

# MARQUETTE LAW REVIEW

Volume 66

Fall 1982

No. 1

## POPULISM, A WISCONSIN HERITAGE: ITS EFFECT ON JUDICIAL ACCOUNTABILITY IN THE STATE\*

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The author is grateful for the help and insight of Dorothy Dey, J.D., Marquette University Law School (1978), and his secretary, Barbara Ervin, without whose unstinting labors over draft after draft of this piece it could not have been completed.

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### I. INTRODUCTION

Wisconsin is extraordinary in its attempts to secure political accountability of its judicial officeholders. This adherence to the populist ideal was not born of the western states agrarian reform movement of the late 1890's,<sup>1</sup> nor of the La-Follette-inspired Progressive Movement with its national motto of "initiative, referenda and recall"<sup>2</sup> which followed in the early 1900's and continued to be a power in this state to the late 1930's.<sup>3</sup> The continuum of political accountability has existed since the framing of Wisconsin's Constitution in 1848.

Methods for achieving accountability of public officials have been debated from the birth of the Republic. During the American Constitutional Convention framers Edmund Randolph of Virginia, Charles Pinckney of South Carolina, William Patterson of New Jersey and Alexander Hamilton of New York, separately proposed judicial accountability measures. All their plans required that federal judges serve during "good behaviour" and be subject to removal by impeachment.<sup>4</sup> Hamilton, in written discourses, maintained that to sustain judicial independence the sole method of judicial removal should be impeachment,<sup>5</sup> but also stated that insanity should be pronounced a virtual disqualification for judicial office.<sup>6</sup> The framers of the Constitution ultimately settled on an appointed federal judiciary serving during

1. H. AUSTIN, *THE WISCONSIN STORY* 236 (rev. ed. 1957).

2. B. MAXWELL, *LAFOLLETTE AND THE RISE OF THE PROGRESSIVES IN WISCONSIN* 201 (1956).

3. *Id.* at 298.

4. J. ELLIOT, *THE DEBATES IN THE SEVERAL STATES CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787* (Washington 1836). Randolph's plan is found at 1 *id.* at 143-45. This plan did not originally call for impeachment but was amended to do so. 5 *id.* at 188. Pinckney's plan is found at 1 *id.* at 145-49; Patterson's plan is found at 1 *id.* at 175-77; Hamilton's plan is found at 1 *id.* at 179-80.

5. *THE FEDERALIST* No. 79, at 491-93 (A. Hamilton) (A. Lodge ed. 1908).

6. *THE FEDERALIST* No. 79, at 363 (A. Hamilton) (R. Hallowell ed. 1852).

“good [b]ehaviour”<sup>7</sup> subject to impeachment.<sup>8</sup> Federal statutory attempts to provide other remedies will be discussed in the body of this article.

The sovereign states of the Republic adopted various remedies to insure judicial accountability to the people. Impeachment is imbedded in the vast majority of state constitutions. Other methods of removing judges variously imposed by the states are: address of the legislature, incompatibility with another office of public trust, conviction of a felony, recall, mandatory retirement, election and disciplinary proceedings. In most of the separate states one or two, and in some instances three, of these accountability tools exist with respect to judges.<sup>9</sup> Only one state, Wisconsin, employs all eight.

All of Wisconsin's elected officials are subject to removal by impeachment,<sup>10</sup> election,<sup>11</sup> recall<sup>12</sup> and conviction of a felony.<sup>13</sup> Judges in the state can be constitutionally removed from office for incompatibility,<sup>14</sup> disciplinary proceedings,<sup>15</sup> address of the legislature<sup>16</sup> and mandatory retirement.<sup>17</sup> To establish this extraordinary and all-inclusive demand of judicial accountability to “government by the people” the remedies of impeachment, address, election, conviction of a felony and incompatibility were all encompassed in the 1848 draft of the Wisconsin Constitution.<sup>18</sup> The state constitution

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7. U.S. CONST. art. III, § 1.

8. U.S. CONST. art. I, §§ 2(5), 3(6) & (7).

9. COUNCIL OF STATE GOVERNMENTS, *THE BOOK OF THE STATES* (1980-1981) [hereinafter cited as *THE BOOK OF THE STATES*]. Methods for removal of judges are found at 158-63; provisions for recall of state officials are found at 198.

10. WIS. CONST. art. VII, § 1 (1848, amended 1968).

11. *Id.* art. VII, §§ 4(1), 5(2) & 7. These subsections of the Wisconsin Constitution relate to the election of supreme court justices, court of appeals judges and circuit judges, respectively. For purposes of this paper the writer here refers only to those constitutional provisions dealing with the elections of judges of courts of record.

12. *Id.* art. XIII, § 12 (1926, amended 1981).

13. *Id.* art. XIII, § 3.

14. *Id.* art. VII, § 10 (1848, amended 1912 & 1977).

15. *Id.* art. VII, § 11.

16. *Id.* art. VII, § 13 (1848, amended 1974 & 1977).

17. *Id.* art. VII, § 24(2).

18. H.A. TENNEY, J. SMITH, D. LAMBERT & H.W. TENNEY, *JOURNAL OF THE CONVENTION TO FORM A CONSTITUTION FOR THE STATE OF WISCONSIN 609-13* (Madison 1848) [hereinafter cited as *JOURNAL/WISCONSIN CONSTITUTIONAL CONVENTION 1848*].

was amended to provide the remedy of recall by vote of the people in 1926.<sup>19</sup> Constitutional proposals requiring mandatory retirement of judges and a provision allowing for reprimand, censure, suspension and removal for cause or disability of judges were ratified by the people in 1977.<sup>20</sup>

The purpose of this article is to specifically define, and place in historical context, each of these judicial accountability measures. The article will then examine their actual implementation in populist Wisconsin—their respective use and nonuse throughout the state's history. It will conclude with a comparison of the eight remedies with the author's recommendation for their retention or rejection.

## II. IMPEACHMENT

Impeachment is the most widely known of the common law methods for removal of political officeholders and has been most common for judges in the United States.<sup>21</sup> The impeachment process begins with the lower legislative house which investigates and votes charges against the accused official. The lower house functions as a grand jury,<sup>22</sup> while the upper house acts as a court for trial.<sup>23</sup> This procedure is available in at least forty-five states of the union<sup>24</sup> and in the federal system.<sup>25</sup>

19. WISCONSIN LEGISLATIVE REFERENCE BUREAU, THE STATE OF WISCONSIN BLUE BOOK 241 (Biennial ed. 1981-1982) [hereinafter reference will be to the BLUE BOOK and the edition year]. The statewide vote tally ratifying the recall proposal was 205,868 for and 201,125 against.

20. *Id.* at 244. The proposal for mandatory retirement of judges met the approval of the referendum vote by a resounding vote of 506,207 for and 244,170 against. The people ratified the judicial discipline proposal by an astounding vote of 565,087 for and 151,418 against.

21. Shartel, *Retirement and Removal of Judges*, 20 J. AM. JUD. SOC. 144 (1936).

22. W. BRAITHWAITE, WHO JUDGES THE JUDGES? 12 (1971).

23. K. CORR & L. BERKSON, LITERATURE ON JUDICIAL CONDUCT 7 (1979).

24. THE BOOK OF THE STATES, *supra* note 9, at 158-63 (1980-1981). In W. BRAITHWAITE, *supra* note 22, at 12, the author says that 46 states have adopted the impeachment tool. It may be that a state has eliminated the tool since his 1971 writing. In any event, it is too much for this paper to set forth the state constitutional citations for the impeachment remedy. Suffice it to say that Hawaii, Indiana, Missouri, North Carolina and Oregon do not have the impeachment remedy.

25. The House of Representatives has the sole power of impeachment. U.S. CONST. art. I, § 2(5). The Senate has the sole power to try all impeachments. *Id.* art. I, § 3(6) & (7). Federal judges hold appointed office during "good [b]ehaviour," *id.*

### A. In England

Impeachment was first employed in England in 1376<sup>26</sup> and last employed there in the case of Viscount Melville in either 1805 or 1806.<sup>27</sup> In England it is, and always has been, a criminal proceeding<sup>28</sup> applied against elected or appointed officials, including judges, for any crime whatsoever.<sup>29</sup> Accusations are made in the House of Commons and are judged in the House of Lords.<sup>30</sup>

During that 430 year period, the impeachment remedy rendered a great service to England's constitutional government by bringing to the fore ministerial responsibility to the law. Impeachment applied to all ministries of the Crown and maintained the supremacy of the law over all.<sup>31</sup> Its disuse came about for a number of reasons. Parliament, in wresting control of the government from the Crown, overused it and imposed it on the basis of such slender evidence that it seemed that the fact that impeachment was essentially a criminal proceeding was all but forgotten. Parliament perverted the remedy to eliminate persons with conflicting political views and programs.<sup>32</sup> In the eighteenth century Parliament became a partisan body with its members made up of Whigs and Tories, the precursors of the contemporary Conservative and Labor Parties. Partisan politics in England generated a lack of statesmanship, a necessary ingredient to keep the remedy of impeachment pure.<sup>33</sup> Moreover, this tool proved to be too "clumsy and dilatory" a weapon for a complicated trial.<sup>34</sup> Furthermore, the Act of Settlement

art. III, § 1, subject to "Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." *Id.* art. II, § 4.

26. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 380 (3d ed. 1922); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 204 (5th ed. 1956).

27. 1 W. HOLDSWORTH, *supra* note 26, at 380, and T. PLUCKNETT, *supra* note 26, at 204, cite the date as 1805. However, 10 HALSBURY'S LAWS OF ENGLAND § 736 (Lord Hailsham of St. Marylebone 4th ed. 1975) [hereinafter cited as HALSBURY], states Melville was convicted by impeachment and removed from office in 1806.

28. 3 W. HOLDSWORTH, *supra* note 26, at 379-80; Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 YALE L.J. 1475, 1518 (1970).

29. 10 HALSBURY, *supra* note 27.

30. *Id.*

31. 1 W. HOLDSWORTH, *supra* note 26, at 382.

32. 6 W. HOLDSWORTH, *supra* note 26, at 259-60.

33. 1 W. HOLDSWORTH, *supra* note 26, at 384-85.

34. *Id.*

(1701) created the method of address to the Crown to be employed specifically against judges.<sup>35</sup> This tolled the death knell for impeachment of English judges.

### B. *In the United States*

The American colonial experience before and after the Settlement Act was quite the opposite. Colonial judges were appointed at the pleasure of the Crown, with one notable exception.<sup>36</sup> These judges, for the most part, were servile to the Crown and its local representatives. This condition prevailed in all the colonies and was one of the principal reasons for the calling of the First Continental Congress. The Congress, at its October 14, 1774, meeting, unanimously declared that all the colonies were entitled to the protection of the common law and statutes of England because "their ancestors, at the time of their immigration, were 'entitled to all rights, liberties, and immunities, of free and natural-born subjects within the realm' . . ."<sup>37</sup> The Second Continental Congress adopted the Declaration of Independence, which pointed out the Crown's failure to establish, by law, an independent judiciary.<sup>38</sup>

The Declaration led immediately to the years of intermittent debates concerning the formation of the Republic, which was accomplished in a relatively crude form by the adoption of the Articles of Confederation.<sup>39</sup> The judicial article provided an extremely cumbersome method of judicial selection.<sup>40</sup> There was no provision for tenure or removal,

35. 6 W. HOLDSWORTH, *supra* note 26, at 234.

36. By accident, a New York judge was appointed for good behavior. Berger, *supra* note 28, at 1492-93. *But see* 5 R. POUND, JURISPRUDENCE 364-66 (1959); Berger, *supra* note 28, at 1492-93 nn.89 & 90; Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 680-83 (1980).

37. 1 J. ELLIOT, *supra* note 4, at 44.

38. The Declaration of Independence paras. 10 & 11 (U.S. 1776), where the drafters list crown abuses as follows: "He has obstructed the Administration of Justice, by refusing his assent to laws for establishing Judiciary Powers. He has made Judges dependent on his will alone, for the tenure of their office, and the amount and payment of their salaries."

39. 1 J. ELLIOT, *supra* note 4, at 78. By March 1, 1781, all states had ratified the articles.

40. Articles of Confederation art. IX (2).

probably because the participants realized the Confederation was a temporary structure.

The framers, while despising English authority, relied on their knowledge of English history and customs to create this Republic. Impeachment was retained, but ultimately the House of Representatives was given the sole power to impeach and the Senate given the sole power to try.<sup>41</sup> On September 17, 1787, the Constitutional Convention adopted the present requirements that mandate judicial tenure during good behavior, subject to removal by impeachment.<sup>42</sup> The Constitution became effective March 4, 1789.<sup>43</sup>

In this country's history there have been hundreds of complaints filed in Congress against federal judges.<sup>44</sup> Fifty-five judges have come under congressional investigative scrutiny.<sup>45</sup> Seventeen judges resigned on investigation, nine (one justice) were impeached, four were convicted, and the rest were absolved from impeachable misconduct.<sup>46</sup>

Impeachment as a weapon for removal of corrupt, inept or ill federal judges, or for any federal official, is almost impossible to implement. The nearest thing to it, recently, was the Nixon/Watergate debacle of 1974. Some say Congress could not afford the time to impeach and try a federal district or circuit judge.<sup>47</sup> As one writer put it, "Congress is

41. See *supra* notes 7-8.

42. I J. ELLIOT, *supra* note 4, at 317-18.

43. *Owings v. Speed*, 18 U.S. (5 Wheat.) 420, 422 (1820).

44. 81 CONG. REC. 6178 (1937). This is a paraphrase of the statement of Congressman Sam Hobbs who alluded to the 150 year history of the United States. See J. BORKIN, *THE CORRUPT JUDGE* 237, 243, 249 (1962), where he exhibits the faults in congressional record keeping by citing cases not included in those records.

45. R. WHEELER & A. LEVIN, *JUDICIAL DISCIPLINE AND REMOVAL IN THE UNITED STATES* 11 (1979).

46. *Id.*; J. BORKIN, *supra* note 44, at 204.

47. I J. BRYCE, *AMERICAN COMMONWEALTH* 233 (1912). Impeachment "is like a hundred ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at." Hatton Sumners, judiciary chair: an of the House of Representatives, stated concerning the Senate's problems of trying federal judges, "[w]e know they [the Senate] will not try district judges, and we can hardly ask them to do so." 80 CONG. REC. 5934 (1936). Senator William G. McAdoo stated after the trial of a federal judge:

[T]he matter of the process is such that, as evidenced in the recent proceeding, it seriously interrupts for long periods the necessary transactions of important legislative business, places an almost intolerable burden of hearing and weighing testimony upon senators already charged heavily with other responsibil-

sometimes willing to suffer a misbehaving judge rather than [to] stop the legislative activities of the United States

...<sup>48</sup>

The original thirteen states chose diverse methods of judicial accountability. Some employed impeachment, some address, while another chose conviction of a criminal offense. Delaware, New Jersey, New York, North Carolina, Pennsylvania, Vermont and Virginia all used impeachment but with variant subject matter methods. Delaware allowed for impeachment upon conviction of misbehavior at common law; New Jersey and Pennsylvania, removal for maladministration. Vermont also allowed for removal of lesser judges for maladministration. In Virginia the impeached judge was to be tried by the court of appeals. North Carolina provided for prosecution on the impeachment of the general assembly or presentment for maladministration.<sup>49</sup>

A survey reports that prior to 1960 there were fifty-two impeachments in forty of the forty-five states which employed this remedy. These resulted in nineteen removals and three resignations.<sup>50</sup> During the next ten years there were five more prosecutions.<sup>51</sup> The only subsequent state impeachment proceeding was that of Judge Samuel Smith, a Florida circuit judge, convicted by the Florida Senate in 1978.<sup>52</sup>

### C. In Wisconsin

The framers of Wisconsin's Constitution chose impeachment as a remedy for removal of all elected officials. At each of the state's constitutional conventions<sup>53</sup> there was no

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ties, and for this reason alone is always resorted to with extreme reluctance, even in cases of flagrant misconduct.

*Id.* He concluded that as a result judges, not having to fear impeachment, have a "standing invitation to abuse their authority with impunity and without fear of removal." *Id.*

48. J. BORKIN, *supra* note 44, at 195.

49. Berger, *supra* note 28, at 1495.

50. Brand, *The Discipline of Judges*, 46 A.B.A. J. 1315 n.2 (1960).

51. W. BRAITHWAITE, *supra* note 22, at 13. They occurred in Arkansas, Florida, Missouri, Oklahoma and Tennessee but Braithwaite does not state whether these impeachments resulted in convictions.

52. Smith v. Brantley, 400 So. 2d 443, 446 (Fla. 1981).

53. See WIS. CONST. art. VII, § 1; JOURNAL/WISCONSIN CONSTITUTIONAL CON-

debate on the propriety of this common law removal method covering all "civil officers for corrupt conduct in office or for crimes and misdemeanors." In Wisconsin the legislative assembly is the accuser and the trial takes place in the senate. A majority of the elected members of the assembly is needed to impeach. A two-thirds majority vote of the members present in the senate is needed to convict. Conviction does not extend further than removal from office and disqualification to hold any other public office of honor, profit or trust in the state. The person convicted, however, is liable to indictment, trial and punishment according to law. Upon impeachment no judicial officer can exercise his office until acquitted.<sup>54</sup>

In Wisconsin, there have been four attempts at impeachment of judges. One reached trial and acquittal; the other three were either not acted upon or rejected by the assembly.

Levi Hubbell, the second chief justice of the state supreme court and the first circuit judge elected in the second circuit was the first and only elected official to be tried by impeachment. Judge Hubbell was one of five circuit judges elected by the people after passage of the 1848 Wisconsin Constitution.<sup>55</sup> It appears that Judge Hubbell, at the conclusion of a murder trial in which the jury acquitted one Radcliff, expressed his surprise at the acquittal. Hubbell asked the jury foreman, "Is this your verdict?" The foreman said, "It is." The judge then stated, "Then may God have mercy on your consciences." This remark cut deeply one William K. Wilson, a juryman, who on January 26, 1853, appeared before the Wisconsin Assembly and demanded

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VENTION 1848, *supra* note 18, at 610. See also W. MADISON, JOURNAL OF THE CONVENTION TO FORM A CONSTITUTION FOR THE STATE OF WISCONSIN 113-18, 378 (Madison 1847) (daily journal of the 1846 convention) [hereinafter cited as JOURNAL/WISCONSIN CONSTITUTIONAL CONVENTION 1846]. The constitution proposed by the 1846 convention was rejected by a referendum vote of the people by a vote of 14,119 for and 30,231 against. See BLUE BOOK (1981-1982), *supra* note 19, at 245.

54. WIS. CONST. art. VII, § 1; WIS. STAT. § 17.06(1) (1979). See also WIS. STAT. §§ 750.01-.02 (1979).

55. Biographical Sketches of the Judges of the First Supreme Court of the State of Wisconsin, 3 Pin. 605, 610 (1876) [hereinafter cited as Biographical Sketches]. The 1848 constitution created five circuit courts and provided that the elected circuit judges would comprise the supreme court until the legislature enacted a separate supreme court and trial courts.

Judge Hubbell's impeachment, charging him with numerous acts of misconduct.<sup>56</sup> The assembly rejected an address proposal and voted to proceed by impeachment. On March 22, 1853, the senate resolved itself into a court of impeachment. Judge Hubbell was charged with eleven general counts which contained sixty-eight separate specifications.<sup>57</sup> He was charged with bribery, presiding over matters in which he had a personal interest, giving the wrong sentences for crimes, sitting as a circuit judge and a supreme court justice in matters in which he had previously represented a party, using court fees scandalously, acting as an advising lawyer to parties appearing before him, not being impartial, debauching women, being arbitrary and oppressive, allowing ex parte communications and arbitrarily intermeddling to stir up litigation. Judge Hubbell's trial commenced on June 6, 1853,<sup>58</sup> and concluded on July 11, 1853.<sup>59</sup> During the course of the trial some of the specifications were abandoned, but the senate voted by roll call sixty-four times, and on no occasion did a majority vote for conviction. Nineteen of those roll calls were unanimously for acquittal.<sup>60</sup> It appears that Justice Hubbell was an able jurist<sup>61</sup> and was well liked by his Milwaukee constituents, for on his acquittal and return to that city a large committee met him part way, and a triumphant parade through the city streets was hastily organized. Hubbell, however, realized his reputation as a judge had suffered serious injury and resigned in 1856.<sup>62</sup>

On March 15, 1929, a resolution was introduced in the state assembly to investigate charges for impeachment against Judge E.B. Belden, circuit judge of Racine, Walworth and Kenosha counties.<sup>63</sup> The assembly committee of the judiciary was assigned to investigate the charges, and reported its findings to the assembly on August 29, 1929.<sup>64</sup> It

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56. J. WINSLOW, *THE STORY OF A GREAT COURT* 335-36 (1912); *see also* T. LELAND, *TRIAL OF IMPEACHMENT OF LEVI HUBBELL* 3 (1853).

57. T. LELAND, *supra* note 56, at 5-19.

58. *Id.* at 26.

59. *Id.* at 737.

60. *Id.* at 790-819.

61. *Biographical Sketches, supra* note 55, at 611.

62. J. WINSLOW, *supra* note 56, at 17.

63. A. Res. 30, A.J. 470 (1929).

64. *Id.* at 2381-83.

found that Judge Belden had borrowed \$2,000 from Z.G. Simmons in 1915 or 1916. It further found that while the debt was outstanding, he had presided over a trial in a case named *Lance v. City of Kenosha*, and had ruled in favor of Lance for a tax refund of \$2,000. L.F. Lance was a stockholder in the Z.G. Simmons Company. Other stockholders, including Z.G. Simmons, had similar claims against the city. The judiciary committee also found that the judge had presided over a case involving the Concordia Fire Insurance Company and the Z.G. Simmons Company, and had ruled against the plaintiff insurance company. The judiciary committee report recommended that Judge Belden resign and that the State Board of Bar Commissioners investigate whether the judge should continue as a member of the bar.<sup>65</sup> On April 19, 1930, the State Board of Bar Commissioners reported to the assembly that it had no authority to remove Belden as a judge, but that the legislature had the power of impeachment and address for such removal.<sup>66</sup> However, no further action was taken against Judge Belden.

In 1945 two separate petitions for impeachment of Milwaukee Circuit Court Judge Gustav G. Gehrz were filed in the assembly, one by Josef and Eugenie Geiger and the other by Christ P. Ganchoff.<sup>67</sup> The assembly judiciary committee, which investigated the Geiger petition, reported that the petition should be dismissed and the judge exonerated of all claims of impropriety.<sup>68</sup> That petition was dismissed May 31, 1945.<sup>69</sup> The same committee unanimously recommended that the Ganchoff petition be dismissed in light of the fact that the Wisconsin Supreme Court had affirmed Judge Gehrz's decision on which Ganchoff's impeachment petition was based.<sup>70</sup> This committee report was adopted by the assembly with no recorded opposition.<sup>71</sup>

It is apparent that the Wisconsin Legislature has been loathe to impose the harshness of impeachment since the

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65. *Id.* at 2383.

66. A.J. —, 60th Sess. at 273-76 (1931).

67. A.J. —, 67th Sess. at 80 (1945).

68. *Id.* at 1311.

69. *Id.* at 1346.

70. *Id.* at 1619-22. See *Ganchoff v. Bullock*, 234 Wis. 613, 291 N.W. 837 (1940).

71. A.J., *supra* note 67, at 1622.

1853 Hubbell case. It appears that it did everything it could to avoid use of the tool in the Belden case, first suggesting that the judge resign, then sending the matter to the Board of Bar Commissioners and, finally, just ignoring the problem by making no legislative move, be it impeachment or address, to resolve the issues. It also appears that the two petitions against Judge Gehrz were totally unfounded.

The same problems that caused England's nonuse of impeachment caused the federal government's nonuse and Wisconsin's nonuse. Legislative bodies cannot function as a court because their methods are too clumsy for the holding of an effective trial. The costs of such a trial are outrageously high. In addition, there exists the serious problem that impeachment's use by a legislative body may be colored by partisanship.

### III. ADDRESS OF THE LEGISLATURE

Address and resolution are similar processes for removing judges from office. Address, while requiring the concurrent vote of both legislative houses, directs the chief executive to remove an offending judge. Resolution requires a concurrent vote of both houses ordering removal of a judge without the necessity of approaching the chief executive.<sup>72</sup>

The address method springs from the British Settlement Act of 1701.<sup>73</sup> The Settlement Act requires that "judges' commissions be made *quamdiu bene se gesserint*<sup>74</sup> and their salaries ascertained and established, but upon the address of both houses of Parliament it may be lawful to remove them."<sup>75</sup> Prior to this Act judges held their appointments *durente bene placito*—at the pleasure of the King.<sup>76</sup> From

72. K. CORR & L. BERKSON, *supra* note 23, at 9.

73. 12 & 13 Will. 3, ch. 2, § 3 (1700); 4 W. BLACKSTONE, COMMENTARIES \*440-41; Meador, *English Appellate Judges from an American Perspective*, 66 GEO. L.J. 1349, 1352 n.3 (1978); Shartel, *supra* note 21, at 142 n.37; *see also* T. PLUCKNETT, *supra* note 26, at 248.

74. 2 W. BLACKSTONE, *supra* note 73, at \*268 n.(u), interprets the Latin to read: "During pleasure, but as long as they conduct themselves properly." BLACK'S LAW DICTIONARY 1117 (rev. 5th ed. 1979), interprets the phrase as "during good behavior."

75. 6 W. HOLDSWORTH, *supra* note 26, at 234.

76. BLACK'S LAW DICTIONARY, *supra* note 74, at 1407.

that time forward the English judiciary was completely and permanently independent from the political arena,<sup>77</sup> and it became impossible for the Crown or the Houses of Commons or Lords to exercise pressure on them. Thus, the Act ostensibly guaranteed the impartial administration of the law, securing the liberties of the people against encroachments of claims of royal prerogatives and parliamentary privilege.<sup>78</sup> Judicial independence was firmly entrenched with the addition of George III's statute giving the judges tenure beyond the life of their appointing monarch.<sup>79</sup>

There are no specific grounds for which English judges are removable by address.<sup>80</sup> It must be noted that this supposedly is the exclusive method of removal for judges of the major trial and appellate courts of England.<sup>81</sup> However, to date, address has never been taken against any judge.<sup>82</sup>

On August 27, 1787, John Dickinson of Delaware, a signer of the Declaration of Independence and a delegate to the Constitutional Convention, introduced an amendment to the proposed judicial article of the Constitution which was to follow the words "good [b]ehaviour."<sup>83</sup> This amendment adds: "Provided that they may be removed by the executive on the application of the senate and house of representatives." The measure was voted down with only the Connecticut delegation voting aye. It appears that Dickinson voted against his own proposal.<sup>84</sup> It can readily be ascertained that the founding fathers gave short shrift to address as a removal tool.

