REMOVAL AND RETIREMENT OF JUDGES IN MISSOURI: A FIELD STUDY

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I. INTRODUCTION

On August 23, 1968, three days before his scheduled impeachment trial, St. Louis County Circuit Judge John D. Hasler resigned. He had previously been convicted by a jury of misconduct in office as a result of his personal involvement with a woman divorce defendant in his court.[1]

At the time of the Hasler incident, many Missourians undoubtedly recalled another case involving a judge of the same court, Virgil A. Poelker. Impeached in January 1963 on seventeen articles of misconduct, Judge Poelker resigned five days before his trial and surrendered to the state bar association his license to practice law.[2]

Considerably less well-known than the Poelker and Hasler cases—because less sensational—is a datum reported in a March 1966 law review article about a problem equally as urgent as judicial misconduct, perhaps even more so. Approximately twenty Missouri judges, the article said, have been induced to retire since 1955 by the Judicial Retirement Committee of the state bar association, on the grounds of illness, senility, or other disability.[3]

The problems dealt with by the Judicial Retirement Committee, the Poelker and Hasler cases, and the conviction in May 1968 of former Kansas City probate judge John Lodwick Jr. for federal income tax evasion[4] are only the local manifestations of a nation-wide problem that compels increasing attention: what to do about the judge who is unable or unwilling to carry out properly the duties of his office. Problems of judicial fitness (or unfitness if you will) certainly are not peculiar to Missouri, or any other particular jurisdiction. Consider the

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1. Chicago Sun-Times, July 14, 1968, at 7, col. 1.

2. St. Louis Globe-Democrat, Mar. 14, 1963, at 1, col. 7.

3. *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, 41 N.Y.U.L. REV. 149, 166 (1966).

4. Kansas City Times, May 30, 1968, at 9.

following cases, drawn from those reported in the public press during the past two or three years.

When a judgeship in Love County, Oklahoma fell vacant a few years ago, no one could be found who wanted the job. So the state supreme court, at the request of two local district judges, gave Joe Thompson a special permit to fill the office—until he passed the bar examination. He passed on the fourth try, or maybe it was the third, he's not certain which.[5]

Benjamin A. Schor, a Queens County (Long Island), New York criminal court judge, retired in January 1967 after being indicted for grand larceny and conspiracy to obstruct justice as a result of his alleged involvement in the $3,500 shake-down of an applicant for a state liquor license. These indictments were subsequently dismissed for insufficient evidence by Queens County Supreme Court Justice Irwin Shapiro, who commented in his opinion that Schor had committed "transparent perjury" in his testimony to the grand jury. Schor has been indicted on nine counts of perjury and will be tried sometime in the fall of 1968.[6]

Chicago judges Louis W. Kizas and James E. Murphy were suspended from office by Chief Judge John S. Boyle in May 1967 after an investigation of their bond-writing activities revealed they had written an unusually high number of bonds. Kizas resigned and was later indicted on charges of bribery and official misconduct. He has not yet been tried. Murphy was cleared of wrongdoing, and misconduct charges against him dismissed by the Illinois Courts Commission.[7]

Lexington, Virginia judge William M. A. Romans Jr. was convicted in May 1968 of seventeen counts of forgery and obtaining money under false pretenses. He is now serving a four-year term in the Virginia State Penitentiary. In a hand-printed statement signed by him and filed in the trial court at Lexington, Romans said he "does not desire to offer, and in fact does not have any, defense" to disbarment proceedings against him by the state bar association.[8]

In the public press, from which the foregoing cases are drawn, little mention is made of instances of judicial unfitness besides misconduct.

5. Christian Science Monitor, Apr. 12, 1967, at 14, col. 1.

6. New York Times, Jan. 5, 1967, at 14, col. 6; letter from Frederick J. Ludwig, Chief Assistant District Attorney, Queens County, New York, to William Braithwaite, Aug. 1, 1968.

7. Chicago Sun-Times, May 12, 1967, at 1, col. 1 (four star ed.); Chicago Daily News, Nov. 3, 1967, at 9, col. 1; Chicago Sun-Times, June 11, 1968, at 2, col. 1.

8. Roanoke (Va.) World-News, June 21, 1968.

But there is evidence that other problems, such as judicial disability, may also occur in some jurisdictions. Reference to the disability problem in Missouri has already been made.[9] In California, the Commission on Judicial Qualifications stated in its 1963 report to the governor that among the ten judges who had resigned or retired that year during investigation by the commission, the "most common difficulties" were "[d]isabling illness with incapacity to perform judicial duties" and "weakening of mental faculties connected with advanced age and reflected in unacceptable derelictions in court."[10]

In the past, problems of judicial misconduct and disability were supposed to be dealt with by the traditional common-law procedures of impeachment (forty-six states), address (twenty-eight states), or recall (seven states).[11] Impeachment is a legislative proceeding, in which the lower house acts as grand jury and the upper house sits as a court for trial of the charges. Address is a formal request by both houses of a legislature to the governor asking him to remove a judge; in some states, legislative vote alone is sufficient, the governor's participation being unnecessary. Recall is analogous to initiative and referendum; if a certain percentage of the voters sign a petition to recall a judge, he must face a special election. In some states, he runs unopposed and remains in office if he wins a majority of the votes cast; in other states, he may be opposed and the candidate with the most votes wins the office.

However much used in the past (there is no reliable evidence on the point), the traditional procedures are today obsolete,[12] because cumbersome and inadequate; and as a consequence the problems of judicial unfitness have recently attracted fresh thought. The primary impetus for a new look at removal and retirement of judges probably has been

9. *See* note 3 and accompanying text.

10. CALIFORNIA COMMISSION ON JUDICIAL QUALIFICATIONS, REPORT TO THE GOVERNOR 2 (1963).

11. AMERICAN JUDICATURE SOCIETY, JUDICIAL DISCIPLINE AND REMOVAL 1-3 (Rep. No. 5, April 1968) (also containing a brief explanation of the procedures and an up-to-date though not comprehensive bibliography).

12. It is reasonable to surmise that address and recall have been used hardly at all. Impeachment is still used occasionally. Recent examples from the states: Miami trial judge George E. Holt was impeached but acquitted in 1957; St. Louis County trial judge Virgil A. Poelker was impeached but resigned shortly before his trial in 1963; Oklahoma Supreme Court judge N.B. Johnson was impeached and convicted in 1964 while Earl Welch, a colleague impeached in the same case, resigned before trial; St. Louis County trial judge John D. Hasler was impeached in 1968 but resigned three days before his scheduled trial. The last impeachment of a federal judge was in 1936 (Halstead L. Ritter, Southern District of Florida, convicted).

the publicity given to California's Commission on Judicial Qualifications.[13] Created by constitutional amendment in 1960, the nine-member commission is empowered to receive and investigate complaints from any source about judges, and to recommend to the state supreme court that the court remove, censure, or retire a judge. As a result of the commission's apparent success,[14] procedures modeled after it have been adopted in eight states and are being considered in nine more.[15]

Attentive to the concern evinced by this widespread emulation of the California plan, the American Bar Association decided at its 1965 annual meeting to initiate a general study of judicial removal, discipline, and retirement.[16] The American Bar Foundation, independent research affiliate of the ABA, agreed to do the research, which began in April 1966. As subsequently developed, the plan for research called for field studies in Missouri, Illinois, New York, New Jersey, and California. The purpose of the field studies was to learn how these jurisdictions deal in actual practice with the problems of judicial misconduct, disability, and incompetence. This article is based upon the research in Missouri, the first field study to be completed.[17]

II. Development and Objectives of the Research Plan

The initial tasks of research were to study the reported cases, examine the law, and evaluate the literature. The most interesting finding

13. Cal. Const. art. VI, § 8. *See also* Cal. Ct. R. 901-921.

14. In the first seven years of the commission's operation, forty-four judges resigned or retired during investigation of their performance or conduct. California Commission on Judicial Qualifications, Reports to the Governor (1961-67). The commission's operations and procedure are described in detail in articles by its executive secretary, Jack E. Frankel, *e.g.*, *Judicial Discipline and Removal*, 44 Tex. L. Rev. 1117 (1966); *Judicial Retirement, Discipline and Removal: The California Plan*, 27 Tex. B.J. 791 (1964); *Removal of Judges: California Tackles an Old Problem*, 49 A.B.A.J. 166 (1963).

15. Procedures similar to the California commission have been adopted in Colorado, Florida, Maryland, Nebraska, New Mexico, Ohio, Pennsylvania, and Texas. A variation of the California procedure exists in Vermont. States considering adoption of a California-type procedure are Alaska, Georgia, Idaho, Indiana, Michigan, Missouri, North Dakota, Oregon, and Utah. American Judicature Society, Judicial Discipline and Removal 3 (Rep. No. 5, April 1968).

16. The initiating resolution called for "a comprehensive study of the problems relating to the aged, the ill or the otherwise infirm justice or judge or the justice or judge who for other reasons is not carrying out his judicial responsibilities." 90 A.B.A. Rep. 338 (1965). The resolution was sponsored jointly by the Section of Judicial Administration and the Standing Committee on Judicial Selection, Tenure and Compensation.

17. As already noted, however, *supra*, preceding note 1, this article, while the result of research sponsored and supported financially by the American Bar Foundation, is entirely the responsibility of its author alone.

in the study of cases was the variety of circumstances that have raised the question of a judge's qualification to continue in office. Within the past ten years, for example, judges have been charged with nearly every variety of misconduct, from major felonies, e.g., involuntary manslaughter,[18] bribery,[19] embezzlement,[20] forgery,[21] and grand larceny,[22]

18. Judge Wayne W. Olson, of the Circuit Court of Cook County (Chicago), was charged with involuntary manslaughter, and thereupon immediately suspended from duty by the Chief Judge, as a result of the death of Lawrence Benner. Benner received a fatal skull fracture when he fell during a 4:00 a.m. scuffle outside the Alibi Inn, a suburban tavern where Olson, by his own admission, had been drinking with Benner, whom the coroner ruled was intoxicated at the time of death. Olson claimed his "political discussion" with Benner was friendly throughout, and that he never touched Benner. The grand jury did not indict. Citing this fact as an indication that there was insufficient evidence to warrant a hearing, the Chief Justice of the Illinois Supreme Court declined to convene the Illinois Courts Commission to hear the case. Olson's suspension was then terminated, he returned to duty, and is still in office. Chicago Daily News, Sept. 22, 1964, at 1, col. 1; Sept. 23, at 1, col. 6; Sept. 24, at 3, col. 1; Sept. 26, at 3, col. 4; Jan. 13, 1965, at 15, col. 1; Chicago Sun-Times, Jan. 14, 1965, at 22, col. 1 (three star ed.); Jan. 23, at 36, col. 1 (four star ed.). *See also* Editorial, 48 J. AM. JUD. SOC'Y 164 (1965); Boodell, *What Court Reform Can Do For You—Improving the Image of the Judge, the Lawyer, and the Organized Bar*, 49 J. AM. JUD. SOC'Y 133, 142 (1965). Regarding the Illinois Courts Commission, its jurisdiction and powers, *see* ILL. CONST. art. VI, § 18 and ILL. SUP. CT. R. 51(b).

19. A bribery scandal on the Oklahoma Supreme Court in 1964 got national publicity. Judge N.S. Corn admitted taking a $150,000 bribe in a 1957 tax case and sharing it with Judges Earl Welch and N.B. Johnson. Corn and Welch resigned; Johnson was impeached and convicted. New York Times, Nov. 14, 1964, at 14, col. 6; Mar. 23, 1965, at 30, col. 5; May 14, 1965, at 40, col. 1.

An investigation of the Philadelphia magistrate courts by the Pennsylvania Attorney General in 1965 concluded there was "widespread corruption at every level of the magisterial system." OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA, REPORT ON THE INVESTIGATION OF THE MAGISTERIAL SYSTEM 9 (1965). More recently (November, 1967), a Chicago judge, Louis W. Kizas, was indicted for bribery and official misconduct on the basis of allegations that he took payoffs from lawyers and defendants in an illegal bail bond scheme. Kizas has resigned from the bench but draws $600 a month pension (which he will lose, however, if convicted on the bribery indictment). Chicago Sun-Times, May 12, 1967, at 1, col. 1; May 26, at 1, col. 1 (four star ed.); Chicago Daily News, Sept. 16, 1967, at 2, col. 1; Nov. 3, at 9, col. 2.

20. John Lodwick, Jr., probate judge of Clay County, Mo. (north suburban Kansas City), was indicted in March 1966 on seven counts of embezzlement which charged that he took $2,812 in court fines he levied during 1961 while a town magistrate. North Kansas City (Mo.) News-Dispatch, Mar. 14, 1966, at 1. He has not yet been tried.

21. *See* note 8, *supra*, and accompanying text.

22. Indictments charging attempted grand larceny, conspiracy to commit grand larceny, and conspiracy to obstruct justice were returned against New York City Criminal Court Judge Benjamin A. Schor in November 1966. It was alleged Schor was involved in the shakedown for $3,500 of an applicant for a state liquor license. A week after his indictment, Schor filed for retirement. Subsequently, the indictment was dismissed by the trial court for "insufficient evidence," the court commenting that Schor had committed "transparent perjury" in his testimony to the grand jury. Schor's retirement was effective

to comparatively less serious offenses involving only a breach of some canon of judicial ethics, e.g., running for another public office while a judge[23] or otherwise participating in partisan politics,[24] accepting gifts and favors from lawyers practicing before them,[25] being abusive and discourteous to persons appearing in court,[26] unduly delaying the trial and decision of cases,[27] and engaging in favoritism in official appointments.[28]

January 4, 1967. New York Times, Nov. 5, 1966, at 1, col. 8; Dec. 14, at 1, col. 1; Jan. 5, 1967, at 14, col. 6. Following dismissal of the larceny and conspiracy indictments, Schor was indicted on nine counts of perjury. He will be tried sometime in the fall of 1968. Letter from Frederick J. Ludwig, Chief Assistant District Attorney, Queens County, New York, to William Braithwaite, August 1, 1968.

23. *E.g.*, Mahoning County Bar Ass'n v. Franko, 168 Ohio St. 17, 151 N.E.2d 17 (1958) (Youngstown municipal court judge carried on active public campaign for city prosecutor). After suspending Judge Franko indefinitely from membership in the bar, the state supreme court ruled that suspension worked a forfeiture of the judicial office and the judge could be removed by quo warranto. State *ex rel.* Saxbe v. Franko, 168 Ohio St. 338, 154 N.E.2d 751 (1958). *Cf.* AMERICAN BAR ASSOCIATION, CANONS OF JUDICIAL ETHICS 28 & 30, which generally proscribe political activity.

24. *E.g.*, *In re* Pagliughi, 39 N.J. 517, 189 A.2d 218 (1963) (judge was Republican ward leader, active in Young Republicans Club, attended political dinners, and allowed home to be used for voter registration); *In re* Hayden, 41 N.J. 443, 197 A.2d 353 (1964) (judge wrote political announcement, which was publicly circulated, for former client). As to political activity by judges in New Jersey, see N.J. CT. R. 1:25 & 8:13-7(a).

25. This was one of several charges in articles of impeachment voted May 27, 1957 against George E. Holt, a Miami circuit judge. He was acquitted after a month-long trial. New York Times, July 23, 1957, at 12, col. 3; Aug. 17, 1957, at 16, col. 1. AMERICAN BAR ASSOCIATION, CANONS OF JUDICIAL ETHICS 32, provides:

> A judge should not accept any presents or favors from litigants, or from lawyers practicing before him . . .

