Balancing Judicial Independence Against Public Confidence

Overview

The voters delivered a mixed message regarding judicial independence in the June 2018 primary election. The phalanx of coordinated challengers to four sitting San Francisco Superior Court judges were soundly defeated, but Santa Clara Superior Court Judge Aaron Persky was recalled by a large margin. Those ballot box contests were examples of the conflicting public policy values of judicial independence and public confidence. Today we examine that conflict in the judicial discipline context.

The competing policy concerns

The value-set tradeoff in the judicial discipline context is between judicial independence and public confidence. "An impartial and independent judiciary is indispensable to our legal system. Of equal importance is public confidence in the independence and integrity of the judiciary, because the effective functioning of our legal system is dependent upon the public's willingness to accept the judgments and rulings of the courts."[1] This is distinct from the policy competition in the judicial elections context, which presents a choice between judicial independence and accountability. Judicial elections are one means for the public to hold bench officers accountable. A judicial discipline system serves a different function: preserving the public's confidence in the judiciary. In that context there is an inherent friction between the "confidence" value and the "independence" value. A truly independent judiciary would be entirely self-policing; that, however, would inspire little confidence. Conversely, the more powerful the discipline system, the more the judiciary's independence is compromised.[2]

As with all value-set tradeoffs, this conflict is zero-sum. One competing value can only be enhanced at the other's expense. Both values are important. The policy choice lies in balancing them.

Judicial independence is a core republican value. "In a very real sense the continued

success of American jurisprudence depends on it."[3] It is a bedrock principle of the U.S. Constitution's tripartite government design: "[O]ur Constitution unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States' must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence."[4] California's judicial system is grounded on the same principle of a nonpartisan, independent judiciary.[5] Yet the continued existence of that independence relies in part on an effective discipline system, with "effectiveness" partly measured by public confidence.

Public confidence is a way of stating the policy value of preserving public trust in the justice system. Not only must the process be fair, it must appear to be fair: "[W]hen it comes to public confidence in the judicial system, we are concerned not only with preventing improper conduct, but also with perceptions."[6] There is an argument that making all aspects of judicial discipline proceedings public will contribute to public confidence, on the theory that open proceedings enhance the perception that complaints are being properly handled. The problem with that argument is human nature's tendency towards "where there's smoke there's fire" conclusions about unfounded allegations. A discipline system that discloses all complaints—meritorious or not—undercuts its own confidence objective by presenting false positives. Protecting complainants and witnesses from fear of retaliation is an equally compelling justification for confidentiality, at least before formal proceedings begin.

A recent case nicely illustrates these competing policy concerns.

Commission on Judicial Performance v. Howle, et al.

In Commission on Judicial Performance v. Howle, the state auditor sued the state's judicial discipline body over the scope of confidentiality afforded to the commission's records of complaints against judicial officers.

The legislature and the electorate created the Commission on Judicial Performance as a judicial-branch entity in 1960 via legislatively-referred constitutional amendment.[7] The commission has broad authority to discipline bench officers, subject to California Supreme Court review.[8] The commission has constitutional rulemaking authority to investigate and pursue judicial-discipline cases.[9] And the

constitution grants it authority to "provide for the confidentiality of complaints to and investigations by the commission."[10] The commission's Rule 102(a) provides: "Except as provided in this rule, all papers filed with and proceedings before the commission shall be confidential."

The legislature created the State Auditor by statute.[11] The auditor's ordinary duties include annually examining executive branch financial statements and statutorily-mandated performance audits.[12] The auditor can also audit any other public entity when requested by the Joint Legislative Audit Committee.[13] The auditor has access to all state agency records, including confidential records.[14] This statutory right of access applies "[n]otwithstanding any other provision of law."[15]

On August 10, 2016, the Joint Legislative Audit Committee authorized an audit of the commission. The commission made all of its records available to the auditor, except its confidential records of complaints to and investigations by the commission. The auditor demanded access to those confidential records, relying on Government Code section 8545.2.[16]

The commission refused, relying on California constitution Article VI, section 18(i), which grants the commission rulemaking power to designate as confidential records of proceedings that do not result in public discipline, as it did with its Rule 102(a). The commission offered a compromise: it agreed to an audit on anything (including finances, workload statistics, and processes) that did not require reviewing confidential materials. The auditor rejected that offer and demanded full access.