The same cannot be said for the sovereign states of the Union. As noted earlier, six of the original states provided for removal by impeachment, but Maryland, Massachusetts,

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77. T. PLUCKNETT, *supra* note 26, at 60-61.

78. 6 W. HOLDSWORTH, *supra* note 26, at 234.

79. 1 Geo. 3, ch. 23 (1760); 1 W. BLACKSTONE, *supra* note 73, at \*268.

80. Shartel, *supra* note 21, at 147.

81. *Id.* at 146. *But see* Berger, *supra* note 28, at 1500 (challenges address as being the exclusive English remedy for removal of judges and states that Lord Chancellor Erskine, Holdsworth and others consider that address does not exclude other means of removal, *i.e.*, by impeachment, *scire facies* or criminal conviction).

82. Meador, *supra* note 73, at 1352.

83. U.S. CONST. art. III, § 1, is the adopted article, but on the date of Dickinson's proposal he was amending the proposed judicial article II, § 2.

84. 5 J. ELLIOT, *supra* note 4, at 481-82.

New Hampshire and South Carolina provided for judicial removal by address. Georgia provided a variant in which all state officials could be removed by address.<sup>85</sup> By 1936 there were twenty-eight states that constitutionally approved of one form of address or another;<sup>86</sup> today there are nineteen.<sup>87</sup> Some require the petition to be forwarded to the governor for a letter of removal, some do not. Some require a majority vote.<sup>88</sup> The others require a two-thirds vote with the exception of one which requires a three-fourths vote of both houses of the legislature.<sup>89</sup> Every state that has retained removal by some form of address also retains the impeachment process. It should be obvious that address is to be used for general judicial misprisions that do not reach the import of conduct called for by impeachment. Even a cursory reading of these state provisions reveals wide discretion for the legislatures' implementation. Some do not limit the grounds, while others require that specific charges be presented to the accused judge, who is then allowed to present a defense with counsel.

Of all the states that have adopted address it appears that Massachusetts has been the only state to consistently employ the remedy. Its use of the remedy has been lauded<sup>90</sup> and

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85. Berger, *supra* note 28, at 1495.

86. W. BRAITHWAITE, *supra* note 22, at 12; Shartel, *supra* note 21, at 146.

87. CONSTITUTIONS OF THE UNITED STATES—NATIONAL AND STATE (2d ed. 1980); ARK. CONST. art. XV, § 3; CONN. CONST. art. V, § 2; ME. CONST. art. IX, § 5; MD. CONST. art. IV, § 4, MASS. CONST. pt. 2d, ch. 3, art. 1; MICH. CONST. art. VI, § 25; MISS. CONST. art. IV, § 53; NEV. CONST. art. VII, § 3; N.H. CONST. pt. 2d, art. LXXIII; N.Y. CONST. art. VI, § 23(a)-(c); OHIO CONST. art. IV, § 17; R.I. CONST. art. X, § 4; S.C. CONST. art. XV, § 3; TENN. CONST. art. VI, § 6; TEX. CONST. art. XV, § 8; UTAH CONST. art. VIII, § 11; WASH. CONST. art. IV, § 9; W. VA. CONST. art. VIII, § 8; WIS. CONST. art. VII, § 13.

88. Maine, Massachusetts and Rhode Island. *See supra* constitutional provisions in note 88.

89. Washington. *See supra* note 87 for constitutional provisions.

90. THE FEDERALIST NO. 47, at 339-40 (J. Madison) (B. Wright ed. 1961). Madison, in discussing the necessity for the separation of powers between the executive, legislative and judicial branches, cites with approval the contemporary Massachusetts Constitution, which calls for both impeachment and address, as required overlapping of power between the legislature and the judiciary. While he does not name it the system of checks and balances, it is obvious in his meaning. Frothingham, *The Removal of Judges by Legislative Address in Massachusetts*, 8 AM. POL. SCI. REV. 216 (1914); *Removal by Address in Massachusetts*, 7 MASS. L.Q. No. 4 at 17 (1922).

excoriated.<sup>91</sup> One author praises the scheme as being a very fair solution as opposed to the "vicious" policies of other states which allow election of judges and recall,<sup>92</sup> despite the fact that address removal can be employed for any cause, or no cause, without any restraint or limitation on the legislature's power.<sup>93</sup> Since 1787 eleven Massachusetts judges have been subjected to address and all but one were removed by the process.<sup>94</sup> The excoriators claim that address destroys substantive as well as procedural due process rights of the subject judge. The claimed substantive due process rights protect the legitimate expectations of the continuation of job benefits<sup>95</sup> and the liberty interest in reputation.<sup>96</sup> These in turn could trigger procedural due process which requires a hearing accompanied by confrontation, cross-examination and the right to call one's own witnesses as opposed to merely being entitled to notice of an address hearing and being allowed to be present and to answer questions of a legislative committee. In short, because address is final and unappealable, a responding judge should be entitled to the full trappings of a trial, requiring a final written statement delineating the judge's conduct which falls short of the "good [b]ehaviour" constitutional standard.<sup>97</sup>

The framers of the Wisconsin Constitution, as noted earlier, chose the remedy of impeachment in both the 1846 and the 1847-1848 conventions.<sup>98</sup> They also adopted judicial address. The ten-member standing committee on the organization of the functions of the judiciary of the 1846 convention,<sup>99</sup> called for removal by "concurrent resolution."<sup>100</sup> This was later deleted by amendment and the word

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91. Note, *Due Process Consideration of Judicial Removal*, 13 SUFFOLK U.L. REV. 1319 (1979).

92. Frothingham, *supra* note 90, at 221.

93. *Id.* at 218, 220; *Commonwealth v. Harriman*, 134 Mass. 314, 328 (1883).

94. Note, *supra* note 91, at 1331-43.

95. *Id.* at 1343-47.

96. *Id.* at 1355-57.

97. *Id.* at 1372-75.

98. 1 WIS. STAT. ANN. 11 (West 1957). The 1846 constitution was rejected by a vote of 14,119 for ratification and 20,333 against. *But see* BLUE BOOK (1981-1982), *supra* note 19, at 245 (approval lost by a vote of 14,119 for and 30,231 against).

99. JOURNAL/WISCONSIN CONSTITUTIONAL CONVENTION 1846, *supra* note 53, at 24.

100. *Id.* at 116.

“address” was inserted.<sup>101</sup> The judicial article was engrossed<sup>102</sup> and passed by the convention.<sup>103</sup>

Byron Kilbourn, a Milwaukee County delegate to the 1847-1848 convention, opined that had the judicial article, the banking article and the articles declaring exemptions and the rights of married women been better put, the 1846 constitution would not have met the disapprobation of the people.<sup>104</sup> It was the new committee’s purpose to correct those 1846 errors.<sup>105</sup> The convention debates on the judicial articles centered on the election and tenure of the offices of supreme court justice and circuit court judge. The delegates, like their 1846 predecessors, rejected out of hand “good behaviour” tenure, but fussed over the length of the elected term. At a meeting of the convention as a whole on January 19, 1848, the arguments centered on the length of term in office. Some wanted to ensure judicial independence while others demanded that the judiciary be responsive to the sovereign power—the people.<sup>106</sup> Kilbourn laid to rest the arguments against long terms (eight-year terms for supreme court justices) by stating:

As to the danger of long terms on account of keeping a bad judge, if one were unfortunately elected in office a long time, there was a way provided in the bill to remedy that. It provided that a judge may be removed by the legislature on good cause being shown. It was not necessary that the offense should be an impeachable one. It might be bad habits, incompetency, anything which in the judgment of the legislature made a change expedient. There the people would have complete control over the judiciary, and there could be no danger in a term of eight years.<sup>107</sup>

George W. Laiken, a Grant County delegate, moved on January 22, 1848, to eliminate the address provision from the judicial article because judges should not be subjected to

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101. *Id.* at 314.

102. *Id.* at 361.

103. *Id.* at 378.

104. JOURNAL/WISCONSIN CONSTITUTIONAL CONVENTION 1848, *supra* note 18, at 8.

105. *Id.*

106. *Id.* at 392-97.

107. *Id.* at 397.

such a vague and uncertain provision.<sup>108</sup> The measure did not point to any judicial offenses and gave the legislature an absolute and arbitrary power to remove judges. If the provision were retained he preferred reciprocal judicial address for the members of the legislature.<sup>109</sup> With hardly any response, the measure was defeated by a vote of fifty-two to six.<sup>110</sup> On January 24 Laiken, because of his opposition to address, reintroduced his proposal for reciprocal address by the judiciary.<sup>111</sup> Louis P. Harvey, a delegate from Rock County, responded by facetiously asking if "the gentleman from Grant desired to let loose the tigers of the bench, the lions of the bar and the hyenas of the legislature?"<sup>112</sup> The measure was defeated on a voice vote.<sup>113</sup> Address was adopted as part of the judicial article by the convention on February 1, 1848,<sup>114</sup> and ratified by a vote of the populace on March 13, 1848.<sup>115</sup> Address as adopted in Wisconsin does not require presentment to the governor<sup>116</sup> and is supplemented by statute<sup>117</sup> and retained in the 1977 revision of the judicial article of the constitution.

To date, Wisconsin has seen but one attempt to employ

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108. *Id.* at 457-58.

109. *Id.*

110. *Id.* at 458.

111. *Id.* at 468-69.

112. *Id.* at 469.

113. *Id.*

114. *Id.* at 598-99.

115. 1 WIS. STAT. ANN. 43 (West 1957); BLUE BOOK (1981-1982), *supra* note 19, at 245.

116. WIS. CONST. art. VII, § 13 (1848, amended 1974 & 1977):

Any justice or judge may be removed from office by address of both houses of the legislature, if two-thirds of all the members elected to each house concur therein, but no removal shall be made by virtue of this section unless the justice or judge complained of is served with a copy of the charges, as the ground of address, and has had an opportunity of being heard. On the question of removal, the ayes and noes shall be entered on the journals.

117. WIS. STAT. § 17.06(2) (1979):

In this section, "address" means a procedure for removal of a judge from office based on a document entitled "Address" which specifies charges against a judge alleging misconduct or that he is not physically or mentally qualified to exercise the judicial functions of his office. A copy of the address containing the charges against him shall be served upon the judge. The judge shall have the opportunity of being heard in his defense and he may be removed from office by address of both houses of the legislature if two-thirds of all members elected to each house concur therein.

the remedy of address. On January 2, 1980, representatives introduced joint resolutions for the removal by address of Milwaukee County Circuit Court Judge Christ T. Seraphim.<sup>118</sup> One resolution called for the address remedy,<sup>119</sup> while the other alleged general charges, provided for investigation of those charges and mandated a procedure for a joint hearing. The procedural steps mandated due process requirements at the legislative hearing. The judge was to be allowed legal representation and confrontation rights. Both sides were to present witnesses subject to cross-examination, and both sides were to have the right of summation, after which each house was to take its required vote for removal.<sup>120</sup> This proposed method seems to meet at least procedural due process requirements,<sup>121</sup> but the legislature never acted on these proposals, presumably because the Wisconsin Judicial Commission was investigating the same complaints.<sup>122</sup>

Proponents claim that address is both swift and fair,<sup>123</sup> is a necessary check on the otherwise unbridled power of the judicial branch and reinforces the concept of balancing the separate powers of the executive, legislative and judicial branches.<sup>124</sup> It appears, though, that the evils far outweigh the good of removal by address. Address has, for the most part, been political in nature and has not been based on the guilt or innocence of a judge.<sup>125</sup> Address, as well as impeachment, lacks confidentiality, which can cause unwarranted damage to reputation.<sup>126</sup> More importantly, however, address fails to protect the elemental civil rights of confrontation, cross-examination and summation—a judge simply

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118. Wis. J. Res. 97 & 98, 84th Reg. Sess., A.J. 1809 (Jan. 2, 1980).

119. *Id.* J. Res. 98.

120. *Id.* J. Res. 97 at 2.

121. See *supra* notes 95-97 and accompanying text.

122. See *infra* notes 501-522 and accompanying text.

123. Frothingham, *supra* note 90, at 216; see also *supra* notes 90 & 92 and accompanying text.

124. Note, *Removal of Judges by Legislative Action*, 6 J. LEGIS. 140, 149 (1979).

125. Note, *The Removal, Involuntary Retirement and Censure of Federal Judges: The Judicial Tenure Act in Context*, 12 LOY. L.A.L. REV. 1081, 1087 (1979); see also Note, *supra* note 91 and accompanying text; Comment, *Judicial Discipline, Removal and Retirement*, 1976 WIS. L. REV. 563, 566.

126. Note, *supra* note 91, at 1380.

does not get a trial of the issues.<sup>127</sup> The legislative body charged with the removal power is not equipped to handle the role of judge. Lastly, the method is extremely inefficient and expensive.<sup>128</sup> Address will remain in the Wisconsin Constitution as a judicial removal tool but, just as in the past, it will remain a dormant tool.

#### IV. INCOMPATIBILITY

A third method of judicial removal is a finding of incompatibility. Simply stated, the doctrine of incompatibility provides that a public officer cannot hold a second public office which is inconsistent with or involves a conflict of interest with the first office. Few, if any, of the states adopted constitutional prohibitions of this nature, but populist Wisconsin did. All elected public officials in Wisconsin, including the judiciary, are subject to the constitutional incompatibility prohibition.<sup>129</sup>

Certainly no such proscription existed in the early English common law. In 1066 William the Conqueror simultaneously held the offices of chief executive, legislator and judge.<sup>130</sup> By the year 1307, the business of being king became so burdensome that Edward I created, defined the jurisdiction of, and appointed judges for the courts of King's Bench, Common Pleas and Exchequer, and also created the so-called Model Parliament made up of lay advisers on taxation matters.<sup>131</sup> From this raw beginning grew England's court system and Parliament's House of Commons.<sup>132</sup> Eventually, parliamentary supremacy became absolute after the revolution of 1688 when Parliament named William III and Mary as King and Queen. From that date forward if Parliament could "name the crown it could break it."<sup>133</sup> The final

127. *Id.* But see *supra* notes 90-97 and accompanying text.

128. Note, *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, 41 N.Y.U. L. REV. 149, 164 (1966).

129. WIS. CONST. art. VII, § 10(1) (1977): "No justice of the supreme court or judge of any court of record shall hold any other office of public trust except a judge during the term for which elected." See also WIS. CONST. art. IV, §§ 12 & 13.

130. W. LUNT, HISTORY OF ENGLAND 84-85 (1947).

131. *Id.* at 195-97; 4 W. BLACKSTONE, *supra* note 73, at \*425-28.

132. W. LUNT, *supra* note 130, at 206-23.

133. *Id.* at 463.

separation of powers occurred in England with the Settlement Act of 1701 which made the judiciary independent of both Crown and Parliament.<sup>134</sup> The judges apparently observed a self-imposed rule that they could hold no other public offices when Parliament formalized the incompatibility doctrine by passing the House of Commons Disqualification Act, which provides that no judge of the high court is capable of being elected to or seated in the House of Commons.<sup>135</sup> Of course, this prohibition does not exist for the members of the House of Lords. Lords' members sit both as legislators and, on occasion, in the dual capacity of judges of the highest court of the realm.

James Madison, quoting Montesquieu, wrote: "There can be no liberty where the legislative and the executive powers are united in the same person, or body of magistrates,' or, 'if the power of judging be not separated from the legislative and the executive powers.'" <sup>136</sup> He concluded this political tract by maintaining that mere constitutional demarcation on parchment of limits on the three departments of the proposed republic was not a sufficient guard against these encroachments (mixing of offices in one person) which lead to "tyranny of all power of government in the same hands."<sup>137</sup>

The framers of our Constitution thoroughly discussed the issue of incompatibility as it had evolved in the common law. Consistent with Madison's theory, they ultimately provided that:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.<sup>138</sup>

This simple language forecloses the federal executive and

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134. 4 W. BLACKSTONE, *supra* note 73, at \*440; 6 W. HOLDSWORTH, *supra* note 26, at 234.

135. 10 HALSBURY, *supra* note 27, at § 867, 411 n.6 and accompanying text.

136. THE FEDERALIST NO. 47, *supra* note 90, at 339-40.

137. *Id.* at 347.

138. U.S. CONST. art. I, § 6(2).

the members of the federal judiciary from simultaneously holding their offices and being members of Congress. But it does not deter judges from seeking other political office. In fact, John Jay, the first Chief Justice of the Supreme Court, ran for governor in New York. After losing that election, he ran again in 1795 and won. Only then did he resign from his judicial office.<sup>139</sup> In 1875 Chief Justice Morrison Waite refused to be a presidential candidate because it would undermine the people's high regard for the Court.<sup>140</sup> To date, there is no constitutional or statutory provision keeping federal judges off the presidential ballot. The only deterrents are the ABA Canons of Ethics for Judges adopted at the 1924 ABA convention in Philadelphia<sup>141</sup> and the Code of Judicial Conduct adopted at the 1972 ABA convention.<sup>142</sup> The federal judiciary has decided to avoid incompatibility by adopting these proposals.<sup>143</sup>

Most states have adopted some form of constitutional incompatibility procedure and, as an adjunct, a majority of states have adopted statutes requiring judges to resign when running for nonjudicial office.<sup>144</sup> In addition, all fifty of the states have adopted some form of judicial disciplinary system which operates under some form of code of ethics.<sup>145</sup> These codes of ethics all include some prohibition concerning judges holding office in political organizations or actively participating in political organizations and require judges to resign if they become candidates for partisan office in a general election.

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139. 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 76, 124 (1926).

140. 2 *id.* at 563-64.

141. *Canons of Judicial Ethics*, 47 REP. ABA 70-71, 760-74 (1924). Canon 30 required judges to resign from the bench to run for another office.

142. E. THODE, *REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT* 29 (1973); *Special Committee on Standards of Judicial Conduct*, 97 REP. ABA 556 (1972). Canon 7A(3) required a judge to resign on becoming a candidate for a nonjudicial office.

143. Woodward, *What the Morial Decision Means*, 61 J. AM. JUD. SOC. 422 (1978).

144. Note, *The Constitutionality of Resign-to-Run Statutes: Morial v. The Judiciary Commission of Louisiana*, 53 ST. JOHN'S L. REV. 571 (1979).

145. I. TESITOR & D. SINKS, *JUDICIAL CONDUCT ORGANIZATION* 12-18 (1980). The Appendix Table lists the commissions extant in 49 states. See 2 JUD. CONDUCT REP. No. 3 at 4 (1980), which notes that the state of Washington voters approved a constitutional amendment creating a judicial commission.

Wisconsin is the only state which has a four-pronged prohibition against judicial incompatibility. The constitution,<sup>146</sup> a statute,<sup>147</sup> and a code of judicial conduct rule<sup>148</sup> prohibit judges from holding other incompatible public offices. Moreover, a rule of the code of ethics prohibits judges from running for any other office without first resigning the judicial office.<sup>149</sup>

In its first report to the 1846 constitutional convention, the Wisconsin framers' subcommittee on the judiciary proposed in part: "[Judges] shall hold no other office of public trust, and all votes for either of them for any office except that of judge, of the supreme or circuit court, given by the legislature or by the people shall be void."<sup>150</sup> This proposal was reaffirmed in 1848 with minor grammatical changes<sup>151</sup> and ultimately became part of the constitution adopted by the people's referenda.<sup>152</sup> The 1977 constitutional revision of the judicial article is more tautly worded but has the same meaning.<sup>153</sup> However, the 1977 version eliminates the language "voiding" votes for any other office.

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146. WIS. CONST. art. VII, § 10(1), states in part: "No justice of the supreme court or judge of any court of record shall hold any other office of public trust, except a judicial office, during the term for which elected."

147. WIS. STAT. § 757.02(2) (1979): "The judge of any court of record in this state shall be ineligible to hold any office of public trust, except a judicial office, during the term for which he or she was elected or appointed." This statute originated in 1913 Wis. Laws § 2, chs. 592 & 705.

148. WIS. SUP. CT. R. § 60.04: "A judge shall not hold any office of public trust except a judicial office during the term for which he or she is elected or appointed."

Between January 1, 1968, and December 30, 1979, Wisconsin judges and justices were governed by the Code of Judicial Ethics adopted by the supreme court on November 14, 1967. *In re* Promulgation of a Code of Judicial Ethics, 36 Wis. 2d 252, 252-62a, 153 N.W.2d 873, 873-78, 155 N.W.2d 565 (1967).

Effective June 1, 1980, the Wisconsin Supreme Court adopted a number of Supreme Court Rules, part of which renumbered the Code of Judicial Ethics, 1981 Wisconsin Supreme Court Rules, WIS. STAT. ANN. §§ 60.001-60.19 (West Special Pamphlet 1980). Some changes will be noted between the old and new codes, but those changes are immaterial for the purposes of this paper.

149. WIS. SUP. CT. R. § 60.05: "A judge shall not become a candidate for a federal, state or local nonjudicial elective office without first resigning his or her judgeship."

150. JOURNAL/WISCONSIN CONSTITUTIONAL CONVENTION 1846, *supra* note 53, at 115. The sentence is found in § 10, line 6 of the proposed judicial article.

151. JOURNAL/WISCONSIN CONSTITUTIONAL CONVENTION 1848, *supra* note 18, at 67. The sentence commences at § 10, line 4.

152. WIS. CONST. art. VII, § 10 (1848, amended 1912 & 1977).

153. *See supra* note 146.

Incompatibility became an issue in 1946 when Joseph McCarthy, while a circuit judge of Wisconsin's tenth judicial circuit, campaigned for and was elected to the United States Senate. Out of that election arose two bitterly fought cases brought as original actions and decided in the state supreme court. They are *State ex rel. Wettengel v. Zimmerman*<sup>154</sup> and *State v. McCarthy*.<sup>155</sup> In *Wettengel*, the court determined that the pre-1977 Wisconsin constitutional "void election" language referred to above, was ineffective to disqualify a circuit judge from being a candidate for nomination for the office of United States Senator in either a primary or general election.<sup>156</sup> It stated that the United States Constitution prescribes the qualifications of those to hold the office of senator; Congress can make or alter the time, place and manner of state legislative prescription for the election to these offices; and each house of Congress is the judge of election returns and qualifications of its own members.<sup>157</sup> The court, paying silent homage to the supremacy clause,<sup>158</sup> held that Wisconsin could not by constitutional or legislative enactment prescribe qualifications for a candidate for the office of United States Senator in addition to those proscribed by the Federal Constitution.<sup>159</sup> The court determined that McCarthy had violated his oath of office as a judge and as an attorney when he accepted and held the office of United States Senator during the term for which he was an elected circuit judge because he did so in violation of the Wisconsin Constitution and laws of the state.<sup>160</sup> Because he did not hold the offices contemporaneously,<sup>161</sup> he was merely censured by

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154. *State ex rel. Wettengel v. Zimmerman*, 249 Wis. 237, 24 N.W.2d 504 (1946). This action sought decertification of the primary vote in which Joseph McCarthy defeated the Republican incumbent Robert N. LaFollette, Jr., on the basis that the votes for McCarthy were "void" under Wis. CONST. art. VII, § 10. The petition was dismissed.

155. *State v. McCarthy*, 255 Wis. 234, 38 N.W.2d 679 (1949). This action sought bar discipline of Joseph McCarthy on the basis that in running for the office of United States Senator he violated the ABA Canons of Ethics approved by the Wisconsin Bar Association.

156. *Wettengel*, 249 Wis. at 247-48, 24 N.W.2d at 508-09.

157. U.S. CONST. art. I, §§ 3, 4 & 5.

158. U.S. CONST. art. VI.

159. *Wettengel*, 249 Wis. at 247, 24 N.W.2d at 508-09.

160. *McCarthy*, 255 Wis. at 243, 38 N.W.2d at 684.

161. *Id.*

the court.<sup>162</sup> McCarthy apparently resigned his position as circuit judge in taking the office of United States Senator. Had he not done so, the office would have been ipso facto vacated under Wisconsin's incompatibility doctrine.<sup>163</sup>

The doctrine of incompatibility has been upheld in all court contests in Wisconsin's history. Only two other cases have dealt with judicial incompatibility. A circuit judge terminated his appointed court commissioner for accepting an appointment as a federal court commissioner. The court commissioner sought a writ of mandamus against the judge in an original action in the supreme court. The supreme court dismissed the writ because, under the Wisconsin Constitution, the two positions were incompatible and, on accepting the federal court position, the local circuit court commissioner's position was ipso facto vacated.<sup>164</sup> In another case the state supreme court determined that election to and acceptance of the office of city attorney by one holding the office of justice of the peace ipso facto vacated the office of justice of the peace due to constitutional incompatibility.<sup>165</sup>

An adjunct to the incompatibility doctrine is the resign-to-run statute. Although Wisconsin has no such statute, the judicial code of ethics adopted by the supreme court in 1967 requires judges who run for nonjudicial office to resign.<sup>166</sup> There has been no Wisconsin court test of the rule since its implementation in 1967. No sitting judge has run for any office other than judge with the exception of Frederick P. Kessler, Circuit Judge of Milwaukee County, who honored the code by resigning on June 1, 1981, to run for Congress in the 1982 fall election.

Resign-to-run rules, if attacked in the future, will undoubtedly rely for constitutional support on the Fifth Circuit

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162. *Id.* at 250-51, 38 N.W.2d at 687.

163. WIS. CONST. art. VII, § 10 (1946).

164. State *ex rel.* Hazelton v. Turner, 168 Wis. 170, 173, 169 N.W. 304, 305 (1918).

165. State *ex rel.* Stark v. Hines, 194 Wis. 34, 36, 215 N.W. 447, 448 (1927).

166. *In re* Promulgation of a Code of Judicial Ethics, 36 Wis. 2d 252, 260, 153 N.W.2d 873, 877, 155 N.W.2d 565 (1967). Rule 3 is identical to the present WIS. SUP. CT. R. § 60.05. See *supra* note 149.

case of *Morial v. Judiciary Commission*.<sup>167</sup> Morial was an appellate judge in the Louisiana state court system who chose to run for the office of Mayor of New Orleans. Louisiana had both a statute<sup>168</sup> and a code of ethics provision<sup>169</sup> prohibiting this. Morial petitioned the Supreme Court of Louisiana for a leave of absence which was rejected. He and thirteen citizens commenced a federal action seeking declaratory and injunctive relief, claiming the statute and the code provision denied their rights preserved under the first and the fourteenth amendments of the United States Constitution.<sup>170</sup> The district court granted the relief sought, holding that the statute and rule had a "chilling and inhibitory effect" upon the plaintiffs' free exercise of speech and association in violation of the first and fourteenth amendments.<sup>171</sup>

The Fifth Circuit reversed the district court, relying substantially on the Hatch Act cases in which the United States Supreme Court upheld restrictions placed on political activities of federal civil service employees.<sup>172</sup> It rejected a "balancing approach"<sup>173</sup> analysis for a "means-end"<sup>174</sup> test

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167. *Morial v. Judiciary Comm'n*, 565 F.2d 295 (5th Cir. 1977) (en banc), cert. denied, 435 U.S. 1013 (1978).

