illness or disability, the court was required to retire the judge.[27]

The first application of House Bill 475 came in *In re Carney*.[28] The House of Delegates passed House Resolution 30 requesting the Supreme Court of Virginia to determine whether Judge A.B. Carney should be retired under section five of House Bill 475.[29] The court, however, noted that Resolution 30 did not allege that Judge Carney suffered from an illness or disability, but rather it accused him of malfeasance and misfeasance.[30] Such accusations, the court held, were grounds for impeachment and did not invoke the jurisdiction of section five in House Bill 475.[31] The message was clear: if the court was to have any power to remove a judge from office, that power had to stem from the constitution or from a statute enacted under the constitution.[32]

The cumbersome process of impeachment no doubt forced the House of Delegates to attempt to circumvent that system by passing House Resolution 30 to retire Judge Carney under House Bill 475. Indeed, after *In re Carney* the House tried to remove Judge Carney by voting to impeach him for agreeing to share his salary with his predecessor on the bench if the predecessor would retire.[33] Judge Carney, however, remained on the bench after the Senate refused to remove him.[34] As is evident from this series of events, the process of impeachment consumes large quantities of the General Assembly's time and resources. Furthermore, the cumbersome nature of impeachment is exacerbated in Virginia, perhaps more so than in other states, because the General Assembly meets for a limited duration each year. Within a short pe-

---

26. *Id.*
27. *Id.*
28. 182 Va. at 908, 30 S.E.2d at 789.
29. *Id.*
30. *Id.* at 908–09, 30 S.E.2d at 789.
31. *Id.* at 909, 30 S.E.2d at 790.
32. *See generally* Robert A. Brazener, Annotation, *Power of Court to Remove or Suspend Judge*, 53 A.L.R.3d 882, § 4 (1973) ("[A]ny power existing in a state court to remove a state judge from office must be based upon express constitutional provisions or upon valid statutory enabling provisions enacted thereunder." (citing *In re* Carney, 182 Va. 907, 30 S.E.2d 789 (1944))).
33. Bryson, *supra* note 12, at 715.
34. *Id.*

riod of time, the legislature tackles a voluminous amount of public business—public business that would have to be set aside in order to administer impeachment proceedings. Thus, impeachment is an unsavory option the General Assembly has historically, and justifiably, avoided using.

The impeachment process exists today, although it is rarely used. Instead, recognizing the hurdles that must be cleared to remove a deficient judge or take corrective measures against a misbehaving judge, the General Assembly included the establishment of the Judicial Inquiry and Review Commission ("JIRC") when it wrote Virginia's new constitution in 1971.[35] Every other state, including the District of Columbia, has created similar governmental entities.[36]

III. OVERVIEW OF VIRGINIA'S JUDICIAL INQUIRY AND REVIEW COMMISSION

The JIRC is Virginia's governmental body charged with "investigat[ing] charges that, if true, would warrant the retirement, removal, or censure of a judge."[37] The JIRC is provided for in the Constitution of Virginia, given authority via statutory enactment and acts pursuant to various administrative rules, and has had its authority fleshed out by various judicial interpretations.

A. *Constitutional Amendments*

Article VI, section 10 of the Constitution of Virginia mandates that the General Assembly create the JIRC and stipulates that its membership shall consist of individuals from the judiciary, bar, and public.[38] In exercising the power to investigate charges against judges, the JIRC is "authorized to conduct hearings and to subpoena witnesses and documents."[39] After its investigation, the JIRC may file a complaint in the Supreme Court of Virginia

35. VA. CONST. art. VI, § 10.

36. *See supra* note 11 and accompanying text.

37. Judicial Inquiry & Review Comm'n v. Lewis, 264 Va. 401, 403, 563 S.E.2d 687, 688 (2002).

38. VA. CONST. art. VI, § 10 ("The General Assembly *shall* create a Judicial Inquiry and Review Commission . . . .") (emphasis added).

39. *Id.* The specifics of how the JIRC is to carry out investigations are delineated by the statute addressed *infra* III.B.

against an accused judge if the charges are determined to be well-founded.[40] The supreme court has original jurisdiction in adjudicating complaints filed by the JIRC for the censure, retirement, or removal of a judge.[41]

Once a complaint is filed, the Supreme Court of Virginia must conduct a hearing in open court.[42] If the court finds a judge suffers from a permanent disability that will seriously interfere with his ability to perform his duties, the court must retire the judge from office.[43] The lone benefit a judge derives from this fate is that his retirement benefits remain intact as if he voluntarily retired.[44] If, however, the court finds a judge either (1) "engaged in misconduct while in office," (2) "persistently failed to perform the duties of his office," or (3) "engaged in conduct prejudicial to the proper administration of justice," then the court must either censure or remove the judge from office.[45] Additionally troublesome to a judge removed in this manner is the forfeiture of his retirement benefits.[46]

The constitutionally mandated division of power between the JIRC and the supreme court—the former having investigative powers only and the latter having adjudicative powers—is noteworthy.[47] This division of power, however, potentially would be required by public policy and fundamental fairness even if the constitution failed to divide the powers as it does.[48] In *In re Terry*, an Indiana judge challenged the state's supreme court and judicial disciplinary commission's jurisdiction to remove him and to investigate him.[49] The court noted a constitutional provision similar to Virginia's article VI, section 10, granting the court original jurisdiction in disciplining, removing, or retiring a judge.[50] Next, the court stated that "the interest of the public in the efficient

40. VA. CONST. art. VI, § 10.

41. VA. CONST. art. VI, § 1 ("The Supreme Court shall . . . have original jurisdiction . . . in matters of judicial censure, retirement, and removal under Section 10 of this article.").

42. VA. CONST. art. VI, § 10.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. This distinction is addressed *infra* in Part IV.C.

48. *See In re* Terry, 262 Ind. 667, 669–70 (1975).

49. *See id.* at 669.

50. *See id.* at 669–70.

resolution of disciplinary matters, as well as requirements of fundamental fairness for the respondent, suggest the propriety of delegating those [investigatory] functions to an independent body."[51] Thus, even if Virginia failed to split the investigative and adjudicative powers between the Supreme Court of Virginia and the JIRC, public policy and fundamental fairness arguably would require such a separation of powers.

B. *Statutes*

The General Assembly, adhering to article VI, section 10 of the Constitution of Virginia, enacted Code sections 17.1-900 through -919 to create and govern the JIRC. Specifically, section 17.1-901 "created a Judicial Inquiry and Review Commission" in the judiciary branch of government and required that it be comprised of seven members[52] who are selected by majority vote of the General Assembly and will serve no more than two consecutive four-year terms.[53] The chairman and vice-chairman are elected annually by the members of the JIRC.[54]

The statutory powers of the JIRC are outlined in title 17.1, beginning with section 17.1-902. The first paragraph of that section reiterates that the JIRC is an investigative body charged with the duty of examining allegations of judicial misconduct that would constitute a judge's retirement, censure, or removal.[55] The JIRC is granted a host of powers to comply with this mandate, such as conducting hearings,[56] employing officers or assistants,[57] hiring

---

51. *Id.* at 670. *But see In re* Mikesell, 396 Mich. 517, 529–31 (1976) (concluding that there is no *procedural due process* requirement that investigatory and adjudicatory functions must be separated between two decisionmakers, and citing twenty-four other states, plus the District of Columbia, in accord).

52. JIRC membership is limited to three active members of the judiciary—one each from a circuit, general district, and juvenile and domestic relations court, two active members of the Virginia State Bar who have practiced for fifteen years or more, and two members of the public who are not and never have been members of the judiciary or licensed attorneys. VA. CODE ANN. § 17.1-901 (Cum. Supp. 2008). Further, JIRC members are compensated and allowed "reasonable and necessary expenses incurred" while performing their duties and are paid from the appropriations made to the JIRC. *Id.* § 17.1-904 (Cum. Supp. 2008).

53. *Id.* § 17.1-901 (Cum. Supp. 2008).

54. *Id.*

55. *Id.* § 17.1-902 (Repl. Vol. 2003 & Cum. Supp. 2008).

56. *Id.*

57. *Id.* § 17.1-903 (Repl. Vol. 2003).

experts and reporters,[58] providing for witnesses,[59] administering oaths,[60] requiring the inspection of books or records,[61] issuing subpoenas for witnesses or evidence,[62] and ordering depositions.[63] Further, entities, officers, and employees of the commonwealth must cooperate with the JIRC by providing reasonable assistance and information related to an investigation or proceeding before the JIRC.[64] During these investigations and proceedings, Virginia's Attorney General, if asked, must act as counsel for the JIRC.[65] Finally, the JIRC may issue rules governing its investigations and proceedings if those rules do not conflict with the enabling statute or the constitution.[66]

If the JIRC—after the filing of a complaint, an initial investigation by JIRC counsel determining whether the complaint has merit, and a subsequent hearing further investigating meritorious complaints—determines that the allegations of judicial misconduct are "well-founded" and would warrant retirement, removal, or censorship of the judge, then the JIRC may file a formal complaint against the judge in the Supreme Court of Virginia.[67] Until

58. *Id.*

59. *Id.* As with witnesses in civil matters, witnesses before the JIRC are paid fees and reimbursed for mileage. *Id.* § 17.1-915(A) (Repl. Vol. 2003). This reimbursement provision, however, does not apply to officers or employees of Virginia. *Id.* § 17.1-915(B) (Repl. Vol. 2003).

60. *Id.* § 17.1-907 (Repl. Vol. 2003).

61. *Id.*

62. *Id.* Service of process issued to subpoena witnesses or the production of witnesses, or to compel the inspection of books and records, *supra* note 61, is effective throughout Virginia. *Id.* § 17.1-908 (Repl. Vol. 2003). Further, if a person refuses either to testify or turn over evidence required by the subpoena, the JIRC may petition a court of record for an order compelling the person to comply with the subpoena. *Id.* § 17.1-909 (Repl. Vol. 2003). That person must then explain to the court why he failed to comply with the subpoena; but, if the subpoena was regularly issued, the court must order the person to comply or be found in contempt of court. *Id.* Finally, sheriffs throughout Virginia must serve process and administer lawful JIRC orders as requested without charge. *Id.* § 17.1-919 (Repl. Vol. 2003).

63. *Id.* § 17.1-910 (Repl. Vol. 2003).

64. *Id.* § 17.1-917 (Repl. Vol. 2003).

65. *Id.* § 17.1-903 (Repl. Vol. 2003). Nevertheless, in the four formal complaints where the Supreme Court of Virginia has issued an opinion, the JIRC has not requested that the Attorney General act as its counsel. Instead, the JIRC counsel has represented the JIRC in each case. *See* Judicial Inquiry & Review Comm'n v. Shull, 274 Va. 657, 661, 651 S.E.2d 648, 650 (2007); Judicial Inquiry & Review Comm'n v. Elliott, 272 Va. 97, 104, 630 S.E.2d 485, 487 (2006); Judicial Inquiry & Review Comm'n v. Peatross, 269 Va. 428, 432, 611 S.E.2d 392, 393 (2005); Judicial Inquiry & Review Comm'n v. Lewis, 264 Va. 401, 403, 568 S.E.2d 687, 688 (2002).

66. VA. CODE ANN. § 17.1-902 (Repl. Vol. 2003 & Cum. Supp. 2008).

67. *Id.* During the initial inestigation JIRC counsel will also decide ex parte whether

a formal complaint is filed in the Supreme Court of Virginia, all investigations, proceedings, evidence, and testimony before the JIRC is confidential.[68] This duty of confidentiality applies to the person who filed the complaint, those who are interviewed concerning the complaint, and anyone who participates in the investigative or hearings process.[69] A judge, however, may divulge information regarding the complaint to the extent necessary to investigate the charges against him and prepare for hearings before the JIRC.[70]

The constitution does not require, however, that proceedings before the JIRC and documents filed with the JIRC be kept confidential.[71] Instead, the General Assembly has discretion in determining the confidentiality of JIRC proceedings and documents.[72] Wisely, the General Assembly did implement such a confidentiality requirement.[73] Initially, the statute—and the constitution—prohibited all persons, whether directly involved with the proceedings or not, from divulging any information concerning the investigation, proceedings, and evidence.[74] Further, any person who violated this statute was guilty of a misdemeanor.[75] This strict confidentiality requirement was challenged in the Supreme

---

to recommend suspending the judge under investigation. If JIRC counsel feels suspension is warranted he will recommend suspension to the committee. The committee will then decide *ex parte* whether to suspend the judge. If the committee agrees that suspension is warranted the judge will be suspended and that judge will be notified when he is served with the suspension.

68. *Id.* § 17.1-913(A) (Cum. Supp. 2008). Any record of proceedings not filed in the supreme court, along with the formal complaint, however, remain confidential and are kept in the confidential files of the JIRC. *Id.*

69. *Id.* The one exception to the rule of confidentiality applies when a witness under oath "willfully and intentionally testifie[s] falsely." *Id.* When the JIRC has reason to believe that a witness has done so, the JIRC chairman or one of its members may file a detailed report with the Commonwealth Attorney in the city or county where the act occurred for the prosecution of a perjury charge against the witness. *Id.*

70. *Id.*

71. VA. CONST. art. VI, § 10 ("Proceedings and documents before the [JIRC] *may* be confidential as provided by the General Assembly in general law.") (emphasis added).

72. *See id.*

73. For a discussion of confidentiality in JIRC proceedings, see Brian R. Pitney, Note, *Unlocking the Chamber Doors: Limiting Confidentiality in Proceedings Before the Virginia Judicial Inquiry and Review Commission*, 26 U. RICH. L. REV. 367 (1992).