26. The Appellate Division of New York's Second Department removed Long Island Judge Floyd Sarisohn in May 1967, after finding him guilty on six of ten specifications charging official misconduct, including use of "intemperate and abusive language" in court. New York Times, May 16, 1967, at 1, col. 5. The Iowa Supreme Court in September 1964, admonished two Cedar Rapids municipal court judges for handling court business "according to their personal whims and predilections" and "oppressive and unjust use" of the powers of their courts. *In re* Judges of the Municipal Court of the City of Cedar Rapids, 256 Iowa 1135, 130 N.W.2d 553 (1964). *Cf.* AMERICAN BAR ASSOCIATION, CANONS OF JUDICIAL ETHICS 10.

27. *See In re* Judges of the Municipal Court of the City of Cedar Rapids, *supra*, note 26. *Cf.* AMERICAN BAR ASSOCIATION, CANONS OF JUDICIAL ETHICS 7 ("A judge should be prompt in the performance of his judicial duties . . .") and 18 ("A judge . . . [should] enforce due diligence in the dispatch of business before the court.")

28. The Oregon Supreme Court in 1965 denied a probate judge's request for a writ of prohibition to thwart disciplinary proceedings against him based upon his appointment of his wife as appraiser of an estate. Jenkins v. Oregon State Bar, 241 Ore. 283, 405 P.2d 525 (1965). During the investigation that followed the indictment for embezzlement of Missouri probate judge John Lodwick Jr. (*see* note 20, *supra*), it was discovered he once appointed his father inheritance tax appraiser for an estate valued at $935,000; the father

Not unexpectedly, the news media have given most attention to those incidents involving serious or sensational misconduct. But other problems may be just as urgent. One of them is lack of professional legal ability. Columbia law professor Maurice Rosenberg, a member of the New York City Mayor's Committee on the Judiciary, argues:[29]

> Avoiding a catastrophic choice [in selecting judges] is essential, but it is not enough. A judge need not be vicious, corrupt, or witless to be a menace in office. Mediocrity can be in the long run as bad a pollutant as venality, for it dampens opposition and is more likely to be tolerated. Judicial office today demands the best possible men, not those of merely average ability who were gray and undistinguished as lawyers and who will be just as drab as judges.

Another problem is that presented by the judge who because of age or illness becomes unable to do his job. California has reported such difficulties; they have been a recurring problem in Missouri.[30] Undoubtedly, other jurisdictions have been troubled as well with this distressing situation.

Specific instances of unfit judges fall into one of three classes of problems: incompetence, involving lack of professional job skills; misconduct, involving failure to satisfy community standards of judicial deportment (private and public); and disability, involving any disqualifying condition related to health, whether physical, mental, or emotional.

American jurisdictions have dealt with the problems of incompetence, misconduct, and disability in various ways. All jurisdictions have one or more of the traditional procedures of impeachment, address, and recall. Many of them have other procedures as well, evidence of the felt ineffectiveness of the traditional remedies. The principal "modern" procedures are the widely copied California commission plan already mentioned,[31] which is best-known, and the court on the judiciary. This latter procedure, originally adopted in New York in 1947,[32] operates through a court specially constituted for the sole purpose of deciding

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received a $1,000 fee. North Kansas City (Mo.) News-Dispatch, Apr. 7, 1966, at 1. AMERICAN BAR ASSOCIATION, CANONS OF JUDICIAL ETHICS 12, provides: "[A judge] should also avoid nepotism and undue favoritism in his appointments."

29. Rosenberg, *The Qualities of Justice—Are They Strainable?*, 44 TEX. L. REV. 1063, 1064 (1966).

30. *See* notes 3 & 10 *supra*, and accompanying text.

31. *See* notes, 13-15 *supra*, and accompanying text.

32. N.Y. CONST. art. VI, § 22.

cases of judicial misconduct and disability. Eleven states[33] have a procedure of this type. A hybrid procedure with characteristics of both the commission and the court on the judiciary is the special retirement procedures that exist in five states[34] only for cases of disability. Finally, a few states, e.g., New Jersey[35] and Ohio,[36] have dealt with judicial misconduct by use of the state supreme court's disciplinary power over judges as members of the bar.

One's evaluation of the literature on the subject, which is modest in amount, depends upon what one is looking for. Of approximately 110 relevant articles listed in the volumes of the Index to Legal Periodicals covering 1866-1966, sixty are about the traditional procedures, mainly impeachment. Taken together, these sixty articles contain a full discussion of the doctrinal aspects of the law of impeachment. The remaining fifty articles are on various subjects, doctrinal and historical. If concern is addressed, however, not to legal doctrine but to the practical operation of removal-retirement procedures today, none of the law review literature before 1960 is useful or even relevant.

The literature since 1960 falls into three classes. One is the spate of articles provoked by the Chandler incident.[37] These mostly concern the constitutional issues involved in removal or retirement of federal judges and are therefore not informative about any practical aspects of

33. Alabama, Hawaii, Illinois, Indiana, Iowa, Louisiana, New York, North Carolina, Oklahoma, Texas, and Virginia. AMERICAN JUDICATURE SOCIETY, JUDICIAL DISCIPLINE AND REMOVAL 2 (Rep. No. 5, April 1968). (New Jersey does not have a court on the judiciary and is therefore erroneously included in the list in Rep. No. 5).

34. Alaska, Hawaii, Missouri, New Jersey, and Oregon. *Id.* at 3.

35. *See In re* Pagliughi, 39 N.J. 517, 189 A.2d 218 (1963) and *In re* Mattera, 34 N.J. 259, 168 A.2d 38 (1961).

36. *See* State *ex rel.* Saxbe v. Franko, 168 Ohio St. 338, 154 N.E.2d 751 (1958) and Mahoning County Bar Ass'n v. Franko, 168 Ohio St. 17, 151 N.E.2d 17 (1958).

37. Stephen S. Chandler, Chief Judge of the Western District of Oklahoma, was found by the Tenth Circuit Judicial Council in December 1965 to be "unable or unwilling to discharge efficiently the duties of his office" and thereupon ordered by the Council to "take no action whatsoever in any case or proceeding now or hereafter pending" before him. *See* Misc. Order No. 1111, Chandler v. Judicial Council of the Tenth Circuit of the United States, 382 U.S. 1003 (1966). After a month of wrangling and an abortive appeal by the judge to the Supreme Court, he and the Council reached accord. New York Times, Feb. 8, 1966, at 27, col. 1. The incident provoked a flurry of comment in the law reviews, mostly about the constitutional issues involved. *The Chandler Incident and Problems of Judicial Removal*, 19 STAN. L. REV. 448 (1967); *Removal of Federal Judges—Alternatives to Impeachment*, 20 VAND. L. REV. 723 (1967); 21 RUT. L. REV. 153 (1966); 41 ST. JOHN'S L. REV. 97 (1966); 20 SW. L.J. 667 (1966); U.C.L.A.L. REV. 1385 (1966). *See also* 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 (1967).

the problem. A second class is one 1966 article by two New York University law students,[38] the only thing to date based upon an attempt at empirical research. The third class is the writings of Jack E. Frankel, whose articles[39] are valuable—one should say invaluable—because he is the only person who writes from experience. He has been executive secretary of the California Commission on Judicial Qualifications since its creation in 1960 and personally processes every complaint addressed to that agency, an average of about ninety each year. Although it is the nine-member commission itself which decides what action to take in each case, for purposes of day-to-day administration, Frankel *is* the commission. Clearly he knows whereof he writes.

The student article is a result of research funded by the Institute of Judicial Administration at New York University School of Law and is based upon interviews with "judges, lawyers, court administrators, law professors, and laymen" in California, Missouri, New Jersey, New York, and Wisconsin. While limited in depth and sophistication at some points, it nevertheless has the distinction of representing the first conscientious effort to find out what is actually happening.

The student article and Frankel's writings provided the initial inspiration for the plan of the present research. As eventually developed, the plan called for field studies in Missouri, Illinois, New York, New Jersey, and California, whose removal-retirement procedures differ significantly in their formal characteristics. The method of research was to collect "case histories," using as sources public and private records and interviews with people who had been involved in the situations. The immediate aim was to develop an accurate description of the practical operation of different procedures. A broader purpose was to identify the functional similarities and differences among different procedures, in order to see what generalizations might be made about the best way to deal with the problems of judicial misconduct, incompetence, and disability.

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

39. Frankel's articles include: *Removal of Judges: California Tackles an Old Problem*, 49 A.B.A.J. 166 (1963); *Discipline and Removal of Judges*, 38 FLA. B.J. 1033 (1964); *Removal of Judges—Federal and State*, 48 J. AM. JUD. SOC'Y 177 (1965); *The Case for Judicial Disciplinary Measures*, 49 J. AM. JUD. SOC'Y 218 (1966); *Judicial Misconduct and Removal of Judges for Cause in California*, 36 SO. CAL. L. REV. 72 (1962); *Judicial Retirement, Discipline and Removal: The California Plan*, 27 TEX. B.J. 791 (1964); *Judicial Discipline and Removal*, 44 TEX. L. REV. 1117 (1966).

III. The Research in Missouri

To keep the Missouri research within manageable limits, we decided to focus mainly, though not exclusively, on one city, St. Louis. The aim was to learn how the state's removal and retirement procedures have been implemented in that city. Since it turned out, however, that no judge in St. Louis had been charged with misconduct during the period covered by the research, it was necessary to go beyond the city to learn about Missouri's use of its removal procedure (impeachment). Thus, St. Louis became a point of reference rather than a limitation on the subject-matter. (The trial court for St. Louis *County*, where two judges have been impeached since 1963, is separate from the trial court for St. Louis City. To clarify this distinction in this article, "St. Louis" is used to refer to the city; if the reference is to the county, the word county is used.)

Preliminary investigation into the problems of disability and misconduct in St. Louis revealed that (a) eight judges had left office since 1953 because of disability, (b) no judge had been removed or disciplined for misconduct or incompetence since at least 1950. The first finding suggested an inquiry into the workings of the retirement procedure. Two agencies are involved: the Committee on Retirement of Judges and Magistrates, consisting of nine judges, and the state bar association's Judicial Retirement Committee, consisting of seven lawyers (increased from five in 1963). Actual authority to retire a judge for disability is in the committee of judges. The bar committee theoretically is only a mechanism to activate the committee of judges, which does not initiate proceedings on its own motion. The bar committee either seeks to induce disabled judges to apply voluntarily for a hearing before the judges' committee, or acts as complaining witness when this approach fails (which is seldom). The operations of these two committees were studied through the use of certain confidential records, supplemented by corroborating information from the two sources mentioned in the next paragraph.

The second finding of the preliminary investigation, that no St. Louis judge has been removed or disciplined for misconduct or incompetence since at least 1950, suggested the need to inquire whether there had been incidents of misconduct or incompetence which for some reason had not resulted in action by the legal community. Two sources of information were used in this inquiry: interviews with a selected group of lawyers and judges; and local newspaper files.

The principal purpose of the interviews was to discover whether there had been any incidents of judicial misconduct or incompetence which should have provoked some action but did not. The best source of such information is trial practitioners, since they have the most direct, frequent, and regular contact with judges. A list of ten trial lawyers whose experience and age had given them opportunity for first-hand knowledge of the character of the local trial judiciary was drawn up by David L. Millar of St. Louis. Millar is a former president of the state bar association and was chairman for twelve years (until 1966) of the association's Judicial Retirement Committee, which was instrumental in effecting the retirement or resignation of seven of the eight disabled judges in St. Louis.

All the ten lawyers, whose ages ranged from forty-two to sixty-five, had extensive trial experience. They came from small firms, solo practice, and large firms (ten partners is large by St. Louis standards). Besides the lawyers, three judges, also suggested by Millar, and two newspaper reporters were interviewed. One of the judges has been on the bench over twenty years, the other two over ten years each. Both reporters have covered the local courts for a number of years. These fifteen persons were selected because they were in positions to have direct, reliable knowledge of any serious incidents of judicial misconduct or incompetence which might have occurred. It was not to be expected that there would have been many such incidents, since the St. Louis trial judiciary is small (twenty judges), has a low rate of turnover (only seventeen judgeships vacated and filled in twenty-five years, 1941-66), and is well regarded by the legal community.

The interviews were loosely structured around four main questions: (1) What incidents do you know about where a judge's performance or conduct could have been called into question? (2) What were the circumstances of each such case? (3) What action was taken and by whom? (4) If no action was taken, why not, in your opinion? Discussion of these questions was supplemented by additional, "open-ended" questions appropriate to the character of information which the particular respondent had.

Both major St. Louis papers, the Globe-Democrat (morning) and the Post-Dispatch (evening), have long-established reputations as watch-dogs of local government. Thus it could be supposed that any serious incident of judicial misconduct or incompetence would have been reported in the newspapers. The files of the Globe-Democrat were used to check the news clippings on every judge who has been on the circuit

(trial) bench since 1940. In some cases, the newspaper files provided leads that were then checked with other sources; in other cases, the newspaper stories corroborated information acquired elsewhere.

For further information about Missouri's response to the problem of judicial misconduct, a case history was developed for each of three cases that have occurred outside St. Louis in the last five years.

IV. Missouri's Court System

A brief description of the state's court system will place the problems of judicial incompetence, misconduct, and disability in their institutional context. Missouri's courts are arranged in the conventional four-tier structure shown in Table 1. There are minor courts, circuit courts (trial courts of general jurisdiction), and two levels of appellate courts. A total of 277 judges staff these courts. The supreme court is constitutionally granted "general supervisory control" over all lower courts but exercises this control moderately. Statistical reports from lower courts, for example, are required only annually, rather than quarterly or monthly as in some states. The limited character of the supreme court's administrative supervision may be partly a result of the predominantly rural geography of the state. Thirty-five of the forty-three circuits into which the state is divided have only one judge, five others, only two or three judges. Half the state's four and a quarter million people live in the two urban areas, St. Louis and Kansas City. The trial courts in these two cities include thirty-five of the state's ninety-seven trial judges and are largely independent of the supreme court administratively.

The trial court of the twenty-second circuit, St. Louis, has twenty divisions, each presided over by one judge. There are eleven civil litigation divisions, one of which handles assignment of cases; two divisions each for equity and domestic relations; and five divisions for criminal cases, one of which handles assignment of cases. Judges are assigned to the divisions for one-year terms by the court *en banc*, and with few exceptions each judge rotates assignment regularly. The presiding judgeship, mainly an administrative position, is also rotated yearly.

