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In re Anderson and the Removal of Utah State Court Judges: The Supreme Court of Utah and its Review of Judicial Conduct Commission Orders

I. INTRODUCTION

Since becoming a state in 1896, only one Utah state court judge has been removed from the bench by any branch of the government,¹ Third District Juvenile Court Judge Joseph W. Anderson.² Appointed by Governor Michael O. Leavitt in 1995,³ Anderson received a 79% “Yes”⁴ retention vote from the public,⁵ and an average favorability rating from attorneys of 91.7%⁶ in the 1998 election. Yet less than six years later, on January 23, 2004, Anderson’s impressive career, which included a U.S. District Court clerkship,⁷ sixteen years as Assistant United States

1. See *In re Worthen* 926 P.2d 853, 857-58 (Utah 1990); Elizabeth Neff, *Judge Fired from Bench: Supreme Court Cites ‘Tragic Personal Decisions’ in a First for Utah; Judge is Removed from Bench*, SALT LAKE TRIB., Jan. 24, 2004, at B1.

2. See *In re Anderson*, 82 P.3d 1134 (Utah 2004). When the Utah Supreme Court removed Judge Joseph W. Anderson from the bench on January 23, 2004 the order read, “we . . . order that Judge Joseph W. Anderson be, and hereby is, removed from his office as a juvenile court judge, effective immediately.” *Id.* at 1153. Joseph W. Anderson graduated from the University of Utah College of Law in 1974. After clerking for a year for a Federal Circuit Judge in the Northern District of West Virginia, he spent three years as an associate with the Salt Lake City, Utah firm of Parsons, Behle, & Latimer. In 1979 he became an Assistant U.S. Attorney (“AUSA”) and spent three years in the Northern District of West Virginia before transferring to the District of Utah in 1982 where he worked as an AUSA until his nomination to the bench in 1995. See 3rd District District and Juvenile Courts, at http://governor.state.ut.us/lt_gover/vip3district.html (last visited Feb. 16, 2005).

3. *Anderson*, 82 P.3d at 1141. He was nominated by Governor Michael O. Leavitt. Brief of Appellant at 8-9, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC).

4. Stephen Hunt, *Judge Voluntarily Removes Himself From Child Welfare Cases*, SALT LAKE TRIB., Nov. 16, 2000, at B2; see also 1998 General for Judicial Retention Elections, available at http://governor.state.ut.us/lt_gover/98GenJudView.htm (79% was a percentage comparable to his colleagues) (last visited Feb. 16, 2005); *In re Anderson*, 82 P.3d at 1141-42; Brief of Appellant at 8-9, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC).

5. UTAH CONST. art. VIII, § 9. State judges in Utah are subject to retention elections: Each appointee to a court of record shall be subject to an unopposed retention election at the first general election held more than three years after appointment. Following initial voter approval . . . each judge of other courts of record every sixth year, shall be subject to an unopposed retention election at the corresponding general election.

Id.

6. 3rd District District and Juvenile Courts, at http://governor.state.ut.us/lt_gover/vip3district.html (last visited Feb. 16, 2005). The favorability ratings are established in thirteen different questions of judicial competency and this average was reached by simply taking the sum of all thirteen percentages and then dividing it by thirteen. The “standard favorable response” is 70%, though the vast majority of judges scored well above the 70% level. *Id.*

7. Anderson clerked in the Northern District of West Virginia. See 3rd District and Juvenile

Attorney,⁸ and eight years as a juvenile court judge, came to an abrupt halt when the Utah Supreme Court (“supreme court”) removed him from the bench.⁹

The supreme court does have the power to remove a judge from the bench, but their decision to do so in *Anderson* extended beyond the scope of both precedent and their constitutionally-granted powers¹⁰ pertaining to orders from Judicial Conduct Commission (“JCC”) orders.¹¹ Prior to *In re Anderson*, only three judicial discipline cases had reached the state’s supreme court,¹² and these cases delineated a conservative precedent when reviewing JCC proceedings and recommendations.¹³ More pointedly, the Utah Constitution states that the court’s function is limited to reviewing the body of the proceedings and complaints before the JCC,¹⁴ yet the court removed Judge Anderson for conduct never considered by the JCC. This paper therefore concludes that the court should have followed precedent and constitutionally-prescribed procedure by limiting its review to the complaints dealt with by the JCC.

Also, the supreme court has now set a precedent that bypasses a constitutional body, and takes matters into its own hands. In slippery-slope fashion, one wonders under what circumstances the supreme court will feel are unique enough or severe enough to repeat this outcome and whether the supreme court could extend its reasoning into its review of government agencies and their judicial proceedings. In short, the possible repercussions of this decision extending to other realms or even to other judicial discipline cases, could subsume due process as intended by both the state’s legislature and its constitution.

A. A Brief Overview of the Case

The Guardian ad Litem’s (“GAL”) office filed the initial complaint with the state’s JCC, stating that Judge Anderson was not complying

Courts, at http://governor.state.ut.us/lt_gover/vip3district.html (last visited Feb. 16, 2005).

8. Three years were in the Northern District of West Virginia and approximately thirteen were in the District of Utah where he spent nine years as the Civil Division chief. *See id.*

9. *Anderson*, 82 P.3d at 1134.

10. UTAH CONST. art. VIII, § 13; *see also Anderson*, 82 P.3d at 1134.

11. It should be noted that of the three methods provided in Utah for the removal of a judge, only one is open to the judiciary. *See infra* Section II: “Removal of State Judges in Utah.” That method permits removal based on the court’s review capacity of the Utah Judicial Conduct Commission’s (hereinafter “JCC”) recommendations and was the method employed by the court in removing Judge Anderson from the bench. *See Anderson*, 82 P.3d 1134 (Utah 2004).

12. *In re Young*, 976 P.2d 581 (Utah 1999); *In re McCully*, 942 P.2d 327 (Utah 1997); *In re Worthen*, 926 P.2d 853 (Utah 1996).

13. *See infra* pp. 6-7.

14. UTAH CONST. art. VIII, § 13.

with the state's statutory deadlines pertaining to child welfare cases.¹⁵ Despite various attempts to remedy the situation, the timeliness problems remained and the JCC began official proceedings.¹⁶ During the JCC investigation, however, Anderson disqualified himself from hearing the majority of his cases because they involved either the GAL's office or the Attorney General's office, a party that had also become involved in the proceedings.¹⁷ Anderson also minimized the cases he could objectively hear by filing a civil complaint in federal court against the JCC and GAL as well as their directors alleging various rights violations under the U.S. and the Utah Constitutions.¹⁸ He further alleged that the directors of both GAL and the JCC were conspiring to have him removed from the bench.¹⁹ The complaints before the JCC, however, pertained only to the timeliness issues and the JCC accordingly recommended to the supreme court that Anderson be publicly reprimanded.²⁰

Upon receiving the case, the supreme court did something they had never done when dealing with judicial discipline; they appointed a special master²¹ to gather additional evidence.²² The information requested by the court, however, pertained almost exclusively to the federal suit and Anderson's actions subsequent to the complaints filed with the JCC.²³ The court's requests are problematic because precedent²⁴ and the Utah Constitution²⁵ strongly suggest that all complaints must first be addressed to the JCC, after which the supreme court is to *review* the proceedings. Thus, collecting evidence pertaining to matters beyond the scope of the complaints filed with the JCC exceeds the scope of the

15. *Anderson*, 82 P.3d at 1142.

16. *Id.*

17. *Id.* at 1141-42. The Attorney General's office got involved because they often appeared before Judge Anderson and gave statements to the JCC concerning Anderson's performance. *Id.* at 1142.

18. *Id.* at 1143.

19. *Id.*

20. *Id.* at 1138.

21. A master is:

[a] parajudicial officer . . . specially appointed to help a court with its proceedings. A master may take testimony, hear and rule on discovery disputes and other pre-trial matters, compute interest, value annuities, investigate encumbrances on land titles, and the like—usu. with a written report to the court.

BLACK'S LAW DICTIONARY 989-90 (7th ed. 1999). A special master is "[a] master appointed to assist the court with a particular matter or case." *Id.*

22. Fourth District Judge Anthony W. Schofield was appointed as special master by the supreme court. *Anderson*, 82 P.3d at 1140.

