Bill as Introduced

CACR 22 – AS INTRODUCED

1999 SESSION

99-0457
09/10

CONSTITUTIONAL AMENDMENT
CONCURRENT RESOLUTION ***22***

RELATING TO:	7-year terms for state judges.
PROVIDING THAT:	all state judges appointed on or after January 1, 2001 be commissioned for 7-year terms, which may be renewed.
SPONSORS:	Rep. Hunter, Hills 7; Rep. Welch, Rock 18; Rep. Pepino, Hills 40; Rep. Buckley, Hills 44; Sen. Roberge, Dist 9
COMMITTEE:	Judiciary

ANALYSIS

This constitutional amendment-concurrent resolution provides that all state judges appointed on or after January 1, 2001 shall be commissioned for 7-year terms, which may be renewed.

- -

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

CACR 22 - AS INTRODUCED

99-0457
09/10

STATE OF NEW HAMPSHIRE

In the Year of Our Lord One Thousand Nine Hundred and Ninety-Nine

CONCURRENT RESOLUTION PROPOSING CONSTITUTIONAL AMENDMENT

RELATING TO: 7-year terms for state judges.

PROVIDING THAT: all state judges appointed on or after January 1, 2001 be commissioned for 7-year terms, which may be renewed.

Be it Resolved by the House of Representatives, the Senate concurring, that the Constitution of New Hampshire be amended as follows:

I. That article 35 of the first part of the constitution be amended to read as follows:

[Art.] 35. [The Judiciary; Tenure of Office, etc.] It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit. It is therefore not only the best policy, but for the security of the rights of the people, that the judges of the supreme judicial court should hold their offices so long as they behave well ***and for any term appointed***; subject, however, to such limitations, on account of age, as may be provided by the constitution of the state; and that they should have honorable salaries, ascertained and established by standing laws.

II. That article 73 of the second part of the constitution be repealed and reenacted to read as follows:

[Art.] 73. [Tenure of Office To Be Expressed in Commissions; Judges to Hold Office During Good Behavior for 7-year terms; Removal.] The tenure that all commissioned officers shall have by law in their offices shall be expressed in their respective commissions, and all judicial officers duly appointed, commissioned and sworn, shall hold their offices during good behavior except those for whom a different provision is made in this constitution. The governor with consent of the council may remove any commissioned officer for reasonable cause upon the address of both houses of the legislature, provided nevertheless that the cause for removal shall be stated fully and substantially in the address and shall not be a cause which is a sufficient ground for impeachment, and provided further that no officer shall be so removed unless he shall have had an opportunity to be heard in his defense by a joint committee of both houses of the legislature. All judges appointed on or after January 1, 2001 shall be duly appointed, commissioned, and sworn to 7-year terms and shall hold their offices during good behavior; except for those judicial officers for whom a different provision is made in this constitution. A judge appointed on or after January 1, 2001 may be reappointed, commissioned, and sworn to subsequent 7-year terms.

III. That the above amendment proposed to the constitution be submitted to the qualified voters of the state at the state general election to be held in November, 2000.

IV. That the selectmen of all towns, cities, wards, and places in the state are directed to insert in their warrants for the said 2000 election an article to the following effect: To decide whether the amendments of the constitution proposed by the 1999 session of the general court shall be approved.

V. That the wording of the question put to the qualified voters shall be:

Are you in favor of commissioning state judges appointed on or after January 1, 2001 for 7-year terms which may be renewed, rather than commissioning judges for life?

VI. That the secretary of state shall print the question to be submitted on a separate ballot or on the same ballot with other constitutional questions. The ballot containing the question shall include 2 squares next to the question allowing the voter to vote "Yes" or "No." If no cross is made in either of the squares, the ballot shall not be counted on the question. The outside of the ballot shall be the same as the regular official ballot except that the words "Questions Relating to Constitutional Amendments proposed by the 1999 General Court" shall be printed in bold type at the top of the ballot.

VII. That if the proposed amendment is approved by 2/3 of those voting on the amendment, it becomes effective when the governor proclaims its adoption.

Speakers

SIGN UP SHEET

To Register Opinion If Not Speaking

Bill # CACR 22 Date 3/17/99

Committee Judiciary

** Please Print All Information **

Name	Address	Phone	Representing	Pro	Con
Lee Hall	P.O Box 32	434-6215	Vocals	✓	
Rep Dick Marple		627-1837	Merr #11	X	

SIGN UP SHEET

To Register Opinion If Not Speaking

Bill # CACR 22 Date 3/17/99

Committee Judiciary

** Please Print All Information **

Name	Address	Phone	Representing	(check one) Pro	Con
Sheila Roberge	SH9	x3080	NH Senate Dist 9	✓	
David H. Bradley	5 Fox Field Lane, Hanover		self		✓
Spencer Kingsland + Maxine Kingsland			Littleton, N.H.		
Jay Flanders	Concord	868-1364	TRUST-NH	✓	
KAREN TESTERMAN	PO BOX 6054 AMHERST	672-5539	SELF	✓	
Jennifer Rafting	42 Browns Lane Loudon	798-5380	Self	✓	
Janet S. McLaughlin	267 Mill Brook Rd Landaff	03585	(My children + Grandchildren)	✓	

SIGN UP SHEET

To Register Opinion If Not Speaking

Bill # CACB 22 Date 3/17/99

Committee Judiciary

**** Please Print All Information ****

Name	Address	Phone	Representing	(check one) Pro	Con
Representative David Hall	Enfield	632-5463		✓	

Hearing Minutes

HOUSE COMMITTEE ON JUDICIARY

PUBLIC HEARING ON CACR 22

BILL TITLE: relating to 7-year terms for state judges. Providng that all state judges appointed on or after January 1, 2001 be commissioned for 7-year terms, which may be renewed.

DATE: March 17, 1999

LOB ROOM: 208 **Time Public Hearing Called to Order:** 9:35 a.m.

Time Adjourned: 4:45 p.m.

(please circle if present)

Committee Members: Reps. Mock, Peterson, Jacobson, Keane, Bergin, Dokmo, L. Jean, Rowe, Ford, Withee, Dudley, Piccopi, Soltani, Woods, Wall, DePecol, J. Pratt, Craig, Lasky, Mitchell, Solow and Wood.

Bill Sponsors: Reps. Hunter, Welch, Pepino, Buckley, Sen. Roberge

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

*Rep. Hunter, sponsor, supporting
-introduced bill and read from written text

Rep. Pepino, co-sponsor, supporting
-gave brief historical perspective of issues
-gave what he perceived to be excuses by the court – "the people want a change" – "the people need a change"
-the governor and council will do the reviewing
-has questions as to the justices who participated in Claremont II – would that be a factor in a decision for renewal – answer vague but leaning toward yes

Rep. Welch, co-sponsor, supporting
-the only time a review would take place would be at the re-appointment before Governor and Council
-he agrees with an independent judiciary
-it is instituting a new system – a measure which is less intrusive – people are upset, they think judges should be accountable
-responded to questions as to the nature of his constituent calls
-they are concerned that the courts have created chaos and the arrogance of the courts
-he has had more calls about the court system in the last two years than in all is previous years as representative
-responded to further questions by committee members

Donna Sytek, Speaker of House, supporting

-gave history of her involvement in this issue during her legislative career
-cited accountability in government with exception of the judicial branch
-if a judge gets "burned out", term limit would be a graceful way for him to retire
-use same process that we appoint in the lst place – the political process is appropriate
-members of judicial branch should be just as accountable as the other 2 branches of government
-hopes for a favorable report from the committee
-testified that she would be flexible as to length of time
-areas of accountability: conduct patterns of decisions that are corrected on appeal
-responded to further questions from committee

Rep. Buckley, co-sponsor, supporting

-should have profound lasting impacts for the next hundred years
-motivated in his public life by issue of justice – this is a suitable issue
-this will take 35 years to become wholly implemented
-there is accountability everywhere in government except in the judiciary
-also flexible on length of term
-no comparison between southern judges upholding the constitution in the 60's and the present legislature before us
-do not compare "apples and oranges"
-do not do a disservice to this legislature by promotion of such a comparison
-Question - as to long tenure of constitutional provision A. Rep. Buckley replied that in 1784 women didn't vote, others were not allowed to vote, we corrected our mistakes, now we should correct this provision

Judy Reardon, Governor's Legal Counsel

-spoke in favor of this legislation (she is spokesperson for Governor Shaheen)
-explained present appointment process
-in other states it's generally the state senate that recommends appointments, not a vote of the legislatures
-governor would not favor the election of judges
-answered further questions by committee

Rep. David Hess – opposed

-take least change to accomplish what is desired allowing that "burnouts" do exist but question the wholesale change of the system
-likely consequence is to further politicize the judiciary
-noted that New Hampshire has been scandal free
-empowered on the differences in the 3 branches of government
-referred to the mechanism of the bill of address as a remedy
-testified that if this were to become law (the CACR) within 3 years 50% of the judiciary could be replaced
-Rep. Lasky suggested minimum age for judges
-open to that idea does not specifically endorse it
-also not supportive of a legislative review committee

*David Bradley, appeared in opposition

-spoke briefly, submitted written testimony
-witnessed illegality in chambers – did nothing!

James Duggin – Franklin Pierce Law Center

-spoke in opposition
-gave a brief personal history in his involvement on this topic
-believed this would further politicize the judiciary
-agreed with the last 4 speakers
-the single most important act of a government is in the appointment of the judiciary
-think that the system is not broken
-would have a chilling effect upon people that would otherwise have a desire to serve

McNeil Peterson ←

Caroline Douglas, representing self as attorney
-Karen Testerman speaking for Ms. Douglas due to Ms Douglas' loss of voice
-Ms. Douglas opened however, and she spoke of the "old boys network"
-there is a huge crack in our legal system
-on hearing Mr. McNeil's testimony I am appalled that he didn't have the guts to turn him in, but that's the way the system works
-in the courts "you appoint your friends"
-spoke briefly to the present abuses within the system
-Karen Testerman then read from a prepared text
-it would not bother her if it did not apply to Supreme Court
-would not favor election of judges
-we have no scandal because of secrecy rules
-if they were not in place the doors would blow wide open

Robert Nichols, representing prisoners
-supports bill
-there are too many innocent people in prison
-the court gives short shrift to psychological damages
-went on to mention anecdotal cases
-witnessed in behavior of judges to influence juries in heinous cases
-too many biased judges
-described "brotherhood" (judges, lawyers, prosecutors, members of the bar, etc)
-if we don't do the very best we can in appointing judges, we don't do justice to the constitution – this is a quote from the Bill of Rights
-present rules are Greek to the common person
-"plea bargains are an atrocity"
-our justice system is in one hell of a mess – gave anecdotal instances

Janet McLaughlin, representing children and grandchildren
-supports this bill
-charged a loss of her civil rights – she was not treated as a person in the legal sense
-this will be a remedy so citizens will have a fair chance at justice
-gave a sobering account of her situation with the legal system and courts

Claire Ebel, NHCLU, opposing
-would force decisional accountability
-judges should be accountable to their decision and constitutionality of their decisions
-never politically biased decisions
-spoke in further general opposition
-could return to the old practice of appointing long-time attorneys to the bench – establishing a minimum age

John McIntosh, NH Bar Assn.

-spoke in opposition of bill
-reiterated other previous testimony in opposition

Theodore Kamasinski
- spoke in favor of bill
-Bridges vs Cal holds that judges are just as accountable as any other officeholders
-submitted written testimony
-alluded to Justice Brock's letter to Rep. Welch concerning his trying to influence him in regard to the court security bill
-thinks fixing present structures could work better than a CACR
-emphasized opening the system
-cited a few examples of judicial misconduct
-supports bill as a last resort

Respectfully submitted,

Rep. Loren J. Jean, Clerk

SPEAKING – SUPPORTING

Caroline Douglas, 205 East Side Dr., Concord
Judy Reardon, representing Governor Shaheen
Rep. Raymond Buckley
Rep. Donna Sytek
Rep. David Welch
Rep. Bruce Hunter
Rep. Leo Pepino

SPEAKING – OPPOSING

Rep. David Hess
David H. Bradley, 5 Fox Field Lane, Hanover
James Duggan, Franklin Pierce Law Center
Malcolm McNeil, Colony Cove Rd., Durham

CACR-22

Rep. Hunter Sponsor Introduced, Read from written test. Submitted same

Rep Repins: Co Sponsor. Gave brief historical perspective of issue. Gave what he perceived to be excuses by the Court "The People want a change" "The people need a change". The Gov + council will do the reviewing. as to the justices that participated in Claremont 2 would that be a factor in a decision for renewal. Answer vague but leaning toward yes

Rep Welch Co Sponsor. "The only time a review would take place would be at the re appointment before Gov + council." Agreed with independent Judiciary. "It is instituting a new system." A measure that is least intrusive. "People are upset they think that judges should be accountable". Responded to? as to the nature of his constituent calls. "They are concerned that the courts have created chaos and the arrogance of the courts. More calls about court system in the last 2 years than all previous" Responded to Smithers com.

Donna Sytek Speaker Gave brief history of her involvement in this issue during her legislative career. Cited accountability in Govt with exception of the judicial branch. If a judge gets "hunt out" 1 term limit would be a graceful way for them to retire. Use same process that we appoint in the 1st place political process is appropriate. Members of Judicial branch should be just as accountable as the other 2 branches. Hopes for a favorable report from committee. Testified that she would be flexible at to length of term

Areas of accountability: conduct patterns of decisions that are corrected on appeal. Responded to further com.?

Rep Buckley Co Sponsor Should have profound + lasting impacts for next hundred years. Motivated in his public life by issue of justice. This is a justice issue. This will take 35 yrs to become wholly implemented. There is accountability everywhere in govt except in the judiciary. Also flexible on length of term. ?. No comparison between Southern judges upholding const. in the 60s and the present leg before us. Do not compare 'apples + oranges' do not do a disservice to this leg by promoting such a comparison.; re: long tenure of const provision: Rep Buckley replied that in 1784 woman didn't vote others were not allowed etc. We corrected our mistakes. That we should also correct this provision

Judy Reardon Gov's Office Spoke in favor of this legislation (spokesperson for Gov.) Explained present appt. process in other states it's generally the state Senate that recommends appts. The Gov support the council to make the appointments not a vote of Leg. Gov would not favor election of judges. Respond to further?

Rep Hess Opposed

Take Court change to accomplish what is desired allowed that "tenants" do exist now but? the wholesale change of system. Likely consequence is to further politicize the Judiciary. Noted that N.H. has been scandal free. Expounded on the differences in the

3 branches of Gov't. Referred to the mechanics of the bill of address as a remedy. Testified that if this were to become law (the BACK) within 3 yrs 50% of the Judiciary could be replaced. Rep Lasky suggested max age for judges. Open to that idea does not specifically endorse it. Also not supportive of a Leg review committee.

David Bradley appeared in opposition.
Spoke briefly submitted written testimony. mentioned illegality in chambers — did nothing!

James Duggin spoke in opposition. Cited need for judicial independence. Alludes to Hoss's testimony.

Malcolm McNeil opposition Spoke to Judicial independence. Submitted written testimony did allow that a few judges were not fair

Walter Peterson Spoke in opposition Gave a brief personal history in his involvements on this topic. Believed this would threaten politicize the Judiciary. Agreed with the last 4 speakers. The single most important act of a Gov in the appt of the Judiciary. Think that the system is not broken. Would have a chilling effect upon people that would otherwise have a desire to serve.

Caroline Douglass. Karen Testerman speaking Ms Douglas Due to Ms Douglas loss of voice.
Ms Douglas opened however and spoke of the "Old Boys Network" There is a high crack in our legal system. On hearing Mr McNeils testimony I am appalled that he didn't have the guts to turn him in. But that's the way the system works. In the appts. "Favor against your friends"

Spoke briefly to the present abuses within the system. Karen Teitelman then read from a prepared text. It would not bother her if it did not apply to Supreme Court. Would not favor election of Judges. We have no scandal because of secrecy rules. If they were not in place the doors would blow wide open.

Robt Nichols Representing Prisoners: Supports bill "There are too many innocent people in prison" It can't give short shrift to physcological damage. Went on to anecdotal cases. Witnessed in behavior of judges to influence juries in serious cases too many biased judges. Described "brotherhood" (Judges, Lawers, prosecutors members of the bar etc) If we don't do the very best we can in appointing Judges we don't do justice to the Constitution. Quoted from the bill of rights. Present rules are greek to the common person. "Plea bargains are an atrocity" "Our Justice system is in one hell of a mess" gave further anecdotal instances.

Janet Mc Laughlin Representing Children + Grandchildren Supports bill. Charged a loss of her civil rights. I was not a person in the legal sense.

This will be a remedy so citizens will have a fair chance at justice Gave a sobering account of her situation with the legal system and courts.

Dave Blak: Civil Liberties Union Would have decisions accountable. Judges should be accountable to their decisions + the Constitution

of their decisions. Never politically biased decisions. Spoke in further General opposition. Could return to the old practice of appointing long time attys to the bench — establishing a minimum age.

John McIntosh N.H. Bar Spoke in opposition. Reiterated other previous testimony in opposition.

Theodore Kamuniski: Spoke in favor Bridges vs Cal. Holds that judges are just as accountable as any other officeholders. Submitted written testimony. Alluded to Justice Brandeis letter to Roy Ulrich concerning his trying to influence him in regard to the court security bill. Thinks fixing present structures could work better than a C.A.C.R. Emphasized opening the system. Cited a few examples of Judicial Misconduct Suggests Bill has a last resort.

HOUSE COMMITTEE ON JUDICIARY

PUBLIC HEARING ON CACR 22

BILL TITLE: relating to 7-year terms for state judges. Providng that all state judges appointed on or after January 1, 2001 be commissioned for 7-year terms, which may be renewed.

DATE: 3/17/99

LOB ROOM: 308 **Time Public Hearing Called to Order:** 9:35

Time Adjourned: Recessed 12:15
Re opened 1:05
Adjourned 4:45

(please circle if present)

Committee Members: Reps. Mock, Peterson, Jacobson, Keans, Bergin, Dokmo, L. Jean, Rowe, Ford, Withee, Dudley, Picconi, Soltani, Woods, Wall, DePecol, T. Pratt, Craig, Lasky, Mitchell, Solow and Wood.

Bill Sponsors:

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

Sub-Committee Actions

Judiciary and Family Law Committee
Judicial Reform Subcommittee Meeting

September 29, 1999
9:30 a.m. – Room 208 LOB

CACR 2	Relating to supreme court rules. Providing that supreme court rules shall be subject to review and approval by a special legislative committee.
HB 568	Establishing a review panel to review judicial officers.
CACR 22	Relating to 7-year terms for state judges. Providing that all state judges appointed on or after January 1, 2001 be commissioned for 7-year terms, which may be renewed.
HB 53	Establishing a process for reviewing judges.

Subcommittee Members Present: Subcommittee Members Rep. Mock, Chairman; Rep. Keans, Rep. Laskey, Rep. Craig, Rep. Picconi, Rep. Woods, Rep. Soltani, Rep. Wall, Rep. Jean.

The meeting was called to order at 9:40 a.m.

The subcommittee started by discussing the proposed amendments to RSA 490:32 and then agreed to go forward with its proposal and approved drafting of an amendment to RSA 490:30. Rep. Soltani offered an amendment to CACR 2, stating that rules cannot be inconsistent to the RSAs.

Subcommittee Executive Session:

CACR 2 Rep. Jean moved OTP/A (#1999-2015h), seconded by Rep. Rep. Woods.
Vote: 7 yeas and 2 nays.

HB 568 Rep. Soltani moved, seconded by Rep. Jean, that the bill be struck and amendments be proposed to RSA 490:32 and RSA 490:30. (Two amendments are being drafted into legal format dealing with RSA 490:32 and RSA 490:30.) The motion was OTP/A.
Vote: 9 yeas and 0 nays.

CACR 22 The subcommittee felt that 7-year terms were an inappropriate move to make with the courts in N.H.
Rep. Craig moved ITL, seconded by Rep. Laskey.
Vote: 7 yeas and 2 nays.

HB 53 The subcommittee believes the evaluation process should be allowed to work. The minority wants a periodic review.
Rep. Keans moved ITL, seconded by Rep. Craig.
Vote: 5 yeas and 3 nays.

Respectfully submitted,

Representative Sandra B. Keans

9:30
208

Judicial Reform Study Comm.

9/22/99

called to order 9:40

I Committee started by discussing the proposed amendments to R.S.A. 490:32
SC Subcommittee has agreed to go forward to proposal

II SUBCOMMITTEE APPROVED FOR DRAFTING OF AMEND. TO RSA 490:3

III SOLTANI OFFERED AMENDMENT CACR 2 STATING THAT RULES CAN NOT BE INCONSISTENT TO THE RSA's

EXECUTIVE SESSION OF SUBCOMMITTEE

CACR 2

LOREN JEAN MOVED CACR 2 OTP/Am 2nd BY WOODS → # 7-2
~~#~~ 7 YEAS 2 NAYS

HB 568 (9-0) OTP/Am 2ND JEAN
SOLTANI MOVED BILL BE STRUCK AND ADD PROPOSED AMENDMENTS TO RSA 490:32 AND RSA 490:30
UNANIMOUS 9 YEAS 0 NAYS

CACR 22 CRAIG ITL 2ND LASKEY (7-2)
ROLL CALL: ACONNI, CRAIG, WOODS, LASKEY,
~~AYES~~ 7 - ~~NAYS~~ 2

HB53 - KEANE ITL CRAIG 2ND (5-3)

HOUSE COMMITTEE ON JUDICIARY

RE-REFER SUBCOMMITTEE WORK SESSION ON

BILL TITLE: CACR 22

DATE: 9/22/99

Subcommittee Members: Reps. Mock, Kenns, Laskey, Craig, Piconi, Woods, Jean, Soltani, Wall

Comments and Recommendations:

Committee felt that 7 year terms were inappropriate more to make with the courts in NH

Amendments:

Sponsor: Rep. _____ OLS Document #: _____ Adopted/Failed

Sponsor: Rep. _____ OLS Document #: _____ Adopted/Failed

Sponsor: Rep. _____ OLS Document #: _____ Adopted/Failed

Motions: OTP, OTP/A, ITL, Re-Refer, Interim Study (Please circle one.)

