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Although *Christ* settles the issue of when jeopardy will attach in a jury trial for purposes of the Fifth Amendment, it offers no standards for determining when a retrial will be barred after a mistrial. The rule established early was that retrials would be barred unless there was a manifest necessity for the mistrial. *United States v. Perez*, 9 Wheat 579 (1924). Significant factors in determining whether there should be a retrial after mistrial are (1) the source of difficulty (the prosecution or defendant), (2) the associated motivation (intentional harassment), (3) the indicated prejudice to the defendant associated with retrial and (4) the available alternatives to mistrial. Schulhofer, *Jeopardy and Mistrials* 125 U.Pa. L. Rev. 449 (1977).

Another case, *Arizona v. Washington*, 434 U.S. 497 54 L.Ed. 2d 717, 98 S.Ct. (1978) decided February 21, 1978, grappled with the issue of when there was manifest necessity for a mistrial. Respondent in this case has been granted a new trial because the prosecutor had withheld exculpatory evidence. During opening argument of the new trial, defense counsel made comments to the effect that a new trial had been granted by the superior court because of prosecutorial misconduct. The prosecutor at the second trial moved for a mistrial on the basis that defense counsel's statements were inadmissible. In granting the prosecutor's motion, the trial judge failed to find that there was manifest necessity for a mistrial or consider alternatives to a mistrial.

It is the conclusion of the Court that the record amply demonstrates the need to terminate the trial because of possible prejudice of the jurors. The trial judge was present during the trial and the decision to declare a mistrial, because of prejudice, was a matter entirely within his discretion. Hence the Court concludes that:

The trial judge's mistrial declaration is not subject to collateral attack simply because he failed to find "manifest necessity" in those words or to articulate on the record all the factors which informed the deliberate exercise of his discretion. *Arizona v. Washington*, supra at 517.

Although four doctrines were mentioned at the beginning of the article, only those confronted by the Supreme Court this term were discussed. These cases only deal with the first two doctrines. As in the case of the rule that jeopardy attaches after the first juror is sworn, the other doctrines were engrafted into the constitutional doctrine against being placed twice in jeopardy without a great deal of discussion as to the rationale for doing so.

Judge Charles E. Moylon would say that when one thinks about the law of double jeopardy, that person should think plural. There is no single law of double jeopardy, but many.

An Analysis of the Baltimore City Police Complaint Evaluation Procedures

by Stephen R. Cochell
John Alan Jones

Introduction

Society entrusts the police officer with an awesome responsibility; literally the power of life and death. Because society grants this authority to the police officer, it is also society's responsibility to review the actions of the police, particularly when it comes to the use of their ultimate weapon, the gun.

WJZ-TV 13 (Baltimore, Maryland)
Editorial Aired June 20, 1978.

Review of police misconduct by the community has traditionally generated friction and conflict among advocates of so-called "civilian review boards" and the police community. A number of civilian review boards have been established in several cities across the country. Their history of failure is mostly attributed to what has been termed the "dilemma" of civilian review of police misconduct. Simply stated, the pro-civilian review groups believe that police are not responsive to the realities of their everyday lives while, on the other hand, police are unwilling to open the processes by which their actions are examined and potentially evaluated to those outside the police department.

A 1969 study of police attitudes towards civilian review revealed that two-thirds of the officers surveyed believed that the public had a right to "pass judgment on the way the police are doing their job." Sixty percent of the officers, however, were opposed to the mere idea of a civilian review board even if the members were "fair and unbiased."

While citizens wish to protect their civil liberties against potential abuse of police authority, they also view the police as a symbol of safety and security.

This "love-hate" relationship fosters disputes between citizens and police which are difficult to resolve. During the civil disorders of the late 1960's, attention was focused on the allegations of police brutality and other forms of alleged police misconduct. In the wake of the actions by the Chicago Police during the 1968 Democratic National Convention (termed a "police riot"), a number of cities began to search for a method to investigate allegations of police misconduct. See National Advisory Commission on Civil Disorders (Kerner Commission Report).