The state uses two methods of judicial selection. All appellate judges, trial judges in the St. Louis and Kansas City circuits, and certain minor court judges in these two circuits are selected by the so-called Missouri

TABLE 1

MISSOURI COURT SYSTEM

SUPREME COURT

7 Missouri Plan* judges
12-year terms
Retirement mandatory at 75

COURTS OF APPEAL

9 Missouri Plan* judges
12-year terms
Retirement mandatory at 75

St. Louis	Kansas City	Springfield
Court of Appeals	Court of Appeals	Court of Appeals
3 judges	3 judges	3 judges

CIRCUIT COURTS

(trial court of general jurisdiction)

43 circuits
97 judges
6-year terms
No mandatory retirement

St. Louis	Kansas City	All Other
(Circuit 22)	(Circuit 16)	Circuits
20 Missouri	15 Missouri	Judges
Plan* judges	Plan* judges	elected

MINOR COURTS

Probate Courts	Magistrate Courts	St. Louis Court of Criminal Correction
One court of one judge in each of 115 counties. Elected; 4-year terms.	One in each of 115 counties. County of pop. 30,000 or less, probate judge is also magistrate. Over 30,000 —one or more magistrates, varies with population. Elected; 4-year terms.	Two Missouri Plan judges

* See text, part IV.

plan,[40] whereby judicial appointments are made by the governor from a panel of three candidates nominated for each vacancy by a commission

40. The procedure is so called because Missouri is the state in which it was first adopted (in 1940). The procedure is also called, variously, the American Bar Association plan, non-partisan court plan, and merit plan. The basic provisions of law are MO. CONST. art. V, § 29 and MO. SUP. CT. R. 10.

of judges, lawyers, and laymen. Circuit judges, probate judges, and magistrates in the forty-one circuits outside St. Louis and Kansas City are chosen by partisan election. Appellate judges' terms are twelve years; circuit judges', six; probate judges' and magistrates', four.

After an initial term of one to two years—it varies depending upon the date of appointment—the Missouri plan judge seeks a full term by filing a declaration of candidacy to succeed himself. He then runs unopposed, without party designation, on a ballot saying: Shall Judge X be retained in office? If a majority of those voting on the question vote affirmatively, the judge is retained. Successive terms are sought in a similar manner. Elected judges run for additional terms on a partisan ballot and may be opposed.

St. Louis and Kansas City each have a five-member commission to nominate circuit judges under the Missouri plan. The presiding judge of the court of appeals district encompassing the circuit is chairman; the lawyers residing in the circuit elect two of their number; and the governor appoints two citizens (non-lawyers) from among the residents of the circuit. The composition and selection of the commission that nominates appellate judges is similar except that it has seven members and they are chosen on a state-wide basis. The chief justice of the supreme court is chairman of the appellate nominating commission.

In the first twenty-six years the Missouri plan was in effect (through 1966), six governors appointed seventy-two judges.[41] By the end of 1966, in Kansas City, fourteen of the fifteen trial judges were Missouri plan judges; in St. Louis, fifteen of twenty. All but one of the sixteen appellate judges were Missouri plan judges.

A substantial body of literature about the plan has been produced,[42]

41. This total includes twelve supreme court judges, sixteen intermediate appellate court judges, twenty-one Kansas City trial judges, nineteen St. Louis trial judges, and four judges of courts with limited jurisdiction in these two cities.

42. Many of the articles favoring the plan have appeared in the JOURNAL OF THE AMERICAN JUDICATURE SOCIETY. One principal activity of the society is to promote the plan. 46 J. AM. JUD. SOC'Y 167-224 (Feb. 1963) includes a cumulative index of the issues from 1937 to 1962. Articles on the Missouri plan are listed at 192-94. Other recent articles favoring the plan include: Hall, *Missouri Non-Partisan Court Plan: A Quarter Century Review*, 33 U. MO. K.C.L. REV. 163 (1965); Medalie, *Judicial Selection: The First National Conference on Judicial Selection and Its Implications for Massachusetts*, 4 BOSTON B.J. 13 (1960); Niles, *The Changing Politics of Judicial Selection: A Merit Plan for New York*, 22 RECORD OF N.Y.C.B.A. 242 (1967); O'Connell & Means, *Should Judges Be Selected by Merit Plan?*, 40 FLA. B.J. 1146 (1966); Roberts, *Twenty-Five Years under the Missouri Plan*, 3 GA. S.B.J. 185 (1966); Schrader, *Judicial Selection: Taking the Courts out of Politics*, 46 A.B.A.J. 1115 (1960); Sneed, *Proposed Judicial Article for Oklahoma*, 36 OKLA. B.A.J. 2218 (1965); Van Osdol, *Politics and Judicial Selection*, 28 ALA. LAWYER 167 (1967);

most of it favorable. Nearly all the commentary, pro and con, has become stereotyped and dogmatic, however. The plan, it is said, selects "better" judges and "takes judges out of politics." Out of party politics and into "bar politics," opponents rejoin. Opponents also charge that the plan is "undemocratic" because it "usurps the right of the people to choose who will govern them." Some comment is frenetic: "the Nazi court scheme," "Fascism's entering wedge in America."[43] Some is evangelical: "the greatest single event of this century in the field of judicial administration."[44]

The discussion may proceed at a less impassioned level after the publication (scheduled for early 1969) of *The Politics of the Bench and Bar: Judicial Selection under the Missouri Nonpartisan Court Plan*,[45] which reports the findings of a four-year study of the Missouri plan. Conducted by a University of Missouri political scientist, Richard A. Watson, and two of his colleagues, the study aimed mainly to find out how the Missouri plan actually does operate and whether, in the opinion of lawyers practicing before them, Missouri plan judges are "better."

Professor Watson and his colleagues used a variety of research techniques, beginning with a study of historical materials including newspaper reports and conventional legal literature. With this background, they conducted about 250 interviews with judges, lawyers, and political figures in order to get information on individual judicial appointments. On the basis of the interviews, a questionnaire was developed, which was intended to reveal the attitudes of a random sample of lawyers

Winters, *Judicial Reform from Coast to Coast*, 2 TULSA L.J. 115 (1965). The opposition literature includes: Moran, *Counter-Missouri Plan for Method of Selecting Judges*, 32 FLA. B.J. 471 (1958); Spence, *Should Judges Be Selected by Merit Plan?*, 40 FLA. B.J. 1146, 1147 (1966); Tate, *As They Say in Missouri*, 12 LA. B.J. 25 (1964); Wormuth & Rich, *Politics, the Bar and the Selection of Judges*, 3 UTAH L. REV. 459 (1953).

43. 6 BENCH & BAR 2 (1942).

44. Address by Glenn R. Winters, Executive Director of the American Judicature Society, Lawyers' Association of Kansas City Meeting, April 8, 1964, in Watson, *Lawyer Attitudes on Judicial Selection*, 72 AM. J. SOC. 373, 375 at n. 14 (1967).

45. R. WATSON & R. DOWNING, THE POLITICS OF THE BENCH AND BAR: JUDICIAL SELECTION UNDER THE MISSOURI NON-PARTISAN COURT PLAN (unpublished). I am happy to acknowledge the gracious assistance of Dr. Richard A. Watson of the Department of Political Science at the University of Missouri, for his making available, before publication, some of the results of his work which were relevant to this research. Three articles have been published in advance of the full-length work: Watson, *Missouri Lawyers Evaluate the Merit Plan for Selection and Tenure of Judges*, 52 A.B.A.J. 539 (1966); Watson, *Lawyer Attitudes on Judicial Selection*, 72 AM. J. SOC. 373 (1967); Watson, Downing, and Speigel, *Bar Politics, Judicial Selection and the Representation of Social Interests*, 61 AM. POL. SCI. REV. 54 (1967).

about the Missouri plan and the lawyers' evaluation of judges selected under it. Using information from *The 1964 Lawyer Statistical Report,* Professor Watson and his colleagues concluded that the 1,233 lawyers who responded to their questionnaire were statistically representative of the 6,606 members of the Missouri state bar. (By law, all lawyers practicing in Missouri are members of the state bar.) Among the conclusions of the Watson study most relevant to the present research are the following.

(1) In the St. Louis metropolitan area, Missouri plan judges are rated higher in overall performance than elected judges by those lawyers who practice in both the city (which uses the Missouri plan) and the suburbs (St. Louis County, which uses partisan election).

(2) In the two major cities where trial judges are selected by the Missouri plan, a high percentage of lawyers favor the plan over other methods of judicial selection (79% in Kansas City; 70% in St. Louis).

(3) Most Missouri lawyers agree that the plan gets "better" judges than popular election (whatever "better" judges may have meant to the individual lawyers who responded). The lawyers explain this result mainly by their belief that qualified lawyers are more likely to seek the bench if spared the expense and uncertainty of an elective contest.

(4) Although lawyers' ratings of Missouri plan judges cover a wide range, no Missouri plan judge was in the lowest quartile of all judges who were rated (elected and Missouri plan), suggesting that one result of the plan is to weed out the very poorly qualified candidates.

(5) Most lawyers agree that the tenure feature of the plan in practice results in life tenure (an incumbent runs unopposed, without party designation, and on the sole question whether he shall be retained); they believe, therefore, that the main problem with the plan at present is the difficulty of getting off the bench those judges who become unable to perform their duties. About four-fifths of all lawyers in Missouri favor a mandatory retirement age for trial judges. Presently, only appellate judges are subject to mandatory retirement, at seventy-five.

It is a reasonable conclusion, by inference from the results of the Watson study, that there is not at present any substantial concern among St. Louis lawyers about the local trial judiciary's overall level of competence (in the sense of job-skill). The research upon which this article is based found nothing to contradict such a conclusion. This is not to say that all the St. Louis trial judges are equally competent, nor that any one of them is an ideal judge (if one exists), nor that they have always been free from criticism. It is to say only that the problems

of judicial misconduct and disability related to age have been and are of obvious concern, and the problem of incompetence is not. Consequently, this report deals only with the first two subjects.

V. Disability

A. *The Problem and the Procedure*

Of the twelve judges who terminated their service on the St. Louis circuit (trial) bench between 1950 and 1965, eight (67%) left office because of disability. In Kansas City, of the twelve trial judges who left office during the same period, five (42%) did so because of disability.

In both cities, the total number of judges leaving office is small, and this fact warns against making hasty inferences about the dimensions of the judicial disability problem. But the percentages referred to above do show that disability has been a recurring problem. Regarding St. Louis, there is further evidence of the significance of the problem. In one year, 1956, three St. Louis trial judges were retired because of age-related disabilities, and in 1963, 1964, and 1965, there was one disability retirement each year. Since the trial bench has only twenty judges, it is apparent that court business has been recurrently disrupted by the decline in work capacity of a judge who ultimately retired because disabled. This disruption is exacerbated by a temporary decrease in manpower which results from the time taken to select the retired judge's successor. The selection process usually takes a month, often two, according to the records of appointments in St. Louis during the last fifteen years.

Since there is no reason to assume that St. Louis judges have a unique susceptibility to illness and aging, the cause of the city's noticeable incidence of disability problems must be elsewhere. The cause appears to be the structure of the state's judicial retirement laws. They are a model of rigor and parsimony. Any judge who is at least sixty-five with six years continuous service before 1959 or twelve years service in the aggregate may retire with benefits of one-third of salary. (A circuit judge's salary is $19,000. Effective January 1, 1969, it will be $23,000; the retirement pay will continue to be one-third of salary.) If not eligible for one-third, he receives nothing. This is an across-the-board formula, applicable to all cases without regard to the circumstances of retirement. It applies equally to appellate judges who by law must retire at seventy-five; to judges who retire voluntarily (few do); and to judges who are retired because disabled (a noticeable number are).

There is one slightly moderating provision. The judge who is retired because disabled gets one-half salary until the end of his current term, a period which can never be more than a full term (six years), and will probably be somewhat less. At the end of his current term, the retired disabled judge is in the same position as his peers—retirement pay of one-third salary if eligible, nothing if not.

Two provisions of this judicial retirement scheme are salient. First, trial judges are not subject to mandatory retirement. Of the approximately 280 judges in the state, only the sixteen appellate judges are subject to mandatory retirement (at seventy-five). There is no age limit on either the ninety-seven trial judges or the 162 probate judges and magistrates. Second, the *maximum* retirement pay for circuit judges is $6333. This seems modest, not to say niggardly, by any standard—except, apparently, the Missouri legislature's, which has successfully resisted several attempts in the last fifteen years to raise it to $9500 (half of salary). David L. Millar, chairman of the state bar's Judicial Retirement Committee for twelve years (until 1966), has said:[46]

> One factor that stands out of my . . . experience with the question of retirement of judges is that the reluctance of the judge to recognize his condition and to retire is due primarily to the inadequacy of the retirement pay. Almost without exception, when judges have been approached on the subject of disability retirement, we are met with the statement that they can't afford to retire.

Besides the absence of mandatory retirement and the poor retirement pay, a third factor contributes to the difficulty that a disabled judge has in recognizing and accepting the fact of his condition: the quite human reluctance, peculiar neither to Missouri nor to the judiciary, to disengage from one's career. For many people, retirement suggests inactivity, purposelessness, a feeling of no longer being useful or needed. These prospects cannot be very appealing to men who have enjoyed busy and active careers.

Together these three factors produce a situation in which Missouri trial judges can find no compelling reason to end their service voluntarily, and at least one compelling reason—a two-thirds cut in income—not to do so. The predictable result is that they will stay in office until they die, probably at some point beyond that where they are capable of fully active service, or are compelled to retire because dis-

46. Letter from David L. Millar, Esq., to Wade G. Baker, Executive Secretary, Missouri Bar Association, April 30, 1964 (quoted by permission).

abled. The simple statistics presented in Table 2 show that this is just what in fact happens.

TABLE 2
REASONS FOR TERMINATION OF SERVICE OF TRIAL JUDGES IN ST. LOUIS AND KANSAS CITY, 1941-1966

Reason for termination of service	St. Louis	Kansas City	Total both cities	Per cent of total terminations
Retired or resigned because of disabilities related to age	8	5	13*	39
Died in office	6	6	12	37
Resigned to take another office	3	3	6#	18
Retired voluntarily	0	1	1	3
Not retained by voters	0	1	1	3
	17	16	33	100%

Notes:

* Of these thirteen, eleven were retired for disability by order of the Committee on Retirement of Judges and Magistrates (described in text). The other two left office ostensibly voluntarily (one resigned, one retired), but actually only after the Judicial Retirement Committee (described in text) had exerted persistent persuasions on them to terminate their service because of disability.

Of these six, five resigned to take another judicial office, and one resigned to take a position outside the judiciary.

The group of judges in the table is those thirty-three judges whose service on the trial courts of St. Louis and Kansas City terminated during the twenty-five year period 1941-1966. Public and confidential records were used to determine the actual reason for termination in each case. As the table shows, only seven judges (21%) left office voluntarily, one by retiring and six to take other jobs.

Of the remaining twenty-six terminations (79%), twelve were by death in office and thirteen were for disability. None of the thirteen disability terminations was voluntary in the sense that the judge decided of his own volition to end his service, then took the formal steps necessary to do so. In each case, external persuasions were exerted, either directly on the judge by the bar's Judicial Retirement Committee (described later herein) or indirectly, e.g., through his family. Of the thirteen judges retired because disabled, nine were over seventy at the time they left office, and six were over seventy-five. Thus a mandatory retirement provision for trial judges pegged at age seventy, or even seventy-five, could have substantially reduced the incidence of disability in office since 1941 in St. Louis and Kansas City.

The function of mandatory retirement is to withdraw from the bench that group of judges in which disabilities related to aging are most likely to occur. But while mandatory retirement can thus reduce the incidence of age-related disability, it cannot eliminate the disability problem altogether. There are other problems, such as the judge in his early sixties who was retired as disabled because found to be "highly nervous, subject to continuous mental disturbances, depressed, emotional, and fearful of financial instability." Even an unrealistically low mandatory retirement age, e.g., sixty-five, will not eliminate this kind of problem completely; in any case, no state presently has a mandatory retirement age lower than seventy. Four of the thirteen disability terminations mentioned in the preceding paragraph—two each in St. Louis and Kansas City—involved judges under seventy. A complete solution to the problem therefore requires not only mandatory retirement but also a procedure to retire those judges who become disabled before mandatory retirement age.