168. LA. REV. STAT. ANN. § 42:39 (West Supp. 1979). The statute provides that no judge except a justice of the peace may qualify as a candidate for nonjudicial office unless he resigns at least 24 hours before the qualifying date.

169. LA. REV. STAT. ANN., Code of Judicial Conduct, Canon 7A(3) (West Supp. 1979). This canon was an adoption of 7A(3) of the ABA Code of Judicial Ethics. See *supra* note 142.

170. *Morial v. Judiciary Comm'n*, 438 F. Supp. 599 (E.D. La.), *rev'd*, 565 F.2d 295 (5th Cir. 1977) (en banc), cert. denied, 435 U.S. 1013 (1978).

171. *Id.* at 608. The court granted a preliminary injunction barring Louisiana's enforcement of the statute. *Id.* at 612-13. It reasoned that immediate injunctive relief was necessary because the citizen-voters would suffer irreparable harm and Morial, as a candidate, would be placed at a severe disadvantage in the campaign. *Id.* While determining that the state had a compelling interest in averting judicial impropriety as well as the appearance of impropriety, the statute and the canon were far too imprecise, ineffective and broad. *Id.* at 611. The statutes and the canons significantly and substantially burdened the fundamental interests of the parties and unduly restricted their first amendment rights. *Id.* at 610. These provisions denied Morial's fundamental right to run for political office and the citizens' right to vote for the candidate of his or her choice. *Id.* at 608-09. They also denied the judge equal protection by singling out judges from all of the other officeholders and requiring them to resign to run. *Id.* at 609.

172. *Morial*, 565 F.2d at 299 (citing *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)).

173. *Morial*, 565 F.2d at 299-300.

174. *Id.* at 300.

when weighing the impairment of Morial's and the citizens' first amendment interests against Louisiana's compelling state interest in the integrity of the state's judicial system. That court stated that "[t]he impairment of the plaintiffs' interests in free expression and political association [was] . . . not sufficiently grievous to require the strictest constitutional scrutiny,"<sup>175</sup> but that those rights were of such magnitude as to warrant a level of scrutiny requiring the state to show a "reasonable necessity" for requiring the judge to resign before being a candidate for elective nonjudicial office.<sup>176</sup> It determined that the state, to meet the reasonable necessity test, needed to show that the statute and the code were required.

The court held that Louisiana met the test by establishing that the statute and the code were properly employed to prevent abuse of a judicial office by a judge during the course of a campaign by using his office to promote his candidacy.<sup>177</sup> The reasonable relationship test was also met by the state demonstrating the danger of judicial abuse that might occur upon the judge's return to court duties after losing another electoral office.<sup>178</sup> The court asserted that the statute and the canon were reasonably necessary to Louisiana's interest in eliminating the appearance of impropriety by judges both during and after a campaign.<sup>179</sup> The court held finally that the plaintiffs' first amendment rights were not burdened by implementation of the statute and the rule because of the widespread adoption of the canon,<sup>180</sup> citing in its appendix thirty-eight states' and the District of Columbia's adoption of similar resign-to-run canons.<sup>181</sup>

The Fifth Circuit rejected the plaintiffs' equal protection argument that judges who sought higher judicial electoral office were protected by the statute and the code, but judges who sought nonjudicial office were not so protected, and fur-

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175. *Id.* at 302.

176. *Id.*

177. *Id.* at 303.

178. *Id.*

179. *Id.* at 303.

180. *Id.*

181. *Id.* at 307-08 app.

ther, that no other candidate for any Louisiana public electoral office was discriminated against in this fashion. The issue presented by the equal protection argument was "whether these classifications [were] reasonably necessary to the vindication of Louisiana's interest in the integrity of its elected judiciary."<sup>182</sup> The court held that, because of the special character of the judicial function, judges cannot campaign for election in the same manner as candidates for other offices. A judicial candidate cannot campaign for judicial office by pledging or promising future results as can candidates for nonjudicial offices. The court concluded:

By requiring resignation of any judge who seeks non-judicial office and leaving campaign conduct unfettered by the restrictions which would be applicable to a sitting judge, Louisiana has drawn a line which protects the state's interests in judicial integrity without sacrificing the equally important interests in robust campaigns for elective office in the executive or legislative branches of government.<sup>183</sup>

With the exception of *State ex rel. Wettengel v. Zimmerman* and *State v. McCarthy*,<sup>184</sup> Wisconsin has consistently upheld the state's constitutional incompatibility doctrine for all public officials, especially its judges. The doctrine denying judges the right to hold other offices of public trust, embodied in the constitution, the statute and the code of judicial ethics, has survived state constitutional tests and will withstand any federal constitutional challenge. Unless *Morial* is overruled, it is almost certain that all states will rely on it to protect resign-to-run statutes or ethics code restrictions. It is certain that populist Wisconsin will fight any attack on the resign-to-run mandate of its Code of Judicial Ethics because of the state's historically enduring interest in judicial accountability.

## V. CONVICTION OF A FELONY

Common-law history teaches that impeachment was the tool employed by the English government to rid itself of

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182. *Id.* at 304.

183. *Id.* at 305.

184. *See supra* notes 154-63 and accompanying text.

public officials involved in criminal conduct.<sup>185</sup> Later, address to the Crown was supposedly the tool used for judicial misconduct.<sup>186</sup> However, a judicial office apparently could also be terminated by criminal information without address to the Crown.<sup>187</sup>

The framers of the national Constitution followed the path of impeachment, stating that: "The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."<sup>188</sup> Most of the founding states chose either the impeachment or address remedy. North Carolina, a founding state, adopted impeachment, but also employed an alternate removal device with criminal procedures of trial and conviction in the court system.<sup>189</sup>

Populist Wisconsin was the first state to adopt a separate constitutional proposal prohibiting any person convicted of any infamous crime in any court within the United States from being eligible to hold any office of trust, profit or honor in the state.<sup>190</sup> Other states have similar constitutional mandates once a felony conviction is finalized.<sup>191</sup> Still other states provide for removal on investigation and recommendation of the state judicial commission body.<sup>192</sup> A few states' statutes provide for removal through constitutionally authorized judicial commissions.<sup>193</sup>

185. See *supra* notes 28 & 29 and accompanying text.

186. See *supra* notes 73-82 and accompanying text.

187. 8 HALSBURY, *supra* note 27, at § 1107, 680-81 n.5, refers to "Barrington's case (1830) 62 Lord's Journals 599 at 602." See also *supra* note 81.

188. U.S. CONST. art. II, § 4.

189. See Berger, *supra* note 28, at 1495. Berger states that "North Carolina provided for prosecution on presentment for maladministration, *i.e.*, a judicial criminal proceeding." See also *supra* note 49 and accompanying text.

190. WIS. CONST. art. XIII, § 3 (1848).

191. CAL. CONST. art. VI, § 18(a) & (b); IND. CONST. art. VII, §§ 11 & 13; MD. CONST. art. IV, § 4; MISS. CONST. art. VI, § 175.

192. ALASKA CONST. art. IV, § 10; ALASKA STAT. § 22.30.070(b) (1976); LA. CONST. art. V, § 25(c); MICH. CONST. art. VI, § 30(2); MINN. CONST. art. VI, § 9; MINN. STAT. ANN. § 490.16(2) (West 1971 & Supp. 1981).

193. MONT. CONST. art. VII, § 11; MONT. CODE ANN. § 3-1-1110(1) (1981); N.C. CONST. art. IV, § 17; N.C. GEN. STAT. § 7A-376 (1981); OR. CONST. art. VII, § 8; OR. REV. STAT. § 1.420 (1981-1982); UTAH CONST. art. VIII, § 28; UTAH CODE ANN. § 78-7-28(b) (1953).

Wisconsin's adoption of this ineligibility proposal was an afterthought of the 1846 convention. Twelve days before the convention adjourned and after the bulk of the constitution had been adopted, Edward G. Ryan,<sup>194</sup> a Racine County delegate, introduced the article decreeing ineligibility for conviction of an infamous crime.<sup>195</sup> The 1848 convention adopted the proposal without debate<sup>196</sup> and it was approved by the people's referendum.

The ineligibility provision was complemented by an 1849 statute that provided for immediate removal from office on conviction of an infamous crime.<sup>197</sup> Later, the statute was amended by replacing the words "infamous crime" with the words "felony or other crime of whatsoever nature punishable by imprisonment in jail for over a year or more . . . ."<sup>198</sup> The constitutional and pre-1919 statutory "infamous crime" terminology was construed to mean a crime punishable by sentence to the state prison.<sup>199</sup>

Two Wisconsin judges had their offices vacated for conviction of a felony. Green County Judge John M. Becker was an outspoken antagonist of America's entry into World War I. In a speech at a public meeting called by the Green County Board, he decried the war as a "richman's war" that would engender "war taxes." At the time he was a Green County judge with a term ending January 5, 1920. On Au-

194. Ryan was appointed prosecutor in the impeachment trial of Justice Levi Hubbell. *See supra* notes 55-62 and accompanying text; *see also* T. LELAND, *supra* note 56, at 34. Ryan was later chief justice of the Wisconsin Supreme Court from 1874-1880. *See* J. WINSLOW, *supra* note 56, at 305-401. He is equated with Oliver Wendell Holmes of Massachusetts and Thomas Cooley of Michigan as one of the truly great state supreme court justices. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 332 (1973). It is unfortunate today that he is remembered only as the author of an opinion in which the Wisconsin Supreme Court denied women the right to be licensed attorneys on the basis that they should not be exposed to the harsh, unclean issues, indecencies, vices and all the infirmities of society that are daily in the courts. *Motion to Admit Miss Lavinia Goodell to the Bar of This Court*, 39 Wis. 232, 245-46 (1875).

195. JOURNAL/WISCONSIN CONSTITUTIONAL CONVENTION 1846, *supra* note 53, at 398.

196. JOURNAL/WISCONSIN CONSTITUTIONAL CONVENTION 1848, *supra* note 18, at 618.

197. 1849 Wis. Laws § 11, ch. 2. *See* *Becker v. Green County*, 176 Wis. 120, 124, 184 N.W. 715, 717, *aff'd on rehearing*, 186 N.W. 584 (1922).

198. 1919 Wis. Laws ch. 362; WIS. STAT. § 17.03(5) (1919).

199. *Becker*, 176 Wis. at 124, 184 N.W. at 717.

gust 6, 1918, he was convicted in the federal court of the Western District of Wisconsin of violating the National Espionage Act and was sentenced to prison for three years. The sentence was stayed pending appeal. The United States Court of Appeals for the Seventh Circuit reversed the conviction in October 1920 (after Becker's elected term of office ended), holding that as a matter of law the evidence did not support the conviction.<sup>200</sup> This outrageous, politically motivated conviction<sup>201</sup> destroyed Becker's judicial career.<sup>202</sup>

In 1979 and 1980 the Wisconsin Judicial Commission investigated complaints of judicial misconduct against Iron County Circuit Judge Alex J. Raineri. During the course of the investigation it became apparent to the members of the commission that Judge Raineri's activities merited federal criminal investigation. The commission met with Frank M. Turkheimer, then the United States Attorney for the Western District of Wisconsin. Turkheimer had these matters investigated and took them to a federal grand jury. On June 6, 1980, the grand jury indicted Judge Raineri<sup>203</sup> on three

200. *Becker v. United States*, 268 F. 195, 198 (7th Cir. 1920); *Becker*, 176 Wis. at 121, 184 N.W. at 715-16.

201. At the time of Judge Becker's vocal opposition to the United States' entry into World War I, there were no canons or codes of ethics to advise the judiciary to stay out of politics. See *supra* note 141 and *infra* note 400. Today such voicings on emotional political issues would conflict with the ABA and Wisconsin Codes of Judicial Conduct. See E. THODE, *supra* note 142, at 29, 97. Canon 7A(4) provides: "A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice." See also Code of Judicial Ethics, Wis. SUP. CT. R. §§ 60.01(14) & 60.14, *supra* note 148, which are the comparable Wisconsin provisions.

202. *Becker v. Green County*, 176 Wis. 120, 184 N.W. 715, *aff'd on rehearing*, 186 N.W. 584 (1922). Becker sought reimbursement for pay due him from August 6, 1918, to January 5, 1920. In a wholly apologetic and sympathetic decision, the Wisconsin Supreme Court denied the claim, concluding that because Wis. STAT. § 17.03(5), amended in 1919, became effective after Judge Becker's federal conviction, he had no recourse to it. The statute has the following language:

Reversal of the judgment against such officer shall forthwith restore him to office, if the term for which he was elected or appointed has not expired, but, in any event, shall entitle him to the emoluments of the office for all the time he would have served therein had he not been so convicted and sentenced; but pardon shall not restore him to office nor entitle him to any of the emoluments thereof.

203. *Milwaukee Sentinel*, June 7, 1980, § 1, at 1, col. 1.

counts of violation of the Wisconsin criminal code<sup>204</sup> (activities which were carried out in violation of the federal law concerning interstate racketeering);<sup>205</sup> one count of lying under oath to a federal grand jury;<sup>206</sup> and one count of threatening a federal grand jury witness.<sup>207</sup> At the same time, the Wisconsin Judicial Commission filed a complaint against Judge Raineri in the Wisconsin Supreme Court charging that he had presided over a matter in which a near relative was involved, a violation of the Code of Judicial Ethics.<sup>208</sup> The judicial commission complaint was later amended to include a charge of automobile ticket-fixing, also in violation of the Code of Judicial Ethics.<sup>209</sup> The supreme court held the disciplinary matter in abeyance pending a determination of the federal criminal charges but immediately suspended the judge without pay.<sup>210</sup> On December 18, 1980, after a jury trial, Judge Raineri was convicted of all the federal charges,<sup>211</sup> sentenced to three years in prison and fined \$15,000.<sup>212</sup> The Wisconsin Supreme Court took judicial notice in the state disciplinary case of the conviction and sentence and acknowledged that the federal conviction rendered Judge Raineri ineligible to hold the office of circuit judge under the Wisconsin Constitution;<sup>213</sup> that his office as circuit judge was vacated pursuant to state statute;<sup>214</sup> and that the revocation of his license to practice law rendered him ineligible for the office of judge.<sup>215</sup> Despite

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204. WIS. STAT. §§ 944.30 & 944.34 (1979) (prostitution and keeping place of prostitution, respectively).

205. 18 U.S.C. §§ 2 & 1952 (1980).

206. 18 U.S.C. § 1623 (1980).

207. 18 U.S.C. § 1503 (1980).

208. Wis. Sup. Ct. R. 60.03 (1980).

209. Wis. Sup. Ct. R. 60.07 (1980).

210. *In re Raineri*, 102 Wis. 2d 418, 418-19, 306 N.W.2d 699, 699-700 (1981).

211. *United States v. Raineri*, 521 F. Supp. 30 (W.D. Wis. 1980), *aff'd*, 670 F.2d 702 (7th Cir. 1982); *In re Raineri*, 101 Wis. 2d 313, 314, 303 N.W.2d 842, 843 (1981). Judge Raineri petitioned to have his license as an attorney revoked. The petition was presented to the State Board of Attorneys Professional Responsibility which recommended revocation. The state supreme court granted the motion and Judge Raineri's license to practice law was revoked.

212. *In re Raineri*, 102 Wis. 2d at 419-20, 306 N.W.2d at 700.

213. WIS. CONST. art. XIII, § 3.

214. WIS. STAT. § 17.03(5) (1979).

215. WIS. CONST. art. VII, § 24(1): "To be eligible for the office of supreme court justice or judge of any court of record, a person must be an attorney licensed to prac-

this, and presumably to impress the people of the state with the seriousness of this misconduct, the court removed Judge Raineri from the office of circuit judge under its disciplinary power.<sup>216</sup> The court held that its removal of the judge would foreclose him from eligibility to serve as a reserve judge in the future.<sup>217</sup> Judge Raineri appealed the conviction but it was affirmed.<sup>218</sup> He began serving his sentence April 28, 1982.<sup>219</sup>

Populist Wisconsin's constitutional adoption in 1848 of the automatic removal provisions for conviction of a felony have served the state well throughout its history. This writer is convinced that this constitutional mandate and the supplementary statute eliminate the political implications involved in most impeachment and address attempts at removal and provide due process not normally available when the address remedy is used. The court system's familiarity with day-to-day trials is far superior to legislative bodies' unfamiliarity with trial practice procedure and rules. Finally, a court proceeding is obviously swifter and the costs are certainly less than the impeachment or address remedy.

tice law in this state and have been so licensed for 5 years immediately prior to election or appointment."

216. Wis. CONST. art. VII, § 11. See *In re Raineri*, 102 Wis. 2d at 421, 306 N.W.2d at 701.

217. See *In re Raineri*, 102 Wis. 2d at 421, 306 N.W.2d at 701; see also Wis. CONST. art VII, § 24(3):

A person who has served as a supreme court justice or judge of a court of record may, as provided by law, serve as a judge of any court of record except the supreme court on a temporary basis if assigned by the chief justice of the supreme court.

Wis. STAT. § 753.075(2) provides as follows:

The following persons may serve temporarily on appointment by the chief justice of the supreme court as a reserve judge of the court of appeals or the circuit court for any county:

(a) Any person who, as of August 1, 1978, has served a total of 8 or more years as a supreme court justice or circuit judge; or

(b) Any person who has served 4 or more years as a judge or justice of any court or courts of record and who was not defeated at the most recent time he or she sought reelection to judicial office.

218. *United States v. Raineri*, 670 F.2d 702 (7th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3140 (U.S. June 10, 1982) (No. 82-265).

219. *United States v. Raineri*, No. 80-CR-29 (W.D. Wis. Apr. 5, 1982).

## VI. RECALL

Recall is a device designed to make elected public officials continuously responsive to the electorate. States which employ recall authorize the removal of public officials by an adverse popular vote any time following a specified period after the public official's term commences. The process begins with the preparation and circulation of a petition for removal. The petition must be signed by a percentage of the voters of the state or political subdivision in which the official holds office.<sup>220</sup> In Wisconsin, if the petition meets the constitutional<sup>221</sup> and statutory<sup>222</sup> tests, a special election is called.

Historians debate the date,<sup>223</sup> but do not debate the content, of the fifth section of the Code of Hammurabi which

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220. A. MACDONALD, *AMERICAN STATE GOVERNMENT AND ADMINISTRATION* 362 (6th ed. 1960).

221. WIS. CONST. art. XIII, § 12 (1926, amended 1981):

The qualified electors of the state or of any county or of any congressional, judicial or legislative district may petition for the recall of any elective officer after the first year of the term for which he was elected, by filing a petition with the officer with whom the petition for nomination to such office in the primary election is filed, demanding the recall of such officer. Such petition shall be signed by electors equal in number to at least twenty-five per cent of the vote cast for the office of governor at the last preceding election, in the state, county or district from which such officer is to be recalled. The officer with whom such petition is filed shall call a special election to be held not less than forty nor more than forty-five days from the filing of such petition. The officer against whom such petition has been filed shall continue to perform the duties of his office until the result of such special election shall have been officially declared. Other candidates for such office may be nominated in the manner as is provided by law in primary elections. The candidate who shall receive the highest number of votes shall be deemed elected for the remainder of the term. The name of the candidate against whom the recall petition is filed shall go on the ticket unless he resigns within ten days after the filing of the petition. After one such petition and special election, no further recall petition shall be filed against the same officer during the term for which he was elected. This article shall be self-executing and all of its provisions shall be treated as mandatory. Laws may be enacted to facilitate its operation, but no law shall be enacted to hamper, restrict or impair the right of recall.

222. WIS. STAT. § 9.10 (1979).

223. C. JOHNS, *ANCIENT BABYLONIA* 9 (1913), dates the Hammurabic Code somewhere between 2150-2100 B.C. C. EDWARDS, *THE HAMMURABIC CODE AND THE SINAITIC LEGISLATION* 16, 149 (1904), agrees with the date of 2150-2100 B.C. However, E. WHITE, *LEGAL ANTIQUITIES* 77 (1913), dates the Code at 2285 B.C. More recent authorities are S. KRAMER, *THE SUMERIANS* 72 (1962), which states that Hammurabi lived at or about 1750 B.C., and L. COTTRELL, *THE QUEST FOR SUMER* 149 (1965), which state that he reigned for 43 years from 1728 to 1686 B.C.

required that a judge be expelled from his office by a vote of the populace for a mistake.<sup>224</sup> The Babylonians, it seems, were unalterably opposed to rehearing trials for mistake.<sup>225</sup> If an appeal were taken and a new trial mandated, recall of the trial judge was directed.<sup>226</sup>

*Lives From Plutarch*<sup>227</sup> tells us that the Athenian, Aristides,<sup>228</sup> known as Aristides the Just, often called upon by the people to settle their disputes,<sup>229</sup> was ostracized by a vote of the populace.<sup>230</sup> Recall or ostracism required that the offending public official leave the city for a ten-year period within ten days after the popular vote.<sup>231</sup> The danger in this form of recall was that many prominent people and otherwise powerful public officials were removed in this manner for unpopular decisions, out of envy, or simply for becoming too powerful, and not necessarily because they had committed some wrong.<sup>232</sup> The citizens of Syracuse borrowed ostracism from the Athenians. They called it "petalism" because the citizen votes for recall were cast on the petals of the leaves of the olive tree. Those recalled were required to leave the city for five years.<sup>233</sup>

In the early days of Rome, praetors (judges) were directly responsible to the general public for abuse of their public trust, which was called *perdnellio*. They would be tried in the forum of public sentiment (*populi judico*) and, if

224. C. EDWARDS, *supra* note 223, at 28, states that § 5 translates as follows: If a judge has heard a case and given a decision, and delivered a written verdict, and if afterwards he can be disproved and that judge be convicted as the cause of the misjudgment; then shall he pay 12 times the penalty awarded in the case. In public assembly he shall be thrown from the seat of judgment; he shall not return; and he shall not sit with the judges upon a case.

225. E. WHITE, *supra* note 223, at 78-79.

226. *Id.* at 78.

227. J. McFARLAND, P. GRAVES & A. GRAVES, *LIVES FROM PLUTARCH* (1966) [hereinafter cited as *LIVES FROM PLUTARCH*].

228. Aristides lived in Athens from 530-468 B.C. *Id.* at 21.

229. I F. POLLACK & F. MATTLAND, *THE HISTORY OF ENGLISH LAW* xxvii (2d ed. 1899), states that at the time of Pericles, and even Demosthenes, there was a great deal of law, but no class of persons answering to the title of judge or counselors. *LIVES FROM PLUTARCH*, *supra* note 227, at 23-27, states that Aristides frequently was asked to referee disputes between private parties and that he was an army general.

230. E. WHITE, *supra* note 223, at 82.

231. *Id.* at 81.

232. *Id.* at 81-82.

233. *Id.* at 86-87.

convicted, would be subject to banishment or death.<sup>234</sup> This form of recall did not survive the formation of the empire.<sup>235</sup> The jurisprudence of the empire makes no note of the recall device in the Twelve Tables, Gaius' Institutes, the Rules of Ulpian, the Opinions of Paulus, or the Institutes, Digests and Code of Justinian.<sup>236</sup>

Our English forbears of the common-law tradition had no recall provision. Since recall is essentially an electoral political device, their system obviated its inclusion. From the inception of the *curia regis*<sup>237</sup> to the present judicial system, all judicial officers were appointed by the Crown and are theoretically appointed by the Crown today. Since election to the office of judge is not the method used, the recall device is unnecessary.

The forefathers of the United States, however, on disengaging from England, saw fit to include recall in the Articles of Confederation.<sup>238</sup> During its sessions, the Continental Congress took up the issue of recall. On May 29, 1787, at the Philadelphia Constitutional Convention, Edmund Randolph, delegate from Virginia, offered a proposal that the members of the popularly elected branch of the national legislature be subject to recall.<sup>239</sup> The recall proposition was short-lived and was excised without debate on a motion of Charles Pinckney of South Carolina at a committee of the whole meeting on June 12, 1787.<sup>240</sup>

234. *Id.* at 87-88.

235. *Id.* at 88.

236. S. SCOTT, *THE CIVIL LAW* 1-17 (1932).

237. Henry II formed the *curia regis* at Westminster in 1178. 2 F. POLLACK & F. MAITLAND, *supra* note 229, at 153-56.

238. Articles of Confederation art. V (dated 1778, but executed by its signators at various dates through March 1, 1781):

For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State, *to recall its delegates*, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year. (emphasis added).

239. JOURNAL OF THE FEDERAL CONVENTION KEPT BY JAMES MADISON 61 (E. Scott ed. 1893) [hereinafter cited as JOURNAL OF THE FEDERAL CONVENTION]; 1 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 20 (1937).

240. JOURNAL OF THE FEDERAL CONVENTION, *supra* note 239, at 159; 1 M. FARRAND, *supra* note 239, at 210.

The issue lay dormant until the progressive political philosophy of reform swept across the United States at the turn of the twentieth century. In the early 1900's, the progressive movement's most famous demand was for initiative, referenda and recall.<sup>241</sup> Wisconsin, a premiere progressive state, holds the distinction of being the first to adopt the direct primary,<sup>242</sup> to require legislators to record roll call votes,<sup>243</sup> and to create civil service,<sup>244</sup> industrial,<sup>245</sup> insurance,<sup>246</sup> railroad<sup>247</sup> and tax commissions.<sup>248</sup> While Wisconsin's movement wielded enormous influence in other states, it was itself influenced by the populist reform movements in California and Oregon. In 1908 Oregon was the first state to adopt recall as part of its reform movement.<sup>249</sup> Wisconsin adopted a recall statute for city officials in 1911.<sup>250</sup> However, when state, county, congressional, judicial or legislative recall was proposed, battle was joined. Protagonists centered their arguments on the judicial field. Progressives argued that government, especially the judiciary with its long terms in office, was controlled by special interests, and recall was the tool to return control of the government to the people. Their opponents argued that, because judges are frequently called upon to render seemingly unpopular decisions, an independent judiciary would be destroyed if its members continuously had to gauge a decision's impact on an unenlightened and overzealous electorate. Despite the opposition of the American and Wisconsin Bar Associations and a united state judiciary,<sup>251</sup> the Wisconsin legislature presented a constitutional referendum on recall of judges to the people in 1914, but it

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241. B. MAXWELL, *supra* note 2, at 201.