Three procedural systems for evaluating complaints of police misconduct have evolved as a result of the initial efforts of the Kerner Commission. These include: systems internally administered by police; systems administered by civilians; and systems which share authority between the police and the community. This section of the report will evaluate the first two systems while the third alternative will be discussed in greater detail in the remainder of this study.

Typically, where review systems are internally administered by the police, there have been ongoing complaints of cover-ups. *Brent, Redress of Alleged Police Misconduct: A New Approach to Citizen Complaints and Police Disciplinary Procedures*, 11 U.San Fran. L. Rev. 587 (1977). Generally, the internal system consists of an internal investigation conducted by the police themselves with some type of variety of administrative review of the allegations. Critics of this type of review system argue that it is not practical to expect police to be able to investigate themselves. The reasoning is that it is not a matter of dishonesty or even cover-up. It is an issue of attitude on the part of the investigators. As one critic of this system of evaluating police misconduct put it, "They go into the investigation expecting the complaint to be unfounded." The issue of whether such criticisms are valid is immaterial. A more important objection to this type of system is that an internal investigation by the same department (regardless of its quality and completeness) is perceived by the community as a "cover-up" or "whitewash." The integrity of the police department is not only brought into question by the initial allegations of misconduct but by the procedures with which those allegations are evaluated. The result is that the community views the process with suspicion and distrust.

There are three major cities which have instituted a completely civilian review of police misconduct complaints. These include Philadelphia, Pennsylvania, Rochester, New York and a newly instituted program in San Francisco, California. Of those, the Philadelphia program was eliminated by actions of Mayor Rizzo. See *Rizzo v. Goode*, 423 U.S. 362 (1976).

Civilian Review boards have encountered resistance and hostility to their establishment. Objections range from the reasonable to the absurd. As one retired police lieutenant put it, "The policeman naturally desires that his alleged delinquencies and violations of rules be reviewed and judged by those who have "been through the mill" themselves." The possibility that his very human errors or even outright exercise of poor judgment would be reviewed and judged by men biased by political or racial motivation, and that the judgment could jeopardize his entire career, served to congeal rank and file opposition. Another, less thoughtful but nonetheless widely circulated belief was stated by Robert

W. Welch, Jr., founder and president of the John Birch Society. He stated that the drive for civilian review boards is part of "a subtle, but now increasingly bolder and more extensive effort to harass and discredit local police forces and their individual officials and members going on in our country for more than a decade."

The Complaint Evaluation Board (CEB) was created to provide an agency to review and evaluate complaints lodged by members of the general public regarding alleged acts of *discourtesy* and *excessive force* by personnel of the Baltimore City Police Department. *Baltimore City Local Laws*, §16-41. The CEB is composed of seven members including the following agencies:

- (1) State's Attorney of Baltimore City
- (2) Attorney General of Maryland
- (3) City Solicitor of Baltimore City (chairperson)
- (4) Police Commissioner of Baltimore City
- (5) Executive Director, Legal Aid, Inc., Baltimore City
- (6) Executive Director, Maryland Human Relations Commission
- (7) Executive Director, Baltimore City Community Relations Commission

The CEB is required to meet at least once a month and must have five members present to constitute a quorum.

The statute provided a complaint procedure for "any person who claims to have been subjected to, or any person who claims to have personal knowledge of an act or acts of discourtesy, use of excessive force, or injury allegedly resulting from excessive force by Police personnel." *Baltimore City Local Laws* §16-42(a). Upon making a written and notarized complaint, the Internal Investigation Division (IID) and the Secretary of the Board (Legal Aid) are mailed copies within 48 hours. The Secretary starts a case file and IID initiates its investigation. The investigation is completed within 90 days and the report and IID recommendations are then forwarded to the CEB. The CEB conducts its review of the IID report and, within 30 days of receipt of the IID report, communicates its findings and recommendations to the Commissioner. *Id.*, §16-42(f). The Commissioner then makes his disposition within 30 days of receipt of the CEB report.