23. *Id.*

24. See *In re Young*, 976 P.2d 581 (Utah 1999); *In re McCully*, 942 P.2d 327 (Utah 1997); *In re Worthen*, 926 P.2d 853 (Utah 1996).

25. See UTAH CONST. art. VIII, § 13.

court's review capacity.²⁶ Furthermore, the court's reliance upon the special master's findings in removing Judge Anderson, placed his removal beyond the scope of the court's constitutionally-prescribed powers.²⁷

II. REMOVAL OF STATE JUDGES IN UTAH²⁸

Utah currently has three alternative methods for removing state judges from the bench. The first, as laid out in article VIII, section 9 of the Utah Constitution, states that "every sixth year" state judges "shall be subject to an unopposed retention election at the corresponding general election."²⁹ This empowers the state's citizens to remove a judge if they are able to muster a majority vote against a specific judge during a retention election.³⁰ This method has been in place since 1985, but was not successfully employed to remove a judge until Judge David S. Young lost his retention election by a 53% to 47% vote in 2002.³¹

A Utah state judge can also be removed by the state's legislative branch. Under this method a judge can only be removed by a two-thirds vote from the House of Representatives and a trial, followed by a two-thirds vote in the Senate.³² Such an action can only arise when a judge is impeached for "high crimes, misdemeanors, or malfeasance in office"³³ and has never been employed in Utah.³⁴

The final removal method makes use of the state's JCC as well as the

26. See *infra* pp. 15-20. While the court explicitly refutes this argument, this Note argues that it did so unsuccessfully. See *Anderson*, 82 P.3d at 1148.

27. It is important to point out a distinction: This Note does not argue that Judge Anderson should never have been removed from the bench; rather it focuses on the improper procedures of the court in doing so.

28. For a more complete discussion of the history and progression of judicial discipline in Utah, see *Worthen*, 926 P.2d at 857-59, and *Anderson*, 82 P.3d at 1138-40.

29. UTAH CONST. art. VIII, § 9.

30. Elizabeth Neff, *Voters Oust Young, Making Him 1st State Judge Removed on a Retention Ballot*, SALT LAKE TRIB., Nov. 6, 2002, at A15.

31. Elizabeth Neff, *Judge's Removal Causes Stir*, SALT LAKE TRIB., Nov. 7, 2002, at B1. Judge Young had gained a reputation for being soft on sexual offenders. In one instance, a newspaper reported:

The effort to remove the judge has been in the works since he ordered two 21-year-old men to perform 150 hours community service hours for sex acts with a 12-year-old girl. Prosecutors in Tooele had charged the men with sodomy, a first-degree felony. Young reduced those charges to third-degree felonies and did not order any jail time. The men said they thought the girl was 17.

Laura Hancock, *Group Steps up Efforts to Remove Judge Young*, DESERET NEWS (Salt Lake City), Oct. 12, 2002, at B6. It should also be noted that Judge Young was almost successfully removed from the bench in 1996—being retained by a very slim 51% to 49% vote. *Id.*

32. *Anderson*, 82 P.3d at 1138-39.

33. UTAH CONST. art. VI, § 19.

34. See *In re Worthen*, 926 P.2d 853, 857 (Utah 1996).

state supreme court.³⁵ This removal process is slightly more complex than the other two methods of removal because it involves the state constitution, judicial precedent, the JCC's bylaws, and the review capacities of the supreme court. Article VIII, section 13 of the Utah Constitution established the JCC and reads as follows:

A Judicial Conduct Commission is established which shall investigate and conduct confidential hearings regarding complaints against any justice or judge. Following its investigations and hearings, the Judicial Conduct Commission may order the reprimand, censure, suspension, removal, or involuntary retirement of any justice or judge for the following:

- (1) action which constitutes willful misconduct in office;
- (2) final conviction of a crime punishable as a felony under state or federal law;
- (3) willful and persistent failure to perform judicial duties;
- (4) disability that seriously interferes with the performance of judicial duties; or
- (5) conduct prejudicial to the administration of justice which brings a judicial office into disrepute.

Prior to the implementation of any commission order, the Supreme Court shall review the commission's proceedings as to both law and fact. The court may also permit the introduction of additional evidence. After its review, the Supreme Court shall, as it finds just and proper, issue its order implementing, rejecting, or modifying the commission's order.³⁶

Judge Joseph W. Anderson was the first, and at the publication of this Note, the only judge to be removed from office under the auspices of this constitutional provision.³⁷ The supreme court exceeded this constitutionally prescribed method of judicial discipline in the manner in which it removed Judge Anderson from the bench.

This Note will illustrate this by: first, analyzing the precedent in Utah pertaining to judicial discipline cases and showing that the supreme court exceeded the bounds they had placed on themselves pertaining to

35. UTAH CONST. art. VIII, § 13.

36. *Id.*

37. Though because the first two methods are fairly narrow in their reach, this is the method employed on a regular basis to levy less stringent forms of discipline and the JCC regularly investigates dozens of complaints. See Elizabeth Neff, *Discipline Records Opened*, SALT LAKE TRIB., Jan. 2, 2003, at B1 ("Utah's Conduct Commission dismisses 82 percent of all complaints Between fiscal years 1996 and 2002, judges were privately sanctioned in 34 cases, while public sanctions were issued in 14 cases.").

their review capacity of JCC recommendations; second, discussing the proceedings of the principle case, the hearings, investigations and orders of the JCC, the special master's task and report, and the supreme court's reasoning; third, discussing the referral to the special master and that the information the court requested from the special master lay beyond the realm of the supreme court's powers as laid out in both precedent and the Utah Constitution; fourth, expanding upon the dissent in stating that the supreme court's review was unconstitutional because they considered actions and issues that were never before the JCC; and fifth, stating how the court's action should have occurred in order to be constitutional.

III. JUDICIAL DISCIPLINE PRECEDENT IN UTAH

Prior to Judge Anderson's case, the supreme court had rendered but three opinions in its review capacity of a JCC recommendation pertaining to judicial discipline.³⁸ Consequently the language of the Utah Constitution is the principle source in defining the relationship between the court and the JCC, stating that a JCC order must be reviewed by the supreme court before it is implemented.³⁹

The Utah Constitution, however, does not specify how the court is to proceed in its review of a JCC order. For instance, how much deference should the court give to the JCC's findings of fact and conclusions of law? To what extent and for what purpose can or should the court "permit the introduction of additional evidence"?⁴⁰ Just how broad is the supreme court's review? Supreme court precedent holds answers to these questions and an examination of that precedent is vital to grasping this Note's argument that the supreme court's review in *Anderson* exceeded the scope of its authority.

A. *The Three Defining Cases*

The supreme court's first opinion pertaining to its JCC review capacity came in the joined cases of two Justice Court Judges—Richard Worthen and Gaylen Buckley.⁴¹ The JCC's investigation of Judge

38. *In re Anderson*, 82 P.3d 1134 (Utah 2004). The three cases are: *In re Young*, 976 P.2d 581 (Utah 1999); *In re McCully*, 942 P.2d 327 (Utah 1997); *In re Worthen*, 926 P.2d 853 (Utah 1996). There is another case of great significance to this area, *In re Greenwood*, 796 P.2d 682 (Utah 1990), that also describes the role of the supreme court pertaining to its review of JCC orders. The JCC was created in 1984. *Anderson*, 82 P.3d at 1138-39.

39. UTAH CONST. art. VIII, § 13; see *Worthen*, 926 P.2d at 862 ("the Commission's order has no effect whatsoever unless it is first reviewed by [the supreme court] and this court determines to enforce it" (emphasis added)).

40. UTAH CONST. art. VIII, § 13.

41. *Worthen*, 926 P.2d at 856. The court's rulings pertaining to both judges were joined into

Worthen considered his late reporting of DUI convictions to the Driver's License Division,⁴² whereas Judge Buckley was investigated for not following proper warrant procedures and for exceeding his authority in handing out an excessive contempt conviction.⁴³ The JCC ordered a sanction of public censure⁴⁴ for each judge due to "willful misconduct in office and for conduct prejudicial to the administration of justice,"⁴⁵ and also ordered that Judge Worthen be suspended for ninety days.⁴⁶

In its review, the supreme court reaffirmed itself as the ultimate arbiter of judicial discipline in Utah,⁴⁷ yet set a conservative precedent by choosing to forego the chance to gather further evidence, claiming it had no ready means to do so.⁴⁸ It also did not want to demean the role of the constitutionally created Judicial Conduct Commission,⁴⁹ so it remanded the proceedings back to the JCC for that body to collect enough information for the court to make a determination.⁵⁰

The following year, 1997, the supreme court heard Juvenile Court Judge Sharon McCully's appeal from a JCC order that she be publicly reprimanded.⁵¹ The JCC's order stemmed from Judge McCully's submission of an affidavit describing the role of the Guardian ad Litem's office in juvenile court.⁵² The JCC found that McCully's conduct was

prejudicial to the administration of justice which brought a judicial office into disrepute in violation of section 78-7-28(1)(e) of the Utah Code because she prepared and allowed a litigant to submit an affidavit containing not only facts regarding the operation of the juvenile courts, but also her opinion as to the ultimate issue before the court in which her affidavit was submitted.⁵³

this one opinion. *Id.*

42. *Id.* at 861.