242. *Id.* at 196.

243. *Id.*

244. *Id.* at 75.

245. *Id.* at 198.

246. *Id.* at 197.

247. *Id.* at 75.

248. *Id.* at 199.

249. *Id.* at 199-201; A. MACDONALD, *supra* note 220, at 362.

250. 1911 Wis. Laws ch. 635 (codified as amended at Wis. STAT. § 9.10(4) (1979)).

251. J. HURST, *THE GROWTH OF AMERICAN LAW* 360 (1950); Milwaukee Sentinel, Jan. 7, 1914, § 1, at 1, col. 1; Milwaukee Sentinel, Aug. 29, 1912, § 1, at 3, col. 3.

was soundly defeated.<sup>252</sup>

Recall of all elected officials was finally adopted as an amendment to the Wisconsin Constitution by a 1926 referendum of the people.<sup>253</sup> This referendum had the same organized opposition, but it came too little and too late. This time, the bar and the judiciary organized their opposition campaign less than a week before the referendum vote.<sup>254</sup> Even though the constitutional recall amendment was self-executing, an enabling statute was passed by the legislature in 1933.<sup>255</sup> Wisconsin is one of thirteen states that now have constitutional recall of elected officials. Six states except judges from the recall provision.<sup>256</sup> Fifteen additional states have the recall process available only for local units of government.<sup>257</sup>

In the fifty-five years of this remedy's existence in Wisconsin, the fears of its opponents have not materialized as far as any part of the electoral body politic is concerned. It is an arduous task to implement recall. The petitioners have sixty days to accumulate the electors' signatures which must

252. BLUE BOOK (1981-1982), *supra* note 19, at 241 (the statewide vote was 144,386 against and 81,628 for).

253. WIS. CONST. art. XIII, § 12 (1926, amended 1981). *See supra* note 221; BLUE BOOK (1981-1982), *supra* note 19, at 241 (the statewide vote tally was 205,868 for and 201,125 against).

254. Milwaukee J., Oct. 29, 1926, § 1, at 1, col. 1 & at 8, col. 1; Milwaukee J., Oct. 25, 1926, § 2, at 1, cols. 1 & 7.

255. 1933 Wis. Laws § 1, ch. 44 (codified as amended at WIS. STAT. § 9.10 (1979)). *See* WIS. CONST. art. XIII, § 12 (1926, amended 1981). *See supra* note 221: "This article shall be self-executing and all of its provisions shall be treated as mandatory. Laws may be enacted to facilitate its operation, but no law shall be enacted to hamper, restrict, or impair the right of recall."

256. The states with recall are: ALASKA CONST. art. XI, § 8; ARIZ. CONST. art. VIII; CAL. CONST. art. II, §§ 13-20; COLO. CONST. art. XXI; IDAHO CONST. art. VI, § 6; KAN. CONST. art. 4, § 3; LA. CONST. art. X, § 26; MICH. CONST. art. II, § 8; NEV. CONST. art. 2, § 9; N.D. CONST. art. III, § 1; OR. CONST. art. II, § 18; WASH. CONST. art. I, §§ 33, 34; WIS. CONST. art. XIII, § 12.

Those that except judges from recall are Alaska, Idaho, Kansas, Louisiana, Michigan and Washington. THE BOOK OF THE STATES, *supra* note 9, at 198.

257. ARK. STAT. ANN. § 19-817 (1980); GA. CODE ANN. § 89-1901 (1980); MINN. STAT. ANN. § 410.20 (West Supp. 1982); MO. REV. STAT. §§ 73.550, 74.200 & 75.350 (1952); MONT. CODE ANN. § 2-16-601 (1981); NEB. REV. STAT. §§ 23-2010, 14-209 & 19-613.01 (1977); N.J. STAT. ANN. § 40:81-6 (West Supp. 1982-1983); OHIO REV. CODE ANN. § 705.92 (Page 1976); WYO. STAT. § 15.1-207 (1957).

THE BOOK OF THE STATES, *supra* note 9, at 198, also names Hawaii, Illinois, Iowa, Maine, Oklahoma, South Carolina and Texas.

amount to twenty-five percent of the previous gubernatorial election tally in the recall district. The petitions are filed with the clerk of the electoral district who certifies the petitions and the signatures within three days. Once certified, the electoral district clerk must set a special election forty to forty-five days after the date the petitions are filed.<sup>258</sup> Given this formidable task, there have been only eight recall procedures attempted against judges in this state, seven of which can be verified.<sup>259</sup> One judge resigned; three sets of petitions failed for insufficient signatures; two went to recall election with the judges retaining their posts on the bench; and one resulted in the recalled judge losing his post.

In January of 1948, recall petitions were circulated against Jackson County Judge Harry M. Perry of Black River Falls, Wisconsin. Newspaper accounts credit a businessmen's association with organizing the drive because of claimed misappropriations by the judge of county welfare funds.<sup>260</sup> Judge Perry resigned from the county bench on January 31, 1948.<sup>261</sup>

Petitions were also circulated for recall of Milwaukee County Traffic Judge John E. Krueger on March 16, 1962, for claimed erratic bench conduct.<sup>262</sup> The petitions were quickly withdrawn when the supreme court transferred Krueger to small claims work, thus eliminating the necessity for the recall action.<sup>263</sup>

Circuit Court Judge Ronald D. Keberle of Wausau found himself subject to recall petitions in October of 1978. A committee was registered with the state elections board to promote the recall. The petitions were circulated in retalia-

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258. WIS. CONST. art. XIII, § 12, *supra* note 221; WIS. STAT. § 9.10(1)-(2) (1979).

259. In 1927, recall petitions were filed in the Forest County Clerk's office at Crandon, Wisconsin, against County Judge S.J. Conway. 1 WIS. BAR BULL. 1, 14 (1927). This writer personally interviewed the present county clerk, Dora James, who could not verify from the Forest County records that recall petitions were filed, but could verify that no election or special election for county judge occurred in Forest County in 1927. BLUE BOOK (1923), *supra* note 19, at 314, notes that an S.J. Conway was county clerk but later editions do not list any S.J. Conway as judge. BLUE BOOK (1927), *supra* note 19, at 596, lists T.J. Conway as county judge as does BLUE BOOK (1925), *supra* note 19, at 635, and BLUE BOOK (1931), *supra* note 19, at 409.

260. Milwaukee Sentinel, Jan. 23, 1948, § 1, at 1, col. 3.

261. BLUE BOOK (1948), *supra* note 19, at 487.

262. Milwaukee Sentinel, Mar. 16, 1962, § 2, at 1, col. 1.

263. Milwaukee Sentinel, Mar. 17, 1962, § 1, at 1, col. 6.

tion for a court decision.<sup>264</sup> However, no petitions were ever filed with the county clerk.<sup>265</sup>

Milwaukee County Circuit Court Judge Christ T. Sera- phim was the subject of a concerted effort of recall, claiming his conduct on and off the bench was, at best, injudicious.<sup>266</sup> The circulation of petitions began on March 31, 1979.<sup>267</sup> A newspaper account stated that 79,000 signatures were needed; the petitioners fell short by obtaining only 30,000.<sup>268</sup>

James W. Karch, Sauk County Circuit Court Judge from Baraboo, was the subject of another short-lived recall attempt. A losing, disgruntled businessman litigant attempted a one-man campaign that failed for lack of public interest.<sup>269</sup>

Two thousand four hundred verified signatures (the required number being 1,436) were on petitions filed with, and certified by, the Juneau County Clerk to force County Judge William R. Curren into a special recall election set by the clerk for November 1, 1977.<sup>270</sup> Judge Curren had held office since 1969. While the claimed problems with the judge allegedly had been smoldering for a long period, the spark for the recall petition was the judge's alleged mishandling of a drug-related case.<sup>271</sup> Judge Curren retained his judicial seat in the winner-take-all recall election, outdistancing his nearest rival by 478 votes.<sup>272</sup>

During a May 25, 1977, dispositional hearing concerning

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264. Milwaukee J., Oct. 28, 1978, § 2, at 13, col. 1.

265. Because of the lack of any further news reporting of this recall venture, on March 2, 1981, the writer personally interviewed Judge Keberle who advised the writer that no petitions with signatures were ever filed.

266. Milwaukee J., Apr. 19, 1979, § 2, at 12, col. 2.

267. Milwaukee Sentinel, May 16, 1979, § 2, at 12, col. 7.

268. Milwaukee J., July 30, 1979 § 1, at 1, col. 8.

269. This information was gleaned from verbal reports of judicial gossip. It was verified when the writer personally interviewed Judge Karch on March 2, 1981.

270. Milwaukee Sentinel, Sept. 23, 1977, § 1, at 10, col. 3.

271. *Id.*

272. Milwaukee J., Nov. 2, 1977, § 1, at 22, col. 1. (The unofficial returns noted that the vote tally was: William R. Curren with 3,293 votes; John Eakins with 2,819 votes; and Michael Solovey with 1,096 votes.) *But see* BLUE BOOK (1981-1982), *supra* note 19, at 244, 872-74.

The winner-take-all recall election provision in WIS. CONST. art. XIII, § 12 (1926) has been amended to provide for a separate primary recall election when more than one candidate files sufficient nomination papers in opposition to the incumbent, to be followed by an election between the top two vote recipients in the primary election. This amendment was ratified by a vote of the people on April 7, 1981, by a vote of

a juvenile found delinquent for participating in a gang rape which occurred inside a Madison high school, Judge Archie Simonson made a comment that the juvenile boy was "react-

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366,635 in favor and 259,820 against. The present constitutional recall provision, Wis. CONST. art. XIII, § 12 (1981), reads:

The qualified electors of the state, of any congressional, judicial or legislative district or of any county may petition for the recall of any incumbent elective officer after the first year of the term for which the incumbent was elected, by filing a petition with the filing officer with whom the nomination petition to the office in the primary is filed, demanding the recall of the incumbent.

(1) The recall petition shall be signed by electors equalling at least twenty-five percent of the vote cast for the office of governor at the last preceding election, in the state, county or district which the incumbent represents.

(2) The filing officer with whom the recall petition is filed shall call a recall election for the Tuesday of the 6th week after the date of filing the petition or, if that Tuesday is a legal holiday, on the first day after that Tuesday which is not a legal holiday.

(3) The incumbent shall continue to perform the duties of the office until the recall election results are officially declared.

(4) Unless the incumbent declines within 10 days after the filing of the petition, the incumbent shall without filing be deemed to have filed for the recall election. Other candidates may file for the office in the manner provided by law for special elections. For the purpose of conducting elections under this section:

(a) When more than 2 persons compete for a non-partisan office, a recall primary shall be held. The 2 persons receiving the highest number of votes in the recall primary shall be the 2 candidates in the recall election, except that if any candidate receives a majority of the total number of votes cast in the recall primary, that candidate shall assume the office for the remainder of the term and a recall election shall not be held.

(b) For any partisan office, a recall primary shall be held for each political party which is by law entitled to a separate ballot and from which more than one candidate competes for the party's nomination in the recall election. The person receiving the highest number of votes in the recall primary for each political party shall be that party's candidate in the recall election. Independent candidates and candidates representing political parties not entitled by law to a separate ballot shall be shown on the ballot for the recall election only.

(c) When a recall primary is required, the date specified under sub. (2) shall be the date of the recall primary and the recall election shall be held on the Tuesday of the 4th week after the recall primary or, if that Tuesday is a legal holiday, on the first day after that Tuesday which is not a legal holiday.

(5) The person who receives the highest number of votes in the recall election shall be elected for the remainder of the term.

(6) After one such petition and recall election, no further recall petition shall be filed against the same officer during the term for which he was elected.

(7) This section shall be self-executing and mandatory. Laws may be enacted to facilitate its operation but no law shall be enacted to hamper, restrict or impair the right of recall.

ing normally because of the permissiveness in the City [of Madison] and [the] provocative clothing of women." He then ordered the juvenile placed under close supervision in the juvenile's home for one year.<sup>273</sup> This and other personal comments in the record gained Judge Simonson the vocal enmity of both liberals and conservatives, with the liberals claiming he was insensitive to the violence of rape because rape is not a "normal reaction,"<sup>274</sup> and the conservatives claiming the disposition meted out was insufficient for the crime.<sup>275</sup> Spearheaded by the National Organization for Women, the Dane County Committee to Recall Judge Simonson was formed.<sup>276</sup> A coalition of feminist groups was joined by such diverse and politically unsophisticated units as parents, teachers and school principals. Judge Simonson subsequently exacerbated the situation by making public statements asking "should we punish severely a 15 or 16 year old who reacts . . . normally" and stating that "women [are] sex objects [though he did not say he approved of them being such] and they should stop teasing men with provocative clothing."<sup>277</sup> The local and state newspapers' almost unanimous protest of the judge's statements ultimately snowballed to national editorial reprobations.<sup>278</sup>

The recall committee filed petitions containing 36,343 signatures (with 21,049 needed) on July 25, 1977.<sup>279</sup> The Dane County Clerk certified 35,319 of those and set a recall election for September 7, requiring opponents' nomination papers to be filed in the clerk's office no later than August 10 at 5 p.m.<sup>280</sup> Judge Simonson was defeated in the September

273. Milwaukee J., May 27, 1977, § 1, at 1, col. 6.

274. Milwaukee J., May 30, 1977, § 1, at 10, col. 1.

275. Milwaukee J., May 31, 1977, § 1, at 9, col. 5.

276. Milwaukee J., June 3, 1977, § 1, at 1, col. 2.

277. Milwaukee J., June 5, 1977, § 1, at 1, col. 1.

278. Milwaukee J., June 9, 1977, § 1, at 20, col. 1 & June 10, 1977, § 1, at 15, col. 5, contained editorials of the Milwaukee Journal, the Racine [Wisconsin] Journal Times, the Los Angeles Times, the Green Bay [Wisconsin] Press Gazette and the Valley News of Lebanon, New Hampshire.

279. Milwaukee Sentinel, July 29, 1977, § 1, at 9, col. 1.

280. Records of the certification and recall election are on file in the Dane County, Wisconsin clerk's office under the date of June 28, 1977. See WIS. STAT. § 9.10(3)(c) (1979). The recalled official is automatically on the ballot unless he or she resigns. Opposing candidates must file nomination papers under the usual procedure

7 election.<sup>281</sup>

On December 22, 1981, Grant County Circuit Court Judge William L. Reinecke sentenced one Ralph Snodgrass to three years probation with the first ninety days to be served in the Crawford County jail under the Wisconsin Huber Law,<sup>282</sup> after conviction of the crime of first degree sexual assault.<sup>283</sup> The victim was a five year old girl. Snodgrass was acknowledged to be mentally retarded and had been living with the victim's mother prior to the incident. Apparently, Snodgrass and the mother had engaged in sexual activity in the presence of the child. At the sentencing, Judge Reinecke stated:

"I am satisfied that we have an unusual sexually promiscuous lady and that this man just did not know enough to knock off her advances on that occasion and allowed the contact to take place. Not initiated by him. I don't think it was initiated by him. It was initiated by him and the mother perhaps in having sexual contacts in view of that young lady.

"But no way do I believe he initiated the sexual contact that did take place and I would be quite satisfied that being an unusual type lady that he is probably not going to come into contact with another one where it will ever occur again. I don't think it will."<sup>284</sup>

This statement caused outraged citizens to form a committee to commence recall petitions. They named themselves Citizens for Children. These supporters of the recall, as in the Simonson case above, were concerned with the judge's insensitivity in characterizing a five year old child as being sexually promiscuous. Other supporters opposed the

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of nomination for a primary election four weeks preceding the recall election to have their names placed on the ballot of the special election.

281. Milwaukee J., Sept. 8, 1977, § 1, at 1, col. 6, reports the unofficial vote tally as follows: Moria Krueger, 27,244; Archie Simonson, 18,435; Daniel Moeser, 15,250; William Bradford Smith, 8,446; Robert Burr, 5,190; and Worth S. Piper, 3,342.

282. WIS. STAT. § 56.08 (1979). The statute is named after the legislator who authored the original, innovative proposal. It allows anyone sentenced to the county jail to leave the jail during working hours and return at the work day's finish.

283. WIS. STAT. § 940.225(1) (1979) is a class B felony which carries a maximum penalty of imprisonment not to exceed twenty years. See WIS. STAT. § 939.50(3)(b) (1979).

284. Milwaukee J., Jan. 17, 1982, § 1, at 17, col. 1.

leniency of the sentence.<sup>285</sup> Forty-one lawyers, approximately 95% of the profession in Grant County, signed a statement supporting the judge and opposing the recall movement.<sup>286</sup> Despite the fact that the judge publicly apologized for the statement, the recall supporters continued their effort to obtain the needed 3,798 signatures on their petitions.<sup>287</sup> On March 26, 1982, petitions with 5,351 signatures were filed with the state elections board in Madison, Wisconsin.<sup>288</sup>

Pursuant to the Wisconsin Constitution and the enabling statute, the elections board certified the sufficiency of the petitions and set the recall primary election for May 11, 1982.<sup>289</sup> The judge immediately announced his candidacy.<sup>290</sup>

Judge Reinecke survived the recall primary election,<sup>291</sup> receiving a majority vote of the electorate and thereby avoiding the need for a subsequent runoff election which would otherwise have been required by the 1981 recall constitutional amendment.<sup>292</sup> In the official vote canvass the judge received two more votes and won the election by a 50.8% majority.<sup>293</sup> This did not end the judge's electoral problems. One of his opponents demanded a recount in which he questioned the handling of many of the nearly 200 absentee ballots cast.<sup>294</sup> After the recount the state elections commission confirmed the election results.<sup>295</sup> That same opponent appealed to the circuit court for nullification of the recount. Reserve Judge John A. Fiorenza of Milwaukee, sitting in the Grant County Circuit Court, ruled that there were administrative mistakes in the election but that they were not serious enough to void the election. He therefore

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285. Milwaukee Sentinel, Jan. 12, 1982, § 2, at 10, col. 4.

286. Milwaukee J., Jan. 16, 1982, § 1, at 7, col. 3.

287. Milwaukee J., Jan. 25, 1982, § 2, at 3, col. 1.

288. Milwaukee J., March 27, 1982, § 1, at 7, col. 1.

289. Milwaukee J., April 1, 1982, § 1, at 4, col. 1.

290. Milwaukee J., April 2, 1982, § 1, at 2, col. 3.

291. Milwaukee Sentinel, May 12, 1982, § 1, at 4, col. 1. The unofficial election returns show Judge Reinecke receiving 7,033 votes, James Dahlquist 6,051 and Norman Kvalheim 745.

292. WIS. CONST. art. XIII, § 12(4)(a); *see supra* text accompanying note 272.

293. Milwaukee J., May 14, 1982, § 1, at 12, col. 4.

294. Milwaukee J., May 19, 1982, § 1, at 12, col. 1.

295. Milwaukee J., May 26, 1982, § 1, at 15, col. 1.

dismissed the lawsuit.<sup>296</sup>

Recall is essentially a political device, and because of the swiftness of its occurrence there is, therefore, a paucity of case law, at least in Wisconsin, on the subject. The case law of Wisconsin addresses directly the recall of city officials and the sufficiency of the petitions, but only peripherally the recall of state, county, congressional, judicial and legislative officers. In the case of city recall petitions, courts will look to the fact that the petition states the reasons for the recall, but not to the correctness or the truth or falsity of the reasons,<sup>297</sup> and courts will look to the sufficiency of the number of signatures and the date of the signatures to see if they were obtained within the statutory time limits prior to filing.<sup>298</sup> Judicial scrutiny is limited because statutory provisions relating to recall are "liberally interpreted in favor of the electorate, because power granted to remove certain elected officials (city) through the recall procedure is political in nature, hence it is for the people and not the courts to determine the merits of the reasons stated in a recall petition."<sup>299</sup> The same is not true for state, county, congressional, judicial or legislative recall petitions because neither the constitution nor the statutes require the petitioners to state any reasons.<sup>300</sup>

Recall, in Wisconsin as elsewhere, has reached neither the highest hopes of its altruistic originators, nor the darkest prophecies of its cynical opponents. Wherever it has been adopted, it has seldom been abandoned—the public is too well satisfied with the sense of security which the existence of recall conveys to permit it to be discarded.

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296. *Dahlquist v. Reinecke*, No. 82-CV-272 (Grant County Cir. Ct. June 8, 1982).

297. *Beckstrom v. Kornsi*, 63 Wis. 2d 375, 382-86, 217 N.W.2d 283, 286-89 (1974).

298. *State ex rel. Baxter v. Beckley*, 192 Wis. 367, 369-72, 212 N.W. 792, 793-94 (1927).

299. *Mueller v. Jensen*, 63 Wis. 2d 362, 374, 217 N.W.2d 277, 283 (1974).

300. Wis. CONST. art. XIII, § 12; Wis. STAT. § 9.10(1) & (2)(a); *Beckstrom v. Kornsi*, 63 Wis. 2d 375, 381, 383, 217 N.W.2d 283, 287-88 (1974). It must be noted that § 9.10(4), which deals with recall of municipal officers and all of its legislative predecessors back to the original 1911 Wis. Laws ch. 635 (codified as amended at Wis. STAT. § 9.10(4) (1979), required recall petitions of municipal officers to state reasons for the recall.

## VII. MANDATORY RETIREMENT

Mandatory retirement provisions are uniform dates arbitrarily selected by governments which decree when judicial offices must be vacated. This device is employed to remove disabled or elderly judges. Certainly the uniformity of compulsory retirement produces some waste of judicial talent. It was unfortunate for New York to lose Chancellor James Kent when he was forced off the bench at age sixty. Reciprocally, however, it was fortunate for the American legal community because Kent spent the next twenty years writing *Kent's Commentaries*.<sup>301</sup> Other examples of long-lived and illustrious service to their respective countries include Lord Halsbury of England, who served that court system until he was almost ninety and Oliver Wendell Holmes, who served on the United States Supreme Court to the age of ninety-three.<sup>302</sup> These men are, of course, the exceptions, for some judges are too old at fifty.<sup>303</sup> It is important, therefore, to the continuance and sustenance of a vigorous judiciary that an arbitrary age balance be struck to retire mentally or physically disabled judges.

Forced retirement requires complementary pension systems. But like forced retirement provisions, pension systems for judges are relatively new. England had no judicial pension until 1959 and since then has required high court judges to retire at seventy-five.<sup>304</sup> Although our federal judiciary has no mandatory retirement, it has a remarkably enlightened pension system: federal judges can resign, go on senior status<sup>305</sup> or resign for disability.<sup>306</sup>

Most states of the union have adopted either constitutional<sup>307</sup> or statutory<sup>308</sup> mandatory retirement for their judi-

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301. J. KENT, COMMENTARY ON AMERICAN LAW (5th ed. 1840).

302. Shartel, *supra* note 21, at 137 n.18.

303. *Id.* at 137.

304. 10 HALSBURY, *supra* note 27, § 867; *see supra* note 27 and accompanying text.

305. 28 U.S.C. § 371(a) (1976) provides that any judge or justice, after reaching age 70, may resign at full pay with 10 years service. Section 371(b) provides that any judge or justice after reaching age 65 with 15 years service can resign at full pay.

306. 28 U.S.C. § 372 (1976) provides that any disabled judge or justice with 10 years service can resign at full pay, and those with less than 10 years service are entitled to half pay.

307. Those states that have constitutional mandatory retirement are: ALASKA

ciary and have settled on arbitrary age limits between the years seventy and seventy-five. The harshness of mandatory retirement has been ameliorated in all states except Indiana, by constitutional or statutory provisions that permit part-time continuance of judicial service after retirement.<sup>309</sup> Four states, Colorado, Connecticut, Louisiana and New York, have added cost of living automatic adjustment provisions to their judicial retirement schemes.<sup>310</sup>

The first publicized mention of the problem of aged and disabled judges in Wisconsin is found in a 1915 report<sup>311</sup> to the legislature on court reorganization. Wisconsin's Chief Justice John B. Winslow was the chairman of the committee.<sup>312</sup> The assigned task of the committee was to find a way for statutory reorganization of the courts but the report also discussed the "delicate problem" of age taking its toll on the members of the circuit court. The committee proposed a constitutional mandatory retirement age of seventy and leg-

CONST. art. IV, § 11; ARIZ. CONST. art. 6, § 39; COLO. CONST. art. VI, § 23; CONN. CONST. art. 5, § 6; FLA. CONST. art. V, § 8; HAWAII CONST. art. VI, § 3; LA. CONST. art. V, § 23(B); MD. CONST. art. IV, § 3; MICH. CONST. art. VI, § 19; MO. CONST. art. V, § 26; N.H. CONST. Pt. 2d. art. 78; N.J. CONST. art. VI, § 6(3); N.Y. CONST. art. VI, § 25(b); OHIO CONST. art. IV, § 6(c); OR. CONST. art. VII, § 1(a); PA. CONST. art. V, § 16(b); TEX. CONST. art. V, § 1(a); VT. CONST. ch. II, § 35; WASH. CONST. art. IV, § 3(a); WIS. CONST. art. VII, § 24; WYO. CONST. art. V, § 5. The Commonwealth of Puerto Rico also has a constitutional mandatory retirement. P.R. CONST. art. V, § 10.

308. ALA. CODE § 12-18-7 (1975); ALASKA STAT. § 22.25.010 (1976); ARK. STAT. ANN. § 22-902 (Supp. 1981); CAL. GOV'T CODE § 75075 (West 1976); D.C. CODE ENCYCL. § 11-1502 (West Supp. 1978-1979); IDAHO CODE § 1-2007 (1979); ILL. ANN. STAT. ch. 37, § 23.71 (Smith-Hurd 1972); IND. CODE ANN. § 33.2.1-5-1 (Burns 1975); IOWA CODE ANN. § 605.24 (West Supp. 1982-1983); KAN. STAT. ANN. § 20-2608 (Supp. 1980); ME. REV. STAT. ANN. tit. 4, § 5 (Supp. 1981-1982); MINN. STAT. ANN. § 490.025 (West Supp. 1982); MONT. CODE ANN. § 19-5-504 (1981); NEB. REV. STAT. § 24-708 (1979); N.C. GEN. STAT. § 135.57 (Supp. 1981); OR. REV. STAT. § 1.314 (1981); S.C. CODE ANN. § 9-7-30 (Law. Co-op. Supp. 1981); S.D. COMP. LAWS ANN. § 16.1-4.1 (1979); UTAH CODE ANN. § 49-7a-39 (1981); VA. CODE § 51.167 (1982); WIS. STAT. § 41.11(2) (1979).