The commission petitioned the Superior Court for a writ of mandate, which was granted on December 19, 2017 (case number CPF16515308) (16-515308).[17] The state auditor appealed (case number A153547). That case is now pending, and after briefing completed the Court of Appeal ordered the parties to a settlement conference "at the earliest possible date."

Analysis

This case demonstrates the difficulty of balancing judicial independence with public confidence. As noted above, these two values necessarily conflict. A truly

independent judiciary would be entirely self-governing, free from even political or public-opinion pressure. Conversely, a judiciary that prioritized public opinion would be slaved to its whims.

Those conflicting imperatives apply in the judicial discipline context. A fully independent judiciary would be self-policing, and the public would simply need to have faith that the honest public servants of the judicial branch punished each other as needed. But no human institution is free from error, so when a judge merits serious discipline, meting it out publicly affirms the public's faith. And keeping unproved, frivolous, or minor infractions confidential prevents litigants from giving undue weight to petty faults.

While this case illustrates this values conflict, it is not a vehicle for relitigating the electorate's policy choice. Instead, it is governed by the fundamental principle that a constitutional provision overrides a statute.[18] Article VI section 18(i)(l) says: "The commission shall make rules for the investigation of judges. The commission may provide for the confidentiality of complaints to and investigations by the commission." The commission's Rule 102 provides for confidentiality subject to enumerated exceptions: "Except as provided in this rule, all papers filed with and proceedings before the commission shall be confidential."[19] Based on those constitutional confidentiality provisions, the trial court correctly found the auditor's statutory argument inadequate.

The auditor may not want the commission's records to be confidential, but that doesn't make it so.[20] Even before reaching the main constitutional issue, the auditor's statutory authorization for access does not apply to records made confidential by the state constitution. Government Code section 8545.2 provides in relevant part (emphasis added): "No provision of law providing for the *confidentiality of any records* or property shall prevent disclosure pursuant to subdivision (a), unless the provision specifically refers to and precludes access and examination and reproduction pursuant to subdivision (a). [¶] For purposes of this section "*confidentiality of records or property*" means that the record or property may lawfully be kept confidential as a result of a statutory or common law privilege or any other provision of law." The California Supreme Court has held that the phrase "or any other provision of law" means what it says.[21] But it proves too

much to assume that by that phrase the legislature meant to attempt to override a constitutional provision by statute. That would be wrong and absurd, and courts do not presume that the legislature had unlawful or absurd intent.[22]

We write not merely to agree with the trial court ruling, but to explore the deeper reasons for its correctness. This case presents a conflict between a constitutional provision and a statute, which is not an opportunity to re-weigh competing values. The legislature and the electorate balanced the conflicting imperatives of judicial independence and public confidence when they enacted Propositions 92 and 190.[23] Absent further action by the state's legislative actors, the policy debate is settled. And the fact that the electorate and the legislature combined their powers here gives this constitutional provision particular force.

To require greater consensus for more significant acts, the California constitution distinguishes between what the electorate and the legislature can accomplish separately, and what they can do together. As we have argued elsewhere, the constitutional requirement that the legislature and electorate combine their powers to call a convention or to revise the constitution means that those acts require a greater measure of power than does a statutory enactment or even a constitutional amendment.[24] The relevant constitutional provision here arose from an initiative measure proposed by the legislature and approved by the electorate. That procedure is an exercise of the state's full legislative power, which is great enough for ultimate acts like revising the constitution or calling a convention to write a new charter.

To be clear: we are not arguing that this was a revision. These measures do not accomplish the broad or fundamental changes to the California government's design that characterize a revision. Just because the electorate approves a legislatively-proposed constitutional amendment does not make that act a revision. Yet it is significant that these acts arose from the electorate and the legislature acting in concert.[25] It was the exercise of the state's full legislative power.[26] This is unlike the legislature and governor acting together to make a statutory law, which is only the ordinary lawmaking process; indeed, the legislature could have made the commission's confidentiality requirements a statutory matter, or the electorate could by initiative have enacted the same statutory provision. Instead, here the legislature and the electorate combined their powers to amend the state constitution. From any

angle, that is a more significant use of power than enacting a statute.

