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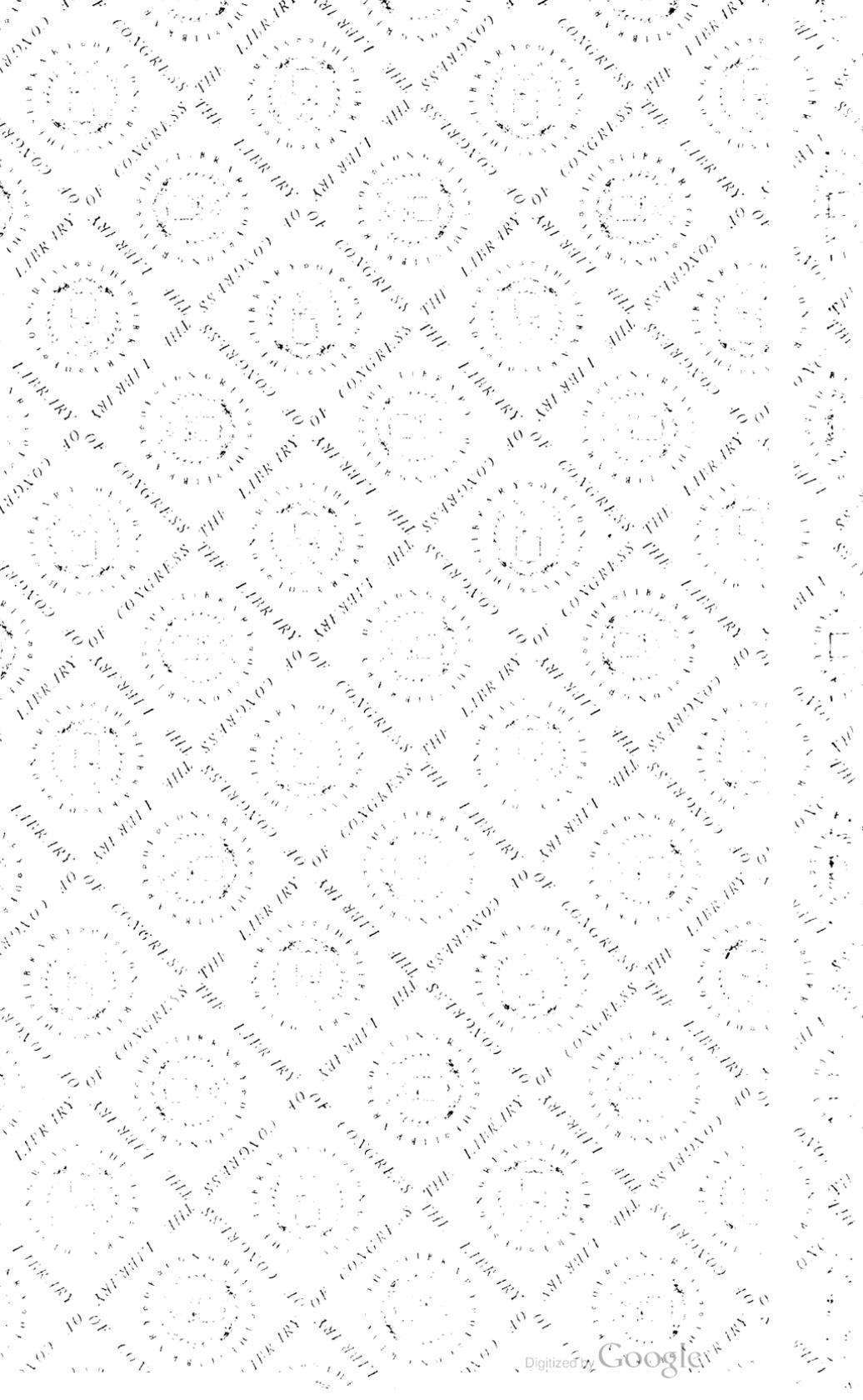


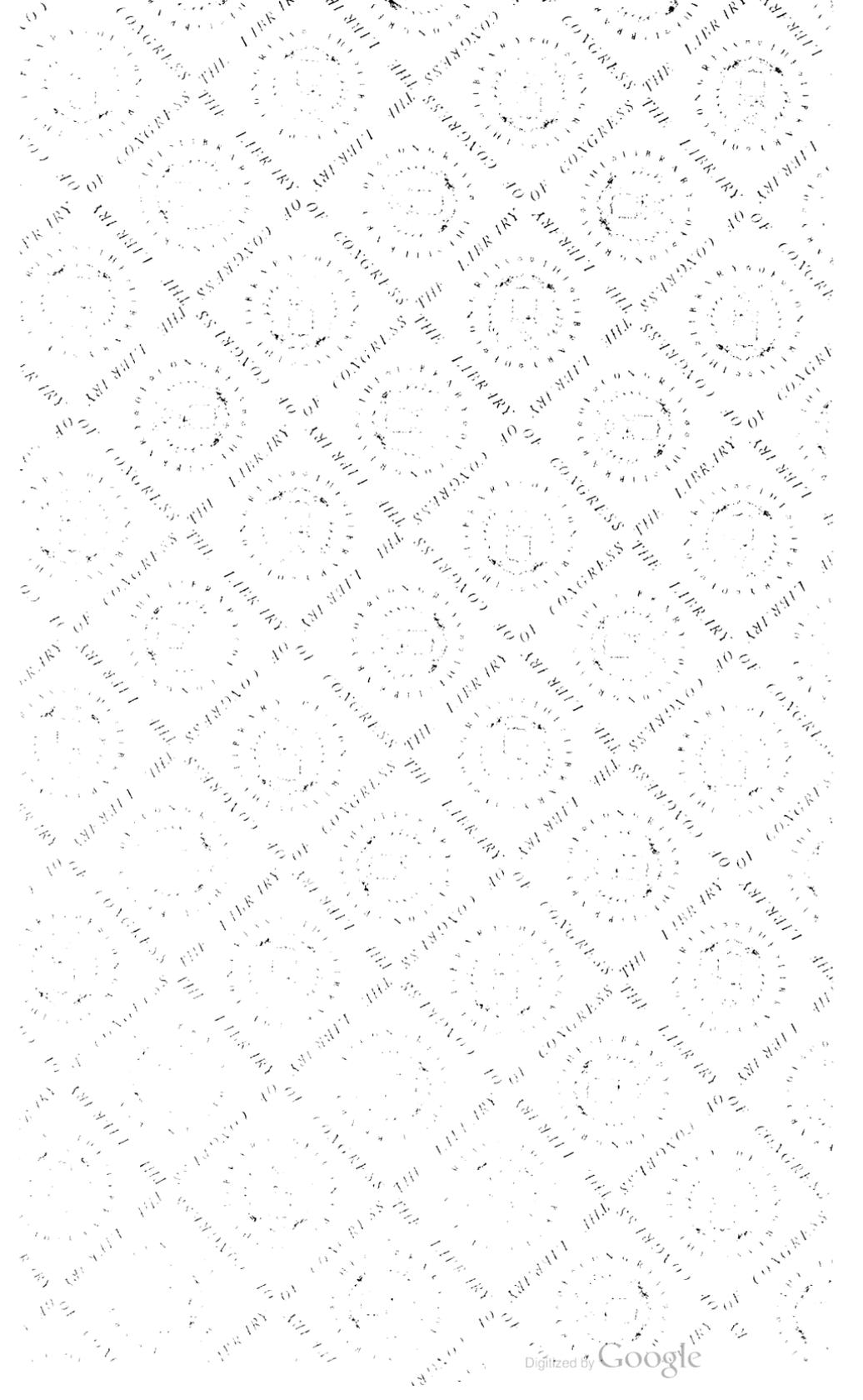
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JUDICIAL FITNESS

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HEARINGS

BEFORE THE

CARD DIVISION

SUBCOMMITTEE ON IMPROVEMENTS

IN JUDICIAL MACHINERY.)

OF THE

U.S. Congress Senate

→ COMMITTEE ON THE JUDICIARY. ↓

UNITED STATES SENATE

EIGHTY-NINTH CONGRESS

SECOND SESSION

ON

PROCEDURES FOR THE REMOVAL, RETIREMENT, AND
DISCIPLINING OF UNFIT FEDERAL JUDGES

MAY 9, JUNE 17 AND 20, AND JULY 15, 1966

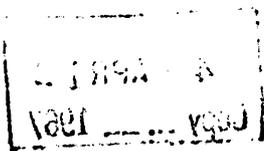
Part 2

Printed for the use of the Committee on the Judiciary



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WASHINGTON : 1967



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JUDICIAL FITNESS

Procedures for the Removal, Retirement, and Disciplining of Unfit Judges

MONDAY, MAY 9, 1966

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL
MACHINERY OF THE COMMITTEE OF THE JUDICIARY,
New York, N.Y.

The subcommittee met, pursuant to notice, at 10 a.m., in the U.S. Courthouse, Foley Square, New York, N.Y., Senator Joseph D. Tydings (chairman of the subcommittee) presiding.

Present: Senators Tydings and Scott.

Also present: William T. Finley, Jr., chief counsel; Peter J. Rothenberg, deputy counsel; Rex L. Sturm, minority counsel; and Barton A. Hertzbach, research assistant.

Senator TYDINGS. We will call the subcommittee to order. I am sure that the unfortunate weather has delayed Senator Scott. But, on behalf of the other members of the subcommittee, I would like to take this opportunity to thank Chief Judge Ryan and the other judges of the U.S. District Court for the Southern District of New York for their cooperation and hospitality in allowing us the use of this courtroom for our hearing.

STATEMENT OF SENATOR JOSEPH D. TYDINGS, CHAIRMAN OF THE SUBCOMMITTEE

This is a hearing before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary of the U.S. Senate. We are hearing testimony on the subject of procedures for the removal, retirement, and disciplining of unfit Federal judges.

The inquiry opened in Washington on February 15 at which time we heard from three very distinguished and knowledgeable witnesses, the Honorable John Biggs, Jr., senior circuit judge for the Third Circuit, U.S. Court of Appeals; Bernard G. Segal, Esq., representing the American Bar Association; and Joseph Borkin, Esq., author of the book "The Corrupt Judge."

The testimony at the February 15 hearing showed that while the Federal judiciary as a whole maintains an extremely high standard of excellence and integrity, the very few judges who are unfit can do tremendous damage to the image of the judiciary and to the efficient administration of justice.

The testimony also demonstrated that at present the Federal judiciary lacks adequate procedures for the investigation of allegations of judicial unfitness and for the removal of judges whose unfitness is established. The purpose of the subcommittee's study in this area is to determine, first, what procedures are workable and desirable, and second, what procedures are constitutionally permissible. We are here today in pursuit of this first goal to hear testimony concerning the system of removal and disciplining in effect in the courts of the State of New York, to find out how well this system is working and whether it can be adapted for use in the Federal judiciary.

Next month we shall be doing the same thing in California, and at some point in the next few months we hope to hear testimony about the removal systems and problems of several other States at further hearings in Washington or elsewhere.

We have chosen New York and California for detailed investigation for two reasons:

First, these two States have the best developed examples of the two leading approaches to the problem, New York using a specially convened court on the judiciary and California using a continuing commission on judicial qualifications to investigate complaints.

Second, both New York and California, the two most populous States in the Union, have judicial systems that exceed the Federal judiciary in number of personnel and that cover a significant geographical area. It may well be, for example, that the type of removal and discipline system that works well in one of our smaller States would be unsuitable for the Federal judicial system because its efficacy depends on the limited geographical area it must cover. New York and California, on the other hand, are both great States in area as well as population.

At the same time as we pursue our study of State removal mechanisms, we have asked a number of distinguished constitutional scholars at leading law schools throughout the country to assist us in determining what removal methods are constitutionally permissible. We hope to have the results of their studies late this year.

Our witnesses today are distinguished representatives of the New York bench and bar. We are very grateful to them for taking the time to be with us and to assist us in this very important and challenging undertaking. This afternoon after the lunch recess we will hear from the Honorable Charles S. Desmond, chief judge of the New York State Court of Appeals, and from the Honorable George J. Beldock, presiding justice of the second judicial department.

This morning we have the pleasure of hearing from Judge Bruce Bromley, representing the New York State Bar Association; Thomas McCoy, the State administrator of the courts; Henry C. King, representing the Association of the Bar of the City of New York; and Lester Goodchild, Esq., assistant director of administration for the first judicial department, who will present a statement prepared by Judge Bernard Botein, presiding justice, and Leland L. Tolman, director of administration, for the first judicial department.

Our first witness is the Honorable Bruce Bromley, formerly a judge of the Court of Appeals of New York State, and today a senior member of one of the Nation's great law firms. In one of the three cases thus far tried before the New York court on the judiciary, Judge Bromley was specially appointed to serve as prosecuting attorney, and so he is particularly well qualified to testify today.

Judge Bromley is here as a representative of the New York State Bar Association. On behalf of myself, Senator Scott, and the members of the subcommittee, Mr. Bromley, we are delighted that you would take the time and effort to be with us this morning to assist us in this very important endeavor, and we will be delighted to hear from you, sir.

We will insert your prepared statement in the record in its entirety, and you may proceed to summarize the most important points of the Statement.

(A biographical sketch of Judge Bromley follows:)

BIOGRAPHICAL SKETCH OF HON. BRUCE BROMLEY, NEW YORK STATE BAR ASSOCIATION

The Honorable Bruce Bromley, representing the New York State Bar Association, was admitted to the New York Bar in 1920 after being educated at the University of Michigan (A.B.) and the Harvard Law School. He has been associated with the New York City firm of Cravath, Swaine & Moore since 1923. He has been a partner in this firm since 1926 except for a brief period in 1949 when he served as an associate judge of the New York Court of Appeals. From 1933 to 1938 and again from 1946 to 1947, Mr. Bromley was a Sterling lecturer at the Yale Law School. He is a member of the Lawyers Committee for Civil Rights Under Law, the Mayor of New York City's Board of Ethics and the National Committee to Study Antitrust Laws.

STATEMENT OF HON. BRUCE BROMLEY, REPRESENTING NEW YORK STATE BAR ASSOCIATION

(The prepared statement of Judge Bromley follows:)

On behalf of the New York State Bar Association, I should like to express our keen interest in the studies currently being conducted by the Subcommittee. The problem of establishing effective procedures for disciplining members of the judiciary is an extraordinarily difficult one and I shall not presume to add to the views that have already been submitted to the Committee. It may, however, be helpful to the Committee to have a brief outline and history of the procedures currently in effect in New York.

The removal or retirement of judges or justices for cause or for physical or mental disability is provided for in Article VI, Section 22, of the New York State Constitution. It provides that any judge of the Court of Appeals, justice of the Supreme Court, or judge of the Court of Claims, County Court, Surrogate's Court or Family Court may be removed for cause or retired for mental or physical disability preventing the proper performance of his judicial duties after due notice and a hearing by a Court on the Judiciary. Such Court is composed of the Chief Judge and the Senior Associate Judge of the Court of Appeals and one justice of the Appellate Division of the Supreme Court in each of the four judicial departments. The affirmative vote of four members of the Court is necessary for removal or retirement and the Court may disqualify a judge or justice removed from office from again holding any public office in New York. Removal does not prevent subsequent indictment and punishment. The Chief Judge of the Court of Appeals may convene the Court upon his own motion and shall convene it upon written request by the Governor or by a presiding justice of the Appellate Division or by a majority of the Executive Committee of the New York State Bar Association. After the Court on the Judiciary has been convened and charges have been preferred, the presiding officer of the Court, before any hearing on charges of removal for cause, is required to give written notice to the Governor, the Temporary President of the Senate and the Speaker of the Assembly. The legislature is thereupon deemed to be in session and if any member prefers the same charges against the judge or justice within 30 days after receipt of such notice and if such charges are entertained by majority vote of the Assembly, the legislative proceedings are exclusive and final. A judge of any of the courts for New York City or of a district court or a town, village or city court outside of New York City may be removed for cause or retired for disability after hearing by the Appellate Division of the judicial Department of his residence.

Since January 1, 1948, the judges of all major courts of this State have been subject to removal for cause by three different procedures at the option of the legislature:

(1) By impeachment by majority vote of the Assembly and conviction by two-thirds vote of the members present of a Court for the Trial of Impeachments composed of the Lieutenant Governor, the Senate and the Court of Appeals or the major part of each. (Article VI, Section 24, the substance of which has been in all previous New York Constitutions since 1777);

(2) By concurrent resolution joined in by two-thirds of the members of each house of the legislature (as to judges of the Court of Appeals and justices of the Supreme Court) or on recommendation of the Governor by a two-thirds vote of all members elected to the Senate (as to judges of the Court of Claims, county judges, surrogates, judges of the Family Court and some minor court judges). (Article VI, Section 23, the substance of which has been in effect since 1822); and

(3) By the Court on the Judiciary. (Article VI, Section 22, adopted by the People November 7, 1961, effective September 1, 1962, formerly Article VI, Section 9-a, adopted by the People November 4, 1947, effective January 1, 1948).

The Court on the Judiciary was created to provide a mechanism for the removal of judges by judges and while such procedure had been continuously authorized by the Constitution for the removal of minor court judges since 1822 (Constitution of 1822, Article Fourth, Sec. VII) it was not until 170 years after New York's first Constitution of 1777 that the procedure was first authorized for the removal of judges of major courts.

Only one major court judge has ever been removed by impeachment. George J. Barnard, a justice of the Supreme Court, was removed in 1872 after a trial. No judges have been removed by concurrent resolution and only one judge, John H. McCunn, a Superior Court judge, has been removed (also in 1872) by resolution of the Senate after a hearing at the request of the Governor. In November 1938, the Governor recommended that the Senate remove Kings County Judge George Martin. Trial was held before the Senate in the fall of 1939 and resulted in an acquittal.

It seems obvious that the creation of an addition procedure for removing major court judges was needed not because judges were getting worse during the 40's but because the other ways of impeachment and concurrent resolution were too costly, cumbersome, prolonged and in view of the history of their application probably ineffective.

However, the Court on the Judiciary was not convened from its effective date, January 1, 1948, until December 1959, in spite of the fact that the Chief Judge of the Court of Appeals had the power at all times to convene it on his own motion and could be required to do so by the Governor, the presiding justices of any Appellate Division, a majority of the Judicial Council (reconstituted as the Judicial Conference in 1955) or a majority of the Executive Committee of the New York State Bar Association. (The power of a majority of the Judicial Conference to mandate the convening of the Court was eliminated from Section 9-a of Article VI by Section 22 of Article VI which became effective September 1, 1962.)

The Court on the Judiciary was first convened on December 18, 1959, by Chief Judge Albert Conway at the request of the Judicial Conference which presented a resolution charging that County Judges Sobel and Leibowitz were guilty of violations of the Canons of Judicial Ethics. The essence of the charges was that Judge Sobel had made public statements accusing Judge Leibowitz of unfairness in the trial of a homicide case and that the latter had used his courtroom as a forum for vilification of Judge Sobel, his fellow jurist. The proceedings of the Court on the Judiciary are reported in 8 N.Y. 2d following page 1158.

In that case (as in all subsequent cases), the first order of business was the adoption of a set of rules. John R. Davison, of Albany, and William R. Brennan, of Buffalo, were designated as counsel and the complaint in the form of the Judicial Conference resolution was submitted to the Court for preliminary determination as provided for in its newly adopted rules. A preliminary determination was then made that the complaint for removal stated facts sufficient to constitute cause for the referral of charges. An opportunity was given the Legislature to pre-empt the proceedings and the matter came on before the Court on a motion to dismiss the charges for legal insufficiency. This motion was denied but the charges were dismissed on the merits in the exercise of the Court's discretion. In its opinion, the Court stated (at "j"):

"Under all the circumstances, we have decided that the charges, grave as they are, do not call for removal. In so deciding, we are not holding that improper or injudicious statements by a Judge in or out of court cannot justify removal from office. Each case must be considered on its merits. . . ."

The second convening of the Court on the Judiciary was initiated by a letter dated July 2, 1962, from the Presiding Justice of the Appellate Division, Second Department, to Chief Judge Desmond, requesting that the Court be convened to consider matters involving the conduct of Supreme Court Justice Louis L. Friedman. The proceedings before the Court on the Judiciary are reported in 12 N. Y. 2d, following page 1111.

This Court was the first Court on the Judiciary convened under new Section 22 of Article VI of the Constitution which had become effective September 1, 1962. Like its predecessor Court, it was composed of the Chief Judge and Senior Associate Judge of the Court of Appeals and one justice from each of the four Appellate Divisions.

The Court on the Judiciary convened to consider the conduct of Supreme Court Justice Friedman and proceeded to adopt its own rules which were identical to the rules of the First Court except that Rule 1 was changed to require only four instead of five members to constitute a quorum. Again the Court made a preliminary determination that the complaint forwarded by the Presiding Justice of the Second Department against Judge Friedman stated facts sufficient to constitute cause for the preferral of charges for removal. It appointed the same counsel as in the *Sobel* case, who prepared a statement of charges, the essence of which was that Judge Friedman had engaged in unethical and improper conduct by maintaining in his judicial chambers financial records and moneys of the firm of Friedman and Friedman, refused to surrender them to his partner and obstructed the judicial inquiry and investigation ordered by the Second Department. The matter came on for trial on January 11, 1963, and on February 26 the decision was announced removing Judge Friedman from office by a vote of four to two.

The New York State Constitution makes no provision for any appeal from the Court on the Judiciary. However, Friedman appealed to and filed an Article 78 proceeding in the Appellate Division, Third Department, which dismissed both and denied leave to appeal to the Court of Appeals. See *Matter of Friedman*, 19 App. Div. 2d 120 (Third Dep't 1963). It is of interest in connection with this decision that both the Senate and the Assembly Rules Committees, about 10 days prior to the close of the 1963 session, introduced bills permitting an appeal from the Court on the Judiciary to the Appellate Division. The Assembly passed the measure but then recalled it. See S. Intro. 3688, Print S. 4288 (1963); A. Intro. 5016, Print A. 4648 (1963).

In his answer to the statement of charges, Judge Friedman challenged the constitutionality of Article VI, Section 22, as contravening in his case due process because the Court on the Judiciary directly, or through its counsel, became either the complainant or the grand jury which made the charges and therefore the Court was disqualified to sit in judgment. The Court on the Judiciary ruled against respondent. The United States Supreme Court dismissed an appeal taken to that Court for lack of a substantial federal question. 375 U.S. 10 (1963).

The third convening of the Court on the Judiciary is reported in full in 13 N. Y. 2d, following page 1188. The proceedings were initiated by a letter from Governor Rockefeller dated April 16, 1963, in which he requested Judge Desmond to convene a Court on the Judiciary with respect to Melvin H. Osterman, a judge of the Court of Claims. The letter stated that the Governor had been advised by District Attorney Hogan that Judge Osterman was called before a grand jury for questioning pending inquiry to determine whether penal violations had been committed in connection with the administration of the State Liquor Authority regulations and that Judge Osterman, when asked to execute a waiver of immunity, refused to sign a general waiver but stated that he would sign a waiver limited only to the conduct of his judicial office. On April 29, 1963, the Court was convened and on May 25 adopted rules of practice and designated Bruce Bromley of New York as counsel to conduct the proceedings.

The Rules of Practice provided that four members of the Court should constitute a quorum and a vote of four necessary for a decision. Rules 5 and 6 provided for a preliminary determination whether the complaint for removal stated facts sufficient to constitute cause for the preferral of charges, and that thereafter a statement of charges alleged for removal should be personally served on the respondent who must answer within 20 days. The Rules also provided that service on the respondent of the statement of charges alleged for removal would constitute the preferral of charges as provided in Article VI,

Section 22, of the Constitution and thereupon notice should be given to the Governor, the Temporary President of the Senate and the Speaker of the Assembly setting forth the charges and the trial date. If a member of the legislature should prefer the same charges, then the Court proceedings would be stayed. The Rules empowered the Court to try an issue of fact or direct a hearing thereof before one or more members of the Court, an official referee of the Court of Appeals or of the Supreme Court to hear and report. The Court was empowered to confer immunity upon a witness and may issue subpoenas.

In the *Osterman* case, the charges contained in the statement of charges were narrowed by stipulation to one charge, as follows:

" . . . he refused to cooperate with and assist the Grand Jury investigating whether there had been a conspiracy to bribe an official of the State Liquor Authority in that he refused to sign a general waiver of immunity with respect to answers that he might give concerning such conspiracy. . . ."

An abstract of the grand jury proceedings was before the Court on the Judiciary and Osterman's counsel asserted that he was an object or target of the investigation and that it was therefore a violation of his constitutional rights to call him before the grand jury except to question him as to his official conduct in office. Osterman's counsel relied on Section 6 of Article I of our State Constitution which provides that no one shall be compelled in any criminal case to be a witness against himself providing that any public officer who upon being called before a grand jury to testify concerning the conduct of his present office or the performance of his official duties refused to sign a waiver of immunity or to answer any relevant questions concerning such matters shall by virtue of such refusal be removed from his office by appropriate authority.

Since there was no dispute of fact, counsel designated to conduct the proceedings moved for judgment of removal and counsel for Osterman crossmoved for dismissal. The motion for removal was granted and in a per curiam opinion the Court said that the question was—should a judge be removed when he refuses to cooperate in an investigation of alleged corruption in a state agency except on condition that he be given immunity from prosecution for any crimes of his own disclosed by his answers? Osterman offered to waive as to questions relating to his judicial conduct but refused to sign a general waiver. The Court said that despite his right as a citizen to refuse to answer possibly incriminating questions a judge may be removed not because of any inference of guilt arising from his refusal to talk but for withholding the truth which the government is entitled to expect and receive from him. Cause for removal of a judge may be found not only in official misconduct but in his taking attitudes and positions which show unfitness for the office which unfitness is demonstrated by a refusal of one sworn to enforce the law to cooperate in any investigation of official corruption. On February 17, 1964, Osterman's petition for certiorari was denied by the United States Supreme Court (376 U.S. 914).

The Court on the Judiciary has not thus far been called upon to exercise its authority to retire a judge for disability.

It is perhaps unnecessary to state that the New York procedures fall considerably short of perfection. On the other hand, in an area of judicial administration where perfection is hardly to be expected, these procedures appear to me to have sufficient merit to warrant serious consideration by the Committee.

Judge BROMLEY. Mr. Chairman, it is a privilege to be here. The New York State Bar Association has a keen interest in the problem which you are considering. In addition to the compliment contained in the written statement which I filed, I want to assure you that personally I think this is an illustration of the very highest type of legislative process in the formulation of new legislation. I compliment you on the manner in which it is being conducted.

The removal or retirement of judges or justices for cause or for physical or mental disability is provided in our State constitution, in article VI, section 22. Any judge of the court of appeals, any justice of the supreme court or judge of the court of claims, or county court, or surrogate's court, or our family courts may be removed for cause under our constitution or retired for mental or physical disability such as to prevent the proper performance of his judicial duties, after due notice and hearing by a court which we call the court on the judiciary.

That court is composed under the constitution of the chief judge and the senior associate judge of the court of appeals and one justice of the appellate division of the supreme court in each of our four judicial departments. So that makes a bench of six judges. The affirmative vote of four members is necessary for removal or retirement, and the court may, in addition to retiring the judge, disqualify him from holding any public office in New York thereafter.

Removal under the constitution doesn't prevent subsequent indictment and punishment. The chief judge of the court of appeals may convene the court on the judiciary upon his own motion and is obligated to do so upon the written request by the Governor or the written request by a presiding justice of any one of the four appellate divisions or by a majority of the executive committee of the New York State Bar Association.

After the court on the judiciary has thus been convened and charges have been preferred, the presiding officer of the court, before any hearing on charges of removal for cause, is required to give written notice to the Governor, the temporary president of the New York State Senate and the speaker of the New York Assembly.

The legislature is thereupon deemed to be in session, and if any member prefers the same charges against the judge or justice within 30 days after the receipt of that notice, and if such charges are entertained by a majority vote of our assembly, the legislative proceedings are exclusive and final.

A judge of any of the courts for New York City or a district court or town or village or city—that is, our inferior courts—may be removed for cause or retired for disability after hearing by the appellate division of the judicial department of his residence. The court, upon being convened, proceeds to adopt its own rules and contrary, Mr. King, to the implication in the statement which you have filed, the court has no set of rules. It is newly convened for each complaint. It seldom consists of the same individuals and it always adopts rules for the particular proceeding. The rules, however, as they have been adopted in each of the three proceedings contain a very important provision which has been present in all of them, and that is they provide for a preliminary determination as to whether the complaint which has been received for removal really states facts sufficient to constitute cause for the preferral of charges.

That is a very important preliminary determination which has always been provided for in all the rules which the court has so far adopted and which I think prevents perfectly obvious injustice of publicly exposing groundless charges and thus embarrassing without cause and perhaps injuring the reputation and standing of the fellow against whom frivolous charges are filed.

Senator TYDINGS. Is this done in a confidential manner?

Judge BROMLEY. Yes, it is. It is done in a confidential manner after the court is convened. It is only after that determination has been made that the statement of charges is prepared by the counsel entrusted with the prosecution of the particular complaint.

The rules go on to provide that the charges shall thereafter be prepared and personally served on the respondent who must answer within 20 days. Service on the respondent of the statement of charges alleged for removal constitutes the preferral of charges as provided in our article VI, section 22 of our constitution.

Thereupon, and only then, is notice given to the Governor and the speaker and the temporary president of the senate in order to give the legislature a chance to assert its exclusive jurisdiction. That has never happened since the court on the judiciary has been created in 1948. Under the constitution, we have to give the legislature that preliminary right. Of course, if a member of the legislature sees fit to prefer the same charges, then the court proceedings would be stayed.

Senator TYDINGS. As I understand it, he would have to get a majority of the assembly to agree to take it up?

Judge BROMLEY. Oh, yes, that's right, of course. He does, yes. The rules generally so far have always empowered the court to try and elicit facts or direct a hearing thereof before one or more members of the court or appoint an official referee of the court of appeals or of the supreme court to take the testimony and render a report.

The court on the judiciary has the power of subpoena and the power to confer immunity. I think that briefly outlines the constitutional provisions and the rules thus far adopted by the court on the judiciary.

As a matter of history, I call your attention to the fact that our judges have been subject to removal for cause by three different procedures at the option of the legislature of which the court on the judiciary is only one, and the most recent one. Ever since our constitution was adopted in 1777 there has always been a provision for impeachment by majority vote of the assembly and conviction by two-thirds vote of the members present of a court—it is not really a court but the constitution calls it a court—for the trial of impeachments. It is a very large and unwieldy body for it is composed of the Lieutenant Governor, the senate and the court of appeals or the major part of each. I don't wonder that it has been so infrequently made use of.

Secondly, since 1822 our constitution has provided that judges may be removed for cause by concurrent resolution, joined in by two-thirds of the members of each house of the legislature (as to judges of the court of appeals and justices of the supreme court) or on recommendation of the Governor by a two-thirds vote of all members elected to the senate, applicable to the judges of the court of claims, county judges, surrogates, judges of the family court and minor court judges.

Thirdly, created only in 1948, we have the amendment in article VI, section 22, which created the court on the judiciary.

I notice in Mr. King's statement he says he has been unable to compile data with respect to judicial impeachments. As I am informed, only one major court judge has ever been removed in our system by impeachment, and that was back in 1872. He was removed after a trial. No judges have ever been removed by concurrent resolution and only one judge has been removed, also in 1872, by resolution of the senate after a hearing requested by the Governor.

In 1938, 10 years before the amendment creating the court on the judiciary, a Kings County court judge in Brooklyn was subject to senate proceedings at the request of the Governor, and he was acquitted.

It is a historical fact that the court on the judiciary was not convened from its effective date, January 1, 1948, until December 1959. That is 11 years. This is so in spite of the fact that at all times the chief judge of the court of appeals had the power to convene it on his own motion and could be required to do so by the Governor, the presid-

ing justices of any appellate division, a majority of the judicial council, reconstituted later as the judicial conference in 1955, or upon the request by a majority of the executive committee of the New York State Bar Association.

The power of a majority of the judicial conference to mandate the convening of the court was eliminated recently by constitutional amendment. The court was first convened in 1959 as stated above by Chief Judge Albert Conway of the court of appeals at the request of the judicial conference.

Two judges in Brooklyn were proceeded against on the grounds of violation of the canons of judicial ethics, and they were tried and acquitted. Those proceedings are reported in our court of appeals reports 8 New York 2d, following page 1158. That, as I said, was in 1959.

The second time the court was convened was in 1962. This was initiated by a letter from the presiding justice in the appellate division of the second department over in Brooklyn to the chief judge of the court of appeals requesting a convening of the court to consider the conduct of a supreme court justice in Brooklyn. Those proceedings are reported in 12 New York 2d following page 1111. This was the first court convened under the amended article of our constitution, article VI, section 22.

Like its predecessor, that court was composed of the chief judge, the senior associate judge of the court of appeals and one justice from each of the four appellate divisions. Again, it adopted its own rules which contained a change, providing that only four instead of five members were necessary to constitute a quorum.

Again, as in the first convening of the court, the first business of the court was to make a preliminary determination, that the complaint forwarded by the presiding justice of the second department stated facts sufficient to constitute cause for removal, if sustained. Counsel was appointed, a statement of charges was prepared and served, and the matter came on for trial in January 1963, and in February the judge was removed by a vote of 4 to 2.

Our constitution makes no provision for any right of appeal. This particular judge, however, took an appeal and filed an article 78 proceeding, which is our way of reviewing administrative determinations in the appellate division for the third department, which is in Albany.

The judge took an appeal to the third department which court dismissed both his appeal and his article 78 proceeding, and denied leave to go to the court of appeals. That decision is reported in 19 App. Div. 2d, at page 120.

I think it is of passing interest that in connection with this decision, bills permitting an appeal from the court on the judiciary to the appellate division had been introduced in the legislature. The assembly actually passed that bill and then recalled it. My statement gives the reference to the bill.

In his answer to the charges against the Brooklyn supreme court judge he challenged the constitutionality of article VI, section 22, as contravening in his case due process, and his contention was that our court directly or through its counsel acted either as the complainant or as a grand jury which made the charges, and, therefore, the court was disqualified to sit in judgment.

The court on the judiciary, as might be expected, ruled against that contention, and the U.S. Supreme Court subsequently dismissed an appeal taken to that court by the Supreme Court Justice in question on the ground that no substantial Federal question was presented, and that is reported in 375 U.S. at page 10.

The third and final convening of our court on the judiciary, in which I acted as the prosecutor, is reported as 13 New York 2d following pages 1188. In this case the proceedings were initiated by a letter from Governor Rockefeller in 1963. This had to do with a judge of our Court of Claims. The Governor had received a letter of complaint from District Attorney Frank Hogan here in New York County, and he called to the Governor's attention facts in connection with what has now developed into a scandal having to do with our State liquor authority.

This judge of the Court of Claims had been subpoenaed by Mr. Hogan to appear before a grand jury, and upon his appearance he refused, although requested, to sign a general waiver of immunity. Our constitution provides that in the case of a public officer, including a judge, if he should be subpoenaed to testify before a grand jury and is informed that the investigation had to do with his official conduct as a judge, he was subject to immediate removal unless he signed a waiver of immunity with respect to his official conduct as a judge.

This judge, when called by Mr. Hogan before the grand jury, was promptly informed that the investigation had nothing to do with the performance of his judicial duties and although he had offered to sign a limited waiver of immunity, he refused when requested to sign a general waiver, relying upon the usual provision of our constitution of his right not to incriminate himself.

So that the question presented in this case was really one of law. Can you remove a judge for exercising his constitutional right not to be required to testify against himself when he offers to sign an immunity regarding his official conduct as a judge but is told that he really was the target of an investigation for conduct outside of his official duties?

Having thus preferred the issue in our charges and having received his answer, counsel for the judge and I entered into a stipulation which provided that the sole question was as I have stated it. The judge's counsel, as I suggested, relied on section 6 of article I of our constitution which provides that no one shall be compelled in any criminal case to be a witness against himself but also provides that any public officer who, upon being called to testify before a grand jury concerning the conduct of his present office or the performance of his official duties, refuses to sign a waiver of immunity or to answer relevant questions concerning such matter, shall by virtue of such refusal be removed from his office by appropriate authority.

Since there really then was no dispute of fact, I moved for judgment of removal and the judge's counsel cross-moved for dismissal. The question presented to the court was that the judge—and I now quote the stipulation which his lawyer and I entered into:

The judge refused to cooperate with and assist the grand jury investigating whether there had been a conspiracy to bribe an official of the State liquor authority in that the judge refused to sign a general waiver of immunity with respect to answers that he might give concerning such conspiracy.

We had an abstract of the grand jury minutes before the court on the judiciary. I agreed that the judge was a target or an object of the grand jury's investigation, and I argued against his counsel's contention that to try him really violated his constitutional rights. We argued and briefed it and the court rendered an opinion which is reported in 13 New York 2d. at the page to which I have referred.

Briefly, the court decided that despite the judge's right as a citizen to refuse to answer possibly incriminating questions, a judge may be removed not because of any inference of guilt arising from his refusal to talk but for withholding the truth which the government is entitled to expect and receive from a judge. The court went on to say that cause for removal of a judge may be found not only in his official conduct but in his taking attitudes and positions which show unfitness for the office which unfitness was demonstrated by his refusal to aid in enforcing the law and his refusal to cooperate in an official investigation.

After the decision of the court of appeals, he applied for certiorari which was denied, 376 U.S. 914.

That completes in brief fashion the history of our court on the judiciary. You will notice it never has been convened, although it possesses the authority, for the purpose of retiring a judge for disability. As far as I am concerned, I think that is the best system there is in existence today in the country. I believe that judges should judge judges and that the California system of having lawyers and laymen is quite inappropriate, and I also believe that in spite of the California experience which doesn't match ours at all in that they seem to have had so many complaints which they have considered—in spite of the fact that we have had very few, I think no one can dispute the fact that there is plenty of opportunity for any citizen who has any information against a judge to go over to the Governor, to go over to the legislature, the speaker or the president of either or both houses or to go over to the New York State Bar Association.

It seems to me there is plenty of opportunity then for calling attention to possible charges of misconduct of judges. Although this is not a part of my function, I am not sure the New York State Bar Association will endorse what I say, I believe there is no Federal constitutional impediment to the creation through the machinery of the Judicial Conference of the United States, provided for in some section, in 28 United States Code—Section 321 U.S.C. I think that is a good instrumentality through which the Congress could create either a commission or a court without the necessity for a constitutional amendment. I say "commission" not because of California, but I have just finished as a member of the judicial commission of the court of appeals of this State the unpleasant task, subject to the rulings of the Supreme Court of the United States, of redistricting our State, so that as far as our senators and assemblymen are concerned—so that now we have one man one vote and one vote-one value.

That was done by a so-called judicial commission of the court of appeals consisting of five members. I think the Supreme Court or the Judicial Conference representing the various circuits, all of the circuits, could without constitutional inhibition or violation create that kind of a body.

Permanent or temporary, as ours is, is to my mind a matter of detail.

Now I have talked too long. I stop.

Senator TYDINGS. Judge Bromley, we certainly appreciate the care and obvious work that went into the preparation of your statement. I would like to ask you some questions about the initiation of the three cases which actually caused the convening of your court on the judiciary in New York. You have indicated, I think, that the *Osterman* case, the case which you handled, came when the prosecuting attorney, Mr. Hogan, sent a letter to the Governor and then the Governor wrote to the chief judge, and the court of the judiciary was then convened.

In the other two instances, do you know what the mechanics were, the details before the court was actually convened? In other words, how did the matter come to the attention of the authorities? What started it? Did a citizen complain? The first case, as I recall, was a case involving Judge Liebowitz and Judge Sobel—who initiated that? Was it newspapers, lawyers, bar associations?

Judge BROMLEY. It may have been a result of the publicity because the judges publicly denounced one another as they sat on the bench in Brooklyn in their respective courtrooms. So that it was reported in the press. But the complaint was initiated by our judicial conference in the second department which took up the matter and investigated it and then filed it with the Governor.

They adopted, as I recall, a resolution charging that the judges in their judgment were guilty of a violation of the canons of judicial ethics.

Senator TYDINGS. You think it was probably the newspaper publicity which called the matter to their attention?

Judge BROMLEY. I think in that case it probably was, although I am sure it would have been called to their attention if it hadn't been in the papers because it was the subject of such comment at the bar in Brooklyn. That is the way that originated. The judicial conference to the Governor to the chief judge of the court of appeals.

Senator TYDINGS. Since that time, the judicial conference has been removed, as I gather from your constitution, as one of the parties that can initiate a case?

Judge BROMLEY. That's right; it has been removed.

Senator TYDINGS. The first case involving the State liquor authority, how was that case initiated?

Judge BROMLEY. The second convening of the court, the first case under the present constitutional provision didn't involve the State liquor authority. It had to do with the supreme court justice in Brooklyn who was really practicing law in his chambers in connection with his firm with which he had been connected in the negligence business prior to his elevation to a judgeship. He kept the firm's records in his chambers and—

Senator TYDINGS. That was the *Friedman* case?

Judge BROMLEY. The *Friedman* case; yes.

Senator TYDINGS. Do you know how that case was initiated?

Judge BROMLEY. Yes. That was initiated by the presiding justice of the second department in Brooklyn, to which, of course, Judge Friedman was subject. That was his intermediate appellate court.

In July 1962 the presiding justice of the appellate division, second department, wrote not to the Governor this time but to the chief judge of the court of appeals and really complained, and that caused

the chief judge to convene the court and to make the preliminary investigation in camera, to which I have referred to frequently today, in order to determine whether or not the charges were sufficient or whether they were just frivolous.

I say again, this is a very important part of our procedure so that it insures that unjust charges, silly charges, frivolous charges will not be aired publicly.

Senator TYDINGS. Have there been cases, to your knowledge, where requests to convene the court on the judiciary have been filed by someone and have not been acted on by the court on the judiciary because there wasn't a good cause of action?

Judge BROMLEY. I guess Chief Judge Desmond will have to answer that. I believe not, though, subject to his greater knowledge. I believe not.

Senator TYDINGS. So that the only three cases were the ones that we know about that were fairly—I won't say notorious but at least matters of public discussion among members of the bar and the judiciary.

Judge BROMLEY. That's right. It is true, I say again, that it has never been called upon to remove anybody for disability. I don't know that such a case has ever existed, but it might have.

Senator TYDINGS. Do you think that there is any merit to the point raised in one of the cases which you outlined; namely, that the court on the judiciary in a sense is acting as both a prosecutor and the judge?

Judge BROMLEY. No, I don't think so.

Senator TYDINGS. Why not? The court in a sense is appointing the prosecutor, they are making a judgment that the case ought to be brought, and they are sitting on it.

Judge BROMLEY. That is true, but they have received under the Constitution a preliminary complaint, and all they are doing is judging its sufficiency. It is no more, really, than a motion to dismiss a complaint or dismiss an indictment. The charges are there. They consider whether it is sufficient as it is legally expressed.

As far as their appointing their own counsel, I see nothing wrong in that. Courts appoint counsel all the time to represent the interests of the public or particular people. At any rate, the Supreme Court of the United States didn't think it merited any consideration when raised.

Senator TYDINGS. I am not quarreling with your answer, I am just trying to get this matter into the record, because anything we come up with will be subject to this sort of questioning. Have you codified in your statutes the canons of judicial ethics, or what sort of standards for extrajudicial behavior do you have in New York? How do you determine this? Is it in law? Is it in rules?

Judge BROMLEY. We have not codified the canons. All we have is the canons of judicial ethics as adopted by the ABA. This is what was considered, I believe, in the first case, the two judges in Brooklyn.

Senator TYDINGS. Let me ask you this. In the nature of the organization of a court on the judiciary or a commission, do you feel that it should be on an ad hoc basis or a continuing basis, if we move into this for the Federal judiciary?

Judge BROMLEY. That is a very difficult question. I think probably for our State, and I really think for the Federal system, on an ad hoc

basis is preferable, but it is very difficult for me, really, to have an informed opinion.

Senator TYDINGS. Do you think that there should be special staff assigned to the court on the judiciary that would work only in this field or do you think it should be handled by the administrator of the courts, the people who handle everything else?

Judge BROMLEY. The latter. I might say in connection with our court on the judiciary—ever since its creation, the clerk of the court of appeals has always been appointed as the clerk of the court on the judiciary who has his own staff to do whatever work the court wants him to do, and that has turned out to be, although not a permanent staff in the sense that you speak of or in the sense that California has, it has turned out to be a body of men who had experience and who do operate as a staff, and then when you think that the court can appoint official referees of the court of appeals or otherwise assemble facts by way of pretrial discovery, I think the machinery for getting at the facts is adequate.

I have a distrust of a permanent staff, and it is rather difficult for me to say why, but I do have—I think it encourages frivolous reports, possibly, and it seems to me in the federal system that the caliber of the judges is so high, generally, that you really don't need that kind of continuing supervision.

Senator TYDINGS. Just one final area. The problem of removal or retirement of a judge who, because of physical or mental impairment, is no longer able to do the job, to fulfill his responsibilities, would you care to comment on how the New York system works in this area?

Judge BROMLEY. As I say, the court has never been presented with that since it was created.

Senator TYDINGS. Is there such a problem in New York State?

Judge BROMLEY. I do not believe there is. I do not believe there has been that kind of a problem, at least for the long number of years that I have been at the bar, although I know it has existed in the federal system.

Now, of course, we have mandatory retirement, and I think that has aided a great deal. Although I think it also has unfortunate results as you will see when our chief judge comes before you this afternoon. He is about to be compelled to retire although I believe he is just at the height of his powers.

However, he can become an official referee of the court of appeals, if he wishes to.

Senator SCOTT. To which of the following would you attribute the fact that you have no matters before you pertaining to retirement for disability: The mandatory retirement provision, the mechanics of the court on the judiciary system, or the lack of basis for complaints regarding disability?

Judge BROMLEY. I think it is due to the first and last of those three.

Senator SCOTT. In other words, there hasn't come to the attention of your court any evidence of judicial disability arising prior to this period of mandatory retirement?

Judge BROMLEY. Not that I am aware of.

Senator SCOTT. You haven't had occasion, I take it, to use any system of screening since you have not so far provided for convening a court on the basis of citizens complaints. I have in mind the reference to charges which might be frivolous or silly or based on some

form of bias or some other motive. There is no need in your mind in your court for a screening system?

Judge BROMLEY. I think we have a screening system which resides in the rules requiring a preliminary determination. For all that I know, and only Judge Desmond can tell you when he comes here today, there may have been such preliminary determinations of which I have no knowledge, because I have never served on the court.

Senator SCOTT. That is all I have, Mr. Chairman. Thank you, Judge Bromley.

Senator TYDINGS. We certainly appreciate your being with us this morning, Judge Bromley, and your testimony, I think, will add a great deal to our formulation of Federal policy hopefully next year some time.

Judge BROMLEY. I appreciate the opportunity, again, and I thank you.

Senator TYDINGS. The Honorable Thomas F. McCoy, administrator of the courts of the State of New York.

We are delighted to welcome you this morning before this subcommittee, Mr. McCoy.

Mr. McCoy is the secretary of the New York State Judicial Conference. He succeeded to the post of State administrator in 1960 after serving as counsel to the judicial conference. Mr. McCoy is a graduate of the Harvard Law School, practiced law with the firm of Hodges, Reavis, McGrath & Downey before becoming involved with the administration of the New York court system, which is one of the great court systems in our Federal system.

We will be delighted to hear from you at this time, Mr. McCoy.

STATEMENT OF HON. THOMAS F. MCCOY, ADMINISTRATOR OF THE COURTS OF THE STATE OF NEW YORK AND SECRETARY OF THE ADMINISTRATIVE BOARD OF THE JUDICIAL CONFERENCE

Mr. McCoy. The matter we meet to discuss this morning is one, we will agree, that yields to few others in its relative importance. Concerned as it is with the internal well-being of the judicial system and the assurance to the public of a sense of well-being, it is a worthy subject for consideration and resolution. Since meeting in New York with Senator Tydings and Mr. Rothenberg, I have discussed this general subject with some judges and lawyers, with lay people, and my own staff. I have attempted to review the available literature on the subject. It is the consensus that, in the interest both of the public and the bench itself, an apparatus should be provided which will safeguard those interests. It is to the nature of this apparatus that I would address my remarks.

In New York State, as this subcommittee is aware, discipline or removal of judges may be accomplished, pursuant to the constitution, by impeachment or removal, by action of the court on the judiciary and, with respect to certain local courts, by the appellate divisions of the supreme court. It is fair to state, however, that the only processes utilized have been the court on the judiciary and the appellate divisions whose power extends to removal for cause or retirement for disability.

By and large, I would say that these institutions are well suited to the court structure of the State of New York and are in accord with the administrative procedures enacted for the court system.

I would suggest, however, that the overall procedures could be improved by the establishment in each judicial department of a screening committee which should have both judicial and lay members, in my judgment, not more than five, appointed by the appellate division. It would be empowered to receive and investigate complaints (including those relating to health and incapacity) and summon witnesses. It might also be empowered to reprimand judges but, in any event, could make findings of fact and recommendations to the appellate divisions or chief judge concerning the matter. This screening committee, so-called, would be an adjunct of the court on the judiciary and the appellate divisions. To my mind, it should properly be a part of the departmental director's office for budgetary and administrative purposes.

By a parity of reasoning, I believe that this recommendation could be adapted to the Federal system. For example, in each of the judicial circuits, a screening committee could be constituted and appointed by the court of appeals to receive and investigate complaints. If legislation was required to accomplish this, legal provision should also be made for the establishment of a court on the judiciary to implement, where necessary, the recommendations of the screening board. Because of the more centralized administration of the Federal system, I would also recommend that the screening committees be attached to the administrative office of the courts for budgetary and administrative purposes only.

In making these recommendations, I have two motivations: First, the people, for whom alone the courts exist; second, the image of the courts and their judges, their enhancement, and, yes, their protection. Let me explain. I do not believe that our attention is only directed to the venal or corrupt judge. Rather, we are also concerned with the unfit judge, the disabled judge, the lazy or senile judge who, for whatever reason, does not or cannot carry his share of the judicial burden and thus impedes the disposition of court business.

To attempt to remedy these latter judicial faults by impeachment is both cumbersome and an anachronism. Corruption or venality is not an issue in the great bulk of cases. What is involved is the administration of the courts and the administration of justice. I submit that these matters are properly within the sphere of those charged with the administration of the courts. Granted the proper machinery, they can achieve the desired ends, in a proper case, without subjecting the unfortunate judge to the public spectacle of impeachment from which, even if absolved, he bears the scars forever.

As a concomitant of the foregoing recommendations, I would also recommend to the subcommittee that it consider the advisability of a grant of a disability allowance to those judges who, by reason of disability or illness, may be deemed unfit to continue to serve in office or who might tender their resignations if such an allowance was available to them. Such a disability allowance is available in New York State under certain conditions, such as voluntary petition and resignation by a justice of the supreme court and also upon retirement of a judge or justice for disability by a court on the judiciary.

I commend the subcommittee for its attention to and concern with this important matter and tender to you my assistance on achieving the ends we all desire.

Senator Tydings, Senator Scott, to my mind this matter that we discuss this morning is one that I think we will all agree yields to few others in its importance. It is concerned with the internal well-being of the judicial system and, just as importantly, the assurance to the public of a sense of well-being within that system.

Since meeting last month with Senator Tydings and Mr. Rothenberg in New York, we have all had reason to look at this matter anew.

I have discussed it with lawyers in New York and judges, lay people, and people on my own staff. I have also discussed it with some representatives of the Trial Judges Association of the United States, and I think it is the consensus that, in the interest of the public and the bench itself, some apparatus should be provided generally to safeguard the interests both of the bench and the public.

In New York State, as this subcommittee has heard from Judge Bromley, discipline and removal of judges may be accomplished pursuant to the constitution by impeachment, by removal by action of the court on the judiciary and, with respect to certain local courts specified in our constitution, by the appellate divisions of the supreme court.

It is fair to state, I think, and I think Judge Bromley made this point, that the only processes utilized to date that I know of have been the court on the judiciary and, in some instances, the appellate division.

I should digress at this point. A question was asked of Judge Bromley about the standards set up for judges. Apart from the canons of judicial ethics, I should point out to you there are certain rules of the administrative board of the judicial conference which relate to political activities of judges, for example, and also there are rules of the appellate divisions which relate to certain activities.

As Judge Bromley has reviewed the history of the court on the judiciary and some of the other procedures for disciplining and removal of judges, I find that I must agree with him that by and large these institutions are certainly well suited to the court operation in New York in view of its administrative structure.

But I have always been struck, and here I have to disagree a little with Judge Bromley, by the fact that I think there is a big gap in our procedures. I would suggest that, within the framework of our own State, the overall procedures could be improved by the establishment in each judicial department, and we have four departments in this State, as you know, of a screening committee manned by both judicial and lay members—in my judgment, not more than five—and these would be appointed by each appellate division.

Such a screening committee, somewhat like California, would be empowered to receive and investigate complaints, including those relating to health and incapacity of a judge, and to summon witnesses. It might also be empowered, and this would be a matter of policy, to reprimand judges; but, in any event, it could make findings and recommendations to the appellate division or to the chief judge with respect to the matter, whether it should die there or go further, either to the court on the judiciary or to the appellate division.

This screening committee could also be an adjunct of the court on the judiciary just to obviate the kind of statement that Senator Tydings made to the effect that "isn't the court really acting as prosecutor and judge."

To my mind this screening committee and any staff it might need should properly be a part of the departmental director of administration's office. Certainly for budget purposes.

By a parity of reasoning I believe that this recommendation could be adapted and adopted in the Federal system, without any constitutional requirement for legislation. I think such a screening committee could be set up in each of the judicial circuits, possibly appointed by the court of appeals, to receive and investigate complaints. If legislation was required, it certainly should include, again as Judge Bromley I think suggested, the establishment of a court on the judiciary within the Federal system. Because of the more centralized administration of the Federal system, I would suggest that the screening committees, whatever staff they have, be attached to the administrative office of the Federal courts.

On making these recommendations—and they are very simple ones but I think they are almost necessary—I have two motivations. The people for whom the courts exist and secondly the courts themselves and their judges and their protection.

As I have discussed with our judges and members of the subcommittee, I don't think we are so much concerned in this context with the venal or corrupt judge. I think adequate machinery exists to take care of these people. We are concerned and perhaps primarily concerned with the unfit judge or the disabled judge, the lazy or the senile judge who doesn't carry his share of the judicial burden and impedes the progress of cases through the courts.

I think to remedy the latter judicial faults by impeachment is cumbersome and an anachronism. What is primarily involved is administration of the courts, not venality or corruption and these matters should properly come within the purview of those charged with administration of the courts.

As a concomitant to these recommendations I would also recommend to the subcommittee that it consider the grant or the advisability of a grant of a disability allowance to those who by reason of illness or disability are deemed unfit to continue to serve in office or who, under proper circumstances, might tender their resignations or apply for retirement if such an allowance were available to them. Such a disability allowance is available in New York under certain conditions.

As a matter of fact, there is legislation pending in our legislature now to extend it to other courts which are now not covered. If anybody is interested in that, you can have it.

This is my statement. I certainly will tender any assistance that we may render to you in your consideration of this important problem.

Senator TYDINGS. Thank you, Mr. McCoy. I notice in your proposal you suggested that the commission should have a lay member or members, although appointed by the judiciary, and not solely members of the judiciary. Why should there be a layman or lay member on a screening committee?

Mr. MCCOY. For a variety of reasons. One gain is this image business. Secondly, I think that—

Senator TYDINGS. By image you mean what the public thinks of it?

Mr. McCoy. Yes. I think some times the public has the idea that this is all a closed corporation of some kind where the lawyers and the judges are in some sort of mystic band. Maybe it is not necessary, but I do think for public consumption it should be there. That may seem like a weak reason but—

Senator TYDINGS. Do you think there is any problem of the lay members dominating the judicial screening committee?

Mr. McCoy. No. I think it might be the other way around, at least in the beginning until they get their feet wet. I would think the bulk of the members, if there are five, certainly should be members of the legal profession or the judiciary.

Senator TYDINGS. In your present office, do you have any complaints that come in on judicial conduct to the administrator of the courts?

Mr. McCoy. Yes.

Senator TYDINGS. Who processes them?

Mr. McCoy. We transmit them to the appropriate appellate division.

Senator TYDINGS. You just transfer them to the presiding justice of that department or that appellate division?

Mr. McCoy. Yes.

Mr. TYDINGS. Do you know what happens to the complaint then?

Mr. McCoy. I would say, with some local variations, that an investigation is made of it and then a report is given back to our office as to what happened to it.

Senator TYDINGS. You do get a report back?

Mr. McCoy. Yes. Usually an informal kind of thing. This is where I think the screening committee would be helpful to the appellate division because the judges have other things to do besides investigating complaints. They have to dispose of cases. I think it would be desirable for them to have a staff or screening committee to help them.

One thing I should mention. In the State of New York, which is a very large court system, we have over 3,000 judges, ranging from the court of appeals down to the JP's and police justice. This is quite a sizable judicial establishment.

Senator TYDINGS. That is tremendous. How many complaints do you average in a year through your office? More than 100? Less than 100?

Mr. McCoy. I would say around 100 a year. Maybe one or two a week.

Senator TYDINGS. The majority of these, if you could categorize them into areas of judicial unfitness—would the majority of them be in areas other than corruption and venality?

Mr. McCoy. Absolutely.

Senator TYDINGS. What proportion of them would have to do with, say, physical or mental instability or unfitness?

Mr. McCoy. Very few. I think a great many of the complaints are generated by the fact that someone loses in a case. A complaint will come in—"I don't see how this could have happened, with all the evidence we presented" and that kind of thing. Fifty percent of the litigants are dissatisfied. This generates letters, not from attorneys but from the client who writes when he loses, "I can't see how it happened."

Senator TYDINGS. As you visualize your proposal, each screening committee would be an adjunct or part of a judicial division or judicial

department. You indicated that they should be staffed by the administrator of the courts. Would each committee have a secretary or somebody to help the judges or—

Mr. McCoy. Yes. In each department of our State there is a departmental administrator. There is an overall State administrator, there is also a local or departmental administrator. Each of these is attached to the appellate division. In that office, I would think, some attorney could be delegated to be the secretary of this screening committee. I wouldn't expect that the work would be that burdensome that he couldn't take it on in addition to his other work, but he might require some stenographic help.

Senator TYDINGS. As I understand it, now in each judicial department there is a power in the appellate division to remove an inferior court judge for cause?

Mr. McCoy. Yes.

Senator TYDINGS. I would assume that from time to time under the present system either the administrator in the appellate division or the presiding justice would have occasion to call an inferior judge in either to discuss a complaint or, if it were a serious one, perhaps to tell him that they were going to bring charges against him.

Mr. McCoy. I think that has happened; yes.

Senator TYDINGS. Would it be a fair statement to say that the fact that the appellate division has the power to remove an inferior judge means that the inferior judge might be more receptive to criticism about his conduct of office which didn't warrant an extreme penalty of removal?

Mr. McCoy. I think this is the cure, in many cases: the fact that there is the power of removal and the presiding justice or someone in the court calls him in and says something to him. I think this is great therapy.

Senator TYDINGS. Under your present system in New York, there is no such procedure, no such mechanism?

Mr. McCoy. I think there is; it is done informally. It is not done by reason of what is contained in the statute. I think if there are complaints against a judge, the presiding justice will send for him.

Senator TYDINGS. Even if he is a supreme court judge, not an inferior judge?

Mr. McCoy. Yes. I think a great deal of the cure is administered by direct contact.

Senator TYDINGS. Just for a few moments on a slightly different subject, because we have you before our subcommittee and because Senator Scott, who is here, is also interested in this problem; namely, the problem of sound management of your court system.

Senator SCOTT. Before you get into a different subject, might I ask one question on this one?

Senator TYDINGS. Certainly.

Senator SCOTT. The procedure that you suggest, Mr. McCoy, might, I think, be used in the case of a lazy judge as well.

Mr. McCoy. Yes.

Senator SCOTT. I assume there are no lazy judges in New York, but in the Federal courts where I have had some experience and then our State courts in Pennsylvania, there have been judges—I recall one who had a home in Bermuda which he lived in most of the year, and he became the best bicyclist in Bermuda and the poorest judge in

the eastern district. Yet there seemed to be no method for bringing him to account. He was a delightful gentleman. His hedonism exceeded his judicial zeal.

Then we have had in the common pleas courts judges whose vacations seemed rather lengthy. Perhaps a word from someone with authority to review such a judge that more than two vacations a year would be frowned upon might be useful, don't you think?

Mr. McCoy. I would think so. I think perhaps there ought to be some ground rules. The hours of court or such-and-such.

Senator SCOTT. Judges who suffer and stay there and do the work are sometimes quite bitter about the more peripatetic brethren.

Mr. McCoy. I think these are all problems of administration. I think in the interests of the court, those who do not have the 6-week vacation, and so forth, that some administrative control should be set up. Once the judges I think are apprised of it and that there is a mechanism for reviewing this kind of thing—a lot of it will clear up. I hope and I am sure that just as in New York there have been very few of these glaring cases—I am sure it would be so in the Federal system too, very few.

Senator TYDINGS. Let me ask you this, Mr. McCoy. How do you promulgate rules for, say, working hours or vacation assignments or vacation time within your judicial system in New York?

Mr. McCoy. Under our constitution, administrative supervision of the courts is vested in the administrative board which consists of the chief judge of the court of appeals, Judge Desmond, and the presiding justices of the four departments. They can establish policies for statewide application throughout the court system, and one of them is the establishment of rules governing the operation of the court system.

The appellate divisions are vested locally with very much the same kind of powers as the administrative board has statewide. So that in a particular situation, if the board doesn't think a rule should be applied statewide, the appellate divisions may apply such a rule locally.

In other words, they may promulgate a rule and apply it only within their department. So that you have two administrative features, perhaps—the overall State application of these rules and also local application.

Senator TYDINGS. Have rules been promulgated either on a statewide basis or in the appellate division relating to vacations, time, and hours a judge should spend on the bench?

Mr. McCoy. Yes. I will send those over as soon as I get back to the office.

Senator TYDINGS. Have you adopted any reforms or procedures within the last several years to cut down backlogs in the various courts of New York which you think could be adaptable to or considered within the Federal system?

Mr. McCoy. I think we are always seeking to cut down backlogs. I think this is an eternal search, both in the Federal system and in the State system. As a matter of fact, what we have done in New York here in the city is transferring judges from court to court to help cut down the backlog.

Senator TYDINGS. When I was here before you told me that you were having a 3-day or a 2-day conference of trial judges in New York.

Mr. McCoy. We are having that in June. This is called the Crotonville Conference of Judges. Every year we go and discuss matters relating to the administration of the courts, new laws, that kind of thing.

Senator TYDINGS. Has that been of material benefit to you, to the administration of justice in New York?

Mr. McCoy. I think it has been, yes, very much.

Senator TYDINGS. Have you utilized any data processing machinery within your big metropolitan areas as they are now doing out in Los Angeles, to cut down on the paperwork and speed up the administrative process, getting cases tried continuously without delay?

Mr. McCoy. What we have done, and I think it is a very small step—is that all our statistics are kept by data processing machines. What we hope to come to in the metropolitan area of New York is a master calendar system based upon electronic machinery which will set up calendars for all the courts within this particular area so that we will not be competing as we are now in the courts for the same lawyers every day. We will regularize the calendars, and so forth.

Senator TYDINGS. Have you devoted any time yet to the preparation of certificates of readiness?

Mr. McCoy. Yes.

Senator TYDINGS. You do have those?

Mr. McCoy. Yes. We have had them for 5 or 6 years.

Senator TYDINGS. Do you require the major law firms who generally handle defense work to sign them and then to be in court regardless of the fact that they may have 15 or 20 lawyers in other courts defending—

Mr. McCoy. I think the certificate of readiness has outlived its usefulness. In the beginning it was fine. It cut down backlogs. It helped remove cases from the calendars.

Senator TYDINGS. You indicated that you compete for lawyers. What do you mean you compete for lawyers?

Mr. McCoy. Right in this area here we have the Federal court upstairs, the supreme court next door, we have the civil court, the criminal courts, and right in the metropolitan area we have the five counties, all with the same kind of courts plus Nassau, Suffolk, Westchester, and so forth. The same lawyers are trying the cases in all these courts every day.

If McCoy is in the supreme court here, he can't be in Kings or Queens or some other place. This is one of the problems we have, plus the trial bar and its size, the influx of cases generally. These are all factors that run—

Senator TYDINGS. What are you doing about that?

Mr. McCoy. This is what we hope to do with the calendaring by computer of the cases, to try and straighten this out so that we won't be competing.

Senator TYDINGS. What is the average backlog in the city courts here? In a civil case between the date of joinder of issue and the close of the trial, I mean.

Mr. McCoy. In Manhattan, I think it is the best of the metropolitan areas, it is 19 months now. This is only in negligence cases. Actually, that is not a bad figure—

Senator TYDINGS. Has that been reduced? Prior to that time was it more?

Mr. McCoy. It had been higher but not too much higher. Not as high, I should say, as the surrounding counties where, for example, out in Nassau where I live it was up around 50 months.

Senator TYDINGS. Is it still that high?

Mr. McCoy. No, it has come down since then, but just 3 years ago we added seven more judges out there which helped considerably.

Senator SCOTT. What proportion of your cases are tried by waiver of jury trial?

Mr. McCoy. In the negligence cases, and this is the only area where the backlogs or congestion exists, I will give you a couple of figures. One is that for the most part juries are requested in those cases. By a funny twist or an ironic twist, about 95 percent of those cases are disposed of before the jury ever comes in with a verdict. This is what motivated Judge Desmond about a year or so ago to call for a new dialogue on the use of the jury. In other words, he felt that perhaps the time had come when we ought to consider whether the jury is serving its purpose.

Senator SCOTT. The jury then is often being used for leverage by one side or another?

Mr. McCoy. I think this is the suspicion; yes.

Senator SCOTT. Then perhaps there are judges who are rather insistent that a matter be settled by compromise, pending the jury trial or even when the jury is out. Isn't that possible?

Mr. McCoy. Yes.

Senator SCOTT. I was the author of the waiver of trial by jury in Pennsylvania State.

Mr. McCoy. There have been proposals in this State for modifications of the jury impact. For example, a couple of years ago there was a bill to obviate the harsh or so-called harsh effects of contributory negligence by instituting a rule of comparative negligence.

Senator SCOTT. The old Nevada rule.

Mr. McCoy. Yes. Just this year I think it was the Trial Lawyers Association in New York sponsored legislation to institute a rule of comparative negligence. However, they didn't go along with the concomitant of doing away with the jury.

Senator SCOTT. Is that now the law in New York?

Mr. McCoy. No. It is still contributory negligence as a bar. Though, as a matter of fact, I suppose any trial lawyer would tell you that what juries do is apply their own rule of comparative negligence.

Senator SCOTT. They have been doing it for centuries.

Senator TYDINGS. Mr. McCoy, we certainly appreciate your being with us and the interest that you have taken in this study and the fact that you took time out to meet with me several weeks ago. We appreciate your statement and your comments.

Mr. McCoy. Thank you.

Senator TYDINGS. Mr. Lester Goodchild, assistant director of administration for the first judicial department.

Mr. Goodchild, as I understand, you are presenting a statement submitted jointly by the Honorable Bernard Botein, presiding justice of the first department, and the Honorable Leland L. Tolman, director of administration for the first department.

(The statement referred to follows:)

**STATEMENT OF HON. BERNARD BOTKIN, PRESIDING JUSTICE,
FIRST JUDICIAL DEPARTMENT, AND LELAND L. TOLMAN,
ESQ., DIRECTOR OF ADMINISTRATION, FIRST JUDICIAL DE-
PARTMENT, SUBMITTED BY LESTER GOODCHILD, ESQ.**

The authors of this statement are the Presiding Justice and the Director of Administration of the Appellate Division, First Judicial Department, which contains a single judicial district composed of the counties of New York and the Bronx, which are two of the five counties of New York City.

It is one of the four judicial departments into which the State of New York is divided for purposes of judicial administration. Each judicial department has one or more of the State's 11 judicial districts within its jurisdiction. Each judicial district contains one or more of the State's 62 counties (see attached map of judicial departments and districts).

Located within the First Department, in addition to the Appellate Division, are two Surrogates' Courts, the Supreme Court, First Judicial District, the Family Court of the State of New York within the City of New York, the Civil Court of the City of New York and the Criminal Court of the City of New York. The last-mentioned three are city-wide in operation. The judicial manpower of these courts is as follows:

	Total judicial officers	Resident judicial officers, 1st department
1. Appellate division.....	8	7
2. Supreme court.....	49	49
3. Surrogates' courts.....	3	3
4. Family court.....	33	17
5. Civil court.....	95	54
6. Criminal court.....	78	39
Total.....	266	169

The 169 judicial officers who are residents of the First Judicial Department, to a greater or lesser degree, are under the administrative supervision of the Department. By far the strongest means of administrative control is the power to remove or retire from judicial office. This applies on the Appellate Division level in the First Department only to resident judges of the Civil and Criminal Courts of the City of New York.¹ The judicial officers of the remaining courts, although they can be removed or retired only by the statewide Court on the Judiciary, are subject to several other important direct or indirect administrative controls by the Department or its Presiding Justice, including (1) inter-court and intracourt judicial assignment, (2) recommendation for certification as retired justice of the Supreme Court, (3) convening the Court on the Judiciary to seek removal or retirement, (4) quarterly reporting of undecided matters and other statistical reports of judicial output, (5) retirement of Supreme Court Justice for disability with $\frac{2}{3}$ of annual salary, and (6) review and investigation of all complaints concerning resident judicial officers in the Department which are referred to the Office of the Director of Administration. Each of these is discussed below.

In addition, and in collaboration with the Appellate Division, Second Department, the First Department exercises day-to-day administrative supervision of the three city-wide courts, such as general assignments of judges, budget review, overall rules, etc.

INTRACOURT ASSIGNMENTS

The various parts of any particular court have their own unique or challenging features, frequently requiring fitting the right judge to the part for which he is best suited or, conversely, keeping the wrong judge from receiving an unsuitable assignment.

Experience has shown that certain judges are unable adequately to cope with the workload of particularly busy parts of a court, and sometimes prefer to avoid such assignments. On the other hand, the same judges may be superb when functioning in the more leisurely trial parts of the court, or on other less pressing

¹ New York State Constitution, Article 6, § 22(1), Code of Criminal Procedure, § 132.

assignments. Intelligent application of the intracourt assignment powers can do much to avoid critical situations in this area.

INTERCOURT ASSIGNMENTS

The Appellate Divisions as the administrative supervisors of the trial courts have been given the power under State law temporarily to assign judges of one court to other courts.³

The authority, for example, to assign a Civil Court judicial officer who has an extensive criminal law background, interest or experience to a Criminal Court, or to assign to the Civil Court a judge of the Family Court who is an excellent lawyer but lacks the elements to deal sensitively with the challenging family and juvenile problems presented in that court, can be of great assistance in the proper administration of a large court system.

RECOMMENDATION FOR CERTIFICATION AS A RETIRED JUSTICE

New York requires the retirement of all New York City judicial officers at age 70.⁵ However, Supreme Court Justices may be continued as certified Justices upon being certified as being mentally and physically able to perform judicial services which are deemed to be necessary by the Administrative Board of the Judicial Conference.⁴

As a practical matter, each Appellate Division submits the names of Justices in its department for certification. This offers the various Appellate Divisions the opportunity to screen unfit persons and deny or condition the endorsement which will enable continuation in office after 70 years of age.

CONVENING THE COURT ON THE JUDICIARY

The New York State Constitution empowers the Presiding Justice of each Appellate Division to convene the Court on the Judiciary, which has removal powers.⁵ Obviously, this is a powerful administrative device and strengthens the Appellate Division in all its dealings with judicial officers subject to removal by the Court on the Judiciary, *i.e.*, the judges in the Supreme, Surrogates and Family Courts.

STATISTICAL REPORTS OF JUDICIAL WORK

Pursuant to the Rules of the Administrative Board, the Appellate Division, First Department, requires each judicial officer to submit quarterly reports of all cases which have been finally submitted and remain undecided for a period of 60 days.⁶ Other statistics furnished the Appellate Division show the daily work of all of the judges. Upon receipt, summaries of these completed reports are reviewed by the Presiding Justice. These procedures act as an early warning of judicial delay in deciding cases and of other deficiencies. Thus, they minimize complaints based upon them.

RETIREMENT FOR DISABILITY

A Supreme Court Justice can retire voluntarily (with a special disability allowance of two-thirds of his judicial salary) by approval of his Appellate Division, upon his showing that he is incapacitated from performing his judicial duties.⁷ The current legislative session is considering bills sponsored by the judiciary to extend this provision to the judges of the other courts of New York City and the State.⁸ The special disability allowance continues until the end of the judge's elected or appointed term, or until he reaches the age of seventy, whichever occurs first. A similar provision applies to judges retired from office for disability by the Court on the Judiciary.⁹ It has been suggested that this little-used procedure might be employed to obtain the retirement of any judicial officer whose judicial misconduct might have an emotional or physiological basis, such as alcoholism.

³ New York State Constitution, Article 6, § 26.

⁴ *Ibid.*, Article 6, § 25(b).

⁵ Judiciary Law, § 115.

⁶ New York State Constitution, Article 6, § 22(d).

⁷ Article I, Rule 2, of the General Rules of the Administrative Board of the Judicial Conference, effective September 1, 1962.

⁸ Judiciary Law, § 25.

⁹ Senate Intro. 3109, Point 3218 pending in 1966 New York Legislative Session.

¹⁰ Judiciary Law, § 25-a.

RULE-MAKING POWER

In their administrative capacity, the Appellate Divisions have been given broad powers to supervise the administration and operation of the courts in their respective departments and adopt such rules as are necessary to carry out these powers.¹⁰ One example of the effective exercise of this power is a rule, jointly enacted by the Appellate Divisions for the First and Second Judicial Departments which prohibits all members of the judiciary in the departments from directly or indirectly participating in charitable fund raising enterprises.¹¹

COMPLAINTS AGAINST JUDICIAL OFFICERS

Background

The Administrative Board of the Judicial Conference (comprised of the four Presiding Justices of the Appellate Divisions and the Chief Judge of the State of New York) is empowered to establish standards and policies relating to complaints and criticisms with regard to the administration of justice in the unified court system of the State of New York.¹² The Board, soon after its creation under court reorganization in 1962, established the policy of referring all complaints concerning the administration of justice to the appropriate Appellate Division. There is some evidence that the publicity given to court reorganization and the establishment of the Administrative Board of the Judicial Conference has encouraged the submission of complaints, and has substantially increased the volume in some parts of the State, including New York City. This increase has led to reconsideration of the Administrative Board's policy and a proposal which will be set out later in this report.

Under the current policy of referral to the Appellate Divisions, the Office of the Director of Administration, on behalf of the Appellate Division, First Department, has processed over 200 complaints since January, 1965 to date. Of these, a little over 20% were directed specifically against a judicial officer. An informal and unofficial report from the courts in the First Department indicates that each court also received and processed complaints in addition to those referred to it by the Appellate Division, as follows:

	Number	Percent of complaints involving conduct of judicial officers
Supreme court.....	50	15
Surrogates courts.....	4	25
Family court.....	300	10-
Civil court.....	88	10-
Criminal court.....	5-10	50-

Current appellate division procedures

All complaints received by the Appellate Division from the Administrative Board, the various departments of the City of New York, the Presiding Justice, or directly from a complainant are incorporated into a central file in the office of the Director of Administration. The complainant and the party forwarding the complaint are sent a letter of acknowledgment. Oral complaints are not generally accepted. Personal interview with the complainant is discouraged at this early stage, unless unusual circumstances dictate otherwise. As a general policy, almost all complaints are initially referred by the departmental Director of Administration to the Administrative Judge of the Court involved in the complaint. Occasionally, the letter referring the matter to the Administrative Judge suggests a disposition that might be considered but generally it merely requests comments from him. Because a very high percentage of the complaints reflect no more than the usual dissatisfaction of disgruntled litigants seeking to obtain a judicial review of an adverse decision, most replies from the Administrative Judges indicate their inability to do anything regarding the matter except to advise the complainant to file an appeal. Upon receipt of this type of reply, the complainant is so informed and the complaint file is closed. Several complaints have involved the conduct of a judicial officer which led the Administrative Judge to require the judge complained

¹⁰ New York State Constitution, Article 6, § 28 and Judiciary Law, §§ 214 and 216.

¹¹ Special Rule of the Appellate Divisions, First and Second Departments, dated November 7, 1962.

¹² Judiciary Law, § 212(6).

of to appear before the Administrative Judge to discuss the situation. The Appellate Division has also held conferences with such judicial officers concerning alleged conduct unbecoming of their office. In general, admonition of this kind suffices to prevent recurrence of the conduct complained of or otherwise correct the condition.

Proposed appellate division procedure

Although the present procedures are not inadequate, the greatly increased volume of complaints has required proposing a more formalized approach to handling complaints. The Presiding Justice of the Appellate Division, First Department, recently submitted a proposal to the Administrative Board of the Judicial Conference suggesting a new policy concerning the handling of complaints. The new procedures are set out in the attached chart. Briefly they involve—

(1) The establishment in each appellate division of a Judicial Complaint Review Board, to be appointed by that Court and to be responsible to it. No legislation is necessary to accomplish this since it would fall within the ordinary administrative powers of the Appellate Division.

(2) Each Board would process all complaints involving courts and judicial officers under its jurisdiction and, if necessary, investigate and hold hearings.

(3) After completion of the processing, the Board could dismiss the complaint, defer action or arrange for consideration of the case by the appropriate removing authority, *i. e.*, the Appellate Division or the Court on the Judiciary. The major advantages of this new system would be—

(1) To formalize and centralize the processing of complaints in each Appellate Division with an effective procedure and staff.

(2) To create an intermediate step between a complaint of judicial misconduct and the exercise of the power of removal of judicial officers.

(3) To establish a continuing investigative body for the processing of complaints in place of an *ad hoc* approach.

(4) To assist the authorities having the power of removal by providing them with a documented case.

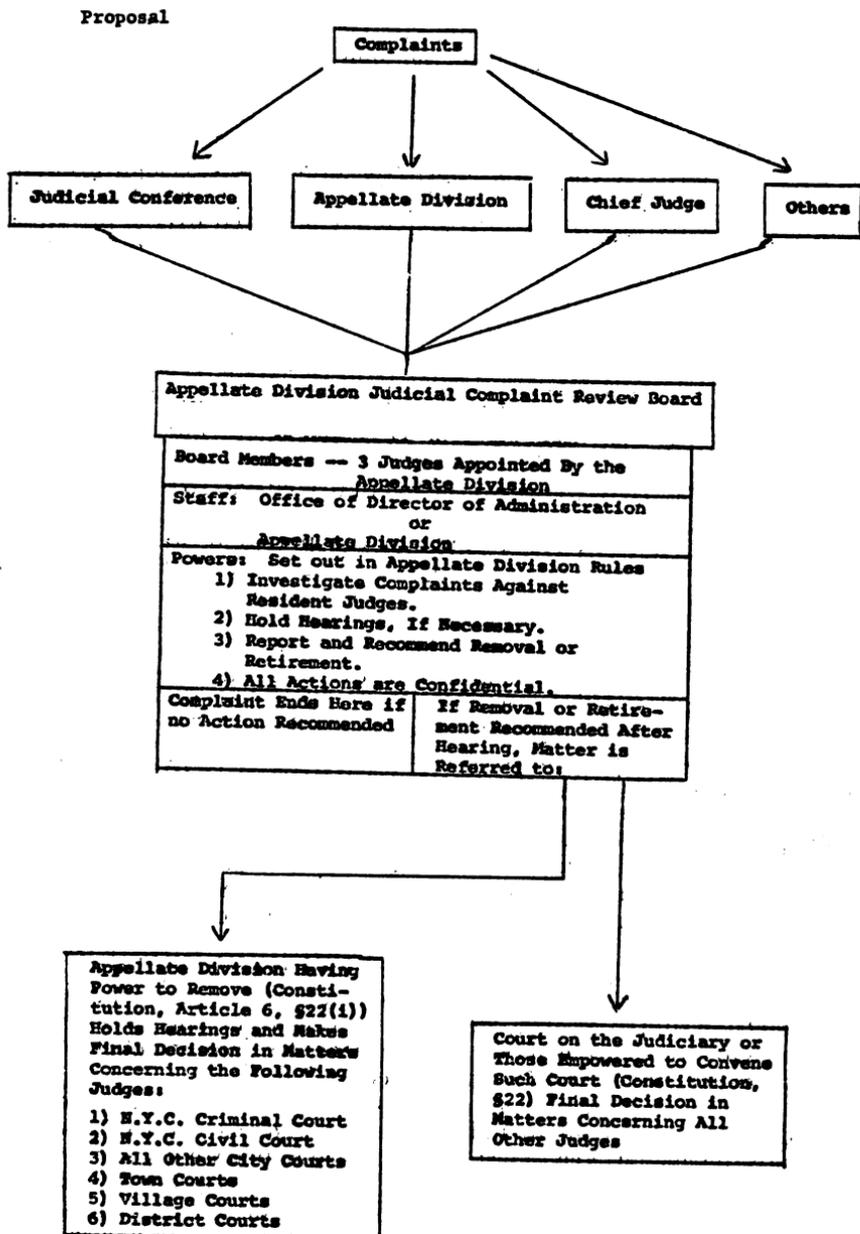
(5) To increase public confidence in the integrity of the judiciary because of the public knowledge that the Board, which could be composed of trusted and distinguished citizens and public officials, is a continuing and active body concerned with judicial conduct.

(6) To bring about an increase, in appropriate cases, of voluntary resignations or retirements by incapacitated judicial officers as a result of the preliminary investigation of claims of physical and mental disabilities.

CONCLUSION

The experience of the First Department has been that the most effective processing of complaints against the judiciary or the courts must start with the establishment of a strong administrative arm for the courts. Through such an office centered as it is in New York City in the highest local echelon of the State court system, many procedures can be coordinated more effectively to deal with the varied difficulties and complaints that are certain to arise in this sensitive and important branch of the government. No single procedure, body or statute can be as effective as an adequately staffed professional administrative branch of the court working on a regional level, which with the backing of the judiciary and with broad supervisory powers, can be tailored to the varied problems that arise in this field in the locality. New York is fortunate that it has by statute established in each of its judicial departments as a result of the 1962 court reform just such an office for the administration of the courts.¹³

¹³ *Ibid.*, §§ 214, 215, and 216.



STATEMENT OF LESTER GOODCHILD, ESQ., ASSISTANT COURT ADMINISTRATOR, FIRST JUDICIAL DEPARTMENT

Mr. GOODCHILD. Senator, I didn't furnish you with some of my background, perhaps I ought to tell you now. I was formerly an assistant counsel to the judicial conference, mainly concerned with the area of training our town and village judges. I joined the judicial conference after practicing law upstate. I am a former police justice of a small village upstate. I joined the appellate division, first department, and now serve as the assistant director of administration. I appear here today to present a statement prepared by the presiding justice, the Honorable Bernard Botein, and our director of administration, Mr. Leland L. Tolman.

Mr. Tolman, I believe, is familiar to some of you, after having spent many years with the Federal judicial system.

Senator TYDINGS. I think for purposes of your testimony we will insert the entire statement, together with the exhibits, in the record and ask that you summarize the statement, with particular emphasis really on the last several pages of your statement on the proposed appellate division procedure. I think that that section which has to do with the history of the court on the judiciary and so forth—I think we have already heard sufficient testimony on that.

Mr. GOODCHILD. I have a chart in the prepared statement indicating the structure of our court system in New York State. I also brought a map along which you might care to look at which is in color. Our State is divided into four appellate divisions, which are the courts, below the court of appeals, our highest court. They have administrative powers and in each appellate division there is an office of administration headed by a director of administration who is appointed by the presiding justice of each appellate division.

As Mr. McCoy has indicated over the entire administrative structure of our courts is the administrative board of the judicial conference. It makes, as Mr. McCoy has indicated, general standards and policies applicable to the State as a whole.

Each appellate division has the day-to-day supervisory responsibilities of the courts. In my particular department, we have two judicial districts, one in the Bronx County and one in New York County.

As I have indicated in my statement, we have within the appellate division first department 49 supreme court justices, plus 8 additional judges of the supreme court, who are assigned to the appellate division by the Governor. We have 3 surrogates, 33 family court judges, 95 civil court judges and 78 criminal court judges.

Of that total judicial manpower, 169 are resident judges of the first department. I might indicate to you that as you can see from the map the city of New York contains two appellate divisions which jointly administer those courts which are citywide in operation. As to the 169 judicial officers who are residents of our department by far the strongest means of administrative control is the power to remove. The appellate division first department has the power to remove only resident judges, of the civil and criminal court of the city of New York, or in our case, in New York, 54 judges of the civil court and 39 judges of the criminal courts.

The judicial officers of the remaining courts, although they can be removed only by the statewide court on the judiciary are subject to

other important and indirect controls by the appellate division. I briefly set out in my report a summary of what these controls are. I would like to emphasize that it is from our administrative day-to-day operational level of the courts that we find that you need many kinds of, you might say, devices to administer the court.

You can't do it with a court on the judiciary alone. When you are looking at the removal of judges, I don't think you ever have any problem with a judge who is a misdemeanor. He is usually indicted, most times goes to jail, and it is very easy to remove this man. We have the more important problem of conduct short of that. What do we do there? I would like to show you what we do in the first department. We have a very important control in intracourt assignments. That is, within a court like the criminal court of the city of New York there are various parts of that court. It is very, very important to be able in our minds to see that certain judges are assigned to certain parts because of their particular background and experience. That is a very important power and administrative device.

In addition to that, as Mr. McCoy has spoken of, we have intercourt assignments. In other words, the appellate court has power to assign a judge from the civil court to the criminal court or from the family court to the civil court and there is quite a bit of that intercourt assignment going on.

In fact, in the first department we are just completing a study of our intercourt assignment policy and what we did as part of the study was to call in the various judges who, over a period of time were sort of experimentally assigned back and forth, to get their viewpoints.

We also called in members of the bar to see what they thought of the intercourt assignment project. We have not completed that study but I will be very happy to furnish the report when we do have it.

Another important administrative tool and something short of removing the judge is the recommendation for certification as a retired judge.

All judges in New York City are required to retire at the age of 70. However, the supreme court judges may be continued as certified judges for I think it is two, possibly three successive 2-year terms. I think they go up to the age of 76.

On a certificate by the administrative board, the highest administrative body in the State, that the man is physically and mentally able to perform his duties and that his services are necessary, these judges may be retained.

I don't think we have ever had any trouble saying that a judicial officer's services are necessary in New York State. I think we have an extreme shortage of judicial manpower in almost every branch of the court system in New York State. As a practical matter each appellate division submits the names of these justices to the administrative board for consideration for certification. This obviously offers a very good opportunity to screen at this point a judicial officer to see if he is fit to be certified as a retired judge. Our appellate division does just that. Each judge is considered by the appellate division, all the judges of the appellate division, as to his fitness for certification.

As has been indicated, our presiding justice in the first department is empowered, as all other presiding justices are empowered, to convene

the court on the judiciary. This is a very potent weapon and administrative device in carrying out our administrative duties. Obviously its existence is very important when a judge of the lower court or a supreme court judge is called before the appellate division to answer a certain charge. We also have an adequate, I think, statistical reporting system. We have two general types. One is a quarterly report of pending undecided cases, cases which haven't been decided for 60 days.

In addition we have a very detailed form filled out to show as to each judge of most of the courts—workload and what they do. This is summarized in our office, in the office of the director of administration and a summary is given to the presiding justice, so he knows what practically every judge is doing in our courts.

Senator TYDINGS. What do you do if a judge isn't cutting the mustard?

Mr. GOODCHILD. Call him in.

Senator TYDINGS. Has that happened on a regular basis?

Mr. GOODCHILD. Since we instituted the undecided pending case reports which we send out quarterly—

Senator TYDINGS. To all the judges?

Mr. GOODCHILD. Yes. We had a few who had some delays. But these have been eliminated, practically, plus the fact, you have to remember, this can be used in combination with some of our other devices. In other words, we had one judge who obviously couldn't handle the workload in a particular part of court. This showed up over a period of time, so we just didn't assign him to that part any more.

We use this combination with other things to remedy situations.

Senator TYDINGS. Are these records a matter of public record or not?

Mr. GOODCHILD. I suppose they are. We never publish them.

Senator TYDINGS. Suppose an inquisitive reporter came in and asked for them, would you give them to him?

Mr. GOODCHILD. We have never been faced with that problem, Senator. I don't know whether we would or we wouldn't.

Senator TYDINGS. I was just curious. Excuse me.

Mr. GOODCHILD. I don't know. I will say this. It certainly is no secret because it comes up through our administrative structure. We supply these report forms to each judge. He then supplies it to us through his administrative judge. I forgot to indicate that within our court system each court has its own administrative judge. He is in charge of the court.

Senator TYDINGS. How is he selected?

Mr. GOODCHILD. He is designated by the appellate division.

Senator TYDINGS. On his administrative ability or on seniority, which?

Mr. GOODCHILD. This is new. As you know, we only brought about our reorganization in 1962 and we were pretty much frozen to seniority as a criterion, but recently there has been some indication that this shouldn't be the only factor.

Senator TYDINGS. You mean you still use seniority as a basis?

Mr. GOODCHILD. We haven't had a change since the original administrative structure was set up in 1962. In other words, we sort of had frozen in for that period of time those judges who were

administratively entitled to it, shall we say, because of seniority plus other factors. When a new administrative judge is to be appointed, I think that some consideration and a lot of consideration will be given to the man's administrative ability.

Senator TYDINGS. Do you really think so?

Mr. GOODCHILD. I really think so; yes. In fact, the presiding justice of our department is talking about it quite a bit because we will be having some changes. As has been indicated, we do have provisions for retiring judges in New York State for disability. We have two sections of the law which allow for retirement. One would allow a judge to petition on his own for retirement to the appellate division and indicate what his disability is and that because of it he can't perform his duties. Then we are empowered to retire him at two-thirds of his salary.

We have, to my knowledge, never had such a petition. In addition, the Court on the judiciary can, if it considers a judge disabled after going through its regular removal procedures—can also, instead of removing him—can retire him under the law as a disabled judge and give him two-thirds of his salary. This continues, by the way, only during his term of office. We don't retire him for life. We just continue him until his term of office would have expired or until he reached age 70, whichever would occur first.

Senator SCOTT. After he reaches age 70 you can certify him for continued duty or for continued limited duty, can't you?

Mr. GOODCHILD. We don't have a limited duty power, but we do have the right to certify retired judges. This is only in our Supreme court and our court of appeals. We don't have any provision for retiring our lower court judges and continuing them after retirement as retired justices.

Senator SCOTT. You say here, "Supreme Court justices may be continued as certified justices upon being certified as being mentally and physically able to perform judicial services," and so forth. "As a practical matter, each Appellate division submits the names of justices in its department for certification." He has a chance for screening. After you have once certified him, isn't there a rather painful problem there as to whether to decertify him after that?

Mr. GOODCHILD. Obviously, it's painful.

Senator SCOTT. You certify him. Time passes. Time, as it must to all men, causes some deterioration. Do you have an arrangement for decertifying him after certifying him?

Mr. GOODCHILD. No; we do not.

It is questionable whether the section of the judiciary law which permits retirement for disability, applies to retired justices. It indicates that a judge may be continued for the balance of his elective term, and a retired judge is not elected, he is certified or continued in office by an action of the Administrative Board of the Judicial Conference.

Senator TYDINGS. I gather as a practical matter that that provision is more or less worthless because it is never used, is that right?

Mr. GOODCHILD. The disability retirement? To my knowledge, it hasn't been. Although, as I have indicated in my report, we are giving serious consideration to the possibility that certain kinds of misconduct, which have a basis, may be something like alcoholism, or something, which is a sickness, so to speak, and has been so declared

as a sickness, might fall within that category, and we might be able to retire the justice.

Senator TYDINGS. What is the term of office for a supreme court judge?

Mr. GOODCHILD. Fourteen years.

Senator TYDINGS. Do they retire at the age of 70 on full pay?

Mr. GOODCHILD. No. It is based upon time in the retirement system and some formula and the retirement cost is shared both by the municipality in which he happens to be a judge, the judicial district—

Senator SCOTT. When that term of office is up, aren't justices of the supreme court of appeals elected for the same term? For your highest court?

Mr. GOODCHILD. The highest court; yes. The court of appeals; yes.

Some mention was made of the rulemaking power, and we have used the rulemaking power in the appellate divisions.

We have, in addition to the power of the administrative board to make general rules for the entire court system, we have power to make rules in each appellate division. As a matter of fact, we have taken one of the canons of judicial ethics and adopted it as a rule in the first department. That is the canon which prohibits a justice from directly or indirectly participating in charitable fundraising enterprises.

Senator SCOTT. Reverting to my other question, practically speaking, any lawyer elected to the bench after the age of 56 is unable to serve out his full term, isn't that right?

Mr. GOODCHILD. That's right. The term is 14 years. There have been cases where justices of New York State—I recall a case upstate where a judge was elected to a full term at age 68 and he was only in for 2 years, obviously. The latter part of the statement that I am presenting is devoted to the complaints against judicial officers which we handle in the first department. I will give you a background of how we do it in our office.

The administrative board of the conference, as has been indicated, is empowered to establish standards and policies relating to complaints and criticisms. This is part of their statutory power. I believe these are the exact words:

"Complaints and criticisms with regard to the administration of justice in the unified court system of the State of New York." The board, soon after its creation under court reorganization in 1962, established the policy of referring all complaints concerning the administration of justice to the appropriate appellate division.

There is some evidence that the notoriety and publicity attaching itself to court reorganization has greatly encouraged the submission of complaints. The volume has had a notable increase in New York City. This increase is what has led to a reconsideration of the administrative board's policy of referring to each appellate division.

Mr. McCoy has indicated the procedure of referral. In our department, the first department, we have received since January of 1965, which is when we started keeping an accurate record of what we were getting in because the volume started to indicate that it was quite an important item of our work, we received over 200 complaints. These come as referrals from the administrative board. They come directly from the complainants, mailed to us. Some are sent to the

mayor of the city of New York and he forwards them to us. They come from the Governor and he sometimes directly forwarded them to us, but generally the Governor forwards them to the administrative board and then it is sent on to us. Many are sent directly to the presiding justice of the appellate division who refers them to the director's office.

Of these 200, roughly 20 percent were directed specifically against a judicial officer. I have made an informal and unofficial survey of the number of complaints, in addition to what we handle in the way of complaints, which the other courts themselves handle directly. This is exclusive of what we refer to the courts under our jurisdiction.

In the supreme court they informed me that they receive around 50 complaints a year, 15 percent involving conduct of a judicial officer.

In the surrogate's court, they get four or five. It's a minor number.

The family court receives the largest volume, around 500 complaints, 10 percent of which relate to the conduct of a judicial officer. I might point out that the family court, as you know, handles the squabbles, family squabbles, so to speak. I don't know if a wife is ever satisfied.

Senator SCOTT. I put in years in that purgatory.

Mr. GOODCHILD. The civil court reports 88 a year, 10 percent against judges. The criminal court gets 5 to 10 a year.

Our present practice in the appellate division for handling complaints is as follows: They are directly sent to our office and incorporated into a central file. Then the complaint is generally forwarded to the administrative judge. We do not accept oral complaints, as a general rule, and we discourage personal interviews at this early stage.