Moved by Rep. Craig

Seconded by Rep. Laskey

Vote: 7-2

Motions: OTP, OTP/A, ITL, Re-Refer, Interim Study (Please circle one.)

Moved by Rep. _____

Seconded by Rep. _____

Vote: _____

Respectfully submitted,

Rep. Sandra P Kenns

Subcommittee Chairman/Clerk

Sub-Committee Minutes

Henry P. Mock
Chairman
Andrew R. Peterson
Vice Chairman

State of New Hampshire

HOUSE OF REPRESENTATIVES
Legislative Office Building, 33 North State Street
Concord, NH 03301-6328
TEL: (603) 271-3184
TDD Access: Relay NH 1-800-735-2964

COMMITTEE ON JUDICIARY

MEMORANDUM

TO: **"Judicial Reform" Subcommittee Members**

Rep. James W. Craig
Rep. Loren J. Jean
Rep. Sandra B. Keans
Rep. Bette R. Lasky
Rep. Al J. Picconi
Rep. Robert H. Rowe
Rep. Tony F. Soltani
Rep. Janet G. Wall
Rep. Phyllis L. Woods

FROM: **Representative Henry P. Mock, Subcommittee Chair**
PO Box 237, Jackson, NH 03846-0237
(603) 356-5109 / majorchip@landmarknet.net

DATE: **August 19, 1999**

SUBJ: **Subcommittee Work Sessions**

The next subcommittee work sessions for the "Judicial Reform Subcommittee" will be held on Wednesday, September 1 and September 8, 1999 at 10:00 a.m. to continue the work on the bills listed below. At our first work session held today, only four of the ten subcommittee members were present. I know this is a busy time of year, however, please make every effort to be present for the next two work sessions.

Should you have any questions, please do not hesitate to contact me.

CACR 2	relating to supreme court rules. Providing that supreme court rules shall be subject to review and approval by a special legislative committee.
✓ **CACR 22**	relating to 7-year terms for state judges. Providing that all state judges appointed on or after January 1, 2001 be commissioned for 7-year terms, which may be renewed.
HB 53	establishing a process for reviewing judges.
HB 568	establishing a review panel to review judicial officers.

cc: Judiciary Committee Members

Judiciary and Family Law Committee
Judicial Reform Subcommittee Organizational Meeting

August 19, 1999
10:00 a.m. – Room 303 LOB

CACR 2	Relating to supreme court rules. Providing that supreme court rules shall be subject to review and approval by a special legislative committee.
CACR 22	Relating to 7-year terms for state judges. Providing that all state judges appointed on or after January 1, 2001 be commissioned for 7-year terms, which may be renewed.
HB 53	Establishing a process for reviewing judges.
HB 568	Establishing a review panel to review judicial officers.

Present: Subcommittee Members Reps. A. Picconi, B. Lasky, S. Keans, H. Mock; Committee Researcher Kevin Moquin; Reps. J. Pratt, N. Ford, M. Smith; Eileen Fox, Supreme Court Counsel; John MacIntosh, N.H. Bar Association.

Chairman Mock stated his feeling is that the general public has a problem with the courts because of their immunity to sanctions.

One approach we should take is to develop a standard of criteria that needs to be met in order to be nominated by the Governor. Rep. Ford has federal criteria list.

Chairman Mock has asked that we take the section from the Family Court bill that deals with criteria of marital masters and put in a separate, stand-alone piece of legislation.

Seven-year reappointment issue. Problems: (a) within a matter of 7 years the total judiciary could be turned over without regard to qualifications; (b) how would someone in 6th year of term react to politically connected defendants.

Rep. J. Pratt would be interested in the role the Bar Association plays both in this state and others. J. MacIntosh: For years the Bar has had a process candidly done in confidence and then ranks the individuals, including demeanor. Governor may ignore. Mr. MacIntosh will supply the process.

Rep. Smith cautioned the committee not to "over fix" the problem or "throw the baby out with the bath water" in their zeal to compensate for the few bad judges.

Rep. J. Pratt: CACR 2 goes into effect at the federal level unless, within 90 days, the Congress turns it down.

The subcommittee will reconvene on September 1st at 10:00 a.m. for the full day.

Respectfully submitted,

Representative Sandra B. Keans

State of New Hampshire

FILE

STATE HOUSE

CONCORD

TDD Access: Relay NH 1-800-735-2964

Work Session of the Judicial Reform Subcommittee

9/1/99
10:00 AM to 10:40 AM
Legislative Office Building, Room 208

Meeting called by: Rep. Henry Mock

Type of meeting: Work Session

Attendees: Rep. Rowe, Rep. L. Jean, Rep. Lasky, Rep. J. Wall, Rep. Craig, Rep. Soltani, Rep. Keans, Rep. Woods, Rep. Picconi

Agenda

1. Evaluation/Qualifications for Judges
2. Qualifications/Appointment/Review of Marital Masters
3. RSAs/Constitutional Articles/Case Law Relating to Lesislative Authority Over Judicial Appointments
4. The Role of the New Hampshire Bar Association in Judicial Appointments

Additional Information

Resource persons: Kevin Moquin, House Committee Research, Tel: 271-3600

Special notes:

SUBCOMMITTEE WORK SESSION

COMMITTEE: **Judicial – Subcommittee on Judicial Reform**

BILL NUMBER: **CACR 2, relating to supreme court rules.**

CACR 22, relating to 7-year terms for state judges.

HB 53, establishing a process for reviewing judges.

HB 568, establishing a review panel to review judicial officers.

DATE: **Wednesday, September 1, 1999** LOB ROOM: **208**

TIME CALLED TO ORDER: **10:00 a.m.** TIME ADJOURNED: **12:45 p.m.**

SUBCOMMITTEE MEMBERS PRESENT: **Reps. Mock (Chair), Keans (Chair), Rowe, Lasky, Craig, Soltani, Woods, and Picconi.**

OTHERS PRESENT: **Rep. Solow, Kevin Moquin (Committee Researcher), Eileen Fox (Counsel to the Supreme Court), Jennifer Comer (Executive Director of NH Trial Lawyers), Kevin Duggan (NH Trial Lawyers), Jon MacIntosh (NH Bar Association)**

Evaluation of Judges

Rep. Mock commented that during session he found there was not a lot of support for term limits and thought a more productive approach would be looking at an evaluation process.

Eileen Fox, Counsel to the Supreme Court, said forms are used currently in the system.

I. District Court – sent to police, DCYF, county attorney, NH Public Defenders Office, NH State Police, various lawyers/prosecutors using court. The committee is developing questions to ask administrative judges when they appear next week.

II. Superior Court – sent to attorneys and staff in court.

Howard Zibel, Clerk of Supreme Court of NH, requested to appear on September 8, if possible.

Kevin Duggan, NH Trial Lawyers (Manchester), said he opposes bills relating to judicial review and term limits and believes the longstanding protections are adequate. He does not understand the motivation for this legislation, but suspects it is Claremont and one case should not change the longstanding procedures and constitution. Judge Nadeau has been in touch with trial lawyers

to get an opinion. If there are problems, how do we to correct them? The Association has developed a survey for the membership to rate judges. He said it was an eye-opener, i.e. the comments on extremes of both ends (most moderate on check off). The form was used for Municipal Courts, Superior Courts, and Probate Courts. The Association has not rated candidates for judgeships and recognizes the nature of the business is adversarial, therefore, so many unhappy litigants particularly in divorce cases (hates to see). He opposes the bill changing the court rule authority as well. To do, believes there is a benefit to ranking the process politically.

Jon MacIntosh, New Hampshire Bar Association, said a screening procedure was recommended by NH Bar Association and offered to the Governor, which may or may not participate. Governor John Sununu refused. Some doubt that with the constitutional power to appoint, the Legislature can set qualifications. Rep. Rowe asked if there was a problem if a lawyer has complaint and brings to administrative judge and it becomes known to judge, must disclose to client. His experience is that most judges offer recusal before lawyer requests. He will supply historical data on correlation between assessment with actual appointment.

RECOMMENDATION TO THE FULL COMMITTEE:

❒ See Below
❒ No Recommendation Yet

RESPECTFULLY SUBMITTED,

Rep. Sandra B. Keans, Clerk
For the Subcommittee

Rev. 7/99

SUBCOMMITTEE WORK SESSION

COMMITTEE: **Judicial – Subcommittee on Judicial Reform**

BILL NUMBER: **CACR 2, relating to supreme court rules.**

CACR 22, relating to 7-year terms for state judges.

HB 53, establishing a process for reviewing judges.

HB 568, establishing a review panel to review judicial officers.

DATE: **Wednesday, September 8, 1999** LOB ROOM: **208**

TIME CALLED TO ORDER: **10:00 a.m.** TIME ADJOURNED: **4:10 p.m.**

SUBCOMMITTEE MEMBERS PRESENT: **Reps. Mock (Chair), Keans (Chair), Rowe, Lasky, Craig, Soltani, Woods, Picconi, Wall, and L. Jean.**

OTHERS PRESENT: **Rep. Dyer, Rep. Solow, Rep. J. Pratt, Sen. Roberge, Kevin Moquin (Committee Researcher), Judge Morrill, (for Judge Nadeau), Eileen Fox (Counsel to the Supreme Court), Howard J. Zibel (Clerk of Supreme Court), Donna Craig (Howard Zibel Assistant)**

Howard J. Zibel, Clerk of Supreme Court and Executive Secretary of the JCC, has no direct involvement in the evaluation of judges. (See written testimony attached.) Major rules change: (a) is an "after the fact" change, i.e. when complaint is concluded will be made public, and (b) even if dismissed, judge will see and offered opportunity to put a response in file. The purpose is not to embarrass or besmirch the judge, but rather to make them better judges. For example: (1) Judge with DWI after denying continuing drinking and (2) judge called police officer who arrested his brother.

Between 1960 and 1980, all 50 states had formed Judicial Conduct Committees. He recognizes there is a perception of potential intimidation and therefore not a lot of complaints come from lawyers. JCC does not necessarily wait for a pattern of behavior before acting. A great many complaints arise out of marital matters with words like "biased" included. Obviously, the JCC does not deal with facts of case, but judges' behavior. The JCC can not be used as a separate appeal process. Seven votes are needed to bring action.

It would be very rare, but there may be a situation where a judge does not follow the law intentionally in an order and could therefore be actionable before JCC, e.g., sentence to ten years when RSAs call for six years maximum. It is obviously very provable.

Judges orders and findings are exempt from the committee's jurisdiction. There is no where for a judge to be reeducated if he disregards the law. Not looked at by JCC because can be thought of as "findings and rulings." The public perception is wrong as to how many judges are reprimanded. There were 31 cases of reprimand last year and the public knew nothing about it. The Supreme Court will be the final decision-maker if complaints are to be made public. Mr. Zibel thinks this will happen as have proposed new rules.

Rep. Merton S. Dyer, E. D. & A. Committee, (see handout) spoke of the judges retirements and the new judge retirement system. Presently, retirement is eight years for full-time judges with a non-contributory by justices and state provides all funds. You must retire at age 70, will receive ¾ of his last salary, and has to have served seven years. To retire at age 65, you have to have served 10 years. If declared permanently disabled, judges get benefits as well.

The proposed retirement plan would only include judges appointed after the bill goes into effect. The defined contribution plan by state and judges. Judge could say where money is invested and would be vested at a rate of 20 percent per year for five years. Could leave bench and get retirement money. The bill would do nothing for judges in position now. Not looked at retirement system for part-time ECS.

Eileen Fox, Counsel to the Supreme Court, said has been working on judicial retirement system for new judges and has concerns about the judicial branch having a plan that would attract people to judicial service and keep them there, i.e., a little older, experienced and will stay. The judicial branch thinks there would be a defined benefit plan and tells at the end what benefit would be and would this be more appropriate. In addition, wants to make sure tax implications won't be against present judges in system. A six percent contribution by individuals and four percent by state is what is being proposed now. This will work with legislative committee as far as a defined benefit plan versus a defined contribution plan.

The committee recessed at 12:00 Noon and reconvened at 1:00 p.m.

Judge Edwin Kelley, Administrative Judge of District and Municipal Courts, used the form for four to five years. (Seventy-nine judges in his district.) Twenty-five go out – not signed. Judge gets compilation. Also gets on regular basis, letters of complaint to supplement the process. Everyone gets a response within 30 days. Actually listens to tapes from court. (All cases are taped.) Sometimes, he will sit down with judge to listen to tapes.

In cases of pure misconduct has obligation to pass to JCC. Always work in conjunction with the Supreme Court for removal or reassignment. Notified by JCC in severe cases, especially discipline that required monitoring. Fifty to sixty individual letters of complaint per year. The response back to complainant always carries the notation that they may file with JCC.

Rep. J. Pratt asked, do you have authority to order continuing education in an area. Judge Kelley said would, but also would get concurrence of Supreme Court, by an informal call to Judge Brock who quickly meets with associate – quick turn around.

Judge Morrill, for Judge Nadeau, read a handout of Judge Nadeau's statement. The evaluation process takes place every 2 to 2-1/2 years. Speaking for himself, he feels evaluations are helpful and honest. The incentive is to him, this evaluation is "his grade" for his work in his profession. Judge Nadeau get about 25 evaluation (unsolicited) per year, both positive and negative. There is approximately 12 hours of continuing education required each year for judges (which is determined by the Supreme Court). Take the oath, office, etc. seriously and discussions (reprimands) with Chief Justice taken seriously. He feels burnout can be a concern to him personally and feels a retirement system could change that. He is required on the Judicial Code of Ethics to report any infraction see to JCC, with some self-policing involved.

Judge Mahar, Probate Court, feels settling the retirement issue would help burnout and issues of having to stay put for perhaps 40 years. (He used the example of a spouse who gets job offer out of state.) They send out 70-80 evaluation forms on each judge and get back approximately 50 forms. Then goes to see judge in each court and goes over the evaluations. He also does self-assessment. When going over evaluation form, he tells you where judge is strong or weak. Would not hesitate to go to Supreme Court if judge would not respond to his comments. Judge Mahar keeps a copy and the judge being evaluated keeps a copy. Overall, he feels evaluations are positive and productive. He has been trying to make the courts more uniform.

Chairman Mock went over the bills (CACR 2, CACR 22, HB 53, HB 568) wanted to know how the committee wants to proceed. On CACR 2, a discussion ensued to eliminate the last sentence of 73-a. Also, there was a discussion on the wording of CACR 1.

The subcommittee adjourned at 4:10 p.m. The next meeting is scheduled for September 15 to vote on the bills.

RECOMMENDATION TO THE FULL COMMITTEE:

❒ See Below
❒ No Recommendation Yet

RESPECTFULLY SUBMITTED,

Rep. Sandra B. Keans, Clerk
For the Subcommittee

SUBCOMMITTEE WORK SESSION

COMMITTEE: **Judicial – Subcommittee on Judicial Reform**

BILL NUMBER: **CACR 2, relating to supreme court rules.**

✓CACR 22, relating to 7-year terms for state judges.

HB 53, establishing a process for reviewing judges.

HB 568, establishing a review panel to review judicial officers.

DATE: **Wednesday, September 15, 1999** LOB ROOM: **208**

TIME CALLED TO ORDER: **10:05 a.m.** TIME ADJOURNED: **12:40 p.m.**

SUBCOMMITTEE MEMBERS PRESENT: **Reps. Mock (Chair), Keans (Clerk), Rowe, Lasky, Craig, Picconi, Wall, and L. Jean.**

OTHERS PRESENT: **Rep. J. Pratt**

Rep. Rowe presented a proposal for a five-year term for Chief Justice of Supreme, Superior Court. This does not mean removal from the court. Reps. Picconi, Keans, Lasky, Wall and Craig spoke against this proposal. Looking for a statute not constitutional evaluation. Rep. Jean spoke in favor of this proposal.

Chairman Mock presented a proposal for statutes to deal with performance evaluations of judges adding to RSA 490:32. There was a thorough work session on the proposal. Chairman Mock will redraft with agreed upon changes.

The next meeting is scheduled for September 22, 1999 at 9:30 a.m. At that time, the subcommittee will vote on all these re-referred bills.

RECOMMENDATION TO THE FULL COMMITTEE:

❒ See Below
❒ No Recommendation Yet

RESPECTFULLY SUBMITTED,

Rep. Sandra B. Keans, Clerk
For the Subcommittee

Testimony

RULE

RULE 39. COMMITTEE ON JUDICIAL CONDUCT

(1) Pursuant to RSA 490:4 (Supp. 1977) and to provide for the orderly and efficient administration of the Code of Judicial Conduct, Rule 38 of the Rules of the Supreme Court, there is hereby established a committee on judicial conduct.

(2) *Appointment of Committee*

(a) The committee on judicial conduct shall consist of eleven members appointed by the supreme court. One member shall be an active or retired justice of the supreme court; one an active or retired justice of the superior court; one a district court judge; one a probate court judge; two New Hampshire Bar Association members; and five citizens not of the bar or bench.

(b) The committee address shall be:

Executive Secretary
Committee on Judicial Conduct
Supreme Court Building
Concord, New Hampshire 03301

(3) *Terms of Office*

The term of each member shall be four (4) years, and members may be reappointed to successive terms without limitation.

(4) *Vacancy*

(a) A vacancy in the office of the committee shall occur

(1) When a member ceases to be a member of the committee; or

(2) When a judge who is a member of the committee ceases to hold the office which he or she held at the time of selection; or

(3) When a lawyer ceases to be admitted to practice in the courts of this State or is appointed to a judicial office; or

(4) When a citizen appointee becomes a lawyer or a judge; or

(5) When a member ceases to be domiciled in New Hampshire.

(b) A vacancy shall be filled by selection of a successor with the same qualifications as those required for the selection of his predecessor in office. A member selected to fill a

vacancy shall hold office for the unexpired term of his or her predecessor.

Each vacancy in the office of the committee shall be filled within thirty days after the vacancy occurs.

(c) Members may retire by submitting their resignations to the committee, which shall certify each vacancy to the supreme court.

(d) No member may participate in any proceedings before the committee involving his or her own conduct.

(e) Whenever a member is disqualified from participating in a particular proceeding, or is unable to participate by reason of prolonged absence or physical or mental incapacity, the court, upon written request of the chairperson, may appoint an alternate to participate in any such proceeding or for the period of any such disability, any such alternate to have the same qualifications as those required for the selection of the member who is being replaced.

(5) *Expenses of the Committee and Staff*

(a) The expenses shall be paid from appropriations of funds, if any are available, to the committee on judicial conduct through the supreme court budget.

(b) Members shall serve without compensation for their services, but shall be reimbursed for necessary expenses incurred in the performance of their duties, subject to the availability of funds.

(c) The committee may employ or appoint an executive secretary and other employees, including counsel, to perform such duties as it shall direct, subject to the availability of funds. The attorney general may, if requested by the committee, act as its counsel generally or in any particular investigation or proceeding.

(d) The executive secretary of the committee shall be the clerk of the supreme court or any other person designated by the supreme court.

(6) *Quorum and Chairperson*

(a) A quorum for the transaction of business by the committee shall be seven members. No act of the committee shall be valid unless concurred in by seven of its members.

Members of the committee may participate in a meeting of the committee by means of a conference telephone or similar

communications equipment by means of which all persons participating in the meeting can hear each other at the same time. Participation by these means shall constitute presence in person at a meeting.

(b) The committee shall elect from its members a chairperson and a vice-chairperson, each of whom shall serve a term of two years. The vice-chairperson shall act as chairperson in the absence of the chairperson. In the absence of both the chairperson and the vice-chairperson, the members present may select one among them to act as temporary chairperson.

(7) *Meetings of the Committee*

Meetings of the committee shall be held at the call of the chairperson, the vice-chairperson, or the executive secretary or at the written request of three members of the committee.

(8) *Annual Report*

On or before December 31 of each year, the committee shall prepare a report summarizing its activities during the preceding year. One copy of this report shall be filed with the chief justice of the supreme court and other copies may be made available to the public by a majority vote of the full committee with the approval of the supreme court.

(9) *Complaints and Investigations*

(a) Who May File Complaints: Complaints may be filed only by any person who is directly affected by the conduct complained of or was present when the conduct complained of occurred.

(b) Complaints: The committee shall consider all complaints, submitted in writing and signed by a complainant having standing and not obviously unfounded or without merit, alleging conduct on the part of a judge complained against that may be contrary to the Code of Judicial Conduct, or alleging conduct on the part of a master or referee complained against that may be contrary to canons 1, 2, and 3 of the Code of Judicial Conduct. The committee shall not consider complaints against a judge or master or referee relating to his rulings. Such matters should be left to the appellate process. The committee shall also consider written complaints by a complainant having standing and not obviously unfounded or without merit against court stenographers or reporters and any clerk of court or deputy clerk, including registers of probate and any persons performing the duties of a clerk or register, alleging conduct that may be contrary to canons 1, 2, 3 A(1)-(3) and (5)-(7) and 3 B of the Code of Judicial Conduct. Following evaluation of a complaint by the committee, the executive secretary shall provide the person complained against with a copy of the complaint,

except that such person shall not be notified of a complaint that the committee is without jurisdiction to consider unless otherwise determined. The person complained against shall respond in writing to the merits of the complaint within twenty days after receipt from the committee of a copy thereof and the committee's request for a response. Whenever the executive secretary provides a clerk of court or deputy clerk or register of probate, or other person performing the duties of a clerk or register, or court stenographer or court reporter, with a copy of a complaint against such person, the executive secretary shall at the same time give notice of the complaint to the chief justice or administrative judge of the court system in which such person serves. In such instances, the chief justice or administrative judge shall send a copy of the complaint to the presiding justice of the particular court in which such person serves.

