A PROPOSED COMMISSION PLAN FOR CENSURING, RETIRING, OR REMOVING JUDGES FOR GOOD CAUSE*

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The removal from office of a corrupt judge, or one who due to a debilitating illness now lacks the physical strength or the mental energy to do the work of the court involves a difficult and a delicate problem. This problem requires careful balancing of the principles of judicial independence against the public interest in the removal of an unfit judge.

Under present Iowa law the methods for compulsory removal of a judge from office are age,[1] denying retention in office and impeachment.[2] Compulsory retirement for age provides no remedy for the misconduct of a judge who has not yet attained the requisite years. The power to deny retention in office to a judge can be exercised only at the end of his term of office. Constitutional impeachment in Iowa deals only with "misdemeanor and malfeasance."[3]

There is also an Iowa statutory procedure[4] for the removal of a judge for "permanent physical or mental disability, rendering him incapable of properly performing his duties." This statutory procedure cannot be used for a removal for moral turpitude, and can only be brought on petition by the Chief Justice, the Attorney General or 25 members of the bar before a specially constituted court of selected judges.

The only way to remove a judge from office in Iowa, on the basis of his own misbehavior, is through legislative impeachment. Impeachment as a procedure for removing a judge on the basis of complaints about his misbehavior is unfair to the judge. Senators who are the triers of the issues in an impeachment

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* On October 13, 1969, the Committee on Legislative Development and Research of the Iowa District Judges Association, asked the Drake University Law School to prepare for the use of that committee a memorandum on the California plan for the removal from office of unfit judges, with whatever variations therefrom which would seem to be desirable. That task was assigned to the writer, and this article is a revision of that memorandum. The committee furnished some thoughtful guidelines which it regarded as appropriate for possible inclusion in a proposed statute for the State of Iowa. The opinions expressed in this Article, however, should be attributed to the writer and not to the committee.—Ed.

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1 IOWA CODE § 605.24 (1966).
2 IOWA CONST. art. III, §§ 19, 20.
3 IOWA CONST. art. III, § 20.
4 IOWA CODE §§ 605.26-.32 (1966).

trial have other and more pressing matter to consume their time, and therefore may be forced to make decisions with only a partial or superficial knowledge of the evidence presented. There are usually times in impeachment trials when only a few senators are on the floor to hear the witnesses testify. Impeachment trials have seldom been free from political bias and procedural tactics which would be improper in an authentic judicial proceeding. Impeachment procedure is so dilatory, cumbersome, expensive, time-consuming and patently inadequate that it has never been used in the State of Iowa. Since 1962, Iowa judges have been appointed by the Governor from a list of three nominees submitted by a nominating committee. After their initial term of office, judges are not opposed by other candidates, but stand alone for retention in office on ballots which submit to the voters as the only question whether they shall be retained in office for an additional term.[5] Often the voters do not have the information needed to decide that question. This method of holding on to office has been criticized on the ground that it is in effect an appointment for life or to the mandatory retirement age. In view of that criticism, there is a special need in Iowa for a remedy for the removal of a senile, inebriate or unfit judge that is more effective than impeachment. Public confidence in the judiciary is the *sine qua non* for a jurisprudence that works well.

In 1960 California pioneered, through the establishment of a constitutional amendment, a new procedure to remove, censure or retire judges. A Commission on Judicial Qualifications composed of judges, lawyers and lay persons was set up to police the judiciary. Its primary function is to receive and investigate complaints about judicial officers. The Commission has an Executive Secretary who, unlike an attorney general or a judge, can devote full time to his function in the area of judicial discipline without prejudicing other responsibilities. The Executive Secretary receives complaints, investigates them and makes reports thereon to the Commission. His function has been likened to the Scandinavian ombudsman.[6] If the Commission finds a complaint to be frivolous, irrelevant, malicious or without credibility, it does no more than to inform the complainant accordingly. If, however, it encounters a problem of judicial incapacity or misbehavior, it seeks a voluntary solution, holding in confidence all proceedings to that end. If the Commission finds

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[5] IOWA CONST. art. V, § 4, as amended in 1962.

[6] The ombudsman concept is that a citizen aggrieved by the action of a public officer should be able to state his grievance to an influential commissioner empowered to investigate the complaint. An extraordinary amount of recent interest in the ombudsman idea reflects a growing public belief that this country needs an added system which functions informally, expeditiously and without cost to aggrieved citizens. The creation of the ombudsman's office has been proposed in 47 of the 50 states and in numerous cities and countries, and the National Conference of Commissioner's on Uniform State Laws is preparing a model law on the subject. Gelhorn, *The Ombudsman's Relevance to American Municipal Affairs*, 54 A.B.A.J. 134 (1968) (the article just mentioned outlines the advantages that may flow from the use of a municipal ombudsman). Governor Robert Ray's mail soars at times to 400 to 600 letters a day and 80 per cent of which could be handled by an ombudsman. Governor Ray intends to ask the 1970 Iowa Legislature for authority to appoint an ombudsman. Des Moines Register, Dec. 28, 1969, § T, at 1, col. 8.

that the complaint is of a serious nature, and is supported by factual evidence, it may order formal hearings. At these hearings the judge is given the opportunity to defend himself. On the basis of the findings at formal hearings, the Commission may recommend censure, retirement or removal. If the judge refuses to comply with the recommendation, the Commission arranges for a review and decision by the state supreme court.