As a general policy almost all complaints are sent to the administrative judge of the court involved. We very seldom suggest disposition. We usually send it to the administrative judge for information and comment. Because a very high percentage of these complaints usually involved a disgruntled, dissatisfied litigant, we usually receive a reply indicating that the only remedy in the case is to appeal.

Upon receipt of that type of reply we usually forward it on. We do not as a general rule review the particular court file of the case involved ourselves. We leave that up to the administrative judge to do.

Several complaints have involved conduct of judicial officers and have led to a recommendation by us that the administrative judge call in the judicial officer to discuss his conduct.

In addition, the presiding justice of the appellate division has also called in judicial officers to discuss their conduct. Although the present procedures aren't inadequate, the greatly increased volume of complaints suggested proposing a more formalized method of handling complaints.

Judge Botein recently proposed to the administrative board of the judicial conference a new method of handling complaints. I set out the proposed procedure in the chart which is attached to the statement. Briefly, Mr. McCoy has touched upon some of it, the proposal is that we would have in each judicial department a judicial complaint review board to be appointed and responsible to the appellate division. No legislation is necessary for this in New York State.

Each board would process all complaints involving courts and judicial officers under its jurisdiction and, if necessary, investigate and hold hearings. We do not do that at present. We do not hold hearings. We do investigate.

After completion of the processing, the Board could dismiss the complaint, defer action or arrange for consideration by the appropriate removing authority, either the appellate division having power to remove certain judicial officers or the court on the judiciary.

The major advantages of this system, some of which I know I will be repeating because Mr. McCoy has cited some—but I would like to give them to you because you have touched upon them. To formalize and centralize the processing of complaints in each department with an effective procedure and staff—I am particularly interested in staff because in addition to my other duties I have to generally process these complaints and they have become voluminous. It would create an intermediate step between a complaint of judicial misconduct and the exercise of the power of removal.

It would establish a continuing investigative body for processing of complaints in the place of the ad hoc approach. I might point out here that there have been complaints which involve the type of conduct which is a pattern kind of thing, and you don't walk into a courtroom and observe a judge once and then make a judgment as to his pattern. That kind of conduct has to—requires an investigation of some length and requires an investigation maybe over a period of a year, watching the judicial officer, his courtroom mannerism. We do not have that procedure and staff in New York State.

Senator SCOTT. You spoke of a pattern. I suppose you don't have any way of reaching a situation such as we have in Philadelphia: one court, where one of the judges automatically acquits everybody. Everyone waives trial by jury and he automatically acquits. Conviction is as rare as an earthquake in that court. This is a matter of the press continually reporting that this happens.

Some would say that a miscarriage of justice might well be involved there and yet it again involves a question of judicial discretion. Do you have any such problem or any way of meeting it?

Mr. GOODCHILD. We have that problem but I don't know if there is any way of meeting it. We do have the problem, especially in a large system with many judges, and you are bound to—by the way, our judges in New York City are appointed by the mayor to serve in the family and criminal court. Although there is a screening system set up, in the past it hasn't been as effective as possible so that the judiciary—

Senator SCOTT. You don't think it is necessarily the best system, do you? In your personal opinion, you don't think it is necessarily the best system, do you—appointment by the mayor?

Mr. GOODCHILD. Personally, I feel that the mayor, as well as the electorate in fact—in a large city such as New York City—cannot know very much about this particular officer. The screening system is very effective because the bar usually knows something about its colleagues and the judges who, if they are on the screening committee or have had something to do with appointing members of it, can make sure that certain people—only certain kinds of individuals are referred to the mayor for appointment.

Senator SCOTT. In your opinion, then, that would be a better system than having an appointment by the city council; is that right?

Mr. GOODCHILD. I have never considered that particular thing: appointment by the council.

Senator SCOTT. The reason I raise the question is that the home-rule bill for the District of Columbia which is pending in Congress, as I recall it, provided for the appointment of judges by the city council. I cited that as a reason for voting against home rule, though normally disposed toward the principle.

It seems to me that appointment by city council, many of whose members are lawyers and have their own law offices, creates a situation where any relation to justice thereafter might be purely coincidental.

Mr. GOODCHILD. I have no personal opinions on that. I came from upstate New York and in upstate New York we know a little more about the background of almost every candidate for judicial office on the ballot.

In a small town of 4,000 or 5,000 people, you get to know the lawyers in the community quite closely. In New York City it is a particularly difficult problem. They vote party line, I would say, on judicial officers.

Continuing with the advantages, this was mentioned, I think, by Senator TYDINGS, that we think this system would assist the authorities having the power to remove by presenting to them a documented case that might avoid the judge and jury and prosecutor combination which now unquestionably is in our court on the judiciary.

I believe it would increase the public confidence in the integrity of the judiciary.

Senator TYDINGS. You propose, I gather, that in that screening committee you would have a lay member as well as judges?

Mr. GOODCHILD. Yes. This proposal has been in the first department for over a year now for consideration. Originally there was some sympathy for only having judges and I think my chart indicates that because we only show three judges on it—on the judiciary complaint review board. But since then both Judge Botein and Mr. Tolman have considered that possibly it might be helpful to have a lay person or two on this board.

Senator TYDINGS. For the same reason that Mr. McCoy stated: public confidence?

Mr. GOODCHILD. Generally, public confidence—this closed-shop sort of thing.

Senator TYDINGS. You don't think if you had a layman on there he would dictate to the judges what to do?

Mr. GOODCHILD. No.

Senator SCOTT. The point is to have a layman who is highly respected in civic affairs, I would think.

Mr. GOODCHILD. Definitely. I believe that also this board might increase the number of voluntary resignations because a preliminary investigation of the type which would be conducted by the board would strongly indicate one way or another to the judge that it is highly recommended that he voluntarily submit his resignation.

The experience of the first department has been that the most effective processing of complaints against the judiciary or the courts must start with the establishment of a strong administrative arm for the courts. Through such an office, centered as it is in New York City, in the highest local echelon of the State court system, many procedures can be coordinated more effectively to deal with the very difficulties and complaints that are certain to arise in this sensitive and important branch of the government.

No single procedure, body, or statute can be as effective as an adequately staffed professional administrative branch of the court working on a regional level, which, with the backing of the judiciary and with broad supervisory powers can be tailored to the varied problems that arise in this field in the locality.

I think New York is fortunate that it has by statute established in each of its judicial departments as a result of court reform and reorganization just such an office for the administration of the courts.

I would strongly recommend that this structure which we have in New York State be adopted for the Federal system: a very strong administrative arm with varied powers and supervisory controls, not just one, such as removal. I think those are powers for the day-to-day administration of the courts, and to have people who are constantly looking into the methods and procedures of administration is much more helpful than just a pure removal body.

Senator TYDINGS. Thank you very much, Mr. Goodchild. I wish you would pass on our appreciation to Justice Botein and Mr. Tolman for their assistance and cooperation with us in this matter.

Henry L. King, Esq., representing the Association of the Bar of the City of New York. Mr. King was educated at Columbia College and Yale Law School and served as managing editor of the Yale Law Journal. Mr. King has been a member of the New York bar since 1952 and has been associated since the start of his practice with the firm of Davis, Polk, Wardwell, Sunderland & Kiendl. Mr. King has been a member of the firm since 1961. He has been a lecturer at the Practising Law Institute. Mr. King serves as a trustee of the Lenox School in New York City and will shortly assume the duties of president of the Association of the Alumni of Columbia College.

I might suggest we incorporate your remarks in their entirety into the record at this time, and I suggest you stress those areas which you think are particularly important. I think you have been here and heard a good deal of testimony so we would like to try to avoid a repetition.

(The following statement is a report of the Committee on State Courts of Superior Jurisdiction, Association of the Bar of the City of New York. Mr. King is chairman of the subcommittee that prepared the report.)

STATEMENT OF HENRY L. KING, ESQ., REPRESENTING THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

(The prepared statement of Mr. King follows:)

REMOVAL OF JUDGES FOR DISABILITY AND MISCONDUCT

This Committee has investigated the problem of judicial misconduct or disability as it pertains to New York State and, as a result of its investigation, has concluded that certain changes in the way the problem is handled in this jurisdiction are desirable and should be implemented.

Introduction

The subject of removal of judges has received much attention in recent years from bench, bar and legislatures. A number of states have proposed or are considering proposing constitutional amendments relating to the problem. The American Bar Association at its general meeting in Miami last August authorized a comprehensive study of the subject. The United States Senate has been holding hearings on the problem. The American Bar Association Journal and the

Journal of The American Judicature Society have carried numerous pertinent articles in the last three years.¹

The problem is to devise a fair and effective means to deal with judges and justices who cannot properly discharge their duties because of their age, incompetency, arbitrariness, judicial misconduct, extra-judicial misconduct or other breaches of judicial ethics.

The traditional method of impeachment has been found to be an inadequate solution. Impeachment is a legislative action generally brought by the lower house and tried by the upper house, with conviction requiring a two-thirds vote. Article 6, § 23 of the New York Constitution provides for removal of Court of Appeals judges and Supreme Court justices by concurrent resolution of two-thirds of each house and for removal of other judges by resolution of two-thirds of the Senate. Impeachment proceedings are cumbersome, often political, with no right of appeal. While we have been unable to compile data in regard to judicial impeachments in New York, it is fair to say that the process is a cumbersome one not often invoked; in the history of this country, only eight judges have been tried by the United States Senate and only four have been impeached. It has been reported that the average length of these trials was 16 to 17 days.

The ABA Committee on the Removal and Discipline of Judges, headed by Justice Miles F. McDonald of Brooklyn, reported that impeachment is an "inadequate" solution and that "A new or alternative method is not only recommended but is an absolute necessity." Senator Joseph D. Tydings, Chairman of the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary said in a speech to the National Conference of Bar Presidents on February 19, 1966 that "virtually every time that the impeachment machinery was set in motion it proved so unworkable and cumbersome that there was soon an attempt in the Congress to provide an alternate remedy." Bernard G. Segal of Philadelphia, chairman of the ABA Committee on Judicial Selection, Tenure and Compensation, has stated that that Committee concluded that—

"There is a critical urgency for an immediate comprehensive study, at both Federal and state levels, of the problems relating to the aged, the ill or otherwise infirm justice or judge or the justice or judge who for other reasons is not carrying out his judicial responsibilities."

There have been various proposals suggested or adopted to meet the problem of removal and to avoid the impeachment process. Compulsory retirement at a fixed age has been suggested. While this is a help, it does not deal with judges who should be retired early or for reasons other than age. Removal by action of the executive branch of government has been criticized because of the threat to judicial independence.² In some states, the problem has been treated as one of bar discipline. The Ohio and Wisconsin Supreme Courts have vested bar association grievance committees with authority to consider complaints for judicial misconduct. But this practice has been criticized as vesting too much authority in the organized bar. Further, it does not appear to be a satisfactory arrangement for practicing lawyers to present and try charges against their judges.³

There are two additional methods which have been adopted for handling the problem of removal and retirement which in the opinion of the undersigned provide fairly effective machinery. One may be called the "Special Court System" and another the "Commission System". Using New York and California as prototypes, each of these methods will be described in detail below.

The special court system: the New York prototype

By amendment to the Constitution effective January 1, 1948, New York created the Court on the Judiciary (Article 6, § 9, renumbered September 1, 1962 as Article 6, § 22, a copy of which is attached hereto). Under this constitutional provision, a judge or justice of the courts of superior jurisdiction in the State⁴ "may be removed for cause or retired for mental or physical disability preventing the proper performance of his judicial duties after due notice and hearing by a court on the judiciary." The Constitution also provides that judges of courts of lower jurisdiction such as the courts for the City of New York and for towns or villages elsewhere in the State, may "be removed for cause or retired for disability after due notice and hearing" by the Appellate Division covering his residence.

¹ E.g., 48 J. Am. Jud. Soc. 9 (February 1965).

² Within certain limitations and safeguards, the Governor in Massachusetts may retire judges because of advanced age or mental or physical disability.

³ See Phillips and McCoy, *Conduct of Judges and Lawyers* p. 144.

⁴ I.e., those of the Court of Appeals, Supreme Court, Court of Claims, Surrogates Court, County Court and Family Court.

The Court on the Judiciary is composed of the Chief Judge of the Court of Appeals, the Senior Associate Judge of the Court of Appeals, and one justice of each of the four Appellate Divisions selected by the majority of the justices of each of the Appellate Divisions. If the Chief Judge or Senior Associate Judge of the Court of Appeals cannot sit for reasons of disqualification or inability, the Court of Appeals must designate a judge or judges from that Court to act in his or their stead. The Chief Judge acts as a presiding officer of the Court.

The Chief Judge may convene the Court on the Judiciary upon his own motion and must convene it upon written request by the Governor, by a presiding justice of the Appellate Division or by a majority of the Executive Committee of the New York State Bar Association.

The Court on the Judiciary has power to designate counsel to conduct proceedings, to summon witnesses and to compel production of documents in advance of trial. By the rules of practice of the Court (adopted February 26, 1960), a copy of which is annexed hereto, the Court first determines preliminarily whether the complaint for removal or grounds for retirement state facts sufficient to constitute cause. If so, a statement of the charges is personally served on the respondent judge, who has twenty days to answer.

Under the constitutional provision, after charges have been preferred against a judge, but before any hearing is held, the Court must give written notice to the Governor and the Senate and Assembly of the name of the judge and the nature of the charges and the date set for hearing. If the legislature decides to proceed by way of impeachment, proceedings before the Court on the Judiciary are stayed pending determination of the legislature, which are exclusive and final. However, a proceeding by the Court on the Judiciary for the retirement of a judge for mental or physical disability is not so stayed.

Under its rules, the Court on the Judiciary may try any issue of fact or direct a hearing before any of its members, or before an official referee, to hear and report.

The affirmative concurrence of not less than four members of the Court is necessary for removal or retirement and the Court may disqualify a judge or justice removed from office from again holding any public office in New York. A judge retired for disability may thereafter receive such compensation as is provided by law. The Court in its discretion may suspend a judge pending determination of the charges against him.

In the more than seventeen years since creation of the Court it has been convened three times. The first, in 1959, resulted in a dismissal of the charges with censure. The other two cases resulted in removal from office.

A number of other states have adopted some variation of this "Special Court" plan either by constitutional amendment or by statutory enactment. These states include Alabama, Texas, Louisiana, New Jersey, Illinois and Alaska, and similar proposals are presently before the legislatures in Kansas, Ohio and Oklahoma. In addition, the American Bar Association in 1962 endorsed a model judicial article which includes such a "Special Court System".⁴

The "commission system": the California prototype

In 1960 the voters in California approved effective March 24, 1961 a constitutional amendment (a copy of which is attached hereto) providing for the formation of a "Commission on Judicial Qualifications." The Commission consists of nine members: five judges appointed by the Supreme Court (two from the intermediate Appellate Court, two from the base-line trial court and one from the trial court of limited jurisdiction); two laymen from the public appointed by the Governor with the consent of the Senate; and two lawyers appointed by the Board of Governors of the State Bar, which is an integrated bar. The members serve for staggered terms to provide continuity.

The Commission has authority to investigate and conduct proceedings against any California judge, including a judge of the Supreme Court. The duty of the Commission is to recommend to the Supreme Court for removal from judicial office any judge found by the Commission to be guilty of willful misconduct in office, willful and persistent failure to perform his duties, habitual intemperance, or disability of a permanent character seriously interfering with the performance of his duties.

The Commission employs an executive secretary and a legal stenographer. It meets regularly. It has jurisdiction to receive complaints from any source, initiate inquiries, communicate with judges about complaints and inquiries, conduct preliminary investigations and formal hearings, adopt findings and recommend removal and retirement to the Supreme Court. All complaints, investiga-

⁴ 47 J. Am. Jud. Soc. 11 (June 1963).

tions and hearings are confidential. However, if a recommendation for removal or retirement is filed with the Supreme Court, the record becomes public.

No members of the Supreme Court are eligible for appointment to the Commission, because the Supreme Court itself acts as an appellate body to review the actions of the Commission. The Supreme Court may take evidence itself and it has the final power to remove or retire a judge upon recommendation of the Commission.

Some statistics have been compiled showing the experience of the California plan after four years of operation.⁴ As of the end of 1964 the Commission received 344 complaints against judges. Of these, 118 required investigation. The rest were reported to be groundless on their face. As a result of action taken by the Commission, 26 judges have resigned or retired. It is interesting to note that over the same four-year period there were more than 1,000 judges in California. The allegations against the 26 judges included physical disability of the judge; habitual intemperance; impaired mental condition, including emotional instability, failing memory, inability to concentrate and comprehend and patterns of erratic and perverse behavior; and particular acts of misconduct in office.

In every instance except one where the Commission determined to recommend removal or retirement, the judge involved has either retired, if eligible, or has resigned. In only one instance was a formal hearing held, after which the Commission recommended to the Supreme Court the removal of the judge. The Supreme Court reviewed the proceedings and rejected the recommendation, disagreeing with the Commission that there was sufficient grounds to warrant removal of the particular judge from office.

Four other States are considering adoption of the California "Commission System". These are Colorado, New Mexico, Florida and Texas. The Florida and Texas legislatures have approved their plans, but voter approval in 1966 is required because constitutional amendments are involved. The Journal of the American Judicature Society, (Vol. 48, No. 9) included a comparative study of the proposals in those four states with that of California. For convenience, there is annexed hereto a photocopy of pages 174 and 175 of that Journal issue which presents in chart form the essential features of the "Commission System" in those states.

Evaluation and recommendation

Any system for removal or compulsory retirement of judges involves a delicate balance with the need to maintain judicial independence. In the view of the Committee, the best way to preserve this balance is to keep the removal process within control of judges themselves. It should be a prime objective of any system to assure against the possibility of removal or discipline merely because a judge or justice has rendered unpopular decisions. The less the executive or legislative branches have the ultimate determination, the more likely judicial independence will be maintained. In this respect both New York's Court on the Judiciary and California's Commission (dominated by the Judiciary) serve the public interest well.

There are features of the Commission System which have advantages over the Court on the Judiciary. The Commission has continuity. It has a small but permanent staff which can aid in hearing and sifting complaints. It has the prestige and authority to eliminate groundless grievances without publicity. If cause appears to exist, it may hold hearings on notice to the accused judge who may be represented and heard, all in confidence. If the Commission finds no cause after hearing, the proceedings are dismissed without adverse publicity.

On the other hand, the New York Court on the Judiciary suffers from lack of continuity and lack of a staff. The Court is convened on an ad hoc basis, with much publicity before, during and after hearing. There is no opportunity for investigation, confrontation and hearing on a confidential basis that would protect the respondent judge in the event the charges are unfounded. Judges are tried by the same tribunal which formulates the charges, conducts the investigation and prosecutes the case, with no right of appeal. Complaints about judicial misconduct are relegated initially to bar association committees of practicing lawyers ill-suited to investigate adequately.

It is the recommendation of this Committee that a modified commission-type system be adopted in New York by constitutional amendment. Specifically, it is recommended that the Court on the Judiciary be reconstituted as a permanent court with permanent staff. The Court should consist of eight judges, four Ap-

⁴ 48 Journal of the Amer. Judicature Society 170, 171.

pellate Division justices, one to be appointed by each of the Appellate Divisions, and four judges or justices, one from each of the four Judicial Departments, to be appointed by the Court of Appeals from the Supreme Court, Surrogates Court or Court of Claims. No Court of Appeals judge should be a member. The Court on the Judiciary should have the same powers and functions as that of the California Commission, that is, to receive, evaluate, investigate, and hear cases of alleged judicial misconduct or disability of any judge or justice in the state, and to recommend to the Court of Appeals appropriate action. If any member of the Court on the Judiciary sits on the same court as the respondent judge, he should be relieved of any duty to participate in the determination with respect to that respondent judge. Thus, in some cases there will be only seven members of the Court eligible to participate. An affirmative vote of a majority of the judges sitting, but in no event no fewer than four, should be required to decide against the respondent. Staggered terms for the eight members should be established in order to provide continuity.

All deliberations of the Court on the Judiciary should be in confidence unless the respondent demands in writing that the hearing be made public. Appropriate rules should be adopted by the Court on the Judiciary with the approval of the Court of Appeals to protect the rights of the accused judge or justice to a fair hearing. The Court of Appeals should have the right and duty to hear and determine each case presented to it from the Court on the Judiciary and its decision should be final. There should be no power in the legislature to override that determination or to suspend or stay the Court's deliberation and decision, as presently exists under the New York Constitution.

The Committee considered the question of whether laymen or practicing lawyers should be eligible for membership on the reconstituted Court on the Judiciary and concluded that they should not be. As stated above, judicial independence is best achieved when there is no lay or non-judicial influence involved in determining a judge's fitness. We believe that it is wholly appropriate for judges to judge themselves. Further, lawyers should not be put in the obviously embarrassing position of rendering formal judgment on judges before whom they practice, a point which makes bar association investigations of the judiciary particularly difficult.

There are of course arguments against the permanent commission-type of plan. These were marshaled at the time that the California plan was under consideration in 1959 and 1960. The arguments against the plan have been summarized by Jack E. Frankel, Executive Secretary of the California Commission, in an article in 49 ABA Journal 166 (Feb. 1963). Mr. Frankel there points out that many California judges were sharply critical of the proposed Commission. The arguments included the following:

It was said that there would be secret investigations by the Commission before trial, resulting in the formation of an opinion by the Commission before the Judge involved had a chance to be heard.

It was charged that since any citizen could make an accusation, judges would be at the mercy of cranks.

It was claimed that the plan overlooked unworthy legislators, governors and other state officials where the need was as great as that respecting judges.

It was alleged that existing procedures for misconduct were adequate and had not been used more often because there had been no reason to do so.

It was claimed that the procedure would be an unwarranted infringement on the right of the electorate to select their own judges.

Mr. Frankel further pointed out that the Conference of California Judges ultimately endorsed the change 364 to 34.

In the judgment of this Committee, the arguments against the California system do not outweigh the advantages which can be derived from the Commission plan, as modified in the recommendations set forth above.

It is recognized that a new Court on the Judiciary would have to be established by Constitutional amendment in New York. The Committee believes that while there are variations in detail which might well be made in the suggestions contained in this report, there are several fundamentals which should be recognized in any such amendment:

1. The problem of removal or compulsory retirement calls for a permanent body, preferably composed of judges only, with the powers to receive, evaluate, investigate and hear cases of alleged judicial misconduct or disability.
2. Such a body should be provided with a permanent staff capable of investigating any complaint from any source.

3. Such a body should have the power only to recommend action to the Court of Appeals, thereby assuring to a respondent an appeal to our highest Court. The Court of Appeals should have the right to conduct additional hearings and take such evidence as it determines to be appropriate in the circumstances of any case.

4. The rules of the Court on the Judiciary and of the Court of Appeals in such cases should be designed to afford due process to a respondent in the conduct of all proceedings.

5. All investigations, hearings, deliberations, etc., should be kept confidential, unless and until a recommendation is made to the Court of Appeals, where the proceedings should be public.

Respectfully submitted.

William W. Karatz, Chairman; Michael A. Bamberger, Edward J. Bloustein, Jesse Climenko, Edward M. Cramer, Ellis M. Deull, Kenneth L. Everett, Arnold G. Fraiman, A. Edward Grashof, Seymour Graubard, C. J. Head, Henry L. King, James W. Lambertson, Joseph A. McManus, Michael Malina, William J. Manning, M. Holt Meyer, Samuel W. Murphy, Jr., Edgar J. Nathan III, Melvin H. Osterman, Jr., Irving Parker, Charles C. Parlin, Jr., John P. Reiner, Donald I. Strauber, William E. Willis.

NEW YORK CONSTITUTION

§ 22. [Removal or retirement of judges or justices for cause or for physical or mental disability]

a. Any judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's court or judge of the family court may be removed for cause or retired for mental or physical disability preventing the proper performance of his judicial duties after due notice and hearing by a court on the judiciary.

b. The court on the judiciary shall be composed of the chief judge of the court of appeals, the senior associate judge of the court of appeals and one justice of the appellate division of the supreme court in each judicial department designated by concurrence of a majority of the justices of each such appellate division of the supreme court. In the absence, inability or disqualification of the chief judge of the court of appeals or of the senior associate judge of the court of appeals, the court of appeals shall designate a judge or judges from the court of appeals to act in his or their stead. The chief judge of the court of appeals shall act as the presiding officer of the court but in the absence, inability or disqualification of the chief judge, the senior associate judge of the court of appeals sitting on the court shall act as the presiding officer.

c. The affirmative concurrence of not less than four members of the court shall be necessary for removal or retirement and the court may disqualify a judge or justice removed from office from again holding any public office of this state. Proceedings to remove or the removal of a judge or justice from office shall not prevent his indictment and punishment according to law. A judge or justice retired for disability in accordance with this section shall thereafter receive such compensation as may be provided by law.

d. The chief judge of the court of appeals may convene the court on the judiciary upon his own motion and shall convene the court upon written request by the governor or by a presiding justice of the appellate division of the supreme court or by a majority of the executive committee of the New York State Bar Association thereunto duly authorized. The court in its discretion may suspend the judge or justice from the exercise of his office pending the determination of the removal or retirement proceedings before the court.

e. After the court on the judiciary has been convened and charges of removal or retirement have been preferred against a judge or justice, the presiding officer of the court on the judiciary shall, before a hearing on charges of removal for cause commences give written notice to the governor, the temporary president of the senate and the speaker of the assembly of the name of the judge or justice against whom charges have been preferred, the nature of the charges and the date set for hearing these charges, which shall not be less than sixty days after the giving of such notice. Immediately upon receipt of such notice, the legislature shall be deemed to be in session for the purpose of this proceeding. If any member

of the legislature prefers the same charges against the judge or justice concerned within thirty days after receipt of such notice and if such charges are entertained by a majority vote of the assembly, proceedings before the court on the judiciary shall be stayed pending the determination of the legislature which shall be exclusive and final. But a proceeding by the court on the judiciary for the retirement of a judge or justice for mental or physical disability preventing the proper performance of his judicial duties shall not be stayed.

f. The court on the judiciary shall have power to designate an attorney or attorneys at law to act as counsel to conduct the proceeding, to summon witnesses to appear and testify under oath and to compel the production of books, papers, documents and records before such counsel in advance of the trial and before the court upon the trial, to grant immunity from prosecution or punishment when the court deems it necessary and proper in order to compel the giving of testimony under oath and the production of books, papers, documents and records, and to make its own rules and procedures for the investigation and trial.

g. The court on the judiciary shall have such further powers and duties as may be provided by law.

h. The judges or justices while exercising the powers of a court on the judiciary shall serve without additional compensation but the legislature shall provide moneys by appropriation to meet the expenses of the court.

i. A judge of the courts for the city of New York established pursuant to section fifteen of this article, of the district court or of a town, village or city court outside the city of New York may, in the manner provided by law, be removed for cause or retired for disability after due notice and hearing by the appellate division of the supreme court of the judicial department of his residence. Adopted by the people Nov. 7, 1961, eff. Sept. 1, 1962.

Library references: Judges \S 11, 22(11); C.J.S. Judges \S 26 et seq., 35.

\S 23. [Removal of judges or justices by legislature for cause]

a. Judges of the court of appeals and justices of the supreme court may be removed by concurrent resolution of both houses of the legislature, if two-thirds of all the members elected to each house concur therein.

b. Judges of the court of claims, the county court, the surrogate's court, the family court, the courts for the city of New York established pursuant to section fifteen of this article, the district court and such other courts as the legislature may determine may be removed by the senate, on the recommendation of the governor, if two-thirds of all the members elected to the senate concur therein.

c. No judge or justice shall be removed by virtue of this section except for cause, which shall be entered on the journals, nor unless he shall have been served with a statement of the cause alleged, and shall have had an opportunity to be heard. On the question of removal, the yeas and nays shall be entered on the journal. Adopted by the people Nov. 7, 1961, eff. Sept. 1, 1962.

Library references: Judges \S 11; Officers \S 73; States \S 52; C.J.S. Judges \S 26 et seq.; C.J.S. Officers \S 68; C.J.S. States \S 49, 79, 95.

RULES OF PRACTICE OF THE COURT ON THE JUDICIARY

(Adopted February 26th, 1960, by Authority of Article VI, \S 9-a(6) of the Constitution)

RULE I

Five members of the court shall constitute a quorum and the affirmative concurrence of four shall be necessary for a decision except that where less than four members of the court shall vote in favor of the removal or retirement of a judicial officer, an order shall be entered dismissing the proceeding.

RULE II

The court shall keep its records and hold its sessions, unless, from time to time, otherwise ordered by the court, at Court of Appeals Hall in the City of Albany.

RULE III

The seal of the court shall be two and one quarter inches in diameter and shall consist of the device of the arms of the State of New York surrounded with the

inscription: "State of New York Court on the Judiciary". The clerk of the court shall have custody of the seal.

RULE IV

The decisions, judgments, orders, notices and subpoenas of the court shall be attested by the clerk under the seal of the court.

RULE V

Upon convening of the court, it shall determine, preliminarily, whether the complaint for removal or grounds for retirement of a judicial officer that have been presented, state facts sufficient to constitute cause for the preferral of charges for removal or ground for retirement; and are in form fairly permitting an answer.

RULE VI

(a) If such complaint for removal or grounds for retirement are determined sufficient within Rule V, the court shall direct that a statement of the charges alleged for removal or of the grounds alleged for retirement be personally served on the respondent, who shall within twenty days of such service, file his answer with the clerk of the court and serve a copy on counsel, if any, designated by the court to conduct the proceeding.

(b) If such complaint for removal or grounds for retirement are determined sufficient within Rule V, but are not in a form fairly permitting an answer, the court shall direct the complaining party, or the attorney designated by the court, to prepare in sufficient form the charges for service in accordance with these rules.

(c) If such complaint for removal or grounds for retirement are determined by the court insufficient within Rule V, the court shall dismiss them; and the presiding judge shall give written notice to the complaining party, the respondent, the Governor, the President of the Senate and the Speaker of the Assembly of such dismissal.

RULE VII

The service on the respondent of the statement of the charges alleged for removal and a statement of the date set by the court for the trial thereof shall constitute preferral of charges as provided by Constitution, Article VI, § 9-a (4); and thereupon the presiding judge of the court shall give written notice to the Governor, the President of the Senate and the Speaker of the Assembly stating the name of the judicial officer who is respondent and setting forth a copy of such charges and the date set by the court for the trial thereof.

RULE VIII

Upon the preferral of the same charges by a member of the legislature, the requirement of the respondent to answer if his time to do so has not theretofore expired, shall be suspended; and all proceedings in the court in his case shall be stayed pending the determination of the legislature.

RULE IX

Objection in point of law or application for more definite and certain statement or for particularization in any respect may be made upon timely notice at a time fixed by the court.

RULE X

The court may try an issue of fact, or direct a hearing thereof before one or more members of the court, an official referee of the Court of Appeals or of the Supreme Court to hear and report.

RULE XI

The fees and mileage of witnesses attending under subpoena shall be the same as provided for witnesses in an action in the Supreme Court in the county in which they are required to appear and such witnesses shall not be entitled to prepayment thereof. The Comptroller shall pay such fees and mileage after audit upon the certificate of the Clerk.

CALIFORNIA CONSTITUTION

ARTICLE VI

SECTION 1b. There shall be a Commission on Judicial Qualifications. It shall consist of: (i) Two justices of district courts of appeal, two judges of superior courts, and one judge of a municipal court, each selected by the Supreme Court for a four-year term; (ii) two members of the State Bar, who shall have practiced law in this State for at least 10 years and who shall be appointed by the Board of Governors of the State Bar for a four-year term; and (iii) two citizens, neither of whom shall be a justice or judge of any court, active or retired, nor a member of the State Bar, and who shall be appointed by the Governor for a four-year term. Every appointment made by the Governor to the commission shall be subject to the advice and consent of a majority of members elected to the Senate except that if a vacancy occurs when the Legislature is not in session, the Governor may issue an interim commission which shall expire on the last day of the next regular or special session of the Legislature. Whenever a member selected under subdivision (i) ceases to be a member of the commission or a justice or judge of the court from which he was selected, his membership shall forthwith terminate and the Supreme Court shall select a successor for a four-year term; and whenever a member appointed under subdivision (ii) ceases to be a member of the commission or of the State Bar, his membership shall forthwith terminate and the Board of Governors of the State Bar shall appoint a successor for a four-year term; and whenever a member appointed under subdivision (iii) ceases to be a member of the commission or becomes a justice or a judge of any court or a member of the State Bar, his membership shall forthwith terminate and the Governor shall appoint a successor for a four-year term. No member of the commission shall receive any compensation for his services as such, but shall be allowed his necessary expenses for travel, board and lodging incurred in the performance of his duties as such.

No act of the commission shall be valid unless concurred in by a majority of its members. The commission shall select one of its members to serve as chairman.

SECTION 10b. A justice or judge of any court of this State, in accordance with the procedure prescribed in this section, may be removed for willful misconduct in office or willful and persistent failure to perform his duties or habitual intemperance, or he may be retired for disability seriously interfering with the performance of his duties, which is, or is likely to become, of a permanent character. The Commission on Judicial Qualifications may, after such investigation as the commission deems necessary, order a hearing to be held before it concerning the removal or retirement of a justice or a judge, or the commission may in its discretion request the Supreme Court to appoint three special masters, who shall be justices or judges of courts of record, to hear and take evidence in any such matter, and to report thereon to the commission. If, after hearing, or after considering the record and report of the masters, the commission finds good cause therefor, it shall recommend to the Supreme Court the removal or retirement, as the case may be, of the justice or judge.

The Supreme Court shall review the record of the proceedings on the law and facts and in its discretion may permit the introduction of additional evidence and shall order removal or retirement, as it finds just and proper, or wholly reject the recommendation. Upon an order for retirement, the justice or judge shall thereby be retired with the same rights and privileges as if he retired pursuant to statute. Upon an order for removal, the justice or judge shall thereby be removed from office, and his salary shall cease from the date of such order.

All papers filed with and proceedings before the Commission on Judicial Qualifications or masters appointed by the Supreme Court, pursuant to this section, shall be confidential, and the filing of papers with and the giving of testimony before the commission or the masters shall be privileged; but no other publication of such papers or proceedings shall be privileged in any action for defamation except that (a) the record filed by the commission in the Supreme Court continues privileged and upon such filing loses its confidential character and (b) a writing, which was privileged prior to its filing with the commission or the masters does not lose such privilege by such filing. The Judicial Council shall by rule provide for procedure under this section before the Commission on

Judicial Qualifications, the masters, and the Supreme Court. A justice or judge who is a member of the commission or Supreme Court shall not participate in any proceedings involving his own removal or retirement.

This section is alternative to, and cumulative with, the methods of removal of justices and judges provided in Sections 10 and 10a of this article, Sections 17 and 18 of Article IV, and Article XXIII, of this Constitution.

Judicial retirement, discipline, and removal provisions—5 variations

[From the Journal of the American Judicature Society, February 1965]

	California (adopted 1960)	Colorado (a 1965 proposal) 1	Florida (a 1965 proposal) 1	New Mexico (a 1965 proposal) 1	Texas (a 1965 proposal) 1
Commission membership: Number.....	9	9	9	9	9
Composition and number.....	2 intermediate appellate judges, 2 general trial judges, 1 municipal court judge, 2 lawyers, and 2 nonlawyers.	2 intermediate appellate judges, 2 county court judges, 2 lawyers, and 2 nonlawyers.	2 intermediate appellate judges, 1 county judge, 2 lawyers, and 2 nonlawyers.	1 appellate judge, 1 general trial judge, none, 2 lawyers, and 5 nonlawyers.	2 intermediate appellate judges, 2 general trial judges, none, 2 lawyers, and 3 nonlawyers.
Chairman.....	Elected by commission.	Not specified.	Elected by commission.	Elected by commission.	Elected by commission.
Method of initial selection: Appellate judges.....	Supreme court appoints.	None.	Judges of those courts appoint.	Supreme court appoints.	Supreme court appoints.
Trial judges.....	do.	do.	do.	Judicial council appoints.	Do.
Other judges.....	do.	do.	do.	None.	None.
Lawyers.....	Board of governors of State bar appoints.	Appointed by majority vote of chief justice, attorney general, and Governor.	Board of governors of State bar appoints.	State board of bar commissioners appoints.	Board of directors of State bar appoints.
Nonlawyers.....	Appointed by Governor with consent of Senate.	Appointed by Governor.	Appointed by Governor.	Appointed by Governor.	Appointed by Governor with consent of senate.
Term.....	4 years.	4 years.	Fixed by law.	5 years staggered.	6 years.
Compensation.....	Travel expenses.	Travel and other expenses.	do.	Not specified.	Legislature may provide for expenses.
Complaints: Who can complain.....	Not specified, but practice is to allow any person to complain.	Not specified, but presumably is to be same as California.	Not specified, but presumably is to be same as California.	Not specified, but presumably is to be same as California.	"From any source."
Form of complaint.....	Not specified, but practice is to accept any written complaint without regard to form.	do.	do.	do.	"Complaints or reports, formal or informal."
Status of complaint.....	Privileged.	Privileged.	Supreme court to make rules.	Privileged.	Privileged.
Method of investigation.....	Confidential.	Confidential.	do.	Confidential.	Confidential.

<p>Causes: Involuntary retirement.</p>	<p>"Disability seriously interfering with the performance of his duties which is, or is likely to become, of a permanent character." "Willful misconduct in office or willful and persistent failure to perform his duties or habitual intemperance."</p>	<p>"Disability seriously interfering with performance of his duties which is, or is likely to become, permanent in nature." "Willful or persistent failure to perform his duties or habitual intemperance or conduct unbecoming of the judiciary."</p>	<p>"Disability seriously interfering with performance of his duties which is, or is likely to become, of a permanent nature." "Willful or persistent failure to perform his duties or habitual intemperance."</p>	<p>"Disability seriously interfering with performance of his duties which is, or is likely to become, permanent in nature." "Willful or persistent conduct, whether in the actual discharge of his judicial duties or otherwise, which is clearly inconsistent with the performance of his said duties or is likely to cast public discredit upon the judiciary or administration of justice."² Not specified, but presumably is to be same as California.</p>
<p>Removal</p>	<p>Not specified, but practice is to communicate with judge about results of investigation and suggest corrections.</p>	<p>Private reprimand for causes as for removal.</p>	<p>Same causes as for removal but types of disciplinary action not specified.</p>	<p>Not specified, but presumably is to be same as California.</p>
<p>Discipline</p>	<p>Receives complaints, makes confidential investigation, may order hearing by 3 special masters appointed by supreme court, may recommend retirement or removal to the supreme court.</p>	<p>Receives complaints, makes investigation, may order hearing by 3 special referees appointed by supreme court, may recommend retirement or removal to the supreme court.</p>	<p>Receives complaints, makes confidential investigation, may order hearing or request 3 special masters appointed by supreme court, may recommend retirement or removal to the supreme court.</p>	<p>"Keep itself informed as fully as may be of 'circumstances,' receive complaints or reports, make such preliminary investigations as it may determine," may order hearing or request hearing by a master, may recommend retirement or removal to the supreme court.</p>
<p>Commission</p>	<p>Reviews law and fact of hearing, may permit additional evidence, makes final disposition of matter. "A justice or judge of any court of this State."</p>	<p>"Review the record of the proceedings on the law and the facts"; makes final disposition of matter. "Every justice or judge of every court of this State except municipal court and courts established under art. VII, sec. II,"</p>	<p>Reviews law and fact of hearing, may permit additional evidence, makes final disposition of matter. A justice or judge of any court of this State.</p>	<p>Reviews law and fact of hearing, may permit additional evidence, makes final disposition of matter. "Justices and judges of appellate courts and district and criminal district courts."</p>
<p>Supreme court</p>	<p>Reviews law and fact of hearing, may permit additional evidence, makes final disposition of matter. "A justice or judge of any court of this State."</p>	<p>"Review the record of the proceedings on the law and the facts"; makes final disposition of matter. "Every justice or judge of every court of this State except municipal court and courts established under art. VII, sec. II,"</p>	<p>Reviews law and fact of hearing, may permit additional evidence, makes final disposition of matter. A justice or judge of any court of this State.</p>	<p>Reviews law and fact of hearing, may permit additional evidence, makes final disposition of matter. "Justices and judges of appellate courts and district and criminal district courts."</p>
<p>What judges covered</p>	<p>These 4 1965 "proposals" are all tentative. At least 1 is only a discussion draft and none have been reported as having received legislative approval. Since all 4 proposals are in the form of constitutional amendments, ultimate adoption will require voter approval. In spite of these limitations, they have been included to provide a basis of comparison with the California commission.</p>	<p>These 4 1965 "proposals" are all tentative. At least 1 is only a discussion draft and none have been reported as having received legislative approval. Since all 4 proposals are in the form of constitutional amendments, ultimate adoption will require voter approval. In spite of these limitations, they have been included to provide a basis of comparison with the California commission.</p>	<p>These 4 1965 "proposals" are all tentative. At least 1 is only a discussion draft and none have been reported as having received legislative approval. Since all 4 proposals are in the form of constitutional amendments, ultimate adoption will require voter approval. In spite of these limitations, they have been included to provide a basis of comparison with the California commission.</p>	<p>These 4 1965 "proposals" are all tentative. At least 1 is only a discussion draft and none have been reported as having received legislative approval. Since all 4 proposals are in the form of constitutional amendments, ultimate adoption will require voter approval. In spite of these limitations, they have been included to provide a basis of comparison with the California commission.</p>

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Mr. KING. Senator Tydings and Senator Scott, I am pleased to represent the Association of the Bar of the City of New York at your hearings today. The association of the bar wholeheartedly supports these hearings and the objectives of them.

The written report which I previously submitted to your counsel is not my own personal statement. It is, rather, a report of one of the committees of the association of the bar, which has been studying the problem of procedures for removal of judges for the past year. Only 5 days ago this report received the approval in principle of the executive committee of the association of the bar and I believe that today will probably be the first time that it has received public notice.

We embarked on a study of this in committee a year ago in part because of the notoriety which accompanied the California commission plan and some publicity about the American Bar Association's appointment of a committee to study the problem on a Federal level and the activity in a number of States in the country considering various proposals for adopting procedures for removal.

You have heard this morning a very adequate description of the court on the judiciary in New York State and the way it works. I don't believe it would serve any useful purpose for me to repeat that. You also plan to go to California and hear the way the California commission plan operates. We have summarized both the court on the judiciary and the California commission plan in our written report as a prelude to reaching an evaluation and recommendation for removal procedures in New York. I will turn to that right now.

We feel, that is, the association of the bar feels, that any system for removal or compulsory retirement of judges involves a delicate balance between the necessity of removing offending judges and the need for maintaining judicial independence. In the view of the association of the bar the best way to preserve this balance is to keep the removal process within the control of judges themselves. It ought to be a prime objective of any system to assure against the possibility of a judge being called up on charges merely because he has rendered unpopular decisions.

We feel that the less the executive or legislative branches have the ultimate determination in this matter, the more likely judicial independence will be maintained. In this respect we feel that the New York court on the judiciary serves the policy interest well.

I believe also that the California commission does so because it is dominated by the judiciary. There are on the commission five judges and four nonjudges—two lay people and two lawyers.

Senator TYDINGS. That's correct.

Mr. KING. In our deliberations and review of New York's court on the judiciary we came to the conclusion that there are features of the California commission plan which seemed to us to be attractive and perhaps could be adopted for use in New York. The California commission has continuity. It has a small but permanent staff which can aid in hearing and sifting complaints. It has the prestige and authority to eliminate groundless grievances without any publicity.

If cause appears to exist, it can hold hearings on notice to the accused and conduct an investigation, all in confidence. If the commission finds no cause after a hearing, the proceedings are dismissed without adverse publicity.

In New York, on the other hand, the court on the judiciary in our view suffers from lack of continuity and lack of a staff. The court is convened on an ad hoc basis only with considerable publicity before, during, and after hearing. There is no real opportunity provided within the court on the judiciary itself for investigation, confrontation, and hearing on a confidential basis that would protect the respondent judge in the event the charges are unfounded.

Judges are tried by the same tribunal which formulates the charges, conducts the investigation, and prosecutes the case with no right of appeal. Complaints about judicial misconduct are relegated initially to bar association committees, practicing lawyers, whom we think in the end are ill-suited to investigate adequately.

Senator TYDINGS. What do you mean by that, Mr. King: complaints are relegated initially to bar association committees?

Mr. KING. In the association of the bar, for example, there are various court committees. When a complaint is made to the bar association it is referred to one of the court committees for investigation and the court committees, composed of lawyers who are generally actively practicing in the courts, must conduct these investigations. The committee on which I serve, covering the State courts of superior jurisdiction, has had several investigations which have been undertaken, and I say we are ill-suited to do it in the end, because we appear before the judges whom we are investigating and their colleagues, and because we don't have the time or staff to really make the kind of investigation that is necessary.

Mr. Goodchild a moment ago referred to the pattern kind of activity on the part of judges, which presents the greatest problem. Where there is a case of venality, there is no real problem. But where you have a judge who over a period of time may be intemperate or who comes into court in the afternoon having had too much to drink or is particularly abusive to lawyers in front of their clients or in front of the jury, you can't establish this simply by one visitation in the courtroom. This has got to be done over a period of time by interviewing lawyers who have appeared before this particular judge and searching the record to find out whether there was cause or no cause for the particular activity involved.

It's been my experience that bar association committees are not equipped to do this job adequately and that some commission or staff or secretary or court ought to be set up to conduct these investigations.

Senator SCOTT. In Philadelphia we don't have this system, but in Philadelphia we have the system of bar association plebiscite when a judge is a candidate for reelection. It serves as a pretty good vehicle for the reflection of the opinion of the bar. Some judges lose the plebiscite and then are rarely reelected, if they lose it. The judiciary committee doesn't endorse them. But if you have the power in the bar, there are times when, let's say, negligence lawyers practicing before a very stern judge might feel he was largely a plaintiff's judge, and if the committee were headed by a prominent negligence lawyer there is almost an element of blackmail when he goes in to try a case before that judge.

In one case a judge lost a plebiscite because he was entirely too stern. He was a very upright judge, but he was removed from the bench. I wouldn't like to see that power going further than that.

He was really removed by disgruntled lawyers who had lost too many cases against him.

Mr. KING. We agree with that, Senator Scott, and this is one of the reasons why we have concluded after much soul-searching that the court on the judiciary ought to be maintained as a judge-only court without any lawyers on it and without any lay people on it. This is one of the reasons. We feel that judges are best able to judge judges, and their conduct and whether they are capable of performing their duties. There ought to be no outside influence of a lay nature brought to bear in this particular area.

We would recommend that our court on the judiciary be reconstituted to be a permanent court with a permanent staff of investigators and secretarial help who could on complaint make the kind of investigation that I have referred to, as well as other kinds of investigation.

We recommend also that preliminary hearings and investigations by the court or its staff be conducted strictly in confidence, even to the extent of giving the judge an opportunity to be heard through counsel and of calling witnesses—in other words, the initial trial of the case before the court on the judiciary should be in confidence, whereas today it is not.

Judge Bromley earlier in the morning referred to the fact that the court on the judiciary has the power to sift complaints and if they are groundless to dismiss them without publicity, and I think that is true. But, unfortunately, the way the court is convened via the Governor or the chief judge himself or presiding justice of the appellate division, by the time the matter reaches the stage of convening the court on the judiciary, the chances are there has been some publicity and the chances are probably slim that the court will dismiss the charges on its own without hearing some testimony, which would mean more publicity.

It is that testimony which today is a matter of public record. We think it should not be until there is a determination that the judge should be removed, at which point we believe it is essential that the matter become a matter of public record and subject to publicity.

We feel, the committee felt, that the court of appeals, which is our high court, ought to have final word in this matter, much as the California Supreme Court has the final word under the California commission plan. I understand that when the executive committee of the association of the bar considered this matter a few days ago, there was some question about the mechanics of carrying out the ultimate thrust of this report, whether the court of appeals ought to be the court of last resort in these cases or whether that should be reposed in the court on the judiciary, the way it is now.

In other words, the bar association approval of this particular report which is going to be part of your record is an approval in principle rather than an approval in all of the details of the mechanics of working it out.

Judge Bromley responded to a question from Senator Tydings, I believe, about whether the court on the judiciary ought to be a permanent court. I think he said that he had a distrust of a permanent body.

Senator TYDINGS. Permanent staffing, I believe.

Mr. KING. I must say, this is one item, one element that was considered by the committee. There is a feeling—and I think it is right—

that there should not be a superbody like big brother looking over the conduct of the judges on a continuing basis with a large staff who must in the end perhaps try to justify its own existence. We think, though, that there are safeguards that can be adopted to eliminate this legitimate feeling of distrust. One of them is that the investigation be conducted entirely in confidence. It falls to the court on the judiciary in the first instance to decide whether there is any merit in the charges against a judge. Until that is determined there should be no publicity; all of the investigation and hearing should be in confidence.

No. 2, we think that by staggering the terms of the members of the court, you would tend to have less entrenchment in the body itself; and third, I think it would be dangerous to overstaff the court. I would rather see it understaffed and perhaps filled in when necessity arose.

Senator TYDINGS. California has only one man on their staff and they utilize other State agencies for investigation. Do you think that is a meritorious procedure?

Mr. KING. Yes; we think it would be. We realize that in New York any kind of proposal such as we are talking about must be adopted by constitutional amendment, and there may be variations suggested; there may be mechanics that would be different, but there are certain essentials that we believe would be important in any procedures for removal, and I have set them out on the last two pages of this report. You have them in front of you. I can perhaps just run down them very briefly.

No. 1, the problem of removal or compulsory retirement calls for a permanent body, preferably composed of judges only, with the powers to receive, evaluate, investigate, and hear cases of alleged judicial misconduct or disability.

Senator TYDINGS. I wonder if I might ask you a question there. I gathered from the thrust of your testimony that if there were any other members other than judges in the permanent body, you would rather they be prominent lay civic leaders rather than members of the bar?

Mr. KING. No; not necessarily. I think if there were to be non-judicial members, I don't have any particular feeling whether they be lay members or lawyers. Once you go outside of the judges, I think it perfectly all right to have lawyer members, although I think that if a lawyer is practicing actively in the courts it may be more difficult for him to render judgment.

On the other hand, we as practicing lawyers all have a responsibility in this matter and I think if you get the right kind of lawyer serving on it, he will step up to the responsibility. It's difficult, however. It presents difficulties.

Senator TYDINGS. Just one step further. If you were devising such a commission in the Federal system, with whom would you say the appointive powers should lie?

Mr. KING. For the members of the commission? If they were to be judges only, I would suggest that one class of members be appointed by the courts of appeal and another by the supreme court. There is an analogy to the proposal we have for New York State where the judges would be selected by the four appellate divisions, and also by the court of appeals.

If there were to be nonjudge members, we see nothing wrong with the California system of having the executive appoint lay people. Of course, in California there are two lawyers appointed by the president of the State bar association. But there you have an integrated bar. Every lawyer is a member of it and you have a different situation in the Federal or New York State cases where there is no integrated bar.

We believe as a second fundamental in any constitutional change that the body be provided with a permanent staff capable of investigating any complaint from any source. Such a body should have the power to recommend action to the court of appeals, thereby assuring to a respondent judge an appeal to our highest court. It is this point which I mentioned before as being a question that the executive committee of our city bar association had as to how this should be carried out.

The rules of the court on the judiciary and the court of appeals in such cases should be designed to afford due process to the respondent judge in the conduct of all proceedings; that is, notice, opportunity for hearing, counsel, and so forth.

Finally—and we think of real importance—all investigations, hearings, deliberations, and so forth, should be kept confidential unless and until a recommendation is made to the court of appeals where the proceeding should be public.

Senator TYDINGS. That is also the California system, isn't it?

Mr. KING. Yes, it is.

Senator TYDINGS. One possible question arises as to the staff member who is assigned to this commission or body. Do you think that person should be also serving as an attaché in the office of the administrator of the courts or do you think he should be specifically assigned as an independent staff member, and so forth?

Mr. KING. I would rather see him wholly independent.

Senator TYDINGS. Why?

Mr. KING. I think that it is possible that the administrative boards may begin to have positions of their own. Further, they may be subject to control by judges in the various departments and by the court of appeals, and I think in this area maintaining independence is terribly important. We should give every appearance of independence as well maintaining the fact of it.

Senator TYDINGS. Mr. King, I certainly appreciate your being with us this morning, staying with us through the other testimony, and I think your suggestions are excellent. I think that they are applicable to the Federal system as well as to the New York State system, and certainly they are going to be extremely fruitful to us in our deliberations after these hearings are concluded. Thank you very much for being with us.

We will now stand recessed until 2 o'clock.

(Whereupon, at 12:30 p.m., a luncheon recess was taken to 2 p.m. of the same day.)

AFTERNOON SESSION

Senator TYDINGS. Judge Desmond, on behalf of the Subcommittee on Improvements in Judicial Machinery of the Judiciary Committee of the U.S. Senate, Senator Scott, and myself, let me tell you how much we appreciate your kindness and your offer to assist us in this most important study which we hope will lead to some changes in the Federal machinery for removal of unfit judges.

Your presence here and your statement is greatly appreciated by us and all the members of the Judiciary Committee.
(A biographical sketch of Judge Desmond follows:)

THE HONORABLE CHARLES S. DESMOND, CHIEF JUDGE, NEW YORK COURT OF APPEALS

The Honorable Charles S. Desmond, Chief Judge, New York Court of Appeals, was educated at Canisius College (A.B.; A.M.) and the University of Buffalo (LL.B.). He was admitted to the New York Bar in 1920 and engaged in the private practice of law for twenty years in Buffalo, New York. In 1940 Judge Desmond was appointed to the New York State Supreme Court. In 1941 he was elected associate judge of the New York Court of Appeals and served in that capacity until 1961, when he became the Chief Judge. He is a member of the law faculty of the Cornell Law School, and of the advisory council of the University of Notre Dame Law School. Judge Desmond is also member a of the American Law Institute.

STATEMENT OF THE HONORABLE CHARLES S. DESMOND, CHIEF JUDGE OF THE STATE OF NEW YORK AND CHIEF JUDGE OF THE NEW YORK STATE COURT OF APPEALS

(The prepared statement of Judge Desmond follows:)

New York State's provisions for removing judges of courts on the county level and higher are in the State Constitution in article VI, sections 22, 23 and 24. Sections 23 and 24, while still on the books, have not been used in many years and will probably never be used again. Section 23 authorizes the removal "for cause" of judges of the Court of Appeals (the highest State court) and the Supreme Court (the State-wide trial court) by a two-thirds vote of the two houses of the Legislature, also for removal of judges of certain lower courts "for cause" by a two-thirds vote in the State Senate on the recommendation of the Governor. Section 24 describes an impeachment process.

Section 22 of article VI of the State Constitution (formerly section 9-a), which is headed "removal or retirement of judges or justices for cause or for physical or mental disability", was added to the State Constitution in 1938 and the court has been convened three times since then (see proceedings in Appendices, Vols. 8, 12, 13 of New York Reports, 2nd Series). The section was proposed, and affirmatively voted by the Legislature and the people of the State, because of dissatisfaction with the other two (sections 23 and 24) cumbersome methods. As the heading of section 22 indicates, it, as a new method (Court on the Judiciary), authorizes retirement of judges for "physical and mental disability" as well as for "cause" but the former authorization has never been used. In the few cases of alleged disability that have arisen it has been possible to persuade a disabled judge to withdraw from the bench without court proceedings.

By subdivision a of section 22, the Court on the Judiciary is empowered to remove a judge for "cause" and while "cause" is not further defined such further definition is probably impossible or at least inadvisable. A Court on the Judiciary is to be composed of the Chief Judge of the Court of Appeals, the senior Associate Judge of that court, one justice of each of the Appellate Divisions (intermediate appellate court) in each of the four judicial departments, the latter to be designated by the majority of the justices of his court. In case the Chief Judge of the Court of Appeals or the senior Associate Judge of that court is absent or disqualified the Court of Appeals itself designates a judge from that court to act in the place of the acting Chief Judge or Associate Judge. The Chief Judge of the Court of Appeals acts as the presiding officer of the court but in his absence or disqualification the senior Associate Judge of the Court of Appeals presides. The affirmative concurrence of at least four judges is necessary for removal or retirement and a Court on the Judiciary may, besides removing a judge, disqualify him from ever again holding public office in the State. A judge or justice who is retired by a Court on the Judiciary because of physical or mental disability shall thereafter receive such compensation as is provided by law. There are special pension provisions for disabled judges.

A Court on the Judiciary may be convened by the Chief Judge of the Court of Appeals on his own motion and he must convene it upon written request by

the Governor or by a Presiding Justice of the Appellate Division or by a majority of the Executive Committee of the New York State Bar Association. The last method of convening the court has never been used. Subdivision of section 22 authorizes a Court on the Judiciary in its discretion to suspend a judge or justice from the exercise of his office pending the determination of removal or retirement proceedings. There have been such suspensions but by consent. The Constitution does not say whether such a suspension is to be with pay or without pay but since other New York laws in other instances specifically provide for suspension without pay when such is intended, it has been assumed that a suspension under this subdivision is with pay.

Subdivision e sets up a rather unusual procedure whereby after a Court on the Judiciary has been convened and charges have been preferred the presiding officer of the Court on the Judiciary must before hearings are held give written notice to the Governor and the presiding officers of the two houses of the Legislature, of the nature of the charges and the name of the judge or justice and of the date set for hearing the charges which must be not less than sixty days after the giving of the notice to the Governor and the Legislature. If any member of the Legislature (and the Legislature is deemed to be in session for these purposes) within thirty days after notice given prefers the same charges against the judge or justice and such charges are entertained by a majority vote of the lower house the proceeding before the Court on the Judiciary shall be stayed pending the legislative determination which shall be exclusive and final. This does not, however, apply to the removal of a judge or justice for disability. This subdivision e was undoubtedly inserted to preserve the ancient legislative prerogative in these matters but in the three cases that have been heard before the Court on the Judiciary the Legislature has not taken over. Subdivision f of section 22 authorizes a Court on the Judiciary to designate an attorney to act as counsel, to summon witnesses, compel the production of papers, to confer immunity to witnesses and to make its own rules.

Because of the wording of section 22 it has been assumed that a new Court on the Judiciary is set up each time charges are entertained. Each time such a court has been convened it has adopted rules of practice (one set of which rules can be found as a supplement to Vol. 13 of New York Reports, 2nd Series). These rules provide not only that four members must be present to constitute a quorum but that the affirmation of four is necessary for decision and that no judge shall be removed on a vote of less than four. The Clerk of the Court of Appeals acts as the clerk of such a court. Its headquarters are in the Court of Appeals building in Albany and all papers are filed there. Under the rules the court when convened must determine preliminarily whether the complaint for removal presents facts sufficient to constitute cause. If such a complaint is deemed sufficient the court directs the personal service of a statement of charges on the respondent who is given twenty days to file his answer. If it is deemed that the complaint does not sufficiently charge grounds for removal or retirement the court must dismiss them and give notice thereof to the Governor and legislative leaders. Other necessary details are embodied in the rules.

In two of the three cases (involving four judges in all) heard by Courts on the Judiciary since 1938 the judges have been removed. In the first case the charges were dismissed but the court assumed the power to deliver a strong censure.

Of course, besides these three cases which went to trial numerous informal complaints have been made to the Chief Judge as well as to other judicial officers and to the Governor. Many of these are obviously ill-founded—even incoherent—and many indicate merely the disappointment of litigants or confusion as to the functions and duties of judges. There is no provision in the Constitution or statutes specifically describing any process for dealing with such minor or confused complaints. However, they are, of course, not ignored but investigations are made through the administrative office of the courts or through the staff of the Appellate Divisions. Perhaps there should be some more formal procedure and perhaps there should be found somewhere in the books a procedure to which a citizen could resort, short of filing formal charges. However, the present system seems to work and it has the advantage of preventing the publicizing of unfounded or minor claims. In practice and by statute and by custom each Appellate Division supervises the day-to-day operations of the courts and the work of the judges inside their departments and each Appellate Division has an administrative staff for this purpose. The result is a constant scrutiny and if there is any lack of cooperative effort on the part of any particular judge the Appellate Division can and does call him to task with the result that matters are generally kept in order. Although the present New York system is not a perfect one it seems adequate for

its purpose and I have no present suggestions for a change. I strongly believe that supervision and, when necessary, discipline of judges should be in the hands of judges. While there must be procedures for investigating and punishing delinquent judges and for removing disabled judges care must also be taken not to give publicity to unfounded charges.

New York State has other procedures for removal of judges of lower courts but my remarks do not apply to them.

Judge DESMOND. It's an honor, Senator.

Senator TYDINGS. Thank you, sir. We would be happy to hear from you at this time.

Judge DESMOND. Do you want me to read it?

Senator TYDINGS. You can, or you can submit it in its entirety, as you wish, and emphasize those points which you think are of particular interest to the subcommittee.

Judge DESMOND. You have been hearing others and perhaps you have already heard all that I have to say. We have actually three methods in New York on the books for removing judges on the county level and higher, but two of them are obsolete, although they are still on the books in the constitution. The one that we have used several times is section 22 of article VI which provides a court on the judiciary to retire judges who are said to be physically or mentally disabled or to remove judges for cause.

We have never used the retirement part of the constitutional provision. It hasn't been necessary. There have been a few cases where judges appeared to be losing their faculties and it has always been possible to get rid of them by persuasion, without publicity, and so forth. I have known of a couple of cases. There hasn't been any problem about it. We talked to them reasonably, and they were willing to get off. I don't want to go into detail on this but there is in New York a provision for a sort of special pension for judges who have had to leave the bench because of disability.

The court on the judiciary as to removal for cause has been used three times involving four judges. That doesn't seem very many times in the period of 28 years, and oddly enough those three cases have all been within the last 7 years. The first case involved two judges and we censured them, although there is nothing in our constitution providing for censure. We dismissed the charges because the charges didn't seem heavy enough to justify removal. There may be a weakness in our system, in our constitutional provision, because the only penalty or sanction provided is the removal of a judge for cause.

There is a provision that a judge may be suspended but we read that as merely meaning an interim suspension while the charges were pending. I don't suppose it would do to have it provided that a judge may be suspended for a period as a punishment for his sins because it would destroy his effectiveness as a judge if we suspended him and he then returned to the bench as we sometimes suspend lawyers on charges and they go back into practice after a period.

I think it would be incongruous to suspend a judge. If the misdeeds were serious enough to justify suspension, you wouldn't want him on the bench any more.

The composition of the court on the judiciary is the chief judge of the court of appeals, the senior associate judge of the court of appeals, and one justice of each of the appellate divisions, our intermediate appellate courts in each of the four judicial departments.

Incidentally, those four judges, one from each appellate division, are chosen by their respective courts. The only permanent members

of the court are the chief judge of the court of appeals and his senior associate.

Senator TYDINGS. Is that automatically the presiding justice of the appellate division?

Judge DESMOND. No. The justice who comes from each appellate division is designated by a vote of his court. I suppose the presiding justice has the largest voice in the matter.

Senator TYDINGS. We had this morning some interesting proposals here. One proposal was made by a committee of the Bar Association of New York, which I understand their executive committee just approved in principle. The theory of it might have pertinence in the Federal system. For that reason I wonder if I could propound a few questions to you.

Judge DESMOND. I haven't seen the proposal but I will be glad to answer any questions.

Senator TYDINGS. The proposal was based around six points, the first of which was that the problem of removal or compulsory retirement calls for or should call for a permanent body, preferably composed of judges only, with the powers to receive, evaluate, investigate, and hear cases of alleged judicial misconduct or disability.

Judge DESMOND. May I interrupt? Do they mean a continuous body?

Senator TYDINGS. Yes. They mean—specifically the suggestion was made—a type of commission attached as an adjunct of each appellate division which would act as a screening board to screen complaints, with a permanent staff member to assist the committee to screen complaints, throw away bad ones, look into others, and then make recommendations to the court or the judiciary, which in turn would make a final decision. But the screening would take place by a body other than the one who ultimately made the decision.

Then, as I say, the body would have the power to recommend action to the highest court. The highest court would actually take the action. But it wouldn't be the highest court investigating; it wouldn't be looking into it and acting as both prosecutor and judge.

Judge DESMOND. Is this a substitute? Would this be a substitute for the court on the judiciary or would it be a screening body?

Senator TYDINGS. An adjunct; a screening body. In other words, assistant to the court on the judiciary. The court on the judiciary, as I gather, would just be passing judgment after a commission had screened, gone over, and made recommendations. You see, this might be considered in the Federal system within the different circuits, and I would be interested in your thoughts on that.

Judge DESMOND. The suggestion is new to me, but I mention in my paper somewhere that one defect in our present system is that there is no such—there is no formal—"formal" is not the word—there is no fixed method for getting rid of minor complaints in which there are a great many. I don't know how many, but in the course of a year they might run into maybe a couple of hundred, at a guess. I get a great many letters complaining about judges. I think we have been able to dispose of these things in the past.

The way it is done now is that the judicial conference refers these numerous minor complaints to the appellate divisions which use their present administrative staffs to winnow these things out. This is rather an informal method, but I think it works practically. I wouldn't object to having some such screening body.

You probably know this; you have probably been told by others—an awful lot of complaints against judges are received, usually in the form of letters. Some of them are just incoherent things that can be ignored.

Senator TYDINGS. Our committee receives them every day, so we are familiar with what you must be up against.

Judge DESMOND. Many of them are written intelligibly and apparently from sincere people, but they just represent a failure to understand what has happened. The citizen has been in a lawsuit, usually, and he doesn't—well, he is disgruntled, to start with. You never get one from a winning litigant. Not yet. Either he doesn't understand the function of the court, doesn't understand what the court can and cannot do and how it is limited and restricted by rules of law, or very often the judge has been a little brusque with him, probably, a little impatient, a little arrogant, perhaps—there are arrogant judges, you know, believe it or not—and I think usually the coherent letter, the intelligible letter can be disposed of either by a conference or by a letter.

I find, in most of the instances, I can write a comparatively short letter and never hear from the person again. I think it is just a kind of reaction to losing a lawsuit in many instances. I think such a screening body—I don't think it should be elaborate—I don't think it would require any new staff. We have the people. It is a defect in our system, that while we handle these things we handle them in such a simple and informal way there isn't much of a record kept of it. Perhaps it isn't even due process. I don't know.

Senator TYDINGS. It was also pointed out that in any such commission or screening body, all investigations and hearings and deliberations of that body or commission should be strictly confidential, unless and until they made a recommendation to the court on the judiciary. Then formal action would be taken and a formal hearing would be conducted.

I have a little difficulty understanding how much confidentiality there is in your present system. For instance, when the letter from District Attorney Hogan went to the Governor, and then, as I understand it, went to you in connection with the proceedings against the judge. That was all out in the open before your court on the judiciary ever received a complaint, wasn't it? Didn't the newspapers pick it up?

Judge DESMOND. Yes. I don't see how you could keep secret a formal request by the Governor that the court on the judiciary be set up. I think when things have reached that position, there is no use in trying to keep it secret any more. It's the beginning of a lawsuit, shall we say.

Senator TYDINGS. It would appear to me that even Governors are fallible and that perhaps there should be a screening mechanism, or something. At least it could be argued, that would protect a judge from an unfair charge or unfair publicity, unless you found in each case that has been before you that the judge involved should be removed. But if you hadn't found such—

Judge DESMOND. We have never acquitted anybody, as I say. The first case involved two judges, and they were censured publicly, a strong statement of disapproval of what they had done. I think there is a distinction. I think the screening process should be

secret by all means. "Secret" is not a good word. Confidential, because so many of these charges and complaints have no substance whatever. They just represent confusion or bitterness. You can see where, if a number of these were publicized against a particular judge, he would begin to look pretty bad to the public where there might not be an ounce of substance in the whole group of complaints made against him. We get these every day.

You say you get them yourself. They just represent confusion in most instances or some discourtesy. Something of this sort. I think the big problem in the area is whether you should have something like our court on the judiciary, something set up in the form of a judicial tribunal or whether you should have some sort of commission, and whether there should be a layman or some laymen on it.

I think that is a real problem. You can readily see arguments both ways. It is something like the discussions you hear in New York about the proposed police review board. Should the judicial group be judging its own members or should there be representation of the public?

Senator TYDINGS. The thrust of the testimony of those persons whom we have heard to date who favor lay representation is that any screening commission should be appointed by the chief judge, it should consist primarily of judges but it might be well to have one or two outstanding civic leaders in the community on there, perhaps to give public confidence, but not enough so that they could in any way dominate either the commission or the screening committee. In other words, there would always be a substantial majority of judges, and the civilian or the lay representation on the committee would be more to engender good will and confidence in the public rather than to attempt to make policy.

Senator SCOTT. Provide a channel to the public.

Judge DESMOND. I have a feeling—there may be no substance to it—that bringing laymen in, a layman or some layman, would have a tendency to create publicity. I think, however, that having laymen on there would increase confidence in the body. I don't know just how this would work. Would there be a continuing personnel of such a commission or would people be appointed into it from time to time?

Senator TYDINGS. Generally it is just for a term. It would be a 4-year term or a 2-year term.

Judge DESMOND. I think, and I may be wrong, Senator, you probably would know that our State's setup, our present setup, takes on more the semblance and character of a court.

Senator TYDINGS. Yours is a court. We were talking about a commission, whether it be an adjunct of your appellate division or whether it be on a statewide basis as in California or whether it would be a commission that is an adjunct of our circuit courts of appeals. In any case, the problem would arise as you pointed out: Should there or should there not be a layman or lay representation on this judicial screening commission?

Judge DESMOND. If it was just a screening body, I don't see any reason why there shouldn't be lay people. I don't see any pressing necessity for it. I say that is a matter of judgment. I wouldn't see any argument against it.

I think the handling of these minor complaints is administrative and the handling of a substantial claim is judicial.

Senator TYDINGS. That's right. As I gather from the testimony we heard, there seems to be no question, even among those who suggested that you should have a commission as an adjunct to your appellate division, that that should be distinct and apart from the function of judging. In other words, the screening commission would screen, it would investigate, it would look into, even call judges in, talk to them, find the facts and then—

Judge DESMOND. Something like a grand jury, vaguely.

Senator TYDINGS. Yes; something like a grand jury. Then they would make the formal recommendation and if the judge would retire or resign voluntarily that would be the end of it—but they could make an indictment or presentation to the court of appeals or court on the judiciary, however it would work, and from then on it would be a matter in controversy.

Judge DESMOND. I would be opposed to having any formal trials held before any of our existing courts, for this reason only: That a trial of a judge whose removal is sought is apt to be kind of a lengthy process and it would interfere too much with the work of our courts because our courts are extremely busy now.

Senator SCOTT. Not only that, but even his acquittal would have tainted him to a degree in the public eye.

Judge DESMOND. There is no doubt about it.

Senator SCOTT. It would be against good conscience to do it.

Judge DESMOND. Using a grand jury analogy, a well-constituted screening body would try to see to it that charges were not leveled publicly unless there was the strongest reason for doing it.

Senator TYDINGS. One other area, Judge Desmond, and this may not be as great a problem as it is on the Federal bench, and that is the problem of the judge who, because of advanced age, generally speaking, may have his physical abilities impaired or his mental capacities reduced. How do you handle that in New York, or do you have any thoughts in this area?

Judge DESMOND. We do have a retirement age, you know, which tends to make the problem smaller than it is in the Federal courts, I think. As I say, in the instances I have known where it was thought that a judge was losing his faculties, was no longer able to carry on, it has been handled simply by approaching him or approaching his family. I haven't known of any instance—I haven't personally known of any instance where a judge refused to go along.

Senator TYDINGS. Would the presiding justice of the appellate division handle that or would someone from the court on the judiciary handle it?

Judge DESMOND. No. The court on the judiciary as we have it as a body set up anew for each case. I think in almost every instance, it would be the presiding justice of the appellate division because in the New York system he has close supervision, immediate supervision over the trial judges. By tradition he would be the one who would do it. In what way he would do it would be dependent on a lot of things.

Senator TYDINGS. As a practical matter, it does happen—he goes out and talks to the judge, the family, the children?

Judge DESMOND. Oh, yes. It does happen. Not too often. I know of a case recently. They don't seem to have any great difficulty in accomplishing the desired result.

Senator SCOTT. I have no questions.

Senator TYDINGS. I don't have any additional questions, Judge Desmond. I will offer your entire statement in the record and let us say we appreciate so much your being with us, sir.

Judge DESMOND. Glad to come.

Senator TYDINGS. The Honorable George J. Beldock, presiding justice of the second judicial department. Justice Beldock, we are happy to welcome you, sir, before our subcommittee. We know your distinguished background as presiding justice of the second department.

We are delighted that you are willing to come down here and make a contribution to our study. We would be delighted if you would offer your statement in its entirety for the record and stress or emphasize those sections which you think are most pertinent.

(A biographical sketch of Justice Beldock follows:)

**THE HONORABLE GEORGE J. BELDOCK, PRESIDING JUSTICE, APPELLATE DIVISION,
NEW YORK SUPREME COURT'S SECOND DEPARTMENT**

The Honorable George J. Beldock is the Presiding Justice of the Appellate Division of the New York Supreme Court's Second Department. He is a member of the Administrative Board of the New York State Judicial Conference, which is composed of the chief judge of the New York Court of Appeals and the presiding justices of the four Judicial Departments. Judge Beldock has been a member of the New York Bar since 1925 and has been a justice of the Supreme Court since 1947. He is a former district attorney of Kings County.

**STATEMENT OF THE HONORABLE GEORGE J. BELDOCK, PRESIDING
JUSTICE OF THE APPELLATE DIVISION OF THE SUPREME COURT,
SECOND JUDICIAL DEPARTMENT**

(The prepared statement of Judge Beldock follows:)

The power of the courts and the procedure within the court structure in New York to censure or remove judges for cause, and to retire them for physical or mental disability long antedated the widely heralded reorganization of the courts, which occurred on September 1, 1962.

On January 1, 1948, there was created by constitutional amendment a Court on the Judiciary, very much like the court so named and invested with the same duties and powers in the present Judiciary article of our State Constitution, adopted by the sweeping constitutional amendment effective September 1, 1962.

Prior to the establishment of the Court on the Judiciary, only the Legislature had the power to remove a justice of the Supreme Court or a judge of a State court of record. Upon its establishment, that power was also given to the Court on the Judiciary.

However, the Appellate Division of the Supreme Court is invested with power to censure or remove judges of inferior courts of local jurisdiction. Prior to September 1, 1962, such proceedings dealt generally with alleged misconduct on the part of a Magistrate, Justice of the Peace, Police Judge, Municipal Court Justice, and similar officials. Since September 1, 1962, the disciplinary powers of the Appellate Division have been expanded to include all courts with limited territorial jurisdiction.

The Court on the Judiciary has had occasion to deal with three cases in all in more than eighteen years of its existence, one involving two judges of a County Court, and the other two, respectively, a Justice of the Supreme Court and a judge of the Court of Claims. In the first case, in which I sat as a member of the Court on the Judiciary, the court dealt with charges against two judges of the County Court of Kings County, who had become embroiled in a public wrangle in connection with a murder case. There were statements issued by one of the judges which were very critical of the other, and vice versa. The Court on the Judiciary was convened by the then Chief Judge, Albert Conway. After the Court was convened, charges were drawn, served upon the two respondents, counsel was appointed to prosecute the case in the Court on the Judiciary, and after answers

were filed, the parties involved consented through their counsel that all of the testimony that had been taken preliminary to the convening of the Court on the Judiciary should become part of the record before the Court on the Judiciary and in lieu of another hearing. As a result of this the Court, after taking briefs and hearing all arguments, wrote an opinion (which is reported in 8 NY 2d h), severely criticizing the conduct of both of the judges named in the proceeding.

A subsequent case involved the conduct of a Justice of the Supreme Court, Kings County, and the same procedure was pursued. In that case a good deal of the testimony which had been recorded in a judicial inquiry involving the Judge's brother (who was also suspended as a member of the Bar for a stated period) was used and, by consent of counsel, made part of the record of the proceedings before the Court on the Judiciary. There was also in that case oral testimony given by the respondent Justice himself and, after the hearings and the submission of briefs and oral arguments, the Court on the Judiciary by a split vote, 4 in favor and 2 against, voted to remove the Justice from public office, and he was so removed. The grounds for the removal were: (a) obstruction of a Judicial Inquiry; (b) violation of Canons of Judicial Ethics; (c) other unethical and improper conduct in maintaining in his chambers the exclusive custody of the records of his former law partnership and refusing to surrender them to his brother (his former law partner), despite reasonable and proper demand therefor. (*Matter of Friedman*, 12 NY 2d d.)

The third case which appeared before the Court on the Judiciary involved a Judge of the Court of Claims, who had been charged with some complicity in connection with the investigation of the State Liquor Authority and some of its officials conducted by the District Attorney of New York County. In that case the Court on the Judiciary convened and removed the Judge from office for his refusal to sign a general waiver of immunity, which constituted a refusal to cooperate with and assist the Grand Jury's investigation into an alleged conspiracy to bribe a State Liquor Authority official.

In the first case the Court on the Judiciary was convened by the Chief Judge of the Court of Appeals. In the second case it was convened at my request as Presiding Justice of the Appellate Division Supreme Court, Second Department, and in the third case it was convened by the Chief Judge of the Court of Appeals at the request of the Governor.

These three cases referred to are the only cases that have been acted upon since the Court on the Judiciary came into existence.

However, there have been instances of disciplinary action taken by the Appellate Divisions with the reference to Judges of lower courts. In some cases hearings were held, charges were filed, and a severe censure was administered by written opinion of the Appellate Division reported in our law books.

In other cases, I as Presiding Justice have called in Judges who have been charged with misconduct regarded as relatively minor and neither venal nor wilful, such as the failure to comply strictly with a rule of the Administrative Board of the Judicial Conference of the State of New York, of which I am a member, or of the Appellate Division, or a Canon of Judicial Ethics relating to activities out of court, e.g. being photographed or otherwise participating as more than passive observers at political functions. In these cases the practice has been for the Presiding Justice of each Department himself, or through the Director of Administration of the Courts, to interview the judge, obtain his written explanation, make a formal record, and, if necessary, to give him a private admonition explicitly made part of the record which he is affirmatively advised may be considered at any time in the future should he thereafter engage in any conduct which violates the Canons of Judicial Ethics, the rules of the Appellate Division, or the rules of the Administrative Board of the Judicial Conference, or is otherwise subject to criticism.

In an appendix which follows, I have summarized the pertinent Constitutional and statutory provisions and have referred to decided cases published in our law reports, which are regarded as precedents with continuing relevance today.

APPENDIX

The Constitution and statutes of the State of New York provides a number of methods of procedure for the removal, retirement, and disciplining of Judges, depending on the Court in which the Judge or Justice presides:

REMOVAL FOR CAUSE

(A) A Judge of the Court of Appeals or a Justice of the Supreme Court may be removed for cause by (1) a Court on the Judiciary (Const., Art. 6, § 22, subd. a) or (2) concurrent resolution of both houses of the Legislature, if two-thirds of all the members elected to each house concur therein (Art. 6, § 23, subds. a, c);

(B) A Judge of the Court of Claims of the County Court, of the Surrogate's Court, or of the Family Court, may be removed for cause by (1) a Court on the Judiciary (Art. 6, § 22, subd. a) or (2) the Senate, on the recommendation of the Governor, if two-thirds of all the members elected to the Senate concur therein (Art. 6, § 23, subd. b);

(C) A Judge of the Civil Court of the City of New York, of the Criminal Court of the City of New York, or of the District Court, may be removed for cause by (1) the Appellate Division of the Supreme Court of the Judicial Department of his residence (Art. 6, § 22, subd. i; Code Crim. Pro., § 132; New York City Criminal Court Act, § 22, subd. 5), or (2) the Senate, on the recommendation of the Governor, if two-thirds of all the members elected to the Senate concur therein (Art. 6, § 23, subd. b);

(D) Judges of the Courts of a town, village, or City Court outside the City of New York, may be removed for cause by the Appellate Division of the Supreme Court of the Judicial Department of his residence (Art. 6, § 22, subd. i; Code Crim. Pro. § 132).

The Court on the Judiciary is composed of six Judges: The Chief Judge of the Court of Appeals, the senior Associate Judge of the Court of Appeals, and one Justice of the Appellate Division of the Supreme Court in each Judicial Department designated by concurrence of a majority of the Justices of each said Appellate Division of the Supreme Court (Art. 6, § 22, subd. b). The affirmative concurrence of not less than four members of the Court is necessary for removal (Art. 6, § 22, subd. c).

The Court on the Judiciary may be convened by the Chief Judge of the Court of Appeals on his own motion; and he must convene the court (a) on written request by the Governor; (b) on written request by a Presiding Justice of the Appellate Division of the Supreme Court; (c) on written request by a majority of the Executive Committee of the New York State Bar Association (Art. 6, § 22, subd. 4).

Before a hearing by the Court on the Judiciary on charges for removal for cause commences, if a member of the Legislature prefers the same charges against the Judge or Justice within thirty days after receipt of notice given by the Presiding Officer of the Court on the Judiciary to the Governor, The Temporary President of the Senate, and the Speaker of the Assembly of the name of the Judge or Justice, the nature of the charges, and the date set for hearing those charges, and if such charges are entertained by a majority vote of the Assembly, proceedings before the Court on the Judiciary are stayed pending the determination of the Legislature, which shall be exclusive and final (Art. 6, § 22, subd. e).

Proceedings for removal may be initiated before the Appellate Division by:

(a) the Appellate Division on its own motion (*Matter of O'Rourke*, 255 Ap. Div. 50);

(b) Application of a Bar Association (*Matter of Hirshfield*, 229 App. Div. 654);

(c) A Citizen (*Matter of Thomas v. Balluffi*, 4 A D 2d 950; *Matter of Troy*, 277 App. Div. 116; *Matter of Becher v. Case*, 243 App. Div. 375);

(d) The Chief Judge of the particular court involved (*Matter of Murtagh v. Maglio*, 9 A D 2d 515);

(e) the foreman of a Grand Jury (*Matter of Kane v. Rudich*, 256 App. Div. 856)

Both the Court on the Judiciary (Art. 6, § 22, and the Appellate Division (*Matter of Somers v. Eilperin*, 232 App. Div. 675) have the power to designate an attorney to act as counsel to conduct the proceeding.

All removals are only after due notice and hearing.

When the Court on the Judiciary is authorized to remove, the hearing must be conducted by the Court on the Judiciary.

When the Appellate Division is authorized to remove, the Appellate Division itself may conduct the hearing (*Matter of Kane v. Rudich*, 256 App. Div. 586) or it may direct the hearing to be held before a Referee appointed by the Appellate

Division, who thereafter reports to the Appellate Division his findings and recommendation (Code Crim. Pro., §132; *Matter of Sala*, 279 App. Div. 665). A motion to confirm or reject the report of the Referee must then be made before the Appellate Division.

Both the Court on the Judiciary (Art. 6, §22, subd. d) and the Appellate Division (*Matter of Maglio*, this Court, Nov. 13, 1959) have the power, in discretion, to suspend the Judge or Justice from the exercise of his office pending the determination of the removal proceedings before the Court.

Neither the Constitution nor the statutes enacted thereunder have prescribed what constitutes "cause" which justifies a removal. The judgment of the Court authorized to remove upon the sufficiency or insufficiency of a "cause" passed upon by it is final. (*Matter of Droege*, 197 N.Y. 44.)

The cases have defined "cause" as including corruption, general neglect of duty, delinquency affecting general character and fitness for office, acts violative of law inspired by interest, oppressive and arbitrary conduct, reckless disregard of litigants' rights, and acts justifying the finding that his future retention of office is inconsistent with the fair and proper administration of justice. (*Matter of Kane v. Rudich*, 256 App. Div. 586, citing cases.)

"Cause" does not include error of judgment, error in the decisions of particular cases, mistakes in the construction of statutes, nor mistakes in the determination of the extent or limitation of his powers, without further proof of unworthy or illegal motives (*Matter of Murtagh v. Maglio*, 9 A D 2d 515, 521).

Specific instances where Judges have been removed for conduct constituting "cause" are the following:

In *Matter of Harris v. Rounsevell* (64 App. Div. 623) a Justice of the Peace was removed where (a) he had used money to induce votes in favor of a town liquor license; (b) during voting, he examined ballots and signaled the information to a friend; and (c) he assaulted a watcher at the town meeting.

In *Matter of Bolle* (97 App. Div. 551) a Justice of the Municipal Court was removed where the Justice (a) showed favoritism for some lawyers and bias toward others; (b) did not permit the court stenographer to note objections and exceptions; and (c) omitted proof from the minutes.

In *Matter of Droege* (129 App. Div. 866, appeal dismissed 186 N.Y. 44) a City Magistrate was removed where, after convicting and sentencing prostitutes to the workhouse, without informing the probation officer, he set aside the convictions and discharged defendants at the instance of intermediaries.

In *Matter of Voorhees v. Koplér* (239 App. Div. 83) a Justice of the Peace was removed where he was shown to have drawn a revolver from his pocket while attempting to collect a bill for a prospective complainant before him and, as a matter of custom, acted as collector of debts, for which he was paid, and in so doing, utilized his position as Justice to stimulate payments by delinquent debtors.

In *Matter of Becher v. Case* (243 App. Div. 375) a Police Justice was removed where he was delinquent for a year in making reports and returns of moneys on fines, gave credit to persons fined, and there was proof of conversion of one fine.

In *Matter of Kane v. Rudich* (256 App. Div. 586) a City Magistrate was removed where, with knowledge of the notorious character of one Kassman, the Magistrate made himself unduly accessible to Kassman and indulged in cooperation with Kassman to an extent that enabled Kassman successfully to carry on his nefarious activities and bring the administration of the law under a cloud.

In *Matter of Murtagh v. Maglio* (9 A D 2d 515) a City Magistrate was censured because he curtly refused to explain to the complaining witness (a police officer) his action in reducing (without the recommendation or consent of the District Attorney) a felonious assault charge to a misdemeanor, when requested to do so by the complaining witness and the Magistrate berated the complaining witness for his attitude.

In *Matter of Furey* (17 A D 2d 983) a Police Justice engaged in a political campaign to promote his own candidacy for non-judicial office of Assemblyman. He thus violated the Canons of Judicial Ethics but, because he acted in good faith and under an honest belief that the Canons of Judicial Ethics had no application to Police Justices, he was not censured or otherwise disciplined.

Although the Constitution and the statutes provide only that the Court on the Judiciary and the Appellate Division have the power to remove, and both courts have exercised that power (*Matter of Friedman*, 12 N Y 2d 643; *Matter of Osterman*, 13 N Y 2d 1; *Matter of Kane v. Rudich*, 256 App. Div. 586), the same Courts have assumed that the power to remove also includes the power to censure only (*Matter of Sobel* and *Matter of Leibowitz*, 8 N Y 2d h; *Matter of Murtagh v. Maglio*, 9 A D 2d 515).

RETIREMENT FOR MENTAL OR PHYSICAL DISABILITY PREVENTING THE PROPER PERFORMANCE OF HIS JUDICIAL DUTIES

Neither the Legislature nor the Senate alone has the power to retire a Judge or Justice for mental or physical disability. The same Courts (Court on the Judiciary or the Appellate Division) which have the power to remove judges of particular courts for cause have the power to retire a Judge or Justice for mental or physical disability (Art. 6, § 22, subds. a, i). This is also after due notice and hearing.

The Appellate Division is also vested with special additional power to retire a Justice of the Supreme Court for disability where the Justice files with the Appellate Division his resignation and a petition stating the reasons he is incapacitated to perform the duties of his office, followed by a finding by the Appellate Division that the Justice is incapacitated (Judiciary Law, § 25).

Section 25(a) of the Judiciary Law provides that a judicial officer retired from office for disability by a Court on the Judiciary shall receive a special disability allowance which, together with his pension, if any, shall equal two-thirds of the annual salary which such judicial officer was receiving at the time of his retirement from office. Similar provision for allowance is made by section 25 of the Judiciary Law for a Justice of the Supreme Court retired by the Appellate Division.

IMPEACHMENT

The Constitution also provides (Art. 6, § 24) that the Assembly shall have the power to impeach a judicial officer by a vote of a majority of all the members elected thereto. The Court for the trial of impeachments is composed of the President of the Senate, the Senators, and the Judges of the Court of Appeals. No person may be convicted by judgment of impeachment, without the concurrence of two-thirds of the members present.

ADDENDUM

In addition to removal for cause, the Court on the Judiciary (Art. 6, § 22, subd. c), the Appellate Division (Code Crim. Pro., § 132), and the court for the trial of impeachments (Art. 6, § 24) have the power to disqualify a Judge or Justice removed from office from again holding any public office under this State.

Judge BELDOCK. Yes, I should like to offer the statement for the consideration of your committee and as part of my testimony. I thank you for the privilege of coming here, and perhaps I should have said this in the presence of Chief Judge Desmond with whom I serve on the administrative board and with whom I have served on the court on the judiciary. At the level that I serve, the appellate division, we have perhaps more intimate experience with individual complaints than even the court of appeals has.

Many people will write to the chief judge with reference to a complaint as to how a judge conducted himself in a trial, and sometimes, as Judge Desmond said, incoherently about some influence that was brought to bear by the other side's attorney which resulted in him losing his case. That letter will then be sent by Judge Desmond directly to the presiding justice of the department in which that judge served. Sometimes it will be sent through Mr. McCoy's office. He is the State administrator, and he will refer it to me, if it is in my department. Sometimes the chief judge will send it directly to me. Our setup is such that we have eight judges in my court, seven permanent judges and one temporary, but they all sit as a court, and we have a staff of our own.

My administrative assistant will sometimes, if it is a minor complaint, communicate with the judge or with his secretary, give him a copy of the complaint, ask him for a report in writing.

We do make a file on every case, regardless of how lacking in merit it might appear on the surface. We do investigate every complaint which involves a judge or a member of the bar in our department.

If it appears to be a complaint that may have some substance to it, I will send it to the administrator of our department.

There is a Mr. Wegman who is the administrator, as Mr. McCoy is the overall State administrator. Each department has a separate administrator who really is an arm of the court and of the judicial conference in a sense. Mr. Wegman has his own staff and he will call the judge in if he feels that it is necessary or he will call him on the phone, send him a copy of the complaint, ask him for a response. He will make a file, that will be reported back to me and then I will take the complaint up in each case with our entire court. If it is a matter which involved a transgression on the part of a judge, I may call him in myself and admonish him. I have done that in a number of cases. That is why I say our experience at the level of the appellate division is somewhat different than Judge Desmond's who will only reach the matter if it results in a court on the judiciary being called, either by him or by any of the presiding judges or by the Governor or the legislature.

We have had this kind of procedure. I have had judges in who have been charged with some minor misconduct, like participation in political events. We have a statewide rule which limits the activity of a judge in politics, excepting for the office of judicial officer.

We have newspaper pictures of a judge participating at some rally in behalf of a candidate running for some office. That will be called to my attention. We will call the judge in, make a record of it—I usually put it on a tape recorder, my conversation, his conversation, sometimes we transcribe it and we put it in the file.

The first time it is just an admonition. If we have more difficulty with him, we haven't yet decided at which point we would have to take some action to censure him. We haven't had such cases. In the last few years since 1961 when I became presiding justice, I would say that I have personally admonished five judges on the record, privately, as far as the public is concerned. There is no record made of it elsewhere, but I do have a file in each case in our court. Two weeks ago we dealt with a case of a judge who picked himself up and went to Florida for 2 weeks vacation without permission. He left a letter on his desk in which his doctor said that he is tired and he has been treating him for a little hypertension and it would be a good thing for him to go south.

The judge left. He was told before he left that he had to get permission. He had called the administrator of the courts, Mr. Wegman, and Mr. Wegman told him that he could ask me for permission, but he would not get it unless he was ill; that I insist upon some certification that he is ill, and if he is ill he should stay home, go a hospital, or go somewhere for a rest.

But going to Florida around Eastertime or midwinter is something that doesn't fit in with my philosophy of a judge going off for a rest cure.

So he was told that he could call me, but the answer would be "no." Well, he thought he would do it anyhow, and on a Monday morning when he was assigned to a criminal part of the regular calendar, he didn't show up and a clerk announced that the cases are being adjourned for 2 weeks, and the D.A. and the rest of the lawyers left and cases were adjourned. I learned of this about 3 or 4 days later at

which time they came in and found a letter on his desk from his doctor.

I called Mr. Wegman, my administrator, and said:

You find out where judge so and so is in Florida. You tell him that he must be back here tomorrow. Tomorrow is a Saturday; he can be back Monday morning.

After that I want to hear from him. I want to visit with him and I want the Administrative Judge to be present while I make a record of what goes on.

The judge came back the next day—he was in court the following Monday, after having lost a week. He was brought in at a conference in my chambers with the senior judge of that court who is the acting administrator of the court, with Mr. Wegman present, with my tape recorder on. I told him we are making a record for the future and I asked him to give us his explanation, balled him out, told him how foolish this was; that if he was sick all he had to do was come and tell us he is sick and if he can't work, why, that is fine. But that if every judge who wanted go to Florida in December, February, or March or Easter would take off and leave a letter on his desk and adjourn a criminal calendar which had some murder cases on them, that we would have chaos and not order in the court.

He was very contrite and apologized and offered to make up this time, he would work during the summer three or four weeks to make it up and would never do it again.

We closed the book in the sense that I said:

Well, forget about it. The next time there is any complaint about you we may have to do something about it.

Then I took this into my court, made a record of it before all the judges—they all knew what happened—and within 24 hours every judge of that court, that lower court where this man served—this is the supreme court but it is lower than us, of course—every judge in that court knew that this particular judge was brought back from Florida and that he had been admonished and we hope that that will have a salutary effect on the judges in that whole area. I am sure it will.

I gave you this as an illustration of what has happened in the last month. Beyond that there have been complaints about judges being unjudicious or losing their temper, not letting the witnesses talk, balling them out. Much of this comes from the family court, strangely enough.

In the family court the procedures are a little more informal, they are dealing with husband and wife or neglected children, problems of nonsupport, and very often the loser in that court is sure that the judge was approached by the husband's lawyer or the wife's lawyer and that they are friends in politics or they have seen them together in restaurants, and I will get complaints and complaints.

It is very hard to satisfy those people. I do take those complaints, send them to the judge, have him submit in writing an explanation of what took place, get a copy of the transcript of the testimony of the hearing, if it was transcribed, and make a file on it. After the court has acted on it—we notify the complainant that we have examined into the matter and find no cause for any further proceeding on the part of the court. This has happened frequently in our department.

As you know, it is a very large department. We have the largest number of judges in the State, more than half of the population of the State, and there is a lot of litigation and a lot of complaints. We get complaints from lawyers about the conduct of judges, from litigants,

sometimes anonymous complaints. Even those are examined into, either by my administrative assistant in my own office or by Mr. Wegman or his staff. So that the questions you asked Judge Desmond about the suggestions made this morning which I am sorry I didn't hear, about a screening panel—

Senator TYDINGS. Evidently you perform today in your appellate division the work or the task which such a screening committee would ostensibly do.

Judge BELDOCK. Precisely.

Senator TYDINGS. Let me ask you this: Do the other presiding justices do this same sort of thing?

Judge BELDOCK. Well, I would say that the first department, Judge Botein's administration, is similar to ours. Keep in mind that the first department, where you are now, is Manhattan and the Bronx. Judge Botein is presiding justice. He has an administrator, Mr. Tolman. Very often the complaint will be against the judge of a citywide court, where we two have joint administration. In other words, we administer three courts together—the family court, the criminal court, the civil court of the city of New York being administered by our two departments.

