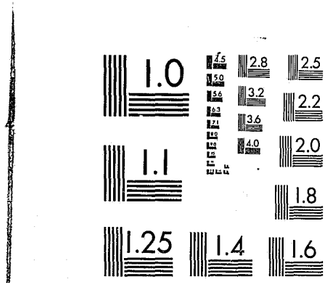

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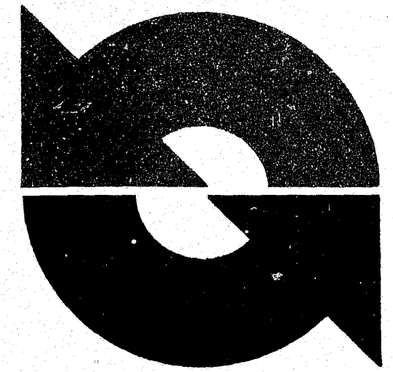
Judicial Disciplinary Commissions: Alternatives to Impeachment

FJRP-80/001

by Nathan C. Goldman



April 1980

FJRP-80/001

JUDICIAL DISCIPLINARY COMMISSIONS:

ALTERNATIVES TO IMPEACHMENT

by

Nathan C. Goldman

April 1980

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ABSTRACT

Fifty-one jurisdictions, including forty-eight states, have established commissions on judicial conduct in response to the failure of impeachment to hold judges adequately accountable for misconduct. This report assesses the states' experience with commissions on judicial conduct as alternatives to impeachment and the applicability of these alternatives to the federal judicial system. There are three kinds of commissions: (1) the one-tiered system, which has one tier to investigate complaints and recommend action to the highest court of the state; (2) the two-tiered system, which has one tier to investigate and a second to adjudicate; and (3) the commission-legislature system, in which the commission recommends lesser punishment to the court, but removal remains with the legislature. The data for this report comprise case studies of three state commission systems (North Carolina, New York, and Massachusetts), questionnaires to judges in those three states, questionnaires to executive secretaries and commissioners in over forty states, reported court cases, and law review literature.

The debate over adoption of a commission should weigh the costs to judicial independence against the benefits of sanctioning judges who abuse their powers or otherwise misbehave. This report suggests that the commissions have had little effect on judicial independence and have provided a measure of accountability for abuse never attained by impeachment or other traditional disciplinary methods.

In addition, several elements--the mixed composition of the

commissions, multiple appointing agencies, requirements of confidentiality and due process, and final review by the highest court of the state--seek to impose checks and balances on the new disciplinary systems. This protection of the interests of the judiciary is reflected in the responses by the judges to the questionnaires. Although the questionnaire only surveys three states and the response rate is modest, the responses suggest that judges tend to find the commissions to be effective both in punishing misconduct and in protecting adequately the rights of the judiciary.

The states' experience with these commissions suggests that disciplinary methods short of impeachment could be adapted to the federal judiciary. After analyzing congressional efforts to establish such a system, the report concludes with some suggestions for an effective disciplinary system.

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PART I INTRODUCTION

Chapter 1: Statement of Purpose, Method, Organization and Findings of the Study

1. Statement of Purpose

This project assesses state organizations on judicial conduct as models for the federal government. These organizations--variously called commissions, boards or committees--receive and investigate complaints against judges. Although a few commissions can order sanctions, most can only recommend such action to the state supreme court.

The introduction discusses the failure of impeachment as a method of policing the judiciary, the development of alternative methods by the states, and the unsuccessful efforts in Congress to establish a disciplinary system for the federal judiciary. The commission on judicial conduct, the most recent and successful of the alternatives, is the primary focus of the report. Emphasizing its effect among other things upon the independence and accountability of the judiciary, the report concentrates on three commissions and their political environment. It concludes with an assessment of present efforts and suggestions for a disciplinary system which would be effective and feasible.

2. Historical Background of Judicial Discipline

a. Failure of Impeachment in the Federal Government

Many constitutional scholars have found impeachment to be both unfair and ineffective. Since the founding of the Republic, it has been the sole means of removing federal judges. In two hundred years, the House of Representatives has impeached eight judges and one Supreme

Court Justice, none of them since 1936; the Senate convicted four of the judges.[1]

Impeachment raises serious questions of due process for the judge and of fairness to the judge and the public. Opponents of impeachment generally argue that: (1) the grounds for removal are too narrow; (2) the sanctions are too limited; (3) the process is cumbersome; and (4) it is too political. All five judges impeached since 1803 have confronted consistent partisan opposition, confirming the fears of Charles Pinckney that impeachment would serve the "passions to throw out the political enemy."[2]

Accepting Alexander Hamilton's assessment in Federalist #79, Senator Joseph D. Tydings wrote: "It is uncertain whether senility, insanity, physical disability, alcoholism or laziness--all of which are forms of unfitness that require remedial action--are covered by the impeachment process." With their stigma of near criminality, impeachment and trial would be unfair to the judge in most of these cases. On the other hand, Congress routinely ignores minor infractions because the procedure is costly and removal is too draconian.[3]

The remainder of this introduction will show that impeachment is ineffective as it has neither rid the bench of unfit judges nor stemmed the decline in the public's respect for the judiciary.[4] An impeachment trial, which has averaged seventeen days, contributes to this ineffectiveness. If it was "absurd to think that large national interests during the (second world) war . . . must await upon the trial of Judge X," as James Moore had complained in 1942, Senator Nunn asked, how much more debilitating would such a month-long cessation of the House and the Senate be in today's world.[5]

Disuse of impeachment has meant that unfit--senile, corrupt, or incompetent--judges have remained on the bench. Examples of senile Supreme Court Justices who refused to resign undermine arguments for the effectiveness of impeachment as a deterrent. Justice Samuel Field disliked President Grover Cleveland and wanted the record for tenure. The other members of the Court delegated Justice John Marshall Harlan to "request" Justice Field's resignation. Justice Joseph McKenna was another example. The Supreme Court decided not to rule on any case in which McKenna's vote was decisive.[6]

President Taft once wrote to Justice Horace Lurton that:

> the condition of the Supreme Court is pitiable, and yet those old fools hold on with a tenacity that is most discouraging. Really, the Chief Justice is almost senile; Harlan does not work. Brewer is almost deaf that he cannot hear and has got beyond the point of the commonest accuracy in writing his opinions; Brewer and Harlan sleep almost through all the arguments. I don't know what can be done. It is most discouraging to the active men on the bench.[7]

After the 1803 acquittal of Associate Justice Samuel Chase on charges of partisan Federalist activities on the bench, the Democratic-Republican majority in Congress tried to amend the constitution to make judges more accountable to the political process. Thomas Jefferson expressed his party's disgust with impeachment in these famous diatribes: "Impeachment is a farce which will not be tried again . . .(a) bungling way of removing judges . . . an impracticable thing--a mere scare crow."[8] Still, the Federalists blocked all efforts of the Jeffersonians to obtain the two-thirds majority in each house needed to pass an amendment and send it to the states for ratification.

In 1972, Professor Harold Chase estimated that ten percent of the federal judges beneath the Supreme Court level did not dispense justice fairly or efficiently. Among the more glaring recent examples of inefficiency or outright misconduct were Judge Otto Kerner, who resigned only five days before entering prison; Judge Stephen Chandler, whose caseload was suspended by his circuit council until he retired in 1975; and Judge Willis Ritter, who embarrassed the nation with his odd behavior, but served until his death in 1978 at the age of 78.[9]

The experience of two hundred years confirms the failure of impeachment. The House Judiciary Committee has investigated fifty-four judges and one Justice; the Senate has removed four. The last trial occurred in 1936.[10] Senator Sam Nunn (D., Ga.) has concluded that it is "unreasonable to assert that only four federal judges in our history have misbehaved or have been disabled." Impeachment has not been a "successful enforcer of good behavior" except for a few cases, when it became Jefferson's "engine more of passion than of justice."[11]

Representative Robert Kastenmeier (D., Wis.) succinctly justified the search for alternatives to impeachment in 1977: "Today, although instances of judicial misconduct are often brought to our attention, the Judiciary Committee's heavy workload makes it difficult, if not impossible, for us to set aside all other legislative activities."[12]

b. Congressional Attempts

The dismal record attributed to impeachment has given rise to numerous attempts by Congress to establish alternative procedures for handling cases of judicial misconduct. This section will assess some of the reasons for the failure, at least thus far, of these congressional efforts.

The constitutional issue is whether impeachment is the only method allowed for the removing or disciplining a judge. The issue is beyond the scope of this study and will therefore not be directly addressed.[13] The claim that impeachment cannot discipline judges has a long history.[14] In the nineteenth century, the efforts to make judge more accountable for misconduct concentrated on mandatory retirement and shortened or elected judicial terms. Between 1889 and 1941, congressmen proposed over forty amendments to elect some or all judges to terms ranging from four to twelve years. More recently, former President Dwight Eisenhower proposed judicial retirement after a twenty-year tenure or age seventy-two, whichever occurred first. Senator Harry Byrd drafted an amendment to have judges reappointed every eight years.[15]

Judicial Conference and Councils: Supervision and Discipline of Lower Court Judges

The early reform efforts failed because their supporters had to prove the reform's worth and then overcome the amending process. Instead of changing the Constitution to provide other removal techniques, Congress achieved a related goal, supervision and oversight of lower court judges, by a statute establishing the Judicial Conference of the United States in 1922.[16] Early in 1911, the Congress enacted legislation which established judicial councils in each circuit.

> The statute now provides that:
> Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the court within its circuit. The district judge shall promptly carry into effect all orders of the judicial council.[17]

This language became controversial when the Judicial Council of the Tenth Circuit ordered Judge Stephen Chandler to stop hearing cases on his docket, climaxing a long feud between Judge Chandler and the rest of the circuit.[18] Judge Chandler sued the Council, arguing that either the statute did not authorize this action, or, if it did, the statute unconstitutionally invaded judicial independence.[19]

Scandals involving federal judges have on several occasions prompted members of Congress to propose legislation establishing procedures for disciplining judicial misconduct.[20] Pre-World War II attempts were based, with some differences, on Professor Shartel's proposal to establish a court empowered to remove lower court judges.[21] Senator William McAdoo of California, for example, proposed that the special court have jurisdiction over all but Supreme Court Justices with the Department of Justice acting as prosecutor.[22] Representative Hatton Summers, chairman of the House Judiciary Committee, drafted legislation that would have the House of Representatives prosecute a case of judicial misconduct before a court of three circuit judges appointed by the chief justice.[23]

More recent congressional attempts to establish procedures for handling judicial misconduct have been patterned after state practice. California, for example, provided the model for Senator Tydings' bill introduced in the 90th and 91st Congresses,[24] but the procedures resembled the yet-to-be-established Illinois system. In 1969, Illinois adopted a two-tier system: one tier to investigate; a second tier to decide the case, with no appeal to the state supreme court.[25] The Tydings bill called for five federal judges to serve as a fact-finding panel (tier one) to dismiss spurious complaints or to recommend removal to the Judicial Conference of the United States (tier two).[26]

Tydings chose the Judicial Conference as the most convenient forum to adjudicate the case. To make the Conference more representative, that is, to strengthen checks and balances to prevent abuse by a small group of people, Tydings would have expanded the Conference. Reconstituted, the Conference would include a district and appellate judge from each circuit, a representative of the special courts, and the Chief Justice as the presiding officer.[27]

The Tydings plan met heavy opposition from district court judges and a split verdict from the Judicial Conference.[28] Finally, in the 1970 Senate subcommitte hearings, Senator Sam Ervin (D.,N.C.), having concluded that the plan threatened judicial autonomy, killed the bill. The subcommittee never voted on the legislation.[29]

House Attempts

Members of the House introduced three different pieces of legislation. Each bill reflected a different state practice for judicial conduct organizations. Representative Mathis, in January 1977, proposed a two-tiered system which resembled the earlier Tydings legislation. The proposed system would consist of one tier to act as an investigatory Council on Judicial Tenure and a second tier, the Judicial Conference, to try the cases. Seven states then had two-tiered systems.[30]

In September 1977, legislation that would have established a one tier, California Plan was introduced by a bipartisan group of Representatives (Kastenmeier, Railsback, and Butler). More than earlier bills, this one borrowed extensively from the predominant experience in the states, i.e., the California-style commissions.[31] Finally, in October, 1977, Representative Findley proposed legislation patterned after the defunct one tiered New York Court on the Judiciary.[32]

Senate Attempts

After a five-year hiatus, judicial disciplinary reform found a new senatorial advocate in Sam Nunn (D., Ga.). In 1975, he began hearings and co-authored legislation to reincarnate the Tydings proposals. Senator Nunn's proposals have received the most publicity and initially made the most progress in Congress. The first Senate hearing in 1976 provided a wealth of testimony by illustrious witnesses.[34]

The bill proposed a two-tiered system. The Judicial Conduct and Disability Commission would investigate complaints against judges. The Commission's membership would comprise one judge from each circuit and one chosen from among the special courts.[35] Each circuit would have a committee of judges which would "receive, process and review" complaints sent to it by the Judicial Conduct and Disability Commission.[36]

The committee would conduct the preliminary investigation. It could, by majority vote, take one of three actions: (1) dismiss the complaint; (2) request time to resolve the case privately; or (3) recommend that the commission itself proceed because the committee finds sufficient cause to suspect an infraction of the good behavior standard.[37]

After the commission rules, either the complainant or the judge may petition the Court on Judicial Conduct and Disability to issue a writ of certiorari. The Judicial Conference elects one of its members as presiding officer of the court, since the Chief Justice cannot participate. This presiding officer selects six judges who serve one year. With the receipt of the commission's report, the presiding officer convenes the court, which has all the powers of an Article III court of record.[38]

The court may suspend the judge subject to the hearing. Further, the judge is still given his salary, thus avoiding the constitutional problem of salary alterations during a judge's term of office. The court may

dismiss a complaint, censure, remove, or involuntarily retire the judge. The vote of four of the seven members is necessary to sanction a judge. The order must be written and a copy must be sent to the commission, the complainant, and the judge. Only the commission or the judge may file a writ of certiorari. And the order is automatically stayed pending review or expiration of the time to file.[39]

If the complaint is against a Supreme Court Justice, the procedure has only two steps, ending in the referral of the complaint to Congress. Anyone may complain. Committees are bypassed since the commission investigates the complaint. If the case is dismissed, the commission notifies the Justice and the complainant. The complainant can seek certiorari to reopen the case. If the Court on Judicial Conduct finds sufficient cause, it convenes and may recommend censure or impeachment to the House of Representatives.[40]

The Senate Judiciary Committee's report to the floor explicitly stated that the process supplemented, and did not replace impeachment. The Committee endorsed the bill.[41] It passed the Senate in 1978 by a vote of 43 to 31, but the House conducted no hearings. In 1979, Senator Nunn reintroduced the bill as S. 295. The bill was later defeated on October 30, 1979.

Senator Bayh offered an alternative which avoided one of the major constitutional questions, i.e., removal by impeachment only. Relying on existing judicial bodies, the Bayh bill would authorize the circuit councils to investigate and to censure a judge or lift his caseload. The judge could appeal to the Supreme Court.

Senator Kennedy's Federal Court Improvement Act, S. 678, provides a plan that would be similar to Bayh's; however, Kennedy would have the councils recommend to the Judicial Conference that the Conference inform the House of Representatives that some conduct may warrant impeachment hearings.[42]

Senators Bayh's and Kennedy's proposals resemble the solution to the problem adopted by Kennedy's state of Massachusetts as well as by Rhode Island, South Carolina, Tennessee, and Arkansas. Without a constitutional provision, the legislature by statute or the high court of these states established commissions to investigate complaints and to discipline judges short of removal, retaining legislative action as the sole means to remove a judge.

The most recent bill, S.1873, passed by a vote of 56 to 33, attempts to build on the experience of these failures. The proposal retains impeachment as the sole means of removal. The system is streamlined and relies heavily on existing judical bodies. The system maintains a two-tiered approach. The judicial councils process and investigate complaints against judges and take final actions, including censures, reprimands, and lifting the judge's caseload.

The judge may appeal to a second tier, the Court on Judicial Conduct and Disability. As in the Illinois system, there is no judicial review of the court's decisions. This court is composed of five judges--four appointed by the Chief Justice and the fifth, the chief judge of the respondent judge's circuit. If a case is determined to warrant removal, the court submits its report to the House of Representatives.[43] The House of Representatives has yet to act on the matter of judicial tenure and discipline this session.

c. State Impeachment Experience

Although almost all the states authorize impeachment in their constitutions, the states have impeached and tried judges as infrequently as the federal government. From 1900 to 1925, only Montana and Texas impeached and removed judges. A 1952 Michigan Law Review report revealed that the three state judicial impeachments in the entire nation between 1948 and 1952 resulted in acquittals. A 1960 A.B.A. survey[45] reported that, with forty states responding, only seventeen states had ever impeached a judge. There had been fifty-two trials, resulting in nineteen removals and three resignations. From 1955 to 1970, only five states used impeachment.[46] Thus, as of 1970, over one-half of the states had never used impeachment.

The goal of an independent judiciary has always competed with the need to hold the judges accountable for their misdeeds. The constitutions of the national government and nine of the thirteen original states attempted to insulate the judiciary from politics by means of life tenure and difficult procedures for removal.[47] During the Jacksonian revolution, 1830-50, a majority of states adopted legislation to elect judges to make them more accountable to the populace.[48] The low saliency of candidates and of issues doomed the effort and incumbents usually ran unopposed.[49] Other methods for removing judges, such as recall, elections, address, and joint resolution by both houses of the legislature were difficult to implement, and the state rarely employed them.[50] Thus, the experience in the state and national governments indicated that the drafters achieved their goal of an independent judiciary but at the expense of judicial accountability.

3. Organization of Paper

In focusing on the commission process, this paper divides naturally into three parts. The first part deals with the inputs into the commission system. This section attempts to find out who complains and the nature of those complaints.

The largest section of this report will be concerned with the conversion stage. This part discusses how complaints are processed, the mechanisms used, and the factors--external and internal to the commission--which shape the decisions.

The third section involves the outcome stage. This section presents data about the product of the commission system--the disposition of complaints by the commissions and by the courts. It concludes with the views of commissioners and judges about the success of the commissions, as well as the applicability of the states' experience to the federal system. Based on these data, the report concludes with some recommendations for a federal disciplinary procedure which would be both feasible and effective.

4. Research Issues/Questions

The purposes or objectives of the commission system, whether and how effectively these objectives are achieved, and to what extent they impinge upon or influence the outcome of the complaints, are the foci of this paper. Simply, the processing of complaints is the commission's chief purpose. The justifications for this purpose, however, are numerous: disciplining misconduct, reinforcing judicial guidelines, protecting the image of the judiciary,

making the judge more accountable for the administration of justice, and more accountable to the public.

Fulfillment of these purposes is complex. Not only do some of them conflict on occasion, but the commission confronts limitations which may prevent the fulfillment of these purposes. The commission system has placed upon it statutory and constitutional limitations. The commission cannot infringe upon the independence of the judiciary, and must provide the judge fair procedures and confidential proceedings. Finally, external and internal factors influence the final decisions of the commissions. This research attempts to provide evidence on the views of commission members and of judges from North Carolina, New York and Massachusetts about the success of the commission system in terms of achieving the intended objectives while maintaining judicial independence.

5. Research Methods

Since 1947, forty-eight states have adopted some form of judicial disciplinary commission. This may be the most extensive and rapid adoption of judicial reforms ever, and suggests the extent of the dissatisfaction of the states with impeachment for disciplining judicial misconduct. On the other hand, this history also shows the legislators' concern for providing commission procedures that would protect the judge from arbitrary actions and still provide effective deterrence.

The three kinds of commissions reflect different strategies to balance the protection of the judge with the protection of the public--the one-tiered system, the two-tiered system and the legislature-commission system.

About thirty-five states have adopted the one-tiered approach. Systems in which a single tier both investigates complaints and makes recommendations to the court are the most efficient. That efficiency, however, renders the commission more susceptible to charges of abuse and providing less due process than two-tiered systems. In view of this perception of one-tiered commission systems and a growing workload, most commissions, regardless of kind, have adopted procedures to separate the functions of screening, investigating, and recommending. In many states, once a commission decides to investigate, the commissioners have nothing further to do with processing the complaint. Panels of commissioners or outside masters hear the cases, and report the facts or make recommendations to the commissions. This procedure creates a de facto multi-tiered system. This functional merger provides checks and balances to offset the one-tiered deficiency.

The two-tiered system has two bodies, one to investigate and one to adjudicate the case. In various states, the Supreme Court passes on the second tier's recommendation (Ohio), reviews the second tier's order (Alabama), or issues a writ of mandamus to review its actions (Illinois). This multi-tiered process provides an extra check and balance to protect the judge, but that redundancy has created obvious delays. While some states have recently

adopted it, New York abolished its second tier in 1978. Eight states have some form of multi-tiered system.[51]

The third approach to prevent abuse by a commission retains removal authority in the legislature. The four states that have this system are South Carolina, Massachusetts, Arkansas and Rhode Island. The commission operates as a one-tier system, investigating the complaint and recommending actions to the high court. The court, however, can only censure or reprimand a judge; the judge can only be removed by impeachment or by other traditional procedures.

Methods

North Carolina, New York, and Massachusetts were selected as examples of the three kinds of commissions. North Carolina has a California-plan, one-tiered system. New York created the Court on the Judiciary in 1947, modified it into a two-tiered system--a commission and the court (1975)--and then shifted to a one-tiered system abolishing the court (1978). Massachusetts is one of a handful of states that operates a legislature-commission system.

The executive secretaries and many of the members in the three states were interviewed. Six persons were interviewed in North Carolina--the executive secretary, one bench, two lay, and two bar members. In New York, seven persons were interviewed--the executive secretary, a judge member, a lay member, and four lawyer members. Two executive secretaries, a judge and a lawyer member of the Massachusetts commission were also interviewed. Finally, the

executive secretaries in Maryland and in South Carolina were contacted. This method provided an in-depth study of the workings of individual commissions and the attitudes of the members.

