Hastings Constitutional Law Quarterly

Volume 8
Number 1 *Fall 1980*

Article 3

1-1-1980

The California Supreme Court Hearings--A Tragedy That Should and Could Have Been Avoided

James Duke Cameron

The California Supreme Court Hearings — A Tragedy That Should and Could Have Been Avoided

By JAMES DUKE CAMERON*

Introduction

California has led the way, through its constitution,[1] in the creation of an effective judicial discipline commission. With some exceptions, the California procedures are similar to those adopted by the House of Delegates of the American Bar Association.[2] Thus it is ironic that California should also provide us with an example of how not to respond to widely publicized charges of alleged misconduct against members of its highest court. Admittedly, there should be an adequate response to public allegations of misconduct on the part of the judiciary.[3] But the fact that such allegations are of great public interest does not justify a departure from established and accepted methods of investigating asserted judicial misconduct. Once a method of investigating and evaluating charges of misconduct has been provided, these procedures should be fol-

* Justice, Arizona Supreme Court; Co-chairman of the American Bar Association Joint Committee on Professional Discipline; B.A., 1950, University of California, Berkeley; J.D., 1954, University of Arizona College of the Law.

1. CAL. CONST. art. VI, § 8 (1879, amended 1976). *See* Frankel, *What's in a Name? — California Sets the Style*, 41 L.A.B. BULL. 189 (1966).

2. *See* NATIONAL CENTER FOR PROFESSIONAL RESPONSIBILITY FOR THE JOINT COMMITTEE ON PROFESSIONAL DISCIPLINE, AMERICAN BAR ASSOCIATION, PROFESSIONAL DISCIPLINE FOR LAWYERS AND JUDGES (1979) [hereinafter cited as ABA Standards]. Subsequent reference to the ABA Standards will be to Part 1, *Standards Relating to Judicial Discipline and Disability Retirement*, approved by the House of Delegates in February 1978.

3. "The public has an indisputable interest in those who preside in its courtrooms. It also has suspicions about courts and judges which will not be allayed by judicial reluctance to submit to visible disciplinary proceedings." Peskoe, *Procedures for Judicial Discipline: Type of Commission, Due Process & Right to Counsel*, 54 CHI.-KENT L. REV. 147, 147 (1977).

lowed scrupulously. The fiasco in California was, for the most part, the result of the failure of the California Judicial Council and the California Commission on Judicial Performance to follow well-traveled roads pioneered by the State of California and recognized by most states today.[4]

This article will consider four questions concerning the investigation of the California Supreme Court by the California Commission on Judicial Performance:

1. Were the allegations, if true, grounds for judicial discipline?
2. Should the hearings have been open to the public?
3. Should the internal deliberative processes of the court have been the subject of investigation?
4. Should the Standards Relating to Judicial Discipline and Disability Retirement be amended to provide public funds for the defense of judges when they are required to defend themselves in a judicial discipline proceeding?

The Factual Background[5]

Rose Elizabeth Bird was selected by Governor Jerry Brown, on March 26, 1977, to be Chief Justice of the California Supreme Court. A newly appointed justice or chief justice of the state supreme court must stand for retention at the next regular election, so that the voters may decide whether the justice should remain in office.[6] Chief Justice Bird's appointment provided considerable controversy, and formal, as well as formidable, opposition appeared in the form of a law and order campaign committee led by State Senator H. L. Richardson. The committee's stated aim was to raise over one million dollars to defeat Chief Justice Bird and Associate Justice Frank C. Newman in the fall election. By August 1978, a second group was formed and designated the "No On Bird Committee." This committee hoped to raise between five hundred

4. Forty-nine states and fifty-one jurisdictions, if the District of Columbia and Puerto Rico are included, have some form of judicial conduct commission.

5. I am indebted to Teresa Tan and Alexander B. Aikman of the Western Regional Office of the National Center for State Courts for their excellent article on the factual background of the California Supreme Court hearings. Tan & Aikman, *California Supreme Court Investigation*, 4 STATE COURT J. 3 (1980).