(c) Investigation: An investigation of the complaint shall be conducted by the chairperson or the committee's designee.

(d) Hearings or Trials in Process: The committee shall not ordinarily investigate any complaint while a hearing or trial giving rise to the complaint is in process. The committee may waive this rule by vote of six members of the committee in an appropriate case.

(e) If the matter is not informally resolved or adjusted and if the investigation does not disclose probable cause to warrant further proceedings, the person submitting the statement, criticism or complaint shall be so notified but nevertheless a hearing may be requested by the person complained against. The person complained against shall be notified of the committee's findings and action.

(f) Inquiries Initiated by Committee: An inquiry relating to the conduct of a judge, master, referee, stenographer or reporter, or clerk of court or deputy clerk, including a register of probate or any person performing the duties of a clerk or register, may be initiated by the committee on its own motion, without a signed written complaint, upon any reasonable basis. If by virtue thereof the committee determines that sufficient cause exists for further inquiry, it may proceed to an investigation which shall be conducted by the chairperson or the committee's designee. Notice of the initiation of an inquiry by the committee on its own motion and of any resulting investigation shall be given to the person whose conduct is the subject of the inquiry or investigation at such time or times as the committee deems appropriate.

(10) *Hearings*

The person whose conduct is being investigated shall be given an opportunity to explain and be heard before the committee in

advance of any unfavorable action.

(a) Notice of Hearing: Notice of the hearing shall be given to the person and the complainant by mail prepaid at least thirty days prior to any hearing. Such notice to the judge, master, or referee whose conduct is being investigated shall include the following:

(1) A general factual summary of the complaint, or if the committee has proceeded on its own motion, a general factual summary of the charges generated by the committee's inquiry,

(2) those standards of the Code of Judicial Conduct which are alleged to have been violated,

(3) the time, date and place of the meeting or hearing,

(4) the fact that all further notices concerning the hearing, including any adjournments thereof, shall be given by the chairperson,

(5) the fact that the committee and the judge, master, or referee whose conduct is being investigated may be represented by counsel at the hearing, and may have witnesses present.

(b) The hearing shall be held before the committee with a record thereof by a stenographer to be paid for by the committee. The hearing shall be open to the public.

(c) If, after the hearing, the committee determines that there has been a violation of the Code of Judicial Conduct, but that the violation is not of a sufficiently serious nature to warrant the imposition of formal discipline by the supreme court, it shall dispose of the matter by informal resolution or adjustment. Such disposition may take the form of admonishing the judge, issuing a reprimand, requiring corrective action, directing professional counseling or assistance, imposing conditions on the judge's conduct, or other similar remedial action, or any combination of the foregoing.

(d) If, after the hearing, the committee determines that the person complained against has violated the Code of Judicial Conduct and that the violation is of a serious nature so as to warrant formal disciplinary action, censure or suspension, the committee shall file a report of its findings with the supreme court together with a record of the proceedings. Said report and record and all further proceedings before the court shall be public.

(e) The committee shall have subpoena powers. Every witness in any hearing before the committee shall be sworn to tell the truth.

(f) Evidence necessary to establish a violation of the Code of Judicial Conduct shall be clear and convincing but no judge shall be compelled to testify.

(g) The committee may respond publicly to any unjustified criticism of a judge.

(h) Committee action shall require a vote of at least seven members concurring in any action under (c) and (d) above.

(11) *Review by Supreme Court*

Upon receipt of a report of its findings from the committee under 10(d), the supreme court shall set the matter down for hearing which shall be open to the public. At such hearing the judge or master or referee complained against shall have the opportunity to appear in person and/or by counsel and be heard on the facts and the law. The supreme court shall file a written opinion and judgment directing such disciplinary action as it finds just and proper, or exonerating the judge or master or referee complained against.

(12) *Counsel Fees*

Any judge or master complained against shall be entitled to counsel. Upon application, the committee may, in its discretion and subject to the availability of funds, pay such portion as it deems equitable of the fee and expenses of the judge's or master's counsel.

(13) *Immunity*

Each person shall be immune from civil liability for all of his statements made in good faith to the committee or to the supreme court or given in any investigation or proceedings pertaining to a complaint against a judge, master, or referee. The protection of this immunity does not exist as to statements made to others. The committee, its staff, counsel, and investigators shall be immune from civil liability for any conduct arising out of the performance of their duties.

(14) *Duty of Participants*

All participants in the proceedings shall conduct themselves so as to maintain the confidentiality mandated by Supreme Court Rule 40. Violation of this duty shall constitute an act of contempt of the supreme court.

FILE

RULE 40. PROCEDURAL RULES OF COMMITTEE ON JUDICIAL CONDUCT

(1) Applicability and Definitions.

(a) All proceedings of the committee on judicial conduct, created by Supreme Court Rule 39, shall be governed by these rules.

(b) As used herein, the following terms shall have the following meanings:

(1) "Judge" includes a full-time marital master for all purposes of the Code of Judicial Conduct, and includes a referee or other master insofar as complaints arise under canons 1, 2, and 3 of the Code of Judicial Conduct. "Judge" shall also include court stenographers or reporters and clerks of any court or deputy clerks, including registers of probate and any persons performing the duties of a clerk or register, with respect to canons 1, 2, 3 A(1)-(3) and (5)-(7), and 3 B of the Code of Judicial Conduct.

(2) "Proceeding" includes each step taken or which may be taken under these rules with respect to a complaint filed with the committee alleging misconduct of a judge, or with respect to an inquiry concerning the conduct of a judge which the committee has initiated on its own motion.

(3) For the purposes of these rules, a "hearing" is that procedure which follows a statement of formal charges.

(2) Meetings, Conduct of Business, Staff, Quorum and Disqualification.

(a) The committee may, by vote, establish regular or stated meeting dates. In addition, special meetings of the committee may be called by the chairperson, the vice-chairperson, or the executive secretary, or at the written request of three members of the committee.

(b) The business of the committee may be transacted by telephone, exchange of correspondence, or other informal poll of members, unless one or more members object; provided, however, that no formal charges shall be instituted or regular investigation ordered or unfavorable action taken against a judge except upon deliberation and the affirmative vote of at least seven members at a meeting of the committee.

Members of the committee may participate in a meeting of the committee by means of a conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other at the same time. Participation by these means shall constitute presence in person at a meeting.

(c) The executive secretary shall perform the duties and responsibilities prescribed by these rules and such other duties and responsibilities as the committee may determine from time to time. He shall receive all complaints, information, and inquiries, and process the same under the direction and supervision of the committee. He shall maintain the committee's records, maintain statistics concerning the operation of the committee, and prepare an annual report of the committee's activities for presentation to the committee. He shall coordinate investigations ordered by the committee, and ensure that they are conducted discreetly and with dispatch. Subject to the direction and control of the committee, he shall have charge of the disbursement of expense funds available to the committee through the supreme court's budget. Generally, he shall supervise the work of other personnel employed by the committee, direct the activities of the committee's office, and endeavor to keep members of the committee properly informed about its business.

(d) The committee may employ such private investigators, special counsel, experts and other personnel as the committee in its discretion deems necessary for the efficient discharge of its duties, subject to the availability of funds. The function of special counsel shall be to gather and present evidence in support of formal charges filed by the committee against a judge at a hearing held to consider such charges, and, in the case of supreme court review, to support before the supreme court the committee's report of its findings.

(e) A quorum for the transaction of business by the committee shall be seven members. No action of the committee shall be valid unless concurred in by seven of its members, except as otherwise provided in these rules.

(f) No member of the committee shall participate in any proceeding in which his or her impartiality might reasonably be questioned. If a member personally appears before a judge against whom a complaint is pending, or has reason to believe that he or she will appear before a judge against whom a complaint is pending, such member shall not take part in the proceeding.

(g) If a quorum of the committee cannot be obtained by reason of the disqualification or absence of members thereof, the chairperson or the executive secretary shall request the supreme court to designate a temporary replacement or replacements. Any such temporary replacement shall have the same qualifications as the member replaced.

(3) Confidentiality of Proceedings.

(a) Except as provided in this section, all proceedings before the committee, and all information, communications, materials, papers, files and transcripts, written or oral, received or developed by the committee in the course of its work, shall be confidential. No member of the committee or its staff and no employee of the committee shall disclose such proceedings, information, communications, materials, papers, files and transcripts, except in the course of official duty or as otherwise authorized in this section.

(b) A complainant shall keep confidential the fact that a complaint has been filed with the committee until either the complaint is dismissed, a statement of formal charges is prepared and filed as described in section 7(a) of this rule, or the complainant is notified that the committee has disposed of the complaint by taking appropriate remedial action as described in subsection (h) of this section.

(c) Upon preparation and filing of a statement of formal charges, the complaint or notice of inquiry, the judge's response, the statement of formal charges, all pleadings filed thereafter, the hearing, and the committee's disposition shall be public. The committee's deliberations shall be confidential.

(d) If a matter against a judge is disposed of by informal resolution or adjustment, and if the judge shall thereby have received three or more informal dispositions during the preceding five years, the following shall be, after notice to the judge, available to the public: the complaints or notices of inquiry, the judge's responses, and the committee's findings and dispositions in all of the proceedings.

(e) If a judge is publicly charged, through independent sources, with involvement in a proceeding before the committee, or publicly charged with conduct likely to become the subject of such a proceeding, the committee may, at the request or with the consent of the judge involved, issue brief public statements as it deems appropriate in order to confirm or deny the pendency of the proceeding, to clarify the procedural aspects thereof, to explain the right of the judge to a fair hearing without prejudgment, and to state that the judge denies the allegations.

(f) If the pendency of a proceeding before the committee is generally known to the public, through independent sources, and the subject matter thereof is of broad public interest or speculation, and public confidence in the administration of justice may be threatened because of lack of information concerning the status of the proceeding and the requirements of due process, the committee may, on its own motion, issue brief statements as it may deem appropriate in order to confirm the

existence of the investigation, to clarify the procedural aspects of the proceeding, to explain that the judge is entitled to due process, and to state that the judge denies the allegations.

(g) If the committee, at any stage of a proceeding, dismisses a complaint or formal charges, whether from insufficiency of the complaint or because there is insufficient cause to proceed further with the matter or for other reason, the committee shall inform the complainant of such disposition. In addition, the committee may, at the request or with the consent of the judge concerned, issue a short explanatory statement to the public.

(h) If the committee disposes of a proceeding by informal resolution or adjustment prior to the filing of formal charges, it shall inform the complainant of the form of informal resolution or adjustment. However, if the committee provides for monitoring or review of remedial action that it may require or conditions it may impose in connection with any informal resolution, it may make such disclosure of the terms of such informal resolution to the administrative judge or other person to whom such monitoring or review is delegated by the committee as necessary to enable such judge or person properly to perform such function.

(i) This section shall not be construed to prohibit the committee from preparing and releasing to the public materials which are not related to any particular proceeding or situation. Such materials may include explanations of:

(1) The jurisdiction of the committee and the limitations upon its powers and authority;

(2) The procedure for filing complaints; and

(3) The internal procedures of the committee.

In addition, the committee may release periodic statistical reports of its work which do not identify or permit the identification of any person involved in any proceeding before the committee other than persons involved in proceedings governed by subsections (c) and (d) of this section.

(j) Nothing herein shall prevent the committee from responding to unjustified public criticism of a judge which is not the subject of a proceeding, and the committee may so respond in appropriate cases.

(k) Any violation of these provisions relating to confidentiality shall constitute contempt of the supreme court. The committee may enforce these provisions by appropriate proceedings for contempt before any justice of the supreme court.

Notwithstanding the provisions of this rule, the committee may disclose to an appropriate law enforcement authority any matter that comes before it.

Comment

One of the protections of the confidentiality provision is that a complainant is not liable for good faith statements contained in a complaint or made in the course of its proceedings.

Nothing in the rule of confidentiality prevents a complainant from disclosing publicly the conduct of a judge which he or she believes violates the code of conduct or is otherwise inappropriate. The immunity from civil liability does not apply to such disclosures. The rule does prohibit a complainant, however, from disclosing publicly the fact that a complaint against the judge about the conduct has been filed with the committee until a statement of formal charges is prepared and filed as described in section 7(a) of this rule or until the complaint is finally disposed of by the committee.

Once a complaint has been disposed of by the committee, a complainant may make a public disclosure concerning the filing of a complaint including the conduct complained of and the action of the committee. The duty of confidentiality upon the committee remains, however, unless one of the specified exceptions provided by the rules applies.

(4) Initial Review of Complaints.

(a) Each complaint shall be submitted in writing and signed by the complainant, and shall be directed to the Executive Secretary, Committee on Judicial Conduct, Frank Rowe Kenison Supreme Court Building, Concord, New Hampshire 03301. The executive secretary shall acknowledge the receipt of all complaints as quickly as possible. A copy of the complaint shall be sent to each member of the committee for review. Following evaluation by the committee, the executive secretary shall send a copy of the complaint to the judge, except that the judge shall not be notified of a complaint dismissed pursuant to subsections (b), (c) or (d) of this section unless otherwise determined. In the case of such dismissals, the complainant shall be notified that as a result of the committee's finding, the judge complained against has not and will not receive notice of the complaint or the action of the committee.

(b) The committee shall evaluate each complaint promptly after receipt to ascertain whether the committee has jurisdiction to consider the same under Rule 38 of the Supreme Court. If it clearly appears on the face of the complaint or from preliminary inquiries by the committee that--,

(1) the complainant lacks standing (*i.e.* is not a person directly affected by the conduct complained of, or is not a person who was present when the conduct complained of occurred), or

(2) the complaint relates to a judge's findings and rulings or is a substitute for an appeal, or

(3) the complaint does not allege conduct on the part of the judge which, if established, would be contrary to the Code of Judicial Conduct, the committee shall dismiss the complaint, and shall notify the complainant in writing that the matter raised is outside the committee's jurisdiction, assigning the reason therefor.

(c) If the committee determines, upon preliminary review, that a complaint is obviously without merit or is obviously unfounded, it shall dismiss the complaint and advise the complainant in writing of such action.

(d) The committee shall dismiss any complaint arising out of acts or omissions occurring more than one year prior to the receipt of the complaint, and the complainant shall be so advised in writing. However, when the last episode of an alleged pattern of recurring judicial conduct arises within the one-year period, the committee may consider all prior acts or omissions alleged to be a part of such pattern.

(e) Receipt by the committee of a complaint which is repetitive of a prior complaint, whether from the same or a different source, following disposition of the initial complaint, shall be acknowledged, but the committee shall take no further action thereon.

(f) Any complaint which appears to have merit, but which is defective in some respect so that the committee cannot act thereon, or requires clarification, may be returned to the complainant for curative action or clarification and resubmission.

(g) A complaint relating to a trial or judicial proceeding in progress shall be held in abeyance until the termination of the trial or proceeding, unless the

committee for good cause votes to proceed immediately with such complaint.

(5) Response by Judge.

(a) Except where the complaint has been dismissed pursuant to subsections (b), (c), or (d) of section 4 of this rule, the judge complained against shall respond in writing to the merits of the complaint within twenty days after receipt from the committee of a copy thereof. Such response shall be filed with the executive secretary, who shall, after receipt of a written request from the complainant, provide to the complainant a copy of the judge's response or the substance thereof in the discretion of the committee.

(b) In addition to such required response, the judge may submit to the committee such other matters as he may choose.

(5-a) Inquiries Initiated by Committee.

The committee may initiate an inquiry concerning the conduct of any judge on its own motion, without a signed written complaint, upon any reasonable basis, including conduct that is a matter of public record, reports in the news media and information provided by sources considered reliable by the committee. No such inquiry shall be initiated by the committee except upon the affirmative vote of six or more members of the committee taken at a meeting thereof. Notice of the initiation of an inquiry by the committee on its own motion shall be given to the judge by the committee at such time as it deems appropriate. The committee may delay giving such notice to the judge to avoid possible compromise of the inquiry and any resulting investigation or for other good reason.

(6) Preliminary Investigation.

(a) The committee may order an investigation of any complaint properly before it, or of any proceeding initiated by the committee on its own motion, upon the affirmative vote of seven or more members of the committee taken at a meeting thereof. Such investigation shall be conducted under the direction of the chairperson and in such manner as he may determine.

(b) The judge shall be notified of the investigation and whether it is upon a complaint or on the committee's own motion, and afforded a reasonable opportunity to present such relevant matters as he may choose. In any proceeding where the committee is acting on its own motion,

notice of the investigation may be deferred and given to the judge at such time as the committee deems appropriate.

(c) In conducting an investigation, the chairperson may require that any statement or written information furnished to the committee or its employees be given under oath or affirmation subject to the penalties for perjury or false swearing in official proceedings pursuant to RSA ch. 641. It may also require a complainant to verify his complaint under oath or affirmation, subject to such penalties for perjury or false swearing in official proceedings.

(d) Persons contacted for information shall be informed of their obligation to maintain confidentiality.

(e) Judges, clerks of court, court attaches, members of the bar and other officers of the court shall comply with the reasonable requests of the committee for assistance and cooperation in the conduct of any investigation by the committee.

(f) During the course of its investigation, the committee may informally resolve the matter with the consent of the judge. Such informal resolution may take the form of written advice or admonishment, the requirement of remedial action, or the imposition of conditions, or any combination thereof. The committee may provide for monitoring or review by an administrative judge or other suitable person of any remedial action it may require or conditions it may impose in connection with an informal resolution or adjustment. The consent of the judge to informal resolution of the matter shall constitute a waiver of his right to a hearing. If a complaint is disposed of by way of informal resolution or adjustment, disclosure to the complainant shall be limited as provided in subsection (h) of section (3) of this rule.

(g) Upon completion of the investigation, if the matter has not been informally resolved pursuant to subsection (f) of this section, the committee shall determine whether the investigation has disclosed probable cause to warrant formal proceedings. If the committee does not determine that the investigation has disclosed probable cause to warrant formal proceedings, the committee shall dismiss the complaint or terminate the inquiry commenced on its own motion, as the case may be, and shall promptly notify the judge and the complainant (if any) in writing of such dismissal or termination.

(7) Statement of Formal Charges, Notice of Hearing, and Answer.

(a) If, after investigation the committee concludes, by the affirmative vote of seven or more members taken at a meeting, that probable cause to warrant formal proceedings exists, it shall prepare and file a formal statement of charges and shall set a time and place of hearing before itself. The committee shall promptly serve the judge, by registered or certified mail, postage prepaid, with a copy of the formal statement of charges together with a notice of hearing.

(b) The formal statement of charges shall (i) state whether the committee is proceeding on the basis of a written complaint or on its own motion, (ii) contain a clear summary of the allegations against the judge and of the alleged facts forming the basis of such allegations (including facts developed by the investigation), (iii) identify and cite those standards of the Code of Judicial Conduct alleged to have been violated, and (iv) advise the judge of his duty to answer as provided in subsection (f) of this section.

(c) The formal statement of charges together with the notice of hearing shall be served on the judge at least thirty days prior to the hearing date assigned.

(d) The notice of hearing shall include the following:

(1) the date, time and place of the hearing;

(2) the fact that both the committee and the judge may be represented by counsel at the hearing, may secure the attendance of witnesses and the production of documents by subpoena, and may examine and cross-examine witnesses;

(3) the identity of any special counsel for the committee; and

(4) the fact that all further notices concerning the hearing, including any adjournments thereof, shall be given by the chairperson or pursuant to his direction.

(e) The committee shall give notice to the complainant of the date, time and place of the hearing. He shall be entitled to attend the hearing as an observer, and may be required to attend and participate therein as a witness, but shall have no other function or right with respect to the hearing.

(f) Within twenty days after receipt of the formal statement of charges, the judge shall file an answer with the executive secretary, setting forth all denials, affirmative defenses, mitigating circumstances and other matters which the judge intends to raise at the hearing.

(g) At any time prior to final decision, the committee may allow or require an amendment of the formal statement of charges, and may allow an amendment of the answer. When an amendment is made to the formal statement of charges, whether before or after commencement of the hearing, the judge shall be afforded a reasonable opportunity to answer the matters newly charged, as determined by the chairperson, and shall answer such matters within the time allowed. In any such case, the judge shall also be afforded a reasonable time, as determined by the chairperson, in which to prepare his defense to the matters newly alleged.

(h) For good cause shown, the chairperson may extend the time within which the judge is required to file his answer, and may grant a continuance of the scheduled hearing, but no such extension or continuance shall be for a period longer than thirty days without the concurrence of the committee.

(i) The committee may terminate the proceeding and dismiss the complaint and formal statement of charges following the answer by the judge, or at any time thereafter, and shall in that event give notice to the judge and the complainant that it has found insufficient cause to proceed.

(8) Discovery and Subpoena Powers.

(a) At any time after the filing of a formal statement of charges, the judge or his counsel shall, upon written request, be entitled, as a matter of course:

(1) to obtain the names and addresses of all persons known to the committee to have relevant information;

(2) to examine and copy any of the following:

(A) statements of the complainant;

(B) statements of persons claiming to have knowledge of the acts, omissions or events underlying the formal proceeding;

(C) investigative reports made by or for the committee in connection with the proceeding; and

(D) any other writing or item which is relevant to the proceeding, or which appears likely to lead to relevant information.