There are three counties in my department within the city of New York. We have seven other counties, but within the city of New York we have joint administration over the criminal court of the city of New York, which has about 75 judges; over the civil court of the city of New York, which has jurisdiction up to \$10,000 and has 95-some-odd judges; and the family court, which has 33-some-odd members.

This is the volume of judicial manpower within the city of New York, where our two departments share the administration.

If a complaint comes in about a judge of the civil court who resides in the Bronx, I will send it to Judge Botein and he will follow this process more or less. If it is a complaint about a judge who resides in Brooklyn or Queens or Richmond or who sits in these parts, Judge Botein will send it to me, and that is the procedure we both follow.

Outside of the city of New York, in the third and fourth departments—that is, Albany, where Judge Gibson is the presiding judge, and Buffalo, where Judge Williams presides—I don't know precisely how they operate.

I do know that there is more intimacy in the third and fourth departments upstate and there is an administrative judge or many administrative judges who serve because there is a larger area to be covered. I would believe that in those cases the local administrative judge has a good deal to do with this problem.

In the city of New York and outside the city and within our second department, where we have an administrative judge, I will call in the administrative judge on the complaint. You had one case referred to in my written testimony, *Maglio*—it's in the books—in that case Maglio was a judge from Brooklyn who sits in the criminal court. You talked about publicity—there was a great deal of publicity before I heard about the complaint. There was a big blowup in the newspapers about Judge Maglio admonishing a police officer who had come in with his arm in a sling or cast claiming that he had been assaulted by a man in a gas station. There was a charge against the defendant, and the judge was very rough on the policeman. He was a young policeman who had been on the force 6 to 8 months and the

judge went after him, the complainant, and reduced the charge from a more serious charge to a minor one—disorderly conduct.

The policeman started to explain that his arm was broken with a tire iron by this man and the judge shut him up, chased him out of the courtroom, and the newspapers picked it up. This became a big headline in the evening papers and the next few days there were editorials and stories, and there the administrative judge of that court, Judge Murtaugh, came to me with a complaint.

Senator TYDINGS. Did he file the complaint himself, the administrative judge?

Judge BELDOCK. Yes. If he didn't I would have done it myself. He immediately called me up and I said, "I want a written complaint from you." He submitted a written complaint. At this level the appellate division has complete jurisdiction over the conduct of the judges.

Senator TYDINGS. You can remove him for cause?

Judge BELDOCK. We can remove him for cause or we can discipline him. We can also censure him. In the case of Maglio, what we did—we had formal charges drawn—I had them drawn for the court, had them served on Judge Maglio, and we appointed a former colleague of ours in the appellate division and who is now off the bench because of age, Judge Macrate, to sit as the hearing officer.

We have done this a number of times. He sat and took testimony under oath of all of the parties—the complainants, the witnesses, the newspapermen who were in the courtroom, as well as the testimony of the judge himself who was on charges. This was all secret, it was a private, quiet, in-camera proceeding. The referee made a report to us of his findings. Our court found the charges sustained and his conduct was criticized very severely in the opinion that we wrote.

However, we felt and we so stated that the censure which we administered was adequate punishment in this case. This is the fourth or fifth time that we have had similar proceedings, in my experience, in the appellate division.

On one occasion we dealt with a judge of the lower court who had a drinking problem. On another occasion we dealt with a judge—not in the city of New York; this is in our outlying districts—a judge who was careless about coming to court on time. When he came to court he would get in late, he would have lunch, and he would call the calendar, and he would adjourn the matter. As there were only two judges in that particular court in that county—it was serious as he wasn't doing a day's work.

This was called to our attention by the administrative judge of that county. There I had no difficulty. I called the judge in. He said that he had had a heart attack, which we knew of, and that he was sick and that he just couldn't do the full work.

I said to him, "Well, frankly, either you perform your duties or I have the unpleasant task of starting a proceeding which might result in your removal." This judge was under the jurisdiction of the appellate division as it was in the family court.

I said, "I don't want to start that proceeding. I think you would be better off taking your retirement, if you can." This man had to run in a year and the problem was not as severe as it could be with someone who had 8 or 9 years to go. So he stayed on for the rest of that year and he didn't run again and he vacated that office.

Had he been elected—run and been elected for another term of 10 years—it would have been our responsibility to do something about it because he wasn't performing his duties. That is the case in the family court. Another case had to do with a judge of the criminal court, and in that case we found that he was temperamentally unfit. He had problems at home and they showed up in his work and he was very irritable, bawling out the lawyers in the courtroom and the DA's and cutting everyone short. There we had another remedy. He is a good judge, otherwise. We just removed him from the criminal court and transferred him—we have that power—to the civil court, where he is doing a very excellent job. He doesn't have the pressures that are imposed upon a judge in the criminal court. He is trying negligence cases and other nondifficult cases, and he is very happy and he is doing a very fine job. That case we solved ad hoc, based upon the power to transfer one judge to another court.

So we get back to the question you asked Judge Desmond about a screening committee and the advisability of having a civilian or more than one civilian on the screening committee. My own view is that we do our screening. We do it confidentially; we don't release anything to the press that might injure a judge and his reputation, and it is only where the charge is of that serious nature that it requires definite action, like the *Maglio* case which resulted in a censure or the *Friedman* case which was in my memorandum, which required calling the court on the judiciary, where the matter gets any publicity.

Senator TYDINGS. Did your predecessor as presiding justice devote the same amount of time and effort in this field as you obviously have done?

Judge BELDOCK. My answer to it is that before 1961 the position of presiding justice of the appellate division was a very simple, easy, enjoyable position. After court reorganization, the position of presiding justice became very difficult. This goes for all the four departments and for Judge Desmond. We are now members of an administrative board; we are members of the judicial conference; and we were given greater responsibility, by the very concept of court reorganization.

So that all of us now take a very serious look at any charges of misconduct and I think that this is an innovation in court administration since 1961.

Senator TYDINGS. How much of your time do you devote in this area, to the area of—

Judge BELDOCK. It would be hard to judge the time. Hardly a week goes by in which we don't have a complaint against a judge. They all require this treatment. We try to feel that we are not neglecting our responsibility by sloughing it off, because we know Judge X is a very fine gentleman; he couldn't be guilty of that offense. We treat the matter coldly and objectively and it takes hours of every week of my time, of our administrator, Mr. Wegman, sometimes of the administrative judge, and this is the current procedure that we employ.

Senator TYDINGS. It is very obvious in your case that you do all of the work that such a screening committee would do.

What is your reaction to having such a screening commission, assuming we would name, say, four judges and two laymen or three judges and one layman or five judges?

Judge BELDOCK. I would be frank and say I don't think it necessary in this State. That is no indication of what may be necessary in the

Federal system. You have different problems than we have. In this State, being divided into four appellate divisions, each appellate division takes a very active role in the administration of the courts. We assign the judges. We tell them where they are to sit, we fix their hours of work.

One of the first things that the administrative board did was to increase the daily working session from 9 to 4 to 9 to 5. That is 9:30 on the call of the calendar to 5 p.m. We have added 1 hour to the court day. We have taken a very serious look at the conduct of the judges. We have had conferences, individual and collective, with the judges.

They know that the responsibility for court administration is in the appellate divisions, that if it gets beyond us, we can call on the court on the judiciary. We have only done that in three cases. None of the other complaints reached the proportion that required a court on the judiciary nor did they involve conduct that we couldn't deal with, sometimes by reasoning, by admonition, by a censure, private censure, and so forth. So I say, I don't think the screening committee for a system such as ours would be a substitute for what is now being done under the supervision of the presiding justice and his court and his administrator and his administrative judge.

We also at times get an assist from the judicial conference because we have a staff there, and if I need some additional help, if I want a private inquiry to be made—I could call upon Mr. McCoy and Mr. Marcus, his counsel, and say, "I would like to have you send someone else to make a check into such and such a situation."

There comes to mind that there was one such case of a police justice who failed to report under our rules. They are required to keep separate bank accounts and to report their income, so-called—it's the fines levied, mostly in traffic violations. The comptroller of the State has a separate department that keeps tabs on the reports of the police justice or justice of the peace.

I got a report about 3 years ago that a certain police justice in my department, in one of the upper counties, was neglectful, he had not reported his bank account, "we can't get a rise out of him, he doesn't answer our letters." In that case I believe we took it up first with Mr. McCoy and then we took it back and we adopted a rule, through the conference and the administrative board, to try to tighten up the procedures to void such lack of observance of reporting. We still get complaints about some police judges who don't make their reports on time, whereupon they receive an admonition or a letter from the administrator of the courts or sometimes from me.

Senator TYDINGS. It's apparent to me from your testimony that in actual application your system works with pretty much the same results that California does. The principal difference is that in New York, rather than having the screening work and the study and the investigation done by a statewide commission, it is done in each department by the presiding justice and then any final, formal action which has to be taken is either done by your appellate division, in the case of the inferior courts, or by the court on the judiciary. In California, they go before their supreme court.

Of course, your testimony is the first that has really shed light on how you operate. Our problem in the Federal system is that we don't have the really strong administration of the circuits that you have in your appellate divisions.

Judge BELDOCK. I could venture this thought. I would prefer, if I had a choice in the Federal system, to see an administration such as we have through the circuit court, designating one of the judges in charge of such a department, rather than to have a standing screening committee with overlapping terms, such as I have heard.

Senator TYDINGS. Staggered terms?

Judge BELDOCK. Yes, staggered terms. I have a feeling that the best administration over the judges, supervision over the judges insofar as their conduct, comes from direction from within the judiciary. So that if you take us, as an illustration, we do get immediate response from the judges. None of them so far have disobeyed our rules, and we have called them to task, but in those cases where we felt that it wasn't warranted to create any big to-do about it——

Senator TYDINGS. How many judges do you have in your division?

Judge BELDOCK. That is a hard question to answer.

Senator TYDINGS. More than 100?

Judge BELDOCK. We haven't a full count. There are acting city court judges and there are acting police judges. We have a total of well over 700.

Senator TYDINGS. That gives you the ability to act with a certain amount of objectivity and impartiality. If you were to sit in a circuit where the total number of judges was 20 or 25 or less, it would be a little more difficult for you, wouldn't it?

Judge BELDOCK. Yes, I hadn't considered it from that aspect. I was thinking of some representative of the Federal system who would have within his jurisdiction the supervision, say, over 100 judges and he would set up the machinery to receive complaints, to screen the complaints and then act upon the complaints. I didn't mean a circuit. I meant that if it were possible to combine——

Senator TYDINGS. An administrative reorganization. We have, even including senior judges, less than 500 judges, and an average of 5 or 6 in a district.

Judge BELDOCK. In the city of New York City we have 95 in the civil court, 70-some-odd in the criminal court, 33 in the family court.

Now we go to the supreme court. In the first department there are 50-some-odd judges. In my department there are over 50 in the city of New York. Without the city of New York are almost another hundred.

Now, I haven't touched the inferior courts. We have a district court in Nassau with over 20 judges and so on down the line.

Senator TYDINGS. We have some experience in the Federal system. We have a provision in the Federal statute now that says that if a judge is physically unable to perform his task, there are provisions whereby the Judicial Council in each circuit can certify that fact to the President and an additional judge can be appointed. This law was enacted after a great deal of work by the members of the American bar and it has yet to be used effectively. In a given circuit one judge just won't act against another.

Judge BELDOCK. We have had that experience, Senator. We have a cutoff, 70, constitutional age limit beyond which a supreme court judge can sit only by certification of the administrative board for 2-year periods as a retired justice, for three 2-year periods. He can be certified until he is 76. He has to be mentally and physically fit.

Senator TYDINGS. How does that work out as a practical matter?

Judge BELDOCK. We haven't refused to certify anyone yet, although we came pretty close to it. There is a gentleman named Liebowitz who was in one of these disciplinary matters. He was 70, and you should know that Judge Liebowitz is known far and wide as an outstanding—

Senator TYDINGS. Quentin Reynolds helped him along.

Judge BELDOCK. That's right. Judge Liebowitz became 70 and there was a great to-do about whether we would certify him. My own answer to my own court first was that he is a good judge. Unfortunately he has some habits which I don't approve of, which we had no control over before 1961. But now we do have control, because we can move him, since court reorganization, from one branch, criminal branch, to the civil branch. I stated that I would move him into the civil branch where he would do an excellent job and he would have no occasion for publicity or reporters or stories in the press, and so 4 years ago I came to the administrative board and recommended that he be certified for 2 years.

Judge Desmond and I get along very well through these years, although on opposite sides of this certification argument. I wanted him certified. Judge Desmond violently opposed certifying him and gave his reasons. It is not a secret because in the published report the vote was 3 to 2. Three members of the administrative board, myself and two others who were persuaded to go along with me, voting to certify him.

Judge Desmond and Judge Williams dissenting—they dissented on the certification on the record. That was 4 years ago, 3½ years ago. The certification ran out after 2 years and last December or November I had the same problem. I presented the fact that this man is now sitting in the civil side where you don't hear a word about him. He does fine work, he gets along with the lawyers, he is a different person.

He has come and told me—and I told this to the administrative board—that he felt like a person let out of a cage, because he was so steeped in the work of the criminal law, he hated some of the lawyers in that branch, he had such fixed opinions about them and about defendants that he couldn't control himself on the bench, and it showed up in his appeal records. We reversed him many times because of the fact that the defendant didn't get what we felt was a fair trial. The judge was balancing the scales a bit one-sidedly.

Since we took him out of there, he is doing very fine work because all he does is try negligence cases. He sits in what we call a blockbuster part that is a control part to settle cases, and he is sitting in a matrimonial case once in a while and he has been behaving very well.

I again had difficulty with the administrative board but they went along with me. If in the next 6 months, his second term ending next year—if I should come to the opinion that this man doesn't deserve to be recertified, I won't make the fight and he won't be recertified.

In this one case I felt that by taking him out of the criminal side of the court, we could still use a good judge, as he is not senile, he has a very active mind and he is in good health. He works very hard. On the other hand, we did have a case before I was presiding justice, when I was a member of the appellate division, where a judge had been certified for his second term—he was 72. No, he was 74. He

was a very likable person—he is dead now so I won't talk about his idiosyncrasies, but he had many of them. One of them was that he wouldn't let the lawyers try their case, and if he had someone who was a foreigner on the stand in a case before him, he would ask them how long have you been in this country. "You speak with an accent. Why didn't you learn to speak English? Are you a citizen? How long have you been a citizen?" And he acted very brutal in these cases. So that when his time came up for certification I was the one who told my court that I would vote against this man as being no longer qualified to sit as a judge. As much as I liked him and as much as I was fond of him in the old days, he has become a little senile and I don't think we should certify him. It was a five-man court that voted on this. There were four in favor and I was the lone dissenter. The good Lord took him a few years later.

It is true that leaving to colleagues of a judge to determine that a man can or cannot serve because he is not mentally fit is not the best system. On the other hand, where we are dealing, as I am now, with a statewide court system, it is no longer a matter of partiality. If there was some judge that I was close to, I don't know how I would act. In this case I did not know Judge Liebowitz favorably. I was a district attorney and I had an experience with Liebowitz that should have set me up against the man for the rest of my life. Yet, when it came to recommending him, I recommended him because I knew he would be competent—he is honest, he worked hard, but he was the wrong round peg in a square hole. You just had to put him in a round hole and he was all right. We resolved it that way.

What you can gather from this I don't know, sir.

Senator TYDINGS. I think we have gained a great deal. If we felt that in the Federal system it was necessary to go to a screening commission rather than trying to do it in the circuit or have a strong administrator in the circuit court, do you have any comments on the composition of a screening committee?

Judge BELDOCK. Yes. I don't want to give the impression that I feel strongly that a screening committee is unnecessary. I don't. I think a screening committee is a very good thing. I don't find it necessary in our setup. Maybe it would be very helpful in the Federal system. I would answer your question by saying that my own opinion would be that it ought to be composed of the administrative judge, if there be one, a trial judge from the trial bench from another circuit, and, if you wish to have civilian representation, I would say that the then president of the Federal Bar Association of that district, who I feel would be the best person representing the bar itself to contribute some balance, public relationswise, to this panel.

I think that a three-man panel or a six-man panel on which you had the bar represented would be sufficient. I am now answering the question with something else in mind. I am now dealing with OEO, Senator.

Senator TYDINGS. I am aware of some of the problems there. George Brownell is the chairman of that.

Judge BELDOCK. Yes. George Brownell is working very closely with Judge Bottein and myself. We are having a devil of a time selecting the composition of the board of directors for the legal aid group, but they are not legal aid, really. It is a legal organization which will have on its board laymen to administer the funds of the

OEO and supervise the local law offices. We have been struggling with this now over a year and the composition of the board is the big conflict.

The mayor of the city feels that the board should be made up one way, the large bar associations feel it should be made up another way, the minority bar associations, the Puerto Rican bar and the Harlem bar and the Bedford-Stuyvesant bar, these are the predominantly Negro bar associations—they are not truly bar associations; they are called bar associations, they are interested in the lawyers in their community—but they are a small part of our bar as compared with the Association of the Bar of the City of New York or the County Lawyers Association of New York.

They want equal representation with the association of the bar. In other words, when it gets to running this board with civilians on it, including members of CORE and members of civic organizations and women's leagues, and I have one proposal from one of the counties in my department outside of the city that everyone including the sheriff of the county is put on this board, the women's clubs and civic organizations, and so on.

Therefore, I am a little wary about boards to administer the supervision and discipline of judges that are too broad in trying to satisfy the public image of a fair board. I think the board should be made up predominantly of judges. If it is going to have lay people on it, it ought to be a representative of the bar and not necessarily a civic leader. But I would say that would satisfy me if I had something to do with it. I would say a representative of the bar would get the bar's views and the bar's attitude about the conduct of this judge.

I hope I have answered your question.

Senator TYDINGS. Judge Beldock, let me say this, that your testimony, I think, had been one of the highlights of our entire stay here in New York. I am particularly interested to hear about the administration of your division. One of these years we are going to move into that field in the subcommittee; namely, the effective administration of the Federal courts from a strictly managerial point of view.

When that time comes we are going to be getting your advice and counsel again.

Judge BELDOCK. I must say, Senator, I am not too proud of our problems because most of these complaints are in my department. Two of the three cases on the Court of the Judiciary are from my department. One of them I instituted, the other one former Chief Judge Conway instituted. They resulted in both cases in the removal of judges, judges who were very intimate, who grew up with me, in the community and on the bench—both of these judges.

It is not a pleasant position to be in when you have to be unkind sometimes and do what you think is right. Perhaps you could find a way to relieve the administrative judge or the presiding judge of this responsibility.

I like the system as it is now and I will be glad to help you at any time if I can be of some help.

Senator TYDINGS. Thank you very much.

The hearing will stand adjourned until further call.

(Whereupon, at 3:15 p.m., the committee adjourned subject to the call of the chairman.)

JUDICIAL FITNESS

Procedures for the Removal, Retirement, and Disciplining of Unfit Judges

FRIDAY, JUNE 17, 1966

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL
MACHINERY OF THE COMMITTEE ON THE JUDICIARY,
San Francisco, Calif.

The subcommittee met, pursuant to notice, at 10 a.m., in courtroom No. 10, U.S. Courthouse, Senator Joseph D. Tydings (chairman of the subcommittee) presiding.

Present: Senators Tydings (presiding) and Hruska.

Also present: William T. Finley, Jr., chief counsel; Peter J. Rothenberg, deputy counsel; and B. A. Hertzbach, research assistant.

Senator TYDINGS. The subcommittee will come to order.

This is a hearing before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary.

On my right is Senator Roman L. Hruska, the ranking minority member of the subcommittee, and I am Senator Joseph D. Tydings, chairman of the subcommittee.

STATEMENT OF SENATOR JOSEPH D. TYDINGS, CHAIRMAN OF THE SUBCOMMITTEE

We are here today to hear testimony on the operation of the California Commission on Judicial Qualifications, which is perhaps the most sophisticated and effective method of judicial removal and discipline in effect in the court systems of the several States.

This hearing is part of a continuing study of the problem of procedures for the removal, retirement, and disciplining of unfit judges, and we hope that the information we receive at our hearings in California will enable us to develop fair and effective procedures for the Federal judicial system.

Our inquiry into the problem of judicial fitness is not intended as a criticism of the fine men and women who occupy the Federal bench. We have the greatest confidence in the competence and integrity of the Federal judiciary. But we must recognize that even a very few unfit judges—judges who are senile, judges who are lazy, judges who are physically or mentally disabled—can cause harm to the judiciary far out of proportion to their number. They can interfere with the orderly performance of the business of the courts, and they can tarnish the image of the judiciary in the eyes of the public.

For these reasons, we are concerned that the Federal judicial system presently lacks adequate and fair methods for removing unfit judges from the bench. We believe that the problems of judicial fitness are best handled by the judiciary itself, yet the only method now available for removal of judges is the cumbersome legislative mechanism of impeachment.

We think that the Federal judiciary needs something better than impeachment, a removal method that gives the dominant voice to the judges themselves. Such a system, we feel, is not inconsistent with the principle of an independent judiciary.

Our impression is that California has developed such a system, and that the system has been successful. Our hearings here in California are intended to shed some light on the California system.

We hope to find out why California—a State with an excellent judiciary—was led to adopt a more expeditious removal system than impeachment; how the commission on judicial qualifications has operated in its 5 years of existence; and what the impact of the commission system has been on the California bench and bar.

Our witnesses today in San Francisco and Monday in Los Angeles are well qualified to provide us with the information we seek.

We begin today with the Honorable Phil S. Gibson, retired chief justice of the Supreme Court of California, who now serves as chairman of the National Commission on Food Marketing. Justice Gibson was in many ways the principal moving force behind the adoption of the commission on judicial qualifications system, and we are delighted that he has taken time out from his pressing Marketing Commission duties to be with us today.

Next, we will hear from Jack E. Frankel, who has been executive secretary of the commission since its inception in 1961. We will also hear today from two men who have served on the commission for a long time, Edward W. Schramm, Esq., of Santa Barbara, who was a lawyer member of the commission for the first 4 years of its existence, and Benjamin H. Swig, who has been a lay member of the commission since its founding.

I would like to take this occasion to thank Chief Judge George B. Harris of the U.S. District Court for the Northern District of California, for his courtesy in making this courtroom available to us.

Senator HRUSKA. I have a brief comment to make, Mr. Chairman.

The basis for this series of hearings was the splendid statement on the subject of the chairman in the Senate Chambers last fall. From there we went to the hearings in Washington and New York.

We are laying a foundation for the Senate to consider one or the other of several alternatives before us.

I want to commend the chairman and also his staff for their progress.

In Nebraska we have something of a reversal of what has happened historically in so much of our midwestern jurisprudence.

Nebraska 100 years ago turned to the East for its codes, and had frequent occasion to go back to Ohio precedents for interpretation of our code, and many of our constitutional provisions.

This time, however, Nebraska turned not to the East but to the West, to adopt the working mechanism of the California system of dealing with the judicial qualifications. On the ballot in November of this year the Nebraska voters will have a constitutional amendment which will embody virtually all of the California system, and I should

like to pay my respects, therefore, to Chief Justice Gibson for his labors on this system, and for the testimony that he will give today.

Parenthetically, I want to pay him renewed respect as Chairman of the National Food Marketing Commission.

Thank you, Mr. Chairman.

Senator TYDINGS. We are delighted to see you here today, Justice Gibson.

(A biographical sketch of Justice Gibson follows:)

THE HONORABLE PHIL S. GIBSON

Justice Phil S. Gibson received his undergraduate and LL.B. degrees from the University of Missouri, and did post-graduate work at the Inns of Court in London. After holding several positions in the Executive Branch of the State of California, he was appointed Associate Justice of the Supreme Court of California. He served as Chief Justice of the Court from 1940 to 1964, when he retired and was appointed Chairman of the National Food Marketing Commission.

Justice GIBSON. Thank you, gentlemen.

STATEMENT OF HON. PHIL S. GIBSON, RETIRED CHIEF JUSTICE
OF THE SUPREME COURT OF CALIFORNIA

Justice GIBSON. It is an honor to appear before this committee. In my opinion, it is difficult to exaggerate the importance of the need for adequate procedures to govern the removal, discipline, or retirement of unfit judges.

I understand that Mr. Frankel, who is secretary of our commission on judicial qualifications, will appear as a witness. He is much better informed than I with respect to the day-to-day operation of the commission, so with your permission I shall leave that part of the discussion to him.

I shall confine my statement to the reasons the commission was created and a description of the judicial system in which it operates.

Our court structure, of course, differs in material respects from the Federal system, and this obviously is an important factor in determining whether the methods used here for the removal or forced retirement of judges would work in the Federal courts.

Shortly after I became chief justice of the Supreme Court of California, I was forcefully impressed with the inadequacy of existing procedures in this State. I soon discovered that several judges had been absent for long periods of time—one judge had tried only six cases in 3 years—and in several instances complaints were received concerning the misconduct of judges.

I was surprised and shocked by these conditions, and where it appeared appropriate, an attempt was made to correct the situation by conversations with the judge involved. I found, however, that suggesting to a judge that his retirement would be in the best public interest was a most delicate and difficult message to deliver.

You have no doubt heard the story of the experience of Justice Field's colleagues in this regard. Justice Field was once selected by his brothers on the U.S. Supreme Court to call on the aged Justice Grier with the suggestion that he should retire in his own best interests and those of the Court. Field performed his assignment reluctantly.

Years later when Field's own mental condition was causing his associates considerable anxiety, Justice Harlan was designated to

call upon him with a similar suggestion. Harlan attempted to approach the subject as gently as possible, asking Field if he remembered the occasion when he had spoken to Grier about retiring.

Field, eyes blazing, answered, "Yes, I remember it damn well, and a dirtier day's work I never did in my whole life."

Perhaps I should explain at this point that in California the chief justice acts *ex officio* as chairman of the judicial council, and in that capacity it is his duty to see that all of the courts in the State function efficiently. The constitution provides that he shall seek to expedite judicial business; equalize the work of the judges; and assign any judge to another court of like or higher jurisdiction to assist a court whose calendar is congested, to act for a judge who is disqualified or unable to act, or sit where a vacancy in the office of judge has occurred. It thus appears that the chief justice has a direct responsibility for the efficient operation of all courts in our judicial system.

Although the inadequacy of the existing procedures for the removal or retirement of judges was obvious when I became chief justice, no attempt was made at that time to obtain corrective legislation because we were confronted with the need for what we considered more pressing reforms.

Among these were the complete reorganization and simplification of our judicial system and the enactment of provisions for adequate salaries and retirement benefits for judges.

It took 10 years to accomplish those reforms and another 10 years to secure an enactment of a constitutional amendment establishing procedures for the removal or retirement of unfit judges.

In order to understand the operation of our present method of dealing with problems in this field, I think it is important to know in rough outline at least something about our court structure, the manner of selecting judges for the different courts, and provisions for their retirement.

These matters, of course, have a necessary relationship to the kind of methods that should be employed in connection with the removal or forced retirement of judges.

In California there are 957 judges. This number includes 17 judicial positions created by the present session of the legislature.

We have three trial tribunals—justice courts, municipal courts, and superior courts.

Justice courts function in the more sparsely settled areas in nearly all counties in the State. There are 268 of these courts presided over by laymen and lawyers. Nearly one-third of the judges are lawyers. The offices are elective; vacancies are filled by the county board of supervisors.

In order to qualify as a candidate for election or appointment, a layman must pass an examination given by the State judicial council, which is a constitutional body.

Municipal courts are established in districts having a population of 40,000 or more. There are no justice courts in a municipal court district. There are 71 municipal courts in the State presided over by 280 judges. The offices are elective and vacancies are filled by appointment by the Governor.

A superior court is established in each county. There are 58 of them with a total of 363 judges. The offices are elective and vacancies are filled by appointment by the Governor. The judges of municipal

and superior courts must be lawyers who have been admitted to practice for 5 years. All judicial offices in California are nonpartisan.

The State is divided into five districts with an intermediate appellate court, called the district court of appeal, in each district. The courts within a district are divided into divisions of three justices each, in some districts there is only one division, and in others there are several. There are in all 13 divisions, with a total of 39 justices.

The supreme court consists of seven justices.

All justices of the district court of appeal and the supreme court are appointed by the Governor subject to approval by the commission on judicial appointments, a constitutional body composed of the chief justice, a presiding justice of the district court of appeal, and the attorney general.

The justices of these courts serve for terms of 12 years and run on their records without opposition.

In order to avoid confusion, I should perhaps state here that the commission on judicial appointments was formerly known as the commission on qualifications, and that name was changed when the present commission on judicial qualifications was created in 1960.

California now has a very good retirement system for judges. It does not make retirement mandatory at any age, but it contains a very persuasive inducement for a judge to retire at 70.

A judge with 20 years' service who has reached the age of 60 may receive 75 percent of his salary on retirement; a judge with 10 years' service may retire at 70 with 65 percent of his salary.

If a judge does not elect to retire at 70, his retirement allowance is reduced to 50 percent.

If a judge has become permanently disabled he may be retired, with the permission of the Governor and chief justice, at 65 percent of his salary regardless of the period of service.

In all situations, the spouse of a deceased retired judge is entitled to half of the retirement allowance for life.

Before the adoption in 1960 of the constitutional amendment creating the commission on judicial qualifications, three methods were provided in our constitution for the removal of judges: One, removal by the supreme court of a judge convicted of a crime involving moral turpitude; two, impeachment for misdemeanor in office; and three, recall.

The first rarely occurs and usually comes after the damage is done. Only two judges have been impeached in the history of our State, and one of these was found not guilty. Three judges were recalled in one election in Los Angeles, and two in San Francisco.

These methods of removal are cumbersome, and experience has shown they are not resorted to except in the most aggravated cases.

It was evident that some better method had to be devised to compel retirement in cases where the mental or physical infirmity of a judge seriously interfered with the performance of his judicial duties and to secure the removal of a judge for causes other than conviction of a crime involving moral turpitude.

We are fortunate in California in having an integrated bar and a judicial council. They are both constitutional bodies. The first is composed of every attorney in the State; the second is composed of 12 judges appointed by the chief justice who is chairman, 4 attorneys appointed by the board of governors of the State bar, and 2 members of the State legislature.

These two bodies work very closely together in all matters affecting the administration of justice and in obtaining the cooperation of the executive and legislative branches of the State government in the formulation and accomplishment of programs designed to improve the administration of justice.

In the late forties or early fifties, we began the development of plans which resulted in the adoption of the amendment creating the commission on judicial qualifications.

The commission on judicial qualifications consists of five judges chosen by the supreme court, two attorneys selected by the board of governors of the State bar, and two laymen appointed by the Governor with the consent of the State senate.

The commission is empowered to receive and investigate complaints concerning a judge's willful misconduct, willful failure to perform duties, habitual intemperance, and disability likely to become permanent. If after a hearing the commission decides that a judge should be removed or retired, it makes such recommendation to the supreme court which may take such action as it deems proper under the circumstances.

When the proposal was presented, it had splendid support from the bar and from most judges. However, a few lawyers and a number of judges spoke out in opposition.

The principal argument against the creation of the commission was that it would destroy the independence of the judiciary. It was also argued that adequate methods existed for the removal of an unfit judge. In this connection, it was pointed out that in addition to impeachment such a judge could be defeated or recalled by the electorate.

It is the almost unanimous opinion of lawyers, judges, and the informed public that the commission on judicial qualifications has done an outstanding job. Working quietly and with a minimum of publicity it has succeeded in securing the retirement of judges who, because of mental or physical infirmities, were no longer able to properly discharge their duties.

It is also clear that the very existence of the commission has led to higher standards of ethics and performance among judges.

Senator TYDINGS. Thank you, Justice Gibson, for that excellent statement.

It has been suggested that the adoption of the California Commission on Judicial Qualifications was needed primarily to look over the work of the justice courts and municipal courts, and the superior court really didn't need a commission.

Would you comment on that?

Justice GIBSON. That isn't true. I think some of the most flagrant cases were in the superior court.

Senator TYDINGS. Would it be a fair statement to say, then, it is just as important to have this system for the higher courts, the superior court level, as it is for the inferior courts?

Justice GIBSON. Absolutely. There is no question about it in my mind.

Senator TYDINGS. I noted in your testimony that you met with resistance from some members of the judiciary, and that these men argued that such a commission would destroy the independence of the judiciary.

How did you meet that argument?

Justice GIBSON. We pointed out that a judge who conducted himself properly had nothing to fear.

Senator TYDINGS. What sort of resistance did you meet from the bench?

Justice GIBSON. Some judges openly opposed the creation of the commission; others working less openly sought to persuade their associates, lawyers and legislators to oppose it.

Senator TYDINGS. How long did it take to get the California system adopted?

Justice GIBSON. About 10 years from the time we started working on it.

We did not make much progress the first few years because we had to get public opinion behind us before we presented the proposed constitutional amendment to the legislature. We were very gratified with the public response and with the support we received from the press.

Senator TYDINGS. Have any of the judges, who were vocal in their resistance, changed their thinking since the adoption?

Justice GIBSON. Oh, yes. Some of them have acknowledged their fears that the independence of the judiciary would be endangered were entirely unjustified, but there is still opposition from a few judges and some lawyers. It is not very vocal, but there is some opposition. The big factor in obtaining the support of judges was the establishment of good salaries with fair retirement benefits.

The two have to go together. If a judge receiving a fair salary can get 75 percent of it on retirement and if his widow will be protected for the rest of her life with half of his retirement pay, he is inclined to step down if a serious question is raised concerning his ability to properly discharge the duties of his office.

Senator TYDINGS. Why in the makeup of your commission did you decide to include two members of the bar, two lay members, as well as five members of the judiciary?

Justice GIBSON. Ever since I became chief justice, I have argued for the inclusion of members of the bar in all public bodies operating within the judicial system; and I worked hard to get the integrated bar, which was created by statute, made a constitutional body so that it would be a simple matter to specify in the constitution that officers of that organization, or persons selected by it, be represented on the judicial council and other constitutional bodies operating within our judicial system.

A lawyer is an officer of the court, and the judicial branch of our government is composed entirely of lawyers and judges. Lawyers as well as judges have a direct interest and play an important role in the administration of justice.

For this reason, I wanted the bar represented on the commission. It is not so easy to justify the inclusion of laymen on a body of this kind and, frankly, I was influenced to some extent by the belief that the public would like it.

I do not think the inclusion of laymen has in any way handicapped the commission in the performance of its duties, and I think on the whole it has been a healthy thing.

Senator TYDINGS. Wouldn't that impair the independence of the judiciary, having laymen and lawyers on the commission?

Justice GIBSON. I do not think so. A competent, honest, and industrious judge has nothing to fear from anybody, and the independence of the judiciary is not threatened because he acts courageously.

Of course, as we all well know, if a client loses a case he may think the judge is incompetent or worse, and sometimes the winner thinks he did not get everything to which he was entitled. However, on the whole, I think that honest, competent, and industrious judges are honored and respected by lawyers and laymen alike.

Senator TYDINGS. In practice, has the presence of the two laymen and two lawyers on the commission impaired the independence of the California judiciary?

Justice GIBSON. Not in the least.

Senator HRUSKA. Judge Gibson, if the commission had not included members of the bar nor members of the public, do you believe that the opposition of the bench would have been less, because there would not have been a threat to their independence?

Justice GIBSON. Well, I couldn't answer that with any certainty. I really don't know.

There was opposition by some on the ground that lawyers were included, and there was opposition by others because laymen were included. But I thought we could get more public support for the program if both lawyers and laymen were represented. And I also thought it would be a good thing.

Senator HRUSKA. You also stated that two factors that were helpful in getting approval of the plan was the fact of decent pay and retirement.

Did the factor of the reorganization of the judicial system within the State also play a part in that regard?

Justice GIBSON. Oh, yes. We had a very complicated and inefficient court structure in California, and it was necessary to reorganize and simplify our judicial system before considering problems involving the forced retirement and removal of judges.

As a result of this reorganization, we were able to get more competent men to preside over our courts. For example, the kinds of inferior courts were reduced from six to two. All judges, except those presiding over the lowest inferior court, had to be admitted to practice law for 5 years. In order to qualify as a candidate for election or appointment to the lowest inferior court, a layman had to pass an examination given by the judicial council.

Senator HRUSKA. Thank you, sir.

Thank you, Mr. Chairman.

Senator TYDINGS. Mr. Justice, would the commission be as effective if, rather than the authority to actually recommend removal, it merely had the authority to talk with judges who are out of line, but had not authority to make a formal recommendation to the supreme court?

Justice GIBSON. No, I think not. I think it has to have power in order to have the prestige necessary to function efficiently.

Senator TYDINGS. In order to be effective, it has to have the power to recommend removal?

Justice GIBSON. Yes, I think so.

Senator TYDINGS. Well, thank you very much, Mr. Justice Gibson.

We are deeply indebted to you for your time and for the obvious effort you made in preparing a statement.

I wish to congratulate you on the success of the California system of which you were the father.

Justice GIBSON. It has just occurred to me that in my discussion I used the pronoun "I" more often than I should, and I want to make it clear now that the State bar, the judicial council, the Governor, members of the legislature, and later lay organizations, such as service clubs, all worked together in the establishment of this commission.

I am very appreciative of this opportunity to appear before you, and I only regret that I did not have time to prepare a better presentation for you.

I thank you, gentlemen.

Senator TYDINGS. Thank you very much.

Next we have Mr. Jack E. Frankel, who is the executive secretary of the California Commission on Judicial Qualifications, and has been such since its inception.

I am delighted to welcome you, Mr. Frankel.

(A biographical sketch of Mr. Frankel follows.)

JACK E. FRANKEL, ESQ.

Jack E. Frankel received his undergraduate and J.D. degrees from the University of Chicago. A member of the California and Ohio Bars, he engaged in private practice in San Francisco before joining the staff of the State Bar of California. In 1961 he became the first Executive Secretary of the California Commission on Judicial Qualifications.

**STATEMENT OF JACK E. FRANKEL, EXECUTIVE SECRETARY,
CALIFORNIA COMMISSION ON JUDICIAL QUALIFICATIONS**

Mr. FRANKEL. Mr. Chairman, Senator Hruska, members of the subcommittee, it is a privilege to be called upon to assist your subcommittee in its deliberations.

This testimony contains the personal views of the witness and should not be considered to represent any official position of the commission on judicial qualifications.

Any reference that I may make to judicial fitness examples or difficulties should be considered hypothetical as I do not intend any allusion to any specific case in California.

The value of a judicial disciplinary system must be judged by how it works and if it works. Scattered throughout the laws of the States of the Union are many apparent methods of judicial removal.

Before 1960 there were four on the books in California alone. They were ineffective. Therefore, perhaps I can be of service to the subcommittee by describing the functioning of the California Commission on Judicial Qualifications.

As you know, the commission was established by constitutional amendment in November 1960. By March 1961, when the first meeting was held, all nine members were named. Justice A. F. Bray was elected chairman at the first meeting in March 1961.

Five of the nine members are judges selected by the supreme court. Two of the five must be from the district court of appeal, two from the superior court, and one from the municipal court. Two lawyers who have practiced 10 years are named by the board of governors of the State bar, and two citizens are appointed by the Governor with the consent of the State senate. Terms are 4 years. Rules of procedure, formulated by the judicial council, became effective August 1, 1961,

which was the date an office was established and the commission employed me as its executive secretary. There is also a secretarial employee. Thus there have now been about 5 years of regular commission operation.

The commission examines and investigates complaints on specific grounds, as set forth in the law. Complaints which are unfounded and outside commission jurisdiction are closed by letter to the complainant with a short explanation. Normally the judge would not hear of this complaint since there is nothing pending before the commission. Over half of the cases are in this category.

The confidentiality protects the reputation of judges against irresponsible charges. It has been observed that there is a therapeutic value in these situations by allowing a citizen with a real or fancied grievance to bring it to a place which is empowered to give due consideration, and if justified, to take meaningful action.

Sometimes when a judicial disciplinary commission proposal has been discussed, there has been a fear expressed about false and malicious accusation. This should be no cause for concern since in California unfounded charges have been quickly disposed of without injury to anyone.

Let us now follow the progress of a case in which the facts appear to merit further consideration. Upon receipt of data which indicates that commission attention is warranted, a basic inquiry is made to round out the essentials and check the allegations.

This enables the commission to evaluate possible courses of action in light of its scope and purview. This inquiry need not be based on a developed complaint from a private citizen.

The commission may receive a legitimate report from any number of places—for example, local officials or judges or lawyers. If the source discloses significant and apparently reliable information the commission will probably check into it.

Occasionally as a part of this early inquiry, the judge is notified of the complaint and asked for his comment or explanation. The reply might satisfy the question which was raised and with notice to the judge and complainant the case is closed.

More commonly, if the matter involves some impropriety or questionable practice, the letter may have the effect of bringing about a change in the condition which was complained about. The matter can then be closed and the commission procedure has had the result of contributing to better judicial performance.

Whenever it appears warranted the commission can order a preliminary investigation. This step involves a formal notice by letter that a matter against the particular judge is pending before the commission. This is the first procedural phase under the rules.

He is advised of the nature of the charges and that he is now being given an opportunity to reply. In the process, there is a more complete investigation. This step indicates the possibility of a potentially serious problem.

In 1964 there were five such preliminary investigations and in 1965 there were six. Naturally, at any stage, a decision by a judge against whom proceedings are pending to retire or resign has the effect of terminating the proceedings, and as I think you know, there have been a number of instances in which judges have decided to retire or resign rather than face future proceedings or completely answer the charges.

At the completion of a preliminary investigation the commission will decide whether a formal hearing is warranted. If so, charges are drawn and served on the judge, counsel selected, and the case proceeds to trial either before the commission or special masters.

An attorney who may be from the attorney general's office or may be outside counsel presents the case before the commission from the prosecution side. Rules of evidence apply and, of course, the judge is represented by his counsel.

Both sides have subpoena power.

Following the hearing the commission either dismisses or recommends removal or retirement to the supreme court. At this point for the first time, upon the filing of the record, the proceeding is public. The case is reviewed by the supreme court which enters its order.

Senator TYDINGS. Let me interrupt you there. Suppose the commission dismisses; do you file a record then?

Mr. FRANKEL. No record would be filed, and the matter would continue to be confidential.

Only one case has gone through the whole procedure and in that one the supreme court declined to follow a removal recommendation.

The course of action to be followed in any particular case will naturally depend on the circumstances. Sometimes there will be a personal interview with the judge. In a few cases there have been more than one such interview. If a disability question is involved the commission might ask the judge if he is willing to supply medical reports from his own doctor or have us talk to his doctor. The commission may decide to arrange for independent medical examinations. There is flexibility and discretion as to the particular manner in which it decides to proceed, depending on what is appropriate.

There is no rigid formula, and the decision has to be based on the facts of the particular situation.

Every effort is made to insure confidentiality and in large measure this is successful. There has been general understanding and acceptance of this principle by the news media.

The disciplinary measures have had a constructive impact. Sometimes carelessness or a disregard for what is expected of the judicial office has permitted an unsatisfactory practice to develop.

Frequently a judge has not had the perspective to view some borderline or possibly unethical activity objectively. An outside tribunal can be invaluable in dealing with such lapses. Often when the alleged impropriety is discreetly called to the judge's attention there is a cooperative response.

Of course, there may be a disagreement either on the allegations or on their import, but at the very least a reasonable method exists for enforcing legitimate standards of judicial conduct.

Under government code section 68725:

State and local public bodies and departments, officers and employees thereof, and officials and attaches of the courts of this State shall co-operate with and give reasonable assistance and information to the commission and any authorized representative thereof, in connection with any investigations or proceedings within the jurisdiction of the commission.

With this principle of reasonable assistance we receive cooperation from such State agencies as California Highway Patrol, State Department of Justice, the controller, administrative office of the courts, and county offices such as sheriff and district attorney. Also, on

occasion we are in touch with presiding judges of courts, grand juries, local bar association officials, and practicing lawyers. This enables the commission to discharge its responsibilities efficiently.

Expenses are modest. Commission members receive travel allowance but no other compensation. In its first year of operation (1961-62) the commission spent \$24,000. In the fiscal year now closing (1965-66) expenses will be about \$27,000.

As of January 1, 1966, there were 940 judicial positions within commission jurisdiction.

The appellate courts accounted for 40; the superior courts, 361; the municipal courts, 270; and the justice courts, 269; making a total of 940.

Allowing for normal changes in judicial personnel there has been an average of about 1,000 individuals holding judicial positions in the course of each year.

Thus, in summary, besides providing a fair and effective method for terminating office where cause exists there are important corollary effects.

First, the very existence of the commission, as Justice Gibson pointed out, is an important deterrent. This is with respect to situations which never become cases before the commission. It fosters a high level of performance and encourages retirement when bad health prevents carrying out the judicial function.

Secondly, violations of ethics and derelictions which are of a minor nature not warranting removal can be dealt with.

Thirdly, irresponsible and baseless accusations against judges can be disposed of without harm to the judiciary or without harm to the judge.

In summary, the judicial branch is given a tool so that it can exercise its judgment for the public good on matters of fitness and conduct. This cannot help but raise public confidence in the judicial process.

Senator TYDINGS. Let me ask you this: Do you have a statutory authority, in the case of a judge whose mental faculties are questioned, to require that judge to submit to a physical examination or psychiatric examination?

Mr. FRANKEL. There is not any specific statutory authority. It has been considered that this authority is encompassed within the constitutional power to investigate. Within the rules there are provisions for introducing testimony as to the refusal of a judge to submit to medical examination, and there is statutory authority which relates to compensating medical witnesses, so the whole import I think is that this authority or power does exist, but it is not specifically spelled out in so many words.

Senator TYDINGS. What is the importance of a permanent staff to the commission, and why is that necessary?

Mr. FRANKEL. I think one of the reasons for what success the California system has had is because there has been a permanent and independent staff, and I don't think this existed in any previous system.

This I think points up the energy and the positive nature of the whole inquiry that may be made, and also, of course, provides adequacy of receiving complaints and making investigation and inquiry.

If there were no staff, and if complaints had to go to some member of the commission, who primarily has other responsibilities, I think there would be inability and inadequacy to function.

I think the provision for staff gives the whole mechanism the vitality which it needs and the ability to function.

Senator TYDINGS. What about the fact that the commission in a sense functions as the investigator as well as the prosecutor and judge?

Mr. FRANKEL. Of course, this same setup holds true in many administrative agencies where the two functions are combined.

There is I think a need for it here where the elementary, the basic part of the whole program is investigation, and the actual hearing is a secondary feature since so few cases reach hearing.

I think that, further, there is the ability to appoint special masters to hear a case which so far hasn't been used but could always be used if this were thought to be a problem.

Of course, finally, although the commission is said to act as judge, nothing it does is final; it only makes a record and make a recommendation.

- It is a judge in a very limited sense.

Senator TYDINGS. In the one case before the supreme court, did the court take additional evidence in that case? Did they have a formal hearing, or just review the record?

Mr. FRANKEL. There was no additional evidence taken except an affidavit which was presented for the first time before the supreme court, which was admitted in evidence.

There was one additional document admitted, but that was all.

Of course, the supreme court in these matters has the power to make its own findings. It is not bound by the findings as is the normal situation in an appellate review.

Senator HRUSKA. In effect, then, it would be a de novo proceeding—could be made into a de novo proceeding?

Mr. FRANKEL. That is right. If it is dissatisfied with the evidence or wishes to draw different findings on the basis of evidence, that power is there.

Senator TYDINGS. What percentage of the complaints involve superior court judges, and what percentage have to do with the inferior, less courts?

Mr. FRANKEL. I don't have any specific breakdown on that, but I think one reason that there are more complaints with the nonsuperior courts, the lesser courts, is simply that there are more judges in the justice courts and the municipal courts. I think that is the principal reason.

We have had serious complaints against superior court judges.

Senator TYDINGS. Do bar groups and judges use your commission as a means to improve standards?

Mr. FRANKEL. Bar groups and judges; yes.

I think that the most important single elements are the judges themselves because the judges by and large recognize this as a factor for improvement, and I think, for example, presiding judges who become aware of these problems are very pleased that there is a place to take them where there will be some investigation and decisions made, rather than being put in their own lap, so we have had very

excellent cooperation from presiding judges and other judges who have heard about these problems.

There has also been some of that from bar groups. I would say that the bar associations have not done too much. There is a great reluctance on the part of lawyers to get involved in something like this, especially formally, and when it is done through a bar association there is a great fear that word will come out and there will be retaliation against members of the bar by the judges, so I think probably most of that has been on an informal basis.

That is, individual lawyers will bring information, and our confidentiality requirement permits us to offer protection, so that if anything comes out of it, it is done on the basis of facts, and it doesn't matter where the facts first came from.

Senator TYDINGS. You mentioned in your testimony that you have had, I think, five preliminary investigations in the last year, and six the year before. Perhaps it was vice versa. These obviously were the more serious matters.

What percentage, what number of these cases were brought to your attention by members of the judiciary itself?

Mr. FRANKEL. I really couldn't say offhand. There isn't a heavy proportion from any one source.

Senator TYDINGS. When you make your preliminary investigation of a complaint, at what point do you make available to the judge the name of the complainant, and how do you handle that?

Mr. FRANKEL. All of our preliminary investigations so far have been decided on the commission's own motion in order to provide this protection, because in each instance we have developed facts which are presented, and we feel that the commission has developed the facts which will stand on their own merit.

Senator TYDINGS. Do you mean the facts that substantiate the original complaint? You merely bring in the facts and let the facts stand on their own?

Mr. FRANKEL. That is correct. The judge out of the particular facts might think he knows where the information came from, but the name is not provided in a preliminary investigation.

Senator TYDINGS. What standards do you use insofar as judicial behavior is concerned?

Mr. FRANKEL. Well, of course, what we start from is the constitutional language: willful misconduct in office, failure to perform duties, or habitual intemperance.

Then from that there are certain areas which are accepted as judicial standards. For example, sometimes the canons of ethics would point to what would be a standard of conduct.

Just as an example, the judge does not conduct ex parte proceedings on contested matters, so this has come down to be accepted as a standard of conduct through the canons of ethics, and which could be a standard which we would enforce.

There are other standards throughout the law. For example, in terms of deciding cases which have been completed within 90 days. This is in the law, and we would follow it because it is already set forth.

Another place that this would come from would be the judicial council which adopts rules for the courts, and throughout the rules of the judicial council there would be certain standards of court behavior of various kinds which we could follow.

Of course, you have to also keep in mind the nine members of the commission have a certain discretion, and in certain cases it comes down to their own interpretation of what is willful misconduct in office.

So, it is the common law of what standards would be applied.

Senator TYDINGS. Do you feel that your removal mechanism is needed for superior court judges as well as inferior court judges?

Mr. FRANKEL. Yes; I do.

Senator TYDINGS. Do you feel that your commission would be as effective, or would be an effective instrument, if it did not have power to recommend removal?

Mr. FRANKEL. I would say that would reduce the effectiveness considerably. It would be much, much less effective.

Senator HRUSKA. Mr. Frankel, in your judgement what would be the effect of limiting commission membership only to judges within the judicial system to which it applies?

Mr. FRANKEL. I don't think it would have a disastrous effect. I think the commission could still function adequately. I think that it functions much better with the makeup it has, especially with the inclusion of lawyer members on the commission, but I wouldn't think this would be or would have necessarily a critical effect if that took place.

Senator HRUSKA. Do you see a distinction between the bench of the judicial system which is elected, such as exists in some of the States, as opposed to the Federal judicial system where judges are appointed?

Would you see a sufficient distinction to warrant a restriction of the commission membership to members of the bench only as in the case of the Federal system?

Mr. FRANKEL. I myself would not see that that distinction would make any difference.

Senator HRUSKA. Would engaging in an outside business be willful misconduct in office?

Suppose a judge became a part owner of a retail business, a service organization, or became a member of a board of directors of a corporation.

Are those things taken care of in his qualifications of office? Are there statutory prohibitions against him doing those things, or would that fall in the general category of willful misconduct in office?

Mr. FRANKEL. I don't think there is much in the California law on that. Certainly there is no outright prohibition on other business activities.

There could be situations in which it would be misconduct. For example, if a judge didn't pay any attention to his judicial duties and spent most of his time running a private business, or if there were a connection between the private business he ran and the matters he was ruling on in court, this could very easily become misconduct, but it would depend on the facts, and there is no general prohibition of that nature.

Senator HRUSKA. Do you think there should be?

Mr. FRANKEL. I wouldn't want to comment on that. I don't have any opinion.

Senator HRUSKA. Would you rather put it on the basis of a case-by-case treatment?

Mr. FRANKEL. I would say this, if there were any need for changes in this field, the judicial council is the agency in the State that would consider it. It would depend on what their deliberations and conclusions would be, so I don't know myself whether it would be desirable to do anything along this line or not.

Senator HRUSKA. Is the power of the judicial council so great that it can say, "You must not be, Mr. Judge, a member of the board of directors of a savings and loan association, insurance company, or a bank?"

Mr. FRANKEL. There could be certain standards adopted. The power would be one of the questions. I don't know that that has ever come up, and I honestly don't know whether the judicial council would think that that authority is present or not, but there are agencies which could give this consideration, such as the judicial council, if it were thought to be a problem, but as to whether they have the power or it would be desirable to do it, or even a need to do it, I just wouldn't want to say.

Senator HRUSKA. It has been asserted that some 30 retirements or resignations have been brought about in the last 5 years by the mere fact that charges against a judge were either pending or contemplated. Would you care to comment on that?

Mr. FRANKEL. That is correct. Through 1965, 30 of the cases which were started did end in the judge either retiring or resigning.

Of course, during this period of time there were a great many judges, about a thousand individuals as judges per year, and this is over 5 years, and so I would like to point out this is a very small percentage of the whole number of judges in the State.

I should also mention on this point, on the number who have left office, that this is not necessarily an indication there were 30 very serious cases.

There were 30 cases in which for one reason or another the judge made that decision, but in some of these cases he might have reached that conclusion himself 6 months later, so it doesn't necessarily mean that there were 30 cases of that nature.

Senator HRUSKA. Could it be said that there might not be in some of those instances a causal relationship between the pendency of the charges and the resignation?

Mr. FRANKEL. No. I think in each of these cases there was a close causal connection. I know in some of them there were other causes also.

For example, a health situation; the judge involved probably came to the conclusion that it was a good idea to retire 3 or 4 months sooner. He might have come to that conclusion 3 or 4 months later completely on his own.

Senator HRUSKA. Mr. Chairman, one case has been mentioned that became a formal matter of record.

Would it be considered appropriate to insert a copy of the opinion of the supreme court?

Senator TYDINGS. I think it would.

Senator HRUSKA. Either in the body of the record here or in the appendix.

Senator TYDINGS. You could get us a copy of that?

Mr. FRANKEL. Yes. It is a very short opinion. I could get it for you, as well as the opinion of the commission.

(The material referred to follows:)

[39 Cal. Rptr. 397]

CHARLES F. STEVENS, PETITIONER, v. COMMISSION ON JUDICIAL QUALIFICATIONS,
RESPONDENT, L.A. 27765.

Supreme Court of California, In Bank.

July 9, 1964

Proceeding brought against Commission on Judicial Qualifications which had recommended that petitioner be removed from office. The Supreme Court held that there was no basis for recommendation and it must be rejected.

Proceeding dismissed.

Judges ⇄ 11

Recommendation of Commission on Judicial Qualifications that petitioner be removed from office was unsupported and must be rejected. West's Ann. Const. art. 6, § 10b.

Schall, Nielsen, Boudreau & Price, W. J. Schall, San Diego, and William P. Gray, Los Angeles, for petitioner.

Stanley Mosk, Atty. Gen., Gordon Ringer and Derald E. Granberg, Deputy Attys. Gen., for respondent.

PER CURIAM.

We have reviewed the record herein on the law and the facts as required by section 10b of article VI of the California Constitution. We find no basis for supporting, and therefore reject, the recommendation of the Commission on Judicial Qualifications that petitioner, Charles F. Stevens, be removed from office. The proceeding is dismissed.

STATE OF CALIFORNIA—BEFORE THE COMMISSION ON JUDICIAL QUALIFICATIONS

INQUIRY CONCERNING A JUDGE, No. 3

The proposed Findings and Recommendation, and Objections to and Request for Modification of Proposed Findings and Recommendation in the above entitled matter having been considered by the Commission, the following Findings of Fact, Conclusions of Law and Recommendation be and they hereby are adopted.

FINDINGS OF FACT, CONCLUSIONS OF LAW, RECOMMENDATION

The proceeding entitled Inquiry Concerning a Judge, No. 3, having been submitted after a hearing held January 13, 14, 15, 16, 17, 20 and 21, 1964, Gordon Ringer and Derald E. Granberg, Deputy Attorneys General appearing as examiners and the respondent Charles F. Stevens appearing in person and through his counsel, William J. Schall, Leland C. Nielsen and William H. Daubney, the Commission now finds as follows upon each count charged in the Notice of Formal Proceedings:

I

The finding as to Count I is that on November 4, 1958, the respondent Charles F. Stevens was elected to the office of Judge of the Oceanside Municipal Court; that thereafter, he was retained as counsel by the defendant in the case of *People v. Tolles*, No. CR 9537, a matter filed in the Oceanside Municipal Court on November 12, 1958; that subsequently, the respondent made appearances on behalf of the defendant on November 14, 1958, November 19, 1958 and November 21, 1958, and that each time the matter was continued; that on December 12, 1958, the respondent made an appearance along with the defendant at which time the defendant pleaded not guilty and the matter was set for trial on January 9, 1959, which was after the time the respondent was to assume the office of Judge in that court; that on January 5, 1959, the day that the respondent assumed the office of Judge, he on his own motion dismissed the case; and that the docket entry for the case for the date of January 5, 1959, reflects an entry over the respondent's signature to the effect that the case was dismissed in the furtherance of justice.

CONCLUSION OF LAW

The foregoing conduct by the respondent constitutes a violation of his oath of office and constitutes willful misconduct in office.

II

The finding as to Count II is that the case of *People v. Prokop*, No. C-17587, a prosecution for theft in the Oceanside Municipal Court, was set for trial on July 17, 1962; that two witnesses for the prosecution, Sandy Wickard and William Roulette, were present in court under subpoena on that date; that the defendant Mrs. Jeanne Prokop and her attorney Deane F. Andreassen discussed the case with the respondent Charles F. Stevens in his chambers and out of the presence of the attorney for the People while the case was pending and ready for trial; that the respondent then in chambers and before the case was called in open court dismissed the case for lack of prosecution; and that the docket entry for the case for the date of July 17, 1962, reflects that the case was dismissed for lack of prosecution.

CONCLUSION OF LAW

The foregoing conduct by the respondent constitutes a violation of his oath of office and constitutes willful misconduct in office.

III

The finding as to Count III is that on September 20, 1962, the case of *People v. Mangan*, No. C-19144, in which the defendant was charged with a violation of Vehicle Code Section 23102a (drunk driving), was then pending in the Oceanside Municipal Court; that on said date the respondent Charles F. Stevens discussed certain facts of the case with William Marshall Morgan, the defendant's attorney, at a time when the attorney for the People was not present; that the respondent then advised said attorney that the defendant would be just as well off to waive trial by jury; that after this discussion an arraignment was held and a waiver of trial by jury was made on behalf of the defendant; that subsequently, on November 19, 1962, the case was tried before the respondent without a jury; and that thereafter, the respondent acquitted the defendant.

CONCLUSION OF LAW

The foregoing conduct by the respondent constitutes a violation of his oath of office and constitutes willful misconduct in office.

IV

The finding as to Count IV is that *People v. Dudin*, No. 18268, was a case pending in the Oceanside Municipal Court in which the defendant was charged with violating Section 22349 of the Vehicle Code (exceeding the speed limit) for traveling 90 miles an hour in a 65 mile per hour zone; that the case was set for trial on July 5, 1962; that on June 29, 1962, the court continued the case until July 12, 1962, on motion of the defendant's attorney; that on July 12, 1962, the case was called by Judge Hamner and was continued on the court's own motion until July 25, 1962; that on July 12, 1962, the defendant's attorney John W. Kimball contacted the respondent Charles F. Stevens and discussed the case with him out of the presence of the attorney for the People; and that thereafter, on said date, the respondent, without notice to the People, dismissed the case by an order in which "the interest of justice" is given as a reason for the dismissal.

CONCLUSION OF LAW

The foregoing conduct by the respondent constitutes a violation of his oath of office and constitutes willful misconduct in office.

V

In Count V of the Notice of Formal Proceedings the following allegations were made:

"In *People vs. McCue*, No. 16745, and in *People vs. Garrett et al.*, No. 16749, in the Oceanside Municipal Court, tried before you on December 18, 1961, McCue was charged with violation of Business and Professions Code § 25658A (furnishing of alcoholic beverage to minor) and Garrett and two other minors

were charged with violating Business and Professions Code § 25662 (possession of alcoholic beverage by a minor). You found the defendants not guilty and gave as a reason for acquitting the minors that the officers should have waited until the minors opened the bottles."

CONCLUSION OF LAW

The evidence does not sufficiently show that the acquittal of the defendants in these cases was the result of misconduct by the respondent Charles F. Stevens rather than the result of an honest error of law.

VI

In Count VI of the Notice of Formal Proceedings the following allegations were made:

"In *People vs. Snyder*, No. C-15308, in the Oceanside Municipal Court, tried before you May 22, 1961, the defendant was charged with violating Vehicle Code § 22349 (exceeding the maximum speed limit). Before the trial started you conferred privately with the defendant who was not represented by counsel. At the conclusion of direct examination of Officer Larry Ray Jensen of the Oceanside Police Department you conducted a lengthy hostile examination of Officer Jensen designed to embarrass, ridicule, and discredit him in the eyes of the jury. The defendant was acquitted."

CONCLUSION OF LAW

The evidence is not sufficiently clear that the examination of Officer Jensen by the respondent Charles F. Stevens was conducted for the purpose of embarrassing, ridiculing and discrediting him in the eyes of the jury rather than one conducted in good faith and within the limits of judicial discretion.

VII

The finding as to Count VII is that in the cases of *People v. Newberry*, No. 9892, and *People v. Suit*, No. 9893, in the Oceanside Municipal Court, each of the defendants, on January 23, 1959, was charged with violating Section 415 of the Penal Code (disturbing the peace); that while the defendants were free on bail, the respondent Charles F. Stevens, on February 3, 1959, dismissed the case on his own motion without contacting any representative of the People; and that the respondent subsequently told Lt. Wallace D. Rossall of the Carlsbad Police Department that he dismissed the case because a bailbondsman informed him that there was no substance to the complaint.

CONCLUSION OF LAW

The foregoing conduct by the respondent constitutes a violation of his oath of office and constitutes willful misconduct in office.

VIII

The finding as to Count VIII is that in *People v. Hoodak*, No. 14575, in the Oceanside Municipal Court, the defendant was charged with the violation of Vehicle Code § 14601 (driving with a suspended license) and Vehicle Code § 27800 (required equipment on motorcycles); that the case was scheduled for trial on June 19, 1961; that although defense counsel stipulated that the defendant was driving a motor vehicle, that his license was suspended and that he was aware of the suspension, the respondent Charles F. Stevens dismissed the charge of driving with a suspended license; that in doing so, he gave as a reason that he had recommended to the Department of Motor Vehicles following a prior drunk driving conviction in his court, that the defendant's license not be suspended and that he refused to convict anyone of driving with a suspended license under those circumstances because he did not think the Department of Motor Vehicles had the right to suspend a man's license after he had recommended that the license not be suspended; that the respondent also dismissed the second charge of operating a motor vehicle without the required equipment; and that the docket entry for this case, June 19, 1961, reflects that the dismissal was "in furtherance of justice."

CONCLUSION OF LAW

The foregoing conduct by the respondent constitutes a violation of his oath of office and constitutes willful misconduct in office.

IX

In Count IX of the Notice of Formal Proceedings the following allegations were made:

"In People vs. Sanchez, No. 19581, tried before you in the Oceanside Municipal Court, December 3, 1962, the defendant was charged with a violation of Vehicle Code § 22350 (speeding). The defendant was not represented by counsel. At the conclusion of direct examination of Officer Bruce Wishart of the Carlsbad Police Department, you conducted a lengthy examination of Officer Wishart. You then stated you were familiar with the particular area in question and that what Officer Wishart testified to could not have happened. Without any testimony from the defendant you found defendant not guilty and when Officer Wishart left the witness stand you shouted in substance that what he had testified to could not happen."

CONCLUSION OF LAW

The respondent Charles F. Stevens made the remarks attributed to him in this charge; this was done for the purpose of ridiculing, embarrassing and belittling Officer Bruce Wishart of the Carlsbad Police Department; but the evidence is not sufficiently clear that the acquittal of the defendant was the result of his misconduct rather than an honest determination by him that the defendant had not violated the basic speed law.

X

In Count X of the Notice of Formal Proceedings the following allegations were made:

"In People vs. Prettyman, No. 19692, tried before you in the Oceanside Municipal Court December 17, 1962, the defendant was charged with violation of Vehicle Code § 22350 (speeding) in driving 50 miles per hour in a 35 mile zone. At the conclusion of the People's case, you told the defendant she need not testify, that you (Judge Stevens) traveled in that area at 50 miles per hour on numerous occasions and did not think it excessive, that you were not going to find her guilty anyway, and you asked her how fast she was going. The defendant replied 50 or 55 miles and you said in substance, 'That is all I wanted to know. Not guilty.'"

CONCLUSION OF LAW

Even though the respondent Charles F. Stevens made the remarks attributed to him in this charge, the evidence is not sufficiently clear that the acquittal of the defendant was a result of his misconduct rather than the result of an honest determination by him that there had been no violation of the basic speed law.

XI

In Count XI of the Notice of Formal Proceedings the following allegations were made:

"In People vs. Boehme, No. 19089, the Oceanside Municipal Court, the defendant was charged with a violation of § 21755 of the Vehicle Code (passing unsafely on the right). The minutes of September 12, 1962, show the following:

"Defendant is an attorney. He called and requested a court trial. (Will enter a not guilty plea.) Defendant waived a trial by jury; Waived all benefits of sub. sec. 3 of sec. 1382 of the Penal Code. Trial set by court at 2 p.m. October 1st, 1962. Defendant ordered released O.R. Charles F. Stevens, Judge. Letter to defendant confirming above setting."

"On October 16, 1962, during the pendency of an appeal by the People from an order to Judge Daniel C. Leedy dismissing the case, you ordered the minutes of September 12, 1962 to be changed as follows:

"Upon the request of the defendant and on the Court's own motion the above-entitled matter is continued to October 1, 1962 at 2:00 p.m. for arraignment, plea and trial. CFS'."

"The minutes, as altered, were not in accord with what you knew had taken place on September 12th."

CONCLUSION OF LAW

The evidence is not sufficiently clear that the correction of the records by the respondent Charles F. Stevens constituted an alteration of the record to reflect what had not occurred on September 12, 1962, rather than a correction which honestly reflected what had occurred on said date.

XII

The finding as to Count XII is that in numerous court proceedings while the respondent Charles F. Stevens presided as Judge of the Municipal Court of the Oceanside Judicial District and North County Judicial District, he engaged in a course of conduct designed to ridicule, embarrass and belittle law enforcement and other public officers which course of conduct had the result of ridiculing, embarrassing and belittling such officers; and that the respondent exhibited a bias and partiality against the People in criminal proceedings.

CONCLUSION OF LAW

The foregoing conduct of the respondent constitutes a knowing disregard and abuse of proper legal processes, an intentional interference and obstruction with the orderly administration of justice, a violation of the respondent's oath of office and willful misconduct in office.

In addition to the findings on the allegations in the Notice of Formal Proceedings, the Commission further finds:

XIII

That during substantially all of the time that the respondent has been in office a certain firm of attorneys who were indebted to the respondent were permitted by him to practice before him in his court; that the members of the firm who so practiced are Deane F. Andreasen who represented the defendant in *People v. Prokop* charged in Count II; Russell G. Grosse who represented the defendant in *People v. Hoodak*, charged in Count VIII; Earl Howard Thompson; and Arthur E. Gore.

XIV

That during substantially all of the time that the respondent has been in office, an attorney-client relationship existed between him and the firm of Andreasen, Thompson, Gore, and Grosse, and/or individual members thereof; that this relationship culminated in the firm's representation of him in *Brown v. Vallas*, a civil action litigated in the Superior Court of San Diego County in which he was one of the plaintiffs and took an active part in the litigation; that during the existence of this attorney-client relationship, the respondent permitted the various members of said firm to practice before him in his court.

XV

That the testimony of the respondent at the hearing before the Commission, particularly as it related to Counts I, II, III, IV, VII, VIII, IX, and XII of the Notice of Formal Proceedings, was evasive, untruthful and lacking in candor.

CONCLUSION OF LAW

The foregoing conduct of the respondent as set forth in Findings XIII, XIV, and XV, and each of them, constitutes a violation of his oath of office and willful misconduct in office.

RECOMMENDATION

The Commission having found and hereby concluding that the conduct of the respondent as charged in Counts I, II, III, IV, VII, VIII, and XII, and each of them, of the Notice of Formal Proceedings and as found in Findings numbers XIII, XIV and XV, and each of them, constitutes a violation of his oath of office, the Commission, by virtue of the powers vested in it by Section 10b of Article VI of the California Constitution, hereby recommends to the California Supreme Court that the respondent Charles F. Stevens be removed from his office of Judge of the Municipal Court of the North County Judicial District, formerly the Oceanside Judicial District, in the County of San Diego.

By order of the Commission on Judicial Qualifications.

Dated February 24, 1964.

A. F. BRAY, *Chairman.*

Senator TYDINGS. Let me ask you this. Of those cases which the commission felt warranted a preliminary investigation, what type of complaints, what type of situations were involved?

Mr. FRANKEL. Do you mean which kind of reports or allegations?

Senator TYDINGS. Yes. What type of conduct causes preliminary investigations?

Mr. FRANKEL. Well, I will try to give you some examples of some of the ones which have been repeated rather than isolated, if that is what you have in mind.

Senator TYDINGS. Yes. That is what I want.

Mr. FRANKEL. There might be allegations of uncontrolled emotional outbursts and irrationalities.

This would be checked to verify the facts, time, place, and cases, and there might be a check made to other like instances, if there have been any, and something like this could develop into a rather grave situation where there would be a question as to the mental capacity, or whether there might be a question of mental disability.

Of course, this could also get into the area of senility, and this could develop into a preliminary investigation, and eventually start a formal hearing.

This same type of situation could prove out to be of a less serious nature if it were thought to be occasional or isolated, or not grave enough to constitute misconduct in office, or permanent disability, and here we have some of the situations where the Commission has felt that there was a recognition by the judge of the problem, and a willingness to work to correct it.

Another area would be where there would be allegations that cases were not being expeditiously decided. This might be a matter of many months or even years where there was a failure of a judge to issue a ruling where there was no reason for it, or failure to decide a case, and here, too, there would be a check as to whether it was a chronic condition or whether isolated or whether it might be a failure to perform duties under the constitutional lines or something the judge would be willing to correct.

Of course, we know that there is a problem among some judges in any jurisdiction with procrastination, and once this is called to the judge's attention it is the kind of situation where he is likely to not wish to make an explanation again and therefore will correct his future behavior.

Is this what you had in mind?

Senator TYDINGS. Yes. Of the 30 cases which were mentioned, what situations were they generally?

Mr. FRANKEL. Well, most of the ones that ended up in termination of office were health problems, permanent disability, either mental disability or physical disability, and, of course, in the aged that is often a factor, although not necessarily.

These problems will come about sometimes in younger individuals.

As far as the other problems are concerned, other areas, we have had some problems with excessive use of alcohol which have resulted in the judge leaving office, and I don't think I could generalize beyond that, because they have been of different kinds.

We have had a couple where judges did have private activities that were incompatible and they preferred to give up their judicial activities.

Senator TYDINGS. Do you mean business or moral?

Mr. FRANKEL. No. Business activities.

Senator TYDINGS. In the course of checking to see whether or not a preliminary investigation was warranted, have there been many occasions where you have been able to bring alleged misconduct to the attention of the judge, and then he proceeded to correct it?

Mr. FRANKEL. There have been a number like that which were specifically called to the attention of the judge, and he was entirely cooperative about it, and I think there was no ill feeling or recrimination, but he was in a sense glad that certain behavior or activity, which was thought to be a problem, was called to his attention carefully and discreetly.

Senator HRUSKA. You have four or five courts now. Of those 30 cases to which reference has been made, could you tell us what type of judges were involved?

Mr. FRANKEL. Yes. I don't have that broken down. They were all, I believe, in the justice courts, municipal, and superior courts, but I don't have a breakdown.

Senator TYDINGS. Thank you very much, Mr. Frankel. Your testimony has been most informative.

I want to congratulate you on the success of the California Commission on Judicial Qualifications. I am sure your contribution has been a significant factor in its success.

Mr. FRANKEL. Thank you, Mr. Chairman.

Senator HRUSKA. I might say this, that chances are good that Mr. Frankel will be the recipient of some correspondence from the State of Nebraska starting next January asking for advice on how to set this up and run it properly.

Mr. FRANKEL. Thank you very much.

Senator TYDINGS. Mr. Edward W. Schramm, member of the Ohio and California bars, member of the board of governors of the State bar of California from 1957 to 1960, and member of the California Commission on Judicial Qualifications from its inception until 1964.

We are delighted to welcome you before this subcommittee, Mr. Schramm. We appreciate your attendance and your cooperation.

STATEMENT OF EDWARD W. SCHRAMM, MEMBER, CALIFORNIA COMMISSION ON JUDICIAL QUALIFICATIONS

Mr. SCHRAMM. Thank you, Senator. I am not sure yet whether I am going to enjoy this, but I hope I will be helpful to you.

I note, Senator Tydings, and Senator Hruska, that you have obviously read the statement that I have prepared, but I am quite ready to read it into the record again if you choose to have me do so.

Senator TYDINGS. I think we could order it included in the record in its entirety at this point, and you might elaborate on the points which you would like to stress.

(The prepared statement of Edward W. Schramm follows:)

Mr. Chairman, I was appointed as one of two lawyer members of the Commission on Judicial Qualifications of the State of California at the time it came into existence and served out my four year term thereafter. I worked on the details of organization of that Commission and played at least some small part in the drafting of the rules of procedure which are followed by the Commission.

I know how that Commission has functioned and what degree of success it has achieved. I can speak not only from the viewpoint of a one time member of that

Commission but also as a practicing lawyer. As a trial lawyer I am at least in part aware of the problem that existed in this state prior to the existence of our Judicial Qualifications Commission. I know that there was a real need for a mechanism by which members of the state judiciary might be removed from the bench efficiently in those cases in which removal was justified.

While my knowledge of the Federal judiciary is not as extensive, I know that this problem also exists among that group. Earlier testimony before this Committee, i.e., the testimony of Judge Biggs, of Bernard G. Segal, Esq., and Joseph Borkin, Esq., have disclosed that there have been some isolated examples of misconduct and corruption on the Federal bench and no one could dispute that, as they have occurred in the past, we can reasonably expect that they may occur in the future. I, myself, can plead innocent of personal knowledge of men on the Federal bench who by reason of old age or physical or mental disability no longer decorate the bench and should be removed into retirement, but by indirection, I have heard over the years of many members of the Federal bench who fall into that category.

I am sure that while the problem may be just as serious among the Federal judiciary as in California, it is not as extensive. Bear in mind, that generally speaking, there is a more complete and intensive inquiry into the qualifications of the Federal judges, prior to their appointment than is the case with California judges. Some California judges are elected without any informed examination of their qualifications, and seldom does one who is appointed become subject to the same careful scrutiny that is given to appointees to the Federal bench. Also bear in mind that there are in California almost three hundred Justice Court judges many of whom are not even members of the Bar, and bear in mind that an appointee to the Municipal Court (and there are over two hundred and fifty Municipal Court judges) is not expected to meet the same exacting requirements as an appointee to the Federal District Court. Nevertheless, the problem of the removal or retirement of the unfit judge from the bench exists in the Federal system, and indeed, will exist in any system no matter how carefully its members are selected because even the most capable of humanity are subject to the erosion of the passage of time; even the most painstaking process of selection sometimes passes a "bad apple"; and it is always possible that a man without apparent blemish at the time of his appointment may succumb to one of the many pressures which the bench is subject to and develops into a man unfit to grace the Federal bench.

Does the California plan provide an efficient method for the removal of the unfit? The full test of its efficiency will, of course, occur only with the passage of time, however, I was a member of the Tribunal which sat on the first, and to date, only formal hearing, *Stevens vs. The Commission*, 61 Cal. 2 886 (1964), and can assure you that the procedure that was followed provided an efficient, fair and thoroughly judicial trial of the facts. What is more impressive, I have discussed the proceedings with William P. Gray, Esq., an outstanding member of the Bar of this state who represented the judge who was the subject of the proceedings for removal in the hearing before the Supreme Court, and he advises that he considered the conduct of the Commission hearing to have been an exemplar of fairness, thoroughness and due process and that not a single charge of error or impropriety of process was asserted by him in his argument before our Supreme Court. Indeed, he advised me that the fairness, impartiality and efficiency of the proceedings enabled him to rely entirely on the record of those proceedings to convince the Supreme Court, as he did, that no willful misconduct was involved. In short, there is no reason that fair, impartial and efficient hearings cannot be had before a Tribunal of the nature of the California Commission on Judicial Qualifications and indeed no reason to fear that such hearings will be anything but fair, impartial and efficient.

The experience of the California Commission on Judicial Qualifications has been that a full dress formal hearing to remove an unfit member of the bench is seldom necessary. Although there has been only one such formal hearing to date, over a period of five years there have been thirty retirements or resignations brought about by the mere fact that charges against the judge were either pending or were contemplated. This is impressive not only with respect to results achieved but also with respect to the manner in which they were achieved. I know of no reason why a Federal commission would not produce a similar record.

It has also been the experience of the California Commission that in the vast majority of cases where conduct was reported to the Commission which was undesirable but yet not serious enough to warrant removal of the judge from the Bench, the mere inquiry of the Commission was sufficient to cause the judge in question to mend his ways. For example, I know of a particular case of a judge

who shall not only be nameless, but without venue, who was an avid golfer and pursued the little white pellet on every afternoon that he felt he could reasonably absent himself from bench and chambers. There were some in the community, other than his golfing partners, who thought he was spending too much time on the golf course and too little time attending to the duties of his office. Complaint was made to the Commission and inquiry followed from which it appeared that while there might be some ground for criticism, there certainly were no sufficient grounds to institute proceedings for removal. The judge, of course, became aware that inquiry was being made because he was, in the ordinary routine, asked to comment upon the charges. The very fact that he learned that inquiry was being made resulted in a substantial change in his habits. He thereafter has devoted his full time to the duties of his office with the result that criticism of him has evaporated. He is a better judge than he was before the inquiry was made. This same type of thing has happened in numerous cases during the life of the California Commission in instances where there were judges who were drinking too much and too indiscreetly but not enough to warrant their removal; in cases of judges who were improperly rude, overbearing and arrogant to counsel, but whose conduct clearly did not warrant removal from the bench; of judges who held matters under submission and undecided for such lengthy period of time as to warrant real criticism, but whose conduct was not yet such as would warrant removal from the bench; and of many other cases almost as varied as the imagination can conceive. There are, of course, no statistics available on this type of thing, but I can assure you that within my own knowledge it has been a highly desirable byproduct of the function of the California Commission.

I can conceive no reason why a Federal Commission should not produce the same results. There are many judges, State and Federal, whose conduct in one respect or another is subject to serious criticism, and yet are not themselves aware of the seriousness with which others view that conduct. When they learn that serious criticism is being leveled at them they are usually quick to correct the fault.

The existence of the California Commission has been widely and generally welcomed by the Bar of this state because it gives the Bar a lever to do something about an impossibly poor judge. In California, an attorney, or even the entire Bar of a particular area, was without an effective remedy for improper judicial conduct. Not many lawyers, no matter how idealistically oriented, are willing openly to criticize the conduct of a judge before whom they practice, much less to take any overt action toward the discipline or removal of such a judge, because they fear the results that will follow when that judge learns of their efforts; they fear not only the results as far as they are concerned, but as far as their clients are concerned. The California system enables a member of the Bar, or a segment of the Bar, organized or unorganized, to bring facts and conditions having to do with judicial fitness to the attention of the Commission without themselves being a party to the proceeding; without having to bear the burden of procedure; and without having to shoulder the open responsibility for making the charge, because those facts and conditions having been brought to the attention of the Commission, the Commission can and in many instances has, acted upon its own motion to institute inquiry. This is particularly important in the smaller communities. In the larger communities where there are large numbers of judges, it is nearly always possible by statutory means or otherwise to avoid having a particular cause heard before a particular judge. The smaller the number of judges in a particular forum, the more difficult it is to avoid an unfit judge. The larger the forum, the easier it is for the presiding judge to assign to the unfit judge matters of such nature that it will be difficult for him to make too serious a mess of it. The smaller the forum, the greater the undesirable consequences which follow from the presence of an unfit judge upon the bench.

In short, I am firm in my conclusion that the creation of the California Commission on Judicial Qualifications has been of tremendous benefit to Bench, Bar and public in this state, and I see no reason why a Federal commission of the same nature should not produce similar or even greater benefits.

I know that this Committee has not yet determined whether or not any action is desirable, much less what form that action should take, and yet even less, the specifics of any particular solution. I am sure that there must be a number of solutions other than the creation of a Federal commission of the size, shape and color of the California Commission, but whatever solution is finally settled upon, it should take into consideration the fact that there is not now any satisfactory judicial definition of such concepts as "during good behavior" or "willful misconduct in office". I believe I am safe in saying that no one on the California Commission actually knows what conduct will warrant them removing a judge

from office. The phrase, "willful misconduct in office" is as broad or as narrow a concept as he who uses it may choose to make it. Does it cover conduct of the judge only while actually engaged in his official duties? Or, does it cover conduct, on or off the bench, during the period that the judge holds office? How serious does the "willful misconduct" have to be before it warrants removal? Only by the slow process of judicial precedent will that term, "willful misconduct in office" be defined by the decisions of the Supreme Court of California. As for myself, and I don't think that any of the past or present members of the Commission on Judicial Qualifications would disagree with me, I would have found it very helpful had some of these questions been answered by those who framed the constitutional amendment which created the Commission.

Another problem which the California Commission encountered and which I do not believe is as yet resolved, is the problem of whether or not the Commission has a right to require a physical or psychiatric examination of a judge who is charged with disability. The desirability and even the necessity for such an examination by a doctor designated by the Commission is apparent and yet it has been suggested that any requirement of such an examination might infringe upon the constitutional rights of the man whose condition is under scrutiny. Another problem that should be considered is whether or not the judge charged with misconduct should be permitted to sit and function while the charges are pending. There are arguments, of course, on both sides of this question, and I believe I have heard most of them. I am convinced that when there has been a recommendation made by the Commission that a judge should be removed from office, he should not function officially until that recommendation has been reviewed by the Supreme Court and become final. And finally, should removal from office be the only sanction which the Commission is empowered to recommend or should the Commission be empowered to recommend suspension for a period, or even public censure? Again, there are arguments on both sides of this question, but it is my own idea that either suspension or public censure would so destroy the image of such judge in the eyes of the public and in the eyes of the Bar as to make it impossible for him to be an effective judge thereafter.

I hope that the foregoing will be of some help to you in shaping your decision and I take this opportunity to assure you that I am grateful that you have offered me this opportunity to express myself.

EDW. W. SCHRAMM.¹

Mr. SCHRAMM. Well, I think I could sum it up from my point of view very hurriedly, since I have seen this California commission operate.

I was on the board of governors of the State bar during the last years of struggle to put the commission into effect, and as Chief Justice Gibson indicated, the board of governors is the governing body of the State bar and was instrumental in the creation of this commission.

Then I sat on the commission for its first 4 years, I have seen it work, and from my experience am completely satisfied with the necessity for such a commission in California.

I can say that I am completely satisfied that it would be an asset to the judicial system of any of the various States.

On the other hand, I am a little less positive in my position with respect to the Federal judiciary, because there are differences between the Federal judiciary and the State judiciary but, generally speaking, I do not see how it could fail to be helpful and desirable as an adjunct to the Federal judiciary system.

There are a number of problems that we ran into in California which I have listed in my prepared statement. There is one problem, though, which occurred to me later which I did not list, and which I think should be mentioned.

¹ Born 1913, educated at Loyola University, Chicago, A.B. 1935; University of Michigan, LL.B. 1938. Admitted to the California and Federal Bars, 1938 and entered private practice in Santa Barbara, California, where he is now the Senior partner of the firm of Schramm, Raddue & Seed.

Member of the American, California (Vice President, 1960), and Santa Barbara Bar Associations (President, 1955), The American Judicature Society, and the International Association of Insurance Counsel. Fellow of the American Bar Foundation. Formerly a member of the Executive Committee of the California Conference of Bar Delegates, 1955-1957, of the Board of Governors 1957-1960; and of the California Commission on Judicial Qualification, 1961-1964.

I might preface this by saying I did not mention it because during the time I sat on the commission it did not develop. I think the problem is still inchoate.

It arises in this way: the commission has a staff, a secretary, Mr. Frankel, and it is empowered to hire investigators when the occasion arises. It also has need for someone to represent the commission and to prosecute any proceeding which actually goes to hearing.

In California, the problem was not solved in a clear-cut fashion. The rules provide that the commission can retain its own counsel, but they also provide that the commission is entitled to use the services of the attorney general of the State. They provide that the commission can hire its own investigators, or that it may seek out services of the attorney general's office for investigative purposes.

I would like to emphasize that this problem had not arisen, but you have to recognize the possibility of a conflict of interest between the attorney general's office and the judiciary.

After all, the attorney general's office appears before the courts of our State more frequently than any other body of lawyers, and like any trial lawyer the attorney general's office may develop certain prejudice toward certain members of the bench. It has been a concern of mine that by turning over the investigative process and the prosecution process to the attorney general's office, one would create a situation in which there might inhere grounds for criticism.

Senator TYDINGS. I gather to date you actually haven't had to do that? You have been able to conduct your own investigation?

Mr. SCHRAMM. I am not sure of the statistics on it, but I do know that independent investigators have been hired on occasion and I also know that the attorney general's investigators have been used in some cases.

In one case we had before the commission, special counsel, an independent attorney engaged in private practice, was retained and paid. The only case that went to hearing and was actually prosecuted was handled by the attorney general's office.

Senator TYDINGS. Before your commission?

Mr. SCHRAMM. That is right, sir.

There is something else that hasn't been mentioned which might deserve some attention, and that is that our commission was authorized to refer these matters for hearing before a board of three referees, I believe they are called, or hearing officers, or whatever you choose to call them, empowered to sit itself in banc, or by a number of its members, and hear these matters itself.

On the only one that went to hearing, we sat in banc. I think seven of the nine members sat, two of them for some reason or another had disqualified themselves.

Senator TYDINGS. You actually only had one that went to a hearing?

Mr. SCHRAMM. Only one.

Senator TYDINGS. Is that the one that went to the supreme court?

Mr. SCHRAMM. Yes. I might add that I quoted in my statement the opinion and comments of William P. Gray, Esq., who was the defendant's representative in the matter in the supreme court.

Mr. Gray, as of 2 days ago, had been nominated for a Federal judgeship in Los Angeles.

Senator HRUSKA. Would it be, had it not been for the commission?

Mr. SCHRAMM. Senator Hruska, I think one of the important functions of the commission is to shed light on unfounded charges. It does it effectively.

The commission found that those charges were well founded by a unanimous decision of those sitting, and we found willful misconduct. It turned out we didn't know what willful misconduct was, and the supreme court told us so in a very few words. The supreme court found no grounds for our recommendation for a dismissal. I have pointed this out in my prepared statement. We found no really determinative law.

You placed a question to one of your earlier witnesses as to whether or not a certain line of conduct would be willful misconduct in office. You asked this question of Mr. Frankel.

Of course, he will admit he doesn't know. No one knows, sir. No one knows what constitutes willful misconduct.

I think that if any legislation be enacted it would be highly desirable were some guidelines laid down as to what is or is not willful misconduct, what is and is not grounds for removal.

Senator HRUSKA. I have an idea you are going to be getting a questionnaire as to your ideas of willful misconduct.

I am sure you realize it is a very difficult field.

Mr. SCHRAMM. Indeed I do. I can forecast my answer to your questionnaire will be highly unsatisfactory.

Senator HRUSKA. What was the nature of the record which was sent to the supreme court in this case?

Mr. SCHRAMM. The pleadings which are rudimentary pleadings in a process before this commission, and the entire trial transcript, complete with argument of respective counsel on the various points of a process before this commission, and the entire trial transcript, complete with argument of respective counsel on the various points of law that arose during the proceeding.

Senator HRUSKA. I assume that is a bulky set of documents?

Mr. SCHRAMM. Yes. It was, as I recall, 6 or 7 days of hearing.

Senator HRUSKA. Was it printed?

Mr. SCHRAMM. No; it was not printed, sir.

Senator HRUSKA. Thank you, Mr. Chairman.

Senator TYDINGS. I have a few more questions.

It has been stated by some that this removal mechanism is not really needed for the higher courts—the superior courts—and is needed only for the inferior courts. Would you care to comment on that statement?

Mr. SCHRAMM. I wouldn't agree with such a statement. I concur entirely with Chief Justice Gibson. The higher the judicial level, the more serious misconduct, or claim of misconduct. However, I do feel that the experience in California has indicated that there was a higher incidence of claimed misconduct directed at the inferior courts than there were at the superior courts, and I think that is easily explainable because there are a lot of the justices of peace in California who are not lawyers, for they are required to be lawyers. Their standards of behavior are just not at the same level as the standards of behavior of the superior court judge.

Senator TYDINGS. Let me ask you this: In the actual operation of your commission, do you find that the great distances in California are a hindrance to meetings of the commission or the carrying out of its

functions? For instance, the fact that California extends all the way from Shasta on the north, south to the Mexican border?

Mr. SCHRAMM. This has been no real problem. The judges and laymen and lawyers on the California commission, and I don't hesitate to include myself, were impressed with the importance of the task they were doing, they were really dedicated to it, and the attendance record at meetings of the commission has been very, very high.

Senator TYDINGS. Were there any instances where members of the commission would personally know the judge about whom the complaint was filed?

Mr. SCHRAMM. Oh, yes; that occurred frequently.

Senator TYDINGS. What sort of procedure would be followed then with respect to disqualification because of a personal acquaintance with the judge?

Mr. SCHRAMM. When you use the words "personal acquaintance," you introduce an element that I think we should be clear on. There were a number of instances where the judge against whom the charge was made was known to one or more members of the commission. In those cases where it was just an acquaintanceship, the commission had the benefit of the knowledge of that member or member of the commission concerning the particular judge. Of course, we listened carefully to what such a member had to say concerning the problem.

In one instance, as I recall, there was a personal relationship between one of the members of the commission and the judge who was accused of misconduct.

In such an instance, the member of the commission who was acquainted would withdraw from consideration of the matter, and disqualify himself.

Senator TYDINGS. Did you ever have a situation where the judge who was a member of your commission sat on the same bench or in the same court with the judge about whom the complaint was filed?

Mr. SCHRAMM. Yes, more than once.

After all, the number of judges in the superior court in Los Angeles County, for example, is astronomical. It is in the hundreds, and at all times, I believe, we had a member of the superior court in Los Angeles sitting on the commission.

Senator TYDINGS. Would the same rule apply, then, as to his qualifications? Would it depend on the personal relationship of one judge to the other?

Mr. SCHRAMM. Yes, it would.

Senator TYDINGS. Do you think that your commission would be as effective if it did not have the power to recommend removal to the supreme court?

Mr. SCHRAMM. No; I don't. As a matter of fact, I think that the withdrawal of that power would emasculate the effectiveness of the commission.

Senator HRUSKA. Mr. Schramm, the commission has rules concerning the confidentiality of the preliminary investigation of complaints.

You also have lay members on your commission and members of the bar.

Do you feel that if the commission were made up of only judges that this confidentiality would be interpreted by the public as being a coverup or whitewash? In other words, do you believe the laymen and bar members serve a useful purpose?

Mr. SCHRAMM. I do. It removes the atmosphere of the members of the club attending to the affairs of members of the club.

It not only removes that element of the situation, but I think there is a very desirable element in the introduction of the point of view of the layman on any of these charges of misconduct, and also it is very desirable to introduce the point of view of the practicing attorney. Judges and attorneys both come from the same nest, but as anyone knows who practices law, they don't all see eye to eye on all judicial matters. It is desirable that the commission have the point of view of the practicing lawyer, and it is desirable to have the point of view of lay members.

Senator HRUSKA. Those are all the questions that I have, Mr. Chairman.

Thank you.

Senator TYDINGS. All right. Let me, on behalf of the subcommittee, thank you very much, Mr. Schramm. Your testimony has been extremely enlightening, and it will be most helpful in the record we are trying to prepare.

Mr. SCHRAMM. Thank you, Senator. It has been a pleasure.

Senator TYDINGS. We will recess until 2 o'clock this afternoon.

(Whereupon, at 11:30 a.m., the hearing in the above-entitled matter was recessed, to reconvene at 2 p.m. the same day.)

AFTERNOON SESSION

Senator TYDINGS. We will reconvene the U.S. Senate Subcommittee on Improvements in Judiciary Machinery, of the Committee of the Judiciary, which is presently holding hearings in California to study the California system of removal of unfit judges.

We are particularly pleased this afternoon to have with us one of the outstanding civic leaders of the State of California, a man who has served as a lay member of the California Judicial Qualifications Commission since its inception, Mr. Ben Swig.

Mr. Swig, on behalf of myself and Senator Hruska, ranking minority member, we welcome you to this subcommittee. We are particularly concerned about the role of the lay member of the California Judicial Qualifications Commission—whether or not you feel that the lay member makes a contribution, if he does, what the contribution is, and any comments you may wish to make on the effectiveness of the system as a whole, as it works in California.

(A biographical sketch of Mr. Swig follows:)

BENJAMIN H. SWIG

Benjamin H. Swig was born in Massachusetts and engaged in the real estate business in Boston and New York City from 1925 to 1945. He has been chairman of the board of the Fairmont Hotel Co. since 1945 and is a member of the board of numerous business, educational, and religious organizations and foundations. He has been a lay member of the California Commission on Judicial Qualifications since its founding.

STATEMENT OF BENJAMIN H. SWIG, LAY MEMBER OF CALIFORNIA JUDICIAL QUALIFICATIONS COMMISSION

Mr. SWIG. Well, Senators, I think the role of the layman on this commission is very, very important. I think they have an entirely

different view and aspect of the whole situation than perhaps any member of the judiciary may have.

They have not been judges. They are laymen. I think they have the pulse of the common person on these questions, and I think they have been very, very helpful.

This commission in my opinion has done a great service to the judiciary. They have, as you probably heard from Mr. Frankel, that we had I don't know how many cases before us.

You heard very, very little publicity on them. All of our hearings are private. We do not disseminate any information whatsoever. Of course, you gentlemen must realize a great majority of the cases that come before us are from disgruntled litigants; having lost a case in one court, they feel that we can do something that can help them, and they confuse us with a higher court, and so a great many cases are eliminated for that reason.

We don't try to be appellate court judges and supreme court judges. When it is a question of law we leave it to the courts to decide.