The advantages of the California Judicial Qualifications Commission concept have been summarized as follows: "The commission fulfills several functions: it provides the public with a regular institution to listen to grievances against judges; it acts as a disciplinary force through its ability to issue warnings and to discuss personal problems with judges; and it provides a confidential arena removed from public political bodies to protect reputations until the verdict is reached."[7]

The Executive Secretary of the California Commission on Judicial Qualifications has indicated that the most serious types of complaints filed with that Commission concern a judge's inability to perform judicial duties due to age or poor physical condition, habitual intemperance including intoxication while on the bench, impaired mental condition including such signs as failing memory, inability to concentrate and patterns of erratic and perverse behavior. Other complaints allege a failure to attend scheduled court sessions, showing disregard for attorneys, litigants and witnesses; excessive and inexcusable delay in deciding cases, amounting sometimes to over a year; unusually short working hours in spite of a large backlog of cases; and absence from the bench for more than six months.[8] Complaints have also been made about judges of courts of general jurisdiction practicing law or supplementing judicial salaries by profitable nonjudicial sidelines which take time and energy from the work of the court. Profitable nonjudicial activities raise the possibility of putting pecuniary interest ahead of the public interest.[9] Other complaints concern conflict-of-interest determinations or decisions involving insensitivity to ethical considerations of the type which recently cast a shadow over some Justices of the Supreme Court of the United States.[10]

The *1967 Report of the California Commission*[11] states in part:

> During the course of the year, out of 101 matters which came before the Commission for its consideration, 48 required some investigation. In 33 instances this included contacting the judge about the complaint either by way of letter or interview. A number of times the judge's explanation was wholly satisfactory. In several other cases the judge, in effect, admitted to some transgression or

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[7] B. Cook, Judicial Process in California 55 (1968).

[8] Frankel, *Removal of Judges: California Tackles an Old Problem*, 49 A.B.A.J. 166, 169-70 (1963).

[9] Fisher, *Moonlighting by Judges*, 55 A.B.A.J. 949 (1969).

[10] Acheson, *Removing the Shadow Cast on the Courts*, 55 A.B.A.J. 919 (1969).

[11] The reports of the California commission can be obtained by writing Jack E. Frankel, Executive Secretary, Commission on Judicial Qualifications, 304 State Building, San Francisco, California 94102.

poor practice and the Commission accepted his recognition of the fault and his apparent willingness to correct it. There were other cases in which wrongdoing was denied, but the Commission, after studying the reply to the allegations and completing its investigation, concluded that the judge had been at fault and in effect admonished him. The Commission felt its confidential criticism and warning were the proper measure of discipline and that the circumstances did not justify a formal hearing. Five judges resigned or retired during the course of an investigation. This is only one-half of one percent of the state's judges.

The *1968 Report of the California Commission* states in part:

> During 1968, 132 complaints were filed with the Commission of which 48 warranted some inquiry or investigation. In 35 instances this included asking the judge for his explanation and reply. In two cases the judge resigned or retired from office thus terminating the investigation. This is but a fraction of the total retirements this year. . . .
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> The word "Qualifications" in the Commission's title is to some extend a misnomer. Jurisdiction is limited to specific conduct, condition or activity which falls within one of five grounds, . . . wilful misconduct in office, wilful and persistent failure to perform duties, habitual intemperance, conduct prejudicial to the administration of justice that brings the judicial office into disrepute or disability that seriously interferes with the performance of duties and is or is likely to become permanent. Unless allegations come within one of these five areas a problem or situation is outside of the Commission's purview. The power to act against a judge for misconduct or wrongdoing is totally different from the power to act for or against a prospect for judicial office during the selection process.

The *1969 Report of the California Commission* states in part:

> In the course of 1969 the Commission received 155 complaints of which 46 were deemed to justify further inquiry or investigation. In 28 instances there was a communication with the judge involved informing him of the reported information and requesting his response. When indicated, a thorough investigation was made. A number of times the Commission concluded that some conduct or act or practice by the judge appeared unsatisfactory or questionable and the judge was so advised. Usually the conduct was corrected and this terminated the proceeding. The constitutional requirement of confidentiality has been a key factor in the successful handling of the Commission's work. On four occasions during the year resignations or retirements were submitted while a matter was pending before the Commission. Over the years the principal factor leading to such a retirement or resignation has been poor health preventing the proper performance of judicial duties. It should be emphasized that during 1969, as is true each year, the great bulk of retirements and resignations from state judicial office were in the normal course of affairs and totally unrelated to any action by the Commission. The number of matters against judges processed in 1969 is somewhat above that of 1968. With more judges and more cases coming before the courts yearly it is natural for complaints to increase as well. Nationwide comment upon and concern with issues of judicial standards and

propriety seem a likely contributing factor.