The fact that this provision arrived in the constitution via legislatively-referred initiative constitutional amendment means that the drafter's intent (which is the focus of judicial construction) in this instance includes the legislature and the electorate as drafters in the sense that both intended this measure to permit the commission to keep its non-public case records confidential. And the fact that the measures made confidentiality a constitutional matter means that only the electorate can change it. Any later legislative attempt to regulate this issue by statute must bow to the constitutional command.[27]

The legislature and the electorate combined their power to amend the constitution to permit the commission to keep its records confidential. The change from "shall" to "may" was intended to make the commission's authority discretionary. To a reviewing court this means that both of the state's legislative powers so intended. And it would take a constitutional amendment to relieve the commission of that discretion. Surely these considerations warrant a strict reading of any statutory attempt to authorize access to the commission's records.

Of course, the fact that the legislature's power to regulate the commission is circumscribed does not mean that the commission is a free agent. The electorate can always amend the constitutional terms governing the commission—and it has done so. Before 1988, the commission's proceedings were confidential unless it recommended serious discipline and the proceeding reached the California Supreme Court. In the November 1988 general election, the voters adopted Proposition 92 (a legislatively-referred constitutional amendment), which authorized the commission to open its hearings to the public "in the event charges involve moral turpitude, dishonesty, or corruption."[28]

The 1988 amendment also proves the main points in contention here: whether some judicial discipline proceedings are confidential, and whether the commission has discretionary rulemaking authority in that area. Before 1988 the relevant constitutional provision said: "The Judicial Council shall make rules implementing this section and providing for confidentiality of proceedings."[29] The California Supreme Court held that this provision required confidentiality of investigations and

proceedings before the commission, and that not even the Judicial Council could order investigations and hearings be opened.[30] As the state high court explained, the commission "was created to act as a constitutionally independent body," and its authority to keep a matter confidential or order that it be open "is established by our Constitution in article VI, section 18, subdivision (f), adopted by amendment in 1988."[31]

The 1988 amendment did nothing to change the commission's constitutional power to maintain confidentiality:

> [T]he Commission retains the authority to maintain the confidentiality of proceedings and thus to have an entirely private admonishment in the event it concludes that public confidence and the interests of justice would not be served by an open hearing. [¶] The circumstance [of] the 1988 constitutional amendment . . . does not reflect any contrary intent. [It] simply affirms the continuing authority of the Judicial Council to promulgate rules implementing section 18, including but not limited to provisions relating to confidentiality.[32]

This section was amended again by legislatively-referred amendment in 1994, making only subtle changes to the confidentiality provision.[33] Two changes bear on the issue here, because they *increased* the commission's discretion, making it the sole arbiter of whether informal proceedings should be confidential. One change was new subdivision (i), which moved discretionary rulemaking authority from the Judicial Council to the commission.[34] The other change was new subdivision (j), which required formal proceedings to be public.[35] Read with the commission's discretion over making informal proceedings confidential under subdivision (i), and the applying the *expressio unius* canon, the plain implications are that only formal proceedings must be public, and that the commission has constitutional discretionary power to make its other proceedings confidential.

Finally, there is an argument that this case is not a conflict between a statute and a constitutional provision—always an obvious result there—but between a statute and an administrative rule adopted under constitutional authority. It is possible that the commission could exceed the constitutional grant of discretionary rulemaking power. Here, because there is no indication that the commission's rule abuses that

discretion, the statutory attack fails. The general rule is that an administrative entity's interpretations of its constitutional authority and of constitutional provisions it is charged with implementing are accorded considerable weight.[36] Interpretations by independent agencies like the commission warrant deferential treatment by the courts, which generally will not overturn those interpretations unless they are clearly erroneous or unauthorized.[37] And quasi-legislative rules receive only limited review under a narrow standard, solely to determine whether the agency's action is arbitrary, capricious, lacking in evidentiary support, or contrary to procedures provided by law.[38] Regardless which of those rules applies here, the commission's rule will receive a deferential review.

Conclusion

Judges are people, and people make mistakes. Judicial independence depends in part on public confidence: the public needs to be confident that the judiciary is using its independence wisely. A discipline system that inspires confidence can help validate the trust placed in the judicial branch. But a discipline system can also undermine trust by making unfounded allegations public. This is the crux of the problem: outing bad judges without making good judges seem bad by disclosing meritless complaints against them.

