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THE JUDICIARY

SPECIAL REPORT TO THE 1978 CONSTITUTIONAL CONVENTION

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William S. Richardson.

PERFORMER: Hawaii State Supreme Court, Honolulu.

The problem of appellate congestion in the state judicial system of Hawaii is addressed. Several alternatives to alleviate the situation are examined. One solution highly recommended and discussed in detail is the creation of an intermediate appellate court.

KEYWORDS: *Courts of law, *Hawaii, *Intermediate appellate courts.

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SUPREME COURT OF HAWAII
ALIIOLANI HALE
HONOLULU

CHAMBERS OF
WILLIAM S. RICHARDSON
CHIEF JUSTICE

July 7, 1978

To the 1978 Constitutional Convention
State of Hawaii

To assist you in your deliberations on what basic changes might be made in our State Constitution, I am forwarding to you a report and my personal recommendations on amendments to the Judicial Article.

As the administrative head of Hawaii's judicial system for more than a decade, I feel Hawaii has taken a leadership role nationally in establishing uniform standards for the administration of justice. If we are to maintain this leadership role, we must look to the community's future requirements for judicial services and not be afraid to be innovative or try new approaches when they are needed.

The issues which I discuss in this report are ones which have a far-reaching effect for the judiciary and thus for the State. I have formulated my recommendations based upon a great deal of research done by my staff and I have also consulted with the members of the Judicial Council and others in the community who are knowledgeable and interested in the administration of justice.

I know that each of you share my concern that Hawaii's citizens continue to have the benefit of the best judicial system possible. I will be available to share my thoughts with you during the convention.

In closing, I would like to express my hope that you have a fruitful and harmonious session.

Aloha,

William S. Richardson

INTERMEDIATE APPELLATE COURT

By Chief Justice William S. Richardson

For additional information see National Center for State Courts' "Hawaii Appellate Report."

The following article will appear in the Summer issue of the "Hawaii Law Journal."

INTRODUCTION

In recent years, almost every appellate court in the nation has experienced a substantial increase in its workload. The Hawaii Supreme Court is no exception. Although increasing the number of matters it terminates each year, the Court has been unable to keep up with the growing appellate docket. The result is an ever-expanding backlog of pending appellate cases.

Factors contributing to the expanded caseload in Hawaii include the population growth of our state, the greater number of attorneys admitted to practice, easier access to the courts, the expansion of the rights of criminal defendants, an increased tendency of litigants to exercise their right of appeal, the creation of new administrative agencies and an increase in complex legislation requiring interpretation by the Court.

Our five-member Supreme Court must resolve all appeals from the state's trial courts.[1/] As the only court of review,[2/] the Supreme Court performs two appellate functions. One function is to review cases to correct errors made in the determination of the rights of individual litigants. The Court's most important function, however, is to formulate and develop the common law of the state, giving shape and direction to the growth of substantive and procedural law.

Today, appellate backlog with its corresponding delay hampers our Court in performing its error-correcting function. More importantly, appellate congestion threatens

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1/ In addition, the Court hears direct appeals from proceedings before some administrative agencies such as the Public Utilities Commission.

2/ The circuit courts review certain administrative appeals. The circuit courts' decisions in those instances are in turn appealable to the

the ability of the Court to give shape and direction to the law. With an increase in the Court's docket comes a decrease in the amount of time that can be spent on the careful research and study that should be devoted to developing the law of the state. The end result could be prejudice to individual litigants, a decrease in the quality of the Court's opinions and a resulting failure to clearly and definitively articulate the law of the state.

The Court also must perform other duties which are necessary to the smooth functioning of the judicial system. The Chief Justice is responsible for the administration of the state court system; the Court must promulgate rules and procedures to be used throughout the state courts; the Court, through its clerk's office, is responsible for processing Bar applications and administering Bar examinations; and the Court, aided by the Disciplinary Counsel for the Supreme Court, is also responsible for the supervision and discipline of attorneys. Appellate backlog and delay undoubtedly have an adverse effect on the ability of the Court to efficiently perform these other necessary duties.

In an attempt to alleviate appellate congestion, the Court has been implementing new internal procedures during the past two years. However, there has not yet been an impressive reduction in its caseload. Even after the new procedures take full effect, the backlog of cases and delay in the appellate process are expected to continue to grow at a significant rate each year.

The following remarks discuss the extent of the problem and examine the alternatives which have been proposed to remedy the situation. I do not believe that the Court can continue to work effectively under present conditions.

After a consideration of the possible alternatives, I have personally concluded that creation of an intermediate appellate court is the alternative most likely to meet the Court's increased caseload problem as well as insure that the law-stating function of the Court is not diluted. Ultimately however, the decision to change our judicial system and the way in which it should be changed is a choice which must be made by the people of our state. I urge your careful study and consideration of this problem.

THE CURRENT APPELLATE CASELOAD PROBLEM

The enormous growth in the appellate caseload in Hawaii during the last several years is illustrated below by the increased number of matters filed with the Supreme Court each year.

Table 1
Supreme Court Filings
3/
(Fiscal Years 1970-71 to 1976-77)

Primary Cases	70-71	71-72	72-73	73-74	74-75	75-76	76-77
Civil Appeals	102	77	112	91	105	150	184
Criminal Appeals	35	28	41	69	78	99	114
Other Appeals	14	11	6	12	6	4	5
Original Proceedings	20	5	12	6	5	12	13
Total	171	121	171	178	194	265	316
Supplemental Proceedings							
Motions	222	168	176	217	242	360	421
Petitions for Rehearing	18	23	20	24	11	15	13
Total	240	191	196	241	253	375	434
Total Filings	411	312	367	419	447	640	750

3/ A fiscal year extends from July 1st of a calendar year to June 30th of the following year.

Although there has been a steady rise over the years in the number of matters filed with the Court, filings in 1975-76 and 1976-77 dramatically increased. Apparently, the expansion of criminal defendants' rights has had a significant impact on appellate filings. The number of criminal appeals taken has greatly increased while the number of motions filed, many dealing with criminal appeals, has more than doubled in the last four years.

In the first three-quarters of the 1977-78 fiscal year, 672 matters were filed with the Court. If this growth pattern continues through the next year (there is now no indication that it will change), there will be approximately 900 filings in the current fiscal year. This estimate is twice the number of filings recorded just three years ago in fiscal year 1974-75.

In contrast to the number of matters filed with the Court is the number of matters terminated by the Court, indicated below.

Table 2
Terminations

(Fiscal Years 1970-71 to 1976-77)

Primary Cases	70-71	71-72	72-73	73-74	74-75	75-76	76-77
Appeals	123	118	137	140	140	155	144
Original Proceedings	18	7	10	7	5	11	9
Total	141	125	147	147	145	166	153
Supplemental Proceedings							
Motions	217	170	179	212	248	339	397
Petitions for Rehearing	17	20	21	24	12	15	13
Total	234	190	200	236	260	354	410
Total Terminations	375	315	347	383	405	520	563

The number of primary cases terminated each year has remained relatively constant. However, the number of supplemental proceedings terminated in the 1976-77 fiscal year was more than 1-1/2 times that terminated in 1970-71. Of those supplemental proceedings terminated, 20 were disposed of by written opinions, while the remainder were disposed of either by a separate order prepared by the Court[4/] or by an order submitted by a party.

The amount of the Court's time which must be devoted to consideration of supplemental proceedings should not be underestimated. Although three-fourths of all motions filed appear to deal with routine matters such as extensions of time or waiver of costs, even routine motions can consume a substantial amount of time if opposed by the other party. Motions to dismiss an appeal require detailed study. Similarly, miscellaneous motions, such as a motion to stay a judgment pending appeal or a motion with respect to bail on appeal, call for careful consideration.

In the first three-quarters of the 1977-78 fiscal year, 534 matters were terminated by the Court. If this pattern continues throughout the year, the total number of terminations for this year should be over 700. This figure would be almost twice the number of total terminations of the 1973-74 fiscal year and more than twice that of fiscal year 1972-73.

4/ In calendar year 1977, approximately 92 separate orders were prepared by the Court.

The following table indicates that the total number of written opinions filed in the 1976-77 fiscal year was higher than in previous years:

Table 3
Written Opinions

(Fiscal Years 1970-71 to 1976-77)

	Opinions of the Court 5/	Memorandum Opinions	Total
70-71	68	30	98
71-72	58	24	82
72-73	67	37	104
73-74	74	25	99
74-75	75	22	97
75-76	72	23	95
76-77	79	28	107

The total number of written opinions in the 1976-77 fiscal year is comparable to the total number of written opinions filed in the 1972-73 fiscal year. However, a greater proportion of cases were disposed of by individually authored and per curiam opinions in 1976-77 than in 1972-73. This is an achievement which should be recognized because, although the same amount of time is required to research cases eventually disposed of by memorandum opinions, there is a significant increase in time and work involved in the drafting of individually authored and per curiam opinions.

5/ This category includes individually authored and per curiam opinions. Each jurisdiction develops its own standard for determining which opinions should be termed per curiam opinions. Thus, in some jurisdictions, a "per curiam" opinion is similar to what the Hawaii Supreme Court terms a "memorandum opinion." In Hawaii, however, the average "per curiam" opinion is a fairly detailed opinion authored by the Court as a whole.

In the first three-quarters of the 1977-78 fiscal year, a total of 84 opinions were filed. Of this total, 66 opinions were individually authored or per curiam and the remaining 18 were memorandum opinions. If the growth pattern continues throughout the new year, approximately 115 written opinions can be anticipated.

Due to the increased volume of cases and despite the increased terminations by the Supreme Court, the backlog of appeals has grown from 348 after the 1975-76 fiscal year to 535 after the 1976-77 fiscal year.

Table 4
Pending Matters
(Fiscal Years 1970-71 to 1976-77)

Primary Cases	70-71	71-72	72-73	73-74	74-75	75-76	76-77
Civil Appeals	78	83	104	107	143	196	283
Criminal Appeals	28	24	26	49	62	111	184
Other Appeals	11	8	7	13	13	9	8
Original Proceedings	4	2	4	3	3	4	8
Total	121	117	141	172	221	320	483
Supplemental Proceedings							
Motions	11	9	6	11	5	26	50
Petitions for Rehearing	1	4	3	3	2	2	2
Total	12	13	9	14	7	28	52
Total Pending	133	130	150	186	228	348	535

Based on a study of the judicial system in Hawaii, the National Center for State Courts estimated in its Hawaii Appellate Report that even if no new appeals were accepted, it would require over three years for the Hawaii Supreme Court at the current rate of disposition to dispose of all appeals pending on December 31, 1976.[6/] At that date however, there were 430 cases pending before the Court. At the end of December one year later, that number had grown to 617 and was expected to reach over 700 by the end of the 1977-78 fiscal year. Over the span of 1-1/2 years then, the number of pending cases has increased by a multiple of 1-1/2. The present system is clearly inadequate to handle the growing backlog.

The length of time to process a case through the Hawaii Supreme Court has grown with the increase in the backlog. The National Center for State Courts has estimated that there is an average delay of 16.4 months in criminal appeals and 20.6 months in civil appeals from the date an appeal is filed to the date an opinion is rendered. When added to the average length of time from filing to termination in the circuit courts, it requires approximately 27 months from the time a defendant is arrested for a criminal case to reach final disposition in our Supreme Court. Statistics available for civil cases tried in the First Circuit Court reveal that

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6/ Hawaii Appellate Report, National Center for State Courts, at 10 (1977).

The Hawaii Appellate Report discusses the appellate situation in Hawaii and suggests a plan for the creation and implementation of an intermediate appellate court. The National Center for State Courts is a non-profit organization which works towards the improvement of justice at the state and local levels and the modernization of court procedures.

in the first 9 months of 1977 it required an average of 20.1 months to close a case in circuit court. Allowing for the lapse of time between such closing and transmission of the trial court record to the Supreme Court, it requires approximately 42.2 months after a civil case is filed in the trial court for a case to be resolved by the Supreme Court.

STEPS TAKEN TO ALLEVIATE THE INCREASING CASELOAD

To deal with the increasing caseload, the Court has instituted several internal measures to expedite the appellate process. These measures have begun to improve productivity, but they are interim measures which are unlikely to make an appreciable impact on the backlog.

Our Court makes extensive use of law clerks, usually recent law school graduates, to carry out the research necessary to the disposition of a case on appeal. The number of law clerks assigned to the associate justices has recently been increased from one to two. Due to his additional administrative responsibilities, the Chief Justice now has the services of three law clerks.

Several members of the Court have also begun to extend law clerks' employment terms to two years. Traditionally law clerks were employed for a year, but since a considerable amount of time is invested in training a law clerk to become familiar with court procedure and appellate practice, employment for a longer period of time permits a justice to fully utilize those newly acquired and developed skills. Further, the practice of staggering law clerks' employment terms, adopted by some members of the Court, allows a more experienced clerk to provide training assistance to a newly appointed law clerk. It is anticipated that the addition of law clerks and extension of employment terms will enable each

justice eventually to issue approximately 25 written opinions each year.

As mentioned before, written opinions[7] are an integral part of the development of the law because they articulate legal principles on significant issues. These principles inform and guide lower courts and litigants. As legal precedents are established, the number of appeals or even the need for certain litigation will be curtailed.

Some law clerks now prepare bench memos or pre-hearing memoranda on cases for the Court. These aid the justices by providing them with factual material and scrutiny of legal issues on cases prior to oral argument. The memos are helpful in narrowing the scope of issues at oral argument.

The utilization of the law clerks in the preparation of pre-hearing memoranda is a step in the direction of creating a central staff system for our Court. This is an organizational scheme often used by high volume courts where cases are previewed initially by a staff attorney.[8] In those systems the staff attorney researches relevant issues and, for selected cases with limited issues, prepares a pre-hearing memorandum. The memorandum is circulated to the justices with a recommendation. In some instances, if the issues are clear cut and fully discussed in the written briefs submitted by the parties, or if the appeal is clearly

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7/ Written opinions are published in bound form in Hawaii Reports. Volume 57 of Hawaii Reports containing over 670 printed pages was published this spring.

8/ See Carrington, Meador, and Rosenberg, Justice on Appeal, at 44, West Publishing Co. (1976) and Meador, "Appellate Case Management and Decisional Processes," 61 Virginia Law Review 255 (1975) for general discussion of the central staff concept.

frivolous, a recommendation to dispense with or shorten oral argument is made. The parties, of course, may still petition the Court to schedule full oral argument. Since oral argument is an essential part of the appellate process, few cases should be handled in this manner. However, a court should have the flexibility to eliminate or shorten oral argument in appropriate cases. The American Bar Association Commission on Standards of Judicial Administration has noted:

> Oral argument may be denied if the court concludes from a review of the briefs and record of the case that its deliberation would not be significantly aided by oral argument. When the court advises the parties that it does not believe that oral argument would be useful, it should permit the parties to submit a written statement of reasons why oral argument should be allowed. 9/

As an initial step toward creation of a central staff, two permanent positions are occupied by attorneys in the Judiciary. One attorney advises the Small Estates Division of the circuit courts and the other attorney works on motions and petitions under the supervision of a justice. Both attorneys carry out special research projects for the Judiciary in addition to these other obligations.

In recent years, the Court has also utilized more memorandum opinions. While these alleviate the opinion-writing aspect of appeals, much preparation is still required and only a small percentage of cases permit this type of disposition. The Court is concerned however that the increased use of the memorandum opinions will result in diminishing returns. These opinions are not published and do not have precedential value. Therefore the law-stating function of the Court is not promoted by the use of memorandum opinions.

9/ Standards Relating to Appellate Courts, Approved Draft, Standard 3.35(b), at 56 (1977).

Although staff additions and new operating procedures may improve the appellate process, they will provide only limited relief for the Court and its caseload problem. Three long-term solutions to the caseload problem have been proposed: increasing the number of justices on the Court, increasing the number of justices while also allowing them to sit in panels, and creating an intermediate appellate court.

