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What's in a Name? California Sets the Style

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By Jack E. Frankel

Jack E. Frankel became the first Executive Secretary of the California Commission on Judicial Qualifications August 1, 1961. He was born in Cleveland, Ohio, educated at the University of Chicago (A.B., 1947; J.D., 1950), and is a member of the Bars of Ohio and California. He practiced law in San Francisco for two years before joining the State Bar staff in 1953, where he was employed as Assistant Secretary until taking his present post in 1961. He is the author of several articles about bar administration and judicial discipline.

» » SCA 14 (PROPOSITION 10 at the 1960 general election) emerged from the studies of the Joint Judiciary Committee on the Administration of Justice in 1959. The measure, would create a state-wide agency, the Commission on Judicial Qualifications, and *as introduced in the Senate,* having as one purpose the screening of the Governor's proposed appointees to Municipal and Superior Courts. No such appointment was to be effective without the Commission's approval. The agency was also to be a disciplinary tribunal with the authority to take steps to terminate judicial tenure for cause and disability. The appointment-veto function was eliminated in the Legislature but the amendment passed with the name of the agency unchanged and the administration of the disciplinary program as its mission.

Los Angeles judges and lawyers played significant roles in the adoption of this procedure. The organized bar had sought a new method for dismissing unfit judges as early as 1948 when the Judiciary Committee of the Los Angeles Bar Association, Arnold Praeger, chairman (later Los Angeles Superior Court judge), unanimously approved in principle the creation of a court to try judges for misconduct or omission of duty and asked that the matter be studied by the State Bar.[1] Nothing came of that effort.

However, leading lawyers and judges knew that there was a serious problem that would not go away so notwithstanding the delicacy of the subject the search for a solution continued. The Board of Governors of the State Bar, joining with the Judicial Council, advanced a judicial removal procedure as part of a court reform project in 1956 which the 1957 Legislature referred to the Joint Judiciary Committee for study.

Chief Justice Gibson was outspoken in favor of seeking a fair but expeditious means of action in cases of apparent judicial unfitness. On November 26, 1956 he testified before the Senate Judiciary Committee.

"° ° ° Indeed, we may expect that, as a practical matter, the mere initiation of proceedings before the Commission would often induce voluntary retirement in disability cases and voluntary resignation in misconduct cases.

"The conditions which gave rise to the proposal are well known to both the bench and the bar. And they are not wholly unknown to persons outside the profession. By way of illustration, I might call your attention to the situation which exists in one county which has five inferior courts. Of the five judges, two have been absent continuously from their courts for over six months. One, after being absent for nearly a year, lost his position as the result of the creation of a new municipal court district, and one has been continuously absent for more than a year. All of the judges have drawn full salary while absent. It seems reasonably certain that one of them will never be able to perform his duties, but he continues to draw a full salary.

"This sort of thing is no credit to the bench or the bar, and it tends to undermine all of the public confidence in the legal system that is so laboriously built up by procedural reforms and by the work of the vast majority of conscientious and able judges. We now have no effective remedy for judicial disability or misconduct. And we have reason to believe that the new power, if granted, will go a long way toward alleviating this disgraceful condition."

This concept was startling to some for it aroused sharp disagreement. One judge, expressing the sentiments of many, contended,

"It must be kept in mind that judges are elected officials and derive and maintain their office by the will of the people and such must be the case if the judiciary is to maintain its independence."

Another bitterly argued,

"It is understandable that lawyers and judges would confine their aggressive concern in the health of public office [sic] to judges, and would overlook the fact that the need for a convenient and expeditious way of removing unworthy legislators, governors, and other state officers, is, by mathematical probability, just as great as any like need in respect to judges."

In answering critics, Justice Thomas P. White, under the title, "Should Judges be Subject to Disciplinary Action?", introduced the topic by writing,

"To me the subject of this discussion might appropriately be entitled, 'Why Should Judges Not be Subject to Disciplinary Action?'—judicial office is a public trust and judges are not the masters but the servants of the people."[2]

Later that year the Joint Judiciary Committee with Goscoe O. Farley as Executive Director (now Los Angeles Superior Court judge), began its work aided by a nine-member advisory committee. Among those representing the State Bar in the advisory group were the immediate past State Bar Governors from Los Angeles, Joseph A. Ball and Herman F. Selvin. Los Angeles judges on the advisory committee were Judge Julius Patrosso from the Conference of California Judges, and Justice White and Judge

[1] 23 L.A. Bar Bulletin (March 1948) 216.

[2] 32 L.A. Bar Bulletin (February 1957) 99.

Clarence L. Kincaid from the Judicial Council. (Judge Kincaid was later to serve as a Commission member.) The opposition subsided. The efforts of the proponents bore fruit and a plan, modified from earlier proposals, was enacted.[3]

The Los Angeles bench and bar have been influential in the Commission's successful performance. Louis H. Burke, then Presiding Judge of the Superior Court and now Supreme Court Justice, was one of the original appointees. Judge William B. Neeley of the Los Angeles Superior Court (named to the Commission in 1963) was elected chairman in 1965.