However, I guess Mr. Frankel has also told you about the great many cases where judges have retired or resigned as a result of our investigation. We are not a police department. We don't go looking for trouble. We don't try to find out if there is anything wrong. All the cases that come before us are by registered complaints, and we investigate them very, very thoroughly before we attempt to make any decision on them.

All in all, I think the commission performs a wonderful service to the State and to the judiciary. I think the people of the State have a great respect for our judiciary in the State.

Senator TYDINGS. What has been your role on the commission in relationship to the judicial members? Are you generally in agreement? Do you find yourself stricter than they, or more magnanimous than they are in their judgment of their fellow judges?

Mr. SWIG. It is pretty hard to set a rule. Sometimes we agree, and sometimes I think they are too strict, and other times I don't think they are strict enough. Each case is individual.

I suppose we all have different ideas, and we look at things differently. However, most of the time we have been in accord.

Senator TYDINGS. The argument has been advanced against using laymen on a commission of this type, that the laymen might try to influence the judiciary or dominate the judiciary, or upset the independence of the judiciary.

Do you have any comment on that view?

Mr. SWIG. I don't see that you can interpret it that way, because there are nine members on the commission, of which five members are of the judiciary, two members of the bar association, and two lay members, and with only two lay members it would be difficult to control the majority.

Senator HRUSKA. Under those conditions, any control they could gain would be deserved control?

Mr. SWIG. Yes.

Senator TYDINGS. How much of your time does it take to serve on this commission?

Mr. SWIG. We generally meet once every 2 months, and most of the time for the entire day. And, of course, we do have telephone conversations in between on certain subjects. The lay members, as well

as members of the judiciary, try to help in certain cases and, rather than bringing charges and have it out in the open, why, we try to prevail upon them to retire or resign.

And I think the personal contact we have with them has meant a great deal.

Senator TYDINGS. What do you mean by personal contact?

Mr. SWIG. Well, sending representatives over to the judge sometimes to tell him of a complaint that has been made against him.

Rather than bringing it out and bringing charges immediately against them, we let them know the information that we have, and we are very frank with them and tell them the information we have, and as a result they know that we have information that could result in their removal, or have data which would mean that they served their usefulness on a bench, and as a result they either could retire or resign.

Senator TYDINGS. Have you performed any of those functions?

Mr. SWIG. Yes.

Senator TYDINGS. Talking with a judge with whom you were personally acquainted?

Mr. SWIG. Yes.

Senator TYDINGS. Has any other layman—has the other lay member performed such a function?

Mr. SWIG. I think not; I don't think so. These judges are known by other members, other judiciary members of the commission, rather than the laymen.

Senator TYDINGS. The instance to which you referred in which you happened to be acquainted with the judge involved, it was the judgment of the commission that you might be the proper emissary, or that you might persuade him to voluntarily retire or resign?

Mr. SWIG. Yes.

Senator TYDINGS. Were you successful?

Mr. SWIG. Yes.

Senator TYDINGS. Have you ever had a situation where you thought there was a personal conflict, or a conflict because of your personal friendship with a judge who was under scrutiny?

Mr. SWIG. No. I can't remember of any case where there was any conflict. We have to serve in the capacity of which we are appointed, and we have to take the facts rather than what we personally think of an individual, and have to make our decision, therefore, just upon the facts.

Senator TYDINGS. Do you always meet in San Francisco, or do you meet in different parts of the State?

Mr. SWIG. We generally meet in San Francisco. We have met in other cities. I think we met in Santa Barbara one time, and we met in Los Angeles where there was a bar association meeting, and sometimes there are a great many members of the association there, so we make it convenient for them at the bar association meeting.

However, most of the meetings are held in San Francisco.

Senator TYDINGS. Do you feel that authority to make a positive recommendation of removal to the supreme court is an important part of this California machinery? Do you feel that if you didn't have the authority to make a positive recommendation of removal, that you would be less effective than you are?

Mr. SWIG. I would go further. We would be of no effect at all if we didn't have the power of making recommendations.

Senator TYDINGS. Do you feel that the California Commission on Judicial Qualifications serves an important function, insofar as oversight of superior court judges is concerned, as well as the lower court judges?

Mr. SWIG. Yes, I do. I think also the fact that it is not only the cases that we recommend or that we persuade to retire or resign, but I think the fact that we have such a commission here has a great effect on the judges that are presiding in open court.

They realize that we have that authority to recommend their removal, and I think as a result they are pretty careful of what they do on the bench. I think their behavior is much better.

Senator TYDINGS. Were you active during the period when the original proposal was made and adopted by the State legislature and approved by the citizens of California?

Mr. SWIG. No; I was not. I never heard of the commission until after it was created and I was appointed.

Senator TYDINGS. What sort of reception has the commission received, insofar as the general public of California is concerned, in your judgment? Is it well thought of, or—

Mr. SWIG. I think very frankly that the general public doesn't know too much about our commission. We don't have any publicity attached to it at all, and I think if you meet a person on the street, he probably never has heard of the commission on judicial qualifications.

Senator TYDINGS. The civic leadership of California, the more enlightened persons who might be aware of the operation of it, taking it one step further?

Mr. SWIG. I should say most of those in the legal fraternity think it is a great commission, and it is fulfilling a very useful purpose.

I think very few laymen in civic life know about the commission on judicial qualifications. They never thought that they would have to know too much about us.

Senator TYDINGS. Do you think it is necessary to have a permanent staff with such a commission?

Mr. SWIG. Yes; it is absolutely necessary.

Senator TYDINGS. Why?

Mr. SWIG. There are a lot of preliminary investigations that have to be made. It would be impossible for the commission to make all these investigations. I don't know how many cases we have come up every year. However, so many are about disgruntled litigants, and if we as a commission would have to go and investigate every one of them, we would have to work 3 days a week.

Senator TYDINGS. Do you feel your effectiveness would be seriously limited?

Mr. SWIG. Definitely.

Senator TYDINGS. Do you think that the legal members, the non-judicial, but legal members of the commission, make a contribution to the commission?

Mr. SWIG. They do a very excellent job, They do a wonderful job, every one that has been on the commission.

Senator TYDINGS. And in what way. Why wouldn't the commission be just as effective if you—well, let's say if you had neither lawyers nor laymen on there, just judges?

Mr. SWIG. Well, I think it is necessary to have a different point of view, not only the judges' point of view. I think laymen have a different point of view, and some of the attorneys have a different point of view than the judges, and I think it is good to have a diversified point of view on these matters.

Some of these judges, after they have been on the bench a great length of time, have different views than when they first go on the bench.

Senator HRUSKA. Mr. Swig, this subcommittee has earlier discussed the situation where a judge on the commission sits in the same court as the judge who might be under scrutiny. Are there any rules for disqualification of a member of the commission under those circumstances?

Mr. SWIG. We have had occasions when judges have voluntarily disqualified themselves because they have known the judge that is under investigation, and they have automatically disqualified themselves.

Senator HRUSKA. They feel out of deference to all concerned that it would be better to disassociate themselves?

Mr. SWIG. Yes.

Senator HRUSKA. There are no formal rules?

Mr. SWIG. No formal rules that I know of.

Senator HRUSKA. Would there be any disqualification of lay members who might be personal acquaintances of the judge under investigation?

Mr. SWIG. I don't think any lay member has been asked to disqualify himself, or has.

Senator HRUSKA. Do you think there should be a rule on that?

Mr. SWIG. I think he automatically takes care of himself. It is up to the layman himself as to whether he can sit impartially.

Senator HRUSKA. There are four grounds which can form the basis of the proceeding for the removal of a judge from office. One is willful misconduct in office; two, habitual intemperance; three, failure to perform his duties; and, four, failure to abide by the law.

What is willful misconduct in office, do you know?

Mr. SWIG. I've never seen a definition but I suppose it is action so wrongful as to render this judge unfit to hold office.

Senator HRUSKA. If he serves on the board of directors of a corporation, is he guilty of willful misconduct?

Mr. SWIG. I wouldn't—unless some other litigation came up where that company was involved in some legal matter that came up before him, I would say he would not be.

Senator HRUSKA. That would be in the field of conflict of interest?

Mr. SWIG. Yes, conflict of interest. We have had cases where that has come up, where some of the judges have been interested in some outside business where it has come up before his court.

Senator TYDINGS. What have you done in those cases? How have you handled those cases?

Mr. SWIG. Well, we brought it to their attention, and in some cases they got out of the business they are in, and in some cases we persuaded them to retire.

Senator HRUSKA. Wouldn't it be sufficient for them to simply disqualify themselves from presiding over cases pertaining to that conflict?

Mr. SWIG. Some of them come up very often.

Senator HRUSKA. What would that be?

Mr. SWIG. I think one of them was in connection with bail bondsmen, and let me see, what would be some other cases.

Senator TYDINGS. Did the judge have an interest in the bonding company?

Mr. SWIG. Yes.

Senator HRUSKA. Suppose he was on the board of directors of an insurance company that wrote liability insurance on automobiles or public buildings.

Mr. SWIG. I don't think we have ever had cases where any judges were members of an insurance company where things like that came up.

Senator HRUSKA. But the commission had to form its own judgment as to what particular acts would be willful misconduct or what would not?

Mr. SWIG. They have to use their own judgment; yes.

Senator HRUSKA. It has been called to our attention that the statute also provides that State and local public bodies, and their officers, and their employees, and so on, are authorized to give you reasonable assistance and information in the commission work.

Do you have any comment as to how much of this reasonable assistance public officials have given your commission?

Mr. SWIG. Well, I think the only time we ever go to anybody is probably to the Attorney General's Office to get assistance, and we have gone to other judges and asked them their opinion on what is going on in other courts.

Senator HRUSKA. Do you see a possible conflict of interest there whether either the Attorney General's Office or the district attorney has frequent contact with the judges, and a great many of them might not be considered the most impartial or nonprejudicial witness?

Mr. SWIG. We found them to be very fair and reasonable.

Senator HRUSKA. You have?

Mr. SWIG. We found them to give us all the information we want.

Senator HRUSKA. Of course, the commission members can weigh the contact and acquaintance of the district attorney with the judge, and take that into consideration?

Mr. SWIG. That is right. If we think they are not cooperating properly, we have a right to use our own judgment.

Senator HRUSKA. Those are all the questions that I have.

Senator TYDINGS. I think that will conclude our questions, Mr. Swig.

On behalf of Senator Hruska and myself and the subcommittee, we appreciate how much you are doing, and your taking time out in a busy schedule to come before us to testify.

We appreciate the fine public service that you have contributed to citizens of California by serving on their judicial qualifications commission.

Mr. SWIG. Thank you very much. It is a pleasure to be here, gentlemen.

Senator HRUSKA. Both the State of Maryland and the State of Nebraska are going to establish the California type plan in their respective States, and you are one of the reasons that the plan has been successful.

Mr. SWIG. I am happy to hear that. I think a great many of the States are going to do that.

Senator TYDINGS. We will now recess the hearing until 9:30—excuse me—10 o'clock Monday morning in Los Angeles, at the Federal Courthouse, U.S. Courthouse, 312 North Spring Street, Los Angeles, Calif.

(Whereupon, at 2:30 p.m., the committee recessed until 10 a.m., Monday, June 20, 1966, in Los Angeles, Calif., Federal Courthouse, U.S. Courthouse, 312 North Spring Street.)

JUDICIAL FITNESS

Procedures for the Removal, Retirement, and Disciplining of Unfit Judges

MONDAY, JUNE 20, 1966

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL
MACHINERY OF THE COMMITTEE ON THE JUDICIARY,
Los Angeles, Calif.

The subcommittee met, pursuant to notice, at 10 a.m., in room 256, U.S. Courthouse, 312 North Spring Street, Los Angeles, Calif., Senator Joseph D. Tydings (chairman of the subcommittee) presiding.

Present: Senators Tydings and Hruska.

Also present: William T. Finley, Jr., chief counsel; Peter J. Rothenberg, deputy counsel, and Barton Hertzbach, research assistant.

Senator TYDINGS. The subcommittee will come to order.

This is a hearing before the Subcommittee on Improvements in Judicial Machinery of the U.S. Senate Committee on the Judiciary.

STATEMENT OF SENATOR JOSEPH D. TYDINGS, CHAIRMAN OF THE SUBCOMMITTEE

We are here today to hear testimony on the operation of the California Commission on Judicial Qualifications.

Senator Roman Hruska, ranking minority member of the committee, and myself will represent the subcommittee.

This hearing is a part of a continuing study of the problem of procedures for the removal, retirement, and disciplining of unfit judges, and we trust that the information we receive at our hearings in California will enable us to develop fair and effective procedures for the Federal judicial system.

Our inquiry into the problem of judicial fitness is not intended as a criticism of the fine men and women who occupy the Federal bench. We have the greatest confidence in the competence and integrity of the Federal judiciary. But we must recognize that even a very few unfit judges—judges who are senile, judges who are lazy, judges who are physically or mentally disabled—can cause harm to the judiciary far out of proportion to their number. They can interfere with the orderly performance of the business of the courts, and they can tarnish the image of the judiciary in the eyes of the public.

For these reasons we are concerned that the Federal judicial system presently lacks adequate and fair methods for removing unfit judges from the bench. We believe that problems of judicial fitness are best handled by the judiciary itself, yet the only method now available for

removal of judges is the cumbersome legislative mechanism of impeachment. We think that the Federal judiciary needs something better than impeachment, a removal method that gives the dominant voice to the judges themselves. Such a system we feel is not inconsistent with the principle of an independent judiciary.

Our impression is that California has developed such a system, and that the system has been successful. Our hearings here in Los Angeles are intended to shed some light on the California system. We hope to find out why California—a State with an excellent judiciary—was led to adopt a more expeditious removal system than impeachment; how the commission on judicial qualifications has operated in its 5 years of existence; and what the impact of the commission system has been on the California bench and bar.

We are fortunate in having some outstanding witnesses, as we did in San Francisco on Friday. Today we will hear testimony from the Honorable William B. Neeley, chairman of the commission; the Honorable William L. Murray, presiding judge of the superior court of Orange County; and Grant B. Cooper, Esq., of Los Angeles, representing the State bar of California.

I would like to take this occasion to thank Chief Judge William M. Byrne of the U.S. District Court of the Southern District of California for his courtesy and cooperation in making this room available to us.

At this time I am very happy to welcome before the subcommittee the Honorable William B. Neeley, chairman of the California Commission on Judicial Qualifications.

Senator Hruska, do you have anything to add?

Senator HRUSKA. I have nothing to supplement your very fine statement.

Senator TYDINGS. We are delighted to have you with us, Judge Neeley.

Also present at the table are Mr. Barton Hertzbach from Senator Hugh Scott's office; chief counsel for the subcommittee, Mr. William T. Finley, Jr.; deputy counsel, Mr. Peter Rothenberg.

With these introductory remarks, we are delighted to hear from you, Judge Neeley.

(Judge William B. Neeley received his LL.B. from the University of Colorado. He is a member of the bench of the Superior Court of Los Angeles County, and is the chairman of the California Commission on Judicial Qualifications.)

STATEMENT OF HON. WILLIAM B. NEELEY, CHAIRMAN, CALIFORNIA COMMISSION ON JUDICIAL QUALIFICATIONS

(The prepared statement of Judge William B. Neely follows:)

The statements herein are the personal views of the witness, and are not to be construed as being made on behalf of the Commission on Judicial Qualifications, or any other member of the Commission.

Historically, California prior to 1960, had, in common with many other States, three methods for the removal of judges—impeachment, joint resolution of the legislature, and recall; together with the election process by which some unfit judges were defeated. However, each method was so involved with political overtones that for all practical purposes each was ineffectual except in instances wherein the incumbent was involved in circumstances of a gross moral character which resulted in a generally aroused public demand for his removal.

There was no board or agency to which a lawyer, a litigant, or citizen could present an alleged complaint of judicial misconduct or unfitness, and no machinery for independent investigation of such charges if made.

At the same time there was a growing acceptance by the bar and the public generally that in order to attract the best qualified lawyers to the bench, it was necessary that relative permanence of tenure be assured for those judges who by their conduct and industry justified their continuing on the bench. By removing or reducing the threat of election defeat and increasing the probabilities of longer tenure it was all the more necessary that a workable and effective method for the retirement or removal of the unfit judge be provided.

It was with this background that in 1960 the voters of California, by Constitutional Amendment, provided for the creation of the "Commission on Judicial Qualifications".

It is doubtful if any commission was ever more completely misnamed. By its function it could be better termed the "Commission on Judicial Disqualification". Unfortunately, many Californians, including lawyers, are under the false impression that the Commission screens and evaluates potential judicial appointees.

The Commission on Judicial Qualifications has nine members:

(Art. VI, Sec. 1b, California Constitution)

(i) Two justices of the district courts of appeal, two judges of the superior courts, and one judge of a municipal court, each selected by the Supreme Court for a four year term;

(ii) Two members of the State Bar, who shall have practiced law in this State for at least 10 years who shall be appointed by the Board of Governors of the State Bar for a four year term (California has an integrated bar); and

(iii) Two citizens, neither of whom shall be a justice or judge of any court, active or retired, nor a member of the State Bar, and who shall be appointed by the Governor with the advice and consent of the Senate for a four year term.

Members of the Commission are not compensated and receive only expenses while engaged in the performance of their duties. No action of the Commission is valid unless concurred in by a majority of the members.

The Commission selects its own chairman.

(Art. VI, Sec. 10b, California Constitution)

A justice or judge of any court may be removed for:

- (1) Wilful misconduct in office;
- (2) Wilful and persistent failure to perform his duties; or
- (3) Habitual intemperence.

A judge or justice of any court may be retired for disability seriously interfering with the performance of his duties, which is, or is likely to become, of a permanent character.

After such investigation as it deems necessary, the Commission may:

- (1) Order a hearing to be held before it; or
- (2) May request the Supreme Court to appoint three special masters (justices or judges of courts of record) to conduct a hearing and report to the Commission.

If the Commission finds good cause therefor, it shall recommend to the Supreme Court—removal or retirement as the case may be.

All proceedings, papers and records of the Commission are *confidential* and *privileged*. However, with the filing of the hearing record with the Supreme Court, the confidential character ceases but the privilege continues.

Commission procedures are prescribed by Judicial Council rule.

The offices of the Commission are in San Francisco. The only salaried staff is the full time Executive Secretary and a legal secretary. Regular meetings are held bimonthly at the offices in San Francisco.

The Commission has an annual budget and in the performance of its duties is authorized to employ such assistants as may be necessary, including investigators and medical and other experts. On request of the Commission the Attorney General shall act as its counsel. The Commission in its discretion may also engage special counsel.

There is no formality by which a complaint may be presented to the Commission. A simple letter is sufficient. Complaints have come from the Judicial Council, bar associations, judges, lawyers, litigants and others of the community. Some letters of complaint are addressed to individual Commission members, and

by Commission policy all such communications are forwarded to the Executive Secretary, who acknowledges their receipt and may request additional factual information.

A large percentage of the complaints contain no specific charge against a judge, but are expressions of criticism or displeasure of the judge, of legal procedures, or reflect a misunderstanding of the judicial process. All of these are answered and an attempt made to explain the situation which gave rise to the dissatisfaction. Such matters are usually closed by staff action and approval of the Commission.

If the complaining communication contains a specific charge against a judge or reflects a reasonable probability of a valid complaint, a staff inquiry may follow. Inasmuch as Commission meetings are approximately two months apart, if such a complaint is received some time in advance of a meeting, the Executive Secretary advises the Commission chairman, who may authorize the Secretary to make a "staff inquiry" in order to have more information for the Commission at its next meeting, and thus expedite the matter.

Staff inquiry may be by letter to the president of a local bar association or other reliable person, or the Executive Secretary may personally inquire into the matter. In some instances a member of the Commission is authorized to make the inquiry. In all such cases the persons who are contacted are requested to keep the matter confidential and there has been the fullest cooperation in respecting confidentiality.

If the complaint or the staff inquiry indicates that the conduct of a judge, or his physical or mental health, is such as to bring him within an area in which the Commission may act, then what is designated as a "preliminary investigation" is commenced. The judge is notified of the investigation, the nature of the charge or charges, and is invited to present in answer such matters as he may choose. The preliminary investigation is always on the Commission's motion. This makes it unnecessary to name the source of the complaint and largely eliminates personality implications.

The Commission then reviews all the material disclosed by the complaint, the preliminary investigation and the answer of the judge, and decides whether or not to initiate formal proceedings.

Unless the preliminary investigation reveals sufficient cause to warrant further proceedings, the case is closed and the judge is notified of this fact.

In a proper case the notice to the judge that the matter is closed may also contain a constructive suggestion as to his avoiding the circumstances which caused the complaint to be filed.

If, on the contrary, the Commission concludes that formal proceedings should be initiated, definitive charges are drafted and the judge is advised by written notice of the institution of formal proceedings to inquire into the charges against him.

These proceedings are entitled "Before the Commission on Judicial Qualifications—Inquiry Concerning a Judge, No. —."

The notice sets forth "in ordinary and concise language" the charges against the judge and alleged facts upon which the charges are based, and advises him of his right to file a written answer to the charges within 15 days after service of the notice.

The answer of the judge must be verified and in style shall conform to the Rules on Appeal in California (Sub. 1c Rule 15). An original and eleven legible copies of the answer must be filed.

With the filing of an answer or the expiration of the time within which it may be filed, the Commission sets a time and place for the hearing and gives notice thereof to the judge by mail at least 20 days before the hearing date.

The judge against whom proceedings are pending has the power of subpoena to compel the attendance of witnesses and to procure books, records, etc., that he may require for his defense. He may be represented by counsel at the hearing.

The Commission may engage special counsel or use the office of the Attorney General to serve as Examiner to present the evidence in behalf of the Commission. All hearing proceedings are phonographically reported. Only legal evidence may be received.

If the hearing is before the Commission, not less than 5 members shall be present at all times during the presentation of evidence.

In all cases in which at the conclusion of the hearing the Commission votes to recommend to the Supreme Court that the judge be removed or retired, the Commission makes written findings of fact and conclusions of law, and prepares a transcript of all evidence and proceedings, which, together with a certified copy of the recommendation, is filed with the Clerk of the Supreme Court. Notice of the filing, together with a copy of the transcript, recommendations, findings and conclusions, is delivered to the judge.

Within thirty days after the filing of the Commission recommendation with the Supreme Court, the judge may file a petition to modify or reject the recommendation, specifying the grounds relied upon.

The Supreme Court has full authority to accept or reject any Commission recommendation.

OBSERVATIONS

The good results achieved by the Commission have exceeded expectations, and the concerns expressed prior to its creation have not materialized. The treasured independence of the judiciary has in no way been restricted.

Its success can in only a very small degree be measured in terms of the hearings it has held or in judges who have resigned or retired as a result of its actions. In many instances, the staff inquiry or the letter of inquiry from the Commission has been all that was necessary to completely correct the cause of complaint.

The judges, and the lawyers from whose ranks they are selected, can take great pride in the extremely small percentage of judges who by their conduct merit discipline. For example, in California, with approximately one thousand judges in all courts, only 85 complaints were filed in 1965. Of these, 38 were such as to warrant inquiry, and of these only 29 resulted in a communication to the judge or a personal interview with him by the Executive Secretary.

Since its inception, the Commission and every member has been motivated by the philosophy that within the limits of its jurisdiction its function is to avert, as promptly and quietly as possible, derelictions by judges. We all make a full boulevard "stop" when there is an officer on the corner, and we strictly obey rules of the road in the presence of a highway patrol car. In a comparable way the very existence of the Commission has had a salutary effect on the judge who is inclined to be lax in keeping court hours; the judge who is intemperate with litigants, lawyers or witnesses; the judge who permits his personal activities to interfere with his judicial duties; the judge who delays unduly in disposing of court business. Conversely, it serves to protect the judges from irresponsible charges.

The existence of an agency to which the public may address its criticisms of the judiciary and receive an answer constitutes a substantial contribution to the judicial process.

In January 1964, Governor Brown of California, in reply to a letter from the Dean of the University of Colorado School of Law, inquiring about the Commission, gave this evaluation:

"The law has been in effect for slightly over three years now, and I am convinced that it is a tremendous success. It is beyond argument that the operations of the Commission have had a marked effect in raising the already high level of our California judiciary, and I feel that as the Commission continues to operate this effect will be multiplied.

"In my opinion, the major thrust of the Commission's effect has been not simply in the fact that a small number of judges have resigned after the Commission has investigated their activities and found them wanting in quality. Rather, I note with pleasure the salutary effect which the Commission has had on the vast majority of our hardworking judges."

These same favorable conclusions are true today, and would receive the approval of the bench and bar of California.

Judge NEELEY. Senator, there is not a whole lot I can add to the statement I prepared and delivered to Mr. Rothenberg on Saturday.

I would like to say this. We in California have a feeling that we have an outstanding judiciary, and the impetus which gave rise to the constitutional amendment which resulted in the creation of the qualifications commission came about because of the fact that there was a limited number of judges who undoubtedly were not carrying out their full responsibilities. There were some suspicions of over-indulgence in intoxicants, there were certain judges who had not been on the bench for months and who were obviously incapable of returning to the bench, and these relatively isolated incidents created a large impact on the public mind, and particularly on the legislature.

The matter was thoroughly aired before the legislature, and these instances were brought to light, and it was felt because of the impact that a few derelict judges made on the public attitude toward the

judiciary in general, that something had to be done about it, and that is what brought about this enactment. I feel that to the then Chief Justice Phil Gibson should go the primary credit for the creation of the commission.

It has now been in operation some 5 years. Those of us who work with the commission and in our conversations with judges and with the bar and with the public at large are satisfied that it has exceeded the expectations which the proposal offered when it was first presented to the people for constitutional amendment.

We are satisfied that it has in no way infringed upon the independence of the judiciary.

Its impact is not in its statistical report. I think I should say to you one of the problems that the commission has faced is to make this statistical report as brief and as unappealing to publicity as it was possible to make it.

I have been on the commission now almost 4 years, and every member of the commission as long as I have been there has been impressed with the necessity that the more quietly we can bring about the results which we were created to achieve, the better off we are.

We very definitely have avoided anything that would invite the interest of the press. We have had instances where something has broken in the press first, and, of course, they have tried to get comments from the commission. We have steadfastly refused to make any comments, because we feel if we make comments when they are favorable, the very fact we do not make favorable comment implies that something unfavorable has occurred. So we have avoided completely any effort or any desire to appear in the public press.

In the one full hearing which was conducted when we advised the press of the confidential nature of our proceedings, they were completely cooperative. The first day we held our hearing they were there to get what information they could, and we told them we were inhibited by the constitutional provision about giving out information. The reporters accepted our position, and the hearing proceeded in complete confidence.

I think that an incident that happened not too long ago is an example of how the commission has operated in certain areas which do not invite a statistical report. We know that in the past some judges were incapacitated for various reasons and were off the bench for many, many months. The judges are aware of the commission's interest in cases of prolonged absenteeism and in a recent instance a judge who had a substantial absence as a result of illness reported on his recuperation though there had been no inquiry by the commission.

I am of the opinion that one of the reasons the commission has been effective is we have avoided setting specific "yardsticks." For example, we haven't said if a judge is off the bench x number of weeks or months he becomes one subject to investigation by the commission.

We feel a judge may be off the bench for a year or more due to major surgery or illness, yet if there is a reasonable probability of his being able to return to full service he should be given that opportunity.

We haven't arbitrarily set up rules that control us in the exercise of discretion. But the fact that a judge would of his own account call and tell of his improvement and the report that his doctor was making

is, to my mind, of tremendous significance in showing that the bench itself looks to the qualifications commission to protect the bench and yet to be reasonable in the individual instance, whatever it may be.

Unlike the Federal system, where you have definite legal spelling out of retirement, we have had numerous instances in which, through the efforts of the commission, we have called to a judge's attention the fact he could have a very substantial retirement, and that if he delayed in doing so, if he was not ready for retirement for years of service, on his death his widow would be unprotected. We have been of help to a number of judges who, when advised of the legal significance of the retirement laws, have been appreciative of what we have told them and have taken advantage of it.

We have had many instances such as you commented upon, Senator Tydings, where complaints come to the commission of unreasonable delays in issuing of orders where counsel has written to the judge several times asking for a ruling.

Many times the delays result from heavy caseloads, but a letter of inquiry from the commission has cleared up the instant matter, and corrected the incidence of delayed rulings.

We have one instance in which I am certain that the person that complained had no idea that the commission had acted at all. It was a complaint about the attitude of a judge. We sent our inquiry letter which is referred to in the statement which I prepared and the judge came back with a letter in which he said he realized that the complaint was proper, that he had been working hard and had some illness in the family that had him on edge, and he said, "The complaint is well taken, and it will be corrected."

The proof of the fact that it was corrected was that without any knowledge to the person or the organization that lodged the complaint we got a letter advising us that the condition had been entirely corrected, and they wanted to withdraw any criticism.

It is in those areas where I think the commission has been most effective.

Every complaint—and it can be the most informal complaint, a letter from a litigant or a bar association—is answered.

If the complaint is addressed to a commission member it is forwarded to the executive secretary to be acknowledged.

The vast majority of complaints are entirely beyond the jurisdiction of the commission, but in answering them we endeavor to the best of our ability to explain the background of the complaint and how it should have been corrected by appeal, or how it is beyond the jurisdiction of the court or of the commission.

We feel that we supply a great need for the public at large to have a place to which it can direct its complaints of the judicial process.

Now, if there is anything further, I will be glad to endeavor to answer questions. This is just a general résumé.

We do feel the very existence of the commission contributes to a better judiciary. I think the general motorist is more courteous on the highway and observes traffic rules if there is a highway patrol car in sight—and we think the commission has a comparable deterrent effect upon a judge who might otherwise become lax or overbearing with litigants or attorneys because he now knows that there is a place where a complaint can be made.

Conversely, it is a great protection for the judge who is doing a good job. We have had many instances in which a complaint has been lodged against a judge which has no basis at all and only reflected a criticism of the law.

Senator TYDINGS. Thank you very much, Judge Neeley.

Let me ask you a question which has arisen.

Do you think that the commission, or a commission such as yours, is primarily needed only for inferior courts, rather than the higher courts of record, such as the superior courts?

Judge NEELEY. Frankly, I feel our provision that it applies to all courts is best because—let's concede that in the higher level of courts there is probably less occasion for its powers to be exercised but the very fact that they are available is a deterrent.

I think it is a good thing, and I don't think we should say that the lower courts are more inclined to have a greater dereliction among its judges.

We have considerable difficulties and, for example, still have in California in the lower courts where the judge is not an attorney and, as you would discover, it is often difficult to explain to them why they shouldn't be conducting a collection business in the same jurisdiction where they are sitting as a justice of the peace, for example. They don't see that there is any underlying coercion in their business or collection agency.

I think it should apply to all courts, and then if the occasion presents itself, the machinery is there for action.

Senator TYDINGS. In California does it apply to district courts of appeal?

Judge NEELEY. Yes. It even applies to the supreme court.

Senator TYDINGS. It applies to the Supreme Court of California as well?

Judge NEELEY. I suppose if such a case arose a justice of the supreme court would be disqualified from acting as a member of the court sitting to review a commission recommending the removal or retirement of the justices.

There are two areas in which the commission is uncertain of its jurisdiction (1) where the act, which is the basis of a removal order occurs in one term of office, and the judge is reelected before the removal order is affirmed; and (2) if removed is a judge thereafter disqualified for judicial office?

The constitution revision which is in progress in California should provide that once a judge is removed he should be disqualified from judicial service.

I believe there should be a broader disciplinary area such as reprimand or suspension where removal would constitute too harsh a penalty.

I think the confidence of the bench itself has now reached that point where if in the revision disciplinary powers, in addition to removal or retirement, were granted to the commission, it would be acceptable to the bench. I don't believe any of the bench feels that the commission has in any way endeavored to establish standards of personal judicial conduct.

Senator TYDINGS. Senator Hruska.

Senator HRUSKA. Judge, when you mentioned additional disciplinary powers, would you give us an idea what you mean?

Judge NEELEY. Well, reprimand by the supreme court, for example. After we had a hearing, we might feel that a public reprimand was in order.

We recognize that among the judiciary it is particularly a critical area. A reprimand from the supreme court might be tantamount to a removal through the election processes that comes up later on. That is why we have been careful in our commission discussions what we would recommend.

In our last report we suggested certain amendments that had been proposed by the Constitutional Revision Commission that we approve. There is one, maybe, I should comment on.

The commission removed the word "confidentiality" on the theory it was covered by other sections of the code or other sections of the Constitution and by the code. We opposed it.

We didn't get any place with our opposition. We felt it should be right in the sections which govern the commission [for this reason, that an attorney is in a very difficult position unless there is complete confidentiality, because if he offers a complaint to the commission, and it isn't fully protected by confidentiality, he puts himself in an embarrassing position, not only to that judge, but maybe to other judges of the county, superior court, or wherever it might be.

We feel, and we have approved the recommendations of the Constitutional Revision Commission with respect to further authority. I mentioned about public reprimand by the supreme court.

I believe it would be perfectly proper—within our jurisdiction at the present time—after a hearing not to vote to retire the judge or to have him removed, but the commission itself in its statement to the judge before the commission to advise him of the feelings of the commission.

We feel that might be sufficient, because many of our letters where we have had an inquiry and justified the inquiry in our reply to the judge we state, "This matter is now closed," and "The commission would like to suggest the following which would obviate a similar complaint in the future."

Senator TYDINGS. Judge Neeley, the objection has been raised that a judicial removal commission of this type could be used as a political instrument to impair the independence of the judge, or coerce the judge.

Would you care to comment on that?

Judge NEELEY. Yes.

I don't believe it could. I will confess that any commission is no better or no worse than its personnel, but under our own system, where the supreme court names all the judge members of the commission, it is almost inconceivable to me that they would not select from the personnel of our courts, two from the district courts of appeal, two from the superior court, and one from the municipal court, men in whom the judges of the supreme court have confidence that they were motivated by a desire to improve the administration of justice, rather than destroy it.

The amendment itself provides that there must be at least five concurring members to exercise any discipline. The commission itself, the majority of them, are judges. An endeavor has been made by our supreme court to pick men from the various parts of the State, and we have a big State.

I think we could conceive of the commission becoming politically minded, and so forth, but the manner by which its members are selected makes it reasonably certain that it will not occur.

I have attended conferences in Colorado, and the conference on the reorganization of the New Mexico courts, and they raised this same question. So I have had an opportunity to discuss it with their people. The Colorado Bar Association is working on a comparable program to the one we have in California. After we finished our panel discussion, a judge of the Colorado Supreme Court who had been very critical of possible political implications said in substance, "The way it looks, I am completely satisfied that that condition would not develop."

I have some reservations as to whether the adoption of the so-called Missouri plan or a comparable commission to select potential appointees for judicial office will eliminate all political influences. But even assuming that appointments to the bench are all individuals possessing those abilities and temperament most to be desired in a judge even such individuals when invested with the power that goes with the office all too frequently develop personality changes which materially affect their judicial image. In short it can be said that no matter how we select judges we have no assurance they will always be good judges.

Senator TYDINGS. The point you are making is that regardless of the selection process you have, there is still a need for a judicial removal commission?

Judge NEELEY. Absolutely.

Senator TYDINGS. Judge Neeley, wouldn't the fact that you have nonjudicial members on your commission tend to put undue influence on or undermine the integrity or independence of the judiciary?

Judge NEELEY. I can only speak from the experience we have had.

We have Mr. Swig of San Francisco, and Mr. Cummings of Los Angeles as the two lay members. It is very interesting in our meetings that they bring to bear on a problem a very interesting viewpoint. Frankly, they are far more lenient than the judges are. They are understanding.

They do not hesitate to express their views, and in many instances our action has been prompted by their thinking.

Conversely, when it comes to a question of direct legal ethics or legal questions, they defer to the judge and lawyer members of the commission.

In early discussions on the commission proposal there was some question of the advisability of having lay members. In my view they strengthen the commission by presenting a nonlegal viewpoint.

Senator TYDINGS. Wouldn't the fact that you have lawyers on the commission tend to bring bar association politics into play, or wouldn't that affect the independence of the judiciary?

Judge NEELEY. It could. I don't think you could say it couldn't.

Here again, maybe we have had an unusual experience. I have served on the commission during the half term of two lawyer members, Mr. Schramm, who I know was before you in San Francisco, and Mr. Irving Walker, who is probably one of the most highly respected attorneys in the State, certainly in southern California. Now we have Mr. Tiday, and Mr. Goldberg as lawyer members. Working with four lawyers, I have never evidenced in them the slightest bias,

political or otherwise, with respect to the bench. We have had a nonpolitical judiciary in California for so many years that I think the bar in general has pretty well gotten away from thinking of a judge as a Republican or a Democrat.

Senator TYDINGS. Would you say the lawyers on the commission make a substantial contribution to the commission?

Judge NEELEY. Very much. When you are on the bench you put yourself in such a nonadvocate position that it is possible to lose sight of the fact that some of these problems that come before the commission are predicated on the advocate position, and the lawyer member is, strange to relate, a leveling influence that is very good.

Senator TYDINGS. Judge Neeley, when these proposals by the California commission were initially made, there was some resistance from members of the bench in California.

Would you care to comment on that resistance, and what the reaction is now?

Judge NEELEY. I think the primary basis of the resistance was the thought you expressed in your opening remarks as to whether or not it would curtail the independence of the judiciary.

I think that all of us have the concern that when you set up what might be called a policing body, you, therefore, destroy independence. I know there was considerable concern about it.

In the conversations I have had with members of the bench since becoming a member of the commission, and particularly in the last 2 years, I can say that in every instance the judge expressed the opinion that the commission is doing a good job.

Frankly, once in a while when a letter of inquiry goes to a judge I think his reaction is not entirely favorable to the commission, and I am sure we can understand that, but I believe that the vast majority of the members of the bench, if they were offered an opportunity to vote on the commission at the next conference of judges, would support it.

Senator TYDINGS. Do you think it is necessary for the effectiveness of your commission to have the power to recommend to the supreme court of the State that they actually remove a judge—that you have that power?

Judge NEELEY. Do I think it is necessary?

Senator TYDINGS. Yes.

Judge NEELEY. I think so. I feel it for this reason. If we didn't, how is the commission to function? I think the supreme court should be the final arbiter as to whether a judge should or should not be removed or retired.

The proceeding before the commission is in fact a trial where the evidence should be heard in the quiet and seclusion of a hearing such as ours and completely confidential. If we do not vote to remove or to retire, it ends there, and the only ones who know that there has ever been a hearing, or know what it was about, are those who were in the hearing room or what persons who have participated in the hearing tell others. The average judge who is brought before the commission isn't going to tell others of the fact that he is before the commission. The rule of confidentiality also protects him.

If the commission votes to recommend removal or resignation the hearing record is filed with the supreme court, and confidentiality ends. I am firmly of the opinion that action by the commission should not be final and that the review of its action should be by the supreme court, not the legislature.

Senator TYDINGS. Let me ask you, Judge Neeley, doesn't the fact that California is such a tremendous State, areawise, make it a real inconvenience to have just one central judicial qualifications commission?

Wouldn't it be better if you maybe had three or four, one in each section of the State, so it would be less inconvenient for the people involved?

Judge NEELEY. I can't see where it would be more convenient.

We meet in San Francisco, but when we hold a hearing, we go to where the people are.

Senator TYDINGS. Have there ever been any complaints because you have just one commission and the people have to travel great distances, or anything like that?

Judge NEELEY. They don't appear before the commission until such time as we file formal charges. These preliminary inquiries and preliminary investigations, and so on, are done entirely by correspondence or interview by the executive secretary, a member or an investigator.

We don't have any witnesses appear before us until we file formal charges, and then a date and place is set convenient to the judge and witnesses.

Our one formal hearing was held in San Diego, where it was convenient to the witnesses and all parties.

Senator TYDINGS. What about your individual commission members? Don't they come from all over California?

Judge NEELEY. Yes, they do.

Senator TYDINGS. Isn't it a great inconvenience to them to have to travel to one part of the State which might be a great distance from their home?

Judge NEELEY. Well, it takes me 40 minutes to fly to San Francisco from Los Angeles. It is hard to realize we can be in San Francisco to a hearing in less time than an attorney in Long Beach can be in court in Lancaster both in Los Angeles County.

Commission meetings are always on Friday. This avoids a mid-week break in favor of a 3-day weekend.

Senator HRUSKA. Judge Neeley, one of the four grounds for removal specified in section 10(b) is willful misconduct.

What is willful misconduct in office?

Judge NEELEY. Where a judge has repeatedly, after being admonished, is away a good deal, or doesn't dispose of cases.

Senator HRUSKA. Failure to perform his duties is another ground. Habitual intemperance is still another, but what is willful misconduct?

Judge NEELEY. I would hate to definitively define willful misconduct. I think it could be active participation in political campaigns, where he brings the judiciary into public criticism.

It is hard to put your finger on just what it would be.

Senator HRUSKA. If he was a partner in the bail bond business?

Judge NEELEY. That would be willful misconduct.

Senator HRUSKA. You might inquire into that?

Judge NEELEY. Yes. I wouldn't say it is an example, because I want to avoid that, but where he engages in a business that because of the very fact he is on the bench it offers some sort of coercion to any person involved against that business.

Senator HRUSKA. So part of it would be in the concept of conflict of interest?

Judge NEELEY. Conflict of interest; yes.

Senator HRUSKA. What about serving on the board of directors of a corporation, whether it is a business that comes before his court or not?

Judge NEELEY. I can't believe that we would feel that would necessarily be willful misconduct.

If, however, he served on the board of directors of a corporation and repeatedly refused to disqualify himself, or was in an area where they had to try matters before him, I think—and he refused to grant a motion for change of venue—I think that could eventually become a matter of willful misconduct, even though by appeal or by a writ before the district court of appeals they might accomplish the same thing.

I think it would bring about such turmoil that it could constitute willful misconduct.

Senator HRUSKA. Would any conduct, or would any business or professional connection which might not be in keeping with the dignity of the court, be considered misconduct, or are both terms so ambiguous you couldn't say?

Judge NEELEY. No, I wouldn't want to be specific, but I imagine if a man was engaged in bookmaking—of course that is a felony—but if we were in gambling, if a judge was an officer and active in—well, I even wonder about that—I can see where there would be instances where it wouldn't be willful misconduct.

In other words, he might be an officer of the Hollywood Turf Club, which exists by virtue of legalized gambling.

Maybe it might be different if the Hollywood Turf Club became such that it was looked upon as, say, crooked gambling; that is, that they were fleecing the public as distinguished from high standard legal operation.

Senator HRUSKA. You don't believe a judge could divorce himself from his court and fleece people, if it is within the law and be a good judge starting Monday morning until Friday noon?

Judge NEELEY. He could. In a New Mexico conference I was asked, "What would you do about a judge that became inebriated during the night, but when he got back on the bench the next morning he was a fine judge?"

Wisely or unwisely, I said, "In view of the fact good judges are more or less at a premium, I am afraid we would say in California, 'What he does at night is his own business.'"

I was reprimanded by a member of that conference from Iowa, who said, "We don't look at things in Iowa like you do in Hollywood."

Senator HRUSKA. It is an area we have to wrestle with quite a little, whether a judge can divorce himself from his judgeship at certain times and do things or assume capacities as an individual.

Judge NEELEY. I think you would have to weigh the evidence on both sides.

For example, I am of the opinion that to prove habitual intoxication, or an excessive use of intoxicants, is a very difficult thing to prove.

Unfortunately, a judge's clerk, and even some of his associates from the bench are a little inclined to protect him. He is away from the bench. Was it illness, or was it illness as a result of alcoholism?

When that arises, we are going to have some problems on proof, I think.

Senator HRUSKA. The reason for this line of inquiry is not to be just noisy, but you did suggest that at one time these things might be put in the hands of a commission, without any guidelines except through the interpretation of cases through the years and that is why I am asking you.

Judge NEELEY. I am glad you asked the question, and my answer would be on the philosophy of our courts.

Many times we will have conduct which we disapprove. How shall we proceed? We do not feel that this would justify a hearing with the possibility of removal or retirement and therefore we take a more moderate position and communicate with the judge with respect to the conduct which we feel is subject to criticism, and drop it.

I think I would like to compare it with the case of a district attorney. He may feel he has an offense on his hands, but he evaluates it in the light of the evidence. He isn't going into court on a case where certainly he is going to get licked.

I think the commission is more or less actuated in certain of these borderline situations with comparable philosophy.

Even if we found for removal, we would feel the supreme court would not sustain the finding, and I think that is a deterrent also from the commission becoming overzealous.

Senator HRUSKA. You had a report in your hand a while ago, and you said in your latest report of the commission—

Judge NEELEY. Yes; the 1965 report.

Senator HRUSKA. Is it an annual report?

Judge NEELEY. Yes.

Senator HRUSKA. To whom is it made?

Judge NEELEY. Made to the Governor.

Senator HRUSKA. Those are all the questions I have at this time.

Senator TYDINGS. Are these annual reports public?

Judge NEELEY. Yes; they are available, and this is the only time that the public ever hears of the commission.

When this comes out, it is the subject of publicity, so many judges retired, and so forth and so on. But as I say, we have avoided publicity, and this is the only notice the public ever has of the commission.

Frankly, the public at large has an impression, and knowing I am chairman of the commission, will say, "How do you pass on these candidates for the bench?"

As the judicial qualifications commission, they think we are the commission to whom the Governor refers potential nominees for the bench.

Senator TYDINGS. Thank you very much, Judge Neeley. We certainly appreciate the time and the effort which you have made in preparing your statement. We will include your statement in its entirety in the record, as well as your oral testimony.

We appreciate the outstanding job which your commission has done for the citizens of California.

Thank you very much.

Judge NEELEY. Would you like me to remain, if there are some questions?

Senator TYDINGS. We would be glad to have you remain.

Judge NEELEY. I would like to hear it, anyway.

Senator TYDINGS. Yes.

We are delighted to welcome the Honorable William L. Murray with us this morning. Judge Murray is a distinguished member of the superior court in Orange County, and we have a copy of your statement. We will include your statement in its entirety in the record, Judge Murray, and you may read it or comment on it, if you wish.

THE HONORABLE WILLIAM L. MURRAY

Judge William L. Murray graduated from Wabash College and received his LL.B. from Boalt Hall School of Law of the University of California. He was admitted to the Bar in 1952 and is the Presiding Judge of the Superior Court of Orange County.

**STATEMENT OF HON. WILLIAM L. MURRAY, JUDGE OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE
COUNTY OF ORANGE**

(The prepared statement of Judge William L. Murray follows:)

I am most flattered at having been asked to appear before this Subcommittee as a witness. However, I find some difficulty in arriving at an advanced prepared statement in that I am not sure just what information I may have that will be of interest to the members of this honorable group.

The title of the Subcommittee and certain information furnished me by Mr. Rothenberg, your Deputy Counsel, has indicated that you are interested in the California system of removing from his office the judge who is disqualified or misbehaving. I am sure that you gentlemen are familiar with Sections 10a and 10b of Article 6 of the California Constitution. Section 10 provides for the removal of a judge by action of both houses of the Legislature. In substance, it involves impeachment as is provided for removal of a United States judge. Section 10a provides for the removal from office of a judge who has been convicted in any court in California or of the United States of a crime involving moral turpitude. In that instance the power to do so is vested in the Supreme Court of the State. It is interesting to note no provision for removal of a judge convicted of crime in another state or in a foreign country. Section 10b provides for an investigation of a judge by the Commission on Judicial Qualifications. That Commission is vested with the power to recommend to the Supreme Court that a judge be removed from office or that he be retired.

It will probably be well to call your attention to Section 24 of Article 6 of the California Constitution. That Section provides that no judge shall be paid his salary if he has had under submission any matter for longer than ninety days. It has been my observation and experience that this provision of the law probably does more to speed up the administration of justice in this state than does any other.

My first employment in the legal profession, after graduating from law school, was as law clerk to the Honorable Oliver J. Carter, United States District Judge for the Northern District of California. During my tenure there I often heard discussed by judges, attorneys and court attaches the rather pathetic case of a former judge of that Court who had grown senile while on the bench. It was said of this judge that he always had present in court during sessions his law clerk and, further, that it was his custom to permit his law clerk to make all rulings. The subterfuge adopted was for the law clerk to shake his head either in the affirmative or the negative when a judicial ruling was required by the proceedings. All persons present at these times noted that the judge, without any exceptions, always followed the nod of his law clerk. The legend further went that this judge was eventually persuaded to retire by his attorney friends. While this particular instance illustrates the need for legislation, possibly, it also illustrates that pressures will be brought to bear upon a disabled judge in many instances. This is mentioned in passing with the thought that there may be solutions to the problem of the disabled judges other than that of action to remove them from office without their consent.

At the present time I serve as presiding judge of an eighteen-judge court. One of the judges of that court is presently under investigation by the California Commission on Judicial Qualifications. Inasmuch as the law provides that such proceedings shall be confidential until the termination thereof and, further, because

of the fact that this judge is actually serving on the bench, I am certain you will understand if I discuss the matter only in general terms. The particular problem involved is that of the disabilities which result from the excessive use of alcohol. In only one instance has the judge been thought to have been intoxicated while actually sitting on the bench. On the other hand, there has been a great deal of absenteeism. As presiding judge of the court it has been my duty to assist the Commission on Judicial Qualifications in its investigation. In this instance this is a rather difficult position. The judge in question is older than I, and I had the privilege of practicing before him for a number of years before becoming a judge. Like a great majority of the Bar, I have always held this man in great respect. I regard him as a personal friend. My position with the Commission has been that I will honestly answer all questions put to me concerning this matter but that I do not wish to, and will not, play the role of an informer. It is my belief that you will find such an attitude general among all judges, whether they serve in courts of the United States or in courts of an individual state.

One factor to be considered is that a presiding judge in a multi-judge court, wherein a master calendar system is used, can to some extent minimize the bad effects of such a judge. This is done by careful selection of cases assigned to such judge. This is another factor which helps to some extent to control the lazy judge.

My own personal experience has been that really the lazy judge is the greater problem from an overall standpoint. Judges of the same court stand on the same level as far as authority is concerned. One judge can no more discipline another than can one member of the United States Senate effectively bring to task a colleague. If a judge won't work, the only thing which can be done by the presiding judge is to attempt to persuade him. To some extent group pressures, i. e., all the judges acting in concert, have some effect. Public opinion, particularly among the leaders of the Bar, is another factor which helps in varying degrees in individual cases.

If a man was of such quality as to have originally been selected to serve as a judge of the United States, it would seem unlikely that the threat of removal from office would be more persuasive upon his work habits than would the opinion of his colleagues on the bench and the members of the Bar. Lawyers, like all other people, work at varying paces. Thus, if the problem is to attend to the lazy judge there immediately arises the problem by what criteria shall he be judged as lazy as distinguished from methodical or plodding.

It well may be that the problem of alcohol may be more serious in the legal profession than in some others. I recall that some years ago a graduate student at Columbia University performed a detailed study of the drinking habits of Americans by occupation. Lawyers and judges (joined in one class) came third only to agricultural workers and house painters as consumers of spirits. I can recall another United States District Judge known to me, who is now dead, whose disposition was thought by lawyers to be affected by the quantity of the previous night's good cheer. Yet, this man was always on the bench and who is really to say that he would have been any sweeter tempered had he taken the pledge and abandoned strong drink.

The sick judge is a separate problem. I would respectfully suggest that any consideration toward legislation follow the lines of the California provision, which has this man retired for disability instead of removed from office. This removes a stigma which is undeserved by the victim of God's fate. Further, it provides a way for the judge to live and support his dependents and thereby eliminates the pressure of trying to stay on the job just to support himself or to get a child through college or to pay off the mortgage on his home.

In summary, I would respectfully remind you that throughout the history of our country the attempt has been to select men of honor to serve as judges of the United States. It is my belief that the individual honor of men carefully chosen is the greatest safeguard for insuring the effective administration of justice by our courts. Perhaps legislation is needed to handle the few difficult cases, but I respectfully suggest that in the long run nothing will equal the individual conscience of the judge in question.

I stand ready to answer any questions which the Honorable Members of this Subcommittee may care to pose.

Judge MURRAY. Gentlemen, I assume you have read it, and rather than bore you by my reading it again, I think I would respectfully suggest that perhaps we can accomplish more if you Senators would

indicate to me any particular areas of information that I might have that would be of assistance to you.

Senator TYDINGS. Well, let me begin by asking you the same question I asked Judge Neeley.

My understanding is that there was considerable resistance to any proposal along these lines in California when the thought was first advanced by Chief Justice Gibson; that is, to any type of commission to look over judges' shoulders.

Would you care to comment on that initial resistance, and reasons for it, and how it was overcome, if it was, and what the position or feeling of the bench is today since you are in a position to comment upon that?

Judge MURRAY. Well, actually, gentlemen, I haven't been a judge too long, just short of 5 years, so this came into being when I was an attorney, as distinguished from a judge.

I have had occasion to hear the matter discussed by a number of judges since I have come up on the bench and, as nearly as I can determine, I think Judge Neeley put it rather succinctly that the initial resistance was that many judges felt this was an encroachment on their individual freedom as a judge, that it would be a limitation upon the judiciary and thereby ultimately create a detriment in the fair administration of justice.

Since it has gone on in operation, most of us have felt that, as far as we know, it is doing a good job.

We have an interesting situation in my county, which is Orange County. It is an 18-judge court. As I mentioned in my statement, as investigation is being conducted as to one of our judges at this time.

Many of the judges have said among themselves in little groups of two or three that they thought it was a long time in coming.

The conduct of this particular judge has been subject to censure in the eyes of the fellow judges for at least 5 years, and has been the subject of jokes in the bar association.

I personally know of no member of the public who has ever complained to any other member of the bench, though some citizens have made jokes, and have said, "I see him out drunk every night."

On one occasion this gentleman did involve himself in an automobile accident as to which I might tell you a highway patrol sergeant told me afterward had he not been a judge, he would have been charged with felony drunk driving, whereas it was disposed of in court on a misdemeanor level, and this was at the urging of the police authority as distinguished from the district attorney; covering it up, so to speak.

The commission served a useful purpose in this regard in my court, that after a recent incident wherein it appeared that the judge was drunk on the bench, inasmuch as I am presiding judge, two other judges came to me and demanded, "Now, it is up to you, you are the presiding judge, you go down there and straighten him out."

I indicated in my statement it is rather embarrassing to me, since this gentleman is much my senior, and I practiced law before him and in his court for 7 or 8 years.

However, it was wonderful that at about this point I was notified that an investigation was underway, and I had that as an answer to the other disturbed judges on the bench; that something is being done.

Senator TYDINGS. Would you have considered requesting an investigation yourself, as presiding judge?

Judge MURRAY. Senator, I would have done it most reluctantly, inasmuch as—I don't really know how to verbalize this, whether it is the old school tie, or we are all members of the same union, or what, but because of the peculiar relationship that I have practiced before this man and held him in high respect, and when he is sober he is an excellent judge, one of our very best, I would have been reluctant to do it. But if the situation had gotten worse, I tell you what I would have done, because I thought about it.

I would have gone to some of the other senior judges, those senior to him, and discussed it, saying, "What, if anything, should we do to try and prevent this particular problem?"

We have only had the one instance where he has been drunk on the bench, but there have been a number of absences.

I noted with interest what Judge Neeley said about a man's staff. This man's staff has gone to great lengths to protect him.

His court reporter, for example, would go looking from bar to bar for him, and he always picked rather prominent places to do his drinking, on judicial days, too.

Senator TYDINGS. As the presiding judge in Orange County, you have the administrative responsibility for a very large caseload?

Judge MURRAY. Yes.

Senator TYDINGS. Do you think the fact that there is a judicial qualifications commission is helpful to you in your responsibilities as presiding judge, and in your effort to get a fair balance of workload?

Judge MURRAY. I can see no concrete evidences one way or the other.

To be specific, I have two lazy judges. One of them is just awful. I don't know what to do about it.

On the other hand, it seems to me that, like one schoolboy snitching on another one, now, you say, "Straighten him out, Commission," and really, I think if you got down to it, it would be hard to make a charge stick.

He comes to work early, and stays late. He just doesn't like to come out of his chambers. Whether he reads comics or works crossword puzzles, I don't know, but he sits on the bench an average of an hour and a half to 2 hours a day.

Senator TYDINGS. What do you do about it? Aren't you presiding judge?

Judge MURRAY. Yes.

Senator TYDINGS. Do you sit back and just let him do that?

Judge MURRAY. Well, he is on the same level with me, as another U.S. Senator is with you. I can't fire him, or give him days off without pay.

I would proceed to discuss it with him, but he has no sense of shame in the sense of what his brother judges say about it, and yet nearly all of us have attempted to talk with him, and it doesn't bother him. He doesn't eat lunch with or fraternize with any of us.

Senator TYDINGS. Do you have regular hours in your superior court?

Judge MURRAY. Yes.

Senator TYDINGS. Does he deliberately not keep those hours?

Judge MURRAY. Well, he is at work ahead of the hour of commencement of court. He stays later than practically anyone else except perhaps myself.

We park right next to each other, and I know his comings and goings that way.

However, there is a difference between being in chambers, you know, and being on the bench, as far as disposing of a caseload.

I have done this. I have sent him some very distasteful cases in the hope that by this way I would make him more amenable to doing his share of the workload.

Senator TYDINGS. Senator Hruska.

Senator HRUSKA. Judge, in reading your statement I fail to see any answers or comment on the question of willful misconduct in office.

You discussed the other three grounds of removal, but you did not say anything about what willful misconduct is.

Would you like to do it now?

Judge MURRAY. I will attempt to. It necessarily has to be in the abstract, since I have had no personal contact ever with such a charge being leveled against a judge, and never heard of it.

When you put this question to Judge Neeley, the thing that came to my mind was taking a bribe. Of course you have a felony there, too.

I am not sure what the draftsman of that legislation had in mind. Were I to initiate the charge, I feel it would be something pretty serious.

Senator HRUSKA. Yes bribery is one, or the attempt to get a bribe. Another would be conflict of interest, of course.

Judge MURRAY. Right.

Senator HRUSKA. When you say conflict of interest, that necessarily is nebulous, also, isn't it?

Judge MURRAY. Yes, and opinions might vary whether or not there was a genuine conflict of interest.

For instance, if a judge owns 10 shares of stock in General Motors, does this disqualify him from ever hearing a lawsuit involving General Motors?

The thing that has come most often to my own attention is the fact that at the time I went on the bench I owned an interest in a building with some lawyers, which I immediately sold, because, as well as I know my own mind, I don't think it would have influenced me, but on the other hand, some other people might think it would.

Senator HRUSKA. It is not just evil, but sometimes the appearance of evil.

Judge MURRAY. Yes. I think this is very important to judges, to be as Caesar's wife, or to attempt to reach that status.

Senator HRUSKA. It has been contended from time to time, that a judge is a judge and in that capacity he can wall himself off from certain activities as an individual.

Do you subscribe to that in the field of the judiciary any more than you would in other high places in government, the executive, and legislative, and so on?

Judge MURRAY. I don't feel that a judge should live in an ivory tower, if I correctly understand you.

Senator HRUSKA. That is not what I had in mind.

Judge MURRAY. I am told when a man ascends the bench in Canada, for instance, or in England, he gives up the right to vote. I don't think certainly that is required, but I feel a judge is a part of the community, and as a citizen I think any judge ought to have the right

to vote for Governor and U.S. Senator, but the canons of ethics prohibits partisan politics, and I think that is proper.

Senator HRUSKA. Can't that also prevent their serving on a corporate board of directors?

Judge MURRAY. Yes.

Senator HRUSKA. Yet we know of instances when that was violated, and nothing was done about it.

Would you do anything about it, if one of your judges was on a board directors of a building and loan association, or bank, or a bridge factory?

Judge MURRAY. Yes, I would.

Senator HRUSKA. So we get into another element here.

We can cover conflict of interest and bribery, or attempt to bribe. Now you tie into this willful misconduct the canons of ethics. You would use that as a guideline?

Judge MURRAY. I would.

Senator HRUSKA. Is there anything else you could think of that you would include in the classification of willful misconduct?

Judge MURRAY. I would this way. I am not sure it is even provable, but if I thought a man had willfully decided a case one way or the other because he affirmatively liked or disliked a party or an attorney. The difficulty would be in the proof, but if I thought that, I think it would be willful misconduct.

Senator HRUSKA. Would you think that would be a legitimate area for a commission to go into? Should they be called upon to go into the cases and say, "Now, let us find how he was motivated, whether by prejudice or bias or liking for one party or another"?"

Judge MURRAY. I think only if you started out with some concrete evidence as distinguished from suspicion.

It is the very nature of a lawsuit that someone loses and walks away unhappy. Being a judge is not a popularity contest, if one attempts to do it conscientiously.

I think, as far as I know, almost every judge on the bench has from time to time received poison pen letters, or been subjected to some sort of censure.

For instance, some people actually circulated a petition to try to recall me at one time. I think they got 100 names or something. It was for disagreement with a sentence I had given in a criminal case.

Senator HRUSKA. I agree, it would have to be in the nature of a complaint that this man grossly misbehaved, he liked his college chum who was representing one side.

You heard my reasons for these questions. We want to know if we are going to create a commission or vest in a body certain disciplinary power, what will they be guided by?

Judge MURRAY. This might be of interest to you.

I was in San Francisco a couple weeks ago, and inasmuch as I was once law clerk with a U.S. district judge, I stopped and visited with him and had lunch with a number of judges of that court.

Your investigation was discussed at the time, and it was the position of the majority of the judges I heard speak that the present statute, which I understand permits the chief judge of the circuit to prevent a district court judge from taking cases, was awful.

I only brought it up because you might be interested in it, if those gentlemen haven't presented their views already to you.

Senator HRUSKA. Did you say the powers of the chief judge of a circuit?

Judge MURRAY. It was cited to me.

Senator TYDINGS. There was no such rule. Were they referring to the administrative powers of the judicial council for effective and expeditious administration of the business of the courts within its circuit, which the judicial council of the 10th circuit used in the case of Judge Chandler?

Judge MURRAY. Yes.

Senator TYDINGS. That is highly questionable to say the least. It is the right of the judicial council to oversee the administrative operation of the lower courts, but to construe that as a power to remove a judge—

Judge MURRAY. There is one thing conceivable, you know, in the California system that doesn't apply in the Federal system. Conceivably, someone can run against an incumbent judge here.

We come up in superior court every 6 years. It has been a long time to my personal knowledge since anyone was beaten in an urban county, and I am not sure it could be done in Orange County, but if the conduct were bad enough, and people were disturbed enough about it—

Senator HRUSKA. And if the public relations firm were effective enough?

Judge MURRAY. Yes.

Senator HRUSKA. But they would have to have ammunition with which to fire.

Judge MURRAY. That's right. I would tell you what I would expect then. I would expect some of the other judges on the same bench even though probably they didn't like it, to attempt to defend the man, just because they had served together.

Senator HRUSKA. That is all.

Senator TYDINGS. Thank you very much, Judge Murray. We appreciate the effort you have obviously put into the preparation of your statement, and your taking time out from your busy schedule.

Judge MURRAY. Thank you.

Senator TYDINGS. Mr. Cooper, we are delighted to have you here, sir. We recognize that you are one of the outstanding advocates in California—president of the Los Angeles County Bar Association, 1960, vice president of the State bar in 1955 and 1956, president of the American College of Trial Lawyers, 1962 and 1963.

Before we question you, do you have any comments you would like to make, based upon testimony you have heard, along the general lines of inquiry directed to the other witnesses?

Mr. COOPER. I would like to, Senator.

Senator TYDINGS. Fine.

GRANT B. COOPER, Esq., STATE BAR OF CALIFORNIA

Grant B. Cooper, a partner in the Los Angeles firm of Cooper and Nelsen, received his LL.B. from Southwestern University, and was admitted to the California Bar in 1927. He was president of the American College of Trial Lawyers in 1962-63 and President of the Los Angeles County Bar Association in 1960. He was Vice President of the State Bar in 1955-1956.

STATEMENT OF GRANT B. COOPER, ESQ., STATE BAR OF CALIFORNIA

Mr. COOPER. One of the things that is of particular interest to me is that there are some judges who are opposed to any plan based upon the principle of the California Qualifications Commission. I was also interested to learn that some of this opposition emanates from judges in the ninth judicial circuit.

I can well understand that judges, just as lawyers, believe fiercely in their right to be independent. I, too, am jealous of the right of a lawyer to be independent and would want, at all costs, to preserve the independence of the bar. Without such independence where would our country be today? I also believe in freedom of speech, but I recognize that freedom of speech doesn't give one the right to go into a crowded theater and shout "fire." There are certain limitations to independence and freedom.

I would like to make the analogy, to the opposition that is voiced by some few judges, to the opposition that was voiced by some few members of the bar more than 35 years ago to the creation of our State bar here in California. I still cannot understand why some lawyers are opposed to an integrated bar in some of the other States of our Union. The same fears that are expressed today by some few judges are the same fears that were expressed when we formed an integrated bar in California.

Prior to the formation of the State bar of California we had a difficult time in disciplining and removing lawyers from our ranks. We had a cumbersome system—a system that required a bar association to maintain a grievance committee without power. These committees had to investigate without the power of subpoena. If a grievance committee was successful in its attempt to gather sufficient evidence against a lawyer, the committee was compelled to file a written complaint as a matter of public record in our superior court, necessitating public trial; and if the lawyer was acquitted, his reputation suffered.

Today in California, with an integrated bar, we have in principle a system very much like that of our California Qualifications Commission. In fact, I would hazard a guess that this commission's procedure was patterned, generally speaking, on the disciplinary proceedings of our State bar. If a complaint is made against a lawyer for misconduct today, it is generally made to a secretary or assistant secretary of the State bar, each of whom is a lawyer. He makes a preliminary evaluation of the merits of the complaint. Many complaints are eliminated at this stage. If, in the judgment of the secretary or assistant secretary there may be merit to the complaint, it is referred to a committee of three lawyers, members of the State bar, all of whom serve without pay. They sit more or less as a grand jury or preliminary hearing group to determine informally whether there is probable cause for the issuance of a formal notice to show cause.

If a notice to show cause is filed and personally served on the respondent lawyer, and after the cause is at issue, a hearing is held before an administrative committee, sitting as a trial committee, consisting of three lawyers who also serve without compensation. The respondent lawyer has the right to be represented by counsel. The State bar is represented by a lawyer, denominated an examiner, who presents the

evidence against the lawyer charged with a violation of one of the rules of conduct. A court reporter records the testimony. At the conclusion of the hearing, findings of fact, conclusions and a recommendation for discipline are prepared in writing by the administrative committee and forwarded to a disciplinary board. This board is empowered to a review similar to a review by an appellate court. They may affirm or reverse any findings of the local administrative committee. They may likewise recommend an increase or decrease in discipline to the Supreme Court of California. If the respondent lawyer is dissatisfied with the findings, conclusions or recommendations of the disciplinary board, he may request a review by our supreme court, which has the ultimate power to reprove, suspend or disbar. Up to the point the matter is brought before the supreme court all hearings are secret. Thus, if a lawyer is cleared of the charge or there is a private reproof, the lawyer's reputation is not affected.

Lawyers have lived under this system now more than 35 years, and I have yet to hear any substantial criticism. As I pointed out earlier, the same system prevails with the California Qualifications Commission.

Our bar still maintains its rugged independence, though we can be disciplined by suspension or disbarment. So, also, the Bench of California has complete independence, although its members can be removed or otherwise reproofed for justifiable misconduct.

I have read some of the testimony that has been adduced before this committee at previous hearings, and I have read instance after instance cited where the need for removing some judges was critically necessary. You heard some such testimony this morning.

Here in California we have had 5 years' experience with our California Commission. In these 5 years there have been 30 judges of our courts who have either resigned or who have asked to be put on pension as a result of the commission's investigations, and this with a bench in California of over 900 judges. This morning, before I came down here to appear, I figured up that this is a little more than one-half of 1 percent—and that is what we are talking about; but that one-half of 1 percent of the judges can cause a great deal of embarrassment to the administration of justice in any State.

I have written down what our former Chief Justice Gibson has said concerning the qualifications commission:

No honest and industrious judge who has had the mental and physical capacity to perform his duties has anything to fear from the commission. Surely the people have the right to expect that every judge will be honest and industrious, and that no judge will be permitted to remain on the bench if he suffers from physical or mental infirmity which seriously and permanently interferes with the performance of his judicial duties.

Gentlemen, these remarks are brief. I hope they are to the point. I feel very strongly that there is a need for some system in the Federal courts, in principle the same as we have in the State of California.

Senator TYDINGS. Do you feel that the presence on the commission of laymen or lawyers, nonjudicial members, would impair the independence of judges?

Mr. COOPER. No. As a matter of fact, I, as a practicing lawyer, would, if I had the power, insist that lawyers be represented, and I feel that the public has the right to representatives on the commission, so that each will have representatives—the bench, the bar, and the

public. As Judge Neeley has pointed out, not only have the laymen on our commission contributed to it, but so also have the lawyer members of the commission.

Senator TYDINGS. In the California system the qualifications commission has the power to formally recommend removal to the Supreme Court of California. Do you think that is necessary for an effective commission?

Mr. COOPER. I think it is absolutely necessary. If we didn't have it, we would be very much like some of our world courts. They don't have the power to enforce their judgments.

If the courts of this country didn't have the power to enforce their judgments, they wouldn't be any good. Otherwise, they wouldn't be able to operate, in my opinion.

Senator TYDINGS. Do you see any conflict in the fact that the commission acts as prosecutor as well as judge in the initial, preliminary inquiry?

Mr. COOPER. Not with the type of inquiries that they make, and not with a commission as well balanced as ours. A commission such as we have in California, where you have justices of the district courts of appeal, judges of our superior court, a judge of the municipal court, two lawyers appointed by the board of governors of the State bar, and two laymen appointed by the Governor, I feel that you have a composite of well-balanced individuals who can handle this matter with tact, discretion, diplomacy, and force where necessary.

Senator HRUSKA. Judge—excuse me.

Mr. COOPER. That is all right. Thank you for the promotion.

Senator HRUSKA. Mr. Cooper, I thought you made a very pertinent statement in regard to the principle involved in the integrated bar.

Of course, in your State of California you haven't had as much experience with this judicial qualifications commission as you have had with the integrated bar, nor as we have had in the State of Nebraska with the integrated bar.

I think our integrated bar history closely parallels that of California.

As things go on, things are settled by statutory enactments or the rulemarking power of the Supreme Court in the same way as the integrated bar.

We have the requirement, for instance, that there be disbarment if a lawyer misappropriates funds. Even if there is restoration of those funds, that man is disbarred.

Now, have you any similar provision of the integrated bar of California?

Mr. COOPER. No, we do not. As a matter of fact, I served on the board of governors for a period of 3 years, and we have no fixed rule in California.

The board of governors formerly, and now the new disciplinary board of 15 members, review the findings of the local administrative committee. Of course, they have only the power to recommend discipline to the supreme court. For example, if a lawyer misappropriates funds, and assuming it was an isolated incident, and assuming there were mitigating circumstances, they could disbar him and place him on probation for a period of 5 years.

Now, the Supreme Court of California has the power to review, but we have found that our supreme court is many times not as severe as the lawyers themselves. The supreme court may reduce any recommendation.

We have no fixed rules. In other words, while there were certain things calling for disbarment, they may, nevertheless, suspend him for 3 years, or they may disbar him and place him on probation on condition that they are suspended for a year or 6 months or 3 years.

I like our system, because it tailors the punishment to the crime and the individual circumstances in any case.

Senator HRUSKA. I am sure those considerations were in the minds of those who established the rule that prevails in our State, but your system lacks the deterrent effect that a rigid rule puts on people.

Everybody is advised in advance, if you misappropriate, you suffer this penalty.

There is always this question of which is the best in the interest of friends and fellow members of the bar. We have chosen this other road as a State, but I am interested in your comment.

Mr. COOPER. I disagree with their point of view, and let me say this. Some wise man once said, "A well-educated man is a man that appreciates the viewpoint of another." I like to think of myself as a well-educated man, but I disagree with the philosophy of rigid rules, particularly rigid rules of discipline.

I happen also to be on the California Commission on Crime and Delinquency. They have made a study on the question of granting of probation.

This, of course, while it is outside the issues here, comes directly to the point you put to me. Most people, particularly when there is some heinous crime and the newspapers pick it up, want to throw the man in jail and throw the key away for the rest of his life.

We have been doing this for a long time, and it still hasn't prevented crime.

The National Council on Crime and Delinquency has made a study of the situation, and they have found, first, that if the wider use of probation were used there would be less crime, and they have proved it by statistics.

Of course, I know you can prove almost anything by statistics.

No. 1, the costs would go down. You would have to increase the number of probation officers twofold or threefold, but it costs about \$3,000 a year to keep a man in the penitentiary. You can supervise a man adequately on probation for about \$350 per year.

Now, you don't have the side effects here of the family going on relief, and all those other things. When I say, it costs \$3,000 a year, that doesn't count the capital outlay of buildings, whereas, the individual granted probation without going to jail becomes a productive member of society, and they have found less recidivism in these individuals who don't go to jail.

I come back to lawyers. I realize lawyers should be held to a higher accountability than the average citizen by virtue of his education, the power that he has to handle his clients' funds, he has the power of life and death when he sits on the bench, and he has the responsibility of life and death when he represents a client, but at the same time lawyers are just as human as senators, as judges, and everybody else, and to arbitrarily, in my opinion, just say that if a man—well, if I follow your rule to its end, if he misappropriates \$1 he would be disbarred, or if he misappropriates \$50, he would be disbarred.

I don't feel that there should be rules quite so rigid. That is my point of view, Senator.

Senator HRUSKA. If it is a misappropriation, it is one thing. If it is sloppy bookkeeping, that is another.

There is one thing that distinguishes this situation from the general field of criminology and penology. That is that this man is a member of a select group, and whatever he does reflects upon each other member of the group. If the public says, "Well, John Brown, attorney, stole \$50, and still is in business to be able to steal the next time \$5,000 from some widow," that is not particularly good for the entire practice.

Mr. COOPER. I appreciate your point of view, but I respectfully disagree.

Senator HRUSKA. In the field of criminology, I have gone into the matter of mental sentences for narcotics. I have been reproached for temperance in the way that you have. I think we are on the road now, but do feel the concern that I have is whether or not there would creep into this disciplinary process something either too lax or too rigid by reason of the very general powers as in your section b.

They are given those powers now. California's experience with this system is only 5 years. It has a good start, but assume that after a while civic pride dies down and we get into a more ordinary layer of human beings that become commission members, and then we establish precedents one way or another. Do you see any danger in that process?

Mr. COOPER. There is always a danger in taking any step forward.

I would like to ask this question first; certainly, I think your investigations thus far have established, at least from what I have read, that there certainly is a need for some kind of change. The question is, What?

I think we have got to take the step forward, and I think that—well, I am not suggesting that the California commission plan is the only plan. I do think that it is a good plan, and I think the plan is good in principle.

Whether this plan would work in the Federal courts, I do not know. I think the principle of it would, but obviously Senators have powers in their hands that could be misused; Presidents of the United States have powers that can be misused. Wherever any one or any group is the repository of power, they have the power to abuse it, and there would have to be checks and balances.

Happily, in California we have them reviewed by the Supreme Court of California and, as a matter of fact, in the one case that was tried by the California Qualifications Commission—and they recommended some kind of discipline—the Supreme Court of California reversed them.

It seems to me that certainly that is a sufficient check.

So, also, I would assume that if some commission generally similar in principle to the California commission is established there certainly should be a review, either to the circuit court of appeals or to the Supreme Court of the United States. It seems to me that would be a sufficient check. We have always checks and balances in our Government.

Senator HRUSKA. But would you think, Mr. Cooper, that the original opposition of the members of the bench to this commission has been dissipated now?

Mr. COOPER. I can only say this. I have heard no opposition of any kind or character from anyone.

Now, I know many lawyers and many judges in this State, just as other lawyers and judges do. In none of our discussions at bar association and other similar affairs, or at any other time or place, have I heard criticism of any kind or character leveled at this commission or the principles underlying this commission.

Senator HRUSKA. We have had testimony to the fact that the mere existence of this commission and its powers are deterrents upon those who might submit to weaknesses of the flesh. Do you agree?

Mr. COOPER. I certainly agree.

I know if I don't see a policeman on the highway, I will sometimes go beyond the speed limit.

Senator HRUSKA. You have a policeman which exists, though you might not see him. If his mere existence doesn't have a deterrent effect on you occasionally, maybe the existence of this commission might not.

Mr. COOPER. It is like a policeman that you can see in your rearview mirror. You know he is there, but a policeman patrolling the road will not hurt you unless you can see him in your rearview mirror.

Senator HRUSKA. Thank you very much. I am sure the record is much better for your testimony and all the testimony this morning. From the standpoint of your practice and as a very good practitioner you have added a great deal.

Mr. COOPER. Thank you.

Senator TYDINGS. Thank you very much. Your testimony is to the point and tremendously helpful to us, and we appreciate your taking time out of your busy schedule to be with us this morning.

Mr. COOPER. Thank you.

Senator TYDINGS. The record will remain open, and we will stand recessed until Friday, the 15th of July in Washington, D.C.

(Whereupon, at 11:35 a.m., the committee recessed, to reconvene Friday, July 15, 1966, in Washington, D.C.)

JUDICIAL FITNESS

Procedures for the Removal, Retirement, and Disciplining of Unfit Judges

FRIDAY, JULY 15, 1966

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL
MACHINERY OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 11:20 a.m., in room 6226, New Senate Office Building, Senator Joseph D. Tydings (chairman of the subcommittee) presiding.

Present: Senators Tydings and Hruska.

Also present: William T. Finley, Jr., chief counsel; Peter J. Rothenberg, deputy counsel, and Barton Hertzbach, research assistant.

Senator TYDINGS. I will call the subcommittee to order.

STATEMENT OF SENATOR JOSEPH D. TYDINGS, CHAIRMAN OF THE SUBCOMMITTEE

We will now resume our consideration of the problem of removal and retirement of unfit judges. Our hearing on this subject today is a continuation of the second phase of our study—a survey of the systems in effect or under consideration in various State judicial systems for investigating allegations of judicial unfitness and taking appropriate action. The problem of removing unfit judges from the bench in a fair and expeditious manner is one that is receiving increased attention in the States during recent years. Our study of the measures that various States are taking is designed to let us know what the new systems are, and what innovations have been made, and whether or not it is possible for the Federal judiciary to adopt some of the systems or measures which have been successful in several States.

At the same time, in order to determine what is constitutionally feasible for the Federal courts, we have asked a number of distinguished constitutional scholars at law schools throughout the country to conduct research this summer on the constitutional problems surrounding the tenure, removal, and retirement of Federal judges. We hope to have the results of that research later this year. This material, coupled with our present study of State removal and retirement systems, will enable the subcommittee to decide on the proper course of action for the Federal judicial system.

As I have emphasized in the past, our study of the problem of judicial fitness is not intended as a criticism of the fine men and women who staff the Federal bench. The number of unfit judges in

the Federal system is fortunately small, but the damage they can do is great. We have found that the majority of Federal judges are conscientious and of a high standard of both scholarship and integrity. We have also found that they feel means should be enacted by which the judicial branch itself can relieve the judiciary the onerous burden of the unfit judge. And that is the purpose of this inquiry, for we are convinced that the best place for problems of unfitness to be handled is in the judicial establishment itself, without outside interference and supervision. Most of the State plans we are studying have this feature, and it is this that distinguishes them from the traditional and cumbersome legislative process of impeachment, which at the present is the only method of removing a Federal judge from office.

Our study of State removal systems began in New York City on May 9 with a hearing on the New York court on the judiciary system. We continued in San Francisco on June 17 and in Los Angeles on June 20 with hearings on the California Commission on Judicial Qualifications. Today we will hear testimony on the systems in effect in three additional States. I might add that we had originally anticipated covering Nebraska and Illinois today as well, but the airline strike and other difficulties made it impossible for the witnesses from those States to be present. We plan to insert material on those States and perhaps on several others into the printed record of these hearings as we continue.

Our witnesses today are eminently qualified to explain to the subcommittee the systems in effect or under consideration in their States.

Our first witness is Mr. J. Cameron Hall, general counsel for the State bar of Michigan.

Senator Philip Hart was to be here this morning, Mr. Hall, to introduce you personally. However, he is chairing important hearings of the Subcommittee on Antitrust and Monopoly. And, unfortunately, our timing conflicted. However, he wished me to put in the record his great respect for you, and the fact that he wished to be here to introduce you to the subcommittee.

STATEMENT OF J. CAMERON HALL, GENERAL COUNSEL OF THE STATE BAR OF MICHIGAN

Mr. HALL. Thank you for relaying Senator Hart's comment. I am sure that if he cannot be here he is busily occupied with important matters.

If the subcommittee please, I have filed a written statement dated July 7, 1966, on this subject, particularly on the law as it presently exists in Michigan.

Senator TYDINGS. We will incorporate your statement, together with your exhibits, in their entirety in the record at this time.

Mr. HALL. The three-sheet statement on the top of the papers I have filed I think summarizes present Michigan law on the subjects that the subcommittee is inquiring into at this time. The attached papers are exhibits indicating in more detail the present law in Michigan, court rules and court case law on these subjects. The enumerated matters in my three-sheet statement are ones that I composed myself, and represent my opinion on present Michigan law.

I might point out that in Michigan, and I think unfortunately, we have a constitutional provision requiring removal of judges only by impeachment, and not by court action, as presently exists in the Federal system.

In my personal opinion I think this puts an undue burden on governmental authority for the purpose of removal in requiring as cumbersome a system as impeachment to review the conduct of a judicial officer, and requiring a vote of a large number of congressmen, or in our case, legislators, in order to effectively remove a judicial officer.

It is my opinion, and I think it is the opinion of many of the lawyers in the country, that the courts should have supervision of judicial officers, so that a superior court, and particularly the supreme court, would have jurisdiction to remove if the cause existed.

Senator TYDINGS. Under the Michigan system, Mr. Hall, is there a permanent secretary to the chief justice who handles complaints, or who looks into those matters, or does the administrator of courts do this?

Mr. HALL. We have a court administrator with a staff, an assistant court administrator for probate courts, and an assistant court administrator for circuit courts and supervised by the court administrator himself, acting under a Michigan court rule on superintendence of the judiciary. And under that rule there is provision for an investigation of grievance, a report to the supreme court, and if the circumstances warranted, a trial of the matter on an order to show cause with the judicial officer having a right to be represented, and under court rules and procedures similar to those in civil cases in circuit courts or courts of general jurisdiction. If it is a circuit-court officer the trial is in the supreme court, or if it is a judicial officer below circuit-court level, or courts of general jurisdiction, the trial may be either in the supreme court or in the court of general jurisdiction for that area in the discretion of our supreme court.

Senator TYDINGS. Have you ever had any trials?

Mr. HALL. We have had one trial. The rule has been tested twice, and the cases are appended as part of my papers I filed with the subcommittee. The first case tested the adequacy of the rule itself as to whether the court had authority to direct—

Senator TYDINGS. Is it a test case or an actual case?

Mr. HALL. That was an actual case, in re *Huff*.

Senator TYDINGS. How did it arise?

Mr. HALL. It arose when the Michigan Supreme Court, acting under the rule of the superintendence of the judiciary which is attached to my papers, determined that the docket in the 10th judicial circuit, where Saginaw is located, had an unduly heavy backlog of cases, and that proper judicial approach could assist in ridding the court of at least part of the backlog, whereupon the court then exercised its discretion by entering an order assigning a judge from another district to act as temporary presiding judge from the 10th judicial circuit, and assigning Judge Huff, who was the subject of this case, to the 3d judicial circuit, which is Wayne County.

Senator TYDINGS. Was he then the presiding judge in that district?

Mr. HALL. He was then the presiding judge in the 10th district, and they attempted to remove him by order to the 3d district, which is Wayne County, where Detroit is located, with several other circuit judges to act as another trial judge, while a judge from a different

circuit stepped in and attempted to relieve the backlog of cases in Judge Huff's circuit. Judge Huff took the position that he was not required to do this, that the supreme court, by a ruling making power on the superintendence of the judiciary, did not have authority to take him from the county where the electors had determined that he should be the judge of cases arising in that county. The case of course held that the supreme court did have authority to enter an order moving Judge Huff from one circuit to another, that the rule on superintendence of the judiciary was effective, and was enforceable by the Michigan Supreme Court.

Senator TYDINGS. Did Judge Huff resign?

Mr. HALL. No, he complied with this order after the case in the Michigan Supreme Court.

Senator TYDINGS. But there was no discipline or no removal, actually; he was just removed to another district?

Mr. HALL. I think partly, if the committee please, that may have been, because this was the first test case, the judges were feeling their way, and possibly Judge Huff represented some feeling of other judges in some lack of certainty as to the extent to which this rule would be enforced by the Michigan Supreme Court.

Senator TYDINGS. Now, your next case.

Mr. HALL. The other case is one involving Judge Graham, a probate judge, who had, in fact, as the trial developed, committed misconduct in connection with an estate being probated in the court of which he was judge of probate. That involved some testimony as to possible misuse of funds preceding the particular circumstances involved, but primarily evidence developed by the Michigan State Police Department under the supervision of the attorney general's office by tape recordings in an adjacent room involving a conversation between Judge Graham and the fiduciary of an estate, a guardian, from whom Judge Graham attempted to get a personal loan from the funds of the estate, indicating that the court personally was probably an adequate depository for the funds, although that was not the case under Michigan law. And Judge Graham was determined to have committed an offense against the judicial canon of ethics, and he committed improper conduct as a judicial officer. And the Michigan Supreme Court in its opinion restrained him from exercising any of the powers of a judge of probate and in addition, referred the matter to the Michigan Legislature for proceedings either by way of an impeachment or two-thirds vote of each house, at the request of the Governor, for removal which are the only means of removal in Michigan.

And the legislature did not act within 30 days or 6 weeks, whereupon the supreme court entered the restraining order keeping Judge Graham from exercising the powers of a judge of probate.

But let me point out the very weakness of this system, of this case. I think it would apply to the Federal system, too.

You will note that Judge Huff continued to be judge of probate, because the supreme court had no authority to remove him. They could only restrain him. They did restrain him from exercising any powers. And, accordingly, for the duration of his term as judge of probate, he held office, drew a salary, but was incapable of performing any work under the provisions of the Michigan Supreme Court opinion. So that in effect it was a temporary award until time for reelection.

Senator TYDINGS. Is there any movement in Michigan to institute a more effective removal?

Mr. HALL. This would require a constitutional amendment, of course, under our law. The constitution provides that the Michigan Supreme Court shall not have power to remove a judicial officer, to state it flatly, bluntly, without room for construction otherwise. And we need a constitutional amendment. We believe from time to time there is a little movement toward that end, but I do not believe it is strong at this time.

Senator TYDINGS. And there is not active movement in the State bar machinery?

Mr. HALL. There is a committee with a recommendation that something be done, but I do not think it is actively being done.

Senator TYDINGS. Do you have any procedure for removing or retiring a physically or mentally disabled judge who refuses to retire?

Mr. HALL. The only retirement safeguard we have is again incorporated in the constitution and some Michigan statutes, which merely set arbitrarily the age of 70 years as an age at which a judge may not run for reelection or be capable of receiving appointment as a judicial officer. We have no other means of removing judges.

Senator TYDINGS. In other words, if a judge has a stroke at the age of 65 and becomes completely mentally incapacitated, and has an attention span which is diminished to maybe an hour a day, he would still be sitting judge?

Mr. HALL. Our only alternative would be No. 1, impeachment proceedings in the Michigan Legislature; and No. 2, which is slightly a different proceeding, at the request of the Governor a resolution adopted by a two-thirds vote of each House of the legislature—that does not involve a trial, that is a resolution—otherwise until he reached 70 he could hold office—he could resign, of course. If he failed to resign only his physical incapacity or realization of his incapacity in not holding court would be the only means of keeping him from conducting cases. He would, of course, if he were mentally unstable and did conduct cases reaching discretionary opinions that were wrong, he would probably be reversed on appeal several times.

Senator TYDINGS. Could the supreme court pass an order restraining him from exercising his judicial functions?

Mr. HALL. The supreme court has the power to restrain the judge from exercising his judicial function, but they could not remove him from office.

Senator TYDINGS. Has that ever been done?

Mr. HALL. In the *Graham* case only.

Senator TYDINGS. Only in *Graham*?

I gather, then, that it is your opinion that the present system does not give the bar and public and the bench an adequate agency for removing retiring or disabled judges.

Mr. HALL. In my opinion, and I think in the opinion of many sound lawyers and members of the judiciary, this is not a sufficient protection to the bench, the other members of the bench, or the bar, or, I think, primarily to the public itself. Because by removal only by impeachment, or something close to it, the public, in order to be protected against an incapable judge or a judicial officer who has committed wrongdoing as a judicial officer, the machinery is much too cumbersome and too unlikely to be utilized. I think it is far inadequate protection for the public itself.

(The statement, and its attachments, of J. Cameron Hall follows:)

STATE BAR OF MICHIGAN,
OFFICE OF GENERAL COUNSEL,
Detroit, Mich., July 7, 1966.

REPORT TO THE SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY,
COMMITTEE ON THE JUDICIARY, U.S. SENATE

INVOLUNTARY REMOVAL AND RETIREMENT OF JUDGES IN MICHIGAN

HONORABLE SIRS: This report is pursuant to your request last month that the writer appear before you on July 15, 1966, to testify on the above subject and that this written statement be submitted in advance.

In the opinion of the writer, the following statements summarize Michigan law on the above subjects.

1. A Michigan judge may not be removed from office involuntarily by Court proceedings.
 - a. See Exhibit I: Michigan Constitution of 1963, Article XI, Section 4.
2. A Michigan judge may be removed from office involuntarily only by impeachment proceedings in the Michigan legislature, or by the Governor upon concurrent resolution of $\frac{2}{3}$ of each house of the legislature.
 - a. See Exhibit I: Michigan Constitution of 1963, Article VI, Section 7.
 - b. See Exhibit II: Michigan statute outlining impeachment procedure in the Michigan legislature.
 - c. See Exhibit III: Michigan statutes on removal by impeachment, or by governor upon concurrent $\frac{2}{3}$ resolution.
3. A Michigan judge may be restrained from conducting court by order entered in the Michigan Supreme Court.
 - a. See Exhibit I: Michigan Constitution of 1963, Article XI, Sections 3 and 4.
 - b. See Exhibit IV: Michigan Supreme Court Rule 930 on Superintendence of the Judiciary.
 - c. See Exhibit V: *In re Huff*, 352 Michigan 402 (1958), as to effectiveness of Rule 930 on Superintendence of the Judiciary.
 - d. See Exhibit VI: *In re Graham*, 366 Michigan 268 (1962), recommending removal of a Michigan Judge of Probate by concurrent resolutions in the Michigan legislature, followed by a Michigan Supreme Court order six weeks later (see footnote at end of exhibit) that, the legislature not having acted to remove, the judge was restrained from exercising any of the powers of a judge of probate.
4. A Michigan judge is retired involuntarily by the age limitation that he is not eligible for election or appointment in the event he is seventy (70) years of age or older at the time of election or appointment.
 - a. Michigan Constitution of 1963, Article VI, Section 19: " * * * No person shall be elected or appointed to a judicial office after reaching the age of 70 years."

This limitation is expressed in the following statutes as to eligibility for various judicial offices.

 - b. As to Michigan Supreme Court Justices, Michigan Statutes Annotated, Sections 6.1391 and 6.1392(1).
 - c. As to Judges of the Court of Appeals, Sections 6.1409 and 6.1409(2).
 - d. As to Circuit Judges, Sections 6.1411 and 6.1413(1).
 - e. As to Judges of Probate, Sections 6.1431 and 6.1433(1).
 - f. As to Municipal Court Judges, Sections 6.1426(2) and 6.1426(5).
5. By the provisions of the Michigan Judges' Retirement Acts (Michigan Statutes Annotated, Sections 27.125(1) through 27.125(30), and Sections 27.3178 (60.1) through 27.3178(60.33)), pension benefits are made available to retired judges, in accordance with age at retirement and duration of service as a judge, computed in proportion to the judge's salary.

Respectfully submitted.

J. CAMERON HALL,
General Counsel, State Bar of Michigan.

EXHIBIT I

MICHIGAN CONSTITUTION OF 1963

Impeachment of civil officers. SEC. 7. The house of representatives shall have the sole power of impeaching civil officers for corrupt conduct in office or

for crimes or misdemeanors, but a majority of the members elected thereto and serving therein shall be necessary to direct an impeachment.

Prosecution by 3 members of house of representatives. When an impeachment is directed, the house of representatives shall elect three of its members to prosecute the impeachment.

Trial by senate; oath, presiding officer. Every impeachment shall be tried by the senate immediately after the final adjournment of the legislature. The senators shall take an oath or affirmation truly and impartially to try and determine the impeachment according to the evidence. When the governor or lieutenant governor is tried, the chief justice of the supreme court shall preside.

Conviction; vote, penalty. No person shall be convicted without the concurrence of two-thirds of the senators elected and serving. Judgment in case of conviction shall not extend further than removal from office, but the person convicted shall be liable to punishment according to law.

Judicial officers, functions after impeachment. No judicial officer shall exercise any of the functions of his office after an impeachment is directed until he is acquitted.

Art. II, § 8

Recalls. SEC. 8. Laws shall be enacted to provide for the recall of all elective officers except judges of courts of record upon petition of electors equal in number to 25 percent of the number of persons voting in the last preceding election for the office of governor in the electoral district of the officer sought to be recalled. The sufficiency of any statement of reasons or grounds procedurally required shall be a political rather than a judicial question.

Justice of the supreme court; number, term, nomination, election. SEC. 2. The supreme court shall consist of seven justices elected at non-partisan elections as provided by law. The term of office shall be eight years and not more than two terms of office shall expire at the same time. Nominations for justices of the supreme court shall be in the manner prescribed by law. Any incumbent justice whose term is to expire may become a candidate for re-election by filing an affidavit of candidacy, in the form and manner prescribed by law, not less than 180 days prior to the expiration of his term.

Chief justice; court administrator; other assistants. SEC. 3. One justice of the supreme court shall be selected by the court as its chief justice as provided by rules of the court. He shall perform duties required by the court. The supreme court shall appoint an administrator of the courts and other assistants of the supreme court as may be necessary to aid in the administration of the courts of this state. The administrator shall perform administrative duties assigned by the court.

General superintending control over courts; writs; appellate jurisdiction. SEC. 4. The supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; and appellate jurisdiction as provided by rules of the supreme court. The supreme court shall not have the power to remove a judge.

EXHIBIT II

TRIALS OF IMPEACHMENT

Act 62 of 1872

SEC.	
2.191	Impeachment of civil officers; suspension; filling vacancies.
2.192	Same; trial by senate; judgment.
2.193	Same; prosecution by house.
2.194	Same; organization of court; oath; attendance of members.
2.195	Same; appearance of accused; answer.
2.196	Same; counsel for accused.
2.197	Same; trial, time, place, adjournment.
2.198	Same; acquittal.
2.199	Same; president of senate, notice to senate.
2.200	Same; writs and process, signing and testing; enforcement.
2.201	Same; duties of secretary; record of proceedings; oaths.
2.202	Same; senate appointment and removal of subordinate officers.
2.203	Same; powers of managers; right to process.
2.204	Same; rules.
2.205	Same; compensation of members of court, managers, other officers; payment.
2.206	Application of act.

Act 62, 1872, p 103; imd eff March 30.