74. *See* VA. CODE ANN. § 2.1-37.13 (Repl. Vol. 1973) (current version at VA. CODE ANN. § 17.1-913 (Cum. Supp. 2008)).

75. *Id.*

Court of the United States in *Landmark Communications, Inc. v. Virginia.*[76]

In *Landmark*, the Virginian-Pilot published an article accurately reporting an ongoing investigation by the JIRC into alleged judicial misconduct by a Virginia judge.[77] Landmark Communications, Inc., owner of the Virginian-Pilot, was charged with violating Code section 2.1-37.13, found guilty, and fined $500.[78] On appeal, the Supreme Court of the United States addressed the question of whether section 2.1-37.13, as applied to "third persons who are strangers to the [JIRC] inquiry," violated the First Amendment.[79] In holding that the Virginia statute did violate the First Amendment, the Court concluded that Virginia's interest in protecting the judiciary was not sufficient to outweigh the infringement of the media's rights under the First Amendment.[80] Thus, those parties not involved in a judicial misconduct proceeding are free to exercise their First Amendment rights in reporting those proceedings, but the Court declined to address whether Virginia could compel the silence of those involved in the JIRC proceedings.[81]

The Virginia General Assembly responded to the *Landmark* decision by enacting Code section 2.1-37.13 (now section 17.1-913),[82] which passes constitutional muster by bringing only those involved with the JIRC proceedings under the confidentiality mandate.[83] Additionally, any testimony given before and any documents filed with the JIRC are privileged.[84] Notwithstanding the confidentiality and privilege requirements, the JIRC must send all complaints and evidence regarding the alleged miscon-

76. 435 U.S. 829 (1978).

77. *Id.* at 831.

78. *Id.* at 831–32.

79. *Id.* at 837.

80. *Id.* at 838, 841. "[N]either the Commonwealth's interest in protecting the reputation of its judges, nor its interest in maintaining the institutional integrity of its courts is sufficient to justify the subsequent punishment of speech at issue here, even on the assumption that criminal sanctions do in fact enhance the guarantee of confidentiality." *Id.* at 841.

81. *Id.* at 837 ("We do not have before us any constitutional challenge to a State's power to keep the [JIRC's] proceedings confidential or to punish *participants* for breach of this mandate.") (emphasis added).

82. Act of Feb. 6, 1979, ch. 11, 1979 Va. Acts 11 (codified as amended at VA. CODE ANN. § 17.1-913 (Cum. Supp. 2008)).

83. VA. CODE ANN. § 17.1-913 (Cum. Supp. 2008).

84. *Id.* § 17.1-914 (Repl. Vol. 2003).

duct of a judge to the designated District Committee of the Virginia State Bar.[85] In addition, the JIRC must send the House and Senate Committees for Courts of Justice, as well as any General Assembly member upon request, all evidence regarding the alleged misconduct of a judge whose reelection will be addressed at the next session of the General Assembly.[86] Evidence transmitted to the General Assembly under Code section 17.1-918 loses its confidential status.[87]

The final piece of the JIRC statutory puzzle is its power over judges when allegations of misconduct are made. The first of two significant powers in this regard is the JIRC's ability to require a judge to submit to mental and physical examinations when there is probable cause to believe the judge is unable to perform his duties because of alcohol or drug abuse, or because the judge is suffering from a physical or mental illness.[88] Prior to ordering an exam, the JIRC must conduct a preliminary investigation via informal conference and must hold a consultation with the judge.[89] Further, the JIRC may require that the judge submit waivers allowing the JIRC to obtain medical records, reports, and health care information pertaining to the judge's physical and mental condition.[90] If a judge challenges his ordered exam, he may request a hearing and may call witnesses to testify on his behalf.[91] If, however, the JIRC maintains its probable cause finding and the judge fails to submit to the examination, a new charge of misconduct will be filed against the judge for failing to comply with the JIRC's orders.[92]

---

85. *Id.* § 17.1-918(A) (Cum. Supp. 2008).

86. *Id.* § 17.1-918(B) (Cum. Supp. 2008).

87. *Id.* The JIRC also must file an annual report with the General Assembly that includes: (1) the number of complaints filed; (2) how many of those complaints came from attorneys, judges, court employees, or the public; (3) how many complaints were dismissed based on the failure of the complaint to fall within the JIRC's jurisdiction or to state a violation of the Canons of Judicial Conduct, or based on the failure of the JIRC to reach a decision as to whether the Canons of Judicial Conduct were violated; (4) the number of complaints where the JIRC found a violation of the Canons of Judicial Conduct; and (5) how many times a JIRC member or employee recused themselves because of a conflict. *Id.* § 17.1-905 (Repl. Vol. 2003).

88. VA. CODE ANN. § 17.1-912(A) (Repl. Vol. 2003).

89. *Id.*

90. *Id.*

91. *Id.* § 17.1-912(B) (Repl. Vol. 2003).

92. *Id.* § 17.1-912(C) (Repl. Vol. 2003).

The second, curious power of the JIRC—considering its grant of investigative powers only[93]—is its power to summarily suspend a judge upon a finding that the judge represents a substantial and immediate threat to the public interest in the performance of the judge's duties.[94] This power over a judge after an allegation of misconduct is made represents a departure from the purely investigative powers the JIRC normally maintains in the process. Nevertheless, once the JIRC finds probable cause to believe Virginia Code section 17.1-911(A) is satisfied, the JIRC may suspend a judge with pay indefinitely.[95] The only other requirements incumbent upon the JIRC with respect to a suspension are: (1) reasonable notice of the suspension to the judge as outlined by JIRC rules; and (2) at the judge's request, arrangement of a hearing during the first fifteen days of the suspension to ascertain "whether justice would be served for the suspension to continue until the completion of the investigation or formal hearing."[96] Although he may not exercise judicial powers during suspension, a judge must still comply with the Canons of Judicial Conduct (the "Canons").[97]

C. *Administrative Rules*

Like most administrative agencies, the JIRC has established a series of rules with which investigations and hearings must comply.[98] There is, however, an exception allowing the waiver of any rule when the interests of justice require a waiver and good

---

93. *See* Judicial Inquiry & Review Comm'n v. Peatross, 269 Va. 428, 443–44, 611 S.E.2d 392, 400 (2005) (holding the Supreme Court of Virginia reviews JIRC decisions de novo "because the [JIRC's] function is *only* to determine whether 'the charges are well-founded, and sufficient to constitute the basis for retirement, censure, or removal of a judge.'") (emphasis added).

94. VA. CODE ANN. § 17.1-911(A) (Repl. Vol. 2003 & Cum. Supp. 2008).

95. *Id.*

96. *Id.* § 17.1-911(B) (Repl. Vol. 2003 & Cum. Supp. 2008).

97. *Id.* § 17.1-911(C) (Repl. Vol. 2003 & Cum. Supp. 2008). The Virginia Code does not outline the logistical application of the summary suspension of a judge. Practical considerations, such as what happens with the judge's docket, and how to explain the judge's absence, are not addressed either. This ambiguity has caused the media to take note when a judge is missing from the bench. *See* Michelle Washington, *No Explanation Yet on 3-Month Absence of Judge*, VIRGINIAN-PILOT, Jan. 16, 2008, at B2 [hereinafter Washington, *No Explanation Yet on 3-Month Absence of Judge*]. One may assume that the court's other judges or a substitute judge would fill in for a suspended judge, and queries about his absence would be met with silence, but no official procedure is mandated.

98. Va. Judicial Inquiry & Review R. 1(A).

cause is shown.[99] The administrative crux of these rules is found in Rule 3, which outlines the procedures for handling complaints.[100]

Initially, all complaints are filed in the JIRC's Richmond office and the JIRC's attorney ("counsel") acknowledges receipt of the complaint with the complainant.[101] Counsel operates as the first line of defense against frivolous allegations of judicial misconduct by disposing of complaints that fail to state a violation of the Canons.[102] Complaints that counsel believes do allege a violation of the Canons are given to the JIRC for inquiry.[103] Next, counsel conducts a preliminary investigation and presents his findings to the JIRC.[104] The JIRC dismisses complaints lacking merit and counsel notifies the complainant.[105] Meritorious complaints are identified as a "charge," the JIRC holds an informal conference[106] with the judge named in the complaint, and further investigation begins if needed.[107] If, after this investigation, the JIRC determines a charge is "well-founded,"[108] a formal hearing will be

99. *Id.* R. 1(C).

100. *Id.* R. 3.

101. *Id.* R. 3(A)(1)–(2).

102. *See id.* R. 3(A)(3).

103. *Id.* R. 3(A)(4).

104. *Id.* R. 3(A)(5).

105. *Id.* R. 3(A)(5)–(6). The JIRC may terminate a charge at any point where the commission determines that the complaint is without merit or is insufficient to serve as the basis for the judge's retirement, censure, or removal. *Id.* R. 3(D)(1). When it terminates a complaint, the JIRC must issue a signed order and send a copy to the accused judge if the judge is aware of the complaint. *Id.* R. 3(D)(2). The order must state whether the charge was well-founded and whether it was sufficient to warrant the judge's retirement, censure, or removal. *Id.* R. 3(D)(3). The order must outline action taken by the JIRC, including, if the judge permits the disclosure, whether a supervision agreement was reached with the judge as a condition of the complaint's termination. *Id.* R. 3(D)(3)–(4). The complainant must be notified when a charge is terminated. *Id.* R. 3(D)(5).

106. An informal conference consists of a meeting between the judge and the JIRC to informally discuss the alleged misconduct and possible solutions. *Id.* R. 4. The judge may obtain an attorney to represent him at the conference, but no witnesses may testify. *Id.* If the matter is not resolved during the informal conference, the JIRC either may terminate the complaint or may proceed with a formal proceeding. *Id.* The informal conference, however, is not required, and the JIRC rules do not apply to such conferences. *Id.*

107. *Id.* R. 3(B)(1).

108. A "well-founded" complaint means "that the [JIRC] has found based upon clear and convincing evidence and supported by facts and sound judgment that the misconduct has occurred." *Id.* R. 2(M).

gin;[109] charges not meeting this criteria are disposed of according to Rule 15.[110]

Prior to a formal hearing, several preliminary matters are addressed, such as a prehearing conference, that conference's order, party motions, and discovery.[111] Although rarely done, a prehearing conference may be conducted, upon either counsel or the judge's motion, to consider (1) the simplification of the issues; (2) the necessity or desirability of amendments to the pleadings; (3) the possibility of obtaining admissions of fact and documents which will avoid unnecessary proof; (4) the limitation of the number of witnesses; (5) lists of witnesses; (6) stipulations of evidence; (7) admissibility of evidence; (8) any preliminary motion filed; (9) any other procedural matter, which will expedite the hearing process.[112]

The JIRC will then enter a conference order summarizing what occurred at the prehearing conference and any agreements or rulings made; such order will govern the remainder of the action.[113] Discovery rules require counsel to offer to meet with the judge's attorney.[114] If the judge's attorney requests the meeting, counsel will outline the JIRC's case, give a synopsis of each witness's testimony, and provide copies of all evidence that counsel plans to present at the hearing.[115] Any subsequent evidence or testimony that counsel decides to offer at the hearing "will be disclosed promptly to the judge's attorney."[116] Finally, all preliminary motions must be filed at least fourteen days before the formal hearing or prehearing conference, whichever occurs first.[117]

Formal hearings are governed by Rule 13 and represent the final opportunity for the JIRC to dismiss a complaint until a formal charge is made with the Supreme Court of Virginia.[118] Similar to

---

109. *Id.* R. 3(B)(2).

110. *Id.* R. 3(B)(3).

111. *Id.* R. 11. Rule 11 was amended February 14, 2006 after the *Elliott* decision to respond to the due process concerns raised in that case.

112. *Id.* R. 11(B).

113. *Id.* R. 11(C). "The official transcript . . . of the prehearing conference may serve as the order to the extent that it includes rulings and agreements on material questions raised at the prehearing conference." *Id.*

114. *Id.* R. 11(D).

115. *Id.*

116. *Id.*

117. *Id.* R. 11(A).

118. *See id.* R. 13.

civil and criminal matters, the alleging party—JIRC counsel—presents his case-in-chief against the judge first, and the judge presents his defense second.[119] Both parties may present evidence, including exhibits,[120] and, although relevancy rules of evidence apply, "[h]earsay is admissible so long as it is material, relevant, and probative."[121] Further, parties may make evidentiary objections in the same manner as in civil or criminal trials, or in writing before the formal hearing begins.[122] Finally, an official reporter must transcribe all formal hearings.[123]

When all investigations, informal conferences, and formal hearings have been completed, the JIRC may take one of four courses of action.[124] First, the JIRC may dismiss the charges.[125] Second, if the JIRC determines the charges are well-founded and warrant the retirement, censure, or removal of the accused judge, the JIRC "shall file a complaint against the judge in the Supreme Court of Virginia."[126] Third, if the charges are well-founded, but do not warrant the retirement, censure, or removal of the accused judge, then the JIRC will advise the judge of its findings and dismiss the complaint.[127] The dismissed charges, however, remain on file and will be considered if the judge is again charged with misconduct.[128] Fourth, if the charges are well-founded, the judge and JIRC may enter a supervision agreement in lieu of the filing of a formal charge with the Supreme Court of Virginia.[129] If the judge fails to adhere to the supervision agreement, such violation will warrant a new charge of judicial misconduct.[130] Finally, the JIRC must send all findings and its final order to the General

119. *Id.* R. 13(A). A judge's presence is required during a formal hearing, unless the JIRC excuses his appearance. *Id.*

120. *Id.* R. 13(D).