In assessing each of these proposals, two considerations are of foremost importance. First, the basic assumption of our system of justice that a litigant is entitled to at least one meaningful appeal encompasses the idea that such an appeal should involve more than a pro forma consideration of the merits and should be expeditiously resolved. Second, a court of last resort must preserve its law-stating function in order to give consistency and direction to the law of a jurisdiction. Alternative solutions should be examined in light of these two objectives.

PROPOSED SOLUTIONS

A. Increasing the Number of Supreme Court Justices

The most obvious way to increase the output of opinions by the Court would be to increase the number of justices on the Supreme Court from five to seven. At first glance, this would appear to immediately increase, by 40 or 50, the number of opinions the Court could be expected to issue each year. No change in the present appellate structure would be necessary for attorneys and litigants, and it would be less expensive to add two members to the Court than to create an intermediate appellate court.

While expansion of the Court seems to be the easiest and least expensive solution, further examination has led me to conclude that it would be an inadequate solution to the appellate caseload problem. The basic decision-making process of the Court would not be altered by the addition of two justices. Individual cases would take longer to process through seven justices than they now do through five. There could be anticipated an increase in the time needed to finalize all decisions made by the Court, including decisions on petitions and many on motions. The addition of two justices would also result in more concurring and dissenting opinions, and oral argument before the Court could be prolonged. Indeed, the American Bar Association has noted that "the presence of additional judges to a highest court may actually slow down its operations rather than speeding it up."[10/]

Michigan Supreme Court Justice Dethmers has accurately summarized the advantages and disadvantages of increasing the size of a court of last resort:

> The time-saving advantage of increasing court membership is that it reduces the number of opinions each judge must write. It does not lessen the work of each judge necessary for the study of records and briefs, legal research, and examination of opinions in cases which the other members write. This he must do, of course, in order to decide whether he agrees and will sign such opinions or write dissents. Enlarging a court does not decrease the amount of time required for listening to oral arguments of counsel and for conference, consultation, and discussion by the judges. In fact, increase of numbers increases the man-hours thus consumed and, perhaps, the number of court hours as well, because of resultant increase in number of questions addressed to counsel from the bench and more arguments and discussion by the larger number of judges in conference. Enlargement of court membership is, therefore, not necessarily 100 percent gain.[11/]

10/ Standards Relating to Court Organization, Standard 1.13, Commentary, at 35 (1974).

11/ Dethmers, "Delay in State Appellate Courts of Last Resort," 328 Annals 153, at 158 (1960).

It appears therefore that the mere addition of justices to the Court would, at best, only temporarily alleviate the backlog problem[12/] and would not effectively reduce the delay presently experienced by individual litigants. For these reasons, I found this alternative unsatisfactory.

B. Increasing the Number of Justices/Sitting in Panels

Along with the proposal of increasing the size of the Court, the alternative of expanding the Court to seven members and sitting in panels was examined.[13/] In essence the Court would function as a court of intermediate review when sitting in panels and as a court of last resort when sitting en banc.

A number of states have adopted panel or divisional systems.[14/] The Missouri Supreme Court sits in two divisions of four and three judges respectively, and the New Mexico Supreme Court, with five justices, sits in panels of three

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12/ Even if the addition of two justices results in an increase of 40 or 50 opinions per year, this would not substantially decrease the Court's backlog of pending cases. At the end of fiscal year 1976-77 there were 483 pending primary cases. See Table 4, p. 7.

13/ A draft of the Hawaii Supreme Court Report, prepared by the National Center for State Courts, recommended expanding the Court to seven members and sitting in four-person panels with the Chief Justice sitting on all panels.

14/ An article entitled "Appellate Court Reform," 45 Mississippi Law Journal 121, at 141 (1974) lists 14 states in which judges sit in panels under varying restrictions: Arkansas, California, Colorado, Florida, Iowa, Indiana, Kentucky, Mississippi, Missouri, Nebraska, New Mexico, Tennessee, Virginia, and Washington. However, although empowered to, not all of these states actually make use of divisional sitting. The California Constitution of 1879 authorized divisional sitting of the Supreme Court but the court ceased divisional sittings in 1904 when intermediate appellate courts were established. The Washington Supreme Court sits in departments solely to hear motions and writs. Colorado, Florida, Indiana, Kentucky, New Mexico, and Iowa have all established intermediate appellate courts.

to decide almost all cases.[15] The federal courts of appeals have also long operated with three-judge panels.

The panel system would require a careful administrative structure so that complex cases and cases of great public importance would be heard initially by the full Court, in order to avoid double hearings by a panel and then the full Court. As mentioned previously, the addition of two justices would immediately increase the number of written opinions issued by 40 or 50 per year. And, because it is less time-consuming to obtain the concurrence of three or four people than the votes of seven, more decisions would be made using this system than by merely increasing the membership of the Court.

However, as one commentator has noted, the claims that a panel system would enable a court to nearly double the number of cases it could decide en banc are exaggerated. "While it is true that a judge would only have to engage in the decisional process in half of the cases disposed of, it is also true that he would have to write as many opinions as before because his turn would come twice as often. It is doubtful, therefore, if the output would be increased as much as is claimed."[16] There would probably not be a reduction in the individual caseload of each justice, but the

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15/ As mentioned in note 14, New Mexico is among those states which have established intermediate appellate courts. The extent to which New Mexico still maintains divisional sittings is unclear.

16/ Iowa Justice William A. Stuart, "Iowa Supreme Court Congestion: Can We Avert A Crisis?", 55 Iowa Law Review 594, at 598 (1974). Justice Stuart advocated a panel-sitting system to aid the Iowa Supreme Court in clearing its backlog. However, in 1977 an intermediate appellate court was created in Iowa. Under the Iowa system, the Court of Appeals only takes cases which are referred to it by the Supreme Court.

backlog of pending cases could be reduced.[17]

Although the panel-sitting system does present an effective way of increasing the work product of an appellate court, it is not without its disadvantages. Because different panels of the court may give different results, there would be the possibility of conflicting decisions within the Supreme Court itself. Such conflicts would require hearings en banc, which may take more time than would have been expended had the court as a whole initially determined the question. Further, there would likely be many more petitions requesting rehearings before the court en banc. If the Chief Justice were required to sit on every panel, as in some jurisdictions, the burden may become so overwhelmingly oppressive that he will be unable to perform his other duties as administrator for the court system. Another criticism leveled at the panel-sitting system is that it places too much emphasis on the arbitrary assignment of a case to a particular panel and promotes "judge shopping."[18]

However, the most serious drawback to the panel system is that the law-stating function of the highest court would be diluted. The formulation and development of the law

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17/ In a research project conducted by the American Judicature Society the following responses to panel-sitting were received from high court justices sitting in panels in states where there was no intermediate appellate court: 85% indicated that sitting in panels reduced the caseload and 82% thought that efficiency was increased by such a system. However, 74% did not believe that there was a reduction in their individual workloads. The general attitude, however, was that panel-sitting was effective in reducing the backlog of cases. Congestion and Delay in the State Appellate Courts, American Judicature Society, at 53 (December 1974).

18/ Of course, "judge shopping" could be minimized by continually changing the make-up of panels rather than establishing permanent panels.

is the most important function of the court of last resort. This function would be substantially weakened if the Court spoke through panels. 19/

The ABA Commission on Standards of Judicial Administration discourages panel-sitting in a court of last resort:

> In deliberating upon and deciding the legal questions that come before it, the supreme court's entire membership should participate so that its collective professional and intellectual resources are brought to bear in the development of the law. To the extent that such a court divides itself into panels or divisions, it creates possibilities of conflict or inconsistency in its decisions. 20/

The Commission notes that such an arrangement has "often been used as a means of transition to the establishment of an intermediate appellate court"; that such a system has often been kept in force long after the time that an intermediate appellate court should have been established; and that under these circumstances internal inconsistencies were excessively tolerated to avoid the cost of establishing an intermediate court. 21/

Although a panel-sitting system may reduce the Court's backlog of pending cases, the weakening of the law-stating function of the Court would seem to outweigh this advantage. Moreover, panel-sitting, while providing initial relief, will probably not be effective in meeting the long-term

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19/ The panel-sitting system was examined by the Idaho Supreme Court Appellate Court Committee in considering methods to alleviate its appellate problem. The committee determined that the use of panels was not desirable. The Committee Report notes: "Committee members seemed to take the view that the function of a court of last resort is to take a broad and balanced view of the law and the needs of society, and that dividing any court of last resort into smaller units of decision would interfere with this basic role." An Investigation Into The Problems Created By The Growing Appellate Caseload In Idaho, Report of the Supreme Court Appellate Court Committee, at 29 (September 16, 1977).

20/ Standards Relating To Appellate Courts, Approved Draft, Standard 3.01, Commentary, at 8 (1977).

21/ Id., at 8-9.

projected increases in Hawaii's appellate caseload. Thus, should we adopt a panel-sitting system, in a few years we will be faced with the same problem of appellate backlog and delay.

C. Establishing An Intermediate Appellate Court

The most effective and permanent method of reducing appellate congestion and delay in a court of last resort is creation of an intermediate appellate court.

The ABA Commission on Standards of Judicial Administration has commented:

> Where a supreme court, by reason of workload, is unable to perform both of its principal functions, some additional mechanism of appellate review becomes necessary. This situation has long since prevailed in states with large population, and is becoming increasingly prevalent in states of smaller population. The immediate necessity for an intermediate appellate court may be met or postponed by such devices as use of per curiam and memorandum decisions in cases having limited general significance, by limiting oral argument in appropriate circumstances, and by improved efficiency in management of the highest appellate court's work. On the other hand, such expedients as dividing the highest appellate court into panels, using commissioners to hear cases, or eliminating oral argument dilute the appellate function, particularly that of developing the law. . . . Hence, when improvements in efficiency of operation in the highest court cannot be achieved without dilution of the appellate function, the appropriate solution is the creation of an intermediate appellate court. Since there seems little prospect for a long-run decline in the volume of appellate litigation, once the surge of appellate cases has been felt in a state having only one appellate court, steps should be taken forthwith to establish an intermediate appellate court rather than temporizing with substitute arrangements. 22/

Twenty-eight states currently have an intermediate appellate level in their court system. 23/ Although most states with intermediate appellate courts have large populations,

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22/ Standards Relating to Court Organization, Standard 1.13, Commentary, at 35 (1974).

23/ These states are: Alabama, Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, and Washington.

states with populations comparable to Hawaii's (whose 1976 population estimate was 887,000) are increasingly moving toward creation of intermediate appellate courts as a solution to appellate congestion.[24/] New Mexico, with an estimated 1976 population of 1,168,000, has already established an intermediate appellate court. In Nevada, with a 1976 population of 610,000, a constitutional amendment to create an intermediate appellate court has passed one session of the Nevada legislature. In Idaho, with a 1976 population of 831,000, the Supreme Court Appellate Court Committee (comprised of representatives of the legislature, the executive branch of government, the courts, the bar, business, labor, and the media) has recently published a report strongly recommending creation of an intermediate appellate court in that state. Other states seriously considering creation of an intermediate appellate court, with their respective 1976 populations, are Alaska (382,000), North Dakota (643,000), and Utah (1,228,000).

The major duty of an intermediate appellate court would be to review trial court determinations for errors and to correct such errors. Since the Supreme Court would be relieved of this error-correcting function, it could devote more time to its principal duty of selective review and formulation of decisional law.

24/ The information which follows is derived from: The Hawaii Appellate Report, National Center for State Courts, at II (September 1977); An Investigation Into The Problems Created By The Growing Appellate Caseload In Idaho, Report of Supreme Court Appellate Court Committee, at 23-24 (September 16, 1977). All state population figures are from 1977 Statistical Abstract of the United States, U.S. Bureau of the Census, at 11 (1977).

Establishment of an intermediate appellate court would require amendment of the State Constitution.[25] Article V, Section 1 of the State Constitution presently provides that the judicial power of the state shall be vested in the Supreme Court, circuit courts and such inferior courts as the Legislature may establish. An amendment could provide for a court of appeals with internal procedures to be set by rules of Court[26] or to be prescribed by the Legislature.

The Hawaii Appellate Report recommends that both the Supreme Court and the proposed intermediate appellate court have jurisdiction to hear all types of cases.[27] Such authority may be provided for in the Constitution. A general jurisdiction grant coupled with discretionary review in the court of last resort has also been recommended by the American Bar Association:

> Review by the highest appellate court is designed to serve the general public in the proper administration and development of the law and only secondarily the interests of litigants in having their cases considered by the highest judicial authority. Accordingly, review by the highest appellate court should be available only with its permission. There should be no category of cases in which such review is mandatory, even - as is now required in some states - in capital cases. At the same time, the highest court should have authority to permit an appeal to bypass the intermediate appellate court where there is urgent public necessity to do so - for example in litigation involving impending elections

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25/ Expansion of the Court and panel-sitting would also require amendment of the State Constitution. However, it would probably be possible without a constitutional amendment for the Hawaii Legislature to create an appellate division of the circuit courts which would perform practically the same functions as an intermediate appellate court. See S.B. 1701-78, H.B. 1874-78 introduced in the 1978 Legislature which proposed an appellate division which initially would hear appeals from district courts and administrative agencies but could eventually be expanded to hear appeals from the trial division of the circuit courts.

26/ The Constitution presently provides that the Supreme Court shall promulgate rules for the court system.

27/ Hawaii Appellate Report, National Center for State Courts, at 23 (September 1977).

or deadlocked disputes as to the authority of government officials. 28/

Every litigant would have the right to appeal a trial court decision at least once. All appeals could be filed with the intermediate court. In order to avoid unnecessary double appeals, a bypass mechanism could be set to permit the Supreme Court, in its discretion, to immediately hear special types of appeals. These may include cases where a trial court has held a state statute or county ordinance unconstitutional; where there seems to be a conflict between opinions of the Supreme Court and the intermediate appellate court; where life imprisonment has been imposed as the penalty; where important public policy issues with far-reaching effects are raised; and, where certain proceedings against state officers have been instituted. This list is not exhaustive and the Supreme Court would be empowered to promulgate rules establishing additional criteria for other types of cases to be heard directly by the Court. The intermediate court would be bypassed by granting a motion made by the litigant, or by the Supreme Court acting on its own motion. 29/

In most instances, appellate review would be terminated at the intermediate appellate level. Although a litigant could petition the Supreme Court for review of a decision made by the intermediate court, further review would be granted only in special or extraordinary cases according to criteria set out by court rule. The rules of court could also provide that if the Court does not act on a

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28/ Standards Relating to Court Organization, Standard 1.13(b)(ii), Commentary, at 37 (1974).

29/ The Legislature could also designate by statute certain actions which could be appealed directly to the Supreme Court.

petition for review within a certain number of days, such inaction would be deemed a denial of review.

Under an intermediate appellate court system, not all double appeals can be avoided.[30/] However, double appeals would be kept to a minimum by use of the bypass mechanism and discretionary review of intermediate appellate court decisions.

An alternative means of eliminating double appeals would be to permit all cases to be filed with the Supreme Court. The Chief Justice would preview all cases and, in his discretion, would assign cases to the intermediate court. The previewing of cases would require a considerable amount of time and would divert the Chief Justice's attention from his other obligations. Eventually, the task would become burdensome because of the increase in filings. Therefcre, filing all cases with the intermediate court and providing for a bypass to the Supreme Court is probably the preferable alternative.

Under either alternative, a unitary filing system could be developed. Thus, all appeals would be filed at one central clerk's office and only one filing fee would be required whether the case is heard by the intermediate appellate court, the Supreme Court, or is successively reviewed by both courts. This unitary filing fee would prevent additional expenses for litigants.

30/ U.S. Court of Appeals Judge Shirley Hufstedler, in advocating creation of a two-tiered appellate system to relieve appellate court congestion, commented:

> Critics of the development of a two-tiered appellate system have raised the specter of the waste of judicial resources by the potentiality of double appeals. If the supreme court judiciously exercises its powers to order transfer of causes and its supervisory functions and if there is no appeal from an intermediate court as of right that specter is exorcised.

"Constitutional Revision and Appellate Court Decongestants," 44 Washington Law Review 577, at 600 (1969).