6. CAL. CONST. art. VI, § 16(d) (1849, amended 1974).

and seven hundred and fifty thousand dollars for its campaign against the chief justice. The amount of money actually raised is not known, but sufficient funds were gathered to subject the voters of California to an emotional media campaign which questioned prior decisions of the court and urged a "no" vote for Chief Justice Bird, as well as Justice Newman. As the election drew near, the chief justice became the primary target of the campaign.

Against this background—a chief justice fighting for her political life—two controversial cases, *People v. Tanner*[7] and *Fox v. City of Los Angeles*,[8] came before the California Supreme Court. *People v. Tanner* involved the California "use a gun, go to prison" statute, while *Fox v. City of Los Angeles* concerned the legality of the City of Los Angeles' placing a lighted cross on top of City Hall during the Christmas season. As election day neared, these cases were still before the court. On election day, the *Los Angeles Times*, in a lead article, stated: "The California Supreme Court has decided to overturn a 1975 law that required prison terms for persons who used a gun during a violent crime, but has not made the decision public. . . ."[9] The article reported that the vote was four to three with Chief Justice Bird being among the majority.[10] In the election, the chief justice was retained by only fifty-two percent of the vote, the smallest margin by which any justice in California has ever won retention. It is not over-speculative to conclude that had the court decided and released the *Tanner* and *Fox* opinions[11] before the election, Chief Justice Bird could well have been defeated.

Because of the allegations made by the press, the chief justice, on November 24, 1978, publicly requested that the Commission on Judicial Performance conduct an investigation of the charges of

7. 23 Cal. 3d 16, 587 P.2d 1112, 151 Cal. Rptr. 299 (1978), *rehearing granted*, 24 Cal. 3d 514, 596 P.2d 328, 156 Cal. Rptr. 450 (1979).

8. 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978).

9. L.A. Times, Nov. 7, 1978, at 1, col. 3 *quoted in* Tan & Aikman, *supra* note 5, at 4.

10. The article was correct in stating that the opinion, handed down on December 22, 1978, affirmed the decision of the trial court. Basically the Supreme Court held that the mandatory provisions of the "use a gun, go to prison" law were not applicable when the trial judge wished to set the gun use provision aside and give the defendant probation.

11. The *Fox* opinion was handed down on December 15, 1978, and held that the City of Los Angeles could not display a lighted cross on City Hall during the Christmas season. 22 Cal. 3d at 794, 587 P.2d at 664, 150 Cal. Rptr. at 868. Justice Newman wrote the opinion for the court, and the chief justice filed a concurring opinion. Justices Clark and Richardson dissented.

delay, suggesting the issuance of a public report and offering her full cooperation. In response to this request, the California Judicial Council adopted a resolution providing:

> that the request of the Chief Justice that there be "an investigation of the charges that the Supreme Court improperly deferred announcing a decision in the *Tanner* case" by the Commission on Judicial Performance be acknowledged as action taken by her in her capacity as Chief Justice. . . . [and] . . . that the designation of the Commission on Judicial Performance as the body to conduct that investigation be approved.[12]

A special rule dispensing with the California constitutional requirement for confidentiality provided that all segments of the news media could "be present and report."[13] However, the rule, by its terms, was limited to this particular proceeding:

> This rule shall apply to any investigation or proceeding of the Commission on Judicial Performance relating to any possible improper conduct of any Justice of the Supreme Court of California arising out of (1) any irregularities or delays in handling the *Tanner* case, (2) any irregularities or delays in handling any other case or cases pending before the Supreme Court prior to the election of November 7, 1978, caused or instituted for the purpose of delaying the filing of the Court's decision in any such case until after the date of the election, and/or (3) any unauthorized disclosure of confidential information regarding any of the above pending cases prior to the public release of the decision.[14]

Seth Hufstedtler, of the law firm of Beardsley, Hufstedtler

---

12. Judicial Counsel Resolution (adopting CAL. R. CT. 902.5) *reprinted in* Tan & Aikman, *supra* note 5, at 42 (Appendix A). The relevant portion of the text of the resolution is as follows:

"WHEREAS, a public inquiry into the actions of the Supreme Court in reaching a decision in the *Tanner* case has been requested and widely supported, and

"WHEREAS, no opposition to such an inquiry has been expressed by the members of that Court, and

"WHEREAS, the office of the Chief Justice has publicly expressed support of a public inquiry,

"RESOLVED, that the request of the Chief Justice that there be 'an investigation of the charge that the Supreme Court improperly deferred announcing a decision in the *Tanner* case' by the Commission on Judicial Performance be acknowledged as action taken by her in her capacity as Chief Justice.