121. *Id.* R. 13(B).

122. *Id.* R. 13(C).

123. *Id.* R. 13(G).

124. *Id.* R. 15(A). If the judge consents, however, the JIRC may take any of the four actions following just the informal conference. *Id.* R. 15(B).

125. *Id.* R. 15(A)(1).

126. *Id.* R. 15(A)(2).

127. *Id.* R. 15(A)(3).

128. *Id.*

129. *Id.* R. 15(A)(4).

130. *Id.*

Assembly and the judge if the charges are well-founded and disposed of under either Rule 15(A)(2), (3), or (4).[131]

The disposition of charges under Rules 15(A)(2) and (4) has been a source of contention within the supreme court.[132] The disagreement concerns the variation of language between the permissive stance on filing a formal charge taken in the Constitution of Virginia and in the statute,[133] and the rigid standard requiring the filing of a formal charge under certain conditions set forth in the administrative rules.[134] The inconsistency surfaced in *Judicial Inquiry & Review Commission v. Elliott*, where the JIRC found charges alleging Judge Elliott verbally threatened another judge, distributed materials embarrassing and personally attacking two more judges, yelled at a courtroom employee, practiced improper courtroom tactics in drug cases, and made false representations to the Chief Justice were found by the JIRC to be well-founded.[135] Instead of filing a formal complaint with the supreme court as required by Rule 15(A)(2), however, the JIRC entered into a supervision agreement under Rule 15(A)(4).[136] When Judge Elliott allegedly violated the supervision agreement, the JIRC filed a formal charge against him in the supreme court.[137]

The *Elliott* majority noted the inconsistent language between the JIRC rule and the statutory and constitutional text but interpreted the former rigid rule as consistent with the latter permissive language.[138] The court did so by ignoring the plain meaning and historical interpretation of the word "shall," concluding that Rule 15(A)(2) is "necessarily permissive, rather than mandato-

131. *Id.* R. 15(A)(5).

132. *See* Judicial Inquiry & Review Comm'n v. Elliott, 272 Va. 97, 104–06, 630 S.E.2d 485, 487–89 (2006).

133. The constitutional text states, "If the [JIRC] finds the charges to be well-founded, it *may* file a formal complaint before the Supreme Court." VA. CONST. art. VI, § 10 (emphasis added). The statute states, "If the [JIRC] finds the charges to be well-founded, and sufficient to constitute the basis for retirement, censure, or removal of a judge, it *may* file a formal complaint before the Supreme Court." VA. CODE ANN. § 17.1-902 (Repl. Vol. 2003 & Cum. Supp. 2008) (emphasis added).

134. The rules of the JIRC state, "If the [JIRC] finds the charges against the judge to be well founded and of sufficient gravity to constitute the basis for retirement, censure or removal, it *shall* file a complaint against the judge in the Supreme Court of Virginia." Va. Judicial Inquiry & Review R. 15(A)(2) (emphasis added).

135. *Elliott*, 272 Va. at 105–06.

136. *Id.* at 107–08, 630 S.E.2d at 489.

137. *Id.* at 113, 630 S.E.2d at 493.

138. *Id.* at 118, 630 S.E.2d at 495–96.

ry."[139] The majority's argument states that because administrative rules must be consistent with their enabling statute, and because supervision agreements are beneficial to accused judges, the explicit and strict use of the word "shall" in Rule 15(A)(2) must be equated with the permissive "may" in the Virginia Code and Constitution of Virginia.[140] This reasoning, however, appears to ignore the legal differences between the words "may" and "shall."[141]

---

139. *Id.*, 630 S.E.2d at 496.

140. *See id.*

141. A thorough discussion of the interpretation of "may" and "shall" is beyond the scope of this article, but one issue deserves mention. The court has, at times, construed "shall" as permissive rather than mandatory. *See* Huffman v. Kite, 198 Va. 196, 93 S.E.2d 328 (1956); Ladd v. Lamb, 195 Va. 1031, 81 S.E.2d 756 (1954). The court in *Huffman* answered the question of whether "shall," as used in a particular section of the Virginia Code, was permissive or mandatory by looking at "the history of the act, its nature, subject matter and purpose, and the significance and importance of the provision . . . , and then by giving to the language used its ordinary and usually accepted meaning . . . ." 198 Va. at 198–99, 93 S.E.2d at 329–31. The statute in question stated that each county "*shall*" have a school board that "*shall* be composed of" certain residents from the county and that any vacancy "*shall* be filled" within thirty days of the vacancy occurring. *Id.* at 197, 93 S.E.2d at 329 (emphasis added). The petitioner challenged that new members were appointed to the Board after the thirty-day limit and, therefore, their appointments were invalid. *Id.* at 198, 93 S.E.2d at 330. Viewing "shall" as permissive, the court noted the "rule is where a statute specifies a time within which a public officer is to perform an act regarding the rights and duties of others, it will be considered as merely directory, unless the nature of the act to be performed or the language shows that the designation of time was intended as a *limitation of* power." *Id.* at 200, 93 S.E.2d at 331 (emphasis added). *Lamb* is in accord: the court held the clerk of the court's failure to forward a certified copy of a conviction to the Commissioner of Motor Vehicles within a specified time period as required by the word "shall" in the statute did not render the conviction invalid. 195 Va. at 1035, 91 S.E.2d 758–59. A statute prescribing such time limits is "directory unless it denies the exercise of the power after such time." *Id.* As recently as 2002, the court held

> while the word "shall" is primarily mandatory in effect, and "may" is primarily permissive in effect, "courts, in endeavoring to arrive at the meaning of written language, whether used in a will, a contract, or a statute, will construe "may" and "shall" as permissive or mandatory in accordance with the subject matter and context.

TM Delmarva Power, L.L.C. v. NCP of Virginia, L.L.C., 263 Va. 116, 121, 557 S.E.2d 199, 201 (2002) (citing Pettus v. Hendricks, 113 Va. 326, 330, 74 S.E. 191, 193 (1912)).

The court in both *Huffman* and *Lamb* interpreted "shall" in the context of time constraints in which an act was to be performed, not in the context of whether the act must be performed. Had it addressed whether a board must be appointed or whether the clerk of the court must send a certified copy of a conviction to the Commissioner of Motor Vehicles, the court undoubtedly would have found "shall" mandatory in requiring the act's performance. The court's holding in *TM Delmarva Power* supports this proposition, as a corollary statute in *Lamb* mandated that failure to send the certified copy was a misdemeanor. *Lamb*, 195 Va. at 1035, 91 S.E.2d at 759.

When Rule 15(a)(2) is put in context and when one examines Rule 15's subject matter, the dissent's view of the word "shall" in *Elliott* appears to be the correct interpretation. Rule 15(a)(2) states when charges against a judge are "well founded and *of sufficient gravi-*

The *Elliott* dissent identified the problem with the majority's holding.[142] Rule 15(A)(2) states that a well-founded complaint, warranting retirement, removal, or censure, *shall* result in the filing of a complaint with the supreme court.[143] The provision is "mandatory, not discretionary" and holding otherwise "renders the use of 'shall' meaningless."[144] The dissent's interpretation of Rule 15(A)(2) would render Rule 15(A)(4) meaningless, and this point was acknowledged by noting that although agencies are usually granted the power to issue rules, such power is limited by the agency's enabling statute.[145] With respect to the JIRC, the Constitution of Virginia and Virginia Code section 17.1-902 authorize the JIRC to take only one course of action when a complaint is well-founded: the JIRC "may file a formal complaint before the Supreme Court."[146] Further, Code section 17.1-902 authorizes the creation of rules, but limits the scope of such rules to the administration of investigations and hearings only.[147] Thus, the JIRC has no authority to implement Rule 15(A)(4) or to enter into and enforce supervision agreements.[148] This sound reasoning only garnered three of the seven Justices votes, thus,

---

ty to constitute the basis for *retirement, censure or removal*," the JIRC "shall" file a complaint. Va. Judicial Inquiry & Review R. 15(a)(2) (emphasis added). Such language, read in context, evidences the drafters' concern for the judiciary's integrity—a subject matter of utmost importance. The drafters of the rule saw the filing of a complaint with the supreme court as the only appropriate remedy, as the court is the only entity vested with power to retire, censure, or remove a judge. To add additional context, a Commonwealth's Attorney has authority to file complaints with the judiciary against individuals under a statute that says, "An information *may* be filed by the attorney for the Commonwealth . . . ." VA. CODE ANN. § 19.2-217 (Repl. Vol. 2004) (emphasis added). Comparing the use of "may" with regard to the Commonwealth's Attorney, and "shall" with regard to the JIRC puts the use of the terms in context and supports the proposition that the use of "shall" in Rule 15(A)(2) is mandatory, not permissive.

142. *Elliott*, 272 Va. at 124, 630 S.E.2d at 499 (Keenan, J., dissenting).

143. *Id.* at 124–25, 630 S.E.2d at 499.

144. *Id.* at 125, 630 S.E.2d at 499–500.

145. *Id.* at 126, 630 S.E.2d at 500.

146. *Id.* at 125, 630 S.E.2d at 500.

147. *Id.* at 126, 630 S.E.2d at 500.

148. *Id.* at 126–27, 630 S.E.2d at 500–01. Justice Keenan used the example of occupational regulatory boards, such as the Virginia State Bar Disciplinary Board and the Board of Medicine, which are authorized to not only investigate, but also dispose of "charges by imposing license suspension, probation with or without terms, reprimands, and in some cases financial penalties." *Id.* at 126, 630 S.E.2d at 500 (citing VA. CODE ANN. §§ 541-2706, -2915, -3007, -3316, -4413 (Repl. Vol. 2005 & Cum. Supp. 2008)). This same authorization, however, is not present in the enabling statute of the JIRC. *Id.*

leaving in place the JIRC's ability to dispose of well-founded complaints by entering into supervision agreements.[149]

The remaining JIRC rules address the more mundane procedural aspects of pleadings, service of process, subpoenas, and file retention. Rule 6 requires that all pleadings properly identify the case, state the facts and relief sought, and be signed by the judge and his attorney.[150] Further, upon receiving notice of a JIRC hearing, a judge must file an answer, the requirements of which are substantially similar to those in civil proceedings.[151] The JIRC must serve a notice of hearing on the accused judge as outlined in Rule 8, which requires the notice be personally served on the judge and all subsequent documents be served on the judge's attorney.[152] Any service made upon the JIRC must be served to counsel.[153] Rule 8 uniquely requires that the judge be served at his home to ensure confidentiality.[154] If the judge cannot be found at home, service may be made wherever the judge can be found.[155] The time for filing pleadings, answers, service, and conducting JIRC hearings may be extended at the JIRC's discretion—although "motions to continue hearings are regarded with disfavor."[156] An application for a subpoena must "be made at least fourteen days (14) before [a] hearing" and must be granted if the application complies with the JIRC Rules.[157] A judge may nevertheless waive a procedural rule in a writing signed by the judge, his attorney, and counsel, unless a hearing has begun, at which point waivers may be stated on the record.[158]

Finally, reaffirming the curious statutory power of summarily suspending a judge, Rule 3(C) provides for a judge's suspension with pay in accordance with Virginia Code section 17.1-911.[159] In addition, Rule 3 reiterates the JIRC's ability to procure a physical

149. *Id.* at 124, 630 S.E.2d at 499.

150. Va. Judicial Inquiry & Review R. 6(A)–(B).

151. *Id.* R. 6(C). The judge must file his answer within twenty-one days from the date of service; in the answer the judge must state the nature of the defense, admit or deny specific allegations in the Notice of Hearing, and outline affirmative defenses. *Id.*

152. *Id.* R. 8(A).

153. *Id.*

154. *Id.* R. 8(B).

155. *Id.*

156. *Id.* R. 10(B).

157. *Id.* R. 12.

158. *Id.* R. 14.

159. *Id.* R. 3(C)(1).

or mental exam of a judge.[160] Such an examination is contingent upon the JIRC finding "probable cause to believe that a judge is unable to perform his duties because of excessive use of alcohol or drugs or physical or mental illness."[161] The provision of Rule 3(C) pertaining to procurement of an examination of a judge certainly maintains the integrity of the JIRC's constitutional mandate of investigating allegations of judicial misconduct, but the portion of the rule providing for a judge's suspension—as mentioned above[162] and discussed later[163]—raises questions of a usurpation of powers.

D. *Judicial Interpretation*

The judiciary has also acted as a significant arbitrator of the bounds of the JIRC's power. Nevertheless, the supreme court has handed down relatively few decisions that address formal complaints filed against judges. Counsel's role as gatekeeper for complaints and the JIRC's investigative process are the main reasons for this result; "almost seventy-five percent of all complainants base[ ] their complaints on meritless allegations."[164] The remaining meritorious complaints are likely disposed of under Rule 15(A)(4), as a judge would rather agree to confidential supervision or resign than face public scrutiny for his malfeasance. The few cases that remain, however, provide valuable guidance as to the scope of the JIRC's power.