AN ACT regulating trials of impeachment and providing for the expenses thereof

§ 2.191] Impeachment of civil officers; suspension; filling vacancies. SECTION 1. *The People of the State of Michigan enact,* That the house of representatives shall have the sole power of impeaching civil officers for corrupt conduct in office, or for crimes and misdemeanors, but a majority of the members elected shall be necessary to direct an impeachment. Every officer impeached may by the governor be suspended in the exercise of his office until his acquittal, and the governor may make a provisional appointment to a vacancy occasioned by the suspension of an officer, until he shall be acquitted, or until after the election and qualification of a successor. (CL '48, § 6.1; CL '29, § 59; CL '15, § 32; How § 50; CL '97, § 18.)

Cross-references.

Impeachment, see Const 1908, art IX, §§ 1, 5; vacancies, see Const 1908, art XVI, § 5; governor's power to make provisional appointment, Const 1908, art IX, § 5. For statutory provisions as to filling vacancies generally, see §§ 6.711-6.717, *infra*.

ALR notes.

Physical or mental disability as ground for impeachment, 28 ALR 777.

Power of officer as affected by pendency of impeachment proceeding, 30 ALR 1149.

§ 2.192] Same; trial by senate; judgment. SEC. 2. Every impeachment shall be tried by the senate. When the governor or lieutenant governor is tried, the chief justice of the supreme court shall preside. When an impeachment is directed, the senate shall take an oath or affirmation truly and impartially to try and determine the same according to the evidence. No person shall be convicted without the concurrence of two-thirds [$\frac{2}{3}$] of the members elected. Judgment, in case of impeachment, shall not extend further than removal from office, but the party convicted shall be liable to punishment according to law. (CL '48, § 6.2; CL '29, § 60; CL '15, § 33; How § 51; CL '97, § 19.)

Cross-references.

Const 1908, art IX, § 3.

ALR notes.

Jurisdiction of courts to determine election or qualifications of member of legislative body, and conclusive-ness of its decision, as affected by constitutional or statutory provision making legislative body the judge of election and qualification of its own members, 107 ALR 205.

Reversal of conviction of crime as affecting status of one removed from office, or whose license has been revoked because of the conviction, or facts involved in the prosecution, 106 ALR 644.

§ 2.193] Same; prosecution by house. SEC. 3. When an impeachment is directed, the house of representatives shall elect from their own body three [3] members, whose duty it shall be to prosecute such impeachment; and the house of representatives are hereby authorized to empower the said managers to prepare and present articles of impeachment in accordance with the resolutions of said house. (CL '48, § 6.3; CL '29, § 61; CL '15, § 34; How § 52; CL '97, § 20.)

Cross-references.

Const 1908, art IX, § 2.

§ 2.194] Same; organization of court; oath; attendance of members. SEC. 4. Whenever an impeachment is directed, the senate shall forthwith, after the hour of final adjournment of the legislature, be organized into a court for the trial of the same, at the state capital, and such organization shall be deemed to be perfected when the presiding officer of the senate and all the members thereof, present, shall have taken the oath or affirmation hereinbefore prescribed; and no member of the court shall sit, or give his vote upon such trial, until he shall have taken such oath or affirmation, which oath or affirmation shall be administered by the secretary of the senate to the presiding officer thereof, and by the presiding officer to each of the members of the senate. The senate, sitting upon the trial of an impeachment, shall have the same power to compel the attendance of its members, as when engaged in the ordinary business of legislation. (CL '48, § 6.4; CL '29, § 62; CL '15, § 35; How § 53; CL '97, § 21.)

§ 2.195] Same; appearance of accused; answer. SEC. 5. The senate, when so organized, shall forthwith cause the person impeached to appear, and to answer the charge exhibited against him; and upon his appearance, he shall be entitled to a copy of the articles of impeachment, and to a reasonable time to answer the same. (CL '48, § 6.5; CL '29, § 63; CL '15, § 36; How § 54; CL '97, § 22.)

§ 2.196] Same; counsel for accused. SEC. 6. The person accused shall be allowed counsel on the trial of the impeachment. (CL '48, § 6.6; CL '29, § 64; CL '15, § 37; How § 55; CL '97, § 23.)

§ 2.197] Same; trial, time, place, adjournment. SEC. 7. When issue shall be joined in an impeachment, the senate, sitting as a court for the trial of the

same, shall appoint a time and place for the trial thereof. At the time and place so appointed, the senate, as a court, shall proceed to hear, try, and determine the impeachment, and may from time to time, if necessary, adjourn the trial to any other time or place at the state capital. (CL '48, § 6.7; CL '29, § 65; CL '15, § 38; How § 56; CL '97, § 24.)

§ 2.198] **Same; acquittal.** SEC. 8. If two-thirds [¾] of all the members elected to the senate shall not assent to a conviction, the person impeached shall be declared acquitted. (CL '48, § 6.8; CL '29, § 66; CL '15, § 39; How § 57; CL '97, § 25.)

§ 2.199] **Same; president of senate, notice to senate.** SEC. 9. If the president of the senate shall be impeached, notice thereof shall be immediately given to the senate by the house of representatives, that another president may be chosen. (CL '48, § 6.9; CL '29, § 67; CL '15, § 40; How § 58; CL '97, § 26.)

§ 2.200] **Same; writs and process, signing and testing; enforcement.** SEC. 10. The writs and process of the senate, sitting as a court for the trial of an impeachment, shall be signed by the secretary of the senate, and tested in the name of the presiding officer, and the senate, as such court, shall have power to enforce obedience to its process by attachment and punishment, as for contempt of the process of a court of record. (CL '48, § 6.10; CL '29, § 68; CL '15, § 41; How § 59; CL '97, § 27.)

Cross-references.

Contempt of court, see §§ 27.511-27.541, *infra*.

Textbook references.

See Callaghan's Mich Pl & Pr § 67.01.

§ 2.201] **Same; duties of secretary; record of proceedings; oaths.** SEC. 11. It shall be the duty of the secretary of the senate, in all cases of impeachment, to keep a full and accurate record of the proceedings, which shall be taken and held as a public record; and he shall have power to administer all requisite oaths or affirmations. (CL '48, § 6.11; CL '29, § 69; CL '15, § 42; How § 60; CL '97, § 28.)

§ 2.202] **Same; senate appointment and removal of subordinate officers.** SEC. 12. The senate, sitting as a court of impeachment, shall have power from time to time to appoint such subordinate officers or clerks and reporters as may be necessary for the convenient transaction of business, and at any time to remove such officers. (CL '48, § 6.12; CL '29, § 70; CL '15, § 43; How § 61; CL '97, § 29.)

§ 2.203] **Same; powers of managers; right to process.** SEC. 13. The managers elected by the house of representatives shall have all necessary powers for conducting the trial of impeachments before the senate, and they, and also the person impeached, shall severally be entitled to process for compelling the attendance of persons, or the production of papers and records, required for the trial of the impeachment. (CL '48, § 6.13; CL '29, § 71; CL '15, § 44; How § 62; CL '97, § 30.)

§ 2.204] **Same; rules.** SEC. 14. The senate, sitting as a court of impeachment, shall have full power and authority to establish such rules and regulations as may be necessary in the trials of impeachment. (CL '48, § 6.14; CL '29, § 72; CL '15, § 45; How § 63; CL '97, § 31.)

§ 2.205] **Same; compensation of members of court, managers, other officers; payment.** SEC. 15. The presiding officer and members of the senate, while sitting as a court of impeachment, and the managers elected by the house, shall receive the sum of five [5] dollars each per day, and mileage at the rate of ten [10] cents per mile in going from and returning to their places of residence by the ordinary traveled routes; and the compensation of the secretary, sergeant-at-arms, and all subordinate officers, clerks, and reporters, shall be such an amount as shall be fixed by the vote of the members of such court. The state treasurer shall, upon presentation of a certificate or certificates signed by the presiding officer and secretary of the senate, and countersigned by the auditor general, pay all expenses of the senate and managers elected by the house which may be incurred under the provisions of this act. (CL '48, § 6.15; CL '29, § 73; CL '15, § 46; How § 64; CL '97, § 32.)

1-10. [Reserved for use in future supplementation.]

11. Right to compensation.

This section, passed before constitution went into effect, and providing for payment of \$5 per diem to members of court of impeachment and managers of house of representatives was in effect repealed by § 9, Art. 5, of Constitution, prior to amendment thereof in 1948, but such section did not repeal provisions with reference to payment of employees of senate and it did not forbid payment of mileage for one round trip to managers of house of representatives and to members of court of impeachment or payment of expenses of impeachment trial itself. Op Atty Gen, April 15, 1943, No 0-517.

§ 2.206] Application of act. SEC. 16. The provisions of this act shall apply to all resolutions and proceedings heretofore had, or hereafter to be had, to impeach any civil officer of this state. (CL '48, § 6.16; CL '29, § 74; CL '15, § 47; How § 65; CL '97, § 33.)

EXHIBIT III

MICHIGAN STATUTES ANNOTATED

§ 6.1403 Impeachment; removal by governor upon resolution of legislature; notice of charges; hearings; notice of vacancy to be given to governor.] SEC. 403. Any person holding the office of justice of the supreme court may be removed from office by impeachment for the reasons and in the manner set forth in **◆** [section 7] of article [11] of the state constitution, or the governor shall remove any justice of the supreme court upon a concurrent resolution of $\frac{3}{4}$ of the members elected to [and serving in] each house of the state legislature, and the cause for such removal shall be stated at length in such resolution, as provided in the constitution of this state. **◆** Such person shall be served with a written notice of the charges against him and be afforded an opportunity for a hearing thereon. **◆** When a vacancy shall occur in any of the said offices, a notice of such vacancy and the reason why the same exists shall, within 10 days after such vacancy occurs, be given in writing [by the secretary of state to the court administrator with a copy] to the governor. **◆**

§ 6.1404

§ 6.1404 Filling vacancy in office; oath and term of appointee; election, term; candidate deemed elected and qualified.] SEC. 404. Whenever a vacancy shall occur in the office of justice of the supreme court, the **◆** [supreme court may authorize persons who have served as judges and who have retired, to perform judicial duties for the limited period of time from the occurrence of the vacancy until the successor is elected and qualified. Such persons shall be ineligible for election to fill the vacancy, and the person so appointed shall take the oath of office]. At the next general November election **◆** held at least 90 days after such vacancy shall occur, a person shall be elected to fill such office, and the person so elected shall hold such office for the remainder of the unexpired term. A candidate receiving the highest number of votes for said office and who has subscribed to the oath as provided in section [1] of article [11] of the state constitution shall be deemed to be elected and qualified, even though a vacancy occurs prior to the time he shall have entered upon the duties of his office.

§ 6.1409(11) Impeachment; removal upon resolution of legislature; notice of charges; notice of vacancy.] SEC. 409k. Any person holding the office of judge of the court of appeals may be removed from office upon conviction in impeachment proceedings for the reasons and in the manner set forth in section 7 of article 11 of the state constitution, or the governor shall remove any judge of the court of appeals upon a concurrent resolution of $\frac{3}{4}$ of the members elected to and serving in each house of the state legislature, and the cause for such removal shall be stated at length in such resolution, as provided in section 25 of article 6 of said constitution. Such person shall be served with a written notice of the charges against him and be afforded an opportunity for a hearing thereon. When a vacancy occurs in any of the said offices, a notice of such vacancy and the reason why the same exists shall, within 10 days after such vacancy occurs, be given in writing by the secretary of state to the court administrator, with a copy to the governor.

§ 6.1409(12) Filling of vacancies; activation of retired judges; election to fill vacancies.] SEC. 409-l. (1) When a vacancy occurs in the office of judge of the court of appeals, the supreme court may authorize persons who have served as judges and who have retired, to perform judicial duties for the limited period of time from the occurrence of the vacancy until the successor is elected and qualified. Such persons shall be ineligible for election to fill the vacancy.

(2) Unless the vacancy is filled at a special election, candidates shall be nominated at the next fall primary held at least 70 days after such vacancy occurs, to fill the vacancy in the manner provided in this chapter for the nomination of candidates for judge of the court of appeals. The vacancy shall be filled at the general election next following the primary in the manner provided in this chapter for the election of judges of the court of appeals. The person elected shall hold such office for the remainder of the unexpired term.

§ 6.1423 Impeachment; removal by governor upon resolution of legislature; notice of charges, hearing; notice of vacancy to be given to governor.] SEC. 423. Any person holding the office of circuit judge may be removed from office **◆**

[upon conviction in] impeachment [proceedings] for the reasons and in the manner set forth in ♦ [section 7] of article [11] of the state constitution, or the governor shall remove any circuit judge upon a concurrent resolution of $\frac{2}{3}$ of the members elected to [and serving in] each house of the state legislature, and the cause for such removal shall be stated at length in such resolution, as provided in the constitution of this state. ♦ Such person shall be served with a written notice of the charges against him and be afforded an opportunity for a hearing thereon. ♦ When a vacancy shall occur in any of the said offices, a notice of such vacancy and the reason why the same exists shall, within 10 days after such vacancy occurs, be given in writing [by the secretary of state to the supreme court, with a copy] to the governor ♦.

§ 6.1424 **Filling of vacancy in office; term of appointee; election to fill vacancy, term.]** SEC. 424. Whenever a vacancy shall occur in the office of circuit judge, ♦ [the supreme court may authorize persons who have served as judges and who have retired, to perform judicial duties for the limited period of time from the occurrence of the vacancy until the successor is elected and qualified. Such persons shall be ineligible for election to fill the vacancy. At a special primary election or the next] fall primary election held at least 70 days after such vacancy shall occur, candidates shall be nominated to fill the vacancy in the manner provided in this chapter for the nomination of candidates for circuit judge. The [vacancy] shall be filled at the ♦ election next following the primary in the manner provided in this chapter for the election of circuit judges. The person elected shall hold such office for the remainder of the unexpired term.

§ 6.1443 **Office to become vacant upon happening of certain events.]** SEC. 443. Any person holding the office of judge of probate may be removed from office ♦ [upon conviction in] impeachment [proceedings] for the reasons and in the manner set forth in ♦ [section 7] of article [11] of the state constitution, or the governor shall remove any judge of probate upon a concurrent resolution of $\frac{2}{3}$ of the members elected to [and serving in] each house of the state legislature, and the cause for such removal shall be stated at length in such resolution, as provided in the constitution of this state. ♦ Such person shall be served with a written notice of the charges against him and be afforded an opportunity for a hearing thereon. ♦ When a vacancy shall occur in any of the said offices, a notice of such vacancy and the reason why the same exists shall, within 10 days after such vacancy occurs, be given in writing [by the secretary of state to the court administrator with a copy] to the governor. ♦

§ 6.1444 **Vacancy in office, filling; term of appointee, ineligibility to election; election to fill vacancy; term of person elected.]** SEC. 444. Whenever a vacancy shall occur in the office of judge of probate, ♦ [the supreme court may authorize persons who have served as judges and who have retired, to perform judicial duties for the limited period of time from the occurrence of the vacancy until the] successor is elected and qualified. ♦ [Such persons shall be ineligible for election to fill the vacancy. At a special primary election or the next general] primary election held at least 70 days after such vacancy shall occur, candidates shall be nominated to fill the vacancy in the manner provided in this chapter for the nomination of candidates for judge of probate. The vacancies shall be filled at the general election next following the primary in the manner provided in this chapter for the election of judges of probate. The person elected shall hold such office for the remainder of the unexpired term.

EXHIBIT IV

SUPREME COURT ADMINISTRATIVE RULES—RULE 930

RULE 930—SUPERINTENDENCE OF THE JUDICIARY OF MICHIGAN

.1 In General.

(1) Rule 930 shall be liberally construed for the protection and benefit of the public and the judicial department of this state, and to facilitate the proper administration of justice in all courts and tribunals therein.

(2) No investigation or proceeding under Rule 930 shall be held invalid by reason of any non-prejudicial irregularity, nor for any error not resulting in a substantial miscarriage of justice.

(3) The enumeration of or reference to particular powers in Rule 930 shall not be construed to exclude or limit others possessed by the Supreme Court or the circuit courts.

(4) The enumeration of or reference to particular duties or standards of conduct herein shall not be construed to exclude or limit any other duties or standards of conduct to which any judicial officer and any inferior court or tribunal is subject.

(5) The court administrator, under Rule 930, shall be the administrative officer of all of the courts and tribunals in the judicial department of this state.

(6) The term "judicial officer" as used in Rule 930 means any officer of the judicial department of this state who exercises the judicial functions of any court or tribunal therein.

(7) The term "proceedings" as used in Rule 930 means the proceedings commenced by petition of the court administrator pursuant to Rule 930.

(8) Except where the context otherwise indicates, the term "court" means the court having jurisdiction of the proceedings under Rule 930.

(9) Any statutory provision that is inconsistent with any provision in Rule 930 shall be considered as superseded by these rules.

.2 Investigation.

(1) The Chief Justice of the Supreme Court may, with or without a request, cause an investigation to be made by the court administrator of the affairs of any court or tribunal in the judicial department of this state, or the personal practices of any judicial officer thereof.

(2) All requests for an investigation of any court or tribunal, or any judicial officer thereof, shall be in writing, and shall be made to or received by the court administrator.

(3) All state, county and city law enforcement officers, and all judges, clerks, members of the bar, and other officers of the courts, shall comply with the requests made by the court administrator for aid in such investigations.

(4) The court administrator shall report the results of all such investigations in writing to the Chief Justice, and shall recommend the action to be taken thereon.

.3 Misconduct; Petition.

(1) If, from the report of an investigation by the court administrator, the Chief Justice finds there is reasonable cause to believe that any judicial officer in this state is guilty of misconduct, the Chief Justice may authorize a petition in the matter of the accused judicial officer, as the respondent, to be made by the court administrator and filed in the Supreme Court, setting forth the facts of such alleged misconduct and the action sought by reason thereof.

(2) The authorization for said petition shall be endorsed thereon by the Chief Justice before the same is filed in the Supreme Court.

(3) Misconduct to be dealt with under Rule 930 includes misconduct in office, misfeasance, malfeasance, neglect of duty, personal practices contrary to any of the Canons of Judicial Ethics that have been or may from time to time hereafter be adopted by the Supreme Court, and any other practices that are likely to expose any court or tribunal in this state, or any judicial officer thereof, to public censure or reproach, or that are in any manner prejudicial to the proper administration of justice.

(4) Every judicial officer in this state shall be personally responsible under Rule 930 for the proper conduct and administration of the affairs of the court or tribunal in which he presides.

.4 Jurisdiction.

(1) The Supreme Court may, in its discretion, transfer jurisdiction of any proceedings under Rule 930 to the circuit court of the county in which the court or tribunal of the respondent is located.

(2) If jurisdiction of the proceedings is retained by the Supreme Court, the proceedings shall be conducted and heard by said court.

(3) If jurisdiction of the proceedings is transferred to a circuit court, the proceedings shall be conducted and heard by a judge of the circuit court to which jurisdiction is transferred, unless the Supreme Court shall otherwise order. If the respondent is a member of the bar of this state the Supreme Court shall designate 3 circuit judges to conduct and hear the proceedings in the circuit court.

(4) When jurisdiction is transferred to a circuit court, the clerk of the Supreme Court shall transmit the petition, and the order transferring jurisdiction, to the clerk of the circuit court for filing therein, and the proceedings thereafter shall be entitled in the circuit court.

.5 Prosecutor.

(1) The Chief Justice may, in his discretion, direct the court administrator to prosecute the proceedings, or may appoint counsel to prosecute the same, or may

request the Board of Commissioners of the State Bar of Michigan to appoint counsel to do so.

(2) Such counsel may be appointed from the list of counsel for the several grievance committees of the State Bar of Michigan.

.6 Pleading; Counsel

(1) Upon the filing of the petition the Chief Justice, or any judge of the circuit court to which jurisdiction of the proceedings is transferred, shall issue an order requiring the respondent to appear before the court and answer to the charges of misconduct set forth in the petition, and to show cause why the action sought by said petition should not be taken.

(2) Said order shall specify a date for such appearance and answer, which shall not be later than 30 days after the filing of the petition.

(3) A copy of said order together with a copy of said petition shall be served upon the respondent, either by personal service wherever he may be found in this state, or, if he cannot be found, by registered mail addressed to the respondent at the place where his court or judicial office is located; and proof of such service shall be made and filed in the proceedings.

(4) The respondent may be represented by counsel, who shall enter formal appearance.

(5) The appearance and answer of the respondent shall be made and filed in the proceedings as directed by the court, and a copy thereof shall be served on the court administrator.

(6) New matter set forth in the answer filed by the respondent shall be answered by a reply, and a copy of such reply shall be served on the respondent within 15 days after service of the answer on the court administrator.

(7) Except where personal service, or service by registered mail is expressly required by law or these rules, service of any paper upon any party shall be sufficient if made upon any counsel of record formally appearing for such party.

.7 Hearing.

(1) All proceedings under Rule 930, including the trial of issues of fact and law, shall be conducted in open court without a jury, and shall otherwise conform as nearly as may be to the established civil practice and procedure in the circuit courts, and the rules of evidence in civil actions shall apply.

(2) Such proceedings, when ready for trial, shall have priority over all other civil actions.

(3) If the respondent fails to appear or answer within the time specified, the court may in its discretion proceed without further notice to the respondent.

(4) Amendments to any pleading, order or process may be made at any time prior to the final disposition of the proceedings, and the party affected by the amendments shall be given a reasonable opportunity to meet any new matter presented thereby.

.8 Action on Findings.

(1) If the court finds that the charges in the petition do not merit court action, the court shall dismiss the petition. If the court finds that the charges are meritorious, the court shall make its written findings of fact and law, and shall determine such corrective and disciplinary measures as in the judgment of the court are warranted by such findings, and may issue such orders, directives, mandates, writs or process as in the judgment of the court are necessary or expedient to carry the court's determinations into effect.

(2) If the respondent is a member of the bar of this state, and if the court finds sufficient grounds for such action, the court may suspend or revoke respondent's license to practice law in this state.

(3) If the respondent is subject to removal from his judicial office by the governor and the court finds that there are sufficient grounds for such removal, the court may recommend to the governor that the respondent be removed from such office.

(4) If the respondent is subject to removal from his judicial office only by the governor on a concurrent resolution of two-thirds of the members elected to each house of the legislature, and the court finds that there is reasonable cause for such removal, the court may recommend to the legislature that the respondent be removed from such judicial office.

(5) If the court finds that the respondent is guilty of corrupt conduct in office, or of crimes or misdemeanors, the court may recommend to the house of representatives that the respondent be impeached.

(6) The enumeration of specific powers and remedies herein shall not be construed to deny other powers and remedies possessed by the court.

(7) The court shall cause a copy of any order, directive, mandate, writ or process issued by the court to the respondent in the course of the proceedings to be served on the respondent, either personally wherever he may be found, or by registered mail addressed to the respondent at the place where his court or judicial office is located; and proof of such service shall be made and filed in the proceedings.

.9 Review. Any final order of the circuit court in the proceedings under Rule 930 shall be subject to full review by the Supreme Court, in its discretion, upon the law and the facts. Leave to appeal is required.

EXHIBIT IV(A)

§ 27A.615 Superintending control.]

SEC 615

The circuit courts have a general superintending control over all inferior courts and tribunals, subject to the rules of the supreme court. (CL '48, § 600.615)

EXHIBIT V

JUNE TERM, 1958.

IN RE HUFF

1. EVIDENCE—JUDICIAL NOTICE—COURT FILES—ASSIGNMENT OF CIRCUIT JUDGES TO OTHER CIRCUITS.

The Supreme Court takes judicial notice of the files in the office of the court administrator relative to assignment of circuit judges to serve in circuits other than those in which they were elected.

2. SAME—JUDICIAL NOTICE—CIRCUIT COURTS—ACTION IN OPEN COURT.

The Supreme Court takes judicial notice of occurrences in open court in a circuit court relative to compliance with the Supreme Court's orders assigning circuit judges to serve in circuits other than those in which they were elected.

3. CONTEMPT—SHOW CAUSE ORDER—ISSUANCE—JUDICIAL NOTICE—ATTACHMENT OF AFFIDAVIT BEFORE SERVICE ON DEFENDANT.

Issuance of order to circuit judge to show cause why he should not be adjudged guilty of contempt for failure to serve in circuit other than that in which he was elected and to permit a visiting circuit judge to serve as presiding circuit judge while he was away, as required by order of the Supreme Court, had ample foundation in judicially-noticed letter from defendant that he intended to disregard the duly-issued assignment and of the judicially-noticed occurrence in open court of such circuit whereby defendant continued as presiding judge and declined to permit the visiting judge to function as presiding circuit judge, the attachment of a supporting affidavit by such visiting circuit judge before service of the show-cause order upon defendant constituting full observance of procedural due process, since he was thereby apprised of the nature and substance of the disobedience charged against him so as to be enabled to prepare his defense to be presented 4 days later.

REFERENCES FOR POINTS IN HEADNOTES

- [1] 20 Am Jur, Evidence §§ 78, 86.
- [2] 20 Am Jur, Evidence § 83.
- [3-6] 12 Am Jur, Contempt § 69.
- [7] 12 Am Jur, Contempt § 24.
- [8] 30A Am Jur, Judges §§ 31, 237, 242.
- [9] 30A Am Jur, Judges § 242.
- [10] 12 Am Jur, Contempt § 24.
- [11, 13, 14] 12 Am Jur, Contempt § 40.
- [12] 12 Am Jur, Contempt § 4.
- [15] 14 Am Jur, Courts § 171.
- [16] 30A Am Jur, Judges § 237 *et seq.*
- [18] 14 Am Jur, Courts § 264.
- [19] 14 Am Jur, Courts § 265.
- [20] 14 Am Jur, Courts § 266.
- [21] 14 Am Jur, Courts § 271.
- [22] 30A Am Jur, Judges § 237 *et seq.*
- [23] 30A Am Jur, Judges § 242.
- [24] 42 Am Jur, Public Officers § 9.
- [2] 12 Am Jur, Contempt § 61 *et seq.*

4. **SAME—WAIVER OF IRREGULARITIES—VOLUNTARY APPEARANCE.**

The voluntary appearance in Supreme Court in response to that court's show cause order in a contempt proceeding waives all irregularities in the initiation of the proceeding.

5. **SAME—COURT RULES—NOTICE OF HEARING ON PETITION.**

Provision of court rule entitling the attorney for an opposite party to notice of hearing of motions and petitions of at least 4 days does not apply to a show cause order of the Supreme Court, issued *sua sponte*, in contempt proceedings against a circuit judge, hence, he was not entitled to more time to prepare his defense than allowed by the show cause order (Court Rule No 10, § 2 [1945]).

6. **SAME—SHOW CAUSE ORDER—TIME.**

Time allowed in show cause order in contempt proceedings against circuit judge, consisting of 3 or 4 days available for the purpose of enabling him and his counsel to explore and present the relevant law, *held*, ample, where there was no issue of fact involved and no necessity for seeking witnesses or evidence to refute showing of disobedience to the order of the Supreme Court to serve as circuit judge in a circuit other than the one in which he had been elected and to permit a visiting circuit judge to serve as presiding circuit judge while defendant was away (CL 1948, §§ 605.3, 605.5).

7. **SAME—CIRCUIT JUDGES—ASSIGNMENT FOR SERVICE ELSEWHERE—VISITING JUDGE.**

Defendant circuit judge was properly found guilty of contempt of the Supreme Court by failure to comply with latter's order to him to serve as circuit judge in a specified circuit other than the one in which he had been elected and with interfering with another circuit judge who had been ordered to serve as presiding circuit judge during period of defendant's absence, where defendant not only declined to serve elsewhere upon receipt of order of assignment or show cause order, but failed so to serve at any time before adjudication of contempt several days later, and in open court at first sought to obstruct the visiting judge from assuming duties of presiding judge in defendant's circuit.

8. **COURTS—CIRCUIT COURTS—CONSTITUTIONAL LAW—STATUTES.**

The right of the people of a judicial circuit to the service of a judge whom they have elected is subject to express and distinct limitations and qualifications provided for by the Constitution and statutes (Const 1908, art 7, § 8; CL 1948, §§ 602.61, 691.212; CLS 1956, § 692.701 *et seq.*).

9. **SAME—SUPREME COURT.**

An inferior court may not pass upon and hold invalid the determinations of the Supreme Court.

10. **SAME—SUPREME COURT—DISOBEDIENCE OF ORDERS—CONTEMPT.**

An order of the Supreme Court, even though its propriety or validity be questioned, should be obeyed until it is vacated and until it is vacated the Supreme Court has power to punish disobedience thereof as for contempt.

11. **CONTEMPT—COURTS—COMMON LAW—STATUTES.**

Courts have inherent power to adjudge and punish for contempt to the full extent that it existed in the courts of England at the common law, independent of, as well as by reason of, statute that is merely declaratory and in affirmation of the common law, the determination of such issue not being for a jury but for the court (CL 1948, § 605.1 *et seq.*).

12. **SAME—COMPLIANCE WITH ORDER OF THE COURT—CONSTRUCTIVE CONTEMPT.**

The inherent power of a court to punish for contempt extends not only to contempt committed in the presence of the court, but also to constructive contempt arising from refusal of defendant to comply with an order of the court.

13. **SAME—POWER TO PUNISH—STATUTES—COURTS.**

The inherent judicial power of constitutional courts to punish for contempt cannot be limited or taken away by act of the legislature and is not dependent on legislative provision for its validity or procedures to effectuate it.

14. SAME—POWER TO PUNISH—DUE PROCESS.

The inherent power of a court to punish summarily for contempt for refusal to obey a valid court order is not a denial of due process, where the adjudication is made in the course of proceedings in which defendant was duly informed of the charged disobedience, had reasonable time to prepare his defense and persisted in refusal to obey after ample opportunity to purge himself of the contempt charged.

15. SAME—SUPREME COURT—JURISDICTION.

The Supreme Court has jurisdiction to adjudge that its order has been violated in such a way as to subject the violator to punishment for contempt (Const 1908, art 7, § 4).

16. COURTS—ASSIGNMENT OF CIRCUIT JUDGES TO OTHER CIRCUITS.

The Supreme Court has constitutional and statutory power to assign judges from their own circuit to another in the interests of sound judicial administration (Const 1908, art 7, §§ 4, 8; CL 1948, §§ 602.61, 691.212; CLS 1956, § 692.701 *et seq.*).

17. SAME—ASSIGNMENT OF CIRCUIT JUDGES—SUPREME COURT.

An order of the Supreme Court assigning defendant circuit judge to another circuit and a visiting circuit judge to function as presiding judge in defendant's circuit was clearly within the power of the Supreme Court (Const 1908, art 7, §§ 4, 8; CL 1948, §§ 602.61, 691.212; CLS 1956, § 692.701 *et seq.*).

18. SAME—SUPERVISORY POWER OF SUPREME COURT—CIRCUIT COURTS.

The supervisory power of the Supreme Court extends over the circuit courts and cannot be restricted or removed by legislative action (Const 1908, art 7, § 4).

19. SAME—SUPERINTENDING CONTROL OVER INFERIOR COURTS BY SUPREME COURT.

The Supreme Court's power of general superintending control over all inferior courts is an extraordinary power, is not hampered by specific rules or means for its exercise and is unlimited, being bounded only by the exigencies which call for its exercise (Const 1908, art 7, § 4).

20. SAME—SUPERINTENDING CONTROL OF COURTS.

The general superintending control conferred upon the Supreme Court by the Constitution is a power that is separate, independent and distinct from its other original jurisdiction and appellate powers, its purpose being to keep the courts themselves within bounds and to insure the harmonious working of the judicial system (Const 1908, art 7, § 4).

21. SAME—SUPERINTENDING CONTROL OF COURTS BY SUPREME COURT—ASSIGNMENT OF CIRCUIT JUDGES TO OTHER CIRCUITS.

The general superintending control over inferior courts vested in the Supreme Court includes the power to assign judges from their own circuit to another in such manner and to such extent as to the Supreme Court shall seem appropriate and necessary in order to improve the administration of justice; a power exercisable by the Supreme Court without need for implementing legislation (Const 1908, art 7, § 4).

22. JUDGES—ASSIGNMENT TO OTHER CIRCUITS—SUPREME COURT.

Defendant circuit judge had the duty to serve as a judge in the circuit to which he was assigned by duly-authorized orders of the Supreme Court and the latter had power to compel him so to serve (Const 1908, art 7, § 8; PA 1952, No. 269, as amended by PA 1954, No. 162).

23. COURTS—ASSIGNMENT TO OTHER CIRCUITS—CONSTITUTIONAL LAW.

The exercise of the power of the Supreme Court to assign a circuit judge to serve in a circuit other than that in which he was elected does not constitute a violation of a right protected by the Constitution of the State or of the United States.

24. OFFICERS—CONTRACTS—ELECTION TO PUBLIC OFFICE.

One does not have a contractual right to the public office to which he has been elected.

25. COURTS—JUDGES—ASSIGNMENT TO OTHER CIRCUITS—CONTEMPT.

Circuit judge, under record presented, was properly found guilty of contempt of the Supreme Court by willfully disobeying its order to him to serve in another circuit and in interfering with a visiting circuit judge who had been ordered to function as presiding circuit judge in defendant's circuit and the Supreme Court had the power to require him to pay \$250 to the clerk of the Supreme Court and to observe the further order of the Supreme Court to serve as judge in a circuit other than the one in which he had been elected (Const 1908, art 7, §§ 4, 8; CL 1948, §§ 602.61, 691.212; CLS 1956, § 692.701 *et seq.*).

Original proceedings in contempt against Eugene Snow Huff, circuit judge of the tenth judicial circuit, for his failure to comply with order of the Supreme Court to serve in the third judicial circuit and for interfering with assignment of visiting judge to the tenth judicial circuit assigned for the purpose of expediting the work of the court in that circuit. Citation issued *sua sponte* May 12, 1958. Adjudication of contempt May 16, 1958. (Calendar No. 47,795.) Opinion filed June 5, 1958.

Robert J. Curry, for defendant.

DETHMERS, C. J. For the first time in Michigan's judicial history, it has become necessary to cite one of her circuit judges before this Court for contumacious disregard and willful and flagrant disobedience of its lawfully entered order. A proper regard for understanding by the bench and bar and the public generally of the authority under which this Court moved and the reasons which impelled it to do so requires their announcement through formal opinion.

On April 23, 1958, the Chief Justice, the court administrator and the defendant, Circuit Judge Eugene Snow Huff, then presiding judge of the tenth judicial circuit of Michigan, considered together the unsatisfactory condition of the dockets in the tenth circuit and agreed upon specific corrective measures. In conformity therewith, and at the direction of the Chief Justice, the court administrator, on that date, assigned defendant to serve as judge in the third judicial circuit, commencing May 12th, and continuing until June 12, 1958, and assigned Circuit Judge Timothy C. Quinn, of the fortieth judicial circuit of Michigan, to serve during the mentioned period, hereinafter referred to as the month, as presiding judge in the tenth circuit. On May 8, 1958, defendant sent the court administrator a letter in which he acknowledged the mentioned agreement and consequent assignments but stated that he would not accept the assignment to the third circuit and intended to remain as presiding judge of the tenth circuit and hear cases there during the month. On May 9, 1958, this Court entered a formal order approving the assignments, directing defendant to serve as judge in the third circuit and Judge Quinn to serve as presiding judge in the tenth circuit in accord therewith, and ordering the assignment clerk of the tenth circuit to assign cases and perform the functions and duties of his office during the month under and at the direction and control of Judge Quinn as acting presiding judge of the tenth circuit. On that date defendant was informed that this Court had so determined.

At the opening of Court on May 12, 1958, Judge Quinn appeared in the courtroom in the tenth circuit customarily presided over by defendant and declared that he was reporting for service and ready to assume the duties of presiding judge of the tenth circuit for the month. Defendant thereupon made a statement, entered on the record, in open court, that he was continuing as presiding judge of the tenth circuit, that as such he would assign cases for Judge Quinn to hear, and that the assignment clerk would be required to continue to take orders from defendant as presiding judge and not from Judge Quinn.

Being apprised of defendant's refusal to comply with the assignments of the court administrator, this Court on May 12, 1958, caused its mentioned order of May 9th to be served upon defendant, Judge Quinn, and the assignment clerk. Thereupon, and on that same day, defendant announced in open court that he would continue to serve as presiding judge of the tenth circuit during the month. He declined to permit Judge Quinn to serve as such and failed and refused to go and to serve as judge in the third judicial circuit.

Having taken judicial notice of the files in the office of the court administrator and particularly of the mentioned May 8th letter therein from defendant, stating that he declined to accept the assignment to the third circuit, and having been directly informed by Judge Quinn and having taken judicial notice of the occurrences of May 12th in open court in the tenth circuit, namely, defendant's openly announced refusal and failure to comply with the court administrator's assignments and the order of this Court and his willful disobedience thereof, this Court,

on that day, on its own motion, entered a show cause order, to which, after issuance but before service on defendant, the affidavit of Judge Quinn was attached stating the above facts constituting defendant's defiance and disobedience of the court administrator's assignments and this Court's May 9th order, after which said order to show cause was, on that same day, served upon defendant and a copy thereof with copy of said affidavit attached delivered to him, requiring him to appear personally before this Court on May 16th to show cause, if any there was, why he should not be adjudged in contempt of this Court and dealt with accordingly for failure to serve as judge in the third circuit and to permit Judge Quinn to serve as presiding judge in the tenth circuit as required by the order of this Court.

In response to the order to show cause defendant, on May 16, 1958, appeared before this Court personally and represented by counsel. At the incoming of Court the motion of the Saginaw County Bar Association to intervene was denied as was the defendant's motion for continuance. Defendant thereupon filed and furnished the Court with copies of his answer to the show-cause order. Both his motion and answer admitted the service upon him on May 12, 1958, of the May 9th order and the May 12th show-cause order with affidavit attached. His answer admitted that he had not complied with the May 9th order but continued to hear matters in the tenth circuit and that he had objected in open court to Judge Quinn's serving as presiding judge therein. Defendant admitted before this Court that he had received the assignment of the court administrator and the May 9th order of this Court, that he knew that thereby he was directed to serve as judge in the third circuit, Judge Quinn was directed to serve during the month as presiding judge in the tenth circuit, and the assignment clerk of the tenth circuit was ordered to perform the functions of his office under the direction and control of Judge Quinn; further, that he, the defendant, in disobedience to the assignment and the order of this Court, failed and refused to serve as judge in the third circuit, continued to sit and hear matters in the tenth circuit and refused in open court to permit Judge Quinn to assume the duties of presiding judge of the tenth circuit. Defendant and his counsel stated before this Court that there were no issues of fact, that the recitals of fact in the order to show cause and attached affidavit were true and correct, and that the only issues defendant desired to raise in answer to the show-cause order were legal challenges to the sufficiency of the proceedings herein and the authority of this Court in the premises. Upon inquiry then made by this Court, defendant personally and through his counsel stated that he still declined to comply with and to obey the May 9th order of this Court to serve as judge in the third circuit.

After hearing duly had before this Court the defendant was on said May 16, 1958, adjudged to be in contempt of this Court, whereupon it was so announced to defendant in open court. He was then reminded by the Court that the arrangement for service by the 2 judges in the circuits other than their own had been arrived at by agreement voluntarily entered into by him for the avowed purpose of instituting measures designed to correct the unsatisfactory docket situation in the tenth circuit; that in arriving at such agreement, consideration had been given to the dilatory tactics of a few lawyers in the tenth circuit and that it had been concluded that a visiting judge could combat such tactics and effect satisfactory trial schedules with less embarrassment than would be possible for the local judges; that there were approximately 300 cases in the tenth circuit that had been pending for more than 2 years; that certain reports filed with the court administrator by defendant, as required under Court Rule No. 78,* stated that there were no cases left undecided by defendant for more than 4 months, but that such reports did not comport with fact, and that it had been necessary in the past to send visiting judges to the tenth circuit to attend to what would have been defendant's current work so that he might devote himself exclusively to rendering overdue decisions and writing opinions in such undecided cases; that despite the less than State average annual case load per judge in the tenth circuit, the pending cases in the tenth circuit which were more than 2 years old represented 27% of the total cases there pending, whereas the average State-wide, in that respect, was 7%; that reports to the court administrator from visiting judges assigned to the tenth circuit and complaints of attorneys therein indicated defendant's failure to address himself industriously to the work of the court; that such visiting judges reported that the assignment of cases in the tenth circuit was so inefficiently conducted that visiting judges were not kept occupied with hearing of cases while there despite the considerable backlog of cases there existing; that the business of the court in the tenth circuit has been inefficiently administered

* Adopted December 28, 1955; effective March 1, 1956. 344 Mich. xiv.—REPORTER.

and that it was for that reason that Judge Quinn was assigned to serve as presiding judge in the interests of instituting more efficient and effective procedures. This Court then offered defendant the opportunity to purge himself of contempt by agreeing to obey the May 9th order of this Court. He requested a recess to consider the matter, after which, this Court having reconvened, the defendant in open court declined to avail himself of such opportunity and stated that he was determined to persist in disobeying the May 9th order of this Court. Defendant, thereupon, was ordered, in consequence thereof, to pay \$250 forthwith to the clerk of this Court and to attend the court administrator to receive another assignment and to receive service of another order of this Court directing him to serve as judge in the third judicial circuit for a period of 4 weeks commencing May 19, 1958. Such assignment was immediately thereafter delivered to the defendant by the court administrator and such order was thereupon served upon defendant. He was admonished by this Court that persistence in his course of defiance of the orders of this Court and particularly of the last-mentioned order would result in further action of this Court to enforce compliance therewith.

Defendant's technical objections to the sufficiency of these proceedings are without substance. Although the affidavit of Judge Quinn was not filed in the office of the clerk nor attached to the order to show cause before its issuance, as hereinbefore noted, this Court had taken judicial notice of defendant's letter of May 8th asserting his intention to disregard the assignment of the court administrator and had likewise been directly informed by Judge Quinn and taken judicial notice of the occurrences in open court (as we properly may do—*Cullen v. Voorhies*, 232 Mich 420) in the tenth circuit on May 12th which transpired both before and after service of this Court's May 9th order upon defendant. This afforded ample foundation for this Court's issuance, on its own motion, of the show cause order. Judge Quinn's affidavit was attached to the original and copies thereof were attached to copies of the order prior to service upon defendant, thus apprising him of the nature and substance of the disobedience charged against him and enabling him to prepare his defense to be presented to this Court 4 days later. Procedural due process was fully observed. On May 16th the defendant, not having been seized upon *capias* or otherwise forcibly brought into court, voluntarily presented himself before this Court to show cause why he ought not to be adjudged in contempt. In so doing, he waived all irregularities in initiating the proceeding. *In re McHugh*, 152 Mich 505; *Craig v. Baird*, 109 F Supp 496.

At the outset of the hearing before this Court defendant's counsel urged the provisions of Michigan Court Rule, No 10, § 2 (1945), and of CL 1943, § 605.3 and § 605.5 (Stat Ann § 27.513 and § 27.515), as entitling him to a continuance and more time to prepare his defense. The mentioned rule governs noticing of motions by parties, but has no application to the Court's issue, on its own motion, of an order to show cause. With respect to the reasonable time to prepare an answer contemplated by the mentioned statutes, it is to be observed that no issue of fact has been raised here and there has been no pretense of any necessity for seeking witnesses or evidence to refute the showing of disobedience to the order of the Court. The defense consisted solely of legal claims with respect to the sufficiency of these proceedings and the validity of this Court's May 9th order, the 3 or 4 days available for that purpose having been reasonable and ample to enable defendant and his counsel to explore and present the relevant law. Nothing has been made to appear to indicate defendant's need for additional time.

Point was made of the fact that Judge Quinn did, after service upon him and defendant of our order of May 9th, assume the duties of presiding judge in the tenth circuit. This does not alter the admitted fact that defendant sought in open court to obstruct him from doing so. As for defendant's point that the May 9th order was served on him at 2:30 p.m. on May 12th, too late to allow him to present himself during court hours on that day in the third circuit and that the order to show cause was served upon him at 10:30 p.m. on that day, suffice it to say that the defendant did not on any of the succeeding days present himself to serve as judge in the third circuit and that at the hearing before us on May 16th, upon invitation extended by this Court before the adjudication of contempt, he declined to do so.

Citing *Lamb v. Board of Auditors of Wayne County*, 235 Mich 95, defendant says that the people of the tenth judicial circuit are entitled to his service as judge. To that may be added that they are entitled to efficient and effective judicial service and to courts which discharge their business promptly. In *Lamb* the sole question related to the compensation to which a visiting judge was entitled and this, in turn, depended on whether the language "judges regularly holding court

therein," found in Michigan Constitution (1908), art 7, § 12, included visiting judges as relates to the requirement in that section that compensation paid by counties in addition to that paid by the State shall be uniform to the judges regularly holding court therein. Utterly irrelevant to the decision of that question was the dicta (p 98) that "the people are entitled to the service of the judge whom they elect." As will appear from the constitutional and statutory provisions hereinafter to be considered, such right is subject to express and distinct limitations and qualifications which needed not to be considered or construed in deciding the *Lamb Case*.

Defendant in this case has presumed to pass upon and hold invalid the May 9th order of this Court, as well as the April 28th assignment of the court administrator, directing him to serve as judge in the third circuit and Judge Quinn to serve as presiding judge in the tenth circuit. The 4 days intervening between service of the show-cause order upon him and the hearing in this Court having been available to defendant and his counsel in which to examine the law, not even a semblance of legal authority for that position was presented by them to this Court. It does not comport with our system of administration of justice that an inferior court shall review the determinations of this Court. Even though the propriety or validity of our order be questioned, it should be obeyed until this Court has vacated it; and, until such time, this Court has power to punish disobedience thereof as for contempt. *Rose v. Aaron*, 345 Mich 613, and cases therein cited.

There is inherent power in the courts, to the full extent that it existed in the courts of England at the common law, independent of, as well as by reason of statute (CL 1948, §605.1 *et seq.* [Stat Ann §27.511 *et seq.*]), which is merely declaratory and in affirmation thereof, to adjudge and punish for contempt, and determination of the issue is not for a jury but the court. *Langdon v. Wayne Circuit Judges*, 76 Mich 358; *In re Dingley*, 182 Mich 44; *In re Scott*, 342 Mich 614; *Craig v. Baird*, *supra*. Such inherent power extends not only to contempt committed in the presence of the court, but also to constructive contempt arising from refusal of defendant to comply with an order of the court. *Carroll v. City Commission of Grand Rapids*, 266 Mich 123; *Craig v. Baird*, *supra*. Such power, being inherent and a part of the judicial power of constitutional courts, cannot be limited or taken away by act of the legislature nor is it dependent on legislative provision for its validity or procedures to effectuate it. *Nichols v. Judge of Superior Court*, 130 Mich 187; *In re White*, 340 Mich 140 (reversed on another point in *In re Murchison*, 349 US 133 [75 S Ct 623, 99 L ed 942]).

To defendant's objections that in these proceedings this Court functions as complainant, prosecutor, jury and judge, that there is an absence of the ancient established course of legal proceedings observed in prosecutions for criminal offenses, and that this has served to deprive defendant of due process,¹ equal protection of the law,² right to trial by jury³ and other rights guaranteed by Federal and State Constitutions, complete and effective answer is found in *In re Merrill*, 200 Mich 244, *Bowman v. Wayne Circuit Judge*, 214 Mich 518, *Ex Parte Merrill*, 245 F 778; and *Green v. United States*, 356 US 165 (78 S Ct 632; 2 L ed 2d 672). These cases recognize the inherent power of courts to punish summarily for contempt for refusal to obey a valid court order and that it comports with due process to do so after adjudication upon proceedings comparable to and no more elaborate than those here employed. Even the dissenting justices in *Green* (p 197) recognized the validity on proceedings even less formal and more summary than those at bar, of conditional imprisonment or punishment to compel a person to obey valid court orders in the future, like here, as distinguished from imprisonment to punish for past disobedience of an order with which compliance is no longer possible in the future.

We have considered the matter of the inherent power of this Court to adjudge defendant in contempt for disobedience of its valid order. We come now to defendant's challenge of the validity of and power of this Court to make the May 9th order directing defendant to serve as judge in the third circuit and Judge Quinn to serve in his stead as presiding judge in the tenth circuit during the month. With respect to the wisdom thereof and policy questions involved, there was division of this Court before the order entered. Once it was made by the determination of a majority of this Court, no division remained as to this Court's power to adjudge its violation a contempt and the necessity for doing so, not alone to protect the dignity of this Court but to avert a crippling blow to effective court administration in the Michigan judicial structure and to insure prompt

¹ See US Const, Am 14; Mich Const (1908), art 2, § 16.—REPORTER.

² See US Const, Am 14; Mich Const (1908), art 2, § 1.—REPORTER.

³ See US Const, art 3, § 2; Mich Const (1908), art 2, § 13.—REPORTER.

and efficient administration of justice in accord with the popular mandate expressed in the Michigan constitutional and statutory provisions hereinafter to be considered. This Court is unanimous in respect to its constitutional and statutory powers to assign judges from their own circuit to another in the interests of sound judicial administration. With equal unanimity we hold the order of May 9th to be within those powers. Pertinent provisions of Constitution and statute permit no other conclusion.

Michigan Constitution (1908), art 7, § 4, provides:

"The Supreme Court shall have a general superintending control over all inferior courts."

That supervisory power of the Supreme Court extends over the circuit courts. *Kloka v. State Treasurer*, 318 Mich 87. It cannot be restricted or removed by legislative action. *Brown v. Kalamazoo Circuit Judge*, 75 Mich 274 (5 LRA 226, 13 Am St Rep 438). In 14 Am Jur, Courts, § 265, it is said:

"The power of superintending control is an extraordinary power. It is hampered by no specific rules or means for its exercise. It is so general and comprehensive that its complete and full extent and use have practically hitherto not been fully and completely known and exemplified. It is unlimited, being bounded only by the exigencies which call for its exercise. As new instances of these occur, it will be found able to cope with them. Moreover, if required, the tribunals having authority to exercise it will, by virtue of it, possess the power to invent, frame, and formulate new and additional means, writs, and processes whereby it may be exerted. This power is not limited by forms of procedure or by the writ used for its exercise. Furthermore, it is directed primarily to inferior tribunals, and its relation to litigants is only incidental."

For general treatment of the subject, see annotations at 112 ALR 1351 *et seq.*; also, 51 LRA 111. The superintending control conferred by Constitution on this Court is a power separate, independent and distinct from its other original jurisdiction and appellate powers, its purpose being "to keep the courts themselves 'within bounds' and to insure the harmonious working of our judicial system." *State, ex rel. Whiteside, v. First Judicial District Court*, 24 Mont 539 (63 P 395); *Hayes Freight Lines v. Cheatham* (Okla), 277 P2d 664 (48 ALR2d 1278); *State, ex rel. Auto Finance Co., v. Landwehr*, 229 Mo App 1221 (71 SW2d 144); *State, ex rel. Johnson, v. Broderick*, 75 ND 340 (27 NW2d 849). Such power having been conferred by Constitution upon this Court, it also received all the power necessary to make that control and its implementing orders and writs effective. *State v. Broderick, supra*. We construe the power so invested in this Court to include the power exercised in this case to assign judges from their own circuit to another in such manner and to such extent as to this Court shall seem appropriate and necessary in order to improve the administration of justice; and we hold that such power may be exercised by this Court without need for implementing legislation.

Michigan Constitution (1908), art 7, § 8, provides:

"Each circuit judge shall hold court in the county or counties within the circuit in which he is elected, and in other circuits as may be provided by law."

Under CL 1948, § 602.61 (Stat Ann § 27.198), it was provided that judges might be assigned to other circuits than their own by the governor. CL 1948, § 691.212 (Stat Ann § 27.302), provided for such assignment by the State presiding judge. In *Alpena National Bank v. Hoey*, 281 Mich 307, jurisdiction of a court presided over by a visiting judge so assigned thereto from another circuit and validity of the proceedings had before him were upheld by this Court despite technical defects inhering in the steps taken to effectuate such assignment.

PA 1952, No 269, as amended by PA 1954, No 162 (CLS 1956, § 692.701 *et seq.*) [Stat Ann 1957 Cum Supp § 27.15(1) *et seq.*], creating the office of court administrator, transferred the powers of the State presiding judge to the court administrator acting under direction of this Court. Section 5 of that act provides:

"The Supreme Court shall have the right to direct and compel a judge of any court named herein to serve as a judge in any other court in which by law he is authorized to act as judge. The authority granted by this section may be exercised by the Supreme Court at its discretion through its direct order, through the court administrator or through the presiding circuit judge of the State of Michigan." (Circuit courts are named therein [section 7] and the judges thereof are authorized by law to act as judge in other circuits than their own.)*

Section 6 thereof provides, in part:

"The Supreme Court shall have the right to take such action as it may deem proper to facilitate the proper administration of justice, and issue such directives and mandates as in its judgment are necessary and expedient to carry its determinations into effect."

*See CL 1948, § 602.61 (Stat Ann § 27.198).—REPORTER.

Made a part of the record in this case is the order of this Court of January 13, 1954, empowering the court administrator to assign circuit judges to other circuits, this Court's order of April 15, 1954, authorizing a committee of this Court to advise and direct the court administrator in all matters pertaining to his office, and this Court's order of January 17, 1958, transferring such powers from the committee and conferring them upon the Chief Justice. On April 28, 1958, the Chief Justice directed the court administrator to make the assignments above considered. On May 9, 1958, this Court made its order of like import. In view of the above-noted provisions of Michigan Constitution (1908), art 7, § 8, and PA 1952, No. 269, as amended, it was defendant's duty under said assignment and order of this Court to serve and this Court is empowered to compel him to serve as judge in the third judicial circuit.

Defendant suggests in vague terms some right, under the Federal Constitution as well as that of this State, to hold court only in the circuit in which he was elected, and urges that the provisions of article 7, § 4 and § 8, and PA 1952, No. 269, as amended and as above construed by this Court, are in contravention of such right and are therefore, violative of some other provisions of the Michigan Constitution and also of the Constitution of the United States, presumably of its 14th amendment. In *Snowden v. Hughes*, 321 US 1, 7 (64 S Ct 397, 88 L ed 497), it was held that "an unlawful denial by State action of a right to State political office is not a denial of a right of property or of liberty secured by the due process clause," and, further, that it is not a denial of rights guaranteed by the equal protection or privileges and immunities clauses of the United States Constitution, the court saying further (p 11):

"And State action, even though illegal under State law, can be no more and no less constitutional under the Fourteenth Amendment than if it were sanctioned by the State legislature."

Similarly, in *Sprister v. City of Sturgis*, 242 Mich 68; *MacDonald v. DeWaele*, 263 Mich 233; *Attorney General v. Guy*, 334 Mich 694; and *Cicotte v. Damron*, 345 Mich 528, it was held that one does not have a contractual right to the public office to which he has been elected. With even less force can it be contended that he has a contractual or any other right under the 14th amendment or other provisions of the Federal or State Constitutions, to perform the duties of such office exclusively in the district or circuit in which he has been elected. The rights of both defendant and of the people of the tenth circuit to have defendant serve therein as judge are subject to the provisions of the Michigan Constitution and statute hereinbefore considered.

We conclude that the assignment of the court administrator and the May 9th order of this Court were valid and within the power of this Court, that defendant's willful disobedience thereof constituted contempt of this Court, that he was duly adjudged in contempt and that, in consequence, it was within the power of this Court to require him to pay \$250 to the clerk of this Court and to observe the further order of this Court with respect to future service in the third judicial circuit.

CARR, KELLY, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

EXHIBIT VI

APRIL TERM, 1962

IN RE GRAHAM

1. COURTS—SUPERINTENDENCE OF JUDICIARY—COURT RULES.

The rules concerning the superintendence of the judiciary were designed as implements of procedure and due process for the constitutional mandate of superintendence (Const 1908, art 7, § 4; Rules for Superintendence of Judiciary, Nos 1-9).

2. SAME—OPEN COURT—ACTION ON RECORD.

Courts of record usually act in open court or at chambers, on the record, with respect to judicial duties and matters subject to their jurisdiction.

3. SAME—JUDGES—RECORD—FIDUCIARIES—ACTION WITHIN JURISDICTION.

Judges of courts of record do not usually arrange by telephone, with no record made of such doings in the court file, for distant and off-the-record conferences with fiduciaries appointed by them and remaining under their jurisdictional control, nor do they deal in such manner with estate assets which are the subject-matter of appointment and jurisdictional control.

4. SAME—PROBATE JUDGES—LOANS FROM ESTATES.

It is both intolerable and unpardonable for a probate judge to attempt to negotiate a personal loan to him from an estate subject to his lawful control and orders and to use his official position in furtherance thereof.

5. SAME—SUPERINTENDENCE OF JUDICIARY—PRESUMPTION OF INNOCENCE—BREACH OF FIDUCIARY DUTY—PROBATE JUDGE.

A sympathetic consideration of ethically questionable conduct and of leaning toward application of the presumption of innocence and of crass ignorance on the part of a judge of a court of record who should, but does not, know better, normal in matters of superintendence of the judiciary is not applied where facts adduced disclose a pattern of secretly attempted, and at least once successful, breach of duties of primary and judicial trusteeship on part of respondent probate judge (Const. 1908, art 7, § 4).

REFERENCES FOR POINTS IN HEADNOTES

- [1] 14 Am Jur, Courts § 264 *et seq.*
- [2, 3] 14 Am Jur, Courts § 137.
- [4] 43 Am Jur, Public Officers § 266.
- [6] 21 Am Jur, Executors and Administrators § 804 *et seq.*
- [7, 8, 10] 30A Am Jur, Judges §§ 24, 25.

6. EXECUTORS AND ADMINISTRATORS—APPOINTMENT OF SPECIAL ADMINISTRATOR—ASSETS BROUGHT TO COURT.

It is the duty of a probate judge to appoint a properly bonded special administrator of an estate to take charge of assets of the estate of a decedent which have been brought into court (CL 1948, § 702.60, as amended by PA 1959, No 126).

7. JUDGES—ESTATES OF DECEDENTS—MISAPPLICATION OF FUNDS BY PROBATE JUDGE.

Evidence presented in superintendence proceeding against probate judge *held*, to require a finding that he had appropriated, to his own improper use, indeterminate amounts of money belonging to a decedent's estate subject to his jurisdiction (Const 1908, art 7, § 4).

8. COURTS—SUPERINTENDING CONTROL—REMOVAL FROM OFFICE—IMPEACHMENT.

The Supreme Court's power of superintending control over other State courts includes no power, or duty, to remove or impeach a judicial officer, a function belonging to other branches of government (Const 1908, art 7, § 4; art 9).

9. SAME—SUPERINTENDENCE OF JUDICIARY—EXERCISE OF POWER.

The duty of superintendence of the judiciary should be sparingly and carefully administered (Const 1908, art 7, § 4).

10. SAME—SUPERINTENDENCE OF JUDICIARY—RECOMMENDATION OF REMOVAL FROM OFFICE OF PROBATE JUDGE.

Recommendation, pursuant to rules concerning superintendence of the judiciary, is made to the legislature that a judge of probate be removed from office, where it is found that he had, for a period of time, appropriated to his own improper use, funds from a decedent's estate subject to his jurisdiction, and had attempted to borrow funds from a ward's estate also subject to his jurisdiction, the Supreme Court's power and authority to enjoin the judge of probate from exercising the powers and duties of his office being held in abeyance pending the result, if any, of legislative action, during a period of 30 days from and after delivery of certified copies of opinion, judgment, and order to the governor, president of the senate and speaker of the house of representatives (Const 1908, art 7, § 4; art 9; CLS 1956, § 168.443; Rules for Superintendence of Judiciary).

Original superintendence proceedings by Meredith H. Doyle, Court Administrator, against Henderson Graham, judge of probate, Tuscola county, to restrain further exercise of his functions in office and to effect his removal therefrom. Testimony taken January 23, 1962. (Calendar No. 49,562.) Opinion and order filed April 4, 1962, with reference to governor and legislature for removal proceedings.

Benjamin F. Watson, for plaintiff.

Thomas R. McAllister, for defendant.

PER CURIAM. June 5, 1959, this Court adopted its currently effective rules for superintendence of the judiciary of Michigan. Such rules were prepared and submitted to the Chief Justice, with due recommendation of adoption, by the board of commissioners of the integrated Michigan bar. A transcript thereof may be found in 356 Mich xv-xxi. They were designed as implements of pro-

cedure and due process for the constitutional mandate of superintendence. See Const 1908, art 7, § 4.

Following an investigation which had been instituted and concluded by the attorney general, and reference by his office of the results of such investigation to the court administrator, the present proceeding¹ was authorized by the Chief Justice under Rule No. 3. Since Rule No. 8 requires in presently indicated circumstances that the hearing court make written findings of fact and law, and that such court determine such corrective and disciplinary measures as in the judgment of the court are warranted by such findings, we respond with the following findings and determination.

Henderson Graham, respondent in the present proceeding, is the duly elected, qualified and acting probate judge of Tuscola county. He was serving his second 4-year term during the period of judicial and personal action brought into present scrutiny.

Edwina Dering, by recent marriage Edwina Green, became 21 years of age since the hearing of January 23d. By guardianship proceedings instituted in the Tuscola county probate court under date of January 27, 1958, one William Walkiewicz was appointed guardian of Edwina's estate. Mr. Walkiewicz submitted his final account as such guardian and was duly discharged after having paid over to the successor guardian the accounted amount remaining in his hands, namely, \$3,669.51. Shortly before such discharge Edwina's older sister, Sylvia Goszkowski, a resident of Detroit, was appointed successor guardian of Edwina's estate by order of the respondent judge dated September 21, 1959. The amount of her bond was set by respondent at the sum of \$3,000. Mrs. Goszkowski's bond was approved and filed, and letters of guardianship were duly issued to her by order of the respondent.

Under date of October 3, 1960, Mrs. Goszkowski filed with said probate court an inventory of the ward's estate. The inventory disclosed then, as the testimonial record does now, that the parents of the 2 sisters had been killed in an automobile accident and that there had been distributed, to Mrs. Goszkowski as guardian of Edwina, the total sum of \$16,666.67 representing Edwina's distributive share of the recovered proceeds of death actions which had been instituted, in the Livingston circuit, by the personal representatives of the 2 parental estates. Such proceeds, added to the amount previously received, made up—on the face of the probate record—a net total of liquid assets, in the hands of the guardian, of \$20,294.18 (from the added amounts we have deducted \$42, consisting of allowed administration expenses).

In early February of 1961 the respondent judge, at Caro, that being the county seat of Tuscola county, telephoned guardian Goszkowski at Detroit. The purpose of his call was to open negotiations with the guardian for a personal loan, to him, from the ward's estate as reported in the probate record, in the sum of "about \$20,000." Mrs. Goszkowski advised respondent that she would discuss the proposal with her sister (the ward, then a student at Michigan State University) and that she would return respondent's call. The proposal to Mrs. Goszkowski seemed "unusual." She called her attorney for advice. Her attorney thereupon called a member of the attorney general's staff; whereupon the attorney general's department undertook and concluded the investigation to which we have referred. Details of the latter follow:

Mrs. Goszkowski was directed to call respondent as she had agreed, in the presence of 2 officers of the State Police. The call was made. In the course thereof Mrs. Goszkowski accepted respondent's offer to come to her home, in Detroit, to discuss his proposal. It was agreed that he come to her home "the following Wednesday," which was February 8th. Respondent came to the Goszkowski home as arranged, where the conversation between judge and guardian was secretly recorded by the officers. Mrs. Goszkowski testified that respondent "brought with him several documents about his real estate and insurance policies, and he was going to show that this would be a very good investment as he was—he certainly could cover the \$20,000 if I ever needed it, provided that we went through with the investment." The security offered by respondent for the loan as proposed was to be a promissory note signed by himself and wife, "And he said, well, we could have—we could hold the mortgage on his home or his property, and he said—but he would just as soon not, that all really that would be necessary would be his signature and his wife's." Mrs. Goszkowski went on to relate that respondent said that "If my sister insisted upon a mortgage he would give it to her,

¹ This Court elected under Rule No. 4 to retain jurisdiction. The issues framed by the court administrator's petition and the respondent's answer thereto were heard upon testimony taken, in open Court, January 23, 1962.

and he said we could keep it in the house, and that it wouldn't be necessary to register it."

The following testimony, which is found established by clear preponderance, is significant at this point:

"Q. All right. Now I am still on that Wednesday conference. At any time during this day was the question of your bond as the fiduciary, the guardian, talked about?

"A. Yes.

"Q. What was said about that?

"A. That seeing that the assets were now increased from \$3,000 that I would have to increase my bond, provided I did not make this loan to Judge Graham.

"Q. To him?

"A. Yes.

"Q. Now there is no question about that at all, is there, Mrs. Goszkowski—

"A. No.

"Q. —in your mind?

"A. No.

"Q. Do I gather, then, that if you agreed to make this loan to him your \$3,000 bond would continue as adequate in his court?

"A. Yes."

The conference of February 8th, at the Goszkowski home, was left "with no decision made." Respondent appeared desirous of an answer "at some early date" and Mrs. Goszkowski agreed to get in touch with him later. Two days later, by appointment, Mrs. Goszkowski went to the Detroit office of the attorney general. There she placed a call to respondent. On that occasion she told respondent "that we would not discuss this any more because we would not go through with any type of a note or an investment with him personally." Later that day respondent called Mrs. Goszkowski again and expressed a desire to discuss the proposed loan with the ward, suggesting that "he could go to East Lansing and talk to her." Mrs. Goszkowski then advised that she would discuss the proposal with the ward and "would return his call." That she did, later in the day. Respondent was advised "That my sister would be in Detroit the following day and that if he would like to come to my home he could speak to her." Respondent replied that he would be there at the appointed time: 1 o'clock in the afternoon. The meeting as arranged was duly held. The 2 sisters were present, along with respondent. Officers Whalen and Denkel were present in the home. Their presence was not disclosed to respondent, and the entire conference was tape recorded by them.

The same proposal, to borrow approximately \$20,000 from the ward's estate, was presented by respondent and discussed for approximately 1 hour. The 2 sisters finally told respondent that their decision was "No", whereupon respondent told the two that the guardian's bond would have to be increased from the then amount of \$3,000 if the proposed loan was not made and if made the \$3,000 bond would remain without ordered increase of the amount thereof.

It is unnecessary to detail further the evidence of respondent's design. It was proven clearly and is not categorically denied. And we cannot help noting, with a feeling of shame, the secrecy this judge of a court of record employed as he sought to take over and apply, to his own use, funds of which he was a primary, as well as judicial, trustee. Courts of record usually act in open court or at chambers, on the record, with respect to judicial duties and matters subject to their jurisdiction. The judges thereof do not usually arrange by telephone, with no record made of such doings in the court file, for distant and off-the-record conferences with fiduciaries appointed by them and remaining under their jurisdictional control. Nor do they deal in such manner with the subject-matter of appointment and jurisdictional control, that is, estate assets.

This Court finds that, on and prior to February 11, 1961, the respondent judge sought affirmatively if unsuccessfully to negotiate secretly a personal loan to him from an estate subject to his lawful control and orders, in the sum of approximately \$20,000, and to use his official position in furtherance thereof. Such conduct on the part of a judge is both intolerable and unpardonable. We shall say more of this later.

The respondent judge was given full opportunity to explain and excuse his conduct. An all day hearing was provided with all eligible members of the Court participating. No further time for presentation of additional proof was requested. Respondent's defense, submitted by testimony and with the aid of able counsel, is that he is not legally schooled, that he was not versed or familiar with the canons of judicial ethics, that he was guilty at worst of poor judgment, that he was activated by honest if ill-advised motives, that adequate security for

the proposed loan would have been provided, and that no injunctive or recom-mendatory order should issue as prayed in the court administrator's petition.² For reasons already indicated and others to follow, this position is found wholly untenable.

In matters of superintendence particularly, our normal instinct is that of sym-pathetic consideration of ethically questionable conduct and, where some doubt exists, that of leaning toward application of the presumption of innocence and crass ignorance on the part of one who should, but does not, know better. In such instances the inclination of a constitutionally charged superintendent might well be that of ordering a judgment of censure and reprimand only. But there are other facts, shown here beyond fair dispute, which require forceful action. We simply cannot overlook a disclosed pattern of secretly attempted and once-suc-cessful "borrowing," by a probate judge, from estates under his jurisdiction. Once such pattern is discovered, the opportunity of continuity thereof must be concluded with firmness and resolution.

It was established testimonially, during the hearing of January 23, that the respondent actually took over and commingled with his own funds certain cash which at all times belonged of right in the hands of a duly appointed fiduciary of another estate under his jurisdiction. Study of such testimony has resulted in our calling in, for examination, the Tuscola county probate file entitled "In the matter of the estate of John Prief a/k/a John Brief, deceased."

A few days after Mr. Prief's death a Mr. Montague brought in, to the Tuscola county probate court, certain amounts of cash belonging to the decedent. The first amount was \$2,990. It was brought in November 25, 1959, and receipted for as estate funds by the probate register, Mrs. Douglas Putnam (a witness during the hearing of January 23). The next amount, \$661.51, was brought in by Mr. Montague on November 27, 1959, and receipted for by respondent as estate funds. No special administrator was appointed³ and it was not until October 31, 1960, that Claude Sirdan, another witness who testified during the hearing of January 23, was appointed executor of Mr. Prief's will upon order of respondent. Mr. Sirdan promptly asked respondent for the money belonging to the estate and, shortly after such request, received \$2,990 thereof from re-spondent. On the first occasion thereafter, when Mr. Sirdan asked for the balance, respondent said "I'll have a check in the mail shortly." No check was sent. Still again Mr. Sirdan asked the judge for the balance. The judge replied "You don't need the money too bad right now, and I'll have it to you shortly." It was not until the estate was ready for closing and distribution that respondent paid the balance and, being in doubt respecting the amount owing by him to the estate,⁴ did so by his personal "blank check" sent to the attorney for the estate. The latter was told to compute what was due from the judge and to fill out the check as to amount, which he did.

The only explanation offered by Judge Graham, for retention of the remaining six hundred odd dollars received by him from Mr. Montague, was that "It appar-ently got into a compartment where I kept some of my own personal money at times." We cannot accept this as an excuse for such judicial misconduct and find as a fact that the respondent appropriated, to his own improper use, between November 27, 1959, and the distribution of the Prief estate on May 16, 1961, indeterminate amounts of money belonging to the estate.

The judgment of this Court is sufficiently indicated by findings of fact and law aforesaid. Our constitutional obligation is clear. The "unlimited" extent of exigent duty arising under the constitutional mandate was unanimously considered and plainly defined in *In re Huff*, 352 Mich 402. It includes no power of or duty to remove or impeach a judicial officer, a function belonging to other branches of government under article 9 (Const 1908), yet it brooks no shrinkage from that

² The prayer is as follows:

"Wherefore, your petitioner prays that the Court forthwith enter its order commanding respondent to desist and refrain further from exercising the powers and functions of said office of judge of probate or in any way, directly or indirectly, interfering with or impeding the orderly operation of said office of judge of probate of said county of Tuscola until the further order of the Court; and further, that the Court forthwith direct a written communication to the legislature of the State of Michigan requesting the adoption of a concurrent resolution of 2/3 of the members elected to each house thereof, under and by virtue of the provisions of article 9, section 6 of the Constitution of Michigan (1908), demanding of the governor the immediate removal of said respondent, Henderson Graham, from said office of judge of probate of the county of Tuscola."

³ When the funds were brought in it was the plain duty of Judge Graham to appoint, immediately, a properly bonded special administrator of Mr. Prief's estate to take charge of such assets. See CL 1948, § 702.60, as amended by PA 1959, No. 126 (Stat Ann 1959 Cum Supp § 27.3178 [130]).

⁴ Judge Graham apparently kept no record of the amounts receipted for November 25 and 27, 1959. It was by resort to the receipts given Mr. Montague that the attorney for the estate was able to compute the amount owing and thus ready the estate for distribution.

which was pressed upon this Court, by the people, on 2 separate occasions, once in 1850 and again in 1908.

In modern times the present proceeding is the second occasion only when disciplinary action under the superintendence section has become imperative. This speaks volumes to the general credit of Michigan's judiciary. It shows, too, that the duty of disciplinary superintendence is, as it should be, sparingly and carefully administered. We regret, then, that action of such nature has to be taken now against a judge of a subordinate court. Regret, however, relieves us no whit from duty. Here it is shown abundantly, by proof we have seen uttered, heard uttered, and then have examined with requisite reading care, that a judge of one of our courts of record has been guilty of that kind of misconduct which would require firm animadversion of any responsible superintendent.

Judgment and Order

It is judgment of this Court that there is reasonable cause within meaning and purpose of section 6 of article 9 of the Constitution (1908), for recommendation under Rule 8 that the legislature, after due hearing (see CLS 1956, § 168.443 [Stat Ann 1956 Rev § 6.1443]), adopt a concurrent resolution for removal of Henderson Graham, judge of the probate court of Tuscola county, from such judicial office.

It is adjudged accordingly that this Court does so recommend.

Upon due consideration of the foregoing it is

Ordered that certified copies of the foregoing opinion, and of this appended judgment and order, be forthwith transmitted by the clerk to the governor, and to the president of the senate and the speaker of the house of representatives, and

Ordered further, that the records and files of this Court in the matter of the proceeding entitled above, including the transcript of all testimony taken during the hearing of January 23d and the State police tape recordings marked exhibits 1 and 2, and expressly including the 2 Tuscola county probate files that are now in custody of the clerk, be made available under supervision of the Chief Justice to such committee or committees of the legislature as may have need for same.

It is further ordered that the question whether this Court shall employ its power and authority to enjoin said judge of probate, from exercising the powers and duties of said judicial office, be held in abeyance pending the result if any of legislative action, as recommended above, during a period of 30 days from and after delivery of such certified copies to the governor, the president of the senate, and the speaker of the house of representatives.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, and OTIS M. SMITH, JJ., concurred.

SOURIS, J. (*concurring*). I concur in my Brothers' finding of facts, the conclusions reached therefrom, and the recommendation to the legislature and to the governor that respondent be removed from office as provided by Const 1908, art 9, § 6. However, our constitutionally mandated duty to exercise general superintending control over inferior courts (art 7, § 4) requires more from us. We should forthwith enter our order enjoining respondent from exercising the powers and duties of his judicial office pending the legislative and executive action recommended, or until further order of this Court.

We have found that respondent's misconduct, related to the performance of his judicial duties, was shameful, unpardonable and intolerable and for such misconduct we have recommended his removal from office. How, then, can we justify his interim exercise of judicial authority, authority which rests alone upon the public's continuing confidence in the moral integrity of its judgments? I cannot. Nor can I justify exposing the citizens of this State, not alone of Tuscola county, to the possibility of continuing depredations by this respondent until the legislature and the governor are able to act.

ADAMS, J., did not sit.

[On May 17, 1962, an order was entered, reciting that the legislature had not adopted a resolution as recommended: enjoining respondent from exercising powers and duties of judge of probate, or in any way, directly or indirectly, interfering with or impeding the orderly operation of said office, or in any way attempting to direct or control the course of any proceedings pending in the probate court of Tuscola county; and directing the circuit judge of the circuit including the county of Tuscola to exercise supervisory control over the probate court and, in conjunction with the court administrator, to procure such judicial assistance as may be deemed necessary.—REPORTER.]

Senator TYDINGS. Thank you very much, Mr. Hall, for your most helpful testimony, direct and to the point, and for the obvious interest

you show in this important area, and for bringing your lovely wife to our Nation's Capital, who I am sure will grace the entire environs. And I wish you a happy journey home.

Mr. HALL. Thank you for making that a part of the court record. Thank you for inviting me.

Senator TYDINGS. We are delighted to welcome Mr. LeRoy Blackstock, president of the Oklahoma Bar Association.

Mr. Blackstock, Senator Harris just called me. Unfortunately he still is chairing a subcommittee at this time. Our Senators are extremely active. And Senator Harris stated that he would particularly like an opportunity to see you before you leave if you would be kind enough to drop by his office. And I have got another message which I will give to you from Senator Harris after the hearing.

We will incorporate your statement in its entirety, Mr. Blackstock, and suggest that you emphasize or summarize it in the most expeditious manner you see fit, bringing out the points which you think should be stressed.

STATEMENT OF LEROY BLACKSTOCK, PRESIDENT, OKLAHOMA BAR ASSOCIATION

Mr. BLACKSTOCK. Thank you, Mr. Chairman and distinguished members of the subcommittee.

As the statement reflects, we do have under our State constitution the impeachment process by which you can move against a member of the supreme court. That impeachment process does not cover any judge of our court of criminal appeals, nor any trial judges. The only forum by which you can go against a trial judge or the court of criminal appeals is through an ancient system known as ouster action. And that involves one that the chairman, I believe, referred to a while ago, of a nonprofessional group. It involves a jury trial. Those are the only two forums which are provided in Oklahoma either by constitutional provision or by the State statute.

We have the history of four impeachment trials against justices of the Oklahoma Supreme Court.

Senator TYDINGS. You are talking about the supreme court now?

Mr. BLACKSTOCK. Yes. We have two appellate courts, one with civil cases, which is a constitutional court. And then our constitution provides that the legislature may set up a court of criminal appeals, which it did. And they are judges.

In the middle twenties in Oklahoma the legislature impeached a Governor. And then they got impeachment happy, as somebody said, and attempted to impeach three supreme court justices in the latter 1920's, all of which failed.

And there were no more impeachment trials until the impeachment trial in 1965 of Justice N. B. Johnson, who was impeached by the narrowest of margins, the required 30 votes, and that is what it was, and he was impeached.

Senator TYDINGS. Let me ask you, the impeachment attempts of the judges back in the twenties, were they politically motivated, or were there political overtones in those impeachments?

Mr. BLACKSTOCK. I would say very, very much, almost 100 percent.

Senator TYDINGS. I know it was before you were born or during your youth anyway. But do you recall any details?

Mr. BLACKSTOCK. Thank you, Mr. Chairman. It was at an early age. But everybody I think that was included was politically motivated in every respect.

Senator TYDINGS. Was party politics involved, and judges of one party in the legislature?

Mr. BLACKSTOCK. No; I think it was somewhat of an estrangement between members of the court and members of the State legislature. Because at that time we were pretty much a one-party State. So it was not a matter of partisan politics, but intraparty, I imagine—I would not necessarily say it was party politics, but it grew out of some other matters, holdings that they have made against certain legislative enactments, and so forth.

Senator TYDINGS. You mean the Supreme Court of Oklahoma had ruled certain legislative enactments unconstitutional?

Mr. BLACKSTOCK. Yes. So that delineated into a partisan matter. I call it a political matter, but it had nothing to do with the two-party system.

Senator TYDINGS. Right; a political matter in the broadest sense.

Mr. BLACKSTOCK. Yes, sir.

Senator TYDINGS. And what sort of charges did they bring against the judges?

Mr. BLACKSTOCK. Most of them for incompetency.

Senator TYDINGS. Not based on misconduct or disability?

Mr. BLACKSTOCK. I cannot recall exactly. But the successful impeachment of Governor Walton was on incompetency. The exact charges I cannot tell you about now, but most of them were competency, as I recall.

Senator TYDINGS. It did not involve moral turpitude, or anything like that?

Mr. BLACKSTOCK. No, sir; they did not.

Senator TYDINGS. I was interested for the record, because one of the points about which I feel very strongly is that impeachment offers the opportunity for politics to become intermingled with the judiciary, which is unfortunate. And not only is impeachment not effective, it is an invitation for political considerations to affect the judiciary. And I was interested to get your testimony on this point, because I think it reinforces the testimony we have had from other distinguished lawyers and jurists before the committee. And it reinforces my own thinking on the point as well.

Mr. BLACKSTOCK. The impeachment trial which is in the sharp memory of everybody in Oklahoma, of course, was the 1965 impeachment trial of Justice N. B. Johnson. And our procedure is the same as in most of the States. The House is the prosecutor, and the forum is the Senate. And we have had reapportionment in Oklahoma, and but for reapportionment it is my firm opinion that the impeachment process against Justice Johnson would not have been accomplished. It required 30 votes for impeachment and that is what it got. ■

But I am against the impeachment process not only because of the fact that it may be a political circus—although I would say this, I think the Oklahoma Legislature performed admirably throughout that matter, and did a very distinguished job.

Senator TYDINGS. You are referring to this impeachment proceeding of 1965?

Mr. BLACKSTOCK. Yes, sir.

Senator TYDINGS. But that involved moral turpitude, did it not?

Mr. BLACKSTOCK. Yes sir.

Senator TYDINGS. That did not involve incompetency?

Mr. BLACKSTOCK. No, sir. It was solely on alleged impropriety. But the Legislature of Oklahoma in my opinion performed most adequately in that particular situation.

But the cost was—the cost of the actual legislators' time was only \$50,000. And other costs—

Senator TYDINGS. Is that 10 cents an hour—

Mr. BLACKSTOCK. It is not very much more than that. But the total cost of a State legislature to conduct an impeachment trial is in excess of \$100,000. Florida has had two impeachment trials there in recent years, and one cost \$110,000, and the other cost approximately \$115,000. They are very time-consuming and they are very expensive.

But I would very much reinforce—I am in favor of the chairman's remarks that a forum to try an errant judge or default of a judge is within the judicial establishment, or by professional members of a court, and it should never be by impeachment, nor should it be a trial by jury. I think it is much more penetrating and probative and fair if it is—if the forum, the members of the forum are composed of professional people such as the lawyers and the judges.

The Oklahoma Bar Association experienced some frustration in 1950 when one of our common pleas judges, which is the court of record, came on the bench and performed less than admirably, in a very bad manner. And there was some suggestion of intoxication. And there was very little argument as to the fact that he was guilty of both social and professional indiscretion by performing that way on the bench. The Oklahoma Bar Association sought to remove him.

Senator TYDINGS. That was a case where the supreme court had held that the bar association had no authority over the—

Mr. BLACKSTOCK. They said that when a lawyer becomes a judge, he is no longer a lawyer, and therefore you fellows in the bar association cannot do a thing in the world about it.

So we were actually—the writ of prohibition was issued against us, and so we suffered for several years, probably a decade, trying to figure out how to get around it.

Senator TYDINGS. Had that decision been the other way, would you have disbarred the judge? Or what would you have done?

Mr. BLACKSTOCK. Our plan was that we felt the judge should be disbarred, and that having been disbarred, I think we could not have removed him from office, he would have served out his term, and then when he filed for reelection he would have had to have been a lawyer at that time, and at that time our efforts would have been effective to get him off the bench. I say that by way of speculation. We have some case authority on a judge—on a prosecutor violating Canon 20, in which he makes pretrial statements and violates Canon 20, and in those they can disbar the prosecutor, but they cannot remove him from the prosecutor's office, until the end of his term he cannot refile because he has lost his license.

The several years remaining after that devolved around the study—and our State bar being very much interested in it, then began its real work in the early 1960's, about 1960, to provide a forum which would have to be, as Mr. Hall said about Michigan, a constitutional

amendment. That is the only way we could have gotten the forum, which we did. And we feel like the experience in other States such as in New York and California has been very valuable to us.

And then in addition to having the forum, it would be classified to two main subheads. One would be removal, and one would be retirement, compulsory retirement. And then under compulsory retirement you have two subheads, with or without compensation. And that court we have now—it is in my statement, I will not go into detail about it, but it is composed of lawyers and judges, and since the bar association wrote it, we provide the prosecutor. So we know, we feel like the motivation will be through the bar association, and that we will have a very effective court. But I think that the court is going to be—

Senator TYDINGS. Have you used your court of the judiciary yet?

Mr. BLACKSTOCK. No, it is very much in its infancy. It was passed on May 3.

Senator TYDINGS. Of this year?

Mr. BLACKSTOCK. Of this year. It is that recent. But it has been implemented, it provides that within 30 days we can name the personnel, which has been done, and within 30 days it shall meet and organize, which it has. So in Oklahoma what we are doing now is writing the rules of procedure.

Senator TYDINGS. Have you written the rules of procedure for this court of the judiciary which you have now?

Mr. BLACKSTOCK. They are being written now.

Senator TYDINGS. By whom?

Mr. BLACKSTOCK. By the court itself, but principally by the lawyer members of the Oklahoma Bar Association.

Senator TYDINGS. How did you happen to pattern your machinery for removal or retirement more on the New York system than on the California system?

Mr. BLACKSTOCK. We feel that the New York system is better in this—maybe I should say that we did not take too strongly to the California system. We feel like professional people should constitute the members of the forum, but we do not believe that the supreme court itself is—as I understand the California system, a commission makes the investigation, and so forth, and then refers it to the court. We feel like we should have a separate and autonomous group. Not that I would recommend that in the federal system. But this is because of the lack of a real good administrative system in our State court as contrasted to a much better administrative system in the federal system. We think that it moves better if we can have an autonomous body.

Incidentally, there is no appeal from our court on the judiciary, that is the end of it. We have a trial division and an appellate division, and that is the end.

Senator TYDINGS. You do not have any permanent secretary, anyone to receive complaints. Where would a complaint be made by a lawyer to the bar?

Mr. BLACKSTOCK. It would be made through the bar association.

Senator TYDINGS. To the bar association?

Mr. BLACKSTOCK. Yes. Now, also the rules will provide, I am sure—because I have heard them talk to the people—they will provide a form of an executive secretary, or staff personnel. But the act

itself provides to whom you may make the complaint. We feel like a complaint should be—that private individuals should not be permitted to make the complaint direct, because in our grievance matters 80 percent, or 90 percent of the complaints against lawyers, are frivolous. But there are some that have real merit. And if it is a complaint against a lawyer, and his conduct before a judge, then that will be sifted all through the bar association, and the bar association will make the complaint. By that time it is a genuine complaint.

Senator TYDINGS. In other words, the bar association is the one that is going to do the screening?

Mr. BLACKSTOCK. I am sure they will do most of it, like the commission in California.

Senator TYDINGS. Like the commission in California?

Mr. BLACKSTOCK. Yes, sir.

I might comment, if it is proper, if I have the time, that it is my personal feeling that moral turpitude is probably not the main thing, not the only thing. I feel like a much broader area—that more repetitive situations arise as to the professional competency of the judge rather than moral turpitude. Moral turpitude are isolated cases.

And the thing that the Federal system would profit by a great deal is that your judicial council will gather statistics. And in modern days we need to set up the criteria, and then apply the facts to these criteria. And in our State we are going to have to have some system of gathering the information in order to make an honest evaluation of the judge's performance. And statistics is one source.

Senator TYDINGS. In your court of the judiciary do you include a representative of the State bar on both courts?

Mr. BLACKSTOCK. Yes sir.

Senator TYDINGS. But you include no representative of the public?

Mr. BLACKSTOCK. No sir.

Senator TYDINGS. Why did you include a representative of the State bar?

Mr. BLACKSTOCK. Because I think the bar association has a great interest in this, and that the traditional and active participation of the State bar in promulgating its legislation, and promulgating grievance matters, brought about this interest. And I think, too, we might as well admit, the bar association wrote this measure, and we wanted participation in it somewhere in the process.

Senator TYDINGS. You do not think that would impair the independence of the judiciary?

Mr. BLACKSTOCK. I didn't get that.

Senator TYDINGS. Do you think that the presence of lawyers on each of these two courts would impair the independence of the judiciary?

Mr. BLACKSTOCK. I do not look upon the presence—I do not look upon the court on the judiciary in the first place as impairing the judicial independence. I feel it is of great help—I do not feel that the presence of a member of the bar association on the court would impair it, I think it would greatly help it. I realize that I am speaking as a representative of the bar association. Therefore it is the feeling of the lawyers that the judges are much more sensitive now to the fact that they have immunity removed, which they traditionally had. In other words, they are no longer not only men—

Senator TYDINGS. They no longer can walk on water.

Mr. BLACKSTOCK. I guess that is a good expression.

Senator TYDINGS. Thank you very much, Mr. Blackstock. We have a message for you here from Senator Harris.

And also we would like an opportunity to talk with you on other matters before you go back to Oklahoma if you have some time this morning or this afternoon.

Mr. BLACKSTOCK. I would like to say, as I said in my statement, how much I applaud this committee. Of course, I know about your personal participation. But we in the bar association are so much interested in quality of the judiciary—if I can take 60 seconds—in a sense, we have gone at this backward in Oklahoma. Real judicial reform begins with selection and tenure. You already have it in the federal system. And then if you have made a mistake the court on the judiciary takes care of it, but we started with the court on the judiciary and now we are starting on the other.

Senator TYDINGS. Thank you very much, sir.

(The statement of LeRoy Blackstock follows:)

STATEMENT OF LEROY BLACKSTOCK, TULSA, OKLA., PRESIDENT, OKLAHOMA BAR ASSOCIATION

Mr. Chairman and members of the subcommittee, on May 3, 1966, the voters of the State of Oklahoma, by overwhelming plurality of three to one (3-1), voted in favor of an amendment to Article VII-A of the Oklahoma State Constitution creating a Court on the Judiciary, consisting of a Trial Division and an Appellate Division.

The Court on the Judiciary was proposed originally by the Oklahoma Bar Association in the 29th Legislature of Oklahoma on June 10-11, 1963. It is modeled closely on the New York Amendment passed in 1947, but also incorporates elements of legislation of both California and Illinois.

The Trial Court Division, mentioned above, has nine members, eight of whom are District Judges, senior in service, but under sixty (60) years of age, with no two (2) from the same Supreme Court Judicial District. It also has one lawyer from the Oklahoma Bar Association, chosen by that group.

The Appellate Division has two (2) members from the Oklahoma Supreme Court, chosen by that body, one active member of the Oklahoma Bar Association, chosen by that Association, one member of the Court of Criminal Appeals, chosen by that Court, and five District Judges, senior in service, but under sixty-five (65) years of age. All members of the Court met and organized on June 29 of this year and commenced preparation of rules of procedure.

The Oklahoma Court on the Judiciary does not replace—it supplements existing removal procedures; however, these procedures in the past have not been considered sufficiently effective. Prior to the enactment of the Amendment, the methods provided by the Oklahoma Constitution and State Statutes for removal were:

- (1) Impeachment for members of the Oklahoma Supreme Court; and
- (2) Ouster by action for members of the Court of Criminal Appeals and all trial courts.

The impeachment process has been found to be both expensive and political. The expenses of a special session of the Oklahoma Legislature, or the extension of a regular session to serve as an indictment and court of impeachment body, have to be borne by the already over-burdened taxpayers.

The action of an impeachment tribunal could, of necessity, degenerate into a partisan political squabble.

Under present Oklahoma Ouster Statutes (22 O.S. 1961, par. 1181, and 51 O.S. 1961, Sec. 93) grounds for removal of judicial personnel run the gamut of habitual drunkenness to a failure to account for public funds, but few of the causes for removal have anything to do with the judge's *technical* and *professional* fitness to perform his job, nor do they deal with the very vital factor of diligence. Experience in Oklahoma has shown the ouster statute has never been invoked against a judge, so for all practical considerations for the improvement of the administration of justice, the ouster statute is valueless.

The Oklahoma Bar Association has traditionally carried on a vigorous program of disciplinary matters involving its members. It also has given much attention to the improvement of the administration of justice. It has involved itself in alleged misconduct of judges.

The efforts of our Bar Association were begun several years before the so-called, alleged bribery scandals involving four members or former members of the Oklahoma Supreme Court. The Oklahoma Bar leadership, along with the leadership of other State Bars, has been interested not only in deviations among the judiciary involving moral turpitude and social and professional indiscretions, but it has also concerned itself with diligence and high professional qualifications among the judiciary.

The Court on the Judiciary was personally written and supported in the State Legislature by the Past Presidents of the Oklahoma Bar Association, who experienced frustration in their previous attempts to discipline errant judges through proceedings by the Bar Association.

In November, 1950, the Supreme Court of Oklahoma, in a landmark case (*Chambers v. Central Committee of the Oklahoma Bar Association*, 224 Pac. 2d 583) held that a judge is not an attorney at law so long as he holds the judicial position. In the Chambers case a Grievance Committee of the Oklahoma Bar Association sought to discipline a judge of a court of record charging that the judge used loud, boisterous and intemperant language, that he gave evidence to those in his courtroom that he was swayed by some uncontrolled emotion, perhaps arising from anger or hatred, or perhaps from using intoxicating liquor. The Oklahoma Supreme Court issued a Writ of Prohibition against the Bar Association Committee prohibiting the Bar Association from proceeding upon its complaint against the judge. The Oklahoma Court, in rendering its decision, stated, among other things, as follows:

"In Oklahoma misconduct of a judge may be dealt with in certain cases by criminal prosecution, or in certain cases by action (ouster actions) to remove the judge from office, or in the case of elective judicial office, he may be dealt with by the citizens at the voting places. There is no rule making a judge answerable to a group of his own profession, the Bar Association. It is so as to all state officials. They are all answerable to the law, and to the courts as provided by law, and to all the people under the election plan. When it is sought to make a judge, or any official, answerable to any other forum, or in any other character of proceedings, then legal authority therefor must appear. There is no such legal authority and it is our duty to grant prohibition to the end that this unauthorized action shall not proceed further."

The Bar Association, therefore, having decided that there was no provision for impeachment of trial judges or judges of the Criminal Court of Appeals, and having found that ouster proceedings were impractical and having received the adverse decision in the Chambers case, then turned to the task of establishing a constitutional forum which would grant relief in the case of social or professional indiscretions of the judge, as well as other shortcomings.

The Bar Association leadership studied for several years the Court on the Judiciary established in New York and legislation of both California and Illinois.

The State Bar then wrote its own Constitutional Amendment and took it to the Legislature where it was passed and placed on the ballot.

It will be interesting to contrast the procedures of impeachment and ouster action provided by the Constitution and Statutes of the State of Oklahoma with the newly adopted measures under the Court on the Judiciary.

The Oklahoma plan provides two separate forms of relief, that of:

- (1) Removal from office; and
- (2) Compulsory retirement from office.

Under the Oklahoma Plan for a Court on the Judiciary causes for removal from office are:

- (1) Gross neglect of duty;
- (2) Corruption in office;
- (3) Habitual drunkenness;
- (4) Commission in office of any offense involving moral turpitude;
- (5) Gross partiality in office;
- (6) Oppression in office;
- (7) Other grounds as may be specified hereinafter by the Legislature.

Causes for compulsory retirement from office, with or without compensation, are:

- (1) Mental or physical disability preventing the proper performance of official duties;
- (2) Incompetence to perform the duties of the office.

In light of the rapidly rising concern among both the laymen and the lawyers for a more professionally qualified judiciary; it may well be anticipated that the Court on the Judiciary will prove to be one of the most effective vehicles yet devised for maintaining a quality judiciary. This is underlined by the provision for compulsory retirement from office and points up the necessity for both mental and physical fitness in one performing the duties of a judge.

The jurisdiction of the trial division of the Court on the Judiciary may be invoked by a petition filed by either the Supreme Court or the Chief Justice of that court, by the Governor, by the Attorney General, by the Executive Secretary of the Oklahoma Bar Association, when directed to do so by the majority vote of the members of the Executive Council (State Board of Directors), by the Resolution of the House of Delegates of the Oklahoma Bar Association, or by Resolution of the House of Representatives of the Oklahoma Legislature. Prosecution under the proposal is placed in the hands of a member of the Bar selected from a list of five submitted to the presiding judge of the Trial Division by the Executive Council of the Oklahoma Bar Association.

The penetrating disciplinary measures of the Court on the Judiciary once and for all time remove the immunity which traditionally surrounded members of the judiciary. This sweeping change should aid materially in providing a judiciary more professionally and less politically responsive to the people.