A second method complemented the first. A questionnaire was sent to the executive secretaries and commission members in the American jurisdictions which maintain judicial conduct organizations (See appendix C). Permission was obtained to use questions from a similar survey sent out by Dr. Richard E. Dunn in 1973. Other questions were based on the literature and the interviews. Thus, the interviews provided a micro- and the questionnaires a macro-look at the workings of these commissions.

Because the data are either nominal (status of the member--judge, lawyer, lay) or ordinal (views about the role of the commission) and since this research is exploratory, only simple Chi-square (X^2) based significance tests are used on the data. These tests reveal whether a relationship exists between the variables. Given the observed frequencies, the formula tabulates the expected frequencies and estimates how often the given (observed) frequencies would occur by chance, given these expected frequencies. A .05 level of signfi-cance is a standard benchmark in political science research, meaning that the null hypothesis will be rejected, with a confidence of better than one in twenty times.[52]

The questionnaires had to receive Office of Management and Budget (OMB) clearance under the new human subjects regulations. The wording of a number of questions had to be revised. By error on my part, the ethnic origin item was mistakenly not changed ac-

cording to OMB standards. The error, however, was not detected until after the mailings, therefore precluding any analysis of this item.

Another questionniare was mailed to judges in the three case-study states.[53] It went to 221 judges in North Carolina, 239 in Massachusetts, and a random sample totaling 298 of 3500 New York judges. A total of 455 questionnaires were sent to executive secretaries and commmissioners and 758 to the judges. Fifteen judge surveys and 32 commissioner surveys were returned either unopened or with a reason for not answering the questionnaires. Thus, the questionnaires expected to be returned were 423 commission surveys and 743 judge surveys. The commission survey's response rate, based on returnable questionnaires, is 35%, 148 of 423. The judge survey's return rate was 30%, 222 of 743. The percentages varied from about 25% from New York, to about 35% from North Carolina. Although the rate is modest, it is sufficient to be suggestive of attitudes and trends.

Finally, using the Decennial Digest of reported cases, data were accumulated from nearly two hundred commission cases decided by the courts from 1965 through 1979. The overlap in this data provided empirical insights into the relationships among the commissions and other segments of their political environment. The insights, so gained, should be helpful in understanding the workings of these commissions in the states and their applicability as models for the federal judiciary.

6. Summary of Findings

The interviews with and questionnaires to commissioners suggest that the members take seriously their statutory mandate to investigate complaints and recommend action on findings of "willful misconduct in office, conduct prejudicial to the administration of justice," or other statutory language. The profession of members, perceptions about the role of the commission, and the composition of the commission seem to have little direct effect on the commission's decisions. But a caveat is in order. The modest return rate for the commissioners' survey thus far, 148 of 423 (or 35%), makes conclusions more tentative than definitive. Nonetheless, the responses, supplemented by interviews and observations, suggest that the commissioners base their recommendations on their assessment of the facts after full give-and-take discussions, and on their interpretation of their statutory mandate. The prior training and attitudes of judges, lawyers, and lay people may affect their assessments and interpretations; but discussion and exposure to views of different members counterbalance these tendencies. This itself is an important check against the potential abuse of the system.

The commissioners--judges, lawyers, and lay members--and the executive secretaries generally consider their commission to have been effective in disciplining misconduct. The commissioners and secretaries, for example, found that the commissions have been very or fairly effective in reinforcing the judicial standards for open-mindedness, 40 of 109 (36.7%); temperance, 55 of 108 (51.0%); courtesy to lawyers, 56 of 111 (50.5%); and professional integrity, 72 of 111 (64.8%).

Obviously, the judiciary is the group most directly interested in the work of the commission. With this in mind, judges in the three case study states were surveyed. Again, the low response rate, 222 of 743 (30%), precludes definitive statements about judicial views even in these three states. Nevertheless, these data show that most responding judges found the commissions to be effective without impinging on their discretion and independence.

This section concludes with a costs/benefits analysis of the commission system based on the responses of these judges in three states. The primary cost of the commission is its potential to infringe on or chill judicial independence and discretion. The data from the three states suggest that this cost may not be as high as many have feared.[54] One question in the judicial survey asked whether the commission had affected six listed functions of the judge. In all six cases, 85 to 95% responded that the commission had had no effect or indeed had a positive effect on these functions. Other questions assess the judges' perceptions about the benefits of the commission, such as reinforcing guidelines and punishing misconduct. The responding judges split over whether the commissions achieve some or all of these benefits. This suggests that, in these judges' eyes, the commission does not cost as much as its opponents fear nor benefit as much as its proponents hope. Independence remains the major concern, and judges do express uncertainty about the commission. These results suggest a further study to include a survey of lawyers, litigants, or legislators to assess their analysis of the costs and benefits of these systems.

Differences among judges in the three states are striking. North Carolina respondents for example, were much more laudatory

about their commission than judges in the other two states. Specifically, 73% of the respondents in North Carolina would recommend their commission as a model for a federal commission; the percentage of respondents so recommending in Massachusetts and New York was 48% and 43%. Because all three states have active commissions which have handled major cases, there is no straightforward explanation for this result.

The same question was asked of the commissioners. More than 75% in each category--bench, bar, lay members and executive secretaries--recommended their state's commission as a model for a federal system. These percentages bespeak a high degree of support by the commissioners for their systems.

The Disposition of Complaints and Cases

Dealing with the disposition of complaints and cases, the next section indicates further lessening of the potential costs or dangers to judicial independence. The commissions dismiss most complaints as frivolous or as beyond or outside their jurisdiction. Again, the court has the final word in these cases. The case law shows that most court cases involve abuses of power or illegal activities, not subsumed under judicial independence. Moreover, the courts and commissions provide the judge with due process protections, and the cases themselves provide guidelines to other judges, warning them against similar infractions.

The Federal Government

Based on a reflection of the states' experience and an assessment of recent efforts to establish a federal commission, a few

suggestions are offered for a bill which would be effective and be able to pass both houses of Congress. First, the federal system should implement a two-tier approach with appeal to the Supreme Court. Second, the Circuit Councils and the Judicial Conference should constitute the two tiers of the system. Supreme Court Justices should be excluded from the process. Finally, the commission should be limited to making recommendations of reprimand, censure and suspension (with pay).

Although there is no evidence of judicial vendettas against other judges, a two-tiered system would counteract the opportunity. The redundancy of two tiers also allows a second, independent look at the actions of the judge. And appeal to the Supreme Court would be one more check on any such abuse.

Using the Circuit Councils and Conference (either or both) as tiers, the bill would provide the members of Congress with known quantities, and thus enhance the chances of passage. Inclusion of elected members and representation of special courts could be provided. Using panels, or appointing committees or masters, these tiers could handle all complaints efficiently.

The exclusion of Supreme Court Justices is a political and practical move. Practically, there are only nine members who are all visible; the traditional impeachment process can handle any such misconduct. Politically, the importance of the high court for the structure of government deters many from voting to tinker with such a vital part of the system.

Finally a federal commission only needs the power to censure and suspend. This provision avoids the constitutional issue of whether impeachment is the sole form of removal. Moreover, impeachment can still handle any action egregious enough to demand removal. Based on the experience in Massachusetts with this arrangement and with California-plan commissions, a censure in a well-publicized case will reach the attention of the legislature. The judge who is the subject of a complaint often retires rather than faces removal proceedings in the legislature.[55] Without appreciably affecting the efficiency of such a federal commission, these suggestions should enhance the chances that such a bill can become law.

Footnotes - Introduction

[1]William F. Swindler, "High Court of Congress: Impeachment Trials, 1797-1936." A.B.A.J. 60 (1974): 420-23.

[2]Raoul Berger, Impeachment: The Constitutional Problem (Cambridge, Mass.: Harvard Univ. Press, 1973), pp. 94-7, citing Professor Jacobusen Broeck; Wright H. Andrews, Jr., "Judicial Removal of Federal Judges--A Statutory Alternative to Impeachment," Ga. S. Bar J. 11 (1974): 157, pp. 158-9. Pinckney was a South Carolina delegate to the Constitutional Convention.

[3]Larry C. Berkson and Irene A. Tesitor, "Holding Federal Judges Accountable," Judicature 61 (1978): 442, pp. 443-5.

[4]1978 poll conducted by Yankelovich, Skelly, and White, cited in "Judging the Judges," Time (August 20, 1979), p. 40.

[5]Sam Nunn, "Judicial Tenure," Kent L. Rev. 54 (1977): 29, pp. 31-3. In 1936, Senator William McAdoo argued in the Congressional Record: "The pressure of other responsibilities on the time of the Senate, together with the inevitable increase in the number of Federal judges, is clearly bringing us close to the time when this body will find it a matter of sheer physical impossibility to conduct a sufficient number of impeachment trials to render the prosepct of impeachment an effective deterrent to judicial conduct. On the other hand, the practical certainty that in a large majority of cases misconduct will never be visited with impeachment is a standing invitation for judges to abuse their authority with impunity and without fear of removal." Cong. Record (94th Cong., 2d sess., 4/23/36), Vol. 80, p. 5934.

[6]Berkson and Tesitor, supra note 3, pp. 445-6; Jack E. Frankel, "Removal of Judges: California Tackles an Old Problem," A.B.A.J. 49 (1963): 166.

[7]Berkson and Tesitor, supra note 3, pp. 445-7.

[8]"Removal of Federal Judges--An Alternative to Impeachment," Vand. L. Rev. 20 (1967): 723, citing Jefferson's letter to Wm. Branch Giles (4/20/1807).

[9]Berkson and Tesitor, supra note 3, pp. 446-7; see Chandler v. Judicial Council, 398 U.S. 74 (1970).

[10]Ibid.

[11]William F. Swindler, "High Court of Congress: Impeachment Trials, 1797-1936," A.B.A.J. 60 (1974): 420-3; Nunn, supra note 5, pp. 31-3.

[12]Robert W. Kastenmeier (D., Wis.), "Judicial Tenure Act," Cong. Record (95th Cong., 1st sess., 9/12/77), Vol. 123, #140.

[13]This subject is beyond the scope of my study. Here are a few works on the topic: Raoul Berger, Impeachment: The Constitutional Problems (Cambridge, Mass,: Harvard Univ. Press, 1973): S. W. Snarr and Bradley H. Parker, "'Good Behavior' Alternative to Impeachment," J. Contemp. L. 4 (1977): 38; Judith Rosenbaum and David L. Lee, "A Constitutional Perspective on Judicial Tenure," Judicature 61 (1978): 475; Thomas M. Boyd, "Removing Federal Judges: An Alternative to Impeachment," L.A. Bar Bull. 49 (1974): 416.

Professor Berger and Messrs. Snarr and Parker deal with the nature and continued existence of common law writs for removing judges which may have survived to the present.

[14]Edward J. Schoenbaum, "A Historical Look at Judicial Discipline," Kent L. Rev. 54 (1977): 1, pp. 5-7.

[15]Berkson and Tesitor, supra note 3, pp. 451-2; Evan Haynes, The Selection and Tenure of Judges (National Conference of Judicial Councils, 1944), p. 26.

[16]28 U.S.C. Sec. 331. The Conference is presently composed of the Chief Justice, the chief judge of each circuit court, a district judge from each circuit and the chief judges of the special courts.

[17]28 U.S.C. Sec. 332.

[18]John P. MacKenzie, The Appearance of Justice (New York: Charles Scribner's Sons, 1974), pp. 38-39.

[19]Chandler v. Judicial Council of the 10th Circuit, 398 U.S. 74 (1970); Berkson and Tesitor, supra note 3, pp. 449.

[20]Stewart A. Block, "Comment: The Limitations on the Proposed Judicial Removal Machinery: S. 1506," U. Pa. L. Rev. 118 (1970): 1064, p. 1065.

[21]Burke Shartel, "Federal Judges--Appointment, Supervision and Removal--Some Possibilities Under the Constitution," Part III, Mich. L. Rev. 28 (1930): 870, p. 875.

[22]Nunn, supra note 5, p. 36; U.S. Congress, Senate, Senator McAdoo speaking for an Alternative Method of Impeachment for Trial of Inferior Federal Judges, S. 4527, 74th Cong., 2d sess., 23 April 1936, Congressional Record 80: 5933, p. 5934.

[23]Nunn, ibid., p. 36; Berkson and Tesitor, supra note 3, pp. 452-3. On October 22, 1941, the bill passed the House 124 to 121, with 184 not voting. The Senate held hearings in late November 1941, two weeks before Pearl Harbor. World War II caused the Senate to shelve the reform.

[24]Berkson and Tesiter, supra note 3, pp. 454-5; M. Albert Figinski and Lee M. Miller, "Judicial Reform and Tydings' Legacy," Judicature 55 (1971): 75, pp. 78-9, citing Hearings on Judicial Fitness in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2d sess., pt. 1 and 2 (1966).

[25]Frank Greenberg, "The Illinois 'Two-Tier' Judicial Disciplinary System: Five Years and Counting," Kent L. Rev. 54 (1977): 69.

[26]Nunn, supra note 5, p. 36; Block, supra note 20, p. 1076.

[27]Ibid., p. 1065.

[28]Figinski and Miller, supra note 22, p. 79.

[29]Berkson and Tesitor, supra note 7, p. 454, citing U.S. Congress, Senate, Hearings on the Independence of Federal Judges Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 91st Cong., 2d sess., 1970.

[30]Schoenbaum, supra note 14, pp. 21-22. Alabama, Hawaii, Illinois, New York, Ohio, Oklahoma, and West Virginia then had two-tiered systems. New York adopted a one-tiered system in 1978; U.S. Congress, House, Judicial Tenure Act, H.R. 1850, by Dawson Mathis (D., Ga.), 95th Cong., 1st sess., 1/13/77, Sec. 377.

[31]U.S. Congress, House, Judicial Reform Act, H.R. 9042, by Robert W. Kastenmeier (D., Wis.), 95th Cong., 1st sess., 9/12/77.

[32]U.S. Congress, House, To Provide for the Review of the Behavior of Individual Justices and Judges by Three-Judge Panels, H.R.9541, by Paul Findley (R., Ill.), 95th Cong., 1st sess., 10/15/77.

[33]Nunn, supra note 5, pp. 36-9.

[34]Ibid., pp. 36-7.

[35]U.S. Congress, Senate, Judicial Tenure Act, Committee Print, Draft No. 3 of S. 1423, 95th Cong., 2d sess. (1978), Sec. 381 et seq.

[36]Ibid., Sec. 382.

[37]Ibid., Sec. 383 (c).

[38]Ibid., Sec. 384 (d) and 385.

[39]Ibid., Sec. 385-388.

[40]Ibid., 389.

[41]U.S. Congress, Senate, Judicial Tenure Act: Report of the Committee on the Judiciary on S. 1423, 95th Cong., 2d sess. (1978), p. 3.

[42]"Disciplining Judges: New Efforts in an Old Controversy," Cong. Quarterly (April 7, 1979): 640.

[43]U.S. Congress, Senate, mimeographed draft of Judicial Conduct and Disability Act of 1979, S. 1873, 96th Cong., 1st sess. (1979); Greenberg, supra note 25.

[44]Frederic Miller, "Discipline of Judges," Mich. L. Rev. 50 (1952): 737.

[45]George E. Brand, "The Discipline of Judges," A.B.A.J. 46 (1960), 1315.

[46]L. Lewis, "Judicial Discipline, Removal, and Retirement," Wis. L. Rev. (1976): 563, pp. 564-6.

[47]William F. Swindler, "Seedtime of an American Judiciary, 1775-1800," in American Courts and Justice, Glenn R. Winters and Edward J. Schoenbaum (eds.) Chicago, Ill.: The American Judicature Society, 1976), p. 31.

[48]Evan Haynes, The Selection and Tenure of Judges (The National Conference of Judicial Councils, 1944), pp. 99-101.

[49]Edward J. Schoenbaum, "A Historical Look at Judicial Discipline," Kent L. Rev. 54 (1977): 1, pp. 9-10.

[50]Lewis, supra note 46, pp. 564-7.

[51]These are Alabama, Oklahoma, Delaware, Alabama, Illinois, Hawaii, Ohio, West Virginia.

[52]Hubert Blalock, Social Statistics (1972), pp. 275-85. Yates' connection for continuity is not deemed necessary for the data.

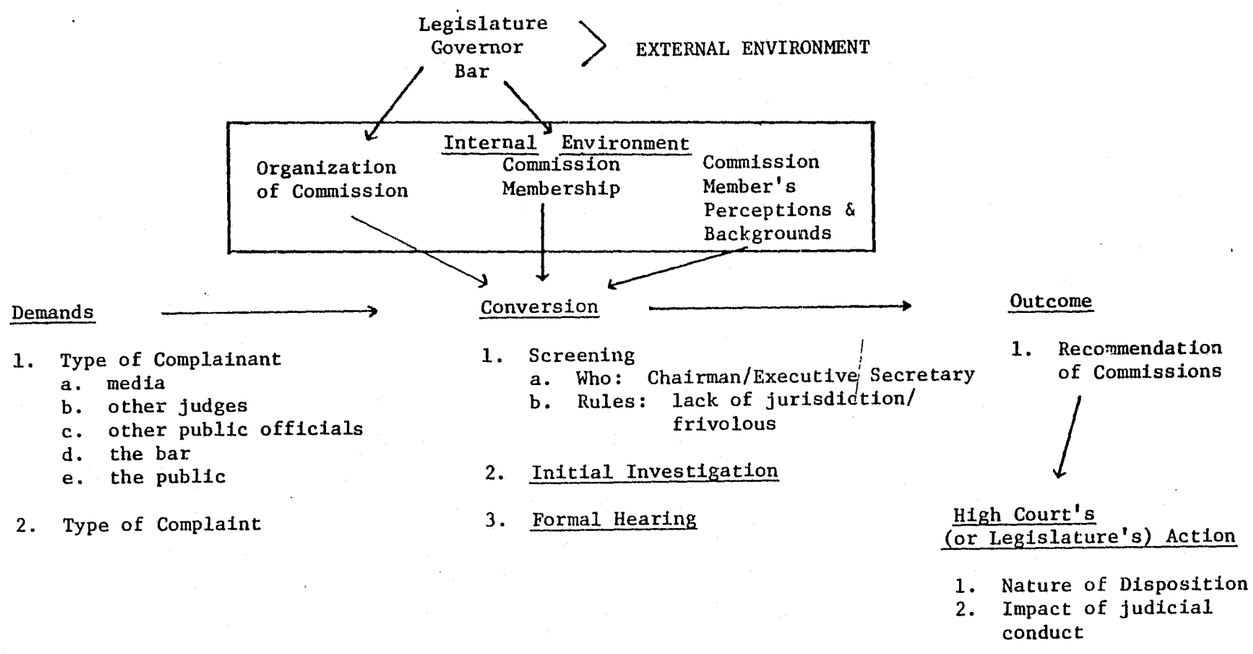
[53]See Appendix B.

[54]Frank J. Battisti, "An Independent Judiciary or an Evanescent Dream," Case West. Res. L. Rev. 25 (1975): 711.

[55]In re Bonin, 378 N.E.2d 669 (Mass., 1978).

PART II: The Process of Judicial Conduct Commissions

The Process of Judicial Conduct Commissions



Differences in the organization and membership of the state judicial conduct commissions notwithstanding, they basically adhere to the same scheme of complaint treatment. Rules about who can complain and the subjects, form, and nature of the complaint are established by statute or by the court or commission itself. These rules include whether all judges are subject to the process, whether the complaint must be certified and in writing, and whether the commission's jurisdiction extends to judicial action subject to appellate review (never) and disability (usually) as well as to misconduct.

Further, the conversion stage generally involves an initial screening by a designated person(s) and is based on certain rules. The complaints that are considered to merit further investigation are forwarded to a panel of commission members, special masters or the commission undertakes this task before the formal hearing, depending on the structure or organization of the commission and established procedures. Procedures regarding due process and grounds for imposing sanctions are established and followed in this stage of the complaint handling process. Despite the differences in the internal environment, the external environment of all commissions is composed of similar elements. For example, the state executive, legislature, and judiciary all impinge to some extent on the workings of the commission. The bar, the media, and other interested parties may also influence this stage of the proceeding.

Commissions also vary with respect to the mode of sanctioning and outcome determination. Most commissions in fact only recommend that a judge be sanctioned by the state supreme court. In most states, these sanctions include reprimand, censure, removal, and retirement.

Chapter 2: The Demand Stage

Who complains and what he/she complains about largely determine the work of the commission; the complainants control the type of cases with which the commission deals.* Of course, the public needs to be informed about the commission in order to bring its complaints. The role of the media in publicizing the commission, therefore, is of major importance to the number and the nature of complaints received by the commission.

1. Who Complains and the Nature of Complaints

TABLE I Complainants Nationwide in 1977[1]

Type of Complainant	Percentage
disappointed litigants	63.0
concerned citizens	12.7
judges & judicial personnel	3.8
lawyer & bar groups	12.3
commission initiated	3.8
court watchers, public officials and others	4.4
	100.0%

Although nationwide disappointed litigants brought most of the complaints (63.0% in 1977), they were the least likely to receive satisfaction. According to executive secretaries in New York and North Carolina, many litigant complaints concerned legal decisions of the judges, decisions expressly beyond the commission's jurisdiction. Between January 1975 and December 1977, the New York Commission on Judicial Conduct, for example, dismissed 640 (32%) of all its complaints for lack of jurisdiction.[2] In the same period, the North Carolina Judicial Standards

*Most states, however, allow the commission to proceed on its own motion.

Commission dismissed 78 (52%) of its complaints as "frivolous."[3] (See Table 1.) Nationwide, the commissions received another one-eighth (12.7%) of their complaints from concerned citizens. Therefore seventy-five percent of all complainants were members of the lay public.[4] This ombudsman service has helped to make the judicial system more responsive to popular expectations.