43. *Id.* at 860.

44. *Id.* at 860, 862.

45. *Id.* at 856; *see also* UTAH CONST. art. VIII, § 13(3) (stating the Judicial Conduct Commission can sanction a judge for "(1) action which constitutes willful misconduct in office" or "(5) conduct prejudicial to the administration of justice which brings a judicial office into disrepute").

46. *Worthen*, 926 P.2d at 862.

47. *Id.*

48. *Id.* at 864.

49. *Id.* at 865.

50. *Id.* at 872 (explaining that because the JCC's findings lack specificity dealing with certain areas of the judge's misconduct "we [the court] find it impossible to perform our constitutional and statutory review function on the . . . records before us").

51. *In re McCully*, 942 P.2d 327 (Utah 1997).

52. *Id.* at 328-30.

53. *Id.* at 333.

The supreme court reviewed each finding and the associated proceedings in turn,⁵⁴ dismissed McCully's subsequent claims,⁵⁵ and ultimately implemented the JCC's order.⁵⁶

The most recent case prior to *Anderson* involved another Third District Judge, David S. Young.⁵⁷ The JCC received a complaint alleging Judge Young made an ex parte phone call to counsel in one of Young's active cases.⁵⁸ The JCC found that Judge Young had violated the Judicial Code of Conduct and recommended a public reprimand as the appropriate sanction.⁵⁹ The case was then referred to the supreme court for review.⁶⁰

After examining the evidence, the supreme court concluded that the JCC's factual findings were "not arbitrary, capricious, or plainly in error, but [were] sufficiently supported by the record evidence."⁶¹ As a result, the supreme court "conclude[d] that Judge Young's misconduct warrant[ed] the sanction of public reprimand."⁶²

IV. THE PRINCIPAL CASE: *IN RE ANDERSON*⁶³

The actions that led to Anderson's ultimate removal occurred between the years 1999 and 2000.⁶⁴ Utah law mandates that a juvenile court judge hold an adjudicative hearing "no later than 60 calendar days from the date of the shelter hearing" when dealing with certain forms of child welfare cases.⁶⁵ Secondly, a trial court judge "shall decide all matters submitted for final determination within two months of submission, unless circumstances causing the delay are beyond the judge's control."⁶⁶

54. *Id.* at 330-31.

55. *Id.* at 332-34.

56. *Id.* at 333-34; *see also* Sheila R. McCann, *Utah's High Court Slaps Judge With Reprimand*, SALT LAKE TRIB., July 9, 1997, at B3. Despite the reprimand, Judge McCully has had a distinguished career. She has twice been named the Utah State Bar's juvenile court judge of the year (1988, 2001) and in July 2004, she was named as the sixtieth president of the National Council of Juvenile and Family Court Judges for the 2004-05 term. *Utah Judge Named to Lead U.S. Group*, DESERET NEWS (Salt Lake City, Metro ed.), July 28, 2004, at B2.

57. *In re Young*, 984 P.2d 997 (Utah 1999).

58. *Id.* at 998-99.

59. *Id.* at 1000.

60. *Id.*

61. *Id.* at 1004.

62. *Id.* at 1009. Judge Young has since lost a retention election. *See supra* p. 4.

63. *In re Anderson*, 82 P.3d 1134 (Utah 2004).

64. *Id.* at 1142.

65. UTAH CODE ANN. § 78-3a-308(2) (2004). The specific types of child welfare cases are those dealing with abuse, neglect, and dependency. *Id.*

66. *Id.* at § 78-7-25(1). In the case before the Utah Supreme Court, Judge Anderson disputed the constitutional authority of the legislature to set such deadlines. *Anderson*, 82 P.3d at 1141. His

Judge Anderson's apparent lack of timeliness pertaining to these two statutes created a stir amongst litigants who appeared before him—most particularly the Guardian ad Litem's and Attorney General's offices.⁶⁷ These offices worried that in cases dealing with abuse and neglect, any unnecessary delay could be damaging to the children who were in limbo throughout the court proceedings.⁶⁸ The two offices worked together in an unsuccessful effort to resolve the delays in Judge Anderson's courtroom⁶⁹ and they may have been more successful if Anderson had been willing to admit that he was the root of the problem. Instead, he abdicated all responsibility for the delays.⁷⁰ Anderson even remained immovable in the face of a compliance order from the Utah Court of Appeals.⁷¹

Accordingly, Kristin Brewer, in her position as Director of the Guardian ad Litem's office, filed a formal complaint with the JCC on June 27, 2000.⁷² The complaint dealt specifically with Judge Anderson's inability to comply with the statutory deadlines in child welfare cases.⁷³ On the same day, Laura Beck, on behalf of the Attorney General's office, filed a similar complaint with the JCC.⁷⁴ Shortly thereafter the JCC

claim relied on the separation of powers doctrine by stating that laws which set deadlines and scheduling for judges "are unconstitutional intrusions of the legislature into the core functions of the judiciary." Brief of Appellant at 30, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC). In response, the Attorney General's office extensively addressed the constitutionality of the two statutes in its second brief to the Utah Supreme Court. Brief of Utah Attorney General Mark L. Shurtleff at 2, 3-8, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC). The Attorney General's brief contended that the "statutes do not interfere with the core judicial function of deciding cases and because they do not impermissively exert the power of the legislative branch over the judiciary, they do not violate the separation of powers provision." *Id.* at 8. Interestingly, the supreme court stated that Judge Anderson's claims may have some merit, but dismissed the claim because he did "not argue that his constitutional objection to the statutory deadlines was the reason he failed to observe those deadlines." *Anderson*, 82 P.3d at 1149. Thus, because Anderson did not raise his objection "contemporaneous with his refusal to observe the statutory requirements" the supreme court had "no reason to believe that constitutional principle motivated that refusal" to follow the statutes. *Id.* at 1149.

67. See *Anderson*, 82 P.3d at 1142. From "1999-2000, Judge Anderson had significant difficulty managing his child welfare cases in compliance with statutory deadlines for hearings and action." *Id.*; see also Stephen Hunt, *Judge Voluntarily Removes Himself From Child Welfare Cases*, SALT LAKE TRIB., Nov. 16, 2000, at B2.

68. 1998 General for Judicial Retention Elections, available at http://governor.state.ut.us/It_gover/98GenJudView.htm; Stephen Hunt, *Judge Voluntarily Removes Himself From Child Welfare Cases*, SALT LAKE TRIB., Nov. 16, 2000, at B2.

69. *Anderson*, 82 P.3d at 1141-42.

70. *Id.* at 1142.

71. Office of Guardian ad Litem v. Anderson, 987 P.2d 611 (Utah Ct. App. 1999). The supreme court references multiple orders from the court of appeals. *Anderson*, 82 P.3d at 1142.

72. Brief of Appellant at 9, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC); Initial Brief of Utah Judicial Conduct Commission at 3, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC).

73. UTAH CODE ANN. § 78-3a-308(2) (2004); *Id.* at § 78-7-25(1); *Anderson*, 82 P.3d at 1142.

consolidated the two complaints and treated them as one throughout its investigation and review.⁷⁵

A. JCC Proceedings

The JCC began its formal proceedings against Judge Anderson on December 8, 2000, and throughout the course of its investigation addressed seventy-six claims of misconduct.⁷⁶ Only a month earlier, Judge Anderson had “voluntarily removed himself from hearing child welfare cases and began hearing only juvenile delinquency cases,”⁷⁷ thereby eliminating about 70 percent of his caseload.⁷⁸ This left his colleagues in the Third District with a significantly heavier caseload.⁷⁹ Yet the biggest complications during the proceedings stemmed from Anderson’s own actions.