> The bulk of the grievances and complaints reaching the Commission are related to criticism of, and dissatisfaction with, judicial dispositions and rulings. This is noticeable in connection with traffic and small claims courts, forums in which the citizen litigates without an attorney. The Commission neither has nor seeks power to review court rulings or to intrude upon the judicial decision-making prerogative. However, the Commission does receive and process those citizen complaints which fall within its jurisdiction. Corrective and disciplinary measures, when justified, are promptly taken in such cases.

According to an article in a 1965 issue of the *Journal of the American Judicature Society*, during the first four years of the California Commission's existence 26 judges left office because of action by the Commission.[12] The Commission's success in getting senile, inebriate or unfit judges to relinquish their offices is due in part to its ability to induce them to resign or retire before there is any public proceeding. Where the complaint is of a less serious nature, a Commission suggestion that the judge had better shape up usually results in a sufficient redress. During the nine years the California Commission has been operating it has been necessary for the Supreme Court of California to make a decision in only one of the over 1,000 complaints about sion.[13] In that case[14] the supreme court rejected the Commission's removal recommendation and merely filed a one paragraph per curiam opinion. It should be noted, however, that a disability retirement by a judge in California is rendered less painful by a fair retirement system. The California experience indicates that its commission plan is an effective remedy for the problem of the erring or the incapacitated judge, and that it is not unduly expensive. Over a period of six years the entire budget of the Commission, including the Executive Secretary's salary, has averaged only about $35,000 per year.[15] In a state of the size of Iowa there would not be the necessity for full time staff employees and the budget would be less. The jurisdiction of the Commission extends to all levels of the California judiciary. As of December 1, 1969, this totaled 1050 judges as follows: appellate courts 55, superior courts 416, municipal courts 335, and justice courts 244. In Iowa there are 9 justices of the supreme court, 76 district court judges and 22 municipal court judges or a total of 107 judges.

Within the last decade 16 American states have set up commissions for the retirement, discipline or removal of judges.[16] All 16 of these states have

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[12] Burk, *Judicial Discipline and Removal: The California Story*, 48 J. AM. JUD. SOC'Y 167, at 170 (1964).

[13] Note, *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, 41 N.Y.U. L. REV. 149, 182 (1966). *See* note 39 *infra*.

[14] Stevens v. Comm'n on Judicial Qualifications, 61 Cal. 2d 886, 393 P.2d 709 (1964).

[15] Note, *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, 41 N.Y.U. L. REV. 149, 182 (1966).

[16] ALAS. CONST. art. 4, § 10 (1968); ALASKA STAT. §§ 22.30.010-.080 (1962). CAL. CONST. art. 6, §§ 8, 18; CAL. R. CT. 901-19. COLO. CONST. art. VI, § 23. FLA. CONST. art. 5, § 17A; *In re* Rules of Florida Judicial Qualifications Comm'n, 207 So. 2d 443 (Fla. 1968); FLA. STAT. § 43.20 (1965). IDAHO CONST. art. 5, § 28; IDA. CODE ANN.

patterned their commissions after the California plan and most of the variations from it are in the provisions relating to the membership of the commission and the method of selecting its membership, rather than in the procedure under which the Commission operates. In these 16 states the enabling basis for the commission setup is an explicit constitutional amendment, supplemented by either statutory provisions or supreme court rules, outlining the procedure the commission is to follow in adjudicating specific cases.

Whether Iowa can constitutionally adopt the essential features of the California Commission plan for policing the judiciary without an amendment to its constitution is a question entitled to consideration. There is no reported case, either federal or state, which adjudicates the question whether constitutional provisions, similar to those in the United States and Iowa constitutions providing for legislative impeachment and removal from office of a judge for official misbehavior, preclude the enactment of a valid legislative act.[17] Further, the relatively few law review commentators who have expressed their opinions on that question have reached different conclusions. One such opinion is that the Congress, or a state, may properly enact a valid statute authorizing such removal by an appropriate judicial process, notwithstanding constitutional impeachment provisions.[18] Another opinion is that, in the absence of a constitutional amendment otherwise providing, the impeachment provisions in the United States Constitution bar all other methods for removing a federal judge of a constitutional court from office.[19]

At its meeting on December 2, 1969, the Iowa District Judges Association adopted a report recommending to the 63rd General Assembly a constitutional amendment. The amendment to Article V of the Constitution of the

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§§ 1-2102-04 (1948). ILL. CONST. art. 6, § 18; ILL. SUP. CT. R. 51. LA. CONST. art. 9, § 4; LA. SUP. CT. R. 17. MD. CONST. art. IV, §§ 4A, 4B; MD. ANN. CODE art. 40, § 45 (1957). MICH. CONST. art. VI, § 30; GEN. CT. R. 932. NEB. CONST. art. V, §§ 28-31. NEB. REV. STAT. §§ 24-715 to 24-728 (1943). N.M. CONST. art. VI, § 32; N.M. STAT. ANN. §§ 16-1-8 to 16-8-4 (1953). OHIO CONST. art. II, § 38; OHIO REV. STATS. §§ 2701.11-.12 (Pages Supp. 1968); OHIO SUP. CT. R. 21. ORE. CONST. art. VII, § 8; ORE. REV. STATS. §§ 1.410-.480 (1953). PA. CONST. art. 5, § 18. TEXAS CONST. art. 5, § 1-a; TEX. REV. CIV. STAT. art. 5966a (1968). UTAH CONST. art. VIII, § 28; UTAH CODE ANN. 49-7-8 (1953).