The policy choice by the legislature and the voters was to balance these values by requiring imposed discipline to be public, and permitting the commission to keep baseless claims private. The legislature and electorate made that policy decision by constitutional amendment, and so balanced the need for judicial independence against public confidence in the judiciary. And the legislature and electorate have modified that balance several times. If the auditor (or anyone else) disagrees with the current balance, then the solution is the ballot box. As it stands now, the state constitution trumps the auditor's statutory authority.

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[1] *Adams v. Comm'n on Judicial Performance* (1994) at 637.

[2] Wilbank J. Roche, *Judicial Discipline in California: A Critical Re-Evaluation* (1976) 10 Loy. L.A. L. Rev. 192, 235.

[3] *Ibid*.

[4] *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.* (1982) at 60. *See also Commodity Futures Trading Com'n v. Schor* (1986) at 848 (Article III, § 1 serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government); *United States. v. Will* (1980) at 217–18 ("The Compensation Clause has its roots in the longstanding Anglo-American tradition of an independent Judiciary. A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.").

[5] *People v. King* (2002) at 34; *In re Horton* (1991) at 97.

[6] *Castaneda v. Super. Ct.* (2015) at 1447, citing *Lois R. v. Super. Ct.* (1971) at 902, quoting *Hewart, Lord, Rex v. Sussex Justices* (1924) 1 K.B. 256, 259 ("justice should not only be done, but should manifestly and undoubtedly be seen to be done"); See also *People v. Pride* (1992) at 272 ("'justice must satisfy the appearance of justice'") quoting *Offutt v. United States* (1954) at 14.

[7] *Adams, supra,* at 637; Cal. Const., art. VI, § 8; Cal. Proposition 10, Comm'n on Judicial Qualifications (Nov. 8, 1960).

[8] Cal. Const., art. VI, § 18, subd. (b), (d).

[9] Cal. Const. art. VI, § 18, subd. (i).

[10] Cal. Const. Art. VI, § 18, subd. (i)(l), (j). Confidentiality lifts once the commission begins a formal discipline process; all such papers and proceedings are public.

[11] Government Code sections 8543, subdivision (a) and 8543.2.

[12] Government Code section 8543.1.

[13] Government Code section 8546.1, subdivision (b).

[14] Government Code section 8545.2, subdivision (a).

[15] *Ibid*.

[16] Government Code section 8545.2 provides in full:

(a) Notwithstanding any other provision of law, the California State Auditor during regular business hours shall have access to and authority to examine and reproduce, any and all books, accounts, reports, vouchers, correspondence files, and all other records, bank accounts, and money or other property, of any agency of the state, including a commission, whether created by the California Constitution or otherwise, any local governmental entity, including any city, county, and school or special district, and any publicly created entity, for any audit or investigation. Any officer or employee of any agency or entity having these records or property in his or her possession, under his or her control, or otherwise having access to them, shall permit access to, and examination and reproduction thereof, upon the request of the California State Auditor or his or her authorized representative.

(b) For the purposes of access to and examination and reproduction of the records and property described in subdivision (a), an authorized representative of the California State Auditor is an employee or officer of the state or local governmental agency or publicly created entity involved and is subject to any limitations on release of the information as may apply to an employee or officer of the state or local governmental agency or publicly created entity. For the purpose of conducting any audit or investigation, the California State Auditor or his or her authorized representative shall have access to the records and property of any public or private entity or person subject to review or regulation by the public agency or public entity being audited or investigated to the same extent that employees or officers of that agency or public entity have access. No provision of law providing for the confidentiality of any records or property shall prevent disclosure pursuant to subdivision (a), unless the provision specifically refers to and precludes access and examination and reproduction pursuant to subdivision (a). Providing confidential information to the California State Auditor pursuant to this section, including, but not limited to, confidential information that is subject to a privilege, shall not

constitute a waiver of that privilege. This subdivision does not apply to records compiled pursuant to Part 1 (commencing with Section 8900) or Part 2 (commencing with Section 10200) of Division 2.

(c) Any officer or person who fails or refuses to permit access and examination and reproduction, as required by this section, is guilty of a misdemeanor.

(d) For purposes of this section "confidentiality of records or property" means that the record or property may lawfully be kept confidential as a result of a statutory or common law privilege or any other provision of law.

[17] This factual background is derived from that order. We have no independent knowledge of this case beyond what we read in publicly-filed documents.