In 1977, judges and lawyers brought a considerable percentage of the complaints. Nationwide, judges and judicial personnel, in a position to observe misconduct, inititated 3.8% of the complaints, belying fears of a judicial protection society. Lawyers and bar groups brought 12.3% of the complaints in 1977,[5] disproving as well, the conjecture that lawyers will not challenge the conduct of judges before whom they practice. These lawyers' complaints have been critical to the success of the commissions. Appearing regularly before the court, lawyers can distinguish judicial discretion from judicial abuse. In North Carolina, for instance, the commission dismissed fewer lawyers' complaints; 20% of the attorney-inititated complaints resulted in action, private or public--double the rate for the total complaints.[6] Finally, the commission inititated 3.8% of the complaints, or one out of twenty-five, on its own motion.[7] The remainder were brought by public officials, court watchers, and so forth.[8]

Table 2

The Kinds of Complaints[9]

Subject	North Carolina 1975-77 Complaints	% of Total	New York 1975-77 Complaints	% of Total	% Minus Ticket Cases
Dismissed for lack of jurisdiction	81	53.6	724	36.0	46.2
Demeanor of judge	9	6.0	325	16.0	20.8
Conflicts	-	-	187	9.5	11.9
Delays and incompetency	30	19.8	135	6.8	8.7
Improper political activities	-	-	32	1.5	2.0
Bias	10	6.6	65	3.5	4.2
Corruption	9	6.0	50	2.5	3.2
Ticket-fixing	2	1.3	429	21.5	-
Intoxication	-	-	10	0.5	0.6
Miscellaneous	10	6.6	39	2.0	2.4
TOTAL	151	99.9	1996	99.8	100.0

The commission dismissed most of the complaints as frivolous or beyond the jurisdiction of the commission. The nationwide percentage, excluding New York, was 79% in 1977.[10] After dismissal of the frivolous complaints, the rest divide into three groups. The first involves the competency or fitness of a judge to perform his duties--questions of ability, delays, and backlogs. The second involves abuses of power from simple rudeness to favoritism, bias, corruption, and conflicts of interest. And the third deals with private conduct. Of course, many cases involve allegations of violations in all three areas. Although most states authorize discipline of conduct unbecoming or prejudical to the judiciary, many judges and commissions question whether this language extends to private action. In egregious cases, courts have removed judges for off-bench conduct, especially that involving criminal activities.[11]

2. Role of the Media

The role of the media in the proper functioning of the commission process cannot be overstated. The media inform the public about the commissions and their proceedings. Through their stories, the media can pressure the commission or the rest of the government. Conversely, their support can be a major factor in commission politics. The media have, indeed, been the most salient feature in the political atmosphere in the three case study states.

New York. Given their often conflicting interests, relations between commissions and media have been friendly at times, hostile at others. The media have a long-standing interest in judicial reform. Ticket-fixing was a big story, and most of the media supported the commission.

The New York City newspapers reported these cases accurately. Unlike the North Carolina commission, which is bound by strict confidentiality,

the New York commission can issue press releases and be more open to the public and the media. The New York commission, conscious of the media, issues packets, which include the commission's rules, with its press releases. The Administrator has logged hours "educating" the media about the commission.[12] The commission prepares its releases to educate the media and, through them, the public.[13] Such political savvy benefited the commission in these cases.

Judicial reform interests editors, and they put their best people on it. As a nonexpert, a reporter may miss technicalities, but the commission attempts to prevent such things from happening often.[14] Occasionally, reporters who have not read the statute write articles stating the commission suspended judges, a power reserved to the courts. On the whole, however, Mrs. Gene Robb, chairwoman and a publisher herself, believes that most of the media have done a good job. As examples of good reporting, she singled out the New York Times, New York Daily News and some upstate papers.[15]

Nevertheless, the media, the commission, and judges have clashed over confidentiality. Reporters have uncovered complaints supposedly protected. The aggrieved judge or complainant often presents his version of the facts to the press. Real leaks have been rare, and Administrator Stern could only name four incidents in which the press had cited "unnamed sources."[16] Some judges believe that the commission leaked these and other stories. Although there is no evidence, the rumors increase the tension among the media, the commission and the judiciary.

One can document the effect of media coverage on the commission. In the first few months of the commission, only two or three percent of the complaints came directly to it. The offices of the courts, legislature, and governor forwarded most. By 1978, 95% of the complaints came directly

to the commission; 90% were addressed to Mr. Gerald Stern, Adminstrator.[17] In all, the commissioners assess media-commission relations as positive, considering the nature of the media.[18]

Massachusetts. Before the committee or commission, the media investigated and reported judicial misconduct to the public and the court. The Boston Globe publicized Judge Larkin's attempt to give a contribution to Governor Sargent in violation of the Code of Judicial Conduct and state law. In 1975, the Supreme Judicial Court censured the judge.[19]

The watchdog role of the Massachusetts media persisted after the establishment of the committee and commission. On January 11, 1979, the WBZ-TV "I-team" presented a 32-minute show about the misconduct of some judges. The show resulted in a complaint filed by the commission against several judges.

Most of the publicity about judicial misbehavior and the commission emanates from the newspapers. Most of the complaints, especially from Boston, are marked "c.c. to the Boston Globe." Although the commission cannot control this situation, some judges have accused it of thereby violating confidentiality.[20] Such accusations resulted in the enactment of a new law that forbids the commission from commenting on the cases before it.[21]

North Carolina. The Peoples case in North Carolina delineates the influence on the public that the media can exert in a big case.[22] Linwood T. Peoples was a district judge in the 9th Judicial District in north central North Carolina. In a routine investigation, state auditors discovered 49 cases held in abeyance, some since 1974. These were mostly traffic cases, including

drunken driving, of local businessmen and friends of the judge.[23] Within fifteen months, in re Peoples would be the source in one newspaper of sixty-five articles, three letters to the editor, and two editorials.

The district's chief judge ordered Peoples not to sit on any criminal cases pending the outcome of the complaints.[24] Early, the jurisdictions overlapped, creating the impression that someone was persecuting the judge. The State Bureau of Investigation began investigating before the Judicial Standards Commission had received any complaints.[25] Because he worked with Peoples and believed there had been no criminal violations, the district attorney requested an advisory opinion from the Attorney General. Though conceding that there were "a whole lot of things he (Peoples) should not have done," the district attorney concluded that this case would be better handled by the Bar or some other professional body. "Peoples," he said, "was trying to help some of this friends. Everybody should have to sup from the same spoon, as far as I'm concerned, but helping people he'd known all his life was his only motive, I'm sure."[26]

The Durham papers in an editorial supported the removal of the judge by the commission, even if there were no indictments.

> Although small favors from the bench constitute small sins common to almost every courtroom, we have a right to expect better from our judges whom we elect on the supposition that they will serve the spirit as well as the letter of the law.[27]

The grand jury indicted Peoples for embezzlement and retaining filing fees in some of these cases. The amount was under $100.[28] Letters to the editor expressed the belief that Peoples was being railroaded.[29] The commission held hearings and recommended that Peoples be removed, not be allowed to hold office, and forfeit his retirement pension. The

commission found that Peoples had violated the judicial code, regardless of whether he had received money for these activities. With this, the members recommended removal to the supreme court.[30]

Meanwhile, Peoples won the Democratic primary in a close race, 14,207 to 13,639. There would be no Republican opposition. Peoples and his defenders argued that the people had vindicated him.[31] Also, in the fall of 1978, two separate trials found Peoples innocent of embezzlement. One juror told the press: "Some jurors thought Peoples put some things in the wrong place but didn't think he took the money for his own use."[32]

The state supreme court, nevertheless, accepted the recommendations of the commission and removed Judge Peoples. Peoples raised the philosophical question of the legitimacy of his removal in the face of the popular vote. "The people who voted for me wasted their time going to the polls to vote if, after having elected me, I can be barred from holding the position." A citizens defense committee raised funds for his appeal.[33]

This incident damaged the reputation of the commission among some segments of the public. The Durham papers supported the commission; however, they did a mediocre job of presenting the legal situation. The standard of proof in North Carolina cases is "clear and convincing evidence," a lesser standard than the criminal standard of "beyond a reasonable doubt." Peoples' criminal trial had involved criminal statutes; the commission case dealt with ethics and questions of fitness. The newspaper did not make these distinctions clear.[34]

If the North Carolina commission had the resources of the New York commission, the executive secretary may have been able to educate the

press better, and some of this confusion may have been avoided. Although the media may have a major impact in a few such cases, the commissions proceed largely unobserved.

3. Role of the Lay Public

The media and organizations such as the League of Women Voters inform the public about the commission and its activities. The public can exert their influence on the commission in two ways: (1) as a body, through voting, directly, as on amendments, or indirectly through the election of public officials; and (2) individually, or as complainants, and direct users of the system.

Nationwide, over three-quarters of the complaints in 1977 were brought by disgruntled litigants and concerned citizens.[35] Handling these complaints is crucial to the commission. If the complainants perceive that their complaints have received a fair review from the commission, the commission can build a reserve of support and good feeling, which would generate more complaints and facilitate its role as ombudsman. Explaining why complaints are dismissed will also, over time, lessen the number of frivolous complaints, further facilitating the commission's work.

Footnotes - Chapter 2

[1]Irene A. Tesitor, Judicial Conduct Organizations (Chicago: American Judicature Society, 1978), pp. 5-6, excluding New York in these statistics.

[2]New York Commission on Judicial Conduct Annual Report (1978), p. 132.

[3]Mimeographed compilation by Dallas Cameron, Jr., former executive secretary of N.C. Judicial Standards Commission.

[4]Tesitor, supra note 1, p. 6.

[5]Ibid.

[6]Cameron, supra note 3.

[7]Tesitor, supra note 1, p. 6.

[8]Ibid.

[9]New York Annual Report, supra note 2, p. 132; Cameron, supra note 3.

[10]Tesitor, supra note 1, pp. 7, 32-33.

[11]In re Haggerty, 241 So. 2d 469 (La., 1970).

[12]Gerald Stern, interview held with Administrator of Commission on Judicial Conduct, New York, N.Y. (3/26/79).

[13]Victor Kovner, interview held with bar member of Commission on Judicial Conduct, New York, N.Y. (4/4/79).

[14]David Bromberg, interview held with bar member of Commission on Judicial Conduct, New York, N.Y. (4/13/79).

[15]Mrs. Gene Robb, interview held with chairwoman, lay member of Commission on Judicial Conduct, Albany, N.Y. (4/26/79).

[16]Stern interview.

[17]Ibid.

[18]Four interviews.

[19]In re Larkin, 333 N.E. 2d 199 (Mass., 1975).

[20]McKenney v. Commission on Judicial Conduct, unofficial synopsis from the Reporter of Decisions (Mass., 1979). Justice Elbert Tuttle, interview held with judge member of the Commission on Judicial Conduct, Boston, Mass. (4/11/79).

[21]Steve Limon, interview held with executive secretary, Commission on Judicial Conduct, Boston, Mass., 5/7/79; John F. Burke, interview held with executive secretary, Committee on Judicial Responsibiltiy, Boston, Mass., 4/9/79.

[22]In re Peoples, 250 S.E. 2d 890 (N.C., 1978).

[23]Ibid.

[24]John Coit, "Vance Judge Under Probe," Durham Morning Herald (9/30/77).

[25]"D.A. Is Studying Report on Judge," Durham Morning Herald (1/13/78).

[26]"Advisory Opinion Requested," Durham Morning Herald (1/13/78); John Coit, "No Criminal Offense Reported by White," Durham Morning Herald (1/18/78).

[27]"The Judge Shows Callous Attitude," Durham Morning Herald (1/21/78).

[28]John Coit, "Peoples Indicted in Embezzlement," Durham Morning Herald (4/5/78).

[29]Letters, Durham Morning Herald (4/19/78); (5/6/78); (1/10/79).

[30]"Judicial Panel Recommends Peoples Forfeit Retirement," Durham Morning Herald (4/26/78).

[31]Jack Holmes, "Peoples Tops Foe in Judge's Race," Durham Morning Herald (5/4/78).

[32]Jack Holmes, "Peoples Found Innocent of Embezzlement," Durham Morning Herald (8/11/78).

[33]Don Frederick, "Peoples Plan Appeal to Acquire Judgeship," Durham Morning Herald (1/17/79); Letter, Durham Morning Herald (1/10/79); Carol S. Smith, "Defense Fund Begun," Durham Morning Herald (1/19/79).

[34]"He Should Not Warm This Bench," Durham Morning Herald (5/10/78).

[35]Tesitor, supra note 1, pp. 5-6.

Chapter 3. The Conversion Stage

After receiving the complaints, the commission processes them. As we have seen, most of the complaints are dismissed after the initial screening or after an investigation. The surviving few usually result in a formal hearing before the commission. These complaints may be dismissed or result in some action. Some commissions may order discipline which is subject to appeal to the high court. Most commissions, however, make recommendations of sanctions directly to the high court, a second-tier, or a court on the judiciary.

1. History

The history or evolution of these systems provides insights into the politics which still affect the working of these commissions. New York's Court on the Judiciary was the first modern non-legislative procedure for disciplining judges.[1] Between the establishment of this Court in 1948 and 1973 (twenty-five years) thirty-nine states established and maintained judicial disciplinary systems.[2] By 1978, forty-eight states, the District of Columbia, Guam, and Puerto Rico had such organizations. Using 1960, when the California Commission was created as an alternative benchmark, 51 jurisdictions have adopted the reform in eighteen years.

In New York, several instances of judicial misconduct had tainted the reputation of the judiciary and engendered a climate for reform. In his 1945 annual message to the New York legislature, Governor Thomas Dewey renewed the debate over judicial removal by proposing that a court on the judiciary be established.[3] The press, political parties, former members of the Court of Appeals, deans of the major law schools, and most of the bar supported the proposal. Although the court that emerged was a compromise, the public viewed it as a great reform.[4]

Because it was an untested compromise, the court soon disappointed its advocates. No staff received and processed complaints or developed expertise.[5] The court had limited powers and jurisdiction. The proceedings of the court could be stayed if the legislature preferred to handle the case.[6] Overlapping the Court, the four Appellate Divisions still could discipline lower court judges.[7] Only the chief judge, governor, presiding judges of appellate divisions, or a majority of the executive council of the State Bar Association could convene the court.[8] The difficulty of invoking the process facilitated the appearance of cover-ups, and the composition of the court enhanced it. The court on the judiciary did not convene until 1960, nor did it remove its first judge until 1963, and it has convened only six times between 1947 and 1974, resulting in several removals.[9]

In late 1975 voters approved legislation which established a permanent State Commission on Judicial Conduct. It was a two-tier system whereby a commission tier investigated and made recommendations and a separate court adjudicated the case.[10] In 1977, New York voters abolished the Court on the Judiciary and the commission assumed the court's duties.[11]

To avoid losing the advantage of two-tiers, the commission and its staff duplicated the separation of investigating and adjudicating. After the commission orders an investigation, the staff investigates independently of the commission. The staff lawyer presents the case to the referee as a prosecuting attorney. If the commission needs assistance, it can hire special counsel.

The commission appoints the referee or hearing officer. The officer, a retired judge or prominent lawyer, hears the case and reports

to the commission. Then, with the report, the commission hears oral arguments from the staff lawyer and the judge's counsel. The commission can decide the case or remand it for further hearings.[12]

The One-Tier - California System. New York arrived at its hybrid systems through trial and error. Meanwhile, states such as California experimented with other methods of judicial discipline. The 1959 session of the legislature produced the Judicial Qualifications Commission, based on the American Judicature Society's Model Judiciary Article. The voters approved it on November 8, 1959, and the commission became effective on March 24, 1961.[13] This plan is dominant in the states, and is the focus of most of this report.

Commission-Legislature Plan. Five states have the commission-legislature system. Today, Rhode Island, Massachusetts, Tennessee, Arkansas, and South Carolina have this compromise system.[14] Tennessee recently adopted a Court on the Judiciary. These systems have a commission to recommend lesser sanctions to the court, but removal remains with the legislature.[15].

The system developed in two ways: (1) as a court-sanctioned stop-gap in the absence of constitutional or statutory power for the court or legislature to act; and (2) as a political compromise between the judiciary and legislature. If the constitution holds or is interpreted to hold that removal is effectuated solely by impeachment, the court may still impose lesser penalties. Furthermore, a commission that investigates and recommends removal to the legislature does not usurp the impeachment power; it facilitates it.[16] Similarly, the Nunn Bill, on the federal level, would have authorized the commission to recommend impeachment against a Supreme Court Justice, reflecting the political position of the Supreme Court in the United States government.[17]

Blurring Distinctions. Many procedures for the handling of complaints are common to both one- and two-tiered systems. Moreover, many policy distinctions are not correlated with the kind of commission. Take, for example, the question of whether the formal hearing should be opened or closed. Michigan, Indiana (one-tiered), and Illinois (two-tiered) hold open hearings; California and most of the systems maintain confidentiality until the commissions file their recommendations with the high court.[18]

New elements in the system do not respect the old divisions. Some states (one-tiered and two-tiered states) establish committees to advise judges concerning the Code on Judicial Conduct. These advisory opinions are not binding, but guide the judge on unclear questions. These committees teach and deter. Their opinions are admissible as evidence in a disciplinary proceeding.[19]

Since their inception, commissions have used hearing masters, panels, and referees almost as a first tier, blending differences between one-tier and two-tier.[20] The New Hampshire and Massachusetts high court used hearing officers who are often judges, to filter complaints and to supervise lower court judges with the least expenditure of time.[21] Until the New Jersey legislature established a commission in the 1970's, the supreme court had to use local bar ethics committees and masters as the "functionally equivalent device of (a hearing agency.)"[22]

To facilitate their work, commissions use panels or referees to hear and to report the facts of the cases.[23] Several state courts have rejected due process challenges to this procedure.[24] This bifurcation assuages fears of opponents that the investigating commission cannot adjudicate the case impartially. Usually a judge, the master hears the

evidence nad reports to the commission.[25] At the extreme, West Virginia has three tiers--investigatory, prosecutory and adjudicatory.

One-Tier/Two-Tier Systems. Because this study is based on one California plan (North Carolina) and one two-tiered plan (New York until 1978), the effectiveness of one- and two-tiered systems cannot be compared conclusively. It could be said, however, that the information suggests that the effectiveness of a commission system is determined by more than tier structure. The New York system during its two-tiered stage became embroiled in the ticket-fixing affair, in which the commission's interim report attracted much attention and provoked the suspicion of village and town justices being investigated. Theoretically, with more checks and balances, the two-tiered system should be less susceptible to poor relations with the bench than the one-tiered system. Moreover, in New York, the second tier was composed of judges, which would seem to further minimize the difficulty. But unlike most states, the New York commission could censure judges, subject to appeal to the Court on the Judiciary. Because of this power, the buffer between the commission and judiciary was therefore weaker than it was for some two-tiered systems.

Several commissioners admitted in interviews that the interim report may have been a mistake, and had hurt both the image of the judiciary and the standing of the commission. As discussed earlier, the commission was caught in judicial politics between the village and town justices and the statewide courts. Finally, unlike any other state commission, New York's had the staff and money to undertake that mammoth investigation.

This problem would be less likely to occur in Illinois, which also follows the two-tiered approach. First, the Illinois lower tier, the

Judicial Inquiry Board, does not recommend sanctions, but only finds whether the complaint presents a "reasonable basis" to suspect that misconduct has occurred. Also, confidentiality of the Board's proceedings is apparently stricter than that of the New York Commission. According to the Illinois Constitution, "all proceedings of the Board shall be confidential except the filing of a complaint with the Courts Commission."[26] A New York-type interim report would have exceeded the power of the Illinois Board. Given the varied nature of states, two state studies--New York and North Carolina--would not justify an analysis into relative effectiveness of the two kinds of commissions.

2. Procedure

Rules. The procedures discussed here follow the one-tiered approach. Complainants include litigants and defendants, attorneys, and court and legislative officials. In forty-one states and the District of Columbia, the commission can initiate proceedings on its own motion in the absence of a formal complaint. The three case study states follow this practice.[27]

The 1978 A.B.A. Standards for Judicial Discipline and Disability recommend accepting complaints from all sources and on the commission's own motion.[28] The commissions dismiss most complaints as frivolous without publicity. As for the rest, because of confidential screening, the guilty judge can resign without harmful publicity. The ability of commissions to resolve minor infractons informally makes them more flexible. Statistics cannot measure the corrective value of these informal activities.[29]

In California and some other states, the commission explains to the complainant the reasons for dismissal of the complaint. This is good public relations and also serves an educative purpose. Citizens are less

likely to feel that the commission is sweeping things under the rug.