[17] Kurkland, *The Constitution and the Tenure of Federal Judges*, 36 U. CHI. L. REV. 665 (1969).

[18] Shortel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870, 892-98 (1930); Pergler, *Trial of Good Behavior of Federal Judges*, 29 VA. L. REV. 876 (1943); Scott, *Legislative Proposals for Reform of the Federal Judiciary*, 50 J. AM. JUD. SOC'Y 50, 55 (1966); Note, *Removal of Federal Judges—Alternative to Impeachment*, 20 VAND. L. REV. 723 (1967).

The American Bar Association's House of Delegates, at its last midyear meeting, gave solid backing to the view that the impeachment provisions in the United States Constitution do not prevent Congress from providing a statutory method for removal of federal judges for misconduct or disability. At that meeting the House of Delegates endorsed Senator Joseph Tyding's judicial reform bill, S. 1506, 91st Cong., 1st Sess. (1969) which would create a statutory procedure for removal of federal judges for good cause. 38 U.S.L.W. 2470 (Mar. 3, 1970).

[19] Kramer & Barron, *The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of "During Good Behavior"*, 35 GEO. WASH. L. REV. 455, 458 (1967); Otis, *A Proposed Tribunal: Is It Constitutional?*, 7 U. KAN. CITY L. REV. 3 (1938).

State of Iowa consisted of the addition of the following:

> In addition to the Legislative power of impeachment of judges as set forth in Article three (III), section nineteen (19) and twenty (20) of the Constitution, the Supreme Court shall have power to retire judges for disability and to discipline or remove them for good cause, upon application by a commission on judicial qualifications. The General Assembly shall provide by law for the implementation of this section.[20]

If a constitutional amendment for disciplining or removing judges is a prerequisite for a valid enactment by the Iowa legislature of provisions similar to California's, it would seem to follow that the present Iowa Code provisions[21] outlining a remedy for removal of a judge who stays on the bench after an intensely serious and permanent deterioration of his mental or physical abilities is also unconstitutional. Absent a constitutional amendment, the doubt, if any, of the validity of an Iowa adoption of the California plan may also be equally applicable to sections 13, 14 and 15 of the Iowa State Bar Association bill for judges retirement and widows' annuities.[22] In 1969 that bill passed the House but not the Senate.

The task of amending the Iowa constitution is one that is expensive, arduous and long-drawn-out.[23] It is the opinion of the author of this Article that if and when the question is presented to the Supreme Court of Iowa, it will have a sound basis for upholding the validity of the establishment of a commission to investigate complaints about the conduct of judges and to make reports to the supreme court and for that court to discipline, retire or remove unfit judges, even though the sole basis for the establishment of that plan is a statute and rules promulgated by that court.

The courts of Iowa have always operated on the theory that the English common law is the law of Iowa by virtue of its tacit adoption, and the Supreme Court of Iowa has expressly declared that lawyers and laymen are entitled to rely on those English common law rules and principles which are consistent with American constitutions, statutes or court decisions.[24] Whether a senile, inebriate or corrupt judge should be removed from his judgeship was at common law a judicially justiciable issue. At the time of the separation of this country from England, the English courts of King's Bench, Common Pleas and Exchequer exercised jurisdiction under writs of *scire facias* or *quo warranto* to remove unfit judges from office.[25] This historical fact clearly indicates that

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[20] S.J.R. 1002, 63d G.A., 2d Sess. (1970). At the time of writing, both the Iowa Senate and House have passed this constitutional amendment proposal.

[21] IOWA CODE §§ 605.26-.32 (1966).

[22] H.F. 428, 63d G.A., 1st Sess. (1969).

[23] IOWA CONST. art. X, §§ 1-3, as amended 1964.

[24] *In re* Wills of Proestler, 232 Iowa 640, 5 N.W.2d 992 (1942); Pierson v. Lane, 60 Iowa 60, 14 N.W. 90 (1882); State v. Twogood, 7 Iowa 252 (1858); O'Ferrall v. Simplot, 4 Iowa 381 (1857).