Irving Walker of the Los Angeles Bar, long a prominent figure in judicial affairs, and one of the original lawyer members of the Commission served a full four-year term. Los Angeles businessman and civic leader, Theodore E. Cummings, was one of Governor Brown's citizen appointees and is a Commission member now.

Justice Burke, vice president of the American Judicature Society, has spoken in other states about the plan. He recently wrote,

"° ° ° When it was initially proposed, there were a few judges who conscientiously felt the establishment of such a commission constituted a threat to the independence of the judiciary, and they raised their voices in opposition to its passage. Most judges were strongly in favor of the proposal, as was the Conference of Judges which supported it. Now that the plan has been in operation for approximately four years, practically all opposition to it has disappeared and it has met with uniform and widespread support. ° ° °

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"° ° ° By the establishment of a program for the removal or retirement of those judges who fail to measure up to these high standards, similar to the California plan, which we are advised is now being studied in more than a dozen states, the independence of the judiciary is fully protected and at the same time the public is assured of the continued service of capable, efficient and conscientious judges."[4]

There is some confusion about the Commission in the legal profession in California and even lack of knowledge that such a tribunal exists which may be due in part to the non-descriptive title. Its operation was recently summarized by Chief Justice Roger Traynor.

"When the Commission receives a complaint, it investigates the allegations. If it finds them frivolous, it does no more than inform the complainant of that finding. If, however, it encounters a problem of judicial incapacity or misbehavior, it takes action in one of two ways. If the circumstances do not warrant retirement or removal, the Commission communicates with the judge without publicity by way of informal warning. If the circumstances do warrant retirement or removal, the Commission permits a judge to resign or retire voluntarily. Should he refuse, the Commission arranges for a hearing.

"Until the Commission decides to recommend a removal or retirement, it holds all proceedings in confidence. It operates under rules adopted by the Judicial Council to insure fairness. Once it decides to recommend removal or retirement of a judge, he is entitled to a full hearing before the Supreme Court. Thus far only one such case has reached the Supreme Court. About seven judges a year have voluntarily retired or resigned while under investigation.

"The California commission plan encourages voluntary and confidential solution of most problems of alleged judicial incapacity or misbehavior. It is particularly appropriate to the painful case where the judge must be given to understand that he has become physically or mentally incapacitated for the job."[5]

Texas became the second state to establish a Commission on Judicial Qualifications when a constitutional amendment was approved by the electorate at the November, 1965 election. Similar amendments, all patterned after California's, were passed in 1965 by the Legislatures of Maryland, Nebraska and Florida and will be voted on in the 1966 elections. Other states are following suit.

The subject is proving of interest in the nation's Capitol. On the subject of "Improving the Federal Judicial System," United States Senator Joseph D. Tydings of Maryland on October 15, 1965 outlined some topics to be taken up by the Subcommittee on Improvements in Judicial Machinery, of which he is chairman. Concerning

[3]Frankel, *Judicial Conduct and Removal of Judges for Cause*, 36 So. Calif. L. Rev. (Summer, 1962) 72, 83.

[4]Burke, *Judicial Discipline and Removal—The California Story*, 48 J. Am. Jud. Soc. (February 1965) 167, 170, 172.

[5]Traynor, *Rising Standards of Courts and Judges*, 40 Calif. S.B.J. (September-October 1965) 677, 687.

"Fitness of Federal Judges," Senator Tydings said,

"On the whole, the President and the Senate have done quite well in the appointment of Federal judges, and they have been ably assisted by the Justice Department and the organized bar. But mistakes have been made, and when controversy arises over a potential nominee, too often the battle rages in the darkness of inadequate information. The decision is ultimately that of the President and the Senate, but it may be that they need more assistance in order to ensure the selection of the best possible candidates. Therefore the Subcommittee will look into the possibility of establishing an additional independent body, within the government, which would assist the President and the Senate in the selection of judges, by obtaining relevant information from outside sources and impartially evaluating and recommending candidates.

"We must also remember, Mr. President, that no system of judicial selection, no matter how intelligently designed and administered, can be infallible. There must be an effective method of removing a judge if, once in office, he turns out to be unfit by reason of physical or mental incapacity, inefficiency or corruption. I do not mean to suggest that such situations are common or widespread in our Federal judicial system. But the fact is that they have existed and continue to exist. ° ° °

"Therefore, one possibility which our Subcommittee intends to consider very seriously is the establishment of an independent commission to deal with judicial fitness at all stages from nomination through removal, with jurisdiction to receive complaints, investigate cases, and make recommendations to the appropriate decision-making authorities. The existence of such a body might go far to improve judicial performance, to eliminate irresponsible and unfounded charges against the judiciary, and consequently to raise the stature of the Federal courts in the eyes of the public."

Thus, California has been instrumental in developing a modern concept of judicial discipline which stands as a worthwhile example for the country. Yesterday's pioneering innovation may soon be tomorrow's conventional wisdom.

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