A proposed court of appeals would initially consist of three judges, with additional judgeships to be created by the Legislature to meet caseload demands. Selection and tenure of appellate court judges should be similar to that of Supreme Court justices.

The intermediate appellate court would convene in panels of three.[31/] Because of the routine nature of cases to be taken by the intermediate appellate court and shortened opinions to be written by the judges, each judge could prepare about 50 opinions per year. It is expected that at least half of the cases pending in the Supreme Court could be transferred to the intermediate court. If the Supreme Court were to write 125 opinions per year, then the total annual number of appellate opinions would be 275.[32/]

In addition to the immediate reduction in the Supreme Court's caseload, the decision-making process would

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31/ Most commentators recommend three-judge panels for an intermediate appellate court:

> The basic concept of an appeal is that it submits the questions involved to collective judicial judgment, and does not merely substitute the opinion of a single appellate judge for that of a single trial judge. A panel of three performs this function without entailing the costs involved in panels composed of a larger number of judges. The number of panels can be increased by adding judges as the increase in the workload of the court requires.

Standards Relating to Appellate Courts, Approved Draft, Standard 3.01, Commentary at 9 (1977).

32/ However, the total number of appeals terminated per year would be substantially higher, due to voluntary withdrawals of appeals and to involuntary dismissals ordered by the Court. Compare Tables 2 and 3, supra, showing that in fiscal year 1976-77, a total of 153 primary cases were terminated, while 107 written opinions were filed. Of these written opinions, 20 related to supplemental proceedings. Thus, well over one-third of the total number of appeals and original proceedings terminated in fiscal year 1976-77 were terminated by means other than written opinions.

be expedited and the serious delays now experienced between filing and decision would be reduced. Difficulties due to inconsistencies in decisions between panels could be resolved through discretionary review by the Supreme Court.

An analysis of the intermediate appellate court alternative would be inadequate without some mention of costs. The costs of establishing an intermediate appellate court would include the salaries for a chief judge and initially two associate judges. Their salaries could be fixed between that of a Supreme Court justice and a circuit court judge, with the chief judge receiving slightly more.

The appellate judges would also each need the services of a secretary and a law clerk. It is important to note that the primary difference in cost between adding two justices as discussed in the first proposal and the creation of an appellate court would be the salary of one intermediate court judge and his support staff. If a unitary filing system is utilized, the present Supreme Court clerk's office could handle all filings for both courts. In balancing the intermediate court proposal with the alternatives, there results a small cost increase compared with the increased efficiency and permanence anticipated with an intermediate appellate court.

CONCLUSION

The Hawaii Supreme Court is presently confronted with an unmanageable caseload and an increasing backlog of pending appeals. Although the Court has instituted internal measures to increase productivity, such measures will not provide an effective and permanent solution.

After a careful consideration of the merits of the alternative solutions, I believe that an intermediate appellate court should be established in Hawaii. Increasing the membership of the Court will not substantially increase resolution of cases. Although increasing the size of the Court and sitting in panels may aid in clearing up the case backlog, the major disadvantage to such a system is the dilution of the law-stating function of the Supreme Court. Thus, the formation of an intermediate appellate court presents the most desirable long-term remedy to solve the problems created by appellate volume.

The primary role of the intermediate court would be to review and correct trial errors. The Supreme Court would then be freed to concentrate on development and formulation of the common law of the state. In instituting a two-tiered appellate system, we would preserve the vital law-shaping function of the Supreme Court and insure a litigant's right to a meaningful appeal by affording a review on the merits without unnecessary delay.

Adoption of any of the solutions which have been proposed will result in a major change in the Hawaii judicial system. Any proposal for change in the basic structure of the court system is bound to meet resistance, particularly among those who have worked with the present system for many years. Although it is my personal judgment that the establishment of an intermediate appellate court is the most effective solution to the problems of backlog and delay, any decision as important as this one must be reached by public consensus after extensive discussion and debate. Provided our decision is well thought-out and planned, I believe that we should not be afraid of restructuring our appellate system.

Recommendation of the Chief Justice Relating to an Intermediate Appellate Court

Hawaii's constitution vests judicial power in a supreme court and circuit courts, and gives the legislature the power to establish inferior courts. No provision is made for the establishment of an appeals court which could hear appeals prior to reaching the court of last resort, the supreme court. It is recommended that the constitution be amended to provide for the establishment of an intermediate appellate court.

The workload of the supreme court has doubled since 1970, with the greatest increase occurring within the last several years. While the court has increased the number of matters terminated each year and has instituted internal procedures to alleviate appellate congestion, it has been unable to keep pace with the growing appellate docket. The result is an increasing backlog of pending appellate cases.

Appellate backlog with its corresponding delay means increased costs and prejudice to litigants and results in loss of respect for the legal process as a whole. The supreme court has a duty to promptly review the decisions of lower courts to determine if error has been committed in an individual case. It also must give authoritative expression to the developing body of the law and to see that justice is uniformly administered throughout the state. Appellate congestion hampers the court in performing its error-correcting function. More importantly, it threatens the court's principal duty to selectively review and formulate the law.

The appellate caseload problem has reached a critical point. Although other remedies have been proposed, I do not believe that increasing the size of the supreme court or empowering the court to sit in panels offer long-term solutions to the caseload problem. In my opinion, only the establishment of an intermediate appellate court can insure that the appellate system will continue to function effectively. I strongly recommend that Article V, section 1 of the constitution be amended to provide as follows:

> The judicial power of the State shall be vested in one supreme court, an intermediate appellate court, circuit courts, and in such inferior courts as the legislature may from time to time establish. The several courts shall have original and appellate jurisdiction as provided by law.

(Amendment underscored).

JUDICIAL SELECTION

By Chief Justice William S. Richardson

The quality of justice in our society is closely related to the competency, fairness and effectiveness of our judges. Although the qualities of a good judge are not easily measurable, it is generally agreed that a judge should have sound legal training and experience, intellectual skill, personal integrity, and an ability to understand and relate to people. The search for the most competent judges inevitably boils down to the search for the best method of judicial selection.

However, the goal of a judicial selection system is not merely to select good judges. An effective judicial selection system must remove judges from political pressure in order to insure judicial independence. A selection system should also provide the public with confidence in the judiciary, that is the public must be assured that its judges are competent and that their decisions are made on an impartial basis.

There are three basic models of judicial selection used throughout the United States. (See Table A.) Since many states employ different systems of judicial selection at different court levels, it is difficult to classify states by their selection systems. However, in general, the elective system is the most widely used; thirteen states utilize partisan elections as their predominant selection method while eleven states hold non-partisan judicial elections. Appointment by the executive is used in seven states. Another form of the appointment system, election or appointment by the legislature, is used in four states. Finally, the Missouri Plan, sometimes termed the "merit selection" plan, is used in varying forms by fifteen states.

Article V, section 3, paragraph 1, of Hawaii's Constitution reads in part:

> The governor shall nominate and, by and with the advice and consent of the senate, appoint the justices of the supreme court and judges of the circuit courts.

District court judges, by statute, are appointed by the Chief Justice.[1/] Hawaii, from its early days, has had an appointive judiciary. The Constitutions of 1852, 1864, 1887 and the Constitution of the Republic all provided for an appointive judiciary. When Hawaii became a territory, judges of the supreme court and circuit courts were appointed by the President and confirmed by the Senate.

Our judicial selection process stirred a great deal of debate in the Constitutional Convention of 1968.[2/] At issue was whether to modify the appointive system to incorporate a non-partisan nominating commission to preview and recommend candidates to the governor. A minority of the Judiciary Committee advocated the creation of a nominating commission to eliminate "political considerations" from the selection process. The minority contended that a nominating commission would produce a more highly qualified judiciary. However, the majority argued that there was no compelling reason to deviate from the appointive system since no abuse of the system had been shown and the appointive system had produced a judiciary of consistently high competence. The majority's argument was persuasive to a greater number of delegates at the Convention and the appointive system was retained.

1/ Hawaii Revised Statutes § 604-2 (1976 Replacement).

2/ See Proceedings of the Constitutional Convention of Hawaii of 1968, Vol. I at 196 for Majority Report, at 333 for Minority Report, Vol. II at 344 for Floor Debate.

The various judicial selection systems are described in the following report with emphasis placed on the arguments advanced both for and against each selection process. It should be noted that little data exists on which to base an accurate evaluation of the alternative systems. However, there is some evidence which suggests that judicial selection methods have less of an impact on the characteristics of the judges chosen than might be indicated by the arguments advanced by advocates of each system.[3/]

The Appointive System

The earliest system of judicial selection used in the United States was the appointive system. After the American Revolution, the original thirteen states reacted against domination of the judiciary by the Crown and chose judicial selection methods which reflected their suspicion of the executive influence on the judiciary. In eight states the power of appointment was vested in one or both

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3/ One study of state trial judges found that while there were some differences in the characteristics of judges selected by various methods, no one method tended to recruit judges having an identifiable profile of social background characteristics. The data did show however that legislative selection favored those who had previously been active in politics, and that judges selected by partisan election or the Missouri plan tend to have been born, reared and educated in the districts where they presided. Herbert Jacob "The Effect of Institutional Differences In The Recruitment Process: The Case of State Judges," 13 Journal of Public Law 104, 106-111 (1964).

Another study, which compared characteristics of state supreme court justices on the basis of selection method, found only minimal variations which could be attributable to selection system. Among these was that state legislative experience was a common factor among justices selected by the state legislatures. Bradley Cannon "The Impact of Formal Selection Processes on the Characteristics of Judges - Reconsidered," 6 Law and Society Review 574, 584, 588 (1972).

houses of the legislature. Two states allowed appointment by the governor and his council. In three states the power of appointment was vested in the governor but was subject to the consent of the council. No state provided for a popularly elected judiciary. Thus, on the state level, the appointment power was vested in both the executive and legislative branches. On the federal level the power resided in the executive alone. While the appointive method continues at the federal level, it enjoyed only a brief period of dominance in the states.[4/]

The appointive system places primary reliance on the executive for judicial selection. The executive appointment process usually calls for appointment by the governor followed by confirmation by the legislature, often the senate. Some states also incorporate a nominating commission to review the qualifications of potential candidates and to recommend several to the appointing official. Another variation includes appointment by the governor with confirmation by a non-legislative body, such as an executive council or judicial confirmation commission. Connecticut switches the process around and has the governor nominate candidates with the legislature doing the actual appointing. In three other states, the legislature elects judges with no involvement by the executive.

The basic arguments advanced in support of Hawaii's appointment system are:[5/]

4/ Of the seven states which still utilize the appointive system five are of the original thirteen states; Maine and Hawaii are the exceptions. The four states which select their judges by legislative election or appointment are also of the original thirteen states. Thus, of the original thirteen states which adopted an appointive process, nine have retained that system.

5/ Many of these arguments may also be applied to legislative election or appointment or other variations of the appointive system.

First, under an appointive system, the appointing official is directly responsible to the electorate for the quality of judicial officers. A series of bad appointments can be politically damaging to the executive and therefore accountability to the public acts as a check on the executive's exercise of discretion.

Second, the governor's discretion is subject to further scrutiny by the senate through the confirmation process. The governor's appointment is effective only with the approval of the senior legislative body. The requirement of senate approval means that representatives of the people can reject unsuitable judicial candidates without politicizing the selection process by requiring judges to stand for election.

Third, the appointment system in operation produces a balanced and qualified judiciary. The governor may seek out qualified persons who have little political backing or who are not widely known to the public. Further, persons who may not have run for office or subjected themselves to the rigors of a political campaign under an elective system can be appointed. Thus, the appointive system carefully avoids confusion between ability and popularity.

Fourth, once appointed, a judge can concentrate his or her efforts on performing the job according to individual perspective and values. A judge appointed under this sytem is not obligated to the executive or to anyone else but is responsible only to do justice according to conscience and the law. This is especially true in Hawaii since circuit court judges and supreme court justices are appointed for 10 years while the governor and senate members serve four-year

terms.[6] The judge's comparatively long tenure affords job security and decreases the possibility of dependence upon the will of the executive or legislature, thus insuring an independent judiciary.

Finally, the appointing official can develop the staff to obtain information and make assessments of the different candidates. The qualifications of candidates can be evaluated by the staff and recommendations presented to the executive. This assures consideration of a larger group of candidates and objectivity in evaluation.

Criticisms commonly leveled against the appointive system center around the political nature of appointments, the influence the appointing official has over the judiciary, and the lack of a mechanism to actively seek out the best judges.[7] These criticisms are:

First, the appointive system does not remove selection of judges from the political arena but merely creates a different type of politics. The appointing official is subject to numerous political pressures and such pressures are more invidious since fewer people are involved in the judicial selection process.

Second, although the governor may be directly responsible to the electorate, it is highly unlikely that the electorate will remove a governor for making a series of bad judicial appointments. The public does not usually identify the governor with the actions of the judicial appointee. Further, if an executive has functioned well in

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6/ See Aricle V, § 3, Article IV, § 1, and Article III, § 5 of the Hawaii Constitution.

7/ Legislative Reference Bureau, Hawaii Constitutional Convention Studies, Article V: The Judiciary, at 15 (1968).

other areas of government, the public would be reluctant to remove him or her solely for poor judgment in judicial appointments.

Third, the appointive system undermines the principle of separation of powers of the three branches of government and infringes upon judicial independence. A judge who is appointed by the governor may feel pressure to rule in certain ways. This is especially true if the judge intends to seek reappointment. Similarly, a judge seeking reappointment may feel obligated to party leaders in the senate in order to insure confirmation.

Fourth, the appointment system does not provide a mechanism for actively seeking out the best judicial talent. Although appointments are made subject to senate confirmation, it is not likely that the senate would reject a nominee, unless the nominee was clearly incompetent. Therefore, although there may be no incompetent judges on the bench, there may likewise be no distinguished jurists.

Finally, the appointive system is basically undemocratic in that it deprives the electorate of direct control of the judicial branch of the government.

Election of Judges

Until 1832, every state in the Union utilized some form of the appointive system to select the majority of its judges. Mississippi was the first state to elect its entire judiciary, but it was not until New York amended its constitution in 1846 to allow for popular election of judges that a major shift to elected judges began. As one commentator has noted:

> [T]he fundamental causes of that change had very little to do with the relative merits of . . . that system of judicial selection and tenure but were rather the ideas and impulses of a violent swing toward the democratization of government generally. 8/

By 1856, 15 of the 29 states in the Union had swung over to the elective method of judicial selection and every state that entered the union after that time, until Alaska in 1959, adopted the electoral approach.

The election of judges is still the most widely used system of judicial selection. However, the number of states utilizing the election system has decreased from 31 to 24 in the last decade. 9/ As mentioned earlier, 13 states maintain a partisan election system while 11 states have a non-partisan system. In partisan elections, candidates compete for judicial office in accordance with political party affiliations. These systems usually involve primary elections to earn party endorsements. In non-partisan elections, the names of judicial candidates appear on a ballot without party designation. Supporters of the non-partisan system argue that undesirable political influences are eliminated while the public's right to selection of judges is preserved.

The case for elective judicial selection centers on two principle arguments: the open nature of elections and the appeal of political competition. The proponents of the elective system claim that the process of electing judges is the most open and straightforward method of selection,

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8/ Evan Haynes, Selection and Tenure of Judges at XIV (1944), quoted in Patrick W. Dunn's article "Judicial Selection In The States: A Critical Study With Proposals For Reform," 4 Hofstra Law Rev. 267, at 277 (1976).

9/ Legislative Reference Bureau, Hawaii Constitutional Convention Studies 1978, Introduction and Article Summaries, at 118 (1978).

and further that popular participation at the polls results in a judiciary which is both representative of and accountable to the electorate.[10/] The arguments for the elective system are:

First, the judiciary, because it is directly responsible to the public under an elected system, will not impose social and political policies which are contrary to the fundamental aims of the people.

Second, elected judges will be representative of various social, ethnic and religious groups in the community and thus more responsive to community needs.