In 28 states and the District of Columbia, the executive secretary screens complaints and determines whether they have prima facie validity. This is the practice in North Carolina and New York, but not in Massachusetts. On his recommendation or presentation, the commission decides, by majority vote, to hold a preliminary investigation. The courts do not require notice to the judge at this stage; however, most states, such as California, let the judge explain or correct his behavior.[30] If the complaint is minor, such as taking long recesses or wisecracking, a letter or call could conclude the proceedings with a verbal promise from the judge to stop such behavior.[31]

Colorado uses such a one-tiered, two-step process. The chairman and executive secretary review the complaints and decide which to docket. The commission may discuss any complaint, but rarely challenges the decision of the chairman. Likewise, until North Carolina got a permanent staff, the chairman and one other member reviewed and dismissed complaints, subject to commission veto. In Michigan, the staff of the commission prepares a report and submits ballots to each commissioner. One vote invokes a meeting. To commence a formal proceeding, however, five members must find sufficient cause.[32]

The Standards recommend "discrete" telephone calls to screen complaints; the caller swears the contacted person to secrecy. Colorado allows its commissioners to telephone.[33] In 27 states, including the case study states, the executive director or a staff member conducts the preliminary investigations. Sixteen commissions hire investigators or attorneys and another 8 bring in government agencies for this task. A few states use all three.[34] The Standards recommend that the staff should do the investigating. The commission should avoid using the attorney general's staff or a law enforcement agency, because people associate albeit unfairly, a law enforcement investigation with criminality and guilt of the investigated judge.[35]

Keeping the initial commission's procedures informal provides the judge with the "opportunity to retire with honor" or "the motivation to correct behavior when warned by letter." Jack Frankel, California's Executive Secretary, found this a great advantage of commissions.[36]

After the investigation, many commissions often use masters to hear evidence in complex cases. Because of the workload, California uses them in most cases. The masters or a panel of commissioners reports to the commission, which accepts or rejects the report or requests further fact-finding.[37]

The method of notifying a judge of an investigation varies by case and by commission. Due process requires notice of and opportunity to be heard at the formal hearing, and although most commissions give earlier notice, due process does not require it. The Standards recommend that the commissions should give notice before the decision to hold a formal hearing in ninety percent of the complaints.[38]

Sufficient and Probable Cause. If the informal processes do

not resolve a complaint, the commission can order a formal hearing on finding of sufficient cause, usually by majority vote.[39] Sufficient cause does not constitute probable cause. Sufficient cause denotes that the complaint is not frivolous, and that the commission should investigate further. Based on sufficient cause, a formal complaint initiates a full investigation and the probable cause hearing.[40]

The Standards committee defines probable cause as evidence of misconduct in which the judge is or has been engaged and which warrants formal review. Many commissions determine this without the presence of the judge; the Standards recommend his/her presence for fairness and efficiency.[41] Recommending open formal hearings, the committee members believe that the probable cause hearing has fulfilled the purposes of confidentiality.

Although there is a trend toward open hearings, only ten states have them.[42] The hearings in the case study states are closed. Despite elaborate hearings lasting days with dozens of witnesses and exhibits, the record in most states remains confidential until recommendation is made to the court. Then, anyone may inspect the transcripts and the briefs of the parties.[43]

While confidentiality protects the reputation of the innocent judge as well as allows the complainant to come forward in anonymity, many of its defenders recognize confidentiality's limitations--the dangers of misunderstandings and leaks which can be harmful to the judge, the witness, the complainant, or the commission. Retaining confidentiality for the preliminary hearing, the Standards and many statutes have authotized press releases to alleviate some of these problems. Moreover, some commissioners believe that public hearings could dispel public mistrust of such clandestine operations. As a further benefit, a notorious case

can inform potential users about the commission.[44]

The Michigan statute provided for public hearings, representation by counsel, and use of the civil rules of evidence and procedure.[45] Before 1979, Wisconsin authorized the public hearings before the full commission. A master received testimony and reported to the commission. If the judge did not object, the commission would adopt the report and would decide the case. Unlike most commissions which make recommendations, the Wisconsin commission issues orders, which the judge can appeal to the supreme court.[46]

At the hearing, a reporter records a verbatim transcript. The North Carolina rules permit "legal evidence" only. As a court, the commission has the power (or authority) to subpoena, swear in, and compensate witnesses. The North Carolina chairman--always the member from the Court of Appeals--rules on evidentiary matters, but all members may question the witnesses. Counsels for the judge and for the commission present evidence, examine and cross-examine witnesses.[47] Unlike a court, this commission has no representatives of the press present, and swears the witnesses "not even to reveal the fact that the hearing has been held." Only cases recommended to the supreme court lose that cloak of secrecy.[48]

The Massachusetts commission also acts under extreme confidentiality imposed by statute and rules. The statute limits the commission to press releases that explain the jurisdiction and procedures of the commission. This restriction has had unexpected results. Unlike the old rules established by the court, the statute does not even allow the commission to exonerate the innocent judge.[49]

My case studies reveal public mistrust of the private session. Because confidentiality protects the witnesses from harrassment and judges from frivolous charges, the Standards still sanction confidentiality for the preliminary stage and require explanation to the complainant why the commission dismissed his complaint. The drafters hoped that such openness would foster both respect and familiarity.[50]

6. Due Process. Federal district and circuit cases have upheld state court decisions that the "full panoply (of due process) does not apply to removal procedure." There is "no constitutional right to hold office." In Gruenberg v. Kavanagh, the district court ruled that interim suspension of a judge had not raised substantial due process questions.[51] But, along with statutory procedures, the case law dealing with due process does place limits on the commission by establishing the rights of the judge.

Due process has to be flexible because the judge often has to balance protected interests. In Matter of Del Rio, Michigan's Judicial Tenure Commission had announced, before it had filed the complaint, that an investigation was underway. The court ruled that this announcement did not infringe upon the judge's due process rights. The statute authorized the commission to issue reports when public knowledge and distortion already imperiled the rights of the parties. The courts deferred to the commission's judgment that this danger outweighed the danger to the defendant from this clarification.[52]

The Rights to Trial, Notice, and Opportunity to be Heard. The courts agree that the judge has no right to a jury trial in these proceedings. Its sui generis nature removes the procedure from the common law tradition.[53] Some courts have drawn the analogy to bar

disciplinary proceedings also conducted without juries.[54]

But courts assure the judge notice and opportunity to be heard even when they do not grant the "full panoply." Before the formal hearing, courts enforce a lesser standard of notice about the charges, but at the formal hearing the charges must be clear and timely for the judge to prepare a full response.[55] These rights lie at the core of due process.

Combination of Investigatory and Adjudicatory Functions. The combination of investigatory and adjudicatory functions in a single agency does not deny due process. The Pennsylvania commission removed a city magistrate who requested a federal three-judge panel to hear his issue. The Pennsylvania commission presented the strongest case of combining the two functions because the executive secretary who carried out the investigation was also a voting member.[56] Still, the federal court ruled that the case had not raised a federal question.

The U.S. Supreme Court has accepted such schemes for disciplining workers. The U.S. Supreme Court ruled that a job was not an interest analogous to the loss of liberty and that a removal process did not need to approach the full protection provided in the criminal process.[57] In 1977, the District of Columbia Court of Appeals ruled that the commission concept encroached on neither the separation of powers nor judicial independence. The court rejected a list of due process challenges, including the mixing of investigation and prosecution.[58]

In 1975, the Alaska supreme court ruled that while there was no per se violation of due process in the mixing of adjudicatory and investigatory functions, the court must determine whether the judge received

a hearing before an "impartial tribunal." If the mixing of functions did not bias the commissioners, the process preserved due process. The court found no bias, and censured the judge.[59]

Due Process (Summation). Although the commission proceedings do not invoke the "full panoply" of due process rights, the judge does have the rights to have the case processed through normal channels, the rights to notice, to respond, to have counsel, and to produce and cross-examine witnesses. The rights of the judge increase as the complaints progress from the preliminary stages to a formal hearing and adjudication. The judge has the right to a fair hearing before an unbiased commission.[60]

d. Standards of Evidence

Numerous courts have litigated standards of proof with mixed results. The dominant position has been that the commission must prove its charges with "clear and convincing evidence."[61] In most civil cases, courts employ the weakest standard of proof, the "preponderance" of the evidence, "proof which leads the trial jury to find that the evidence of the contested fact is more probable than its non-existence." An element of doubt is permissible. Only a handful of states have adopted this standard for judicial proceedings.[62]

"Beyond a reasonable doubt" is the criminal standard. The Standard propounds the belief that it is worse for an innocent person to be found guilty than for a guilty one to go free. Constitutional protections are fully operative in criminal proceedings. Only New Jersey has adopted that standard.[63]

The standard accepted in most states including the case study states and recommended by the Standards is "clear and convincing evidence." This lies midway between "beyond a reasonable doubt" and the "preponderance" standard. A South Dakota case, In re Heuermann, states the rationale:

> The first issue we consider is appropriate standard of proof in proceedings under the Act. We note that it would be inappropriate to require proof "beyond a reasonable doubt" as this is not a criminal prosecution. Proof by a mere preponderance of the evidence is also inappropriate because of the severity of the sanction which can be imposed. We conclude that the proper standard of proof is by clear and convincing evidence. Such a standard provides adequate protection for the party subject to charges, but at the same time does not demand so much evidence that the ability of the Commission and this court to effectively oversee the judiciary is impaired.[64]

The statutory procedures, the standards of evidence, and the constitutional decisions provide rights for the judges and provide limits on the commission's actions.

3. Major Functions of the Commissions

The commissions are intended to serve several functions or meet certain objectives. These include reinforcing judicial guidelines, protecting the image of the judiciary, punishing misconduct, and making the judge more accountable to the administration of justice and the public. The actual processing of complaints is not only influenced by the multiple functions imposed on the commission, but also by the attitudes and goals of the individual commission members.

Furthermore, the commissions have limited jurisdiction. The commissions, for instance, cannot infringe upon judicial independence.

The process must be fair to the judge, by shielding the innocent judge from unfounded complaints and, at a minimum, providing a speedy procedure with due process and a review of the commission's findings. Likewise, the public and especially the complainants must perceive the process as fair and not as an exercise in white-washing.

Interviews in the three states suggest that in order to perform these functions subject to these limitations, the commission should have sufficient staff, facilities, and funding. The commissions do not universally have adequate resources. Until 1977, the North Carolina Commission had makeshift procedures and operated without an executive secretary or staff.[65] The commission used the State Bureau of Investigation to take evidence from witnesses and the Attorney General's office to prosecute. The commissioners handled the preliminary investigations themselves, often by phone. Meanwhile, the caseload grew for an ill-prepared and understaffed commission.[66] A 1977 LEAA grant allowed the commission to acquire a full-time executive secretary, investigator, and secretary with a budget of $80,000 a year.[67]

In Massachusetts, the commission staff consists of the executive secretary, a secretary, and law student interns. The budget permits the commission to employ private investigators for specific cases; however, they are expensive and their quality varies. The commission relied on the state police to conduct one investigation. With a budget of $40,000, the executive secretary and staff do most of the leg work for the commission.[68] This budget, however, underestimates the cost of the commission. The commission regularly approaches lawyers to serve gratis as counsel. The committee and commission

have received excellent assistance from these special counsels who usually have conducted their own supplemental investigations.[69]

Unlike the other two states, New York operates on a budget of $1.6 million. The Administrator supervises a staff of sixty-five lawyers, secretaries, and investigators. The headquarters are in New York City, with regional offices in Albany and Buffalo. To maintain a separation of investigatory and adjudicatory functions, the commission has no contact with staff members, except the Administrator or a staff lawyer who presents a case before the commission.[70]

Perceptions of Commissioners and Judges about Functions

Socialization. As a starting point, one may assume that the commissioners' perceptions about their work will affect the processing of complaints. Initially, the members must acquire these perceptions or attitudes of their roles, that is, be socialized into the commission's way of doing (or perceiving) things. Socialization may appear to explain commissioners' perceptions of the commission's role and their recommendations of sanctions.

The North Carolina commission inducted only three members between 1973 and 1978. Cordiality made socialization easier, but the work of the commission is serious business. Members must submit to self-evaluation and self-socialization to cope with this responsibility. One of two original lay members admits it took two or three years to feel at ease with the work. The difficulty was not with fellow commissioners nor with principles of "right and wrong," but how they applied to concrete cases.

> As a layman, I had to determine where the protection of the law stopped and misconduct questions began. Some times it is not clear cut. The people who worked in the courts might not have had this in mind but as a lay member I had to determine this. There, I had some uneasiness at first.[71]

The executive secretary is responsible for the orientation of new members. He provides new members with recent files and literature, discusses procedures, and answers questions.[72] Until 1979, there were no new lay members. Members from the legal professions claimed no difficulty in adjusting. One lawyer stated that the rules and procedures of the commission were simpler than those for taking an appeal to the supreme court. Judge Clark also adjusted well. He was sworn in as chairman the morning of a hearing and presided over it.[73]

Though the commissioners represent different "constituencies"--lay, lawyer, and judge--and are appointed by different processes, their attitudes and even backgrounds are similar. For instance, all of the original members of the commission voted <u>against</u> the 1972 constitutional amendment that established the Judicial Standards Commission.[74]

If not representative of the public, the commissions are often blue ribbon.[75] According to interviews in all three states, the dynamics of interchange show up in the votes and views of the members. One commissioner has stated that their discussions and voting "head toward the happy center." The members make a "dedicated effort to meet the views of all and to balance all the interests." Although the debate may be contested, a "surprising number" conclude unanimously or with only one member in dissent.[76]

The give and take of debate has smoothed out even some philosophical differences of members. One judge member admitted that his ideas

after a year on the commission were "in flux." Based upon his own experience, he had been slightly "paranoid" about the system. A litigant with "an axe to grind" once accused him of undue rudeness. While most complaints were like these, the member had seen that they, as well as valid complaints, were handled fairly. Admittedly, this experience made him less paranoid about the commission.[77]

To assess their perceptions, the commissioners were asked how accurately each of five statements describes the role (purposes) of the commission. These statements were: the commission (1) reinforces guidelines for judicial conduct, (2) makes judges more accountable to the administration of justice, (3) protects the image of the judiciary, (4) makes judges more accountable to the public, and (5) punishes misconduct. The respondents rated each statement on a scale of 1 to 4, 4 being "very accurate." The following table presents the percentages of judge, lawyer and lay commission members who believed that the statements "very accurately" described the role of the commission.

<u>Table 3</u>

COMMISSIONERS' VIEWS ABOUT COMMISSION'S ROLES
(Percentages finding these purposes very accurate descriptions of the commission's role)

Members	(a) Reinforces Guidelines	(b) Makes judge accountable to administration of justice	(c) Protects image of judiciary	(d) Makes judge more accountable to people	(e) Punishes misconduct
Judges	24 (52.2%)	20 (43.5)	8 (17.8)	13 (29.5)	26 (56.5)
Lawyers	22 (56.4%)	14 (35.0)	7 (18.9)	11 (30.6)	26 (66.7)
Lay Members	20 (66.7%)	9 (32.1)	7 (25.0)	9 (31.0)	15 (53.6)
Total	66 (57.4)	43 (37.7)	22 (19.5)	33 (30.3)	67 (59.3)

The most striking feature of Table 3 is the similarity of views held by all three groups of commissioners. Socialization may account for much of this. Given the similarity of views, past legislative conflicts over the composition of commissions seems unnecessary in retrospect.

Nevertheless, there are some differences among the three groups. The lay members perceive the commission more as having the role of reinforcing guidelines, while the legal members, especially the lawyers, respond that punishing misconduct most accurately describes the purpose of the commission. Finally, judge members tend to find the purpose of making judges more accountable to the administration of justice, more important than other members do. These are unexceptional. The explanation for this finding may be that the lawyers, more confident in a legal setting, respond with blunter "punishes misconduct." The lay members may respond with the more neutral "reinforces guidelines." And the judges may express a professional standard.

The similarity of commissioners' views is highlighted by the responses of judges in the three states to the same question. Only the judges in North Carolina responded somewhat like the commissioners. The judges in Massachusetts and New York generally did not believe that these five statements "very accurately" described the work of the commission. For the commissioners and the judges, reinforcing guidelines and punishing misconduct compete for attention as the members' perceived role of the commission. The outsiders, non-commission member judges, see the punishing misconduct role as paramount. Of course, this may be just the natural sensitivity of the subjects to oversight.

Table 4

JUDGES' VIEWS ABOUT COMMISSION'S ROLES
(Percentages finding these purposes very accurate descriptions of the commission's role)

State of Judge	Reinforces Guidelines	Makes judges more accountable to administration of justice	Protects image of judiciary	Makes judges more accountable to people	Punishes misconduct
Mass.	14 (24.6)	14 (24.1)	5 (8.6)	8 (13.8)	16 (29.1)
N. Y.	15 (21.7)	17 (23.9)	13 (18.6)	11 (16.2)	23 (34.3)
N. C.	35 (50.0)	28 (40.0)	16 (23.2)	20 (29.9)	32 (45.7)
	64 (32.7)	59 (29.6)	34 (17.3)	39 (20.2)	71 (37.0)

4. Commissioners' Perception of Their Effectiveness

In the questionnaire, the commission members were asked to assess effectiveness of the commission upon various categories of judicial bearing and behavior:

17. In your opinion, how effectively has the commission succeeded in establishing or reinforcing the following judicial attributes (indicate (4) "very effectively"; (3) "fairly effectively"; (2) "somewhat effectively"; and (1) "makes no difference").

a) Punctual _____
b) Neat personal appearance _____
c) Decisive, not dilatory _____
d) Sense of humor _____
e) Aura of dignity _____
f) Temperate with drink, sober _____
g) Open-minded, able to listen to both sides patiently _____
h) Common sense _____
i) Courteous to lawyers _____
j) Courteous to witnesses _____
k) Hardworking _____
l) Professional integrity _____
m) Understands people _____
n) Able to keep control of case being tried _____

o) Not susceptible to influence _____
p) Competence, knowledge of the law _____

Nine of the 16 attributes do not involve commission-complaint areas. These include, neat personal appearance, decisiveness, sense of humor, aura of dignity, common sense, hardworking, understanding people, ability to control cases, and competence. The other seven involve areas which could arise as complaints and which should be affected by the commission. These are punctuality, temperance, open-mindedness, courtesy to lawyers and witnesses, integrity, and insusceptibility to influence. The data generally support this dichotomy. Generally less than 13% of the commissioners responded that the commission affected the judges in the first category of attributes. In the other category of attributes, 10% to 37.5% of the commissioners responded that the commission was "very effective" in establishing or reinforcing the guidelines of being courteous to lawyers and witnesses, personal integrity and insusceptibility to influence. By way of caveat, since many of these commissions are new, the percentages may reflect that many of these situations have not yet arisen in the complaint process.

Table 5

COMMISSIONERS' VIEW ON THE EFFECTIVENESS OF THE COMMISSION IN ESTABLISHING THESE ATTRIBUTES

Noncomplaint-area Attributes

	Attribute	Commission very effective	%
b)	neat appearance	4	(3.7)
c)	decisive	11	(10.2)
d)	sense of humor	3	(2.8)
e)	dignity	8	(7.1)
h)	common sense	8	(7.4)
k)	hardworking	14	(12.8)
m)	understands people	5	(4.7)
n)	controls case	8	(7.6)
p)	knowledge of law	11	(10.1)

	Attribute	Commission very effective	%
a)	punctual	11	(10.0)
f)	temperate with drink	23	(21.3)
g)	open-minded, listen to both sides	15	(13.7)
i)	courteous to lawyers	18	(16.2)
j)	courteous to witnesses	19	(17.4)
l)	professional integrity	37	(33.3)
o)	not susceptible to influence	42	(37.5)

4. Handling Complaints (Hypotheticals)

The basic question remains whether these roles or purposes affect the handling of complaints. To attempt to answer this, the commissioners were asked to make recommendations based on fourteen hypothetical complaints (Question 15). These complaints, largely drawn from actual situations, involved both on-bench conduct and off-bench conduct. Only one case dealt with a judge's condition rather than conduct (a judge becoming drunk at a party).

The following attempts to measure the effect of five roles (statements) on the recommendations fo the commissioners. To create a summary measure for comparison purposes, the percentage of commissioners recommending removal or suspension (the most expreme punishments) were computed for the sum of all complaints. It should be noted that this sum is solely for comparison of the effect of various roles on recommendations; the complaints are not of the same order of seriousness and removal may be an inappropriate sanction.

Table 6 suggests that there is no statistically significant relationship between the commissioner's recommendation of removal and his role concept of the commission as reflected in these five statements. Whether the members held one or another statement to describe accurately the commission's work, the percentage of those commissioners recommending removal or suspension remained constant, 21.6% to 24.7%. The intensity (accuracy) of a role did not affect greatly the members' (its holders') recommendation of removal, i.e., 21.6% for those who delineated reinforcing guideline as a very accurate description compared with 22.8% removals for all recommendations. The degree to which the commissioner subscribes to these roles does not seem to affect his/her handling or deciding of the complaints.

Table 6

THE EFFECT OF ROLE PERCEPTIONS ON RECOMMENDATIONS OF REMOVAL OR SUSPENSION

Percentage recommending removal by view of Role's accuracy	Reinforces by guidelines for judicial conduct	Makes judges more accountable administration of justice	Protects image of judiciary	Makes judges more accountable to people	Punishes misconduct
Very accurate	21.6%	21.8	24.7	24.3	22.0
Total	22.8	24.3	25.0	23.3	23.0

Combining all the complaints may appear to sacrifice some valuable data, but this is not so. Although not reproduced here, x^2 - tests on seventy tables, comparing the fourteen complaints individually with the five role statements, found the effect of these roles to be minimal upon the outcome.

Table 7 represents the only case in which role perception did have a statistically significant effect; the effect is counter-intuitive. It would be expected that the more important one's role position on making judges accountable to the administration of justice, the more likely that member would recommend stiffer sanction for the failure of a judge to recuse himself in a case in which he has an interest. Yet, over one-half of the respondents who found this role unimportant would have suspended or removed the judge while only one-third who found this role more important expoused the stiffer sanctions. The question of recusal does involve areas of judicial discretion and this could be complicating the recommendations, raising questioning of autonomy and independence.

Table 7

EFFECT OF COMMISSION'ROLE, "MAKING JUDGE ACCOUNTABLE TO THE ADMINISTRATION OF JUSTICE," UPON THE RECOMMENDATIONS ON QUESTION 15(j), "JUDGE'S REFUSAL TO RECUSE HIMSELF"

Accuracy of role description, making judge accountable to administration of justice	Dismiss or Cannot say	Censure or Reprimand	Suspension or Removal	N (100%)
Does not apply	2 (18.2)	3 (27.3)	6 (54.5)	11
Somewhat accurate	3 (12.5)	7 (29.2)	14 (58.3)	24
Fairly accurate	10 (20.4)	22 (44.9)	17 (34.7)	49
Very accurate	2 (4.7)	27 (62.8)	14 (32.6)	43
Total	17 (13.4)	59 (46.5)	51 (40.2)	127

$X^2 = 12.89$, 6 degrees of freedom. Significance $< .05$

a. Effect of the Type of Complaint on Processing. One would expect the type of complaint to affect its processing. To test this, the fourteen complaints have been divided into on- and off-bench conduct. The on-bench conduct has been further divided between complaints dealing with a specific case and those not dealing with a case. The off-bench complaints include such cases as: (1) a judge while stopped for erratic driving was found to have a concealed revolver; (2) a judge who fenced in his yard two feet beyond his neighbor's property line; (3) a series of complaints involving a judge who runs for Congress without first resigning his judgeship. The on-bench conduct, not involving cases directly, include: (1) writing letters of reference for a convict to get

another judge to reduce the sentence; (2) allowing a TV station to film and air an interview with the judge about a pending trial; and (3) refusing to discipline a bailiff arrested in a gambling raid. Finally, the following hypotheticals include the on-bench cases, involving cases directly: (1) failing to instruct the jury properly; (2) backdating a docket to appear that a motion was timely made; (3) not reporting an attempt to get him to fix a ticket; (4) criticizing and humiliating counsel in the courtroom; and (5) refusing to recuse himself in cases involving a company in which he has invested.

