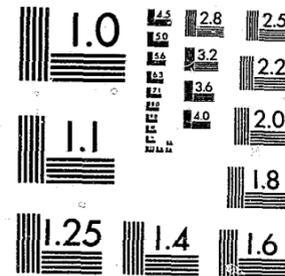


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1982 REPORT OF THE
COMMISSION ON JUDICIAL PERFORMANCE
TO THE GOVERNOR

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LETTER OF TRANSMITTAL

To: His Excellency, George Deukmejian
Governor of the State of California

The 1982 Report of the Commission on Judicial
Performance is presented herewith.

January 3, 1983

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Chairperson

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During 1982, three significant cases that the Commission on Judicial Performance had placed before the Supreme Court were concluded. In two of the cases, In re Hugo Fisher, 31 Cal. 3d 919, and In re Charles S. Stevens, 31 Cal. 3d 403, the Court adopted the Commission's recommendations and censured each Superior Court judge (San Diego and Santa Barbara, respectively) for conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The third case, In the Matter Concerning a Judge-Lewis A. Wenzell, L.A. 31506, was dismissed by the court after the San Diego Municipal Court judge resigned on August 3, 1982. Because each case presents particularly noteworthy issues, a brief discussion of each follows.¹

Article VI, Section 18(c) of the California Constitution provides that, upon the Commission's recommendation, the Supreme Court may publicly censure or remove a judge for willful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

In both the Fisher and Charles Stevens cases, the Supreme Court, in adopting the Commission's recommendations, publicly

¹ The discussion of the Wenzell case appears at pages 3-8 infra.

censured very specific, limited conduct. In Charles Stevens, the court censured the judge's repeated use of ethnically offensive language, but did not find bias in the handling of the judge's cases. The majority of the judge's comments were made off the bench or in chambers. Several episodes in chambers occurred during settlement conferences or other meetings for official court business. In addition, the Commission found the judge made one objectionable statement, not an ethnic remark, from the bench.

Judge Hugo Fisher was initially charged with thirty instances of possible misconduct involving the Conservatorship of the Estate of Carole McCune, Conservatee. After an evidentiary hearing and oral argument, the Commission dismissed all except one of those charges. It presented the remaining charge to the Supreme Court as the basis for recommending the public censure which ensued. The judge had engaged in a pattern of ex parte contacts with lawyers for only one side in the complex conservatorship case which was pending before him for several years and had recurrently failed to include the opposing side in his contacts, orally and in writing.

Fisher offers a noteworthy substantive precedent. In its decision, the Supreme Court stressed the violation of the California Code of Judicial Conduct, which states: "[a] judge should ..., except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding." (Canon 3, part A(4).) This marks the first time the Court has imposed discipline relying only upon the Code as authority.

Fisher also set a procedural precedent. In its recommendation, the Commission noted a previous private admonishment, administered to the judge in another proceeding, as an enhancement to the recommendation supporting discipline. The action was taken pursuant to California Rule of Court 909(b), which reads:

(b) Any prior disciplinary action may be received in evidence to prove that conduct is persistent or habitual or to determine what action should be taken or recommendation made following the finding of facts constituting grounds for private admonishment, censure, removal or retirement.

The Court tacitly approved the enhancement by following the Commission's recommendation for public censure.

At the end of 1982, two of the Commission's recommendations for judicial discipline, one for removal and one for censure, were pending before the Supreme Court. The Commission recommended on May 7, 1982, that Mario P. Gonzalez, of the East Los Angeles Municipal Court, be removed from office, L.A. 31572. On June 16, 1982, the Commission recommended that Harry R. Roberts, of Mono County Superior Court, be censured, S.F. 24436. This is the first of the Commission's nine recommendations for censure to be contested before the Supreme Court.

II

In the Matter Concerning a Judge - Lewis A. Wenzell, L.A. 31506, constituted the first time the Commission has exercised its power to recommend suspension of a judge under Article VI, Section 18(b) of the California Constitution, which reads:

(b) On recommendation of the Commission on Judicial Performance or on its own motion, the Supreme Court may suspend a judge from office without salary when in the United States the judge pleads guilty or no contest or is found guilty of a crime punishable as a felony under California or federal law or of any other crime that involves moral turpitude under that law. If the conviction is reversed suspension terminates, and the judge shall be paid the salary for the judicial office held by the judge for the period of suspension. If the judge is suspended and the conviction becomes final the Supreme Court shall remove the judge from office. (Emphasis supplied)

Judge Wenzell had been convicted October 9, 1981, of five instances of a publicly offensive, disgraceful misdemeanor, Section 647(b) of the Penal Code, soliciting or engaging in an act of prostitution. His notorious behavior off the bench, which was publicized in the press, greatly agitated the bar and bench as well as the general public. Accordingly, the Commission considered use of its authority in making findings to recommend that Judge Wenzell be suspended, pending the appeal of his conviction.