Missouri has such a procedure. The power to retire judges for disability was granted to the general assembly by the Missouri Constitution of 1875. By two-thirds vote of each house and with approval of the governor, the general assembly could retire a judge who was "unable to discharge the duties of his office with efficiency, by reason of continued sickness, or physical or mental infirmity."[47]

The extent to which the 1875 procedure was used is lost to history. It is fair to guess that it was used very little, on the assumption that there was no more willingness then than now to crank up a cumbersome formal public proceeding to terminate the service of a sick or senile judge.

In any case, when Missouri wrote its most recent constitution, in 1945, the power to retire judges for disability was taken from the general assembly and given to a committee of nine judges.[48] The supreme court is given power to make rules of procedure for the committee and the constitutional provision expressly enjoins that there be "notice . . . fair hearing and . . . a finding of two-thirds of the committee that the disability is permanent."

By statute, the committee is designated the Committee on Retirement of Judges and Magistrates (hereinafter Committee on Retirement or

47. Mo. Const. art. VI, § 41 (1875). *See also* Mo. Const. art. VI, § 19 (1865); Mo. Const. art. V, § 16 (1820).

48. Mo. Const. art. V, § 27. The other basic provisions of law are Mo. Rev. Stat. §§ 476.400-40 (1959), and Mo. Sup. Ct. R. 12.

judges' committee). Its initial organization was accomplished with dispatch. The 1945 constitution was adopted February 27, 1945, and within the year the legislature passed an enabling statute, the supreme court wrote rules of procedure, and the committee held an organizational meeting. Notwithstanding this promising beginning, the committee was not immediately active. No formal complaints were received for two and a half years, and it was January, 1948, before the committee entered its first order of retirement. Since then, however, it has met nearly every year, and by the end of 1966 had retired thirty judges.[49] Not surprisingly, twenty-seven of the thirty were circuit judges, probate judges, and magistrates, none of whom, it will be recalled, are subject to mandatory retirement at a specified age. The pace of business has been irregular: the committee retired six judges in 1956, four each in 1955, 1963, and 1965, three in 1966, and one in each of nine other years.

In every case but one in which the Committee on Retirement has held a formal hearing during the eighteen-year period ending 1966, the judge was found disabled and was retired. One should not, however, rely upon the number of judges retired by the committee as a measure of the extent of the disability problem in Missouri. Not every situation of a disabled judge comes to the official attention of the committee, and of those which do, not all reach the hearing stage. In the course of this research, reliable evidence was uncovered of at least nine more incidents of judicial disability in which the committee did not act for some reason.[50]

On one occasion, a judge was sufficiently incapacitated that his court had to bring in outside judges to keep up with the workload; the situation had become nearly intolerable by the time the judge eventually died. Another judge, after submitting medical affidavits attesting to his disability to the Committee on Retirement, died on the day of the committee hearing. In a third case, no action at all was taken, apparently

49. The total includes one judge of the supreme court, two from courts of appeals, fourteen circuit judges (six from St. Louis, five from Kansas City), eleven probate judges, and two magistrates.

50. Although the Committee on Retirement did not hold a hearing and make a finding in any of these cases, I am satisfied from the evidence that the judges were in fact substantially incapacitated from performing their ordinary official duties and would have been found disabled if there had been a hearing. This evidence includes: the age of the judge (three were over seventy-six, for example); written statements by the judges themselves about their physical condition; and confidential information about the judge's physical and mental condition from persons in a position to be knowledgeable and with no apparent motive to falsify.

because the judge's condition was simply not causing much of a practical problem in the court's operations, even though he was incipiently senile (and not very competent as well). In two cases, the judge died after formal proceedings had been initiated but before the hearing. Two judges terminated their service on their own motion after being tactfully approached by friends or professional associates. Similar persuasions were exerted in two other cases, where the judges took the alternative of not seeking an additional term when their current terms expired.

By statute, the Committee on Retirement is given basic procedural powers: to hold hearings "as it may deem necessary in the discharge of its duties;" to issue subpoenas, compel the attendance of witnesses and the giving of testimony; to require a physical or mental examination of a judge and to appoint a doctor to make the examination; and to punish for contempts arising from refusal to obey its "lawful orders or process."[51]

The organization of the committee and the details of its procedure are prescribed by supreme court rule. The committee members, who serve one-year terms, are three judges of the supreme court, one judge from each of the three courts of appeals, and three circuit judges. All are elected by the judges of the respective courts at the annual meeting of the state judicial conference. A chairman, by custom usually one of the supreme court members, and a vice chairman are chosen by the committee itself; the clerk of the supreme court is secretary. Besides the members and the secretary, the only other person directly involved in proceedings is the state attorney general, who is directed by statute to assist the committee.[52]

Committee action can be triggered by either "information in writing" charging that the judge is disabled or by a statement from the judge himself that he requests retirement because of disability. In practice, it is always a statement from the judge which initiates proceedings; on only one occasion has a written complaint been prepared by a third party, and it was withdrawn when at the last minute the judge decided to resign rather than face a disability proceeding. Upon receiving a judge's request for retirement, the committee chairman has authority to make an informal investigation. The investigation is pro forma, since the chairman usually already knows the background of the case: senility and other age-related disabilities are conditions

51. MO. REV. STAT. §§ 476.400-476.420 (1959).
52. *Id.* § 476.430.

that become progressively apparent, and the chairman is likely to have been unofficially aware of the situation for some time. If he needs substantiating evidence, lawyers in the judge's community are asked for statements about his physical or mental condition. In some cases, the judge's doctor writes a letter to the committee.

Procedurally, the next step is to file an "application for retirement," whereupon the chairman orders a hearing. The application is filed by the state attorney general, who presents the case at the hearing. The subject judge is afforded the usual procedural rights: notice, fair hearing, right to appear, to present evidence, to be represented by counsel. To this extent, the prescribed procedure of the Committee on Retirement is modeled on the adversary system. But a supreme court rule expressly disclaims an adversary character for the proceedings, enjoining that they shall be, rather, "an impartial investigation to ascertain the facts with due regard to public welfare and the rights of the judge or magistrate under investigation."

In practice, the proceedings bear little resemblance to the adversary model. Except for the fact that a hearing is actually held (in order to make a record), the proceedings are informal. While it has the powers to do so, for example, the committee has never ordered a doctor's examination of a judge or subpoenaed a witness. Sometimes, for reasons of health, the judge does not appear personally at the hearing, although he always has notice of it—indeed, it is he who initiated it. The facts are never controverted. The evidence is almost always in the form of a letter from the judge's doctor or statements from lawyers who have appeared in the judge's court, as to his forgetfulness, poor hearing or eyesight, absent-mindedness, general physical infirmity, or other indicia of disability.

Besides the absence of an adversary character, another factor that contributes to informality in the proceedings is the relatively small size of the state's legal community and consequent likelihood that a particular judge will be known to both his peers and a substantial part of the trial bar, at least in the two big cities.[53] Since there are only about 280 judges in the state, one or more of the committee members is likely to know the subject judge in a proceeding, if only on a pro-

53. Roughly one-third of the state's 6600 lawyers practice in St. Louis and one-third in Kansas City. In either city, there are not more than several hundred lawyers in the active trial bar, which is the group most knowledgeable about a judge's day-to-day performance in court. Since there are only twenty trial judges in St. Louis and fifteen in Kansas City, the odds are quite high that a particular judge will be more than casually known to a substantial part of the trial bar.

fessional basis. And since the lawyers who are the judge's personal and professional friends are the people who know him best, it is they who always are called upon to give statements about his disability. Consequently the natural sympathies of the decision-makers and witnesses in a committee proceeding are reinforced by personal and professional loyalties.

Early in the committee's history it was more formal in its proceedings, particularly regarding evidence and fact-finding. In 1949, in its second case, the committee summoned a number of witnesses to testify in person, including the judge's son and his personal physician. The following year, in its third case, the committee received in evidence depositions from a doctor, the county sheriff, and a nurse who was attending the subject judge in his home after two major operations. The high point of formality in fact-finding was perhaps the case in which the committee, obviously lifting the vocabulary of its findings bodily from the doctor's report, found the judge to be suffering from "hypertension, acute myocardial infarction, ventricular hypertrophy, and intermittent attacks of coronary occlusion."

Gradually it developed that only clear-cut cases reached the hearing stage.[54] (In every case that has reached hearing, the judge was ordered retired.) The committee became correspondingly less formal in its proceedings and depended more on its own common-sense judgments. In a case in the early 1950's, the committee retired a judge it found to be "highly nervous, subject to continuous mental disturbances, unable to sleep, very depressed and emotional, fearful of financial instability, and continually worrisome about matters with little or no provocation." In all cases during the last fifteen years, the committee's finding of fact has simply been in the words of the constitutional provision: "unable to discharge the duties of his office with efficiency by reason of continued physical [or mental] infirmity and the disability is permanent."

Two-thirds of the committee must concur in this finding for an order of retirement to be made. The order, which is effective im-

54. This might have been because the committee chairman screened out doubtful cases; or it might have been because lawyers and judges, seeing that the committee proceeded formally and demanded a high standard of proof, were discouraged from filing a written "complaint" in doubtful cases. It is impossible to say, however, which of these explanations—if either—is the correct one, since there is no way to know about those cases which no one complained of in writing, and the committee keeps no records of cases that are screened out at some point before "information in writing" is filed with the chairman.

mediately, is entered in the committee's records, kept by the clerk of the supreme court. Copies are sent to the governor, secretary of state, and the state auditor. No constitutional provision, statute, or rule of court requires the proceedings or records to be confidential, but they have by custom been so, except for the fact of the decision that a certain judge has been ordered retired.

As noted earlier, by constitutional mandate a judge retired by the Committee on Retirement receives one-half his salary until the end of his term.[55] Thereafter he receives the standard retirement pay of one-third of salary, if at the time of the committee's order he was at least age sixty-five with (a) six years continuous service before 1959 or (b) twelve years service in the aggregate.

One procedural impediment in the committee's operation is that it cannot initiate proceedings on its own motion. Missouri Supreme Court Rule 12.03 provides:

> Upon *information in writing* being filed with the secretary [of the committee] charging that [a judge] . . . is unable to discharge the duties of his office with efficiency by reason of continued sickness or physical or mental infirmity, *or* upon *a statement of [the judge himself]* . . . that he is so incapacitated . . . the chairman . . . may cause the matter to be investigated informally . . . . (Emphasis added).

The rule implies that the chairman may not initiate the informal investigation until and unless the secretary has received information in writing from a third party or a statement from the judge himself. This has in fact been the practice of the committee, which has taken the position that it cannot be self-activating. Either the subject judge must make a statement of his disability or a third party must file written information of it, or else the committee cannot proceed.

No provision of law *expressly* prohibits the committee to move on its own motion. Perhaps, then, an argument can be made that as a matter of law it is not forbidden to do so.[56] But the question is aca-

55. According to a 1953 opinion of the state attorney general, judges who are retired as disabled are entitled to receive one-half the salary they would be making if they had not been retired, rather than one-half the salary they were receiving at the time of retirement. Thus, if the salary of a judge's office is increased between the time of his retirement for disability and the end of his term of office, he is entitled to one-half the increased salary. OP. MO. ATT'Y. GEN. No. 3 (1953). *See* supplement Index to Note following MO. CONST. art. V, § 27 (Supp. 1966).

56. MO. CONST. art. V, § 27 and MO. REV. STAT. § 476.410 (1952) give the Supreme Court power to prescribe rules of procedure for the Committee on Retirement. Rule 12, quoted in part in the text, was made under this authority. Two questions of law must then be

demic, since the committee's operations are not in practice impeded by its inability to be self-activating. The reason is that this procedural vacuum is filled by another agency, the state bar association's Judicial Retirement Committee (hereinafter sometimes called the bar committee).

The Judicial Retirement Committee consists of seven lawyers (increased from five in 1963) appointed by the president of the state bar association and is empowered

> to receive information from any source . . . and to initiate an inquiry on its own motion, as to whether a judge is unable to discharge the duties of his office with efficiency . . . ; to conduct an investigation as to the facts; and if it determines that such judge is unable to discharge the duties of his office with efficiency by reason of continued sickness or physical or mental infirmity, and that such disability is permanent, to file a formal information against such judge with the [Committee on Retirement of Judges and Magistrates]. . . .[57]

Since the bar committee is entirely the creation of a resolution adopted by the board of governors of the state bar, it has no official standing as an agency of the state. It is nevertheless an essential part of the process of getting disabled judges out of office, because it is the mechanism that activates the Committee on Retirement, albeit sometimes indirectly. It does this by exerting various persuasions upon the judge to encourage him to request disability retirement himself. If the judge is recalcitrant, the bar committee can file a written complaint against him with the Committee on Retirement.

Although the bar committee may act upon information from any source, it is the committee's own members who provide the initial information in most cases. They in turn get it from first-hand observation or from other lawyers who bring it to them informally. The committee membership is geographically representative—one member from each of the three court of appeals districts and two each from St. Louis and Kansas City; thus at least one member almost always

considered. The first is whether under this grant of rule-making power the court could make a rule that the committee may proceed on its own motion. The second question arises from the maxim of construction, *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another). Does this mean that Rule 12, because it affirmatively specifies (a) information in writing or (b) statement of the subject judge as activating mechanisms, must be construed to prohibit by implication other mechanisms, such as the committee's own motion?

57. Resolution of the Board of Governors of the Missouri Bar, Sept. 10, 1954. 11 J. Mo. B. 1 (1955).

has first-hand knowledge about a particular case. When the committee member's personal knowledge is not conclusive, an inquiry is made, usually by the member who is from the subject judge's community or geographically nearest it.

When initial information suggests the need for further inquiry, several approaches may be used. In nearly all cases, local lawyers who have appeared regularly in the judge's court are asked to give confidential opinions of his physical and mental condition. The judge himself may be visited by the committee member and asked about his health. Sometimes his doctor is consulted. Occasionally, a check is made of the judge's attendance and work records.

If the committee determines that the judge is unable to discharge his duties efficiently, it deputes one of its members to try to persuade the judge to retire voluntarily. The tactics used in this effort vary with the case. Not infrequently, the committee member and the judge have associated professionally; sometimes they are personal friends. In these circumstances, the committee member may approach the judge personally. Or the medium of persuasion might be family or colleagues. In one case, the committee operated through the judge's son, a lawyer, who was able after a number of entreaties to persuade his father to request retirement for disability. In another case, the judge's court sent three of its members to call upon the judge or his wife and broach the subject of retirement.

Sometimes the judge responds understandingly to these persuasions and agrees to terminate his service. In practice, termination is usually accomplished by the judge himself requesting the Committee on Retirement (the judges' committee) to retire him for disability. Or the judge can resign or retire on his own; this has happened in a few cases. When the judge is unwilling either to resign or retire on his own or to request disability retirement, the bar committee's response could be to file an information against him with the Committee on Retirement. This would certainly be an effective push, since the Committee on Retirement would then have to investigate the case. Notwithstanding the availability of this response, the policy of the bar committee has been to exert low-intensity persuasions over a relatively long period of time rather than simply to file a written information immediately.