[25] The Queen v. Parham, 116 Eng. Rep. 1491 (Q.B. 1849); 11 HALSBURY'S LAWS OF ENGLAND 145 (3d ed. 1956); Davis, *The Chandler Incident and Problems of Judicial Removal*, 19 STAN. L. REV. 448, 460 (1967).

the adjudication of an issue of judicial fitness for office is the exercise of a judicial function. The Iowa constitution allocates powers as well as separates them. The provision in that constitution relative to the legislative impeachment of a judge is a specific exception to article III, section 1, prohibiting one department of government from exercising a power properly belonging to another department. It is an instance where the legislature is expressly authorized by the constitution to perform the judicial function of adjudicating a specific case. Such a provision militates against the delicate balancing powers concept and impairs the independence of the judiciary. A constitutional provision making that type of an exception to the threefold division of governmental functions should be construed narrowly, and so as not to prevent the legislature from conferring on the highest court of a state express statutory jurisdiction to remove an unfit judge by a more efficacious remedy than impeachment.

A remedy which provides for a commission to take the initiative and investigate, and the highest court of the state, acting in accordance with procedural due process and following the established rules of evidence, to try an issue of fitness for office, certainly furnishes a more efficient and efficacious remedy and better safeguards to the parties than a trial by a body primarily charged with the enactment of policy-making legislation. Confidence in the courts is the very essence of the American way of life, and respect and esteem for the men who preside over them is necessary, if that confidence is to be maintained. The judiciary should not only be clean and sound in fact but it should be perceived by the public to be clean and sound.

Procedural due process requires "a fair trial in a fair tribunal."[26] A trial before a judge who, due to mental or physical disability or senility, is unable to understand and rationally rule on issues which in the case at bar are for the determination of the court is not "a fair trial in a fair tribunal."[27] Such a trial subjects the litigants and the state to the economic loss resulting from an appeal, reversal and new trial before a competent tribunal.

The assumption that impeachment by the house of representatives and trial by the senate is the only means of removing unworthy or incompetent judges does not seem to be borne out by the provisions of the Iowa constitution on this question.

Article III, section 1 provides: "The powers of the government of Iowa shall be divided into three separate departments—the Legislative, the Executive, and the Judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertain-

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[26] *In re* Murchison, 349 U.S. 133, 136 (1955).

[27] State v. Industrial Tool and Die Works, Inc., 220 Minn. 591, 21 N.W.2d 31 (1945). Such a trial involves the possibility of arbitrary, unreasonable or capricious judicial conduct. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934); Note, *Removal of Federal Judges—New Alternatives to an Old Problem: Chandler v. Judicial Council of the Tenth Circuit,* 13 U.C.L.A. L. REV. 1385, 1397 (1966).

ing to either of the other, except in cases hereinafter expressly directed or permitted."

Article III, section 20 provides in part: "Judges of the Supreme Court and District Courts, . . . shall be liable to impeachment for any misdemeanor or malfeasance in office; but judgment in such cases shall extend only to removal from office, and disqualification to hold any office of honor, trust, or profit, under this State; but the party convicted or acquitted shall nevertheless be liable to indictment, trial and punishment, according to law."

Article III, section 19 provides in part: "The House of Representatives shall have the sole power of impeachment, and all impeachments shall be tried by the Senate."

Article V, section 4 as amended in 1962 provides: "The Supreme Court . . . shall exercise a supervisory and administrative control over all inferior Judicial tribunals throughout the State."

Prior to the constitutional amendment of 1962, section 4 of article V of the Iowa constitution gave the supreme court only *supervisory* control over all inferior judicial tribunals throughout the state. In a 1916 case[28] that court defined "supervisory control" to mean "to inspect with authority, to exercise governing influence over and to overpower." The 1962 amendment inserted into section 4 the words "shall" and "an administrative", and thereby made the section read: "The Supreme Court . . . shall exercise a supervisory and administrative control over all inferior Judicial tribunals throughout the State". The obvious purpose of the 1962 amendment was to substantially increase the power of the supreme court to inspect with authority, to overpower and to administer the discipline that court deems appropriate, in the event the conduct of a judge is prejudicial to the administration of justice or brings a judicial office in disrepute.

A relatively recent Iowa case[29] involved complaints about judicial misbehavior and unethical conduct by two judges of the Municipal Court of Cedar Rapids who were charged with unduly delaying trials and decisions and dismissing criminal cases without giving the prosecution an opportunity to be heard. One of these judges was also charged with holding himself out as practicing law after assuming judicial duties, by allowing himself to be listed in the yellow pages of two successive editions of the Cedar Rapids telephone book, and it was further charged that as a judge he passed on his own claim for reimbursement for travel expenses, and threatened to issue a court order to compel payment of the claim. The two judges were censured by the Supreme Court of Iowa but were given an opportunity to correct their objectionable and disapproved practices with continued surveillance by that court.

In that case the Supreme Court of Iowa impliedly indicated, by the quotations set out below, that the 1962 amendment to the Iowa constitution pro-

[28] Hutchins v. City of Des Moines, 176 Iowa 189, 216, 157 N.W. 881, 890 (1916).
[29] *In re* Judges of Cedar Rapids Municipal Court, 256 Iowa 1135, 130 N.W.2d 553 (1964).

viding that "The Supreme Court . . . shall exercise a supervisory and administrative control over all inferior Judicial tribunals throughout the State," gave it plenary constitutional power to discipline adequately Iowa judges for violations of the *Canons of Judicial Ethics* or conduct that brings a judgeship into disrepute.