(3) to discovery to the extent permitted in civil proceedings.

Anything in this section to the contrary notwithstanding, the committee shall not be required to disclose to the judge the identity of any informant who will not be called as a witness in support of the charges, and who has declined to sign a written complaint, unless the alleged misconduct was directed at the informant.

(b) The judge shall make available to the committee, as a matter of course, upon the written request of the chairperson, executive secretary, or special counsel, any specified material which would be discoverable in civil proceedings in this State. The committee shall be entitled to discovery to the extent permitted in civil proceedings.

(c) Nothing in this section shall authorize access to any information, writing or other item which is privileged by law, or which is protected as an attorney's work product.

(d) If disclosure is not forthcoming as provided in subsection (a) or (b) of this section, the judge or the committee may move to compel discovery before a justice of the supreme court.

(e) The committee shall have the power to subpoena witnesses, compel their attendance and testimony, and require the production of books, records, documents or other evidence or material deemed relevant to the investigation or hearing. Such subpoena powers may be exercised for the committee by the chairperson, the executive secretary or special counsel to the committee.

(f) The subpoena powers of the committee shall be exercised in behalf of the judge, upon his written request or the written request of his counsel.

(g) If any witness disobeys a subpoena of the committee, either as to his appearance or as to the production of things specified in the subpoena, or refuses to testify or answer questions, the committee may apply to a justice of the supreme court for an order compelling compliance with the subpoena or compelling him to testify.

(h) Witnesses summoned to appear shall be entitled to the same fees and mileage expenses provided by law for witnesses in regular judicial proceedings. The expenses of witnesses shall be borne by the party calling them.

(9) Conduct of Hearing.

(a) The hearing shall be open to the public.

(b) The committee may proceed with the hearing at the time and place fixed, whether or not the judge has filed an answer or appears for the hearing. The committee may draw an unfavorable inference from the failure of the judge to answer or appear; but no such failure, standing alone, shall be sufficient to meet the standard of proof.

(c) The committee shall have the burden of establishing by clear and convincing evidence a violation of the Code of Judicial Conduct. The judge shall not be required to testify or present affirmative evidence in his own behalf.

(d) The judge shall be entitled to counsel of his choice, and shall have the right to adduce evidence, produce and cross-examine witnesses, and present all relevant arguments.

(e) The committee shall not be bound by the technical rules of evidence, and may admit evidence which it considers to be reliable, material, and relevant. The chairperson shall rule on objections to the receipt of evidence, subject to being overruled by a majority of the committee present at the hearing. The chairperson may defer ruling on an objection to the receipt of evidence, and admit evidence subject to later ruling thereon.

(f) The hearing shall be recorded verbatim by stenographic, electronic or other means approved by the committee. A transcript of the hearing shall be provided to the judge without cost. The judge may tape record the hearing with the permission of the committee.

(g) The decision of the committee shall be based solely on the record evidence presented to the committee at the hearing, but shall not be based solely on hearsay evidence. The committee shall exclude from its consideration any information reviewed in earlier stages of the proceeding, unless such information is received in evidence at the hearing so as to become a part of the record.

(h) At any time after the hearing is closed but prior to final decision, the committee may reopen the hearing for the taking of additional evidence. The judge and the complainant shall be given such notice of any such supplemental session as the circumstances may reasonably require.

(10) Dispositions Following Hearing.

(a) The committee shall render its decision promptly after the hearing.

(b) If the committee decides that a violation of the Code of Judicial Conduct has not been established, the proceeding shall be dismissed, and the judge and the complainant shall be so notified.

(c) If the committee determines, by the affirmative vote of at least seven of its members, that there has been a violation of the Code of Judicial Conduct, but that the violation is not of a sufficiently serious nature to warrant the imposition of formal discipline by the supreme court, it shall dispose of the matter by informal resolution or adjustment. Such disposition may take the form of admonishing the judge, issuing a reprimand, requiring corrective action, directing professional counseling or assistance, imposing conditions on the judge's conduct, or other similar remedial action, or any combination of the foregoing. The committee may provide for monitoring or review by an administrative judge or other suitable person of any remedial action it may require or conditions it may impose in connection with an informal resolution or adjustment. If a proceeding is disposed of by informal resolution or adjustment pursuant to this subsection (c), disclosure to the complainant shall be limited as provided in subsection (h) of section (3) of this rule.

All admonishments, reprimands and other informal adjustments shall be reduced to writing.

(d) If the committee determines, by the affirmative vote of at least seven of its members, that the judge complained against has violated the Code of Judicial Conduct and that the violation is of a serious nature so as to warrant formal disciplinary action by the supreme court, the committee shall prepare a summary report of the proceeding and of its findings. Such report shall include the recommendations of the committee (if any) concerning the sanctions to be imposed. Any member who dissents from the determination of the committee may prepare a minority opinion which shall be appended to the report of the

committee. The committee shall also prepare a record of the proceeding, which shall include the committee's formal statement of charges, the judge's answer, any other pleadings, and a transcript of the hearing. The committee's report and the record of the proceeding, certified by the chairperson or the executive secretary, shall be filed with the supreme court. Contemporaneously with such filing, copies shall be served on the judge, and proof of such service shall be filed with the court.

(11) Use of Closed Files.

(a) A closed file may be referred to by the committee in subsequent proceedings in the following circumstances:

(1) Where a complaint or formal charges have been dismissed for any reason or there has been a finding of insufficient cause to proceed, and the subsequent proceeding raises similar allegations against the judge or is based upon a similar occurrence or factual situation, the closed file may be used to exonerate the judge or may be made a part of the investigation of the new complaint; or

(2) Where, after the disposition of a prior proceeding by informal resolution or adjustment, the judge fails to refrain from acting in the manner that caused the prior complaint to be filed and a subsequent complaint is filed alleging similar conduct which is established or proven, the closed file may be used as evidence tending to show that the problem is a continuing one; or

(3) Where, following the hearing of subsequent related or unrelated charges, the committee determines that a violation of the Code of Judicial Conduct has occurred, the closed file may be referred to in connection with the decision as to the nature of the informal resolution to be imposed by the committee or as to the sanction to be recommended to the supreme court for imposition by the court.

(12) Amendment of Rules.

The committee may from time to time submit amendments of these rules to the supreme court for approval.

FILE

JUDICIAL PERFORMANCE EVALUATION IN SUPERIOR COURT

JUDICIAL PERFORMANCE EVALUATION IN SUPERIOR COURT
JOSEPH P. NADEAU, CHIEF JUSTICE
NEW HAMPSHIRE SUPERIOR COURT

I regret I cannot meet with you personally to discuss superior court judicial evaluations. I hope this statement addresses issues of concern to the committee.

First, I would like to emphasize that the purpose of judicial performance evaluations is to provide trial judges with insight into their conduct on the bench as perceived by lawyers, litigants, clerks, staff, bailiffs and myself.

The process begins by the judge filling out a self assessment form (**Attachment A**) which provides the opportunity to reflect on his or her work as a judge. The judge can also comment on how his or her job is affected by such things as scheduling, education and resources. The judges ends the completed form to me for review and use in our final interview.

Next, I ask each clerk to make a list of the attorneys and law firms who regularly practice in the court where the judge sits. I then send a form (**Attachment B**) to those firms and any other firms which I feel should be included.

An evaluation form is also sent to all court personnel who work in the courthouse where the judge presides. These forms provide clerks and bailiffs, (**Attachment C**) office staff, law clerks, and court reporters (**Attachment D**) a chance to rate the judge in many categories. The categories are those which are used by most jurisdictions which conduct such evaluations. The forms also provide space for additional comments and observations.

The forms are confidential and anonymous. Confidentiality and anonymity are important because they permit people to provide an honest view of the judge's performance. Employees, attorneys and litigants know they will suffer no disadvantage because of the information provided. They also know the information will be used only for evaluation and improvement not for personal attack. Since the forms are not public, there is no concern that one isolated event will gain disproportionate attention.

Not surprisingly, most comments for most judges are highly favorable. But, even if a judge receives only one unfavorable survey, I do not disregard it. Rather, unfavorable surveys are use as a learning tools. Even if observations may be uncommon, they deserve attention. I ask the judge to recognizes that these observations or perceptions come from someone who feels strongly about the conduct described.

We also discuss how judges can avoid even a single instance of bad temper or uncharacteristic conduct. We discuss how judges can respond to contentious litigants or troublesome attorneys in positive ways, and how judges can avoid times of impatience and work hard to make certain that even unhappy litigants perceive the judge as a fair and tolerant person.

Finally, the forms also reinforce positive conduct and inform judges when they are on the right track. Judges know when the conduct described, whether positive or negative, is typical and make genuine efforts to work on areas that need improvement.

Occasionally someone asks whether these evaluations can be made public so that anyone can see the surveys and comments. Of course they can. But I have two thoughts about that suggestion. The first is that it is unnecessary. Any individual or group can solicit information about judges by conducting their own inquiries or surveys. They can gather information and make whatever use of it they desire. Also, most judicial activity takes place in a public courtroom open to all and frequently covered by the media.

My second thought is that making the surveys public will change the process. Such a public airing of administrative evaluations risks the prospect that the focus will be directed away from performance review and toward personal vilification. There is a serious risk that a small unrepresentative group would use information selectively to create the unwarranted impression that there is a serious problem with judicial performance.

For these reasons if surveys were to be made public, it seems to me those who fill out the surveys should be required to identify themselves. How else can a judge defend against what he or she believes to be unfair or untrue comments? With the cover of anonymity, it would take very little effort to create the false impression that the performance of a particular judge is questionable.

It is very frustrating to me to hear someone repeat an anonymous and usually unfounded allegation involving a judge without identifying the court, the judge or the circumstances. Judges must make difficult decisions. They must control the courtroom and everyone who comes before them. Judges are human beings and no matter how hard every judge tries to exercise their responsibilities in the most judicious manner they will occasionally make mistakes.

Finally, I ask the legislature to reflect on the harm to government of providing an additional opportunity to make unwarranted attacks on its institutions by a small vocal minority. I believe the process we have in place allows us to deal with human frailties without creating the unfounded and unwarranted impression of disarray that a handful of disgruntled litigants might like to convince the public exists. I believe our 28 superior court judges and 11 marital masters earn and deserve public confidence for their daily handling of thousands of cases throughout the state.

2/1/99 **(Attachment A)**

PERSONAL EVALUATION FORM - JUSTICE

Personal Information:

Types of cases you have heard in each category in the last year. (Estimate percentages)

Civil, Equity _____
Criminal _____
Marital _____
Other _____

1. How often have you been able to review case files prior to hearings or trials?
Never_ Rarely_ Sometimes____ Most of the time____ Always

2. How often would you like to be able to review case files prior to hearings or trials?
Never___Rarely___Sometimes____ Most of the time____ Always

3. How often have you had to stay late, or arrive early, to accommodate emergency of special scheduling problems?
Never_ Rarely___Sometimes____ Most of the time____ Always

4. Do you generally involve attorneys, litigants, and court staff when making scheduling decisions about special situations, such as working late or through the lunch hour?
Never___Rarely___Sometimes____ Most of the time____ Always

5. Do you think you take a fair share of the difficult work on the docket?
Never____Rarely__Sometimes____ Most of the time____ Always

6. Do you feel pushed by the caseload to the point where "moving cases" takes precedence over quality of justice concerns?
Never___Rarely___Sometimes____ Most of the time____ Always

7. How often do you feel you are sufficiently familiar with the law and the facts that apply to the cases you are hearing?
Never___Rarely___Sometimes____ Most of the time____ Always

8. Do you think you give attorneys a fair opportunity to make their argument to the court?
Never___Rarely___Sometimes____ Most of the time____ Always

9. Do you think that litigants and attorneys leave the courtroom when you are presiding having understood what has happened and what is to happen next?
Never___Rarely___Sometimes____ Most of the time____ Always

10. How often have you found it necessary to intervene in cases being presented in the courtroom, in order to ensure justice is done, above and beyond exact procedural and legal requirements?
Never___Rarely___Sometimes____ Most of the time____ Always

11. How would you describe your style of courtroom control?
Easy going____ Somewhat controlling____ Very controlling

12. How would you describe your settlement style? (i.e. do you actively participate?)
Never___Rarely___Sometimes____ Most of the time__ Always

13. How would you rate the amount of continuing education you have received since being appointed to the Superior Court?
Less than sufficient_____ Sufficient_____ More than sufficient

14. How would you rate the amount of continuing education you have received during the past two years?
Less than sufficient____Sufficient____More than sufficient

15. Are there any areas in which you would like more education?

16. Are there any innovations which you would like to try?

19. Are you satisfied with your overall performance?
YES ____ YES, but room for improvement____ NO

OTHER COMMENTS:

(Attachment B)

2\1\99 **SUPERIOR COURT PERFORMANCE EVALUATION - ATTORNEY**

Please rank performance in the areas with which you are familiar. **1 (low)->10 (high)** **RANK**

1. Accessibility to staff	
2. Conscientiousness and diligence	
3. Patience and tolerance	
4. Effectiveness of communication	
5. Shows respect for staff	
6. Has earned your respect	
7. Allows me to perform my job	
8. Attentiveness to court business	
9. Promptness in rendering decisions	
10. Efficiency in use of court time	
11. Familiarity with and use of court forms	
12. Familiarity with office procedures	
13. Accessibility to counsel	
14. Handling of complex cases and issues	
15. Control in courtroom	
16. Decisiveness of decisions and rulings	
17. Attentiveness to witnesses and counsel	
18. Knowledge of law	
19. Knowledge of evidence	
20. Knowledge of procedure	
21. Understanding & compassion	
22. Fairness and equality of treatment	
23. Freedom from racial, religious or gender bias	
24. Level of professionalism	
COMPARE TO OTHER SUPERIOR CT JUDGES\MASTERS **A-(top third), B-(middle), C-(lower third)**	

Number of years in practice._____

Number of hearings before this judge or master._____

Number of appearances before other judges or masters.___

Civil____, #Criminal____, #Marital____.

(Please make any additional comments on the back of this page

ADDITIONAL COMMENTS:

It is not necessary to sign this form but you may do so if you wish.
Please return to:

New Hampshire Superior Court Center
Judicial Evaluation - Confidential
99 North State Street
Concord N.H. 03301

(Attachment C)

2\1\99 **SUPERIOR COURT PERFORMANCE EVALUATION CLERK/BAILIFF**

JUSTICE\MASTER_____

Please rank performance: 1 (low) -> 10 (high) RANK

Accessibility to counsel	
Conscientiousness and diligence	
Patience and tolerance	
Effectiveness of communication	
Handling of complex cases and issues	
Control in courtroom	
Decisiveness of decisions and rulings	
Attentiveness to witnesses and counsel	
Promptness in rendering decisions	
Efficiency in use of court time	
Knowledge of law	
Knowledge of evidence	
Knowledge of procedure	
Understanding & compassion	
Fairness and equality of treatment	
Freedom from racial, religious or gender bias	
Level of professionalism	
COMPARE TO OTHER SUPERIOR CT JUDGES\MASTERS A-(top third), B-(middle), C-(lower third)	

Number of years employee in judicial branch._____
Number of other judges\masters with whom you have worked_____

ADDITIONAL COMMENTS

It is not necessary to sign this form but you may do so if you wish.

(Attachment D)

2\1\99 **SUPERIOR COURT PERFORMANCE EVALUATION - STAFF**

Please rank performance in the areas with which you are familiar. **1 (low)->10 (high)** **RANK**

1. Accessibility to staff	
2. Conscientiousness and diligence	
3. Patience and tolerance	
4. Effectiveness of communication	
5. Shows respect for staff	
6. Has earned your respect	
7. Allows me to perform my job	
8. Attentiveness to court business	
9. Promptness in rendering decisions	
10. Efficiency in use of court time	
11. Familiarity with and use of court forms	
12. Familiarity with office procedures	
13. Accessibility to counsel	
14. Handling of complex cases and issues	
15. Control in courtroom	
16. Decisiveness of decisions and rulings	
17. Attentiveness to witnesses and counsel	
18. Knowledge of law	
19. Knowledge of evidence	
20. Knowledge of procedure	
21. Understanding & compassion	
22. Fairness and equality of treatment	
23. Freedom from racial, religious or gender bias	
24. Level of professionalism	
COMPARE TO OTHER SUPERIOR CT JUDGES\MASTERS A-(top third), B-(middle), C-(lower third)	

Number of years you have worked in judicial branch._____
Number of other judges or masters with whom you have worked.____

(Please make any additional comments on the back of this page.)

ADDITIONAL COMMENTS:

It is not necessary to sign this form but you may do so if you wish.
Please return to:

New Hampshire Superior Court Center
Judicial Evaluation - Confidential
99 North State Street
Concord N.H. 03301

FILE

PRESENTATION ON JUDICIAL CONDUCT COMMITTEE BEFORE SUBCOMMITTEE STUDYING CACR 2, CACR 22, HB 53 AND HB 568

September 8, 1999

by Howard J. Zibel, Executive Secretary
Judicial Conduct Committee

Last week, I understand this committee had some questions about the scope and operation of the Judicial Conduct Committee. Before I answer your specific questions, I would like to explain the organization of the Judicial Conduct Committee (JCC or committee) and discuss how the JCC processes and reviews complaints. My desire is to give you a better understanding of the workings of the committee.

I. ORGANIZATION OF JCC

The JCC was established on June 23, 1977, to receive and review complaints against judges for violations of the Code of Judicial Conduct. The word "judges" is used very broadly in this context. It includes masters, referees, clerks, deputy clerks, registers and deputy registers of probate, and court stenographers and reporters. It is so used in this presentation.

Originally, the JCC had seven members - three judges, two lawyers, and two lay people. In 1991, the membership was increased to nine by adding one judge and one lay person, Then, just last year, the size of the JCC was increased again by two to eleven members, this time adding two lay members. Thus, the current composition of the committee is four judges, two lawyers,

and five lay members.

Over the twenty-two year history of the JCC, lay representation has gone from the smallest segment of the committee to the largest. Judges have always comprised less than half of the membership. All of the members are appointed by the supreme court. Members serve four year terms and are eligible for reappointment. The current members are as follows:

Name	Member Type	Member Since
Robert L. Chiesa	Lawyer	1983
Raymond A. Cloutier	Probate Court	1991
Anne Coughlin	Public	1998
Douglas S. Hatfield, Jr.	District Court	1983
David A. Hodges, Sr.	Public	1990
William R. Johnson	Supreme Court	1989
Donna K. Lencki	Public	1998
Joseph M. McDonough, III	Lawyer	1997
Walter L. Murphy	Superior Court	1993
John R. Newsom	Public	1994
Terrence R. Pfaff	Public	1999

Justice Johnson of the supreme court is the chair, and public member David Hodges is the vice-chair. All members serve as volunteers and receive no compensation for their services.

II. METHOD OF PROCESSING AND REVIEWING COMPLAINTS

All complaints must be in writing. When a complaint is filed with the committee, it is assigned a docket number such that, for example, the first complaint filed this year is JC-99-001. Subsequent complaints are numbered consecutively throughout the year. Last year, the JCC received fifty-three complaints.

The first action taken on a complaint is an initial review by me and the assistant executive secretary for two purposes.

First, we determine if the complaint contains a sufficient statement of the allegations such that the committee will be able to understand it. Second, we are looking to see if the complaint contains any allegation of criminal conduct by a judge. RSA 490:30, III, which the legislature passed in 1988, requires that if a complaint contains an allegation of criminal conduct, the chair of the committee will send it to the attorney general for investigation. While the attorney general investigates a complaint alleging criminal misconduct, the JCC must suspend its work on the complaint. The forwarding of complaints to the attorney general is rare, but it does happen.

If the complaint contains a sufficient statement of the allegations and contains no alleged criminal conduct, the JCC sends a letter to the complainant acknowledging the complaint. The complaint will be on the committee's next agenda for discussion, and copies of the complaint are sent to all committee members prior to the meeting. If criminal conduct is alleged not only is the complaint sent to the attorney general, but the complainant is also sent a letter informing him or her of that action. Finally, if the complaint contains an insufficient statement of the allegations against the judge, we send the complainant a long letter explaining the work of the committee and enclosing copies of the Code of Judicial Conduct, the procedural rules of the committee, and a cover sheet which tries to get the complainant to focus the complaint. Two facts are worthy of note at this stage. The first is that all people

filing complaints with the JCC will get a letter acknowledging it. These letters usually go out within a week of the filing of the complaint. Second, at this initial stage, before committee consideration of the complaint, no notification of the complaint is sent to the judge against whom the complaint was filed.

When a complaint is ready for action by the committee, copies of the complaint are distributed to all committee members, and the complaint is placed on the committee's next agenda. Usually seven committee meetings are scheduled each year; however, some special meetings are often added so that in recent years the committee has generally met an average of eight times per year. At each meeting, the full committee, except for members who are recused from a matter, will discuss each complaint on the agenda. Many are dismissed for lack of jurisdiction. The most common reasons for such a dismissal are that the complaint relates to the judge's findings or rulings and is, therefore, merely a substitute for an appeal or that the complaint does not allege conduct that would be a violation of the Code of Judicial Conduct. If a complaint is so dismissed, the complainant gets a letter informing him or her of the dismissal and the reasons for it. Under the current rules, if the complaint is dismissed by the committee at the time of its initial consideration, the judge complained against is not notified of the complaint or the committee's action.