"Further, that the designation of the Commission on Judicial Performance as the body to conduct that investigation be approved."

13. CAL. R. CT. 902.5, *quoted in* Tan & Aikman, *supra* note 5, at 42 (Appendix A).

14. Judicial Counsel Resolution (adopting CAL. R. CT. 902.5) *reprinted in* Tan & Aikman, *supra* note 5, at 43 (Appendix A).

and Kemble, was retained as special counsel for the Commission. Computed on an hourly basis, Hufstedtler's fee eventually amounted to $418,935, plus almost $26,000 on reimbursable expenses.[15] During the prehearing investigation, each of the seven justices was interviewed, as well as fifty-two past and present members of the supreme court staff. The public hearing began on June 18, 1979. Five members of the court, Chief Justice Bird, Justice Mathew D. Tobriner, Justice Frank K. Richardson, Justice Wiley Manuel and Justice William P. Clark, were publicly examined before the proceedings were ordered closed by one of California's intermediate courts of appeal as a result of a suit brought by California Supreme Court Justice Stanley Mosk.[16]

On October 18, 1979, a special ad hoc supreme court, consisting of seven intermediate appellate judges chosen by lot, affirmed the court of appeal, holding that the California Constitution requires that judicial disciplinary investigations must be conducted confidentially. The special court concluded

> that in light of the history and purpose of article VI, section 18, the limited scope of the Commission's authority to investigate judicial misconduct, the strong public policy in favor of confidential investigations by the Commission, and the absence of any indication that the people of California intended to change the constitutional requirement of confidentiality by revision of article VI in 1966, the Judicial Council has authority to adopt rules which provide for confidentiality but it does not have the power to authorize public investigations and hearings before the Commission. . . . For this reason Justice Mosk cannot constitutionally be compelled to testify at a public hearing before the Commission in C.J.P. No. 3012.[17]

The hearings were closed, and in November of 1979, the Commission reported that the investigation had been terminated and that "no formal charges [would] be filed against any Supreme Court justice."[18]

---

15. Information received from a staff member of the California Commission on Judicial Performance.

16. Mosk v. Superior Court, 25 Cal. 3d 474, 601 P.2d 1030, 159 Cal. Rptr. 494 (1979).

17. *Id.* at 499, 601 P.2d at 1047-48, 159 Cal. Rptr. at 511-12 (footnote omitted).

18. California Comm'n on Judicial Performance, Report on Status and Announcement of Results (Nov. 5, 1979), *quoted in* Tan & Aikman, *supra* note 5, at 7.

Grounds for Discipline

The California Constitution provides that the Commission on Judicial Performance may recommend censure or removal of a judge for conduct that "constitutes wilful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute."[19] Under these standards, only the allegation of unauthorized disclosure of information regarding pending cases was worthy of investigation. That a chief justice of the California Supreme Court might have delayed the publication of an opinion for a reasonable period of time, until after an election, is not, nor should it be, a proper subject of inquiry by a judicial discipline commission. If there is no excessive delay, the timing of an opinion should not bring the judiciary into disrepute, even if it might conceivably improve the election chances of a particular judge. As long as a judge is required to enter the political arena and stand for retention, it can be expected that, on occasion, the timing of judicial decisions will be based on political considerations. Provided that the decision itself is insulated from the political process, timing of an opinion for political purposes should not be a ground for discipline.