Judge Anderson filed a federal civil complaint in the Federal District of Utah on December 5, 2001.⁸⁰ In that complaint he named Steven Stewart, the Executive Director of the JCC, Dane Noland, the Chairman of the JCC, and Kristin Brewer, in her capacity as the Director of the Guardian ad Litem office, as defendants.⁸¹

Anderson’s suit made numerous claims, the first of which was that the JCC is unconstitutional because there is no separation of functions—meaning that the JCC acts as the investigator, prosecutor, and judge in all cases that come before it.⁸² He also claimed that the Office of the

74. Initial Brief of Utah Judicial Conduct Commission at 3, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC).

75. *Id.*

76. Brief of Appellant at 9, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC).

77. Stephen Hunt & Ashley Estes Broughton, *Judge Tries to Turn Tables on Judicial Conduct Board*, SALT LAKE TRIB., Dec. 11, 2001, at A1; Stephen Hunt, *Judge’s Battle May Head to Supreme Court*, SALT LAKE TRIB., Jan. 5, 2002, at B2 (quote is the same in both accounts).

78. Stephen Hunt & Ashley Estes Broughton, *Judge Tries to Turn Tables on Judicial Conduct Board*, SALT LAKE TRIB., Dec. 11, 2001, at A1.

79. *In re Anderson*, 82 P.3d 1134, 1142-43 (Utah 2004); Stephen Hunt, *Judge Voluntarily Removes Himself From Child Welfare Cases*, SALT LAKE TRIB., Nov. 16, 2000, at B2.

80. Brief of Appellant at 11, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC). “The suit was filed in federal court because it challenges the constitutionality of the 10-member Judicial Conduct Commission, which includes state representatives, state senators, Utah State Bar members and a state judge.” Stephen Hunt & Ashley Estes Broughton, *Judge Tries to Turn Tables on Judicial Conduct Board*, SALT LAKE TRIB., Dec. 11, 2001, at A1. Thus, Anderson filed in a forum where the potential for bias and or outside influence was minimal.

81. *Anderson*, 82 P.3d at 1143; Brief of Appellant at 11, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC).

82. Angie Welling, *Juvenile Court Judge Sues Judicial Conduct Panel*, DESERET NEWS (Salt Lake City), Dec. 11, 2001, at B4. Stephen Hunt & Ashley Estes Broughton, *Judge Tries to Turn Tables on Judicial Conduct Board*, SALT LAKE TRIB., Dec. 11, 2001, at A1; *see also* Brief of Appellant at 35-36, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC). This topic could be its own note because Anderson also made this claim before the supreme court. *See* Brief of Utah

Guardian ad Litem “was deficient in a number of important respects” in its “representation of children.”⁸³ Furthermore, Anderson alleged that the complaint filed with the JCC was reviving a resolved issue and was meant to “deprive Judge Anderson of both his position on the bench and his constitutionally protected rights in the process.”⁸⁴

In his First Amended Complaint filed on December 20, 2001, Anderson sought monetary damages by naming Kristin Brewer and Steven Stewart personally as defendants.⁸⁵ He claimed that Brewer’s JCC complaint made false comments about him to his public detriment, and that the complaint constituted retaliation for the frustration she feels at Judge Anderson’s lack of timeliness in child welfare cases.⁸⁶

The animosity between Judge Anderson and the GAL and AG’s offices only intensified when, in the late summer of 2002, they⁸⁷ filed motions to disqualify Judge Anderson from hearing “any matter involving representation by the Office of the Guardian ad Litem . . . for reason of expressed bias against the attorneys of that office, including the director.”⁸⁸ In each case the trial court denied the motion, and in each case the ruling was appealed to the Utah Court of Appeals.⁸⁹ As to the Guardian ad Litem’s motion, the appellate court ruled that Anderson should be disqualified “in any pending or future cases in which an attorney employed by the Office of the Guardian ad Litem appears.”⁹⁰ The court of appeals likewise accepted the Attorney General’s motion and disqualified Anderson from “all cases in which the Attorney General’s office appeared or would appear in the future.”⁹¹ Naturally this resulted in Judge Anderson’s already-minimal caseload⁹² becoming even more restricted.⁹³

Attorney General Mark L. Shurtleff at 2, 3-8, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC). Interestingly, however, the supreme court dismissed the claim, upholding both the composition and the tasks of the JCC seeing “no constitutional infirmity with this process.” *Anderson*, 82 P.3d at 1147.

83. *Anderson*, 82 P.3d at 1143.

84. *Id.*

85. *Id.* at 1143; *see also* Brief of Appellant at 12, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC).

86. *Anderson*, 82 P.3d at 1142-43. Ironically, the supreme court’s ruling called Judge Anderson’s federal lawsuit, “retaliation”, the very charge he laid at the feet of Kristin Brewer. *Id.* at 1141, 1152.

87. The AG’s office filed on behalf of the Department of Child and Family Services (“DCFS”).

88. *Anderson*, 82 P.3d at 1143.

89. *Id.* at 1143-44.

90. Brief of Appellant at 12, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC).

91. *Id.* at 13.

92. *Anderson*, 82 P.3d at 1142-43.

93. It is significant to note, however, that Judge Anderson was in the process of trying to get the Court of Appeals’ decisions reversed. State Dep’t of Human Services, Div. of Child and Family

1. JCC hearings

Following these events, the JCC held two confidential hearings—the first on November 12, 2002, and the second on March 11, 2003.⁹⁴ Anderson testified at each and submitted numerous documents supporting his defense, and attorneys from each side argued their clients' cases before the Commission.⁹⁵ Following these proceedings, the JCC released its Findings of Fact and Conclusions of Law on March 27, 2003.⁹⁶ Although the JCC dismissed the majority of the claims against Judge Anderson,⁹⁷ it found that Anderson had violated Utah Code § 78-3a-308(2) by failing to hold adjudication hearings “within 60 days of the related shelter hearings” in nine separate instances.⁹⁸ They also found that Anderson violated Utah Code Ann. § 78-7-25(1) on two occasions, meaning that Anderson did not “decide all matters submitted for final determination within two months of submission” in two cases.⁹⁹

The JCC concluded that Anderson's wayward actions “constitute[d] a pattern of disregard and indifference to the law,” “violated Code of Judicial Conduct Canon 2A, which requires judges to ‘respect and

Services v. Oddone, 84 P.3d 1170 (Utah 2004). In this case, the Third District Juvenile Court's Presiding Judge, Frederic Oddone, appealed the Court of Appeals' decisions that disqualified Judge Anderson from cases dealing with the Attorney General or the Guardian ad Litem's offices. He appealed because Anderson's disqualification had a serious impact on the Third Juvenile District and, as the judge in charge of coordinating the district's schedules, Oddone sought a removal of the severe restrictions placed upon one of his judges. *Id.* at 1170. The Utah Supreme Court decided the case at the same time as *In re Anderson*, making the case a moot issue. *Id.* Yet the court did state that the indeterminate time period put forward by the Court of Appeals was inappropriate. But the court also agreed that the disqualification was appropriate for the time it was in place. *Id.* The significance lies in the fact that the supreme court could have removed the disqualification on Judge Anderson and he could have begun hearing cases once again.

94. Initial Brief of Utah Judicial Conduct Commission at Addendum 2, 1, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC) (Addendum 2 is the Judicial Conduct Commission's Findings of Fact and Conclusions of Law).

95. *Id.* at 1-3.

96. *Id.* at 9.

97. The Commission dismissed the claims for several reasons. One was because “the Examiner failed to prove, by a preponderance of the evidence, that the matter was under advisement for more than two months.” *Id.* at 8; *see also id.* at 6 (“insufficient evidence to find that the adjudication hearings were held more than 60 days beyond the shelter hearings”). The Commission also found that the exception provision in Utah Code Ann. § 78-7-25(1), which permits delays if they are caused by circumstances beyond the judge's control, was applicable to many of the delays at issue. *Id.* at 8. Mr. Colin Winchester, Executive Director for the JCC, also moved to dismiss a number of claims at the outset of the hearings. *Id.* at 2. Following the dismissals, eleven of the original seventy-six claims remained.