309. T. PYNE, JUDICIAL RETIREMENT PLANS 4-5 (1980).

310. *Id.*

311. Report of the Joint Committee of the Legislature of Wisconsin on Investigation of the Organization of the System of Courts in Wisconsin (1915) [hereinafter cited as Winslow].

312. Justice Winslow served as a circuit judge of the 1st Circuit of Wisconsin from 1883 to 1891 and as a justice of the Supreme Court of Wisconsin from 1891 to 1920. 174 Wis. xxxii-viii (1922). He authored *The Story of a Great Court*, *supra* note 56, and was a founder and incorporator of the American Judicature Society, along with Herbert Harley, Albert Kales and Roscoe Pound. See *infra* notes 364-65.

isolation providing half pay after twenty years service.<sup>313</sup> The report was not heeded by the legislature, which took no steps toward reorganizing the court system nor toward providing judicial pensions.

This is not to say that there were no legislative overtures proposing judicial retirement. In 1897 a bill was introduced in the Wisconsin legislature calling for mandatory retirement without a pension. From 1907 to 1921 some form of judicial retirement with pension benefits was before every biannual legislative session.<sup>314</sup> Again in 1929, 1937 and 1949 proponents presented judicial retirement and pension legislation.<sup>315</sup> In 1951 supreme court justices and circuit judges were included in the state employees' retirement plan at their option.<sup>316</sup> Those who opted into the plan were required to retire at age seventy.<sup>317</sup> Voluntary entry into the retirement system ceased by legislation in 1957, when all justices and circuit judges were mandatorily included in the retirement plan and were required by statute to retire on reaching the age of seventy.<sup>318</sup> All of the state's county judges, except those in Milwaukee County who were included in a Milwaukee County retirement plan, came into the retirement system in 1962 and were required to retire at seventy.<sup>319</sup>

The legislative opponents to any judicial entry into the state employee retirement system argued throughout the period that these proposals ran counter to the constitutional prohibition against extra compensation for incumbent judges. But once the judicial pension mandatory retirement plan was in place, no constitutional challenge was ever initiated. Two reasons can be given for the failure to challenge the judicial retirement statute. First, no one really cared.

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313. Winslow, *supra* note 311, at 7-8.

314. Comment, *A Retirement System for Judges and Justices in Wisconsin*, 1950 WIS. L. REV. 662, 663-64.

315. *Id.* at 664-65.

316. 1951 Wis. Laws ch. 475; WIS. STAT. § 66.901(5)(i) (1952) (currently codified at WIS. STAT. § 41.02(14) (1979)).

317. WIS. STAT. §§ 66.901(5)(i) & 66.906(1a) (1952) (currently codified at WIS. STAT. §§ 41.02(14) & 41.11(2) (1979)).

318. 1957 Wis. Laws ch. 527; WIS. STAT. § 66.903(1)(a) (1957) (currently codified at WIS. STAT. § 41.07 (1979)).

319. 1961 Wis. Laws ch. 642; WIS. STAT. § 66.89 (1962) (currently codified at WIS. STAT. § 41.07(3) (1979)).

Second, those who would have challenged the statute knew that the Wisconsin Supreme Court had rebuffed challenges to the constitutionality of the state teachers' retirement plan.<sup>320</sup> The court rejected the argument that the teachers' pension plan was compensation for past services in violation of the constitution by reasoning that the pension plan was not extra compensation for past services but an inducement for future services. It added that this was a valid legislative objective because the state had an interest in having experienced teachers remain in their positions to stabilize and improve the state educational system.<sup>321</sup>

Statutory mandatory retirement continued in Wisconsin until the Blue Ribbon Committee's report of 1973,<sup>322</sup> which outlined a plan for reorganizing the court structure and included a provision for constitutional mandatory judicial retirement at age seventy. This proposal was adopted by the people's referendum<sup>323</sup> in 1977 with a resounding two-to-one majority vote.<sup>324</sup> The constitutional mandatory retirement requirement adoption affected only the fourteen Milwaukee County judges,<sup>325</sup> because all other judges were not only

320. *State ex rel. Dudgeon v. Levitan*, 181 Wis. 326, 193 N.W. 499 (1923). *Accord* *Slate v. Noll*, 474 F. Supp. 882 (W.D. Wis. 1979), *aff'd*, 444 U.S. 1107 (1980). The majority opinion of this three-judge federal district court panel affirmed the constitutionality of the Wisconsin employee retirement fund requiring mandatory retirement of all employees at age 65.

321. *Dudgeon v. Levitan*, 181 Wis. 326, 339-45, 193 N.W. 499, 504-06 (1923).

322. Citizens Study Committee on Judicial Organization, Report to Governor Patrick J. Lucey 124-27 (1973) [hereinafter cited as Blue Ribbon Committee Report]. "Blue Ribbon Committee" is the name given to the committee by the Wisconsin media and employed throughout the committee's three-year existence. *See also infra* note 389 and accompanying text.

323. WIS. CONST. art. VII, § 24:

(2) Unless assigned temporary service under subsection (3), no person may serve as a supreme court justice or judge of a court of record beyond the July 31 following the date on which such person attains that age, of not less than 70 years, which the legislature may prescribe by law.

(3) A person who has served as a supreme court justice or judge of a court of record may, as provided by law, serve as a judge of any court of record except the supreme court on a temporary basis if assigned by the chief justice of the supreme court.

*See also* WIS. STAT. § 41.11(2) (1979) which incorporates the compulsory language of WIS. CONST. art. VII, § 24(2).

324. BLUE BOOK (1981-1982), *supra* note 19, at 244. The vote in favor of mandatory retirement was 506,207; the vote against was 244,170.

325. *See supra* note 319 and accompanying text.

compelled to participate in the state retirement fund but were also required by statute to retire at age seventy. The Milwaukee County judges had been participants in the Milwaukee County retirement plan which had, at least at that time, no mandatory retirement rule. These fourteen judges continued in office after their seventieth birthdays but no county judge in Milwaukee ever tried to be reelected after he was over seventy.

Mandatory retirement methods are examples of legislative line drawing in which some people are classified in one manner while others are not. State judges, whether elected on partisan or nonpartisan ballots and whether subject to noncompetitive retention ballots or serving on good behavior, have all been subjected to mandatory retirement at a given age by either state constitution or statutes. This is generally in contrast to the situation of state legislators or chief executives. Therefore, this situation has been a natural breeding ground for challenges by judges on due process and equal protection grounds. Facially, there is little, if any, justification for setting the judiciary apart as a class from the legislative and executive departments of government and arbitrarily concluding that at a given age judges are less capable of continuing to serve the people than are legislators or executives.

The primary question is whether there is a legitimate state interest in the mandatory retirement of judges as a class. Central to the equal protection argument is whether this age classification is subject to the litmus test of strict scrutiny as a suspect class or as an interference with a fundamental right, or subject to the more relaxed rational relationship test to determine the legitimacy of the state's interest in this constitutional or statutory mandatory retirement scheme. A subissue of the equal protection argument is the status of the various classes within the judicial branch itself. This argument comes into play when, for example, appellate judges are allowed to retire at a later age than are trial judges of courts of general jurisdiction, or lower court judges, or when the retirement method employed "grandfathers out" certain judges from mandatory retirement. Central to the due process debate is the validity of the irrebuttable or conclusive presumption that judges, as a

class, become unfit for office when, at the same age, other governmental officeholders do not.<sup>326</sup>

The United States Supreme Court has addressed the equal protection issues raised in challenges to mandatory retirement legislation. One case dealt with mandatory statutory retirement of state police officers<sup>327</sup> and another with federal foreign service officers.<sup>328</sup> In both cases the Supreme Court determined that the legislatively drawn mandatory retirement age line involved neither a suspect class nor a fundamental right which would require application of the strict scrutiny test.<sup>329</sup> The Court determined in both cases that the rational relationship test was applicable and held that the state and the federal governments respectively had exhibited a legitimate interest in mandatory retirement at the age imposed, and that such age limitation was rationally related to achieving that objective.<sup>330</sup>

No case contesting judicial mandatory retirement has reached the United States Supreme Court, but a handful of cases have been litigated in the federal or state appellate courts.<sup>331</sup> All of these courts have upheld the constitutionality of state constitutional or statutory age-related mandatory retirement for judges. Those that have addressed the equal protection issue (that is, the argument that judges are classified differently than are legislators and executives) have stated that age is not a suspect category and that a judge's interest in the job, even though the judge is elected, is not a fundamental interest requiring strict scrutiny. All these

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326. This author will not attempt an in-depth analysis of the various appellate decisions that have dealt with mandatory retirement. That subject is better left to treatises particularizing the subject matter. See Abramson, *Compulsory Retirement, the Constitution and the Murgia Case*, 42 Mo. L. REV. 25 (1977).

327. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976).

328. *Vance v. Bradley*, 440 U.S. 93 (1979).

329. *Id.* at 96-97; *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-14 (1976).

330. *Vance v. Bradley*, 440 U.S. 93, 103-06 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314-17 (1976).

331. *Malmed v. Thornburgh*, 621 F.2d 565 (3d Cir. 1980); *Trafelet v. Thompson*, 594 F.2d 623 (7th Cir.), cert. denied, 444 U.S. 906 (1979); *Rubino v. Ghezzi*, 512 F.2d 431 (9th Cir. 1975); *Boughton v. Price*, 70 Idaho 243, 215 P.2d 286 (1950); *O'Neil v. Baine*, 568 S.W.2d 761 (Mo. 1978); *Grinnell v. State*, 121 N.H. 823, 435 A.2d 523 (1981); *Nelson v. Miller*, 25 Utah 2d 277, 480 P.2d 467 (1971); *Aronstam v. Cashman*, 132 Vt. 538, 325 A.2d 361 (1974).

courts have employed the rational relationship test, and all have determined that the state has a legitimate interest in establishing an age classification for mandatory retirement for judges. Generally, the legitimate interest has been shown by the state's need to weed out those judges who are disabled at the age date; by the fact that some judges cannot handle the rigors of the job as they age; and by the fact that such methods replenish the judiciary by infusion of younger, more vigorous judges.

The equal protection attacks have not rested solely on the claimed differential treatment of age classification for judges as opposed to legislators and executives. The equal protection doctrine has been raised in class actions in which citizens have joined as plaintiffs in the judges' actions. In these lawsuits the added claim is the adverse effect upon the voters' right to vote for the candidate of their choice. The courts have rejected this argument because it presents no substantial federal question.<sup>332</sup>

Another equal protection argument advanced challenges those mandatory retirement plans which set up different age classifications within the judiciary itself (for example, mandatory retirement for supreme court justices at seventy-five with a lower mandatory retirement age for judges in the trial courts). The state courts which have addressed this issue have determined that different age classifications within the judicial class itself do not contravene equal protection.<sup>333</sup>

At one time the United States Supreme Court held that a state can show no legitimate interest in laws establishing ir-rebuttable or conclusive presumptions because such laws are unconstitutionally violative of procedural due process which, minimally, requires notice and hearing standards.<sup>334</sup>

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332. *Trafelet v. Thompson*, 594 F.2d 623, 631-32 (7th Cir.), *cert. denied*, 444 U.S. 906 (1979); *Rubino v. Ghezzi*, 512 F.2d 431, 433 (9th Cir. 1975); *accord Aronstam v. Cashman*, 132 Vt. 538, 544-46, 325 A.2d 361, 365 (1974).

333. *O'Neil v. Baine*, 568 S.W.2d 761, 764 (Mo. 1978); *Nelson v. Miller*, 25 Utah 2d 277, 289, 480 P.2d 467, 476 (1971).

334. Examples of the Supreme Court striking down such statutes are: *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (regulations requiring mandatory maternity leave); *United States Dep't of Ag. v. Murry*, 413 U.S. 508 (1973) (regulations denying food stamps to a household consisting of one or more persons over 18 who had been claimed as a dependent within the preceding two years by taxpayers who were themselves ineligible for food stamps); *Vlandis v. Kline*, 412 U.S. 441 (1973)

However, in the 1975 case of *Weinberger v. Salfi*,<sup>335</sup> the Court seemingly retreated from this rigid posture by restricting the applicability of the irrebuttable presumption approach. Justice Rehnquist, writing for the majority, viewed the wholesale extension of the irrebuttable presumption doctrine of *Stanley v. Illinois*,<sup>336</sup> *Vlandis v. Kline*,<sup>337</sup> and *Cleveland Board of Education v. LaFleur*<sup>338</sup> as a legalistic monstrosity that "would turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution."<sup>339</sup> Justice Rehnquist concluded that legislative bodies, reasonably concerned with the possibility of abuse and reasonably desiring to avoid the abuse, can rationally conclude both that a particular limitation or qualification would protect against the abuse's occurrence and that the expense and other difficulties of individual determination justifies the imposition of a prophylactic rule.<sup>340</sup> This less restrictive standard of review enabled a lower federal court to strike down the mandatory presumption doctrine attack against a mandatory judicial retirement statute enforced in

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(statute mandating that any student who initially applied to attend a state college from out of state could not, during the term of attendance at a state college, apply as a resident of the state); *Stanley v. Illinois*, 405 U.S. 645 (1972) (presuming the natural father of an illegitimate child was unfit for custody of that child); *Bell v. Burson*, 402 U.S. 535 (1971) (statute presuming an uninsured motorist was negligent in an accident and providing that the motorist's license be revoked unless he deposited a cash bond for damages in the amount of the injured party's claimed damages, provisions the statute did not require of insured motorists).

335. *Weinberger v. Salfi*, 422 U.S. 749 (1975). In this case the Supreme Court majority affirmed the validity of 42 U.S.C. § 416(c)(5) (1976), which defined a qualified recipient widow for federal social security benefits as one who was married to the deceased worker for more than nine months before the worker's death, and § 416(e)(2) (1976), which defined a qualified recipient stepdaughter for such benefits who had been a stepdaughter for one year prior to the worker's death. The acknowledged purpose of the law was to prevent benefits to participants in sham marriages. *Id.* at 767. This decision denied the worker's widow social security benefits because she was not married to the worker for nine months prior to his demise.

336. 405 U.S. 645 (1972).

337. 412 U.S. 44 (1973).

338. 414 U.S. 632 (1974).

339. *Weinberger v. Salfi*, 422 U.S. at 772.

340. *Id.* at 777-78. The Court concluded that the duration-of-relation social security test meets this constitutional standard.

Pennsylvania.<sup>341</sup>

It appears at this writing that constitutional and statutory mandatory retirement requirements will withstand constitutional attack on either equal protection or due process grounds. In most cases this arbitrary age limitation is harsh in its application, but there can be little argument that the various states have a legitimate permissible interest in establishing such classifications for the continuance of a healthy vigorous judiciary. Though not essentially a populist issue, the constitutional amendment approving mandatory retirement for Wisconsin's judiciary was a classic example of the populist mood, for the proposal was adopted by better than a two-thirds majority of the state's voters.

#### VIII. ELECTION OF JUDGES<sup>342</sup>

The elected judiciary is pure Americana.<sup>343</sup> It is the result of populist belief that judges, like other elected public officials, should be responsive to the public. This accountability to the people is accomplished by electing judges to stated terms of office.

The founders of this country rejected election of the judicial branch with little discussion. The only mention of popular election of the federal judiciary in the debates on the framing of the United States Constitution is negative.<sup>344</sup> Consequently all federal judges receive their appointments from the President with the advice and consent of the Senate. They hold office during good behavior. Most of the founding states also adopted this common-law method and did not elect their judiciary. Vermont is an exception to this general rule. In its 1793 constitution, Vermont gave to the

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341. *Malmed v. Thornburg*, 621 F.2d 565, 574-76 (3d Cir. 1980). *Accord* *Trafelet v. Thompson*, 594 F.2d 623, 629-30 (7th Cir.), *cert. denied*, 444 U.S. 906 (1979); *O'Neil v. Baine*, 568 S.W.2d 761, 766-67 (Mo. 1978); *Aronstam v. Cashman*, 132 Vt. 538, 545-46, 325 A.2d 361, 365-66 (1974).

342. Historically, PART VIII, ELECTION OF JUDGES would follow PART V, CONVICTION OF A FELONY. Both are 1848 Wisconsin Constitutional remedies; however, since election is an evolving area, it serves as a transition between the traditional remedies and recent methods of judicial accountability.

343. *Jacob, Judicial Insulation—Elections, Direct Participation, and Public Attention to the Courts in Wisconsin*, 1966 WIS. L. REV. 801, 801.

344. 5 J. ELLIOT, *supra* note 4, at 137. James Madison opposed the direct election of members of the Senate and the judiciary. *Id.*

freemen of each county the liberty of choosing the judges of inferior courts.<sup>345</sup> Vermont's scheme of electing lower court judges was followed by Georgia in 1812 and Indiana in 1816.

After Jacksonian democracy came to the fore in the 1830's,<sup>346</sup> a complete change took place in the method of selection and tenure of the judiciary in most state court systems. All but a few states abandoned the appointment system that had become the settled practice of the rest of the civilized world. They amended and wrote their constitutions to provide for popular election of judges to hold office for a short term of years.<sup>347</sup> The basic principle of Jacksonian democracy was the equality in fact of all people. This principle was translated into a variety of political reforms, among them the notion that all public officials, including judges, should be elected.<sup>348</sup> In 1832, Mississippi became the first state to adopt popular election for all of its judiciary.<sup>349</sup> New York, in 1846, was the first former colony to change its constitution to allow election of the whole judicial body.<sup>350</sup> Four other former colonies, Georgia, Maryland, Pennsylvania and Virginia, also joined the movement from an appointed to an elected judiciary. By the time of the Civil War, twenty-four of thirty-four states had established an elected judiciary. Every new state, from Iowa in 1846 to Arizona in 1912, provided for an elected judiciary.<sup>351</sup> In fact, as new states were admitted into the Union, all adopted popular election for some or all judges until the admission of Alaska in 1959.<sup>352</sup>

Wisconsin followed the mainstream of populist political thought in providing for the election of its judiciary.<sup>353</sup> The

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345. VT. CONST. ch. 2, § 9 (1793).

346. L. FRIEDMAN, *supra* note 194, at 111.

347. 5 R. POUND, *supra* note 36, at 418.

348. A. ASHMAN & J. ALFINI, *THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS* 9 (1974).

349. *Id.*; L. FRIEDMAN, *supra* note 194, at 111.

350. A. ASHMAN & J. ALFINI, *supra* note 348, at 9.

351. P. DUBOIS, *FROM BALLOT TO BENCH* 3 (1980).

352. L. BERKSON, S. BELLER & M. GRIMALDI, *JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS* 4 (1981) [hereinafter cited as *JUDICIAL SELECTION*].

353. *JOURNAL/WISCONSIN CONSTITUTIONAL CONVENTION 1846*, *supra* note 53,

Wisconsin founders' reasons for this adoption are eloquently stated in the convention's judiciary subcommittee report of the 1846 convention. The committee laid down the axiom that "the people are the source of all political power, and to them should their officers and rulers be responsible for the faithful discharge of their respective duties."<sup>354</sup> The report objected to life appointments by the executive and legislature, for such appointments would render the judiciary dependent upon these politicians and not upon the people.<sup>355</sup> It rejected the national government's adoption of England's common-law system of an appointed judiciary because "[t]here all judicial power is presumed to reside in the king . . . ."<sup>356</sup> The populist ideal inherent in these deliberations can best be measured by this statement from the report:

Now it is proposed to carry out these principles in the election of our judiciary, as well as other departments of government. And why not? Are not the people so competent to choose in one case as the others, and are they not equally interested to make wise and judicious selections? Why prohibit the exercise of the elective franchise in a single department of government? If it be true, that all power resides in and should flow from the people, is it not true, not only in the part, but in the whole? If false, let us discard the principle entirely; let us at once proclaim to the world that our political theory is a delusion; let us no longer seek to cherish in the hearts of the down-trodden and oppressed millions of Europe, the fond hope of freedom and equal rights, a hope doomed to wither and perish like untimely fruit. But for ourselves we have no such fears. We believe the electors of Wisconsin will judiciously exercise the right of suffrage, however liberally extended, and that they ought to exercise it in the selection of all their officers wherever practicable.<sup>357</sup>

The committee report further alerted the convention to the

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114-15; JOURNAL/WISCONSIN CONSTITUTIONAL CONVENTION 1848, *supra* note 18, 66-67. See *supra* note 11 for the present constitutional election mandate for all courts of record in Wisconsin.

354. JOURNAL/WISCONSIN CONSTITUTIONAL CONVENTION 1846, *supra* note 53, at 108.

355. *Id.* at 109.

356. *Id.*

357. *Id.* at 110. This report was tendered to the convention on October 27, 1846. *Id.* at 104.

problems inherent in partisan elections of judges, which made judges submissive to political parties. The report proposed that judicial elections not be held within thirty days of any general election.<sup>358</sup> The committee concluded its arguments for an elected judiciary with a rather naive assumption that election of able, conscientious and learned judges would foreclose those elected from rendering unjust decisions to secure reelection.<sup>359</sup> The proposed constitution did, however, provide for appointments by the governor when interim vacancies occurred.<sup>360</sup> These arguments won out in both Wisconsin constitutional conventions without any serious opposition. The state has had a nonpartisan elected judiciary since its admission into the Union.

Dissatisfaction with an elected judiciary has been a *cause celebre* of scholars, the American Judicature Society and the American Bar Association (ABA) since early in the twentieth century. Resentment of political party control of judicial candidates in New York in 1870 gave impetus to the movement.<sup>361</sup> The leading spokesperson was Dean Roscoe Pound, who addressed the 1906 ABA convention with his paper, *The Causes of Popular Dissatisfaction With the Administration of Justice*.<sup>362</sup> His chief complaint was that the election of judges put courts into politics and thereby had almost destroyed the traditional respect for the courts.<sup>363</sup> The first bulletin of the American Judicature Society proposed discussions on the selection, retirement and discipline of judges.<sup>364</sup> Albert Kales, a founder of the society, presented the so-called "merit selection plan" to replace par-

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358. *Id.* Section 9 of the proposed judicial article presented by this committee on the organization and functions of the judiciary reads in part: "No election for judges, or any single judge, shall be held within thirty days of any other general election." *Id.* at 115.

359. *Id.* at 111.

360. *Id.* at 115, § 9.

361. A. ASHMAN & J. ALFINI, *supra* note 348, at 10; L. FRIEDMAN, *supra* note 194, at 325-26.

362. 29 REP. ABA 395, 395-417 (1906) (reprinted in 8 BAYLOR L. REV. 1, 6-24 (1956)).

363. *Id.* at 415; see also 5 R. POUND, *supra* note 36, at 420-23.

364. Harley, *Concerning the American Judicature Society, An Attempt to Give a Brief History of a Unique Organization and to Explain Its Objectives*, 20 J. AM. JUD. Soc. 9 (1936).

tisan and nonpartisan elections.<sup>365</sup> He set out "to devise a method of judicial selection that would maximize the benefits and minimize the weaknesses of both the appointment and elective processes."<sup>366</sup> In essence, he sought to preserve the so-called "informed and intelligent choice," which is the strongest feature of the appointment system, while retaining ultimate voter control.<sup>367</sup> The focal point of any merit selection plan is the creation of a nominating commission, appointed by the executive, made up of lawyers and laypersons. The commission generates, screens and submits a list of judicial nominees to the appointing executive who is legally or voluntarily bound to make a selection from the list.<sup>368</sup> The person chosen from the list is appointed and serves for a period of time and then submits his name on a noncompetitive ballot for retention.<sup>369</sup>

The proponents of merit selection and retention plans wanted the two propositions to coexist and complement each other. They did not, however, design retention election to advance democratic principles. Rather they intended it to be a sop to populists. Retention election was designed to provide judges with longer terms of tenure with only a modest amount of accountability. Indeed, those who developed the paradigm preferred life tenure, but they acquiesced to political realities and allowed the public an opportunity to remove judges in extreme cases.<sup>370</sup> These efforts bore first fruit with the initiative referendum vote in Missouri in 1940.<sup>371</sup> Since that time it appears that seven states have completely adopted merit selection and tenure for all courts of record.<sup>372</sup> Thirty-one states have employed commissions to aid the governor in selecting some or all of the judicial officers.<sup>373</sup>

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365. Kales, *Methods of Selecting and Retiring Judges*, 11 J. AM. JUD. SOC. 133-55 (1927). This article is a reprint of the text of an address which Mr. Kales gave at the meeting of the Minnesota Bar Association on August 20, 1914.

366. A. ASHMAN & J. ALFINI, *supra* note 348, at 11.

367. *Id.*

368. *Id.* at 12.

369. *Id.* at 11.

370. S. CARBON & L. BERKSON, *JUDICIAL RETENTION ELECTIONS IN THE UNITED STATES* 65 (1980).

371. MO. CONST. art. V, § 29(a)-(g).

372. *JUDICIAL SELECTION*, *supra* note 352, at 18-30.

373. *Id.* at 6.

Twenty states employ retention elections for some or all of their jurists.<sup>374</sup>

There have been sporadic attempts to initiate merit selection and tenure proposals in Wisconsin. At the Wisconsin State Bar Association's 1934 convention, a committee on selection and tenure, noting the necessity of constitutional change to accomplish this purpose, proposed such a change from the nonpartisan electoral system. The proposal required that a judicial council consisting of the chief justice of the supreme court, the deans of the two state law schools, and seven attorneys not holding judicial office, propose candidates for a vacant judicial office to the governor; the governor was then to make his choice from the three named; the candidate would be appointed to serve during good behavior, but every six years would be subject to a noncompetitive retention election.<sup>375</sup> The bar voted to study the matter further.<sup>376</sup> The committee was continued in 1936<sup>377</sup> and 1937<sup>378</sup> until finally, in 1938, both the committee and its proposal were abandoned for the following reason:

To conclude: Your committee has given a substantial amount of study to the proposals that have been made throughout the country on this very important subject, and feels that if a change in our method of selecting or retaining judges is desirable, the plan of selection that we have outlined, and the non-competitive re-election, would best fit our needs and our traditions. We are not, however, fully convinced that at the present juncture there is any crying demand for a change in methods of selection in Wisconsin. Thanks to our completely non-partisan judicial elections, and to the conscientious manner in which our governors of all parties have, in the main, made their judicial appointments in the past, the Wisconsin judicial system is not in any dire need of change, however great the need may be in certain other states. The question of the integration of the bar in Wisconsin, which has an important bearing on the weight which the bar can put behind any proposal, remains an unsettled issue. Your committee therefore has

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374. S. CARBON & L. BERKSON, *supra* note 370, at 70-75 app. A.