> The grant of the power of supervision and administration implies a duty to exercise it. In fact, the language of the constitution is mandatory that we must do so. And necessarily this power must apply to something beyond the ordinary appellate procedure and correction of errors at law, which are also provided for in Article V, section 4, of the Constitution. . . .
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> But when there is apparent a pattern of procedure which shows a consistent disregard for the rights of litigants, or an arbitrary and capricious course of conduct in the handling of cases, or an oppressive and improper use of the power of the court, it is our duty to exercise our supervisory and administrative powers to insure the correction of such abuses. . . .[30]

It is submitted that the foregoing quotation indicates that the Supreme Court of Iowa will hold, if and when presented with the question, that appropriate legislation is all that is needed to institute the California plan of disciplining judges in Iowa.

The Supreme Court of Iowa has repeatedly said that all presumptions favor the constitutionality of an Iowa statute, and that it will resolve every reasonable doubt in favor of its validity, and that a statute must not be declared invalid, unless it clearly, plainly, palpably and without doubt infringes the constitution, and the party challenging the statute's constitutionality has the burden of negating every conceivable basis which might support it.[31] It is noteworthy that the court's phrasing of the opinions in the cases cited puts two heavy tasks on a party challenging the validity of a statute. One of these tasks involves the burden of persuading the court by a very high quantum of proof, namely beyond a reasonable doubt, that the statute involved is invalid. The other task involves the rule that since the statute was enacted by the Legislature of Iowa, this fact weighs heavily in favor of its validity, and the party challenging validity has the burden of showing by a clear and convincing demonstration that the legislature acted beyond its authorized powers in the enactment of that statute. The invalidation of Iowa legislation is certainly not a philosophy which is compatible with the general mores and traditions of the Supreme Court of Iowa. In view of the arguments favoring constitutionality, no party who challenges the validity of the proposed statute set out below can carry the very heavy burdens that rest upon him.

The draft of the proposed statute set out below is premised on the assumption that an amendment to the Iowa constitution is not necessary for such a

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[30] *Id.* at 1136, 130 N.W.2d at 554.

[31] Green v. City of Mt. Pleasant, 256 Iowa 1184, 131 N.W.2d 5 (1964); Hiatt v. Soucek, 240 Iowa 300, 36 N.W.2d 432 (1949); Dickinson v. Porter, 240 Iowa 393, 35 N.W.2d 66 (1949).

statute to be constitutionally valid. However, the only way of being absolutely sure of the constitutional validity of the legislation proposed is through the adoption of an amendment to the Iowa constitution of the type recommended by the Iowa District Judges Association.

About half the sections in the draft set forth below are almost identical with the corresponding California provisions. There are substantial variations from the California plan in the other sections. Most of these variations follow suggested guidelines furnished to the writer by the Committee on Legislative Development and Research of the Iowa District Judges Association. A recommendation of that Committee is in part as follows: "We recommend a workable system of retiring judges for disability and of disciplining or removing judges for good cause, and the establishment of a Judicial Qualification Commission containing lay members, as well as lawyers and judges."

A BILL FOR

An Act to create a commission to investigate complaints about misconduct or disabilities of judges and to make confidential reports thereon to the Supreme Court and to authorize that court to censure, retire or remove judges.

Be It Enacted by the General Assembly of the State of Iowa:

Section 1. Repeal of Code Sections.

Sections six-hundred five point twenty-six (605.26) to and inclusive of six-hundred five point thirty-two (605.32) Code 1966, are hereby repealed and the following enacted in lieu thereof.

Sec. 2. Title.

This Act shall be known as the "Judicial Qualifications Commission Act."

Sec. 3. Appointment of Commissioners.

There is hereby created a commission on judicial qualifications, hereinafter referred to as the "commission." The commission consists of the following seven (7) members:

1. The Supreme Court shall appoint two (2) district court judges from different districts.

2. The Supreme Court shall appoint two (2) members of the Iowa State Bar who are of good reputation, responsibility and maturity.

3. The Governor shall appoint three (3) adult residents of Iowa who are not judges, retired judges or who do not hold any other office or position under the laws of this state.[32]

[32] Of the 16 states having judicial qualification commissions, the size of the commission varies from 5 in Maryland to 17 in Ohio, with an average size of 9. All of the commissions have laymen as commissioners, except Ohio. The average number of laymen is 3 but in New Mexico 5 of the 9 are laymen. In Maryland all of the commissioners are appointed by the governor, and in Nebraska the appointment of the lawyers and judges are by the chief justice. In most of the 16 states the supreme court as a whole appoints the judges and lawyers, and the Governor appoints the laymen. Only 4 of the 16 states have supreme court justices on the commission.

Sec. 4. Terms of Office.