The following table shows the recommendations of bench, bar and lay members for the total complaints. The overriding fact is that there is not that much difference among the three groups. Again, socialization, and shared learned values, may account for this similarity.

Table 8

COMPOSITE STATISTICS OF RECOMMENDATIONS FOR FOURTEEN HYPOTHETICAL COMPLAINTS

	Discipline							
Members	Dismissal	Not Sure	Dismiss but disapprove	Reprimand	Censure	Suspension	Removal	Total
Judge	124 (20.6)	58 (9.7)	39 (5.5)	141 (23.4)	115 (19.1)	54 (9.0)	70 (11.6)	601 (99.9)
Lawyer	113 (20.4)	80 (14.4)	36 (6.5)	79 (14.2)	114 (20.5)	57 (10.3)	76 (13.7)	555 (100.0)
Lay	75 (18.2)	54 (13.1)	24 (5.8)	90 (21.8)	67 (16.2)	36 (8.7)	66 (16.0)	412 (99.8)

The trends that do appear are instructive. Over the range of sanctions, the bench members tend to be slightly more lenient than the lawyers who, in turn, are slightly more lenient than the lay members. Looking at the table below, the one case involving judicial condition (disability) also demonstrates that there is little difference among the three groups.

Table 9

RECOMMENDATIONS OF COMMISSIONERS FOR HYPOTHETICAL COMPLAINT AGAINST JUDGE INTOXICATED AT A PARTY

	Recommendation							
Members	Dismissal	Not sure	Dismiss but disapprove	Reprimand	Censure	Suspension	Removal	Total
Judge	11 (25.0)	4 (9.1)	6 (13.6)	19 (43.2)	4 (9.1)	0	0	44
Lawyer	6 (15.0)	5 (12.5)	11 (27.5)	13 (32.5)	5 (12.5)	0	0	40
Lay member	6 (20.0)	4 (13.3)	4 (13.3)	13 (43.3)	1 (3.3)	1 (3.3)	1 (3.3)	30
	23 (20.2)	13 (11.4)	21 (18.4)	45 (39.4)	10 (9.0)	1 (.9)	1 (.9)	114

The following two tables present the members' recommendations for off-bench and on-bench conduct cases. The two tables should not be compared directly because the egregiousness of the cases in the two are not comparable. They are useful for comparing the responses of the types of members to these two types of cases.

Table 10

RECOMMENDATIONS OF COMMISSIONERS FOR OFF-BENCH CONDUCT COMPLAINTS

	Recommendation							
Members	Dismissal	Not Sure	Dismiss but disapprove	Reprimand	Censure	Suspension	Removal	Total
Judge	40 (19.0)	28 (13.3)	8 (3.8)	22 (10.4)	28 (13.3)	30 (14.2)	55 (26.7)	211 (99.7)
Lawyer	35 (17.9)	31 (15.9)	6 (3.1)	14 (7.2)	36 (18.5)	16 (8.2)	57 (29.2)	195 (100.0)
Lay	25 (17.1)	23 (15.8)	6 (4.1)	25 (17.1)	11 (7.5)	14 (9.6)	42 (28.7)	146 (99.9)

Table 11

RECOMMENDATIONS OF COMMISSIONERS FOR ON-BENCH CONDUCT COMPLAINTS

	Recommendation							
Members	Dismissal	Not sure	Dismiss but disapprove	Reprimand	Censure	Suspension	Removal	Total
Judge	73 (21.1)	26 (7.5)	25 (7.2)	100 (28.9)	83 (24.0)	24 (7.0)	15 (4.4)	345 (100.1)
Lawyer	72 (22.5)	44 (13.8)	19 (5.9)	52 (16.2)	73 (22.8)	41 (12.8)	19 (5.9)	320 (99.9)
Lay	44 (18.7)	27 (11.4)	14 (6.0)	52 (22.0)	55 (23.3)	21 (8.9)	23 (9.7)	236 (100.0)

Since the seriousness of complaints vary, these tables cannot be compared directly. The off-bench conduct questions dealing with the refusal of a judge to resign before running for Congress resulted in the most recommendations of removal. Nevertheless, the tables suggest that on-bench conduct may not be punished as harshly as off-bench conduct. Off-bench conduct often is more obvious to the public and elicits a greater outcry. On the other hand, on-bench complaints frequently raise questions of judicial independence causing the commission to proceed cautiously.

The differences in response among commissioners, however, are only marginal and revolve about the lawyer members. The lay members tend to dismiss the least complaints and recommend removal the most. The bench members tend to dismiss more complaints and recommend removal less. The lawyers occupy the middle area; however, for these off-bench conduct complaints, the lawyers recommended more removal than the other groups. With on-bench complaints, the lawyers dismissed more complaints than the other groups. However, these deviations are slight statistically and qualitatively, and the basic patterns remain the same.

Finally, comparing on-bench complaints involving specific cases with those not involving cases, the patterns do not change. The type of complaint does not seem to affect the recommendations. In all kinds of complaints, the judges tend to be less strict than the lawyers who are less strict than the lay members, although the differences are only within a narrow range.

Table 12

RECOMMENDATIONS OF COMMISSIONERS FOR ON-BENCH (SPECIFIC CASE) COMPLAINTS

	Recommendation							
Members	Dismissal	Not sure	Dismiss but disapprove	Reprimand	Censure	Suspension	Removal	Total
Judge	52 (23.9)	14 (6.5)	12 (5.5)	65 (29.9)	47 (21.6)	18 (8.3)	10 (4.6)	217 (100.3)
Lawyer	50 (24.9)	21 (10.4)	9 (4.5)	32 (15.9)	43 (21.4)	31 (15.4)	15 (7.4)	201 (99.9)
Lay	33 (22.6)	19 (13.0)	7 (4.8)	31 (21.2)	23 (15.8)	19 (13.0)	14 (9.6)	146 (100.0)

Table 13

RECOMMENDATIONS OF COMMISSIONERS FOR ON-BENCH (NOT INVOLVING CASES) COMPLAINTS

	Recommendation							
Members	Dismissal	Not sure	Dismiss but disapprove	Reprimand	Censure	Suspension	Removal	Total
Judge	21 (16.4)	12 (9.4)	13 (10.2)	35 (27.3)	36 (28.1)	6 (4.7)	5 (3.9)	128 (100.0)
Lawyer	22 (18.5)	23 (19.3)	10 (8.4)	20 (16.8)	30 (25.2)	10 (8.4)	4 (3.4)	119 (100.0)
Lay	11 (12.2)	8 (8.9)	7 (7.8)	21 (23.3)	32 (35.6)	2 (2.2)	9 (10.0)	90 (100.0)

6. Effect on Composition on Processing Complaints. Another factor which may affect the processing of complaints is the composition of the commissions. Small group analysis, used by social psychology and political science, suggests that the on-going, face-to-face interaction among members of a small group (a commission) will affect the views and votes of individual members. The commissions have been grouped into judge-dominated (at least two more members than the next largest group) and other-dominated categories. This section deals with the affect of composition on the recommendations of the members for the hypotheticals (Question 15). The evidence points to a marginal effect of composition on these recommendations.

One hypothetical in which the relationship between voting and compostion was statistically signifcant involved a judge who failed to instruct the jury properly (15(d).) In that case, lay members in the other-dominated commissions constituted the only group in which a substantial bloc would have punished the activity--an activity which borders on judicial discretion.

Table 14

EFFECT OF COMMISSION COMPOSITION ON VOTING ON CASE INVOLVING JUDGE WHO INSTRUCTED JURY IMPROPERLY (Question 15 (d))

Member and Composition of Commission	Dismiss Complaint or Cannot Say	Censure or Reprimand	Removal or Suspension	N (100%)
Judge in judge-dominated	17 (94.4)	1 (5.6)	0	18
Judge in other-dominated	25 (96.2)	1 (3.1)	0	26
Lawyer in judge-dominated	6 (85.7)	1 (14.3)	0	7
Lawyer in other-dominated	31 (93.9)	2 (6.1)	0	33
Lay in judge-dominated	3 (75.0)	1 (25.0)	0	4
Lay in other-dominated	16 (61.5)	8 (30.8)	2 (7.7)	26
Total	98 (86.0)	14 (12.3)	2 (1.8)	N= 114

x^2 = 20.33; degrees of freedom, 10; < .03

The small numbers are only suggestive.

A hypothesis that the judge members on a judge-dominated commission are laxer on judges than are judge members on another commission has some support in these cases; however, some of the data suggest the contrary. In nine of the hypotheticals, the composition of the commission had no apparent effect on judges' votes. But in the other five, judges in judge-dominated commissions tended to be more lax in two and stricter in three than their colleagues in other-dominated commission. (See Table 15.)

The cases in which judges in judge-dominated commissions are less strict reveal that the difference is slight.

Table 15

CASES IN WHICH JUDGES IN JUDGE-DOMINATED COMMISSIONS DECIDED HYPOTHETICALS DIFFERENTLY THAN JUDGES IN OTHER-DOMINATED COMMISSIONS

Case	Member	Dismiss or Cannot Say	Censure or Reprimand	Removal or Suspension
(a) Less Strict				
15 (b) Letters of reference for a convict to reduce his sentence in another court	Judge in judge-dominated	5 (29.4)	9 (52.9)	3 (17.6)
	Judge in other-dominated	4 (16.0)	16 (64.0)	5 (20.0)
15 (e) Backdated docket entry to appear timely made	Judge in judge-dominated	2 (11.1)	11 (61.1)	5 (27.8)
	Judge in other-dominated	2 (7.7)	13 (50.0)	11 (42.3)
(b) Stricter				
15(a) Erratic driving, and concealed unregistered revolver	Judge in judge-dominated	5 (27.8)	9 (50.0)	4 (22.2)
	Judge in other-dominated	9 (37.5)	14 (58.3)	1 (4.2)
15 (f) Intoxicated at country club dance	Judge in judge-dominated	6 (33.3)	12 (66.7)	0
	Judge in other-dominated	15 (57.7)	11 (42.3)	0
15 (h) Refused to discipline bailiff arrested in gambling raid	Judge in judge-dominated	9 (50.0)	9 (50.0)	0
	Judge in other-dominated	20 (80.0)	5 (20.0)	0

These findings suggest that judges on judge-dominated commissions dispense lesser sanctions than would other judge members in cases involving performance of judicial functions. Respondent judges often envoke the defense of judicial independence to which judges, especially in a judge-dominated commission may be more receptive than judges on a lay- or lawyer- dominated commission. On the other hand, judges in judge-dominated commissions may issue stronger sanctions against judges who act in a manner that is illegal or immoral, especially if the act occurred off the bench. Such actions may be seen to threaten the dignity and position of the entire judiciary.

The conclusion to this section must be that the data are sketchy. Dominance by the largest group may be present, but is marginal. Judges, lawyers, and lay members form blue-ribbon panels. The lawyers have been members of their bars for years. The lay members generally are well-established in their professions. These backgrounds develop independent thinking. The cordial give and take on the commission results only in compromise, not in renunciation, of strongly-held viewpoints. Apparently, members do consider the positions of others, but decide independently whether the investigation and hearing have disclosed "willful misconduct in office" or a breach of other statutorally-mandated standards. In the last analysis, the exact membership breakdown of judges, lawyers, and lay persons may affect the outcomes, but only marginally.

C. Limitations

a. Checks and Balances. Aside from internal forces such as

the organization of the commission and perceptions of individual commission members, the commissions confront external forces which affect their processing of complaints. The confrontation creates a system of checks and balances which oversees much of the commission's work and helps to protect the system from both disuse and misuse of its powers. Besides the vigilant oversight of the media and the judiciary, the commission is the concern of other organizations, including the bar, the legislature and the executive.

The Executive. Although the commission is not one of the most important issues for the governor, the executive is important to the commission. In many states, governors initiate legislation concerning the commission, including funding. Governors' support or opposition to funding the commission or to amending its procedure can be crucial to the smooth operation of a commission.

The most direct impact of the governor is his function of appointing members to the commission, usually the lay members. In a handful of states, the senate must consent to these appointments. In six other states--Connecticut, Hawaii, Illinois, Iowa, Maryland and Minnesota--the governor appoints over half of the commissioners.[79] Of course, since the commission operates in secrecy and the commissioners cannot be fired, the influence of the governor is indirect.

The Legislature. The most obvious link between the commission and the legislature is funding. A hostile legislature could render a commission inoperative. In Massachusetts, for example, until the legislature established the commission in 1978, the court-created Committee on Judicial Responsibility was funded by

the Supreme Judicial Court. When the LEAA grant expired in the summer of 1979, the North Carolina commission likewise became dependent on the legislature for funding. There is, however, no evidence this leverage is used to influence decisions.[80]

The Bar. The bar, like the other appointing agencies, does not have the power to fire members. The constitutional amendments establishing the commissions do not provide for removal of the members, except when they no longer qualify for their position--i.e., a lawyer member is elected judge. Lawyers serve, except for Hawaii, on all commissions, and are appointed in most states by the bar associations. But without power to fire their appointees, these agencies cannot apply direct pressure. The commissioners take their independence and obligations seriously, especially the rules of confidentiality.

An interesting example of the potential intrusion of professional sentiments on the independence of commissioners has been noted in a recent North Carolina situation. The North Carolina commissioners have zealously guarded their autonomy. A lawyer member, Emerson Sanders, also served on the Executive Bar Council. In 1973, the Council asked him to report on commission activities. Bound by the constitutional requirement of confidentiality, he gave the Council the commission's P.O. Box and told them to contact it directly. He confessed that several times he would have liked to inform the Council of a certain action which, had the Council known about it, would have influenced the decision. Sometimes he fought proposals before the Council but could not tell the Council

his reason. Enough members usually "caught the hint" and joined him, defeating the propositions.[81]

The bar community affects the commissions more directly as complainants. Individual lawyers as well as the bar itself may bring complaints against judges. According to executive secretaries in several states, these are generally less frivolous than average and are more likely to obtain some form of sanction. Nationwide, lawyers brought 10.4% of the complaints in 1978, compared to 3.8% for judges and other court-room personnel.[82]

ii. Judicial Independence. Judges cherish the independence and discretion of the judiciary, and are vigilant and suspicious of any organization that might infringe on those principles. Inevitably, there is a grey area between discretionary use and abuse of power. By either statute or interpretation, the commission only reviews abuses--misconduct or disability--but judges are anxious that the commissions concentrate only on cases of abuse and do not exceed its authority. A Massachusetts trial judge said:

> At present in most states, there are Administrative Judges whose offices effectively handle matters of administration and decision-making dysfunctions of the system. A conduct commission should focus on willful misconduct, persistent failure to perform duties, habitual intemperance and behavior off the bench which brings the office into disrepute.[83]

Another Massachusetts trial judge put the problem this way:

> The problems with any commission sitting in judgment on judges are extremely vexing.
>
> A thorough understanding and appreciation of the function and work of judges is essential. Judges deal in making decisions involving the freedom of individuals, the property and family rights of people and every situation is loaded with emotional and personal feeling. Judges will always be the villain.

> That is why it is so very important that the crank complaints and the chronic litigant cannot be able to use a commission to further harrass and immobolize the judicial process.[84]

Cases That May Affect Judicial Independence. The disciplinary equation juxtaposes judicial abuse and judicial independence. How much of a risk to the independence of a judge is permissible in the process? Several cases processed by various state judicial disciplinary commissions illustrate this risk to the independence of a judge.

In 1974, the Illinois Courts Commission censured Judge Kaye for not cooperating with the chief judge's administrative orders.[85] The Indiana Commission suspended Judge Terry for publicly harrassing prosecutors and for his deteriorating relations with bench and bar.[86] In Fisher v. Thompson, the Delaware Court on the Judiciary suspended a justice of the peace. The "failure of the justice of the peace to comply with orders . . . was (a) willful violation of a directive given by and under the authority of the Chief Justice as administrative head and is thus a biasis for removal."[87] The Florida court reprimanded Judge Kelly in 1970. His rules as presiding officer created chaos in the circuit and the judges voted him out of that office. He then publicly cirticized the judiciary and was reprimanded.[88]

All of these cases evince judicial misconduct which appear to outweigh the suggestion that the courts were using the disciplinary system to control a maverick or independent judge. But

a more in-depth study might be undertaken to find whether commissions have been used periodically against politically unpopular judges.

One of the hypothetical complaints was designed to raise a question of judicial independence. The complaint concerned a judge who failed to instruct the jury properly in a case; thus it involved an area within the discretion of the judge. A proper response, which preserved independence, would be dismissal (or dismissal with disapproval or not sure). For a commission to take any action other than dismissal would constitute infringement of judicial independence. Dismissal was, indeed, the response of 98 of 114 (86%) of the commissioners. Lay members seem a little less willing to dismiss such a case possibly because of a lesser commitment to judicial independence. If the commission would intervene in cases such as this, the judge would be making his ruling not on the law but on what was popular or at least not controversial.

This discussion suggests that judicial independence is a concern of judges and commissioners alike, and this limitation does affect the processing of complaints.

Table 16

RECOMMENDATIONS OF COMMISSIONS CONCERNING A JUDGE WHO FAILED TO INSTRUCT JURY PROPERLY

	Recommendation							
Members	Dismissal	Not sure	Dismiss but disapprove	Reprimand	Censure	Suspension	Removal	Total
Judge	39 (88.6)	1 (2.3)	2 (4.5)	2 (4.5)	0	0	0	44
Lawyers	37 (90.2)	1 (2.4)	0	2 (4.9)	1 (2.4)	0	0	41
Lay member	10 (34.5)	6 (20.7)	2 (6.9)	7 (24.1)	2 (6.9)	1 (3.4)	1 (3.4)	29
Total	86 (75.4)	8 (7.0)	4 (3.5)	11 (9.6)	3 (2.7)	1 (.9)	1 (.9)	114 (100%)

The Views of the Judges

In the questionnaire, judges in three states were asked about their views on the effectiveness of the commissions. The first two parts of the administrative and decision-making functions posed in this question deal with the judge's discretion in areas which are and should be beyond the commission's jurisdiction. The judges are asked how the commission has affected their behavior, 1 being "very negative effect," 2 "negative effect," 3 "no effect," 4 "positive effect," and 5 "very positive effect." Responses of 3, "no effect," should represent an affirmation that the commission has not interfered with the judge's discretion. The third part of the question deals with judicial conduct, an area within the commission's jurisdiction. Here, responses of 4 or 5, "positive" or "very positive effect," represent confirmation that the commissions fulfill their role of overseeing the conduct of the judiciary. Most judges responded that the commission had not affected their exercise of discretion (parts 1 and 2). Almost one half of the judges found that the commission had had a positive effect on the conduct of the judiciary (part 3).

The familiarity of judges with the commission does not seem to affect their views of the commission's effectiveness. The null hypothesis that familiarity does not affect the responses cannot be rejected. In fact, given expected frequencies, the alignment in every table of familiarity to response could have occurred by chance at least one out of three times. To reiterate, except fo-

the block of New York judges (possibly judges who have been investigated), the states of judges and familiarity with the commission do not affect views of their effect on individual independence. This eighty-five to ninety-five approval or neutral rating is remarkable. It appears, thus, that judges may be accepting the reality of the commission.

Table 17

RESPONSES OF JUDGES TO THE EFFECT OF THE COMMISSION ON JUDICIAL FUNCTIONS AND CONDUCT

Judicial Functions/ Conduct	Very Negative	Negative	No Effect	Effect Positive	Very Positive	Total (100%)	Levels of Significance, Effect of Familiarity on Response
Function							
Handling various calendars	10 (4.9)	9 (4.4)	161 (78.5)	21 (10.2)	4 (2.0)	205	p .43
Expediting cases	12 (5.9)	16 (7.8)	160 (78.0)	16 (7.8)	1 (0.5)	205	p .86
Ruling on objections	10 (4.9)	8 (3.9)	174 (85.3)	12 (5.9)	0	204	p .79
Instructing jurors	10 (4.9)	7 (3.4)	171 (83.8)	16 (7.8)	0	204	p .35
Making final decisions of judgments (outcome of litigation	12 (5.9)	15 (7.4)	149 (73.8)	24 (11.9)	2 (1.0)	202	p .91
Sentencing criminal defendants/awarding or finding for civil litigants	12 (5.9)	8 (4.0)	161 (79.7)	20 (9.9)	1 (0.5)	202	p .79
Conduct							
Acting towards counsel, litigants, witnesses and jurors	6 (2.9)	5 (2.5)	98 (48.0)	91 (44.6)	4 (2.0)	204	p .78
Being punctual for hearings and trials	4 (2.0)	3 (1.5)	121 (59.5)	73 (36.0)	2 (1.0)	203	p .96

A North Carolina judge expressed the position of advocates of judicial conduct commissions:

> I believe the impeachment mechanism in our present system is totally unworkable. A standards commission is the only possible alternative for discipline of judges.[89]

Another North Carolina judge responded: "It is my opinion that the Judicial Standards Commission in North Carolina has been useful, fair, and good for the people of the State."[90] And a New York judge summed up: "There is a need for a watchdog of some form."[91]

c. Fair Process as a Limitation

Confidentiality. Many judges are uneasy about the commission system. The judicial concern centered about alleged leaks from the commission and about media coverage of misconduct cases. A trial judge echoed this sentiment:

> I fear that such commissions may unfairly deal with the judiciary in that press 'leaks' and comments cannot be fairly or accurately explained away even when such leaked information or comments are without foundation.[92]

The so-called leaks often only involve complainants sending copies of the complaints to the local newspapers. And, indeed, according to judges' views, the media shared the villain's role. Three judges stated:

> I have had three complaints against me. Each one was dismissed. Each was totally baseless. This creates a lot of work for all with little results; except that newspapers and T.V. love it.[93]

> While I have no personal complaint against the media, I am privy to instances where unfounded charges have been made, reported as fact by the media and then found to be unsubstantiated. The result has been irreparable injury to the reputation and career of the person complained of.[94]

Fear about the influence of the press on the reputation of the judge seems to find further expression in the opposition of a substantial segment of judges to open hearings. Likewise, a substantial segment of the commissioners oppose open hearings.