1. The Supreme Court of Virginia's Standard of Review

The first published opinion in a judicial discipline case since the JIRC's creation in 1971 came in 2002 with *Judicial Inquiry & Review Commission v. Lewis*.[165] Judge Lewis, a juvenile and domestic relations judge, entered a custody order "requiring Albert Valery to surrender custody of his two children to their mother no later than 3:00 p.m." that date.[166] Mr. Valery failed to surrender the children at 3:00 p.m., and instead sought review from the cir-

160. *Id.* R. 3(C)(2).
161. *Id.*
162. *See supra* Part III.B.
163. *See infra* Part IV.A.
164. *See* Pitney, *supra* note 73, at 373.
165. 264 Va. 401, 568 S.E.2d 687 (2002).
166. *Id.* at 403, 568 S.E.2d at 688.

cuit court at 4:00 p.m.[167] The circuit court stayed Judge Lewis's order until a hearing could be held two days later on October 5th, but on October 4th the juvenile court issued a criminal show cause summons against Mr. Valery to explain why he did not comply with Judge Lewis's order.[168] At the show cause hearing, Mr. Valery's counsel advised Judge Lewis of the circuit court's stay order, yet Judge Lewis found Mr. Valery in contempt for failing to turn over his children and sentenced him to ten days in jail without bond unless he complied with the judge's earlier order.[169] A complaint was filed with the JIRC against Judge Lewis and after an investigation, the JIRC filed a formal complaint with the supreme court alleging Judge Lewis violated several Canons.[170]

The crux of the *Lewis* opinion is in the court's departure from affording administrative agencies deference to the agencies' evidentiary and factual findings.[171] Instead, in *Lewis*, the court wisely decided to consider all determinations of fact de novo based on the evidence presented.[172] Additionally, the court found the JIRC "must prove its charges . . . by clear and convincing evidence."[173] With this standard in place, the court determined Judge Lewis violated the Canons by requiring Mr. Valery to comply with his order when he had knowledge of the circuit court's stay.[174] The court then censured Judge Lewis "for engaging in 'conduct prejudicial to the proper administration of justice.'"[175]

2. Standard of Review Expanded and Errors of Law

In *Judicial Inquiry & Review Commission v. Peatross* the supreme court clarified its holding in *Lewis* and outlined the standard for what constitutes judicial misconduct.[176] Judge Peatross

---

167. *Id.* at 404, 568 S.E.2d at 688.

168. *Id.*

169. *Id.*

170. *Id.*

171. *See* VA. CODE ANN. § 2.2-4027 (Cum. Supp. 2007 & Supp. 2008); *see also* Vuyyuru v. Va. Bd. of Med., No. 0610-07-2, 2008 Va. App. LEXIS 30, *4 (Ct. App. Jan. 5, 2008) (unpublished decision) ("In reviewing an agency decision, we give deference to an administrative agency's factual determination . . .").

172. *Lewis*, 264 Va. at 405, 568 S.E.2d at 689.

173. *Id.*

174. *Id.* at 406, 568 S.E.2d at 689–90.

175. *Id.* at 407, 568 S.E.2d at 690 (quoting VA. CONST. art. VI, § 10).

176. 269 Va. 428, 611 S.E.2d 392 (2005).

allegedly partook in several acts in various cases that violated the Canons, including: (1) *nolle prosequing* a criminal charge *sua sponte*, (2) acting in an uncivil manner towards attorneys, (3) establishing a policy of refusing to hear misdemeanor cases unless in conjunction with a felony charge, (4) misrepresenting in a plea agreement that he did not take part in plea negotiations, (5) establishing a policy of encouraging his previewing of all plea agreements, (6) engaging in *ex parte* communications with a defendant, (7) removing the Commonwealth Attorney and Public Defender from a case "vindictively and in retaliation," (8) engaging in *ex parte* communications with the Chief Justice regarding the JIRC complaint, and (9) misrepresenting to the Chief Justice that his case would not come before the supreme court.[177] Judge Peatross opted to adhere to a supervision agreement in lieu of having formal charges filed against him, but when conditions that he had not discussed orally with the JIRC were included in the agreement, Judge Peatross decided not to enter into the agreement and the JIRC filed a formal complaint against him.[178]

The court immediately rejected the JIRC's contention that "due weight" be given to the JIRC's findings and credibility determinations.[179] Citing *Lewis*, the court held that it would review the evidence and JIRC conclusions de novo.[180] The thrust behind the court's rationale is that the JIRC's purpose is to perform only two tasks: (1) decide whether charges levied against a judge are well-founded, and (2) if so, determine whether those charges warrant the retirement, censure, or removal of that judge.[181] If the JIRC answers both of these questions affirmatively and then files a formal complaint, the supreme court's original jurisdiction is invoked.[182] It is the court's duty to take adjudicative action against the accused judge.[183]

---

177. *Id.* at 433–42, 611 S.E.2d at 394–99.

178. *Id.* at 442, 611 S.E.2d at 399.

179. *Id.* at 443–44, 611 S.E.2d at 400.

180. *Id.* at 443, 611 S.E.2d at 400.

181. *Id.* at 444, 611 S.E.2d at 400.

182. *See id.*

183. *See id.* Interestingly, the court went on to note that if it finds clear and convincing evidence that a complaint is valid then it *must* censure or remove the judge from office. *Id.* The court then cited the language in article VI, section ten of the Constitution of Virginia, *see id.*, which states the court "*shall* censure him or *shall* remove him from office." VA. CONST. art. VI, § 10 (emphasis added). This conclusion directly contradicts the court's decision in *Lewis* that the word "shall" in the JIRC's rules is permissive. *See supra* notes

Applying these principles to Judge Peatross's case and reviewing evidence presented de novo, the court found the evidence insufficient to warrant the censure, removal, or retirement of Judge Peatross.[184] Audio recordings of the court proceedings in question revealed Judge Peatross displayed a "stern, direct, and authoritative" demeanor towards attorneys, but not an "'uncivil' or 'extremely impatient, undignified and discourteous'" one.[185] Also, the court found, the JIRC presented insufficient evidence to support a credibility finding against Judge Peatross with regard to either his representations and policies concerning plea agreements, or his communications with the Chief Justice.[186] Most importantly, the court noted, the remaining allegations against Judge Peatross represented, at most, mere errors of law, which, without more, cannot sustain a violation of the Canons.[187] A rule protecting judges from punishment for committing errors of law is essential to protect the judiciary's independence.[188]

3. Due Process Rights of Judges, Adherence to Administrative Rules, and Procedural Safeguards

One of the supreme court's most significant decisions in terms of establishing judges' rights came in *Judicial Inquiry & Review Commission v. Elliott*.[189] The JIRC filed a complaint against Judge Elliott for allegedly violating the Canons on twelve separate occasions.[190] After determining that seven of the twelve incidents were well-founded, the JIRC offered Judge Elliott a supervision agreement in exchange for not filing a formal complaint against him.[191] The supervision agreement required that Judge Elliott (1) retire from the bench no later than June 30, 2006; (2) write apology letters—approved by the JIRC—to all judges he verbally assaulted; (3) discontinue his practices of (a) claiming to have a "DEA light" that could detect when a drug defendant was

---

132–48 and accompanying text.

184. *Peatross*, 269 Va. at 449–50, 611 S.E.2d at 403–04.

185. *Id.* at 445, 611 S.E.2d at 401. The Supreme Court of Virginia noted that the audio recordings relied on by the JIRC "do not even remotely provide clear and convincing evidence of a violation of the Canons." *Id.*

186. *Id.* at 445–46, 449, 611 S.E.2d at 401, 403.

187. *Id.* at 447, 611 S.E.2d at 402.

188. *Id.*

189. 272 Va. 97, 630 S.E.2d 485 (2006).

190. *Id.* at 105, 630 S.E.2d at 488.

191. *Id.* at 105–06, 630 S.E.2d at 488–89; *see also supra* note 135 and accompanying text for an explanation of acts giving rise to judicial misconduct.

lying, (b) reviewing criminal records prior to hearing evidence, and (c) holding himself out as an expert on ethics; and (4) submit to supervision by a judge of the JIRC's choosing.[192] Also, under the agreement, although Judge Elliott could announce that he was returning to the bench, he could not say or imply to anyone except family and his attorney that he was "vindicated" by the JIRC.[193]

After Judge Elliott executed the agreement, the JIRC asked the Judge and his attorney to appear before the Commission to discuss allegations that the Judge violated the supervision agreement.[194] The two incidents to which the JIRC referred were: (1) in response to his bailiff inquiring how the proceedings went, Judge Elliott stated, "'I can't say specifically . . . but everything is going to be okay'"; and (2) in response to an attorney asking the same question at church, Judge Elliott replied, "'[E]verything will be all right, everything is fine.'"[195] The JIRC decided these comments were statements of vindication and thereafter rescinded the original supervision agreement and agreed not to file a formal complaint if a new agreement was reached that moved Judge Elliott's retirement date up six months.[196] The Judge declined this offer and therefore the JIRC filed a formal complaint against him in the supreme court asking for his censure or removal.[197]

The court began its analysis by recognizing that a balance must be maintained between "protecting the integrity of the judiciary and the *rights* of individual judges."[198] Procedural due process rights require that the JIRC "employ adequate procedural safeguards to prevent arbitrary deprivation of the *rights and property interests* of a judge."[199] Thus, the court concluded that a judge has "vested property rights" in his position as judge and a constitutional right to protect his "'good name, reputation, honor, or integrity.'"[200] The existence of these rights requires that the

192. *Elliott*, 272 Va. at 107, 630 S.E.2d at 489.
193. *Id.* at 108, 630 S.E.2d at 489.
194. *Id.* at 111, 630 S.E.2d at 491.
195. *Id.* at 112, 630 S.E.2d at 492.
196. *Id.* at 112–13, 630 S.E.2d at 492.
197. *Id.* at 113–14, 630 S.E.2d at 493.
198. *Id.* at 114, 630 S.E.2d at 493 (emphasis added).
199. *Id.* (emphasis added).
200. *Id.* (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)). *See generally* WILLIAM BLACKSTONE, 2 COMMENTARIES *36 (stating that those in public office acquire a property right in that office and are restricted only in their ability to transfer that proper-

JIRC afford judges the same entitlements any other citizen receives from the government.[201] The court's holding marked a dramatic, but correct, shift from the rule in several states that because judges have no vested property rights in their positions as judges, judges have no due process rights in the context of proceedings involving judicial misconduct.[202]

With due process rights established, the court emphasized that once an administrative agency implements rules, the agency cannot violate those rules.[203] Additionally, administrative rules must comply with the agency's enabling statute and the principles of due process.[204] If, however, the agency does violate its rules and prejudice results, the agency's actions must be reversed.[205] Thus, once the JIRC and a judge enter into a supervision agreement, the JIRC must adhere to the agreement unless it can establish that the judge breached the agreement.[206] Whether or not a supervision agreement was in fact reached is a question of the law of contracts.[207] In *Elliott*, the court found that the JIRC and Judge Elliott did enter into a supervision agreement, but that the JIRC failed to establish that Judge Elliott violated the agreement, and therefore the agency improperly revoked the agreement; thus, the JIRC's formal complaint was not properly before the supreme court and warranted dismissal.[208]

4. The Supreme Court's Departure from *Elliott's* Due Process Holding

In the thirty years following the JIRC's creation in 1971, the Supreme Court of Virginia did not publish a single opinion regarding a complaint filed by the JIRC.[209] *Judicial Inquiry & Re-*

---

ty right to others).

201. *Elliott*, 272 Va. at 114, 630 S.E.2d at 493.

202. *See, e.g.*, Gruenburg v. Kavanagh, 413 F. Supp. 1132, 1136–37 (E.D. Mich. 1976); *In re* Del Rio, 256 N.W.2d 727, 734 (Mich. 1977); O'Neil v. Baine, 568 S.W.2d 761, 768 (Mo. 1978); *see also* Jeffrey M. Shaman, *State Judicial Conduct Organizations*, 76 KY. L.J. 811, 838 (1988). For a discussion of why Virginia's rule is more constitutionally sound, see *infra* Part IV.A.

203. *Elliott*, 272 Va. at 115, 630 S.E.2d at 494.

204. *Id.*

205. *Id.*

206. *Id.* at 119, 630 S.E.2d at 496.

207. *Id.*

208. *Id.* at 123, 630 S.E.2d at 498–99.

209. Alan Cooper, *JIRC Becoming a Regular Litigant Before High Court*, VA. LAW.

view Commission v. Shull, however, marked the fourth published opinion by the court in the past five years.[210] Judge Shull allegedly (1) required a woman to proceed in a custody dispute without representation; (2) forced her to remove her pants twice to prove the existence of a disputed wound; (3) engaged in *ex parte* communications; and (4), in another case, decided a visitation dispute by flipping a coin.[211] The JIRC suspended Judge Shull after it was made aware of the above allegations.[212] The judge requested a section 17.1-911(B) hearing to determine whether "'justice would be served'" by continuing his suspension and he asked to cross-examine witnesses who provided evidence supporting the suspension.[213] The JIRC granted his request for a hearing, but denied his request to cross-examine witnesses.[214] The JIRC also required that Judge Shull bear the burden of proof to show justice would not be served by his continued suspension.[215] At the hearing's conclusion the JIRC held that Judge Shull should remain suspended.[216] Additionally, the JIRC concluded the charges filed against him were well-founded and significant enough to warrant his retirement, censure, or removal; thus, the JIRC filed a formal complaint with the supreme court.[217]

At the supreme court hearing, Judge Shull argued the JIRC violated his due process rights when it shifted the burden of proof at the suspension hearing and denied him the right to cross-examine witnesses.[218] The court did not reach the merits of his argument, however, because it concluded that it lacked jurisdiction over the issues.[219] In reaching its decision, the court stated:

> Our jurisdiction over the formal charges filed in this Court is purely original in nature. The [JIRC], not this Court, is vested with the statutory authority to determine whether a judge should be suspended

---

WKLY, Nov. 19, 2007, at 1.