At most, timing is a question which, like a judge's decisions, may be considered by the voters in the election. If it were grounds for judicial discipline, a judicial conduct commission would have a plethora of allegations to consider before and after each election campaign in which a judge was aggressively challenged. Indeed,

---

19. CAL. CONST. art. VI, § 18 (1849, amended 1976). Section 18 also contains other disciplinary provisions, as well as a disability retirement provision. The ABA Standards, *supra* note 2, at 29, provide that

"Grounds for discipline should include:

(a) Conviction of a felony;

(b) Willful misconduct in office;

(c) Willful misconduct which, although not related to judicial duties, brings the judicial office into disrepute;

(d) Conduct prejudicial to the administration of justice or conduct unbecoming a judicial officer, whether conduct in office or outside of judicial duties, that brings the judicial office into disrepute;

(e) Any conduct that constitutes a violation of the codes of judicial conduct or professional responsibility." *Id.*

See also Overton, *Grounds for Judicial Discipline in the Context of Judicial Disciplinary Commissions*, 54 CHI.-KENT L. REV. 59 (1977).

considering the extreme pressures that can be brought to bear on a judge seeking retention, it is questionable whether a judge should be required to make a decision at a time when his or her political survival may be at stake. A court should minimize the pressures in a particular case so that the decision, when made, does not appear to be the result of outside influences. A litigant is entitled to a learned and dispassionate consideration of his case. A losing party should not feel that his case was decided on the basis of public opinion and media pressure, nor should he feel that the court was taking pains to avoid the appearance of succumbing to outside pressure. Judicial bravado, evidenced by handing down an unpopular opinion a few days before an election in which the judge may lose his office, does not create confidence in the decision rendered.

It is interesting to note that during the Judicial Commission hearings, it was revealed that the second *Tanner* decision was "rushed through" and the opinion filed prior to the Commission hearing so that it would not pose a problem during the investigation into *Tanner I*.[20] This is an example of timing an opinion in response to factors that were foreign to the decision itself and which vitally affected the members of the California Supreme Court.[21] Yet, no allegations of misconduct were made as to the timing of this opinion, nor should there have been. Except as to the unauthorized disclosure problem, which was never truly developed, the Commission should not have proceeded. There were no grounds for the discipline of any justice of the California Supreme Court in the delayed publication of the *Tanner* and *Fox* opinions.

Confidentiality of the Proceedings

Judicial discipline, like attorney discipline, is not imposed for the purpose of punishment. As stated in the ABA Standards:[22]

> The fundamental principle upon which these standards are based is that the major purpose of judicial discipline is not to punish

20. Information obtained from video tapes of the Commission hearings.

21. People v. Tanner, 24 Cal. 3d 514, 596 P.2d 328, 156 Cal. Rptr. 450 (1979). On rehearing, the court held that the "use a gun, go to prison" law was mandatory, reversing the decision of the trial court. Justice Clark wrote the majority opinion, joined by Justices Richardson, Manuel and Mosk, who had voted the other way in the first *Tanner* opinion. Chief Justice Bird and Justices Tobriner and Newman concurred in part and dissented in part.

22. *See* note 2 *supra*.

> judges but to protect the public and, thus, preserve the integrity of the judicial process, maintain public confidence in the judiciary, and create a greater awareness of proper judicial behavior on the part of judges themselves.[23]

Judicial discipline commissions, such as the California Commission on Judicial Conduct, provide the public with an avenue whereby perceived misconduct on the part of a judge can be addressed and corrected. Pursuant to the Constitution of the State of California,[24] the California Rules of Court, which govern the proceedings of the Commission on Judicial Performance, require that any preliminary or probable cause hearing be closed to the public and the press.[25] In California, the proceedings are not made public until the recommendations of the Commission are filed with the state supreme court. The ABA Standards differ in that they provide that an investigation into alleged misconduct becomes public after the "finding of probable cause," but before the formal hearings.[26] Both procedures, however, keep probable cause hearings closed to the public.