If a complaint is not dismissed for lack of jurisdiction when initially discussed by the committee, the judge complained

against is asked for a response. A judge asked to respond has twenty days to do so. When a judge is asked to respond, a letter is written to the complainant informing him or her of the action taken by the committee. The judge's response will then be placed on the next agenda after the JCC receives it, and it will be distributed to the committee members. After the JCC considers the judge's response, it may dismiss the complaint, begin an investigation, or offer the judge informal resolution. If the JCC dismisses the complaint, the complainant, as mentioned above, gets a letter informing him or her of the dismissal and the reasons for it.

One of the choices mentioned above that the committee has at this point is informal resolution. An informal resolution is used where the judge has committed a minor violation of the Code of Judicial Conduct. The judge must agree to the informal resolution because an informal resolution means no hearing will be held and the judge must waive his or her right to a hearing. An example of the kind of case in which an informal resolution has been used is the failure of a judge to render a prompt decision. Informal resolutions are confidential; however, if a judge has three of them in a five year period, they all become public. Despite this confidentiality, if a complaint results in an informal resolution, the complainant is informed by letter of the informal resolution and the reasons for it. One of the conditions of an informal resolution may involve monitoring or review of the judge by the administrative judge of the judge's

court or some other suitable person.

If the committee votes to conduct an investigation, the investigation usually consists of inviting those with knowledge of the matter to appear before the full committee. Sometimes the committee hires a private investigator to conduct the investigation. At the end of the investigation, the committee can dismiss the complaint, reach an informal resolution with the judge, or commence formal charges. The former two results have already been discussed, and the complainant will be informed of these resolutions by letter. If formal charges are brought, the complaint will at that point become public and a hearing will be held before the full committee. Again, after formal hearing, the committee can dismiss the complaint or reach an informal resolution, both of which will be communicated to the complainant by letter. At this point, the third option is to bring a petition to the supreme court requesting the imposition of discipline. That petition is public. In both cases where public petitions have been brought before the supreme court, the discipline requested has been suspension. Neither the JCC nor the supreme court has the power to remove a judge from office. Only the legislature through impeachment or the legislature and Governor and council through address have that power.

In sum, the judicial conduct system in New Hampshire is a system that works. Complaints are carefully processed and considered by the committee. Complainants are kept informed of the progress of their complaints. Misconduct is appropriately

treated. The backbone of this system is a very hard-working and dedicated committee. The amount of material that committee member must go through to prepare for a meeting is daunting. Nevertheless, all committee members come prepared to discuss each and every matter. The JCC members, who serve as volunteers, deserve substantial thanks for their dedication.

FILE

Supreme Court of New Hampshire

Committee on Judicial Conduct

Role and Operations of the Committee and Report for 1997

Frank Rowe Kenison
Supreme Court Building
Concord, New Hampshire 03301-1476

Supreme Court of New Hampshire

Committee on Judicial Conduct

Role and Operations of the Committee and Report for 1997

THE STATE OF NEW HAMPSHIRE
SUPREME COURT
COMMITTEE ON JUDICIAL CONDUCT

Honorable William R. Johnson, Chair
David A. Hodges, Sr., Vice-Chair
Robert L. Chiesa, Esquire
Honorable Raymond A. Cloutier
Anne Coughlin
Honorable Douglas S. Hatfield, Jr.
Donna K. Lencki
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Executive Secretary
Donna R. Craig
Assistant Executive Secretary
(603) 271-2646

TDD Access: Relay NH 1-800-735-2964
(nonconfidential calls only)

November 1998

To the Supreme Court of New Hampshire:

Pursuant to Supreme Rule 39(8), ***Annual Report***, the Committee on Judicial Conduct respectfully submits this annual report of its activities during the period from January 1, 1997, through December 31, 1997.

In the interest of increasing public awareness of the committee and its work, the report also provides some background on the committee's role in providing New Hampshire's citizens with a means for filing formal complaints about violations of New Hampshire's Code of Judicial Conduct.

Honorable William R. Johnson, Chair

David A. Hodges, Sr., Vice-Chair

Robert L. Chiesa, Esquire

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Donna R. Craig,
Assistant Executive Secretary

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COMMITTEE ON JUDICIAL CONDUCT

1997 Membership

JUDICIAL MEMBERS

Honorable William R. Johnson
(Supreme Court), Vice Chair
(Elected Chair 9/26/97)

Honorable Raymond A. Cloutier
(Probate Court)

Honorable Douglas S. Hatfield, Jr.
(District Court)

Honorable Walter L. Murphy
(Superior Court)

ATTORNEY MEMBERS

Frederic K. Upton, Esquire
Chair (Retired 8/1/97)

Joseph M. McDonough, III, Esquire
(Appointment effective 8/1/97)

Robert L. Chiesa, Esquire

PUBLIC MEMBERS

David A. Hodges, Sr.

John R. Newsom

Donna P. Sytek

DEDICATION
Frederic K. Upton

Frederic K. Upton announced his retirement as a member of the Judicial Conduct Committee at the end of his term in 1997, concluding twenty years of service on the committee—eight as Chair. Fred Upton is the ultimate role model for the legal profession and, in fact, for any profession: a person of the highest integrity who donates his time, talents, and energy to the improvement of his community.

From the perspective of the Judicial Conduct Committee, Fred has been both a creator and a leader. He was one of the original members of the committee when it was established in 1977, and during his twenty years of service, he continually helped to create a new vision for the committee as he worked to interpret the original Code of Judicial Conduct and to adopt the 1990 Code.

As a leader he has demonstrated a work ethic held in awe by the members of the committee. He has exhibited a sensitivity to those who have filed complaints with the committee, as well as to the judiciary itself—and to the diverse views of the committee members as they thrash out suitable responses to complaints that are under consideration. His penetrating analysis of each complaint set a standard for the committee as it worked to carry out its responsibilities effectively and efficiently.

Fred's passion for an independent judiciary of the highest integrity made him an advocate for strict interpretation and enforcement of the Code of Judicial Conduct. Any violation of the Code brought strong words and recommendations for discipline. At the same time, he was an outspoken defender of judges and other members of the judiciary who were unable to defend themselves from often malicious and unjustified attacks. Fred Upton's tireless dedication and commitment in his role as a member and then leader of the New Hampshire Judicial Conduct Committee has been a significant factor in strengthening the New Hampshire judiciary and helping it to meet the needs of New Hampshire citizens.

The committee here formally recognizes and celebrates the extraordinary contributions of Frederic K. Upton as a member and Chair of the Judicial Conduct Committee from 1977 to 1997, and wishes him the very best of good health and happiness in his retirement from the committee. His contribution cannot be duplicated but will be warmly remembered and emulated. We are proud to have Fred Upton as our friend and colleague.

Douglas S. Hatfield, Jr.
(for the Committee)

BACKGROUND ON THE COMMITTEE AND ITS WORK

All fifty of the United States have created committees, or commissions, that are organized to receive and consider citizen complaints about judicial conduct—that is, about the behavior of judges and other court personnel, as opposed to the decisions and rulings that are a part of any judicial proceeding.

Litigants who find themselves involved in court actions may not agree with a judge's decisions, of course, and may decide to appeal those decisions to a higher court to test whether their objections are legally valid.

But they may also object to a judge's conduct—to the way a judge (or other court official or employee) *behaves* in performing his or her duties. Such objectionable behavior might include rudeness, bias, favoritism, conflict of interest, impropriety, or lack of integrity or diligence, among other possibilities.

The states' judicial conduct committees have been established to provide their citizens with a means for having such complaints considered formally, where disciplinary action can be taken or recommended when the complaints are found to be valid.

New Hampshire's Judicial Conduct Committee, established in 1977, is a committee of the New Hampshire Supreme Court. All of its members are appointed by the court, may be reappointed to successive terms without limitation, and serve without compensation.

The committee's objective is to enforce the high standards of behavior that are mandated by New Hampshire's Code of Judicial Conduct. This Code applies to virtually everyone who is a part of the state's judicial system—including judges, marital masters, referees, clerks, deputy clerks, registers of probate, persons performing the duties of clerk or register, and court stenographers and reporters.

The powers and procedures of the committee are governed by Supreme Court Rules 39 and 40, and its primary duty is to enforce Supreme Court Rule 38, which spells out quite specifically which kinds of conduct are in violation of the seven canons of the Code of Judicial Conduct.

This report, a formal accounting to the supreme court on 1997 committee operations, is designed also as a means of helping the Executive, Legislative, and Judicial branches of New Hampshire's government, as well as the general public, to a fuller understanding of what the Judicial Conduct Committee does in the public's interest. In addition to covering the committee's activities during the calendar year 1997, the report also provides a statistical analysis of complaints over the last ten years.

The Committee in 1997: Changes in Members and Staff

During 1997 there were nine members of the committee serving staggered four-year terms. By design, this total included four members who were judges, each representing one of New Hampshire's four court systems—the supreme court, the superior courts, the district courts, and the probate courts; two who were lawyers and members of the bar; and three who were citizens representing the general public.

In September 1997, the supreme court announced that the total membership of the committee would be expanded to eleven, through the addition of two more public members. Thus, at the end of the year the committee consisted of its traditional membership, with two new members to be appointed in 1998.

The committee elects one of its members to be Chair, and one to be Vice-Chair. Its staff consists of one part-time executive secretary and one part-time assistant executive secretary. On the retirement of Frederic Upton as Chair in August 1997, the committee elected Vice Chair William Johnson as Chair, with the Vice Chair remaining vacant until the new members of the committee could be appointed.

On July 2, 1997, Joseph M. McDonough, III, Esq., of Manchester, was appointed as a new attorney member to replace retiring member and Chair Frederic K. Upton. Mr. McDonough's appointment and Mr. Upton's retirement were effective August 1, 1997. On November 17, 1997, supreme court Clerk Howard J. Zibel was appointed Executive Secretary of the committee, replacing Deputy Clerk David S. Peck. Ms. Donna Craig continued as Assistant Executive Secretary.

How the Committee Works: Handling the Complaint Stream

The committee considers any complaint that is submitted in writing and that is signed by the complainant. As will be seen in the Operations section that follows, ninety-seven complaints were considered in 1997, many of them extensively detailed. In the case of a telephone inquiry by a potential complainant, the assistant executive secretary sends the caller a complaint information letter that spells out how the committee and its complaint system work for the benefit of complainants (see appendix A).

The rules also permit the committee, on its own initiative and without a written complaint, to investigate conduct that it learns about and believes may be in violation of the Code.

All complaints are docketed, and each complainant is sent an acknowledgment of his or her complaint. If the substance of the complaint is not clear, the complainant is asked to fill out a summary "cover sheet." This summary enables committee members to keep in mind, as they read, who is filing the complaint, what the complaint is all about, and what kind of supporting evidence they should be looking for. The committee feels that this summarizing and focusing of the accusation can

also be helpful to the complainant. A copy of the cover sheet is included as appendix B.

Copies of all complaints are distributed to all members of the committee, who review them in preparation for the next meeting. If the complaint alleges conduct that would constitute a crime, the Chair of the committee must refer the matter to the attorney general, and the committee suspends its consideration of the matter until any criminal proceedings are concluded.

Disposing of the Complaints: Committee Meetings and Discussions

When the committee meets, it reviews each complaint on the agenda—those that are new and those that have been carried forward—and decides whether to investigate or dismiss the complaint. If it is dismissed at this stage, the complainant is notified and given the reasons. Many complaints are dismissed because they are clearly unfounded, or prove to be after preliminary inquiry. Others are dismissed because they complain about behavior that does not violate the Code of Judicial Conduct.

Occasionally, a complaint relates to conduct that dates back more than one year, which is beyond the committee's jurisdiction. Such a complaint may be dismissed because it is "stale." If the last episode of an alleged pattern of recurring judicial behavior occurs within this one-year period, however, the committee may consider all prior behavior as an alleged part of a pattern.

Committee Often Mistaken for Appeals Court

The most common reason for dismissing a complaint is that it reflects the complainant's dissatisfaction with a judge's decision or ruling. *The Judicial Conduct Committee has no jurisdiction in such a situation, and is unable to act on any complaint that is simply a substitute for an appeal. The committee's jurisdiction relates solely to the conduct of judges and other court personnel who are found to have violated the Code of Judicial Conduct.*

Unfortunately, the committee spends much of its time dealing with such misdirected complaints: of the sixty-one complaints that were dismissed by the committee in 1997, for example, twenty-six, or forty-three percent, were based on the fact that they were substitutes for appeals from judges' rulings.

Investigating a Complaint's Validity

If the committee determines that a complaint against a judge appears to have merit, the committee requires the judge to respond in writing to the substance of the complaint within twenty days, and the complainant is notified.

When anyone else who is subject to the Code of Judicial Conduct is complained against—a clerk of court, deputy clerk, or register of probate, for example—and the complaint appears to have merit, the committee similarly asks for a response from that person within twenty days. In such a case, copies of the complaint and the response

are then provided to the chief justice or the administrative judge of the court system that is involved, who forward them, in turn, to the appropriate presiding justice.

Where a judge is involved, upon receipt of the judge's response, the committee again considers the complaint and may vote to conduct an investigation, which usually consists of inviting those with knowledge of the matter to appear before the committee. Occasionally, the committee may hire a private investigator to conduct the investigation.

After the investigation—and considering the response and perhaps interviewing the judge and/or the complainant—the committee may decide to dismiss the complaint. The judge's response, or a summary, would then be provided to the complainant, who would also be notified of the committee's decision.

Resolving Cases Informally

In some circumstances, such as when there has been a relatively minor infraction of the Code or conduct that warrants advice from the committee, the complaint may be resolved "informally." Such an informal resolution is private and may take the form of a written notice to the person who has violated the Code. In such a case, the recipient is advised that a record has been made of the infraction. He or she may then be further admonished that any Code violation, however minor, is serious; if three such violations occur in a five-year period, the full record becomes public.

Alternatively, in more serious instances, the committee might require that remedial action be taken by the judge or other offending person, or that conditions be imposed on his or her work schedule. In such a situation, the committee expresses disapproval of the conduct and requires agreement by the judge or other person to the terms of the informal action.

By agreeing to such an informal resolution, the judge or other offender waives the right to a hearing, and the complainant is notified of the informal disposition.

Serious Misconduct Cases Become Public

When more serious misconduct is found, the committee may commence formal proceedings, and at that point everything becomes public: the complaint itself, the judge's response, the statement of formal charges, all pleadings filed thereafter, the hearing, and the committee's final disposition.

If, after the hearing, the committee finds that such grave misconduct has occurred as to warrant formal disciplinary action by the supreme court, the committee files a report of its findings with the court, including its recommendations, if any, as to the sanctions that might be imposed. The court then holds a hearing that is open to the public, and at the conclusion of the hearing it produces a written opinion or order that directs such disciplinary action as it thinks just—or, alternatively, that exonerates the judge.

Confidential Aspects of the Committee's Work

Although New Hampshire's system of justice is an open system—typically, court proceedings and records are publicly accessible, on the assumption that the system will function most fairly if it is subject to public scrutiny—there are times when a degree of confidentiality is necessary to preserve the system's integrity.

Such is the case with the Supreme Court's Judicial Conduct Committee. While some of the committee's work is open to the public, and recent rules changes have enlarged that portion considerably, it is still necessary to keep a significant part of the proceedings confidential. There are several reasons for this policy. One is that it encourages the filing of serious complaints that can be considered by the committee outside the glare of publicity, while at the same time it discourages the filing of frivolous complaints that seek little more than public attention.

The policy also makes it easier for witnesses to come forward when that is appropriate. Further, it allows for the informal resolution of complaints that are not major violations of the Code but call for some action by the committee and some acknowledgment by the judge or other court official that the Code should be adhered to closely.

These rules of confidentiality also protect complainants. As long as the complaints are filed with the committee and the complainants abide by the committee's rules, judges and others who are complained against are unable to sue complainants for libel.

Committee rules prohibit any member of the committee or its staff from disclosing details of the committee's work unless such disclosure is specifically authorized. Again, a judicial conduct proceeding becomes public if the committee develops a statement of formal charges. Also, as has been noted, if a judge has received more than three "informal" dispositions of valid complaints in the preceding five years, the complaints, responses, and dispositions shall also be available to the public.

Otherwise:

- A complainant must keep confidential the fact that he or she has filed a complaint until the complaint has been dismissed, or formal charges have been filed, or the complainant has been notified that the committee has disposed of the complaint by taking remedial action.
- *This requirement does not prevent any complainant from talking publicly and critically about the behavior of a judge, however. It simply rules out disclosure of the fact that the committee has received a complaint.*
- Immunity from libel suits applies only to statements made in good faith in a complaint to the committee or in judicial conduct proceedings.

OPERATIONS FOR 1997

During calendar year 1997, the committee met five times and considered seventy-nine new complaints, in addition to seventeen that were carried forward from prior years and one that was initiated by the committee itself. Sixty-seven complaints against seventy-five individuals were disposed of (see table on next page).

As in previous years, the primary reason for disposing of a complaint—in sixty-four percent of the cases—was that it was beyond the committee's jurisdiction: either it reflected dissatisfaction with the trial judge's findings or rulings, or it alleged behavior that was not in violation of the Code of Judicial Conduct (see Table 3).

Specifically:

- *Twenty-six* of the sixty-seven complaints disposed of, or 39 percent, were dismissed because they had to do with trial judges' decisions, and did not involve misconduct.
- *Seventeen* complaints, or another 25 percent, were dismissed because they did not allege conduct that would be in violation of the Code.
- *Ten* complaints were felt by the committee to be unfounded, and were dismissed on that basis.
- *Five* complaints were dismissed because there were insufficient grounds to proceed further.
- *Two* complaints referred to conduct that occurred more than a year earlier, and thus were "stale."
- *One* was dismissed because the judge had retired, and no further action was warranted.
- *Five* cases of Code violations were found, and resulted in informal resolutions with the consent of the judges involved.
- *One* case resulted in a letter of advice to the judge to be more sensitive in dealing with difficult litigants.

As of December 31, 1997, thirty cases were pending, including four that were awaiting resolution of a related hearing or trial, and two that had been referred to the attorney general. The committee is required by rule, which it can waive, to suspend consideration of any complaint that has to do with any current hearing or trial. Also, by statute, the committee chair must refer to the attorney general any complaint that alleges criminal activity, and the committee must suspend its consideration of the complaint during that referral.

Breakdown of Complaints by Court System

Following is a breakdown of complaints disposed of in 1997, according to the court system involved and the personnel against whom the complaints were filed:

Disposition of Complaints—1997

Personnel	Supreme	Superior	District	Probate	Totals
Judges	2	17	28	5	52
Masters		13			13
Clerks		2	3		5
Registers					0
General	1	1	3		5
TOTAL	3	33	34	5	75

Ten-year Trends

The tables that follow illustrate trends over the last decade—by source, position complained against, and disposition; and by numbers of complaints filed, disposed of, and pending at the end of each year. (Discrepencies in totals are due to multiple or consolidated complaints and/or dispositions.)

Table 1 shows the sources of the complaints received by the committee from 1988 to 1997. By far the largest number of complaints—about ninety-two percent—came from private citizens. Attorneys initiated a little over three percent of the complaints, and judges about two percent. The committee itself initiated another two percent

TABLE 1: Complaint Sources

	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	Total
CITIZENS											
	48	57	55	36	67	51	69	59	70	75	587
ATTORNEY											
	2	1	3	2	1	3	3	2	2	1	20
JUDGES											
		3		2	2		1	1	3	1	13
COMMITTEE INITIATED											
		1	1	2	2	2		2	2	3	13
OTHER											
		1	1	1	1		2		1		7

Table 2 breaks down the complaints by judicial or court position during the 1988–1997 decade. The largest number of complaints (fifty-one percent) related to the district court system, which handles the greatest number of cases. Another forty-three percent related to the superior courts, with the probate courts accounting for another four percent, and the supreme court and the court system as a whole for the remaining two percent.

TABLE 2: Complaints by Judicial Position

	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	Total
SUPREME COURT											**11**
Judges								3	3	2	**8**
Clerks											
General		1				1				1	**3**
SUPERIOR COURT											**297**
Judges	10	16	11	16	15	21	35	17	15	17	**173**
Masters	8	4	9	3	8	9	8	15	9	13	**86**
Clerks	2				2	4	4	2	4	2	**20**
General	2	4	6	3		1	1			1	**18**
DISTRICT COURT											**332**
Judges	24	26	32	20	31	32	32	34	25	28	**284**
Clerks	4	5	1		5	2	3	4	6	3	**33**
General	2		4	3	1			1	1	3	**15**
PROBATE COURT											**24**
Judges	2	3	2	2	1	2	2	2	1	5	**22**
Registers			1								**1**
General					1						**1**
COURT SYSTEM											**5**
			1		1	2			1		**5**

Between 1988 and 1997, the committee disposed of 631 complaints. Table 3 breaks down the disposition of complaints by type.

By far the most common reason for disposing of a complaint has been that the committee lacked jurisdiction—either the complaint had to do with a judge's ruling, or it did not allege behavior that was in violation of the Code of Judicial Conduct. Almost two-thirds of the total, or 408 cases, were dismissed on these grounds, and of that total, nearly three-fourths (291, or seventy-one percent) were dismissed because they were objecting to judges' rulings.

During these ten years, thirty-one complaints were found to be valid, and twenty-seven resulted in informal resolutions, including letters of reprimand, admonishment, or advice. Four cases resulted in referrals by the committee to the supreme court. Of these, one was dismissed by the court, one was remanded to the committee for a reprimand, and two resulted in suspension of the judges.