The initial terms for the first set of commissioners are as follows: the two (2) district judges, four (4) years, the two (2) members of the Iowa State Bar, three (3) years, and the three citizens appointed by the Governor, two (2) years. All terms, except the initial terms before mentioned, are four (4) years.[33] Vacancies other than those arising upon the expiration of a term shall be filled for the unexpired portion of the term in the same manner as vacancies due to expiration of a term. A commissioner may succeed himself in office only if he has served less than eight (8) consecutive years. Commission membership terminates if a member ceases to hold the position that qualified him for appointment. Terms of office commence on January 1st.

Sec. 5. Compensation of Commissioners.

All commissioners, while away from their homes or regular places of business and engaged in carrying out their duties as members of the commission, shall be allowed travel expenses, including meals and lodging, as authorized by law for persons in the service of the State of Iowa. Members of the commission who are not otherwise receiving compensation as officers or employees of the State of Iowa are entitled to receive compensation at the rate of $50 per diem while engaged in carrying out their duties as such members.

Sec. 6. Meetings of the Commission.

The commission shall meet at least once a year. It may hold meetings, hearings and other proceedings at such times and places as it shall determine. A quorum shall consist of five (5) members. Determinations by the commission shall be by majority vote of those present, except that a recommendation for retirement or removal from office, shall be by affirmative vote of at least four members of the commission.

Sec. 7. Powers and Duties of Commission.

1. The commission shall annually elect one of its members as chairman, and is authorized to appoint and fix the salary of an executive secretary and of clerical employees, and to make other expenditures necessary for it to perform its functions. The executive secretary so appointed may, or may not, be a commission member.

2. The commission, or its executive secretary, upon receiving from any citizen of Iowa[34] a verified statement, not unfounded or frivolous, alleging facts indicating that a Justice of the Supreme Court, a District Judge or a Municipal Judge is guilty of a serious violation of the Judicial Code of Ethics, or of willful and persistent failure to perform his duties, disabling addiction to alcoholic beverages, drugs or narcotics or conduct that brings the judicial office into disrepute, or that such a judge has a physical or mental disability that seriously

[33] The most common term of office for a commissioner is four years. Florida and Texas are the only two states that stagger the terms of the commissioners.

[34] About one half of the 16 acts provide that a complaint may come from any source or any citizen of the state. Presumably the practice in the other states is to allow anyone to be a complainant.

interferes with the performance of his duties and is, or is likely to become, permanent, shall make a preliminary investigation to determine whether formal proceedings shall be instituted and a hearing held. The commission may also make such a preliminary investigation, without receiving a verified statement, to determine whether formal proceedings shall be instituted and a hearing held.[35] If the preliminary investigation indicates that there is substantial evidence to support a charge of judicial unfitness of the type mentioned in this section, a hearing shall be held, and the judge shall be notified of the investigation and the nature of the charge, shall have the right to counsel and to confront the witnesses against him, and shall be afforded a reasonable opportunity to present such matters in defense as he may choose. The notice shall be given by prepaid registered or certified mail addressed to the judge at his chambers and at his last known residence. On the request by a judge against whom a complaint has been filed, the commission may order the hearing to be public.

After the completion of the hearings, the commission may decide to dismiss the case on the ground of insufficiency of the proof, or may decide to recommend to the Supreme Court the censure, suspension, retirement or removal from office of the judge under investigation.

Sec. 8. Certification of Commission Recommendation to Supreme Court.

Upon making a determination recommending the censure, removal or retirement of a judge, the commission shall promptly file a copy of the recommendation, certified by the chairman together with the transcript and the findings and conclusions, with the clerk of the Supreme Court and shall immediately mail to the judge notice of such filing, together with a copy of such recommendation, findings and conclusions.

Sec. 9. Review of Commission's Proceedings.

1. The review of the record of the commission's proceedings by the Supreme Court shall be on the law and the facts[36] and that court may permit the introduction of additional evidence. The Supreme Court may order discipline, suspension, retirement or removal, or reject or modify the commission's recommendation.

2. A petition to the Supreme Court to modify or reject the recommendation of the commission for censure, removal or retirement of a judge may be filed within 30 days after the filing with the clerk of the Supreme Court of the certified copy of the recommendation. The petition shall be verified, shall specify the ground relied upon and shall be accompanied by petitioner's brief and proof of service of ten copies of the petition and of the brief on the commission. Within 20 days of the filing of the petition the commission shall

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[35] The California Commission acts on its own initiative in a substantial portion of the cases investigated.

[36] In Maryland the General Assembly reviews the commission record on the law and the facts and in Illinois the commission itself makes the final decision. There is no court review of the Illinois commission decision. In the other 14 states with commissons the supreme court of the state reviews the record and makes the final determination.

serve on petitioner and file a respondent's brief with the clerk of the Supreme Court. Within 15 days after service of respondent's brief the petitioner may file a reply brief, of which ten copies shall be served on the commission.

Sec. 10. Suspension or Removal by Supreme Court.