Nevertheless, the California Commission on Judicial Performance, pursuant to their special rule, marched into the evening television news to conduct a probable cause hearing. Internal operating procedures of the California Supreme Court were dragged into public view; personal opinions, habits and prejudices of the members of the supreme court were revealed and explored. The minutiae of the deliberative process were unveiled and discussed, the public entertained and titillated, and the California Supreme Court extensively damaged. The California Judicial Council had felt that "the requirement of confidentiality may, to the extent determined by the Commission, be modified with respect to said proceeding."[27] But the Council was ill-advised in amending their rules

23. ABA Standards, *supra* note 2, at 14.

24. CAL. CONST. art. VI, § 18(f) (1849, amended 1976).

25. CAL. R. CT. 902.

26. ABA Standards, *supra* note 2, at 33.

27. CAL. R. CT. 902.5 went on to say: "and, after completion of the investigation, a public hearing shall be held and shall be publicly conducted. The public hearing shall include the right of all segments of the news media to be present and report the proceedings." Evidently the Commission interpreted "shall" to be mandatory in the investigatory stage. A more consistent and rational interpretation would have required a public hearing only after charges had been filed following the usual confidential investigation. It may well be that the Commission did not wish to take "the heat" by keeping the investigation closed until charges had been filed. The Commission therefore took the tenuous position that they were

to allow the Commission to dispense with confidentiality in the probable cause stage; the Commission on Judicial Performance should not otherwise have been required to go public as it did.

Justice Stanley Mosk has commented on the actions of the Commission as follows:

> The Commission, never before cast into the limelight, responded with enthusiasm and, through appropriate channels had its rules changed to provide for public investigative hearings, including radio and television coverage. Such open proceedings, prior to actual disciplinary recommendations to the supreme court itself, were clearly contrary to state constitutional requirements of confidentiality, but reason and restraint were swept aside by fear and emotion.
>
> From that point on, the media had a field day. The Commission . . . permitted reports on corridor gossip among law clerks, inquiries into intent, motivation, speculation, and it welcomed the rankest type of hearsay, and hearsay upon hearsay. Questions by Commission members such as these were not uncommon: Of a law clerk witness, "What did Justice A tell you that Justice B said to him during or after the court conference in which the case was discussed?"
>
> "What was the law clerk's demeanor when you asked him if his judge's opinion was politically motivated?"
>
> In the hearings, justices were called upon to discuss why their secretaries did not get carpeting and why one justice would not speak with another justice unless a law clerk was present to take notes; staff members were asked about conversations with newspaper reporters; law clerks were grilled on why a particular footnote was inserted into an opinion; justices were cross-examined as to why specific citations were included in their writings; and every draft of an opinion, every intra-office memorandum and all court records of an internal nature relating to a number of specific cases were subpoenaed and offered in evidence in the public proceedings.
>
> The entire investigation became a media event that replaced day-time soap operas, and, not surprisingly, television and the press reveled with prurient interest in every juicy morsel relating to internal court personality conflicts.[28]

---

required to conduct a public investigation until the special California Supreme Court held otherwise.

28. Remarks of Justice Stanley Mosk, Administrative Law Judges Symposium, Washington, D.C. (Feb. 15, 1980).

Because so many complaints are frivolous in nature, probable cause hearings should remain confidential until such time as substantial grounds are found for a formal hearing. The purpose of confidentiality is not to conceal evidence which shows misconduct on the part of any judge. If such misconduct exists, this can be revealed after probable cause has been found, or when the record is filed with the supreme court. As the special California Supreme Court stated:

> The confidentiality of investigations and hearings by the Commission is based on sound public policy. Confidentiality encourages the filing of complaints and the willing participation of citizens and witnesses by providing protection against possible retaliation or recrimination. Confidentiality protects judges from injury which might result from publication of unexamined and unwarranted complaints by disgruntled litigants or their attorneys, or by political adversaries. Confidentiality of investigations by the Commission preserves confidence in the judiciary as an institution by avoiding premature announcement of groundless claims of judicial misconduct or disability. Confidentiality . . . is essential to protecting the judge's constitutional right to a private admonishment, if the circumstances so warrant. When removal or retirement is justified by the charges, judges are more likely to resign or retire voluntarily without the necessity of a formal proceeding if the publicity that would accompany such a proceeding can thereby be avoided.[29]

Judge John H. Gillis and Elaine Fieldman have noted in regard to the requirement of confidentiality in Michigan's system of judicial discipline:

