Judicial Discipline and Removal, The California Story

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"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 nonpartisan, 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 conference 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.

“There should be a review of the appointed judge by the voters after a short probationary term of judicial service and, thereafter, at the end of each term of that judicial office. The judge should be required only to run against his record in office on a noncompetitive ballot where the only question before the voter is whether the judge’s record justifies his continued retention. . . . In addition, judicial compensation should be realistically established, after thorough study, in order to attract the most capable men to the bench with reasonable assurance of a continuing judicial career based on performance.”

California Modifies Plan

California was one of the first states of the Union to apply the essentials of such a system in 1934; but, unfortunately, it is applicable only to the appointment and tenure of Supreme and Appellate Court judges. Such judges are appointed by the governor after confirmation by a Commission on Judicial Appointments. At the next general election the appointee’s name goes on the ballot and the voters vote on the proposition whether he shall be retained in office. If he receives a favorable vote, he then serves a term of twelve years before his name again must go on the ballot. The voters vote either “yes” or “no” on his retention. If a majority vote “no” the governor makes another appointment subject, again, to confirmation by the Commission on Judicial Appointments. This periodic facing of the electorate on the basis of the judge’s own record tends to prevent a judge from becoming arbitrary, as sometimes occurs where a judge is given life tenure with no review of his record following his appointment.

The California plan was a forerunner to a similar program endorsed by the American Bar Association in 1937, but which program is applicable to trial court judges as well as to appellate judges. Missouri adopted the plan in 1940 and it became popularly known throughout the nation as the “Missouri Plan.” Recently Kansas, Iowa, Nebraska and Illinois adopted similar plans in whole or in part. The constitution of Alaska, adopted in December, 1955, included a resolution which provided that judges run for election, unopposed, on their records.

Removing judges from politics and assuring them of tenure in office based upon per-
formance 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 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 Con-

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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.
ference 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 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, 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 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 Ap-
pellate 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 wide-cracking 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 in-
spection."

As I have indicated, when the record of proceedings before the commission is filed
with the Supreme Court with a recommenda-
tion 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 Su-
preme 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 war-
rant the removal of the particular judge
from office. This result certainly gave ev-
dence 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 high-
est court of the state.

I was privileged to serve on the first com-
mission appointed under the constitu-
tional 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 profes-
sional members of the commission.

Based on the California experience, I
would certainly stress that any such plan
include within it a provision for confidenti-
ality with respect to all complaints, in-
quiries, investigations and hearings up to
the point of the taking of action by a com-
mision recommending to the state's high-
est court the actual removal or retirement
of a judge. This protects the innocent judge
from irreparable damage by publicity re-
sulting 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 be-
comes a matter of national attention and
concern. That this image may not be un-
justifiably 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 stan-
dards, similar to the California plan, which
we are advised is now being studied in
more than a dozen states, the independen-
tity of the judiciary is fully protected and at the
same time the public is assured of the con-
tinued service of capable, efficient and con-
scientious judges.