1. On recommendation of the commission or on its own motion, the Supreme Court may suspend a judge of any court of record from office without salary when he pleads guilty or no contest or is found guilty of a crime punishable as a felony under Iowa or federal law or of any other crime that involves moral turpitude. If his conviction is reversed, suspension terminates and he shall be paid his salary for the period of suspension. If he is suspended and his conviction becomes final the Supreme Court shall remove him from office.

2. On recommendation of the commission the Supreme Court may (a) retire a judge for a physical or mental disability that seriously interferes with the performance of his duties and is, or is likely to become, permanent,[37] or (b) censure, retire or remove a judge for action that constitutes willful misconduct in office, willful and persistent failure to perform his duties, disabling addiction to alcoholic beverages, drugs or narcotics, or conduct that brings the judicial office into disrepute.[38]

3. A judge retired by the Supreme Court shall be considered to have retired voluntarily. A judge removed by the Supreme Court is ineligible for judicial office pending further order of the court and that court shall refer the question as to his eligibility to practice law to the Iowa State Bar Association.

Sec. 11. Disqualification from Acting as Judge.

A judge is hereby prohibited and disqualified from acting as a judge, without loss of salary, while there is pending (a) an indictment charging him with a crime punishable as a felony under Iowa or federal law or (b) a recommendation to the Supreme Court by the commission for his removal or retirement.

Sec. 12. Disqualification from Acting as Commissioner.

No judge who is a member of the commission or of the Supreme Court shall participate as a member of the commission or of the Supreme Court, in any proceeding involving his own removal, retirement or censure.

Sec. 13. Papers and Testimony Privileged.

The filing of papers with or the giving of testimony before the commission shall be privileged in any action for defamation. No other publication of such papers or proceedings shall be so privileged, except any record pleading or

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[37] Nearly all of the 16 acts state as a reason for retirement permanent or near permanent disability seriously interfering with performance of judicial duties.

[38] In nearly all of the 16 states the grounds for removal from office include willful misconduct in office or willful and persistent failure to perform judicial duties or habitual intemperance.

brief filed by the commission in the Supreme Court continues to be privileged.

Sec. 14. Rules by the Supreme Court.

The Supreme Court shall make and promulgate rules governing the practice and procedure under this Act before the commission and that Court, and governing the confidentiality of proceedings before the commission.

Sec. 15. Closed meetings of Commission.

The commission is hereby expressly permitted to conduct closed meetings.

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[39] *See* text accompanying note 13 *supra*. Recently the California Commission on Judicial Qualifications recommended that the California supreme court publicly censure a Superior Court Judge because of derogatory remarks about Mexican-Americans. This is the second time that commission has taken action. Des Moines Register, Apr. 8, 1970, at 22, col. 6.—Ed.

DECISION-MAKING ON THE IOWA SUPREME COURT—1965-1969

Jerry K. Beatty†

The purpose of this Article is to describe and analyze the workload and voting behavior of justices on the Supreme Court of Iowa from November, 1965, through April, 1969.[1] Investigation will be made of the types of cases appealed to the supreme court, the ratio of nonunanimous to unanimous decisions, the length of judicial opinions, the proportion of cases affirmed and reversed, the record of district court judges in cases appealed to the high court, and the existence or absence of a supreme court bar in Iowa. In addition, by use of bloc and scalogram techniques, analyses will be made of the rate of inter-individual solidarity or agreement and the ideological direction ("liberal-conservative" dichotomy) of judicial decision-making in various issue areas. Finally, an effort will be made to explain the factors related to "liberal" and "conservative" judicial voting behavior.

I. Output of the Iowa Supreme Court

Like most courts of last resort, the workload of the Supreme Court of Iowa has increased dramatically in recent years. The number of petitions, applications, motions, appeal and certiorari cases removed from the supreme court docket rose from 417 in 1960 to 532 in 1969—an increase of 28 per cent. During the same ten-year period, the number of written majority opinions climbed from 169 to 241—an increase of 43 per cent. Indeed, since 1956, the number of majority opinions has risen 56 per cent. Conversely, the number of memorandum or per curiam opinions has declined from an annual volume of approximately 30 to 0.[2]

There also has been a rising number of nonunanimous or split decisions on the Iowa supreme court in recent years. Between 1962 and 1969, the number of written dissents rose 185 per cent (13-37) while the number of un-

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[1] The Article below is based on the research conducted by the author in the preparation of his Ph.D. dissertation. For a more detailed analysis of the history, composition, operation, judicial attitudes, and decision-making of the Iowa supreme court *see* J. Beatty, An Institutional and Behavioral Analysis of the Iowa Supreme Court—1965-1969, January, 1970 (a copy of this unpubiished thesis is on file at the State Law Library and the University of Iowa Library).

[2] The decline in the number of per curiam opinions is largely the result of a recent United States Supreme Court decision, Entsminger v. Iowa, 386 U.S. 748 (1967) which prohibited the Iowa supreme court from disposing of criminal cases solely on the basis of a clerk's transcript. All appeals must now be accompanied by a summary record of the trial court proceedings. Currently, no Iowa supreme court opinion is written without an indication of its authorship.