> Investigatory confidentiality is required during this weeding out process so that the judge is protected from frivolous attacks and litigants and attorneys are encouraged to report their grievances without fear of reprisal from the judge. If all grievances were publicly announced, meritless complaints could have irreversible ramifications. For example, a grievance made in bad faith might be intentionally timed during the apex of a judge's election campaign; thus, leaving no time before the election day to investigate and communicate the truth. The mere allegation of impropriety could have [disastrous] effects on the judge's reputation then and in the future. . . . Public knowledge of a disciplinary investiga-

29. Mosk v. Superior Court, 25 Cal. 3d 474, 491, 601 P.2d 1030, 1041-42, 159 Cal. Rptr. 494, 505-06 (1979) (footnotes omitted).

> tion . . . often cloaks an ill-founded complaint with a veil of credibility regardless of an announcement by a disciplinary body that the grievance was unfounded. Thus, confidential investigations are necessary in order to: (1) protect the judge's reputation until such time as a public disclosure is warranted; and (2) avoid burdening such judges with defending against untruthful allegations.[30]

If the California Commission on Judicial Performance had followed existing rules and maintained confidentiality at the investigative and probable cause stages, the California Supreme Court and the California judicial system would have been spared great embarrassment and harm. What is more important, public confidence and respect for the California judicial system would not have been unnecessarily eroded.

Internal Deliberative Processes

During both the public and the non-public hearings, members of the court and court personnel were subjected to searching examinations concerning the internal deliberative processes of the court. The Commission probed three areas: discussions at the court's decisional conferences, conversations between judges, and discussions between a judge and his staff. A few examples of questions about the discussions at the court's decisional conferences will serve to illustrate this probing:

> Q: Do you remember, Justice Manuel, what your announced position was, if any, on the *Tanner* case at the time of the conference following argument?
>
> A: At that time, I believe I indicated that I was doubtful. I hadn't taken a strong position.
>
> . . . .
>
> Q: . . . With regard to the conference following argument on February 6, do you remember whether or not there were any other justices who were doubtful in stating their position?
>
> A: My recollection is that the chief justice expressed her doubtfulness, and it's also my recollection and interpretation of what Justice Newman indicated that he was doubtful.[31]

30. Gillis & Fieldman, *Michigan's Unitary System of Judicial Discipline: A Comparison with Illinois' Two-Tier Approach,* 54 CHI.-KENT L. REV. 117, 120-21 (1977).

31. Reporter's Transcript at 3816-17, July 17, 1979.

As to conversations with other justices regarding the *Tanner* case, Mr. Hufstedtler examined Justice Manuel as follows:

> Q: . . . Did you have any discussions with Justice Clark about his revised dissent prior to the time he circulated it on August 15?
>
> A: Yes.
>
> Q: More than one such conversation?
>
> A: One that I can recall, only one.
>
> Q: And where did that conversation take place?
>
> A: I believe it took place in his chambers.
>
> Q: Were just the two of you present?
>
> A: Yes.
>
> Q: And will you tell me please, as well as you can recall, what the two of you said?
>
> A: I'm not sure why I was in his chambers, but we were talking about opinion writing, and strong language, and I indicated to him at that time that with regard to *Tanner*, I had signed the opinion, but I was a little bit concerned about what I considered strong language in the opinion, and he indicated to me at that time, and he said something to the effect that I need not worry about that, because he was in the process of revising the opinion and he would take care of my problem.[32]

Concerning the staff of the court, the following is an example of the questioning:

> Q: And as a member of her staff were you involved in the preparation of any of the papers or the workup of any of the case [*People v. Caudillo*] for the chief justice?
>
> A: Yes. I was involved in the preparation of the calendar memo, which at times is assigned to the chief justice's staff. *Caudillo* was reassigned and the chief justice did not herself write the lead opinion in *Caudillo*. It was reassigned to pro tem Justice Jefferson.
>
> . . . .
>
> Q: Now, at that time did that memorandum make any recommendation to the chief justice as to whether the acts involved in that case, the acts involved in the rape of that case constituted great bodily injury?
>
> A: Yes. It dealt with that issue.