375. *Report of Committee on Judicial Selection*, 24 WIS. B. REP. 36-43 (1934).

376. *Id.* at 254.

377. *Report of Committee on Judicial Selection*, 26 WIS. B. REP. 82-86 (1936).

378. *Report of Committee on Judicial Selection*, 27 WIS. B. REP. 7-80 (1937).

presented in this report its views as to what would be the more desirable form in which to recast the system of judicial selection and tenure if a change were deemed imperative; but we do not recommend that the Association go on record at this time beyond discussing the subject and directing this committee to give it continued study as it is worked out in other states of the union which perhaps have greater need to act as pioneers in the movement than has the state of Wisconsin.<sup>379</sup>

In 1950, Thomas E. Fairchild, then the Wisconsin attorney general, later justice of the Wisconsin Supreme Court, subsequently chief judge of the United States Court of Appeals for the Seventh Circuit, now a senior judge, collaborated in writing a wide ranging article addressing past attempts and failures to amend the Wisconsin Constitution.<sup>380</sup> Judge Fairchild addressed two state constitutional issues affecting the judiciary: the adoption of a Missouri plan for merit selection and the need for a unified court. He said that a merit selection plan was needed because an uneducated electorate leads to voter disinterest.<sup>381</sup>

In 1955 the Wisconsin State Bar Association sponsored a bill in the Wisconsin Legislature, supporting the creation of a merit selection commission. Assembly Bill 471 was postponed,<sup>382</sup> reconsidered,<sup>383</sup> passed<sup>384</sup> and then sent to the senate, which voted to nonconcur in its passage.<sup>385</sup> In 1969 the identical proposal was introduced as Assembly Bill 1163 at the request of the Milwaukee Junior Bar Association. The bill was assigned to the Assembly State Affairs Committee which did nothing with the measure.<sup>386</sup> On July 30, 1971, a state senator introduced Senate Joint Resolution 82, calling for a constitutional change that would create two separate judicial selection commissions, one for the supreme court

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379. *Report of Committee on Judicial Selection*, 28 WIS. B. REP. 56-63 (1938).

380. Fairchild & Seibold, *Constitutional Revision in Wisconsin*, 1950 WIS. L. REV. 201.

381. *Id.* at 212-15.

382. A.J. 471, 72d Sess. at 1185-86 (1955).

383. *Id.* at 1253.

384. *Id.* at 1254.

385. S.J. 471 A., 72d Sess. at 1483 (1955).

386. A.J. 1163, 79th Sess. at 2829 (1969).

and one for the circuit courts.<sup>387</sup> The author later amended the proposal to add a third selection commission for county courts. This appears to have been the senator's individual effort. The measure was disposed of without any advancement by a *sine die* resolution in 1973.<sup>388</sup>

The most serious attempt to mandate merit selection for the Wisconsin judiciary was advanced by the Citizens Study Committee on Judicial Organization. This body was created in 1971 by executive order of Governor Patrick J. Lucey to establish a constitutional reorganization of the court system in Wisconsin.<sup>389</sup> This "Blue Ribbon" Committee's<sup>390</sup> report to the governor proposed, among other constitutional changes, merit selection and noncompetitive retention elections.<sup>391</sup> This part of the committee's report was never presented to or acted upon by the legislature because the promoters realized that this proposal, in populist Wisconsin, was a political albatross that might jeopardize the balance of the constitutional changes sought. The other constitutional changes proposed were for the creation of a unified court system with complete administrative control in the supreme court, an intermediate appellate court, a single level trial court system, mandatory retirement for judges at age seventy, and judicial discipline in the form of reprimand, censure, suspension or removal. The promoters of the constitutional package realized that the media throughout the state were uniformly opposed to taking judges off the ballot, that the legislature would probably give the merit selection and retention plan lip service at best, and that the people's referendum voice would be resounding in its opposition. Since voting on this measure might jeopardize a positive vote on the other constitutional measures needed for court reorganization in the state, the committee dropped the merit selection and retention proposal like the proverbial "hot potato." After legislative constitutional approval, the other proposals were adopted by the people in resounding

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387. S.J.J. Res. 82, 80th Sess. at 1503 (1971).

388. S.J. at 2294 (1973).

389. Exec. Order No. 13 (Apr. 23, 1971).

390. See *supra* note 322.

391. Blue Ribbon Committee Report, *supra* note 322, at 124-27.

referendum votes in the 1977 spring election.<sup>392</sup>

By a seventeen to sixteen vote on March 24, 1981, the Board of Governors of the Wisconsin State Bar Association endorsed a judicial merit selection and noncompetitive retention constitutional change.<sup>393</sup> Two responses in newspaper editorials, one supportive,<sup>394</sup> and the other in opposition,<sup>395</sup> as well as the one vote majority maintained in the Board of Governors, signified the deep division of Wisconsin partisans on the subject. The president of the Bar sounded the clarion call for elimination of the nonpartisan election of judges. He employed most of the time-honored arguments to support this merit proposal: thirty-one states have adopted some form of selection commission; the nonpartisan election system is, in practice, not really an election system since fifty of the eighty-three supreme court justices, past and present, or sixty percent of them, and about fifty percent of the present circuit court judges in the state, were initially appointed by the governor; the incumbency advantage is enormous, leading to few contested elections; the lack of issues in a nonpartisan judicial election leads to the lack of choice and voter disinterest; and judicial election contests are expensive.<sup>396</sup> To his list must be added another criticism of both partisan and nonpartisan electoral systems: they do not obtain the best qualified candidates because of the potential candidates' repugnance to facing the electorate.

At the heart of the debates over judicial selection is a tension between the values of judicial accountability and judicial independence.<sup>397</sup> Not enough empirical data is available to prove which is the best system for selection and retention, but it appears that the partisan electoral form achieves higher accountability than either the nonpartisan or merit selection noncompetitive retention form.<sup>398</sup> Adhering to the populist ideal, Wisconsin has demanded that its judi-

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392. BLUE BOOK (1981-1982), *supra* note 19, at 244.

393. Milwaukee J., Mar. 25, 1981, § 2, at 5, col. 1.

394. *Id.*, Apr. 22, 1981, § 1, at 16, col. 1.

395. Milwaukee Sentinel, Mar. 22, 1981, § 1, at 10, col. 1.

396. 54 WIS. B. BULL. No. 5 at 4-6 (May 1981).

397. P. DUBOIS, *supra* note 351, at 242.

398. *Id.* at 145; Adamany & Dubois, *Electing State Judges*, 1976 WIS. L. REV. 731, 778.

ciary be independent but has required nonpartisan elections as a curb on maladministration. It was the first state to employ nonpartisan election of its judiciary to curb the sordidness of partisan political control. An electoral check on the judiciary eliminates the need for the impeachment and address methods of removal.<sup>399</sup> It is not the purpose of this article to measure the value of the various systems, one against the other. The determination of which system best provides the needed judicial independence coupled with the needed accountability is left to those legal scholars who can scientifically prove it. However, this writer is convinced that before populist Wisconsin changes its nonpartisan system of electing judges, such proof will have to meet the beyond a reasonable doubt standard, and even that might not be enough.

## IX. DISCIPLINARY PROCEEDINGS

In 1966 California constitutionally adopted a commission on judicial qualifications with trial and enforcement powers.<sup>400</sup> Since that date all fifty of the states and the federal government have adopted some form of investigative and trial procedure for both the disability and the discipline of their respective judicial members for misconduct off and on the bench.<sup>401</sup> Court reorganization and widespread reporting of judicial scandals<sup>402</sup> were among the reasons such procedures were adopted, but the primary reason was the inadequacy of the traditional Anglo/American methods of officeholder accountability (impeachment and address of the legislature) coupled with the claimed inadequacy of the pure

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399. L. FRIEDMAN, *supra* note 194, at 325. This legal historian concludes that "the advent of the elective principle, at least, made a contribution to the withering away of impeachment."

400. CAL. CONST. art. VI, § 8 (1966). A 1976 amendment changed the name to Commission on Judicial Performance. CAL. CONST. art. VI, § 8 (1976); *see also* CAL. CONST. art. VI, §§ 7, 8 (West Supp. 1981).

401. *See supra* note 145 and accompanying text.

402. For examples of scandalous conduct, see W. BRAITHWAITE, *supra* note 22, at 3-8; R. WHEELER & A. LEVIN, *supra* note 45, at 24-25. *See also* C. ASHMAN, THE FINEST JUDGES MONEY CAN BUY 270-78 app. (1973). This book details the conduct of 73 judges holding office between 1804 and 1973 whose conduct ranged from habitual intemperance to murder. For court reorganization as a cause, see R. WHEELER & A. LEVIN, *supra* note 45, at 25-26.

American accountability methods (election and recall). Prior to 1960 few academic articles addressed the problem of the ineffectiveness of these four methods of accountability.<sup>403</sup> Subsequently, a plethora of books, treatises and periodical articles addressed this inadequacy.<sup>404</sup>

Since the late 1930's there have been attempts at setting up a system of federal judicial accountability short of impeachment. These sporadic congressional proposals increased in the late 1960's and the 1970's<sup>405</sup> and finally culminated in the adoption of the Judicial Council Reform and Judicial Conduct and Disability Act of 1980,<sup>406</sup> which provides that federal court of appeals judges, district judges, magistrates and bankruptcy judges may be denied a caseload assignment for a specified time, may be privately or publicly censured or reprimanded, or may be certified as disabled.<sup>407</sup> This act provides three levels for handling complaints against judges: (1) the chief judge of the federal circuit; (2) the individual federal circuit judicial councils; and (3) the federal judicial conference on a standing committee created by it. Either the complainant or the affected

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403. *E.g.*, Brand, *supra* note 50; Miller, *Discipline of Judges*, 50 MICH. L. REV. 737 (1952); Moore, *Judicial Trial and Removal of Federal Judges: H.R. 146*, 20 TEX. L. REV. 352, 356 (1942); Comment, *Removal of Federal Judges: A Proposed Plan*, 31 ILL. L. REV. 631-35 (1931).

404. *E.g.*, Gasperini, Anderson & McGinley, *Judicial Removal in New York: A New Look*, 40 FORDHAM L. REV. 1, 11 (1972); Comment, *Removal and Discipline of Judges in Arkansas*, 32 ARK. L. REV. 545, 550 (1978); Comment, *Judicial Discipline—Does It Exist in Pennsylvania?*, 84 DICK. L. REV. 447, 449-51 (1980); Comment, *The Procedures of Judicial Discipline*, 59 MARQ. L. REV. 190, 210 (1976); Comment, *supra* note 125, at 566; Alabama Section, *Judicial Discipline and Ethics in Alabama*, 31 ALA. L. REV. 459, 461 (1980); ADMINISTRATION OF CIVIL JUSTICE POSITION PAPER 31 (Def. Res. Inst. Monograph No. 1, 1981). *See also* Defense Research Institute, *An Overview of a Position Paper: Administration of Civil Justice*, 23 FOR THE DEFENSE, No. 3 at 13, 16 (1981).

405. S. 1506, 91st Cong., 1st Sess., 115 CONG. REC. 6220-24 (1969), was a measure to set up a commission on disabilities and tenure to remove corrupt, intemperate and senile judges. S. 295, 96th Cong., 1st Sess., 125 CONG. REC. S899 (1979), was a proposal setting up a federal conduct and disability commission within the judiciary. S. 522, 96th Cong., 1st Sess., 125 CONG. REC. S1960 (1979), allowed for the various circuit judicial council panels to investigate problems within the judicial family.

406. Pub. L. No. 96-458, 94 Stat. 2035-241 (1980) amending 28 U.S.C. §§ 331, 332, 371, 372 & 604 (effective Oct. 1, 1981). For a thorough explanation of the act, see Neisser, *The New Federal Judicial Discipline Act: Some Questions Congress Didn't Answer*, 65 JUDICATURE 142-60 (1981).

407. 28 U.S.C. § 372(6)(b) (1976).

judge can appeal, but finality is reached at the judicial conference level.<sup>408</sup> Confidentiality is imposed throughout the procedures except for the order of the final tribunal<sup>409</sup> or on forwarding material to the Congress of the United States for impeachment proceedings.<sup>410</sup>

It remains to be seen whether the Act will be effective. The main question is whether it can withstand a constitutional challenge on the ground that impeachment is the sole form of censure of the members of the federal judiciary. For years scholars have debated the issue of the exclusiveness of the impeachment remedy and whether alternative methods of accountability destroy the separation of powers doctrine or chill judicial independence.<sup>411</sup>

Wisconsin's convoluted path to the creation of a disciplinary body separate from, and in addition to, its traditional accountability methods of impeachment, address, election, incompatibility, conviction of a felony and the newer method of recall evolved over twenty-five years, beginning with the Wisconsin Bar Association's adoption of the American Bar Association's (ABA's) Canons of Professional Ethics for Lawyers.

The ABA adopted the Canons of Professional Ethics for Lawyers in 1908.<sup>412</sup> It was not until 1924 that it adopted the Canons of Judicial Ethics.<sup>413</sup> The Wisconsin Bar Association

408. *Id.* § 372(10) (1976).

409. *Id.* § 372(15) (1976).

410. *Id.* § 372(14) (1976).

411. *See supra* notes 44-48 and accompanying text. There are those who claim that under the "necessary and proper clause," U.S. CONST. art. I, § 8(18), Congress has the right to pass laws which create a commission of conduct and establish the mechanics of trying a judge within the court system for misprisions. *See Shartel, Federal Judges—Appointment, Suspension and Removal—Some Possibilities*, 28 MICH. L. REV. 870, 883, 892 (1930); Berger, *supra* note 28, *passim*.

Some scholars maintain that impeachment is the sole remedy. *See Kaufman, supra* note 36, at 687-701; Kurland, *The Constitution and Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665 (1969); Otis, *A Proposed Tribunal: Is it Constitutional?*, 7 U. KAN. CITY L. REV. 3 (1938) (this article is a refutation of Shartel's 1930 article).

412. The canons and the report of the ABA COMMITTEE OF PROFESSIONAL ETHICS is found at 31 REP. ABA 567 (1908); the discussion of and the voting on the canons is found at 31 REP. ABA 55 (1908).

413. The ABA Canons of Judicial Ethics are found at 47 REP. ABA 760 (1924). The discussion and voting on these canons is found at 47 REP. ABA 70-71 (1924). *See supra* note 141.

adopted the ABA canons of ethics for its members. However, because it was a voluntary association, it had no effective control over its own members or nonmembers of the bar, much less over the state judiciary. On June 22, 1956, the Wisconsin Supreme Court held that the bar should be integrated<sup>414</sup> and adopted rules for its organization.<sup>415</sup> State Bar Rule 9 provided that the Canons of Professional Ethics of the American Bar Association would govern the practice of law in this state.<sup>416</sup> Since judges were lawyers and were members of the integrated bar, the various grievance committees were instructed to receive complaints against them, to investigate the complaints and to make reports of their investigation and recommendations to the Board of Bar Governors.<sup>417</sup> Because of this integration of bar and bench, the 1924 ABA Canons of Judicial Ethics were never adopted in Wisconsin.

In 1956, however, at the request of the State Bar Association Board of Governors, the Wisconsin Supreme Court created a committee to draft a code of judicial ethics.<sup>418</sup> A code, which covered both conduct and disability, was drafted by the committee, presented to the supreme court and

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414. *In re* Integration of the Bar, 273 Wis. 281, 77 N.W.2d 602 (1956).

415. *Id.* at vii-xxxvii.

416. *Id.* at xx.

417. *Id.* at xxii-xxiii; State Bar Rule 10 § 5. The supreme court entertained an original petition and granted the request of the Dane County Bar Association for disbarment of Ole A. Stolen, a superior court judge of Dane County. *In re* Stolen, 193 Wis. 602, 214 N.W. 379 (1927). The judge borrowed money from three known bootleggers and on occasion interceded in court matters on their behalf or on behalf of members of their respective families. The judge resigned from the bench before this original action was decided. Nevertheless the supreme court disbarred him because his offense was one against the administration of justice and brought courts into disrepute. *Id.* at 623, 214 N.W. at 386. See *supra* notes 155-62 and accompanying text; Comment, *Superintending Power of the Wisconsin Supreme Court and Financial Disclosure Rule for Judges*, 1977 WIS. L. REV. 1111, 1118. See also Gasperini, Anderson & McGinley, *supra* note 404, at 29, which is highly critical of the Wisconsin Supreme Court for not using disbarment as a method of eliminating judicial misconduct. The authors claim the justices were reluctant to employ disbarment because they are elected, as are all Wisconsin judges, and they feared electoral reprisal, or they did not act in such cases because the electoral process would take care of disciplining errant judges. This writer challenges this criticism because there is simply no data to support the conclusions reached in the article.

418. *In re* Promulgation of a Code of Judicial Ethics, 36 Wis. 2d 252, 252-62a, 153 N.W.2d 873, 873-78 (1967), 155 N.W.2d 565 (1968). A copy of the bar association resolution is found in the Wisconsin Supreme Court file.

adopted.<sup>419</sup> The code consisted of sixteen standards which set forth significant qualities of an ideal judge<sup>420</sup> and rules of conduct of sufficient gravity to warrant sanctions.<sup>421</sup>

The Wisconsin Supreme Court was aware that in previous decisions it had limited its constitutionally authorized power of "superintending and administrative authority over inferior courts"<sup>422</sup> to the control of the course of ordinary litigation and inferior courts, as exercised at common law by the Court of King's Bench and by the use of writs specifically mentioned in the constitution.<sup>423</sup> This self-imposed limitation of its superintending jurisdictional role eroded in recent years when the court adopted a code of judicial ethics<sup>424</sup> and a code of professional responsibility for lawyers,<sup>425</sup> created an integrated bar,<sup>426</sup> adopted rules of evidence<sup>427</sup> and civil procedure,<sup>428</sup> and established administrative judicial districts with chief judges.<sup>429</sup> The supreme court rejected its prior decisional constraints and boldly stated that it promulgated the Code of Judicial Ethics under its "inherent and implied power."<sup>430</sup>

419. *Id.*

420. *Id.* at 256-59, 153 N.W.2d at 875-76.

421. *Id.* at 259-62a, 153 N.W.2d at 876-78. *Cf.* E. THODE, *supra* note 142, at 7-32. (Thode was the reporter of the ABA Special Committee on Standards of Judicial Conduct which revised the 1924 Canons of Judicial Ethics. The revised canons were adopted by the ABA House of Delegates on Aug. 16, 1972. 97 REP. ABA 556 (1972). Any comparison between the Wisconsin standards and rules will demonstrate that both the Wisconsin Code of Judicial Ethics and the ABA Code with its canons and commentaries cover the same ethical grounds with merely subject matter juxtapositions).

422. WIS. CONST. art. VII, § 1.

423. *In re Heil*, 230 Wis. 428, 433, 284 N.W. 42, 44 (1939); *State ex rel. McGovern v. Williams*, 136 Wis. 1, 4, 116 N.W. 225, 226 (1908); *Seiler v. State*, 112 Wis. 293, 299, 87 N.W. 1072, 1074 (1901); *accord State ex rel. Fourth Nat'l Bank v. Johnson*, 103 Wis. 599, 614, 79 N.W. 1081, 1087 (1899); *Attorney Gen. v. Blossom*, 1 Wis. 277, 277-90 [\*317-33] (1853).

424. *In re Promulgation of a Code of Judicial Ethics*, 36 Wis. 2d at 252-62a, 153 N.W.2d at 873-78.

425. 43 Wis. 2d ix-lxxvi-b (1969).

426. *See supra* notes 414-17 and accompanying text.

427. 59 Wis. 2d R1-R377 (1973); WIS. STAT. §§ 901.01-911.02 (1979).

428. 67 Wis. 2d 585-748 (1975); WIS. STAT. §§ 801.01-807.12 (1975).

429. 71 Wis. 2d xiii-xviii (1975); WIS. STAT. §§ 251.235-251.243 (1975). *See Wis. Sup. Ct. R.* §§ 70.01-70.34 (1979).

430. *In re Promulgation of a Code of Judicial Ethics*, 36 Wis. 2d at 254, 153 N.W.2d at 874.

The code was implemented in 1970 by the creation of a judicial commission made up of two circuit judges, two county judges, two lawyers and three public members appointed for three-year terms by the Board of Circuit Judges, the Board of County Judges, the state bar and the governor, respectively.<sup>431</sup> The commission was a unitary, or single-tiered, commission plan.<sup>432</sup> The extent of and limits upon the commission's authority were as follows:

The commission shall have power to receive complaints of misconduct or disabilities of judges, make investigations thereof, hold hearings thereon, subpoena witnesses and take action relating thereto. Such action shall be on written findings of fact and written decision. In the case of no merit, the decision shall so state. The commission shall have the power to reprimand or censure a judge but shall make recommendations to the supreme court with respect to suspension, removal, or retirement of judges. All action respecting reprimands and censures made by the commission may be reviewed by the supreme court on its own motion or upon petition of the interested judge.<sup>433</sup>

At this juncture the Wisconsin Supreme Court was anticipatory. While it had abandoned its previously determined limited inherent powers of superintending control, it now adopted and implemented a code through a judicial commission with procedural rules.<sup>434</sup> At the same time, the court recognized that it had no power to suspend, remove or retire

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431. *In re* Promulgation of the Code of Judicial Ethics, 52 Wis. 2d vii-viii (1972).

432. K. CORR & L. BERKSON, *supra* note 23, at 10-11. Single-tiered commissions are generally authorized to receive and review complaints against judges, to conduct investigations, to commence formal hearings and to make a disciplinary recommendation to the state's highest court. See I. TESITOR & D. SINKS, *supra* note 145, at 3. Forty-one jurisdictions have adopted this form of judicial commission plan. Four commissions (New York, Kentucky, Nevada and the District of Columbia) go a step further where the commission itself can impose disciplinary sanctions, including removal, subject to review by the jurisdiction's highest court. These commissions handle cases from the investigation through the formal hearing and recommendation of disciplinary actions to the state supreme court. In most states the supreme court is authorized to make an independent review of the case and to make a final disposition.

Recently the state of Washington constitutionally adopted a unitary commission system making it the 42nd to do so. See 2 JUD. CONDUCT REP., *supra* note 145, at 4.

433. *In re* Promulgation of the Code of Judicial Ethics, 52 Wis. 2d vii, viii-ix (1972).

434. *In re* Promulgation of the Code of Judicial Ethics, 57 Wis. 2d vii-xv (1973).

for disability any judicial officers.<sup>435</sup>

During the same period of time that the court was addressing the adoption of a code, a judicial commission and the commission's rules, then-Governor Patrick J. Lucey had issued an executive order<sup>436</sup> creating the Governor's Blue Ribbon Committee,<sup>437</sup> which was made up of forty law professors, lawyers and prominent laymen from all fields of endeavor. The governor's charge to this committee was to investigate and report the necessity for and the methods of reorganizing the Wisconsin court system's administration and structure. Significantly, and in keeping with the populist ideal, there were no judges on the Blue Ribbon Committee. The committee divided itself into five subcommittees which held well-advertised hearings throughout the state. The report of the subcommittee on judicial performance evaluation supported the Wisconsin Supreme Court's adoption of a code of judicial ethics, the form of the judicial commission and the commission's procedural rules.<sup>438</sup> The subcommittee, in discussing the problem of judicial conduct and disability, noted that the disbarment procedure was severe and inflexible, that traditional constitutional impeachment, legislative address and recall of judicial officers had proven equally ineffective for the redress of complaints against judges, and that election of judges was not a viable solution for eliminating judicial deadwood.<sup>439</sup> The subcommittee further reported the need for a constitutional amendment to empower the supreme court to suspend or remove judges for either willful violations of the rules or physical and mental disability.<sup>440</sup> It also proposed a constitutional

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435. *In re* Promulgation of the Code of Judicial Ethics, 52 Wis. 2d vii, ix (1972). The Wisconsin Supreme Court noted that the sanctions of removal and suspension set forth in § 9 of the creation of the judicial commission "require constitutional amendment" and that retirement for disability as set forth in § 10 "assumes enabling legislation." *Id.* at nn. \* & \*\*.

436. Exec. Order No. 13 (Apr. 23, 1971); *see supra* text accompanying note 390.

437. *See supra* note 322.

438. Blue Ribbon Committee Report, *supra* note 322, at 127-35.

439. *Id.* at 128. The Blue Ribbon Committee Report deals with the failure of impeachment, address and recall as controls, *id.*, and with the failure of elections as a control, *id.* at 120-24.

440. *See supra* notes 433 & 435 and accompanying text.

amendment to effectuate suspension and removal.<sup>441</sup> The judges' subcommittee report was adopted by the Blue Ribbon Committee in its report to the governor.

The report was universally supported by the media and Governor Lucey. It was also well received by the legislature, but the legislature did not make any formal constitutional amendment proposals until the 1975 session. During that session the legislature approved constitutional proposals for a unified court system, an intermediate court of appeals, court system disciplinary measures and mandatory judicial retirement at age seventy. The 1977 legislature passed the same resolutions for the second time,<sup>442</sup> and the electorate approved the referendum by majority votes in the 1977 spring election.<sup>443</sup> Significantly, while the unified court system and the creation of the court of appeals received two-to-one majority voter approval, the judicial disciplinary proposal garnered 78.9% of the total vote, and almost the same majority approved mandatory retirement at age seventy.<sup>444</sup>

These proposals were effectuated by enabling legislation.<sup>445</sup> However, true to Wisconsin's traditional populist temper, the legislature decided that the court-created judicial commission was too closely aligned with the judiciary and

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441. Blue Ribbon Committee Report, *supra* note 322, at 131-32.

442. See *supra* note 392 and accompanying text. Two successive Wisconsin legislatures must approve constitutional amendments which must then be ratified by a referendum of the electorate. WIS. CONST. art. XII, § 1.