This policy, a result of choice and not necessity, is dictated by considerations of practicality and decency. The practical consideration is that an unseemly eagerness to litigate instead of negotiate would give the bar committee a reputation for poor judgment and thus decrease

its effectiveness. Neither the judge in a particular case nor the legal community in general would be cooperatively disposed toward the committee if it had that reputation. The consideration of decency is the genuine sympathy of committee members, to say nothing of that of the legal community at large, who want to preserve the judge's self-respect and dignity. This is better accomplished by encouraging him to terminate his service voluntarily than by compelling him to respond in a formal proceeding to the charge that he is unable to do his job any longer.

Because the bar committee's procedure is low-intensity and aimed at consensual response, it does not try to dictate the mode of termination of service in a particular case. Thus, on occasion, other modes besides retirement (voluntary or by the judges' committee) and resignation have been used. When the judge's current term has only a year or so to run, for example, a very simple solution is for him not to seek retention or re-election at the expiration of the term, as in the following case.

Judge W had over twenty years service and was widely respected both by lawyers and the community at large. After a stroke at the age of sixty-eight, he performed no duties at all for thirteen months. His docket was handled during this time by another judge, assisted occasionally by other judges assigned to hear the jury cases. An investigation begun after the situation came to official attention revealed that the substitute judges had made no complaint of the extra work, nor lawyers of any delay; that the dispatch of court business was not significantly impeded; that Judge W had no independent financial means; that his term would expire in less than a year. It was also learned that through intercession of the judge's friends, a tacit understanding had arisen among the bar whereby no action to compel his retirement would be taken provided he did not seek re-election. No official action was taken, and the judge did not run for another term.

Another response to the problem is makeshift means short of terminating the judge's service, as in the following case. Judge M had been elected at age seventy-four to a second four-year term as county probate judge. At seventy-six, his health began to fail a bit, as he himself admitted. Someone complained and an investigation was made. The investigator talked to the leading citizens in Judge M's hometown of several thousand people—the mayor, the president of the bank, some lawyers, and others. He learned that the judge, though unanimously agreed to be honest, courteous, and industrious, was not really

too competent. Combined with his declining health, this made for a sluggish pace in the business of the probate court.

The investigator also learned that Judge M's clerk, a capable lady of mature years, was carrying on much of the court's business with the assistance of local lawyers. Most of the work was routine enough to be handled by an intelligent layman anyway. Aware of his limitations, the judge, not unwillingly, had accommodated to this arrangement. When the investigator's report was submitted, it was decided not to take any official action. The judge died a few years later.

While the service of a disabled judge thus can be terminated in any one of several ways, disability retirement by order of the judges' committee is, as we have seen, financially advantageous for the judge. Judges retired for disability get one-half of salary until the end of their current term (and one-third thereafter, assuming they are eligible). This temporary financial advantage may not always be a primary concern, of course. Judge H, who was over seventy-five, was clearly disabled and could have been retired for disability if he had requested it. But, insisting to the Judicial Retirement Committee that he was not disabled, he chose to resign instead and forego the one-half salary benefit.

Such reluctance by the judge to recognize his condition is not an unusual reaction to the persuasions initiated by the bar committee. Though some judges respond understandingly to preliminary overtures, others do not. The committee member may have to visit the judge a number of times; other persuasions, from family and colleagues, may be brought to bear. It is not unusual for six to nine months to elapse from the time of the committee's initial contact with the judge to the time his service is officially terminated. In several cases, the committee's efforts have extended over a period of twelve to eighteen months.

Notwithstanding the common occurrence of such delays, the bar committee has adhered to its style of operations and has not adopted the obvious alternative of filing a written information with the Committee on Retirement as soon as there is clear evidence of the judge's disability. In fact, the bar committee has never actually filed a written information with the Committee on Retirement.

Once, though, it came very close to doing so. Judge E, at age seventy-one, had been intermittently ill for seven months before the bar committee acted. Personal friends of the judge called on him; a colleague also exerted persuasions. The judge temporized. As time passed, the committee's suggestions became more pointed. Finally, a deadline was

set and the judge was told that if he himself did not act, a written information charging his disability would be filed. The information had been drawn up and signed when at the last minute the judge agreed to request the Committee on Retirement to retire him for disability.

B. *Conclusion*

What is most intriguing about Missouri's procedure for retirement of disabled judges is the incongruity between its formal characteristics and its actual operation. The basic provisions of law[58] create a procedure formally indistinguishable from the adversary model—complaint, investigation, charge, hearing, counsel, witnesses, evidence, findings, decision. In reality, the proceedings are consensual, informal, and friendly, with the result always foregone. The character of the whole proceeding is administrative much more than adversary.

The fact of this incongruity between theory and practice leads to the conclusion that a formal adversary response to the problem of judicial disability is unacceptable to the legal community. On reflection, this is not particularly surprising, but it is a point not mentioned at all in the literature of the subject and therefore worth emphasizing. Different values are at stake, different community attitudes come into play, depending upon whether a particular case involves bribery or senility, stupidity or laziness. Misconduct evokes condemnation; disability evokes sympathy. In the latter case, accordingly, the community finds it acceptable to terminate the judge's service through the back door of retirement rather than the front door of removal.

The reason for incongruity between theory and practice in Missouri's retirement procedure is a behavior pattern produced by the convergence of three discrete facts. The first fact has to do with the nature of the problem of disability. Rather than being an isolatable act or event, disability related to age usually manifests itself gradually over a period of time, making it difficult sometimes for the responsible agency to decide exactly when to initiate retirement proceedings against a judge. This decision can be made unnecessary by the device of mandatory retirement at a fixed age, but there is no such provision for trial judges in Missouri. Thus the bar committee, which is responsible to initiate retirement proceedings, faces anew with each case the decision when to begin action. And in making this decision, the committee is compelled to be quite cautious, in order to insure its reputation for sound judg-

58. MO. CONST. art. V, § 27; MO. REV. STAT. § 476.400 *et seq.* (1952); MO. SUP. CT. R. 12 (1960).

ment and its acceptability by the local legal community. The result is that the committee will not act until a judge's disability is unquestionably apparent. In one St. Louis case, for example, the committee waited until the judge, who was over seventy-five and had been intermittently ill for several years, had become functionally blind; his eyesight was so bad that his clerk had to read his research and jury instructions for him.

The second fact is the meager judicial retirement pay for Missouri trial judges, $6333 (one-third of salary). Quite apart from the judge's own disenchantment with the prospect of a two-thirds cut in income, the lawyer member of the bar committee who is deputed to induce the judge to retire will naturally have some reluctance about performing his duty, knowing what the economic consequences are.

The third fact has to do with the way the bar committee approaches a judge to persuade him to retire. While it seems originally to have been planned that the whole committee would call upon the judge in each case, this approach was never actually used, probably because impractical and so obviously threatening to the judge. What was and is done is that one member is selected to visit the judge, and usually it is that member who knows the judge best, personally or professionally. This mode of operations puts a substantial emotional burden upon the individual committee member to whom the task falls.

The convergence of these three facts—the gradual appearance of disabilities related to aging, the poor retirement pay, and the personalized approach of the bar committee—causes the committee's operations to proceed at an unusually sluggish pace. The necessity for the committee to be certain of its ground before acting and the natural reluctance and sympathy of the committee member who must implement the decision to act are mutually reinforcing tendencies. The result is that the committee operates at a painfully slow pace compared to what might be expected. It is crucial to realize, however, that under present conditions the committee cannot act any other way, unless it is prepared to offend community standards of decency and tact.

The slow pace of operations has been evidenced in the most recent St. Louis cases. In 1963, 1964, and 1965, one judge of the trial court left office each year for reasons of disability related to aging. (Their ages were eighty-three, seventy-nine, and seventy-eight.) One of them was intermittently ill for several years before he finally left office; in one of the other two cases, it took the bar committee over a year to persuade the judge to terminate his service.

It is true that whenever Missouri's retirement procedure is invoked, the judge is eventually retired. From this point of view, the procedure works. But if evaluated in economic terms, the procedure is the model of a system that is effective but inefficient. It is effective in the sense that it gets the job done, which is to say that a judge who becomes disabled is sooner or later gotten off the bench. But it is inefficient in the sense that this result comes at a high cost.

The cost consequences of judicial disability can be considered from two perspectives: the cost of the problem and the cost of its solution. We know from this research that in most cases in Missouri the judge has been functionally incapacitated for several months, often longer, before action is taken toward his retirement. One economic cost of the problem is therefore the salary of a judge who at worst is unable to do any work at all, and who at best is only marginally productive. And one social cost of the problem is therefore the disruption and delay of court business while proceedings to retire a disabled judge and appoint his successor are in progress for six or eight months or longer.

If one were to study the calendar and docket of the St. Louis trial court for the periods when the most recent cases of judicial disability were pending, it would be difficult to find a direct causal connection between the judge's disability and any disruption of the normal pace of court business. But there is no question that such a connection exists. One who is prepared to argue that court business is *not* disrupted when one of twenty judges is out of service must be prepared to argue that the court did not really need twenty judges in the first place. But if nineteen can do the work of twenty, eighteen can do the work of nineteen. The argument is subject to reductio ad absurdum.

As a practical matter, of course, what sometimes happens is that when a judge becomes disabled, his fellow judges work more, each one taking on part of the work of their absent colleague. This is what was done in the case of Judge W, for example, who after a stroke at the age of sixty-eight performed no duties at all for thirteen months. His docket was handled during this time by another judge, assisted occasionally by other judges assigned to hear the jury cases.

But there are two objections to this way of attempting to minimize the impact on court workload of a judge's absence because of disability. The objection on practical grounds is that the substitute judges can keep up with their own duties only by working overtime; if they do not work overtime, then the calendar in their own courts falls behind. The objection on grounds of policy is that this kind of ad hoc response

is a poor way to run a court system. The business-like way to handle such problems is not to wait for them to cause a crisis but to see that they do not occur in the first place, or if they do, to deal with them expeditiously through an arranged plan. An efficient court system, like an efficient business, is dull: all the crises have been anticipated.

The virtue of Missouri's present procedure for handling judicial disability is that it seems to cost the state essentially nothing in dollar terms. All members of both the bar committee (seven lawyers) and the Committee on Retirement (nine judges) serve without pay. The negligible cost of the paperwork in a proceeding is absorbed by other agencies, e.g., the supreme court (whose clerk is secretary of the judges' committee and responsible for maintaining committee records). There is never any substantial expense for investigation, witnesses' fees, or the other usual trappings of litigation.

But to the extent that Missourians are willing to handle the disability problem by a procedure that is inexpensive but painfully slow and therefore high in social cost, they must also be willing to tolerate a less efficient court system. The fact that it is exceedingly difficult to make with precision a cost calculation that shows the loss to the court system of paying a disabled judge to stay in office instead of retiring him promptly does not alter the fact that there is a cost. And if there is a cost, some attempt to calculate it should be made. The description in this paper of the dynamics of the present procedure should help illuminate the values and alternatives involved in the calculation. Conceivably, Missouri would prefer a more efficient court system and a more efficient disability retirement procedure, and would be willing to pay the price of more attractive retirement benefits for its judges. Better retirement pay would, in turn, make more politically palatable the idea of mandatory retirement for trial judges, a device that would do much to reduce the incidence of judicial disability.

VI. Misconduct

A. *Three Cases*

Three cases of serious judicial misconduct have occurred in Missouri since 1963. Virgil A. Poelker, a St. Louis County trial judge, resigned in March 1963, five days before his impeachment trial on seventeen articles of misconduct. Three years later, in March 1966, John Lodwick Jr., probate judge in north suburban Kansas City, was indicted for embezzlement, although to date he has not yet been tried. He has,

however, been tried and convicted in federal court (in May 1968) of evading payment of federal income taxes on the money allegedly embezzled. In July 1968, a jury found St. Louis County trial judge John D. Hasler guilty of misconduct in office on the basis of his personal involvement with a woman divorce defendant in his court. Articles of impeachment based on the same facts were adopted by the Missouri House of Representatives but the judge resigned in August 1968, three days before his scheduled impeachment trial.

Especially in the first of these cases, involving Judge Poelker, Missouri's legal community acted hesitantly and indecisively. From the time Poelker's misconduct first began coming to public attention in 1961 to the time articles of impeachment were voted, almost two years elapsed. Whatever the legal community may have been doing behind the scenes during this period, its main public response was to call for the judge to resign.

Perhaps, however, the legal community should not be judged too harshly for its ineffectuality in the Poelker case. It is possible to see, in retrospect, that everyone in Missouri, lawyers and judges included, was profoundly shocked and mortified by the scandal Poelker's conduct created. Such a reaction to events does not usually conduce to immediate and decisive action. It is also possible, in retrospect, to surmise that the intensity of shock and mortification among Missourians was roughly proportional to the confidence they had that "it can't happen here."

In a way, this confidence was justified. For two decades before Poelker, there had been no incidents of judicial misconduct even remotely approaching his case in magnitude of scandal. Moreover, the Missouri plan of judicial selection[59] had been widely, often extravagantly, praised during these years as the way to "take judges out of politics" and therefore by implication also the way to keep men like Poelker off the bench. On the basis of this research and of Professor Watson's thorough study of the Missouri plan (see note 45 and accompanying text), it does seem to be true that in St. Louis and Kansas City, the two cities using the plan for their trial courts, there has been no significant concern in the legal community during recent years with the problem of judicial misconduct. And one can hardly help remarking on the fact that all three recent misconduct cases were in non-Missouri plan circuits.

59. *See* note 40, *supra*, and accompanying text.

Because there seems not to have been any serious problem with judicial misconduct in St. Louis and Kansas City—nor elsewhere in Missouri for that matter—during the twenty years before Poelker, it may provide an illuminating historical perspective to recall briefly the situation in 1940, when the Missouri plan of judicial selection was adopted. Certain incidents in that period of the state's political history generated a public concern about the integrity of the judicial establishment which was directly expressed by adoption of a new method of selecting judges. (Before adoption of the Missouri plan for some courts, all judges in the state were selected by partisan election.) If public concern about the integrity of the judicial establishment was renewed by the Hasler trial, however, it was not expressed when voters went to the polls in August 1968 to vote on the adoption of a proposed new judicial article. The article contained a new procedure for removal for misconduct and was defeated in the primary.[60]

Political circumstances in Missouri in 1940 made it an opportune time for a change in the method of judicial selection. The people had had recent, first-hand experience with the worst aspects of the partisan election method. In Kansas City, local government, including some of the courts, was controlled by the openly corrupt political organization of T. J. "Tom" Pendergast. Once, Kansas City judges who refused to pay a $500 campaign assessment had their salaries reduced $1500 a year in reprisal.[61]

Across the state, in St. Louis, citizens endured with dwindling patience the bungling and incompetence of Judge Eugene L. Padberg, whom the St. Louis Post-Dispatch editorially called a "humiliation to the law and to the city." Padberg had made his living as a hospital pharmacist from the time he was admitted to the bar until he became a judge eight years later. During this period, he handled nine legal matters—eight divorces and one annulment. After Padberg's defeat in the 1940 primary (he served one six-year term), some members of the Democratic Central Committee antagonized the public still further by trying, unsuccessfully, to get him on the ballot for a vacancy created by death.