The statute provides that upon review of the investigative record of each case, the CEB may recommend the following alternatives to the Commissioner:

- (1) Sustain the complaint and approve, modify or disapprove the proposed IID action;
- (2) Dismiss the complaint because of lack or insufficiency of evidence;
- (3) Exonerate police personnel because of complainant's failure to prove his case by clear and convincing evidence;
- (4) Remand the case for further investigation by IID or refer the case for further investigation by the Maryland State Police.,

Additionally, the Board may request that the involved complainant, witnesses or police personnel *voluntarily* submit a polygraph test or appear before the Board.

Significantly, the statute provides that police personnel may not be adversely affected or penalized in any way as a result of CEB proceedings without having been first afforded proper notice and an opportunity to present his case to a hearing board within the police department. *Baltimore City Local Laws §16-47.*

Operations of the Complaint Evaluation Board

Since its inception, the CEB has processed from 200 to 270 complaints of excessive force and discourtesy in each fiscal reporting year. A recent of CRC report indicates a number of statistical trends worthy of note. In comparing the period of January-June, 1977 and January-June, 1978, the report found that the number of cases declined by 21%, the number of persons filing by 18% and the number of accused police officers by 28%. Moreover, it was determined that the number of discourtesy charges decreased by 21% while excessive force charges declined by 33%. The reporter, however, noted significant limitations to his findings. First, the complaints filed during that time period may not have been reviewed by the CEB until the next time period. In other words, there was no record of open cases carried over from period to period. The report stated that the decrease could be attributable to an actual decline in the number of cases, persons filing or with the method of data collection.

A CRC Staff Report evaluated the performance of the CEB as mandated by the Legislature. The report concluded from its statistical analysis that the CEB was not carrying out the intent and spirit of the statutory directive (See Appendix). This was based on a finding that procedures had not been established or filing formal complaints at Police District Stations. Moreover, the report alleged that the CEB was in violation of its directive to submit in writing to the Police Commissioner, a statement of its findings of fact with recommendations. It was also alleged that procedures for voluntary appearances of complainants, witnesses and police had not been promulgated. The report also made several recommendations for legislative revision of procedures to evaluate complaints of police misconduct. (See Appendix B).

The performance of the CEB is not the primary focus of this study nor is the frequency or infrequency of "police brutality" relevant to an overview of the problem. Rather, this report focuses on the procedural deficiencies of the CEB and the subsequent rifts such defects produce in the police-community relationship.

The Law Enforcement Bill of Rights

Article 27, §727 to 734A delineates the rights of police officers and the procedures to be followed by the various

law enforcement agencies when disciplinary hearings are instituted against police for misconduct. The statute defines "law enforcement officer" as any person, in his official capacity, who is authorized to make arrests and is a member of one of the specified agencies. Art. 27, §727(b). The statute excludes probationary officers except when there are allegations of brutality within the scope of their duties as police officers. Accused of misconduct, the allegation is heard by a hearing board appointed by the police commissioner. The board's composition included three members of the agency who have had no part in the investigation or interrogation of the law enforcement officer against whom the complaint has been filed.

Complaints against police officers alleging police brutality in the execution of duties cannot be investigated unless the complaint is made under oath by the complainant, his/her immediate family or any interested person who possesses first-hand knowledge of the incident. Art. 27, §728(b)(4) (1978 Supp). As this type of complaint could lead to disciplinary action, demotion or dismissal, the procedures for investigation or interrogation are provided by statute. Basically, the statute directs that officers be informed in writing of the investigation prior to interrogation, that names of the witnesses and the identity and rank of the investigating officer be disclosed. The statute also sets forth guidelines as to how and when the interrogation should be conducted. Art. 27, §728(b). The law enforcement officer can be ordered to take blood alcohol tests, blood, breath or urine tests for controlled dangerous substances, polygraph examinations or interrogations specifically related to the subject matter of the investigation. Art 27, §728(b)(7)(ii). Refusal to submit to such tests constitutes grounds for punitive action. It is significant, however, that evidence acquired by tests obtained under orders is inadmissible in any subsequent administrative or criminal proceeding unless the officer gives consent to such admission. *Id.* Officers under interrogation have the right to counsel at all times during interrogation.