[18] *Cty. of Los Angeles v. Comm'n on State Mandates* (2007) at 904 ("A statute cannot trump the constitution."); *Playboy Enterprises, Inc. v. Super. Ct.* (1984) at 28 ("When the Constitution speaks plainly on a particular matter, it must be given effect as the paramount law of the state."). See also, e.g., *Sands v. Morongo Unified Sch. Dist.* (1991) at 902 (California constitution is "the supreme law of our state" subject only to the United States Constitution); *Ex parte Braun* (1903) 141 Cal. 204, 211 (California constitution is highest expression of people's will and legislative act is ineffective against constitutional command); *People v. Parks* (1881) 58 Cal. 624, 635 ("When a statute is challenged as in conflict with the fundamental law, a clear and substantial conflict must be found to exist to justify its condemnation; but when found, Courts must not hesitate to condemn. The Constitution is the voice of the people speaking in their sovereign capacity, and it must be heeded. When it speaks in plain language with reference to a particular matter, it must have effect as the paramount law of the land.").

[19] *See Comm'n on Judicial Performance v. Super. Ct.* (2007) at 722 ("The Commission's rule 102 provides that, except as stated in that rule, all nonpublic papers and proceedings are absolutely confidential.").

[20] *In re Marriage of Steiner and Hosseini* (2004) at 627.

[21] *People v. Palacios* (2007) at 728 ("we found the phrase 'notwithstanding any

other provision of law' means what it says.").

[22] *Ex parte Miller* (1912) 162 Cal. 687, 696–97 ("The courts must always assume that the Legislature in enacting laws intended to act within its lawful powers, and not to violate the restrictions placed upon it by the Constitution."); *Whitcomb v. Emerson* (1941) at 275 ("In approaching this problem we cannot assume that the legislature, either willfully or ignorantly, intended to violate the organic law of either the United States or of the State of California."); *Ahern v. Livermore Union High School Dist. of Alameda County* (1930) 208 Cal. 770, 779 ("This would be an absurd state of affairs, and we cannot believe that the Legislature ever intended that such a condition should result from the enactment of said amendment.").

[23] See *Adams*, supra, at 649, *Oberholzer v. Commission on Judicial Performance* (1999) at 388, and *The Recorder v. Commission on Judicial Performance* (1999) at 263.

[24] *See*, David A. Carrillo et al., *California Constitutional Law: Popular Sovereignty* (2017) 68 Hastings L.J. 731.

[25] *Oberholzer*, supra, at 388 ("The electorate's passage of Proposition 190 in November 1994 directed the transfer of authority for rulemaking from the Judicial Council to the Commission.")

[26] In California, "the power to legislate is shared by the Legislature and the electorate through the initiative process." *Prof'l. Engineers in Cal. Gov't. v. Kempton* (2007) at 239-40 (citing Art. IV, § 1).

[27] Carrillo et al., *California Constitutional Law: Popular Sovereignty* (2017) 68 Hastings L.J. 731, 742 ("Only the electorate may amend the state constitution, and only through the initiative process; revisions require the legislature's participation, either through submitting a proposed revision to the electorate directly or by convening a constitutional convention."); see also *Briggs v. Brown* (2017) at 893, n.16 (legislature may not amend an initiative statute without subsequent voter approval unless the initiative permits such amendment, and then only upon whatever conditions the voters attached to the legislature's amendatory powers) and *People v. Kelly* (2010) at 1025, 1030.

[28] Art. VI, § 18, subd. (f)(3).

[29] Former art. VI, § 18, subd. (f).

[30] *Mosk v. Super. Ct.* (1979) 25 Cal.3d 474.

[31] *Adams*, supra, at 649.

[32] *Id.* at 652.

[33] Assem. Const. Amend. No. 46 (1994-1995 Reg. Sess.).

[34] "The Commission on Judicial Performance shall make rules implementing this section, including, but not limited to, the following: (1) The commission shall make rules for the investigation of judges. The commission may provide for the confidentiality of complaints to and investigations by the commission."

[35] "When the commission institutes formal proceedings, the notice of charges, the answer, and all subsequent papers and proceedings shall be open to the public for all formal proceedings instituted after February 28, 1995."

[36] *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) at 245.

[37] *Adams, supra*, at 657–58.

[38] *Yamaha Corp. of America v. State Bd. of Equalization* (1998) at 11–12.