210. *See* 274 Va. 657, 651 S.E.2d 648 (2007); *Elliott*, 272 Va. 97, 630 S.E.2d 485; Judicial Inquiry & Review Comm'n v. Peatross, 269 Va. 428, 611 S.E.2d 392 (2005); Judicial Inquiry & Review Comm'n v. Lewis, 264 Va. 401, 568 S.E.2d 687 (2002).

211. *Shull*, 274 Va. at 662–63, 651 S.E.2d at 651–52.

212. *Id.* at 662, 651 S.E.2d at 651.

213. *Id.*

214. *Id.* at 662, 671, 651 S.E.2d at 651, 656.

215. *See id.* at 671, 651 S.E.2d at 656.

216. *Id.* at 663, 651 S.E.2d at 651.

217. *Id.* at 668, 651 S.E.2d at 654–55.

218. *Id.* at 671, 651 S.E.2d at 656.

219. *Id.*

> with pay until resolution of a pending investigation. Moreover, neither the Constitution nor the Code has given this Court authority to review the [JIRC's] suspension hearing procedures or the [JIRC's] decision to suspend a judge with pay until final resolution of pending charges. In the absence of constitutional or statutory authority to do so, we are not at liberty to presume such authority.
>
> . . . .
>
> . . . Judge Shull asks, in the form of a due process challenge, that we address matters over which we have not been given constitutional or statutory authority. In the absence of such authority, Judge Shull's due process challenge effectively requests an advisory opinion concerning matters not subject to our review.[220]

In summary, the court held two things: (1) neither the Constitution of Virginia nor the legislature gave the court power to rule on a constitutional due process claim,[221] and (2) Judge Shull twice disregarded the dignity of litigants and the judicial process and therefore should be removed from office.[222]

IV. PROPOSALS FOR REFORM

Although Virginia's system for handling cases of judicial misconduct is probably one of the better in the country, it is not flawless. Three areas in particular need refinement: (1) judges' due process rights, (2) the rules providing for the creation of supervision agreements, and (3) the JIRC's ability to suspend judges.

A. *Due Process*

The issue surrounding due process, judges, and JIRC proceedings stems from a jurisdictional question hinging on constitutional interpretation. The supreme court started down the right path in *Elliott* when it found the court had jurisdiction to determine that the JIRC must "employ adequate procedural safeguards" to protect judges' due process rights.[223] The court regressed in *Shull*, however, when it held that it has no jurisdiction to hear procedural due process claims during a JIRC proceeding without

---

220. *Id.* at 671–72, 651 S.E.2d at 656–57 (citations omitted).

221. *Id.* at 672, 651 S.E.2d at 656–57.

222. *Id.* at 676–77, 651 S.E.2d at 659–60.

223. Judicial Inquiry & Review Comm'n v. Elliott, 272 Va. 97, 114, 630 S.E.2d 485, 493 (2006).

an express grant from the Constitution of Virginia or the Virginia Code.[224] Thus, the heart of the matter regarding judges' procedural due process rights in JIRC proceedings comes down to a single question: Does the Constitution of Virginia or Virginia Code grant the supreme court jurisdiction to hear due process complaints with regard to the JIRC's preliminary procedures?

To conclude that the supreme court has jurisdiction to hear judges' procedural due process complaints with regard to JIRC proceedings, one must begin with the assumption that, if not for article VI, section 10 of the Constitution of Virginia providing for the creation of the JIRC, the General Assembly would have no power to create the JIRC on its own accord.[225] Prior to the JIRC's creation a judge could be removed from office only by impeachment.[226] Establishing just a single course of action for removing a judge necessarily ensured the separation of powers among Virginia's three governmental branches.[227] Further, although typically the General Assembly may take any action not prohibited by the constitution, the notion of separation of powers and the construction of only one vehicle—impeachment—for removing a judge necessarily preclude the legislature from creating a new means by which to remove judges.[228] Thus, for the JIRC to exist the Constitution of Virginia must permit its existence.

With this assumption established, one turns to the portion of the constitution defining the scope of the supreme court's jurisdiction to determine how broadly or narrowly that scope should be read. Article VI, section 1 grants the court "original jurisdiction . . . in matters of judicial censure, retirement, and removal under Section 10 of this Article."[229] Section 10 grants the General Assembly power to create the JIRC.[230] Thus, there is no doubt the constitution does in fact provide the supreme court with jurisdiction over at least some matters dealing with JIRC proceedings. The question turns on whether this jurisdiction should be read broadly to include *all* matters arising under article VI, sec-

224. *Shull*, 274 Va. at 671–72, 651 S.E.2d at 656–57.

225. *See infra* notes 317–31 and accompanying text.

226. *See supra* notes 14–34 and accompanying text.

227. "The legislative, executive, and judicial departments shall be separate and distinct . . . ." VA. CONST. art. III, § 1.

228. *See infra* notes 312–29 and accompanying text.

229. VA. CONST. art. VI, § 1.

230. VA. CONST. art. VI, § 10.

tion 10—from the procedural beginning to the final adjudication—or only *limited* matters—from the filing of substantive charges to the final adjudication.

The *Elliott* court seemed to find jurisdiction over preliminary JIRC proceedings, adopting a broad interpretation of article VI, section 1 of the Constitution of Virginia.[231] In *Elliott*, the court addressed the actions of the JIRC prior to the filing of substantive charges against a judge, holding that "[t]he procedural due process requirements of the Constitution of Virginia compel the [JIRC] . . . [to] employ adequate procedural safeguards to prevent the arbitrary deprivation of the rights and property interests of a judge who stands accused of official misconduct."[232] Indeed, the "great significance" of both the removal of a judge from office and public confidence in the judiciary acts as the impetus for the "faithful adherence to the law."[233] Summary suspensions—removing a judge from office and imperiling the judge's "'good name, reputation, honor, [and] integrity'"[234]—deprive a judge of his liberty and property interests. Thus, as the *Elliott* Court held, the JIRC "must employ adequate procedural safeguards to prevent the arbitrary deprivation" of a judge's rights in suspension hearings.[235]

To be sure, Judge Shull relied upon the language of the *Elliott* court to illustrate that the supreme court had jurisdiction to hear his due process complaint, but the court held otherwise.[236] The court viewed *Elliott* as dealing with substantive charges filed against a judge and the final adjudication of those charges; the court couched the *Elliott* decision as a narrow reading of the su-

231. *See* VA. CONST. art. VI, § 1; Judicial Inquiry & Review Comm'n v. Elliott, 272 Va. 97, 114, 630 S.E.2d 485, 493 (2006).

232. *Elliott*, 272 Va. at 114–16, 630 S.E.2d at 493–94.

233. *Id.* at 114, 630 S.E.2d at 493.

234. *Id.* (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)).

235. *Id.* The *Elliott* Court held that "procedural due process requirements of the Constitution of Virginia compel the [JIRC] . . . [to] employ adequate procedural safeguards to prevent the arbitrary deprivation of the rights and property interests of a judge . . . ." *Id.* This holding must apply to summary suspensions because the JIRC's only means of depriving a judge of his "rights and property interests" in violation of procedural due process is summary suspensions, as the JIRC is otherwise an investigative body only.

236. Judicial Inquiry & Review Comm'n v. Shull, 274 Va. 657, 671–72, 651 S.E.2d 648, 656–57 (2007).

preme court's jurisdiction over matters arising under article VI, section 10.[237]

If the court has jurisdiction over any preliminary matter it is summary suspensions. Nothing in the JIRC's preliminary procedures as easily falls under article VI, section 1's grant of jurisdiction to the supreme court over judicial removal: summary suspensions *are* judicial removal. But, because the *Shull* court found that the JIRC's suspension procedures were outside the court's jurisdiction, and because no other preliminary procedure as easily falls under the ambit of article VI, section 1, any act taken by the JIRC, short of filing a formal charge in the supreme court or a final resolution of those charges, is now outside the supreme court's review.

The court's narrow jurisdictional holding in *Shull* is unfortunate because it essentially leaves a judge whose rights have been violated with two courses of action: (1) a section 1983 suit or (2) a writ of mandamus in the Circuit Court of the City of Richmond. Compared to a broad interpretation under article VI, section 1 of the supreme court's jurisdiction, neither option is preferable.

A section 1983 action allows a person to file suit against another for deprivation of her constitutional rights "under color of any statute, ordinance, regulation, custom, or usage, of any State."[238] Such a suit in federal court requires a plaintiff to show clearly that she cannot raise her constitutional claim under state law.[239] A judge's due process claim in a JIRC suspension hearing likely would meet this requirement given that the Supreme Court of Virginia in *Shull* held that the court has no jurisdiction to hear such claims. Nevertheless, even where a plaintiff is barred from bringing a section 1983 suit in federal court, such actions may be

237. *See id.* at 671, 651 S.E.2d at 656.

238. 42 U.S.C. § 1983 (2000).

239. *See* Spargo v. N.Y. State Comm'n on Judicial Conduct, 351 F.3d 65, 77 (2d Cir. 2003) (citing Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982)). The law virtually presumes a plaintiff *is* able to raise constitutional claims in state court as the abstention doctrine under *Younger v. Harris*, 401 U.S. 37 (1971), generally requires that "any uncertainties as to the scope of state proceedings or the availability of state remedies [be] resolved in favor of abstention." *Id.* at 77–78. Even the mere possibility that a state court may or may not exercise discretion to hear a plaintiff's constitutional claim is enough to invoke a *Younger* abstention. Hirsh v. Justices of the Supreme Court of Cal., 67 F.3d 708, 712–13 (9th Cir. 1995).

filed in state court.[240] Whether filed in state or federal court, however, a section 1983 suit is inadequate.

First, the filing of a section 1983 suit forces a judge to decide between two rights: his right to confidentiality or his right to due process. Judges have a right to confidentiality with regard to JIRC investigations and proceedings.[241] Judges also have a right to due process with regard to their liberty and property interests.[242] If a judge files a section 1983 suit to enforce his due process rights, however, he loses his right to confidentiality because the section 1983 suit becomes part of the public record. On the other hand, if a judge chooses to maintain his right to confidentiality, he does so at the expense of enforcing his due process rights.

Second, because a section 1983 suit is a federal remedy, it requires that Virginia judges seek federal protection when the state system they have promised to serve has declined to defend them against violations of the very laws they have sworn to uphold. Forcing judges to turn to federal law for help fosters a paternalistic role for the federal government—a role Virginia should reject. "Indeed, few interests can be considered more central than a state's interest in regulating its own judicial system."[243] The principles of comity and federalism urge the alternative of a state remedy in lieu of the federal section 1983 remedy.[244]

The writ of mandamus is also unacceptable as an alternative to the supreme court's exercise of jurisdiction over a judge's due process claim. A writ of mandamus "is an extraordinary remedy . . . issued only when there is a clear right to the relief sought, a legal duty to perform the requested act, and no adequate remedy at law."[245] This remedy fails for two reasons. First, a section 1983

240. *See, e.g.*, Sch. Bd. of Portsmouth v. Colander, 258 Va. 417, 419, 519 S.E.2d 374, 375 (1999).

241. *See supra* notes 68–87 and accompanying text.

242. *See supra* notes 198–202 and accompanying text.

243. *Spargo*, 351 F.3d at 75 (citing Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 848 (1978) (Stewart, J., concurring)).

244. *See id.* at 74–75.

245. Ancient Art Tattoo Studio, Ltd. v. City of Virginia Beach, 263 Va. 593, 597, 561 S.E.2d 690, 692 (2002) (citations omitted). A writ of mandamus would apply only to the JIRC's *ministerial* act of applying established due process rules to its proceedings or suspension hearings. *See In re* Commonwealth's Att'y for Roanoke, 265 Va. 313, 317, 576 S.E.2d 458, 461 (2003). A writ of mandamus would not apply to the JIRC's *discretionary* act of deciding whether to suspend a judge and subsequently hold a hearing, or to conduct

suit provides a judge with an adequate remedy at law in state court; thus, a writ of mandamus is likely unavailable. Second, a judge who must file a writ of mandamus to ensure his due process rights are not violated may violate Virginia Code section 17.1-913. Section 17.1-913 guarantees the confidentiality of JIRC proceedings and prevents judges and other involved parties from divulging information regarding JIRC proceedings to persons not involved with the proceedings.[246] The filing of a writ of mandamus necessarily requires a judge to divulge information pertaining to JIRC proceedings to a non-interested party, a possible violation of the Virginia Code. Also, as in section 1983 suits, to file a writ of mandamus a judge must sacrifice his right to confidentiality to protect his right to due process.[247] Thus, a writ of mandamus is an unsavory and possibly impermissible option.

Given the insufficiency of alternative avenues to enforcing judges' due process rights, the remaining question is: What acceptable remedy is available to judges whose due process rights have been violated? The answer requires rejecting the *Shull* court's narrow construction of its jurisdiction under article VI, section 1, and adopting a broad view of the court's jurisdiction over matters relating to the censure, removal, or retirement of a judge under article VI, section 10.[248] A broad reading of the court's jurisdictional mandate would view any JIRC proceeding, from the investigation of a complaint to its final adjudication before the supreme court—or procedural aspect therein—as a "matter" relating to the censure, removal, or retirement of a judge. A similarly broad interpretation is currently employed in Virginia's circuit courts. Circuit courts, which have original jurisdiction in some criminal matters,[249] possess jurisdiction to rule that prosecutorial action prior to the filing of a formal charge in circuit court violated the defendant's due process rights and is invalid.[250]

---

the procedural aspects of its investigation. *See id.* at 317–18, 576 S.E.2d at 461.

246. VA. CODE ANN. § 17.1-913 (Cum. Supp. 2008).

247. *See supra* notes 241–44 and accompanying text.