TABLE 3: Disposition of Complaints

DISPOSTIONS	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	Total
DISMISSALS											**600**
Lack of jurisdiction											**408**
Judges' rulings	*15*	*30*	*33*	*25*	*31*	*30*	*36*	*36*	*29*	*26*	*291*
No violation	*14*	*6*	*17*	*5*	*9*	*8*	*15*	*10*	*16*	*17*	*117*
Unfounded without merit	4	4	4	12	15	11	9	6	5	10	**80**
No violation found	6	3	1	1		1	1	2	1		**16**
Insufficient information	5	1				1			5		**12**
Insufficient cause to proceed	3	7	7	4	3	14	8	7	7	5	**65**
Beyond 1-year time limit/moot/ no standing	1		1	4	1	1		2	5	3	**18**
Complaint withdrawn	1										**1**
SUSTAINMENTS											**31**
Reprimands/ admonishments/ cautionary letters	1	5	2	2	3	3	4		1	6	**27**
Recommendation to supreme court			2				1	1			**4**

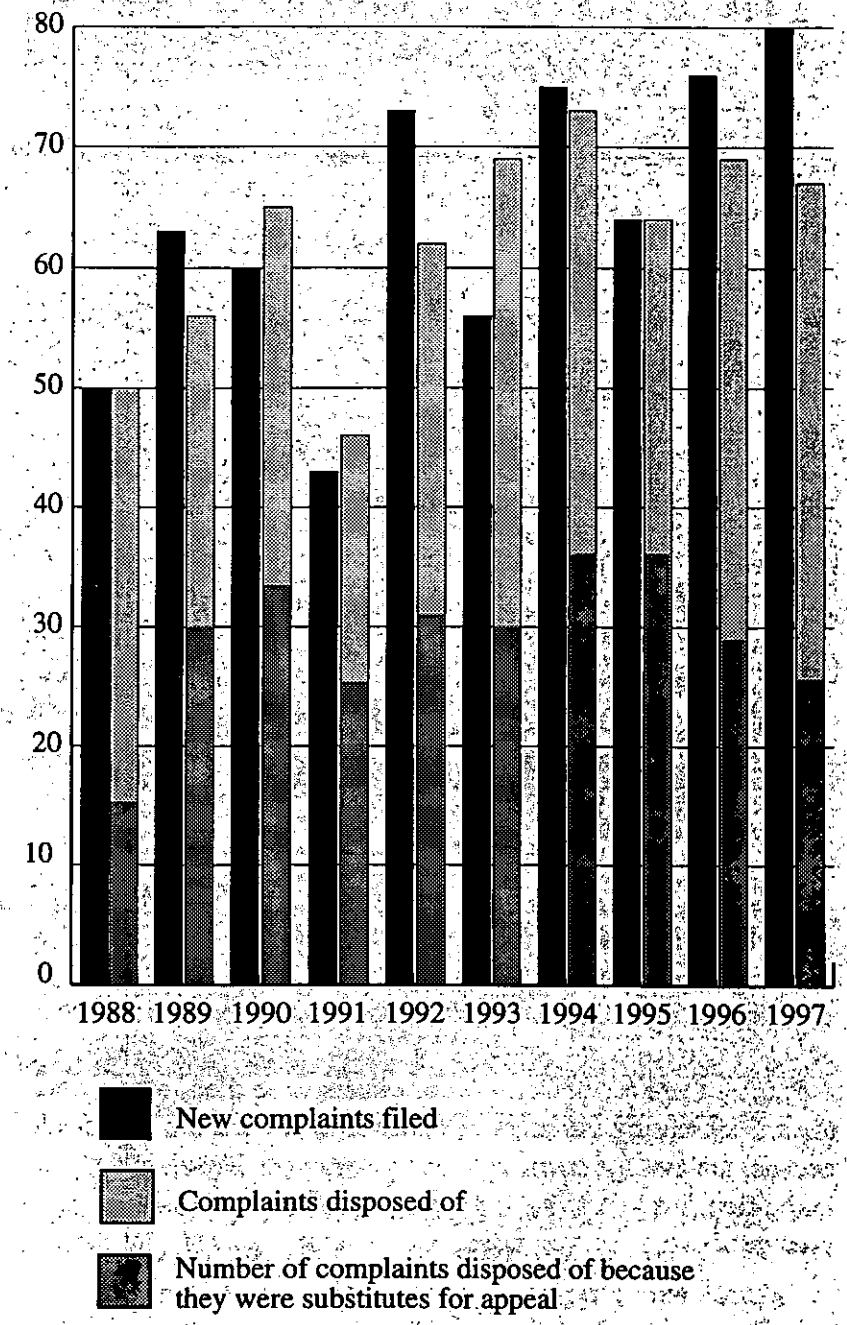
Table 4 shows the number of complaints pending on January 1 of each year from 1988 to 1997, and also, in each year, the number of complaints filed and the number disposed of (the latter reflects a consolidation of complaints).

During these ten years, 640 complaints were filed, with a trend toward increasing numbers of complaints toward the end of the decade: the average number of complaints was fifty-eight per year in the first five years, and during the last five years this rose to an average of over seventy per year, or an increase of over twenty percent.

TABLE 4: 10-Year Summary

COMPLAINTS	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	Total
Complaints pending on Jan. 1	12	12	19	14	11	21	8	10	10	17	**132**
No. of new complaints filed	50	63	60	43	73	56	75	64	76	80	**640**
No. of complaints disposed of	50	56	65	46	62	69	73	64	69	67	**621**

Complaint Flow—1988–1997



APPENDICES

Appendix A:

Complaint Information Letter

Appendix B:

Complaint Cover Sheet

Honorable William R. Johnson, Chair
David A. Hodges, Sr., Vice-Chair
Robert L. Chiesa, Esquire
Honorable Raymond A. Cloutier
Anne Coughlin
Honorable Douglas S. Hatfield, Jr.
Donna K. Lenckt
Joseph M. McDonough, III, Esquire
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THE STATE OF NEW HAMPSHIRE
SUPREME COURT
COMMITTEE ON JUDICIAL CONDUCT

FRANK ROWE KENISON
SUPREME COURT BUILDING
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Howard J. Zibel, Esquire
Executive Secretary
Donna R. Craig
Assistant Executive Secretary
(603) 271-2646

TDD Access: Relay NH 1-800-735-2964
(nonconfidential calls only)

Dear _____,

In response to your telephone call, I am enclosing a copy of Supreme Court Rule 38 (the Code of Judicial Conduct), Supreme Court Rule 39 (the Committee on Judicial Conduct), and Supreme Court Rule 40 (Procedural Rules of the Committee on Judicial Conduct).

As you may know, the Judicial Conduct Committee has eleven members, consisting of judges, lawyers, and public representatives, and meets six or more times a year.

All of the members read all of the complaints that are filed with the Committee. Since each meeting agenda can contain as many as fifteen or more complaints, however, and since each complaint can be lengthy and can include many pages of attachments, the Committee asks each complainant to fill out a summary "Cover Sheet." This summary enables Committee members to keep in mind, as they read, who is filing the complaint, what the complaint is all about, and what kind of supporting evidence they should be looking for. The Committee feels that this summarizing and focusing of the accusation can also be helpful to the complainant.

Attached is such a Cover Sheet, which we ask that you fill out and return to the Committee in order that it may be considered by the Committee along with your complaint. Again, this summary information will not be a substitute for your complaint, which will be read and considered in its entirety by each Committee member. The Cover Sheet is simply designed to enable the members to read each complaint, no matter how complicated and detailed, while looking for the instances of judicial misconduct (and for the supporting evidence) that are being complained about.

The Committee also urges you to be aware of what it does and does not do. It does not review the judges' findings and rulings, for example, unless it can be shown that these have been the result of persistent bad-faith disregard of the law. Unfortunately, the Committee has found that a sizeable majority of the complaints it receives must be dismissed because they essentially involve dissatisfaction with a judge's decisions, findings and rulings, rather than misconduct, and so are a substitute for an appeal. A complaint that merely

alleges that a judge made a wrong decision or ignored the facts or misapplied the law is outside the Committee's jurisdiction. In such a case you may wish to consult a lawyer about filing an appeal. The Committee has no power to change the result in a particular case; only an appellate court can do that.

Three other important rules regarding acceptance of complaints should be mentioned:

1. The complainant must be a person who either witnessed the alleged judicial misconduct or was directly affected by it.

2. The conduct complained of must be judicial misconduct - that is, conduct that is contrary to the Code of Judicial Conduct. Some examples of judicial misconduct are improper demeanor, rudeness and mistreatment of litigants; offensive remarks; gender or other bias; favoritism; receiving private communications from parties or their lawyers; conflicts of interest; excessive delay in decision-making; neglect of administrative duties; and conduct off the bench bringing the judicial office into disrepute.

3. Complaints arising out of conduct that took place over one year prior to receipt of the complaint will ordinarily be dismissed for staleness. If, however, the last episode of an alleged pattern of recurring judicial conduct occurs within the one-year period, the Committee may consider all prior acts or omissions alleged to be a part of the pattern.

The Committee investigates complaints that come within its jurisdiction in a thorough and vigorous manner. In this connection, you should be aware that the Committee has access to trial transcripts and audiotapes.

The proceedings of the Committee are generally confidential, and you are forbidden to divulge to anyone the fact you have filed a complaint until the Committee has either filed a statement of formal charges against the judge or has finally disposed of the complaint. The Committee's rules contain the following Comment, which helps to explain the confidentiality rules:

COMMENT

One of the protections of the confidentiality provision is that a complainant is not liable for good faith statements contained in a complaint or made in the course of its proceedings.

Nothing in the rule of confidentiality prevents a complainant from disclosing publicly the conduct of a judge which he or she believes violates the code of conduct or is otherwise inappropriate. The immunity from civil liability does not apply to such disclosures. The rule does prohibit a complainant, however, from disclosing publicly the fact that a complaint against the judge about the conduct has been filed with the committee until a statement of formal charges is prepared and filed as described in section 7(a) of [Supreme Court Rule 40]

or until the complaint is finally disposed of by the committee. Once a complaint has been disposed of by the committee, a complainant may make a public disclosure concerning the filing of a complaint including the conduct complained of and the action of the committee. The duty of confidentiality upon the committee remains, however, unless one of the specified exceptions provided by the rules applies.

For a more detailed explanation of the confidentiality rules, please review Supreme Court Rule 40(3).

A complainant has no right to appear before the Committee in support of his or her complaint, but may be required to attend as a witness in the course of a Committee investigation or hearing.

As you fill out the attached Cover Sheet, and as you consider your complaint as a whole, please be sure the complaint conforms to these rules governing the Committee's work. This will help you and, at the same time, it will help the Committee.

Thank you for cooperating with the Committee's requests. If I may be of any assistance, please call.

Very truly yours,

_____

Assistant Executive Secretary

New Hampshire Supreme Court
Committee on Judicial Conduct

Complaint Cover Sheet

Docket No. JC-_____

(Please Print Responses)

Complainant's (Your) Name: _____

Name of Person or Persons You Are Complaining Against (Judge, Master, Clerk or other Official):

_____

Court in Which Alleged Misconduct Occurred: _____

Names of Parties in Underlying Action or Suit: _____

Date or Dates of Alleged Misconduct: _____

Did you witness the alleged misconduct? ☐ **Yes** ☐ **No**

If not, state briefly how you are affected by it?

_____

Having read the letter which accompanies this form, please describe briefly the nature of the judicial misconduct about which you are complaining and summarize the supporting evidence.

_____

_____

_____

_____

_____

_____

_____

_____

Date: _____

_____
Signature of Complainant

JUDICIAL PERFORMANCE EVALUATION IN SUPERIOR COURT

JUDICIAL PERFORMANCE EVALUATION IN SUPERIOR COURT
JOSEPH P. NADEAU, CHIEF JUSTICE
NEW HAMPSHIRE SUPERIOR COURT

I regret I cannot meet with you personally to discuss superior court judicial evaluations. I hope this statement addresses issues of concern to the committee.

First, I would like to emphasize that the purpose of judicial performance evaluations is to provide trial judges with insight into their conduct on the bench as perceived by lawyers, litigants, clerks, staff, bailiffs and myself.

The process begins by the judge filling out a self assessment form (**Attachment A**) which provides the opportunity to reflect on his or her work as a judge. The judge can also comment on how his or her job is affected by such things as scheduling, education and resources. The judges ends the completed form to me for review and use in our final interview..

Next, I ask each clerk to make a list of the attorneys and law firms who regularly practice in the court where the judge sits. I then send a form (**Attachment B**)to those firms and any other firms which I feel should be included.

An evaluation form is also sent to all court personnel who work in the courthouse where the judge presides. These forms provide clerks and bailiffs, (**Attachment C**) office staff, law clerks, and court reporters (**Attachment D**) a chance to rate the judge in many categories. The categories are those which are used by most jurisdictions which conduct such evaluations. The forms also provide space for additional comments and observations.

The forms are confidential and anonymous.. Confidentiality and anonymity are important because they permit people to provide an honest view of the judge's performance. Employees, attorneys and litigants know they will suffer no disadvantage because of the information provided. They also know the information will be used only for evaluation and improvement not for personal attack. Since the forms are not public, there is no concern that one isolated event will gain disproportionate attention.

Not surprisingly, most comments for most judges are highly favorable. But, even if a judge receives only one unfavorable survey, I do not disregard it. Rather, unfavorable surveys are use as a learning tools. Even if observations may be uncommon, they deserve attention. I ask the judge to recognizes that these observations or perceptions come from someone who feels strongly about the conduct described.

We also discuss how judges can avoid even a single instance of bad temper or uncharacteristic conduct. We discuss how judges can respond to contentious litigants or troublesome attorneys in positive ways, and how judges can avoid times of impatience and work hard to make certain that even unhappy litigants perceive the judge as a fair and tolerant person.

Finally, the forms also reinforce positive conduct and inform judges when they are on the right track. Judges know when the conduct described, whether positive or negative, is typical and make genuine efforts to work on areas that need improvement.

Occasionally someone asks whether these evaluations can be made public so that anyone can see the surveys and comments. Of course they can. But I have two thoughts about that suggestion. The first is that it is unnecessary. Any individual or group can solicit information about judges by conducting their own inquiries or surveys. They can gather information and make whatever use of it they desire. Also, most judicial activity takes place in a public courtroom open to all and frequently covered by the media.

My second thought is that making the surveys public will change the process. Such a public airing of administrative evaluations risks the prospect that the focus will be directed away from performance review and toward personal vilification. There is a serious risk that a small unrepresentative group would use information selectively to create the unwarranted impression that there is a serious problem with judicial performance.

For these reasons if surveys were to be made public, it seems to me those who fill out the surveys should be required to identify themselves. How else can a judge defend against what he or she believes to be unfair or untrue comments? With the cover of anonymity, it would take very little effort to create the false impression that the performance of a particular judge is questionable.

It is very frustrating to me to hear someone repeat an anonymous and usually unfounded allegation involving a judge without identifying the court, the judge or the circumstances. Judges must make difficult decisions. They must control the courtroom and everyone who comes before them. Judges are human beings and no matter how hard every judge tries to exercise their responsibilities in the most judicious manner they will occasionally make mistakes.

Finally, I ask the legislature to reflect on the harm to government of providing an additional opportunity to make unwarranted attacks on its institutions by a small vocal minority. I believe the process we have in place allows us to deal with human frailties without creating the unfounded and unwarranted impression of disarray that a handful of disgruntled litigants might like to convince the public exists. I believe our 28 superior court judges and 11 marital masters earn and deserve public confidence for their daily handling of thousands of cases throughout the state.

2/1/99 **(Attachment A)**

PERSONAL EVALUATION FORM - JUSTICE

Personal Information:

Types of cases you have heard in each category in the last year. (Estimate percentages)

Civil, Equity _____
Criminal _____
Marital _____
Other _____

1. How often have you been able to review case files prior to hearings or trials?
Never_ Rarely_ Sometimes____ Most of the time____ Always

2. How often would you like to be able to review case files prior to hearings or trials?
Never___Rarely___Sometimes____ Most of the time____ Always

3. How often have you had to stay late, or arrive early, to accommodate emergency of special scheduling problems?
Never_ Rarely___Sometimes____ Most of the time____ Always

4. Do you generally involve attorneys, litigants, and court staff when making scheduling decisions about special situations, such as working late or through the lunch hour?
Never___Rarely___Sometimes____ Most of the time____ Always

5. Do you think you take a fair share of the difficult work on the docket?
Never____Rarely__Sometimes____ Most of the time____ Always

6. Do you feel pushed by the caseload to the point where "moving cases" takes precedence over quality of justice concerns?
Never___Rarely___Sometimes____ Most of the time____ Always

7. How often do you feel you are sufficiently familiar with the law and the facts that apply to the cases you are hearing?
Never___Rarely___Sometimes____ Most of the time____ Always

8. Do you think you give attorneys a fair opportunity to make their argument to the court?
Never___Rarely___Sometimes____ Most of the time____ Always

9. Do you think that litigants and attorneys leave the courtroom when you are presiding having understood what has happened and what is to happen next?
Never___Rarely___Sometimes____ Most of the time____ Always

10. How often have you found it necessary to intervene in cases being presented in the courtroom, in order to ensure justice is done, above and beyond exact procedural and legal requirements?
Never___Rarely___Sometimes____ Most of the time____ Always

11. How would you describe your style of courtroom control?
Easy going____ Somewhat controlling____ Very controlling

12. How would you describe your settlement style? (i.e. do you actively participate?)
Never___Rarely___Sometimes____ Most of the time__ Always

13. How would you rate the amount of continuing education you have received since being appointed to the Superior Court?
Less than sufficient_____ Sufficient_____ More than sufficient

14. How would you rate the amount of continuing education you have received during the past two years?
Less than sufficient____Sufficient____More than sufficient

15. Are there any areas in which you would like more education?

16. Are there any innovations which you would like to try?

19. Are you satisfied with your overall performance?
YES ____ YES, but room for improvement____ NO

OTHER COMMENTS:

(Attachment B)

2\1\99 **SUPERIOR COURT PERFORMANCE EVALUATION - ATTORNEY**

Please rank performance in the areas with which you are familiar. **1 (low)->10 (high)** **RANK**

1. Accessibility to staff	
2. Conscientiousness and diligence	
3. Patience and tolerance	
4. Effectiveness of communication	
5. Shows respect for staff	
6. Has earned your respect	
7. Allows me to perform my job	
8. Attentiveness to court business	
9. Promptness in rendering decisions	
10. Efficiency in use of court time	
11. Familiarity with and use of court forms	
12. Familiarity with office procedures	
13. Accessibility to counsel	
14. Handling of complex cases and issues	
15. Control in courtroom	
16. Decisiveness of decisions and rulings	
17. Attentiveness to witnesses and counsel	
18. Knowledge of law	
19. Knowledge of evidence	
20. Knowledge of procedure	
21. Understanding & compassion	
22. Fairness and equality of treatment	
23. Freedom from racial, religious or gender bias	
24. Level of professionalism	
COMPARE TO OTHER SUPERIOR CT JUDGES\MASTERS **A-(top third), B-(middle), C-(lower third)**	

Number of years in practice._____

Number of hearings before this judge or master._____

Number of appearances before other judges or masters.___

Civil____, #Criminal____, #Marital____.

(Please make any additional comments on the back of this page

ADDITIONAL COMMENTS:

It is not necessary to sign this form but you may do so if you wish.
Please return to:

New Hampshire Superior Court Center
Judicial Evaluation - Confidential
99 North State Street
Concord N.H. 03301

(Attachment C)

2\1\99 **SUPERIOR COURT PERFORMANCE EVALUATION CLERK/BAILIFF**

JUSTICE\MASTER_____

Please rank performance: 1 (low) -> 10 (high) RANK

Accessibility to counsel	
Conscientiousness and diligence	
Patience and tolerance	
Effectiveness of communication	
Handling of complex cases and issues	
Control in courtroom	
Decisiveness of decisions and rulings	
Attentiveness to witnesses and counsel	
Promptness in rendering decisions	
Efficiency in use of court time	
Knowledge of law	
Knowledge of evidence	
Knowledge of procedure	
Understanding & compassion	
Fairness and equality of treatment	
Freedom from racial, religious or gender bias	
Level of professionalism	
COMPARE TO OTHER SUPERIOR CT JUDGES\MASTERS A-(top third), B-(middle), C-(lower third)	

Number of years employee in judicial branch._____
Number of other judges\masters with whom you have worked_____

ADDITIONAL COMMENTS

It is not necessary to sign this form but you may do so if you wish.

(Attachment D)

2\1\99 **SUPERIOR COURT PERFORMANCE EVALUATION - STAFF**

Please rank performance in the areas with which you are familiar. **1 (low)->10 (high) RANK**

1. Accessibility to staff	
2. Conscientiousness and diligence	
3. Patience and tolerance	
4. Effectiveness of communication	
5. Shows respect for staff	
6. Has earned your respect	
7. Allows me to perform my job	
8. Attentiveness to court business	
9. Promptness in rendering decisions	
10. Efficiency in use of court time	
11. Familiarity with and use of court forms	
12. Familiarity with office procedures	
13. Accessibility to counsel	
14. Handling of complex cases and issues	
15. Control in courtroom	
16. Decisiveness of decisions and rulings	
17. Attentiveness to witnesses and counsel	
18. Knowledge of law	
19. Knowledge of evidence	
20. Knowledge of procedure	
21. Understanding & compassion	
22. Fairness and equality of treatment	
23. Freedom from racial, religious or gender bias	
24. Level of professionalism	
COMPARE TO OTHER SUPERIOR CT JUDGES\MASTERS A-(top third), B-(middle), C-(lower third)	

Number of years you have worked in judicial branch._____
Number of other judges or masters with whom you have worked.____

(Please make any additional comments on the back of this page.)