Third, election of judges insures the independence of the judiciary. Since judges are directly responsible to the public, there is no danger that the judiciary will be influenced by the executive or legislative branches of government or feel obligated to the governor or individual senators as under an appointive system.

Fourth, the elective system has worked well in other jurisdictions to produce a qualified and effective judiciary.

Arguments against the elective system are:[11/]

10/ See Barry Golomb, "Selection of the Judiciary: For Election," Selected Readings On Judicial Selection and Tenure, at 74 (American Judicature Society, 1973).

11/ See American Bar Association, Standards Relating To Court Organization, Standard 1.21, Commentary at 49 (1974). The American Bar Association has expressly disapproved all methods of judicial selection involving initial choice by popular election. The Commentary notes:

> Partisan elections inject political issues into judicial selection, require judges to maintain relationships with political parties and political leaders, obligate judges in raising and spending money for election campaigns, and can result in ouster of able judges from office for reasons having no relationship to their performance in office.

First, decisions of voters in judicial elections are rarely based on a consideration of the qualifications of competing candidates. Judicial contests in districts with lopsided political majorities are little more than fait accomplis, particularly since most judicial candidates win or lose not on their own abilities, but rather on the basis of their party colleagues running at the head of the ticket.

Second, competent judges can be swept out of office regardless of their individual merits as a result of a strong national political tide which bears no relation to the judicial contest involved.

Third, the public does not usually have the information available to it to decide which candidates possess the requisite abilities to become competent judges.[12/] The "open" nature of the normal election process is severely constricted in judicial elections because judicial candidates cannot discuss many issues for the benefit of the public due to ethical constraints.

Fourth, the elective system compels judges to become politicians and discourages competent and qualified

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(Footnote 11 continued)

> Non-partisan election procedures are also unacceptable. They require judicial electioneering and campaign fund raising, and they subject judges to political pressure concerning their decisions. In localities with large concentrated populations and a large number of judges, non-partisan elections confront the electorate with long lists of candidates who are personally known by very few voters. Experience with non-partisan election indicates that it is successful only where most judicial vacancies are, in fact, filled in the first instance by interim gubernatorial appointments rather than by popular election.

12/ Surveys have indicated that the electorate knows and cares substantially less about judicial candidates than any

persons, who may have no political backing or who do not have the money to participate in a political campaign, from seeking judicial office.

(Footnote 12 continued)

others on the ballot. A 1954 survey conducted in New York State within a ten-day period immediately following a state-wide election, showed the following:

Of those who had voted at all, the percentage that	New York City	Buffalo	Cayuga County
o voted for any judicial candidates	75%	88%	80%
o paid attention to judicial candidates before the election	19%	52%	25%
o could name one or more judicial candidate voted for	13%	30%	4%
o could name a judicial candidate they had not voted for	0%	less than 1%	less than 1%
o could name a court for which judges had been elected	20%	11%	14%
o either paid no attention to the election at all or merely voted for the straight party ticket	78%	62%	84%

Elmer Roper and Associates, RCOM No. 82, Nov. 1954, cited in Dunn, footnote 8 supra, at 294.

Another survey measuring "drop-off rates," a rate determined by comparing the total vote received by judicial candidates with the total number of ballots cast in the election, showed that the drop-off rates for judicial office varied between 24.1 per cent and 15.1 per cent in Los Angeles County over a four-year period. Drop-off rates for other offices ranged between 4.3 per cent for the District Attorney and 13.4 per cent for the Superintendent of Public Education. Beechan, "Can Judicial Elections Express People's Choices?" 57 Judicature 242 (1974).

However, Professor Stuart Nagel reported that in a nationwide sample of 47 combined judicial and congressional elections from 1950 to 1962 on which data were available, over 90% of those voting in the general elections also voted for judicial candidates, if judicial elections were held at the same time and the ballot was not very long. Voters participating in judicial elections were found to be at least as representative of the populace in terms of ethnic and party affiliations as voters in general elections. They apparently considered party affiliations less, and ethnic backgrounds (possibly last names of candidates) more when selecting judicial candidates. S. Nagel, "Comparing Elected and Appointed Judicial Systems", 1 American Politics Series 04-001, at 19-23, Sage Publications, Inc., 1973.

Fifth, political recruitment of judicial candidates is not based on ability or character but, instead, on service to the party or other considerations such as whether an individual has a politically desirable name.

Sixth, an elective system creates a judiciary which is dependent on political sponsors for its position and tenure:

> Judges must be concerned solely with justice, and their actions should be governed only by the Constitution, the laws, and their own judgment. More than any other public officials, it is imperative that judges be independent of outside influences and pressures in carrying out their duties. A judiciary concerned with the "politics" of its behavior can only be that much less concerned with dispensing justice. 13/

Finally, as one commentator has aptly stated:

> [A]t a time when judicial resources are severely taxed, it is worthwhile to note that the process of electing judges is also an extremely inefficient method of selection. Indeed, much of the time, money, and energy expended under the elective system is minimally related, if related at all, to the selection of qualified judges. These wasteful externalities cause artifically high opportunity costs which have ramifications throughout the entire legal system. For example, many courts face serious backlogs which require judicial attention in the courtrooms. The elective system, however, contains strong incentives for judges, especially during election years, to campaign rather than hear cases. Such campaign activity, which has been shown to have almost no bearing on the selection of competent judges, will not improve the quality of justice and may indeed result in a cost to the system in the form of further backlogs. Certainly judicial resources could be used more efficiently and costs distributed more realistically under an alternative method of selection. 14/

13/ Dunn, supra, at 292.

14/ Id. at 296.

The Missouri Plan

Toward the end of the 19th century many states with the elective system became concerned about the adverse effects which politics was having on judicial selection and looked for ways to curb political abuse while retaining popular judicial election. A number of different measures were adopted which were intended to insulate judicial elections from politics. The most widely used was non-partisan elections, but some states also adopted special nominating committees, direct judicial primaries and shortened ballots.

The Missouri Plan, an attempt to combine the best features of the appointive system and the elective system, was originally devised by Albert Kales, research director of the American Judicature Society.[15/] In 1914, Kales proposed that judges be appointed by the chief justice of the state who should be popularly elected and that these appointed judges have their performance reviewed periodically through elections in which the voters would decide whether a particular judge should be retained. In 1926, the British economist and political scientist, Harold Laski, suggested that the executive rather than the chief justice should make the appointments. However, it was not until 1940 that Missouri became the first state to apply the Kales-Laski plan to selection of some of its judges (and incidentally give the plan its popular name).

The judicial reform movement moved slowly and Alaska entered the Union in 1959 as the only state to apply the Missouri selection plan to all of its courts. Presently,

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15/ See Sari Escovitz, Judicial Selection and Tenure, American Judicature Society, at 8-9 (1975) for a discussion on the background surrounding the formulation of the Kales-Laski plan.

15 states utilize the plan as the predominant method of judicial selection. Several other states apply some features of the Missouri Plan to interim appointments.

Although variations of the plan exist, its basic four-part approach consists of:[16/]

(1) a judicial nominating commission to recommend a slate of candidates to the appointing official;

(2) executive appointment of one of the persons recommended;

(3) a subsequent non-partisan and non-competitive election in which the appointed judge runs on his or her record for retention;

(4) periodic retention elections in which the voters decide whether to retain the individual as a judge.

The nominating commission has been viewed as the key to success of the Missouri Plan.[17/] In some states, nominating commissions are composed solely of legal professionals, but in most, laypeople are included as well. The commissioners may themselves be elected or appointed. The commission can be created by state constitution or statute, or by executive order. It may function formally or informally. Some commissions hold open hearings and publicize judicial nominees while others make public the name of the final appointee only.

Advocates of the Missouri Plan argue:

First, the independent non-partisan nominating commission of laypeople and lawyers removes the selection

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16/ Legislative Reference Bureau, Hawaii Constitutional Convention Studies 1978, supra, at 119.

17/ Escovitz, supra, at 11.

process from political considerations which might influence the appointing executive under a pure appointive system.

Second, the plan provides a method to insure that only well-qualified candidates are considered for judicial positions and prevents mediocre candidates from being selected for mere political reasons.

Third, the inclusion of laypeople in the nominating process allows the concerns of the general public to be voiced in the selection process.

Fourth, the plan retains an advantage of the appointive system in that the executive participates in the selection process and he or she remains directly responsible to the electorate.

Fifth, the electorate will have a chance to see how well a judge performs before being called upon to vote. The attention of the voters in a retention election can be focused on the judge's record. Thus, the chances that a judge will be removed from office on purely political grounds unconnected with performance on the bench are greatly reduced.

Finally, since judges selected under the plan are freed of political preoccupations, they will have more time to devote to their jobs and they will not be influenced by political considerations in making decisions.

Critics of the Missouri Plan focus on the composition of the nominating commission and the retention election feature as the weak points of the plan. Arguments advanced against the Missouri Plan are:

First, although it may be intended that the nominating commission be representative of a broad spectrum of interests from the community, available data indicates that membership on the various commissions fall far short of this goal.

Allan Ashman and James J. Alfini's study[18] of Missouri Plan judicial selection committees throughout the country found their composition to be highly unrepresentative. Of the 371 committee members who responded to their survey, 97.8 per cent were white and 89.6 per cent were male. The paucity of non-whites and women in the legal profession largely accounts for these figures. However, the study also showed that of the lay commissioners only 3.3 per cent were non-white and only 23.3 per cent were women. Nor do commissioners reflect a cross section of occupations: the study found that bankers and businessmen account for 27.1 per cent of the lay members with educators (7.8 per cent), journalists (4.8 per cent) and medical professionals (3.6 per cent) following.[19] A 1975 study of commissioners in Florida generally showed the same trend.[20] Of the 166 Florida commissioners responding to a questionnaire, only 6.6 per cent were women, 86.7 per cent were white and 13.3 per cent identified themselves as non-white. Most (68.1 per cent) identified themselves as attorneys and overall, 81.9 per cent listed either law, business or banking as their occupation.

Second, another drawback to the nominating commission is that it places the control of judicial selection in the hands of a few. Attorneys on the commission, however chosen, may be biased by certain candidates who they feel will be

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18/ Allan Ashman and James L. Alfini, The Key to Judicial Merit Selection: The Nominating Process, at 38-40 (1974), cited in Burton M. Atkins "Merit Selection of State Judges," 50 Florida Bar Journal 203, at 208 (1976).

19/ Ashman & Alfini, id., cited in Dunn, supra, at 302.

20/ Burton M. Atkins, footnote 18, supra, at 208.

favorable to their positions in court. The lay members of the commission may feel intimidated by the attorney members or may not feel qualified to select judicial candidates and defer to the judgment of the lawyer members.[21/]

Third, politics is not removed from the selection process because political party rivalries are replaced by bar politics. In Missouri, where the plan has been in operation for over three decades, the two major state bar associations, one in Kansas City, the other in St. Louis, have operated analogous to a two-party political system, each struggling to dominate the selection of lawyer members to the nominating commissions. In an exhaustive study of the Missouri Plan, it was noted:

> The analysis of lawyer elections under the plan indicates that a competitive "two-party system" has emerged in both Kansas City and St. Louis. Rival bar organizations representing district social status groups in the profession, nominate candidates and pursue techniques and strategies that are adopted to meet the campaign norms and electoral divisions of the lawyer constituency.[22/]

Fourth, the nominating committee often places the governor's preferred candidates on the list of nominees to accommodate the governor. To some extent this claim is borne out by the fact that during the first 25 years of the plan's use in Missouri, 70 per cent of the judges appointed were

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21/ However, another criticism leveled against the Missouri Plan, that attorney control of nominating commissions tends to produce "elitist" conservative judges, was found not to be true in fact. Watson and Downing found that appointees under the plan in Missouri were essentially "local," were more likely to have graduated from night law schools than prestigious law schools, that the majority were affiliated with the majority party, were older than judges previously selected by election and tended to have prior experience in law enforcement. There was no indication that judges selected under the Missouri Plan were more conservative than judges selected by other methods. Richard Watson and Rondell Downing, The Politics of Bench and Bar: Judicial Selection Under the Missouri Nonpartisan Plan, at 343-48 (1969).

22/ Id. at 42-43.

from the same political party as the governor.[23/]

Fifth, a retention election is just as objectionable as initial selection of judges by election. There is no reason to assume that the electorate will be any more informed about judicial candidates running in a retention election than they are about candidates running in any other judicial election. Retention elections too often are mere rubber stamps of incumbent judges. In 1976 in the 13 states which held such elections, only 3 of 353 judicial candidates were defeated.[24/] An impending election may also influence a judge's work so that he or she may be reluctant to render a decision which would be unpopular.[25/]

23/ Atkins, footnote 18, supra, at 208.

24/ William Jenkins, Jr., "Retention Elections: Who Wins When No One Loses?" 61 Judicature 79, at 80 (1977).

25/ The American Bar Association, while approving the nominating commission and appointment aspect of the Missouri Plan, has been reluctant to endorse the retention election feature. The Commentary to Standard 1.21 states:

> The general public should come to recognize that a judge's retention in office should not depend on popular election. Such elections, even when conducted on the basis of a judge's running on his record or of non-partisan candidacies depend mostly on name familiarity. Rarely is the public, especially in densely populated urban and suburban areas, actually informed as to a judge's competence and fitness for office. A judge running for reelection is often vulnerable to opposition by special interests or on the basis of a single decision which he had no legal authority to avoid rendering. Hence, if politically practicable, procedures for selection and tenure of judges should be adopted that do not employ elections or referendums.

American Bar Association, supra, at 48.

RECOMMENDATIONS OF THE CHIEF JUSTICE

The present appointive system has worked well in Hawaii, producing a competent and impartial judiciary. It is recommended that some form of the appointive system be retained as Hawaii's judicial selection process.

Any form of judicial selection involving election, whether it be partisan, non-partisan or retention should be avoided. Judicial elections, by their very nature, inject political pressures into the selection process and have profoundly adverse effects on the judiciary.

Initial Selection of Supreme Court Justices and Circuit Court Judges:

I recommend that the present system of selecting supreme court justices and circuit court judges be retained. Executive appointment with senate confirmation assures both public accountability and an independent judiciary. As a general proposition, I believe that the power of judicial appointment properly lies with the governor. The governor acts from the broadest political base and is least vulnerable to influence by any one group while his actions are the most likely to undergo rigorous public scrutiny. The governor is directly responsible to the electorate for the quality of judicial officers and a bad judicial appointment can be politically damaging. Public accountability is further assured by the requirement of senate confirmation. Since supreme court justices and circuit court judges are appointed to the bench for terms which are longer than either the governor's term or the terms of individual senators, after appointment a judge owes no obligations to any one individual involved in the selection process. This frees each judge to administer

justice according to individual conscience and the dictates of the law and furthers the goal of an impartial and fair judiciary.

Although many other arguments can be advanced in favor of the present appointive system, the most persuasive reason for retaining our present appointive system is that it has produced a judiciary of a consistently high caliber and competence. I do not believe that we should change a system which has worked well where no compelling reason for change has been shown and where no clearly superior alternative exists.

In the event that an intermediate appellate court is established, it is recommended that judges for such a court be selected in the same manner as supreme court justices and circuit court judges.

Initial Selection of Judges of "Inferior Courts"

Article V, § 1 of the constitution provides the legislature with the power to establish "inferior courts". However, the constitution does not provide a method of selecting judges of inferior courts. The chief justice has been given the authority, by statute, to appoint district court judges. It is recommended that the constitution be amended to provide that judges of inferior courts be appointed by the chief justice.