The accelerating complexity of a mature society, the rights and responsibilities of contemporary citizens, both individual and corporate, can be determined only by, and the labyrinth of modern day statutes can be interpreted only by judges of the highest quality.

The adoption of a Court on the Judiciary in and of itself does not provide complete court reform. The next and final phase of judicial reform involves the enactment of a still further Constitutional Amendment in Oklahoma providing for the complete reorganization and modernization of our court system to provide a four level court plan and the removal of the political election process for selection of judges by substituting therefor the American Bar Association model plan on merit selection and tenure of judges and justices. We are now very much involved in the processes of submitting this plan to our Oklahoma citizens by an initiative petition and look forward to success in this final effort.

I personally applaud the interest of this Subcommittee in judicial reform and am gratified for the opportunity to express my views, along with other interested citizens, on matters involving the modernization and improvement of the Judicial Branch of our Government.

Senator TYDINGS. We are happy to welcome Judge S. Ralph Warnken, former distinguished jurist of the Supreme Bench of Baltimore City, leader of the Maryland bar, and also the father of the Maryland removal system as it was submitted to the Legislature of Maryland last year.

We are delighted to welcome you before this subcommittee, Judge Warnken. I have read your statement, and we will incorporate it in its entirety into the record.

We are particularly interested in how you prepared, organized, and adopted the original plan which you presented to the legislature, the motivation behind it, and how you happened to draft such a particular system which, it is my understanding, was patterned after the California plan.

STATEMENT OF HON. S. RALPH WARNKEN, RETIRED JUDGE, SUPREME BENCH OF BALTIMORE CITY

Judge WARNKEN. I think I am fairly safe in saying that the origin of this plan resulted from an article which appeared in the American Bar Association's Journal written by Mr. Frankel, who is secretary of the California commission, because it was called to the attention of Mr. Proctor, who was then the president of our Maryland Bar Association by Senator James, and by Delegate Stark, and also by a lawyer, Reginald Baldwin. I happened to be chairman of the legal

ethics committee at the time, and Mr. Proctor referred the matter to our committee to look into and determine whether we thought there was a need for some such commission in Maryland.

Senator TYDINGS. Was this before or after the Judge Berry incident when the legislature attempted to use legislative address?

Judge WARNKEN. It was after Judge Berry—you see, he was a judge from 1959 to 1964. We did not start our work until along about 1963, I would say. And, of course, between 1959 and 1963 considerable trouble had been had with Judge Berry with respect to his absence from court and other things. And it was desired to have him do something about it, either resign or really come back and work like the other judges in Baltimore County did.

Senator TYDINGS. What do you mean absence from court?

Judge WARNKEN. Oh, my goodness, from 1959 to the time that he resigned, which was in, I think, 1964, he spent very little time presiding in court. And he was quite unsatisfactory when he did preside. All of that is generally known by almost everybody in Maryland who is familiar with law matters.

Senator TYDINGS. The purpose of my question was to get it on the record.

Judge WARNKEN. Yes. Well, he, of course, did have an operation, which would be some excuse for some absence from the court. But there was so much absenteeism that it was terrible. And the judges out there themselves brought the matter to the attention of the Governor and others. And then, of course, there was a committee of the State Bar association appointed which investigated the matter and made a very full report. It was a very fine committee, and its report was published—

Senator TYDINGS. Do you have a copy of that report?

Judge WARNKEN. It was published in the Daily Record.

Senator TYDINGS. If you do not have it, you could probably get it for us.

Judge WARNKEN. Yes, indeed, I have it; fortunately, I did bring it with me.

Senator TYDINGS. We would like to incorporate that report in its entirety in the record at this point.

(The report referred to follows:)

[From the Daily Record, July 10, 1964]

MARYLAND STATE BAR ASSOCIATION COMMITTEE REPORT

EXECUTIVE COUNCIL URGES BERRY'S REMOVAL FROM OFFICE WITH PETITION

In a letter received from H. Vernon Eney, retiring president of the Maryland State Bar Association it was stated that the committee to study the removal of Judge George M. Berry from office as well as introduce into legislature a ruling to remove unsatisfactory judges from office has been worked out by a committee headed by S. Ralph Warnken, retired Baltimore judge.

In the letter sent to THE DAILY RECORD, Mr. Eney stated:

"Under date of May 9, 1964, the Hon. Frederick W. Brune wrote to me suggesting that the Maryland State Bar Association appoint a Special Committee to investigate the charges which had been made publicly that Judge George M. Berry of the Circuit Court for Baltimore County was either unable or unwilling to perform the duties required of a judge of that Court. A copy of this letter was sent to the Governor and under date of May 12, 1964, the Governor wrote to me stating that he would lend his unqualified support and endorsement to Judge Berry's request.

At the direction of the Executive Council of the State Bar Association, I appointed a Special Committee to investigate this matter under the chairmanship

of T. Hughlett Henry, Jr., Esq. of Easton. The remaining members of the Committee were Franklin G. Allen, Esq., of Baltimore, David W. Byron, Esq. of Hagerstown, William M. Loker, Jr., Esq. of Leonardtown, and David R. Owen, Esq. of Baltimore.

The Special Committee has made its investigation and submitted a written report to me under date of June 22, 1964. This report was presented by me to the Executive Council at a special meeting called for that purpose. The Executive Council has carefully studied and considered the report of the Special Committee and approves the conclusions set forth therein. In the opinion of the Executive Council, the public interest requires that Judge Berry be either retired or removed from office as soon as possible so that his judicial position can be filled by one able and willing to perform the duties of that office. Accordingly, the Executive Council will petition the General Assembly of Maryland to retire or remove Judge Berry forthwith.

Although the Executive Council concurs in the conclusion of the Special Committee that this matter is extremely urgent, it is mindful of the fact that many problems are involved in calling a special session of the Legislature and also notes that the facts with respect to Judge Berry's failure to perform his judicial duties have been known for several years, during which time there have been at least two regular sessions of the Legislature. Accordingly, the Executive Council has determined not to request Governor Tawes to call a special session of the Legislature but it will present the petition to retire or remove Judge Berry at the next regular or special session of the Legislature. I have advised Chief Judge Brune and Governor Tawes of this action of the Executive Council and have given to each of them copies of the report of the Special Committee and of each of the exhibits referred to therein. In due time a copy of the report of the Special Committee and exhibits thereto and the transcript of the testimony taken by the Special Committee will be presented to the proper officers of the General Assembly, together with a petition of the Maryland State Bar Association to retire or remove Judge Berry from office."

COMMITTEE REPORT INCLUDED

The Special Committee of the Maryland State Bar Association appointed by Mr. Eney on May 11, 1964, at the request of Chief Judge Frederick W. Brune, of the Court of Appeals of Maryland, to investigate the charges against Judge George M. Berry, has completed its investigation and renders herewith its report:

PROCEDURES OF COMMITTEE

Your letter stated that the Executive Council of the Association had left to the Committee the determination of all procedural matters and the nature and extent of its investigation. Your Committee was immediately organized and first met on May 13th, and determined that since it had no power of subpoena, it would request the witnesses to appear and make voluntary statements and submit to questions by the Committee. The witnesses were not sworn and the Committee was not represented by counsel. The Committee, meeting in the Court House in Towson, first took the evidence of Judges Barrett, Menchine, Raine and Turnbull, who with the exception of Judge Lindsay, who is now deceased, were all the signers of a letter addressed to Governor Tawes dated April 16, 1964, petitioning the Governor to request Judge Berry's resignation, or in the alternative, to call a Special Session of the Legislature to "consider appropriate legislation under the provisions of Article IV, Section 3 of the Constitution of Maryland".

The Committee also heard the evidence of the following members of the Baltimore County Bar: Kenneth C. Proctor, Esquire, Johnson Bowie, Esquire, E. Scott Moore, Esquire, County Solicitor, James H. Cook, Esquire, Clinton P. Pitts, Master in Chancery, W. Mitchell Jenifer, Esquire, and the following county officials: County Probation Officer, Clerk of the Court, Chief Deputy Clerk of the Court, and the Special Assistant Clerk of the Court who performs the function of Court Clerk for Judge Berry. The Committee communicated with Chief Judge Day of the Third Judicial Circuit and expressed an interest in hearing from either Judge Day or Judge Dyer, the remaining judge in the Third Judicial Circuit. While Judge Day expressed a willingness both personally and on behalf of Judge Dyer to appear before the Committee, their expressed lack of knowledge of the circumstances surrounding the charge against Judge Berry led the Committee to feel that a formal request for the appearance of either of them would be an unwarranted interruption of their duties.

The Chairman interviewed Chief Judge Frederick W. Brune, of the Court of Appeals, concerning correspondence and other communications between him and Judge Berry in May, 1962, a copy of which correspondence is attached as an exhibit to this Report.

Your Committee conferred with Frederick W. Invernizzi, Esquire, Director of Administrative Offices of the Courts, and obtained from him pertinent statistical data about the caseload handled by Judge Berry and about the dates of his attendance in Court from the time of his appointment until and including April, 1964.

The Committee requested Judge George M. Berry to appear and this request was denied by Judge Berry in a letter addressed to the Committee, dated June 8, 1964, to which were attached letters of a similar date from Judge Berry to Governor J. Millard Tawes, the Honorable Michael Paul Smity, Chairman of a Committee of the Bar Association of Baltimore County conducting a parallel investigation of the charges against Judge Berry, and a letter to the four Associate Judges sitting in Baltimore County. There was also enclosed a letter from Dr. Bennett A. Stoen addressed to Governor Tawes, under date of June 7th, commenting on Judge Berry's condition of health. Copies of all of these letters are attached to this Report as an exhibit. The Committee, also by letter, requested that Judge Berry make available to it a list of any cases pending in his Court that are now being held *sub curia*, and further requested that he make available to the Committee the hospital reports or doctors' records pertaining to any hospitalization or treatments undergone by him since his ascendancy to the Bench on July 1, 1959. Under date of June 16th, Judge Berry advised the Committee that he was holding only one case *sub curia* at that time, of which he would make prompt disposition. In the same advice, he denied to the Committee access to his medical records. The Committee was informed by the officials of the County Clerk's office that there are no records in that office from which cases held *sub curia* can be determined, and it is your Committee's opinion that neither the hospital records or any other medical evidence is available to it without specific authorization of Judge Berry.

The Committee noted that in Judge Berry's letter of June 16th, the reason given for the denial of access to his medical records was "the recent widespread publicity, which has been extremely embarrassing to me and my family". No publicity releases have been given this Committee as to any of its activities. The appointment of the Committee was reported in the press, but all subsequent publicity came from other sources, some of it presumably from Judge Berry himself.

There is attached to this Report a transcript of the testimony taken by the Committee.

FACTUAL DETERMINATIONS

A. Actual attendance in Court

The records of the Administrative Offices of the Courts do not record the attendance of a judge on a Court working day unless records submitted by the Clerk of Court indicate that that judge presided in the Court Room for a trial, a motion, a hearing, or some other formal procedure. The records, therefore, are not conclusive that on days shown as absences that the judge concerned was not in fact performing some duties of his office. Testimony, however, was presented to the Committee that in the case of Judge Berry, on the days when he was in the Court House, he invariably sat in the Court Room with respect to some matter. Therefore, the Committee concludes that when Judge Berry was reported as not being in Court, he was in fact not at work.

The records of the Administrative Offices of the Courts, with respect to Judge Berry's attendance, show the following:

Judge Berry was appointed on July 1, 1959, and during the first two months of his appointment, sat only one day in court; during the third month, he sat five days; during the fourth and fifth months, he did not sit at all, and during December of 1959, he sat ten days out of twenty-two working days. The evidence before the Committee indicated that Judge Berry had been ill during a part of this time and was hospitalized.

During the calendar year of 1960, with the exception of all of July and the first twenty days of August, when Judge Berry did not sit at all, his attendance was reasonably regular and he sat in cases on approximately fifty per cent of the working days.

During the first six months of 1961, Judge Berry sat on approximately thirty per cent of the working days and did not sit at all during the last six months of 1961.

During 1962, Judge Berry did not sit at all during the first ten and one-half months of the year, appearing for the first time on November 19th. From November 19, 1962 until December 14, 1962, Judge Berry's attendance was regular.

During 1963, he was on duty on approximately fifty per cent of the working days in March, April, June, September, October and November. Of the remaining six months, he attended Court for a total of only twenty-eight days out of one hundred and twenty-seven working days.

During the month of January, 1964, Judge Berry sat on eleven days out of twenty-two available days, and of the remaining sixty-three working days of February, March and April, he sat on seventeen occasions.

On the days in which Judge Berry actually attended Court, the evidence shows that Judge Berry's normal working day was usually concluded by the time of the mid-day recess and that he did not return to the Court House for the performance of duties during the remainder of the day. This is in contradistinction to the evidence that all of the remaining judges were ordinarily required by the caseload in the county to work until the end of the normal working day.

B. Performance of Duty

(1) *Competence.* Judge Berry did not conduct any jury trials and when an effort was made to arrange for rotation of the duties of the judges, he refused to be assigned to jury cases, limiting his practice to equity matters and nonjury criminal matters and administrative appeals. The evidence shows that, both in the opinion of his associates on the Bench and in the opinion of the Bar, Judge Berry's intellectual competence cannot be questioned. There is some evidence that his department on the Bench on occasions lacked judicial dignity, and there is some evidence that he was somewhat arbitrary in his decisions with respect to appeals from the Baltimore County Zoning Board and the Baltimore County Liquor Board. Your Committee does not feel, however, that any of these comments on the performance of his duties or other incidents of somewhat erratic behavior amount individually or in the aggregate to a finding of legal incompetency to perform his duties when present.

(2) *Neglect of Duty.* There is abundant evidence, in addition, to the evidence above set forth about absence from duty, that Judge Berry did not perform his duties with reasonable promptness or with normal vigor. A memorandum from Judge Raine to Kenneth C. Proctor, Esquire, attached to the evidence submitted, mentions several criminal cases in which a finding of guilty by Judge Berry had been made, and long delays (in one instance five months) in sentencing the prisoner had taken place. This happened in 1961, 1963 and 1964. The evidence further sets forth numerous occasions when cases were scheduled for trial and the counsel, litigants and witnesses were inconvenienced by continued postponements, often occurring the evening before the trial was set. These postponements were invariably on the advice by Judge Berry to his Court Clerk that he would not be in the next day and that his assigned cases should be rearranged. On one occasion, after three days of trial, Judge Berry requested counsel to continue the case, apparently because the Judge was finding the case difficult to try—and the case has never been resumed. There is abundant evidence that because of the unlikelihood of a prompt hearing or the setting of a trial date on which the parties can rely, many members of the Bar take whatever steps may be necessary to avoid the chance of assignment of their cases to Judge Berry's Court. One attorney with a large trial practice, stated that he automatically prays a jury trial in all cases because he knows in that way he would never come before Judge Berry.

(3) *Undecided Matters.* The Committee has no way of knowing whether the term "held *sub curia*" has the same definition as used in Judge Berry's letter of June 16th and that given it by the Committee, but the records of undecided matters over the years seem to the Committee to be pertinent. The administrative records of the Court, based on reports filed quarterly by each of the judges with respect to their own work, show that at the end of each reporting period, the cases undecided by Judge Berry far exceed those of the other judges in the Circuit, as follows:

At the end of the statistical year ending September 30, 1960, Judge Berry had two undecided matters over sixty days. No other judge in the Circuit had any.

For the statistical year ending September 30, 1961, Judge Berry had twenty-seven cases and two motions undecided more than thirty days and six cases undecided over sixty days. The remaining six judges of the Third Circuit at the end of the same period had a total of three cases over thirty days and one over sixty days.

Judge Berry made no reports for the statistical year ending September 30, 1962, and was absent from duty for the entire period.

For the statistical year ending September 30, 1963, Judge Berry had fifty-one cases undecided for more than thirty days. Judge Turnbull had three cases undecided over sixty days, and no other judges had any undecided matters.

For the first quarter of the current statistical year beginning October 1, 1963, and ending December 31, 1963, Judge Berry's report shows eighteen cases undecided more than thirty days. No other judges in the Circuit had any.

At the end of the quarter beginning January 1, 1964, and ending March 31, 1964, Judge Berry showed twenty-six cases undecided more than thirty days. Judge Dyer had one motion undecided more than thirty days, and no other cases were reported as undecided in the Circuit.

There are many valid reasons why cases may be held *sub curia* for thirty days or more, and even sixty days, but in the absence of Judge Berry's appearance, the Committee was unable to ascertain any reason for the unusual number of undecided matters in his case.

(4) *Pattern of Absenteeism.* The evidence further shows that on several occasions in the past, when prolonged periods of absence from duty were occurring, efforts had been made in various ways to persuade Judge Berry to resume his duties. Chief Judge Frederick Brune, of the Court of Appeals, made available to the Committee his file of correspondence with Judge Berry in May, 1962, after Judge Berry had been absent from Court for approximately eleven months. Judge Brune pointed out to Judge Berry the necessity of his returning to work and was informed by Judge Berry that due to a "recent and protracted virus infection", it had been impossible for him to return to his duties. At that time, Judge Brune informed Judge Berry that there was a movement to have introduced in a Special Session of the Legislature, a resolution retiring Judge Berry for disability. Judge Berry agreed that if such a resolution was not introduced, he would return to work by June 30th, or would resign, if unable to do so. Although it was understood that Judge Berry would put this agreement in writing, he failed to do so. The legislative action was dropped, but Judge Berry did not return to work by June 30th, nor did he resign. In fact, he did not return until the 19th of November of that year.

The evidence shows also that early in 1963, when another period of absence of approximately two months had occurred, Judge Berry was visited by Kenneth C. Proctor, Esquire, then President of the Maryland State Bar Association, and W. Mitchell Jenifer, Esquire, then President of the Baltimore County Bar Association, and importuned by these gentlemen to return to work. After that visit, his attendance was reasonably regular for more than two months.

During the early part of April, 1964, Judge Berry's absenteeism was given considerable notice in the press and although Judge Berry had not appeared in Court between March 20th and April 23rd, his attendance became reasonably regular after the press notices and until this Committee started its investigation. The Committee was informed at its hearing on Wednesday, May 20th, in Towson, that Judge Berry had not been in Court that week and the Committee has subsequently been informed that he has not been in Court since May 19th. There is some evidence to the effect that Judge Berry could and did attend Court with regularity when his absenteeism was under scrutiny by the Bench, the Bar, the press, or the Legislature.

(5) *Illness.* There can be doubt that Judge Berry was ill shortly after his appointment and underwent an abdominal operation sometime during his long absence from duty in 1961 and 1962. The Committee was unable to ascertain the length of hospitalization, the treatment, or to obtain medical opinions on the proper period for recuperation from the illnesses suffered by Judge Berry. In announcing his various absences from Court, Judge Berry invariably attributed these absences to illnesses, such as "virus infection", "run-down condition", "too ill to come to Court", and similar expressions. There is evidence, however, that on many occasions, Judge Berry would announce to his Clerk, for the information of the other judges, that he would be unable to come in to work on a day some considerable time in advance of the date of his announcement.

There is some evidence of excessive use of alcohol by Judge Berry, but there is insufficient evidence to indicate alcoholism, and there is no evidence that this use of alcohol was apparent in or around the Court House, nor any agreement among witnesses that prior use of alcohol was interfering with the performance of his duties when he was attending Court. Without the benefit of competent medical evidence, this Committee is forced to rely on the lay opinions of Judge Berry's associates and members of the Bar. This evidence shows that alcohol is not a material factor; that nervousness and rambling talk might indicate some

emotional or neurotic disorder, and Dr. Stoen's opinion, expressed in a letter to Governor Tawes of June 7, 1964, that his health "is in a run-down and weakened state" is supported by the observations of witnesses. Several witnesses testified that there was a marked deterioration in his appearance and that the healthy, robust and alert appearance that he had when he first assumed his duties on the Bench no longer existed.

The Committee found no evidence to indicate that the "grinding pressures" to which Judge Berry referred in his letter to Governor Tawes had any connection whatsoever with his judicial duties, nor any evidence to justify the conclusion of Dr. Stoen that an additional absence of three months from his duties will effect a cure.

A complete copy of all correspondence between Judge Berry and your Committee is attached hereto as an exhibit.

C. *Conclusions.* From an examination of the evidence made available to it, the Committee concludes that:

(1) The work of the Court of Baltimore County is being disrupted by Judge Berry's failure to perform his duties, and that his position should be filled by one able and willing to perform such duties.

(2) Having been denied access to medical evidence and relying entirely on lay opinion, the Committee concludes that although Judge Berry is undoubtedly still suffering to some extent from his 1961 abdominal operation, his nonperformance and absenteeism is caused by a deep-seated and incapacitating neurotic illness. In spite of Judge Berry's appraisal of his own condition in his series of letters of June 8th, concurred in by Dr. Bennett Stoen in his letter to Governor Tawes of June 7th, testimony by the Judges, lawyers and county officials give the Committee no reason to hope that Judge Berry will ever be able to perform his duties properly.

(3) Judge Berry has lost the respect and confidence of the Bench, the Bar and the litigating public.

(4) His offer to Governor Tawes under date of June 8th, to resign "if I am unable to perform my duties because of incapacitating illness when Court reconvenes in September" follows a pattern pursued by Judge Berry whenever unusual pressure is exerted upon him to resume his duties on a full time basis; that Judge Berry agreed with Chief Judge Brune in May of 1962, that if proposed legislation for his retirement was dropped, he would return to work by June 30th, or resign—he did neither; that the press reported Judge Berry's offer to resign if he had lost the confidence of the member of the Baltimore County Bar; and, that on the basis of his former promises, the Committee does not feel that his current offer to resign deserves sufficient consideration to warrant a further postponement of a solution to this problem.

RECOMMENDATION

This Committee recommends that the Executive Council of the Maryland State Bar Association petition the General Assembly of Maryland to retire Judge Berry forthwith, pursuant to the provisions of Section 3 of Article IV of the Constitution of Maryland. In view of the urgency of this matter, the Committee recommends that the Council ask the Governor of Maryland to call a Special Session of the Legislature to act thereon.

Respectfully submitted.

FRANKLIN G. ALLEN
DAVID W. BYRON
WILLIAM M. LOKER, JR.
DAVID R. OWEN
T. HUGHLETT HENRY, JR.,
Chairman.

Judge WARNKEN. That was a very fine committee, and they made a very full report, which dealt with absenteeism and other matters, in July 1964.

After that, he promised to either come back and work or resign by a particular time. And he did neither. Eventually the legislature started what is known as legislative address proceedings. There was a resolution passed by the house and senate referring the matter to a committee. The committee fixed a time for hearing, and it was very shortly before that hearing that Judge Berry did decide to resign. And that was the end of that.

Senator TYDINGS. But that was only after the legislature agreed to amend the retirement provisions for judges; was it not?

Judge WARNKEN. I think the deal was that his pension would start perhaps more promptly than otherwise would have been the case. I think the pension starts maybe at 70. He was far from 70. And his pension was to start earlier. Now, that is my recollection about it. I would not be positive about that. There was something whereby they gave him some slight benefit with respect to starting his pension—I do not think it was the amount of it, I do not think they increased it.

If you wish to, as the statement I made at the request of Mr. Rothenberg is very brief, I can leave with you a memorandum which I presented to every member of our legislature while our bills were pending.

Senator TYDINGS. I would like to incorporate that into the record. (The document referred to follows:)

MEMORANDUM WITH REFERENCE TO HOUSE BILLS NOS. 21 AND 22 WHICH PROVIDE FOR REMOVAL AND RETIREMENT OF JUDGES

Senator William S. James and Delegate Alexander Stark called the matter of removal and retirement of judges to the attention of the president of the Maryland State Bar Association by referring to an article in the February 1963 issue of the American Bar Association Journal (pages 166-170) which was written by Jack E. Frankel, Executive Secretary of the Commission on Judicial Qualifications that administers such a plan which has functioned in California since March 1961. The matter was referred to the Judicial Ethics Committee of said Association which, after more than a year of study of the subject, prepared House Bills Nos. 21 and 22. The plan embodied in these Bills is patterned after the California plan.

These Bills were approved at the annual meeting of said Association by its membership of lawyers and judges, and also by the Legislative Council and the Judiciary Committee of the House of Delegates. The Judicial Ethics Committee consists of six presently active judges, two retired judges and two active practicing lawyers.

If Bills Nos. 21 and 22 are enacted and if the first, which is an amendment to the constitution of Maryland, is adopted by the voters of the State, there will be created a Commission on Judicial Disabilities which will have the power and duty, after such investigation as it deems necessary to hold a hearing concerning (a) the removal of a judge for "cause" or (b) retirement of a judge for disability seriously interfering with the performance of his duties which is or is likely to become permanent. The Commission may dismiss the matter *before* or *after* a hearing or it may, but only *after* a hearing, recommend to the Court of Appeals the removal or retirement, as the case may be, of the judge. The Court shall review the record on the law and facts, may permit the introduction of additional evidence, and shall order removal or retirement, as it finds just and proper, or wholly reject the recommendation of the Commission.

These Bills do not take away from the Legislature any power which it now has to remove or retire judges. Bill no. 21 specifically provides (§4(d)) that it is alternative to, and cumulative with, the methods of retirement and removal provided in Sections 3 and 4, of Article IV and in Section 26 of Article III of the Constitution.

The Commission is to be composed of five members: (1) three members shall be appointed by the Court of Appeals from among the judges of the Circuit Courts for the Counties and the Supreme Bench of Baltimore City. (2) one member, who has been for 15 years and is then actively engaged in the practice of law, shall be appointed by the Executive Council of the Maryland State Bar Association and (3) one member who is a citizen and resident of the State and never was a lawyer or judge shall be appointed by the Governor by and with the advice and consent of the Senate.

The power of the Legislature of the states to remove a judge by impeachment or legislative address or to retire a judge for mental or physical disability is regarded as cumbersome and difficult and is very seldom resorted to. The exist-

ence of such power has no coercive effect on judges. Recognizing this, the Chief Justice of California conceived the Commission plan. Judges, politicians and others were critical of the proposed plan. It took four years to obtain approval by the legislature and it was promptly approved by the voters.

The California Commission has jurisdiction over more than 900 judges. As set forth in Mr. Frankel's article and in reports of the Commission for each of the calendar years 1963 and 1964, during the period March 1961 to December 31, 1964, 344 matters against judges were brought to its attention. Most of them were dismissed. One-hundred and eighteen of the complaints warranted further attention. As a result 26 judges retired or resigned, some before and others after a hearing. It was only necessary in one case for the Commission to recommend to the Supreme Court removal of a judge and the recommendation was not sustained.

Mr. Frankel in said article made these interesting observations:

"The California experience has shown these characteristics as important in the system:

"1. A tribunal, a majority of the members being judges, should have the continuity, responsibility and authority to initiate investigations and conduct hearings with respect to all state judges, and to close groundless charges.

"2. Removal or retirement should be by recommendation to the state supreme court, *not* to the legislature or governor, and for cause, besides disability or incapacity.

"3. Confidentiality should be preserved on all complaints, inquiries, investigations and hearings until the case reaches the stage of Supreme Court review."

The indirect effect of such a Commission was expressed by Governor Brown in a letter of January 14, 1964 to the Dean of the University of Colorado School of Law as follows:

"The law has been in effect for slightly over three years now, and I am convinced that it is a tremendous success. It is beyond argument that the operations of the Commission have had a marked effect in raising the already high level of our California judiciary, and I feel that as the Commission continues to operate this effect will be multiplied."

"In my opinion, the major thrust of the Commission's effect has been not simply in the fact that a small number of judges have resigned after the Commission has investigated their activities and found them wanting in quality. Rather, I note with pleasure the salutary effect which the Commission has had on the vast majority of our hardworking judges."

When the Bills were called for third reading an amendment was offered to Bill No. 21 which would require the recommendation of the Commission for removal or retirement of a judge to be approved or disapproved by a two-thirds vote of the members of the Senate and House. The exact purpose of the amendment is not clear. It has been suggested that judges should not judge judges. To judges has been committed the power to decide most our sacred rights—life, liberty and property. Experience makes judges proficient in finding the *true* facts from a mass of conflicting evidence. Is it conceivable that judges would not impartially reach a "just and proper" conclusion with respect to another judge? They would be entirely free of political or other pressure.

Conscientious judges would realize that the judiciary should be responsible for keeping its own house clean by removing or retiring an unfit judge. This was recently illustrated. The working judges in Baltimore County displayed no timidity in complaining about the lack of activity of one of their colleagues.

Actually, under the proposed amendment, only a recommendation *for* removal or retirement would reach the Legislature and this would be by a Commission, a *majority* of the members of which are judges. If the Court of Appeals rejected a recommendation for removal or retirement, the Legislature by reviewing the record, could decide whether it desired to exercise its power under Article IV, Section 4 (Legislative Address), or Section 3 (Disability) by holding a hearing and possibly reaching a different conclusion. *None* of the complaints against judges which the Commission heard and *dismissed* would reach the Legislature because of the provision which makes the proceedings and the papers therein confidential.

These bills would have a salutary coercive and remedial effect on most of those judges who should be censured for what they are doing. The members of the Commission and the Court of Appeals would necessarily be most prudent and cautious, but the *power* to act *effectively* must exist with respect to those who would take advantage of such tender attitude. This can only be accomplished if the plan provides for *prompt* conclusion of the matter after the Commission recommends removal or retirement.

The Court of Appeals would certainly review, hear and determine the matter very promptly. It would be conscious of the *unusual status* of the particular judge so far as the public and lawyers are concerned. Almost one year could elapse before the Legislature would meet plus the additional time necessary to review and conclude the matter. In the meantime the unfit judge would have to be tolerated.

The effect of knowledge of the judge that his matter will be promptly concluded was recently illustrated. It was a long time before the Legislature met to correct a situation which was prejudicially affecting the judiciary. (The public could not understand why the situation had to be endured.) And it was not until virtually the eve of the scheduled hearing that the matter was concluded.

The amendment proposed to Bill No. 21 requires a two-thirds vote of each House on the recommendation of the Commission for removal or retirement. This could develop a very unfortunate situation. Suppose the vote in one House on the Joint Resolution was *less than two-thirds*. Even if it were changed to a majority of each House, the particular Joint Resolution might not be supported by a majority of *both* Houses. Thus the recommendation of the Commission for removal or retirement would remain as a public exposure of the judge. From a practical standpoint the judge's usefulness thereafter would be close to zero. This could only be avoided by making the recommendations of the Commission subject to the action of a *single unit*. The Court of Appeals acts by a majority vote and the number of judges would always assure a conclusive result.

It is earnestly and sincerely hoped that the Bills will be passed as originally introduced.

Respectfully submitted.

S. RALPH WARNKEN,
Chairman, Committee on Judicial Ethics,
Maryland State Bar Association.

Judge WARNKEN. That was also sent to Mr. Rothenberg, but it might not have gotten directly to you. I will be glad to leave this with you. I have an additional copy, so you do not have to return it, although I have my initials on it. But it really shows that what the legislature was proposing to do, and what it eventually did with our bills was very, very unsound. But nevertheless I am prepared here to justify the bills even in their present form, for reasons which I will be glad to state if you wish me to.

Senator TYDINGS. Before you justify the support of the bill as is, it is my understanding that this is presently on referendum for the people of Maryland.

Judge WARNKEN. Yes, it will be voted on this fall, that is right, as a constitutional amendment.

Senator TYDINGS. And basically the commission is patterned after the California system?

Judge WARNKEN. Yes. Of course, it is not as large as the California commission, because they have some 900 judges, and they are in different categories. We did not undertake to give representation to different categories, we have so few in our State—the court of appeals, nisi prius courts, the peoples court, municipal court, orphans court and at that time we had justices of the peace, too, and we still have them, as a matter of fact, in some counties.

Senator TYDINGS. And it is my understanding that the legislature amended your original proposal to take the appointment of the removal commission away from the judiciary and put it into the hands of the Governor, and the final decision on removal to be made not by the judiciary but by the legislature?

Judge WARNKEN. That is right.

Senator TYDINGS. And that the rules of procedure for the commission are not to be made by the judiciary, but are to be made by the legislature?

Judge WARNKEN. By the legislature, that is right. Of course, the bulk of that developed in the Senate. I think it was the handiwork of Senator Malcus, who is head of the Senate Judiciary Committee. It is very unfortunate that they did what they did do, and the question arose, shall we accept the bill as it was about to be amended, and I urged, by all means do so. And the reason is that if we have a commission—and I just heard that being discussed by the gentleman from Oklahoma—if we have a commission to which complaints can be given by anyone who thinks a judge's conduct is not proper, that commission can communicate directly with the judge. And in many instances that will be all that will be necessary. The mere existence of such a commission will have a salutary coercive effect on judges.

Now, just as an illustration, which I know exists in one or two spots, I know a judge who is drinking too much. That kind of a person would be susceptible to suggestion from the commission: "You had better change your habits, or we will have to conduct a hearing." And while the hearing itself will be secret, no one on the outside, the newspapers or anyone, will have access to it, nevertheless, we will then make a finding, and it will be either a recommendation for your removal, or we will dismiss the proceeding.

If we dismiss the proceeding, there will be no publicity attached to it either, you see. But if we recommend removal, then while it will not be effective until the legislature meets and considers it and acts on it, it puts that judge in a terrible position for the purpose of performing his duties, because when the recommendation for removal is made to the legislature it is made public.

That is one of the strong points that I undertook to make, as you will see, in that memorandum there. He will have a rather unique status and many people will not have any confidence in him and would not want to try their cases before him. He is not removed or suspended, and yet he is not free of sin in that sort of a situation, and he has to wait until the legislature acts.

But I would say this—

Senator TYDINGS. As I gather, your point is that if you have a commission to investigate complaints, what the commission does in and of itself will be a deterrent on a judge, because no man wants to have a formal recommendation filed by the commission to the legislature that he should be removed. In other words, it would have basically the same deterrent effect as the California system even though the formal recommendations of removal would be made to the legislature rather than to the court of appeals.

Judge WARNKEN. That is right. And here is another additional reason, I think the commission idea is very good. The judge might not think the case is very strong against him. The commission will conduct a hearing, and it will have the right to issue process, summon witnesses, require the production of documents, and so on—

Senator TYDINGS. Will it have that right?

Judge WARNKEN. That is in the separate bill, yes. That is a legislative bill which was approved by the Governor, and which is conditional upon the constitutional amendment being adopted. And it provides for contumacy, immunity—

Senator TYDINGS. At this time in the record I would like to include house bill 21, and house bill 22, which I gather are the third reading copies of the legislation to which you refer.

(House bill 21, and house bill 22 follows:)

CHAPTER 773

(House bill 21)

【Deleted matter in black brackets; new matter in italic; existing matter in roman】

AN ACT To propose an amendment to Article IV of the Constitution of Maryland, title "Judiciary Department," subtitle "Part I—General Provisions," by adding new Sections 4A and 4B thereto, to follow immediately after Section 4 thereof, creating a Commission on Judicial Disabilities, providing for its members, powers and duties, relating generally to the early retirement and removal of judges **】, as therein defined,】** by the General Assembly on recommendation of the Commission, and submitting this amendment to the qualified voters of the State for their adoption or rejection.

SECTION 1. *Be it enacted by the General Assembly of Maryland* (three-fifths of all of the members elected to each of the two Houses concurring), that the following sections be, and the same are hereby proposed as an amendment to Article IV of the Constitution of Maryland, title "Judiciary Department," subtitle "Part I—General Provisions," by adding new Sections 4A and 4B thereto, to follow immediately after Section 4 thereof, the same, if adopted by the legal and qualified voters of the State, as herein provided, to become a part of the Constitution of Maryland:

4A.

【(a) There is created a Commission on Judicial Disabilities, composed of five members: (i) three members shall be appointed by the Court of Appeals from among the judges of the Circuit Court for the Counties and the Supreme Bench of Baltimore City; (ii) one member, who shall be actively engaged in the practice of law, who shall have been so engaged for at least fifteen years, and who is not a judge of any court, shall be appointed by the Executive Council of the Maryland State Bar Association from among the resident members of said Association; and (iii) one member who is a citizen and resident of this State, who is not a judge, active or retired, and who is not admitted to the practice of law in any jurisdiction, shall be appointed by the Governor by and with the advice and consent of the Senate. The term of office of each member shall be for four years, commencing on January 1, except that, of those judges first appointed, the Court of Appeals shall designate one whose term shall expire December 31, 1969, another for a term expiring on December 31, 1970, and a third for a term expiring on December 31, 1971. Whenever a member appointed under subdivision (i) ceases to be a judge of the court from which he was selected, or whenever the member appointed under subdivision (ii) becomes a judge or ceases to be a resident member of the Maryland State Bar Association, or whenever the member appointed under subdivision (iii) becomes a judge of any court or is admitted to the practice of law in any jurisdiction, or ceases to be a resident of this State, the membership of such member shall forthwith terminate. Any vacancy on the Commission shall be filled for the unexpired term by the respective appointing authority, subject to the same qualifications. If a vacancy in the office appointed by the Governor occurs when the General Assembly is not in session, the Governor may issue an interim commission which shall expire on the last day of the next regular or special session of the General Assembly. No member of the Commission shall receive any compensation for his services as such, but shall be allowed any expenses necessarily incurred in the performance of his duties as such member.】

(A) *There is created a commission on judicial disabilities, composed of five persons appointed by the Governor of Maryland. The members of the commission shall be citizens and residents of this State. Three members of the commission shall be appointed from among the judges of the court of appeals, the circuit court for the counties and of the supreme bench of Baltimore City; one member shall be appointed from among those persons who are admitted to the practice of law in the State, who have been so engaged for at least fifteen years, and who is not a judge of any court, and one member shall represent the public, who shall not be a judge, active or retired, and who is not admitted to the practice of law in this State. The term of office of each member shall be for four years commencing on January 1, except that of those persons first appointed to the commission one shall be appointed for a term of one year, one for two years, one for three years and two for four years and thereafter all terms shall be for four years. Whenever any member of the commission appointed from among judges in the State ceases to be a judge, when any member appointed from among those admitted to the practice of law becomes a judge, when any member representing the public becomes a judge or is admitted to the practice of law in this State, or when any member ceases to be a resident of the State, in such case the membership of this member shall*

forthwith terminate. Any vacancies on the commission shall be filled for the unexpired term by the Governor in the same manner as for making of appointments to the commission and subject to the same qualifications which were applicable to the person causing the vacancy. No member of the commission shall receive any compensation for his services as such but shall be allowed any expenses necessarily incurred in the performance of his duties as such member.

(b) The concurrence of a majority of the appointed members shall be sufficient for the validity of any act of the Commission. The Commission shall select one of its members to serve as Chairman.

4B.

(a) A judge of the Court of Appeals, of the Circuit Courts for the Counties, of the Supreme Bench of Baltimore City, of the Orphans' Courts and all other judges elected or subject to election, and those appointed if the full term of the particular office is for not less than four years, (including a judge holding office on the date of adoption of this Amendment) may, in accordance with the procedure described in this section, be removed for misconduct in office, persistent failure to perform the duties of his office or conduct which shall prejudice the proper administration of justice, or may be retired for disability seriously interfering with the performance of his duties, which is, or is likely to become, of a permanent character. The Commission may, after such investigation as it deems necessary, order a hearing to be held before it concerning the removal or retirement of a judge. If, after hearing, the Commission finds good cause therefor as aforesaid, it shall recommend to the [Court of Appeals] General Assembly the removal or retirement, as the case may be, of the judge.

(b) The [Court of Appeals] General Assembly shall review the record of the proceedings on the law and facts and in its discretion may permit the introduction of additional evidence and *By a joint resolution passed by a two-thirds vote of the members elected in each House thereof*, shall order removal or retirement, as it finds just and proper, or wholly reject the recommendation. Upon an order for retirement, the judge shall thereby be retired with the rights and privileges provided by law. Upon an order of removal, the judge shall thereby be removed from office, his salary shall cease from the date of such order, and neither he nor his widow, upon his death, shall receive any benefits, pension, or retirement allowance accruing from judicial service.

(c) All papers filed with and proceedings before the Commission on Judicial Disabilities, pursuant to this section shall be confidential, and the filing of papers with and the giving of testimony before the Commission shall be privileged. No other publication of such papers or proceedings shall be privileged in any action for defamation except that (a) the record filed by the Commission in the [Court of Appeals] General Assembly continues to be privileged and upon such filing loses its confidential character and (b) a writing which was privileged prior to its filing with the Commission does not lose such privilege by such filing. The Commission and the [Court of Appeals] General Assembly shall have the power to issue and enforce process to compel the attendance of witnesses and the production of evidence. The [Court of Appeals] General Assembly shall by [rules] statute provide for procedure under this section before the Commission on Judicial Disabilities and [the Court of Appeal.] *by rule shall provide for procedure under this section in the General Assembly.* A judge who is a member of the Commission [or the Court of Appeals] shall not participate in any proceedings involving his own removal or retirement, and the [Court of Appeals] Governor shall appoint a substitute member of the Commission for the purpose of said particular proceedings.

(d) This section is alternative to, and cumulative with, the methods of retirement and removal provided in Sections 3 and 4 of this Article, and in Section 26 of Article III of this Constitution.

SEC. 2. *And be it further enacted*, That the foregoing sections hereby proposed as an amendment to the Constitution of this State shall, at the next General Election to be held in this State in November, 1966, be submitted to the legal and qualified voters thereof for their adoption or rejection in pursuance of the directions contained in Article XIV of the Constitution of Maryland, and at the said General Election the vote on the said proposed amendment to the Constitution shall be by ballot and upon each ballot there shall be printed the words "For Constitutional Amendment" and "Against Constitutional Amendment" as now provided by law and immediately after said election due returns shall be made to the Governor of the vote for and against said proposed amendment as directed by said Article XIV of the Constitution and further proceedings had in accordance with said Article XIV.

Approved May 4, 1965.

CHAPTER 774

(House bill 22)

[Deleted matter in black brackets, new matter in italic, existing matter in roman]

AN ACT to add new Section [130] 45 to Article [26] 40 of the Annotated Code of Maryland (1967 Edition and 1964 Supplement), title ["Courts,"] "*General Assembly*," to follow immediately after Section [129] 44 thereof and to be under the new subtitle "Commission on Judicial Disabilities," to provide for the powers of the Commission on Judicial Disabilities and of the [Court of Appeals] *General Assembly* in administering oaths and issuing and enforcing process in connection with proceedings before the Commission and the [Court] *General Assembly* for the retirement or removal of judges in the State, and making this act effective contingent upon the adoption of a Constitutional Amendment creating the Judicial Disabilities Commission.

SECTION 1. *Be it enacted by the General Assembly of Maryland*, That new Section [130] 45 be and it is hereby added to Article [26] 40 of the Annotated Code of Maryland (1957 Edition and 1964 Supplement), title ["Courts,"] "*General Assembly*," to follow immediately after Section [129] 44 thereof, and to be under the new subtitle "Commission on Judicial Disabilities," and to read as follows:

[130.] 45.

For the purpose of any investigation or any proceeding under Section 4B of Article IV of the Constitution of this State:

(a) The Commission on Judicial Disabilities and the [court of appeals] *General Assembly* are empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of any books, papers, correspondence, memoranda, contracts, agreements, other records or tangible things which the Commission or the [Court of Appeals] *General Assembly* finds relevant or material to the inquiry or proceedings. Oaths and affirmations may be administered by, and subpoenas may be issued by, any member of the Commission of any [judges of the Court of Appeals] *officer of the General Assembly*.

(b) In case of contumacy by, or refusal to obey a subpoena issued to, any person, by the Commission, the Commission may invoke the aid of the Circuit Court for the county (or of the Superior Court of Baltimore City) where such person resides or carried on business or is found, in requiring the attendance of witnesses and the production of records. Such court may issue an order requiring such person to appear before the Commission, and there to produce records, if so ordered. Any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served wherever such person is found.

(c) Contumacy by, or refusal to obey a subpoena issued to, [any person, by the Court of Appeals, may be punishable by the Court of Appeals as in cases of contempt of the orders of the Circuit Courts of the counties] *any person, by the General Assembly, may be punishable by the Circuit Court for a County (or by the Superior Court of Baltimore City), upon a complaint of the General Assembly invoked in the same manner as in subsection (B) of this section.*

(d) The Commission and the [Court of Appeals] *General Assembly* shall have power to grant immunity to any person from prosecution, or from any penalty or forfeiture, for or on account of any transaction, matter or thing concerning which said person testifies or produces evidence, documentary or otherwise.

SEC. 2. *And be it further enacted*, That this Act shall take effect contingent upon and contemporaneous with the adoption by the people of an amendment adding new Section 4A and 4B to Article IV of the Constitution of this State proposed by Chapter of the Acts of 1965 (HOUSE Bill No. 21).

Approved May 4, 1965.

Judge WARNKEN. I think you will see by looking at them—and nobody would be more familiar with such matters than you, I think—they show the original provisions of the bills and each of the amendments, and how they finally ended, do they not?

Senator TYDINGS. That is right.

Judge WARNKEN. Do not your copies?

Senator TYDINGS. That is correct. Ours are the third reading copies. However, they only show how they are amended in the House, because this is the third reading copy of the House bill. You see, when the bill goes over in the Senate and the Senate adds an amendment, and the amendment is concurred in the conference

committee, it does not appear in the House bill, because this is only the third reading of the House in the passage of the bill over.

Judge WARNKEN. I can say that the only change that the House made that was ill advised was by a young lawyer who later admitted to Judge Brune and myself that he misjudged the situation, and he would have liked to have corrected it. But he had already gone too far with a couple of people whom he got to introduce the amendment. And it passed by a very close vote.

But that is the only change—the only change that was made in the House was to provide that the recommendation of the commission shall be submitted to the legislature for approval or rejection. All the other changes were made in the Senate. Here is another copy which you might find it convenient to have also of these two bills. Do you want it?

Senator TYDINGS. Yes. Because actually they might be the final bill itself as actually enacted, whereas this is just the bill—

Judge WARNKEN. Yes; these are the bills in final form with all amendments.

Senator TYDINGS. Let me ask you this, Judge Warnken. Is it my understanding that the legislation enacted, not the constitutional amendment, but the legislation enacted will provide all of the rules necessary for this commission to operate? You do not have to go back to the legislature again if the constitutional amendment is adopted?

Judge WARNKEN. Yes; you will. The legislature must provide the rules under which the commission must act. And previously, as we submitted the bill, the court of appeals was to prepare those rules.

Senator TYDINGS. Is there anyone working on those rules now?

Judge WARNKEN. I would certainly doubt that anyone is working on them. I am no longer a member of the legal ethics committee. Of course, the legislature does not meet until next January. I happen to have a copy of the rules of the California commission which I was holding in the expectation that perhaps when the legislature did get busy on the rules I could be helpful.

Senator TYDINGS. So it is my understanding that even if the citizens of Maryland adopt this constitutional amendment, that unless and until rules are adopted by the legislature the commission will not be able to operate.

Judge WARNKEN. That is right. I do not believe the vote on it is in the primary. I do not know.

Senator TYDINGS. No; I think that is in the general election.

Judge WARNKEN. Then that would be passed on in November, and by the time the certification comes through, and the Governor makes the appointments, I think it will be about the time that the legislature is required to meet. And then I would suspect that someone in the legislature who is interested in the subject will undertake to start something going with respect to the preparation of rules so that the commission will be able to act.

Senator TYDINGS. Does the legislation provide for any permanent staff or permanent secretary for this commission?

Judge WARNKEN. Oh, no. The way we had it drafted—and I think it probably still stays that way—the commission selects its own chairman, and nothing beyond that.

Senator TYDINGS. Who is going to do the screening work? Who is going to do Mr. Frankel's work for the Maryland commission?

Judge WARNKEN. Well, I am quite sure that one of the members of the commission will probably be willing to do that. As Maryland is a small State, I think we will have very few complaints of substance. And I also might make this comment, which I heard from the gentleman from Oklahoma. I think it is quite unlikely that this commission will ever undertake to determine that a judge is not capable of performing his work from the standpoint of intellectuality, separate and apart from disability, mental or physical, or just downright refusal to work and to work properly, or some other act such as drinking.

I might mention that we had a proceeding of legislative address in 1860 in Maryland.

Senator TYDINGS. We would like to hear about that, Judge.

Judge WARNKEN. In 1860 there was a Judge Stump who presided in what was then called the criminal court. He was charged with being drunk often while on the bench, and actually while a murder case was going on, and falling to sleep on the bench, and so on, and that was presented to the legislature. The legislature created and referred the matter to a special committee. Some of the politicians in the legislature wanted it referred to one of the standing committees. But it was evidently thought that they had better have a special committee. The special committee was created to conduct a hearing in that matter, and they did. The rather odd thing is that, from my reading of the matter, I think in Frank Kent's book, I believe that is where it was, there was no effort to overcome the charges that I mentioned he was charged with, of drunkenness and falling asleep, and so on. Nevertheless, the effort was made to have him retained as judge.

But anyhow, he was removed.

Now, it is right interesting——

Senator TYDINGS. Was he removed or not?

Judge WARNKEN. Oh, yes. He was removed by the Governor pursuant to the request of the legislature.

Senator TYDINGS. And that was 1862, was it, Judge Warnken?

Judge WARNKEN. It could have been that. It starts in 1860, and I remember, I got the journals of the two houses for the particular year, and it is very interesting reading.

Senator TYDINGS. Do you get it from the Pratt Library?

Judge WARNKEN. That should be in the Pratt Library. I think I got them in the bar library. They had to root and find them for me, but they did, and it was very interesting reading indeed. That is the only time I know when legislative address was used in Maryland.

Senator TYDINGS. I heard that that was a rather fabulous transcript, the Judge Stump address proceedings before the Maryland Legislature.

(The statement of S. Ralph Warnken follows:)

MEMORANDUM OF S. RALPH WARNKEN WITH RESPECT TO MARYLAND LEGISLATION FOR (1) REMOVAL FOR CAUSE AND (2) RETIREMENT FOR PHYSICAL OR MENTAL DISABILITIES OF JUDGES

Several members of the Maryland State Bar Association (Association) separately called the matter of removal and retirement of judges to the attention of the president of the association by referring to an article in the February 1963 issue of the American Bar Association journal (pages 166-170) which was written by

Jack E. Frankel, Executive Secretary of the Commission on Judicial Qualifications that administers such a plan which has functioned in California since March 1961. The matter was referred to the Judicial Ethics Committee of the association. After determining the need for such a plan the committee, after more than a year of study of the subject, prepared what later became known as House Bills 21 and 22.

The need for such a plan was evident to most practicing lawyers. While the Bills were in the Legislature, the latter began proceedings (known as Legislative Address) against a judge who finally retired before the date of the scheduled hearing before a committee.

These bills were approved at the annual meeting of the association and also by the Legislative Council. They were introduced in the House of Delegates by the Legislative Council and referred to the Judiciary Committee. After a hearing the bills were reported favorably to the House.

When the bills were called for a third reading an amendment was offered to Bill No. 21 which would require the recommendation of the Commission for removal or retirement of a judge to be approved or disapproved by a two-thirds vote of the members of the Senate and House.

We were able to have the bills referred back to the Judiciary Committee which, after another hearing, reported them favorably without the amendment. The bills passed in the House with the amendment, after the latter was sustained by a close vote. They were then sent to the Senate and referred to the Judicial Proceedings Committee of that body.

After a hearing, the latter Committee reported them to the Senate with additional amendments. They were then passed by the Senate and the House and signed by the Governor.

Bill No. 21 is a constitutional amendment which will be submitted to the electorate at the general election in November. Bill No. 22 merely implements the other bill if the latter is approved by the voters.

The Maryland plan as prepared and submitted to the Legislature is patterned after the California plan. Briefly, it creates a Commission of five members: (1) three members to be appointed by the Court of Appeals from among the judges of the Circuit Courts of the counties and the Supreme Bench of Baltimore City. (2) one member, who has been in active practice of law for 15 years, to be appointed by the Executive Council of the association and (3) one member who is a citizen and resident of the state and who was never a lawyer or judge to be appointed by the Governor with the advice and consent of the Senate.

The Commission, after a hearing, could dismiss the charge or recommend removal or retirement to the Court of Appeals. After hearing, if desired, the latter could approve or reject the recommendation of the Commission.

In addition to the amendment or change made in the House the Senate made several other changes. It required the Governor to appoint all of the five members of the Commission and required the Legislature to provide rules of procedure for the Commission instead of the rules being provided by the Court of Appeals.

The changes made in the original bills by the Legislature are unfortunate. They open the door wide to political activity. Nevertheless the legislation will have a salutary effect.

Senator TYDINGS. Well, Judge Warnken, let me say, sir, that I deeply appreciate your effort, and your willingness to come down here and testify before this subcommittee. It has been most interesting to me, particularly in view of your long eminence in the Maryland bar, and the fact that you are a Marylander, as I am. And I think that your testimony is going to be most helpful to us, because among other things, before we are able to establish any machinery in the Federal judiciary, we will have to make a great many compromises and a great many decisions such as you had to make on whether or not to take the bill as amended. And I think that your testimony along those lines will be most helpful to us at a future time. Thank you very much, sir, for being with us.

Judge WARNKEN. I was very interested in reading your article in the American Bar Journal. I would say the implied thought that since Congress was given the power to create the judiciary, it also has the power to arrange for it to keep its own house clean, so that it will

not be necessary to resort to impeachment. I mentioned that to a couple of our outstanding lawyers, and they thought that—I put it on two grounds: One, that there might be much more doubt with respect to removal for cause than retirement for disability. They had no difficulty about removal for cause, but they even went so far as to say they thought that it might not be possible to do it even for physical and mental disability.

Of course, I am familiar with what legislation has been passed by Congress that undertakes to shelve the judge who is physically unable to conduct his business, and the power of the President to appoint someone to take his place, although that does not create a new judgeship—it is quite interesting how Congress worked that phase of it out.

Thank you very much indeed. It has been a pleasure to be here.

Senator TYDINGS. Thank you.

The committee will recess the hearing at this time, and the record will remain open.

(Thereupon, at 11:30 a.m., the hearing was recessed, the record to remain open as ruled by the chairman.)

APPENDIXES

**APPENDIX A.—REMEDIES FOR JUDICIAL MISCONDUCT
AND DISABILITY: REMOVAL AND DISCIPLINE OF
JUDGES**

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New York University School of Law
Arthur T. Vanderbilt Hall
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NOTE

REMEDIES FOR JUDICIAL MISCONDUCT AND DISABILITY: REMOVAL AND DISCIPLINE OF JUDGES*

As Chief Justice Taft said of President Hoover's urge to improve "legal machinery," "You know, he really thinks it is machinery."†

Judicial Fitness I . NYU Law Review
3-1-66

INTRODUCTION

It is inevitable that among the approximately 9,000 judges in the United States¹ there will be some whose conduct will call for discipline, and some who will become unfit to serve. There is an increasing awareness that, given even the best methods of selecting judges, the weaknesses in "human nature" will take their toll.² Although in the past most consideration was given to judicial unfitness due to age and illness,³ the focus of current attention is on methods of dealing with judicial misconduct.⁴ Movement in both areas is motivated by a desire both to increase court efficiency,⁵ and to protect litigants—the "consumers" of the law⁶—from the detrimental effects of facing an unfit judge. In attempting to deal with these problems two basic issues arise: first, what standards should be applied in determining what constitutes misconduct or unfitness; and second, what mechanisms can best apply these standards to individual cases.

* The interviews that constituted the major part of the research necessary for this note were financed with funds donated by the Institute of Judicial Administration through its Director, Professor Delmar Karlen of New York University School of Law, whose cooperation the Review gratefully acknowledges. The authors interviewed judges, lawyers, court administrators, law professors, and laymen. Interviews were conducted in California, Missouri, New Jersey, New York, and Wisconsin. Substantially all the factual material in this Note is drawn from these interviews, except where other sources are indicated. Records of the interviews are on file at the Library of the New York University Law Review. ✓

Because of the sensitive nature of much of the information sought, the names of those interviewed are being kept confidential. The authors wish to thank those persons interviewed for their time and particularly for their candor, without which it would have been impossible to prepare this Note.

† Acheson, *Morning and Noon* 107 (1965).

1. U.S. Bureau of the Census, Dep't of Commerce, *Statistical Abstract of the United States* 156 (86th ed. 1965).

2. See Editorial, *New Ways To Deal With Judicial Misconduct*, 48 *J. Am. Jud. Soc'y* 163 (1965); 27th American Assembly, *Report on The Courts, the Public, and the Law Explosion* 7 (1965).

3. Nearly half the states have provisions for mandatory retirement of judges. Winters & Allard, *Judicial Selection and Tenure in the United States, in The Courts, the Public, and the Law Explosion* 146, 166-67 (Jones ed. 1965).

4. See Burke, *Judicial Discipline and Removal—The California Story*, 48 *J. Am. Jud. Soc'y* 167, 171 (1965).

5. See 27th American Assembly, *Report on The Courts, the Public, and the Law Explosion* 4 (1965).

6. See Cahn, *Law in the Consumer Perspective*, 112 *U. Pa. L. Rev.* 1 (1963).

The problem of fixing standards requires a decision as to what society has a right to expect from its judges. On the one hand, judges are given a public trust. Virtually every decision they make requires them to choose between conflicting interests.⁷ Any factor that renders a judge unable or unwilling to do so satisfactorily undermines a basic premise of our legal system—that disputes can be settled fairly through the legal process.⁸ On the other hand, judges are human beings. Perfection is unattainable. The difficult problem, therefore, is where to draw the line short of perfection. The choice of the appropriate mechanisms for dealing with judicial disability or misbehavior is also difficult. Because of the public trust judges hold, the interest in adequately policing them is strong. The very status judges enjoy, however, suggests the appropriateness of restraint; an unfounded accusation against an innocent judge might jeopardize his career.

The first portion of this Note is concerned with standards for judicial conduct. The authors have refrained from attempting to select the "correct" standards, because the choice of any standard is merely a choice between conflicting interests, and therefore no choice is "correct" for all situations. An attempt is made, however, to indicate areas of consensus and dispute among those charged with making these ultimate choices. The second part deals with mechanisms for insuring that the chosen standards are maintained.

II

STANDARDS FOR DISCIPLINE AND REMOVAL

It is impossible to establish a definite rule that will encompass all cases of misconduct or disability. Each jurisdiction must establish standards in accordance with the expectations of its bar and polity. It is feasible, however, to discuss problems arising in such broad areas as misconduct in office, other misconduct which may or may not affect judicial performance, and physical or mental disability.

A. Misconduct in Office

1. The Problem of Judicial Independence

A major justification for limiting scrutiny of the judiciary for purposes of discipline or removal is the need to preserve judicial independence.⁹ Although "judicial independence" has two meanings, in this context it does not refer to the independence of the judiciary as an institution from control by other branches of government, but to the right of the individual judge to exercise his office within his view of the law, without fear of repercussions merely because of those views. The premise underlying this position is that if judges need fear reprisals for being deemed wrong, the judiciary will become so docile that new ideas and approaches will never come to light.¹⁰ Moreover, certain cases might

7. See Pound, *A Survey of Social Interests*, 57 Harv. L. Rev. 1 (1943).

8. Hart & Sacks, *The Legal Process* 2-9 (tent. ed. 1958).

9. See *Gordon v. Clinkscales*, 215 Ga. 843, 114 S.E.2d 15 (1960).

10. See *The Federalist* Nos. 78, 79, at 489, 497 (Wright ed. 1961) (Hamilton).

be decided by the removal and disciplinary authority of the judiciary.¹¹ Although, absent close supervision of some litigants will suffer and gain justice only after costly wrong decisions, these evils must be tolerated to some extent we pay for the law's growth.

It is generally accepted that judges are not accountable either civil suit or discipline for their official acts, even if clearly erroneous.¹² Thus, open disregard of statutes, rules, and cases has been held to be protected official activity.¹³ Although a decision may seem so erroneous as to raise doubts concerning a judge's integrity or physiological condition, absent extrinsic evidence, the decision itself is insufficient to establish a case against the judge.¹⁴ This rule is consistent with the concept of judicial independence. An honest judge, if he were denied the protection of the extrinsic evidence requirement, might become unduly cautious in his work, since he would be subject to discipline based merely upon the inferences to be drawn from an erroneous decision.

One approach might be to permit official conduct to be the basis for undertaking an investigation, while making the eventual introduction of some extrinsic evidence requisite for removal or discipline. For example, a judge whose official acts may indicate senility might be requested to undergo a psychological examination. This approach would not be very helpful, however, in cases involving influence or corruption, since the parties will have made every effort to render extrinsic evidence unavailable. A partial solution here might be to limit inquiry to ministerial, nondiscretionary acts to determine whether they indicate either corruption or gross malfeasance.¹⁵ Such inquiry seems unlikely to affect judicial independence, since the performance of fixed duties rather than the exercise of independent judgment is involved. For example, alteration of court records to show the issuance of an injunction when the injunction had not issued, or premature releasing of prisoners, might provide grounds to initiate an investigation even though such acts are official.

The doctrine of immunity for official acts might also be suspended when a judicial decision is merely evidentiary of an alleged collateral physical defect or act of misconduct. If there is evidence independent of official acts which indicates a defect or act of misconduct, removal or discipline may not be improper, since the official act is not the basis of the disciplinary action. For example, if there were reliable evidence that a judge was being bribed in a given case, it seems that the decision

11. The desirability of isolating the judiciary from outside official pressures is voiced even in the Soviet Union. See Berman, *Justice in the U.S.S.R.* 271 (rev. ed. 1963).

12. See, e.g., *Matter of Brooklyn Bar Ass'n (Hirshfield)*, 229 App. Div. 654, 241 N.Y. Supp. 601 (2d Dep't 1930).

13. E.g., *Commonwealth v. Tartar*, 239 S.W.2d 265 (Ky. 1951).

14. See *Matter of Barlow*, 141 App. Div. 640, 127 N.Y. Supp. 542 (1st Dep't 1910).

15. See, e.g., *Saint v. Meraux*, 163 La. 242, 111 So. 691 (1927).

the case could be scrutinized. If the decision were clearly erroneous, the evidence against the judge would be strengthened considerably.¹⁶

The doctrine that judges are immune from suit or discipline for official acts seems clearly applicable in instances involving inept judges who are neither disabled nor dishonest. The mere suggestion that judges should be removed for lack of judicial ability was either totally rejected by the persons interviewed, or approached with the utmost caution, always in terms less than removal. This might appear paradoxical to someone outside the legal profession, to whom inability would seem an obvious ground for removal from a position of responsibility, but discipline for judicial inability is regarded as the greatest threat to judicial independence. Power to discipline a poor judge is generally deemed inseparable from power to remove an unpopular judge.

Furthermore, it seems impossible to create a reasonable mechanical procedure to govern the removal of inept judges. Among suggested means for gauging judicial ability for purposes of removal are a judge's reversal record and a "bench examination." Although some judges are very sensitive about their reversal records, the feasibility of using the records as a standard of performance is doubtful. Some less respected judges are seldom reversed, because of their slavish adherence to prior law. Good judges, however, often find themselves reversed for attempting new approaches.

A bench examination would involve periodic administration of a test similar to a bar examination as a measure of judges' legal knowledge and skill. Judges who passed would be certified as fit, while those who failed would be subject to further tests or interviews to determine whether removal was warranted. It has been objected that not only would it be virtually impossible to construct a test that would fairly and comprehensively measure judicial ability, but also such a procedure would threaten judicial independence, since judges would fear that failing the test would subject their future decisions to scrutiny by a non-appellate body. In rebuttal, however, it is argued that such a test, even admitting the difficulties involved, is a reasonable alternative to subjecting litigants to one who should never have become a judge. The few attorneys supporting this position felt that the judicial independence argument paints with too broad a brush, that creativity and blunder are distinguishable, particularly where the blunder reflects an obvious ignorance of the law. Even admitting this, some have argued that the selection process in a democratic system must be the last stage at which judicial ability should be scrutinized. Since some judges will always be better than others, we should relieve the removal mechanisms from an extremely difficult task by permitting the people, whether through direct election or executive appointment, to choose unfit judges if they want to. In no jurisdiction covered was there any strong desire to bring removal and disciplinary machinery to bear upon the inept judge.

16. See *Matter of Droege*, 129 App. Div. 866, 114 N.Y. Supp. 375 (1st Dep't), appeal dismissed, 197 N.Y. 44, 90 N.E. 340 (1909).

2. *Administrative Misconduct*

A judge's unwillingness to cooperate in efforts to improve the administration of the court may present grounds for discipline. Rapid population growth and an increasingly complex and accessible legal system make it imperative that improved judicial administration not be frustrated by judges' refusal to conform to rules promulgated by judicial administrative authority.¹⁷ In every jurisdiction canvassed, however, there is some resistance to administrative control, even though the acceptance of such regulations by most judges indicates that the minority is waging a losing battle.

Judges sometimes argue that they have historically been "kings in their court"; they say that requiring them to put in uniform hours, to accept unwanted assignments, or to make reports as to their workload will cause reluctance to put forth extra effort when it is called for, because judges will feel that they are not being treated as professionals, and will therefore no longer feel a professional responsibility toward their work. Resistance has taken the form of a sharp letter of reply when a judge is given an unwanted assignment, or delay and neglect in filing required reports. Some argue that such resistance merely evidences the judges' laziness, since hard working judges put in long hours anyway, and put forth their best efforts no matter where assigned.

Even if the work of some judges will be adversely affected, the pressure of ever-expanding dockets seems irresistible, forcing administrative authorities to do everything possible to meet the demand for judicial man-hours. In San Francisco, where the most desirable departments traditionally have been given to the senior judges, it was contended that to introduce a new mode of assignment would produce so much friction that any administrative benefits derived from the change would be negated. But in Los Angeles, where the superior court consists of approximately 120 judges, seniority has virtually been abandoned—perhaps because of the diminished personal contact among the judges—and with it much resistance to administrative assignment. Los Angeles may well be a more accurate model of future court systems than San Francisco, because the standards imposed by the administrative authority in Los Angeles reflect the pressure of rapid population growth.¹⁸ For example, trial court hours from nine to four-thirty have been established in Los Angeles, whereas in San Francisco no formal hours of court have been established.

A related problem arises when disciplinary bodies seek to control judges' courtroom behavior. Attorneys' complaints of undue discourtesy and abuse from sitting judges are common, particularly on the trial level. A common feeling is that, although judges, being human, can be forgiven if they occasionally lose their temper, and although a good judge is firm with attorneys and other persons in the court who seem to

17. See 27th American Assembly, Report on The Courts, the Public, and the Law Explosion, *passim* (1965).

18. See Holbrook, A Survey of Metropolitan Trial Courts—Los Angeles Area 5 (1956).

be misbehaving, some judges unnecessarily demean attorneys in front of their clients. A few judges will unduly criticize attorneys over matters of behavior, knowledge, and preparation, and may even abuse others in the courtroom. It is contended that judges ought to refrain from being harsh in the courtroom in order to preserve the dignity of the court, saving such statements for chambers. Although disciplinary authorities in California, New York, and New Jersey occasionally have re-proached a judge for his courtroom conduct,¹⁹ judges are allowed discretion in this area,²⁰ so that only very severe and recurring cases lead to action.

B. Misconduct Apart From the Judicial Function

1. In General

Misconduct outside judicial functions sometimes leads to removal or discipline. State constitutions often specify criminal acts of moral turpitude and habitual intemperance as grounds for removal.²¹ Two justifications seem possible for scrutinizing such behavior. First, the absence of a standard, applicable to a judge's work product, which would reveal either its quality or the judge's honesty and impartiality, makes it risky to retain judges who have either been guilty of unlawful conduct or whose personal habits may have an undetectable but real effect on their performance in office. Second, the judiciary functions best in an atmosphere of public respect, making desirable the removal or discipline of judges whose conduct may tend to bring the entire judiciary into disrepute.²²

The two justifications seem related insofar as behavior such as criminal acts, which may cast doubt on judicial performance, will result in adverse reaction to the judiciary. Some publicly disapproved behavior may not affect performance, however. Sexual promiscuity, for example, is not sufficient grounds for discipline and removal in California since it does not influence judicial performance, although such conduct may be disapproved by the public, and may cast a shadow on other judges. Although the members of the California removal and disciplinary body, the Commission on Judicial Qualifications, seem well aware of the need for public respect for the judiciary, they have attempted to strike a proper balance between reluctance to regulate private, noncriminal conduct and the need for public respect. It may well be that the same public apathy that tends to make the election of judges an inadequate control over their quality²³ minimizes the effect of misbehavior off the

19. E.g., *Habenicht v. R.K.O. Theatres, Inc.*, 23 App. Div. 2d 378, 260 N.Y.S.2d 890 (1st Dep't 1965).

20. See *Matter of Reigi*, 222 App. Div. 696, 225 N.Y. Supp. 226 (2d Dep't 1927) (use of expression "shut up" is insufficient ground for removal).

21. Ala. Const. art. VII, § 173; La. Const. art. IX, § 1.

22. See Rifkind, *The Public Concern in a Judge's Private Life*, in *University of Chicago Law School Conference on Judicial Ethics* 25 (1965).

23. See Note, *Judicial Selection and Tenure in Indiana: A Critical Analysis and Suggested Reform*, 39 Ind. L.J. 364, 366-67 (1964).

bench. Even if such conduct creates a public scandal, professional journals and even daily newspapers are often careful to indicate that the vast majority of judges are behaving properly.²⁴ On the other hand, it has been argued that the need for public respect is paramount, and that all misconduct should be deterred. Indeed, the California rule may merely be a result of the Commission's unwillingness to enter into control of private activities, even at the risk of losing needed public support for the judiciary, rather than an attempt at a proper balancing of interests.

2. *The Drinking Judge*

Heavy drinking by judges presents a complex disciplinary problem, and seems to occur occasionally in all jurisdictions covered. There is general agreement as to policy at the extremes. It is intolerable for a judge to be drunk on the bench, but total abstinence is unnecessary. Of course, a wide range of possibilities exists between the extremes. For example, attorneys practicing before a Wisconsin judge hesitated to bring important matters before him in the afternoon, because his craving for alcohol made him want to leave the bench, which in turn adversely affected his patience and judgment. Heavy drinking in public is also a problem, since a judge may become a public scandal. Although public opinion of heavy drinking varies sharply not only among jurisdictions, but also from place to place within a jurisdiction, it seems that alcoholism should be treated as a disease rather than a permanently damning act of misconduct.²⁵ Some judges have successfully left the bench temporarily to "take the cure," indicating that an enlightened approach may yield dividends. On the other hand, there might be great reluctance in most states to give financial support to such disabled judges. The best that may be expected is that some states will permit alcoholic judges to take a leave of absence without pay.

3. *Political Activity*

In General.—Political activity by judges creates ethical problems, particularly in jurisdictions where judges are elected.²⁶ Even in appointive states, the judiciary is chosen by a political figure—the governor—from the traditionally politically active practicing bar.²⁷ The core of the ethical problem is that within the context of a politically chosen judiciary there is a desire to isolate judges as much as possible from the political arena. It is feared that the public will feel that judges, like other public officials, owe favors, and that political debts might actually affect the outcome of particular cases. Moreover, political activity might

24. See Editorial, *Milwaukee Sentinel*, Feb. 10, 1965, § 1, p. 10, col. 6; Burke, *supra* note 4, at 170.

25. New York, for example, has declared alcoholism a disease. N.Y. Mental Hygiene Law § 300 (Supp. 1965).

26. See Rifkind, *supra* note 22, at 29-34.

27. Nat'l Conference on Judicial Selection and Court Administration, *Minimum Standards of Judicial Administration* 6-8 (1959).

render a judge less likely to be impartial in a matter which has partisan significance—such as a labor union case—or in a matter which concerns a party either strongly sympathetic or hostile to the judge's political position.

Reelection.—Political activity engaged in initially to achieve judicial office cannot be grounds for discipline, since it does not occur during a judge's tenure in office. A judge's activities in seeking reelection are relevant, however, and the issue here is whether a judge seeking reelection is to be restricted in the steps he may take, particularly since his opponent, if not a judge, is unrestricted. New York's and California's electoral systems have evolved so as to make it relatively easy for an incumbent judge to retain his office and have thus largely eliminated their judges' problem. In New York, where there are partisan elections,²⁸ judges often run for reelection under the aegis of both major parties, and are thereby assured reelection. In California, where there are nonpartisan judicial elections,²⁹ the incumbent judge is so designated on the ballot and is listed first. Thus, he has very little trouble holding his office, except when his opponent has received massive bar association and newspaper support. It is not uncommon for a California incumbent to win by a three-to-one margin without campaigning.

In Wisconsin, however, an incumbent judge running for reelection has a greater problem, because the elections are nonpartisan and the incumbent receives no preference on the ballot.³⁰ Neither support by both political parties nor incumbency itself is of decisive aid in meeting an electoral challenge. Other practices have evolved, however, to aid worthy incumbents. Although these practices would raise serious ethical questions in other states, they are accepted and expected by most Wisconsin attorneys and judges.

Wisconsin Supreme Court justices, for example, sometimes find themselves in a serious struggle to retain their office. The primary need is for funds with which to wage a campaign, and it is customary for a committee to be formed to solicit contributions. Wisconsin judges and attorneys accept the call for contributions as a fact of life. Occasionally, fellow justices of the Wisconsin Supreme Court will publicly support an embattled colleague who in their opinion is facing a markedly inferior opponent. In one case, an insurgent accused an incumbent justice of attempting to impose his morals on the community through the vehicle of a liberal obscenity opinion. Five members of the court, including those who dissented in the case, issued a public statement pointing to the opinion's judiciousness and to the sincerity of the judge who had written it. Such endorsements are justified by their proponents as a form of self-defense for the judiciary against inferior aspirants, despite an American Bar Association Canon of Judicial Ethics that clearly proscribes public endorsements by judges.³¹ It was argued that no one

28. N.Y. Const. art. VI, § 1.

29. See Cal. Const. art. VI, § 26.

30. Wis. Stat. Ann. § 6.24 (1957).

31. ABA Canon of Judicial Ethics No. 28.

is in a better position to gauge the quality of candidates for judicial office than other judges, and that it is therefore ethical for them to do so. Nevertheless, one attorney believed that a judge receiving such support usually got most of the politically important speaking engagements. No endorsements are made when it is felt that both candidates are worthy, or when two persons are running for an empty seat. Moreover, trial judges do not openly support candidates, although some work quietly for them.

Interim Activities.—Even when an election is not immediately at stake, a few judges in some states maintain political ties. Judges attend party meetings, conventions, outings, and fund raising affairs in their own or someone else's honor. This may reflect social ties with present or former colleagues, but since the judiciary in appointive states has generally avoided politics, perhaps the major motivation behind such activity is an interest in future support. Although Missouri-Plan judges must periodically run against their record,³² the fact that only one has been defeated since the plan's inception may explain the willingness of such judges to forego politics.³³ No Missouri attorney or judge interviewed had detected serious political activity on the part of judges already appointed. New Jersey, which has an appointive system for most courts,³⁴ has gone so far as to enact ABA Canon 28 into law, thereby forbidding political speeches, fund solicitation or contribution, and endorsement by judges.³⁵ The judiciary has been very cooperative in obeying these rules, which have been strictly enforced.

In states where judges are elected, there seems to be a grudging toleration of judges' retention of political ties by authorities charged with discipline. In California, the Commission on Judicial Qualifications seems unlikely to concern itself with a judge's political activities unless they directly affect his performance of duties. California attorneys, however, voiced some dissatisfaction with politically active judges. Particularly in sensitive areas, such as labor cases or mandamus against government officials, it was felt that a nonpolitical judge would be preferable to one who has remained politically active. In Wisconsin, attorneys seemed to take a more casual view of politically active judges, and seemed unconcerned whether or not they presided in such cases. Although both elective and partisan, New York has been striving toward limiting judges' political activity. Judges in one area are officially discouraged from being too prominent at political functions, and the state bar association has criticized a judge for his wife's extensive political activity.³⁶

The Impossibility of Uniform Standards.—Different systems of

32. Since 1940, certain judges in Jackson County (Kansas City) and St. Louis City have been governed by the "Missouri plan," which involves selection by the Governor from a list chosen by a panel of lawyers and laymen. Judges have tenure in office, subject to periodically running unopposed, with the voters deciding whether they should be retained in office. Mo. Const. art. V, §§ 29(a)-(d).

33. Gershenson, *Experience in Missouri With Judicial Selection Under the Non-Partisan Plan*, 46 A.B.A.J. 287, 288 (1960).

34. N.J. Const. art. VI, § 6, ¶ 1.

35. See, e.g., *Matter of Pagliughi*, 39 N.J. 517, 189 A.2d 218 (1963).

36. See 48 J. Am. Jud. Soc'y 198 (1965).

judicial selection and tenure may make it unreasonable to formulate uniform standards for restricting judges' partisan political activity. ABA Canon of Judicial Ethics 28 appears to function successfully only in jurisdictions where incumbent judges are relatively secure in office, either because of an appointive system, or because law or custom gives an incumbent judge relative security in the face of a challenge at the polls. Judges who must actively campaign to stay in office, however, are not apt to show self-sacrificing restraint by allowing their political connections to lie fallow while potential opponents are garnering support. Because the ABA Judicial Ethics Committee has interpreted Canon 28 to be unalterable by local law or custom,³⁷ it is largely ignored in jurisdictions where judges face such a dilemma. It would seem more reasonable to adapt rules defining acceptable political activity to local conditions, possibly restraining both a judge and his opponent. Some practices, however, may be questionable in any context. For example, the Wisconsin practice whereby judges endorse their colleagues seeking reelection seems so ripe for abuse resulting from personal motives that it should be forbidden, despite the difficulties confronting a Wisconsin incumbent judge.

Election to Other Office.—Another ABA Canon states that a judge should resign from office before seeking a nonjudicial elective position.³⁸ By failing to resign, it is argued, a judge is using his judicial office to further personal ambitions, is lessening the dignity of his office, and may be neglecting his duties. Opinion is divided on this issue, however, because mandatory resignation may discourage good men from running for nonjudicial office. Since life tenure is the exception in the United States, rather than the rule, as in other countries,³⁹ and since judges often must contend politically for office, there is reason to believe that judges may move in and out of judicial office without damaging the dignity of the office.

Although most attorneys feel that there is an ethical problem when judges do not resign before seeking other office, disciplinary authorities generally have not taken action. In California, the voters rejected a constitutional amendment that would have required resignation, perhaps indicating that there is little public concern over the ethical issue. A possible compromise solution is suggested by the voluntary action of some California judges who, when seeking nonjudicial office, have suspended themselves from their judicial duties and salary for the duration of the campaign, intending to resume both if defeated.⁴⁰ This approach may be unsatisfactory, however, where the press of the docket necessitates bringing in a short-term replacement judge and his staff at considerable expense.

Expression of Opinion on Public Issues.—There is some authority

37. Opinion 193 (1939), Opinions of ABA Comm. on Professional Ethics and Grievances 382-89 (1957).

38. ABA Canon of Judicial Ethics No. 30.

39. See, e.g., David & de Vries, *The French Legal System* 18-20 (1958).

40. *California Courts Commentary*, July 1965, p. 5.

that judicial office requires a judge to refrain from public expression of his opinions on controversial matters.⁴¹ The object of such restriction may be to foster an image of the judiciary as a group of men who face all questions without preconceptions, although this ideal is obviously impossible to attain. Moreover, many believe it is best to keep the judiciary "above" political disputes. A New York case indicated that active participation by a judge in picketing a foreign dignitary might be a ground for reprimand.⁴² Some state constitutions, however, limit action against judges to specifics which do not include conduct of this type. Thus a Minnesota judge, who during World War I stated that the sinking of the *Lusitania* was justified and argued that the United States should get out of the war, was spared removal because the state constitution allowed removal only for misfeasance or nonfeasance in office.⁴³

There is a divergence of view as to whether judges should take positions on less controversial public questions. Some attorneys felt that judges above all were qualified to speak out on such questions as bond issue referendums, since judges have the legal training to deal with such issues intelligently. Thus the California Conference of Judges approved judges' participation in a debate over the amendment of a city charter.⁴⁴ Moreover, judicial service on public bodies, such as the Warren Commission, seems to be accepted. It seems that judges should participate in such activities so long as they can avoid espousal of a particular political ideology. Nevertheless, the border between the controversial and the uncontroversial may become ill-defined. Chief Justice Stone found fault with Mr. Justice Jackson's participation in the Nuremberg trials, arguing that such extra-judicial activity reduces a judge's judicial output, adversely affects his impartiality, and tends to reduce public respect for the judiciary.⁴⁵

A related problem arises when judges engage in public feuds with colleagues. In both Wisconsin and New York, disciplinary authorities stepped in when judges publicly criticized colleagues' legal abilities and biases.⁴⁶ Although few would object to scholarly legal debates, public attacks against individuals are universally condemned as demeaning to the judiciary.

4. *Community Service*

A judge, like other prominent members of the community, is often called upon to lend both his name and time to public service activities, such as charities and university boards. Judges in New Jersey and part of New York, however, are discouraged from engaging in such activities

41. See Rifkind, *supra* note 22, at 33-34.

42. *Matter of Seelman (Troy)*, 277 App. Div. 116, 98 N.Y.S.2d 669 (2d Dep't 1950).

43. *State ex rel. Martin v. Burnquist*, 141 Minn. 308, 170 N.W. 201 (1918).

44. 34 J. Am. Jud. Soc'y 153 (1951).

45. Mason, *Extra-Judicial Work for Judges: The Views of Chief Justice Stone*, 67 Harv. L. Rev. 193, 209-15 (1953).

46. See, e.g., *Matter of Sobel*, 8 N.Y.2d (a) (Ct. on the Judiciary 1960).

when they involve fund raising, because engaging in such activities is deemed a possible misuse of one's judicial status, inasmuch as attorneys and others may feel constrained to contribute. Moreover, such interests may be connected, however remotely, with political activities. New Jersey judges are discouraged from sitting on public library boards when other board members are politically appointed. Furthermore, it is argued that judges should avoid placing themselves in positions where their outside interests may force them to recuse themselves from litigation involving those interests. Thus New Jersey discourages judges' membership on hospital boards, because such activity involves fund raising and there is a substantial likelihood of hospitals' appearance in the courts. In other jurisdictions, however, it is contended that, even assuming the validity of the above objections to such activity, they are inconsequential in comparison to the benefit obtained from such public service. One California appellate judge proudly holds a high office in a local fraternal organization, and another argues that his participation in a cancer foundation drive is a public duty. It is noteworthy that New Jersey even discourages judges from engaging in some bar association activities because their membership may have the effect of stifling criticism of the judiciary, and that some Wisconsin judges do likewise for the same reason.

5. *Business Activity*

Many jurisdictions attempt to limit the business activities of judges in order to forestall possible bias and conflicts of interest. Although it is recognized that such restrictions may deeply affect a judge's private life, it is contended that the public distrust engendered by the possibility of a judge's having a stake, however remote, in the outcome of cases before him justifies strict control. New York goes farthest, absolutely prohibiting membership on corporate boards or participation in any activities of an enterprise organized for profit.⁴⁷ New Jersey permits activity that will not lead to active dealings with the lay public. Thus a judge may quietly participate in a family corporation and have small holdings in large corporations, so long as he remains in the background of these operations. Moreover, in any case involving a company in which he has even the smallest holding, he must disqualify himself, although he may sit on cases involving other companies in the same industry. California, on the other hand, permits judges to own corporate stock and to sit on public corporation boards. Absent an administrative ruling from the Judicial Council, charged with overall administration of the state courts, it is doubtful that the California disciplinary commission will prohibit such business activity because many judges have acted in reliance upon past permissiveness. Wisconsin is drafting a code of ethics to deal with this problem, largely because the press has been critical of judges' sitting on savings and loan association boards.

47. Rules of the Administrative Board of the Judicial Conference of the State of New York, art. 1, § 8, in 10 N.Y. Judicial Conference Ann. Rep. (July 1963-June 1964).

Jurisdictions unwilling to adopt the absolute New York approach could deal with the problem by enacting strict requirements that judges recuse themselves from cases in which they have an interest, and that they disclose their business activities and holdings, thus notifying litigants of possible grounds for challenging judges. Furthermore, participation by judges in cases where they have a substantial interest probably should be made grounds for removal, because such conduct comes close to crossing the line between unethical and criminal acts. This may be preferable to the New York rule, which has been criticized by a New York judge as being too great an intrusion into his personal affairs.

C. Judicial Disability

The problem of aged and disabled judges seems to have been given more thought by judges and attorneys than any other problem involving removal of judges. Not only is the problem so common that nearly everyone interviewed had encountered it at some point, but also it is so sensitive that there is serious concern as to how the dirty work can best be done—a common complaint is “how do you tell a good judge who you’ve known for years that he is too old and has lost his edge?” Sometimes judges lose their health or faculties at a normal retirement age and can no longer serve effectively, but persist in staying on. In Missouri, where there is a relatively low pension and no compulsory retirement,⁴⁸ the potential scope of these problems is revealed by recurring cases where judges refuse to retire when virtually everyone feels that they ought to leave the bench. In one case, a judge was so ill that he sat only sixteen times in eight months.

Persons charged with solving such problems, however, confront a dilemma when dealing with aged judges. On the one hand, the age at which a man ceases to serve effectively differs sharply from person to person. Some judges lose substantial abilities in their sixties, but others can distinguish themselves well into their seventies. Thus an attempt to solve the problem by compulsory retirement at a given age will remove some judges who are still in their prime, unless the retirement age is so high that it allows many judges to sit too long. On the other hand, an attempt to solve this problem by dealing with each case separately also creates great difficulties. First, there will always be suspicion of favoritism, whether or not it exists. Second, some judges are better even with some of their ability gone than other judges will ever be. By what standard are they to be judged? By their own performance, or by that of others?

Thus the problem of disability is similar to that of inherent lack of judicial ability, in that standards are needed to measure the quality of a judge’s performance. In the case of judicial disability, however, at least a uniform retirement age can be established without threatening the independence of each judge. Some jurisdictions call back into service

48. See Summaries of Judicial Salaries and Retirement Plans, 47 J. Am. Jud. Soc’y 129 (1963).

judges who have retired at the compulsory age but who are still able to function effectively.⁴⁹ Usually only a few of the retired judges are called back. Perhaps this system makes the process of choosing more acceptable than in selective retirement, since all judges are treated uniformly at the stage of initial retirement. The choice thus appears as which "best" judges to recall, rather than which "worst" judges to retire.

D. Uniformity of Standards for Removal and Discipline

There is some question whether standards of conduct for judges in different parts of a single jurisdiction ought to reflect local opinion as to the conduct's propriety, or whether uniform standards should be applied throughout a state. This question seldom arises in situations where removal powers are vested in local hands, such as in the departments of the Appellate Division of the New York Supreme Court,⁵⁰ but local feelings, both among disciplinary authorities and the public, probably influence the decision whether to prosecute in a case or to let a warning suffice.

The problem is more obvious where the removal power is vested in a statewide authority. In California, although the existence of statewide authority may imply the application of statewide standards, it seems that a Los Angeles judge might be removed for heavy public drinking, since this would cast the judiciary in a bad light, although a San Francisco judge might not be censured for identical conduct, since drinking is reportedly more tolerated in the San Francisco area than in Los Angeles. Even if local expectancies are relevant to discipline in those few areas where public opinion rather than courtroom performance is the basis for making misconduct actionable, misconduct affecting courtroom activity should probably be judged uniformly, since the right of a litigant to an able judge anywhere in a jurisdiction seems more basic than the status of the judiciary in a community. However, if a community expects a higher standard of conduct from its judges than a removal body would otherwise deem actionable, the added factor of public disaffection may warrant removal or discipline.

III

MECHANISMS FOR DISCIPLINE AND REMOVAL

Analyses of mechanisms for the discipline and removal of judges have generally dealt with the problem only from the standpoint of those mechanisms which are established by constitutional or statutory mandate.⁵¹ That approach covers many of the methods used to control judicial behavior, but it seems preferable to discuss all the devices which are relevant, both before and after the "damage" is done, to maintaining,

49. *Ibid.*

50. N.Y. Const. art. VI, § 22(i).

51. E.g., Allard, *Judicial Discipline and Removal Plans—A Survey and Comparative Study*, 48 *J. Am. Jud. Soc'y* 173 (1965); Burke, *supra* note 4; Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution* (pts. 1-2), 28 *Mich. L. Rev.* 485, 723 (1930).

raising, or scrutinizing judicial behavior. It is noteworthy that some of these devices, such as administrative judges' power of assignment, were not intended and are generally not considered to be relevant to dealing with the types of conduct discussed earlier in this Note. For that reason, they are characterized herein as *quasi-disciplinary*. Furthermore, some mechanisms are *informal*, in that they function without direct legal sanction. They are included in this discussion, however, because they have operated, with some degree of regularity, in several jurisdictions. The tendency of judges to chide colleagues for not carrying their full workload is an example. Finally, certain devices are characterized as *inadequate*, because they possess certain characteristics which render them inherently incapable of dealing adequately with disabled and misbehaving judges. Legislative removal, generally termed impeachment, for example, is intended to remove misbehaving judges, but has proved to be an inherently inadequate tool. This is not meant to imply that the other devices discussed are self-executing, but only that the other devices do not contain such inherent weaknesses. It must be emphasized at the outset that a sincere desire to deal with problems of judicial conduct has led in some jurisdictions to the effective use of a relatively limited arsenal of devices. Conversely, a lack of desire to act can cause a potentially effective device to fail.

A. Inadequate Mechanisms

1. Impeachment and Address

The method most commonly authorized for dealing with judicial misconduct is legislative action by way of impeachment and removal, or address to the executive.⁵² Impeachment and removal differs from address to the executive in that in the former there must be an impeachment—a specification of charges voted by the lower house of the legislature to be tried by the upper house, which sits for this purpose as a court. Removal usually requires a two-thirds vote rather than a majority.⁵³ Address to the executive is merely a concurrent resolution by both houses of the legislature, also by a vote greater than a majority, ordering the executive to effect a judge's immediate removal from office.⁵⁴ There is no "trial" and the judge in question may have no explicit right to present a defense, as he usually does in the trial of impeachments, which are generally governed by rules for both prosecution and defense.⁵⁵ The federal impeachment power is set forth in the Constitution,⁵⁶ and provisions granting impeachment or address powers may be found in most state constitutions. The provisions also set out grounds for removal, which usually relate to wilfull misconduct, physical or

52. Nat'l Conference on Judicial Selection and Court Administration, *supra* note 27, at 21-23.

53. E.g., Cal. Const. art. IV, § 17.

54. Nat'l Conference on Judicial Selection and Court Administration, *supra* note 27, at 21 & n.57.

55. See Simpson, *Federal Impeachments 21-30* (1916).

56. U.S. Const. art. II, § 4.

mental disability, and habitual intemperance.⁵⁷ It is generally assumed that there is no judicial review of a legislature's action, so that it is within the legislators' discretion to determine when grounds for removal exist.⁵⁸

Address to the executive has become a largely theoretical device, and removal of judges by impeachment has been rare, usually occurring in cases involving corruption of criminal magnitude.⁵⁹ The growth of new devices, despite the existence of impeachment and address, is the result both of their disuse, and of increasing awareness of legislative inability to deal effectively with problems of judicial conduct.⁶⁰ The major criticisms are, first, that legislators are not equipped to assume the unfamiliar role of judge in an area with which they have had relatively limited contact.⁶¹ Second, the procedures of the legislature as a body do not readily lend themselves either to the type of fact finding which is characteristic of a trial, or to the necessity, engendered by the trial of a charge of judicial misconduct, for halting their regular activities.⁶² Third, because there is no mechanism for preliminary gathering of evidence or screening of complaints, cases that do not achieve the level of a public scandal are not likely to be considered.⁶³ Thus in all the jurisdictions covered, only one judge believed impeachment to be an adequate device.

2. Recall

Recall is a procedure sanctioned in some state constitutions whereby certain public officials, including judges, can be removed from office by means of a special recall election.⁶⁴ The election will be called after submission of a petition, signed by a specified number or percentage of voters qualified to vote for the office in question, requesting that the recall proposition be placed before the voters.⁶⁵ Recalls of judges have been rare. In California, for example, the last one occurred in 1932, following charges that the judges in question had been taking kick-backs from receivers.⁶⁶ The reasons for its disuse seem to be that recall, like impeachment and address, is likely to occur only in flagrant instances of misconduct—because there is no mechanism for screening complaints and investigating acts of misconduct. Furthermore, the

57. E.g., Ala. Const. art. VII, § 173; La. Const. art. 9, § 1.

58. See Note, *The Exclusiveness of the Impeachment Power Under the Constitution*, 51 Harv. L. Rev. 330, 331 (1937).

59. Brand, *The Discipline of Judges*, 46 A.B.A.J. 1315 n.2 (1960).

60. Proceedings of the National Conference on Judicial Selection and Court Administration, Nov. 24, 1959, p. 59 (final general assembly) (on file at the Library of the Institute of Judicial Administration, New York University Law Center).

61. Shartel, *supra* note 51, at 871.

62. *Id.* at 871-73.

63. See Proceedings, *supra* note 60, at 59.

64. E.g., Cal. Const. art. 23, § 1.

65. *Ibid.*

66. See Frankel, *Judicial Conduct and Removal for Cause in California*, 36 So. Calif. L. Rev. 72, 75 (1962).

gathering of signatures for the recall petition may be quite expensive. For example, removal of a judge elected county-wide in Los Angeles County in California might require a petition containing more than 100,000 signatures.⁶⁷ Finally, a successful recall campaign might require persons in a position to be hurt by the judge, such as practicing attorneys, to take a strong public stand against him without assurance that the matter would reach the desired conclusion.

3. *Bar Association Recommendation*

In at least two jurisdictions, bar associations have been given some responsibility for coping with judicial misconduct. In Missouri, concern is limited to problems of disability due to age or illness; in Wisconsin, power seems to extend to all grounds for discipline.⁶⁸ In neither jurisdiction, however, is the bar association given final authority. In both, they are limited to making recommendations to a body charged with the actual power to discipline.

Missouri.—For over a decade, the Judicial Retirement Committee of the Missouri State Bar has been empowered by supreme court rule to investigate complaints and to make recommendations for action against judges found to be too old or infirm to serve effectively.⁶⁹ The members of the Committee, chosen annually by the State Bar Board of Governors, are generally from various parts of the state. Usually, the members are highly respected practitioners, relatively well known in their communities.

The Committee receives some complaints directly, and some are referred to it by others with an official interest, such as the Chief Justice and the Court Administrator. Virtually all complaints come from lawyers; few are from laymen or judges. Although local bar grievance committees are empowered to receive and forward complaints, they have not been a fertile source. There have been allegations that these local committees fail to meet, and that complaints are "lost," never reaching the State Bar Committee. Although the State Bar Committee keeps complaints confidential its existence is not widely known. As a result, a potential complainant, believing that his sole recourse is to the local committee, may not complain if the local body does not maintain an express policy of strict confidentiality. The State Bar Committee sometimes acts on the basis of "scuttlebutt" picked up by the Committee members themselves in the course of their daily practice.

Complaints are investigated by speaking to attorneys who practice before the judge in question—twenty-seven were spoken to in one case—and by checking court records and speaking to court officers. Inasmuch

67. Cal. Const. art. 23, § 1 provides that a recall petition must contain the signatures of 20% of the number of voters who cast votes for the office in question in the previous general election.