For the conviction of a misdemeanor which appeared to involve moral turpitude, the Commission devised suspension procedures based upon the record of the criminal proceedings. The Commission's Notice of Intention to Set Hearing was served upon Judge Wenzell October 27, 1981, two and one-half weeks after his conviction. The judge's Response and Memorandum in Support of Request to Stay Proceedings was filed November 13, 1981. The Commission's Notice of Time and Place of Hearing set the hearing for December 3, 1981, before the Commission, and

scheduled briefing. On November 20, 1981, the Commission adopted a resolution provisionally admitting into evidence, subject to objection at the December 3 hearing, the transcript testimony of witnesses in the criminal case, People v. Wenzell. Briefing was completed November 30, 1981, and the Commission heard evidence and argument December 3, 1981. The Commission found that the offenses as set forth in the record did involve moral turpitude, and on December 4, 1981, publicly recommended to the Supreme Court that Judge Wenzell be suspended without pay under Article VI, Section 18(b) of the Constitution, while awaiting the finality of the convictions in his misdemeanor case involving moral turpitude, as had previously been done in felony cases.

The Supreme Court, on January 13, 1982, declined, by a vote of four to one, to suspend upon the conviction and the Commission's record and recommendation. Instead, the Court ordered the matter briefed and argued (June 1, 1982), and ultimately dismissed the recommendation as moot September 22, 1982. (See Mark Forster, "A Tale of Credit-Card Prostitution and Judicial Politics - The trials and tribulations of San Diego's Judge Wenzell", California Journal, Oct., 1982, at 385.)

A look at the history of this section of the Constitution is instructive. The genesis of Article VI, Section 18(b), appears in the circumstances surrounding the conviction, in 1936, of Gavin W. Craig, an associate justice of the California District Court of Appeal, of obstruction of justice in a federal criminal proceeding (Craig v. United States, 81 F. 2d 816 (1936)). An action in quo warranto by the California Attorney General, asking to have the office declared vacant by reason of the conviction, failed twice. (People v. Craig, 92 Cal. 561

(1936); People v. Craig, 9 Cal. 2d 615 (1937)). The judge finally resigned five days before the Legislature convened to begin removal measures, which had never before (nor have since) been employed.

Shortly thereafter, as a result of these troubles, the State Bar sponsored the predecessor to Article VI, Section 18b, to provide that the Supreme Court could remove a judge from office upon conviction of a crime involving moral turpitude. The provision was adopted in November, 1938, but was not used until 1962, when Judge Marvin Sherwin, of the Alameda County Superior Court, was suspended after conviction of three counts of income tax evasion and three counts of perjury (In the Matter of Marvin Sherwin, S.F. 21064, suspended June 4, 1962, removed February 5, 1964.) Subsequently, the section was employed on three other occasions, all for felony convictions: In re Maurice Tindall, obstruction of justice, S.F. 21464; In re Glenn W. Evans, obstruction of justice, S.F. 21465 (both suspended November 3, 1963); and In re Maurice Hardeman, conspiracy and obstruction of justice, S.F. 21997 (removed December 7, 1966).

The suspension provision has always been grounded upon a conviction which involved moral turpitude. While the term "moral turpitude" has historically been difficult to restrict and define, the Supreme Court has held that offenses comparable to Judge Wenzell's amount to moral turpitude. A key element in this finding is the relationship of the offense to the occupation. (See Pettit v. State Board of Education, 10 Cal. 3d 29,31 (1973), following the test of Morrison v. Board of Education, 1 Cal. 3d 214 (1969).)

The Commission's use of the Section 18(b) suspension provision and the difference between this procedure and the Commission's general power to proceed under Article VI, Section 18(c), have been widely misunderstood. A proceeding under Article VI, Section 18(c), for example, for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute", is brought by the Commission under other procedures and upon different grounds. The hearings required under Section 18(c) would risk colliding with the pending criminal case or appeal, thereby impairing the judge's rights, and would duplicate the testimony in the criminal proceeding. The record of criminal proceedings which supplies the grounds for the direct remedy under Section 18(b) substitutes for the lengthy process of formal hearings in a Section 18(c) action. The record of the underlying conviction is the focus of a suspension proceeding under Section 18(b), but not of a proceeding under Section 18(c), the regular disciplinary channel.

In this case, because of the possibility that the Supreme Court would not find "moral turpitude", the Commission decided to proceed simultaneously under Section 18(c). Pursuant to Rule 902(b)(3), the Commission announced on October 30, 1981:

"The Commission on Judicial Performance has ordered proceedings to inquire into matters concerning Judge Lewis A. Wenzell of the San Diego Municipal Court, San Diego County. The Commission is authorized by the California Constitution and the California Rules of Court to conduct inquiries involving judges.

"The Commission is issuing this announcement to confirm that a hearing will be held. The hearing will result in the Commission's decision upon the issues of judicial discipline raised by the facts, following charges about judicial activity or conduct.

Conviction of a misdemeanor may not dispose of issues before the Commission, which may also act upon other constitutional grounds.

"The Commission acts independently and must adhere to Constitutional grounds, rules and procedures established without reference to any particular case or the volume of publicity it may have generated. Under the Constitution, only the California Supreme Court may publicly discipline a judge.