Photo by J.J.R.

If the investigation or interrogation of the officer results in recommendations for some type of punitive measure (e.g. demotion, dismissal, etc.) the officer is entitled to notice and a hearing on the issue involved. Art. 27, §730(a). At that time, a hearing board is convened to consider the matter. Both the agency and the officer possess the right to counsel, to present and cross-examine witnesses, and give argument on the facts adduced. The hearing board is not bound by technical rules of evidence but shall give probative effect to "evidence which possesses probative value commonly accepted by reasonable and prudent men in the conduct of their affairs." Art. 27, §730(a).

The decisions, orders or actions of the hearing board are then written and submitted to the officer. If found guilty of a charge/complaint, the board conducts a hearing as to past performance and other factors relevant to formulating a recommendation to the Commissioner. Art. 27, §731(a). The Commissioner is not bound by the Board's recommendation and is bound to take action within 30 days of receipt of the board action. Action by the Commissioner is deemed a "final order" (Art. 27, §731c) which may be appealed to the Baltimore City Court. Art. 27, §732. See Md. Rule B2. Article 27, §734c provides that any person who knowingly makes a false report, statement of complaint, is subject to a \$500 fine and/or not more than 6 months imprisonment. See Art. 27, §150.

Foreseeing potential conflict with other state statutes, the legislature established the superiority of the Law Enforcement Bill of Rights in §734 B:

The provisions of this subtitle (Law Enforcement Bill of Rights) shall supercede any State, County or municipal law, ordinance or regulation that conflicts with the provisions of this subtitle, and local legislation shall be preempted by the subject and material of this subtitle.

See Prince George's County, Maryland et.al. v. State of Maryland Commission on Human Relations, C.S.A., #264, S.T. 1978, filed October 16, 1978.

A plain reading of the statute indicates that any alteration or restructuring of the police complaint and disciplinary system must fall within and/or satisfy the strictures of the Law Enforcement Bill of Rights or, in the alternative, the Bill of Rights must be revised to conform with the new procedures.

Findings and Recommendations

FINDING

Upon our discussions with citizens, police, CEB members, complainants, alleging police misconduct and attendance at a variety of meetings and hearings concerning alleged misconduct of police, we conclude that the present procedures for internal investigation of complaints of excessive force/discourtesy are viewed with distrust by citizens.

Citizens interviewed typically complained that the police should not be investigating themselves and suspected they protected their brother officers. Several CEB members and police, on the other hand, disclaim such allegations and claim that internal investigations (IID) did not interview all the witnesses to the incident.

In our opinion, internal investigation by IID may be conducted with completeness and thoroughness. It is the appearance of impropriety, however, that inflames critics of the police and brings the department into disrepute.

RECOMMENDATION

Complaints of excessive force should be investigated and evaluated by an independent investigative unit. The most appropriate agency equipped to perform such functions would be the Maryland State Police. It is believed that the State Police possess the necessary independence and acceptance by the community to conduct investigations of excessive force.

FINDING

Discussions with police and CEB members disclosed that many of the complaints (particularly discourtesy and some excessive force complaints) were considered to be minor in nature and could be processed in a more timely manner. Citizen-complainants were typically angry at the length of time it took to process the complaints and were dissatisfied with their exclusion from the process.

Testimony of citizens at the CRC hearings disclosed

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that many citizens were not aware that a CEB existed. Others were not aware of where and how a complaint could be filed.

RECOMMENDATION

1. An informal settlement procedure should be established which would receive complaints and attempt to mediate such complaints within 30 days of filing.