68. Mo. Const. art. V, § 27; Wis. St. Bar R. 10, § 5.

69. Resolution of the Board of Governors of the Missouri Bar, September 10, 1954, in Letter From David L. Millar, Chairman of the Judicial Retirement Committee of the Missouri Bar, to the *New York University Law Review*, February 10, 1966 (on file in the New York University Law Review Library).

as the Committee was created by the Missouri Supreme Court, it has sufficient prestige to make an adequate investigation without subpoena power. Once the Committee feels it has obtained all available evidence, it decides whether to act, sometimes consulting with the Chief Justice on this question.

Generally, the first action taken is that one or two Committee members visit the judge privately and suggest his retirement, citing evidence that points to his disability. Many judges do not comply with the suggestion. Before a second visit, usually about a month after the first, the judge's physician, friends, and relatives are advised of the Committee's intentions and encouraged to discuss the problem with him and urge his retirement. If persuasion fails, the Committee is empowered to recommend that the Attorney General commence proceedings before a commission consisting of three supreme court justices, one judge from each of the three courts of appeal, and one judge from each of the three circuit courts.⁷⁰ Approximately twenty judges have retired under Committee pressure since its inception. In only two cases were formal complaints made, and only once was the Attorney General instructed to begin prosecution. The judge in that case retired fifteen minutes before the hearing was to begin.

There is substantial dissatisfaction in Missouri with having a committee of attorneys handle even this limited area of judicial discipline. The Committee has encountered great difficulty in persuading judges to retire. In one instance it took the Committee six months to obtain a retirement. One Committee member attributed this to the Committee's being composed of attorneys rather than judges. There seems to be a distaste among Committee members for the "dirty work" they do; the Committee has been nicknamed, somewhat to the distress of its members, the "S.O.B. Committee." It is widely felt that compulsory retirement at a reasonable age, with a better pension in cases of disability, would be a preferable means of dealing with this problem, since it would avoid the tensions and anguish inherent in the present system. Even if the Committee were composed of judges, Missouri's low pension would probably engender great resistance to retirement suggestions. There was a distinctly positive reaction to suggestions that both the Judicial Retirement Committee and the other judicial discipline devices in Missouri be replaced by a system similar to California's, where the predominant role is in the hands of the judges rather than attorneys. Finally, the Committee is powerless to deal with misbehavior of judges who are not disabled by age or illness.⁷¹

Wisconsin.—The rules of the integrated Wisconsin bar impose on the discipline committees in local districts a duty to receive complaints of judicial misconduct, make appropriate investigations, and report their findings and recommendations to the Board of Governors of the State Bar.⁷² No justice, judge, or attorney interviewed recalled this section's procedures ever having been invoked, although many felt that problems

70. Mo. Const. art. V, § 27.

71. Resolution, *supra* note 69.

72. Wis. St. Bar R. 10, § 5.

of judicial misconduct were not being satisfactorily dealt with. A Madison attorney, succinctly summing up the reason this mechanism lies unused, said, "it's like asking a committee of mice to put a bell on the cat."

B. Informal Mechanisms

Informal mechanisms are basically the operations of persons and extralegal institutions capable of persuading or "pressuring" a judge to improve his conduct. Although the informal mechanisms might be defined as those that function without legal sanction, this is not entirely accurate. Any attempt to persuade a judge to alter his behavior may contain within it the threat of future use of formal disciplinary mechanisms if the judge does not comply. Thus if a judge is sitting while under the influence of alcohol, a colleague's suggestion that he stop drinking may be effective only because the judge fears that he will become known as a heavy drinker and eventually be removed from office by official methods.

It should also be noted that there is little functional difference between the informal mechanisms mentioned below and the informal aspects of formal mechanisms. The difference lies only in the origin of the mechanism's power. For example, in the preceding discussion of the Judicial Retirement Committee of the Missouri State Bar, it was shown that the Committee's goal is to procure the judge's retirement without recourse to a formal proceeding, which is brandished as a threat but used only as a last resort. A suggestion to a judge by his colleague that he retire differs from the Missouri bar mechanism only in that judges are not ordinarily empowered to police their fellows. The judge's retirement in this situation may be, as suggested above, under the threat of other available mechanisms. An informal mechanism may be more effective in a jurisdiction that provides a strong background of formal disciplinary mechanisms than a formal mechanism with a weak sanction in a jurisdiction that lacks other effective sanctions. The failure of the disciplinary role given the Wisconsin bar illustrates the potential failure of formal mechanisms, despite their establishment under express legal mandate.

Finally, the definition of "informal mechanisms" could be reduced to the absurd by including in it, for example, the admonitions to a judge by his wife. The informal mechanisms discussed below, however, either have functioned effectively in a number of cases, or are acknowledged to have strong potential of effecting a higher level of judicial performance. Where such mechanisms have proved ineffective, their failure usually may be attributed either to an attitude that the responsibility for dealing with problems of judicial conduct is in the hands of others, or to a lack of vigilance.

1. Informal Contacts Among Judges

It is common for judges to discuss the performance of their colleagues, particularly those within their court, and subsequently to make informal approaches aimed at curing any defect in performance.

The judges spoken to are usually responsive and will often correct a fault without anything further having to be said or done. Judges on higher courts will sometimes speak to lower court judges—even in the absence of a legally recognized supervisory power.

A frequent problem dealt with through these contacts is a judge's failure to carry his workload. It seems that all but the most intransigent will react to the criticism that he is forcing others to do his work. Other problems sometimes discussed on a more personal level are excessive drinking, abusive behavior in court, and immoral out-of-court behavior. A problem area in which informal contacts seem insufficient is disability and superannuation. Judges who are quick to voice their displeasure at a colleague's failure to work because of laziness will sometimes "carry" a disabled judge by doing his work for him, particularly if the retirement and disability pensions are small. In Wisconsin, an incapacitated judge rarely appeared in court for over two years while his colleagues filled in for him, and even regularly brought papers to his home for him to sign. Although judges act from the best of motives in filling in for incapacitated colleagues, such practices may adversely affect the performance of the judges giving aid, since they must increase their own workloads to help incapacitated colleagues. Thus the public may lose the services of one judge while receiving less time on each case from the healthy judges. Furthermore, the practice of carrying their disabled colleagues involves—oddly enough—judges' "taking the law into their own hands," since it seems to be the responsibility of others to decide whether the disabled judge should continue to sit and whether his colleagues should do his work for him.

Judges generally give two justifications for bringing a colleague's shortcomings to his attention. First, most judges feel that they have a duty to police the conduct of their fellows. Second, a few judges who feel no such duty believe that self-policing is the lesser of two evils. They believe that problems involving judges' behavior should be "kept in the family" whenever possible, so as to avoid both added embarrassment to the judge in question and intrusion by "outsiders." These judges feel that only a judge's colleagues are in a position to deal with such problems, and have stated that they would not complain to an "outside" disciplinary body, even if they believed misconduct to be occurring. Moreover, one judge, charged with administering the work of his colleagues, felt that self-policing, however ineffective, is preferable to the use of formal disciplinary machinery because the offending judge might discover the identity of the complaining judge. Were the offending judge then not removed, relations within the court would be extremely cool.

Informal contacts among judges are of particular importance on the appellate level. Appellate judges' limited contact with attorneys and their deliberative rather than "on the spot" decision making makes such defects as drinking and senility virtually undetectable by persons other than their fellow judges. Furthermore, since appellate judges generally do not sit alone, their colleagues are in a particularly good position to detect such defects. It appears that appellate judges have been rela-

tively successful in dealing with such problems informally, even though there have been glaring exceptions. One appellate judge attributed this success to their being of higher caliber than their colleagues on the trial level, and more willing to abide by the judgment of their fellows. Whether this properly accounts for the seemingly lower rate of misbehavior on the appellate level is conjectural. In any event, problems of disability, old age, and serious misconduct seem no less difficult on the appellate than on the trial level.

The present movement toward disciplinary bodies empowered to reprimand as well as to remove indicates that informal contacts do not suffice to control conduct warranting discipline but not removal. The weakness of informal contacts between judges characterizes all such informal mechanisms—they are without sufficient sanctions to solve the tough cases.

2. Contact With Bar Associations

Bar associations sometimes effect improvements in judicial behavior by means of informal contacts between their officers and judges. Bar association officers generally act in response to the complaints of association members, although even with the prestige of their office they hesitate to go forward. There is some contact, however, because some of the factors which stymie official mechanisms such as the Wisconsin bar rule scheme are not present. First, the contacts are informal and confidential, so that the inflammatory effects of putting the matter on public record are avoided. Second, the contacts may be "friendly," in that rather than involving a direct accusation of the judge, the problem may be put to a judge in general terms in the course of an ordinary social contact. For example, a bar association officer might approach a judge known to be abusive to attorneys by saying, "There's talk of some judge's jumping down lawyers' throats; have you heard anything about it?" Third, the complaint may be made over the head of the judge in question, so that he would not know where the original complaint arose.

Bar association contacts seem more effective in rural than in metropolitan areas. The bench and bar are closer both socially and professionally, and often the individuals involved are lifelong acquaintances. For example, the local bar associations in upstate New York seem better versed in the doings of individual judges than do those in New York City. Similarly, Los Angeles and San Francisco attorneys agreed that the San Francisco bar is closer to the bench than is the bar in Los Angeles. There also seems to be a feeling that local problems should be dealt with locally, because the atmosphere is conducive to the discussion of such problems as an alternative to taking them to a higher authority.

Occasionally the bar will endeavor to place a recall proposition on the ballot or to oppose the appointment of a judge felt to be clearly unfit. The 1932 California recall, as well as the one electoral defeat under the Missouri Plan, were in large part the result of formal bar

association activity. In general, however, formal action regarding judicial conduct is avoided, other than the publication and interpretation of canons of judicial ethics.

Bar association contacts seem less effective than informal contacts among judges. Judges are more likely to know when colleagues are misbehaving, except in instances involving courtroom conduct. Furthermore, judges have less at stake in expressing their dissatisfaction with a colleague's conduct. It has been argued that even a layman is more likely to criticize a judge, because laymen have not been conditioned to respect judges the way lawyers have. Even in rural areas, bar association contact seems an unreliable control over judicial misconduct.

3. *The Press*

Potentially, the press might be the most effective of all informal disciplinary mechanisms. The threat of publicity can influence even appointed judges because their misconduct reflects upon the appointing authority. Thus in New Jersey, where superior court, appellate division, and supreme court justices are appointed and may acquire tenure,⁷³ the disciplinary authorities regularly consult the newspapers for reports of misconduct.

It is generally felt, however, that although newspapers occasionally play a constructive role in speaking out about judicial behavior, they too often are unsophisticated and unenlightened in their remarks. Newspapers are most effective in exposing blatant cases of corruption or conflict of interest, but little attention is given other problem areas. In no jurisdiction canvassed was there satisfaction with the present conduct of the press in scrutinizing judicial conduct. It was contended that its policy is either to drag some or all judges through the mud or to say nothing, achieving no constructive middle ground. More attention to this middle ground, it was argued, would have a salutary effect on the courts.

C. Quasi-Disciplinary Mechanisms

Certain mechanisms, having ostensible purposes remote from discipline of judges, are used to deal with judges' conduct with varying degrees of effectiveness. Until recently, legislatures had been slow to reform disciplinary machinery,⁷⁴ so that those charged with the administration of the courts were forced to make use of other mechanisms to deter misconduct. The users are invariably quite aware that such mechanisms are being employed outside their usual or intended scope, but they justify their action on pragmatic grounds—"something has to be used, and it may as well be what's available." With the exception of election, these mechanisms are most useful in handling less serious problems—"judicial misdemeanors"—which do not call for removal from office or the notoriety inherent in making a matter public, but which do call for effective, immediate action. These mechanisms usually function

73. N.J. Const. art. VI, § 6, para. 3.

74. See Allard, *supra* note 51, at 173.

at a relatively low level of authority, and are used to correct some misbehavior or prevent some imminent misconduct.

1. *Election*

Although election of judges lacks the characteristics ascribed to the other quasi-disciplinary mechanisms, it falls within the definition because it ordinarily is not considered a means of removing judges, but rather a method of selecting them. It is obvious, of course, that in any election involving an incumbent, selecting the new judge involves removing the old one, but what is relevant for present purposes is that the acts of the incumbent judge sometimes are such that the election revolves around his fitness to remain in office rather than around the virtues of his opponent. In jurisdictions where judges "run against their record" this will always be the major issue.

Although incumbent judges are sometimes defeated in elections in which alleged misconduct is an issue, it is difficult to determine whether, in such cases, the conduct was decisive and whether the accusation was well grounded. Occasionally, a bar association or other nonpartisan public group will inject such an issue into a campaign and take a strong stand, but such efforts very often fail to bring about the judge's defeat. A California woman judge, for example, who was universally considered ignorant of the law and otherwise unfit to serve, was virtually unbeatable at the polls, despite the recurring efforts of many public groups to have her defeated. The source of her strength was her close contact with womens' organizations, which were receptive to her argument that the efforts to defeat her were the product of prejudice against her sex.

Under the Missouri Plan, where the electorate votes on whether the incumbent should retain his office,⁷⁵ only one judge has been defeated in the twenty-five years of the plan's existence. The difficulty in defeating a judge in such an election has caused some dissatisfaction. Since judges average about eighty per cent of the vote in their favor, it has been suggested that the vote necessary for retention of office be raised to two-thirds rather than a simple majority. Some have argued, however, that raising the percentage would force Missouri judges back into politics.

Although defeat at the polls does sometimes remove judges from office who should not have been there in the first place, it appears to be at best an inadequate substitute for more practical and deliberative mechanisms. The disciplinary value of election should not be regarded as a significant factor in resolving the debate over election of judges versus appointment, since election is at best a very haphazard mechanism for discipline.

2. *The Challenge*

Many states have provisions permitting attorneys to challenge the judge assigned to their case, with standards for the challenge varying

75. Mo. Const. art. V, § 29.

from state to state.⁷⁶ In California, under Code of Civil Procedure Section 170.6, a judge can be forced from a case even if the attorney does not provide facts supporting the reasons for his challenge.⁷⁷ This may be done only once in each litigation. Although principally designed to protect litigants from interested judges, the device also has a disciplinary effect similar to that of a reprimand from an official disciplinary body. It is no reprimand for a judge to be disqualified because he is related to one of the parties, or owns stock in a litigating corporation. But under statutes such as those of California and Wisconsin,⁷⁸ the peremptory challenge is also used against dilatory, impatient, or biased judges. Thus the challenge can reflect upon a judge's ability and jeopardize his reputation. In the Los Angeles Superior Court, the Presiding Judge tallies the challenges and sends a monthly report to each judge, totalling the number of challenges against him.

Since the challenges do not come from an official source, some judges ignore them, thereby limiting their disciplinary value. In all jurisdictions covered, trial judges were quick to point out that challenges were frequently utilized by the personal injury bar to escape judges having a strong plaintiff's or defendant's orientation. In some instances, challenges have reportedly been used to avoid good judges, in order to increase the likelihood that errors will appear in the record. Frequently the challenge is used to delay cases, and it was suggested that in California challenges have even been used to get cases removed to air conditioned courtrooms.

Even if used as a disciplinary device, the challenge has obvious limitations. Some attorneys will hesitate to use the challenge because they feel it to be an expression of weakness. More important, in all jurisdictions covered, lawyers argued and some judges conceded that in small, three-judge courts, an attorney challenging a judge may find a hostile reception in the court of his colleague. In Wisconsin and California, when a judge in a one-judge court is challenged, the replacement judge may be chosen because he was challenged from a case in his own county. Thus the second judge may be no improvement over the first. Moreover, once a judge receives a challenge from an attorney, the attorney may feel compelled to challenge him every time he is assigned to that judge. Perhaps the most valuable attribute of the challenge is that it may be used to protect attorneys who have reported misbehaving judges to a disciplinary body.

3. *Reversal and Appellate Reprimand*

Most judges take reversal seriously. In fact, some trial judges are moved to send protesting letters to appellate judges who reverse them. Thus reversal is a means of spurring better performance among those judges willing to heed constructive criticism, and a means to "punish"

76. Frank, *Disqualification of Judges*, 56 *Yale L.J.* 605 (1947); 30A *Am. Jur. Judges* § 196 (1958).

77. *Cal. Code Civ. Proc.* § 170.6(3) (Supp. 1965).

78. *Wis. Stat.* § 261:08 (1961).

more arbitrary judges. More important, reversal for errors of law remains the major mechanism for coping with judges of poor legal ability, since it is widely felt that action taken against the judge rather than against the decision would threaten judicial independence.

Reprimands in appellate opinions, however, also may be directed against misconduct within the courtroom. Although effective in the immediate case, the difficulty with public reprimand is that it weakens public confidence in the judiciary and the respect of attorneys for the particular judge. Thus, such reprimands are used only when the device of informal contacts between judges has been exhausted. For example, the Appellate Division of the New York Supreme Court reversed a trial court's decision on the grounds that the judge's conduct toward one party was so prejudicial that the party was denied a fair trial.⁷⁹ The appellate court extracted dialogues between the attorney and judge from the record reflecting upon the judge's objectivity, and made it clear that the judge's conduct was culpable. The decision was rendered in this manner, however, only after concerted informal effort to correct the judge's mode of behavior.

4. *Assignment*

A major administrative responsibility is the assignment of judges. In many places, it is accomplished either by chance, strict rotation, or seniority—with no additional factors given weight. In some areas, however, administrative officials have been using their power of assignment as a valuable tool to cope with various problems of judicial performance.

One such use is as a threatened sanction for failure to abide by administrative regulations, or even for unacceptable out-of-court conduct. In one of the largest metropolitan courts, for example, the presiding judge sometimes applies pressure by threatening to send a judge to a court located in a place where he does not want to go. The effect of such a threat can be substantial, if, for example, a judge is told that he may be assigned to a branch court fifty miles from his home. Likewise, a judge who dislikes criminal law can be threatened with assignment to that department.

A second use is to assign judges according to their ability: the better judges are given the more delicate, sophisticated, or difficult assignments, while judges of lesser ability are put where they are able to function within their capabilities, or in some cases, where it is thought they will do the least damage. In one jurisdiction, when assignments are being planned, judges are classified according to ability as "lightweights" and "heavyweights." Difficult assignments, which the better judges are given, may include specialized departments which handle difficult matters such as pretrial motions and discovery, courts with heavy workloads which call for an efficient and decisive judge, and places where political pressures make it advisable for a strong judge to

79. *Habenicht v. R.K.O. Theatres, Inc.*, 23 App. Div. 2d 378, 260 N.Y.S.2d 890 (1st Dep't 1965).

sit. The easy assignment to which the "lightweights" are sent is often the civil jury trial pool. Occasionally a judge who has chronic difficulty in making decisions will be assigned there. In one instance, however, a judge was thought so incompetent by administrative officials that a new department was created for him: deciding the validity of excuses from jury duty.

The logical consequence of assigning judges according to ability is to assign a totally incompetent judge nothing at all. This action was recently taken in the case of a federal district judge; the administrative authority refused to assign him any judicial duties, taking away those he had and giving them to the other judges in the district. He was therefore left with only his title and salary.⁸⁰ This occurrence brings into focus an argument made against such selective assignment: all judges in a court hold the same title and derive their authority from the same source. It therefore follows that they have a right to be given the same duties, to the extent that it is possible as a matter of practicality. The usual reply is that there is a necessity for putting a premium on efficiency in the light of the congestion in the courts.

Although the assignment power probably was intended originally to enable administrative officials to place judicial manpower where needed most, it has at times been utilized as a sanction against judges whose behavior would either demean the judiciary or reduce the courts' efficiency. In all states covered, those charged with the administration of the courts stated they would use the assignment power in this manner only if a judge's misbehavior were repeated or were initially intolerable. The difficulties inherent in using administrative power as a disciplinary device are that it taxes machinery intended originally to be merely administrative by requiring too many man-hours on the part of administrators, and that it cannot alone handle cases warranting removal.

Nevertheless, it is superior to the other quasi-disciplinary devices. Unlike election and the challenge, assignment acts in accord with standards relevant to judicial disability, inability, or misbehavior. And unlike reversal and appellate reprimand, assignment can cover extra-judicial misconduct and dilatory behavior while working confidentially within the framework of the administrative system.

D. Effective Formal Mechanisms

Eminent authorities agree that to meet the "law explosion," which will demand increased court efficiency in years ahead, it is necessary to reevaluate methods of dealing with problems of judicial conduct.⁸¹ Although the combined utilization of the various mechanisms discussed above may be helpful in coping with such problems, many jurisdictions have adopted or are considering adoption of new formal mechanisms.⁸²

80. N.Y. Times, Jan. 7, 1966, p. 34, col. 6.

81. 27th American Assembly, Report on The Courts, the Public, and the Law Explosion 7 (1965).

82. Such states include Nebraska, Texas, Florida, and Maryland. 48 J. Am. Jud. Soc'y 237 (1965); 49 J. Am. Jud. Soc'y 37 (1965).

Discussions of these new mechanisms unfortunately have tended to underemphasize two important considerations. First, they have not taken sufficient account of the context in which such mechanisms operate, and have thus implied that one jurisdiction's new mechanism is better than another's merely because it removes more judges, without noting the possibility that the latter jurisdiction has superior subsidiary mechanisms which make a very powerful main mechanism unnecessary.⁸³ Second, they have underplayed the extreme importance of two elements which are at the heart of a mechanism's success or failure: the personnel who are involved in it, and its ability to operate in the socio-political atmosphere in which it must function.⁸⁴ No mechanism is self-executing, and the absence of individuals willing to work responsibly with it may be fatal. Further, even though its participants are enthusiastic, if local tradition or conditions are rooted against a particular type of mechanism, progress may come slowly.

Three formal mechanisms which will be discussed here are the Commission on Judicial Qualifications in California, the Court on the Judiciary in New York, and the "supervision-disbarment" device of the Court Administrator and Supreme Court of New Jersey. The discussions of these mechanisms, however, will attempt to show how they operate in the light of the specific problems and other mechanisms which exist in their jurisdictions. Therefore, the discussions are denoted as being of the California, New York, and New Jersey "systems." Also included is a brief discussion of Wisconsin's approach and the reasons for its apparent failure.

1. *The California System*⁸⁵

Organization and Background.—The major agency concerned with discipline and removal of judges in California is the Commission on Judicial Qualifications. Established by constitutional amendment in 1960, it is empowered to receive and investigate complaints concerning judges' willful misconduct, willful failure to perform duties, habitual intemperance, and disability likely to become permanent.⁸⁶ If, after a hearing, the Commission deems a judge's conduct or condition to be such that removal or forced retirement is warranted, it may recommend such action to the state Supreme Court, which is empowered, after reviewing the facts, to remove the judge's rights to office and pension or to compel his retirement.⁸⁷

83. See Editorial, *New Ways to Deal With Judicial Misconduct*, 48 J. Am. Jud. Soc'y 163, 164 (1965).

84. See, e.g., Brand, *The Discipline of Judges*, 46 A.B.A.J. 1315 (1960).

85. The California court system is headed by a supreme court of seven justices. Intermediate appellate jurisdiction is vested in several geographically delineated district courts of appeal. Justices of both these courts are elected for twelve-year terms. There is a superior court of general trial jurisdiction, whose judges are elected for six-year terms. Inferior courts of restricted jurisdiction, also with elected judges, are the municipal courts in larger communities and justice courts in smaller ones. Cal. Const. art. VI, §§ 1, 2, 3, 4a, 5, 8, 11.

86. Cal. Const. art. VI, § 10b.

87. *Ibid.*

Five of the Commission's nine members are judges chosen by the supreme court: two from the district courts of appeal, two from the superior court, and one from the municipal court.⁸⁸ Of the four other Commission members, two are attorneys chosen by the Board of Governors of the State Bar, and two are laymen—called “public members”—chosen by the Governor with the consent of the state senate.⁸⁹ The Commission members choose an Executive Secretary,⁹⁰ who oversees the Commission's day-to-day operation from a San Francisco office. The Commission itself holds regular meetings approximately every two months and whenever immediate action is warranted. All official actions and correspondence of the Commission and the Executive Secretary are made confidential by force of law until a removal recommendation is made to the supreme court, at which point the prior proceedings become a matter of public record.⁹¹

Credit for the Commission's existence is usually given to former Chief Justice Phil S. Gibson of the California Supreme Court. As chief justice, Gibson often found himself faced with having to “cover” for disabled judges in making assignments. One judge, for example, did not sit for two years. In addition, Chief Justice Gibson encountered many instances in which judges had abused their authority or engaged in gross misconduct, such as a woman judge's having declared seventeen recesses in a single trial day, in order to perform marriages for a fee—wearing pink robes. Finding himself powerless to act in these cases, Gibson mounted a campaign for adequate means to deal with problem judges. After ten years of piecemeal persuasion, opposition among judges and legislators was overcome sufficiently for the present system to be placed on the ballot as a constitutional amendment.

The source of the Commission's success, according to its supporters, is its ability to induce problem judges to resign or retire before there is any public proceeding. It is claimed that in a four-year span twenty-six judges have left office because of Commission action.⁹² In the only case in which the Commission recommended a judge's removal, however, the California Supreme Court refused to follow the unanimous Commission recommendation. The Commission found that the judge, upon ascending the bench, had dismissed a criminal action against his former client. Moreover, he had sold his practice to other attorneys, taking notes in payment immediately following his election. The supreme court unanimously rejected the Commission's removal recommendation, filing a one paragraph *per curiam* opinion.⁹³

88. Cal. Const. art. VI, § 1b.

89. *Ibid.*

90. The Commission is empowered to “employ such officers, assistants, and other employees as it deems necessary . . .” Cal. Gov't Code § 68702.

91. Cal. Const. art. VI, § 10b.

92. Burke, *Judicial Discipline and Removal: The California Story*, 48 *J. Am. Jud. Soc'y* 167, 170 (1965); 1963 Cal. Comm'n on Judicial Qualifications Rep. 2 (10 removals); 1964 Cal. Comm'n on Judicial Qualifications Rep. 2 (6 removals); 1965 Cal. Comm'n on Judicial Qualifications Rep. 2 (4 removals).

93. *Stevens v. Commission on Judicial Qualifications*, 61 Cal. 2d 886, 393 P.2d 709, 39 Cal. Rptr. 397 (1964).

Since the Commission's ability to force retirements and resignations clearly is dependent upon the threat of removal, coupled with accompanying publicity, a series of such refusals to follow Commission recommendations might hamper its performance. In 1963 the Commission received 114 potentially actionable complaints and retired 10 judges, but in 1964, the year of the unsuccessful case, it received only 67 such complaints and retired 6 judges.⁹⁴ Although the decline may be ascribed to the Commission's earlier effectiveness, in some quarters the case has been interpreted as a rebuff to the Commission. This interpretation may be weakened by the upswing in the number of complaints in 1965 to 85.⁹⁵ Moreover, there is particular dissatisfaction with the court's failure to offer guidance for future cases.

The Commission's impact is statewide, and is felt at all court levels below the supreme court. Since regionalism appears to be an active influence in California,⁹⁶ it may seem strange that a statewide mechanism came into being, particularly since California's court administration, also statewide, has little control over local court administrators and little local impact.⁹⁷ It is clear, however, that local court administration was unable to cope with problems of judicial behavior. Presiding judges of local superior and municipal courts found that, besides the power of assignment, which some chose not to use, they lacked sanctions to apply to problem judges. Presiding judges are not appointed by a higher authority as in New York,⁹⁸ but are elected by their fellow judges or ascend on the basis of seniority, and are therefore not inclined to pressure their fellows.⁹⁹ When a new mechanism was being constructed, it is likely that a statewide authority was created rather than the traditional power of the local presiding judges increased, because the inherent weakness caused by the manner in which presiding judges are chosen might have left them vulnerable to pressure from their colleagues. Attempting to remedy this by altering the method by which presiding judges are chosen would be even more radical than a statewide commission. There seems to have been some effort to avoid regional criticism of the statewide body by choosing Commission members from various parts of the state.¹⁰⁰

Setting the Commission's Machinery Into Motion.—Commission actions usually result from the complaint of some person outside the

94. See note 92 supra.

95. 1965 Cal. Comm'n on Judicial Qualifications Rep. 1.

96. Note the recent bill to divide the state in two put forward by legislators from the northern part of the state. Seabury, *The Antic Politics of California*, Harper's Magazine, June 1965, p. 84.

97. See Cal. Gov't Code §§ 68500.5-68548, which indicates that the Administrative Director is principally concerned with the statewide, as opposed to the local, assignment of judges.

98. N.Y. Const. art. VI, § 4c.

99. See Cal. Const. art. VI, § 7. In Los Angeles, the Presiding Judge is elected on his merits. In San Francisco, the senior judge is traditionally elected Presiding Judge.

100. The current membership of the Commission, for example, is split fairly evenly between northern and southern California communities. See 1965 Cal. Comm'n on Judicial Qualifications Rep.

Commission. Most complaints with sufficient substance to warrant investigation come from attorneys; judges virtually never complain. Laymen's complaints, which are numerous, usually are the product of an adverse decision, and are either vague about the judge's conduct or merely assert dissatisfaction with the result in the case. Some complaints are referred to the Commission by other public officials, to whom the complaint was originally made. Complaints usually take the form of a letter, but sometimes are received by telephone. Telephoned complaints are disfavored by the Commission, and the Executive Secretary generally requests that the complainant put the substance of the complaint into a letter. However, the Commission has no strict rule as to the form in which a complaint must be made, so that even telephoned complaints will be investigated when made by a person whose stature lends credence to his statement, such as a public official, or when the complaint charges a specific act at a specific time, which can easily be checked. Anonymous complaints, also disfavored, may likewise be investigated if charging a specific act.

Despite the acceptance of all forms of complaint and complaints forwarded from other agencies, there is evidence that ignorance of the Commission's procedures, functions, and, most often, its existence has caused potentially valid complaints never to be made. The vast majority of California attorneys interviewed either had never heard of the Commission on Judicial Qualifications, or were acquainted with only the name, believing that the Commission was concerned with approving the Governor's judicial appointments. Indeed, many of those familiar with the Commission had either been involved in a Commission proceeding or had worked on criminal prosecutions against judges. One San Francisco attorney, who had encountered a judge's clear invitation of perjured testimony, did not know of the Commission's existence although its office was only a few blocks away. He therefore had never complained, believing little could be done. The obvious result of such ignorance is that the Commission is unable to do as thorough a job as might be possible.

The Commission's members are aware of this widespread ignorance, but hesitate to embark on a broad publicity campaign. It is feared that such a campaign might undermine public confidence in the judiciary by giving the impression that there is a great deal wrong with California's judges, and that this in turn might alienate many judges whose cooperation is essential to the Commission's success. It is especially important that the Commission retain the favor of certain key figures, such as presiding judges, judges involved with grand juries, and supreme court members, all of whom may serve both as sources of rumor and as direct complainants to the Commission's office.

It is further believed that any attorney interested in making a complaint should either make it to some official who will forward it to the Commission, or should be able to learn of the Commission's existence by speaking to someone in a position to provide this information, such as a bar association official. To this end the Commission is

attempting to establish liaison with local bar groups, as well as to educate bar leaders about its existence and function.

It is argued that a broader publicity campaign would be ineffective in any event, since the Commission, unlike the District Attorney or Attorney General, is not part of an ordinary attorney's regular experience, and most attorneys would quickly forget about the Commission. Moreover, it is felt that attorneys of lesser ability would view the Commission as an agency for disqualification in particular cases, or as another remedy or recourse in a case. Finally, the Commission's annual report, which receives coverage in both the lay and legal press, is thought to be sufficient publicity under the circumstances.

It seems, however, that the Commission's fears about a broad publicity campaign may be unwarranted. Reporting the forced retirement of approximately seven judges per year out of 1,000 should not arouse substantial public insecurity. Furthermore, an attorney's active knowledge that an effective means exists to deal with problem judges probably would have the salutary effect of encouraging attorneys to resist a judge's misconduct and to complain if there is no improvement.

Ignorance of the Commission's existence implies, of course, ignorance of the Commission's duty to keep the complainant's identity confidential until an actual hearing is held.¹⁰¹ One of the major causes of attorneys' hesitancy to complain is fear of retribution from the judge complained against, and thus an attorney's active knowledge of Commission procedures should encourage valid complaints. Difficulty might still exist, however, in rural counties where, despite confidentiality, the complainant's identity would be obvious to the judge because of some prior friction. Furthermore, some attorneys will never complain because of a general resolve not to risk being hurt professionally. Attorneys in large firms seemed quite cautious, forecasting that if a difficult situation were to arise the matter would be referred to the partners, who would probably authorize a complaint only in a clear case. Such hesitancy was encountered in all jurisdictions, so that there is probably nothing inherent in the California system which engenders this attitude among those who know where to complain.

One device used by the Commission to deal with a case when a person refuses to be identified as a complainant is to institute the investigation on its own motion. About half of the serious cases before the Commission are dealt with this way. The procedure seems to provide some imagined security to complainants, although its actual value to them is questionable. If the judge leaves office without a hearing, which is almost always the case, the complainant's name would remain confidential as a matter of course, whether the complainant were willing to be identified or the proceeding were instituted on Commission motion. If a hearing is held, even if the investigation is on the Commission's motion, the shielded complainant will be likely to be called as a witness, unless an extremely strong case can be made without his testimony.

101. Cal. Const. art. VI, § 10b.

The Investigation.—When a complaint reaches the Executive Secretary, several alternative steps are available depending on the circumstances of the particular case. Frivolous complaints, and all those that allege matters outside the Commission's powers, such as a judge's lack of legal ability, are marked "closed by staff" by the Executive Secretary. Complaints with prima facie validity are investigated by the Executive Secretary to determine whether the complaint is clearly without basis. This investigation is relatively informal, usually by telephone, but the judge himself is not spoken to. The persons questioned are cautioned that the investigation is confidential, and that discussing it with anyone is unlawful.

If the investigation clearly negatives the complaint's assertions, the matter is "closed by staff." If, however, it appears to substantiate the complaint, the matter is referred to the Commission with a recommendation that further investigation and other steps be taken. A few days prior to its regular meeting, the Commission members receive a summary prepared by the Executive Secretary of matters that will come before it. Both matters "closed by staff" and cases warranting further investigation are included. The Commission may always reopen cases "closed by staff," but in practice it has uniformly followed the Executive Secretary's recommendations. When the Executive Secretary is in doubt as to the action to take on any new or pending matter which cannot wait until a Commission meeting, he seeks the advice of the Commission Chairman, with whom he is in almost daily contact.

The confidentiality of Commission business allows the investigation of complaints without fear of ruining a judge's reputation through public disclosure of mere allegations of misconduct.¹⁰² Thus the Executive Secretary is charged with investigating a variety of complaints, ranging from the most serious to relatively isolated acts of discourtesy, which in other jurisdictions might be put aside until a number of like complaints indicated the existence of a serious situation. To this extent, the Executive Secretary has been likened to the Scandinavian Ombudsman.¹⁰³ Confidentiality also aids investigation by assuring persons who give information that they will not suffer repercussions. In all instances, witnesses and file clerks are warned orally or in correspondence that the matter is "confidential under California Constitution Article VI, Section 10b." Experience demonstrates that unless a judge discloses he is under investigation, there will be no leaks at this stage of the proceedings.

Since all public officials are under a statutory duty to aid the

102. See 1965 Cal. Comm'n on Judicial Qualifications Rep. 2.

103. Anderson, *The Ombudsman: Public Defender Against Maladministration* 2-3 (Institute of Governmental Studies, University of California, Berkeley, Public Affairs Rep., Vol. 6, No. 2, April 1965). See also Reuss & Anderson, *The Ombudsman: Tribune of the People*, 363 *Annals* 44 (1966).

Commission in its investigations,¹⁰⁴ the Executive Secretary may utilize a substantial arsenal of investigative approaches. In cases of alleged disability, court dockets and administrative reports may be examined. In cases of criminal dimension, relevant data gathered in parallel investigations may be obtained from public law enforcement officials, and the state Attorney General will, if requested, supply an agent to aid investigation. The Commission can subpoena testimony as well as books and papers.¹⁰⁵ It is not settled, however, whether the Commission may compel a judge to submit to a physical or mental examination. All judges requested to do so have complied, with a single exception; in that case the Commission subsequently withdrew the request. The Commission has generally received cooperation in its investigations, so that compulsion has rarely been necessary. Most difficulty is found in rural areas where local politics and personal grudges may hamper reliable fact finding.

Contact With the Offending Judge.—When investigation reveals a factual basis for a complaint and it appears that removal by the California Supreme Court would be “probable,” the Commission, acting through the Executive Secretary, has several ways to approach the judge in question. The mildest approach is a letter informing the judge that his case is on the Commission’s agenda and under close supervision.

A more common approach is the “staff inquiry letter” which informally recites the charges against the judge and invites an explanation. This is used in cases of disability, discourtesy, or tardiness, where an improvement in the judge’s health or behavior is possible and where a stronger letter, intended to pressure the judge out of office, is not warranted if improvement seems likely. Judges usually respond by return letter. Often a judge can nullify the complaint against him merely by giving a satisfactory explanation for his tardiness or discourtesy. Such dialogues save the Commission from being put to its proof, rendering intensive, time-consuming investigations unnecessary.

The most forceful approach is a formal registered letter which recites the charges against the judge and advises him of his rights and the Commission’s constitutional and statutory authority. This approach is used both in cases of criminal dimension, where it is imperative that the judge leave office, and as a second letter when a staff inquiry letter has not produced sufficient improvement. Occasionally this formal letter is sent when evidence of discourtesy or other minor misconduct is isolated and probably insufficient to warrant removal, but where it is felt that the judge needs a healthy jolt. In addition, Commission members or others requested by the Commission may meet with a judge informally to suggest his retirement. This occurs particularly in cases of disability, where it is felt that a more gentle personal approach is warranted.

104. Cal. Gov’t Code § 68725.

105. Cal. Gov’t Code §§ 68750-752.

The Commission's Effectiveness.—Commission pressure seems to have been effective in improving judicial behavior. One judge, found to be extremely rude to litigants and so informed by the Commission, is said to have mended his ways completely. "Getting a letter from the Commission" has become a dreaded prospect among California judges.

Some judges retire as soon as they are told they are on the Commission's agenda or receive a "staff inquiry letter," but most retire only after receipt of the formal letter. A few have left the bench after a hearing was scheduled or commenced, and only one has refused to resign before a Commission recommendation of removal.

The threat of publicity is in itself an incentive to retire. Even if a judge retires before a public record is made of his misconduct, word may get around that he retired under pressure, but usually only if the retired judge has himself let the word get out. There has been criticism among judges of the Commission's annual report of the number of "forced" retirements and resignations, because they feel that this makes every retirement and resignation suspect, regardless of whether or not there was Commission involvement.

It is readily admitted both within and outside the Commission that one of the reasons for its success in compelling retirements is the relatively ample pension available. It may be speculated that in a jurisdiction such as Missouri, where judicial pensions are relatively low, more resistance would be encountered by a California-style commission.

Persons close to the Commission have admitted that there are two factors that tend to limit the Commission's effectiveness. First, the Commission has no power to recommend any action less than removal or retirement. Although some articles discussing the Commission have indicated that it may reprimand judges,¹⁰⁶ there is no such authority in the constitution or in the enabling statutes.¹⁰⁷ While it might be said that the Commission's contacting judges in cases where evidence does not provide grounds for removal is a form of reprimand, it is clear that if the judge ignores the implied admonition in the Commission's letter, the Commission cannot officially seek a reprimand from the supreme court.¹⁰⁸ Additional remedies, such as docking of pay, are also unavailable.

The second major limiting factor is the Commission's inability to effect a judge's permanent disqualification from judicial office. Thus the California Supreme Court may find itself in the same position as the Texas Supreme Court, which removed a judge from the bench for gross misconduct, only to have him win a subsequent election to the bench.¹⁰⁹ The only present solution without amending the constitu-

106. E.g., Burke, *supra* note 92, at 171.

107. See Cal. Const. art. VI, §§ 1b, 10b; Cal. Gov't Code §§ 68701-755.

108. The Commission has recommended that it be given a power of reprimand. 1965 Cal. Comm'n on Judicial Qualifications Rep. 3.

109. *Matter of Laughlin*, 153 Tex. 183, 265 S.W.2d 805 (1954); *McDonald, Texas Removes and Replaces a Judge*, 38 J. Am. Jud. Soc'y 47 (1954).

tion¹¹⁰ might be to seek disqualification from holding office through the impeachment process, provided that the prior removal of the judge by the supreme court is not deemed to moot the case.

Criticism of the Commission.—The Commission's substantial coercive powers, of course, could cause great damage if abused. One judge noted, for example, that the "Star Chamber" nature of Commission investigations has created an atmosphere which stifles criticism of the Commission, since judges fear that if they criticize the Commission people will believe that they are under investigation. This problem, however, would inhere in any system calling for confidential investigations.

There are checks upon the Commission which help it function fairly. First, its membership is diversified, so that pressure that might affect some members probably will not affect others. For example, there have been instances of attempted political pressure on the Commission. During one investigation an aide to a state senator called the Commission and stated that a continuation of the investigation would "displease" the senator. On other occasions, political leaders have gratuitously contacted the Commission to praise a judge under investigation, perhaps at the judge's request. Only five of the Commission's members are elective officials,¹¹¹ however, and their election is nonpartisan, so the Commission seems well able to resist such pressure. In addition, Commission members are unsalaried¹¹² and therefore not dependent on the position for their livelihood.

More important, the Commission's composition tends to insure that the standards applied are related to expectations of how judges should behave. The majority of its members are judges, able to present a knowledgeable picture to the other members of what standards may reasonably be applied to the judiciary. Even unintentional regional bias is controlled, since Commission members come from all parts of the state.

One of the Commission's more controversial aspects is the inclusion of two "public members." In theory, they are supposed to add a fresh and independent point of view to the proceedings, but good authority has it that the major reason for lay membership was to aid in getting the approval of the legislature and the electorate. The suggestion that laymen be involved in disciplining judges has often met with a negative reaction. In Missouri, fear was expressed that laymen would merely be political allies of the Governor, as the lay members of the Missouri-Plan appointment commission were said to be. Other objections were that laymen could not grasp the problems confronting judges and might be too harsh.

110. Such an amendment has been recommended by the Commission. See 1965 Cal. Comm'n on Judicial Qualifications Rep. 4.

111. These are the two district court of appeal, the two superior, and one municipal court judges. Cal. Const. art. VI, §§ 1b, 6, 11.

112. Cal. Const. art. VI, § 1b.

Judging from the California experience, however, these fears seem unfounded. In practice, the presence of the lay members appears to have had little impact on the decisions that the Commission reaches. The lay members are said generally to abide by the consensus reached by the other members, except in cases of disability, where they tend to favor a more lenient approach. Moreover, in a judge-dominated body, there is little reason to believe that laymen will not function well.

The Commission's Executive Secretary, even more so than its members, is able to function with energy and independence. Unlike an attorney general or state chief justice, he can devote full time to his function in the area of judicial discipline without prejudicing other responsibilities. Moreover, external political attachments do not restrict the Executive Secretary's ability to investigate judges in positions of political power, as might be true of other public officials.

One criticism of the Executive Secretary's role as a continuing overseer of judicial conduct, however, is that his office may evolve into a large and expensive bureaucracy. The six-year California experience does not bear this out. The entire yearly budget of the Commission, including the Executive Secretary's salary, has averaged only about \$35,000 per year.

There has been some criticism that the Commission is subject to the dangers that accrue when the powers to prosecute and adjudicate rest in the same hands. Administrative agencies have been widely criticized on this ground.¹¹³ An attorney retained to defend a judge before the Commission claimed that the Commission chose a psychiatrist to give the judge a mental examination, and then prejudiced the judge's defense by sending the psychiatrist evidence relating to the judge's conduct which the Commission had previously gathered. Furthermore, the Commission refused to have the examination made by a "neutral" psychiatrist, insisting upon its own choice. The attorney argued that even though any final decision rests in the Supreme Court, it will at a minimum be strongly influenced by the Commission's findings and recommendation. Furthermore, the court may treat the Commission's findings as an administrative determination and weigh them according to those standards, rather than considering the matter *de novo*.

It was argued in reply that to fragment responsibility between prosecution and adjudication might result in paralysis, and that the judge does receive two full opportunities to defend himself—once before the Commission and once before the supreme court—so that it is highly unlikely that an unwarranted prosecution will result in removal. It has been suggested as a compromise that Commission members who speak to a judge to recommend his retirement be disqualified from any subsequent adjudication of that case by the Commission.

113. E.g., Barton, *The Federal Trade Commission and the Need for Procedural Impartiality*, 64 *Colum. L. Rev.* 390 (1964).

2. *The New York System*¹¹⁴

The Court on the Judiciary.—New York established the Court on the Judiciary by constitutional amendment in 1948,¹¹⁵ after having had difficulty in getting some disabled judges to retire. Its membership consists of the Chief Judge and senior Associate Judge of the court of appeals, and one justice from each of the four departments of the Appellate Division of the Supreme Court, selected by a majority of the justices in each department whenever the Court on the Judiciary is convened.¹¹⁶ This body has statewide jurisdiction and is empowered to remove judges from office for cause and to retire judges for mental or physical disability upon the concurrence of four or more of its members.¹¹⁷ It can appoint attorneys in each case, summon witnesses and documents, make its own rules of procedure, and grant immunity from prosecution.¹¹⁸ Any matter in its hands except a disability case can be preempted by the initiation of a disciplinary proceeding in the legislature,¹¹⁹ although that has not yet occurred.

Unlike California's Commission on Judicial Qualifications, the Court on the Judiciary has no permanent staff or continuous existence as a body. It meets only upon call and dissolves after disposing of the business before it. The Chief Judge of the court of appeals, the Governor, the executive committee of the state bar association, or any of the presiding justices of the appellate division departments can call the Court on the Judiciary into session.¹²⁰

Since its creation in 1948, the Court on the Judiciary has been convened three times. In the first case, the offending judge was removed for obstructing a court inquiry involving his brother's law practice.¹²¹ A second judge was removed for refusing to sign a waiver of immunity in an investigation of the New York State Liquor Authority.¹²² Finally, two judges were "rebuked and reprimanded"

114. The New York court system is headed by the court of appeals, which has seven judges elected for fourteen-year terms. Intermediate appellate jurisdiction is vested in the Appellate Division of the Supreme Court, which has justices chosen from the supreme court by the Governor. The appellate division sits in four geographically delineated departments. The supreme court consists of justices elected for fourteen-year terms and has general trial jurisdiction. There are inferior courts which vary in name and jurisdiction from place to place, with some appointive and some elective. In addition there are specialized courts, such as the court of claims with statewide jurisdiction, and the surrogate's courts with county-wide jurisdiction over probate matters. N.Y. Const. art. VI, §§ 1a, 2a, 4a-4c, 7a, 9, 11-15.

115. N.Y. Const. art. VI, § 22.

116. N.Y. Const. art. VI, §§ 22a, 22b.

117. N.Y. Const. art. VI, § 22c.

118. N.Y. Const. art. VI, § 22f.

119. N.Y. Const. art. VI, § 22e.

120. N.Y. Const. art. VI, § 22d.

121. *Matter of Friedman*, 12 N.Y.2d (a) (Ct. on the Judiciary 1963).

122. *Matter of Osterman*, 13 N.Y.2d (a) (Ct. on the Judiciary 1963), cert. denied, 376 U.S. 914 (1964).

for involvement in a notorious public feud, but were not removed, since they did not willfully disregard the law.¹²³

Obvious similarities in function between the Court on the Judiciary and the Commission on Judicial Qualifications have invited comparison of the two. However, officials in New York are quick to take issue with an editorial in the *American Judicature Society Journal*, which cast the Court on the Judiciary in a poor light when compared with California's Commission.¹²⁴ After citing the "forced" resignation or retirement of twenty-six California judges during the Commission's existence, the editorial stated:

Unless California judges are a great deal worse than New York judges, it would seem that the New York court [on the Judiciary] is simply not doing the job. Setting its machinery in motion is only a little less cumbersome than impeachment, and it is hard to believe that if it had been continuously in operation on a basis similar to California's, it would not have had a statistical report more like that of California.¹²⁵

The editorial argued that the California Commission is not, like the Court on the Judiciary, "necessarily limited by its character as a court to hearing serious charges," but rather that its "greatest contribution is what it does below the level of formal action."¹²⁶

In reply, New York officials argued, first, that they have never felt a need to issue a "statistical report" of judges forced off the bench, particularly because such reports might make judges more resistant to pressure; and second, that if New York did issue such a report, it would equal California's if it took into account all of New York's mechanisms for removing judges. In defense of the ad hoc operation of the Court on the Judiciary, it was argued by a person closely connected with the court that it performs well when called upon, operating at little expense to the taxpayer, and is particularly well suited to New York's needs.

The New York officials' reactions seem justified. The Court on the Judiciary functions in an entirely different context from the Commission on Judicial Qualifications, making any side-by-side comparison inaccurate. For more than half a century, the New York Constitution has vested the power to remove many judges below supreme court level in the four departments of the Appellate Division of the Supreme Court.¹²⁷ In at least four cases, judges have been removed pursuant to this authority.¹²⁸ In at least six cases, judges were spared removal,

123. *Matter of Sobel*, 8 N.Y.2d (a) (Ct. on the Judiciary 1960).

124. Editorial, *supra* note 83, at 164.

125. *Ibid.*

126. *Ibid.*

127. See *Matter of Bolte*, 97 App. Div. 551, 568, 90 N.Y. Supp. 499, 507 (1st Dep't 1904).

128. *Matter of Capshaw*, 258 App. Div. 470, 17 N.Y.S.2d 172, leave to appeal denied, 258 App. Div. 1053, 18 N.Y.S.2d 741 (1st Dep't 1940) (judge fixing case); *Kane v. Rudich*, 256 App. Div. 586, 10 N.Y.S.2d 929 (2d Dep't 1939) (*semble*); *Matter of Droegge*, 129 App. Div. 866, 114 N.Y. Supp. 375 (1st Dep't), appeal dismissed, 197 N.Y. 44, 90 N.E. 340 (1909) (judge unduly influenced); *Matter of*

but their conduct was questioned or condemned.¹²⁹ In the remaining cases, totaling at least twelve, a judge was either cleared of charges for lack of evidence, or was found not to have acted improperly, or some issue concerning appellate division disciplinary procedure was determined by the court.¹³⁰

Since no records are kept of "forced" retirements and resignations in New York, one can only speculate as to the number of judges who have resigned from office rather than risk public removal by the appellate division. It is likely, however, that the number has been considerable, since a substantial threat of removal exists. Of the ten forced retirements and resignations reported by the California Commission on Judicial Qualifications for the year 1963, nine were of a level comparable to that which falls within the jurisdiction of the appellate division in New York.¹³¹ It is clear, therefore, that in assessing the New York system for disciplining judges, the Court on the Judiciary must be viewed as only a part of a larger picture. The California Commission, by contrast, has largely preempted the field.

Bohte, 97 App. Div. 551, 90 N.Y. Supp. 499 (1st Dep't 1904) (neglect of duties, abusive behavior).

129. *Murtagh v. Maglio*, 9 App. Div. 2d 515, 195 N.Y.S.2d 900 (2d Dep't 1960) (erroneous reduction of criminal charge, but no proof of judge's willful misconduct); *Matter of Diserio*, 285 App. Div. 690, 140 N.Y.S.2d 478 (1st Dep't 1955) (permitting taking of photographs in courtroom); *Matter of O'Rourke*, 255 App. Div. 50, 5 N.Y.S.2d 831 (2d Dep't 1938) (alteration of court records); *Matter of Investigation Concerning Tompkins Square Holding Co. v. Guson*, 255 App. Div. 48, 5 N.Y.S.2d 813 (1st Dep't 1938) (alteration of court records); *Matter of Brooklyn Bar Ass'n (Hirshfield)*, 229 App. Div. 654, 241 N.Y. Supp. 601 (2d Dep't 1930) (improper civil commitment, scurrilous political speeches); *Matter of Snitken*, 161 App. Div. 516, 146 N.Y. Supp. 560 (1st Dep't 1914) (use of unsuitable language).

130. *Matter of Seelman (Troy)*, 277 App. Div. 116, 98 N.Y.S.2d 669 (2d Dep't 1950) (supervision of political demonstration); *Matter of City Ct. of Buffalo (Erie County Bar Ass'n)*, 268 App. Div. 657, 54 N.Y.S.2d 466 (4th Dep't 1945) (abuses in judicial administration); *Matter of Roosevelt*, 232 App. Div. 23, 248 N.Y. Supp. 312 (2d Dep't 1931) (no factual basis for a general investigation of the magistrates courts); *American Civil Liberties Union, Inc. v. McAdoo*, 229 App. Div. 511, 242 N.Y. Supp. 696 (1st Dep't 1930) (refusal to set bail); *Matter of Reigi*, 222 App. Div. 696, 225 N.Y. Supp. 226 (2d Dep't 1927) (use of unsuitable language); *Matter of Strahl*, 201 App. Div. 729, 195 N.Y. Supp. 385 (2d Dep't 1922) (disbarment improper as a means of discipline, active political campaigning); *Matter of Levy*, 198 App. Div. 326, 190 N.Y. Supp. 383 (1st Dep't 1921) (business activities); *Matter of Levy*, 192 App. Div. 550, 182 N.Y. Supp. 792 (1st Dep't), *aff'd mem.*, 229 N.Y. 637, 129 N.E. 939 (1920) (appellate division may remove judges from courts not of record); *Scheidlinger v. Silber*, 94 Misc. 322, 158 N.Y. Supp. 27 (Sup. Ct.), *rev'd mem.*, 174 App. Div. 887, 159 N.Y. Supp. 1140 (2d Dep't 1916) (appellate division retains disciplinary power over municipal court which became court of record); *Matter of Barlow*, 141 App. Div. 640, 127 N.Y. Supp. 542 (1st Dep't 1910) (erroneous grant of bail); *Matter of Deuel*, 127 App. Div. 640, 111 N.Y. Supp. 969 (1st Dep't 1908) (business activities). See also *Handler v. Berry*, 138 Misc. 584, 247 N.Y. Supp. 46 (Sup. Ct. 1931) (legislative grant of appellate division authority to engage in general investigations held constitutional).

131. Five of the judges were from municipal courts and four were from justice courts. 1963 Cal. Comm'n on Judicial Qualifications Rep. 2. The 1964 and 1965 reports are silent on this point.

The Appellate Division.—In New York, most complaints are made to one of several officials: the Chief Judge of the court of appeals, the Presiding Justice of a department of the appellate division, the Judicial Conference, the State Court Administrator, or even the Governor. Complaints concerning justices of the appellate division, surrogate's court, and court of claims are referred to the Chief Judge of the court of appeals. Complaints concerning justices in the supreme court and inferior courts go to the appropriate appellate division department. Although the appellate division cannot remove supreme court justices, appellate division officials are considered better able to investigate complaints thoroughly than is the Chief Judge of the court of appeals.

Each of the appellate division departments constitutes a separate administrative unit for the supreme court and inferior courts within its geographic scope.¹³² The principal officials within a department are the Presiding Justice, the Administrative Judge, and the Court Administrator.¹³³ The Court Administrator's functions are similar to those of the Executive Secretary in California, and in some instances are similar to the functions of the entire California Commission. He receives the complaints made directly to him and referred to him by others that concern the judges under the administration of his department. As in California, he rejects numerous complaints which are based upon the disposition of particular lawsuits. Those few complaints having prima facie validity are divided among the Administrator himself, the Administrative Judge and the Presiding Justice, with the names of all complainants kept confidential.

Problems relating to judicial inefficiency usually will be handled by the Administrator. Thus, if he receives a complaint that a judge has unduly delayed the disposition of a case, the Administrator may call the judge and encourage a speedy resolution. If several complaints indicate that a judge's faculties are failing, the Administrator may give him an assignment out of the mainstream of cases. In more serious instances, he will contact a failing judge's friends or relatives and attempt to persuade them to seek the judge's retirement.

When a complaint presents a disciplinary problem seeming to warrant a reprimand, the Administrator may forward it to the Administrative Judge. If a complaint charges a judge with abuse of a party in court, for example, the Administrative Judge may investigate the court records or contact the attorneys, or he may contact the judge directly to clarify the problem. If necessary, he will reprimand the judge upon the authority and recommendation of the Presiding Justice.

The Administrative Judge is nominated by the Presiding Justice and elected by the justices in his department of the appellate division.¹³⁴

132. See N.Y. Judiciary Law §§ 214-16 (Supp. 1965).

133. See N.Y. Const. art. VI, § 4c; N.Y. Judiciary Law §§ 215, 217 (Supp. 1965).

134. N.Y. Judiciary Law § 217 (Supp. 1965).

He may be assigned to administer either the civil or criminal parts, or both. Although the post has been successful in general, there is some indication that a few Administrative Judges have difficulty enforcing their orders. One such official considered his authority insufficient, and found it necessary to go to other officials to get his orders enforced. This practice is inefficient, because the other officials may at times be reluctant to neglect their own duties to assist the Administrative Judge. Perhaps, in disciplinary matters, enforcement should be handled by officials on a level higher than that of the judges who are to be supervised.

The most serious cases within appellate division jurisdiction are handled by the Presiding Justice. He is in constant contact with the Administrative Judge and Court Administrator whenever a serious matter arises. He may order either of them to investigate a serious complaint, or may work through the investigatory facilities of the Judicial Conference.¹³⁵ If necessary, the Presiding Justice will contact the Chief Judge of the court of appeals to discuss the need either for informal efforts to remove a judge or for removal proceedings by the appellate division or the Court on the Judiciary.

Although the Presiding Justice's office appears not to be wanting in authority, the post is directed only secondarily toward problems of discipline. One Presiding Justice expressed preference for a system, such as California's, that would relieve him of the responsibility for discipline. Some thought has been given to the establishment of a screening committee for complaints in each of the four departments. This body would be composed of both lay and judicial members, would receive and investigate complaints, and would summon offending judges to explain their conduct. The committee could itself reprimand a judge, or could make findings of fact and recommendations to the appellate division or Chief Judge. The creation of such a body would also establish a more formal procedure for dealing with judicial misconduct, thereby providing the parties involved with a more predictable and consistent system.

The Judicial Conference.—An institution which has been used successfully to investigate complaints and hold hearings is the administrative board of the Judicial Conference. The board is composed of the Chief Judge of the court of appeals and the Presiding Justices of the four appellate division departments.¹³⁶ It is responsible for the administrative supervision of the entire state court system, and as such is empowered to investigate complaints and resolve problems relating to the administration of justice. Any member of the board may subpoena a witness and administer an oath to him.¹³⁷ Nevertheless, the

135. N.Y. Judiciary Law § 213(4) (Supp. 1965). For the composition and purpose of this body of judges see N.Y. Const. art. VI, § 28; N.Y. Judiciary Law §§ 224-29 (Supp. 1965).

136. N.Y. Judiciary Law § 210(1) (Supp. 1965).

137. N.Y. Judiciary Law § 213(4) (Supp. 1965). The Board was the principal investigatory tool in the reprimand of Justices Leibowitz and Sobel. Matter of Sobel, 8 N.Y.2d (a) (Ct. on the Judiciary 1960).

board seems well suited to only the more serious cases. Unlike the proposed screening committees for the appellate division, the Judicial Conference board has no continuous existence for purposes of investigating judicial misconduct. Moreover, the Chief Judge's participation in an investigation by the board could necessitate his disqualification in connected Court on the Judiciary proceedings. Thus it is unlikely that the board could expand its operations in the discipline and disability area.

Relatively few complaints are made against judges at the level at which the Chief Judge has primary responsibility for investigation, and he is therefore able to do much of the investigating himself or through his immediate staff. If inquiry reveals that a complaint has prima facie validity, the Chief Judge often will speak to the judge personally and request an explanation. Absence due to drinking is often handled this way.

If the situation warrants, the complainant and the judge complained against may confront one another in the presence of the Chief Judge, who will then attempt to resolve the differences between them. This procedure was used successfully where the complainants had alleged that a judge was consistently deciding cases against members of racial minorities. Complaints at any level which concern disability will sometimes be referred to the Judicial Conference, which may attempt to procure a voluntary retirement by persuading some of the judge's friends to speak to him. It is said that since 1960 at least three judges have been persuaded to retire. The relatively generous New York pension provisions make this task less difficult than in other jurisdictions.¹³⁸

There are a few significant defects in the New York system. First, there is no single official clearing house for all complaints as in California, so that a matter often passes through a number of hands before getting to the proper place, and may get lost in the process. Second, complaints are not constitutionally guaranteed confidentiality,¹³⁹ and complainants may therefore hesitate to complain, even though strict confidentiality is observed in fact. Third, the officials involved are subject to political pressures, and although their personal integrity may enable them to resist such pressure, the system itself cannot insulate them because they are elected.¹⁴⁰

Even though the New York system is not likely to function well in other jurisdictions, and although few would argue that New York has formulated an ideal solution to problems of judicial conduct, the New York system is a reasonable response to the background of institutions, such as the independent and powerful appellate division department, upon which it was superimposed. Although a California-style commission might be able to function in New York, it is not

138. See *Summaries of Judicial Salaries and Retirement Plans*, 47 *J. Am. Jud. Soc'y* 129, 139-40 (1963).

139. See *N.Y. Const. art. VI, § 22*.

140. *N.Y. Const. art. VI, §§ 2a, 6c*.

obvious that it would do a better job than the combination of the Court on the Judiciary and preexisting institutions. Although the New York system has defects that California's does not, the personnel involved—the Chief Judge, the Presiding Justices of the appellate division departments, and their Court Administrators—traditionally have been men of high integrity who have fulfilled their responsibility. It seems advisable, therefore, to continue to vest authority in them unless their triple task of judge-administrator-disciplinarian becomes too burdensome.

3. *The New Jersey System*¹⁴¹

The New Jersey Constitution provides that judges of the lower courts are subject to removal from office by the supreme court for such causes as are provided by law.¹⁴² The legislature, however, has failed to implement this provision by specifying causes for removal. Instead, two alternative mechanisms have evolved which are enforced by the supreme court pursuant to its general supervisory power over the state judiciary. First, a judge guilty of misconduct may be disbarred and immediately thereafter removed from office for lack of one of the qualifications for continued judicial office—membership in the bar.¹⁴³ Second, a judge can be held in contempt of the supreme court for violating the Canons of Judicial Ethics promulgated by the supreme court.¹⁴⁴

Disbarment as a judicial removal mechanism, although adopted by some jurisdictions,¹⁴⁵ is a device which many states have rejected.¹⁴⁶ The supreme court's continuing concern over the conduct of the state's judges may have led to its use in New Jersey. Beginning with the reforms instituted by Chief Justice Arthur T. Vanderbilt, the court's concern with misconduct has been part of a general movement toward promoting a high standard of judicial efficiency and professionalism. One product of this movement, strong centralized court administration, plays a key role in policing judges' conduct.

Although states such as New York and California place principal responsibility for judicial efficiency with a judicial council and principal

141. The New Jersey court system is headed by a supreme court of seven justices. Intermediate appellate jurisdiction is vested in the Appellate Division of the Superior Court, which hears appeals from the superior courts of general trial jurisdiction and the county courts of lesser jurisdiction. All judges except those of inferior courts not mentioned are appointed by the Governor for a seven-year term. All but county court judges achieve tenure during good behavior if reappointed after serving a first seven-year term. N.J. Const. art. VI, § II, ¶ 1; § III, ¶ 3; § VI, ¶¶ 1, 3.

142. N.J. Const. art. VI, § VI, ¶ 4.

143. See *Matter of Mattera*, 34 N.J. 259, 168 A.2d 38 (1961).

144. *Matter of Pagliughi*, 39 N.J. 517, 189 A.2d 218 (1963). See 1 Waltzinger, N.J. Practice 287 (rev. ed. 1954).

145. *State ex rel. Nebraska State Bar Ass'n v. Conover*, 166 Neb. 132, 88 N.W.2d 135 (1958); *Mahoning County Bar Ass'n v. Franko*, 168 Ohio St. 17, 151 N.E.2d 17 (1958), cert. denied, 358 U.S. 932 (1959). See Annot., 53 A.L.R.2d 305 (1957).

146. E.g., *Matter of Colorado Bar Ass'n*, 137 Colo. 357, 325 P.2d 932 (1958).

responsibility for discipline and removal with another special body, New Jersey gives its supreme court principal responsibility for both these activities.¹⁴⁷ In New Jersey and other less populous jurisdictions this approach is probably more economical and seems very effective.

In New Jersey the State Court Administrator directs the state's disciplinary machinery, acting under the authority of the Chief Justice.¹⁴⁸ Complaints are accepted in any form, with the complainant's name kept confidential. Receipt of a newspaper clipping in an envelope once led to an investigation. Every complaint received by the Administrator provokes a written response answering the complainant's objections to his treatment in court. If the complainant responds to the Administrator's letter, the Administrator will respond in turn until he feels all objections have been answered. This procedure does not mean that all patently invalid complaints are investigated; yet, on occasion, the Administrator will investigate even such complaints as those arising out of domestic relations cases, charging a judge with failure to give one side enough attention. Such spot checks, entailing examination of the hearing or trial transcript, are intended to emphasize the supreme court's attitude toward improper conduct in court. They supplement other spot checks made by investigators who tour the New Jersey municipal courts.

When the Administrator receives a complaint having prima facie validity, he will either investigate it himself or send it to one of twelve assignment judges, who are empowered by the supreme court to execute both its own and the Administrator's directives in geographic areas having approximately equal judicial workloads.¹⁴⁹ An assignment judge will investigate and reprimand a judge when appropriate. In some instances he will receive complaints directly and act upon them without consulting the Administrator. There are no formal standards determining when this should be done, although obviously the more serious cases will be sent to the Administrator.

The Administrator will conduct the investigation from his own office if a case requires intensive fact finding. Thus he will compare complaints concerning undue delay with his records of the judge's output. In one instance, he had an investigator observe a judge for two weeks to determine whether he was drinking to excess. In rare cases the administrator will send the complaint to the Chief Justice, who may write or call a judge he feels will be more responsive to personal contact.

When a complaint is substantiated by the evidence, the Administrator communicates this finding to the Chief Justice who decides what action will be taken. The offending judge may be called before the entire supreme court sitting informally for an *in camera* discussion of the charges. Witnesses may also be asked to testify before the court,

147. N.J. Const. art. VI, § II, ¶ 3; § VI, ¶ 4.

148. N.J. Const. art. VI, § VII, ¶ 1; N.J. Rev. Stat. §§ 2A:12-(1) to -(6) (Supp. 1965).

149. N.J. Rules 1:29-1.

and the Attorney General may be present to act as would a prosecutor before a grand jury. If the evidence warrants, the court may ask the judge to resign, or it may issue an order to show cause why there should not be a disbarment or contempt trial before another judge. In less serious cases, the Chief Justice may simply call or write to the judge, discussing his conduct, or he may direct the Court Administrator to do so.

Continuing judicial concern over judges' conduct is evidenced by the fact that the supreme court meets every two weeks to discuss with the Court Administrator any pending investigations, and to answer questions of judicial ethics raised by judges seeking opinions as to proposed conduct. Periodically, there will be a conference attended by virtually all the state's judges, where ethical and other questions regarding their performance can be discussed.

4. *The Wisconsin System*¹⁵⁰

The Wisconsin Supreme Court, like New Jersey's, has general supervisory power over the state's judiciary.¹⁵¹ Unlike New Jersey's court, it has never decided whether disbarment can be used to remove a judge from office.¹⁵² Wisconsin's Court Administrator, a former chief justice, is charged, among other duties, with investigating allegations of misconduct. Nevertheless, there seems far less of a tradition of Supreme Court involvement in questions of judicial behavior than in New Jersey, so that there is far less confrontation between the court and offending judges. Attorneys, believing that the court will probably not take action, feel little incentive to complain of judges' misconduct.

There is little theoretical difference between the New Jersey and Wisconsin systems, but a difference in spirit and approach seems evident. Since New Jersey judges may achieve life tenure,¹⁵³ the responsibility for eliminating bad judges may not be shifted to the electorate. Wisconsin judges face election at all levels,¹⁵⁴ and this may strain the supreme court's ability to deal with an offending judge, for fear of political reprisals. Furthermore, the Chief Justice assumes office strictly on a seniority basis,¹⁵⁵ and therefore may have to retire before he can become completely acquainted with his office and its potential for dealing with judges' misconduct. As a result, only the

150. The Wisconsin court system is headed by a supreme court of seven justices. There is no intermediate appellate court. General trial jurisdiction is vested in the circuit courts, and municipal courts exercise a lesser jurisdiction. Supreme court justices are elected on a nonpartisan ballot for ten-year terms, while circuit court judges are elected in a like manner for six-year terms. Wis. Const. art. VII, §§ 4, 7; Wis. Stat. §§ 6.24, 252.01 (1961).

151. Wis. Const. art. VII, § 3.

152. *In re Stolen*, 193 Wis. 602, 214 N.W. 379, *aff'd* on rehearing, 193 Wis. 627, 216 N.W. 127 (1927), involved a judge below the level to which the removal provision applied.

153. See N.J. Const. art. VI, § VI, ¶¶ 1, 3.

154. See Wis. Const. art. VII, §§ 4, 7.

155. Wis. Const. art. VII, § 4.

most flagrant or serious cases attract the court's notice, and much of the system's potential, which is realized in New Jersey, is lost.

5. Conclusion

A comparative analysis of mechanisms involved in discipline and removal of judges reveals that a number of common characteristics aid these mechanisms in fulfilling their goals.

Public Stature.—Except for extraordinary cases, disciplinary action against judges will be the result of complaints by persons who have become aware of a defect or misconduct in the course of some ordinary contact with the judge. Even if a disciplinary body exists, however, it will be unable to function effectively if persons with valid complaints either fail to complain, feeling that nothing can or will be done, or complain to public officials who, out of ignorance of the existence of the disciplinary body, fail to pass the complaint along. It is, therefore, important for a disciplinary body to make its existence and its effectiveness known as widely as possible to the lay public, to attorneys, and to public officials likely to receive complaints. It has been objected that public confidence in the judiciary might be undermined by making the existence of such a body widely known, but an opposite effect seems more likely—renewed confidence because of the existence of a policing mechanism. Widespread public knowledge of the existence of the disciplinary body could also be expected to channel invalid complaints of disgruntled litigants into an agency equipped to handle them expeditiously.

Confidentiality of Complaints.—A disciplinary mechanism is likely to receive few complaints from attorneys if the complainant's identity is revealed to the judge during the investigation. In every jurisdiction canvassed, despite a universal feeling that attorneys are obligated to make justified complaints, attorneys stated that they would hesitate to complain about a judge if their identity as complainants might become known. It was argued that if a judge discovered that a certain attorney had registered a complaint, the attorney might become an anathema not only in the courtroom of the judge complained against, but also to some of the judge's colleagues. It is noteworthy that by complaining an attorney has little to gain and everything to lose. The objection that a judge has a right to confront his accusers seems inapposite to this context, which is not a criminal proceeding but an inquiry into whether the judge is fit to continue to hold a public trust.¹⁵⁶

Confidentiality seems justified, therefore, as an encouragement to responsible complainants, not only because judicial ability and conduct must be regulated, but also because shielding complainants from retaliation by the judge prevents further misuse of judicial office. Attorneys interviewed, however, made it clear that assurances of confidentiality, no matter how clear-cut, will not totally remove doubt

156. But cf. *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963).

from their minds, and that this doubt affects how readily they will make a complaint.

Informality of Access.—If a complaint about a judge's conduct must be reduced to a prescribed form before being considered, it is likely that fewer valid complaints will be made to the disciplinary authority. The likelihood that an attorney will often encounter judicial misconduct or unfitness is slight. It is therefore likely that an attorney will retain only a rather sketchy idea of the disciplinary body's method of operation, even if the body has managed to make its existence generally known. Moreover, an attorney who might be willing to write a simple letter or make a phone call might balk if required to do much more, in order to avoid getting too deeply involved.

It has been objected that informality may result in unfounded charges being made without sober forethought, but it seems that this can be controlled by appointing an official to screen complaints who is familiar with his jurisdiction's standards. A single phone call, for example, may not in itself be sufficient grounds for taking further action, but phone calls from different persons, all reliable and all making like allegations, could be sufficient.

Ability To Set Standards.—It is important that standards of judicial misconduct be set, and be known by three classes of persons. Of course, judges should know by what standards their conduct will be judged, both in fairness to them and to reduce the required number of disciplinary proceedings. Witnesses at disciplinary proceedings who could be adversely affected in the event of the judge's return to the bench might be more willing to testify if they were aware of standards of conduct. Attorneys, also, should know which acts of judicial misconduct are proscribed, so that they will not incur a judge's resentment for making an unactionable complaint. This knowledge should help overcome attorneys' hesitancy to complain even after assurances that their identity will not become known to the judge.

In the area of publicized standards, California compares unfavorably to the other states. Although California did adopt a modified version of the Canons of Judicial Ethics,¹⁵⁷ the Canons are not binding upon the Commission. Furthermore, the California Supreme Court has failed to take advantage of an opportunity to discuss standards of conduct.¹⁵⁸ On the other hand, in New York the Judicial Conference and appellate division departments make rules, especially in the area of business interests and political activity.¹⁵⁹ New Jersey has adopted the Canons of Judicial Ethics as law,¹⁶⁰ and Wisconsin is drafting its own canons.

157. McCoy, *Judicial Ethics in California*, 33 J. Am. Jud. Soc'y 105 (1949).

158. See *Stevens v. Commission on Judicial Qualifications*, 61 Cal. 2d 886, 393 P.2d 709, 39 Cal. Rptr. 397 (1964).

159. 10 N.Y. Judicial Conference Ann. Rep. 272-74 (July 1963-June 1964).

160. N.J. Rules 1:25, 8:13-7(a); *Matter of Pagiughi*, 39 N.J. 517, 522, 189 A.2d 218, 221 (1963).

Sanctions.—It is evident in all jurisdictions that informal personal action is in some cases the more effective approach. It is also evident that the effectiveness of such methods depends in large part upon the status of the official approaching the judge. There is necessarily a difference in authority between a reprimand from the Presiding Justice of a New York appellate division department and the Presiding Judge of a California Superior Court. In the prior instance, the reprimand is from an official appointed by the Governor and empowered to institute removal proceedings. In the latter case, the Presiding Judge is elected by the other superior court judges for a one-year term, and must appeal to the Commission on Judicial Qualifications if he is to enforce his authority by any means other than assignment. The difference lies in the status of the reprimanding official and in his proximity to the official removal and reprimand mechanism. Reprimands are more effective when issuing from officials with sufficient status.

Moreover, it is important that the formal removal mechanisms may easily be set into motion. Although there has been some criticism that the New York Court on the Judiciary is cumbersome, it can be called into session by numerous officials and bodies. The mechanisms in the other four states covered also seem easily set into motion. Certainly these institutions compare favorably with the impeachment and recall mechanisms, which are ineffective except in the most serious cases.

Independence.—The members of the removal body and of the fact finding and recommending bodies should be as free as possible from political pressure. Ideally, this goal would necessitate that all such persons be appointed with life tenure. On a practical level, however, the number of elective officials concerned with judicial misconduct and disability should be kept to a minimum, as in California. Where this is not done, as in New York, the officials should be elected for long terms. Those officials who are concerned exclusively with judicial discipline, such as the Executive Secretary of the California Commission, should not be elected because their positions are both highly sensitive and crucial to the proper functioning of the removal system.

Neither the executive nor the legislative branches should be empowered to initiate removals or reprimands without such checks as are inherent in the impeachment process. To so empower these branches would seriously threaten the independence of the judiciary. Moreover, neither the legislature nor the executive should be able to review specific removals and reprimands, because such provisions constitute an admission that political considerations can enter into a determination of fitness to serve. Only in New York can the legislature preempt the judiciary in such matters,¹⁶¹ although the other jurisdictions retain impeachment as a removal device.

161. N.Y. Const. art. VI, § 22e.

Checks.—Sufficient checks should exist to prevent abuses of power by those in charge of discipline. In California, the Executive Secretary's actions are controlled by the Commission, whose composition tends to assure a balanced and fair viewpoint. Moreover, even though the California Supreme Court does not review informal retirements, a judge cannot be involuntarily removed from office without a full hearing before that court. Finally, the Commission must periodically justify its existence to the state legislature for continued appropriations. Abuses causing a public dispute over the Commission's continued operations would jeopardize the Commission's appropriations and will therefore be avoided.

In other states the checks are different. The court administrations of New York, New Jersey and Wisconsin are supervised by the judges under whom they operate. The chief judge, and occasionally the entire supreme court of the state, will be consulted before substantial pressure is applied against a judge. Experience has shown that the integrity of the judges in those states canvassed has prevented abuses of power.

Expeditionness and Economy.—To protect the public, a misbehaving or disabled judge should be removed as quickly as possible. In Missouri, it took the bar committee six months to get one judge to retire. The New York procedure may take as long as six months,¹⁶² although the Court on the Judiciary may suspend a judge pending final disposition.¹⁶³ The California procedure may run three months from complaint to removal, unless the case goes to the Supreme Court.

State legislatures, especially in Missouri and California, seem reluctant to enact important reform measures in the area of judicial administration. Thus, aside from the need to protect the taxpayer, a removal mechanism should be economical in order to induce the legislature to act. Engrafting a removal and discipline system onto an existing central administration, as in New Jersey, seems the least expensive approach. The New Jersey system might not work well in a larger state, however, since it might create too great a burden on the efficiency of the existing structure.

In seeking economy and expeditionness, however, procedural fairness to the judges involved should not be hampered. In all jurisdictions covered, judges were informed of the complaints against them and invited to reply. Formal hearings were never held without right to counsel and to cross-examination. Finally, any removal system will fail unless the key judges of the state support the removal personnel, and unless the personnel are willing to use their authority. Court administrators, especially in elective states, may be more reluctant to act than the executive secretary of a California-style commission, who is specially appointed for the particular job of judicial discipline.

162. See *Matter of Osterman*, 13 N.Y.2d (a) (Ct. on the Judiciary 1963), cert. denied, 376 U.S. 914 (1964); *Matter of Friedman*, 12 N.Y.2d (a) (Ct. on the Judiciary 1963).

163. N.Y. Const. art. VI, § 22d.

**APPENDIX B.—MATERIALS ON CALIFORNIA COMMISSION
ON JUDICIAL QUALIFICATIONS**

1. CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

(CONSTITUTION)

§ 10b. Judges; removal for willful misconduct, failure to perform duties, habitual intemperance or serious disability

Sec. 10b. A justice or judge of any court of this State, in accordance with the procedure prescribed in this section, may be removed for willful misconduct in office and willful and persistent failure to perform his duties or habitual intemperance, or he may be retired for disability seriously interfering with the performance of his duties, which is, or is likely to become, of a permanent character. The Commission on Judicial Qualifications may, after such investigation as the commission deems necessary, order a hearing to be held before it concerning the removal or retirement of a justice or a judge, or the commission may in its discretion request the Supreme Court to appoint three special masters, who shall be justices or judges of courts of record, to hear and take evidence in any such matter, and to report thereon to the commission. If, after hearing, or after considering the record and report of the masters, the commission finds good cause therefor, it shall recommend to the Supreme Court the removal or retirement, as the case may be, of the justice or judge.

The Supreme Court shall review the record of the proceedings on the law and facts and in its discretion may permit the introduction of additional evidence and shall order removal or retirement, as it finds just and proper, or wholly reject the recommendation. Upon an order for retirement, the justice or judge shall thereby be retired with the same rights and privileges as if he retired pursuant to statute. Upon an order for removal, the justice or judge shall thereby be removed from office, and his salary shall cease from the date of such order.

All papers filed with and proceedings before the Commission on Judicial Qualifications or masters appointed by the Supreme Court, pursuant to this section, shall be confidential, and the filing of papers with and the giving of testimony before the commission or the masters shall be privileged; but no other publication of such papers or proceedings shall be privileged in any action for defamation except that (a) the record filed by the commission in the Supreme Court continues privileged and upon such filing loses its confidential character and (b) a writing which was privileged prior to its filing with the commission or the masters does not lose such privilege by such filing. The Judicial Council shall by rule provide for procedure under this section before the Commission on Judicial Qualifications, the masters, and the Supreme Court. A justice or judge who is a member of the commission or Supreme Court shall not participate in any proceedings involving his own removal or retirement.

This section is alternative to, and cumulative with, the methods of removal of justices and judges provided in Sections 10 and 10a of this article, Sections 17 and 18 of Article IV, and Article XXIII, of this Constitution. (Added Nov. 8, 1960.)

[STATUTES]

CHAPTER 2.5

COMMISSION ON JUDICIAL QUALIFICATIONS

Article:	Section
1. General Provisions.....	68701
2. Co-operation of Public Officers and Agencies.....	68725
3. Investigations and Hearings.....	68750

ARTICLE 1

GENERAL PROVISIONS

- Sec.
- 68701. Definitions.
 - 68702. Officers and employees; experts and reporters; witnesses; legal counsel.
 - 68703. Expenses.

§ 68701. Definitions. As used in this chapter, "commission" means the Commission on Judicial Qualifications provided for in Section 1b and Section 10b

of Article VI of the Constitution, "masters" means special masters appointed by the Supreme Court pursuant to said Section 10b, and "judge" means a justice or judge who is the subject of an investigation or proceeding under said Section 10b. (Added Stats. 1961, c. 564, p. 1682, § 1.)

§ 68702. Officers and employees; experts and reporters; witnesses; legal counsel. The commission may employ such officers, assistants, and other employees as it deems necessary for the performance of the duties and exercise of the powers conferred upon the commission and upon the masters, may arrange for and compensate medical and other experts and reporters, may arrange for attendance of witnesses, including witnesses not subject to subpoena, and may pay from funds available to it all expenses reasonably necessary for effectuating the purposes of Section 1b and Section 10b of Article VI of the Constitution, whether or not specifically enumerated herein. The Attorney General shall, if requested by the commission, act as its counsel generally or in any particular investigation or proceeding. The commission may employ special counsel from time to time when it deems such employment necessary. (Added Stats. 1961, c. 564, p. 1683, § 1.)

§ 68703. Expenses. Each member of the commission and each master shall be allowed his necessary expenses for travel, board, and lodging incurred in the performance of his duties, but shall not receive any compensation for his services. (Added Stats. 1961, c. 564, p. 1683, § 1.)

ARTICLE 2

CO-OPERATION OF PUBLIC OFFICERS AND AGENCIES

Sec.

68725. Assistance and information.

68726. Service of process; execution of orders.

§ 68725. Assistance and information. State and local public bodies and departments, officers and employees thereof, and officials and attaches of the courts of this State shall co-operate with and give reasonable assistance and information to the commission and any authorized representative thereof, in connection with any investigations or proceedings within the jurisdiction of the commission. (Added Stats. 1961, c. 564, p. 1683, § 1.)

§ 68726. Service of process; execution of orders. It shall be the duty of the sheriffs, marshals, and constables in the several counties, upon request of the commission or its authorized representative, to serve process and execute all lawful orders of the commission. (Added Stats. 1961, c. 564, p. 1683, § 1.)

ARTICLE 3

INVESTIGATIONS AND HEARINGS

Sec.

68750. Oaths; inspection of books and records; subpoenas.

68751. Scope of process; attendance of witnesses out of county; distance restrictions.

68752. Order compelling witness to attend and testify.

68753. Depositions.

68754. Witness fees; mileage.

68755. Costs.

§ 68750. Oaths; inspection of books and records; subpoenas. In the conduct of investigations and formal proceedings, the commission or the masters may (a) administer oaths; (b) order and otherwise provide for the inspection of books and records; and (c) issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents and testimony relevant to any such investigation or formal proceeding.

The power to administer oaths, to issue subpoenas, or to make orders for or concerning the inspection of books and records may be exercised by a member of the commission or a master, unless the commission shall otherwise determine. (Added Stats. 1961, c. 564, p. 1683, § 1.)

§ 68751. Scope of process; attendance of witnesses out of county; distance restrictions. In any investigation or formal proceeding in any part of the State the process extends to all parts of the State. A person is not obliged to attend as a witness in any investigation or proceeding under this chapter at a place out of the county in which he resides, unless the distance is less than 150 miles from his place of residence. (Added Stats. 1961, c. 564, p. 1683, § 1.)

§ 68752. Order compelling witness to attend and testify. If any person refuses to attend or testify or produce any writings or things required by any such sub-

poena, the commission or the masters may petition the superior court for the county in which the hearing is pending for an order compelling such person to attend and testify or produce the writings or things required by the subpoena before the commission or the masters. The court shall order such person to appear before it at a specified time and place and then and there show cause why he has not attended or testified or produced the writings or things as required. A copy of the order shall be served upon him. If it appears to the court that the subpoena was regularly issued, the court shall order such person to appear before the commission or the masters at the time and place fixed in the order and testify or produce the required writings or things. Upon failure to obey the order, such person shall be dealt with as for contempt of court. (Added Stats. 1961, c. 564, p. 1684, § 1.)

§ 68753. **Depositions.** In any pending investigation or formal proceeding, the commission or the masters may order the deposition of a person residing within or without the State to be taken in such form and subject to such limitations as may be prescribed in the order. If the judge and counsel for the commission do not stipulate as to the manner of taking the deposition, either the judge or counsel may file in the superior court a petition entitled "In the Matter of Proceeding of Commission on Judicial Qualifications No. ——— (state number)," and stating generally, without identifying the judge, the nature of the pending matter, the name and residence of the person whose testimony is desired, and, directions, if any, of the commission or masters, asking that an order be made requiring such person to appear and testify before a designated officer. Upon the filing of the petition, the court may make an order requiring such person to appear and testify. A subpoena for such deposition shall be issued by the clerk and the deposition shall be taken and returned, in the manner prescribed by law for depositions in civil actions. If the deposition is that of a person residing or present within this State, the petition shall be filed in the superior court of the county in which such person resides or is present; otherwise in the superior court of any county in which the commission maintains an office. (Added Stats. 1961, c. 564, p. 1684, § 1.)

§ 68754. **Witness fees; mileage.** Each witness, other than an officer or employee of the State or a political subdivision or an officer or employee of a court of this State, shall receive for his attendance the same fees and all witnesses shall receive the same mileage allowed by law to a witness in civil cases. The amounts shall be paid by the commission from funds appropriated for the use of the commission. (Added Stats. 1961, c. 564, p. 1684, § 1.)

§ 68755. **Costs.** No award of costs shall be made in any proceeding before the commission, masters, or Supreme Court. (Added Stats. 1961, c. 564, p. 1684, § 1.)

[CALIFORNIA RULES OF COURT]

RULES FOR REMOVAL OR RETIREMENT OF JUDGES

ADOPTED BY THE JUDICIAL COUNCIL OF THE STATE OF CALIFORNIA, EFFECTIVE
AUGUST 1, 1961*

Rule 901. Preliminary investigation

(a) The Commission, upon receiving a verified statement, *not obviously unfounded or frivolous*, alleging facts indicating that a judge is guilty of willful misconduct in office, willful and persistent failure to perform his duties, or habitual intemperance, or that he has a disability seriously interfering with the performance of his duties, which is, or is likely to become, of a permanent character, shall make a preliminary investigation to determine whether formal proceedings should be instituted and a hearing held. The Commission without receiving a verified statement may make such a preliminary investigation on its own motion.

(b) The judge shall be notified of the investigation, the nature of the charge, and the name of the person making the verified statement, if any, or that the investigation is on the Commission's own motion, and shall be afforded reasonable opportunity in the course of the preliminary investigation to present such matters as he may choose. Such notice shall be given by prepaid registered mail addressed to the judge at his chambers and at his last known residence.

*Adopted pursuant to the authority contained in Section 10b, Article VI, California Constitution.

(c) If the preliminary investigation does not disclose sufficient cause to warrant further proceedings, the judge shall be so notified.

Rule 902. Notice of formal proceedings

(a) After the preliminary investigation has been completed, if the Commission concludes that formal proceedings should be instituted, the Commission shall without delay issue a written notice to the judge advising him of the institution of formal proceedings to inquire into the charges against him. Such proceedings shall be entitled:

"BEFORE THE COMMISSION ON JUDICIAL QUALIFICATIONS
Inquiry Concerning a Judge, No. _____."

(b) The notice shall specify in ordinary and concise language the charges against the judge and the alleged facts upon which such charges are based, and shall advise the judge of his right to file a written answer to the charges against him within 15 days after service of the notice upon him.

(c) The notice shall be served by the personal service of a copy thereof upon the judge, but if it appears to the chairman of the Commission upon affidavit that, after reasonable effort for a period of 10 days, personal service could not be had, service may be made upon the judge by mailing, by prepaid registered mail, copies of the notice addressed to the judge at his chambers and at his last known residence.

Rule 903. Answer

Within 15 days after service of the notice of formal proceedings the judge may file with the Commission an original and 11 legible copies of an answer, which shall be verified and shall conform in style to subdivision (c) of rule 15 of the Rules on Appeal.

Rule 904. Setting for hearing

Upon the filing of an answer or upon expiration of the time for its filing, the Commission shall set a time and place for hearing before itself or before masters and shall give notice of such hearing by mail to the judge at least 20 days prior to the date set.

Rule 905. Hearing

(a) At the time and place set for hearing, the Commission, or the masters when the hearing is before masters, shall proceed with the hearing pursuant to section 10b of article VI of the Constitution whether or not the judge has filed an answer or appears at the hearing. The examiner shall present the case in support of the charges in the notice of formal proceedings.

(b) The failure of the judge to answer or to appear at the hearing, shall not, standing alone, be taken as evidence of the truth of the facts alleged to constitute grounds for removal or retirement. The failure of the judge to testify in his own behalf or to submit to a medical examination requested by the Commission or the masters may be considered, unless it appears that such failure was due to circumstances beyond his control.

(c) The proceedings at the hearing shall be reported by a phonographic reporter.

(d) When the hearing is before the Commission, not less than five members shall be present when the evidence is produced.

Rule 906. Evidence

At a hearing before the Commission or masters, legal evidence only shall be received, and oral evidence shall be taken only on oath or affirmation.

Rule 907. Procedural rights of judge

(a) In proceedings for his removal or retirement a judge shall have the right and reasonable opportunity to defend against the charges by the introduction of evidence, to be represented by counsel, and to examine and cross-examine witnesses. He shall also have the right to the issuance of subpoenas for attendance of witnesses to testify or produce books, papers, and other evidentiary matter.

(b) When a transcript of the testimony has been prepared at the expense of the Commission, a copy thereof shall, upon request, be available for use by the judge and his counsel in connection with the proceedings, or the judge may arrange to procure a copy at his expense. The judge shall have the right, without any order or approval, to have all or any portion of the testimony in the proceedings transcribed at his expense.

(c) Except as herein otherwise provided, whenever these rules provide for giving notice or sending any matter to the judge, such notice or matter shall be

sent to the judge at his residence unless he requests otherwise, and a copy thereof shall be mailed to his counsel of record.

(d) If the judge is adjudged insane or incompetent, or if it appears to the Commission at any time during the proceedings that he is not competent to act for himself, the Commission shall appoint a guardian ad litem unless the judge has a guardian who will represent him. In the appointment of such guardian ad litem, preference shall be given, whenever possible, to members of the judge's immediate family. The guardian or guardian ad litem may claim and exercise any right and privilege and make any defense for the judge with the same force and effect as if claimed, exercised, or made by the judge, if competent, and whenever these rules provide for serving or giving notice or sending any matter to the judge, such notice or matter shall be served, given, or sent to the guardian or guardian ad litem.

Rule 908. Amendments to notice or answer

The masters, at any time prior to the conclusion of the hearing, or the Commission, at any time prior to its determination, may allow or require amendments to the notice of formal proceedings and may allow amendments to the answer. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing. In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present his defense against the matters charged thereby.

Rule 909. Report of masters

(a) After the conclusion of the hearing before masters, they shall promptly prepare and transmit to the Commission a report which shall contain a brief statement of the proceedings had and their findings of fact with respect to the issues presented by the notice of formal proceedings and the answer thereto, or if there be no answer, their findings of fact with respect to the allegations in the notice of formal proceedings. When the findings support the grounds alleged for removal or retirement, the report shall be accompanied by an original and four copies of a transcript of the proceedings before the masters.

(b) Upon receiving the report of the masters, the Commission shall promptly mail a copy to the judge.

Rule 910. Objections to report of masters

Within 15 days after mailing of the copy of the masters' report to the judge, the examiner or the judge may file with the Commission an original and 11 legible copies of a statement of objections to the report of the masters, setting forth all objections to the report and all reasons in opposition to the findings as sufficient grounds for removal or retirement. Such statement shall conform in style to subdivision (c) of rule 15 of the Rules on Appeal, and when filed by the examiner, a copy thereof shall be sent by mail to the judge.

Rule 911. Appearance before Commission

If no statement of objections to the report of the masters is filed within the time provided, the Commission may adopt the findings of the masters without a hearing. If such statement is filed, or if the Commission in the absence of such statement proposes to modify or reject the findings of the masters, the Commission shall give the judge and the examiner an opportunity to be heard orally before the Commission, and written notice of the time and place of such hearing shall be mailed to the judge at least 10 days prior thereto.

Rule 912. Extension of time

The chairman of the Commission may extend for periods not to exceed 30 days in the aggregate the time for filing an answer, for the commencement of a hearing before the Commission, and for filing a statement of objections to the report of the masters, and the presiding master may similarly extend the time for the commencement of a hearing before masters.

Rule 913. Hearing additional evidence

(a) The Commission may order a hearing for the taking of additional evidence at any time while the matter is pending before it. The order shall set the time and place of hearing and shall indicate the matters on which the evidence is to be taken. A copy of such order shall be sent by mail to the judge at least 10 days prior to the date of hearing.

(b) In any case in which masters have been appointed, the hearing of additional evidence shall be before such masters, and the proceedings therein shall be in conformance with the provisions of rules 905 to 911, inclusive.

Rule 914. Commission vote

The affirmative vote of five members of the Commission who have considered the record and report of the masters and who were present at any oral hearing as provided in rule 911, or, when the hearing was before the Commission without masters, of five members of the Commission who have considered the record, and at least three of whom were present when the evidence was produced, is required for a recommendation of removal or retirement of a judge or for dismissal of the proceedings.

Rule 915. Record of Commission proceedings

The Commission shall keep a record of all proceedings concerning a judge. The Commission's determination shall be entered in the record and notice thereof shall be mailed to the judge. In all proceedings resulting in a recommendation to the Supreme Court for removal or retirement, the Commission shall prepare a transcript of the evidence and of all proceedings therein and shall make written findings of fact and conclusions of law with respect to the issues of fact and law in the proceedings.

Rule 916. Certification of Commission recommendation to Supreme Court

Upon making a determination recommending the removal or retirement of a judge, the Commission shall promptly file a copy of the recommendation certified by the chairman or secretary of the Commission, together with the transcript and the findings and conclusions, with the clerk of the Supreme Court and shall immediately mail the judge notice of such filing, together with a copy of such recommendation, findings, and conclusions.

Rule 917. Review of Commission proceedings

(a) A petition to the Supreme Court to modify or reject the recommendation of the Commission for removal or retirement of a judge may be filed within 30 days after the filing with the clerk of the Supreme Court of a certified copy of the recommendation complained of. The petition shall be verified, shall be based on the record, shall specify the grounds relied on and shall be accompanied by petitioner's brief and proof of service of three copies of the petition and of the brief on the Commission. At least 20 days before the return day the Commission shall serve and file a respondent's brief. Within 15 days after service of such brief the petitioner may file a reply brief, of which three copies shall be served on the Commission.

(b) Failure to file a petition within the time provided may be deemed a consent to a determination on the merits based upon the record filed by the Commission.