Although in most instances it is preferable to vest the appointing power in the governor, there are compelling reasons as well as historic precedence for giving the chief justice the power to appoint judges of inferior courts. At the present time, district courts are the only inferior courts which have been created by the legislature. These courts were designed to deal with high volume activity and

traditionally have handled the greatest number of cases in the court system. For instance, in the 1976-77 fiscal year, the total caseload of all the district courts was 699,459 cases. Further, the district courts handle the widest range of cases, from traffic violations and small claims to preliminary hearings for felonies. Thus, it is essential that the district courts remain fully staffed with judicial officers at all times. The problem of maintaining an adequate number of judicial officers to meet the growing caseload of the district courts has been recognized by the legislature in giving the chief justice power to appoint per diem judges as needed. However, the void created by a vacancy in a full-time district court judgeship cannot be filled by per diem judges. The ability to deal rapidly with a vacancy in the district courts is crucial to the smooth functioning of the court system. For these reasons, the chief justice, in his administrative role as head of the court system, should have the power to appoint district court judges. Since the chief justice is familiar with the legal community, he can assess the talent available from which to recruit new judges as well as readily ascertain an individual's availability. The chief justice would have personal knowledge of an individual's professional capabilities and a nomination can be made with minimal delay.

Judicial Confirmation Commission

Although I personally recommend retention of the present appointive system, if a change in the judicial selection process is deemed necessary, an alternative which merits consideration is confirmation of judicial appointments by an independent judicial confirmation commission. This plan would combine features of the present appointive system and the Missouri Plan.

Under a confirmation commission plan, a non-partisan judicial confirmation commission composed of attorneys, lay people and a representative of the judiciary would investigate the qualifications of individuals nominated by the governor (in the case of supreme court and circuit court appointments) or the chief justice (in the case of district court appointments) and would confirm or reject the appointment. If the commission rejected the nominee, the governor or chief justice would submit another name. If the commission failed to act on the nomination within a specified period of time, the nominee would automatically be confirmed.

As in a nominating commission plan, the composition and selection of members on the confirmation commission is crucial. A member of the judiciary, to be chosen by the chief justice, should serve on the commission to express the views of the judicial system. Lay members of the commission, to be appointed by both the house and senate or by the governor, would represent the interests of the public on the commission and insure that public concerns regarding the quality of judges are influential in the selection process. Finally, attorney members of the commission would be able to evaluate the skills and personal qualities of nominees from a professional standpoint. Certain safeguards, such as limiting the number of attorneys on the commission and providing that no member of the commission be permitted to simultaneously hold political office, could also be instituted to preserve the non-political and neutral character of the commission.

TABLE A

JUDICIAL SELECTION

State	Selection Method
Alabama	Appellate, circuit, district, and probate judges elected on partisan ballots. Judges of municipal courts are appointed by the governing body of the municipality as of 1977.
Alaska	Supreme Court Justices, superior, and district court judges appointed by Governor from nominations by Judicial Council. Approved or rejected at first general election held more than 3 years after appointment. Reconfirmed every 10, 6, and 4 years, respectively. Magistrates appointed by and serve at pleasure of the presiding judges of each judicial district.
Arizona	Supreme Court Justices and court of appeals judges appointed by Governor from a list of not less than 3 for each vacancy submitted by a 9-member Commission on Appellate Court Appointments. Maricopa and Pima County superior court judges appointed by Governor from a list of not less than 3 for each vacancy submitted by a 9-member Commission on Trial Court Appointments for each county. Superior court judges of other 12 counties elected on nonpartisan ballot (partisan primary); justices of the peace elected on partisan ballot; city and town magistrates selected as provided by charter or ordinance, usually appointed by mayor and council.
Arkansas	All elected on partisan ballot.
California	Supreme Court and courts of appeal judges appointed by Governor with approval of Commission on Judicial Appointments. Run for reelection on record.
Colorado	All judges elected on nonpartisan ballot. Judges of all courts, except Denver County and municipal, appointed initially by Governor from lists submitted by nonpartisan nominating commissions; run on record for retention. Municipal judges appointed by city councils or town boards. Denver County judges appointed by mayor from list submitted by nominating commission; judges run on record for retention.
Connecticut	All appointed by Legislature from nominations submitted by Governor, except that probate judges are elected on partisan ballot.
Delaware	All appointed by Governor with consent of Senate.
Florida	All elected on nonpartisan ballot.
Georgia	All elected on partisan ballot except that county and some city court judges are appointed by the Governor with consent of the Senate.
Hawaii	Supreme Court Justices and circuit court judges appointed by the Governor with consent of the Senate. District magistrates appointed by Chief Justice of the State.
Idaho	Supreme Court and district court judges are elected on nonpartisan ballot. Magistrates appointed by District Magistrate's Commission for initial 2-year term; thereafter, run on record for retention for 4-year term on nonpartisan ballot.
Illinois	All elected on partisan ballot and run on record for retention. Associate judges are appointed by circuit judges and serve 4-year terms.
Indiana	Judges of appellate courts appointed by Governor from a list of 3 for each vacancy submitted by a 7-member Judicial Nomination Commission. Governor appoints members of municipal courts and several counties have judicial nominating commissions which submit a list of nominees to the Governor for appointment. All other judges are elected.
Iowa	Judges of Supreme and district courts appointed initially by Governor from lists submitted by nonpartisan nominating commissions. Appointee serves initial 1-year term and then runs on record for retention. District associate judges run on record for retention; if not retained or office becomes vacant, replaced by a full-time judicial magistrate. Full-time judicial magistrates appointed by district judges in the judicial election district from nominees submitted by county judicial magistrate appointing commission. Part-time judicial magistrates appointed by county judicial magistrate appointing commissions.
Kansas	Supreme Court Judges appointed by Governor from list submitted by nominating commission. Run on record for retention. Nonpartisan selection method adopted for judges of courts of general jurisdiction in 23 of 29 districts.
Kentucky	Judges of Court of Appeals and circuit court judges elected on nonpartisan ballot. All others elected on partisan ballot.
Louisiana	All elected on open (bipartisan) ballot.
Maine	All appointed by Governor with consent of Executive Council except that probate judges are elected on partisan ballot.
Maryland	Judges of Court of Appeals, Court of Special Appeals, Circuit Courts and Supreme Bench of Baltimore City appointed by Governor, elected on nonpartisan ballot after at least one year's service. District court judges appointed by Governor subject to confirmation by Senate.
Massachusetts	All appointed by Governor with consent of Executive Council. Judicial Nominating Commission, established by executive order, advises Governor on appointment of judges.
Michigan	All elected on nonpartisan ballot, except municipal judges in accordance with local charters by local city councils.
Minnesota	All elected on nonpartisan ballot. Vacancy filled by gubernatorial appointment.
Mississippi	All elected on partisan ballot, except that city police court justices are appointed by governing authority of each municipality.
Missouri	Judges of Supreme Court, Court of Appeals, circuit and probate courts in St. Louis City and County, Jackson County, Platte County, Clay County and St. Louis Court of Criminal Correction appointed initially by Governor from nominations submitted by special commissions. Run on record for reelection. All other judges elected on partisan ballot.
Montana	All elected on nonpartisan ballot. Vacancies on Supreme or district courts and Workmen's Compensation Judge filled by Governor according to established appointment procedure.
Nebraska	Judges of all courts appointed initially by Governor from lists submitted by bipartisan nominating commissions. Run on record for retention in office in general election following initial term of 3 years; subsequent terms are 6 years.

TABLE A (cont'd)

State	Selection Method
Nevada	All elected on nonpartisan ballot.
New Hampshire	All appointed by Governor with confirmation of Executive Council.
New Jersey	All appointed by Governor with consent of Senate except that magistrates of municipal courts serving one municipality only are appointed by governing bodies.
New Mexico	All elected on partisan ballot.
New York	All elected on partisan ballot except that Governor appoints judges of court of claims and designates members of appellate division of Supreme Court, and Mayor of the City of New York appoints judges of the criminal and family courts in the City of New York.
North Carolina	All elected on partisan ballot.
North Dakota	All elected on nonpartisan ballot.
Ohio	All elected on nonpartisan ballot except court of claims judges who may be appointed by Chief Justice of Supreme Court from ranks of Supreme Court, court of appeals, court of common pleas, or retired judges.
Oklahoma	Supreme Court Justices and Court of Criminal Appeals Judges appointed by Governor from lists of three submitted by Judicial Nominating Commission. If Governor fails to make appointment within 60 days after occurrence of vacancy, appointment is made by Chief Justice from the same list. Run for election on their records at first general election following completion of 12 months' service for unexpired term. Judges of Court of Appeals, district and associate district judges elected on nonpartisan ballot in adversary popular election. Special district judges appointed by district judges. Municipal judges appointed by governing body of municipality.
Oregon	All elected on nonpartisan ballot for a 6-year term, except that most municipal judges are appointed by city councils (elected in three cities).
Pennsylvania	All originally elected on partisan ballot; thereafter, on nonpartisan retention ballot.
Rhode Island	Supreme Court Justices elected by Legislature. Superior, family and district court justices and justices of the peace appointed by Governor, with consent of Senate (except for justices of the peace); probate and municipal court judges appointed by city or town councils.
South Carolina	Supreme Court and circuit court judges elected by Legislature. City judges, magistrates, and some county judges and family court judges appointed by Governor—the latter on recommendation of the legislative delegation in the area served by the court. Probate judges and some county judges elected on partisan ballot.
South Dakota	All elected on nonpartisan ballot, except magistrates (law trained and others), who are appointed by the presiding judge of the judicial circuit in which the county is located.
Tennessee	Judges of intermediate appellate courts appointed initially by Governor from nominations submitted by special commission. Run on record for reelection. The Supreme Court judges and all other judges elected on partisan ballot.
Texas	All elected on partisan ballot except municipal judges, most of whom are appointed by municipal governing body.
Utah	Supreme and district court judges appointed by Governor from lists of three nominees submitted by nominating commissions. If Governor fails to make appointment within 30 days, the Chief Justice appoints. Judges run for retention in office at next succeeding election; they may be opposed by others on nonpartisan judicial ballots. Juvenile court judges are initially appointed by the Governor from a list of not less than 2 nominated by the Juvenile Court Commission, and retained in office by gubernatorial appointment. Town justices of the peace are appointed by town trustees. City judges and county justices of the peace are elected.
Vermont	Supreme Court Justices, superior court judges (presiding judges of county courts) and district court judges appointed by Governor with consent of Senate from list of persons designated as qualified by the Judicial Selection Board. Supreme, superior, and district court judges retained in office by vote of Legislature. Assistant judges of county courts and probate judges elected on partisan ballot in the territorial area of their jurisdiction.
Virginia	Supreme Court and all major trial court judges elected by Legislature. All judges of General District Juvenile and Domestic Relations Courts elected by Legislature. Committee on District Courts, in the case of part-time judges, certifies that a vacancy exists. Thereupon all part-time judges of General District Courts and General District Juvenile and Domestic Relations Courts are appointed by circuit judges.
Washington	All elected on nonpartisan ballot except that municipal judges in second, third and fourth class cities are appointed by mayor.
West Virginia	Judges of all courts of record elected on partisan ballot.
Wisconsin	All elected on nonpartisan ballot.
Wyoming	Supreme Court Justices and district court judges appointed by Governor from a list of 3 submitted by nominating committee and stand for retention at next election after 1-year in office. Justices of the peace elected on nonpartisan ballot.
D.C.	Appointed by President of the United States upon the advice and consent of the United States Senate.
Guam	All appointed by Governor with consent of Legislature from list of 3 nominees submitted by Judicial Council for term of 5 years; thereafter run on record for retention every 5 years.
Puerto Rico	All appointed by Governor with consent of Senate.

Source: The Book of States, 1976-77, The Council of State Governments, at 98-100 (1976).

JUDICIAL TENURE AND COMPENSATION

By Chief Justice William S. Richardson

Judicial tenure and compensation provisions should be guided by two principles:[1] First, tenure and compensation should be adequate to attract highly qualified persons to the bench and to retain those persons in judicial service. Second, tenure and compensation should be designed to insure judicial independence.

Article V, Section 3, paragraph 3 of the Hawaii Constitution provides:

> The term of office of a justice of the supreme court and of a judge of a circuit court shall be ten years. They shall receive for their services such compensation as may be prescribed by law, but no less than twenty-eight thousand dollars for the chief justice, twenty-seven thousand dollars for associate justices and twenty-five thousand dollars for circuit court judges, a year. Their compensation shall not be decreased during their respective terms of office, unless by general law applying to all salaried officers of the State. They shall be retired upon attaining the age of seventy years. They shall be included in any retirement law of the State.

TENURE

Tenure provisions are intimately tied to the judicial selection process. Initial selection procedures and retention methods affect the length of time a judge will serve on the bench. In those states that have adopted some form of the Missouri Plan where judges are appointed for a trial period and then stand on their records for retention, initial tenure is short (usually 1-3 years) with tenure after a retention election being longer (usually 6-11 years).[2]

1/ Legislative Reference Bureau, Hawaii Constitutional Convention Studies: Article V, The Judiciary, at 29 (1961).

2/ For instance, in Alaska supreme court justices are appointed for three years and then run on their records for retention every ten years thereafter; superior court judges are appointed for three years and then run for retention every six years thereafter.

Generally, those states utilizing the elective method seem to have shorter judicial terms.[3/] In Hawaii, supreme court justices and circuit court judges serve for ten years under our constitutional provision. District court judges serve for six years under statutory provision.[4/]

Hawaii's tenure provisions are comparable to those of other jurisdictions. (See Table A.) Terms for judges serving on courts of last resort range from five years in Guam to life tenure in Rhode Island. Massachusetts, New Hampshire and Puerto Rico all provide that once appointed, the terms of judges of the highest court continue until the age of 70. In New Jersey, after serving an initial term of 7 years, a high court judge can be reappointed for life.

The American Bar Association, as part of the recommendation that states adopt judicial selection procedures which include a nominating commission with final appointment by the chief executive, advocates that a judge hold office during good behavior subject to inquiry concerning fitness at any time.[5/]

Longer judicial terms are desirable for two basic reasons. First, the longer the term, the more likely it will be that a qualified judicial candidate will accept a judgeship. Attorneys in private practice, or even those in government service, are reluctant to give up lucrative,

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3/ Of those states which utilize the elective method, over two-thirds have six or eight-year terms for judges of the court of last resort.

4/ Hawaii Revised Statutes § 604-2 (1976 Replacement).

5/ American Bar Association, Standards Relating To Court Organization, Standard 1.21(b)(iii), Commentary at 48 (1974).

permanent positions unless they are assured of a long-term commitment. Second, longer terms aid in insulating the judiciary from control by either the executive or legislature, or outside political forces. A judge who must be re-elected or reappointed after a short term of years may find it difficult to make impartial decisions on controversial cases. In Hawaii, judges serve for longer periods than the governor or legislators and longer judicial tenure is seen as insuring the judiciary's independence. Another reason for longer judicial terms, as noted by the Committee on the Judiciary at the 1968 Constitutional Convention, is to insure that there is adequate accrual towards retirement pensions after one term on the bench, especially for those judges with no prior governmental service.[6/]

Proponents of shorter judicial terms argue that shorter terms make it possible to remove judges who have not performed their duties well and to prevent judges from remaining on the bench to advanced ages when their efficiency may be curtailed.[7/] However, other methods such as strong disciplinary and removal procedures and compulsory retirement are available to handle these problems.

These factors were examined by the Committee on the Judiciary in the 1968 Constitutional Convention when it recommended changing the shorter tenure provisions then in effect (seven years for supreme court justices and six years for circuit court judges) to ten-year terms. The Committee noted:

6/ Proceedings of the Constitutional Convention of Hawaii of 1968, Vol. I., Standing Committee Report No. 40, at 200.

7/ Legislative Reference Bureau, supra, at 29.

> The fear of the opponents of longer tenure that this may perpetuate "bad" judges was considered by this Committee. But the safeguards as contained in the removal clause of Article V together with the benefit of hindsight in assessing the prior history of judicial appointments greatly outweighed and prevailed over any meritorious sentiment for retention of the present tenure in office. 8/

Another aspect of tenure, one dealt with in Hawaii's constitutional provision, is compulsory retirement. Hawaii, like many states, requires that a judge retire upon reaching the age of 70. The American Bar Association recommends in Standard 1.24 on the Retirement of Judges that "[j]udges . . . should be required to retire at age 70." 9/ The Commentary on this standard, notes that "(a) compulsory retirement system makes possible the orderly termination of service of people who, on the average, have reached an age when their physical and mental powers do not permit them to carry a full workload. Compulsory retirement inevitably works arbitrarily in many cases, unless the age of compulsory retirement is fixed so high as to defeat its purpose. The consequences of not having compulsory retirement, however, are unfortunate and sometimes unpleasant both for the court system and for the judge himself. No spectacle is more tragic than that of the judge who hangs on in office beyond the point of his disability, wishing to believe he is still doing his job, but suffering the doubts of others and himself that he is." 10/

The American Bar Association also recommends, and several states currently provide, that where a judge who is fully able to perform the duties of an active judge is retired upon reaching the age of compulsory retirement, he or she

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8/ Id.