A full-time salaried employee appointed by the Mayor and approved by the City Council should perform this function. It is further suggested that this individual possess training in arbitration/mediation techniques and/or a law degree.

2. The complaint system should be more accessible to citizens. Complaint sites should be located in district police stations, the CRC, Human Relations Commission, City State's Attorney, City Solicitor, the Mayor's Office and the offices of any City Council member or any other agency that could legitimately shoulder such responsibility.

FINDING

The present CEB is composed of agencies which serve a "watchdog" function. The CEB evaluates the IID findings and recommendations by reading synopses of "field interviews" with witnesses and complainants of alleged police misconduct. One underlying assumption is that the legal skills and knowledge of the majority of the CEB members will assure a thorough and sufficient investigation by IID. This assumption, however, is fraught with difficulty.

Initially, one must admit that interrogation or questioning of witnesses is a subjective process. Admittedly, the officer's task is to record each individual's version of the facts but it is also true that the facts elicited depend upon the questions asked and the importance assigned those facts by the investigator. In other words, the sufficiency of the investigation depends upon the motivations and integrity of the investigator. The CEB members must rely on those reports in evaluating credibility and demeanor of the witnesses — a process essential to the task of fact-finding. Under the present system, inconsistency of stories and a "feel" for the situation is restricted to what may be gleaned from the written report.

Significantly, the CEB process, as constituted, does not provide for the complainant to review and either agree or disagree with the findings of the IID investigation procedure before, during or after the case has been processed. The citizen-complainant is completely excluded from the process until he is notified by the Commissioner of the disposition of his case. It is no surprise that citizens would be angry, frustrated and suspicious of this type of procedure.

RECOMMENDATION

Citizen-complainants should be included at some point in the process by which their complaints are evaluated. At the very least, complainants should have the opportunity to give written rebuttal to the IID report or

elect to appear for a limited period of time before the body which evaluates the sufficiency of their complaint.

It is further recommended that the model for evaluating complaints of police misconduct be shifted from one of outside agencies reviewing written police reports to an adversarial style proceeding.

Inclusion of citizen-complainants in the process of evaluating complaints would achieve three objectives that are not currently performed by the existing system:

(1) The citizen-complainants would believe that "someone is doing something" about their complaints;

(2) Their side of the story would be fully and completely told; and

(3) Complainants might hear the officer's perspective and come to understand the basis of his conduct.

A Proposed Model for Evaluating Complaints of Police Misconduct

In light of our findings concerning the present system of evaluating complaints of police misconduct, we suggest that the Maryland Legislature revise the affected statutes from an agency-review model of complaint evaluation to an adversarial-style proceeding conducted as an administrative hearing. The alternative that we recommend should not be considered the sole solution to the deficiencies of the present system. The proposed model, instead, should serve as a catalyst for future action.

One underlying principle in approaching revision of the present system was to insure the rights of police officers under the existing Law Enforcement Bill of Rights, yet open up those adjudicatory processes to complainants and the communities the police exist to serve. We believe the following proposal recognizes and implements this principle.

To accomplish the following, it will be necessary to abolish the CEB and revise the composition of Police Hearing Boards in administrative hearings regarding excessive force *only*. The composition of the Hearing Board would be the following; a police hearing officer, two police officers and two citizens.

1. *Appointment of a Police Hearing Officer:* This individual would be appointed by the Mayor and approved by the City Council. The Hearing Officer should possess a law degree and/or membership in the American Arbitration Association. This individual would serve as chairperson at administrative hearings concerning allegations of excessive force and discourtesy. As to allegations of disrespect, it is recommended that attempts at informal settlement with citizen-complainants be made by the hearing officer utilizing skills and techniques of mediation and arbitration. Considerable latitude should be granted the hearing officer in requiring the participation of a police officer in the mediation process. If an informal settlement can be achieved with the complainant, then a "police trial board" has been avoided to the benefit of the officer, complainant and the community. Failure to reach

settlement would result in the complaint being handled by a traditional police board procedure. All statements or evidence adduced at the informal settlement should not be used against the officer.