32. Reporter's Transcript at 3829 and 3835, July 17, 1979.

Q: What was the conclusion that the calendar memorandum arrived at?

A: The conclusion in the calendar memo was that rape itself would not constitute great bodily injury within the meaning of the statute.

Q: Was that a conclusion in which you concurred?

A: Yes, eventually she concurred in that.

Q: Did you discuss the subject with her?

A: I can't recall the particular conversation that I had with her on this matter. . . . my recollection is that she had some reservations about how the matter should be concluded.[33]

An appellate court speaks through its opinions, which are published and are equally available to all who wish to learn the court's view of the law in a particular fact situation. To require justices of an appellate court to submit to questioning about subjective reasons for their decisions and written opinions can only weaken the force of the opinions themselves. The integrity and effectiveness of the opinions of an appellate court will be unnecessarily weakened if the deliberative and reasoning processes of the justices can be subject to after-the-fact examination.

Professor Laurence Tribe has expressed concern that if, by the filing of charges, appellate courts could be forced to respond regarding their decisional processes,

> [J]udges everywhere will not only fear making rulings they think the law requires when the rulings might prove unpopular or displease those in power. They will fear as well the candid and vigorous internal disagreements without which the judicial process would be rendered vastly less thoughtful and ultimately less effective. Nor could collegiality or trust long survive in a court composed of seven or nine strong-willed individuals once each judge knew that a disgruntled or jealous colleague might initiate an investigation simply by leaking hints that an action by that judge had been politically motivated.
>
> These concerns plainly require preserving the sanctity of a court's internal deliberations.[34]

The thought processes of judges or other decisionmakers should not be the subject of inquiry and examination. Justice Frankfurter,

33. Reporter's Transcript at 3480-83, July 13, 1979.

34. Tribe, *Trying California's Judges on Television: Open Government or Judicial Intimidation?* 65 A.B.A.J. 1175, 1178 (1979).

some forty years ago, stated that "[s]uch an examination of a judge would be destructive of judicial responsibility."[35]

I do not mean to imply that internal operating procedures of an appellate court should be concealed from the public. These procedures should be a matter of public record. Some courts have published their internal operating practices, and these publications have been helpful in better understanding the court's operation.[36] But absent a strong showing of bad faith, improper behavior, fraud or other extreme circumstances, the personal thoughts of a justice and the conversational "honing" of opinions by judges in the decisionmaking process should not be a subject of after-decision examination. The damage this can do to the free flow of ideas, to frank and open discussion of difficult problems, and to the development of new and beneficial law cannot be outweighed by the desire of disgruntled litigants, the public and the press to find out what goes on in the court's decisional conferences or in a judge's mind. The need to compromise and accommodate different views in reaching collegial decisions is healthy and appropriate. The exposure of the process would tend to freeze and harden positions lest the judge seem weak or unsure of himself, and this could destroy the value of the appellate process. As Justice Mosk noted:

> [O]nce administrative agencies or any non-judicial bodies are permitted to inquire into internal functions of the judiciary—absent articulable charges of corruption—the independence of the judiciary and its ability to function efficiently are gravely threatened. There is no more pathetic sight than learned judges cringing in fear of an aggressive investigative commission, the members of which are pandering to the media."[37]

Defense of the Judge

The fee received by Seth Hufstedtler and his firm[38] suggests

35. United States v. Morgan, 313 U.S. 409, 422 (1940). *See also* A. BICKEL, THE LEAST DANGEROUS BRANCH 215 (1962).

36. *See, e.g.*, Internal Operating Procedures of the Florida Supreme Court, 1977; Internal Operating Practices, California Courts of Appeal, 1979; and Internal Operating Practices of the Court of Appeals of the State of Oregon, 1979. *See also* articles by individual judges: Cameron, *Internal Operating Procedures of the Arizona Supreme Court*, 17 ARIZ. L. REV. 643, (1976); Molinari, *Decisionmaking Conference of the California Court of Appeal*, 57 CAL. L. REV. 606 (1969).