9/ American Bar Association, supra, Standard 1.24, at 63.

10/ Id., at 64.

should be eligible for call for active service in such assignments as the chief justice specifies.[11/] Until recently, under statutory provision, retired justices of the Hawaii supreme court over 70 years of age were ineligible to serve temporarily on the court as need arose.[12/] However, in the 1978 Legislative Session, an act was passed to amend this provision to allow such service.[13/]

COMPENSATION

Although it is generally recognized that judicial salaries and benefits should be sufficient to attract well-qualified and competent individuals to the bench, the difficulty lies in determining the extent to which judicial compensation should be detailed in the Constitution. Incorporation in our Constitution of specific salaries would set judicial compensation for a ten-year period, an unrealistic and undesirable practice. However, giving the power to the legislature to set judicial compensation permits the legislature to reflect disapproval of judicial decisions by reducing judicial salaries and thus endangering the independence of the judiciary.

Hawaii's present Constitution while giving the legislature the power to set judicial salaries provides a minimum amount below which salaries for supreme court justices and circuit court judges cannot be set. The Constitution also provides that judicial compensation cannot be reduced during a judge's term in office unless by general law applying to all salaried officers of the State. These two provisions seem to act as safeguards on the independence of the judiciary.

11/ Id., at 63.

12/ Hawaii Revised Statutes § 602-11 (1976 Replacement).

13/ Act 114 (H.B. 1889, H.D. 2, S.D. 1).

However, it should be noted that since the Constitution makes no mention of district court judges' salaries, the legislature does have the power to lower those salaries at anytime.

Judicial salaries under Hawaii's present statutes are substantially higher than the minimums listed in the Constitution. The present salary scale is:[14/]

Chief Justice	$47,500
Associate Justices	45,000
Circuit Court Judges	42,500
District Court Judges	40,000

These judicial salaries compare favorably with those of other states. Hawaii, which is 11th among the states in per capita income, ranks 15th among the states in compensation to its highest appellate court judges and 8th in compensation to its trial court judges.[15/] (See Table B.)

Hawaii's salary scale also meets American Bar Association Standard 1.23 on Judicial Compensation, which states, in part:

> Where judges of courts of higher jurisdictional rank receive larger salaries than judges of courts of lower jurisdictional rank, the differential should be small in recognition of the important responsibilities that all judges assume. 16/

Although Hawaii's judicial compensation system has worked well in the past, the Commentary to Standard 1.23 recognizes that "[t]he task of periodically reviewing judicial compensation levels should be performed in a systematic way by people who have qualifications to do so. Review of

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14/ Hawaii Revised Statutes § 602-2, § 603-5, § 604-2.5 (1976 Replacement).

15/ The salary of a Federal District Court judge is $54,500, while judges for the Federal Courts of Appeals are paid $57,500. U.S. Supreme Court associate justices are paid $72,000; the Chief Justice's salary is $75,000. (As of February 1977.)

16/ American Bar Association, supra, Standard 1.23, at 58.

judicial compensation by the legislature alone involves the risk of indifference, and frequently involves also the complication of relating increases in judicial salaries to increases in the legislators' own compensation. Review of judicial compensation by the judiciary itself is self-serving and entails unseemly advocacy of personal interest. A more satisfactory method of performing the task is the creation of an independent agency having this specific responsibility. The suggested agency is similar to ones that have been constituted to review and recommend salary structures in the executive branch of government."[17/]

Many states presently have compensation commissions which determine salaries for members of the executive, legislative and judicial branches of government. (See Table C.) Nineteen states have such commissions which make pay rate recommendations for judges. Of those nineteen states, Louisiana and Alabama have compensation commissions for the judiciary specifically while the other seventeen state commissions review the salaries of specified legislative and executive officials, as well as the judiciary.

The powers and functions of state salary commissions fall into three general categories:

(1) In two states commission recommendations become law if they are not acted upon by the legislature. In Michigan, the same is also true, but commission recommendations apply only to supreme court justices.

(2) Recommendations by the compensation commission must be considered by the legislature in six other states.

17/ Id. at 63.

(3) The recommendations of the compensation commission are advisory only in ten states.[18/]

A report of the Subcommittee on Judicial Salaries of the National Conference of State Trial Judges concluded that of the fourteen states that had compensation commissions as of November 1974, "the majority of these states have made significant, if not dramatic progress in improving judicial salaries."[19/] The subcommittee attributed the effectiveness of these commissions to one or more of the following characteristics:[20/]

1. They were composed entirely of non-judges;
2. Their duties embraced recommending the salaries of top officials in all three branches of state government;
3. They retained professional consultants to develop a strong factual base for proposed salary adjustments; and,
4. They paid careful attention to timing and technique in submitting their proposals to the legislature.

Another method used in several states to set judicial salaries is a "floating salary" statute.[21/] California, Massachusetts and Tennessee provide for judicial salary increases based on a consumer price index. California utilizes the California consumer price index while Massachusetts and Tennessee use the U. S. consumer price index.

18/ National Center for State Courts, "Memorandum on Judicial Compensation Commission," October 4, 1977, at 2.

19/ "Subcommittee Reports on Judicial Salaries," 15 Judges Journal XIV, Fall 1976.

20/ Id.

21/ National Center for State Courts, Survey of Judicial Salaries in State Court Systems, at 23-24 (October 1977).

Maryland provides for automatic salary increases for the judiciary based on general salary increases awarded to all state employees.[22/] Rhode Island provides for automatic increases according to the length of time served on the bench

22/ In Maryland, such increases result from across the board salary increases awarded by the legislature. In Hawaii, another possible method for determining judicial salaries would be to base judicial pay increases on pay increases given to other state employees through the collective bargaining process.

RECOMMENDATIONS OF THE CHIEF JUSTICE

Tenure and Retention:

Hawaii's constitutional provision providing for ten-year terms of office for supreme court justices and circuit court judges should be retained. A ten-year term is desirable because it is more likely to attract qualified judicial candidates and aids in maintaining the judiciary as an independent branch of government.

If the method of initially selecting judges includes confirmation by an independent commission, it is recommended that the same commission evaluate all supreme court and circuit court judges for retention on the bench at the end of each ten-year term. The commission should have the power to deny retention to any judge who it feels is not fit to continue on the bench. A judge determined by the commission to be qualified will be able to remain on the bench without going through the appointment process. This procedure would depoliticize the retention process as well as aid in insuring that qualified judges remain on the bench since judges will be reviewed solely on the basis of their performance by an independent commission.

The legislature presently sets the terms of full-time judges of inferior courts. The legislature should retain this power. Should a confirmation commission system be adopted, full-time inferior court judges should also undergo periodic review and retention evaluation by the judicial confirmation commission at intervals established by the legislature.

Finally, the requirement of retirement upon attaining the age of seventy years should be retained in the

constitution and extended to apply to all full-time state court judges.

Compensation:

A salary commission should be established by constitutional amendment to review and make recommendations on judicial salaries to the legislature. Although such a commission could be established by the legislature without a constitutional amendment, in order to avoid any future question as to the source of the commission's power, a constitutional provision is recommended. It is further recommended that such a commission review salaries of all state judges, including the compensation of judges of inferior courts, and that the recommendations of the commission be deemed law unless acted upon by the legislature within a certain number of days. The composition of the commission should be left to the legislature but as a general principle, the commission should be composed of persons representing all three branches of government. If a commission is established to recommend salaries of officers in the executive and legislative branches of government, the same commission could make recommendations on judicial salaries.

The provision in our constitution that the compensation of supreme court justices and circuit court judges may not be lowered except by general law applying to all salaried officers of the state should be retained and extended to include all full-time judges of the state. This provision, insuring that the independence of the judiciary is not jeopardized by the threat of lowering salaries, should be extended to protect all state court judges from outside political and economic forces.

TABLE A

TENURE OF JUDGES
(In Years)

State or other jurisdiction	Appellate courts: Court of last resort	Appellate courts: Intermediate appellate court	Major trial courts: Chancery court	Major trial courts: Circuit court	Major trial courts: District court	Major trial courts: Superior court	Major trial courts: Other trial courts	Courts of limited jurisdiction: Probate court	Courts of limited jurisdiction: County court	Courts of limited jurisdiction: Municipal court	Courts of limited jurisdiction: Justice, magistrate, or peace court	Courts of limited jurisdiction: Other courts
Alabama	6	6	...	6	...	...	...	6	6(a)	(b)	2(a)	...
Alaska	10	...	...	...	...	6	...	...	...	...	(c)	4(d)
Arizona	6	6	...	...	...	4	...	...	...	...	4(e)	...
Arkansas	6	...	6	4	...	...	...	...	2	2-4	2	2(f)
California	12	12	...	...	...	6	...	...	...	6	6	...
Colorado	10	8	...	...	6	...	...	6	4	(g)	...	6(h,i)
Connecticut	8	...	...	...	...	8	...	4	...	...	...	4(d,j)
Delaware	12	...	12	...	...	12	...	...	...	12	4	12
Florida	6	6	...	6	...	...	...	...	4	...	...	...
Georgia	6	6	...	...	...	4-8	...	4	...	...	4	4(j);1-4(k)
Hawaii	10	...	...	10	...	...	...	...	...	...	...	6(d)
Idaho	6	...	...	...	4	...	...	...	...	...	2-4(l)	...
Illinois	10	10	...	6	...	...	4(m)	...	...	...	...	...
Indiana	10	10	...	6	...	4	4(j)	4	...	4	...	4(k)
Iowa	8	...	...	...	4(h)	...	...	...	...	...	...	...
Kansas	6	(n)	...	...	4	...	...	2	2	...	4	2
Kentucky(o)	8	...	...	6	...	...	...	...	4	...	4	...
Louisiana	10	10	...	...	6	...	...	...	...	4	6	4(h,p)
Maine	7	...	...	...	...	7	...	4	...	...	...	7(d)
Maryland	15	15	...	15	...	...	15(q)	4	...	10(d)	...	...
Massachusetts	To age 70	To age 70	...	...	...	To age 70	...	To age 70	...	To age 70	...	To age 70(r)
Michigan	8	6(s)	...	6(s)	...	...	6(s,t)	6	...	6	...	6(d,j,s)
Minnesota	6	...	...	...	6	...	...	6	6	6	...	...
Mississippi	8	...	4	4	...	...	...	...	4	4	4	4(p)
Missouri	12	12	...	6	...	...	...	4	...	2-4	4	4(u)
Montana	8	...	...	...	6	...	...	...	...	2	4	4(v)
Nebraska	6	...	...	...	6	...	...	...	4(w)	6	...	6(h)
Nevada	6	...	...	...	6	...	...	...	...	1(x)	4	...
New Hampshire	To age 70	...	...	...	...	To age 70	...	To age 70	...	To age 70	...	To age 70(d)
New Jersey	7 with reappointment for life	7 with reappointment for life	...	...	...	7 with reappointment for life	5(y)	...	...	3	...	5(h,z)
New Mexico	8	8	...	...	6	...	...	2	...	4	4	4(aa)
New York	14(ab)	5(ac)	...	...	...	...	14	10(ad)	10	(ae)	4(af)	10(p);6(d);9(ag)
North Carolina	8	8	...	...	...	8	...	...	...	...	...	4(d)
North Dakota	10	...	...	...	6	...	...	...	4	4	4	...
Ohio	6	6	...	...	...	...	6(j)	...	6	6	...	(ah)
Oklahoma	6	6	...	...	4(ai)	...	...	...	...	2(g)	...	...
Oregon	6	6	...	6	...	...	...	...	6	(c)	6	6(d)
Pennsylvania	10	10	...	...	...	...	10(d)	...	...	6(aj)	6(e)	...
Rhode Island	Life	...	...	...	...	Life	...	1(g)	...	...	3	(p);10(d)
South Carolina	10	...	...	4	...	...	...	4	4	(g)	(ak)	4(p)
South Dakota	8	...	...	8	...	...	...	...	...	...	(c)	...
Tennessee	8	8	8	8	...	...	8(am)	...	8	(an)	...	8(ao)
Texas	6	6	...	...	[illegible]	...	...	4	4	(g)	4	4
Utah	10	...	...	...	4	...	...	...	...	6	4	4(h)
Vermont	6	...	...	...	...	6(ap)	...	2	...	...	2	6(d)
Virginia	12	...	...	8	...	...	...	...	...	...	...	6(aq)
Washington	6	6	...	...	...	4	...	...	...	4	4	...
West Virginia	12	...	...	8	...	...	...	...	...	8(ar)	8(ar)	...
Wisconsin	10	...	...	6	...	...	6(as)	...	...	2	...	...
Wyoming	8	...	...	...	6	...	...	...	...	(as)	4	4(at)
Dist. of Col.(al)	15	...	...	...	...	15	...	...	...	...	...	...
Guam	8	...	...	...	...	8	...	...	...	...	...	...
Puerto Rico	To age 70	...	...	...	...	12	...	...	...	8	4	8(d)

(a) Effective January 1977, the county court and justice court will be abolished and replaced by a state trial court of limited jurisdiction called the district court. District judges will serve terms of 6 years.
(b) Effective December 1977, full-time municipal court judges will serve terms of 4 years and part-time municipal judges will serve terms of 2 years.
(c) [illegible] at pleasure of appointing authority. South Dakota magistrates. Oregon: at pleasure of appointing authority; [illegible] when elected for a term of 2 years.
(d) [illegible] courts.
(e) [illegible]. Arizona: term of city or town magistrates provided by charter or ordinance.
(f) Courts of common pleas. Arkansas [illegible] by county judge.
(g) Dependent on applicable charters and ordinances. [illegible] 2 years in [illegible] cities and towns. [illegible] 2 years or at pleasure of appointing authority.
(h) Juvenile courts.
(i) Superior court and Denver juvenile court.
(j) Criminal courts.
(k) District associate judges and full-time magistrates, 4 years; part-time magistrates, 2 years.
(l) Appointed for 2-year term initially, elected for 4-year term thereafter.
(m) Associate judges of circuit court.
(n) New court of appeals takes effect January 1977. Court of appeals judges will serve terms of 4 years.
(o) See footnote (o) on Table 1.
(p) Family courts. Rhode Island: during good behavior.
(q) Supreme bench of Baltimore city.
(r) District courts, juvenile courts, land and housing courts, probate courts.
(s) Terms for new judgeships are for 10, 8, or 6 years; elected thereafter for 6-year terms.
(t) Recorder's court of Detroit.
(u) St. Louis court of criminal corrections.
(v) Workmen's compensation judge.
(w) Effective January 1977.
(x) Police judges. Term of 1 year unless a longer period is fixed by city incorporating such cities.
(y) County courts.
(z) County district courts.
(aa) Small claims courts.
(ab) To age 70; judges may be certificated thereafter as Supreme Court justices (intermediate appellate court) for 2-year terms up to age 76.
(ac) To age 70; judges may be certificated thereafter for 2-year terms up to age 76.
(ad) Surrogate's court. In New York City, term is 14 years.
(ae) In New York City, 10; outside New York City, determined by each city.
(af) Town and village courts.
(ag) Courts of claims.
(ah) Court of claims. May be an incumbent judge of the Supreme Court, court of appeals, court of common pleas, or retired judge, any of whom sit by temporary assignment of the Chief Justice of the Supreme Court.
(ai) Special district judges serve at pleasure of district judges by whom they are appointed.
(aj) Philadelphia municipal court.
(ak) Terms not uniform; [illegible] by General Assembly.
(al) Information reflects 1974 survey. Later information not available.
(am) State district courts.
(an) Set by statute, which varies.
(ao) Courts of general sessions, domestic relations, and juvenile courts.
(ap) Superior courts: 6 years for superior judges, 4 years for assistant judges.
(aq) General district court and general district juvenile and domestic relations courts.
(ar) Municipal and police courts variable. Term set at discretion of Legislature.
(as) County courts.