ADDITIONAL COMMENTS:

It is not necessary to sign this form but you may do so if you wish.
Please return to:

New Hampshire Superior Court Center
Judicial Evaluation - Confidential
99 North State Street
Concord N.H. 03301

FILE

Table 4.3
QUALIFICATIONS OF JUDGES OF STATE APPELLATE COURTS AND GENERAL TRIAL COURTS

State or other jurisdiction	U.S. citizenship (years)		Years of minimum residence: In state		In district		Minimum age		Member of state bar (years)		Other	
	A	T	A	T	A	T	A	T	A	T	A	T
Alabama	5	5	(a)	(a)	...	1	25	25	...	...	...	...
Alaska	★	★	5 (a)	5 (a)	...	...	...	...	★ (b)	★ (b)	...	...
Arizona	...	...	10 (c)	5	(d, e)	1	30	30	10 (c)	5	(f, g)	(f, g)
Arkansas	★	★	2	2	...	...	30	28	(h, i)	(h, i)	(f)	(f)
California	...	...	...	...	...	...	...	...	10 (i)	10 (i)	...	...
Colorado	...	...	(e)	...	...	(e)	...	...	5	5	(g)	(g)
Connecticut	...	...	...	...	...	...	18	18	10	10	...	...
Delaware	...	...	(a)	(a)	...	...	...	...	(h)	(h)	...	...
Florida	...	...	(e)	(e)	★	★	...	...	10	5	(g)	(g)
Georgia	3	3	★	(a)	...	...	...	30	7	7	...	...
Hawaii	★	★	★ (a)	★ (a)	...	...	...	...	10	10	...	...
Idaho	★	★	2	1	...	(e)	30	30	10	10	...	...
Illinois	★	★	★	★	★	★	...	...	★	★	...	...
Indiana	★	★	...	...	★	★	...	...	10 (i)	★	...	...
Iowa	...	...	...	...	...	...	...	...	★	...	...	...
Kansas	...	...	...	...	...	★	30	30	★ (i)	★ (i)	...	...
Kentucky	★	★	2	2	2	2	...	...	8	8	...	...
Louisiana	...	...	2	2	2	2	...	...	5	5	...	...
Maine	...	...	...	...	...	...	...	...	(h)	(h)	(f)	(f)
Maryland	...	...	5 (a,e)	5 (a,e)	6 mos.	6 mos.	30	30	★	★	(f)	(f)
Massachusetts	...	...	...	...	...	...	...	...	...	...	...	...
Michigan	...	...	(e)	...	(e)	(e)	...	...	★	★	(g)	(g)
Minnesota	...	...	...	...	...	...	...	...	★ (h)	★ (h)	...	...
Mississippi	...	...	(a)	(a)	...	...	30	26	5	5	...	...
Missouri	15	10	(e)	(e)	★	1	30	30	★	★	...	...
Montana	★	★	2	2	...	...	...	...	5	5	...	...
Nebraska	★	★	3	...	★ (e)	★	30	30	5 (i)	5 (i)	...	...
Nevada	...	...	2 (e)	2 (e)	...	...	25	25	★	...	...	...
New Hampshire	...	...	...	...	...	...	...	...	...	...	(j)	(j)
New Jersey	...	...	...	(k)	...	(k)	...	...	10	10	...	...
New Mexico	...	...	3	3	...	★	35	35	10 (h,i)	6 (h,i)	...	...
New York	...	...	★	★	...	...	18	18	10	10	...	...
North Carolina	...	...	...	...	...	★	...	...	★	★	...	...
North Dakota	★	★	★	★	...	★	...	...	★ (h)	★ (h)	...	...
Ohio	...	...	...	★	...	★	...	...	6 (i)	6 (i)	(g)	(g)
Oklahoma	...	...	(e)	...	(e)	(e)	30	...	5 (i)	4 (i)	...	...
Oregon	★	★	3	3	(e)	1	...	...	★	★	...	...
Pennsylvania	★	★	1 (a)	1 (a)	...	★	...	...	★	★	...	...
Rhode Island	...	...	...	...	...	...	21	...	...	...	...	...
South Carolina	★	★	5 (a)	5 (a)	...	...	26	26	5	5	...	...
South Dakota	★	★	★	★	★ (e)	★ (e)	...	...	★	★	...	...
Tennessee	...	...	5 (a)	5	...	1	35 (l)	30	★ (h)	★ (h)	...	...
Texas	★	★	(a)	(a)	(d)	2	35	...	★ (i)	★ (i)	...	...
Utah	★	★	5 (m)	3	...	★	30 (n)	25	★	★	...	...
Vermont	...	...	5	5	...	...	...	...	★ (i)	★ (i)	...	...
Virginia	...	...	★	★	...	★	...	...	5	5	...	...
Washington	...	...	1	1	1	1	...	...	★ (o)	★	...	...
West Virginia	...	...	5	★	...	...	30	30	10 (i)	★ (i)	...	...
Wisconsin	...	...	10 days	10 days	10 days	10 days	...	...	5	5	...	...
Wyoming	★	★	3	2	...	...	30	28	9 (h,i)	(h)	...	...
Dist. of Columbia	★	★	...	...	90 days	90 days	...	...	5 (i)	5 (i)	...	(p)
No. Mariana Islands	...	★	...	...	...	...	...	30	...	(h)	...	...
Puerto Rico	★	★	5	...	...	...	...	25	10	★ (i)	...	...

Sources: National Center for State Courts, *State Court Organization 1993*; state constitutions and statutes.

Note: The information in this table is based on a literal reading of the state constitutions and statutes. Requirements that an individual be a member of the state bar or a qualified elector may imply additional requirements.

Key:

A — Judges of courts of last resort and intermediate appellate courts.

T — Judges of general trial courts.

★ — Provision; length of time not specified.

. . . — No specific provision.

(a) Citizen of the state. In Alabama, Mississippi and Tennessee (court of criminal appeals), five years; in Georgia, three years.

(b) Must have been engaged in active practice of law for specific number of years. Alaska: appellate eight years; trial five years.

(c) For court of appeals, five years.

(d) For court of appeals judges only.

(e) Qualified elector. For Arizona court of appeals, must be elector of county of residence. For Michigan Supreme Court, elector in state; court of appeals, elector of appellate circuit. For Missouri Supreme and appellate courts, electors for nine years; for circuit courts, electors for three years. For Oklahoma Supreme Court and Court of Criminal Appeals, elector for one year; court of appeals and district courts, elector for six months. For Oregon court of appeals, qualified elector in county.

(f) Specific personal characteristics. Arizona, Arkansas good moral character. Maine sobriety of manners. Maryland integrity, wisdom and sound legal knowledge.

(g) Nominee must be under certain age to be eligible. Arizona under 70. Colorado under 72, except when name is submitted for vacancy. Florida under 70, except upon temporary assignment or to complete a term. Michigan, Ohio under 70.

(h) Learned in law.

(i) Years as a practicing lawyer and/or service on bench of court of record in state may satisfy requirement. Arkansas appellate: eight years; trial: six years. Indiana 10 years admitted to practice or must have served as a circuit, superior or criminal court judge in the state for at least five years. Kansas appellate: 10 years; trial: five years. Texas appellate: 10 years; trial: four years. Vermont five of 10 years preceding appointment. West Virginia appellate: 10 years; trial: five years. Puerto Rico appellate: 10 years; trial: five years.

(j) Except that record of birth is required.

(k) There are 260 restricted superior court judgeships that require residence within the county at time of appointment and reappointment. There are 144 unrestricted judgeships for which assignment of county is made by the Chief Justice.

(l) Thirty years for judges of court of appeals and court of criminal appeals.

(m) Supreme Court is five; court of appeals is three.

(n) Supreme Court is 30 years; court of appeals is 25 years.

(o) For court of appeals, admitted to practice for five years.

(p) Superior court judges must also have 5 years of legal government practice or service as law school faculty.

DRAFT AMENDMENT

490:35 Marital Masters.

I. Marital masters selected to serve in the Marital Master Program pursuant to New Hampshire Superior Court rule 12 shall possess the following qualifications:

(a) Professional experience in family law matters;

(b) Legal and personal qualities including, but not limited to:

(1) Knowledge of family matters, including related matters such as tax and pension law;

(2) Personal maturity so as to understand and make decisions on matters before the court; and

(3) Personal qualities of patience and understanding of the difficult personal matters which are the subject of divorce and a willingness to deal with complex family matters in a non-adversarial manner.

II. The governor shall nominate and the council shall confirm all new marital masters. The governor and council shall approve those seeking a renewed contract term and the terms and conditions of the marital master contract.

HOUSE COMMITTEE RESEARCH OFFICE
New Hampshire House of Representatives
4th Floor, Legislative Office Building
Concord, New Hampshire 03301
TDD Access: Relay NH
1-800-735-2964

603-271-3600

FILE

To: Henry J. Mock, Committee Chair
Judiciary and Family Law Committee

From: Kevin B. Moquin, Committee Researcher
House Committee Research

Date: August 31, 1999

Re: Legislative authority in relation to the nomination and appointment of judicial officers.

You asked me to verify what power the legislature has in relation to the evaluation, nomination and appointment of judicial officers. In reviewing this issue, I have looked at the state constitution, the state statutes and state case law.

The New Hampshire Constitution, pt. I, art. 37 provides that, "In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity." (Attachment 1). Pt. II, art. 46 further provides in part that "all judicial officers . . . shall be nominated and appointed by the governor and council . . ." (Attachment 2). The New Hampshire Supreme Court has stated, "The ***method of selection*** of constitutional officers is provided by the constitution and ***may not be altered by the legislature. All other officers occupy positions established by the legislature and the method of their election or appointment is determined by the legislature***." (Emphasis added.) ***Opinion of the Justices***, 115 N.H. 159, 161 (1975). (Attachment 3).

Furthermore, the court has stated that "the Governor has broad discretion to select ***the means*** he will use in executing a constitutional duty." ***Opinion of the Justices***, 117 N.H. 398, 402 (1977), ***citing Opinion of the Justices,*** 334 N.E.2d. 604, 609 (Mass. 1975). (Attachment 4). This opinion was issued in response to a bill that proposed to create a judicial selection commission to recommend at least three candidates for all judicial appointments. In spite of the fact that the commission's

powers were merely advisory and that the Governor still retained the power to nominate or appoint some other person not recommended by the commission, the supreme court found the proposed legislation to be "an unconstitutional encroachment upon powers of the Governor and the Council . . . by 'altering' or 'changing' the selection process for judges." ***Opinion of the Justices***, 117 N.H 401-3. Thus, in the past, the supreme court has interpreted the power of the legislature to be relatively narrow, while allowing the governor broad discretion in selecting the means of judicial appointment.

All of this is relevant to two questions that have been raised by the subcommittee: 1) Does the legislature have the power to require that the governor and council use certain criteria or qualifications in nominating and appointing judicial officers; and 2) Does the legislature have the power to limit the terms of the office of chief justice of the supreme and superior courts so long as such legislation does not limit a justices ability to serve on the court during good behavior?

In response to the first question, it would seem doubtful that the court would find legislative authority to require the use of such criteria or qualifications. As previously noted, the governor and council's authority in this area is broad and the legislature retains no power to alter the method of selection of judicial officers. While N.H. RSA 4:44, which requires the governor and council to hold a hearing prior to any judicial appointment, may raise some questions about the extent of legislative power over the appointment process, this law was only adopted in 1997 and has never been tested in court (Attachment 5).

In response to the second question, the answer appears less clear. We would need to know whether the chief justice of either of these courts is a constitutional or statutory officer. The New Hampshire Constitution mentions the chief justice of the supreme court in two articles. N.H. Const., pt. II, arts. 40, 73-a. (Attachments 6 & 7). However, the constitution does not specifically provide a procedure for the nomination and appointment of a chief justice. Furthermore, the constitution makes no mention of a chief justice for the superior court. RSA 490:1 (Attachment 8) and RSA 491:1 (Attachment 9) provide for a chief justice of the supreme and the superior court respectively. Thus, it may be easier to argue that the chief justice of the superior court is a legislative officer and that the legislature has some control over the length of his or her tenure. Though it is not clear, one can infer from the constitution that the chief justice of the supreme court is a constitutional officer and, therefore, that the legislature is subject to constitutional limitations with regard to the power to limit the chief justice's term.

We would further need to know whether the chief justices of the supreme and superior courts are judicial officers for purposes of their nomination and appointment. N.H. Constitution, pt. II, art. 73 states that "all judicial officers . . . shall hold their offices during good behavior." (Attachment 10) The two chief justices are, without doubt, judicial officers insofar as they have been appointed as

justices to their respective courts, and, as such, the legislature cannot interfere with their power to continue in office during good behavior. However, whether specifically the ***office of chief justice*** of either court is a judicial office subject to pt. II, art. 73 is a question which has not been addressed.

In summary, the legislature's authority to regulate the judicial appointment and nomination process appears to be extremely limited. Moreover, the office of chief justice of the supreme court appears to be a constitutional office rather than a legislative office. Thus, the legislature probably has little power to regulate the term of this office. Lastly, the office of chief justice of the superior court appears to be a legislatively created office. However, it is an open question as to whether the office is technically a judicial office, and thus subject to the constitutional requirement that any appointee to the office shall hold office during good behavior. If I may be of further assistance, please do not hesitate to contact me.

Attachment 1

FILE

Art. 37. Separation of Powers.

In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

Annotations

Analysis

1. Generally.
2. Purpose.
3. Overlapping of powers.
4. Encroachment.
5. Delegation of powers.
6. Legislative powers.
7. Judicial powers.
8. Executive powers.
9. Administrative agencies.
10. Immunities.
11. Compatible offices.

1. Generally.

Separation of the three co-equal branches of government is essential to protect against a seizure of control by one branch that would threaten the ability of New Hampshire's citizens to remain a free and sovereign people; the doctrine is thus violated when one branch usurps an essential power of another. Petition of Mone, 143 N.H. - , 719 A.2d 626 (1998).

If the people are to remain free and retain their sovereignty, then government must be limited; the separation of powers is essential to this end. State v. LaFrance, 124 N.H. 171, 471 A.2d 340 (1983).

Separation of powers between the legislative, executive and judicial branches of government is a vital part of the state constitution. In re Gamble, 118 N.H. 771, 394 A.2d 308 (1978).

This article does not require the erection of impenetrable barriers between the branches of government. Opinion of the Justices, 113 N.H. 287, 306 A.2d 55 (1973).

The separation of powers of the legislative, executive and judicial branches of the government is an important part of its constitutional fabric. Opinion of the Justices, 102 N.H. 195, 152 A.2d 878 (1959).

The separation of powers effected by the constitution in the creation of the three departments of government is a vital limitation upon the powers and not merely a convenient and variable assignment of duties. Opinion of the Justices, 86 N.H. 597, 166 A. 640 (1933).

2. Purpose.

Separation of powers prevents usurpation of controlling authority by one branch of government, since each branch acts as a check on the other, protecting the sovereignty and freedom of those governed by preventing the tyranny of any one branch of the government being supreme. State v. LaFrance, 124 N.H. 171, 471 A.2d 340 (1983).

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This article was adopted to protect the executive and judicial branches of the state government from legislative encroachment. State v. LaFrance, 124 N.H. 171, 471 A.2d 340 (1983).

The concept of the separation of powers, contained in virtually every American constitution, was designed to protect the people from the tyranny of government which could result from the accumulation of unbridled power in any one branch of the government. Opinion of the Justices, 121 N.H. 552, 431 A.2d 783 (1981).

Principal purpose of separation of powers between the legislative, executive and judicial branches of the government as set forth in this article is to protect each of the three branches from encroachment by the other, and as applied to the executive, to protect it from legislative encroachment. Opinion of the Justices, 118 N.H. 582, 392 A.2d 125 (1978).

As applied to the judiciary, the primary purpose of this article is to protect the judiciary from legislative encroachments rather than to circumscribe its functions within strict limits. Opinion of the Justices, 102 N.H. 195, 152 A.2d 878 (1959).

3. Overlapping of powers.

Concept of complete separation of powers could interfere with efficient operation of government; therefore, some overlapping of power of each branch of government must exist. Opinion of the Justices, 121 N.H. 552, 431 A.2d 783 (1981).

This article recognizes that the separation of powers cannot be absolute in a workable government. Opinion of the Justices, 110 N.H. 359, 266 A.2d 823 (1970).

The three branches of government cannot be completely separate; there must be some overlapping. Opinion of the Justices, 110 N.H. 359, 266 A.2d 823 (1970); Monier v. Gallen, 120 N.H. 333, 414 A.2d 1297 (1980).

This article does not require the erection of impenetrable barriers between the branches since there are governmental powers of doubtful classification which may be held properly to belong to either of more than one department of the government. Opinion of the Justices, 110 N.H. 359, 266 A.2d 823 (1970).

The three branches of government cannot be completely separate, without overlapping. Opinion of the Justices, 102 N.H. 195, 152 A.2d 878 (1959).

This article contemplates some overlapping and duality as a matter of practical and essential expediency. Cloutier v. State Milk Control Board, 92 N.H. 199, 28 A.2d 554 (1942); Pomponio v. State, 106 N.H. 273, 209 A.2d 733 (1965).

The constitution contemplates no absolute fixation and rigidity of powers between the three departments of the government, and areas of concurrent authority are properly constituted when the fixing of exact boundary lines would give rise to undue interference with the reasonable exercise of valid governmental activities. Ferretti v. Jackson, 88 N.H. 296, 188 A. 474 (1936).

4. Encroachment.

Where a proposed legislative bill directly conflicts with New Hampshire Rules of Evidence 404(b), the separation of powers doctrine is violated; the legislature has no more right to break down the rules prescribed by the court to assure fundamental due process in criminal and civil trials than the court has to prescribe the mode and manner in which the legislature shall perform its legislative duties. Opinion of Justices (Prior Sexual Assault Evid.), 141 N.H. 562, 688 A.2d 1006 (1997).

Once the legislature has made appropriation for the executive branch of government, the requirement of the legislative fiscal committee approval of contracts made pursuant thereto by the executive branch is an unconstitutional intrusion into the executive branch. Opinion of Justices, 129 N.H. 714, 532 A.2d 195 (1987).

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The legislature could not, by operating budget footnotes applicable to specific appropriations, require the approval of the legislative fiscal committee for contracts entered into by the executive obligating expenditure of funds from the footnoted appropriations, since the footnotes were an unconstitutional encroachment by the legislative branch upon the executive branch. Opinion of Justices, 129 N.H. 714, 532 A.2d 195 (1987).

Enactment of bill requiring supreme court to suspend salary and benefits of any judge who is suspended by supreme court for any misconduct for period of suspension would violate separation of powers provisions of part I, article 37 of the New Hampshire Constitution. Opinion of Justices (Judicial Salary Suspension), 140 N.H. 297, 666 A.2d 523 (1995).

Mandatory feature of bill, which requires that supreme court suspend the salary and benefits of every judge suspended for misconduct, intrudes unduly upon court's superintendence power under part II, article 73-a, which includes the authority to exercise discretion in determining whether to suspend a judge without pay; as such, it impermissibly encroaches upon an exclusive judicial function in violation of the separation of powers mandate of part I, article 37. Opinion of Justices (Judicial Salary Suspension), 140 N.H. 297, 666 A.2d 523 (1995).

The separation of powers doctrine set forth in this article compels limits to encroachments by one branch of government into the inherent and internal affairs of another branch. State v. LaFrance, 124 N.H. 171, 471 A.2d 340 (1983).

Improper imposition upon one branch of government of powers of another branch or an encroachment upon powers of one branch by another branch violates separation of powers requirement of this article. Opinion of the Justices, 121 N.H. 552, 431 A.2d 783 (1981).

Separation of powers requirement of this article is violated by an encroachment by one branch of government upon a constitutional function of another. Opinion of the Justices, 116 N.H. 406, 360 A.2d 116 (1976).

This article is violated by an improper imposition upon one branch of constitutional duties belonging to another or an encroachment by one branch upon a constitutional function of another. Opinion of the Justices, 110 N.H. 359, 266 A.2d 823 (1970); State v. LaFrance, 124 N.H. 171, 471 A.2d 340 (1983); State v. Shackford, 127 N.H. 695, 506 A.2d 315 (1986).

The legislature acts ultra vires when it attempts to impose upon the judicial department duties and powers which are inconsistent with or antagonistic to the exercise of judicial power. Attorney General ex rel. Boulanger v. Morin, 93 N.H. 40, 35 A.2d 513 (1943).

5. Delegation of powers.

In order to pass constitutional muster, delegation of authority to State Board of Education to approve amendment procedure in cooperative school district's articles of agreement must contain a declared policy and a prescribed standard laid down by legislature; if the policy and standard are adequately and sufficiently prescribed, discretionary authority may be delegated. In re Kearsarge Regional Sch. Dist., 138 N.H. 211, 636 A.2d 1033 (1994).

Trial court did not err in finding that statute designed to guide State Board of Education in approving amendment procedure in cooperative school district's articles of agreement set forth a declared policy and a prescribed standard, and that statute did not amount to unlawful delegation of legislative authority. In re Kearsarge Regional Sch. Dist., 138 N.H. 211, 636 A.2d 1033 (1994).

A statute granting the director of motor vehicles authority to suspend or revoke drivers' licenses for any cause which he may deem sufficient is an unconstitutional delegation of legislative authority. Guillou v. Division of Motor Vehicles, 127 N.H. 579, 503 A.2d 838 (1986).

Sweeping and general delegation of legislative power with uncontrolled discretion to executive branch agency even in a narrow field exceeds constitutional limits. Smith Ins., Inc. v. Grievance Comm., 120 N.H. 856, 424 A.2d 816 (1980).

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Statute, establishing grievance committee empowered to review termination by insurance companies of agency agreements between the companies and their agents, was devoid of either a declared policy or a prescribed standard laid down by the legislature and as such represented an unconstitutional delegation of legislative power. Smith Ins., Inc. v. Grievance Comm., 120 N.H. 856, 424 A.2d 816 (1980).