37. Remarks of Justice Stanley Mosk, *supra* note 28.

38. *See* note 15 and accompanying text *supra*.

the potentially staggering costs that may be incurred by a judge who must defend himself before a judicial discipline commission. The ABA Standards provide that the "cost of all proceedings should be at public expense."[39] However, the Commentary to the ABA Standards points out that "[t]he expenses of the commission, including staff salaries, its expert witnesses, mental or physical examinations it requests or directs, preparation of its documents, and the service of process are all proper items for public expense. The judge's attorney fees should not be at public expense."[40] The Standards further provide that a judge can only be reimbursed for the cost of an expert witness in the event that he is exonerated.[41] The drafters of the standards knew that the public would be loath to provide attorney's fees for judges in disciplinary proceedings. As Judge Peskoe commented:

> The suggestion that counsel should be provided at public expense was rejected by the drafters even where fees may mount up for special reasons because of the anticipated adverse public reaction. Presently counsel is provided at public expense in most jurisdictions only to indigents. Judges are certainly not viewed by the public as indigents or anywhere near indigent. Besides, judicial disciplinary proceedings cannot be equated with criminal proceedings.[42]

Perhaps the Standards should be changed and some allowance made to provide judges with reasonable attorney's fees for defending themselves in judicial disciplinary hearings. A judge who is living on a limited salary can ill-afford to pay for legal representattion. This is especially true when there is a "show trial" and a "sky's the limit" policy as far as the investigating body's legal expenses are concerned. In matters of this kind, it is not unreasonable to ask that the state bear the expense of a proper defense for the accused judge.

Conclusion

At the hearing Chief Justice Bird stated:

So it is with deep concern in terms of what we are doing histori-

39. ABA Standards, *supra* note 2, at 49.
40. *Id.*
41. *Id.* at 48.
42. Peskoe, *supra* note 3, at 164 (footnotes omitted).

> cally, as opposed to what we are doing for the moment with this momentary investigation into these allegations, but what we are laying for generations ahead as to what a body like this Commission can do in terms of an investigation in which any disgruntled individual can go to a newspaper, purport to give inside information and enough of the truth, perhaps a half-truth, to make an entire lie, have that printed and then require a Commission of this sort to have to begin an investigation. And in the process of your attempting to do your duty you believe you must investigate all the nooks and crannies.
>
> . . . Mr. Hufstedtler at the beginning of this hearing indicated that we are the most fragile branch, and that is true. We are dealing with delicate china here and in some ways I feel that we have thrown very delicate china into a laundrymat.[43]

Chief Justice Bird is correct in her assessment of the damage that was inflicted on the California judiciary by the failure to follow existing procedures. Because the charges were given extraordinary publicity, they took on a substance they did not deserve. Because questions concerning the deliberative processes of the California Supreme Court were allowed, the effectiveness of its decisions was weakened. The fact that the Commission was willing to incur large legal fees and expenses to conduct a show trial made it almost impossible for the members of the court to adequately defend or otherwise participate on an equal basis.

Major damage to the court resulted from the public nature of the proceedings. Judges in our system of government occupy a different position from that held by members of the other two branches of government. Judges must earn acceptance of their decisions based upon the logic of their opinions and not upon the personality of the judge. By bringing to the surface, in a public hearing, the stresses and strains which underlie the decisionmaking processes of the California Supreme Court, the personalities of the justices became more important than the law they made. Personality disputes which affect the decisionmaking process can, if made public, lead to disrespect for the judicial process and erode public confidence in courts generally, not just the supreme court. The failure of the individual members of the California Supreme Court to recognize their responsibility to maintain respect for the institu-

43. Tan & Aikman, *supra* note 5, at 7 (quoting Justices' Reservations about Public Inquiry).

tion of the supreme court, and their lack of understanding of the collegial function of an appellate court in arriving at a collective judgment contributed to this problem.

In their desire to bask in the spotlight of public controversy, the members of the Commission inflicted great damage upon an institution they were supposed to protect. I have confidence that this damage will not be permanent, but it is tragic that it had to happen at all.