Table 18

VIEWS OF JUDGES AND COMMISSIONERS ON OPEN COMMISSION HEARINGS

Member	Strongly Disagree	Disagree	Agree	Strongly Agree	Total
Judges	70 (33.2)	44 (20.9)	63 (29.9)	34 (16.1)	211
Commissioners	30 (21.7)	33 (23.9)	31 (22.5)	44 (31.9)	138

The statutes and constitutional amendments establishing commissions provide whether and to what extent a proceeding will be open or confidential. One purpose of confidentiality is to protect the innocent judge from unjustified publicity. A second, equally important purpose, is to allow a complainant to come forward without fear of reprisal by the judge. On the other hand, some judges would prefer to defend themselves in public. Thus, the dissensus on open hearings and the degree of confidentiality is not surprising. Equally unsurprising is the strong support for open hearings by commission members who may feel that confidentiality limits their ability to have a greater impact on judicial conduct.

Mixed Membership. The inclusion of lay members produces more representative commissions and introduces one more aspect of judicial accountability to the public. Concomitantly, it introduces another potential danger to judicial independence. Mixed memebership is an attempt to effect a balance among the groups interested in proper administration of justice--the bench, the bar, and the public. Many judges initially feared that commissions might become star chambers, denying due process, and allowing public clamor to invade the judicial sanctum. Public members were part of this invasion. A trail judge from North Carolina echoed this view:

> North Carolina's censure and removal procedures are completely void of due process. I endorse the concept of judicial discipline, but I don't want to face a kangaroo court. If my time comes, I'll want a jury to decide whether I am to be deprived of my dignity or my livelihood.[95]

Another judge expressed the lingering dislike of nonlegal persons on the commissions: "It is my strong belief that members of the Judicial Conduct Commission should be judges and lawyers. Lay members can't really appreciate or understand our problems."[96] Nevertheless, the commission experience with lay members seems to have weakened the intensity of this opposition.

In three states studied, sixty-five percent of the responding judges agreed with the statement that for the adjudicating stage, the commission should have lay members. (Table 19). In Table 22, it appears that slightly more judges are in favor of lay members at the investigatory stage than at the adjudicatory stage. One explanation may be that those judges realize the need for some lay participation, but believe that adjudication should be handled by the professionals, the peers.

CONTINUED

1 OF 2

Table 19

JUDICIAL VIEWS OF LAY MEMBERS PARTICIPATING ON COMMISSION, ADJUDICATORY STAGE

	Strongly Disagree	Disagree	Agree	Strongly Agree
Judges	37	39	73	65
Percentage	17.3	18.2	34.1	30.4

N = 214

As shown in Table 20, both commission and non-commission judges agree that judges should participate at the two stages of the proceedings. But commission judges more strongly agreed with having judges on commissions, especially at the adjudicatory stage, than non-commission judges were. The adjudicatory stage is the formal hearing which resembles a trial, the natural setting for the judge member. One would expect some judicial oppostion, on the other hand, to non-judge, especially lay members, at this stage.

Table 20

JUDICIAL VIEWS ON WHETHER JUDGES SHOULD SERVE ON COMMISSIONS

(A) Judges on the Commission, investigatory stage

	Strongly Disagree	Disagree	Agree	Strongly Agree	N (100%)
	%	%	%	%	
Non-commission judges	5 (2.4)	8 (3.7)	74 (34.7)	126 (59.2)	213
Commission judges	3 (6.8)	7 (15.9)	4 (9.1)	30 (68.2)	44
Total	8	15	78	156	257

(B) Judges on the Commission, adjudicatory stage

	Strongly Disagree	Disagree	Agree	Strongly Agree	N (100%)
	%	%	%	%	
Non-commission judges	1 (0.5)	1 (0.5)	71 (32.8)	143 (66.2)	216
Commission judges	0 (0.0)	1 (2.2)	5 (10.8)	40 (87.0)	46
Total	1	2	76	183	262

On the other hand, commission judges are somewhat more amenable to having lawyers and lay people on the commission at both stages, as the following tables demonstrate; than were non-commission judges.

Table 21

VIEWS ON WHETHER LAWYERS SHOULD SERVE ON COMMISSIONS

(A) Lawyers on the Commission, investigatory stage

	Strongly Disagree	Disagree	Agree	Strongly Agree	N (100%)
Non-commission judges	5 (2.4)	24 (11.3)	87 (40.8)	97 (45.5)	213
Commission judges	1 (2.2)	1 (2.2)	7 (15.6)	36 (80.0)	45
Total commissioners	1 (0.7)	3 (2.2)	32 (23.5)	100 (73.5)	136

(B) Lawyers on the Commission, adjudicatory stage

	Strongly Disagree	Disagree	Agree	Strongly Agree	N (100%)
Non-commission judges	6 (2.8)	20 (9.4)	86 (40.3)	101 (47.4)	213
Commission judges	2 (4.3)	3 (6.5)	4 (8.7)	37 (80.4)	46
Total commissioners	2 (1.5)	3 (2.2)	27 (19.7)	105 (76.6)	137

Table 22

VIEWS ON WHETHER LAY MEMBERS SHOULD SERVE ON COMMISSIONS

(A) Lay persons on the Commission, investigatory stages

	Strongly Disagree %	Disagree %	Agree %	Strongly Agree %	N (100%)
Non-commission judges	29 (13.5)	40 (18.6)	80 (37.2)	66 (30.7)	215
Commission judges	1 (2.3)	5 (11.4)	11 (25.0)	27 (61.4)	44
Total Commissioners	3 (2.2)	12 (9.0)	35 (26.1)	84 (62.7)	134

(B) Lay persons on the Commission, adjudicatory stage

	Strongly Disagree	Disagree	Agree	Strongly Agree	N (100%)
Non-commission judges	37 (17.3)	40 (18.6)	73 (34.0)	65 (30.2)	215
Commission judges	3 (6.7)	3 (6.7)	6 (13.3)	33 (73.3)	45
Total Commissioners	3 (2.2)	6 (4.4)	29 (21.5)	97 (71.9)	135

The divergence is greatest between the views of the two sets of judges regarding lay members on the commission. Only 1 in 8 (6 of 45) commission judges opposed such membership, while 1 non-commission judge in 3 (77 of 215) disagreed with lay membership on the commission. Interaction with lawyers and lay members appears to affect these views of judge members. Interviews with several commission judges reinforce this impression.

In conclusion, it seems that the judges and commissioners are growing more comfortable with these parameters or limitations on the commission process such as confidentiality, statutory procedures, and mixed membership. These limitations seem also to accomplish their purposes of making the system more responsive to the needs of the judiciary and the public. These limitations along with the other factors discussed, such as socialization and small group effect, establish a system of checks and balances which assure a fair hearing for all concerned.

Chapter 3 Footnotes

[1]Raymond Cannon, "The New York Court on the Judiciary, 1948 to 1963," Albany L. Rev. 28 (1963): 1, pp. 2-3; In re Capshaw, 17 N.Y.S. 2d 172 (1940.)

[2]Richard E. Dunn, The Law and Politics of Judicial Discipline and Removal (Urbana-Champaign, Ill.: Univ. of Illinois, Ph.D. dissertation, 1974), p. 17, footnote 5.

[3]Edwin L. Gasperini, Arnold S. Anderson, and Patrick W. McGinley, "Judicial Removal in New York: A New View," Fordham L. Rev. 40 (1971): 1, pp. 13-15.

[4]Richard E. Dunn, supra note 2, pp. 12-13.

[5]Gasperini et al., supra note 3, p. 33.

[6]Edward J. Schoenbaum, "A Historical Look at Judicial Discipline," Kent L. Rev. 54 (1978): 1, p. 17.

[7]Gerald Stern, "New York's Approach to Judicial Discipline: The Development of a Commission System," Kent L. Rev. 54 (1977): 137, p. 138.

[8]Dunn, supra note 2, pp. 12-3.

[9]William T. Braithwaite, Who Judges the Judges? (Chicago: The American Bar Foundation, 1971), pp. 56-66; Stern, supra note 7, pp. 138-9.

[10]Stern, supra note 7, p. 141.

[11]Stern, supra note 7, p. 143. Gerald Stern, interview held with Administrator, Commission on Judicial Conduct, New York, N.Y. (3/26/79).

[12]Michael Kirsch, interview held with lawyer member of Commission on Judicial Conduct, New York, N.Y. (4/23/79)

[13]Jack E. Frankel, "Removal of Judges: California Tackles an Old Problem," A.B.A.J. 49 (1963): 166, pp. 167-8.

[14]Ibid., p. 168 Stephen A. Smith, "Impeachment, Address and the Removal of Judges in Arkansas: An Historical Perspective," Ark. L. Rev. 32 (1978): 253.

[15]Judicial Conduct Reporter, Vol. 1, No. 2 (1979), p. 3.

[16]Schoenbaum, supra note 6, p. 11.

[17]Larry Berkson and Irene Tesitor, "Holding Judges Accountable," Judicature 61 (1978): 422, p. 457.

[18]In re Terry, 323 N.E. 2d; 329 N.E. 2d 38 (1975); 360 N.E. 2d 1004 (Indiana, 1977); Judicial Conduct Reporter, supra note 15, p.3.

[19]"Appendix: Standards Relating to Judicial Discipline and Disability Retirement," Kent L. Rev. 54 (1977): 201, p. 232.

[20]In re Evrard, 317 N.E. 2d 841 (1974); 333 N.E. 2d 765 (Indiana, 1975)

[21]In re Mussman, 289 A. 2d 403 (N.H., 1972).

[22]Braithwaite, supra note 9, pp. 18-9.

[23]In re Dandridge, 337 A. 2d 885 (Pennsylvania, 1975).

[24]In re Hanson, 532 P. 2d 303 (Alaska, 1975); In re Midesell, Jud. Tenure Com, #10 (Mich., 1975).

[25]Wilbank J. Roche, "Judicial Discipline in California: A Critical Re-evaluation," Loyola of L.A. L. Rev. 10 (1976): 192, pp. 204-09.

[26]Frank Greenberg, "The Illinois 'Two-Tier' Judicial Disciplinary System: Five Years and Counting," Kent L. Rev. 54 (1977): 69, pp. 83-5, citing Ill. Const. of 1970, Art. VI, sect 15(c).

[27]John H. Gillis and Elaine Fieldman, "Michigan's Unitary System of Judicial Discipline: A Comparison with Illinois' Two-Tier Approach," Kent L. Rev. 54 (1977): 117, pp. 123-4. Irene Tesitor, Judicial Conduct Organizations (Chicago: American Judicature Society, 1978, pp. 28-9.

[28]"Appendix: Standards Relating to Judicial Discipline and Disability Retirement," Kent L. Rev. 54 (1977): 201, p. 210, Standard 4.1.

[29]John H. Culver and Randal L. Cruikshanks, "Judicial Misconduct: Bench Behavior and the New Disciplinary Mechanisms," State Ct. Journ. 2 (1973): 3, pp. 33-4.

[30]William Braithwaite, note 9, pp. 88-9.

[31]Louis H. Burke, "Judicial Discipline and Removal: The California Story," Judicature 48 (1965): 167, p. 171.

[32]Gillis and Fieldman, supra note 27, pp. 125-7; Marvin Koonce, interview held with lay member, Judicial Standards Commission, Raleigh, N.C. (8/15/78).

[33]Stanley D. Neeleman and David C. Miller, "Study of Colorado Commission on Judicial Qualifications," Denver L.J. 47 (1970): 491, pp. 497-501. Florence R. Peskoe, "Procedures for Judicial Discipline: Type of Commission, Due Process, and Right to Counsel," Kent L. Rev. 54 (1977): 147, p. 156.

[34]Gillis and Fieldman, supra note 27, pp. 123-5; Tesitor, supra note 23, pp. 34-5.

[35]"Appendix: Standards . . .," supra note 28, pp. 207-9.

[36]Culver and Cruikshanks, supra note 29, pp. 5-6; Jack E. Frankel, "Judicial Ethics and Discipline for the 1970's," Judicature 54 (1970): 18, p. 19.

[37]Culver and Cruikshanks, supra note 29, pp. 4-6.

[38]"Appendix: Standards . . .," supra note 28, pp. 210-2.

[39]"Discipline of Judges in Maryland: In re Diener and Broccolino, In Re Foster," Md. L. Rev. 34 (1974): 612.

[40]Peskoe, supra note 30, pp. 157-8.

[41]Peskoe, supra note 33, p. 160.

[42]"Appendix: Standards . . .," supra note 28, pp. 206-7; Judicial Conduct Reporter, supra note 15, p. 3.

[43]Burke, supra note 31, pp. 169-75; Frankel, A.B.A.J., supra note 12, pp. 168-9.

[44]Gillis and Fieldman, supra note 27, pp. 119-20; interviews.

[45]Ibid., pp. 125-8.

[46]Lisa L. Lewis, "Judicial Discipline, Removal and Retirement," Wis. L. Rev. (1976): 563, p. 583.

[47]North Carolina Judicial Standards Commission, Rules 11-14.

[48]Mrs. Rebecca Hundley, interview held with lay member of Judicial Standards Commission, Thomasville, N.C. (8/23/78).

[49]Operating Rules of the Commission on Judicial Conduct, Mass Supreme Judicial Court, 1/16/79; interviews in Massachusetts.

[50]"Appendix: Standards . . .," supra note 28, p. 217.

[51]413 F. Supp. 1132 (Mich., 1976).

[52]526 S.W. 2d 727 (Mich., 1977).

[53]Sharp v. State ex rel. Okla. Bar Ass'n, 448 P. 2d 301 (Okla., 1968).

[54]R. Stanley Lowe, "The Developing Law on Judicial Discipline and Removal," in Resource Materials for Fifth National Conference of Judicial Disciplinary Commissions, ed. Edward J. Schoenbaum (Chicago: American Judicature Society, 1976), p. 83.

[55]Richared E. Dunn, supra note 2, pp 150-4.

[56]Keiser v. Bell, 332 F. Supp. 608 (Pa., 1971).

[57]Peskoe, supra note 33, p. 151, citing Arnett v. Kennedy, 416 U.S. 134 (1974); Withrow v. Larkin, 421 U.S. 35 (1974).

[58]Halleck v. Berliner, 427 F. Supp. 1225, 1243 (D.C., 1977).

[59]In re Hanson, 532 P. 2d 303 (Alaska, 1975).

[60]Peskoe, supra note 33, pp. 169-70.

[61]"Appendix: Standards . . .," supra note 28, p. 220; John J. Todd and M. L. Proctor, "Burden of Proof, Sanctions and Confidentiality," Kent L. Rev. 54 (1977): 175, p. 181.

[62]Ibid., p. 179.

[63]Ibid., p. 183; Matter of Hardt, 369 A. 2d 5 (N.J. 1977).

[64]240 N.W. 2d 603, 605-06 (S.D., 1976).

[65]Mr. Dallas Cameron, interview held with Executive Secretary of the Judicial Standards Commission, Raleigh, N.C., 8/15/78.

[66]In re Crutchfield, 223 S.E. 2d 822 (1975); In re Stuhl, 233 S.E. 2d 562 (1976). Maryland has a part-time Executive Secretary and a small $20,000 budget. Because Maryland is one-fifth the area of North Carolina and has two-thirds of the population centered about Washington and Baltimore, a large staff of budget is unnecessary.

[67]Cameron interview.

[68]At the present time, John F. Burke serves as the part-time executive secretary for the Committee on Judicial Responsibility and Steve Limon is the full-time executive secretary for the Commission on Judicial Conduct.

[69]Allan Rodgers, interview held with chairman, bar member, Commission on Judicial Conduct, Boston, Mass., 5/7/79.

[70]Gerald Stern, interview held with Administrator, Commission on Judicial Conduct, New York, N.Y., 3/26/79.

[71]Interview.

[72]Cameron interview.

[73]Two interviews.

[74]Mrs. Rebecca Hundley, interview held with lay member, Judicial Standards Commission, Thomasville, N.C. (August, 1978). She admits that she would probably vote in favor of the amendment.

[75]Hundley interview; Marvin Koonce, interview held with lay member of Judicial Standards Commission, Raleigh, N.C. (August, 1978).

[76]Three Interviews.

[77]Interview.

[78]Walter Murphy and Jospeh Tannenhaus, The Study of Public Law, (1972).

[79]Irene Tesitor, Judicial Conduct Organizations (Chicago: The American Judicature Society, 1978), pp. 37-87.

[80]Interviews in three states.

[81]Emerson T. Sanders, interview held with lawyer member of Judicial Standards Commission, Burlington, N.C., 8/24/78.

[82]Tesitor, supra note 79, pp. 6-7. (Figures exclude New York data.)

[83]Comments on questionnaires.

[84]Comments on questionnaires.

[85]In re Kaye, 73 C.C. 5, 74 C.C. 4 (Ill., Cts. Com., 1974).

[86]In re Terry, 323 N.E. 2d 192; 329 N.E. 2d 38; 360 N.E. 2d 1004 (Ind., 1977).

[87]Ct. on the Jud. #1 (Del., 1973), cited in Resource Materials for 5th National Conference, supra note 1, p. 27.

[88]In re Kelly, 238 So. 2d 565 (Fla.) cert. den. 401 U.S. 962 (1970).

[89]Comments on questionnaires.

[90]Comments on questionnaires.

[91]Comments on questionnaires.

[92]Comments on questionnaires.

[93]Comments on questionnaires.

[94]Comments on questionnaires.

[95]Comments on questionnaires.

[96]Comments on questionnaires.

Chapter 4: Outcome Stage

In the end, a system can only be assesed by its work product. State courts have developed "a whole new body of law" dealing with commissions' cases. "This was expected," although as R. Stanley Lowe observed, it was unlikely that this stream of law would ever grow large, because of the "satisfactory level of integrity and fitness of a great majority" of the judiciary.[1] Nonetheless, the courts have decided almost two hundred cases since 1964.[2] Concomitant with the increase in commissions, from 2 in 1965 to 48 in 1978, the courts have decided most of these cases in the late 1970's. Fewer than 20 reported cases of misconduct a year reflects well on the thousands of judges, magistrates, and justices of the peace.[3] Still by looking at who complaints about what, the parameters of the work of the commission become apparent. The commission handles complaints from litigants, interested citizens, lawyers, and judges. Receiving complaints from all sources, the commission generally takes on the role of an ombudsman.

Meanwhile, with the cases that go to courts, the decisions offer both procedural and substantive guidance to and protection for the judge. The commissions and courts provide judges more due process than state and federal constitutions require for such a noncriminal setting. Due process is an important check against abuse of the system. With mixed membership on the commission and the right of appeal to the supreme court, these procedural safeguards comprise a system of checks and balances to protect the judge

against popular whim or judicial vendetta, while providing judicial accountability that impeachment cannot.

1. AGGREGATE DISPOSITION OF COMPLAINTS

Table 23. Disposition of Complaints

Category	Nationwide[a]	New York
Dismissal--lack of jurisdiction or Frivolous (before investigation)	79.0%	65.6%
Dismissal--after investigation	6.9%	23.9%
Private adjustment, resignation or sanction	14.1%	10.5%
	100.0%	100.0%

a excluding New York

In 1977, the commissions disposed of over 99% of the complaints without formal hearings or recommendations to the high court. Excluding New York state commissions received 2500 complaints, dismissing 79% before and 6.9% more after investigation. Almost two percent of the complaints or more than forty terminated in resignation. The commission settled another 10.7%, over 400 complaints, by private adjustments or a promise from a judge to cease his/her offensive practice.[4] Similarly, the New York Commission dismissed 85 to 90% of the complaints, and concluded most of the remainder confidentially. Less than one percent resulted in a recommendation to the court or in an order to discipline a judge.

2. Grounds for Sanctions

The ABA-approved Standards for Judicial Discipline and Disability recommended grounds for discipline, compiled from those employed in the states. These grounds were (1) felony conviction, (2) willful misconduct in office, (3) willful misconduct unrelated to judicial office but bringing the office into disrepute, (4) conduct prejudicial to the administration of justice or unbecoming a judicial officer--in or out of office, and (5) any conduct which violates the codes of conduct.[6]

Because of the now established and tested body of case law, the various federal proposals for alternatives to impeachment have codified all or part of these grounds in their bills. Now, by studying the case law defining these grounds, the judge can know what is required. For example, the North Carolina supreme court interpreted willful misconduct in office to denote "in his official capacity done intentionally, knowingly and generally, in bad faith. It is more than a mere error of judgment or an act of negligence . . ."[7] In a second case, the court ruled that "willful misconduct in office is neither unconstitutionally vague or overly broad." Mimicking New York "for cause" cases, they ruled that "consideration should be given to the traditions, heritage, and generally recognized practices of the courts and the legal professions, the common and statutory law, codes of judicial conduct, and traditional notions of judicial ethics."[8]

Some state courts have concluded that an element of bad faith is necessary for "misconduct." In New York, Judge Perry did not

like his coffee. He ordered the coffee vendor brought before him, handcuffed, and--on the record--Perry "excoriated" him. Perry's record was otherwise unblemished. The court removed him not for this action but because he showed bad faith, and giving false testimony under oath about this incident.[9] The California court ruled in Geiler v. Commission that "'willful misconduct in office' connotes something graver than . . .' conduct prejudicial to the administration of justive' and should be reserved for 'bad faith' in one's capacity as a judge."[10] "Bad faith," "willfulness" or "persistent" conduct are necessary to discipline for misconduct in office. Most states provide for lesser acts which do not meet these criteria.