248. An alternative approach to resolving any conflict in interpretation would be for the General Assembly to amend the constitution or Virginia Code to grant explicitly the supreme court jurisdiction over the JIRC procedures that occur prior to the filing of a formal charge.

249. VA. CODE ANN. § 17.1-513 (Cum. Supp. 2008).

250. *See, e.g.*, Commonwealth v. Dickens, 73 Va. Cir. 437 (Cir. Ct. 2007) (Norfolk City) (holding that a defendant was entitled to due process during a probation revocation hearing).

A wider reading is also necessary to ensure the protection of the rule of law because "most of the provisions of the Bill of Rights are procedural, [and] it is procedure that marks much of the difference between rule by law and rule by fiat."[251]

Having established the supreme court possesses jurisdiction to hear such claims, the question then becomes how the court should have analyzed the procedural due process in *Shull*. The due process guarantee in Virginia's constitution provides "[t]hat no person shall be deprived of his life, liberty, or property without due process of law."[252] Procedural due process inquiries require answering two questions: (1) whether the "government action affects an interest in life, liberty, or property," and (2) "what procedural requirements of due process of law extend to the interest affected by [the] government action."[253]

The Supreme Court of Virginia established in *Elliott* that judges have liberty interests in their posts as judges[254] and that summary suspensions impede those interests.[255] The removal of

---

251. Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971).

252. VA. CONST. art. I, § 11. The Constitution of Virginia virtually mirrors the U.S. Constitution, which states that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

253. JAMES J. ALFINI ET AL. JUDICIAL CONDUCT & ETHICS 13-24 (4th ed. 2007); *see also* Klimko v. Va. Employment Comm'n, 216 Va. 750, 754, 222 S.E.2d 559, 563–64 (1976) (en banc).

254. *See supra* notes 198–201 and accompanying text.

255. A summary suspension may also affect a judge's property interests. Courts often hold that a suspension with pay is, at most, a *de minimis* deprivation of property rights, and some courts deny that property rights are deprived at all. *See* Pitts v. Bd. of Educ., 869 F.2d 555, 556 (10th Cir. 1989) (two-day suspension with pay did not deprive tenured teacher of measurable property interest and does not implicate due process concerns); Hardiman v. Jefferson County Bd. of Educ., 709 F.2d 635, 638 (11th Cir. 1983) (nine-day suspension with pay of tenured teacher involved *de minimis* property interest); *see also* Hunt v. Prior, 673 A.2d 514, 524 (Conn. 1996) ("[C]ourts have consistently concluded that a suspension with pay does not implicate an employee's constitutionally protected property interest." (citing Swick v. City of Chicago, 11 F.3d 85, 87 (7th Cir. 1993); Hicks v. City of Watonga, Okla., 942 F.2d 737, 746 n.4 (10th Cir. 1991); Royster v. Bd. of Trustees, 774 F.2d 618, 621 (4th Cir. 1985))). These cases, however, mostly deal with situations where an employee is suspended for a short period of time: two days and nine days, for example. Suspensions by the JIRC frequently last for months, sometimes years. Recently, Judge Tripp of the Norfolk Circuit Court has been absent for three months, although the reason for his absence remains unclear. Washington, *No Explanation Yet on 3-Month Absence of Judge*, *supra* note 97. Nevertheless, Judge Shull was suspended for eleven months, Judicial Inquiry & Review Comm'n v. Shull, 274 Va. 657, 661, 651 S.E.2d 648, 650 (2007), and Judge Elliott was suspended for twenty-two months. Judicial Inquiry & Review Comm'n v. Elliott, 272 Va. 97, 105, 630 S.E.2d 485, 488 (2006). One can certainly argue that suspensions of such a long duration cannot constitute a *de minimis* deprivation of a property interest. Further, the position of "judge" entails more than simply receiving monies from the

a judge from his office affects his liberty interests because a suspension damages the judge's "'good name, reputation, honor, [and] integrity.'"[256] The *Elliott* court established this liberty right with regard to when a judge is censured, and the right has equal applicability to a judge's suspension. A judge's suspension results in a void in the courthouse that is filled not only with other judges taking over the suspended judge's docket, but also with rumors.[257] In 2007, Judge Alfred Tripp's absence from his post as a Norfolk Circuit Court judge was noticed and the media's investigation of the matter revealed that he had been "barred from the courthouse."[258] Further, media coverage of Judge Tripp's absence included a discussion of the JIRC and his possible suspension.[259]

A judge's suspension is supposed to be non-public and that notion, if true, would tend to negate the contention that suspension violates a judge's liberty interest as there would be little, if any, damage to the judge's good name, reputation, honor, and integrity. Such a view, however, ignores the real-world implications of a judge's suspension. The sudden disappearance of a judge, often for months at a time,[260] raises questions in the minds of not only courthouse staff, litigants, and attorneys, but also the media and the public in general. The expediency with which observers raise questions and make reports of a judge's absence and possible suspension should not be a surprise in light of the fact that media outlets have staff devoted strictly to "covering courts."[261] The re-

---

commonwealth's coffers. Judges must uphold the constitution, administer the law, and protect Virginia's judicial integrity. A judge is deprived of the ability to administer the duties of his office while suspended, even with pay. Thus, it is likely that a summary suspension with pay also affects a judge's property interests; no court has yet made such a determination, however.

256. *Elliott*, 272 Va. at 114, 630 S.E.2d at 493 (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)); *see also Constantineau*, 400 U.S. at 437 ("[W]here the State attaches 'a badge of infamy' to the citizen, due process comes into play. . . . [And] where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," due process is required).

257. *See* Michelle Washington, *Judge Barred From Court, Source Says*, VIRGINIAN-PILOT, Oct. 23, 2007, at B8 [hereinafter Washington, *Judge Barred from Court*].

258. Washington, *No Explanation Yet on 3-Month Absence of Judge*, VIRGINIAN-PILOT, Jan. 16, 2008, at B2.

259. *See id.*; *see also Needless Suspense*, VIRGINIAN-PILOT, Oct. 27, 2007, at B8; Washington, *Judge Barred From Court*, *supra* note 257.

260. *See supra* note 255.

261. A simple Google search of "covers courts" reveals a litany of reporters whose sole job is to investigate and report upon happenings in the courts. *See, e.g.*, Valerie Orleans, L.A. TIMES, *Staff Writer Covers Courts, Sheriff's Department . . . and Fires*, Working for California, http://campusapps.fullerton.edu/news/working_for_CA/pfeifer.htm (last visited Oct. 10, 2008); OC Watchdog Contributors, The Orange County Register, http://www.ocreg

cent media coverage about Judge Tripp is not unique. Judge Shull faced the same scrutiny; so too did Judges Milbourne,[262] Elliott,[263] and Edmonds.[264] Time after time, the unexplained disappearance of a judge quickly results in reports of suspension and misbehavior being distributed in mass media outlets, thereby damaging that judge's name, reputation, honor, and integrity. The JIRC's act of suspending a judge, therefore, affects a suspended judge's liberty interest.

The inquiry then turns to what process judges must be afforded.[265] Unlike other states, Virginia has not decided what due process must be given to a judge during a suspension hearing. Several states hold that a suspension proceeding seriously penalizes a judge and fundamental due process requirements such as notice, the right to counsel, and the right to confront and cross-examine witnesses must be met.[266] The Supreme Court of Washington has been credited with taking the "most logical and enlightened approach to this question."[267] The Supreme Court of Washington concluded in *In re Deming* that judges must have the right to:

> (1) notice of the charge and the nature and cause of the accusation in writing; (2) notice, by name, of the person or persons who brought the complaint; (3) appear and defend in person or by counsel; (4) testify in his own behalf; (5) the opportunity to confront witnesses face to face; (6) subpoena witnesses in his own behalf; (7) be apprised of the intention to make the matter public; (8) appear and orally argue the merits of the holding of a public hearing; (9) prepare and present a defense; (10) a hearing within a reasonable time; (11) the right to appeal.[268]

---

ister.com/articles/strong-ocregister-reach-1646529-href-register (last visited Oct. 10, 2008); Michelle Washington, VIRGINIAN-PILOT, http://hamptonroads.com/2007/10/michelle-washington (last visited Oct. 10, 2008).

262. *See* Alan Cooper, *Eastern Shore J & DR Judge Has Been Suspended*, VA. LAW. WKLY., Aug. 8, 2005, at 3.

263. *See Secrecy Breeds Suspicion in Portsmouth*, VIRGINIAN-PILOT, Oct. 30, 2004, at B10.

264. Marc Davis, *Judge on Leave To Deal with Claims of Misdeed, Legal Sources Report*, VIRGINIAN-PILOT, July 20, 1996, at B1.

265. *See* Klimko v. Va. Employment Comm'n, 216 Va. 750, 756, 222 S.E.2d 559, 565 (1976) ("Once it is determined that due process applies, the question remains what process is due." (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972))).

266. *See, e.g.*, *In re* Haggerty, 241 So.2d 469 (La. 1970); *In re* Peoples, 250 S.E.2d 890 (N.C. 1978).

267. Shaman, *supra* note 202, at 836.

268. 736 P.2d 639, 650 (Wash. 1987) (en banc).

These requirements, including (1) notice; (2) disclosure of evidence against the accused; (3) the ability to be heard, present evidence, and call witnesses; (4) confront and cross-examine witnesses;[269] (5) "a 'neutral and detached' hearing body"; and (6) a statement explaining the reason for the government's action and the evidence supporting the action,[270] are consistent with Virginia's due process requirements in other proceedings.

These procedural due process rights merely ensure that the JIRC's "exercise of its authority to oversee the conduct of judges is held to the same high standard of fair dealing every citizen has the right to expect from the government."[271] The supreme court recognized this in *Elliott*, requiring "adequate procedural safeguards to prevent the arbitrary deprivation of the rights and property interests of a judge who stands accused of official misconduct."[272] The court's rational holding in *Elliott* makes its reasoning in *Shull* that much more suspect. The only solace one may take in the court's decision in *Shull* is that it seems to confuse Judge Shull's constitutional challenge to the suspension hearing *process* with a challenge to the suspension hearing *conclusion*.[273] This differentiation would lend itself to limitation of the decision to the facts of the case, thereby negating its precedential value. Nevertheless, the court's language that neither the constitution nor the Virginia Code grants the court authority to review the "suspension hearing *procedures*" is cause for concern and should be remedied the next time the supreme court is presented with such a challenge, or via a constitutional amendment specifically authorizing the supreme court with such jurisdiction. The drastic

269. *See* Heacock v. Commonwealth, 228 Va. 235, 241–42, 321 S.E.2d 645, 649 (1984) (holding that the Commonwealth may not deprive a person of her property rights without giving her notice, a hearing, and the "opportunity to confront and cross-examine adverse witnesses" because to do so would violate her due process rights (citing Goldberg v. Kelly, 397 U.S. 254, 269 (1970))).

270. Copeland v. Commonwealth, 14 Va. App. 754, 756, 419 S.E.2d 294, 295 (Ct. App. 1992) (citing *Morrisey*, 408 U.S. at 489).

271. Judicial Inquiry & Review Comm'n v. Elliott, 272 Va. 97, 114, 630 S.E.2d 485, 493 (2006).

272. *Id.*

273. The court discusses how it is the JIRC, not the supreme court, that is vested with the power to "determine whether a judge *should* be suspended . . . ." Judicial Inquiry & Review Comm'n v. Shull, 274 Va. 657, 671, 651 S.E.2d 648, 656 (2007) (emphasis added). Judge Shull "raise[d] certain due process arguments concerning the *manner* in which the [JIRC] conducted the suspension hearing." *Id.* (emphasis added).

act of removing a judge from office and its far-reaching consequences demand a broad interpretation of the court's jurisdiction.

B. *Supervision Agreements*

Neither the constitutional provision nor the enabling statute providing for the JIRC's creation supports the JIRC rule allowing the Commission to enter into supervision agreements with accused judges in lieu of filing formal charges against those judges. Nevertheless, such supervision agreements are necessary to protect the integrity of the judiciary and the privacy of judges. As previously mentioned, the Supreme Court of Virginia addressed the issue of whether the JIRC has authority to enter into supervision agreements in *Elliott*.[274] The majority's argument that the JIRC does have such authority answered the question in the short term, but the unsoundness of the court's rationale leaves much to be desired in terms of long-term legal precedent. Thus, a constitutional amendment authorizing the JIRC to enter into supervision agreements is necessary to maintain the rule of law.

The first problem with the majority's decision in *Elliott* rests in its interpretation of the word "shall" as permissive rather than mandatory.[275] Thus, instead of being *required* to file a formal charge against a judge, the JIRC has *discretion* as to whether it should file such a charge.[276] As Justice Keenan points out in her dissent, such a reading fails to comply with the court's own interpretation of the word "shall."[277]

Nevertheless, there is a simple remedy. The word "shall" is used only in the JIRC's own rules, whereas "may" is used in both the constitutional and statutory provisions addressing the subject.[278] Thus, the JIRC can resolve the problem by substituting

---

274. *See supra* note 148 and accompanying text.

275. *See Elliott*, 272 Va. at 118, 630 S.E.2d at 495–96.

276. *See id.*, 630 S.E.2d at 496.

277. *Id.* at 124–25, 630 S.E.2d at 499–500 (Keenan, J., dissenting).