In another incident, the regular Democratic party put up a mediocre

60. Special Study Committee of the Missouri Bar Association, *The Proposed Judicial Article for Missouri: A revision of Article V of the Missouri Constitution prepared for the Steering Committee of the Citizens Conference on Missouri Courts by a Special Study Committee appointed by the president of the Missouri Bar* (June 1967).

61. Schroeder & Hall, *Twenty-Five Years' Experience with Merit Judicial Selection in Missouri*, 44 TEX. L. REV. 1088, 1093 (1966).

candidate in the 1938 primary to oppose James M. Douglas, a widely respected supreme court judge seeking re-nomination. Judge Douglas had offended political leader T. J. Pendergast by voting with the majority of the court in certain fire insurance litigation. In one case, the court ordered all of $1,750,000 in impounded funds to be returned to the policy-holders, thus voiding an agreement between the fire insurance companies and state superintendent of insurance R. E. O'Malley, a Pendergast man. Under the O'Malley agreement, only twenty per cent of these funds would have been returned to policy-holders, the remainder being distributed to the insurance companies and their agents and lawyers. Pendergast's efforts to defeat Douglas resulted in an extremely bitter primary contest, but Douglas won with a plurality of 120,000 votes.

The Padberg incident and others like it in St. Louis, and Pendergast politics in Kansas City, generated substantial public sentiment for change in the method of selecting judges. Proponents of the Missouri plan capitalized upon this dissatisfaction by organizing a massive voter education campaign.[62] Efforts to get the Missouri plan through the state legislature were blocked, so the plan was submitted to the voters as a constitutional amendment by initiative petition. Of the 980,000 votes cast, the plan got 535,000, a margin of 45,000 above the required majority.

Within six months, disgruntled opponents of the plan had gotten the senate to pass a resolution allowing a repeal amendment to be submitted to the voters in 1942. Whatever chance for success the repeal amendment might otherwise have had, a crucial factor in its defeat was the exposure in 1941-42 of the malfeasance of a Pendergast judge, Marion D. Waltner of Kansas City. Waltner's misconduct offered a political target to supporters of the Missouri plan, who could point to him as a symbol of the failure of the partisan election method of selecting judges. A group of forty-five citizens and community leaders in Kansas City formed the Committee for the Rejection of Judge Waltner; as a result of the committee's successful efforts to unseat him, Waltner has the distinction of being the only judge ever not to be retained under the Missouri plan.

One incident of Judge Waltner's misconduct came to light in August 1941, when the Kansas City Public Service Company, as defendant in a damage suit, asked the state supreme court to set aside the judge's

62. J. PELTASON, THE MISSOURI PLAN FOR THE SELECTION OF JUDGES, 33-64 (1945) contains a detailed account of the campaign for adoption of the Missouri plan.

order granting the plaintiff a change of venue. Judge Waltner had previously refused the Public Service Company's request for a change of venue. Subsequently it was revealed that requests for changes of venue from Judge Waltner, based on allegations of prejudice, had been averaging fifteen a month; the Public Service Company routinely requested a change when any case in which it was involved was assigned to his court. A supreme court commissioner appointed to hear testimony on the allegations of prejudice found as a fact that the judge was "actually prejudiced" against the company to such an extent that it could not get a fair trial in his court.

Another incident involved efforts by the Kansas City Department of Health to enforce against a meat processer the city ordinance requiring local inspection of all meat not subject to federal inspection. After a hearing in July 1941, Judge Waltner took the case under advisement but still had not rendered a decision by October 1942. Legal maneuvers by the city council to force a decision were unavailing. In another case, a divorce action, Judge Waltner heard a motion by the husband in April 1936 to quash execution of a judgment for alimony; the motion was still undecided five years later. The husband, according to the Kansas City Star, was an "office associate of a Pendergast sub-boss."

Based upon these and other incidents, the Committee for the Rejection of Judge Waltner publicly accused the judge of prejudice in deciding cases, delay of court business, appointment of grand juries with "distinct political coloring," extreme rudeness and discourtesy to lawyers, and inefficiency in running his court. In the campaign months preceding the 1942 election, the two Kansas City newspapers, the Star and the Times, co-operated with the committee by regular publication of stories containing the evidence on which these charges were based. The Pendergast organization countered the committee's attack on Judge Waltner with a vigorous campaign in his defense. The election was a close one; of 80,000 votes cast, the margin of the judge's defeat was a bare 5,000.

In the same election in which Judge Waltner was defeated for retention, the amendment to repeal the Missouri plan was defeated by a margin of 86,000 votes, nearly twice the margin of victory for plan proponents as at the 1940 election when the plan was first adopted. (The plan was approved a third time when adopted as part of a new state constitution in 1945).

With the perspective of history, we can see that the 1942 election had two important political consequences. The consequence of the

defeat of Judge Waltner was justification of the claim, or perhaps hope, of Missouri plan supporters that the plan's retention feature actually could be used to oust a judge whom the public found unfit. (Under the plan, an incumbent runs unopposed without party designation on the sole question whether he shall be retained in office.) The consequence of the defeat of the repeal amendment was to frustrate the hope of the plan's opponents to return to the partisan election method and thereby restore some measure of improper political influence to the judicial selection process.

Relieved by the defeat of Judge Waltner and heartened by the twice-pronounced voter approval of the Missouri plan, its supporters rested after an arduous campaign. As time passed, plan judges replaced elected judges; confidence increased that the plan was indeed the way to "better" judges. The body of Missouri plan literature that began growing up[63] was overwhelmingly favorable. The American Judicature Society, a court reform organization, made promotion of the plan one of its principal activities. The Pendergast era became history. Public and legal community concern about the problem of judicial misconduct ebbed, as there seemed to be less and less cause for concern.

Outside the St. Louis and Kansas City circuits, trial judges continued to be selected by partisan election. The vicissitudes of politics made 1958 a Democratic year for St. Louis County, which comprises the city's prosperous western suburbs, and one casualty of the Democratic landslide was sixty-seven year old Raymond E. LaDriere, the only incumbent Republican judge seeking re-election. After fifteen years on the bench, LaDriere was defeated by a thirty-seven year old Democratic lawyer making his first bid for public office after admission to the bar only six years before. His name was Virgil A. Poelker.

Apparently Poelker did not even begin his tenure with clean hands. Article X of the impeachment resolution later voted by the Missouri House charged that contingent upon a substantial campaign contribution from one Victor Hallaner, Poelker had promised a few months before the election to give favorable consideration, if elected, to Hallaner's suggestions of people to be appointed as appraisers in condemnation cases. Whether Poelker ever actually appointed anyone suggested by Hallaner is not known. It is known, however, that in July 1959, barely six months after taking the oath of office, Judge Poelker awarded fees of $7500 to each of three appraisers in a case that normally would

63. *See* note 42, *supra*.

have called for fees of half that amount, or less.[64] Calling the fees "exorbitant and unreasonable," the Missouri State Highway Commissioner filed a motion in St. Louis County Circuit Court to have them reduced. A newspaper editorial hinted that the incident ought to be investigated, but nothing seems to have come of the idea.

For the rest of 1959 and all through 1960, Judge Poelker was not much in the news. His private life during this time may have been less than exemplary, however. Articles V and VI of the impeachment resolution charged him with failing to file a state income tax return in 1959 and filing a false one (by knowingly understating his income) in 1960.

In the spring of 1961, during April, May, and June, the dam broke. In April, Hubert J. Kutz, a building contractor, complained to the county prosecuting attorney that Judge Poelker owed him money and would not pay. The prosecutor "conferred" with the judge, who three weeks later gave Kutz two checks totaling $3000. They bounced. Judge Poelker, pleading "misunderstanding," later made the checks good. Kutz probably deserved what he got. Article IV of the impeachment resolution charged that Judge Poelker, while a director and officer of Mari de Villa Retirement Center, secretly agreed to accept an attorney's fee for representing Kutz regarding a construction contract between Kutz and the retirement center. The conflict of interest in this arrangement could scarcely have escaped Kutz's notice.

In May, a civil suit was filed against Judge Poelker for $500 for building materials delivered to his house. He paid the claim after it was disclosed in the newspapers. A few weeks later, Karl Kraus Construction Company filed a suit against the judge for money owed for work done on his house; Kraus eventually got a default judgment for $3985. The St. Louis County Bar Association adopted a resolution urging a grand jury investigation of allegations of misconduct against the judge.

In June, the grand jury indicted Judge Poelker for failure to file a state income tax return in 1959. The judge, vowing to fight the charge "to the bitter end," agreed two days later not to hear any cases until the charge was cleared up. He never resumed his duties. (His salary continued for nineteen months, however, until January 22, 1963, when

64. *See* Canon 12 of the Missouri Supreme Court's Canons of Judicial Ethics, Mo. Sup. Ct. R. 1.12 (Supp. 1967) (hereinafter cited to Mo. Sup. Ct. R. only):

> While not hesitating to fix or approve just amounts [for the services of persons appointed by him, a judge] . . . should be most scrupulous in granting or approving compensation for the services or charges of such appointees to avoid excessive allowances, whether or not excepted to or complained of.

the articles of impeachment were voted, automatically stopping it.) Legal maneuvers delayed the judge's income tax trial for ten months, but the bitter end came nevertheless. On April 14, 1962, he was convicted and fined $1000, although the conviction was later reversed on the ground that the state did not prove proper venue.

As the full extent of Judge Poelker's misdeeds came to light, newspaper editorial admonitions that he should resign changed to demands for his impeachment. Most of the charges finally brought against the judge were based upon his tangled financial dealings. He apparently had overextended himself financially and began borrowing from Peter to pay Paul. The impeachment resolution charged that Judge Poelker issued so many bad checks "as to constitute a course of conduct evidencing a design to avoid the payment of his just debts . . . and generally to defraud citizens within his jurisdiction and elsewhere" (article XII); that with "intent to cheat and defraud," he made false representations about his income and assets to various banks in order to induce them to lend him money (articles VII and VIII); and that he borrowed money from lawyers residing or practicing in his jurisdiction,[65] including one loan of $10,000 (article XX).

Several charges arose from Poelker's alleged defalcations as attorney for the Mari de Villa Retirement Center. It was charged that he misapplied, converted to his own use, or failed to account for money entrusted to him as attorney, director, and officer of the center (articles I, II, III, and IV). Other clients he apparently treated no better. Article IX charged that while attorney for U.S. Fidelity and Guaranty Company before becoming a judge, Poelker received $500 due to the company which he commingled with his own funds[66] and refused to turn over to the company, even after it had discovered his receipt of the money and made demand for it. Fidelity and Guaranty finally hired a lawyer to collect the money, which Poelker paid in November 1961, nearly three years after he had become a judge.

Finally there were several miscellaneous charges. Article XI charged abuse of authority by threatening to make future adverse and capricious

65. *See* MO. SUP. CT. R. 1.32 (Supp. 1967): "A judge should not accept any presents or favors from litigants, or from lawyers practicing before him or from others whose interests are likely to be submitted to him for judgment." *See also* MO. SUP. CT. R. 1.04 & 1.24 (Supp. 1967).

66. *Cf.* MO. SUP. CT. R. 4.11 (Supp. 1967): "Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him."

rulings against an assistant county prosecuting attorney if the attorney appealed a certain ruling by Judge Poelker. Article XV charged that after defaulting upon a loan secured by a mortgage on a boat in his possession, Judge Poelker concealed the boat from the mortgagee and refused to disclose its whereabouts, thereby intending "to hinder, delay, and defraud the mortgagee." Article XVIII charged an improper attempt to influence a grand jury.

During 1962, the case became a notorious scandal throughout the state. The St. Louis County Bar Association called on Judge Poelker to resign; newspaper editorials urged his removal. Letters to the editor columns expressed unanimous public indignation. In April, the judge was convicted of failure to file a state income tax return in 1959. In October, he was arrested on a charge of assault arising out of a fight at a bar between himself and one of his creditors. When he attempted to resume his official duties in December 1962, having heard no cases since June 1961, his fellow judges on the St. Louis County Circuit Court enjoined him from using his office or performing any judicial functions. The court, its calendar falling behind because of Judge Poelker's absence, had called a few months earlier for judges from other circuits to volunteer in helping bring the calendar up to date.

By the end of 1962, the political pressure to get Judge Poelker out of office had become intolerable. Since the only formal procedure to accomplish this result in Missouri is impeachment, the task fell to the Missouri House of Representatives. After investigation by a committee appointed on January 7, 1963, a resolution containing twenty-one articles of misconduct was introduced in the House on January 22. Seventeen of the articles were adopted, most by an overwhelming vote that reflected a statewide sense of outrage transcending party lines.

On March 13, five days before his trial, the judge resigned. At the same time, he turned in to the state bar association his license to practice law. According to a St. Louis newspaper,[67] the preparation of impeachment proceedings cost the state $15,864. Additionally, the state had paid Poelker $31,000 in salary over a period of one year and seven months during which he heard not one case.

After resigning his judicial office and giving up his law license, Poelker was successively an operator of heavy machinery, driver of a beer truck, and car salesman. The day after Christmas 1966, a St. Louis newspaper reported that he was unemployed and bothered with eye

67. St. Louis Globe-Democrat, Mar. 27, 1963. The total includes $14,000 for lawyers' fees, $1,264 for lawyers expenses, and $600 for witness fees.

trouble so as to be unable to do manual work. A son lived with him; several other children lived with his wife, who has since been awarded their custody and a divorce. The federal government holds an uncollectible lien against him for $14,903 in delinquent taxes.

Three years, almost to the day, after Judge Poelker's resignation, John Lodwick Jr., judge of the probate court in Clay county (north suburban Kansas City), was indicted on seven counts of embezzlement. The indictment charged that he had taken $2,812 in court fines levied during 1961 when he was a town magistrate.

At the time of the indictment, Lodwick was a prestigious name in the law and politics of Clay county. Lodwick Sr., the judge's father, was a former mayor of their hometown of Excelsior Springs (population 6500) and one of three lawyers in the town, where he had practiced since 1936. The judge's younger brother, David, was in their father's firm and was also part-time assistant county prosecuting attorney. The judge's mother was a member of the Clay County Democratic Central Committee. Judge Lodwick himself was vice-president of the county bar association, a former president of the county Young Democrats, and a former Democratic state committeeman.

After graduation from the University of Michigan Law School, where he was president of his senior class, Lodwick Jr. spent two years in the family firm before running successfully for a four-year term as magistrate in 1954. He won a second term to the $7,200 a year position in 1958, then in 1962 defeated incumbent Keller Bell to win the probate judgeship. In the spring of 1966, the last year of his term as probate judge, a two-week grand jury investigation of Judge Lodwick's magistrate court records for 1961 resulted in his indictment on March 10 on seven counts of embezzlement. The family reputation was further tarnished when local newspapers reported a month after the indictment that the judge had once appointed his father inheritance tax appraiser of a $935,000 estate.[68] For his services, Lodwick Sr. received a fee, set by his judge-son, of $1,000.