98. *Id.* at 5-6, findings 7-15. Shelter hearings are defined as “A hearing shortly after the state's removal of a child for suspected abuse or neglect. . . . The purpose of the hearing is to determine whether the state has adequate cause to maintain the children in protective care.” BLACK'S LAW DICTIONARY (8th ed. 2004) (Found on WESTLAW under “hearing”).

99. Initial Brief of Utah Judicial Conduct Commission at Addendum 2, 7-9, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC).

comply with the law’,” and “committed conduct prejudicial to the administration of justice which brings a judicial office into disrepute.”¹⁰⁰ Accordingly, the JCC released its Formal Order of Reprimand, stating, “[a] majority of Commissioners . . . concluded that a formal (public) order of reprimand is an appropriate sanction, and therefore orders the same.”¹⁰¹ At the end of the Formal Order of Reprimand, the JCC stated, in accordance with the Utah Constitution,¹⁰² “[t]his order shall only take effect upon implementation of the same by the Utah Supreme Court.”¹⁰³

B. The Special Master

Upon receiving the case, the supreme court appointed a special master, Fourth District Judge Anthony W. Schofield, to review and gather more evidence.¹⁰⁴ The court tasked the special master with six specific areas of inquiry: (1) the impact of “any dispute between Judge Anderson and the Office of the Guardian ad Litem” on current relations between the two;¹⁰⁵ (2) whether any “conflicts in the past or present between Judge Anderson and any litigants or representatives of litigants, or the Office of the Guardian ad Litem” have impacted Anderson’s ability to carry a typical caseload;¹⁰⁶ (3) whether anything related to the conduct investigated by the JCC has impacted Judge Anderson’s job performance,¹⁰⁷ his colleagues,¹⁰⁸ the “scheduling and assignment of cases in the Third District Juvenile Court,”¹⁰⁹ and the “frequency and result of requests for Judge Anderson to recuse himself” appertaining to

100. *Id.* at 9.

101. Initial Brief of Utah Judicial Conduct Commission at Addendum 1, 1, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC) (Addendum 1 is the Judicial Conduct Commission’s Formal Order of Reprimand p.1. Dated March 27, 2003).

102. UTAH CONST. art. VIII, § 13.

103. Initial Brief of Utah Judicial Conduct Commission at Addendum 1, 1, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC).

104. *Id.* at Addendum 3, 1 (Addendum 3 is the Supreme Court’s Order of Referral to the Special Master). Judge Anderson filed an objection to the referral and claimed that the supreme court had no authority to appoint a special master and that the special master was inappropriately tasked with discovering issues that were not part of the JCC complaint. Brief of Appellant at 51-52, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC) (This argument will be discussed at length later in this Note). The court rejected Anderson’s argument by stating that “[h]ow . . . evidence is to be introduced is left to [the court’s] discretion” and “the appointment of a master is a traditional and time-honored mechanism” for gathering evidence. *In re Anderson*, 82 P.3d 1134, 1148 (Utah 2004).

105. Initial Brief of Utah Judicial Conduct Commission at Addendum 3, 3 part (C)(1), *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC).

106. *Id.* at 3 part (C)(2).

107. *Id.* at 3 part (C)(3)(A).

108. *Id.* at 3 part (C)(3)(B).

109. *Id.* at 3 part (C)(3)(C).

matters that are a “usual part of his assigned caseload”;¹¹⁰ (4) what effect of any “litigation in any court” pertaining to Judge Anderson, and any “directives from higher courts regarding [such] matters”; (5) whether “Judge Anderson has been rendered unable to perform the duties of his office”;¹¹¹ (6) all other matters that will “present a full and accurate exposition of” issues 1-5.¹¹²

Following seven days of evidentiary hearings, the special master filed his findings with the supreme court on October 3, 2003.¹¹³

C. The Utah Supreme Court’s Decision

The supreme court decided, in pertinent part, that Judge Anderson’s actions, particularly those subsequent to the events reviewed by the JCC, were of such a nature that Anderson should be removed immediately from office.¹¹⁴ The court stated that Anderson’s case raised “unique complications”,¹¹⁵ which is why they appointed a special master to collect copious evidence surrounding Anderson’s conduct and the effects thereof, subsequent to the issues dealt with by the JCC.¹¹⁶ The court’s final decision was two-fold. First, it concluded that Judge Anderson’s lack of timeliness pertaining to child custody hearings “constituted a pattern of disregard and indifference to the law”¹¹⁷ that led to “conduct prejudicial to the administration of justice which brings a judicial office into disrepute.”¹¹⁸ Second, and “[m]ore importantly . . . based upon the facts and evidence adduced by the proceedings before the special master,”¹¹⁹ Judge Anderson’s conduct likewise “constitutes conduct prejudicial to the administration of justice which brings a judicial office into disrepute.”¹²⁰ The court then increased the JCC’s sanction recommendation to “order that Judge Joseph Anderson be . . . removed from his office . . . effective immediately.”¹²¹

110. *Id.* at 3 part (C)(3)(D).

111. *Id.* at 3 part (C)(5).

112. *Id.* at 3 part (C)(6).

113. Initial Brief of Utah Judicial Conduct Commission at 4, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC).

114. *In re Anderson*, 82 P.3d 1134, 1138 (Utah 2004).

115. *Id.*

116. *Id.*; *accord* Initial Brief of Utah Judicial Conduct Commission at Addendum 3, 3 part (C), *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC).

117. *Anderson*, 82 P.3d at 1153.

118. *Id.*; UTAH CONST. art. VIII, § 13(5).

119. *Anderson*, 82 P.3d at 1153.

120. *Id.*; UTAH CONST. art. VIII, § 13(5).

121. *Anderson*, 82 P.3d at 1153.

V. ARGUMENT

The supreme court's removal of Juvenile Court Judge Joseph Anderson was both divergent from precedent and unconstitutional. State precedent in judicial discipline cases points to a deferential standard wherein the court has chosen not to engage in significant fact-finding. The court, however, took a new path in appointing a special master, and did so in a manner that surpassed the court's review-capacity under the constitution. Additionally, precedent restrains itself to a proper review of the JCC's proceedings. The *Anderson* court sidelines both precedent and the JCC's proceedings, but more importantly, it pre-empts the state constitution in an attempt to justify its decision. Indeed, in reading *Anderson*, particularly in light of precedent and the constitutional text, Associate Chief Justice Durrant's dissent is the only viable and appropriate understanding of the role of the supreme court in reviewing the JCC's recommendations. Justice Durrant stated that the supreme court had no authority to remove judge Anderson "for conduct that was neither considered by the JCC nor a basis for the Commission's recommended sanction."¹²² Rather, any charge against a judge "must be addressed through the constitutionally-prescribed channel,"¹²³ after which the supreme court can review the proceedings as set forth in the constitution.¹²⁴

A. *Gathering Evidence: Appointing a Special Master*

By appointing a special master to conduct an in-depth and far-reaching investigation into Judge Anderson's case,¹²⁵ the supreme court signaled that it was changing its methodology pertaining to its review of JCC proceedings and orders. Prior to *Anderson*, the court had refrained from engaging in any serious fact-finding in its review of JCC orders in judicial discipline cases.¹²⁶ Precedent dictated that the court would be reluctant to engage in any further evidence collection, though it did reserve itself the right, as granted under the constitution,¹²⁷ to do so if

122. *Id.* at 1154 (Durrant, J., dissenting).

123. *Id.*

124. UTAH CONST. art. VIII, § 13.

125. *See supra* pp. 14-15; *Anderson*, 82 P.3d at 1138, 1141. The court's action was a new approach to reviewing JCC recommendations that, while not making the referral improper, certainly makes a case for increased scrutiny.

126. *See In re Young*, 976 P.2d 581 (Utah 1999); *In re McCully*, 942 P.2d 327 (Utah 1997); *In re Worthen*, 926 P.2d 853 (Utah 1996).