278. *Compare* Va. Judicial Inquiry & Review R. 15(A)(2) ("If the [JIRC] finds the charges against the judge to be well founded and of sufficient gravity to constitute the basis for retirement, censure or removal, it *shall* file a complaint against the judge in the Supreme Court of Virginia.") (emphasis added), *with* VA. CONST. art. VI, § 10 ("If the [JIRC] finds the charges to be well-founded, it *may* file a formal complaint before the Supreme Court.") (emphasis added) *and* VA. CODE ANN. § 17.1-902 (Repl. Vol. 2003 & Cum. Supp. 2008) ("If the [JIRC] finds the charges to be well-founded, and sufficient to constitute the basis for retirement, censure, or removal of a judge, it *may* file a formal complaint

"may" instead of "shall" in its own rule. If the JIRC makes such a change, the Commission certainly would be allowed to use its discretion in determining whether to file a formal charge against a judge, even if a complaint is well-founded. To avoid belaboring the interpretation subject further, the problem with the majority's opinion is easily fixed and the issue rather minute. This is especially true in comparison to the more glaring issue of whether the action discussed in *Elliott*—the entering into of supervision agreements—is even constitutionally permissible.

"[T]he Constitution and statutes of Virginia preclude[ ] the [JIRC] from entering into [supervision] agreement[s]."[279] The majority in *Elliott* held otherwise and analogized the use of supervision agreements by the JIRC to the use of immunity agreements by a prosecutor.[280] This comparison, however, not only is inaccurate, but actually disproves the majority's point. An immunity agreement is a contract between an alleged criminal defendant and the Commonwealth whereby the prosecution abstains from bringing criminal charges against the accused in exchange for assistance in another matter.[281] A supervision agreement is similar to an immunity agreement in that the JIRC abstains from filing a formal complaint with the supreme court,[282] but the similarities end there. The consideration the judge gives in a supervision agreement is not assistance in another matter, but rather is his compliance with certain requirements including, but in no way limited to, retiring from the bench, issuing letters of apology, or attending drug or alcohol rehabilitation courses.[283]

Furthermore, absent from the immunity agreement on which the majority relies is the punishment aspect of supervision agreements. No one would contend that a prosecutor could require a criminal defendant to enter drug or alcohol rehabilitation or issue letters of apology in exchange for the Commonwealth agreeing not to file criminal charges against the defendant. Further, no one would argue that the prosecution could affix additional charges on a criminal defendant for failing to comply with the prosecution's order. Such forms of punishment—which im-

---

before the Supreme Court.") (emphasis added).

279. *Elliott*, 272 Va. at 124, 630 S.E.2d at 499 (Keenan, J., dissenting).

280. *Id.* at 119, 630 S.E.2d at 496 (majority opinion).

281. *See id.*

282. *See id.* at 116–17, 630 S.E.2d at 494–95.

283. *See, e.g., id.* at 106–07, 630 S.E.2d at 489.

pinge a person's liberty—must be affixed by a court: it is a court that administers the rule of law under the guidance of due process.

More analogous to a supervision agreement is a plea agreement. In a plea agreement, the prosecution agrees to dismiss charges and the defendant agrees to plead guilty and to accept the *court's* punishment.[284] As part of the agreement, the prosecutor can recommend that such punishment be parole with either a waiver of Fourth Amendment rights,[285] enrollment in an alcohol[286] or drug[287] rehabilitation program, or general supervision by a parole officer.[288] Further, a defendant faces additional charges if he violates the conditions of the parole as outlined in the plea agreement.[289] Plea and immunity agreements are "markedly different": the former requires the court's approval and thereafter affixes punishment, whereas the latter does not require court approval and says nothing about punishment.[290] Thus, agreements that adjudicate a form of punishment, such as plea and supervision agreements, must have court approval. Whereas plea agreements satisfy this approval requirement, the JIRC has deemed itself able to enter into supervision agreements without any guidance or approval from the court. Such a self-grant of power to affix punishment circumscribes the JIRC's constitutional and statutory mandate of *investigating* charges,[291] enters the realm of adjudication, and is simply not allowed.

The second major issue with the JIRC giving itself the power to enter into supervision agreements is the lack of guidance available to the Commission for executing such agreements. One of the tenets of democracy is "'that the rights of men are to be deter-

284. *See* VA. SUP. CT. R. 3A:8 (Repl. Vol. 2008).

285. *See, e.g.*, Anderson v. Commonwealth, 25 Va. App. 565, 568, 490 S.E.2d 274, 275 (Ct. App. 1997).

286. *See* VA. CODE ANN. § 18.2-271.1 (Cum. Supp. 2008).

287. *See, e.g.*, Vincent v. Warden of the Dillwyn Corr. Ctr., 258 Va. 48, 52, 517 S.E.2d 17, 19 (1999).

288. *See, e.g.*, Thorpe v. Commonwealth, No. 1623-00-4, 2002 Va. App. LEXIS 105 (Ct. App. Feb. 19, 2002) (unpublished decision).

289. *See, e.g.*, *id.* at 50, 517 S.E.2d at 18.

290. Hood v. Commonwealth, 269 Va. 176, 181, 608 S.E.2d 913, 915 (2005).

291. *See* Judicial Inquiry & Review Comm'n v. Peatross, 269 Va. 428, 444, 611 S.E.2d 392, 400 (2005) ("The [JIRC's] function is *only* to determine whether 'the charges are well-founded, and sufficient to constitute the basis for retirement, censure, or removal of a judge . . . .'" (quoting VA. CODE ANN. § 17.1-902 (Repl. Vol. 2003 & Cum. Supp. 2008))).

mined by the law itself, and not by the let or leave of administrative officers or bureaus.'"[292] In *Chapel v. Commonwealth*, the Supreme Court of Virginia addressed the issue of whether a statute creating the State Dry Cleaners Board provided proper legislative guidance in authorizing the board to create and issue rules regulating, among other things, the suspension of dry cleaning business licenses.[293] The statute in question authorized the board to create rules "*as it deemed necessary* to regulate and control the business."[294] Such a broad legislative mandate, however, gave the board unchecked discretion to create rules without "any standard or test to guide and control the exercise of such discretion," and the statute was therefore invalid.[295]

Any grant of power or delegation of authority to an administrative officer or bureau to issue rules affecting the rights of men and women must be accompanied by the establishment of a reasonable standard or test to guide the exercise of that authority.[296] Otherwise, the unguided grant of power and unlimited discretion of the agency is "discriminatory [and] must be regarded as an attempted delegation of the legislative function offensive both to the State and the Federal Constitution."[297] It makes no difference that such an unguided grant of power and discretion is couched in terms of public safety or good.[298]

The Virginia Code simply grants the JIRC "the authority to make rules, not in conflict with the provisions of this chapter or of general law, to govern investigations and hearings conducted by it."[299] Nowhere within the statute is there a standard or test to offer guidance for the promulgation of rules that address the JIRC's ability to forego filing a formal complaint with the supreme court by entering into a supervision agreement. Indeed,

---

292. Chapel v. Commonwealth, 197 Va. 406, 410, 89 S.E.2d 337, 340 (1955) (quoting Thompson v. Smith, 155 Va. 367, 379, 154 S.E. 579, 584 (1930)).

293. *Id.* at 409–10, 89 S.E.2d at 340.

294. *Id.* at 414, 89 S.E.2d at 342.

295. *Id.* at 415, 89 S.E.2d at 343.

296. *Id.* at 411, 89 S.E.2d at 340–41.

297. *Id.* at 413, 89 S.E.2d at 342.

298. Andrews v. Bd. of Supervisors of Loudoun County, 200 Va. 637, 641, 107 S.E.2d 445, 448 (1959) ("A delegation of legislative power to an administrative officer or board is not brought within the permissible limits of such designation by describing the public welfare or good as a standard for the actions of the administrative officer or board." (citing Panama Refining Co. v. Ryan, 293 U.S. 388, 416–18 (1935))).

299. VA. CODE ANN. § 17.1-902 (Repl. Vol. 2003 & Cum. Supp. 2008).

the entire Virginia Code is devoid of any mention of supervision agreements. The absence of any direction or limitation raises questions as to where the JIRC's power or discretion begins and ends. Would a supervision agreement requiring a judge to enter into drug or alcohol rehabilitation, pay a fine commensurate with the JIRC's investigative expenses, retire from the bench altogether, issue letters of apology, or anything else a creative mind could conjure up, fall within the confines of the JIRC's power? If so, when would such terms be appropriate? The utter nonexistence of guidance provided to the JIRC creates an aura of unlimited power for the Commission. As in *Chapel*, the unlimited discretion of the JIRC to issue rules without any standard, test, or guidance renders the rule invalid.

The third issue with the JIRC entering into supervision agreements is glaring: the General Assembly has never given such a grant of power to the JIRC. The only mention of supervision agreements comes in JIRC Rule 15(A)(4).[300] Further, the only mention of the JIRC's ability to create rules is in Virginia Code section 17.1-902, which states the JIRC may issue rules "to govern investigations and hearings conducted by it."[301] Justice Keenan took issue with Rule 15(A)(4) in her dissent in *Elliott* for this very reason.[302]

As background, the delegation of legislative power to agencies is necessary because "[t]hey have none within themselves."[303] An agency cannot create its own power out of whole cloth; the legislature must delegate the power to the agency. Once the legislature does so, a government entity is "'limited to the making of reasonable regulations to carry out the purposes and provisions of [its enabling statute], provided they are not in conflict with the [enabling statute] or the general laws of the State.'"[304]

The Constitution of Virginia grants the JIRC investigative powers only and states the single action that the Commission may take as a result of an investigation is to file (or not file) a

300. Va. Judicial Inquiry & Review R. 15(A)(4).

301. VA. CODE ANN. § 17.1-902 (Repl. Vol. 2003 & Cum. Supp. 2008).

302. *Elliott*, 272 Va. 97, 125–27, 630 S.E.2d 485, 500–01 (Kennan, J., dissenting).

303. Commonwealth v. Anheuser-Busch, 181 Va. 678, 680, 26 S.E.2d 94, 95 (1943).

304. Chapel v. Commonwealth, 197 Va. 406, 412, 89 S.E.2d 337, 341 (1955) (quoting Dickerson v. Commonwealth, 181 Va. 313, 322, 24 S.E.2d 550, 555 (1943)).

formal complaint.[305] Further, although the JIRC is allowed to create rules, the creation of such rules may address "the procedure for investigations and hearings" only.[306] Absent is a grant of power to the JIRC to regulate generally the commonwealth's judges via suspension agreements.[307]

To see this distinction more clearly one need look no further than the statutes addressing the regulation of attorneys.[308] The General Assembly gave the Supreme Court of Virginia, among other provisions dealing with the regulation of the legal profession, the power to issue rules addressing the regulation of attorneys.[309] Specifically, by statute, the supreme court has the power to "[p]rescrib[e] procedures for disciplining, suspending, and disbarring attorneys."[310] The supreme court subsequently issued Rule 13(B)(5)(b), which gives the Virginia State Bar the power "not only to investigate charges of misfeasance, but to dispose of those charges by imposing license suspension, probation with or without terms, reprimands, and in some cases financial penalties."[311]

As compared to the statutes addressing the supreme court's power to regulate attorneys, the problem with the JIRC's power to enter into supervision agreements is obvious—the JIRC has no such power. Neither the constitution nor the General Assembly has given the JIRC *regulatory* power to supervise, punish, or in any way govern judges' conduct.[312] It is counterintuitive that the supreme court's ability to regulate attorneys would necessitate an explicit mandate from the General Assembly, but that the JIRC would require no such empowerment.[313]

---

305. *Elliott*, 272 Va. at 125, 630 S.E.2d at 500 (Keenan, J., dissenting).

306. *Id.* at 126, 630 S.E.2d at 500 ("The [JIRC] shall have the authority to make rules, not in conflict with the provisions of this chapter or of general law, *to govern investigations and hearings conducted by it.*" (citing VA. CODE ANN. § 17.1-902 (Repl. Vol. 2003 & Cum. Supp. 2008))).

307. *Id.*

308. *See id.*; *see also* VA. CODE ANN. §§ 54.1-3900 to -3944 (Repl. Vol. 2005 & Cum. Supp. 2008).

309. VA. CODE ANN. §§ 54.1-3909 (Repl. Vol. 2005).

310. *Id.*

311. *Elliott*, 272 Va. at 126, 630 S.E.2d at 500 (Keenan, J., dissenting); *see also* VA. SUP. CT. R. pt. 6, § IV, para. 13(B)(5)(b) (Repl. Vol. 2008).

312. *See Elliott*, 272 Va. at 126, 630 S.E.2d at 500 (Keenan, J., dissenting).

313. Other examples of regulatory agencies to which the General Assembly has given a grant of both regulatory powers and investigatory powers are "the Board of Dentistry, the

Finally, although it is true that the JIRC may decide not to file a formal complaint with the supreme court, such discretion in no way authorizes supervision agreements.[314] One cannot interpret the JIRC's grant of power to refrain from acting as a grant of power to the JIRC to condition its restraint on compelling a judge to comply with an agreement the JIRC has no authority to create.[315] To hold otherwise creates authority in an agency from that agency's own absence of authority, and is in direct conflict with the requirement that the legislature must delineate specifically such powers to the agency.[316]

The Constitution of Virginia and the General Assembly have made the JIRC an investigative agency—not a regulatory agency, provided no guidance for entering into supervision agreements, and, in fact, failed to grant the JIRC power to enter into supervision agreements. Despite that the JIRC's current practice of entering into supervision agreements is beyond the scope of its powers and is invalid, it would behoove the General Assembly to amend the constitution to allow the JIRC to enter into supervision agreements.