443. BLUE BOOK (1981-1982), *supra* note 19, at 244. The constitutional disciplinary measures adopted in WIS. CONST. art. VII, § 11, read as follows:

Each justice or judge shall be subject to reprimand, censure, suspension, removal for cause or for disability, by the supreme court pursuant to procedures established by the legislature by law. No justice or judge removed for cause shall be eligible for reappointment or temporary service. This section is alternative to, and cumulative with, the methods of removal provided in sections 1 and 13 of this article and section 12 of article XIII.

444. NATIONAL CENTER FOR STATE COURTS, COURT REFORM IN SEVEN STATES 87-103 (1980). Chapter 4, written by Professor Robert Martineau, is an excellent essay on the political environment that threaded the adoption of court reform and judicial accountability proposals in Wisconsin from earliest glimmerings through referenda electorate approval to legislative enabling acts, to the implacement of the system. A fair reading of Professor Martineau's interpretation readily exhibits that the slow and ponderous movement was accomplished well within the parameters of political activity in its purest form. In short, Jefferson and his peers would have been proud.

445. 1977 Wis. Laws chs. 187 & 449.

that the majority of its members should be nonlawyer citizens. The legislature created a separate judicial commission<sup>446</sup> with a separate budget.<sup>447</sup> This legislatively created commission is a two-tiered commission.<sup>448</sup> The nine-member commission consists of five nonlawyers appointed by the governor with senate consent, one court of appeals judge, one trial judge and two members of the state bar appointed by the supreme court. All members serve a three-year term but may not serve more than two consecutive full terms.<sup>449</sup> The legislation authorized the commission to adopt procedural rules pursuant to the Wisconsin administrative rules' provisions<sup>450</sup> and, after organizing, the commission did so.<sup>451</sup>

Because Wisconsin has had the successive experience of two commission forms (the unitary, or single-level, system followed by the two-tiered system), their respective procedures, accomplishments and relevant case law will be treated individually, followed by a comparison of the commissions themselves.

### *A. Unitary Judicial Commission (1972-1977)*<sup>452</sup>

#### 1. Procedure

Under its general provisions this commission was authorized to interpret the judicial code in connection with its cases. It was not authorized to give advisory opinions or to

446. 1977 Wis. Laws ch. 499; Wis. Stat. §§ 757.81-99 (1979).

447. *Id.*; Wis. STAT. § 20.665 (1977). The former commission obtained its budget through the supreme court sum sufficient budget.

448. I. TESITOR & D. SINKS, *supra* note 145, at 3. Nine states, including Wisconsin, have separated the investigative and adjudicative functions so that this disciplinary system consists of two tiers. One body, called a commission, board, council or committee, receives and investigates complaints. If there exists probable cause for disciplinary action or removal, that body presents the charges to a separate board or court for adjudication.

449. Wis. STAT. § 757.83(1)(a) & (b) (1979).

450. Wis. STAT. § 757.83(3) (1979).

451. 8 WIS. ADMIN. CODE §§ JC 1-6 (1979) [hereinafter cited as 1979 JC Rules]. Activities of commissions such as these require confidentiality until a formal complaint or a disability petition is filed. Confidentiality is critical to protect a judge's reputation from frivolous and unfounded charges and to protect the integrity of the judicial system as a whole. It is also in the complainant's interest to be protected from possible recrimination for filing the initial complaint before the commission.

452. I. TESITOR & D. SINKS, *supra* note 145, at 3; K. CORR & L. BERKSON, *supra* note 23, at 10-11.

function as an appellate court. The commission was required to accept complaints from any source. Confidentiality was imposed on all issues brought to the commission until a formal complaint was served. Any action taken by the commission required a majority vote of five members.<sup>453</sup> Complaints tendered to the commission could be treated summarily by a finding of no probable cause. If the commission proceeded further it was to make an informal investigation and notify the judge against whom a complaint had been made, giving the judge an opportunity to respond. Then, if there was no probable cause to issue a formal complaint, the commission would order the complaint dismissed and notify the complainant and the judge. The order had to state the commission's reasons for the dismissal. This commission's order of dismissal upon a finding of no probable cause could be reviewed by writ of certiorari to the supreme court.<sup>454</sup> If the commission determined the complaint had merit, it filed a formal complaint.<sup>455</sup>

Institution of a formal proceeding marked the removal of confidentiality. The complaint, as in civil proceedings, was followed by the judge's formal answer along with his demurrers and affirmative defenses. Amendment of the pleadings was allowed as was discovery.<sup>456</sup> The commission could set the hearing (the trial) before itself or a master (to be appointed by the supreme court). The rules of civil procedure and evidentiary trial rights were preserved for the judge.<sup>457</sup> The commission was required to file its findings of fact and conclusions of law within twenty days of the hearing. The master was required to make his findings of fact within twenty days of receipt of the transcript of the hearing. Fifteen days after the master's findings were filed, provided

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453. *In re* Promulgation of the Code of Judicial Ethics, 57 Wis. 2d vii, viii-ix (Rule 2) (1973).

454. *Id.* at ix-x (Rule 3). The confidential records of the supreme court reveal that certiorari was attempted on 12 occasions. Certiorari was denied eight times and dismissed once. In another case the supreme court determined that the party asking for the remedy was not aggrieved. Certiorari was granted once, requiring the commission to state reasons for the dismissal of the complaint. In another case the supreme court remanded the matter to the commission for further deliberations.

455. *Id.*

456. *Id.* at x-xi (Rule 4).

457. *Id.* at xii-xiii.

there were no formal objections to those findings, the commission was required to file its conclusions of law.<sup>458</sup>

The commission could dismiss the complaint if it determined there was no merit, but its decision had to so state. It had the power to reprimand or censure a judge but was to make recommendations to the Wisconsin Supreme Court with respect to suspension, removal or retirement. All reprimands and censures were subject to review by the supreme court on its own motion or on motion of the affected judge.<sup>459</sup>

## 2. Accomplishments

In its five-year existence, the unitary commission received 280 complaints of alleged judicial misconduct or disability. Two hundred and five were summarily dismissed and sixty-six were dismissed after a preliminary investigation.<sup>460</sup> During that period eleven judges appeared before the commission at the preliminary or formal hearing stages, while several responded in writing.<sup>461</sup> Six formal complaints were filed which resulted in three censures and two dismissals of charges after hearings. One judge of a court of record and one municipal judge resigned from their positions rather than comply with the requirement of filing a financial report.<sup>462</sup> In its sixth annual report to the Wisconsin Supreme Court the commission broke down the sources of the original complaints (totalling 280)<sup>463</sup> and the categories of the complaints (totalling 332).<sup>464</sup> The commission concluded its

458. *Id.* at xiii-xiv.

459. *Id.* at xv (Rules 4 & 5). *See supra* notes 431-33 and accompanying text. Note, however, that at this time the supreme court had acknowledged that it had no power to suspend, remove or retire for disability. The court anticipated constitutional court reorganization which would provide these powers.

460. WIS. JUD. COMM'N SIXTH ANN. REP. TO THE WIS. SUP. CT. 6 (1977). Ninety-four percent of all complaints were dismissed at either the informal or formal level.

461. *Id.* at 8.

462. *Id.* at 7.

463. *Id.* at 8. Litigants, 183; citizens, friends or relatives of litigants, 38; attorneys, 27; public officials, 26; other organizations, 4; anonymous, 2; totalling 280.

464. *Id.* at 7. Dissatisfied litigant, 120; conduct on the bench, 67; conduct off the bench, 66; tardy decisions, 22; dissatisfied nonlitigant, 7; use of intoxicants, 7; practice of law, 6; improper salary voucher, 5; relative practicing in court, 5; on corporate board, 4; financial report matters, 4; election activities, 4; acted previously as counsel,

final five-year assessment with the following statement:

Wisconsin would seem to be blessed with a fine judiciary. This is evidenced by the relatively small number of complaints generated in this period of five years involving a judiciary composed of approximately 450 members, who are covered by the Code of Judicial Ethics. In this period of time the formal complaints filed dealt with such matters as (a) a difference of opinion as to the necessity of filing financial reports; (b) a judge permitting one of his relatives to practice in his court; (c) speaking to a jury in the jury room following the acquittal of the defendant charged with a criminal offense to determine how the jury had arrived at its verdict; (d) allegedly speaking publicly about a case which was coming up for trial; and (e) for practice of law. Also indicative of the justification for complaints is the circumstance that 94% were dismissed summarily, or after preliminary investigation, as being without basis for further action. Wisconsin should be proud of its judicial system. Most states cannot make such a claim.<sup>465</sup>

### 3. Litigation

By an order dated June 28, 1974, the Wisconsin Supreme Court amended the Code of Judicial Ethics<sup>466</sup> to require all the judges in the state to report respective financial holdings of themselves, their spouses and legal dependents. The mandatory report was to disclose only the assets and not their specific dollar values.<sup>467</sup> Judge Charles E. Kading refused to honor this "sunshine rule" in the financial report he filed on March 5, 1974. The Wisconsin Supreme Court noted this failure and directed the judicial commission to investigate. At the informal, confidential stage of its proceedings, the commission noted Judge Kading's failure to

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3; racial discrimination, 2; failure to disqualify, 2; physical or mental infirmity, 2; soliciting charitable funds, 2; conflict of interest, 2; corruption, 1; calendar backlog, 1; totalling 332.

465. *Id.* at 8-9. At this time there were approximately 200 judges of courts of record made up of county and circuit judges and supreme court justices. Municipal judges who do come under the purview of the code numbered about 250.

466. *See supra* note 418.

467. *In re* Amendment of the Code of Judicial Ethics, 63 Wis. 2d vii-viii (1974). *See Comment, supra* note 417, at 1111.

conform to the requirements of rule 17.<sup>468</sup> Later it formally determined this failure and filed a report with the supreme court. The court ordered the judge to comply with the rule or show cause why he should not be held in contempt of the supreme court. Judge Kading formally responded that he refused to disclose his assets on the grounds that rule 17 was unconstitutional. The court ordered a hearing at which the following issues were raised: (1) Did the court have the power to adopt the Code of Judicial Ethics and to amend that code to include mandatory financial disclosure under rule 17?; (2) Was rule 17 an unconstitutionally overbroad intrusion into the private economic affairs of a judge?; (3) Was rule 17 invalid as a legislative act?; (4) Did rule 17 establish a prohibited additional qualification for office?; and (5) Was rule 17 a fundamentally unfair deprivation of due process?<sup>469</sup>

The court held that it had the inherent power to adopt measures, such as a code of judicial ethics and a rule of mandatory financial disclosure, which were absolutely essential to the due administration of justice in the state. It pointed out that the code regulated judicial conduct, such as investments in enterprises that were likely to interfere with the proper performance of a judge's official duties.<sup>470</sup> The court rejected Judge Kading's argument that the court's supervisory power was limited.<sup>471</sup> It determined that rule 17 was a reasonable regulation promulgated as a response to compelling state need to maintain public confidence in the judiciary, that such public confidence was crucial to the due administration of justice in the state and that rule 17 was well within the scope of the court's inherent supervisory powers.<sup>472</sup>

The court rejected Judge Kading's argument that judges have a fundamental constitutional right to economic privacy

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468. *In re Kading*, 70 Wis. 2d 508, 514, 235 N.W.2d 409, 411, 238 N.W.2d 63, 239 N.W.2d 297 (1975).

469. *Id.* at 513-15, 235 N.W.2d at 410-11.

470. *Id.* at 518, 235 N.W.2d at 413.

471. Judge Kading advocated that the court return to its limited superintending jurisdiction stand. *See supra* notes 422-23 and accompanying text.

472. *In re Kading*, 70 Wis. 2d 508, 523-25, 235 N.W.2d 409, 416, 238 N.W.2d 63, 239 N.W.2d 297 (1975).

and that, therefore rule 17, was overbroad. The court noted that judges are public officials by choice and that, as such, their assets are legitimately subject to reasonable scrutiny and exposure.<sup>473</sup> The court went on to hold that even if a fundamental right were involved under a rule requiring financial disclosure by a judge, rule 17 would meet the rigid strict scrutiny test applied to laws or rules impinging on Judge Kading's claimed fundamental right to privacy because the state had compelling interests which could not be achieved by a means less restrictive of constitutional freedom. The compelling state interests for imposition of a judicial conduct code with a financial disclosure requirement were found to be: (1) assuring the honesty and impartiality of state judges; (2) instilling confidence in the people in the integrity and neutrality of their judges; and (3) informing the public of the judges' economic interests which might present a conflict of interest. Taken together, these public interests far outweighed any public official's claim to be free from compulsory disclosure.<sup>474</sup> The court determined that overbreadth was avoided by the limitations in rule 17 which did not require the listing of household furniture or fixtures, personal effects, automobiles or recreational equipment. Also, the disclosure form did not require an appraisal of the dollar value or the quantity of the assets listed.<sup>475</sup>

Relying on the inherent and supervisory power doctrine, the court rejected Judge Kading's argument that a financial disclosure rule had to be promulgated by the legislature.<sup>476</sup> As for Judge Kading's argument that this disclosure rule was unconstitutional on the basis that it was an "additional qualification for holding office," the court determined that he had no standing to make this argument because he was a county judge, an office for which there were no constitutional requirements.<sup>477</sup> Even if he had been a circuit judge, an office for which there were qualifications listed in the

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473. *Id.* at 525, 235 N.W.2d at 417.

474. *Id.* at 527, 235 N.W.2d at 417-18.

475. *Id.* at 528, 235 N.W.2d at 418.

476. *Id.* at 531, 235 N.W.2d at 418-19. The legislature had previously adopted a code of ethics for all state offices which exempted the state's judges from its provisions. Wis. STAT. § 19.42(8) (1975).

477. *In re Kading*, 70 Wis. 2d at 531-32, 235 N.W.2d at 420.

state constitution, the code and disclosure requirements were more accurately viewed as conditions which were ancillary to, and not in addition to, conditions for the office of circuit court judge set forth in the constitution.<sup>478</sup>

Judge Kading's last argument was that rule 17 was fundamentally unfair because it deprived him of liberty or property without due process. The court rejected this theory on the ground that due process only required that he be given prior notice and a hearing before the sanction emanating from a refusal to disclose assets required under rule 17 was imposed. The court found that before rule 17 could be imposed on any judge there must be a hearing in the supreme court and, further, that Judge Kading himself had been given a full hearing before the judicial commission as well as the present hearing before the supreme court. Thus, the judge had been afforded due process by these procedures.<sup>479</sup> Judge Kading was given twenty days to comply and the court retained jurisdiction pending compliance or noncompliance.

On rehearing in 1976, the Wisconsin Supreme Court held that the sanction of civil contempt was available to the court for any judge's refusal to comply with the financial disclosure provision of rule 17 of the Code of Judicial Ethics. It ordered Judge Kading to comply with the economic disclosure form for the year ending December 31, 1974, or be subject to reprimand or censure. The court recognized that Judge Kading was serious and conscientious in his opposition to this code requirement and, therefore, did not choose to hold him in civil contempt at that time. The form, properly showing assets, was due twenty days after the rehearing order.<sup>480</sup>

On March 1, 1976, in a per curiam decision, the court severely reprimanded Judge Kading, but chose not to find him in contempt because this case was a good faith test of rule 17 of the Code of Judicial Ethics. However, it again ordered Judge Kading to comply with the code requirement in his annual financial disclosure form due on March 15,

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478. *Id.*

479. *Id.* at 532-33, 235 N.W.2d at 420-21.

480. *Id.* at 543b-43c, 238 N.W.2d at 63-64.

1976, and advised him that if he failed to do so he exposed himself to being held in contempt of court.<sup>481</sup>

In a November 30, 1976, per curiam decision, the supreme court noted that Judge Kading failed to file the full financial disclosure statement of his 1975 assets required to be filed by rule 17 by March 15, 1976, and the formerly ordered disclosure of his 1974 assets. The court refused to hear his equal protection and due process arguments because the court had disposed of them in the previous case. The court also rejected Judge Kading's new argument that to be held for contempt for his sincerity in refusing to comply with the court's prior mandate amounted to his removal or suspension from office which, at that time, was beyond the supreme court's power. It further rejected his argument that use of the court's contempt power would amount to his removal or suspension from office. The court noted that if Judge Kading chose to resign or be held in contempt rather than disclose his assets, either result was due to his acts, not the court's.<sup>482</sup> Finally, the court rejected his new argument that rule 17 was an ex post facto law and thereby denied him due process. The court stated that the ex post facto argument essentially was a due process argument and it had already ruled on that issue.<sup>483</sup> The court found Judge Kading in contempt and ordered that if he did not file the required financial disclosure form within twenty days of the court's decision, he would be fined \$150 and \$50 for each day thereafter that he failed to comply.<sup>484</sup> Judge Kading resigned before paying any fine.

Additional litigation included an original action commenced in the supreme court seeking declaratory relief to determine whether the Wisconsin open-to-the-public meeting law was applicable to the supreme court created judicial commission.<sup>485</sup> The court reiterated its inherent supervisory

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481. *Id.* at 543f-44, 239 N.W.2d at 297.

482. *In re Kading*, 74 Wis. 2d 405, 409, 246 N.W.2d 903, 905 (1976).

483. *Id.* at 409-10, 246 N.W.2d at 905-06.

484. *Id.* at 412, 246 N.W.2d at 907.

485. WIS. STAT. § 66.77 (1973) (open meetings of governmental bodies), *repealed and recreated by* 1975 Wis. Laws ch. 426 (current version at Wis. STAT. § 19.98 (1975)).

It must be noted that the present judicial commission came into being in July,

control powers doctrine and stated that the court's power in creating the Code of Judicial Ethics, the judicial commission and the commission's procedural rules was exclusive; moreover, the state's open meeting laws were not applicable to the commission's activities.<sup>486</sup> The court concluded that even if the state's open-to-the-public meeting law policy did apply to the commission's procedural activities, that policy was complied with in this case.<sup>487</sup>

The final litigation was a case in which the commission, after a master appointed by the supreme court made his findings of fact, determined as its conclusion of law that a judge violated rule 4 of the code of ethics when he engaged in the practice of law.<sup>488</sup> The judge had assisted one Dougherty in drafting contracts. The commission censured the judge. On the judge's appeal of the commission's sanction of censure, the supreme court noted that the rule did not require that the judge obtain financial gain as an element of the rule violation.<sup>489</sup> It affirmed the commission's conclusion of law that the judge had violated the code's prohibition against practicing law, but modified the censure to a reprimand.<sup>490</sup>

On appeal, the judge advanced two important issues. He maintained that the commission did not have sufficient evidence before it at the informal stage to make a probable cause determination to call for a formal hearing. The court responded to this argument by stating that judicial disciplinary proceedings are neither civil nor criminal in nature, but are inquiries, the purpose of which is not primarily to punish the individual but to maintain the integrity of the judi-

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1978, and must follow the mandate of the state open meeting laws under WIS. STAT. § 19.81-.98 (1979) because it was created by the legislature. See *supra* notes 445-47 and accompanying text.

486. State *ex rel.* Lynch v. Dancey, 71 Wis. 2d 287, 289-96, 238 N.W.2d 81, 82-86 (1976).

487. *Id.* at 296-98, 238 N.W.2d at 86-87. See WIS. STAT. § 66.77(4)(b) & (e) (1975).

488. *In re* Van Susteren, 82 Wis. 2d 307, 309, 262 N.W.2d 133, 135 (1978); *In re* Promulgation of a Code of Judicial Ethics, 36 Wis. 2d 252, 260, 153 N.W.2d 873, 877, 155 N.W.2d 565 (1967) (Rule 4: "A judge shall not engage in the practice of law.").

489. *In re* Van Susteren, 82 Wis. 2d 307, 320, 262 N.W.2d 133, 140 (1978).

490. *Id.* at 321, 262 N.W.2d at 140.

ary.<sup>491</sup> It ruled that the commission had to determine the sufficiency of evidence at the informal stage according to the standard a judge employs in a preliminary hearing in a criminal case: “[A criminal] preliminary hearing must establish to a reasonable probability that a crime has been committed and that the defendant had probably committed it.”<sup>492</sup> That standard is modified to comport with the commission’s preliminary stages of investigation into alleged judicial improprieties. The modified standard requires the commission, at the informal stage, “to determine to a reasonable certainty the probability that a violation of the Judicial Code of Ethics has been committed and the probability that the judge under investigation has committed it.”<sup>493</sup>

The judge also contended that the commission committed prejudicial error when it denied him discovery of the minutes of the commission’s meeting during which it determined the existence of probable cause sufficient to warrant instituting a preliminary investigation, the minutes of the meeting when it decided to issue a formal complaint, and the names of any persons, not members of the commission, who attended those meetings. The commission had complied with all other discovery requests but refused to divulge this information.<sup>494</sup> The court held that a judge is entitled to limited discovery under procedural rule 4.<sup>495</sup> However, a judge was not allowed discovery of the minutes of the commission’s meetings or the names of the people attending those meetings because that material and those names were confidential pursuant to rule 2.<sup>496</sup>

This determination appears to be circular reasoning. To avoid the circularity problem the court noted that the minutes of the meetings addressed in this argument on appeal were not in the record. It stated that if the issue were properly raised in other circumstances, when the propriety of the

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491. *Id.* at 311, 262 N.W.2d at 136.

492. *Id.* The court cited *Vigil v. State*, 76 Wis. 2d 133, 141, 250 N.W.2d 378, 383 (1976).

493. *In re Van Susteren*, 82 Wis. 2d 307, 311-12, 262 N.W.2d 133, 136 (1978).

494. *Id.* at 312-13, 262 N.W.2d at 137.

495. *Id.* at 313, 262 N.W.2d at 137. See *In re Promulgation of the Code of Judicial Ethics*, 57 Wis. 2d vii, xi-xii (Rule 4(2)) (1973).

496. *Id.* at viii-ix (Rule 2(2)).

commission's informal proceedings were at issue, those materials would have to be available to the supreme court on appeal and review.<sup>497</sup>

### B. Two-Tiered Judicial Commission<sup>498</sup>

#### 1. Procedure

The legislatively created judicial commission, in existence since 1978, must investigate any judges' misconduct<sup>499</sup> or disability.<sup>500</sup> It has the power to subpoena witnesses and documents and may require a judge under investigation for disability to submit to a medical examination. The commission may notify the judge of its investigation. Before finding probable cause of misconduct or disability, the commission is required to notify the judge of the substance of a complaint and afford him a reasonable opportunity to respond. On finding probable cause of misconduct or disability by a majority vote of the members present, the commission files a complaint (misconduct) or a petition (disability) with the supreme court. The commission prosecutes all complaints and the procedures applicable to civil actions apply to all proceedings.<sup>501</sup> Before the complaint or petition is filed, the commission has the choice of two forums, a six-person jury requiring a five-sixths vote on all jury questions, presided over by a court of appeals judge chosen by the chief judge of the court of appeals, or a panel of three court of appeals judges chosen by the chief judge.<sup>502</sup> After the complaint or petition is filed in the supreme court and the commission

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497. *Id.*

498. *See supra* notes 448-51 and accompanying text.

499. WIS. STAT. § 757.85(1) (1979). WIS. STAT. § 757.81(4) defines misconduct as (a) a wilful violation of the code of judicial ethics; (b) a wilful or persistent failure to perform official duties; (c) habitual intemperance, due to consumption of intoxicating beverages or dangerous drugs; and (d) conviction of a felony.

500. WIS. STAT. § 757.81(1) (1979). There are two definitions of disability: temporary, WIS. STAT. § 757.81(7), and permanent, WIS. STAT. § 757.81(6). Generally, disability means a physical or mental incapacity which impairs a judge's ability to substantially perform the duties of the office. Temporary disability is one which incapacitates or which is likely to persist for one year for a judge or for six months for a supreme court justice.

501. WIS. STAT. § 757.85 (1979). *See* 1979 JC Rules, *supra* note 451, at 7-9, Rules 4.01-.07 (concerning misconduct); *id.* at 11-13, Rules 5.01-.07 (concerning disability).

502. WIS. STAT. § 757.87 (1979).

chooses the type of forum, confidentiality ceases.<sup>503</sup> Following the filing of a formal complaint or petition, the supreme court may suspend a judge pending final determination of the proceedings.<sup>504</sup>

A public hearing is held in the county in which the judge resides unless there is a request for change of venue. The commission, as prosecutor, must prove the allegations in the complaint or petition to a reasonable certainty by evidence that is clear, satisfactory and convincing. If the panel forum is employed, the panel must file with the supreme court findings of fact, conclusions of law and recommendations regarding appropriate discipline for misconduct or appropriate action for disability. If the forum is a jury hearing, the judge must instruct the jury regarding the appropriate law concerning misconduct or disability. The hearing judge must file the jury verdict and his or her own recommendations regarding appropriate discipline for misconduct or action for disability with the supreme court.<sup>505</sup> The supreme court then reviews the findings of facts, conclusions of law and recommendations as determined by the hearing forum and determines appropriate discipline in cases of misconduct and appropriate action in cases of disability.<sup>506</sup>

## 2. Accomplishments

It is unfortunate that the legislatively created commission has not, to date, made any annual public statement of its caseload or the results of its activities with that caseload, as did the previous supreme court commission. An annual public report would make the judges in the state aware of the general sources and categories of complaints and their disposition. Knowledge of the sources and categories of complaints would, in all probability, serve as an excellent educational device for judges and would apprise them of the general citizenry's reaction to their on and off the bench activities. Further, because the commission is itself a public

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503. *Id.* § 757.93. See 1979 JC Rules, *supra* note 451, at 5, Rule 3.01.

504. WIS. STAT. § 757.95.

505. *Id.* § 757.89.

506. *Id.* § 757.91.

body accountable to the body politic, an annual report is necessary to ensure the commission's integrity.

There is no doubt that the present commission has been more active than its predecessor. This is due in part to the well-published fanfare of its creation from the Blue Ribbon Committee proposals through the period of constitutional adoption by the referendum of the people to the legislative acts defining its statutory parameters. It is also due to the media notoriety of the publicly determined cases which arose from the commission's investigations and deliberations.

The only public source of the post-1978 commission's activities is a 1981 national report of all the country's judicial commissions.<sup>507</sup> This report states that in 1980 the Wisconsin Judicial Commission received 273 complaints, disposed of 200 summarily and disposed of 68 cases after investigation. One judge retired before charges were filed, one was suspended from office, one was removed, and two public cases were still pending at the time of the 1980 report.