127. UTAH CONST. art. VIII, § 13.

necessary.¹²⁸ Thus, historically, when faced with the need to gather significant additional evidence and findings, the court has said that it would likely remand to the JCC for further proceedings.¹²⁹

Just ten years prior to *Anderson*, the supreme court stated, in reference to the deference granted to the JCC's findings of fact, that "while the constitution does permit this court to take additional evidence, we have no ready mechanism for doing so."¹³⁰ The court continued, "We might choose to consider some additional uncontested evidence submitted by affidavit, but if there were a dispute as to proposed additional evidence, it is most likely that we would simply remand the matter to the Commission for further consideration of evidence and the entry of findings."¹³¹ Accordingly, the *Worthen* court held that the "evidence is currently deficient"¹³² and without JCC findings and explanations to support the charges, the court could make no determination as to the nature of, or even if sanctions should be given.¹³³

Accordingly, the *Worthen* court then remanded to the JCC, stating that the Commission may even need to start from scratch "in order to remedy the deficiencies" in the JCC's "complaint and notice, in the evidence, and in the findings and conclusions."¹³⁴ Thus, when the JCC's findings and evidence are particularly deficient, or there are other matters that the JCC needs to consider, the court has indicated it will remand the case back to the JCC rather than forge ahead by gathering its own evidence.

In its order of referral to the special master in *Anderson*, the supreme court stated that it was "considering the imposition of sanctions different from, and potentially more serious than, those ordered by the Judicial Conduct Commission."¹³⁵ Although the Utah Constitution permits imposing more serious sanctions than recommended by the JCC,¹³⁶ the

128. *Worthen*, 926 P.2d at 862 ("In conducting the factual review, this court is not limited to the evidence taken before the Commission but 'may also permit the introduction of additional evidence'" (quoting UTAH CONST. art VIII, § 13)).

129. *See Worthen*, 926 P.2d at 874, 878.

130. *Id.* at 864.

131. *Id.*

132. *Id.* at 875.

133. *Id.* at 874.

134. *Id.* at 878.

135. Initial Brief of Utah Judicial Conduct Commission at Addendum 3, 1 part (C), *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC).

136. *See* UTAH CONST. art VIII, § 13. Judge Anderson raised the issue of the constitutionality of using a special master, but the court said, "we find no merit in Judge Anderson's concern, and reject his challenge to our authority to appoint a special master as our agent to collect additional evidence." *In re Anderson*, 82 P.3d 1134, 1148 (Utah 2004). The author feels that this rebuttal is valid because using a special master is not the problematic issue. Rather, the *referred material* is what was beyond the reach of the supreme court; One cannot give or refer authority that one never

Court then asks the special master to look into matters having nothing to do with the timeliness complaint lodged with the JCC.¹³⁷ Such an expansion of the case, to including allegations not addressed to the JCC, is not constitutional.

The court's referral to the special master focuses on the federal suit Judge Anderson filed against the Attorney General and Guardian ad Litem's offices, as well as Anderson's actions subsequent to those addressed in the complaint.¹³⁸ Anderson's brief to the supreme court summarized this point: "In its Order of Referral the court delineated exactly what it wanted the Special Master to investigate in six separate paragraphs, all of which appear to be directed to issues about Judge Anderson's relationship with litigants, colleagues, or his ability to perform his judicial duties."¹³⁹ It then concludes by stating that "[n]one of those paragraphs refers to the 'proceedings' before the JCC."¹⁴⁰ Justice Durrant described this problem in his dissent, "I disagree . . . that this court is empowered to remove Judge Anderson from office for conduct that was neither considered by the JCC nor a basis for the Commission's recommended sanction."¹⁴¹ The "conduct" Justice Durrant is describing was the entire focus of the Special Master's investigation.¹⁴²

Thus, in asking the special master to conduct an in-depth examination of the six particular factors listed above,¹⁴³ the supreme court breached the constitutionally- and statutorily-prescribed bounds for review of a JCC order. While the constitution does give the court power to gather "additional evidence" in its review capacity, this ability must be read in context to fully understand what is meant. The full text states:

Prior to the implementation of any commission order, the Supreme Court shall review the commission's proceedings as to both law and fact. The court may also permit the introduction of additional evidence. After its review, the Supreme Court shall, as it finds just and proper, issue its order implementing, rejecting, or modifying the commission's order.¹⁴⁴

had in the first place.

137. See Initial Brief of JCC at Addendum 3, 3 part (C), *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC).

138. See *supra* pp. 11-12; Brief of Appellant at 53, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC) (citation omitted); *Anderson*, 82 P.3d at 1155-56 (Durrant, J., dissenting).

139. Brief of Appellant at 52, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC).

140. *Id.*

141. *Anderson*, 82 P.3d at 1154 (Durrant, J., dissenting).

142. See *supra* pp. 14-15.

143. *Id.*

144. UTAH CONST. art. VIII, § 13.

The sentence permitting additional evidence immediately follows the description of the court's review function, thereby implying that the additional evidence should only pertain to those matters that were before the JCC.¹⁴⁵ Additionally, the next sentence begins with "[a]fter its review,"¹⁴⁶ implying that the additional evidence should pertain directly to *reviewing* the proceedings. Anderson's brief also articulated this problem when it stated that

[b]y its Order of Referral the Supreme Court has introduced a new procedure for investigating and sanctioning judges which is neither provided for by the constitution, which vests such authority in the JCC, nor by statute which limits the role of the Supreme Court to that of reviewing the proceedings of the JCC. The Utah Constitution restricts the supreme court to *reviewing* the "commission's *proceedings* as to both law and fact."¹⁴⁷

The issues referred to the special master were beyond the scope of the supreme court's role as reviewer of the JCC proceedings. Thus, the supreme court has interpreted the language, "the court may also permit the introduction of additional evidence"¹⁴⁸ so broadly as to destroy any real power of the JCC—a constitutionally created body. Precedent further strengthens this argument.

In *McCully*, the court engaged in additional fact-finding, stating simply that it "considered additional evidence and heard oral argument from both parties pursuant to its authority under article VIII, section 13 of the Utah Constitution."¹⁴⁹ Nevertheless, the court does not disclose what that "additional evidence" was and in the end concluded that "the Commission's findings are well supported by the evidence we have reviewed on the record."¹⁵⁰ Accordingly, the court upheld the Commission's recommendation, giving *no* real idea as to what role the additional evidence played in their ultimate determination¹⁵¹

Similarly the *In re Young* court looked at the findings, evidence, conclusions, and the considerations used by the JCC, and deemed the

145. See also UTAH CODE ANN. § 78-8-107(8)(i). "Before the implementation, rejection, or modification of any commission order. . .the supreme court shall. . .review the commission's proceedings as to both law and fact *and may permit the introduction of additional evidence.*" *Id.* (emphasis added).

146. UTAH CONST. art. VIII, § 13.

147. *Id.* at § 13(5) (emphasis added).

148. *Id.* at § 13.

149. *In re McCully*, 942 P.2d 327, 328 (Utah 1997).

150. *Id.* at 331.

151. See generally *id.*

recommended sanctions appropriate.¹⁵² The JCC investigated Judge Young after they received a complaint alleging he made a phone call on July 11, 1994, to a litigant regarding a case that was ongoing, but over which he was no longer presiding.¹⁵³ Unfortunately for Judge Young, he was reassigned to the case and one of the litigants complained that the nature of the phone conversation impacted the ultimate settlement.¹⁵⁴ The supreme court exercised proper restraint in this instance by limiting its review to the basis of the complaint filed with the JCC and the telephone conversation that took place on July 11, 1994.¹⁵⁵ While the phone call was five years prior to the court's review, the court did not appoint a special master to gather evidence concerning Judge Young's conduct subsequent to the time of the phone call. Rather, they restricted themselves to a review of the JCC's determination as to the complaint.¹⁵⁶ To do otherwise would not be a review, but an initial investigation into matters not pertaining to the JCC's complaint.

While *McCully* and *Young* demonstrate that some reliance on additional evidence is not improper, the *Anderson* court certainly engaged in a "rare move"¹⁵⁷ by taking upon itself the role of intense investigator and evidence collector through the means of a special master.¹⁵⁸ Had the special master been tasked with discovering "additional evidence" pertaining only to the facts of the eleven cases that were the subject of the JCC's recommendation, the appointment of the special master would simply have been a novel approach to judicial discipline cases in Utah. Indeed, the court notes that "the appointment of a master is a traditional and time-honored mechanism" for collecting evidence.¹⁵⁹ Instead, because the special master was tasked with gathering evidence pertaining to conduct not considered by the JCC,¹⁶⁰

152. *In re Young*, 984 P.2d 997, 1009 (Utah 1999).

153. *Id.* at 999-1000.