Source: Book of States 1976-77, Council of State Governments, at 94-95 (1976).

TABLE B

Rank Order of Judicial Salaries, Income, and Population

Population and income figures are from the U.S. Department of Commerce and Bureau of Census. *Statistical Abstract of the United States 1977*. Where another state has the same rank, rank is shown in parentheses. The salaries reported for the highest appellate court refer to the salaries paid to associate justices. The general trial court salaries refer to standard state-paid salary for ranking purposes.

Rank	Highest Appellate Court and Salary		General Trial Court and Salary		Per Capita Personal Income		Populations
1	California	$62,935	California		49,166	Alaska	California
2	New York	60,573	New York		48,906	Illinois	New York
3	New Jersey	56,000	Alaska		48,576	Connecticut	Texas
4	Pennsylvania	55,000	New Jersey		48,000	Nevada	Pennsylvania
5	Michigan	53,000	Missouri (5)		45,000	Delaware	Illinois
6	Alaska	52,997	Pennsylvania (5)		45,000	New Jersey	Ohio
7	Tennessee	50,391	South Carolina (5)		45,000	California	Michigan
8	Illinois (6)	50,000	Hawaii (8)		42,500	New York	Florida
9	Louisiana (8)	50,000	Illinois (8)		42,500	Maryland	New Jersey
10	Missouri (8)	50,000	Louisiana (8)		42,500	Michigan	Massachusetts
11	Texas	49,000	Minnesota (11)		42,000	Hawaii	North Carolina
12	Minnesota	49,000	Virginia (11)		42,000	Washington	Indiana
13	Maryland	48,400	Tennessee		41,993	Wyoming	Virginia
14	Wisconsin	46,368	Maryland		41,200	Massachusetts	Georgia
15	Hawaii (15)	45,000	Iowa		40,000	Colorado	Missouri
16	Iowa (15)	45,000	Delaware (16)		39,000	Rhode Island	Wisconsin
17	South Carolina (15)	45,000	Washington (16)		39,000	Kansas	Tennessee
18	Virginia (15)	45,000	Florida		38,900	Pennsylvania	Maryland
19	Washington (15)	45,000	Massachusetts		38,379	Iowa	Minnesota
20	North Carolina	43,488	Oregon		37,968	Ohio	Louisiana
21	Florida	43,200	New Hampshire		37,500	Oregon	Alabama
22	Massachusetts	43,078	Nebraska[a]		36,500	Wisconsin	Washington
23	Delaware	42,000	North Carolina		36,758	Virginia	Kentucky
24	Oregon	41,856	Kentucky (24)		35,000	Indiana	Connecticut
25	Colorado (25)	40,000	Montana (24)		35,000	Texas	Iowa
26	Georgia (25)	40,000	Connecticut (26)		34,500	Nebraska	South Carolina
27	Ohio (25)	40,000	North Dakota (26)		34,500	Minnesota	Oklahoma
28	Nebraska	39,750	Texas (26)[a]		34,500	Florida	Colorado
29	Kentucky	39,000	Rhode Island		34,100	Missouri	Mississippi
30	New Hampshire	38,500	New Mexico		33,633	New Hampshire	Oregon
31	Indiana	38,100	Utah		33,500	Arizona	Kansas
32	Oklahoma	38,000	Arizona (32)		33,000	Idaho	Arizona
33	Arizona	37,000	Colorado (32)		33,000	Oklahoma	Arkansas
34	North Dakota	36,800	Georgia[a]		32,500	Montana	West Virginia
35	New Mexico	36,[illegible]	Arkansas		31,914	Georgia	Nebraska
36	Rhode Island	36,300	West Virginia		31,500	Utah	Utah
37	Connecticut (37)	36,000	Wisconsin[a]		31,440	Vermont	New Mexico
38	Montana (37)	36,000	Kansas		30,500	Tennessee	Maine
39	Utah	35,500	Mississippi (39)		30,000	Kentucky	Rhode Island
40	Nevada (40)	35,000	Nevada (39)		30,000	North Carolina	Hawaii
41	West Virginia (40)	35,000	South Dakota (39)		30,000	North Dakota	Idaho
42	Arkansas	34,500	Vermont (39)		30,000	West Virginia	New Hampshire
43	Kansas (43)	34,000	Wyoming (39)		30,000	Louisiana	Montana
44	Mississippi (43)	34,000	Michigan[a]		29,100	Maine	South Dakota
45	Alabama	33,500	Idaho (45)		28,500	New Mexico	North Dakota
46	Wyoming	32,500	Maine (45)[b]		28,500	South Carolina	Nevada
47	South Dakota	32,000	Indiana[b]		26,500	Alabama	Delaware
48	Vermont	31,750	Alabama[a]		25,000	Arkansas	Vermont
49	Idaho	31,500	Ohio[b]		23,500	South Dakota	Wyoming
50	Maine	29,000	Oklahoma[a]		21,000	Mississippi	Alaska

[a] Local supplements may be added to state pay.

[b] Rank is based on lower figure of salary range.

Source: National Center for State Courts, Survey of Judicial Salaries in State Court Systems, at 1 (October 1977).

TABLE C

STATE SALARY COMMISSIONS

STATE	NAME OF COMMISSION	AUTHORIZATION	NUMBER OF MEMBERS	APPOINTMENT OF MEMBERS	COMPENSATION	POWERS OF COMMISSION
Alabama	Judicial Compensation Commission	Alabama Const., Art. 6, §148	5	1 by governor 1 by Pres. of Senate 1 by Speaker of House 2 by Alabama Bar	Funds are appropriated for expenses.	Recommendations are to be submitted within the first five days of a legislative session. They become law if not acted upon by legislature.
Arizona	Commission on Salaries for Elective State Officers	Arizona Const., Sec. 13; Arizona Revised Statutes §§41-1901 to 1904	5	2 by governor 1 by Pres. of Senate 1 by Speaker of House 1 by Chief Justice	Members serve without compensation but are reimbursed for travel and subsistence.	Recommendations apply to judges. They become effective if the legislature does not act upon them within 90 days of submission to that body.
Colorado	Colorado State Official's Compensation Commission	Colorado Revised Statutes §2-3-801 to 806	9	2 by Pres. of Senate 2 by Speaker of House 3 by Governor 2 by Chief Justice	Serve without compensation but are reimbursed for expenses.	Recommendations apply to judges. They are to be considered by the legislature.
Connecticut	Compensation Commission for Elected State Officials and Judges	Connecticut General Statutes Annotated, §2-9a	11	3 by Governor 2 by Pres. of Senate 2 by Speaker of House 2 by each of the minority leaders of the legislature	Serve without compensation but are reimbursed for expenses.	Recommendations apply to judges. They must be considered by the legislature.
Florida	State Officers' Compensation Commission	Florida Statutes Annotated, §112.192	9	2 by Governor 2 by Pres. of Senate 2 by Speaker of House 2 by Chief Justice 1 by other 8 members	Serve without compensation but are reimbursed for expenses.	Recommendations apply to judges. They are purely advisory in nature.
Georgia	State Commission on Compensation	Georgia Code Annotated, §§89-716 to 726	12	4 by Governor 2 by Lieut. Governor 2 by Speaker of House 4 by Supreme Court	Compensation is $25/day and reimbursement of expenses.	Recommendations apply to judges. If pay bills are introduced in the legislature, they must contain the compensation recommended by the commission.

STATE	NAME OF COMMISSION	AUTHORIZATION	NUMBER OF MEMBERS	APPOINTMENT OF MEMBERS	COMPENSATION	POWERS OF COMMISSION
Illinois	Commission on Compensation of State and Local Government Officials	Illinois Annotated Statutes, Chapter 127, §551 to §554	5	By Governor	$50/day to a maximum of 100 days per year. Reimbursement of expenses.	Recommendations apply to judges. The Commission has a purely advisory function.
Iowa		Iowa Code Annotated, §2A.5				Recommendations apply to judges. General Assembly must consider recommendation of the Commission.
Kentucky	Public Officials Compensation Commission	Kentucky Revised Statutes, Chapter 64	5	1 by Governor 1 by Lieut. Governor 1 by Speaker of House 1 by Pres. of Senate 1 by Chief Justice	$50 per diem and reimbursement of expenses.	Commission makes specific recommendations to legislature. Uncertain as to application of recommendations to judiciary or to salary.
Louisiana	Commission on Judicial Compensation	Louisiana Statutes Annotated, Revised Statutes §13:42 to 46.	15	3 by Governor 1 by Chief Justice 1 by Chairman of Conference of Court of Appeals Judges 1 by District Judges Association 5 by presiding officer of House 4 by presiding officer of Senate	Serve without compensation but expenses are reimbursed.	Commission serves in an advisory capacity.
Michigan	State Officers Compensation Commission	Michigan Constitution, Art. IV, Sec. 12. Michigan Statutes Annotated §3.255 (51 to 56).	7	By Governor		Recommendations apply to Supreme Court Justices only. They become effective unless challenged by the legislature.
Minnesota	Compensation Review Board	Minnesota Statutes §15A.041.	9			Recommendations apply to judges. Review board serves in an advisory capacity.

STATE	NAME OF COMMISSION	AUTHORIZATION	NUMBER OF MEMBERS	APPOINTMENT OF MEMBERS	COMPENSATION	POWERS OF COMMISSION
Missouri	Missouri Compensation Commission	Executive Order of Governor	9	3 by Governor 2 by Pres. of Senate 2 by Speaker of House 2 by Chief Justice	No information available.	Recommendations are advisory in nature. They apply to officials in the three government branches.
Montana	Montana Salary Commission	Montana Const., Art. XIII, Sec. 3; Revised Code of Montana 59-1601 to 1604	8	2 by Governor 2 by Supreme Court 1 by majority and minority leaders of both houses of legislature	$25/day and reimbursement for expenses.	Recommendations apply to judges. They are only advisory in nature.
New York	Commission on Legislative and Judicial Salaries	Executive Law, Art. 27-A	9	3 by Governor 2 by Pres. of Senate 2 by Speaker of Assembly 2 by Chief Judge	$100/day to a maximum of $7,500 per Commission member and reimbursement of expenses.	Recommendations apply to judges. They must be considered by legislature.
Ohio	State Employees Compensation Board	Ohio Revised Code Annotated, §143.10.1	5	Members are: Director of State Personnel; Director of Finance; State Auditor; member of the House chosen by the Speaker; member of the Senate chosen by Pres. Pro Tem.	$50.40/day for legislative members.	Recommendations are advisory.
South Dakota	Commission on Salaries for Elective State Officials	South Dakota Compiled Laws Annotated §3-8-1.1 to §3-8-6	5	2 by Governor 1 by Pres. of Senate 1 by Speaker of House 1 by Presiding Judge of Supreme Court	Serve without compensation but are entitled to expenses	Recommendations apply to judges. They are only advisory in nature.
Utah	Executive Compensation Commission	Utah Code Annotated, §67-8-13.5 to 13.12	5	1 by Governor 1 by Pres. of Senate 1 by Speaker of House 2 by other Commission members	$25/day and reimbursement of expenses.	Recommendations apply only to state paid judges. They are only advisory in nature.

STATE	NAME OF COMMISSION	AUTHORIZATION	NUMBER OF MEMBERS	APPOINTMENT OF MEMBERS	COMPENSATION	POWERS OF COMMISSION
Vermont	State Employees' Compensation Review Board	Vermont Statutes Annotated 3, §324	9	3 by bargaining representative for state employees 6 by Governor	$15/day for non-state employees; all members reimbursed for reasonable expenses.	Recommendations apply to members of the judiciary; makes recommendations to governor prior to convening of general assembly.
Washington		Washington Revised Code Annotated, §43.03.028.	7	Members are: Pres. of Puget Sound University; Pres. of Washington State University; Chairman of State Personnel Board; Pres. of Ass'n of Washington Businessmen; Pres. of Pacific Northwest Personnel Managers Ass'n; Pres. of State Bar Ass'n; Pres. of Washington State Labor Council		Recommendations apply to all judges. They must be considered by legislators in their legislation.
FEDERAL	Federal Commission on Executive, Legislative, and Judicial Salaries	Title 2, U.S.C.A. §§351-361	9	3 by President 2 by Speaker of House 2 by Pres. of Senate 2 by Chief Justice	$100/day and travel and per diem expenses.	Recommendations apply to judges. They are submitted to President and used in his budget recommendations, which become effective if not altered by legislation.

Compiled by the Research and Information Service of the National Center for State Courts, 1976. (Updated May 1977 and October 1977.)

Although a fifty-state survey was not conducted, our research indicates that this chart is complete.

JUDICIAL DISCIPLINE, REMOVAL AND DISABILITY RETIREMENT

By Chief Justice William S. Richardson

A good system of judicial discipline is necessary even where the best judicial selection process is utilized. The public looks to the judiciary and the individuals administering justice to settle disputes and define and enforce the laws in an impartial and rational manner. The public further demands honesty and integrity in all actions of a judge, whether in fulfilling his or her duties on the bench or in private life. When a judge's conduct fails to meet these standards, the public's confidence in the decisions of the courts and in the judicial system as a whole is undermined. Thus, a strong disciplinary system is necessary to prevent erosion of public confidence in the effective operation of the judicial process and, in extreme cases, to restore it.

In the past, judicial misconduct and disability were dealt with by four traditional procedures: impeachment, address, resolution and recall.[1/] In a typical impeachment proceeding, the lower house of a bicameral legislature acts as a grand jury, drafting charges against the official to be removed, and the upper house acts as the judge and jury. Address is a formal request from the legislature to the governor seeking the removal of a judge. Resolution, very much like address, requires a resolution and vote by two-thirds of the legislature for the removal of a judge to be effected. Recall is analogous to initiative and referendum; if a certain percentage of the voters sign a petition to recall a judge, a special election is held to determine whether the judge should be retained.

1/ As of 1971, 46 state constitutions as well as the federal constitution contained impeachment provisions, 28 states had address procedures and 7 states had recall provisions. W. T. Braithwaite, Who Judges The Judges?, Amercian Bar Foundation, at 12 (1971). A few states, including California, had resolution procedures.

Impeachment, address and resolution have been criticized as inadequate removal devices largely because of the shortcomings found in the legislative process.[2/] The process is cumbersome and legislators have neither the time nor the ability to undertake the role of a judge in a formal court proceeding. Further, such proceedings are usually accompanied by widespread publicity before a determination of guilt or innocence, thus injecting a strong partisan element into the proceedings and perhaps resulting in prejudice to the individual judge. Finally, there is usually no method for the screening and investigation of complaints and a case of misconduct is not likely to reach the attention of the legislature unless it involves flagrant corruption.

Recall, like impeachment and other legislatively based removal actions, also suffers from the lack of a procedural device for the evaluation of complaints against judges.[3/] Again, only the most flagrant misconduct is likely to be addressed by such a procedure and it can be an extremely costly process where recall petitions require thousands of signatures.

Our present Constitution, unlike those of a majority of states, contains no procedure for impeachment, address, resolution or recall of judicial officers. Prior to the 1968 amendments to the Constitution, however, there was a provision for removal of judges by the legislature:

2/ See J. T. Swain, "The Procedures of Judicial Discipline," 59 Marquette Law Review 190, at 196-197 (1976); W. J. Roche, "Judicial Discipline in California: A Critical Re-evaluation," 10 Loyola of Los Angeles Law Review 192, at 193-201 (1976).

3/ Roche, id.