Partly because of Judge Lodwick's estimable local pedigree, the indictment caused a scandal of some magnitude. For the remainder of the spring and much of the summer, the case was front-page news in

68. *Cf.* Mo. Sup. Ct. R. 1.12 (Supp. 1967):

"Trustees, receivers, masters, referees, guardians and persons appointed by a judge to aid in the administration of justice *should be selected with a view solely to their character and fitness. The power of making such appointments should not be exercised by him for personal or partisan advantage.* He should not permit his appointments to be controlled by others than himself. *He should also avoid nepotism and undue favoritism in his appointments*" [emphasis added].

the North Kansas City News-Dispatch (circulation 3,400) and other local papers. The judge's lawyer indicated he would seek to have the case tried as soon as possible, and the trial was initially set for June 6, just three months after the indictment. But in May the judge was granted a change of venue to another county on the ground that local prejudice in Clay county would prevent his getting a fair trial. Subsequently the trial was delayed several times again for different reasons, and to date Judge Lodwick still has not been tried on the embezzlement charges. He has, however, been tried and convicted in federal court (in May 1968) of evading payment of federal income taxes on the money allegedly embezzled.

During the months following the embezzlement indictment, Judge Lodwick appeared unabashed by his circumstances. On April 28, he filed his name in the August primary election for Democratic candidate for probate judge. In Clay county, the Democratic nomination has always been tantamount to election. The judge's paid political advertisement in local newspapers recited his membership or activities in the Methodist church, Junior Chamber of Commerce, Rotary Club, Shrine Club, Masonic Lodge, Eastern Star, Elks, United Fund, Boy Scouts, Red Cross, Clay County Bar Association, and Missouri Historical Society. The advertisement concluded with a statement of the judge's view that Clay county needed a probate judge who was "experienced, efficient and progressive and acquainted with the people's problems."

Other politicians seemed not to share Judge Lodwick's optimism. Two other candidates had already filed in the primary for the probate judgeship, one of whom, Keller Bell, had held the office when defeated by Lodwick in 1962. Two Democrats seeking their party's nomination for seats in the state legislature publicly rejected the support of local labor groups in order to avoid having their names appear with Judge Lodwick's on labor's political literature. As the campaign moved into mid-summer, local newspapers kept the case stoked up with front-page news stories and editorials.

In the August primary, the Democratic nomination for probate judge went to Rollie Baldwin, with 10,358 votes. Of the 18,000 votes cast, about twice the number usually cast in an off-year primary, Judge Lodwick received 3,151. He carried eight of 115 precincts. In the general elections in November, while Rollie Baldwin ran unopposed, three of his Democratic running mates were defeated by Republicans. In a county where no Republican had held any public office in

over 140 years, two Republicans were elected to the three member county court (board of supervisors) and a Republican was elected county prosecuting attorney. The incumbent Democratic county prosecutor, Gerald Kiser, had disavowed an old friendship with the Lodwick family and announced he would prosecute the judge. While 1966 was a Republican year nationally as well as in Clay county, Linn L. Brown, editor of a local newspaper, said "virtually everyone" agreed that the Democratic debacle was directly attributable to the Lodwick case.

A month after the November elections, the Internal Revenue Service began investigation of Judge Lodwick's court records for his term as magistrate to see whether he had received any taxable but unreported income as a result of the alleged embezzlement. The IRS investigation continued for a year. Meanwhile, Judge Lodwick completed his term as probate judge, which expired January 1, 1967, and his term as vice-president of the county bar association, which expired in July 1967.

The IRS finished its investigation and presented its evidence to a grand jury in Kansas City in January 1968, and the next month Lodwick was indicted for income tax evasion. It was charged that in 1961 he received $6,750 income that he did not report and consequently owed an additional $2,526 in taxes. A second count of the indictment charged that he knowingly signed a false return in 1961. At the close of a five-day trial in May 1968, the jury deliberated an hour before returning a verdict of guilty. Lodwick was sentenced to the maximum imprisonment on each charge, a total of eight years, but the trial judge can later reduce this on the basis of a sentencing investigation. Lodwick is presently free on bond pending final disposition of an appeal (his motion for new trial was overruled August 27, 1968), following which —assuming affirmance—he will serve three months imprisonment while the sentencing investigation is made. It is a safe surmise that the eight-year sentence initially imposed will be substantially reduced.

By one of those curious coincidences of political history, the 1966 general elections were a fateful occasion for the suburbs of St. Louis as well as for the suburbs of Kansas City. In Clay county (north suburban Kansas City), Judge Lodwick's malfeasance tainted the Democrats so badly that they lost three offices to Republicans in a county where no Republican had ever before been elected to anything. In St. Louis county (the city's western suburbs), a scandal involving the incumbent Democratic prosecuting attorney helped Republicans to defeat him as well as to win every other county office on the ballot except the circuit

judgeship occupied by Noah Weinstein, a Democrat who ran unopposed for re-election. Six of Judge Weinstein's incumbent Democratic colleagues were defeated. It was the first time that any incumbent judge had lost a bid for re-election since Poelker, a Democrat, defeated LaDriere, a Republican, in 1958, a Democratic year in St. Louis county elections.

Leading the Republican judges in his margin of victory was fifty-four year old John D. Hasler, who left his Democratic opponent, John B. Gray, 44,334 votes behind. Eighteen months after taking the oath of office, Hasler was convicted by a jury of "oppression, partiality, misconduct, and abuse of authority" as a result of his personal involvement with a woman divorce defendant in his court.

Sometime in October 1967, after the first hearing in the divorce proceedings between Delmar Shelby and Jean Poole Shelby, Judge Hasler and Mrs. Shelby had dinner together. Subsequently, the judge saw Mrs. Shelby socially on other occasions, including several times after December 5, when he heard evidence (including testimony by Mrs. Shelby) and took the divorce case under advisement. Testimony at the judge's misconduct trial indicated that he had written her "close to fifteen" letters[69] and placed several personal phone calls to her. The meetings and correspondence had romantic overtones,[70] but also involved discussion of the divorce proceedings, depositions, and testimony Mrs. Shelby had given or was to give.[71] The relationship between the judge and Mrs. Shelby was apparently not known to either Mr. Shelby or his lawyer.[72]

Early in February, Mr. Shelby discovered five of the judge's letters to Mrs. Shelby. A few days later, Mr. Shelby's lawyer, Theodore Schechter, moved Judge Hasler to disqualify himself from the case. The judge did so and the case was transferred out of his court on February 7.

69. Testimony of Jean Shelby before the Circuit Court, July 8, 1968.

70. Deposition of Jean Shelby on behalf of the defendant, May 17, 1968.

71. *Id.*

72. Mo. Sup. Ct. R. 1.17 (Supp. 1967): "A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him. . . ." and Mo. Sup. Ct. R. 1.13 (Supp. 1967): "A judge should not . . . suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor. . . ." and Mo. Sup. Ct. R. 1.04 (Supp. 1967): "A judge's official conduct should be free from impropriety and the appearance of impropriety . . . and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in everyday life, should be beyond reproach."

Meanwhile Schechter sent copies of the five letters to the local professional ethics committee of the state bar association.

On Friday, March 1, the story of Judge Hasler's personal involvement in the Shelby divorce case broke in local newspapers, with a page one article in the St. Louis Post-Dispatch headlined "Bar Studying Judge's Role in Divorce Case." The following Monday, Judge Hasler's fourteen colleagues on the St. Louis County Circuit Court met en banc and agreed not to assign any more cases to him. Tuesday, the majority leader in the Missouri House of Representatives, Richard J. Rabbitt (D-St. Louis), introduced a resolution to create a legislative committee that would investigate the judge's conduct and recommend whether he should be impeached. Wednesday, Gene McNary, St. Louis county prosecuting attorney, announced that the county grand jury would be asked to investigate the case. Thursday, the Rabbitt resolution passed the House, 102-31.[73]

On March 21, after two days of hearing, the grand jury returned an indictment charging Judge Hasler with violation of the state's oppression in office statute, which provides:[74]

> Every person exercising or holding any office of public trust who shall be guilty of willful and malicious oppression, partiality, misconduct or abuse of authority in his official capacity or under color of his office, shall, on conviction, be deemed guilty of a misdemeanor.

A few days after the indictment, the St. Louis County Circuit Court met en banc again regarding Judge Hasler, this time relieving him of all official duties.

The judge's trial began three and a half months later on July 8. The evidence most relied upon by the state was Judge Hasler's letters to Mrs. Shelby. His letter of January 18 shows most clearly his personal involvement in the case. It begins with the salutation "Dearest" and includes the following passages:

> There is still more I want to tell you and discuss carefully about the way I should like to order this decree. You see I not only want but need that extra testimony in the record to help with the order of custody. What I most regret is that G.G. [Granville

73. Under an impeachment procedure apparently peculiar to Missouri, the trial is before the state supreme court rather than the upper chamber of the legislature. Mo. CONST. art. VII, § 2.

74. MO. REV. STAT. § 558.110 (1959).

> Gamblin, Mrs. Shelby's lawyer] has not brought up the Motion for Temporary Alimony and Child Support while all this is pending, then I could have ordered it and we would not be in any great hurry, for your parents would then be receiving weekly whatever amount I should have ordered for that purpose that he [Mr. Shelby] be directed to pay from his earnings.
>
> This way, more delay is just pushing that off into the future and is not at all helpful to your parents or to you and isn't a whit fair. And good old D. [Delmar, i.e., Mr. Shelby] is just laughing up his sleeve. I am planning to call G.G. into my office and talk to him straight from the shoulder about the way I think he should proceed from this point on. I hope he will. I feel that he most likely will . . . .
>
> . . . .
>
> Now, for me, read this, re-read it if need be, but you and I know it were best that you destroy this writing now, please. For your own sake (not mine) we cannot suffer comment about the "case" ever to run the risk beforehand, to fall into the wrong hands. It is too, too dangerous . . . .
>
> . . . .
>
> Here are copies of the very nice letters from Mrs. Pennington [a social worker assigned to the Shelby case]. I showed them to Schechter [Theodore Schechter, Mr. Shelby's lawyer] and he said, "Who are they talking about? I don't recognize the person they're describing here as a good mother, responsible and competent!" I could have hit his sneering face, but I had to hold my temper for I cannot in any way let the slightest thing show that I am interested personally in anything going on for either side. I am certain you understand that this is in your highest interest and that of the children.

In her testimony for the state, Mrs. Shelby said she thought she had the judge in her "female clutches"; that he had written her about fifteen letters after they first met in court; and that he had once taken pictures of her showing a black eye caused by a beating by her husband; and that the pictures were to be used as evidence in the divorce proceedings. On cross-examination, substantial doubt was raised about Mrs. Shelby's credibility.

On the third day of trial, Judge Hasler himself took the witness stand. He denied some particulars of Mrs. Shelby's testimony, but did not deny the substance of the prosecution's case, which was his course of conduct in seeing her socially and discussing the divorce proceedings with her by letter and telephone. The theory of his defense was that his relations with Mrs. Shelby were "paternalistic" and arose from

sympathy for her and her children. He denied misusing his official position to help her.[75]

The purpose of his first meeting with her, the judge testified, was to confront Mrs. Shelby "eye to eye" about Mr. Shelby's allegations of her adultery. The judge denied having sexual relations with Mrs. Shelby (there was no evidence to contradict this), and said he was not romantically involved with her. Regarding his use of the salutation "Dearest" in his letters to Mrs. Shelby, the judge said that he ascribed no particular significance to the word.

After a five-day trial, the jury of six men and six women began deliberations shortly before six p.m. Friday, July 12. After several hours, no verdict had been reached, and deliberations were resumed Saturday morning. That afternoon the jury returned a verdict of guilty and assessed the judge's punishment at a $1.00 fine. Maximum punishment for the offense is one year in jail, a $500 fine, or both.

Contemporaneously with the criminal proceedings against Judge Hasler by the county prosecutor's office, the Missouri House of Representatives conducted its own investigation to determine whether the judge should be impeached. (Under present law, a Missouri judge can be removed from office only by conviction on articles of impeachment; Judge Hasler's misdemeanor conviction did not itself disqualify him from office.) The resolution to create an investigating committee was passed March 7. The committee's hearings began April 9 and its report recommending impeachment was submitted May 14. After meeting as a committee of the whole to hear evidence, the House, meeting in its second special session, voted four articles of impeachment against Judge Hasler on June 28.

The articles charged[76] that Judge Hasler "did improperly advise and counsel with Jean Shelby . . . concerning the testimony" she was to give in the divorce case; that he made improper "suggestions to Jean Shelby and her attorney as to what action they should take to secure a favorable ruling" from him; that "with intent to hear and secure additional evidence in order that he might make decisions therein personally compatible to him and in support of which no evidence had been adduced and in order that his predetermined decision in the case would be less susceptible to reversal on appeal," he improperly reopened the Shelby case after it had been submitted to him for decision; and that his conduct "brought disrepute to his high office." Each of the four

75. Testimony of Judge Hasler before the Circuit Court, July 10, 1968.

76. H J. OF Mo., 74th Gen. Assembly, 2d Extra Sess., at 34-42.

articles was voted on separately, and all passed by an overwhelming margin.

B. *Conclusion*

Each of the three cases described above was resolved by a very different course of actions and events. Thus we can say that one striking thing about Missouri's response to the problem of judicial misconduct is its reactive, ad hoc character. It is the coincidence of events which seems to dictate the response in a particular case, rather than any conscious effort to implement a regularized procedure.

What other conclusion can we draw, for example, from the fact that it took eighteen months after initial public disclosure of his misconduct to begin impeachment proceedings against Judge Poelker but only six days to do so against Judge Hasler? The legislature can answer that it was not in session and therefore could not act when the full extent of Poelker's misconduct became known in the fall of 1961 and the winter of 1962. But should the resolving of misconduct charges against a judge be subject to such contingencies as whether the legislature happens to be in session?

Or take the Lodwick case. What if Judge Lodwick had been in the first year of his four-year term instead of the last? It is likely that the legislature would have had another impeachment proceeding on its hands. As it happened, the legislature was not in session when the embezzlement indictment was returned in March 1966 and therefore could not be charged with the responsibility to act immediately. The consequence was that Judge Lodwick, even though defeated in the August 1966 primary, stayed in office under a cloud of suspicion about his integrity until January 1, 1967 when his term ended, ten months after the indictment.

The point of these observations is that Missouri's response to the problem of judicial misconduct is very much a function of the circumstances prevailing at the time the particular case arises. There is no assurance therefore that each case will be treated with the procedural regularity to which the subject judge is entitled as a matter of due process, or with the expeditiousness necessary to minimize loss of public confidence in the judiciary and in the legal system's capacity to respond to internal malfunctioning. The fault of the present arrangement is not that it is ineffective, since in all three cases the judge's service was eventually terminated, but that like Missouri's mechanism

for disability retirement, it is procedurally clumsy, high in social cost, and therefore inefficient.

To provide a fully adequate response to the problem of judicial misconduct, a court system must include not only an effective removal procedure but also a number of features that are presently lacking in Missouri. One such feature would be a mechanism for monitoring those areas of a judge's official performance where misconduct might occur. We are entitled to ask, for example, how it happened that Judge Lodwick's embezzlement of court funds in 1961 went undiscovered until 1966. His activities would certainly have come to light much earlier if there were a provision in Missouri for periodic audit of court records involving the receipt of fines and other moneys. New Jersey, which seems to be one of the few states that do such audits, has on at least one occasion discovered by this means that a judge was guilty of "irregularities" in processing traffic tickets.[77]

Similarly, Judge Hasler's relationship with Mrs. Shelby might have been discovered earlier if there were closer scrutiny of the status of court calendars. Nine months elapsed from the time Mr. Shelby filed suit for divorce in May 1967 to the time his lawyer discovered the judge's personal involvement with Mrs. Shelby. Most contested divorces do not take that long to reach final decision. While the normal stop-and-go pace of litigation would account for part of this time, some of the delay was apparently attributable to Judge Hasler's efforts to maintain his relationship with Mrs. Shelby by not making a final decision in the case. A weekly or monthly statistical report, such as that required by court rule in New Jersey,[78] showing cases decided, cases pending, and cases under advisement (and for how long) would have shown up the unusual delay in the Shelby case. Subsequent inquiry might have revealed the judge's indiscretion before he had become so deeply involved. (Delay attributable to other, more usual causes, such as illness or disability, would also be manifest from periodic statistical reports.)