3. The Reported Cases

Since, 1964, the case reporters have recorded 186 judicial disciplinary cases. This does not include an undetermined number of cases from states such as Illinois, Delaware, and New Mexico, which do not report or publish all of their cases in the reporters. These gaps in the data have been filled where possible. Also unrecorded are hundreds of judicial resignations occurring before the case reaches the courts.[11] Although sixteen were reported in which the judge was absolved or the case mooted by resignation, Table 25 understates the rate of dismissals because some state courts only publish the sanctions, maintaining confidentiality for dismissals.

Table 24

Reported Cases by Kinds of Misconduct

	Nature of Activity	Number of Cases
In court conduct 117 cases 56.6%	Lack of decorum/rudeness	25
	Abuse of power/corruption	20
	Failure to perform or improper actions	35
	Exparte hearing	16
	Ticket-fixing	21
Conflicts of interest or appearance thereof 36 cases 17.3%	Direct conflict of interest	12
	Practicing law	10
	Political activities	14
Incapacity 6 cases, 2.9%	Alcohol	3
	Senility/age	3
Nonjudicial activities 34 cases, 16.5%	Criminal cases	22
	Private activity	12
Miscellaneous 14 cases, 6.8%	Miscellaneous	14

Table 24 depicts a compilation of cases from the Decennial Digest report of cases, Resource Materials, and other fragmentary sources. Of course, many of these cases involve multiple infractions, so some cases are counted in more than one category. These divisions are necessarily arbitrary and, especially for

"in court conduct," overlapping. The chart is thus only a guide to trends in the kinds of cases the courts deal with.

The complaints that reach the court involve either a major breach of conduct or a series of such infractions. Much earlier in the process, the commission will have dismissed or handled the minor indiscretions. The courts are reserved for cases, such as Matter of Duncan, where the judge has broken into the home of a neighbor and threatened the neighbor's children,[12] or Cannon v. Commission on Judicial Qualifications, where the commission has charged the judge with more than thirty counts, including abusing the contempt power, abusing attorneys and police, interfering with attorney-client relations, setting bail arbitrarily, sending a minister into prison to proselytize, and making sexual innuendoes to a defense witness.[13]

Eighty percent of these case involved either the judge's on-bench duties or the effect of off-bench activities on these duties. Most of these infractions would have been committed either by state or by federal judges.[14] Offensive on-bench conduct has included: rudeness,[15] racist or sexist language,[16] corruption and favoritism,[17] abuse of power,[18] failure to perform duties,[19] and misdeeds, such as altering court records.[20] Cases involving off-bench activities have dealt with criminal conduct,[21] as well as business[22] and social dealings.[23] Violating Canon 2 of the Code of Judicial Conduct which requires the avoidance of both impropriety or the appearance of impropriety, this conduct has

Table 25

Distribution of Cases by Sanctions in the States

State	Removal	Suspension*	Censure	Reprimand	Dismissal**	
N.Y.	11	2	19	0	3	
Ind.	1	2	0	0	1	
Penn.	1	3	0	1	0	
Calif.	3	0	6	0	1	
N.C.	1	0	6	0	0	
Alaska	0	0	0	1	1	
La.	1	1	2	0	0	
Mich.	3	4	1	1	3	
Ore.	1	0	0	2	0	
Kan.	0	0	4	0	0	
Wisc.	0	2***	0	1	0	
Fla.	1	0	1	3	2	
N.M.	1	1	0	0	0	
Md.	2	0	2	0	0	
Ohio	1	1	0	0	0	
Okla.	2	0	0	0	1	
Tex.	2	0	1	0	0	
Dela.	0	1	0	0	0	
Ill. (71-76)****	3	7	3	4	1	
Ala.	2	0	0	0	1	
Ga.	0	1	0	0	0	
S.D.	0	0	1	0	0	
N.J.	2	2	4	4	0	
Vt.	0	1	0	0	0	
Wyo.	0	0	1	0	0	
Mo.	2	2	1	0	1	
Minn.	1	1	0	0	0	
Ky.	0	0	0	0	1	
D.C.	0	0	1	0	0	
Mass.	2	1	1	1	0	
N.D.	0	0	1	0	0	
Total	43	32	55	18	16	164
%	26.2	19.5	33.5	11.0	9.8	100.0

N = 164

*Suspension might be employed by a court which does not have removal powers. In other states it is a sanction in addition to removal.

**Again, this table understates dismissals.

***This includes fines, which have the economic effect of a suspension without increasing the workload of other judges.

****The Illinois data are from a correspondence. Other sources are the Decennial Digest and 1976 Resource Materials.

often involved conflicts of interest or the appearance thereof.[24] These are offenses which may be committed by any judge, state or federal.

4. Nature of Sanctions

As has been demonstrated, the commissions dismiss or handle internally 99% of all cases. Table 25 subdivides the remainder of the reported cases by state and severity of the sanction. The numbers in the states are too small to permit detailed analysis. This table, again, understates the dismissal rates and overstates the sanction rates because some courts do not report dismissals in order to protect the judge. Nevertheless, the courts dismissed only 10% with a reported decision. Ninety percent of the reported cases resulted in at least a reprimand. Even the weak sanction of a reprimand, commonly given by commissions, is rare from the bench (18 cases). The Illinois Courts Commission employed this sanction four times. Since the Illinois Judicial Inquiry Board only finds sufficient cause for the Courts Commission to convene and can make no private adjustments, that system requires less serious cases to be settled by the second tier, Courts Commission.[25]

Since 1947, New York, the most active commission state, (Commission, Court on the Judiciary, and the four Appellate Division Courts), has removed eleven judges out of scores of reported incidents (or complaints). New York has a special situation with 3500 full- and part-time judges; California has 1100; and most states have many fewer. Only three other states have removed more than two judges. Michigan has removed three judges in

twelve reported cases; California has removed three judges in ten cases; between 1971 and 1978, Illinois removed three judges in eighteen cases.[26] Overall, the removal rate for the 164 cases has been 26.2% (43 removals). Since less than one complaint in one hundred last year reached the courts, it can be estimated that the ratio of initial complaints to removal is about four hundred to one.

Table 25 has been pieced together from many sources, and can only be reliably used as an indicator of the handling of cases by state courts.

Trends

Table 26 depicts the yearly count of disciplinary cases that have been handled by the state courts. Using only the cases in the Decennial Digests, this table shows a dramatic increase in the past fifteen years. The 300 percent increase since 1964 apparently reflects more than 2500 percent rise in the jurisdictions with disciplinary systems from two (New York and California) to fifty-one (forty-eight states, the District of Columbia, Guam and Puerto Rico) than it reflects any increase in judicial misconduct or systemic notice of it.[27]

Table 26

Cases Reported in Decennial Digest, Judge key #11*

Year	Number of Reported Cases	Year	Number of Reported Cases
1964	1	1972	9
1965	0	1973	12
1966	3	1974	17
1967	5	1975	23
1968	6	1976	19
1969	9	1977	31
1970	5	1978	30
1971	10	TOTAL	185

*This chart includes all cited cases including countersuits by judges and so forth.

5. Appellate Judicial Support for the Commissions

Interviews in the three case study states suggest that most complainants bring their complaints against trial judges. Naturally, these judges tend to resent the process more than upper-level judges. Accordingly, appellate judges have been more supportive of the commission system.

The commission's links to the judiciary, especially to the upper levels, are numerous. In most states, the commission is an independent agency within the judicial branch. Its budget must go through the supreme court's administrative office. Its rules are subject to supreme court approval. The chief justice or entire high court appoints the judge members in most states and all members in a few states. In the absence of legislative action, some supreme courts, such as Massachusetts and South Carolina, established the commission to investigate and to make

recommendations. In these two states, the chief justices have been instrumental in creating and supporting the organization in the face of judicial skepticism and fear.[28] Despite controversies, the Massachusetts commission has received little direct pressure because the Supreme Judicial Court has "championed" the commission.[29] Because the supreme court makes the determination on judicial discipline and most commissions only recommend action, the court defends its own determinations when it supports the commission. Observers often overlook this obvious fact of commission life.

There is some indication that the composition of the commission and the supreme court's acceptance of the commission's recommendations may be related. Using the Decennial Digests, the commission cases from 1964--the first commission case--through late 1978 that the courts had decided, were coded. If at least two more judges were on the commission than the next largest group of members, the commission was coded as judge-dominated. The rest of the commissions were coded as other-dominated. Cases were also coded by whether the court accepted or modified the recommendations.* The null hypothesis is that the composition of the commission is unrelated to the supreme court's decisions. The null hypothesis can be rejected at the (.02) level of significance. (See Table 27.)

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*In only three cases did the court increase the severity of the punishment, so most "modifications" were a lessening of the sanction. States such as Illinois were excluded because the commissions do not make recommendations.

Table 27

EFFECT OF COMMISSION COMPOSITION ON DISPOSITIONS OF CASES BY THE STATE SUPREME COURTS

Kind of Commission	Recommendation affirmed by high courts	Recommendation modified by high courts	Totals
Judge-dominated	33 (84.6%)	6 (15.4%)	39
Other-dominated	33 (61.1%)	21 (38.9%)	54
Totals	66 (71.0%)	27 (29.0%)	93

$X^2 = 6.07$, 1 degree of freedom, level of significance $< .02$

The nature or cause of the relationship between composition and decision is not clear. The most obvious but least likely possibility is that judges on the court could be deferring to their colleagues on the commission. More likely, the judge-dominated commission, because of its composition, would share or be more attuned to the views of the high court than would a commission dominated by lawyers and lay members. For a more speculative explanation, the handling of complaints by a judge- or other-dominated commission may have different screening processes, affecting the type of cases that a commission sends to the court.

The data are suggestive of some significant relationship and may be important for any future changes in the composition of commissions. The evidence here suggests that composition may affect the relationship between the commission and the judiciary and the outcome of the complaint against the individual judge.

6. Impact

The outcome of complaints and cases influences both the commission and its external environment. This section focuses on only one aspect of that impact--on the attitudes of judges and of commissioners towards their state's commission as a model for a federal system. Such attitudes may also be labeled as part of the feedback which returns to the system as supports.

a. Can State Commissions serve as models for the Federal System?

The survey responses indicate that the members and staff of state judicial disciplinary commissions are pleased with their systems. At least three-fourths of those responding from each group--bench, bar, lay members and executive secretaries--would make such a recommendation. This suggests wide satisfaction with their commissions. Moreover, one may assume that some of those not recommending their own state system as a model may nonetheless have recommended some modification of the system. Several respondents indeed offered such addendums.

Table 28

MEMBERS' RECOMMENDATIONS OF STATE COMMISSION AS A FEDERAL MODEL (QUESTION 18)

	Yes	%	No	%	N (100%)
Judges	34	(77.3)	10	(22.7)	44
Lawyers	32	(80.0)	8	(20.0)	40
Lay members	26	(86.7)	4	(13.3)	30
Executive secretaries	15	(75.0)	5	(25.0)	20
	107	(79.9)	27	(20.1)	134

On the other hand, the responses of judges in the three states varied dramatically. North Carolina judges, with a California-style commission, recommended theirs as a model almost as highly as did the commissioners. The respondents from Massachusetts and New York, however, were much more divided on this issue.

Table 29

RESPONSE BY STATE WHETHER THE JUDGE'S STATE COMMISSION SHOULD BE A MODEL FOR A FEDERAL SYSTEM

State	Yes	No	Total
Mass.	25 (48.1)	27 (51.9)	52
N.Y.	28 (42.4)	38 (57.6)	66
N.C.	49 (72.1)	19 (27.9)	68
Total	102 (54.8)	84 (45.2)	186 (100.0)

One possible reason for the division in New York may revolve about the 1977-8 ticket-fixing scandal in which four hundred town and village justices were investigated. Based on comments in the questionnaire, it can be asserted that some of the negative voices are from these town and village justices or their sympathizers. All three states have had controversial cases, but the cases have been more numerous in the two urbanized states. Likewise, political conflict surrounding the commission, that is, media and interest group pressure, has been more intense and continuous in the urbanized regions.*

*This impression is based on interviews in the three states.

A small majority (55%) of the respondent judges recommend their commission as a model for the federal system. In the previous section, the judges have responded that the commission is an effective agency in handling misconduct and does not infringe upon legitimate judicial functions. These responses, together, suggest a degree of support among judges for some complaint-processing procedure.

This study suggests a future project. The data here are the views of judges about the commission system. How do the complainants perceive the system? The legislators? The bar? The public? There are legal (confidentiality) and scientific (sampling) problems with such a study. Yet, if they could be overcome, a more complete picture of the perceived usefulness and dangers of these systems could be obtained.

b. Issues to be considered

A follow-up question attempted to probe the views of the respondents about the establishment of such a federal commission. The commissioners and the judges were asked to rank in order of importance five separate issues which may arise in establishing a federal commission: (a) whether the "good behavior" clause is an impeachment standard or grounds for separate removal mechanism; (b) whether a commission would infringe upon the independence of the judiciary; (c) whether a commission would infringe upon the the independence of the individual judge; (d) whether a commission should contain lawyers and lay members in addition to judges; (e) whether the powers the commission should have be censure only or

censure in addition to removal. The question asked them to rank the "issues", "1" being least important, and "5" being most important. Clearly, independence of the judiciary was the number one concern for most responding judges.

Table 30

RESPONSES OF JUDGES TO THE IMPORTANCE OF ISSUES ARISING WITH THE ESTABLISHMENT OF A FEDERAL COMMISSION
(Question 14)

	Least Important 1	2	3	4	Most Important 5	(100%)
a) Nature of the good behavior standard	29 (18.2)	21 (13.2)	29 (18.2)	31 (19.5)	49 (30.8)	159
b) Independence of judiciary	21 (13.0)	19 (11.7)	23 (14.2)	23 (14.2)	76 (46.9)	162
c) Independence of individual judge	31 (18.7)	21 (12.7)	25 (15.1)	41 (24.7)	48 (28.9)	166
d) Membership of lay persons	33 (20.0)	18 (10.9)	27 (16.4)	31 (18.8)	56 (33.9)	165
e) Power to remove or only power to censure	23 (15.1)	18 (11.8)	24 (15.8)	32 (21.1)	55 (36.2)	152

Table 31

RESPONSES OF COMMISSIONERS TO THE IMPORTANCE OF ISSUES ARISING WITH THE ESTABLISHMENT OF A FEDERAL COMMISSION
(Question 19)

	Least Important 1	2	3	4	Most Important 5	(100%)
a) Nature of the good behavior standard	16 (13.6)	6 (5.1)	26 (22.0)	19 (16.1)	51 (43.2)	118
b) Independence of judiciary	27 (21.6)	24 (19.2)	14 (11.2)	18 (14.4)	42 (33.6)	125
c) Independence of individual judge	41 (32.8)	22 (17.6)	16 (12.8)	19 (15.2)	27 (21.6)	125
d) Membership of lay persons	17 (13.4)	15 (11.8)	21 (16.5)	15 (11.8)	59 (46.5)	127
e) Power to remove or only power to censure	6 (5.0)	13 (10.8)	20 (16.7)	25 (20.8)	56 (46.7)	120

While independence of the judiciary was also an important issue for the commissioners, the nature and authority of the proposed system were more important concerns of the commissioners. Given the focus of their experience, naturally the commissioners would be more concerned about the composition and powers of this commission.

c. Independence

Next, comparing the recommendations of the state commissions as a federal model with concern for judicial independence, Table 32

illustrates a striking relationship. The more important the judge considered the issue to the federal debate (the closer to 5), the less likely the judge was to recommend the state's commission as a federal model.

Table 32

RELATIONSHIP BETWEEN JUDGE'S RECOMMENDATION OF OWN STATE'S COMMISSION AS A MODEL WITH VIEW OF IMPORTANCE OF JUDICIAL INDEPENDENCE

Recommendation	Least Important 1	2	3	4	Most Important 5	Total (100%)
Yes	17 (18.9)	15 (16.7)	15 (16.7)	12 (13.3)	31 (34.4)	90
No	4 (5.6)	4 (5.6)	8 (11.1)	11 (15.3)	45 (62.5)	72
	21 (13.0)	19 (11.7)	23 (14.2)	23 (14.2)	76 (46.9)	162

$X^2 = 17.38$, 4 degrees of freedom. Level of significance $< .002$

Apparently, this question tapped the issue of whether a federal commission would affect judicial independence adversely. The judges recommending their commissions as an issue then were judges who did not recommend their commissions. Thus, 62.5% (45 of 72) who did not recommend their commission, believed this was the most important issue; only 34.4% (31 of 90) who recommended their commission as a model were so concerned. The issue of the independence of the individual judge produces a similar although less pronounced trend. There, the level of significance was $< .02$. No such dichotomy appeared with the other three issues.

Table 33

RELATIONSHIP BETWEEN COMMISSIONER'S RECOMMENDATIONS OF OWN STATE'S COMMISSION AS A MODEL WITH VIEW OF IMPORTANCE OF JUDICIAL INDEPENDENCE

Recommendation	Least Important 1	2	3	4	Most Important 5	Total (100%)
Yes	23 (23.5)	22 (22.4)	14 (14.3)	9 (9.2)	30 (30.6)	98
No	4 (14.8)	2 (7.4)	0	9 (33.3)	12 (44.4)	27
	27 (21.6)	24 (19.2)	14 (11.2)	18 (14.4)	42 (33.6)	125

X^2 = 16.86 with 4 degrees of freedom. Significance $<$ 0.002.

Nearly 78 percent (21 of 27) of those commissioners who did not recommend their commission as a model considered independence, as the most or next most important issue. Among those who recommended their commission as a model, only 39.8% rated the effect on judiciary independence as the most or next most important issue. There are fears about the effect of commissions on judicial independence and this may be adduced from this statistic.

7. Judicial Views on the Effectiveness of the Commission

In the questionnaire, judges were asked to respond to the five statements (or goals) of the commission by rating the effectiveness of the commission in achieving those goals, "4" being "very effective," "1" being "no effect." For Table 34, "very" and "fairly effective" were combined to designate the positive benefit category. "Somewhat effective" or "no difference" can be read as marginal or no benefit of the commission.

Table 34

JUDICIAL VIEWS ON THE EFFECTIVENESS OF THE COMMISSION (QUESTION 10)

Statement	Effective	Somewhat Effective	No Difference	N (100%)
Reinforces guidelines	109 (56.8)	66 (34.4)	17 (8.9)	192
Makes judges accountable to administration of justice.	114 (58.8)	54 (27.8)	26 (13.4)	194
Protects image of the judiciary	69 (36.5)	55 (29.1)	65 (34.4)	189
Makes judges more accountable to public	85 (45.2)	60 (31.9)	43 (22.9)	188
Punishes misconduct	112 (60.6)	51 (27.6)	22 (11.9)	185

The responding judges in all three states perceived the main role of the commission and one of its most effective functions to be reinforcing guidelines such as the Code of Judicial Conduct. Likewise, punishing misconduct and making the judiciary more accountable to the administration of justice are frequently cited by these judges as roles of the commission, which the commissions are generally effective in achieving. The responding judges tended to find protecting the image of the judiciary and making the judge accountable to the public to be less accurate descriptions of the role of the commission and less effectively achieved.

Table 35 reveals that a judge's familiarity with the commission has little effect on views about its effectiveness in

performing these roles. The group of judges that responded "very" or "fairly familiar" with the commission had consistently but only slightly higher percentages finding the commission effective. One final caveat is in order, however. The small number of respondents to the survey may indicate that only those judges favorable to the commission concept have responded to this survey.

Table 35

COMPARING JUDGES FINDING COMMISSION EFFECTIVE
WITH JUDGES FAMILIAR WITH
COMMISSION WHO ALSO FOUND THE COMMISSION EFFECTIVE

	Effectiveness	
	All Judges	Those Very or Fairly Familiar with Commission
Reinforces guidelines	109 (56.8)	37 (59.7)
Makes judges accountable to administration of justice	114 (58.8)	39 (62.9)
Protects image of judiciary	69 (36.5)	23 (37.7)
Makes judges more accountable to public	85 (45.2)	29 (47.6)
Punishes misconduct	112 (60.6)	39 (65.0)

Conclusions

Out of tens of thousands of complaints, this group of 164 cases is a tiny percentage of the complaints reaching the commissions. Even 30 out of 3500 complaints (1978) is a tiny fraction (Table 22). This statistic reflects the restraint of the commissions in the interest of judicial independence. In eighteen years, the commission and the court on the judiciary systems have removed forty-three judges. The courts have employed formal sanctions against more than one hundred others. This record shows little evidence of abuse. Furthermore, the developing case law has provided the judges with an indication of the standards to which the states will hold them in the future. Despite real doubts about the effect of the commissions upon judicial independence, there appears to be judicial recognition of the need for and even the success of these commissions in the states.

Footnotes

[1]R. Stanley Lowe, "The Developing Law on Judicial Discipline and Removal," in Resource Materials for Fifth National Conference of Judicial Disciplinary Commissions, ed. Edward J. Schoenbaum (Chicago: American Judicature Society, 1976), p. 83.

[2]1964 was the year that the California court decided its first commission case, Stevens v. Commission on Judicial Qualifications, 393 P. 2d 709 (California, 1964).

[3]Mary Reincke and Nancy Lichterman, eds., The American Bench, 2d ed. (Minneapolis: Reginald Biship Forster and Assoc., Inc., 1979), p. v.

[4]Irene A. Tesitor, Judicial Conduct Organizations (Chicago: American Judicature Society, 1978), p. 7.