One benefit offered by this form of mediation is that it can be handled more quickly and efficiently. Citizen-complainants will “feel” better about the police if their claims are handled rapidly, while it is fresh in their minds, and are mediated by an official independent of the police. Moreover, participation by police officers in a problem-solving atmosphere will illustrate to citizen-complainants the difficulties of the role of the police and the very human errors which all individuals can make. This is the *sine qua non* of police-community relations.

2. *Members from the Police Department:* Two officers should be appointed by the Commissioner to serve on the hearing board. One officer should be of the same rank as the officer against whom the complaint has been lodged. The second officer should be of an administrative rank.

3. *Citizen Members:* It is recommended that two citizens serve on the police trial board on charges of excessive force and discourtesy. Ideally, these citizens would be randomly selected from a list of volunteers compiled by the hearing officer subject to minimal screening requirements. Additionally, volunteers could be subject to approval by the Mayor and/or City Council. An appropriate term of service would be 1-2 years.

In our opinion, citizen members on the trial board would educate community leaders as to the role and functions of police in the community. Inclusion of citizens on police trial boards would also dispel claims of impropriety by the police department in processing and evaluating police misconduct. Additionally, the board would be balanced so that citizens and police would have equal representation. It is believed that the hearing officer would quickly become familiar with the functioning of the police department and would have the ability to identify with the department when appropriate.

The conduct of the proceedings should not be altered. The same due process rights should be afforded officers accused of misconduct; that is, notice, right to counsel and the right to present and cross-examine witnesses should be retained. Police should have the right to refuse blood and polygraph tests and if ordered to take such tests, evidence should be inadmissible in subsequent proceedings unless the officer consents to admission. The same procedures as to disposition of officers found guilty should be followed in that the Board would conduct a hearing as to past performance and other relevant factors and make a recommendation to the Commissioner. The Commissioner would not be bound by this recommendation and would be required to take action within 30 days of receipt of the board action. A dis-

position contrary to the trial board, however, should contain in particular the Commissioner’s objections and concerns about the trial board findings or recommendations. Action at the Commissioner’s level would be considered a “final order” appealable to the Baltimore City Court.

CONCLUSION

The recommendations are geared to alleviate existing deficiencies in the present system for evaluating complaints of police misconduct. The objectives were to devise a system which would provide greater access into the system for complainants and provide for accountability between the parties; that is, the officer and complainant should have an opportunity to resolve their differences directly and informally within a brief period of time (for minor offenses). Accountability would be built into the formal system as citizens would sit on the trial board and would have an opportunity to participate in the decision-making process. The procedural due process rights of police officers would be preserved as none of the rights established by the Law Enforcement Officer’s Bill of Rights would be eliminated. As before, all recommendations by the trial board would be subject to rejection by the Commissioner.

Appendix A — Findings of CRC Report — 6/12/78

Viewed from the perspective of the CRC as a statutory member on the CEB, these statistics reflect the lack of full implementation, both in spirit and intent, of key elements of the legislation which created the CEB. Those portions are:

Section 16-42(a), That Police District Stations be included among the locations at which formal complaints may be received and filed.

Section 16-42(c), That a copy of each complaint be mailed within 8 hours to the IID and to the Secretary of CEB.

Section 16-42(d), That the Secretary of the Board mail within 48 hours a copy of the filed complaint to each member of the Board.

Section 16-42(f), The CEB is to submit in writing to the Police Commissioner a statement of its *Findings* with its Recommendations. The Police Commissioner in turn, within 30 days of his receipt of the Board’s findings and recommendations, is to forward to the Board a statement of *his* disposition of each case, concurrent with his notifying the complaining citizen and the respondent police personnel of his and the Board’s disposition (findings and recommendations).

Section 16-43(c), That the Board may request the complainant, witnesses, and the police personnel involved in a particular complaint to appear voluntarily before the Board.