"The proceedings are conducted so as to provide due process and protect the rights of all parties to a fair hearing. Minimum due process requirements mandate that the Commission proceed objectively and with dispatch."

Although charges had been served and three special masters had been appointed to hear the matter, the full hearings required by Section 18(c) under the "conduct prejudicial" language were delayed by the pendency of the criminal case. Before the matter was heard, the convictions were reversed because of improper jury instructions. Subsequently Judge Wenzell resigned, but after the County certified a recall for the November ballot. The recall passed by a wide margin.

III

As of January 1, 1983, the Commission's jurisdiction extended over 1,308 California state court judges. The total is comprised of:

Supreme Court Justices	7
Justices of Courts of Appeal (does not include 18 new seats)	59
Superior Court Judges	646
Municipal Court Judges	501
Justice Court Judges	95

During 1982, the Commission met ten times in eight one-day sessions and two two-day sessions, for a total of twelve days of meetings. At the conclusion of the year's last meeting on November 19, 1982, 22 pending matters were carried forward into 1983. For purposes of annual statistics, the Commission's year extends from the last meeting of 1981, December 3, to the last meeting of 1982, November 19.

The Commission received and considered 360 complaints during 1982. Of these, 247 were closed without further action after initial scrutiny. This is the customary disposal of complaints where allegations fail either to merit further action or to state a case of misconduct within the Commission's jurisdiction. Each complainant is notified by letter of this determination.

In 68 of the complaints lodged during the year, the Commission investigated before deciding whether to proceed or to close the matter. The judges involved were contacted by letter and invited to respond in 61 cases. The Commission closed the majority of these cases after it received an explanation from the judge involved. Both judge and complainant were notified of this disposition by letter. The Commission may comment upon or criticize certain aspects of a judge's action in a letter to the judge and may suggest that his practices be modified.

The Commission initiated 14 preliminary investigations into a judge's conduct during 1982. This step is taken pursuant to the California Rules of Court when the allegations of a complaint include significant questions about a judge's conduct. Most of the investigations undertaken were ordered

after initial inquiry to the judge. One judge resigned while the Commission was investigating. A summary of cases over the last six years is attached.

In addition to recommendations of censure, removal, or involuntary retirement, the Commission has the authority privately to admonish a judge for improper actions, dereliction of duty, or other constitutionally stipulated grounds. The Commission privately admonished six judges in 1982: five upon conclusion of a preliminary investigation and one after withdrawal of formal charges. Although a judge has the right to appeal an admonishment, none of those imposed in 1982 was appealed.

The Commission held one hearing into a judge's conduct during 1982, pursuant to Rules 905-909, which provide for such action whenever the Commission concludes that formal proceedings should be instituted.

IV

In addition to the constitutional responsibilities outlined above, the Commission on Judicial Performance also receives and reviews judges' applications for retirement for disability which interferes with the efficient performance of judicial duties and is, or is likely to become, permanent. (California Government Code Section 75060(a)). In both its disciplinary and disability functions, the Commission has been concerned for some time that candidates for judicial office are not required by the appointing authority to disclose sufficient information about their health and health history, including chronic problems, before they take office.

This problem becomes especially significant when a judge, who has health problems which were known or discoverable at the time judicial office was sought, either dies in office or seeks disability retirement a short time after he assumed the bench. In these unusual cases, the public bears not only the burden of inadequate performance, but also the heavy additional expense of pensions to the disabled judge or the surviving spouse.

The Commission recommends that judges be required fully to disclose their existing health problems to the appointing authority. To this end, in September, 1980, and again in October, 1982, the Commission proposed to the Governor's Legal Affairs Secretary that the health section of the judicial candidates' questionnaire be expanded to require fuller disclosure of health history and chronic conditions. According to the most recent information available to the Commission, no change has yet been made.

V

In its 1981 Annual Report, the Commission noted that it had produced an informational pamphlet to explain its function and role in the judicial system. The Commission hoped the pamphlet would help to make its work and its limitations clearer to interested members of the public.

The pamphlet discusses the following topics:

- I. What is the Commission on Judicial Performance?
- II. How does the Commission on Judicial Performance work?

III. The role of the Commission regarding judicial performance including some limitations, and

IV. What is "Judicial Independence"?

The pamphlet has proved to be highly successful in informing the public about the Commission. It is now in its second printing. Copies of the informational pamphlet are available at the Commission offices, Room 3052 State Building, 350 McAllister Street, San Francisco, California 94102.

CASES COMING BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

Six Year Summary - 1977-1982

<u>Year</u>	<u>Complaints Filed</u>	<u>Inquiries (some kind of investigation)</u>	<u>Judge Contacted</u>	<u>Preliminary Investigation</u>	<u>Admonishments</u>	<u>Resignations or Retirements</u>	<u>Public Discipline</u>
1977	217	53	52	11	8	1	1 retirement (involuntary)
1978	274	72	59	20	7	3	1 censure 1 retirement (involuntary)
1979	291	76	62	18	3	2	
1980	260	65	54	12	8	1	
1981	267	52	48	18	7	3	1 censure 1 removal
1982	360	68	61	14	6	1	2 censures

January 1983

END