Administrative devices such as audits of court financial records and statistical reports on court calendars are not much mentioned in the literature on removal of judges for misconduct. The foregoing speculations about the Lodwick and Hasler cases should make clear, however, that business-like administration is an indispensable part of a court system's apparatus for dealing effectively with the problem of misconduct, and with disability too for that matter. In general, the better the

77. *See* N.J. Ct. R. 8:13-9, 8:13-10 and *In re* Mattera, 34 N.J. 259, 168 A.2d 38 (1961).
78. N.J. Ct. R. 1:30-5.

administrative structure of a court system, the easier it will be to detect malfunctions in the system which result from a judge's unwillingness or inability to do a decent job.

Effective administration can also help facilitate discipline for minor misconduct: the judge who is habitually late to court, takes off on Friday afternoon (or all day), goes on long vacations, is abusive to persons appearing in court, participates in partisan politics, etc. Such problems can often be detected by administrative devices and remedied internally in the system by informal, low-intensity sanctions such as a suggestive letter, used, for example, in California.[79]

Administrative devices may not detect, however, those kinds of misconduct which do not have manifest symptoms or cannot be easily checked. Examples are bribery, drinking, favoritism in appointments, and accepting gifts and favors from lawyers. Consequently, even with the best administration, the need for a removal procedure remains. Missouri's only formal removal procedure at present is impeachment. That procedure has the following specific deficiencies.

(1) The use of impeachment in Missouri depends upon the legislature (which meets only biennially) being in session. We have seen in the Poelker case the delay that can result when this condition is not met. Similar delay was avoided in the Hasler case only because of the coincidence that the legislature was in session when the judge's misconduct was disclosed.

(2) Impeachment is entirely reactive in its character. Public scandal, rather than legislative initiative, is the trigger mechanism. The legislature will act only when sufficient political pressure has been generated by public disclosure of the misconduct—although the reaction time may be as long as eighteen months (Poelker) or as short as six days (Hasler). (It is a reasonable surmise that the legislature's quick response to the Hasler case was at least partly motivated by its desire to avoid repetition of the severe public criticism it received because of the delay in the Poelker case.)

(3) Impeachment is an ad hoc device, and this means there are no regularized rules of procedure and no permanent staff. Without such rules, there is no assurance of procedural equal protection for the subject judge. Without a permanent staff, impeachment cannot monitor possible problem areas of judicial performance and conduct. It is a removal procedure, nothing more nor less. Once impeached, a judge

79. Frankel, *Judicial Discipline and Removal*, 44 TEX. L. REV. 1117, 1128, 1131-32 (1966).

either resigns under threat of trial (removal by indirection) or is tried. If tried, he is removed or acquitted. No other options are open, such as discipline for an offense not warranting removal.

(4) Impeachment is procedurally clumsy. A grand jury—the function of Missouri's lower legislative house—with 163 members is absurd. Moreover, every step of the proceedings must be taken by motion or resolution and voted on by the legislature. The sequence of legislative action in the Poelker case is indicated in the footnote.[80] Legislative action in the Hasler case was much more abbreviated, comprising only three resolutions and the vote on each of four articles of impeachment. While the Hasler case thus indicates that impeachment *can* be made more expeditious, the very fact of different handling of the two cases evidences the absence of such procedural regularity as will insure due process to the subject judge, a deficiency already referred to.

(5) Impeachment, because it is a legislative proceeding, is intrinsically partisan, in the sense of involving party politics. Legislators are partisan advocates by civic obligation and practical necessity; of all groups, therefore, who might be given authority to judge the judges, legislators are uniquely disqualified by the habits of their occupation. Even for the most statesmanlike of them, it is difficult in an impeachment proceeding to ignore partisan considerations.

Some circumstantial evidence of partisanship can be found in both the Poelker and Hasler proceedings.[81] But the case against impeachment

80. Resolution to appoint two lawyers to investigate and then present evidence to a Committee of the Whole House; appointment of the lawyers by the Speaker; motion to adopt the report of the Committee of the Whole House; resolution to appoint a special committee to draw up the articles of impeachment; appointment of the special committee by the Speaker; recommendation of the special committee for adoption of twenty-one articles; separate vote on each article (seventeen were adopted); motion to transmit the adopted articles to the state supreme court for trial and to appoint two members of the House as managers (prosecutors) of the case before the court; resolution to reimburse the managers for expenses and allow reasonable fees for their services.

81. One piece of such evidence is a comparison of the votes of some individuals who voted in the impeachment of both Poelker and Hasler. For example, House majority leader Richard J. Rabbitt (D-St. Louis) voted "aye" on all four articles of impeachment proposed against Judge Hasler, a Republican. In the proceedings against Judge Poelker, a Democrat, twenty-one articles were proposed and seventeen adopted, all but three by margins of over seventy votes (the house has 163 members). Rabbitt voted "aye" on only five articles. These facts are suggestive of the possibility that Representative Rabbitt was unable to be wholly objective in evaluating the alleged misconduct of a judge in his own party.

Another piece of evidence is the contrast between the percentages of each party who voted "aye" and "no" on the resolution to investigate Judge Hasler's conduct (similar statistics for the Poelker case are not immediately available). Ninety-one of the 107

because of its intrinsically partisan nature does not rest only upon the argument that circumstantial evidence of partisanship can be found in the Poelker and Hasler proceedings. The basic and broader objection is that the partisan character of a legislature makes it *ipso facto* an inappropriate forum to try charges of judicial misconduct, even if specific prejudice cannot be shown in a particular case. It is incongruous and absurd that an ordinary citizen accused of crime has a constitutionally guaranteed right to an impartial jury while a judge can be indicted for misconduct by a group of persons whose professional interests, not to say obligations, make it quite likely that they will be unable to view his case with detachment.

(6) Impeachment is costly. The direct cost of the Poelker impeachment was $15,864. Additionally, the state paid Judge Poelker $31,000 in salary over a period of one year and seven months during which he heard not one case. These two figures total nearly $47,000, but Missouri got off cheaply even at this price if the figures available for comparison are any guide. Florida, for example, has had two impeachments in the last decade. One in 1957 cost $121,869.77. One in 1963 cost $79,742.39 plus approximately $35,000 for printing the 2600 pages of testimony and other proceedings which occupied twelve days.[82]

As for the Hasler impeachment, no figures on its direct cost to the state have been made public. The expeditiousness of the proceedings makes it appear that their cost was negligible compared to the Poelker case. But an accurate account of the cost of the Hasler impeachment must include reference to the fact that the Missouri legislature was in its second special session when most of the proceedings occurred. During the pendency of the Hasler case, the governor remarked that a second special session would cost the state "about $300,000."[83] Whether

Democrats in the Missouri House voted on the resolution; eighty-one voted "aye," seven "no," and three "present." In contrast to this united Democratic front, the Republicans split almost evenly. Fifty-four of the fifty-six Republicans were present and voting; twenty-one voted "aye," twenty-four "no," and nine "present." These facts are suggestive of the possibility that the Republicans were unable to be wholly objective in evaluating the alleged misconduct of a judge of their own party.

Much more evidence than these two items would be needed, of course, to demonstrate that the proceedings in either impeachment were so tainted by partisanship that injustice was done. Both judges very likely deserved to be impeached; the evidence against them was substantial, and the vote on the articles was overwhelmingly affirmative in both proceedings.

82. These figures originated in the Florida state comptroller's office and are stated in a letter, quoted here with permission, from the then chief justice of the state supreme court, E. Harris Drew, to Hampton Dunn, a St. Petersburg newspaperman, Jan. 1, 1964.

83. St. Louis Globe-Democrat, Mar. 6, 1968, at 1, col. 4.

the actual cost was in fact $300,000, or only half that, it would be wrong to count all of it as a cost of the Hasler case, since as it turned out, there were other reasons for calling the second special session, such as action on an urgent capital improvements bill.

But suppose the House investigating committee's impeachment recommendation had been the only item on the legislative calendar for a second special session. The governor would have faced a dilemma: should he call the session, at substantial cost to the state, just to act on the impeachment recommendation? or should he allow Judge Hasler, suspended from duty by his colleagues and convicted by a jury of official misconduct, to remain in office under a cloud of suspicions about his fitness until the next regular session, seven months away in January 1966? By the fact of having other legitimate reasons to call the session, the governor was able to avoid confronting this vexing choice—another example of the way in which the coincidence of circumstances rather than intelligent planning dictates Missouri's response to the problem of judicial misconduct.

But if not impeachment, what else in its place? The answer to this question depends upon what we conceive to be the operational objectives of a removal-discipline procedure. The following are proposed:

(1) To identify problems of judicial misconduct by monitoring the performance and conduct of judges to the extent possible and appropriate within the tradition of judicial independence properly understood;

(2) To investigate promptly and impartially all allegations and evidence of such misconduct;

(3) To give the subject judge notice and opportunity to be heard in all cases; and in cases where the charges, if proved, would justify removal or any lesser sanction of a punitive nature, to afford him all the procedural protections applicable in a criminal proceeding;

(4) Where misconduct is proved, to correct, discipline, or remove the offending judge, according to the nature and seriousness of the offense. (As a matter of policy, though not of operational planning, it should also be the function of the procedure to protect, and where necessary, to vindicate publicly, the reputation and integrity of the judiciary when allegations of misconduct prove groundless.)

Some agency must be identified as having responsibility to accomplish these objectives and vested with power to that end. The responsible agency in the case of impeachment is the legislature, but for reasons already stated, a legislature is unable to utilize its power in this area

either effectively or efficiently. Politically and practically, the only alternative to the legislature is an agency within the judicial establishment itself. The particular membership of the agency is not important —with one qualification: the majority must be judges, since they themselves will certainly not accept any other balance of power. The agency can be the state supreme court,[84] a specially constituted court,[85] a commission of judges,[86] or a commission of judges, lawyers and laymen.[87]

The necessity for monitoring judicial conduct and performance in order to detect misconduct has been discussed earlier. Whether the removal-discipline agency performs the monitoring function directly and independently or relies upon procedures already established will be determined by the internal politics of the judiciary in the particular jurisdiction and the degree and efficacy of existing administrative-managerial organization in the court system. None of the removal-discipline agencies being studied during this research perform directly any significant monitoring function; all utilize the existing administrative structure and procedures.[88]

Some misconduct will be reported by sources outside the agency, however, and thus its effectiveness hinges partly upon its being visible and accessible to potential complainants. Accessibility means there should be no unnecessary formalities to initiating a complaint; a letter or phone call, even if anonymous, should be acceptable. Besides an attitude of receptivity on the part of the agency, another policy that will facilitate complaints is confidentiality. Three considerations support the policy of keeping confidential, at least initially, both the names of the complainant and the subject-judge, and the nature of the complaint. First, many lawyers are reluctant to complain; they feel (whether

84. *See, e.g.*, N.J. CONST. art. VI, § 2, ¶ 3; § 6, ¶ 4.

85. *E.g.*, N.Y. CONST. art. VI, § 22.

86. *E.g.*, ILL. CONST. art. VI, § 18.

87. *E.g.*, CAL. CONST. art. VI, § 8.

88. Five states are being studied. In Missouri, there is only moderate administrative organization and control in the court system. Hence judicial performance and conduct are not monitored very closely, and even then not with the direct or incidental purpose of detecting misconduct. In New Jersey, the supreme court has administrative authority over the court system and is also the removal-discipline agency. Thus, both administration and investigation of alleged misconduct are handled by the administrative director of the courts. The arrangements in Illinois and the appellate divisions of the first and second judicial departments in New York City are roughly similar. In California, the supreme court has the final power of sanction in removal-discipline cases, but the legwork is done by the executive secretary of the Commission on Judicial Qualifications, who has established a close, day-to-day working relationship with the administrative office of courts.

justifiably is not the point) that if the judge stays in office and word gets back to him, they and their clients' interests will suffer somehow. The confidentiality policy can help lessen this anxiety. Second, confidentiality may help encourage a consensual response from the subject judge in cases where the misconduct is proved but where it is appropriate to allow him to resign rather than face proceedings (e.g., alcoholism). Third, in cases where the complaint proves without merit, the confidentiality policy helps insure that the reputations of the subject judge and the judiciary as a whole are not needlessly tarnished by public disclosure of groundless accusations.

The procedural powers of the agency should be adequate to the scope of its jurisdiction and must include at a minimum the power to conduct investigations, call witnesses, subpoena evidence, and have access to court records. If the agency has jurisdiction to retire for disability as well as to remove or discipline for misconduct, it should also have the power to order a physical or mental examination of a judge. And once a complaint is found to have prima facie validity, the agency should have power to suspend the subject judge from duty pending a final determination on the merits.

The inflexibility of sanction which is a principal weakness of impeachment should be avoided by giving the agency the power to adapt its disciplinary action to the character of the offense. In the jurisdictions being studied during this research, at least four different sanctions less than removal have been used: a letter to the subject judge,[89] which, according to its tone, can be instructional or correctional; an admonition or a reprimand; private censure by a judge senior in rank;[90] and public censure[91] or reprimand[92] by the state supreme court.

Staffing the agency is crucial. Inadequate staffing—or what is much the same thing, inadequate financing—can incapacitate the agency even if it is otherwise equipped to do its job. As a practical matter, staffing can be provided in one or a combination of various ways. If the size of the jurisdiction and the expected agency workload warrant it, a full-time salaried position can be created. This is the arrangement in California, where a full-time executive secretary does the daily legwork

89. See note 70 *supra* and accompanying text.

90. *See Hearings on Procedures for the Removal, Retirement, and Disciplining of Unfit Federal Judges Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., at 141 (1966) (testimony of Honorable George J. Beldock, presiding justice, Second Judicial Dep't, State of New York).

91. *In re* Klaisz, 19 N.J. 145, 115 A.2d 537 (1955).

92. *In re* Pagliughi, 39 N.J. 517, 189 A.2d 218 (1963).

of the Commission on Judicial Qualifications; on occasion, he uses outside personnel to help in the investigative work. For the state that can afford such an operation, the full-time one-man staff (or more, if necessary), with supporting secretarial service, seems far the best arrangement.

Second, if the administrative office of the court system also handles judicial disciplinary matters, as in New Jersey, the staff of that office can be used for administrative and investigative work in misconduct cases. This is an economical arrangement, since it utilizes existing resources. The principal disadvantage is that it can divert those resources from their intended use; if very many misconduct cases arise, a decision must be made whether court administration or judicial discipline is to take precedence.

A third possibility is to appoint a referee to hold hearings and make findings of fact on the basis of which the agency will decide whether disciplinary action is justified. This arrangement has been used at times in both New York and New Jersey. Somewhat analogous is the appointment of a legislative committee to investigate and make fact-findings, as in the Poelker and Hasler impeachment cases. Yet another possibility is to hire a private investigator on a case-by-case basis.