154. *Id.*

155. *See id.* at 1000, 1004; *see also id.* at 1001 (stating "the appropriateness of the Commission's recommended sanction turn in large measure on what Judge Young said or implied during that telephone call"). The court reviewed the JCC proceedings in a step-by-step fashion, beginning by looking at whether the JCC could have found that Judge Young was acting in his judicial capacity for the phone call. *Id.* at 1005. The court agreed with the JCC's determination. *Id.* at 1006. The court then analyzed the record and the evidence to determine whether the JCC's determination that the phone call violated judicial conduct, was correct. *Id.* They also agreed with the JCC on this point. *Id.* The court did however disagree with and therefore did not implement the JCC's findings as to Judge Young's purported bias and failure to disqualify himself. *Id.* at 1006-07.

156. *Id.* at 1109-10. The court only used the evidence of the other phone call as a factor supporting the imposition of a sanction.

157. Elizabeth Neff, *Complaints on Judge Reviewed*, SALT LAKE TRIB., June 11, 2003, at A1.

158. *In re Anderson*, 82 P.3d 1134, 1138 (Utah 2004).

159. *Id.* at 1148.

160. *See* Initial Brief of Utah Judicial Conduct Commission at Addendum 3, 3 part (C), *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC).

the scope of the referral became inappropriate. The court's reliance on the special master's findings was likewise inappropriate.

B. Employing the Special Master's Report

The *Anderson* court explicitly recognized the role the special master, as well as the evidence he gathered pertaining to conduct not considered by the JCC, played in making its decision.¹⁶¹ The opinion reads, "We have carefully reviewed all of the materials submitted to us by the parties, as well as the *record of proceedings before the special master*, and the record of proceedings before the Judicial Conduct Commission."¹⁶² Justice Durrant states the court's inappropriate reliance quite plainly by explaining, "we remove Judge Anderson today for conduct that played no role in the Commission proceeding and that had no bearing upon the sanction recommended by the Commission."¹⁶³ In other words, the court removed Judge Anderson *based upon* the special master's evidence—evidence that was beyond the scope of the court's "review" capacity.

Using the special master's evidence pertaining to matters not dealt with by the JCC is particularly troubling given that the supreme court had previously struck down the JCC's practice of initiating complaints of its own volition.¹⁶⁴ Prior to *Anderson*, the JCC would often initiate its own complaints, either through staff or Commission members.¹⁶⁵ This practice was permitted by the statutory definition of a complaint, which was an "allegation based on reliable information received in any form, from any source, that alleges, or from which a reasonable inference can be drawn that a judge is in violation of any provision of Utah Constitution article VIII, section 13."¹⁶⁶ In response to this practice the court held that the JCC cannot "initiate action against a judge or justice absent a complaint brought by someone else"¹⁶⁷ because doing so "'exceeds the Commission's grant of authority by article VIII, section 13 of the Utah Constitution."¹⁶⁸ The court then added that the JCC only had authority over a complaint brought by an outside source; it could not

161. *Anderson*, 82 P.3d at 1138.

162. *Id.* (emphasis added).

163. *Id.* at 1154 (Durrant, J., dissenting).

164. *Id.* at 1147.

165. *Id.*

166. UTAH CODE ANN. § 78-8-101(2) (2002).

167. *Anderson*, 82 P.3d at 1147.

168. *Id.* (quoting *In re Worthen*, 926 P.2d 853, 877 (Utah 1996)). Judge Anderson's brief had challenged the JCC's practice of initiating its own complaints. Brief of Appellant at 36-37, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC). This was one of the few areas in which Judge Anderson's appeal was actually decided in his favor.

initiate a complaint of any sort on its own account.¹⁶⁹

C. Judicial Restraint Developed in Precedent

Like its limitation prohibiting self initiated investigations by the JCC, supreme court precedent gives indication of similar restraints on the court itself, which is logical given that the constitution only grants the court the power to review the JCC's proceedings.¹⁷⁰ For example, when asked to use their "inherent powers" to remove a judge from her position as a bar commissioner and president-to-be of the Utah State Bar, the supreme court said,

We do not have any authority. . .to supervise the conduct of *judges* as a matter of initial investigation and review, that duty being delegated to a judicial conduct commission by section 13 of article VIII of our constitution. We are constitutionally obligated to review the commission's proceedings, but we have no authority to undertake initial review of matters related to compliance with the judicial canon of ethics.¹⁷¹

The court, therefore, gave deference to the JCC as to supervision and initial investigation of matters concerning judges. Further precedent shows such deference in action.

The *Worthen* court refused to adopt a de novo standard of review because they feared that doing so would demean the JCC's role.¹⁷² Instead, the court held that "[t]he standard of review we adopt should not make the Commission a mere factotum, lacking real power and without a significant role to play in the judicial discipline process"¹⁷³ because "[t]here is nothing in the constitution that suggests the Commission is to function as a mere evidence collector for this court."¹⁷⁴ The court recognized the integral role of the JCC in the judicial discipline process and held that it would only overturn the Commission's factual findings if those findings were "arbitrary, capricious, or plainly in error."¹⁷⁵

169. *Anderson*, 82 P.3d at 1147. The Utah Legislature subsequently amended the statute to comport with the court's ruling. See UTAH CODE ANN. § 78-8-101(2) (2004). Indeed, as of May 2004, the statute states that a "'Complaint' does not include an allegation initiated by the commission or its staff." *Id.*

170. See UTAH CONST. art. VIII, § 13.

171. *In re Greenwood*, 796 P.2d 682, 683 (Utah 1990) (emphasis in original).

172. *Worthen*, 926 P.2d at 853, 865.

173. *Id.* at 862-63.

174. *Id.* at 864.

175. *Id.* at 865.

Significantly, the *Worthen* court found the JCC record lacking the integral pieces needed to make a proper review of that body's proceedings, so the court remanded the case back to the JCC for further investigation and rulings.¹⁷⁶ Thus the court did not take matters into its own hands, implicitly recognizing that if it were to make such investigations and rulings, it would extend itself beyond a review of the JCC's proceedings and violate the state's constitution.¹⁷⁷ Yet the court did just the opposite in *Anderson*.¹⁷⁸

When rendering its conclusion, the court referenced the JCC's findings, but then said, "[m]ore importantly, we also conclude, based upon the facts and evidence adduced by the proceedings before the special master, that the direct consequences of those violations also include the creation, by Judge Anderson, of circumstances which have" kept him from being able to do his job as a juvenile judge.¹⁷⁹ Such conduct, therefore, "also constitutes conduct prejudicial to the administration of justice which brings a judicial office into disrepute."¹⁸⁰

Regardless of the potential truth of these statements, the court had no authority to "review" conduct that was never considered by the JCC. Justice Durrant stated that "[m]erely because a problem exists does not necessarily mean that [the supreme court is] empowered to remedy it."¹⁸¹ Accordingly, Anderson's public accusations and his apparent inability to accept responsibility for many of his actions, should have been, at most, "aggravating or mitigating,"¹⁸² rather than determinative factors.¹⁸³ By using the circumstances as determinative factors, however, the court bypassed "the constitutionally prescribed channel"¹⁸⁴ of using the JCC as the initial step. This is certainly in opposition to *Worthen's* precedent of not demeaning the JCC.¹⁸⁵ Indeed, to call the court's decision in *Anderson* a "review" of JCC proceedings as set forth in the Utah Constitution¹⁸⁶ is more than just a stretch. The complaint filed with the JCC and the JCC's eventual order made no mention of Judge Anderson's public accusations or any ongoing difficulties Judge Anderson had in performing his duties.¹⁸⁷ Thus, in spite of its statements and actions in

176. *Id.* at 872.

177. *See* UTAH CONST. art. VIII, § 13.

178. *See In re Anderson*, 82 P.3d at 1134, 1153 (Utah 2004).

179. *Id.*

180. *Id.*

181. *Id.* at 1155 (Durrant, J., dissenting).

182. *Id.* at 1154.

183. *See id.* at 1154-55.

184. *Id.* at 1155.

185. *In re Worthen*, 926 P.2d 853, 865 (Utah 1996).