> They [judges] shall be subject to removal from office upon the concurrence of two-thirds of the membership of each house of the legislature, sitting in joint session, for such causes and in such manners as may be provided by law. 4/

However, the Constitutional Convention Judiciary Committee recommended deleting that section of the constitution and incorporating the removal process into the retirement procedures provided in another section of the article on the judiciary. In doing so, the Committee noted:

> [T]he legislature has done very little if anything to implement rules and procedures by which a judge may be removed. 5/

The proposed amendment was adopted by the voters and Article V, § 4 of Hawaii's present Constitution reads:

> Section 4. Whenever a commission or agency, authorized by law for such purpose, shall certify to the governor that any justice of the supreme court or judge of a circuit court appears to be so incapacitated as substantially to prevent him from performing his judicial duties or has acted in a manner that constitutes wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute, the governor shall appoint a board of three persons, as provided by law, to inquire into the circumstances. If the board recommends that the justice or judge should not remain in office, the governor shall remove or retire him from office.

It is generally recognized that the traditional methods of removal for judicial misconduct have proven

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4/ Hawaii Constitution of 1959, Article V, § 3, paragraph 3.

5/ Proceedings of the Constitutional Convention of 1968, Standing Committee Report No. 40, Volume I, at 201.

ineffective.[6] Between 1960 and 1977, 47 states and the District of Columbia adopted various modern procedures to deal with misconduct or disability.[7] These procedures have usually followed one of two different forms: the commission system developed in California and the court on the judiciary system established in New York. However, it should be noted that many states, while adopting either of these two models,

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6/ For instance, by 1960 California's three traditional methods were so cumbersome that the state had rarely used them; it impeached only two judges (in 1862 and 1929), used recall only once (in 1929), and introduced only one concurrent resolution to remove a judge (in 1936). Roche, supra, at 193-199. Braithwaite, supra, at 12-13 notes that:

> Evidence on the effectiveness and extent of use of the traditional procedures is scant. In 1936 it was reported that during the period 1900-25 two judges were removed by impeachment - one in Montana and one in Texas - and three by address, all in Virginia. In 1952 it was reported that during the period 1928-48 there were only three impeachments of judges, and all three judges were acquitted. A 1960 article states:
>
> > Replies to inquiries in 1960 disclose that in forty of forty-five states, as far back as can be recalled or determined, legislative attempts to invoke impeachment procedures have been made in only seventeen states in a total of fifty instances. The results were nineteen removals and three resignations. In one case the result was unknown.
>
> The present research, though not exhaustive, found only five states that have used impeachment within the last fifteen years, and no instance of the use of address or recall within the last three decades. [Citations omitted.]

7/ 26 jurisdictions adopted new procedures through constitutional amendment, 14 states initiated disciplinary procedures by statute and 7 states discipline judges under court rule. 61 Judicature 205, at 206 (1977).

have also retained the more traditional methods of removal.[8/]

The New York Court on the Judiciary

The New York court on the judiciary model has been adopted by two other states.[9/] Prior to 1975, the court on the judiciary was empowered to remove a judge "for cause" or retire a judge for mental disability. The court, composed of the chief judge and senior associate judge of the court of appeals (New York's highest court) and four appellate division judges, was convened only when a complaint was filed by specifically authorized officials.[10/] Once charges were preferred, notice of the case and hearing date were sent to

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8/ The American Bar Association's Joint Committee on Professional Responsibility has recommended that impeachment should be retained even in jurisdictions adopting a commission system of discipline:

> Impeachment is the least desirable method of judicial discipline. It is an all-or-nothing approach and ordinarily is effective only for egregious and spectacular instances of misconduct. The impeachment process is subject to political considerations; experience has shown it is expensive, cumbersome, and ineffective. If the judicial discipline commission and the court are functioning properly in judicial disciplinary enforcement, there will be no need for impeachment proceedings. Impeachment should be retained, however, as a check not only upon the judiciary, but upon the judicial discipline and disability retirement process as well. No other method of judicial removal is justified or recommended.

Standards Relating to Judicial Discipline and Disability Retirement, Tentative Draft, Standard 1.8, Commentary at 8 (1977).

9/ Delaware and Oklahoma.

10/ The chief judge could convene the court on his own motion, but was required to convene the court upon written request of the governor, a presiding justice of the appellate division, or a majority of the executive committee of the state bar association. New York Constitution, Art. VI, § 22, 1961.

the governor, president of the senate and speaker of the assembly. If any legislator wished to prefer charges of removal in the legislature, the proceedings in the judiciary court were stayed pending the legislative determination which was exclusive and final.

In the period from 1947 to 1975, the court on the judiciary was convened to hear approximately seven cases of judicial misconduct. In two of the cases, the judiciary court ruled to remove, in one other it found that removal was not justified and in four cases the judge resigned after the proceedings were instituted.[11/] The relatively scant use of the court on the judiciary has been attributed to several major defects in the operating procedure.[12/] First, the court could only be convened on the complaints of a limited number of officials and there was no permanent staff to receive and investigate complaints from the public. Second, in cases not warranting removal, the court had no disciplinary capacity. Thus, the court's range of effective operation was limited to those infrequent cases where removal was the appropriate sanction and the judge refused to resign or retire.

To a large extent, these defects have been remedied by the 1975 amendments to the judicial article of the New York Constitution.[13/] The judiciary court now has the power to censure and suspend as well as remove "for cause" any judge

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11/ American Judicature Society, Judicial Disability and Removal Commissions, Courts and Procedures, (G. Winters and R. Lowe eds.), at xxiii (1973).

12/ L. Lewis, "Judicial Discipline, Removal and Retirement," 1976 Wisconsin Law Review 563, at 568 (1976).

13/ New York Constitution, Art. VI, § 22, amended 1975.

within the New York judicial system. Removal for cause includes misconduct in office, persistent failure to perform duties, habitual intemperance, and conduct prejudicial to the administration of justice. A permanent commission on judicial conduct has also been established to receive and investigate complaints from the public. The commission may recommend that the court on the judiciary be convened or determine on its own that a judge should be censured, suspended or retired. In the latter instance, the judge may either accept the findings of the commission or request that the court on the judiciary hear the case. The court on the judiciary may also be convened at request of specified officials.[14/]

Another deficiency of the New York system, not completely remedied by the 1975 amendments, is lack of confidentiality. The requirement that the chief judge give notice of the court's convening to the governor and presiding officers of both legislative houses makes it impossible to keep proceedings confidential. However, since most cases will have been investigated by the commission prior to convening of the court, the possibility of false charges or undue prejudice to the judge are minimized.

The California Commission on Judicial Performance[15/]

Approximately 32 jurisdictions have adopted commission plans modeled after the California Commission on

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14/ The court convenes upon the chief judge's motion or upon request of the governor or a presiding justice of the appellate division. The number of judges sitting on the court on the judiciary was reduced to five by the 1975 amendments; all are justices of the appellate division.

15/ Formerly, the Commission on Judicial Qualifications; changed by constitutional amendment in 1976.

Judicial Performance.[16] The California commission, originally created by a 1960 constitutional amendment,[17] has nine members: two judges of courts of appeals, two judges of superior courts, and one judge of a municipal court, each appointed by the supreme court; two members of the state bar appointed by its governing body; and two laypeople appointed by the governor with the advice and consent of the senate. The commission employs a full-time secretary and is empowered to receive and investigate complaints from any source and to hold confidential adversary hearings. Prior to 1976, the commission itself had no powers. However, it could make public recommendations to the supreme court that it retire a judge for disability that seriously interfered with the performance of the judge's duties and was or was likely to become permanent, or that it censure or remove a judge for action that constituted "wilful misconduct in office, wilful and persistent failure to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute."[18] In 1976, the constitution was amended to authorize the commission to privately admonish a judge found to have engaged in an improper action or a dereliction of duty. In addition, the grounds upon which a judge could

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16/ Alabama, Georgia, Arizona, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin, Wyoming and the District of Columbia. Winters and Lowe, supra.

17/ See generally, California Constitution, Article VI, § 18, amended 1976.

18/ 1966 California Constitution, Article VI, § 18(c)(2).

be disciplined were enlarged to include an "inability" to perform judicial duties. In the past, only a "wilful and persistent failure" of performance could lead to discipline.

Approximately eight cases of judicial misconduct have been decided by the California supreme court since the commission's inception.[19/] In the first case, decided in 1964, the supreme court in a short per curiam opinion rejected the commission's recommendation for removal of a judge. [At that time, the commission was only empowered to recommend removal. Subsequently, the commission was also given the power to recommend public censure.] In four cases which were decided between 1970-73 the court adopted the commission's recommendation for public censure. In 1973, for the first time, the supreme court accepted the removal recommendations of the commission. Since then, the court has accepted a commission recommendation of public censure and another recommendation of removal. In 1977, a seven-judge panel, upon recommendation of the commission, ordered the retirement of a California supreme court justice because of senility.[20/] In addition to the cases which have reached the supreme court, the commission has been effective in inducing retirement or resignations of judges at all levels of the judiciary who voluntarily chose to leave the bench at some stage after commission proceedings were instituted but before the public

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19/ Lewis, supra, at 569.

20/ Under the California Constitution, a seven-judge panel of appeals judges hears cases involving censure, removal or retirement of supreme court justices. California Constitution, Article VI, § 18(e), amended 1976.

recommendation had gone to the supreme court.[21]

The California commission system has been praised as an effective and efficient procedure for dealing with instances of judicial misconduct and disability.[22] Among the reasons for its success is that all actions are completely confidential until the public recommendation to the supreme court. By that time, the charges have been investigated and an adversary hearing held. Thus, the possibility of harm to a judge's reputation due to unfounded claims is minimal. Another reason for the commission's impressive record is that it is permanently staffed and funded and provides a means for private citizens to voice complaints against judges. Also, since the commission can recommend censure (and, as of 1976, can issue private reprimands) it can deal with many cases which are not serious enough to warrant removal but nevertheless should be disciplined. Finally, the commission has gained visibility as a viable system of judicial discipline and the mere existence of a workable system probably acts as a deterrent to misconduct.

Although the commission system has worked well in California, other state commissions have not been as successful. Some of those states have failed to provide adequate staff and funding for their commissions or have not been willing to publicize the commission's function within their states.[23] In other jurisdictions, commissions can only

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21/ For instance, in its first nine years of operation (1960-1969), the commission received an average of 100 complaints a year, of which about two-thirds were unfounded or outside commission jurisdiction. During this nine-year period, about fifty judges resigned or retired during commission investigation of their performance. Swain, supra, at 206.

22/ Braithwaite, supra, at 93.

23/ J. E. Frankel, "Who Judges The Judges?" 11 Trial 52 (1975).

recommend removal of judges and thus a great deal of judicial misconduct which deserves discipline but not removal may go unchecked.

The commission system has also been criticized since prosecution and adjudication are pursued in the same organizational context. However, the California commission acts as a relatively independent body. Procedural due process safeguards are present at every stage of proceedings, and the supreme court makes the final determination in all cases.[24/]

It should be noted that in California, the commission on judicial performance derives its power from the state constitution. However, in other states, commissions have been created by the state's highest court by using its inherent powers.[25/] For instance, in Wisconsin, the methods of judicial removal provided in the state constitution are impeachment, address and recall. However, in 1967 the Wisconsin supreme court, under its inherent powers adopted a Code of Judicial Ethics.[26/] In 1971, the Wisconsin judicial commission was created under the rules for the implementation of the Code of Judicial Ethics adopted by the supreme court. The commission only has the power to receive and investigate complaints and to reprimand or censure a judge. The removal power remains as provided in the state constitution.

24/ Even in cases of private reprimand by the commission, supreme court review is provided. California Constitution, Article VI, § 18(c)(2), amended 1976.

25/ See, A.B.A. Standard 1.1 on Judicial Authority, which recognizes the inherent power of the state's highest court to recommend impeachment, impose discipline on a judge as an attorney, suspend a judge with salary, censure or reprimand a judge and impose other appropriate sanctions. Standards, supra, at 3.

26/ Lewis, supra, at 572-573.

Hawaii's Commission For Judicial Qualification

Pursuant to Article V, § 4 of the Hawaii Constitution (see p. 3, supra) a plan for judicial removal and disability retirement of supreme court justices and circuit court judges was enacted by the legislature in 1969.[27/] The Hawaii plan provides for a commission consisting of five members appointed by the governor, from a panel nominated by the judicial council and confirmed by the senate. Hawaii's plan departs substantially from the procedures followed by most commission plans due to the provision in our Constitution giving the governor the power to remove judges. The commission is empowered only to receive and investigate complaints. However, it may subpoena witnesses, administer oaths and take testimony relative to complaints. All proceedings before the commission are confidential. If a majority of the commissioners determine that there is probable cause to believe that a judge appears to be "so incapacitated as substantially to prevent him from performing his judicial duties or has acted in a manner that constitutes wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute"[28/] the commission certifies its findings to the governor.

The governor in turn appoints a board of judicial removal consisting of the chief justice or an associate justice

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27/ HRS § 610, et seq. (1976 Replacement). District court judges are subject to removal by the supreme court whenever the court deems removal necessary for the public good. HRS § 604-2 (1975 Replacement).

28/ HRS § 610-3(a).

designated as chairperson and two other members. The board then convenes and conducts a full hearing. Afterwards, it submits its findings and recommendations to the governor who must remove or retire an accused judge within thirty days if the board recommends such action.

In the seven years that the commission has been in operation, it has received only two complaints which required investigation.[29/] In both instances, it found that there was no probable cause to recommend removal. The commission has also received several requests to set aside court orders as well as complaints against district court judges. However, these matters were beyond the jurisdiction of the commission.

29/ Conversation with William T. Hiraoka, past chairperson of Commission for Judicial Qualification.

RECOMMENDATIONS OF THE CHIEF JUSTICE

Hawaii's present constitution provides the basis for a sound procedure for the removal and disability retirement of judges. The details of the process, such as the composition of the commission for judicial qualification as well as funding and staff of the commission are left to the legislature to develop. In many respects, our present commission system is modeled after the California commission. However, under our constitution the ultimate power of removal and retirement is vested in a specially appointed board of judicial removal and the governor, as opposed to California where the supreme court has been given this power.

It is recommended that our constitution be amended to provide that the commission's findings be made to the supreme court with the ultimate authority to remove or retire a judge vested in the supreme court. The supreme court already has supervisory power over the proceedings of lower courts as well as the power to promulgate rules to guide the conduct of judicial officers. The supreme court also has the power to impose certain disciplinary measures on judges as attorneys. It is consistent with the existing powers of the supreme court to vest the authority of removal and retirement in the court.

It is also recommended that any removal and disability retirement provision include all judges of state courts. Currently, by statute, a district court judge may be removed from office by the supreme court whenever the court deems such removal necessary for the public good. There seems to be no rationale for having two separate mechanisms - one for supreme court justices and circuit court judges, and one for district court judges - for removal and disability retirement of judicial officers.

SUPREME COURT OF HAWAII
ALIIOLANI HALE
HONOLULU

CHAMBERS OF
WILLIAM S. RICHARDSON
CHIEF JUSTICE

July 7, 1978

To the 1978 Constitutional Convention
State of Hawaii

To assist you in your deliberations on what basic changes might be made in our State Constitution, I am forwarding to you a report and my personal recommendations on amendments to the Judicial Article.

As the administrative head of Hawaii's judicial system for more than a decade, I feel Hawaii has taken a leadership role nationally in establishing uniform standards for the administration of justice. If we are to maintain this leadership role, we must look to the community's future requirements for judicial services and not be afraid to be innovative or try new approaches when they are needed.

The issues which I discuss in this report are ones which have a far-reaching effect for the judiciary and thus for the State. I have formulated my recommendations based upon a great deal of research done by my staff and I have also consulted with the members of the Judicial Council and others in the community who are knowledgeable and interested in the administration of justice.

I know that each of you share my concern that Hawaii's citizens continue to have the benefit of the best judicial system possible. I will be available to share my thoughts with you during the convention.

In closing, I would like to express my hope that you have a fruitful and harmonious session.

Aloha,

William S. Richardson

INTERMEDIATE APPELLATE COURT

By Chief Justice William S. Richardson

For additional information see National Center for State Courts' "Hawaii Appellate Report."

The following article will appear in the Summer issue of the "Hawaii Law Journal."