Section 16-45, That nothing contained in this article may

abrogate any constitutional, statutory, or common law right of the complainants or witnesses who participate in the complaint procedure. (i.e. reopening criminal charges previously *settled*.)

Section 16-50, That the Board shall prepare and publish a semi-annual statistical and *analytical* report regarding the complaints processed under this Article.

Appendix B — Recommendations of CRC Report — 6/12/78

In light of the refusal of the majority of the Board's members to comply fully with all portions of Article 16, Section 41-50, CRC staff has prepared the following recommendations addressing citizen complaints of police abuse:

1. Independent body be established and empowered to receive and investigate citizen allegations of police abuse. This investigative body shall have the legal access to all pertinent records, citizen and police personnel necessary to pursue and process citizen complaints. Establishment of such a body would remove the investigation of police abuse from its present vulnerability to influence and favoritism by members of one police division (i.e. IID) investigating police abuse of citizens by members of other police divisions. For example, the detective assigned to investigate allegations of police abuse by a citizen may tend to slant his investigation in favor of the accused police officer, in situations where that detective is under peer group pressure to advocate on behalf of the accused officers.
2. A civilian component of the CEB be instituted to sit at each meeting of the CEB, provide input and comment on each police complaint case as it comes before the CEB, their comments be incorporated into the Findings and Recommendations of the CEB.
3. Each statutory member of the CEB should prepare a written analysis and recommendations on police abuse cases, prior to every meeting of the CEB. Through the process of deliberation, the CEB should arrive at a recommendation on each case, based upon Findings adopted by the majority of the Board, as well as the Findings and Recommendations of each statutory member of the Board who may be in dissent from the majority.
4. There should be clearly defined procedures and guidelines by which the CEB could hold Hearings on citizen allegations of police abuse. These Hearings would provide citizens with an alternative to the present system of investigation by IID. The CEB would then present Findings and Recommendations to the Police Commissioner based upon Evidence presented at the CEB Hearings.
5. The Findings and Recommendations of the CEB should be binding upon the Police Commissioner, unless the respondent police personnel elects to appeal the decision of the CEB before a Police Trial Board.

Authority of The House of Representatives to Expel a Member

by Thomas J. Sehler*

I. INTRODUCTION

This report summarizes the historical and legal precedents respecting the power of the House of Representatives to expel one of its Members. There exists no constitutional provision, federal statute, House rule, or precedent which is totally dispositive of the issue. Instances in which the House has expelled Members number three, all occurring in the 37th Congress.

II. AUTHORITY

Each respective House of the Congress is given the power to expel its Members in Art. I, sec. 5, cl. 2 of the U.S. Constitution:

Each House may determine the Rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member.

In a Library of Congress Multilith entitled "Precedents of the House of Representatives in Respect to Procedure for Censure or Expulsion", prepared by Robert L. Tienken (Dec. 29, 1966), there appears the following discussion:

There is no judicial process for unseating a Member; it is not a function of the Executive; and, it cannot be achieved through State recall statutes (see *Burton v. U.S.*, 202 U.S. 344 (1906); *In Re Chapman*, 166 U.S. 661 (1897)). Even where a statute prescribes that conviction for an offense shall bar a person from federal office, there is no automatic expulsion of a Member. As the Supreme Court stated in *Burton v. U.S.*, *supra*, P. 369: ". . . the final judgment of conviction [does] not operate, ipso facto, to vacate the seat of [a] convicted Senator, nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment." The decision must be made by the House involved.

It follows, then, that the House has exclusive jurisdiction over the question of expulsion of its Members.

The grounds for expulsion are extremely far-reaching. While the House has been guarded in the use of its power to expel, Cannon's *Precedents of the House of Representatives*, vol. VI, sec. 78, reveals that "The power of the House to expel one of its Members is unlimited; a matter purely of discretion to be exercised by a two-thirds vote, from which there is no appeal." Included in this precedent, which relates to the South Carolina election case against Richard S. Whaley in the 63rd Congress, is lan-