[5]New York Commission on Judicial Conduct Annual Report (1978), p. 132. (These calculations exclude pending cases.)

[6]Kent L. Rev, 54 (1977): 201, p. 207, Standard 3.3.

[7]In re Stuhl, 233 S.E. 2d 562, 568 (N.C., 1977).

[8]In Re Edens, 226 S.E. 2d 5, 9 (N.C., 1977).

[9]Matter of Perry, 385 N.Y.S. 2d 589 (1976).

[10]515 P. 2d 1 (Calif., 1973).

[11]Decennial Digests (St. Paul, Minn.: West Publ. Co., 1967, 1977, 1978, 1979), key index Judge 11; Jack E. Frankel, "Fitness and Discipline of Judges: The California Plan," State Government 41 (1968): 120; Resource Material for the Fifth National Conference of Judicial Conduct Organizations (Chicago: The American Judicature Society, 1976). The 1976 material provides a synopses of some unreported cases, such as those from Illinois and Delaware.

[12]541 S.W. 2d 564 (Mo., 1976).

[13]537 P. 2d 898 (Calif., 1975).

[14]The twenty-one traffic cases represent one exception. See Matter of Kuehnel, 413 N.Y.S. 2d 809 (1978).

[15]McCartney v. Commission on Judicial Conduct, 526 P. 2d 268 (Calif., 1974); Matter of Mertins, 392 N.Y.S. 2d 860 (N.Y., 1977).

[16]In re Glickfield, 479 P. 2d 368 (Cali., 1971); In re Chargin, 471 P. 2d 29 (Calif., 1970); Dade Co. v. Strickland, 150 So. 2d 490 (Fla., 1959).

[17]Matter of Bates, 555 S.W. 2d 420 (Tex., 1976); Matter of Carillo, 542 S.W. 2d 105 (Tex., 1976).

[18]In re Durham, 74 C.C. 7 (Ill. Cts Com., 1974); In re Deluccia, 387 A. 2d 362 (N.J., 1978).

[19]In re Municipal Court of City of Cedar Rapids, 188 N.W. 2d 2d 354 (Ia., 1971); Matter of McDowell, 393 N.Y. S. 2d 748 (1977).

[20]In re Dunahoo, 242 S.E. 2d 116 (Ga., 1978).

[21]Matter of Wireman, 367 N.E. 2d 1368 (Ind., 1977); In re Haggerty, 241 So. 2d 469 (La., 1970).

[22]In re Anderson, 252 N.W. 2d 592 (Minn., 1977).

[23]In re D;Auria, 334 A. 2d 332 (N.J., 1975); In re Lee, 336 So. 2d 1175 (Fla., 1976).

[24]In re Welch, 338 A. 2d 535 (Md., 1978); In re Foster, 318 A. 2d 523 (Md., 1974).

[25]Frank Greenberg, "The Illinois 'Two-Tier' Judicial Disciplinary System: Five Years and Counting," Kent L. Rev. 54 (1977): 69, pp. 83-6.

[26]Ibid., p. 115.

[27]Tesitor, supra note 4, p. 1.

[28]Interviews held with Mr. Howard L Chappell, executive secretary, Board of Commissioners, Columbia, S.C. (5/15/79) and with Steve Limon, executive secretary, Commission on Judicial Conduct, Boston, Mass, (5/7/79).

[29]Ibid.

Chapter 5 Conclusions and Recommendations

This report has offered empirical evidence that commission systems have, in varying degrees, fulfilled the general purposes of a judicial discipline and disability procedure, such as reinforcing guidelines and punishing misconduct. At the same time, the commissions have employed various mechanisms to assure fairness to both the judge and the complainant. These mechanisms have included confidentiality of proceedings, verified or sworn complaints, screening of complaints, review of decisions by the high court, as well as due process requirements such as notice and an opportunity to be heard.

Based on this research of the states' experience as well as the federal legislative efforts, the report concludes with a few recommendations for a federal disciplinary system.

The chances of passage for a federal disciplinary system are not good. The constitutional issue is close; the need for accountability rubs against the sensitive question of judicial independence from internal or external controls. The most useful conceptualization of this situation is traditional checks and balances. Although the Framers instituted impeachment to balance the need for an independent, impartial judiciary against the danger of unchecked judicial monarchs, it has failed in both the federal and state systems to achieve the result. First the states and then the federal government began to experiment with alternative checks. The commission systems thus became a new element in the overall governmental system of checks and balances and concomitantly

needed its own internal checks and balances.

The states provided the new checks and balances through a mixed membered commission, appointed by different agencies. The complainant then had to convince a majority of the members of a commission, some appointed by the governor, the legislature, the bar, or the court. Finally, the supreme court would have to pass on the commission's recommendation or order. This new set of checks and balances helped to prevent one set of people, either within or without the court system, from abusing the disciplinary power.

Because most of the federal plans provide only for judicial members on the commissions, they do not provide parts of this check and balance, that is, multiple appointing agencies and varied membership. That balance must be found elsewhere. Thus, although a handful of states operate with the relatively inefficient two-tier system, most federal plans provide for a multi-body disciplinary scheme. Two tiers provide the missing check and balance. The complainant must now convince a committee, a council, and a court that the judge has violated the good behavior standard. Based on this logic, Representative Findley's one-tier court on the judiciary and Kastenmeier's one-tier California plan have fewer checks and balances to protect the judge than the other bills. To err in favor of judicial independence, one would opt for the Nunn or Bayh-Kennedy plans.

The Bayh, Kennedy and 1979 alternatives avoid the constitutional removal problem of the Shartel-Otis debates. Since these

alternatives provide for censure within the judiciary and an initial screening of impeachable offenses, they also make impeachment a less onerous mechanism. Although the constitutional question remains whether Congress can delegate this screening process to the judiciary, these plans would redress the present imbalance with the least change.

In drafting a bill that creates an effective and feasible system, some version of the multi-tiered system is recommended for adoption for the reasons expressed above. Likewise, a system that employs existing organizations should gain the votes of members who are more reticent to break totally new ground with new organizations. Using the Judicial Councils or Judicial Conference would seem to gain votes of some members. The Councils or the Conference could be modified to create the desired mix of district, circuit and special court judges. Staggering the terms of the members allows fresh imputs into the system, allowing many judges to participate.

The exclusion of Supreme Court Justices from this disciplinary system is politically wise. Since there are only nine Justices, impeachment can handle any rare instance of abuse warranting removal. The idea of tinkering with the U.S. Supreme Court clearly has lost votes for previous bills.

Finally, censure or suspension with pay should be the strongest sanction against a judge. Relying on "good behavior," this strategem avoids the issue of whether impeachment is the only constitutional

form of removal. Often, removal is unnecessary. In egregious cases, judges have often resigned rather than face the charges. In Massachusetts, where the commission can only recommend censure or suspension, the commission process appears not to have missed the power of removal. In Bonin, the Massachusetts court suspended the judge. He resigned rather than wait for the legislature to consider the case.[1] Similarly, in the federal system, the judiciary could handle minor matters with reprimands or censures. The rare case warranting removal can be submitted to the House of Representatives for investigation. The commission system would "supplement" and not replace impeachment.

The record of the state commissions suggests that the risk to the independence of judges is small. Likewise, the contrast in judicial action between 79-year-old, embattled Judge Willis Ritter, sitting on the federal bench until his death in 1978, and the 1978 California removal of 82-year-old Justice McComb presents a strong argument in favor of such a mechanism for the federal judiciary.[2]

The Nunn and Kennedy legislations reflect reasoned, researched responses, relying heavily on twenty years of state experience to achieve a system which provides a proven balance between judicial independence and judicial accountability. However, these are not gaining any support in the House. The thrust of this report is that the commissions have succeeded in the states and can provide guidance for the national government. A federal commission system, which encompasses adequate safeguards for

judicial independence, can be a positive force for maintaining the standards of the judiciary and retaining public trust in the judiciary.

Footnotes

[1] In re Bonin, 378 N.E. 2d 669 (Mass., 1978).

[2] "Editorial on the discipline and removal of federal judges," Judicature 61 (5/78): 440.

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Appendix

THE JOHNS HOPKINS UNIVERSITY
BALTIMORE, MARYLAND 21218

DEPARTMENT OF
POLITICAL SCIENCE

Dear Sir or Madam:

This questionnaire is part of a Ph.D. dissertation and study funded by the U.S. Justice Department, Office for Improvements in the Administration of Justice. The questionnaire and the enclosed envelope have no identifying marks so that anonymity can be preserved. The results will be used for academic purposes.

Forty-eight states have adopted some form of judicial disciplinary commission and several bills are before Congress to establish a federal counterpart. This questionnaire and study is an attempt to ascertain the effectiveness, benefits and costs of the commission systems and whether their systems can be adapted for the federal system.

Please feel free to provide any additional comments that you may have about the judicial disciplinary commission. If you wish to receive a copy of the survey results, please request it in a separate letter. You do not have to be a participant to receive the results.

Feel free to leave any questions blank which you do not wish to answer.

Thank you for your assistance.

Sincerely yours,

Nathan C. Goldman, Esq.

Enc.

THE JOHNS HOPKINS UNIVERSITY
BALTIMORE, MARYLAND 21218

DEPARTMENT OF
POLITICAL SCIENCE

Dear Sir or Madam:

This is a follow-up letter to the questionnaire mailed out three weeks ago. If you have already returned the questionnaire, please ignore this letter. Because of the confidential nature of the questionnaire, this letter is being sent to all recipients of the questionnaire.

If you have not returned it, your response will be greatly appreciated. Please feel free to request a copy of the survey results whether you answered the questionnaire or not.

Thank you.

Sincerely,

Nathan C. Goldman

OMB # 043-S79009

SURVEY TO JUDGES ON

ORGANIZATIONS ON JUDICIAL CONDUCT

Please indicate the correct number or response to each of the questions.

Section I: Background Characteristics

(1) I am a
member of the highest court in the state.....1
member of an appellate court.....2
member of a trial court.....3
other (please specify).....4 — 9/4

(2) I am from the state of
Massachusetts.....1
New York.....2
North Caroline.....3 — 10/3

(3) If you are from New York, of which department are you a member?
First Dept. 1
Second Dept. 2
Third Dept. 3
Fourth Dept. .....4 — 11/4

(4) I became a judge in _____ (year). — 12/99

(5) My age is
less than 40.....1
41-50.....2
51-60.....3
61-70.....4
over 70.....5 — 13/5

Section II: Goals and Functions of Judicial Conduct Commission

(6) How familiar are you with the state judicial conduct commission?
Very familiar 4
Fairly familiar 3
Somewhat familiar 2
Not familiar at all .....1 — 14/4

(7) How strongly do you agree with the following statements (indicate (4) "strongly agree"; (3) "agree"; (2) "disagree"; and (1) "strongly disagree")

(a) For the function of investigating, the commission should have representatives from:

The bench_____
The bar_____
The general public_____ — 15-17/4

(b) For the function of determining misconduct and discipline, the commission should have representatives from:

The bench_____
The bar_____
The general public_____ — 18-20/4

(c) The formal hearing after the investigating stage should be open to the public._____ — 21/4

(8) How accurately does each of the following statements describe the role of the commission (indicate (4) "very accurately"; (3) "fairly accurately"; (2) "somewhat accurately"; and (1) "does not apply").

(a) reinforces guidelines for judicial conduct_____ — 22/4
(b) makes judges more accountable to the administration of justice_____ — 23/4
(c) protects the image of the judiciary_____ — 24/4
(d) makes judges more accountable to the public_____ — 25/4
(e) punishes misconduct_____ — 26/4
(f) other (please specify)_____ — 27/4

(9) In your opinion, how important do you think each of the goals or objectives are to the operation of the commission on judicial conduct? (indicate (4) "very important"; (3) "fairly important"; (2) "somewhat important"; and (1) "unimportant").

(a) reinforces guidelines for judicial conduct_____ — 28/4
(b) makes judges more accountable to the administration of justice_____ — 29/4
(c) protects the image of the judiciary_____ — 30/4
(d) makes judges more accountable to the public_____ — 31/4
(e) to punish misconduct_____ — 32/4
(f) other (please specify)_____ — 33/

(10) In your opinion, how effectively has the commission succeeded in achieving these goals or objectives? (indicate (4) "very effectively"; (3) "fairly effectively"; (2) "somewhat effectively"; (1) "makes no difference")

(a) reinforces guidelines for judicial conduct_____ — 34/4
(b) makes the judiciary more accountable to the administration of justice_____ — 35/4
(c) protects the image of the judiciary_____ — 36/4
(d) makes the judges more accountable to the public_____ — 37/4
(e) to punish misconduct_____ — 38/4
(f) other (please specify)_____ — 39/

(11) In your opinion, what effect has the commission had on the following types of judicial functions (indicate (5) "very positive effect"; (4) "positive effect", i.e. enhance or facilitate function; (3) "no effect"; (2) "negative effect"; and (1) "very negative effect," i.e., impede or constrain objective performance of functions.

Administrative functions of the Court

(a) handling various calendars_____
(b) expediting cases_____ — 40-41/5

Decision-making functions

(a) ruling on objections _____
(b) instructing jurors _____
(c) making final decisions or judgments (outcome of litigation)_____
(d) sentencing criminal defendants/ awarding or finding for civil litigants_____ — 42-43/5

On-Bench Judicial Conduct

(a) acting towards counsel, litigants, witnesses and jurors_____
(b) being punctual for hearings and — 44-47/5

3.

(12) In your opinion, how would other judges view the effect of the commission on the following types of judicial functions? (Indicate (5) "very positive effect"; (4) "positive effect", i.e. enhance or facilitate function; (3) "no effect"; (2) "negative effect"; and (1) "very negative effect," i.e., impede or constrain objective performance of functions.)

Administrative functions of the Court

(a) handling various calendars_____
(b) expediting cases_____

Decision-making functions

(a) ruling on objections_____
(b) instructing jurors_____
(c) making final decisions or judgments (outcome of litigation)_____
(d) sentencing criminal defendants/ awarding or finding for civil litigants_____ 48-56/5

On-Bench Judicial Conduct

(a) acting towards counsel, litigants, witnesses and jurors_____
(b) being punctual for hearings and trials_____

(13) If there is to be a federal commission would you recommend that it be constituted along the lines of your state commission?

Yes.....1
No.....2 57/2

(14) Rank in order of importance the following issues that may arise in establishing a commission to oversee the conduct of federal judges. (5 being most important and 1 least important).

(a) Whether the "good behavior clause" is an impeachment standard or grounds for a separate removal mechanism._____

(b) Whether a commission would infringe upon the independence of the judiciary. 58-62/5

(c) Whether a commission would infringe upon the independence of the individual judge_____

(d) Whether a commission should contain lawyers and lay members in addition to judges_____

(e) Whether the powers the commission should have be censure only or censure in addition to removal_____

(f) Other_____

(15) Please feel free to offer further comments on the survey or on the judicial disciplinary commission.

OMB # 043-S79009

QUESTIONNAIRE ON ORGANIZATIONS ON JUDICIAL CONDUCT

Please indicate the correct number or response to each of the questions.

Section I: Background Characteristics

(1) I am a(n)
bench member of a commission.....1
bar member of a commission.....2
lay member of a commission.....3 10/4
executive secretary of a commission..4

(2) The commission is composed of the following number of:
judges_____ 11/9
lawyers_____ 12/9
lay members_____ 13/9
others_____ 14/9

(3) If you are a bench member of the commission,
(a) in what year did you become a judge _____ 15-16/99
(b) Were you: appointed.....1
elected.....2 17/2

(4) If you are a bar member of the commission, in what year were you first admitted to the bar?_____ 18-19/99

(5) If you are a lay member of the commission,
(a) what is your occupation?_____
_____
_____

(b) in what year did you first become employed in this occupation?_____ 20-21/99

(6) My ethnic background is:
American Indian.....1
Black American.....2
Hispanic American.....3
Oriental American.....4
White American.....5 22/6
Other

(7) I am:
Male..... 1
Female..... 2 23/2

(8) My age is:
less than 40.....1
41-50.....2
51-60.....3
61-70.....4 24/5
over 70.....5

(9) Judges in this state are selected by:
Merit selection (Judicial Nominating Commission)..... 1
Partisan Election..... 2
Nonpartisan Election..... 3 25/5
Gubernatorial appointment with legislative approval..... 4
Other (please specify)..... 5
_____
_____

Section II: Goals and Functions of the Commission

(10) How accurately does each of the following statements describe the work of the commission (indicate (4) "very accurately"; (3) "fairly accurately"; (2) "somewhat accurately" and (1) "does not apply." 26-30/4

(a) reinforces guidelines for judicial conduct_____
(b) makes judges accountable to the administration of justice_____
(c) protects the image of the judiciary_____
(d) makes judges more accountable to the people_____
(e) punishes misconduct_____
(f) other (please specify)_____
_____
_____

(11) How strongly do you agree with the following statements (indicate (4) "strongly agree"; (3) "agree"; (2) "disagree"; and (1) "strongly disagree,"

(a) for the function of investigating, the commission should have representatives from:

the bench_____ 31-33/4
the bar_____
the general public_____

(b) for the function of determining misconduct and discipline, the commission should have representatives from:

the bench_____ 34-36/4
the bar_____
the general public_____

(c) The formal hearing after the investigating stage should be open to the public_____ 37/4

(12) The formal commission hearing is in this state

public_____1 38/2
confidential_____2

(13) To your knowledge, has an opposing lawyer or litigant every complained about a commission bar member's later participation in a legal case? 39/2

Yes.....1
No.....2

(14) Rank in order of importance the following roles of commissioners, (5) being most important and (1) least important.

(a) represents the views of the occupation_____
(b) represents the interests of the public_____ 40/5
(c) represents the interests of justice_____
(d) represents the interests of the judiciary_____
(e) represents the interests of justice but brings the particular views of his occupation to the issues_____

(15) This section attempts to determine your views on the standard of conduct that should be required of a judge by the public and the commission. Please indicate what you would recommend to the court in each of the following hypothetical situations, by placing the appropriate number on the line after each case:

7) remove the judge from office
6) suspend the judge without pay for up to one year
5) issue a public censure to the judge
4) reprimand the judge privately
3) take no official action, but mildly disapprove
2) I cannot determine how I would react
1) Inappropriate complaint, I would take no action

a) A judge, stopped by the police for erratic driving, was discovered, in a proper search to be carrying a concealed, unregistered revolver_____. 41/7

b) A judge wrote several letters of reference for a convict in an effort to persuade another judge to reduce the sentence_____. 42/7

c) A judge allowed a television station to film an interview with him in his chambers about a pending trial. The interview was shown on the evening news_____. 43/7

d) A judge failed to instruct the jury properly._____. 44/7

e) A judge backdated a docket entry relating to an oral motion to make it appear that the motion was timely when it was not_____. 45/7

f) A judge became intoxicated at a Country Club dance_____. 46/7

g) A judge, asked to "fix" a number of traffic tickets, simply ignored the request and took no further action_____. 47/7

h) A judge refused to discipline his bailiff, after the bailiff was arrested in a gambling raid on a local tavern_____. 48/7

i) A judge criticized counsel in the courtroom in such a way as to publicly humiliate him_____. 49/7

j) A judge refuses to recuse himself and sits in a case involving a company in which he has invested_____. 50/7

k) In fencing in his backyard, a judge sets his new fence two feet over his property line into his neighbor's yard_____. 51/7

l) A judge became an active candidate for Congress, without resigning his judicial post_____. 52/7

m) Same as (1) and the judge on request of fellow judges refused to resign_____. 53/7

n) Same as (1) and (m), in addition, the judge is threatened by the judges with legal action and public disclosure _____. 54/7

(16) There are no definitive answers, but we would like to know how important you feel each attribute is to the make-up of the ideal state trial judge?

Please use this set of symbols to indicate your response:

5) Very important
4) Fairly important
3) Somewhat important
2) Unimportant
1) Irrelevant

a) Punctual_____
b) Neat personal appearance_____
c) Decisive, not dilatory_____
d) Sense of humor_____
e) Aura of dignity_____
f) Temperate with drink, sober_____
g) Openminded, able to listen to both sides patiently_____
h) Common sense_____
i) Courteous to lawyers_____
j) Courteous to witnesses_____ 55-69/5
k) Hard working_____
l) Professional integrity_____
m) Understand people_____
n) Able to keep control of the case being tried_____
o) Not susceptible to influence _____
p) Competence, knowledge of the law_____

4.

(17) In your opinion, how effectively has the commission succeeded in establishing or reinforcing the following judicial attributes (indicate (4) "very effectively"; (3) "fairly effectively"; (2) "somewhat effectively"; and (1) "make no difference").

a) Punctual _____
b) Neat personal appearance _____
c) Decisive, not dilatory _____
d) Sense of humor _____
e) Aura of dignity _____
f) Temperate with drink, sober _____
g) Open-minded, able to listen to both sides patiently _____
h) Common sense _____
i) Courteous to lawyers _____ 70-84/4
j) Courteous to witnesses _____
k) Hardworking _____
l) Professional integrity _____
m) Understands people _____
n) Able to keep control of case being tried _____
o) Not susceptible to influence _____
p) Competence, knowledge of the law _____

(18) If there is to be a federal commission, would you recommend that it be constituted along the lines of your state commission?

Yes.....1
No.....2 85/2

(19) Rank in order of importance the following <u>issues</u> that may arise in establishing a commission to oversee the conduct of federal judges (5 being most important and 1 least important).

(a) Whether the "good behavior clause is an impeachment standards or grounds for a separate removal mechanism?_____

(b) Whether a commission would infringe upon the independence of the judiciary?_____

(c) Whether a commission would infringe upon the independence of the individual judge?_____ 86-99/5

(d) Whether a commission should contain lawyers and lay members in addition to judges?_____

(e) Whether the powers the commission should have be censure only or censure in addition to removal?_____

(f) Other _____

(20) Please feel free to offer further comments on the survey or on the judicial disciplinary commission.

END