(c) The rules adopted by the Judicial Council governing appeals from the superior court in civil cases, other than rule 26 thereof relating to costs, shall apply to proceedings in the Supreme Court for review of a recommendation of the Commission except where express provision is made to the contrary or where the application of a particular rule would be clearly impracticable, inappropriate, or inconsistent.

Rule 918. Definitions

In these rules, unless the context or subject matter otherwise requires:

- (a) "Commission" means the Commission on Judicial Qualifications.
- (b) "Judge" means a justice or judge of any court of this State.
- (c) "Chairman" includes the acting chairman.
- (d) "Masters" means special masters appointed by the Supreme Court upon request of the Commission on Judicial Qualifications pursuant to section 10b of article VI of the Constitution.
- (e) "Presiding master" means the master so designated by the Supreme Court or, in the absence of such designation, the justice or judge first named in the order appointing masters.
- (f) "Examiner" means the counsel designated by the Commission to gather and present evidence before the masters or Commission with respect to the charges against a judge.
- (g) "Shall" is mandatory and "may" is permissive.
- (h) "Mail" and "mailed" include ordinary mail and personal delivery.
- (i) The masculine gender includes the feminine gender.

Rule 919. Title

[Repealed effective July 1, 1963.]

2. JUDICIAL CONDUCT AND REMOVAL OF JUDGES FOR CAUSE IN CALIFORNIA

[Nothing expressed herein is intended to reflect the view of the Commission on Judicial Qualifications of which the writer is Executive Secretary]

(By Jack E. Frankel)*

"It is . . . a grave mistake to suppose that judges exercise their judicial power in a distasteful and arbitrary manner merely because they hold office for life or during good behavior. An arbitrary or disagreeable course of action by a judge arises principally from the fact that he is subject to no authority which can receive complaints against him and act upon those complaints by way of private or public criticism and correction of the judge. The best protection against arbitrary and disagreeable actions by judges is a duly constituted body of fellow judges who hold a position of superior power and authority and to whom complaints as to the conduct of judges may be brought and who may investigate those complaints and exercise a corrective influence."¹

There is widespread interest in improving our legal system. While it is part of our tradition for leading citizens and lawyers to point the way to reforms the attention today is pronounced. There is impatience with any process which is demonstrably inferior to alternatives.

To a certain extent our goals and ideals are being taken more seriously. There is dissatisfaction where improper conduct is unchecked. It is "bad public relations." Changes in disciplinary procedures in the organized bar and the integrated bar movement itself are responsive to this. Significant advances are made where the public and the profession are too sophisticated for outmoded and undesirable practices.²

But where do all the committee reports, speeches, legal articles, conferences and bar association resolutions lead? This article will present a treatment of the application of standards of ethics and disciplinary measures to judicial fitness and conduct. The independence of the judiciary is a cornerstone in our society. It is necessary for the exercise of the court's honest judgment. Still the high standing of the judicial branch should not serve as a shield for misconduct and neglect of duties.

In California before November, 1960, a judge could be removed by impeachment, concurrent resolutions of the Legislature, and recall.³ These were expensive, cumbersome and seldom used. The adoption by the American Bar Association of the Canons of Judicial Ethics in 1924 and the integration of the State Bar in 1927 with enforceable rules of conduct were indications that the legal profession recognized the need for self-regulation.

Justice N. P. Conroy discussed *Judicial Ethics in California* in a speech before the Judicial Section of the California State Bar at the Hotel Huntington in Pasadena, October 12, 1928:

" . . . it is necessary to consider the standards of judicial conduct, not only as containing principles which appeal to the conscience, but also as comprising rules of conduct which may be legally enforced.

"And for their legal enforcement a complete system of law must necessarily provide penalties for violation of duty, and the means of enforcing those penalties. Every State, of course, endeavors to provide all of those things. Like other States, California in its Constitution provides for impeachment and trial of officers of the State, including judicial officers, for any misdemeanor in office. There is also the alternative method of removal of public officers by the electors themselves under the process known as the recall. If there is any other method of discipline of a judicial officer for alleged misconduct in office, it is only by some procedure operating indirectly. Under the elective system, when an incumbent of an office whose term is about to expire is a candidate for reelection, of course the whole subject of his qualifications is referred back to the public. According to my obser-

*Executive Secretary, Commission on Judicial Qualifications. A.B. 1947, J.D. 1950, University of Chicago, Member of Ohio and California bars. Assistant Secretary, State Bar of California 1955-1961. The views herein are the sole responsibility of the writer.

¹ Albert Kales, *Methods of Selecting and Retiring Judges in a Metropolitan District*, Reform in Administration of Justice, Annals of the American Academy of Political and Social Science, Vol. LII (1914).

² Louis Banks, *Crisis in the Courts*; Fortune Magazine 87 (Dec. 1961).

³ Cal. Const., arts. IV, §§ 17, 18; VI, § 10; XXIII. Impeachment of judges applies to appellate and superior court judges. Cal. Gov. Code § 3060 permits accusation by a grand jury against other civil officers with removal upon conviction. (People v. Ward, 85 Cal. 585, 24 Pac. 785 (1890).) Query, whether with the adoption of Section 10b, Article VI of the California Constitution, Cal. Gov. Code § 3060 may be applied to any judges? Cal. Gov. Code § 3000 dealing with forfeiture from office upon conviction of designated crimes, and Cal. Gov. Code § 1770(h) are procedural laws prescribing modes of forfeiture. A procedure established by the Constitution as the mode for removing an officer excludes utilization of statutory procedure. 25 Ops Atty. Gen. 167. See p. . . . , herein.

vation, however, the elements of 'publicity' and campaigning ability and popularity have so large a bearing upon the results of such elections that in the nature of things they cannot furnish a satisfactory test of a judge's conduct during the time that he has occupied his office, and the result cannot be regarded as a fair and uninfluenced verdict with respect to such conduct.

"It is manifest that no organization or association of judges has had conferred upon it any authority to sit in judgment upon the conduct of an individual judge."⁴

The above remarks of Justice Conrey appeared in the November, 1928 issue of the State Bar Journal. In that same issue, under the title of *The Work of the Board of Governors*, it was pointed out that ". . . at its initial meeting, which was held in San Francisco, November 22 and 23, the second Board of Governors of the State Bar of California was confronted with a very heavy calendar of business to be transacted." The article went on to discuss the case of Judge Carlos S. Hardy:

"The case of Judge Carlos S. Hardy will reach the Supreme Court by way of an application for a writ of mandate, the Board of Governors having decided to apply to the Supreme Court for such a writ to review the decision of Judge Marshall F. McComb, of Los Angeles, that Judge Hardy, being on the bench, is not a member of The State Bar and therefore not subject to its jurisdiction."

Two months earlier, the first Board of Governors met and appointed a committee consisting of Eugene Daney, Jesse W. Carter, and David Burnett, to take evidence and make findings for the Board with reference to certain alleged conduct of Judge Carlos S. Hardy.⁵

In May, 1929, the California Supreme Court decided *State Bar of California v. Superior Court*,⁶ where a writ of mandamus to compel the Los Angeles Superior Court and Judge McComb to issue an order requiring Judge Hardy to be sworn in and to testify before a State Bar Committee was denied. The court upheld the ruling of Judge McComb that, as a judge, Judge Hardy was not a member of the State Bar and the State Bar lacked jurisdiction over him. Although sustaining the constitutionality of the State Bar, the court reasoned that since Article VI, Section 22 of the Constitution prohibited a judge of a court of record from practicing law during his continuance in office (presently in Art. VI. Sec. 18), State Bar jurisdiction could not extend to judges.

The State Bar Act thereafter was changed to provide that judges of courts of record during their continuance in office were not members of the State Bar.⁷ As a result, the prospect of enforcing acts of misconduct against judges of courts of record through the regular disciplinary processes of the organized Bar and in the same manner as practicing lawyers was foreclosed.⁸

In addition to Article VI, Section 22, the Supreme Court also recognized public policy considerations in not investing the State Bar with authority over judicial officers. The court observes that to proceed against a judge in this way is to accomplish by indirection a disqualification to hold office, and hence a removal from office when a direct procedure is provided by impeachment. Thus, virtually with its formation came the determination that for disciplinary purposes a judge of a court of record was outside the State Bar's jurisdiction while the judge is in office.

On March 18, 1929, the Senate of the State of California, sitting as a High Court of Impeachment, convened to hear, try and determine the impeachment presented by the Assembly against Judge Hardy.

In 1862, there had been an impeachment against Judge James H. Hardy who was found guilty and removed from office for using profane language out of court and expressing sympathy with Jefferson Davis and secession. A later Senate ordered the judgment of impeachment to be expunged.⁹

The Articles of Impeachment brought against Judge Carlos Hardy for the most part concerned activities and connections with Aimee Semple McPherson. On April 26, 1929, the Senate voted not guilty on each of the four articles of impeachment. A demurrer to a fifth article had been sustained earlier.¹⁰

On October 1, 1957, Justice Fred B. Wood observed:

There have been just two impeachment trials in California throughout its history. The earlier one was in the 1860's, and the second and last one was the

⁴ 3 STATE BAR J. 89. See McCoy, *A Note on Judicial Ethics in California* (1940), 22 SO. CAL. L. REV. 241.

⁵ 3 STATE BAR J. 2, 44, 82.

⁶ 207 Cal. 323, 278 Pac. 432 (1929).

⁷ STATE BAR ACT, § 6002.

⁸ Annot., 53 A.L.R. 2d 305 (misconduct in an official capacity as judicial officer as basis for disbarment suspension, or other disciplinary action).

⁹ Stewart, *Impeachment of Judge James H. Hardy* (1862), 28 SO. CAL. L. REV. 61.

¹⁰ Joseph Allan Beck, *Trial of the Impeachment of Judge Carlos S. Hardy*, 61.

Hardy trial of 1929. I don't think there was a single member of the Senate who sat at that trial who wanted to see another one. It was practically unanimous, as I recall it, among members of the Senate at that time that there should be some more adequate method of determining * * * disqualification of a judge.¹¹

It is unrealistic to delegate to a large state legislature working responsibility for the consideration, investigation, hearing and judgment on the proposition of judicial removal for cause. Certainly, traditionally impeachment procedure has a place in the constitutional framework but virtually everyone who has studied the problem has concluded that it is impractical for the purpose stated. Ineffectiveness is demonstrated as much by the absence of any proceeding since 1929 as by the two impeachment proceedings that were brought.

In the spring of 1932 there were public disclosures of apparent irregularities in the administration of certain receivership affairs in Los Angeles. The Judiciary Committee of the Los Angeles Bar Association conducted an investigation and recommended that Judge Walter Guerin, Judge Dailey S. Stafford, and Judge John L. Fleming not be continued in judicial office. The Board of Trustees thereupon undertook a recall proceeding which proved successful. The General Recall Committee organized legal, financial and managerial sub-committees and a campaign covering a 60-day period was conducted. Three hundred ten thousand signatures were obtained. There was also a Citizens' Recall Committee and many other participating civic organizations.¹²

Recall can express the popular will but it is not a dependable or suitable vehicle for the removal of a judge. As with the election process itself, the recall authority provides no reasonable or orderly way for charges of misconduct or mental or physical unfitness of a judge to be properly initiated, examined, and adjudicated.

In 1936, while an associate justice of the District Court of Appeal, Gavin W. Craig was convicted in the United States District Court for the Southern District of California of obstructing the administration of justice with respect to a federal criminal proceeding.¹³ Section 10 of Article VI provides for the removal of appellate and superior court judges by concurrent resolution of both houses of the Legislature, adopted by a two-thirds vote of each house. For the removal of other judicial officers, a vote of the Senate upon recommendation of the Governor is required. Justice Craig submitted his resignation to the Governor on March 3, 1937, five days before hearings were scheduled before a Joint Convention of both houses under Section 10 of Article VI. Although removal was eventually effected under the pressure of this procedure, the experience demonstrated that removal under Section 10 is as cumbersome and unworkable as impeachment and recall.

The *Craig* situation provided a test of another theory of judicial removal. The Attorney General filed an action in quo warranto seeking to have the judicial office declared vacant by reason of the conviction. Section 1770(h) of the Government Code¹⁴ declares an office vacant upon "conviction of a felony or of any offense involving a violation of his official duties". The Supreme Court in October 1936, reversed a judgment to that effect, but then upon rehearing in September 1937 after Justice Craig's resignation, the court declared that the question was now moot.¹⁵

The State Bar then sponsored what is now Section 10a of Article VI of the Constitution. This section, adopted in November 1938, allows the Supreme Court, of its own motion, to remove a judge from office upon his conviction of a crime involving moral turpitude. This section was used for the first time in 1962 to suspend a judge following his conviction of three counts of income tax evasion and three counts of making a false declaration under penalty of perjury.¹⁶

The final chapter in the *Craig* case came in September 1938, when the Supreme Court ordered him disbarred for his conviction of a crime involving moral turpitude.¹⁷ The contention of the former jurist was that a statute requiring the disbarment of a lawyer for the conviction of a crime involving moral turpitude did not apply if the act took place during service as a justice. The court held this to be irrelevant and determined that upon his resignation from that office the constitutional requirements for removal ceased to apply.

¹¹ The California Judiciary (1959), p. 48.

¹² 8 LOS ANGELES BAR 3, 67 (1932).

¹³ See *Craig v. United States*, 81 F.2d 816 (C.C.A. 9th 1936), 83 F.2d 450 (C.C.A. 9th 1936).

¹⁴ Formerly §§ 964, 975 and 996 of the CAL. POLIT. CODE.

¹⁵ *People v. Craig*, 92 Cal. 561, 61 P.2d 934 (1936); *People v. Craig*, 9 Cal. 2d 615, 72 P.2d 135 (1937). See Cal. Const., art. XX, § 11, where persons convicted of certain crimes are excluded from office.

¹⁶ In the Matter of Marvin Sherwin, S.F. 21064, Minute Order dated June 4, 1962.

¹⁷ In re *Craig*, 12 Cal. 2d 93, 82 P.2d 442 (1938).

In *Christopher v. State Bar*,¹⁸ a member of the State Bar, who was a justice of the peace, was suspended for six months, after State Bar proceedings, for practicing law before another justice in the same county.¹⁹ It was argued by the lawyer-justice of the peace that under the *Hardy* case the State Bar lacked jurisdiction. The court held, however, that since the judicial office of the justice of the peace did not prohibit him from practicing law, he was still subject to disciplinary proceedings and that his offense was one against the profession of the law as well as against his judicial office. The violation of the Code of Civil Procedure, Section 171, constituted a violation of his oath and duties as an attorney. It did not matter that the offense did not involve moral turpitude and offended the judicial office as well as the profession of law.

For the most part, the study of judicial removal for cause has been linked with appointment, selection, and tenure. In 1934, Judge John Perry Wood, as chairman of a State Bar Committee on ACA 98, a proposal for selection of judges from a panel, began his report by stating:

"The draft prepared by the Southern Section of the Committee contained a provision enabling the Supreme Court at anytime to appoint a commission of three to examine into the conduct or qualifications of any judge, with power to subpoena witnesses, take evidence and make findings, these findings to be filed with the Secretary of State. If the commission finds that the continuance in office of any judge investigated be not compatible with the public service, then upon the filing of their findings his office becomes vacant.

"It was unfortunate that this provision was omitted from the final draft. Recent occurrences in Los Angeles County clearly have indicated that a provision like this one should be a part of our Constitution. An amendment of like tenor should be presented to the next legislature for submission to the people at the next general election."

Apparently nothing came of this suggestion. Attention was centered on judicial selection. In 1934, Section 26 of Article VI was adopted by initiative establishing the Commission on Qualifications (now the Commission on Judicial Appointments), which required confirmation of appellate judges and also changed judicial elections.

When in 1944, the State Bar Committee on Selection, Qualification, Tenure and Removal of Judges reported, there was no mention of removal. The work of the Committee had been limited to seeking improvements in Section 26 of Article VI which, in the 10 years since its adoption, had encountered some criticism and there was danger of a return to the pre-1934 situation. Therefore, the Committee proposed changes to meet the criticism and also proposed to extend Qualifications Commission approval to the trial courts.²⁰ These suggestions were encompassed in constitutional amendments and submitted to the 1945 session of the Legislature at the request of the Board of Governors but they were defeated in Sacramento.²¹ That State Bar Committee was in effect from October 1942 to January 1946 but made no recommendation on removal.

In 1940, Jay J. Stein asked: *Should the Judicial Council Supervise and Investigate Judicial Conduct?*

"Proposals designed to improve the standards of the judiciary of California have been numerous. Judicial selection and tenure have been, perhaps, the subjects of the greater number of such proposals.

"Unfortunately, other problems relating to improvement of the bench have not been given the serious consideration their importance warrants. Foremost among these, it is submitted, are (1) the inadequacy of the present methods of removal of judges, and (2) the absence of any body legally authorized to receive and investigate complaints relative to judicial conduct."²²

* * * * *

"If the proposed powers are conferred upon the Judicial Council, then, as contrasted to the present unsatisfactory situation, the bar and public generally will be assured that they have a reputable, qualified and legally authorized body to which they may bring their complaints, which complaints will be thoroughly investigated, and, if well founded, will result in the disciplining or reprimanding of the miscreant judge. It is submitted, however, that in only relatively few instances will the complaints be serious enough to result in formal hearings or disciplinary measures, and that practically every complaint may be remedied by consultation

¹⁸ 26 Cal. 2d 663, 161 P. 2d 1 (1945).

¹⁹ CAL. CODE CIV. PROC., § 171.

²⁰ 19 STATE BAR J. 335.

²¹ Report of Committee on Legislation, 20 STATE BAR J. 250.

²² 15 STATE BAR J. 136.

with the judge. The chief advantage of the adoption of such proposal, as Harley, [founder, American Judicature Society] has frequently pointed out, will lie in its prophylactic effect upon the morale of the bench."

In 1940 the Conference of State Bar Delegates voted for the appointment of a committee on the advisability of investing the Judicial Council with disciplinary supervision over judges. In 1941 the Conference approved in principle such a proposal and although a new Committee on Supervisory Jurisdiction of the Judicial Council was appointed and reported in 1946, nothing resulted.

Adoption in New York, in 1948, of a constitutional amendment providing for a Court on the Judiciary caught the attention of the Los Angeles Bar Association. The New York Court on the Judiciary consists of the Chief Justice of the Court of Appeals, the senior Associate Justice of that court, and one justice from the appellate division of each department, and may be convened by the Chief Justice, the Governor, the presiding judge of an appellate division, the Judicial Council, or the Executive Committee of the New York State Bar Association; removal is "for cause".²³ Creation of such a court for California was approved in principle by the Judiciary Committee of the Los Angeles Bar Association, Arnold Praeger, Chairman, and the Board of Trustees approved the committee action and forwarded the matter to the State Bar with the request that it be considered for approval.²⁴

The State Bar Committee on Administration of Justice reported on the proposal, Item 32, on June 21, 1948. In referring to the then existing methods of impeachment and removal by a two-thirds majority vote of the Legislature, the committee commented in italics: "These latter methods of removing incompetent judicial officers have not proved to be adequate." The report continued, "The Committee unanimously approves of the proposal in principle. However, in view of the apparent probability that the Judicial Council will attempt to redraft Article VI of the Constitution, it is recommended that the proposed creation of a court on the judiciary be suggested to the Judicial Council for consideration by it in conjunction with the contemplated redraft of Article VI of the Constitution."²⁵

Meanwhile the subject of judicial conduct in California was being approached from another direction. In 1928 the American Bar Association Canons of Judicial Ethics had been adopted by the State Bar of California but this action was nullified by the *Hardy* case.²⁶ Justice Conroy in his speech already referred to had said:

"... we should have among ourselves a public opinion of our own, which in its own way will demand a faithful adherence, by each and every judge to the highest ideals of judicial conduct."

The Conference of California Judges was organized in September 1939 as a voluntary organization of judges of courts of record which included all California state courts except justice courts. At its annual meeting in August 1949, Canons of Judicial Ethics were adopted after study and report by a drafting committee, Justice A. F. Bray, Chairman.²⁷ The California Canons, while based on the A.B.A. Canons, make some significant departures. An advisory committee on judicial ethics has issued 10 opinions to date. A Special Committee on Judicial Ethics has been appointed to review the Canons of Ethics, to consider a restatement and to make recommendations as to their administration. At the September 1961 meeting of the conference, this committee recommended that the Canons not be amended, that there be no restatement, that there be no change in method of administration, "and that no provision be made for the imposition of sanctions".²⁸ This recommendation was accepted.

Although it is sometimes claimed that a person of high moral principle needs no ethical rules to guide his behavior, codification of rules of conduct is useful even to persons of high principle. The Canons are helpful in many areas such as suggesting legislation (Canon 19), business promotions (Canon 21), politics (Canon 24), candidacy for office (Canon 26), social relations (Canon 29), and publicity of court proceedings (Canon 30). Judge McCoy has discussed the California and A.B.A. Canons in his article on *Judicial Ethics in California*²⁹ and *Judicial Selection and Judicial Conduct*.³⁰

²² *Ibid.*, 140.

²³ N. Y. Const., art. VI, § 9a. Apparently the Court on the Judiciary was first convened in 1960 and did not adopt rules until that time, the occasion for which was provided by the only case to come before it. Here, two judges were in effect censured for making improper statements, 8 N. Y. Rep. 2d series a to j.

²⁴ LOS ANGELES BAR BULLETIN 118, 176, 216.

²⁵ 23 STATE BAR J. 214.

²⁶ Note 4, *supra*; *Proceeding State Bar of California*, 225 (1928).

²⁷ McCoy, *Judicial Ethics in California*, 33. JOURN. AMER. JUD. SOC. 105; 24 STATE BAR J. 298.

²⁸ Report of Special Committee on Judicial Ethics, p. 1.

²⁹ Note 4, *supra*.

Still unresolved was a method of dealing with the unfit judge. There had been indications of a cooperative effort between the State Bar and the Judicial Council toward revision of Article VI of the Constitution.³¹ Chief Justice Phil S. Gibson broached revision on such matters as written opinions, appeal from municipal and justice court judgments, organization of superior courts, selection of trial court judges, and removal of judges for cause in an address on November 16, 1955, entitled *The Need for Constitutional Revision*,³² and in a law review article the following year. It is evident that some better method than the law now affords must be devised to compel the retirement or removal of a judge for cause.³³

One of the recommendations in the 1956 Holbrook Report was that a tribunal be given power to reprimand, suspend or remove judges for cause, subject to Supreme Court review.

"It is anticipated that seldom will the need to invoke this procedure arise, but the mere fact that the presiding judge has recourse to some disciplinary body, in itself, should act as a deterrent to the occasional recalcitrant judge, and minimize absence from judicial duties for extended periods."³⁴

Also in 1956 a series of articles entitled *Our Wasteful Courts* appearing in the Los Angeles Examiner popularized judicial reform.

At the 1955 session of the Legislature, three proposed constitutional amendments had been offered, but apparently not pushed, two of which (SCA 20 and 25) set up a commission, and the third (SCA 27-ACA 58) allowed a petition stating charges to be filed by the Board of Governors of the State Bar with the Supreme Court. This led to meetings between representatives of the Judicial Council, the State Bar Committee on Appointment and Election of Judges, and John J. Goldberg from the Board of Governors. (The State Bar Committee on Appointment and Election of Judges, which was in existence from 1952 until 1957, recognized the removal problem and took part in these meetings but made no recommendation of its own.) Mr. Goldberg was joined by Joseph A. Ball and Herman Selvin as the State Bar agents in developing a program with the Judicial Council. In August 1956 the Board of Governors took the important step of putting the State Bar behind a comprehensive court study.³⁵

On November 26, 1956, before the Senate Judiciary Committee, the Chief Justice stressed the importance of solving the impasse of the unfit and incapacitated jurist. At about the same time, the Chief Justice made similar enunciations in his report to the Governor on the condition of judicial administration in California.

By the close of 1956 several proposals were formulated as the Joint State Bar-Judicial Council project and were introduced as SCA 11 through 17 in the 1957 session of the Legislature.³⁶ SCA 15 contained a method for suspension of a judge by a commission and removal by the Senate after commission recommendation.

The program drew early and heavy fire. The Board of Governors at its March meeting recommended that it be referred to a joint interim legislative committee on court organization and procedure.³⁷ Thus was created the Joint Judiciary Committee on Administration of Justice, Senator Edwin Regan, Chairman, and Goscoe O. Farley, Executive Director. An advisory committee consisting of three members each from the State Bar, Judicial Council and Conference of California Judges, Justice Fred Wood, Chairman, recommended several topics both for immediate and long range study, including provision for a Commission to determine fitness of a person to continue to serve as a judge.³⁸

In an address before the Conference of California Judges at Monterey in October 1957, Chief Justice Gibson discussed the work of the Joint Judiciary Committee, including the removal of judges proposal and the inadequacies of the then existing remedies.

"No honest and industrious judge who has the physical and mental capacity to perform his duties has anything to fear from such measures. Surely the people have the right to expect that every judge will be honest and industrious and that no judge will be permitted to remain on the bench if he suffers from a physical

³¹ 24 SO. CAL. L. REV. 1.

³² See item 31 in 1948 report of Committee on Administration of Justice, 23 STATE BAR J. 213, the same report containing the reference to the New York Court on the Judiciary.

³³ *The Recorder* (San Francisco), Nov. 17, 1955.

³⁴ 29 SO. CAL. L. REV. 389, 399.

³⁵ Holbrook, *A Survey of Metropolitan Trial Courts, Los Angeles Area*, under grant from the Haynes Foundation for the Section of Judicial Administration of the American Bar Association, p. 381.

³⁶ Message of State Bar President Joseph A. Ball, 31 STATE BAR J. 403; Farraher, *Report of the Board of Governors*, 31 STATE BAR J. 454; Work of the Board Aug. 1956 Meeting, 31 STATE BAR J. 549.

³⁷ *State Bar Joint Program with the Judicial Council*, 32 STATE BAR J. 14.

³⁸ 32 STATE BAR J. 254-255. Mr. Selvin has written of some of the difficulties encountered as well as an account of the project's genesis. *Long Range Program*, 32 STATE BAR J. 738.

or mental infirmity which seriously and permanently interferes with the performance of his judicial duties."³⁹

The work of the Joint Judiciary Committee was closely watched.⁴⁰ Alternatives were studied. There was sentiment for vesting suspension authority in an enlarged Qualifications Commission with a removal recommendation directed to the Senate, the judge to be removed unless the Senate disapproved the recommendation. This approach was patterned after 1957 SCA 15. The Legislative Committee of the Conference of California Judges proposed that the power be in the Supreme Court which would act following the filing of a complaint by the State Bar or certain presiding judges.⁴¹ In the first of three reports, Topic 7, *Removal of Judges*, problems which the Committee found were reviewed, the inadequacies of removal procedures were commented upon, and testimony from the Chief Justice on the need for an effective procedure for removal was noted.

" . . . In one county we had three judges, none of whom had been on the bench for a year. One of them hadn't been on the bench for two years. One of them was in an institution. And they were all drawing salary. * * * I think the people of California have a right to expect something different from that. I think they have a right to expect that any man who holds a job and is drawing a salary will do his job."

The Committee concluded, "Present methods for the removal or compulsory retirement of judges are either too cumbersome, too expensive or too time consuming to be very useful. A new Commission on Judicial Qualifications, composed of judges, lawyers and prominent citizens, should be granted power to recommend to the Supreme Court the removal of a judge for cause." In March 1959 the Committee chairman introduced SCA 14, embodying that recommendation.⁴²

This established a nine-member Commission on Judicial Qualifications consisting of five judges appointed by the Supreme Court (two from the District Court of Appeal, two from the Superior Court, and one from a Municipal Court), two lawyers appointed by the Board of Governors and two citizens appointed by the Governor with the consent of the Senate. Grounds for removal are wilful misconduct in office, wilful and persistent failure to perform duties, and habitual intemperance; the grounds for retirement are disabilities seriously interfering with performance of duties, which is, or is likely to become, of a permanent character. The Commission may conduct investigations, hold hearings and recommend removal or retirement to the Supreme Court. Following review the Supreme Court orders removal or retirement or rejects the recommendation. Confidentiality is preserved unless and until a recommendation goes to the court.⁴³

The State Bar, Conference of California Judges, and Judicial Council gave the measure strong support. It was an important feature of the State Bar's 1959 Legislative Program along with other suggested constitutional changes in SCA 14, including augmentation of the Judicial Council membership, permission for the Judicial Council to appoint an administrative director of the courts, requirement of Commission confirmation for trial court judges and permission for legislative delegation of rule-making power to the Judicial Council. These last two were eliminated by the Senate Judiciary Committee.⁴⁴ Although some judges vigorously opposed the removal measure, the members of the Conference of California Judges voted approval by a vote of 364 to 34.⁴⁵ The Judicial Council was also emphatic in its endorsement, arguing that the proposal "would provide an effective means for the removal of unfit judges" while containing "necessary safeguards against damage to reputation from unfounded charges."⁴⁶

The interest which was generated is reflected in studies by two eminent California citizen groups, Town Hall and The Commonwealth Club of California.

³⁹ 32 STATE BAR J. 499, 649, 723.

⁴⁰ *For Modern Courts*, 32 STATE BAR J. 733.

⁴¹ Work of the Board, June and August 1958 Meetings, 33 STATE BAR J. 583, 598; Sterling, *Message of the President*, 33 STATE BAR J. 631.

⁴² Regan, *Court Survey*, 33 STATE BAR J. 385.

⁴³ *The California Judiciary*, 48-51 (1959); Senator Carl L. Christensen dissented from the Senate report, pp. 86, 87; Cal. Const., art. VI, §§ 1b and 10b.

⁴⁴ For a fuller discussion, see writer's article in 36 STATE BAR J. 1008.

⁴⁵ 1959 Legislative Program, 34 STATE BAR J. 151; *Report of Committee on Legislation (Constitutional Amendments)*, 34 STATE BAR J. 512; Sterling, *Report of the President for 1958-1959*, 34 STATE BAR J. 805. The proposal to require confirmation of trial court judges, with which judicial removal had long been studied, was strongly urged again at the 1961 session but was defeated. 36 STATE BAR J. 491, 561. See report of Assembly Interim Committee on Constitutional Amendments, 37, 41 (1960); see also 37 STATE BAR J. 467 and Report of the Board of Governors in Sept.-Oct. 1962 STATE BAR J.

⁴⁶ Letter dated Feb. 3, 1959 from Hon. Lilburn Gibson, President, Conference of California Judges, to Senator Regan, submitting report of the Conference on certain constitutional amendments in the California Legislative Session of 1957.

The Town Hall study conducted by its Legislation and Administration of Justice Section and published in March 1957, is an examination of the Holbrook recommendations which, on the judicial removal topic, differ in detail from the measure finally adopted but are consistent in purpose and principle.⁴⁷ The Town Hall members voiced their support of the Holbrook proposal for discipline of judges by a vote of 210 to 43.⁴⁸

Justice Thomas P. White, in a speech before the Town Hall section on December 2, 1956, asked: *Should Judges Be Subject to Disciplinary Action?*

"That independence of the judiciary is of the utmost importance in our judicial system no one will deny. And that because of its importance no restraints that would endanger that independence should be imposed. While this independence of the judiciary should be zealously guarded, the People are entitled to a weapon with which to combat an abuse of this independence when used as a cloak for continuing in office to the detriment of the best interests of the People. It should also be borne in mind that judicial officers are invested with tremendous power—they pass upon the lives and liberty, to say nothing of the property of our people.

* * * * *

"In conclusion, I submit that judges should be subject to disciplinary action, and that some better method than the law now affords must be devised to compel the retirement or removal of a judge for cause, and that if such a method were granted, the proposed personnel of the Commission insures that it will be used with both courage and discretion."⁴⁹

In presenting the report of The Commonwealth Club's Section on Administration of Justice, the Chairman, Judge Raymond J. Arata, gave pro and con arguments on Proposition 10 (SCA-14).

"Proponents of Proposition 10 (SCA-14) believe the present system for removal of judges is inadequate. There is no workable provision for removing a judge unable to perform his duties because of a lengthy disability which is not of sufficient gravity or notoriety to warrant impeachment proceedings. This results in congestion and delays in litigation, in thrusting additional work on already overburdened judges, and in loss of respect for the courts.

"It is contended that the provision for confidential investigation at the initiatory stage will eliminate the reluctance of practicing attorneys to prefer charges and will prevent unwarranted publicity of unfounded charges. This last factor is important for it is not uncommon for disappointed litigants to make groundless and even unintelligible charges against the judge who decided against them. This proposal also opens the way for establishment of an investigating body with a permanent staff better able to prepare for the proceedings, a tremendous improvement over existing "hit or miss" proceedings.

"Advocates claim that this body could function impartially, free of partisan influence. This might not always be true of impeachment or removal proceedings before the Legislature. The proposed amendment greatly broadens the grounds for removing a judge. It is approved by the Bar, the Legislature and the Judiciary."⁵⁰

In summary, the argument against Proposition 10 (SCA 14) was that the field was adequately covered, that it was not sound for the Supreme Court to be able to sit in judgment on one of its own members, and that since the legislative committee found only a small minority of judges unfit there was no need for such action.

The Commonwealth study also contains an examination by Robert M. Desky, Secretary of the Section, as to how Proposition 10 would operate in cases of an infirm judge and an unfit judge. After pointing to limitations, his conclusion is:

"Nevertheless, Proposition 10 represents a workmanlike step forward to secure enforcement of the judicial ethic in those rare instances when it is not entirely self-effectuating."⁵¹

The Section voted following its two-year study.

"Are present provisions for removal of judges sufficient? *Yes 16, No 84.* Should a Commission on Judicial Qualifications be empowered to recommend to the California Supreme Court that it remove a judge? *Yes 87, No 17.*

"Should the California Supreme Court be empowered to remove a judge following recommendation by a Commission on Judicial Qualifications? *Yes 90, No 14.*"⁵²

⁴⁷ Judicial Council Seventeenth Biennial Report, 20 (1959).

⁴⁸ Holbrook, *A Survey of Metropolitan Trial Courts, Los Angeles Area*, p. 380.

⁴⁹ *Report of Legislation and Administration of Justice Section on the Trial Courts of the Los Angeles Metropolitan Area*, Town Hall (Mar. 1957).

⁵⁰ LOS ANGELES BAR BULL. 99, 105.

⁵¹ *Selection, Retirement and Removal of Judges* (Sept. 1960), The Commonwealth, pp. 108-109.

⁵² *Id.* at 118.

Reviewing the 1960 ballot proposals, that Section, in reporting on Proposition 10 (which also made other changes), voted in favor of the proposals by a vote of 76 to 18.⁵³

The State Bar vigorously urged passage at the polls.⁵⁴ Senator Regan, who, as Chairman of the Joint Judiciary Committee on Administration of Justice and Chairman of the Senate Committee on Judiciary had played a major role in steering the measure through the Legislature, explained why the new system would be such an improvement in accomplishing its objective while maintaining proper safeguards.⁵⁵

On November 8, 1960, the measure received the approval of the voters by approximately three to one. Members were appointed and Justice A. F. Bray was elected chairman. In the 1961 session, implementing legislation was adopted. Effective August 1, 1961, the Judicial Council adopted Rules for Removal or Retirement.⁵⁶ The Commission has reported that while the great majority of cases brought to the Commission were closed as not warranting further action, some judges have resigned or retired while investigations were pending.⁵⁷

While this study has been on California, a national perspective is of interest.⁵⁸ In 1952, the *Survey of the Legal Profession* dealt with this problem; reference can also be made to a *National Conference* (1959), and an *American Bar Association Handbook* (1961). The *Survey* reported that in most states the only discipline and removal of judges is through impeachment. The difficulties in legislative procedures in California are borne out by the experience in other states.

From November 22 to 24, 1959, a meeting sponsored by the American Bar Association, the Institute of Judicial Administration, Inc. and the American Judicature Society was held in Chicago where it was decided that there should be provision for leave during a period of disability, and there is a need for dealing with judicial conduct of a nature not warranting removal as well as for less cumbersome removal methods.⁵⁹

The *Handbook on the Improvement of the Administration of Justice* (1961) was prepared by the Section of Judicial Administration of the American Bar Association and, in their discussions on Judicial Conduct, Discipline and Removal, came to similar conclusions as the other two national studies. A judge should not run for non-judicial elective office while retaining a judicial post. The high court of a state should be able to censure or remove for cause a lower court judge.

Reference has already been made to the comprehensive Holbrook report. We will conclude by comparisons between proposals advanced in that study and the Commission as it exists. Under the Holbrook plan a tribunal consisting of five appellate court justices would be operative in a case after motion of a presiding judge (in the larger courts), the Chief Justice, or the State Bar Board of Governors.

The five judges on the present Commission are chosen from the municipal and superior as well as appellate courts. The four remaining positions are divided between lawyers and public members. While a majority of the nine commissioners are from the judiciary, the bar and citizenry have a voice. The inclusion of practicing lawyers and citizens marks the stake of the bar and the public in the judicial system. A complaint from any source can initiate Commission action and also the Commission can act on its own motion.

Presently, voluntary or involuntary retirement is the only solution for a disability and only if it is, or is likely to become, permanent. Holbrook recommends that for the first four months of a protracted illness the judge receive full salary, the succeeding four months two-thirds salary, and half salary thereafter until retirement for incapacity is necessary. Most of the judges that Holbrook questioned on this subject thought it fair to make an adjustment after an initial period at full compensation.⁶⁰ The Los Angeles County Special Study Commission on Judicial Procedures, attorney Richard Oliver, Chairman, concurred in that position along with other Holbrook proposals including screening for trial court appointments.⁶¹

⁵³ *Id.* at 111.

⁵⁴ *Ballot Proposals for November 1960*, The Commonwealth, pp. 159-164 (Oct. 1960).

⁵⁵ *Vote for Proposition 10*, 35 STATE BAR J. 250; *State Bar Reports July 1960*, p. 1; *State Bar Reports Nov. 1960*, p. 1.

⁵⁶ Regan, *For Better Courts*, 35 STATE BAR J. 324.

⁵⁷ CAL. GOV'T CODE §§ 68701-68755, 56; Cal. 2d 1; *California Rules of Court*, 901-919.

⁵⁸ 1961 *Report of the Commission on Judicial Qualifications to the Governor*, 37 STATE BAR J. 30.

⁵⁹ For removal methods and grounds, see a study by the Institute of Judicial Administration, *Selection, Tenure and Removal of Judges in the 48 States, Alaska, Hawaii and Puerto Rico* (1956); Shartel, *Retirement and Removal of Judges*, 20 JOURN. AM. JUD. SOC. 133 (1936); Brand, *Bar Associations, Attorneys and Judges, Organization, Ethics, Discipline* (1956) and *Supplement* (1960).

⁶⁰ *National Conference on Judicial Selection and Court Administration Nos. 1959*, 45 JOURN. AM. JUD. SOC.

12; Brand, *The Discipline of Judges*, 46 AMER. BAR ASSOC. J. 1315.

⁶¹ Note 47, *supra*, 54, 395.

The California legal profession has to its credit a record of solid legislative achievement in the public interest. Intelligent reform is a never completed task in the administration of justice. With such a worthwhile goal the exercise of wisdom and persistence will lead to greater progress.

3. THE CALIFORNIA COMMISSION STORY

(By Louis H. Burke)

"Granted that the selection and appointment of judges on merit would be a big improvement over electing them on a partisan political basis, mistakes could still be made! How would you get rid of such a judge once you had cemented him in office for a long term or for life?"

"Many judges now choose to remain in office beyond a reasonable retirement age, and even after their physical and mental capacities have deteriorated. Others, with too great security in office, have become arbitrary, impatient and even incompetent. If such judges are removed from the crucible of facing the electorate periodically, what other means is there to keep them humble, attentive and in touch with the people? Through the use of the ballot box the people retain in hand the means of removal of such judges."

These queries and statements are often heard in the wake of the nationwide movement to improve the methods of selection and tenure of judges on a non-partisan, nonpolitical basis of merit, a movement of grand proportions and accomplishment headed by Mr. Justice Tom C. Clark of the United States Supreme Court as Chairman of the Joint Committee for the Effective Administration of Justice. This committee hand in hand with the American Judicature Society, a fifty-year leader in the national efforts to promote the efficient administration of justice, was immeasurably aided by a generous public service grant of the Kellogg Foundation. The educational program of the Joint Committee followed in the footsteps of a National Conference on Judicial Selection and Court Administration, held in Chicago in 1959, which recommended that "a system providing appointment of a judge for a definite term followed by election for a succeeding term in which he runs only against his record, and without competing candidates, is much to be preferred over an elective system in which a judge must run against opposing candidates." This national conference was followed by the work of the Joint Committee which harnessed in one operation all the resources of 17 national organizations concerned with judicial administration.

Conferences, both state and regional, of civic leaders, lawyers and judges have been held in all parts of the Union for the purpose of study of their respective state judicial systems and constitutional provisions with a view of modernizing methods for the selection of judges, at the conclusion of which conferences a consensus of conferees has been published, and by way of example may I quote briefly from one of the more recent of these conferences the consensus of the "Citizens' Conference on Florida's Judicial System":

"Judges must be taken out of politics. Political election and one-man judicial selection must be abolished. A tested method of securing the best judges to serve the courts of Florida must be found.

"Whenever a judicial vacancy occurs, a slate of highly qualified nominees for that office should be selected by an independent nominating commission. The Governor should appoint one of these nominated candidates to fill the vacant office. The nonpartisan commission should be composed of lay citizens and lawyers.

Removing judges from politics and assuring them of tenure in office based upon performance requires some reasonable system for the retirement or removal of such judges when circumstances warrant such action. These matters are interrelated and should be a part of a unified program. In the Florida conference, to which I have alluded, the consensus states:

FLORIDA CONSENSUS

"Florida has no reliable method of removing or retiring judges who are unfit because of misconduct or infirmity, whether physical or mental. A fair and economical plan to discipline or remove such judges is needed in Florida today.

"There should be an independent commission, composed of lay citizens, judges and lawyers, charged with investigating complaints against judges of any state

⁶² Los Angeles Metropolitan News, Mar. 20, 21, 22, 1962.

court. Every citizen should have the right to complain about any judicial behavior to the commission.

"All complaints and commission proceedings should be confidential in order to protect all parties concerned. The commission should make any necessary recommendations to the Supreme Court of Florida for appropriate action.

"This commission plan, which has also been approved in principle by The Florida Bar, is approved in principle by this Conference. It should be in addition to, and not in lieu of, the present impeachment procedures.

"The Conference approves the present method of mandatory retirement of judges at a specified age and temporary assignment of retired judges who are physically and mentally able to properly perform judicial duties. This Conference urges the adoption of a uniform system of retirement benefits for judges. These benefits should be sufficient to allow the retired judge to live with dignity."

California, like most states of the Union, did not have an adequate method for the removal of judicial officers. It did have the three major methods contained in many state constitutions, those of impeachment, recall and judicial action. Generally speaking, however, students of government have concluded that these methods have proved effective only in the few instances where a judge has been involved in a major scandal which has aroused widespread adverse public reaction.¹

None of these methods provide an effective means for a private citizen to seek relief against the wrongful act of a judge. There is no board or agency to which he can complain with some expectation that his complaint will be investigated and heard. To expect such a person to seek relief through the urging of impeachment proceedings by his state legislature, or to resort to petitions for recall is not realistic. These are methods which are beyond the reach of the ordinary citizen and particularly in populous states.

In 1960 California amended its constitution at the behest of the Chief Justice, Phil S. Gibson, the State Judicial Council, the Legislature, the State Bar and State Conference of Judges, and the amendment provided for a system quite similar to the one recently recommended by the consensus of the Florida conference. The system creates a special commission charged with the responsibility of receiving, investigating and considering complaints concerning judges of courts of all levels in the state's judicial system and recommending to the Supreme Court the retirement of any judge for disability or his removal from office for wilful misconduct. When it was initially proposed, there were a few judges who conscientiously felt the establishment of such a commission constituted a threat to the independence of the judiciary, and they raised their voices in opposition to its passage. Most judges were strongly in favor of the proposal, as was the Conference of Judges which supported it. Now that the plan has been in operation for approximately four years, practically all opposition to it has disappeared and it has met with uniform and widespread support. As Chief Justice Gibson of the State Supreme Court stated: "No honest and industrious judge who has the mental and physical capacity to perform his duties has anything to fear from" the commission method of removal. "Surely the people have the right to expect that every judge will be honest and industrious and that no judge will be permitted to remain on the bench if he suffers from physical or mental infirmity which seriously and permanently interferes with the performance of his judicial duties."

The commission established by the constitutional amendment is called "The Commission on Judicial Qualifications," a misnomer since the commission does not participate in the qualifying of judges but only in their disqualification—their removal. The commission consists of nine members: five judges, two lawyers and two laymen. The judges are appointed by the Supreme Court, two from the intermediate appellate courts, two from the trial court of unlimited jurisdiction and one from the trial court of limited jurisdiction. No members of the Supreme Court are eligible for appointment to the commission, since the

¹ *Impeachment* is a legislative action generally brought by the lower house and tried by the upper house, with conviction requiring a two-thirds vote. Impeachment proceedings are cumbersome, often political, and with no right of appeal.

Recall requires the incumbent to submit to the vote of the electorate as to whether he shall be removed on petition of a certain percentage of the voters, and it is also essentially political.

Removal by judicial action is a much less expensive, more expedient and effective method, and in recent years is meeting with considerable support. In the New Jersey and Puerto Rican Constitutions justices of their highest courts are subject to removal by the impeachment process; all other judges are subject to removal for cause, or to retirement for incapacity, by the Supreme Court after appropriate hearing. The Model Judicial Article for state constitutions developed by the Section of Judicial Administration of the American Bar Association, and endorsed by the latter in 1962, contains provisions similar to the constitutional provisions just referred to.

Leading examples of states which employ judicial action as a means of removal of judges are New York, Illinois, Texas, Louisiana and Alabama.

Supreme Court itself acts in a sense as an appellate body to review the actions of the commission and since it has the final power to remove or retire a judge upon recommendation of the commission. The two lawyers are appointed by the Board of Governors of the State Bar, which is an integrated bar, and the two laymen are appointed by the governor. These persons all serve for staggered terms which provide for a measure of continuity.

THE DUTIES OF THE COMMISSION

The duty of the commission is to recommend to the Supreme Court for removal from his judicial office any judge in any court of the state, including the Supreme Court, who is found by the commission to be guilty of wilful misconduct in office, or wilful and persistent failure to perform his duties, or of habitual intemperance. Likewise, the commission may recommend for retirement any judge having any disability which seriously interferes with the performance of his duties, and which is, or is likely to become, of a permanent character. The commission has the power to subpoena witnesses, make investigations, take evidence and to make findings.

As of the end of 1964 the commission has been in existence for approximately four years during which it has received 344 complaints against judges; the commission has directly caused the resignation or retirement of 26 judges. Indirectly, as a result of complaints being filed and of commission action investigating such complaints, it has induced the resignation or retirement of a small number of judges who saw the handwriting on the wall. As over this period there were more than a thousand judges in California, one can readily perceive that the percentage of judges who are unfit for one reason or another is exceedingly small.

Justice A. Frank Bray, presiding Justice of the District Court of Appeal, First Appellate District, Division One, who acted as chairman of the commission during the first four years of its existence, in speaking on the work of the commission stated that in his judgment the California procedure meets four important needs:

"(1) The Commission recommends the removal or forced retirement of judges who, for any reason, are no longer able to properly perform their official duties or have been guilty of misconduct.

"(2) The very existence of the Commission with the powers given it acts as a deterrent to the occasional recalcitrant judge and minimizes absence from judicial duties for extended periods.

"(3) The Commission provides a medium through which the disgruntled litigant, and even the crank, may air his grievances against the courts or judges without publicity affecting the particular judge singled out. In most instances the complaints are so groundless that we do not even notify the judge charged that a complaint against him has been made. In a sense, the Commission offers an apparently sympathetic shoulder upon which these complainants may cry. While they are never satisfied with our actions, nevertheless, you would be surprised to find how much more content they are than they would have been had there not been a public agency to give them consideration. In many of these complaints the complainant is seeking a retrial of the action which he contends was improperly determined against him. We, of course, have no appellate jurisdiction.

"(4) In quite a number of instances, these complaints disclose situations, which, while not serious enough to warrant the removal of the judge designated, nevertheless disclose practices indicating that the particular judge has a poor idea or none at all, of public relations, or the proper relationship between judge and counsel, or judge and witness, or party; or they may indicate a lack of knowledge of the Code of Judicial Ethics of the American Bar Association and of the Conference of California Judges, of such matters, for example, as continued failure to start court on time, taking unlimited recesses, constant wisecracking in court, short court hours, etc. In these instances, we notify the judge of the charge and tactfully suggest that if the practice complained of exists, it be discontinued. Thus, the Commission, in cases of improper judicial conduct not serious enough to warrant removal, does have a sort of disciplinary power. This is important in preventing the judicial image from losing the respect of the people.

"It should be pointed out that there is no red tape or formal restrictions on the making of a complaint against a judge. Any person may make such complaint by letter or other writing. Of the 344 complaints in four years, only 118 required any kind of investigation. The rest were groundless on their faces. If there appears to be the slightest indication of conduct by, or incapacity of, the judge which would justify the action of the Commission, an investigation is made, and the matter of probable cause for proceeding further is determined.

THE VALUE OF A COMMISSION

"Our experience of four years of the Commission's existence has proved, we think, the value of this system of removal. In every instance, save, one, where the Commission, after investigation, has felt that a judge's actions or condition might require a recommendation for removal or retirement, the judge, upon being confronted by the fact that he would have to appear at a hearing before the Commission, has either retired, if eligible, or has resigned. In only one instance has a formal hearing been had. In that instance, the Commission held a seven day hearing at which a Deputy Attorney General presented the charges, and the defendant and his attorney resisted them. Forty-seven exhibits were introduced, and 48 witnesses heard. The Commission recommended to the Supreme Court the removal of the judge.

"The Commission's work is entirely confidential. We may not inform anyone of the charges except the judge himself, until the Commission has recommended removal to the Supreme Court. Then, for the first time, the records are open to public inspection."

As I have indicated, when the record of proceedings before the commission is filed with the Supreme Court with a recommendation for removal or retirement of a judge, the Supreme Court conducts its own review of the proceedings and may, if it deems necessary, permit the introduction of additional evidence. At the conclusion of its review the Supreme Court may order the removal or retirement of the judge if it finds just cause, or it may wholly reject the recommendation of the commission. It is interesting to note that in the single instance referred to by Justice Bray, where the commission at the conclusion of its formal hearing recommended to the Supreme Court that a judge be removed, the court as a result of its own review of the proceedings rejected the recommendation, evidently disagreeing with the commission that there were sufficient grounds to warrant the removal of the particular judge from office. This result certainly gave evidence that the appellate process whereby the recommendations of the commission are subject to the review of the Supreme Court on both the law and the facts is wholly independent, as it should be, and is similar to the final review accorded litigants in ordinary court proceedings by the highest court of the state.

I was privileged to serve on the first commission appointed under the constitutional amendment in California and was very favorably impressed with the operation of the system. I was particularly interested in the active participation in the affairs of the commission by the two outstanding lay leaders appointed by the Governor to serve on the commission. They entered into the work of the commission with the same enthusiasm and deep sense of responsibility which typified the attitude of the professional members of the commission.

Based on the California experience, I would certainly stress that any such plan include within it a provision for confidentiality with respect to all complaints, inquiries, investigations and hearings up to the point of the taking of action by a commission recommending to the state's highest court the actual removal or retirement of a judge. This protects the innocent judge from irreparable damage by publicity resulting from the filing of a complaint which an investigation proves to be groundless, and, equally important, it removes fear of reprisal from potential complainants.

It is essential that of all human beings in our society the judge must remain the most incorruptible because it is he who in the last analysis is the final protector of our rights to life, liberty and property under law. This is the image which, in general, the public has in this country of its judges, and so deeply ingrained is it that when in fact a scandal does involve a judge it becomes a matter of national attention and concern. That this image may not be unjustifiably tarnished, great care must be exercised that complaints against judges do not receive publicity until and unless upon screening by an independent and qualified commission they are shown to have merit. Even then it is better that the action of such a commission result in the relinquishment of office by such a judge, than to have the fine reputation of the hundreds of able men and women to whom judicial office has been entrusted tarnished by the shortcomings of a single judge.

By the establishment of a program for the removal or retirement of those judges who fail to measure up to these high standards, similar to the California plan, which we are advised is now being studied in more than a dozen states, the independence of the judiciary is fully protected and at the same time the public is assured of the continued service of capable, efficient and conscientious judges.

4. ADDRESS BY HON. A. F. BRAY, PRESIDING JUSTICE, CALIFORNIA DISTRICT COURT OF APPEALS, AND CHAIRMAN, COMMISSION ON JUDICIAL QUALIFICATIONS, AT THE UNIVERSITY OF CHICAGO LAW SCHOOL, CONFERENCE ON JUDICIAL ETHICS, OCTOBER 22, 1964

My subject being "The Problem of Sanctions," it occurs to me that I should begin by defining the word "sanctions" as applied to judges. I take the word to mean any type of disciplinary action which may be taken against a judge who is either incapable of performing his judicial duties, who either wilfully or negligently fails to perform them, or who improperly acts in their performance. Unfortunately, in California the only sanction provided by law is removal from office, so that we have no way of disciplining a judge whose conduct deserves censure but is not sufficiently wilful or bad as to merit removal from office. The experience of our Commission, which I will hereafter discuss, has indicated that there should be a procedure which would permit of disciplining a judge meriting it, but where the extreme penalty of removal from office is not justified.

A little of the background which brought about the adoption in California in 1960 of the constitutional amendment which provided for the Commission on Judicial Qualifications might be in order.

Over a period of 30 to 40 years it had become clear to laymen and judges and lawyers alike that there existed no practical method of removing or retiring a judge for misbehavior or disability. While the number of judges who were in this category was extremely small, those who were in it seemed to loom large in the eyes of the public.

Theoretically, we then had three methods of removal of unfit judges. These were impeachment, concurrent resolutions of the Legislature, and recall. Impeachment was tried twice, once in 1862, finding a judge guilty and to be removed from office for using profane language out of court, and expressing sympathy with Jefferson Davis and secession. A later Senate ordered the judgment of impeachment expunged from the record. The other impeachment was in 1929, for allegedly advising Aimee Semple McPherson. The judge was found not guilty.

The concurrent resolution method has never been tried. Recall of judges has only been used once. In 1932, three judges were recalled because of irregularities in the administration of certain receivership proceedings.

In case of the conviction of a judge of a felony involving moral turpitude, we have a statute which requires the Supreme Court to remove such judge forthwith on his conviction becoming final. We also have a statute under which a judge convicted of a crime may be suspended from office by the Supreme Court during the period of appeal.

It was realized that none of these methods of removal (other than for conviction of a crime) were either practical or effective. The people were beginning to declare as deplorable the fact that nothing could be done about the acts or condition of a mere handful of judges who were hurting the judiciary as a whole. There were cases of judges continuing to decide cases although mentally incapable of understanding them, crippling infirmities were preventing some from properly performing their judicial work; judges were appearing in court under the influence of intoxicating liquors or were habitually intoxicated. There were complaints of judges spending more time on personal business or pleasure than on court business, and of more serious matters.

The leaders of the bar and the Judicial Council in California who had studied this situation for many years concluded there existed no practical way under the then law to do anything to remedy the condition. I have since found that the same is true in most states and also in the Federal jurisdiction. Finally the Judges Conference in California endorsed the Qualifications Commission proposal by a vote of 364 to 34, although there was heated opposition in the early stages. I think the opposition argument that intrigued me the most was, "Why pick on the judicial branch—why single out judges if you are going to dismiss feeble-minded office holders? The other two branches of government are equally deserving." Please form your own opinion of the force of that argument.

Of course, one strong objection was that the existence of a workable dismissal procedure would allegedly curtail a judge's independence. While perhaps at the start a few judges were afraid of encroachment on the judicial prerogative, I doubt if you could find any judge in California today who fears that his independence is endangered—with the possible exception of some of the judges we've assisted out of office—and even with that group I haven't heard such a complaint. As long as a program such as this is carefully worked out, as part of the judicial authority—as distinguished from legislative or executive—there need be no fear of interference.

In every instance in which I have heard that there has been a serious study of this problem, it has been concluded that there is a pressing need for an improvement in traditional methods of judicial discipline and removal. Let me give you a few examples.

When a report on the work of our Commission was published in the American Bar Association Journal in the early part of 1963, the St. Louis Globe-Democrat printed an editorial "To Remove Incompetent Judges" which began, "The bizarre case of Circuit Judge [Name] has pointed to Missouri's need for some mechanism to remove incompetent judges." The newspaper then went on to describe the California system.

A current example came recently from Maryland where a Baltimore County Circuit Court judge, 56 years old, frequently failed to sit in his court and ignored the requests of his five associates to resign. Partly as a result of this and from a study of the California system, the Maryland State Bar Association is sponsoring legislation to establish a similar commission.

In one of our large states in which consideration is being given to a procedure patterned after the California plan, the Chief Justice of that State Supreme Court, when asked about the nature of any fitness difficulties which he had experienced, said this:

"We do have the usual problems which plague the judiciary everywhere. We have some judges who simply do not work and we have no machinery for insisting that they work. We have some judges who are unable to reach a decision once a case has been submitted. So far as I know, we have no judges who are for sale."

With the support of the Judicial Council, the State Bar and the Conference of California Judges, the constitutional amendment providing the Commission on Judicial Qualifications was adopted by the people by more than a three to one vote. (Incidentally, the Commission is misnamed, as the Commission has no function in the qualifying of judges, its duties are in the other direction—in disqualifying or removing them.)

The Commission has now been in full operation for 3¼ years. It has jurisdiction over all judges in California from Justices of the Peace to Justices of the Supreme Court—altogether over 900. There are nine members—5 judges, 2 lawyers and 2 laymen. The judges are appointed by the Supreme Court, and are: 2 members of the District Courts of Appeal, 2 of the Superior Court, and 1 of the Municipal Court. The Justices of the Peace Court is not represented, nor is the Supreme Court. The 2 lawyers are appointed by the Board of Governors of the State Bar, which is an integrated Bar. The 2 laymen are appointed by the Governor.

The duty of the Commission is to recommend to the Supreme Court for removal from his judicial office any judge in any court of the state (including the Supreme Court) who is found by the Commission to be guilty of wilful misconduct in office, of wilful and persistent failure to perform his duties, or of habitual intemperance. Likewise, the Commission may recommend for retirement any judge having any disability which seriously interferes with the performance of his duties, and which is, or is likely to become, of a permanent character. The Commission has the power to subpoena witnesses, make investigations, take evidence, and make findings. As of the end of 1963 the Commission had been in existence for approximately 3 years, during which time it had received 277 complaints against judges, and had directly caused the resignation or retirement of 20 judges. Indirectly it had caused the resignation or retirement of a small number of judges who saw the handwriting on the wall. As over this period there were more than 1,000 judges in California, you can readily perceive that the percentage of judges who are unfit for one reason or another is exceedingly small.

During the first eight months of this year 55 complaints against judges were filed with the Commission, including those which were processed under the heading "Commission Investigation." Twenty-five of those were inquired into by the staff which means that there was some check made or additional information acquired. Of the 25 inquiries to which reference has been made 14 included a written, and in some cases a personal, contact with the judge to report the allegations and to request an explanation. Five of those 14 contacts led to retirements. The other 9 covered allegations of lesser improprieties as well as some more serious which might be cause for removal and are under investigation.

The Commission, in my judgment, meets four important needs:

(1) The Commission recommends the removal or forced retirement of judges who, for any reason, are no longer able to properly perform their official duties or have been guilty of misconduct.

(2) The very existence of the Commission with the powers given it acts as a deterrent to the occasional recalcitrant judge and minimizes absence from judicial duties for extended periods.

(3) The Commission provides a medium through which the disgruntled litigant, and even the crank, may air his grievances against the courts or judges without publicity affecting the particular judge singled out. In most instances the complaints are so groundless that we do not even notify the judge charged that a complaint against him has been made. In a sense, the Commission offers an apparently sympathetic shoulder upon which these complainants may cry. While they are never satisfied with our actions, nevertheless you would be surprised to find how much more content they are than they would have been had there not been a public agency to give them consideration. In many of these complaints the complainant is seeking a retrial of the action which he contends was improperly determined against him. We, of course, have no appellate jurisdiction.

(4) In quite a number of instances, these complaints disclose situations, which while not serious enough to warrant the removal of the judge designated, nevertheless disclose practices indicating that the particular judge has a poor idea, or none at all, of public relations, or the proper relationship between judge and counsel, or judge and witness, or party; or they may indicate a lack of knowledge of the Code of Judicial Ethics of the American Bar Association and of the Conference of California Judges, such matters, for example, as continued failure to start court on time, taking unlimited recesses, constant wisecracking in court, short court hours, etc. In these instances, we notify the judge of the charge and tactfully suggest that if the practice complained of exists, it be discontinued. Thus, the Commission, in cases of improper judicial conduct not serious enough to warrant removal, does have a sort of disciplinary power. This is important in preventing the judicial image from losing the respect of the people. It is in this latter respect that we feel that the Commission is handicapped in not having the power to recommend some sort of sanction less than removal. Occasionally, a judge's complete disregard of the judicial image he should display needs to be disciplined by suspension or censure.

There are direct and indirect benefits from the Commission's program. The direct benefits come from the action of the Commission in three categories. The first is in cases which appear to be out and out misconduct reaching official or public notice. These are the cases which, if impeachment were efficient, would be impeachable and therefore on the limited aspect of providing a substitute for impeachment this is a very fundamental benefit.

New York's Court on the Judiciary twice recently was convened on cases probably in this area and the result was that in each instance the judge was removed about six months after the Court was convened—following a full hearing. [*In the Matter of Friedman*, 12 N.Y. 2d(a), (1963); *In the Matter of Osterman*, 13 N.Y. 2d (1963); Cannon, *The New York Court on the Judiciary 1948 to 1963*, 28 Albany L. Rev. 1 (1963); N.Y. Const., Art. VI, §22]. Such situations are rare indeed among judges, rare enough that we have largely failed to provide a means of dealing with those which do occur.

The second kind of direct benefit is in the cases in which the unfitness is not as dramatic or well known. These occur more frequently, although still applicable to only a small percentage of judges. The most usual of these situations is a mental or physical disability of the judge which permanently prevents him from performing his duties. Often, but not necessarily, this is associated with advanced age. These are especially sensitive matters because our human sympathy goes out to those suffering from misfortune. Without pension benefits, it is indeed hard to compel a loyal public servant to relinquish his post even though he is no longer able to perform his duties. But, especially with the advent of retirement benefits, we have come to realize that the public interest should be protected on the issue of mental and physical health of judges. Therefore, one of the principal accomplishments has been the machinery for convincing a judge that his condition is such that he should avail himself of retirement provisions, if available, but if not, that nevertheless he should resign.

The third kind of direct benefit, might be called the corrective scope. These situations, while they showed questionable court activities, did not prove serious enough to warrant a removal proceeding or even necessarily a full preliminary investigation. By letter to the judge setting forth the reported practice or impropriety and requesting a reply the problem can be called to his attention for correction. The judge's explanation may absolve him, or there may be an unsatisfactory condition but outside Commission jurisdiction. While in this so-called corrective purview there are relatively few infractions overall, reliable

studies emphasize the importance of this kind of an authority. Although infrequently needed, there is a salutary effect to an official confidential communication of alleged derelictions made to the judge. These might include unusual procrastination in court work, vindictive and abusive treatment of counsel or parties, repeated and pronounced tardiness in opening court and inexcusable impatience or discourtesy.

Our experience has borne out the good results of this approach and so I list it as a separate direct benefit.

I am also including here situations, such as not performing duties due to excessive absenteeism, and misbehavior in court of a kind which ordinarily would not reach general public notice, and which can be verified and documented only through an office with continuing responsibility.

Here I would like to point to a key to what success we may have had and what distinguishes our approach from what has ever been tried before. We can receive allegations of misconduct, ask for details and verification and on the Commission's own motion develop the evidence, if it exists, and take action. If the charges are not justified the case can be closed. Only an independent commission is in a position to perform this function impartially. It is a mistake to ask a district attorney, grievance committee of a bar association, legislative committee, private citizens or a court to assume this responsibility. That is a job to be undertaken by a disinterested state tribunal composed mostly of judges, who cannot be accused of political motivation and who are not involved in local rivalries.

You might wonder, who is to say what constitutes misconduct or failure to perform duties—that is, how does one decide what is sufficiently improper to justify a removal proceeding? Let me emphasize that in the California program we do not consider that we have the authority to evaluate factors such as lack of technical fitness for the position. We do not rank judges as good, bad or indifferent in their judicial competence.

There is a borderline area as to whether certain conduct is wrongful or so improper as to be called misconduct or failure to perform duties and to justify taking action. There are ethical principles as a guide, and, of course, there is an area of judgment and discretion on the part of the Commission members as to whether particular conduct and activities should be investigated and whether action should be taken. However, such a tribunal—and this is true of ours certainly—will be most prudent and cautious. There is a strong burden of proof required so a case must be clear and convincing to warrant Commission proceedings. Since an actual removal order can only be made by the State Supreme Court, such fact constitutes an important limitation on the Commission's powers.

In the kinds of cases which I have been describing, while the steps provided by our procedure were underway—and after the individual had been confronted with the charges—in several instances the judge chose to resign or retire. Thus, the direct benefit is that the unfit judge left judicial office due to the action of the tribunal. These were all trial judges and mostly from the two courts of limited jurisdiction—Justices of the Peace and Municipal—although there were some from the Superior Court, our general trial court. Also, in the majority of cases there was an eligibility for retirement through either service or disability.

The indirect benefits I referred to follow. These are speculative and depend on one's point of view, but I present them for what they are worth.

1. There has been an upgrading of judicial standards generally. On this I'd like to quote from a letter to the Dean of the University of Colorado School of Law written by California's Governor Edmund G. Brown in reply to a request for an evaluation of our Commission.

"The law has been in effect for slightly over three years now, and I am convinced that it is a tremendous success. It is beyond argument that the operations of the Commission have had a marked effect in raising the already high level of our California judiciary, and I feel that as the Commission continues to operate this effect will be multiplied."

Related to higher standards, I believe, is a factor of better morale among judges.

2. I think it is important to public confidence in the judiciary to have a channel for a complaint against a judge. This allows someone to let off steam and receive official consideration, albeit in the very great majority of times the reply is negative. Without a governmental agency for attending to such charges, harmful and unconfirmed floating slurs may result. One example of this was that some years ago, before our Commission was established, a Los Angeles newspaper printed stories about judges spending the afternoons at the race track instead

of attending to court business. This caused considerable harm. I never knew whether there was any basis for the story or not. Had the Commission been in existence such rumors would have been checked, and the judge or judges involved, if any, warned of impropriety of the conduct.

3. The stature and prestige of the judge has risen. The opinion makers in the community—the newspaper editors, the experienced lawyers, the businessmen active in civic affairs, the legislators—knew that there was no way of taking action in these examples of shocking unfitness that had come to their attention and the resulting discredit tended to rub off on the majority of hard working and capable judges. Now, there is a general feeling that the community no longer suffers from the presence of unfit judges.

Our budget is small. We employ an Executive Secretary and a stenographer. We have investigatory personnel on a part-time basis. Travel expense is minimal and the members of the Commission receive no pay. We receive cooperation from the bar associations, judges, and state and local officials.

Concerning possible application of the Commission system elsewhere, I would not expect any state to adopt precisely the same arrangement. There is room for adaptation to different viewpoints and conditions while retaining the basic philosophy and framework.

I do not wish to suggest that the California plan has proved a panacea to the types of problems we have been discussing. Our scope is properly a narrow one, but at least it has provided a workable approach to a dilemma which has bothered thoughtful judges and lawyers for a long time but with built-in safeguards which prevent its abuse. This evaluation seems to be shared by others as well. Glenn R. Winters, the executive director of the American Judicature Society, writing about *The National Movement to Improve the Administration of Justice*, describes it as the first effective system for discipline and removal of judges. He writes that this subject received only minimum attention prior to the Sixties but that the California plan is now being studied in more than a dozen states. [June 1964 issue *Journal of the American Judicature Society*, pp. 20, 21.]

I would like to summarize what to my mind in our experience are the basic ingredients to be considered by a state which might desire to adopt such a program.

From our experience, we think that the following characteristics should be included in any removal system:

1. A majority of the members should be judges, selected by the highest court in the state, not by a political power. There should be representation of the bar and the public on the Commission. The members should have continuity, the responsibility and the authority to initiate investigations, as well as to follow complaints, to conduct hearings with respect to all state judges, the judges of the highest court included, and to close groundless charges.

2. Removal or retirement should be by recommendation to the state's highest court, not to the Legislature or Governor, and for "cause" in addition to disability or incapacity.

3. Confidentiality should be preserved on all complaints, inquiries, investigations and hearings until the case reaches the stage of review by the state's highest court.

4. No formality should be required as to the making of complaints. Persons with real or fancied grievances against judges should be permitted to call them to the attention of the Commission in any writing they may select.

5. The Commission should have adequate staff assistance to screen complaints and handle investigations.

6. The Commission should be completely independent of other boards, commissions or officials.

You might be interested in hearing what faults we have found with our system. If we were doing this from the beginning we would probably recommend certain changes.

1. The phrase "willful misconduct in office" causes difficulties. "Office" may refer to "term of office." If it does, a judge would probably be beyond the jurisdiction of the Commission to act once he begins another term on the bench, no longer being "in office."

2. The "in office" may also mean "course of duties." In that situation a judge committing a serious offense but one not connected to his duties which, however, does amount to an abuse to his judicial position, would be outside Commission jurisdiction. There are various kinds of improper public activities which disgrace the judicial office but do not directly relate to court duties. This could be cured by having as ground for removal "conduct prejudicial to the administration of justice" or by having removal "for cause" instead of trying to specify particulars.

3. Another problem derives from the eligibility to hold judicial office even though once having been removed. Under our present language there would be nothing to prevent a judge from running at the next election for the same office from which he already had been removed or, of course, running for an even higher judicial office. This happened in the one modern removal proceeding in Texas [In Re Laughlin 286 S.W. 2d 278 (1955)].

4. Another question is whether there should be a method available by which a judge, who is facing serious charges, could be prevented from exercising the powers of his judicial office while the charges against him are being adjudicated. The theory of permitting an interim suspension of the judge before guilt or innocence has been finally established is that in some situations great harm comes to the judiciary and to the public by having a judge on the bench who is defending himself against serious charges. Although this is an unusual situation, you might be surprised at how much trouble it can cause in the rare occasions when it does arise.

5. Most commentators who have examined this subject have agreed that discipline less than removal is important. Under our system there is no provision for censure or suspension. Our experience has borne out the desirability of a sanction less than removal against a judge so that the end result need not be limited to removal of the judge on the one hand or dismissal of a proceeding on the other.

5. 1962 REPORT OF COMMISSION ON JUDICIAL QUALIFICATIONS

The Commission on Judicial Qualifications was formed and operates under Article VI, Sections 1b and 10b of the California Constitution.

It is the function of the Commission to conduct investigations and hear charges against any judge of a California court and to recommend to the Supreme Court the removal of a judge for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, or his retirement for permanent disability seriously interfering with the performance of his duties.

As of September 1, 1962 there were 904 judicial positions within the jurisdiction of this Commission as follows:

Supreme Court.....	7
District court of appeals.....	30
Superior court.....	335
Municipal court.....	237
Justice court.....	295

The Commission has held five meetings in 1962, in March, April, August, September, November. Between January 1 and December 31, 1962, 95 matters involving 110 judges were brought to the Commission's attention. (If a judge was involved in more than one case he was counted more than once. Some matters were against more than one judge.) Of the 110 judges, 27 were justice court judges, 35 municipal court judges, 44 superior court judges and 4 appellate court judges.

The great majority of these were frivolous and unfounded and were in no way a reflection on the caliber or character of the judge. A number were investigated by the Commission. In six cases which warranted further inquiry the judge chose to resign or retire after the investigation was underway. Of these six, five were municipal court judges and one a justice court judge.

The 1961 and 1962 figures on matters filed, those receiving further inquiry and those resulting in the resignation or retirement of a judge are shown by the table below.

	Matters filed	Further inquiry	Resignations or retirements
Mar. 24, 1961, to Dec. 31, 1961.....	68	23	4
Jan. 1, 1962, to Dec. 31, 1962.....	95	23	6

The Commission came into existence through the enactment of a Constitutional Amendment November 8, 1960. March 24, 1961 the Commission members took office. August 1, 1961 an Executive Secretary was selected and an office opened. Those interested in the improvement of the administration of justice nationally are taking note of this pioneering development in California.

Judge Sterry R. Waterman of the United States Court of Appeal for the Second Circuit, and President of the American Judicature Society, in writing on Recent Reforms in Judicial Administration described the establishment of the Commission as "model legislation."

The Commission is proud to be making a significant contribution towards the effective administration of justice in California.

1963 REPORT OF COMMISSION ON JUDICIAL QUALIFICATIONS
INTRODUCTION

The Commission on Judicial Qualifications, established by Constitutional amendment in 1960, has the authority to investigate and conduct proceedings against any California judge when there may be willful misconduct in office, willful and persistent failure to perform his duties, habitual intemperance or disability of a permanent character seriously interfering with the performance of his duties.

The Commission consists of five judges appointed by the Supreme Court, two lawyers appointed by the State Bar and two public members appointed by the Governor. An office is maintained in the State Building, San Francisco, staffed by an Executive Secretary and a stenographer.

Information is received and examined and consideration given to determine if allegations are within the Commission's jurisdiction. A preliminary investigation may be conducted. If the Commission concludes that a formal proceeding should be instituted to inquire into the charges a hearing is held. The proceeding may then be dismissed or the Commission may recommend removal or retirement to the Supreme Court which acts after reviewing the record. Thus far, no recommendation has been filed with the Supreme Court.¹

I

As of October 1, 1963 there were 927 judicial positions within the jurisdiction of this Commission as follows:

Supreme Court.....	7
District court of appeals.....	30
Superior court.....	346
Municipal court.....	253
Justice court.....	291

Taking into account changes during 1963, there were about 1,000 judges within Commission jurisdiction.

The Commission has held six meetings in 1963, in January, March, May, June, September and November. Between January 1 and December 31, 1963, 114 matters against judges were brought to the Commission's attention. Most of these were clearly unfounded, in no way an adverse reflection on the judge, and were closed with no action other than to write the complainant that the Commission had no jurisdiction. In addition, the Commission staff received and attended to many letters and visits arising from claimed grievances against, and misconceptions toward, the judicial system.

In 40 cases out of the 114 complaints brought, some inquiry was made. Thirteen of these inquiries involved Superior Court judges, 13 Municipal Court judges, and 16 Justice Court judges. In ten cases the charges were sufficiently well founded to cause the particular judge to submit his resignation or retirement after being contacted by the Commission and notified of the reported information. Five of these judges were from Justice Courts, four from Municipal Courts and one from the Superior Court. A large share of Commission activities during the year involved the handling of these ten cases which culminated in the judges' retirement or resignation.

The two most common difficulties in these ten cases were:

1. Disabling illness with incapacity to perform judicial duties and
2. A weakening of mental faculties connected with advanced age and reflected in unacceptable derelictions in court.

The function of the Commission is to enforce the standards of fitness as provided by law. This is done principally by taking the appropriate steps in those situations in which it has been demonstrated that a judge should not continue in

¹Two articles by the Executive Secretary concerning the Commission were published early in 1963; 36 Southern California Law Review 72, *Judicial Conduct and Removal of Judges for Cause in California*; 49 American Bar Association Journal 166, *Removal of Judges: California Tackles an Old Problem*.

office. The Commission has tried to exercise prudence and fairness yet with the knowledge that only a positive and resolute program would meet the Constitutional responsibilities with which the Commission has been charged.

Proceedings before the Commission are confidential and every precaution has been exercised to that end. On the occasions in which news media have asked whether there is an investigation regarding some judge, the reply has been that such can neither be confirmed nor denied. Commission correspondence to complainants bears the stamp "Confidential under California Constitution Article VI, Section 10b."

During 1963 various public agencies have given their cooperation. This has been essential for the proper performance of the Commission's task and is particularly true of the Administrative Office of the Courts and the Department of Justice.

II

There are certain secondary benefits which have resulted through the existence of this type of Commission.

1. It is useful for the public to have a place to register alleged grievances against judges even though seldom is there a basis for further Commission action from such a complaint. An official state body to receive complaints against judicial officers furnishes as much protection to honest and dedicated judges as to the public.

2. Indirectly, the Commission's very existence as a standing tribunal empowered to investigate and act has effected standards of conduct and ethics. To a certain extent this is intangible and difficult to assess. Yet the Commission is a constant reminder that the public has a paramount interest in the integrity of the courts.

3. Some of the Commission's inquiries during the year, while revealing questionable practices, were deemed not to justify a removal proceeding. Sometimes transmitting reports of such shortcomings to the judge for his reply has a beneficial effect. These are some of the reported failings warranting correction:

- (a) Undue participation in a cause; appearing to take sides in a case and failing to observe the rule against ex parte communications;
- (b) Insufficient industry; intrusion of private activities on court responsibilities;
- (c) Faulty courtroom demeanor, unwarranted displays of temper and irascibility.

Although only a small minority of judges may properly be subject to this kind of criticism, there are persistent deviations from what may rightfully be expected of a judicial officer.²

III

The Commission is mindful that it is exercising a significant and sensitive attribute of state sovereignty. By operating carefully and unobtrusively a practical contribution to jurisprudence is being forged. It has now been demonstrated that an independent Commission, possessing the authority to investigate and hold hearings, can act for the maintenance of judicial fitness without infringing on the essential prerogatives of the judicial branch.

Especially gratifying has been the reaction from other parts of the country.

An article entitled *Unseating Unfit Judges* by Murray Teigh Bloom in the February 1963 issue of *National Civic Review* carries this introduction: "Touchy problem, long a puzzle to law groups, tackled effectively by California commission." The same article was condensed in the March 1963 issue of *Reader's Digest* with the comment: "A new plan which 49 other states might follow to advantage."

A Florida legislator wrote the Governor of California: "under Florida law impeachment of judges is almost impossible. * * * My congratulations to your state for pioneering in the field of this most important legislation."

An editorial in the *St. Louis Globe-Democrat* began: "The bizarre case of Circuit Judge [Name] has pointed to Missouri's need for some mechanism to remove incompetent judges." Then after an explanation of the California Commission, "The *Globe-Democrat* believes that the creation of such a commission should be studied by the lawyers and judiciary of Missouri."

Glenn R. Winters, Executive Director of the American Judicature Society, in an article entitled *Judicial Power in America—Its Development, Its Present Role, Its Needs for the Future* wrote in the September 1963 *Los Angeles Bar*

² Articles by the Chairman and the Executive Secretary on this subject have appeared this year in the magazine of the Association to which Justice Court judges belong, and the newsletter of the Conference of California Judges, the organization of the judges of courts of record.

Bulletin, "California's newly established Commission on Judicial Qualifications has now gone farther and established a pattern that is being studied throughout the country as a device to provide through quasi-judicial means, a method of judicial discipline and removal that will give the people real protection against judicial misconduct while sacrificing none of the benefits of security of tenure."

CONCLUSION

The operation of the Commission helps insure California's claim to an outstanding judiciary. California may be justly proud of the character and dedication of the great majority of its judges.

1964 REPORT OF COMMISSION ON JUDICIAL QUALIFICATIONS

I

The nine members on the Commission on Judicial Qualifications consist of five judges (two from the District Court of Appeal, two from the Superior Court and one from the Municipal Court) appointed by the Supreme Court, two public members appointed by the Governor with the consent of the State Senate, and two lawyers appointed by the Board of Governors of the State Bar. Two of the judicial members, Justice A. F. Bray and Judge Ben V. Curler, who rendered dedicated service on the Commission since its inception, left in the latter part of the year due to their retirement from their judicial offices. Justice Bray was an outstanding chairman for three and a half years.

The Commission is charged by the Constitution with the responsibility of investigating, and taking further action with respect to any California judge if there appears to be willful misconduct in office or willful and persistent failure to perform his duties or habitual intemperance, or a disability seriously interfering with the performance of his duties, which is, or is likely to become, of a permanent character.

The Commission's procedure is to close complaints which are clearly unfounded; to evaluate and, if warranted, make inquiry and check on apparently actionable allegations; then, depending on the situation and what is appropriate, to contact the judge by letter or in person and, in the event it is justified, hold a preliminary investigation. The preliminary investigation is the first step under the prescribed rules of procedure for the removal or compulsory retirement of judges, and it includes a registered letter setting forth the nature of the charges and requesting an answer. It may also be accompanied by a field investigation.

After a formal proceeding the Commission may recommend to the Supreme Court a judge's removal or retirement. Only the Supreme Court may order the removal or retirement.

During 1964 the Commission conducted a formal hearing before seven of the nine members of the Commission in San Diego and then recommended the removal of the judge. This recommendation was not sustained by the Supreme Court.

II

As of November 1, 1964 there were 933 judicial positions within the jurisdiction of this Commission as follows:

Appellate courts.....	37
Superior court.....	353
Municipal court.....	256
Justice court.....	287

Due to changes in judicial personnel at some time during the year there were probably over 1,000 individuals as judges in the state. Turnover at all levels of the judiciary, mostly due to elevations and normal retirements, is always taking place. It is, therefore, obvious that only a very small number of such changes have anything to do with the functioning of this Commission.

During 1964 67 complaints against judges were filed with the Commission including those which were processed as a "Commission Investigation." This does not reflect the many communications which did not contain specific charges against a judge but were in the nature of displeasure with some phase of the legal system or a misunderstanding of the judicial process. Also not included are the complaints filed and worked on in 1963 but concluded in 1964.

Of the actual matters filed in the year 32 warranted inquiry and therefore there was some check made or additional information required. Of these 32 inquiries 18 included a written notice to, and in some cases a personal interview with, the judge to report the allegations and to request an explanation. In certain situations in which the judge replied to a written notice his account was completely satisfactory.

On several occasions there was substantial Commission investigation and evaluation. In six cases the judge chose to retire without a formal hearing taking place. As in other years, poor health was a leading factor. With some cases in which the charges would not warrant removal, although apparently valid, the Commission action may have had a remedial effect. Only a fraction of a percent of the state's judges were involved either in the matters which resulted in a termination from judicial office or in the matters in which any element of misconduct was discovered.

III

The Commission has received the support of judges, local bar associations, public officials and many others. The critical importance of this kind of cooperation was recognized by the Legislature when, as part of the enabling legislation, it enacted section 68725 of the Government Code.

State and local public bodies and departments, officers and employees thereof, and officials and attaches of the courts of this State shall co-operate with and give reasonable assistance and information to the commission and any authorized representative thereof, in connection with any investigations or proceedings within the jurisdiction of the commission.

The ability of the Commission to fulfill its constitutional function is in large measure a reflection of the extent to which it enjoys the support and assistance of presiding judges, bar association representatives, county officers and other key officials. As in the past, the Commission has benefited immeasurably from the helpfulness of the State Department of Justice and the Administrative Office of the Courts. The Commission has worked with the Constitutional Revision Commission on some suggested changes in constitutional language.

IV

A gratifying by-product of the Commission's work has been the interest shown outside the state. The experience in California has had a national impact. Glenn R. Winters, the executive director of the American Judicature Society, described the Commission as "the first effective system for discipline and removal of judges," and reported, "This plan is now being studied in more than a dozen states."¹

During 1964 members and former members of the Commission accepted invitations to speak before state judicial conferences in Louisiana, Texas, New Mexico, and Indiana, sponsored by the Joint Committee for the Effective Administration of Justice. The Executive Secretary consulted with officials in Maryland, Illinois, and Texas concerning the development of programs in those states.

CONCLUSION

A revealing aspect of the Commission's development is in the area distinct from judicial removal. This point was well expressed in a letter dated January 14, 1964 from the Governor of California to the Dean of the University of Colorado School of Law in reply to a request for information, and it is worth repeating as a conclusion to this report.

"The law has been in effect for slightly over three years now, and I am convinced that it is a tremendous success. It is beyond argument that the operations of the Commission have had a marked effect in raising the already high level of our California judiciary, and I feel that as the Commission continues to operate this effect will be multiplied.

"In my opinion, the major thrust of the Commission's effect has been not simply in the fact that a small number of judges have resigned after the Commission has investigated their activities and found them wanting in quality. Rather, I note with pleasure the salutary effect which the Commission has had on the vast majority of our hardworking judges."

¹ June 1964 Journal of the American Judicature Society, *The National Movement to Improve the Administration of Justice*, p. 17. A talk by the Commission's Executive Secretary before the Annual Conference of Texas Judges was printed in 27 Texas Bar Journal 791 (Oct. 1964), *Judicial Retirement, Discipline and Removal—The California Plan*. Also see 38 Florida Bar Journal 1033 (Nov. 1964), *Discipline and Removal of Judges*.

APPENDIX C.—NEBRASKA REMOVAL SYSTEM

STATEMENT OF FLAVEL A. WRIGHT, ESQ., LINCOLN, NEBR., AUGUST 23, 1966

It is understood that this Subcommittee has been advised by recognized experts concerning (1) the need for procedures for removal of incompetent judges, and (2) the available methods of removal. Accordingly, this statement will be limited to consideration of the situation in Nebraska with the thought that the factors considered and the action taken by responsible agencies in Nebraska may be of some value.

At the outset, note should be taken of the fact that Nebraska has been among the leaders in judicial reform. At an early date a Judicial Council was established, which group is composed of judges of the various courts of the state, representatives of the legal profession throughout the state, and certain lay members. This group is charged with the responsibility of improving the procedural law of the state and, to a certain extent, improvement of the court system of the state.

In 1962 the State of Nebraska adopted a constitutional amendment providing for selection of the judges of substantially all of the courts of the state under the merit plan of judicial selection now advocated by the American Judicature Society and the American Bar Association. Under this plan, all judges coming into office after the adoption of the plan are appointed by the Governor from a group of nominees submitted to the Governor by impartial judicial nominating commissions composed of lawyers and laymen. At the first general election held after the judge has been in office for three years, the judge is required to submit his record to the voters to determine if he shall be retained in office for an additional term of six years. A similar vote is required each six years thereafter as long as the judge remains in office.

The enactment of the constitutional amendment relating to judicial selection was considered a major victory for those interested in improvement of judicial processes in the state. However, not long after the plan was placed into effect, some concern was expressed by lawyers and state legislators concerning the possibility of retaining incompetent judges in office under the new plan of judicial selection.

Actually, under the plan of electing judges which existed before the adoption of the new merit plan there was no effective way of removing incompetent judges. As a result in some cases judges, who, because of ill health or for other causes, were not even sitting were re-elected and retained in office.

No useful purpose could be served by detailing examples of judicial incompetence in Nebraska. Suffice it to say such examples have existed and except on rare occasions under the procedures existing these judges were able to maintain their position in office until they died or reached retirement age.

The Nebraska Constitution provides for removal of judges by impeachment but provides that the impeachment proceedings shall be tried by the Supreme Court if the judge is other than a Supreme Court judge, and by the body of District Court judges if one of the Supreme Court judges is involved.

This procedure would appear to be much more workable than the standard impeachment procedures where the trial is conducted by one of the legislative houses. However, the impeachment process, even under the Nebraska procedure, has not worked and at no time has any judge of a Nebraska court been subject to such a procedure.

Because of complaints of certain state legislators, the matter of removal of incompetent judges came before the Judicial Council in 1964. A study of the various methods providing for removal and discipline of judges was made and a report submitted to the Judicial Council. After some consideration by the Council, including some modifications and amendments, a bill was ultimately prepared providing for a constitutional amendment substantially adopting the California procedure for judicial removal and discipline. The new procedure will be in addition to procedures presently provided.

This amendment will be submitted to the people of Nebraska at the November election and, hopefully, will be approved at that time. At this time it would appear to have substantial support from the lawyers, judges, labor organizations, League of Women Voters and various other civic groups.

The following factors were considered by the Judicial Council of Nebraska to be of importance:

1. The importance of preserving the independence of the judiciary was of prime concern. Courts must protect minorities and the weak. The just determination of a particular controversy may not meet the approval of the majority or even of a strong and vocal minority. A judge must make his decision without concern for this fact and his independence from all pressures is an essential factor.

2. Procedures which encourage responsible and capable lawyers to accept judicial office should be favored. Accordingly judicial tenure should be such that those accepting judicial office will be assured with reasonable certainty that if they perform their duties conscientiously and capably, they will be continued in a judicial capacity until retirement.

3. Those having complaints against actions or conduct of a judge should have a place where these complaints can be voiced with assurance that legitimate complaints will be investigated and appropriate action taken.

4. It was recognized that no plan relating to judicial selection or judicial removal is perfect. Stated another way, under any plan yet devised, it is possible to conceive of situations where the process could be abused. Accordingly, it was considered that the objective should be to produce as workable a plan as possible with the idea of providing the best procedure and avoiding as many of the pitfalls as could be done but understanding that any plan is still subject to possible abuse.

5. Ordinarily the responsibility for removal of a judge should rest with the highest court in the judicial system.

6. Although it is a matter concerning which lawyers are reluctant to talk, every judicial system has within its members certain individuals who either are or will be judicial problems of one type or another. These problems arise from the fact that judges are subject to the frailties to which all humans are subject. For example, a very able judge may have a cerebral accident and become a serious problem. Accordingly, it was considered that any judicial system to be effective must have workable procedures for removal or early retirement or discipline of a judge who is not carrying out his judicial function in a proper manner.

7. It was considered advisable to protect judges from publicity incident to charges of incompetence until such time as it may have been established that reasonable grounds existed for challenging the qualifications of such judge. By the same token, it is essential to protect those making charges against a judge from the reprisals of the judge if the charges are not successfully prosecuted.

8. A procedure whereby a judge who becomes disabled could be retired prior to the usual retirement age and receive his retirement pay was thought to have merit.

9. Finally, it was considered that some procedure whereby a judicial tyrant, truant or tippler could be called before a responsible group to answer for his errant conduct might result in curing some problems by causing the judge to correct his ways.

Of all the methods studied by the Nebraska group, it was considered that the California plan presented the best vehicle for accomplishing these objectives. We were particularly impressed by the fact that it provides a continuing agency which is not created for the specific purpose of considering specific charges against a specific judge on a specific occasion. A continuing agency provides a forum for those having complaints against a judge to be heard quietly and without fear of reprisal. The groundless complaints can be screened and eliminated; those with any substance can be investigated; and those requiring action can be acted upon by a disinterested responsible group to provide for maintenance of the judiciary at the highest level with maximum protection to judges and the public.

We expect the Nebraska voters to approve the amendment on November 8, 1966, and thereafter, we expect to have an additional aid of great value in maintaining our state judiciary at the highest level.

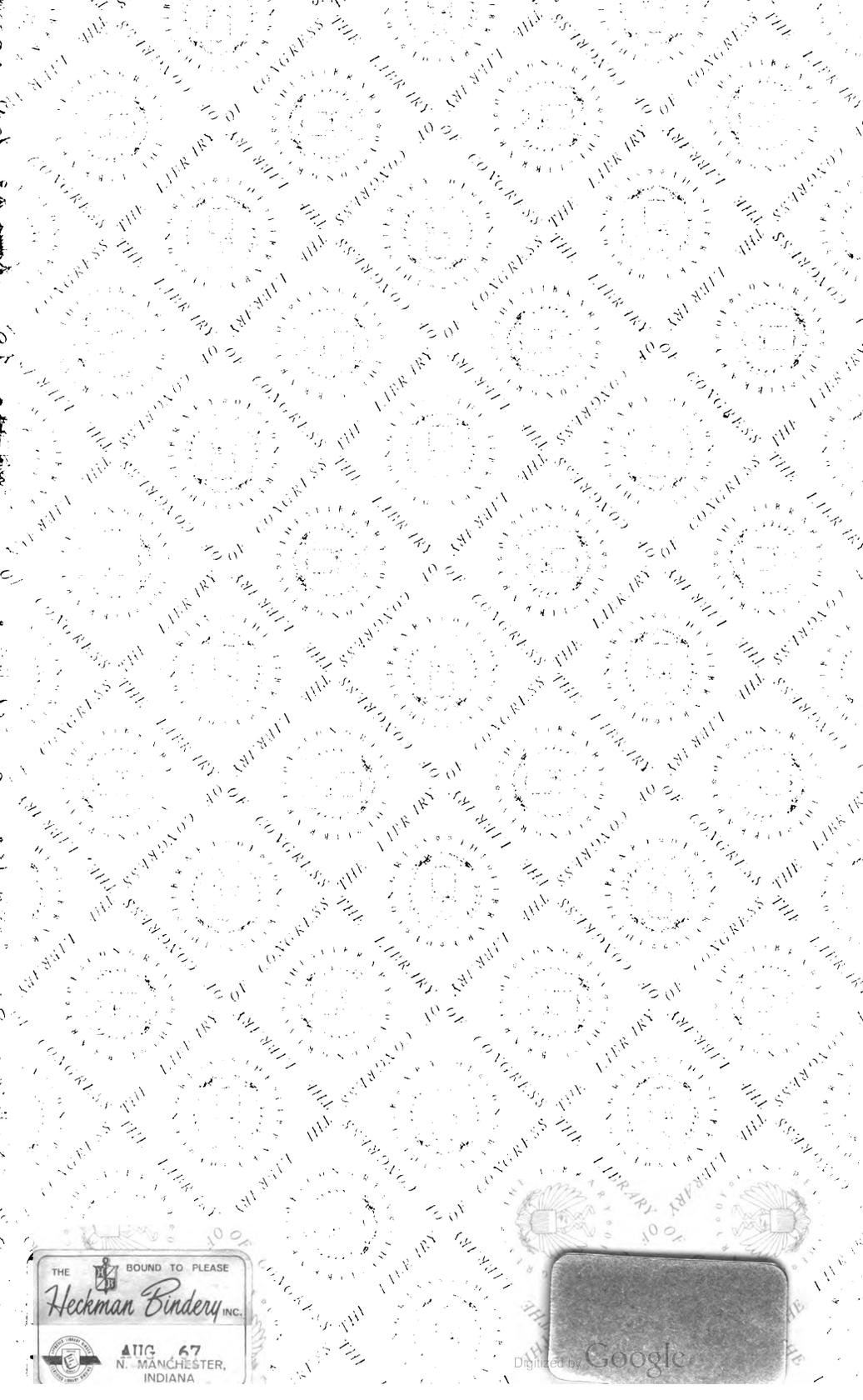
BIOGRAPHICAL SKETCH OF MR. WRIGHT

Born May 15, 1913. Educated at the University of Nebraska, receiving A.B. degree and LL.B. degree in 1936. Admitted to the Bar of Nebraska in 1936 and since that time has engaged in the active practice of law at Lincoln, Nebraska, with the firm of Cline, Williams, Wright, Johnson, Oldfather & Thompson, and its predecessors.

In 1962, served as Chairman of the Nebraska State Bar Association committee for adoption of the merit plan of judicial selection, and is presently Chairman of the State Bar Association committee for adoption of the constitutional amendment relating to judicial qualification procedures.

Former Director of the American Judicature Society for the State of Nebraska. Member of the Judicial Council of the State of Nebraska since 1957. Member of the Judicial Nominating Commission relating to the office of Chief Justice of the Supreme Court of Nebraska. Fellow of the American College of Trial Lawyers. Member of the American College of Probate Counsel. President of the Nebraska State Bar Association, 1961. Member American Bar Association.





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