This report appears to be misleading in two respects. The report exhibits that the Wisconsin commission receives more complaints than the separate California, Florida, Illinois or Ohio commissions.<sup>508</sup> These states have a much greater population than does Wisconsin. It follows that they have many more judges. It seems improbable that Wisconsin, with its lesser population and fewer judges, would generate more complaints. The other misleading feature of the report is that the 273 complaints numbered in the report include requests from judges seeking some type of advisory opinion from the Wisconsin commission. These requests from judges should not be included as complaints.<sup>509</sup>

The report states that 200 cases were disposed of summa-

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507. See 3 JUD. CONDUCT REP. 1, 2-3 (1981). That report follows this article as APPENDIX A.

508. *Id.*

509. This writer is now and has been a member of the Wisconsin Judicial Commission since its 1978 inception. On receipt of 3 JUD. CONDUCT REP. (1981), *supra* note 507, this writer questioned the judicial commission staff and determined that some of the 273 complaints were actually individual judges' requests for advisory opinions concerning their activities. As a policy matter, the Wisconsin Judicial Commission does not issue advisory opinions. If a judge does request an advisory opinion, and if the problem is clearly articulated in the request, the commission staff will direct

rily. These cases include judicial requests for advisory opinions, complaints that are actually appellate matters in which the commission has no jurisdiction,<sup>510</sup> unfounded complaints and complaints that are clearly intended to harass or embarrass a sitting judge. The sixty-eight complaints which were investigated by the whole commission were cases that appeared, at first blush, to have merit. On closer investigation and scrutiny the commission found all but five of them to be without merit since no probable cause existed for either misconduct or disability.<sup>511</sup> In five cases the commission found that the complaints had merit but that the judges' conduct under consideration amounted to only minor rule violations or minor failures to perform official duties. These allegations were dismissed with private admonitions to the judges that such conduct constituted violations or failures to properly perform their duties and that the conduct should be corrected in the future.<sup>512</sup> The complainants received dismissal orders with the private admonitions. This device is usually employed after the judge has been requested to respond to an allegation and make a response personally or in writing. The judge usually admits the wrong done by making a personal appearance or written response.<sup>513</sup>

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responses to the judge to either the standard or the rule the judge should look at for his answer.

510. 1979 JC Rules, *supra* note 451, at 6, Rule 3.07 (commission not to act as appellate court). The commission is not allowed to function as an appellate court to review the decisions of a court or judge or to exercise superintending or administrative control over determinations of courts or judges.

511. *Id.* at 8 & 12, Rules 4.07(1)(b) & 5.07(1)(b).

512. *Id.* at 8, Rule 4.07(1)(c) & (d). The administrative rules provide for private admonitions to a judge.

513. There is no constitutional or statutory authority for the Wisconsin Judicial Commission to privately reprimand a judge. The commission adopted this procedure to prevent needless public humiliation of a judge for a minor violation of a rule or standard and to save the untoward costs of a formal hearing and ultimate supreme court sanction. The validity of this sanction is questionable. Its use is subject to abuse by a commission (*e.g.*, hiding major judicial misconduct incidents with private sanctions). More importantly, its use may deprive an innocent judge of the opportunity to be exonerated from an unfounded allegation of misconduct.

This issue is discussed in Gillis & Feldman, *Michigan's Unitary System of Judicial Discipline: A Comparison With Illinois' Two-Tier Approach*, 54 CHL[-]KENT L. REV. 117,132-34 (1977) (Michigan's commission's rule of private sanction has proven successful over the years, has saved time and money and has resulted in most judges responding to save public embarrassment, but there is danger of abuse by a commission and of foreclosing due process adversary rights); Greenberg, *The Illinois "Two-*

The national report also notes that one Wisconsin judge retired before formal charges were filed. Again this report is not accurate. The judge was actually a retired judge serving as a reserve judge on a temporary basis. He ceased being a temporary reserve judge and the commission decided that there was no need to pursue the matter. The allegation was dismissed after the judge advised the commission of his complete cessation of any judicial function.<sup>514</sup>

### 3. Litigation

As mentioned earlier,<sup>515</sup> the conviction of Circuit Judge Alex J. Raineri of federal felony charges, automatically removing him from office, was a direct result of the new commission's investigation into his off-the-bench conduct.<sup>516</sup>

Efforts in 1979 to recall Milwaukee County Circuit Court Judge Christ T. Seraphim met with failure,<sup>517</sup> and the only attempt at address of the legislature in Wisconsin's history was lodged against him in 1980.<sup>518</sup> After investigation and presentment of allegations to the judge and after he filed his responses with the judicial commission, the commission found that there was probable cause that the judge violated the code of judicial conduct. Formal charges to the supreme court were proffered with a request that the hearing be had before a panel of three appellate judges. The panel was formed, held two status conferences and set the hearing for February 25, 1980.

Judge Seraphim, in the interim, sued the judicial commission in a federal 1983<sup>519</sup> action to enjoin the panel hearing, alleging that the specific code of ethics rules he was charged with having violated and the statutes creating the judicial commission were unconstitutional because they

*Tier* Judicial Disciplinary System: Five Years and Counting, 54 CHI.-[KENT L. REV. 69, 93-94 (1977) (opposing "station-house" adjustments or prosecutorial discretion unless a due process advisory system is adopted for these occasions). See also Cohn, *Comparing One and Two-Tier Systems*, 63 JUDICATURE 244, 247-48 (1979).

514. These statements and conclusions are from the author's personal knowledge as a member of the Wisconsin Judicial Commission since 1978. See *supra* note 509.

515. See *supra* notes 203-19 and accompanying text.

516. See *supra* notes 203-17 and accompanying text.

517. See *supra* notes 266-68 and accompanying text.

518. See *supra* notes 118-22 and accompanying text.

519. 42 U.S.C. § 1983 (1976 & Supp. III 1979).

were vague and overbroad. In an amended complaint the judge charged that the statutes creating the commission and its powers were an improper intrusion by the legislature into the province of the state judiciary. The federal district court denied the temporary injunction and dismissed the action.<sup>520</sup> The court employed the *Younger v. Harris*<sup>521</sup> abstention doctrine because the state interest in the pending determination of judicial misconduct was important and because the state judge, Seraphim, had made an insufficient showing that the state case would come under the *Younger* exceptions. The court held that the judge could raise the constitutional issues brought in the federal case in the state proceedings, that the judge made no showing that the state case was brought in bad faith, and that the challenged statutes were not so patently unconstitutional as to justify immediate federal court intervention.<sup>522</sup>

After the hearing, the panel rendered findings of fact and conclusions of law determining that Judge Seraphim engaged in misconduct because he willfully violated rules 8, 11, 15, 16 and 17(e) of the Code of Judicial Ethics.<sup>523</sup> The panel recommended to the supreme court that the judge be removed from office or, alternatively, be suspended from office without pay for not less than three years.<sup>524</sup> The judge argued to the supreme court that the panel erroneously con-

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520. *Seraphim v. Judicial Conduct Panel*, 483 F. Supp. 295 (E.D. Wis. 1980).

521. *Younger v. Harris*, 401 U.S. 37 (1971).

522. *Seraphim v. Judicial Conduct Panel*, 483 F. Supp. 295, 298-99 (E.D. Wis. 1980).

523. *In re Seraphim*, 97 Wis. 2d 485, 294 N.W.2d 485, cert. denied, 449 U.S. 994 (1980). For the purposes of this article there is no need to enumerate the specific acts. Suffice it to say the judge was found to have accepted gifts from a car dealer for an extended period of time and failed to report them in the required annual financial statement. *Id.* at 500-01, 294 N.W.2d at 494 (Rules 8 & 17(e)). There were five separate incidents with sexual overtones involving women, four of whom were complete strangers to the judge, which amounted to gross personal misconduct. *Id.* at 501-03, 294 N.W.2d at 495 (Rule 11). There were also numerous acts of misconduct on the bench concerning commenting on the merits of litigation pending before him, intimidating lawyers and litigants, using bail as an instrument of retaliation, showing disrespect for other trial and appellate courts, refusing to listen to attorneys' arguments and aligning himself with the prosecution in criminal cases, all of which amounted to persistent and aggravated disregard of the standards a judge should conform to, which, when added together, amounted to a rule violation. *Id.* at 504-11, 294 N.W.2d at 495-99 (Rules 15 & 16).

524. *Id.* at 488-89, 294 N.W.2d at 489.

cluded that the specific facts as found by the panel constituted willful violations. The supreme court rejected this argument, holding that the facts found by the panel were not against the great weight and clear preponderance of the evidence and that its conclusion that the facts constituted violations of the Code of Judicial Ethics was not incorrect.<sup>525</sup> The judge argued that because many of the cases involved in the panel hearing had already been appealed to and affirmed by the supreme court, the court had implicitly condoned his conduct by its failure to reverse on grounds of misconduct. The supreme court rejected this condonation argument by stating:

The fact that none of the cases over which [the judge] presided were reversed by this court because of judicial misconduct does not mean that no misconduct occurred or that this court condoned that which did occur. It means only that this court found no judicial misconduct that had so seriously affected the trial as to warrant reversal.<sup>526</sup>

The court suspended the judge without pay for three years.<sup>527</sup>

The procedural challenges raised in the federal section 1983<sup>528</sup> action were taken up by the Wisconsin Supreme Court and rejected seriatim. The judge maintained that the disciplinary measures established by the legislature<sup>529</sup> were void as an unconstitutional exercise of judicial power and offended the separation of powers doctrine. The supreme court rejected this argument because the 1977 constitutional amendment dealing with judicial discipline<sup>530</sup> expressly required such procedural statutes to be established by the legislature and because there was nothing in the state constitution which vested the supreme court with exclusive control over the manner in which members of the judiciary were disciplined and removed from office. The court noted that the Wisconsin Constitution provided for the impeachment, address and recall methods of removal in which the

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525. *Id.* at 509, 294 N.W.2d at 498.

526. *Id.* at 511-12, 294 N.W.2d at 499-500.

527. *Id.* at 514, 294 N.W.2d at 501.

528. *See supra* notes 520-22 and accompanying text.

529. WIS. STATS. §§ 757.81-.99 (1979).

530. *See supra* note 443.

court had no role. The court concluded that these statutes were not an unconstitutional usurpation of the power of the judiciary.<sup>531</sup>

Judge Seraphim next contended that because the constitutional disciplinary measures authorizing suspension and removal became effective in 1977, he was denied due process under the fourteenth amendment to the United States Constitution because many of the charges against him predated the constitutional change. The supreme court rejected this argument as an *ex post facto* law argument clothed in due process terms because the prohibition against *ex post facto* laws applies only to penal statutes, and judicial disciplinary proceedings are not penal in nature. The court then rejected the argument that the pre-1978 conduct could not be considered. The court noted that the judge had written notice of the date of the adoption of the Code of Judicial Ethics in 1968 and of the conduct that was expected of a member of the judiciary and had written notice of the creation of the one-tiered judicially created commission. In light of the overwhelming importance of the objectives which the disciplinary proceedings were intended to serve and because of the noncriminal character of the sanctions that could be imposed, the court did not believe that due process limited their consideration of conduct predating the constitutional amendment. The court concluded that, even if the conduct to be considered was so limited, a substantial portion of the conduct complained of and found by the panel to be in violation of the code occurred after the adoption of the constitutional amendment and the judge's conduct was the same before and after its adoption.<sup>532</sup>

The judge next challenged the statutory right of the commission to determine the hearing forum. He argued that the statute violates due process and equal protection because permitting the commission as the accuser to determine the forum violates fair play. The court rejected the due process argument, holding that due process required only that the judge be afforded a fair and impartial hearing, not that he be permitted to choose the fact finder. The statute challenged

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531. *In re Seraphim*, 97 Wis. 2d at 491-92, 294 N.W.2d at 489-90.

532. *Id.* at 492-95, 294 N.W.2d at 490-92.

did not violate equal protection because, under the judicial disciplinary statutes established by the legislature, all judicial officers are treated equally and afforded the same protection and rights.<sup>533</sup>

The judge's final procedural argument was that the statute<sup>534</sup> and rules 8, 11, 15 and 16 of the code of ethics were unconstitutionally vague because they failed to establish precise standards of behavior for judges and thereby denied them adequate notice of the prohibited conduct and were overbroad because the rules proscribed constitutionally protected free speech and association. The court rejected this argument stating that while these doctrines are generally used to challenge laws defining criminal conduct or conditions of governmental employment, and even if the standards might not have the preciseness required of laws defining criminal conduct, that was of no consequence because the judge was not charged with engaging in criminal conduct, but with judicial misconduct.<sup>535</sup> The judge's reading of the code of ethics was not that of a layperson unfamiliar with the law, but that of a judge with twenty years' experience on the bench and with almost twenty additional years as an attorney. The rules were not vague and the notice provided by the code was sufficient to overcome a vagueness challenge. The court agreed that:

While . . . Rules 8, 11, 15 and 16 may proscribe some speech and conduct which, for other persons in other circumstances, could not be constitutionally proscribed, we do not accept his contention that they are unconstitutionally overbroad. It is well established "that judges, in company with other public servants, must suffer from time to time such limits on these rights as are appropriate to the exercise in given situations of their official duties or functions."<sup>536</sup>

On or about July 26, 1980, Judge Seraphim commenced another section 1983 action against the State of Wisconsin, the Wisconsin Supreme Court and the Wisconsin Judicial

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533. *Id.* at 495-96, 294 N.W.2d at 492.

534. WIS. STAT. § 757.81(4)(a) (1979), provides that misconduct includes "wilful violation of a rule of the code of judicial ethics."

535. *In re Seraphim*, 97 Wis. 2d at 497-500, 294 N.W.2d at 492-94.

536. *Id.* at 499-500, 294 N.W.2d at 294 (quoting *Matter of Bonin*, 378 N.E.2d 669, 684 (Mass. 1978)).

Commission, seeking declaratory and injunctive relief on the same procedural due process and equal protection grounds discussed above.<sup>537</sup> "The Wisconsin Judicial Commission moved to dismiss this 1983 action on April 4, 1982, and after briefs were filed, the district court dismissed the action on the basis of collateral estoppel.<sup>538</sup> Judge Seraphim has appealed this adverse decision to the Seventh Circuit Court of Appeals."<sup>539</sup> On December 18, 1981, the judge petitioned the Wisconsin Supreme Court to modify the three-year suspension without pay by reinstating him as a judge. In a one sentence order dated December 23, 1981, the court denied the petition.<sup>540</sup>

In another case emanating from the 1980 judicial commission activities, a municipal judge was reprimanded by the supreme court for failing to file his financial disclosure report.<sup>541</sup> This case was disposed of by a stipulation between the commission and the charged judge dismissing the action.<sup>542</sup>

### C. Comparison of the Two Systems

Forty-one states have unitary or one-tiered systems in which the investigation, prosecution and litigation with recommendation for sanctions are joined within the purview of the commission with supreme court overview.<sup>543</sup> Only nine states separate the investigative and adjudicative func-

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537. *Seraphim v. Wisconsin*, No. 80-C-759 (E.D. Wis. Oct. 10, 1980).

538. *Seraphim v. Wisconsin*, No. 80-C-795 (E.D. Wis. Jan. 27, 1982). In its memorandum opinion and order the Federal District Court reasoned that a 1983 action was improper because this suit was an attempt by Judge Seraphim to raise the same federal constitutional issues raised before and determined by the Wisconsin Supreme Court in *In re Seraphim*, 97 Wis. 2d 485, 294 N.W.2d 485, *cert. denied*, 449 U.S. 994 (1980), "where he litigated freely and without reservation . . . [and] where he received fair consideration of his claims by a court of competent jurisdiction." (Opinion and order at 10).

539. *Seraphim v. Wisconsin*, No. 80-C-759 (E.D. Wis. Jan. 27, 1982), *appeal docketed*, No. 82-1276 (7th Cir. Feb. 23, 1982).

540. *In re Seraphim*, No. 79-1729-J (Wis. Sup. Ct. Dec. 18, 1981). The petition and order will not be published in a reporter but may be found in the Wisconsin Supreme Court Clerk's office.

541. *In re Guay*, 101 Wis. 2d 171, 175-76, 303 N.W.2d 669, 671-72 (1981).

542. *Id.*

543. *See supra* note 432.

tions.<sup>544</sup> These statistics indicate that the unitary system is preferable. The American Bar Association Joint Committee on Professional Discipline has also stated its preference for the unitary system.<sup>545</sup> The tentative draft of standards recommends that to enhance the Commission's independence of the executive and legislative branches such judicial disciplinary bodies should report only to the state supreme court, because the separation of powers doctrine requires commissions to operate wholly within the judicial branch of government.<sup>546</sup> In this writer's opinion, this exclusiveness theory under the guise of separation of powers is simply wrong. The statement of the ABA committee is contrary to constitutional text, history and practice. Impeachment, address and recall are all methods of judicial discipline wholly outside any supreme court's authority.<sup>547</sup>

This writer will not attempt to prove which commission form is better. The purpose of this comparison is to demonstrate the benefits or shortcomings of one or the other or both in the Wisconsin experience.

Under the unitary system, in most instances, judges can be privately reprimanded for minor indiscretions. A two-tiered commission generally has no such authority because its function is only to investigate and prosecute complaints while the court system retains sanctioning powers. The ability to avoid publicity by privately reprimanding a judge for a minor violation of a standard or ideal is nonexistent under most two-tiered commissions, and such a situation is unfortunate. The present Wisconsin two-tiered commission has adopted administrative rules which provide a method for private admonishment in cases of minor violation of rules.<sup>548</sup> It remains to be seen whether these regulations can pass constitutional muster. It should also be noted that individual

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544. *See supra* note 448.

545. ABA Joint Committee on Professional Discipline, Tentative Draft, Standards Relating to Judicial Discipline and Disability Retirement (1977) [hereinafter cited as Standards Relating to Judicial Discipline]. The standards relating to judicial discipline and disability retirement were approved by the American Bar Association's House of Delegates at Chicago in February 1978.

546. *Id.* at 9 (Standard 2.1 and comment).

547. *See supra* notes 529-31 and accompanying text. *See also* Cohn, *supra* note 513, at 244.

548. 1979 JC Rules, *supra* note 451, at 8-9. Rule 4.07 provides in part:

judges are usually made aware of complaints being investigated by a commission even if they are not personally interviewed by commission staff, and they generally correct minor problems themselves.

Wisconsin's former (unitary) commission's procedural rules provided that if a person complaining against a judge's conduct or petitioning for disability became dissatisfied with the commission's disposition during the confidential phase, that complainant could appeal the commission's ruling to the supreme court by way of petitioning for certiorari.<sup>549</sup> The legislature did not provide such a remedy when establishing the new two-tiered commission. This oversight should be corrected to provide a continuum of the populist ideal.

Both of Wisconsin's commissions have refused, and rightly so, to provide advisory opinions. A prosecutor should never have this dual responsibility. Still, the joint committee on professional discipline of the ABA has acknowledged the need for an advisory body.<sup>550</sup> The Wisconsin Supreme Court, under its superintending powers, could establish an advisory committee of lawyers and judges similar to the present committee which renders advisory opinions to lawyers who desire an explanation of the Code of Professional Responsibility. Of course, the advisory opinion would not be binding on the judicial commission, but a judicial officer's good faith reliance on such an opinion could be considered in mitigation of or as a defense to a disciplinary charge.

Finally, both commissions have utterly failed in their ed-

Following the conclusion of proceedings under § JC 4.05 or 4.06, the commission may vote to do any of the following:

(d) Find that alleged misconduct involves any of the following and dismiss the allegation with such admonition as the commission deems appropriate:

1. The violation of only one standard of the code of judicial ethics.
2. The violation of a rule of the code of judicial ethics which is not wilful.
3. The failure to perform official duties which is not wilful or persistent.
4. The alleged misconduct does not warrant prosecution because of its minor nature or other circumstances.

549. See *supra* note 454 and accompanying text.

550. Standards Relating to Judicial Discipline, *supra* note 545, at 64-65 (Standards 9.1-.3 and comments).

ucational roles.<sup>551</sup> Every commission has as constituencies the state judges, the court system, lawyers, litigants, the legislature and, in the last analysis, the people. All are entitled to know the progress of the commission's annual activities. No commission should rely on the notoriety of its public cases to meet its educational responsibilities. A commission, through its staff and members, should seek to participate in bar and judicial meetings and be willing to address meetings of the public. Wisconsin's former commission provided an annual report to the supreme court. Unfortunately, that was the end of the report. An annual report should be released statewide to the news media, bar associations, bar libraries, public officials and judges.<sup>552</sup> Educational projects such as these must be undertaken by the present commission if it is to retain credibility with its constituencies.

## X. CONCLUSION

The American Bar Association, in its standards relating to judicial discipline and disability retirement, proposes that impeachment be retained even though it is expensive, cumbersome, ineffective and subject to political maneuvering, but concludes that no other method of judicial removal is justified or recommended.<sup>553</sup> This proposal falls on deaf ears in populist Wisconsin, although no judge has ever been successfully convicted and removed by impeachment. There is no doubt that it is a dull, clumsy tool that too often throughout its English common law and American history was employed for political purposes. This article has noted that its use is nearly impossible against any claimed misconduct of the federal judiciary. Its use of late, in the various states, has been negligible. Its nonuse, with one exception, in Wisconsin, follows the federal and other states' patterns. But, as the ABA recommends, impeachment will be retained.

Address of the legislature suffers from the same problems

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551. It appears that this problem is endemic to all commissions. See Martineau, *The Educational Role of Judicial Conduct Organizations*, 63 JUDICATURE 227, 228 (1979).

552. *Id.* at 229.

553. Standards Relating to Judicial Discipline, *supra* note 545, at 8 (Standard 1.8 and commentary).

as does impeachment. More importantly, however, because address is so harshly final, its use destroys the due process rights of fair notice, hearing and confrontation in a trial-like atmosphere which Americans cherish. England has not employed address since the Act of Settlement, and most states that have adopted the remedy, with the exception of Massachusetts, have also failed to use it. Wisconsin had an opportunity to eliminate this never-used accountability method when it reorganized the court in 1977, but neither the Blue Ribbon Committee nor the legislature discussed the elimination of address as a judicial removal remedy at that time. Populism is implicit.

The incompatibility doctrine, which disqualifies judges, as well as other state public officials, from holding more than one office, is not necessarily a true populist issue; it is more of a separation of powers issue. But it does have populist implications, for all see clearly the danger to a republican form of government of one person being at the same time legislator and judge, executive and judge, or legislator and executive. There would be simply too much concentration of power in the hands of one person. The proper tension between the tripartite areas of government makes for a freer society within the Republic, and that freedom is a populist ideal.

Wisconsin's constitutional afterthought of adopting conviction of a felony as an ipso facto cause for removal from any public office again has its origins in the populist ideal. It needs little discussion to establish relevance. Simply answering the question: "Do the people want a felon holding an office of public trust?" suffices. This tool avoids the clumsiness of impeachment and the denial of due process inherent in the address method. It is swift, fair and populist.

In the early twentieth century the American and local bar associations fought losing battles throughout the various states against recall. Their argument that this was a vicious, unconscionable weapon that struck at the needed independence of the judiciary has proved unfounded, at least in Wisconsin. There can be no doubt that it has been employed because of unpopular judicial decisions, but certainly no valid argument can be made that recall has been misused to thwart judicial independence.

Mandatory retirement, harsh as it is, is without doubt a proper method of removal for age when coupled with proper retirement benefits and a court system's need to employ able retired judges in emergency situations. Its use enables this state to maintain a vigorous judiciary.

The nonpartisan election of judges for stated terms has served as a check against unbridled judicial power or corruption throughout Wisconsin's 134-year history. Sporadic attempts at merit selection and retention have met with rebuff. The most serious or scholarly attempt at such a change was foiled by its authors, the Blue Ribbon Committee, when they deleted it from their 1973 proposed constitutional changes implementing court reorganization. The elimination of the merit selection/retention proposal was a commonsense approach. It was a recognition that presenting this issue to the people could jeopardize the whole of court reorganization in populist Wisconsin. It remains to be seen whether the present Wisconsin State Bar Association's proposal meets with similar rebuff in the legislature or by a vote of the people. Regardless of its failings as a removal remedy, election of judges remains a popular "security blanket."

The most salutary of all these remedies is the creation of judicial commission procedures. Their purpose is to provide a continuous check on the judiciary for violation of a code of judicial ethics. Their unstated purpose, however, is to protect the judiciary from unfounded complaints that are either appellate court matters or simply attempts at harassment. One must note that no matter how powerful one thinks a member of the judiciary or the judiciary as a whole is, judges and the judiciary are extremely vulnerable to unwarranted attacks on their stewardship because they are unable to respond publicly to unfounded complaints either as individuals or collectively. The confidentiality of a commission's investigations pending the filing of a formal misconduct charge or disability petition admirably protects that interest. The commission procedures also eliminate the unwieldiness and untoward costs of impeachment and the due process problems inherent in address, while appearing to eliminate the political overtones of both. Populist accountability inherent in the Wisconsin ideal is realized here because the majority of commission members are nonlawyers.

A judge does not have to be accused of criminal conduct or some other heinous act for the commission's mechanisms to be employed. An alleged minor violation of either the standards or rules of the Code of Judicial Ethics is sufficient to begin the process. Then confidential review at the initial stage eliminates those claims that should rightly be appellate matters and those claims that are intended to harass or humiliate any particular judge. In this manner the judicial commission system not only satisfies the due process rights of the individual but also has the salubrious effect of quenching populist thirst for accountability in a public manner.



## FOOTNOTES TO APPENDIX A

n/a Numbers not reported. Iowa, Ohio, and Virginia restricted by confidentiality requirements.

\* Dispositions may not equal complaints if more than one complaint submitted against a judge. Maryland, New Jersey, Michigan, and South Dakota reported complaints on fiscal year.

\*\* Some commissions do not keep exact numbers for dispositions in this category.

1. Florida. Public Censure and fine.
2. Illinois. Case dismissed by Courts Commission after hearing.
3. Kentucky. Voluntary temporary retirement.
4. Louisiana. Mandatory age retirement.
5. Michigan. Includes 31 pending complaints.
6. Michigan. Resigned and retired dispositions compiled together.

7. Minnesota. One retired judge not to be assigned cases; supreme court dismissed three cases as moot or *res judicata*.

8. Mississippi. Numbers cover first seven months of commission's operation.

9. Pennsylvania. One judge refused to resign to run for nonjudicial office and supreme court declared the office vacant. One judge reinstated after criminal charges were dismissed. One judge's term expired during investigation; the office was declared vacant and case dismissed as moot.

10. South Carolina. Two judges not reappointed by governor.

11. Texas. Two judges resigned after being indicted.

12. Washington. No commission in 1980.

13. West Virginia. Case dismissed as moot when judge failed to win reelection.