Not every judge who has a well-founded complaint filed against him is necessarily a bad judge who should face public censure, forced retirement, or removal. Indeed, many complaints are based on the fact that judges are human and subject to human frailties. For instance, a judge with an alcohol problem should not have to face public scrutiny for his problem via a trial if he is willing to enter into a treatment program and get well, for the same reasons attorneys and other professionals have that option. Indeed, it is not hard to imagine an attorney declining even to file a complaint with the JIRC about a judge's alcohol problem for fear of putting that judge under the microscope of public scrutiny.

Supervision agreements, however, would allow the JIRC to require a judge to successfully complete a treatment program before returning to the bench when a well-founded complaint is made. The benefits to permitting an alcohol treatment program via a supervision agreement are many: protection of the judiciary's in-

---

Board of Medicine, the Board of Nursing, the Board of Pharmacy, [and] the Board of Accountancy." *Id.*

314. *Id.* at 126–27, 630 S.E.2d at 500–01.

315. *Id.* at 127, 630 S.E.2d at 500–01.

316. *Id.*, 630 S.E.2d at 501.

tegrity, efficiency in the handling of complaints, the curing of a person with an alcohol problem, and the maintenance of an otherwise proficient jurist on the bench. The current construct of the JIRC's authority, however, does not allow for such supervision agreements under sound legal principles. Thus, a constitutional amendment granting the JIRC such authority is necessary.

C. *Summary Suspensions*

The statutory provision granting the JIRC power to summarily suspend a judge is beyond the scope of the constitutional amendment authorizing the General Assembly's creation of the JIRC, and is therefore unconstitutional. Further, separation of powers and the public's interest in the integrity of the judiciary require that the Supreme Court of Virginia—not the JIRC—holds the power to administer such suspensions. Importantly, however, the suspension of a judge during the pendency of his investigation should be confidential; yet, where a judge poses a substantial and immediate threat to the public interest in the performance of his judicial duties, the need for confidentiality is mitigated.

The Constitution of Virginia authorizes the JIRC's creation and its performance of a limited number of functions. These functions include (1) investigating charges of judicial malfeasance, (2) convening hearings and subpoenaing witnesses and documents in furtherance of such investigations, and (3) filing formal complaints when an investigation reveals that charges are well-founded.[317] Any adjudicative measures, however, are the responsibility of the Supreme Court of Virginia: under article VI, section 10 of the Constitution of Virginia, the court is vested with the express power to remove a judge from the bench.[318] The only other constitutionally mandated means by which a judge can be removed is impeachment by the General Assembly.[319] Yet, by allowing the JIRC to summarily suspend a judge, the General Assembly, on its own accord, created another avenue for the removal of judges.[320]

317. VA. CONST. art. VI, § 10.
318. *Id.*
319. *See supra* text accompanying notes 14–34.
320. VA. CODE ANN. § 17.1-911 (Repl. Vol. 2003 & Cum. Supp. 2008).

Typically, the General Assembly has virtually unlimited power to make laws because "the Constitution is not a grant of power, but a restriction upon . . . power."[321] That is, the constitution should not be consulted to ascertain whether the General Assembly *may* do something, but rather, whether the General Assembly *may not* do something by either expressed or necessary implication.[322] Nevertheless, "[a]n act is unconstitutional if it is expressly prohibited or is prohibited by necessary implication based upon the provisions of the Constitution of Virginia."[323] For example, the doctrine of *expressio unius est exclusion alterius*—"the granting of certain powers is the exclusion of all others"—often applies by necessary implication to prohibit the General Assembly from exercising particular powers.[324]

The doctrine of *expressio unius est exclusion alterius* is especially relevant in the context of removing judges from the bench. The constitution provides that the legislative and judicial branches of government should be separate and distinct.[325] Thus, the judiciary has no authority to remove a member of the General Assembly from office. Similarly, the constitution begins with a broad prohibition on the General Assembly removing judges, but it then carves out two exceptions. The constitution's grant to the General Assembly of two specific powers—impeachment and removal by the supreme court—is to the exclusion of all other powers because anything beyond these two methods violates separation of powers. Nevertheless, in section 17.1-911, the General Assembly created a third way of removing a judge: summary suspension by the JIRC. The General Assembly's creation of removal by summary suspension is, as shown, ultra vires.

---

321. Pine v. Commonwealth, 121 Va. 812, 822, 93 S.E. 652, 654–55 (1917).

322. *Id.* ("In determining whether an act of the legislature is forbidden by the State Constitution, it must be borne in mind that the Constitution is not a grant of power, but a restriction upon an otherwise practically unlimited power; that the Constitution is to be looked to, not to ascertain whether a power has been conferred, but whether it has been taken away; that the legislature is practically omnipotent in the matter of legislation, except in so far as it is restrained by the Constitution, expressly or by plain, or . . . by necessary, implications. . . .").

323. Marshall v. N. Va. Transp. Auth., 275 Va. 419, 428, 657 S.E.2d 71, 75 (2008) (citations omitted).

324. *Pine*, 121 Va. at 821–22, 93 S.E. at 654.

325. VA. CONST. art. I, § 5 ("That the legislative, executive, and judicial departments of the Commonwealth should be separate and distinct."); VA. CONST. art. III, § 1 ("The legislative, executive, and judicial departments shall be separate and distinct").

Along the same lines, article VI, section 10 of the Constitution of Virginia fully addresses the power of the JIRC; thus, anything granted to the JIRC beyond that power is ultra vires. The constitution often prohibits or requires certain actions by the General Assembly, but there are also instances where a constitutional provision is "either permissive or declaratory."[326] Such instances often occur where a constitution is so detailed in its provision that it resembles legislation, and, because "the Constitution has fully dealt with a subject and covered the entire ground, the legislature would be powerless to make any change in it."[327] Sections 100 and 101 of Virginia's 1902 constitution were such provisions because they addressed the judiciary, which "[t]he convention had dealt fully with . . . and marked out a complete system."[328] Thus, if the General Assembly was to change the construct of the judiciary "in any way," the constitution had to specifically give the General Assembly such power.[329]

Like Virginia's 1902 constitution, Virginia's current constitution fully deals with, and marks out, a complete system for the judiciary. Further, the provision creating the JIRC resembles legislation in that it is detailed and specifically outlines the organization and power of the JIRC. The supreme court stated that the powers of the JIRC are "limited to determining whether . . . 'charges [are] well-founded, and sufficient to constitute the basis for retirement, censure, or removal of a judge,' thereby resulting in a complaint being filed in [the Supreme] Court."[330] This is the constitutional limit of the JIRC's powers: no more, no less. Although

> [t]he Legislature . . . to a large extent represents the Commonwealth, . . . it does so in subordination to the Constitution of the State. It can do nothing which that instrument prohibits and, in what is confided to it, must conform in its mode of action to the requirements of the Constitution. If it transcends its power, or if it acts in contravention of the Constitution, its acts are void; they confer no rights and bind no man, and all the world is charged with notice of the limitations which the Constitution imposes.[331]

---

326. *Pine*, 121 Va. at 824, 93 S.E. at 655.

327. *Id.*

328. *Id.* at 825, 93 S.E. at 656.

329. *Id.*

330. Judicial Inquiry & Review Comm'n v. Shull, 274 Va. 657, 670, 651 S.E.2d 648, 655–56 (2007) (quoting VA. CODE ANN. § 17.1-902) (Repl. Vol. 2003 & Cum. Supp. 2008)).

331. Ellinger v. Commonwealth, 102 Va. 100, 105–06, 45 S.E. 807, 808 (1903).

Thus, the General Assembly, by giving the JIRC power to summarily suspend a judge, failed to conform its actions to the boundaries of the constitution and transcended its power; therefore, its acts are void.

The problems with the JIRC having judicial suspension power are readily apparent. In addition to the constitutional issues at stake, practical considerations abound. For instance, one can envision a scenario where a judge is presented with a case dealing with a socially "hot" topic such as abortion or gun control. Assuming the judge has staunch pro-choice or pro-gun control views, which happen to be wholly adverse to the prevailing view of the JIRC membership, it is not hard to imagine that a "charge" could be filed against the judge and an unchecked[332] determination made that the judge constituted a substantial and immediate threat which warranted his suspension. Thereafter, a judge with views more similar to the JIRC's membership could be assigned the case for a more "favorable" outcome.

Although the above scenario certainly takes a pessimistic view of the powers that be, in designing a successful limited government of checks and balances, such a view is required. Government must be protected against itself to prevent the possibility of tyranny and abuse of power. Peter Lynch once said, "Go for a business that any idiot can run—because sooner or later, any idiot probably is going to run it."[333] The same can be said of government: design a form of government to protect against a tyrant running it—because sooner or later, a tyrant probably is going to run it. The example of the JIRC taking steps to alter the outcome of litigation by summarily suspending a judge is not to say the current, or any prior, JIRC has taken such action, but only that, at some point in the future, such action could feasibly take place. The drafters of article VI, section 10, recognized this and correctly limited the power of the JIRC to investigations only. The General

332. In *Judicial Inquiry & Review Commission v. Shull,* the Supreme Court of Virginia held the JIRC, "not this Court, is vested with the statutory authority to determine whether a judge should be suspended with pay until resolution of a pending investigation. Moreover, neither the Constitution nor the Code has given this Court authority to review the [JIRC's] . . . decision to suspend a judge." *Shull,* 274 Va. at 671, 651 S.E.2d at 656. Thus, there is no check on the JIRC's decision to summarily suspend a judge.

333. GEORGE THOMPSON, DON'T PLAY IN THE STREET . . . UNLESS YOU KNOW WHICH DIRECTION YOUR STOCK IS TRAVELING 51 (2003).

Assembly usurped this limitation by granting summary suspension powers to the JIRC in Virginia Code section 17.1-911.[334]

If the General Assembly wishes to allow a judge's suspension during the pendency of a JIRC investigation because that judge poses a threat to the public and the administration of justice, the supreme court should be granted such power. The Supreme Court of Virginia already possesses adjudicatory powers over judges and therefore, granting the court suspension powers would not offend the notion of separation of powers. The JIRC, upon its initial investigation and determination that the accused judge poses a threat, could petition the court for a type of "emergency" review to have the judge suspended while the investigation continues. It is likely true that upon such a filing the proceedings would lose their confidentiality, but if the judge poses a threat to the public and the administration of justice sufficient to warrant immediate suspension, the public interest outweighs the need for confidentiality. If the General Assembly wishes to leave summary suspension powers to the JIRC, however, a constitutional amendment granting such authority is necessary.

V. CONCLUSION

There is no doubt the intentions of the General Assembly in establishing the JIRC and the JIRC's actions in carrying out its du-

334. *See* Carlisle v. Hassan, 199 Va. 771, 776, 102 S.E.2d 273, 277 (1958) ("Where restrictions are imposed in the Constitution by express language or necessary implication upon the power of the General Assembly, the restrictions may not be ignored, and legislation in contravention thereof is invalid."). An example of legislative usurpation of constitutional power to create a similar JIRC agency played out in Alaska. *See In re* Inquiry Concerning a Judge, 762 P.2d 1292 (Alaska 1988). There, like in Virginia, a constitutional amendment creating the Commission on Judicial Conduct granted exclusive adjudicatory power in the Supreme Court of Alaska. *See id.* at 1294. Further, like in Virginia, the commission was granted power to investigate charges of judicial misconduct and make recommendations to the supreme court for the suspension, removal, or censure of an accused judge. *See id.* at 1293. The legislature also, however, gave the commission power to publicly censure an accused judge. *Id.* Upon a challenge to this grant of power, the supreme court found the statute unconstitutional. *Id.* at 1296. In so holding, the court compared the constitutional amendment, which was devoid of any grant of adjudicative power to the commission, to similar constitutional amendments in New York and Texas where the state constitutions "expressly provide[ ] that the commission on judicial conduct may act on its own authority." *Id.* The Supreme Court of Alaska correctly concluded that "[b]ecause [the constitution] only empowers the Alaska Commission on Judicial Conduct to recommend sanctions to the Alaska Supreme Court, [the statute in question] is in conflict therewith" and is therefore unconstitutional. *Id.*

ties are noble, but even noble actions must comport with constitutional limitations. Amending the Constitution of Virginia to solve the above-mentioned problems in the design of the JIRC sounds severe. Nevertheless, it is "[f]ar better [to] amend the constitution than to violate it, or to sanction its violation, however good may have been the motives of those by whom the act was passed."[335]

The JIRC's duty to ensure the integrity of the judiciary is dignified and arduous for "[i]t is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law."[336] The process by which the judiciary's integrity is ensured, however, must itself adhere to the rule of law. If the converse is true, those who ensure the rights of men and women, certify the proper administration of justice, and demand the trust of the public, are denied the safeguards of the very system they vow to protect. Unless the General Assembly intends to treat Virginia's judges as having fewer rights and protections than an ordinary Virginia citizen, then the legislature must take action to alter the system for handling allegations of judicial misconduct so that it complies with constitutional and practical limitations.

Virginia's judges deserve no less.

Jeffrey D. McMahan, Jr. *

335. Miller v. Commonwealth, 88 Va. 618, 622, 14 S.E. 161, 162 (1892).

336. Bush v. Gore, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting).

* Mr. McMahan received his J.D. from the University of Richmond School of Law in 2008 and his B.A. from Virginia Tech in 2003. This comment was written with the assistance of Blackstone Professor of Law W. Hamilton Bryson and Professor John Paul Jones, both at the University of Richmond School of Law. Mr. McMahan is currently employed as a law clerk for the Honorable C. Arlen Beam of the United States Court of Appeals for the Eighth Circuit in Lincoln, Nebraska.