186. UTAH CONST. art. VIII, § 13.

187. *See* Initial Brief of Utah Judicial Conduct Commission at Addendum 1, *In re Anderson*,

Greenwood,¹⁸⁸ *Worthen*,¹⁸⁹ and *Young*,¹⁹⁰ the holding in *Anderson* ironically and inappropriately expanded its own power to permit the court to initiate its own complaints. In the words of Justice Durrant's dissent, "[t]hus, we remove Judge Anderson today for conduct that played no role in the Commission proceedings" or "upon the sanction recommended by the Commission."¹⁹¹

D. *The Utah Supreme Court's Flawed Reasoning*

In attempting to justify its actions, the majority opinion points to the court's superior position in the state.¹⁹² While stating that the JCC is "necessarily limited to the scope of complaints made against a judicial officer,"¹⁹³ the court stated that it is not so limited because it selects the presiding judges and administrative officials in the state. The court also claims that because it is "the final arbiter of matters of judicial conduct"¹⁹⁴ it is justified in its consideration of matters not dealt with by the JCC by calling them "essential to the resolution of the issue presented to the Judicial Conduct Commission."¹⁹⁵ Certainly the *Worthen* court could have made the same justification but chose instead to give the case back to the JCC for further determination.¹⁹⁶

The court further reasons that this case is different from precedent, or that its situation is "unique"¹⁹⁷ because it deals with "facts and evidence of ongoing difficulty."¹⁹⁸ While the court can consider "whether the judge has acknowledged or recognized that the acts occurred" and

82 P.3d 1134 (Utah 2004) (No. 20030345-SC).

188. *In re Greenwood*, 796 P.2d 682, 683 (Utah 1990) (holding that the supreme court did "not have any authority . . . to supervise the conduct of *judges* as a matter of initial investigation and review, that duty being delegated to a judicial conduct commission by section 13 of article VIII of our constitution").

189. *Worthen*, 926 P.2d at 862-63 (holding that "the purview of the Judicial Conduct Commission is necessarily limited to the scope of complaints made against a judicial officer").

190. *In re Young*, 984 P.2d 997 (Utah 1999).

191. *In re Anderson*, 82 P.3d 1134, 1154 (Utah 2004); see also Daniel E. Witte, *Bad Precedent: Inquiry Concerning a Judge Prompts an Inquiry About Civil Liberty and Judicial Independence*, 2004 SUTHERLAND J. L. & PUB. POL'Y L1, 2-3, available at <http://www.sjlpp.org/documents/badprecedent.pdf>. "Relying upon its own factual findings, rather than on the issues or facts taken on appeal from the Commission, the Court removed Judge Anderson from his office to punish him for filing a federal complaint containing negative statements about individuals in the Offices of the Guardian ad Litem and the Attorney General." *Id.*

192. *Anderson*, 82 P.3d at 1139-40.

193. *Id.* at 1139.

194. *Id.* at 1140.

195. *Id.*

196. *In re Worthen*, 926 P.2d 853, 872 (Utah 1996).

197. *Anderson*, 82 P.3d at 1138.

198. *Id.* at 1140.

“whether the judge has evidenced an effort to change or modify his . . . conduct,”¹⁹⁹ here the court states that “in rare cases, the behavior for which the Judicial Conduct Commission recommends discipline is of an ongoing nature that itself requires correction.”²⁰⁰ This conclusion is flawed. The JCC only considered Judge Anderson’s conduct pertaining to timeliness in certain types of hearings.²⁰¹ The JCC’s recommendation therefore did not deal with the federal suit or Judge Anderson’s disqualification from hearing cases with the Attorney General’s or Guardian ad Litem’s offices as parties. While Anderson admittedly remained obstinate about his faults pertaining to the timeliness charges before the JCC,²⁰² his federal suit and disqualifications were not the behaviors dealt with by the JCC and such circumstances take Anderson’s case beyond “unique” and into an entirely new realm.

VI. CONCLUSION

Judge Anderson, whatever his faults and mistakes, deserved to have the process of judicial discipline, as set forth by the state constitution, run its proper course. The supreme court has power to review only the JCC proceedings once an outside party has filed a complaint with the JCC concerning a specific judge. While Anderson’s seemingly retaliatory conduct was likely inappropriate and stood in the way of him performing his role as a judge, and while Anderson may have even deserved to be removed from the bench, the supreme court’s actions were unconstitutional.

This Note’s arguments would be moot had a number of things occurred: (1) Someone filed a complaint with the JCC concerning Judge Anderson’s federal suit, and his actions subsequent to the timeliness complaints considered by the JCC; (2) the JCC collected evidence, held hearings, and made a determination as to which of the five factors, as delineated in the constitution,²⁰³ Anderson’s conduct violated; (3) the

199. *In re McCully*, 942 P.2d 327, 331 (Utah 1997) (quoting *In re Blauvelt*, 801 P.2d 235, 240 (Wash. 1990) (quoting *In re Kaiser*, 759 P.2d 392, 400 (Wash. 1988))). The rules put forward by the Washington State Supreme Court in *Blauvelt* were adopted as principles of review by the Utah Judicial Conduct Commission on February 7, 1996. *Id.*

200. *Anderson*, 82 P.3d at 1139-40.

201. See Initial Brief of Utah Judicial Conduct Commission at Addendum 2, 1, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC).

202. See *Anderson*, 82 P.3d at 1152-53.

203. The five factors are: “(1) action which constitutes willful misconduct in office; (2) final conviction of a crime punishable as a felony under state or federal law; (3) willful and persistent failure to perform judicial duties; (4) disability that seriously interferes with the performance of judicial duties; or (5) conduct prejudicial to the administration of justice which brings a judicial office into disrepute.” UTAH CONST. art. VIII, § 13(1)-(5).

JCC decided to order a certain sanction for the judge's suit and actions subsequent to the timeliness complaints; (4) the supreme court reviewed the JCC's proceedings and made a determination as to the appropriateness of the recommended sanction; (5) the supreme court felt that, in light of the evidence pertaining to the complaints filed before the JCC, removal was warranted; (6) the court ordered Judge Anderson's removal. The supreme court also could have remanded back to the JCC, asking that someone file a complaint with that body pertaining to Judge Anderson's federal suit and retaliatory actions. If a complaint is filed with the JCC, then the case can proceed through the above listed steps.

The supreme court could have also removed the Court of Appeals' ruling that Judge Anderson be disqualified from all cases in which the offices of the Guardian ad Litem or the Attorney General appeared and conditionally reinstated him—perhaps on a probationary status. This would not have been a severe departure from the JCC's recommendation and would have been a feasible punishment given the conduct dealt with by the JCC. In addition, probation would have provided oversight of his actions and given him a chance to prove his ability to improve the situation under less adversarial circumstances. Under these terms, the court would consider only the conduct dealt with in the JCC's proceedings, while still recognizing that there are “aggravating or mitigating”²⁰⁴ circumstances that currently exist that need to be scrutinized. Indeed, Anderson had requested that his federal suit be withdrawn,²⁰⁵ allowing probation to address the court's remaining concern: any bias in Judge Anderson's conduct while on the bench. If, while on probation, Anderson's actions proved problematic or biased, someone—even a court—could file a complaint with the JCC and the judicial discipline process could follow its constitutionally prescribed course.

These suggestions might be unrealistic, ineffective or an inefficient use of judicial resources, or mere formality. Indeed, a good case exists for Judge Anderson's removal from the bench. However, when a constitution sets forth certain procedures, they should be strictly followed. Failure to do so by creating an ethereal standard based on a conglomeration of negative circumstances creates an unworkable standard. Where does the supreme court draw the line? What if Judge Anderson had only lost half of his caseload, would that have been enough? What if a judge gets sued by a party that deals with one-fourth

204. *Anderson*, 82 P.3d at 1154 (Durrant, J., dissenting).

205. Anderson filed a Motion to Dismiss with the Federal District Court on November 13, 2003. Reply Brief of Honorable Joseph W. Anderson at Addendums 3-5, *In re Anderson*, 82 P.3d 1134 (Utah 2004) (No. 20030345-SC).

of the judge's caseload and the judge responds somewhat vehemently to the complaint? Will government agencies and their litigants face the same standard? One can only guess.

Judge Anderson's actions and decisions were indeed "tragic"²⁰⁶ and caused numerous complications throughout the three-and-a-half year disciplining process, but this did not excuse the court from initiating and investigating its own complaints against a judge. Much of the law and many of the cases decided in courts every day focus on formalities and subtleties. Indeed, for some, the difference between a life sentence and freedom can sometimes be determined by the most minor of procedural requirements. For Anderson, the court's deviance from a constitutionally prescribed procedure cost him his livelihood.

Daniel Swinton

206. *Anderson*, 82 P.3d at 1137.