6. Legislative powers.

RSA 77-A:6 did not violate part I, article 37 of the State Constitution by giving the commissioner unfettered discretion to implement the unitary method of taxation because the statute empowered the commissioner to compel a corporation, either owning more than fifty percent of the stock of another corporation or having another corporation own more than fifty percent of its stock, to provide information concerning the possible unitary nature of its business; there exists both a declared policy to effect an equitable apportionment of the business organization's gross business profits, RSA 77-A:3, II(c), and a prescribed standard - fifty percent "owned or owning" criteria - in the delegation of legislative authority at issue. Baxter Int'l, Inc. v. State, 140 N.H. 214, 665 A.2d 350 (1995).

The trial court's grant of a "builder's remedy" to plaintiff who successfully challenged zoning ordinance on the basis that it wrongfully excluded development of low and moderate income housing projects did not violate this article; the municipality retained control of zoning to the extent it exercised its power for the general welfare of the community. Britton v. Town of Chester, 134 N.H. 434, 595 A.2d 492 (1991).

The separation of powers doctrine requires that the supreme court defer to the state senate in its decisions concerning whom to seat in cases of election contests or disputes. State v. LaFrance, 124 N.H. 171, 471 A.2d 340 (1983).

House of representatives as a separate and coequal branch of government is constitutionally authorized to promulgate its own rules. Union Leader Corp. v. Chandler, 119 N.H. 442, 402 A.2d 914 (1979).

This article does not preclude legislature from requiring governor to make particular designation of an agency to include Office of Health Planning and Development pursuant to Federal Public Health Service Act. Opinion of the Justices, 118 N.H. 7, 381 A.2d 1204 (1978).

In appropriating or not appropriating money for a department or its subdivisions or for the carrying out of particular services, the legislature has fundamental control which must always be subject to a recognition of what funds and agencies are reasonably necessary for the exercise of powers inherent to the proper functioning of the three branches of government if they are to fulfill their constitutional duties. Opinion of the Justices, 118 N.H. 582, 392 A.2d 125 (1978).

However desirable comprehensive legislation in area of conflict of interest may be, enactment of such legislation is the prerogative and responsibility of the legislature and not of the executive. Opinion of the Justices, 116 N.H. 406, 360 A.2d 116 (1976).

Legislature has indicated a willingness and purpose to legislate in area of conflict of interest on part of elected state officials, partial though it may be, and executive policy which would vary statutory requirements and also have practical effect of regulating legislative power and authority in contravention of state constitution may not be permitted. Opinion of the Justices, 116 N.H. 406, 360 A.2d 116 (1976).

Legislature in the exercise of its plenary control over municipalities may modify or divide towns and create village districts and such action does not violate the separation of powers provision in this article even if the matter is pending in the courts. Lisbon v. Lisbon Village District, 104 N.H. 255, 183 A.2d 250 (1962).

7. Judicial powers.

Newly enacted law mandating that county sheriff departments be responsible for providing security in all State courts except supreme court, and that all judicial branch employee positions associated with security function in those courts be abolished, violated separation of powers clause of New Hampshire Constitution; since court security officers play an integral role in the most fundamental function of any

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court, the adjudicatory function, it was an improper encroachment on the judiciary's power for the legislature to remove control of court security from the judiciary and place ultimate responsibility for it with the executive branch. Petition of Mone, 143 N.H. - , 719 A.2d 626 (1998).

It is not the function of the judicial branch of the government to pass upon the wisdom, desirability and expediency of statutes enacted by the legislature, and the supreme court has not been invested with the power to pass upon the wisdom of the legislative branch of the government in determining the qualifications of its members. State v. LaFrance, 124 N.H. 171, 471 A.2d 340 (1983).

Where a petition was brought by the president of the senate requesting that the supreme court either declare that the present senatorial districts were unconstitutional under both the federal and state constitutions and that the 1982 senatorial elections be conducted pursuant to a redistricting plan which had been adopted by both houses of the legislature but vetoed by the governor, or authorize the elections to be conducted pursuant to the existing districts, the supreme court had original jurisdiction to resolve the controversy since it is the role of the court to interpret the constitution and to resolve disputes arising under it, the case did not fall within the bar against confiding political questions to the courts, and the action was one where the parties desired and the public needed a speedy determination of the important issues in controversy. Monier v. Gallen, 122 N.H. 474, 446 A.2d 454 (1982).

If the duty of an executive board is primarily to decide questions of legal rights between parties that are unconnected to any regulatory function, such function belongs to the judiciary; courts of justice even of restricted jurisdiction may not be set up in the executive branch of government. Smith Ins., Inc. v. Grievance Comm., 120 N.H. 856, 424 A.2d 816 (1980).

Courts of New Hampshire have the exclusive authority to determine the reasonableness of compensation for court-appointed counsel; statutes attempting to impose a fee schedule for court-appointed counsel intrude upon this judicial function in violation of the constitutional separation of powers mandate. Smith v. State, 118 N.H. 764, 394 A.2d 834 (1978).

This article did not insulate a decision of the governor and council from judicial review, where the question considered was a judicial question. Attorney General v. Nadeau, 110 N.H. 264, 266 A.2d 118 (1970).

The duty of the judiciary to instruct the jury on the law applicable to a given case does not require that the jury be instructed as to the limitations imposed by RSA 556:13 upon the amount of recovery in wrongful death actions, and hence the provision of that statute forbidding such disclosure to the jury is not violative of the separation of powers provision of this article. Gibbs v. Prior, 107 N.H. 218, 220 A.2d 151 (1966).

An unconstitutional encroachment on the powers of the courts is involved in a proposed statute which would permit the income accumulation of a particular burial lot trust fund to be used, in the discretion of the trustee, under certain conditions, for the general care of the cemetery. Opinion of the Justices, 101 N.H. 531, 133 A.2d 792 (1957).

Questions of law belong to the judiciary for final determination, and legislation cannot bar or restrict this power of the judiciary; the right to apply to the courts for relief from illegality may not be unduly abridged. Cloutier v. State Milk Control Board, 92 N.H. 199, 28 A.2d 554 (1942).

The power to punish for contempt is an essential attribute of a court of general jurisdiction, and an act of the legislature which proposes to limit all punishment for indirect contempt to a specific fine of $ 100 and imprisonment not to exceed fifteen days is an unconstitutional attempt to infringe upon the powers of the court. Opinion of the Justices, 86 N.H. 597, 166 A. 640 (1933).

An act of the legislature awarding a new trial in an action which has been decided in a court of law is an exercise of judicial power contrary to the provisions of this article. Merrill v. Sherburne, 1 N.H. 199 (1818).

Legislation to give towns and cities authority to use unexpended surplus of cemetery trust funds for general cemetery care, under certain conditions, would not be within the power of the legislature to enact, as such would be an invasion of established equitable powers of the courts and hence in violation of this article. 1 N.H.Op.A.G. 185.

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8. Executive powers.

The power to make contracts for the expenditure of State's funds is characteristically an executive function under the plain language of the New Hampshire Constitution. Opinion of Justices, 129 N.H. 714, 532 A.2d 195 (1987).

There was no merit to argument that tape recordings of conversations between informant and defendant suspected of arranging murder of husband violated separation of powers clause; because recordings were consensual, neither warrant nor neutrality and detachment of a judicial officer was required, and recordings were properly authorized by assistant attorney general. State v. Smart, 136 N.H. 639, 622 A.2d 1197 (1993).

Exercise by the governor of the right of his discretion to grant or refuse rendition of one serving a sentence imposed by a New Hampshire court does not violate the separation of powers provision of the state constitution. Koch v. O'Brien, 101 N.H. 11, 131 A.2d 63 (1957).

A system of pauper relief required to be administered by the probate courts, and which imposes upon the judges and registers of such courts by virtue of their official positions the duty of deciding applications, making investigations, issuing rules and regulations and making orders for payment of assistance, etc., is an unconstitutional attempt to impose upon the judicial department executive or administrative powers, duties, and functions belonging to the executive branch of the government. Opinion of the Justices, 85 N.H. 562, 154 A. 217 (1931).

9. Administrative agencies.

The growth of administrative boards with dual governmental functions had long been accepted as not inconsistent with the provisions of this article requiring separation of the legislative, executive, and judicial powers. Petition of Boston & Maine Corp., 109 N.H. 324, 251 A.2d 332 (1969).

Order of public utilities commission authorizing closing of railroad grade crossing was a judicial decision which vested certain rights in railroad of which it could not be subsequently deprived by a legislative act ordering reopening of the crossing as the act violated this article and hence was invalid. Petition of Boston & Maine Corp., 109 N.H. 324, 251 A.2d 332 (1969).

Issues of fact passed upon by an administrative body are not generally reviewable by the courts unless the legislature has provided therefor by expressly giving a right of review by appeal. Cloutier v. State Milk Control Board, 92 N.H. 199, 28 A.2d 554 (1942).

The judicial quality inherent in a finding or verdict by an administrative body does not necessarily signify a justiciable inquiry. Cloutier v. State Milk Control Board, 92 N.H. 199, 28 A.2d 554 (1942).

The vesting of essentially judicial authority in an administrative board is not validated by providing for judicial review of its decisions, and the willingness of litigants to submit their disputes to an administrative tribunal cannot operate to give the decision of such tribunal force as a judgment. Opinion of the Justices, 87 N.H. 492, 179 A. 344 (1935); 110 ALR 819.

10. Immunities.

Under this article, certain actions of the executive branch of government are clearly immune from liability. Opinion of the Justices, 126 N.H. 554, 493 A.2d 1182 (1985).

Whether an action taken by the executive branch of government may be immune from liability, depends on whether the particular governmental conduct which caused the injury is one characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning. Opinion of the Justices, 126 N.H. 554, 493 A.2d 1182 (1985).

11. Compatible offices.

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This article prohibits one department of the state government from interfering with another department or usurping its powers, but it has no reference to the exercise of legislative and judicial powers by an official, and hence does not prohibit one from holding at the same time the offices of supervisor of the check list, city councilman, and member of the legislature. Attorney General v. Meader, 80 N.H. 292, 116 A. 433 (1922).

Cited. In re School-Law Manual, 63 N.H. 574, 4 A. 878 (1885); Sherburne v. Portsmouth, 72 N.H. 539, 58 A. 38 (1904); Opinion of the Justices, 74 N.H. 606, 68 A. 873 (1908); Wyman v. De Gregory, 101 N.H. 171, 137 A.2d 512 (1957) appeal diismissed, 360 U.S. 717, 79 S.Ct. 1454, 3 L.Ed.2d 1540, rehearing denied, 361 U.S. 857, 80 S.Ct. 46, 4 L.Ed.2d 96 (1959); Opinion of the Justices, 102 N.H. 75, 150 A.2d 816 (1959); Robwood Advertising Associates, Inc. v. Nashua, 102 N.H. 215, 153 A.2d 787 (1959); Wyman v. Uphaus, 102 N.H. 461, 159 A.2d 160 (1960); Wyman v. De Gregory, 103 N.H. 214, 169 A.2d 1, aff'd, 368 U.S. 19, 82 S. Ct. 137, 7 L. Ed. 2d 86 (1961); Hampton v. Marvin, 105 N.H. 34, 193 A.2d 441 (1963); Petition of Harvey, 108 N.H. 196, 230 A.2d 757 (1967); Hartford Accident & Indemnity Co. v. Duvall, 113 N.H. 28, 300 A.2d 732 (1973); Opinion of the Justices, 113 N.H. 205, 304 A.2d 881 (1973); Opinion of the Justices, 113 N.H. 287, 306 A.2d 55 (1973); Clark v. New Hampshire Department of Health and Welfare, 114 N.H. 99, 315 A.2d 187 (1974); O'Neil v. Thomson, 114 N.H. 155, 316 A.2d 168 (1974); Opinion of the Justices, 117 N.H. 398, 374 A.2d 638 (1977); Melton v. Personnel Commission, 119 N.H. 272, 401 A.2d 1060 (1979); State v. Fennelly, 123 N.H. 378, 461 A.2d 1090 (1983); Soucy v. State, 127 N.H. 451, 506 A.2d 288 (1985); Opinion of the Justices, 128 N.H. 1, 509 A.2d 734 (1986); Opinion of the Justices, 128 N.H. 17, 509 A.2d 746 (1986); Rousseau v. Eshleman, 129 N.H. 306, 529 A.2d 862 (1987); Opinion of Justices, 129 N.H. 714, 532 A.2d 195 (1987); Newell v. New Hampshire Div. of Welfare, 131 N.H. 88, 550 A.2d 109 (1988); Petition of Strandell, 132 N.H. 110, 562 A.2d 173 (1989); Opinion of Justices (Marital Masters' Contempt Powers), 138 N.H. 425, 640 A.2d 784 (1994); Claremont Sch. Dist. v. Governor, 142 N.H. 462, 703 A.2d 1353 (1997); Opinion of Justices, 142 N.H. - , 712 A.2d 1080 (1998); Claremont Sch. Dist. v. Governor, 143 N.H. - , - A.2d - (1998).

Library References

NH Practice 1 N.H.P. Criminal Practice and Procedure § 2.

2 N.H.P. Criminal Practice and Procedure § 965.

2A N.H.P. Criminal Practice and Procedure § 2065.

Bar Journal Inherent Powers of the Courts to Effect Court Improvements, 14 N.H.B.J. 15 (Summer 1972).

Judicial review and the separation of powers under New Hampshire Constitution of 1776 and 1784, 18 N.H.B.J. 250 (June 1977).

The theory of the New Hampshire Constitution, like virtually every other American constitution, is derived from the concept of checks and balances. A Modern Constitution for New Hampshire, 6 N.H.B.J. 208 (209) (April 1964).

CJS Constitutional Law § 111 et seq.

ALR Inherent power of court to compel appropriation or expenditure of funds for judicial purposes. 59 ALR3d 569.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 ALR3d 474.

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Attachment 2

FILE

Art. 46. Nomination and Appointment of Officers.

All judicial officers, the attorney general, and all officers of the navy, and general and field officers of the militia, shall be nominated and appointed by the governor and council; and every such nomination shall be made at least three days prior to such appointment; and no appointment shall take place, unless a majority of the council agree thereto.

Amendments--1976. Deleted "coroners" following "attorney-general".

--1877. Deleted "solicitors, all sheriffs" and "registers of probate".

Annotations

Analysis

1. Procedure.
2. Approval of council.
3. Judicial officers.

3a. Board of claims.

4. Masters.
5. Magistrates.

1. Procedure.

The method of selection of constitutional officers is provided by the constitution and may not be altered by the legislature. Opinion of the Justices, 115 N.H. 159, 335 A.2d 642 (1975); Opinion of the Justices, 117 N.H. 398, 374 A.2d 638 (1977).

2. Approval of council.

An appointment will be deemed to have received the approval of the council, or of the governor and council, if at a meeting at which a quorum is present, it receives a majority of the votes cast, even though some members present abstain from voting. Opinion of the Justices, 98 N.H. 530, 98 A.2d 635 (1953).

It is inferable from this article that a majority of the council constitutes a quorum. Opinion of the Justices, 98 N.H. 530, 98 A.2d 635 (1953).

3. Judicial officers.

Judicial authority may be exercised only by an officer appointed in accordance with the state constitution and invested with the constitutional incidents of judicial office. Opinion of the Justices, 128 N.H. 17, 509 A.2d 746 (1986).

A judicial officer, within the meaning of this article, must be nominated and appointed by the governor and council as provided in this article, and must be commissioned to hold office during good behavior as provided in article 73 of this part except where the constitution otherwise provides. Opinion of the Justices, 128 N.H. 17, 509 A.2d 746 (1986).

Power of nomination of judges is granted exclusively to governor, and power of appointment is granted exclusively to council. Opinion of the Justices, 117 N.H. 398, 374 A.2d 638 (1977).

3a. Board of claims.

This article does not require that members of administrative board of claims hearing personal injury claims against the state be appointed by the governor and council. Newell v. New Hampshire Div. of Welfare, 131 N.H. 88, 550 A.2d 109 (1988).

4. Masters.

Proposed bill granting marital masters power to impose penalties for civil contempt, including incarceration, would violate New Hampshire Constitution, since effect would be to grant marital masters

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authority of judicial officers, and constitution requires that all judicial officers be nominated and appointed by governor and council. Opinion of Justices (Marital Masters' Contempt Powers), 138 N.H. 425, 640 A.2d 784 (1994).

Marital masters of the superior court are not judicial officers within the meaning of this article. Opinion of the Justices, 128 N.H. 17, 509 A.2d 746 (1986).

5. Magistrates.

Under proposed legislation investing the superior court with the same authority and discretion to appoint marital magistrates that the court exercises in appointing marital masters, such a marital magistrate by definition would not be a judicial officer within the meaning of this article. Opinion of the Justices, 128 N.H. 17, 509 A.2d 746 (1986).

Proposed legislation ostensibly granting marital magistrates the authority of judicial officers, even though the magistrates would not be appointed or tenured as such, would clearly violate this article, and the orders and decrees of such magistrates would have no legal effect, without approval and adoption by a superior court justice. Opinion of the Justices, 128 N.H. 17, 509 A.2d 746 (1986).

Cited. Golding's Petition, 57 N.H. 146 (1876); Opinion of the Justices, 74 N.H. 606, 68 A. 873 (1908); Opinion of the Justices, 102 N.H. 195, 152 A.2d 878 (1959); Attorney General v. Nadeau, 110 N.H. 264, 266 A.2d 118 (1970); Opinion of the Justices, 114 N.H. 88, 315 A.2d 858 (1974); Brouillard v. Governor and Council, 114 N.H. 541, 323 A.2d 901 (1974); Opinion of the Justices, 117 N.H. 390, 373 A.2d 642 (1977); State v. Fennelly, 123 N.H. 378, 461 A.2d 1090 (1983); Witte v. Justices of N.H. Superior Court, 831 F.2d 362 (1st Cir. 1987); Opinion of Justices (Furlough), 135 N.H. 625, 609 A.2d 1204 (1992); Claremont Sch. Dist. v. Governor, 142 N.H. - , 712 A.2d 612 (1998).

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NH Practice 3A N.H.P. Family Law § 25.01.

CJS States §§ 84-87.

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Attachment 3

FILE

Opinion of the Justices

No. 7151
SUPREME COURT OF NEW HAMPSHIRE
115 N.H. 159, 335 A.2d 642
March 31, 1975

HEADNOTE

1. The legislature has the power to name a commissioner of health and welfare or to delegate the appointing power to either the Governor and Council or advisory commission or to both under part II, article 5 of the State constitution , which authorizes the legislature to name or provide by fixed laws for the naming of all civil officers in the State except those whose naming and manner of appointment are provided for by the constitution.

2. The legislature has authority under part II, article 5 of the State constitution to place a time limit on the power of the Governor and Council to appoint a commissioner of health and welfare from a list of names of nominees submitted by the advisory commission on health and welfare and to transfer the power of appointment to the advisory commission upon expiration of that time limit.

3. The Governor and Council's authority under part II, article 47 of the State constitution to sign every nomination and appointment of State officers whose nomination and appointment they are authorized to make under part II , article 46 does not restrict the legislature's authority under part II , article 5.

OPINION

The following resolution was adopted by the house of representatives on March 5, 1975, and filed with the supreme court on March 6, 1975:

*{*160}* "Whereas there is pending in the House of Representatives House Bill No. 36, "An Act relative to the length of time in which the governor and council must approve a commissioner of health and welfare'; and

"Whereas doubt has been expressed as to the constitutionality of certain provisions of said bill;

"Now, therefore, Be It Resolved by the House of Representatives;

"That the Justices of the Supreme Court be respectfully requested to give their opinion upon the following important questions of law:

"1. Would any provision of the Constitution be violated by the provision in said bill establishing a sixty day time limit within which the governor and council must make an appointment to the office of Commissioner of Health and Welfare from the list of nominees furnished by the Advisory Commission?

"2. Would any provision of the Constitution be violated by the provision in said bill empowering the Advisory Commission to make an appointment to the office of Commissioner of Health and Welfare in the event that the governor and council shall fail to make an appointment within such sixty day period?

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"Further resolved that the clerk of the house be instructed to transmit to the clerk of the Supreme Court six copies of this resolution and six copies of House Bill No. 36."

The following answers were returned:

To the House of Representatives:

The undersigned justices of the supreme court submit the following reply to the inquiries contained in your resolution adopted March 5, 1975, and filed with this court March 6, 1975.

Your questions relate to House bill 36 which authorizes the Governor and Council to appoint a commissioner of health and welfare from a list of nominees submitted by the advisory commission on health and welfare within a period of sixty days after such nominees are submitted. Upon a failure of the Governor and Council to make an appointment within the sixty days, the advisory commission is then authorized to appoint a commissioner of health and welfare within the next sixty days.

Question No. 1 asks whether any provision of the constitution would be violated by limiting the power of the Governor and Council to appoint to sixty days after the submission of nominees.

Question No. 2 asks whether any provisions of the constitution *{*161}* would be violated by transferring the power of appointment to the advisory commission for sixty days upon failure of the Governor and Council to appoint within the first sixty-day period.

The constitution provides for certain constitutional State officers and directs the manner in which they are to be appointed or elected. Thus the secretary of state and the State treasurer are chosen by joint ballot of the senate and house of representatives. N.H. Const.pt. II, art. 67. Judges, the attorney general, coroners and military officers are appointed by the Governor and Council. N.H. Const.pt. II, art. 46. The method of selection of constitutional officers is provided by the constitution and may not be altered by the legislature.

All other officers occupy positions established by the legislature and the method of their election or appointment is determined by the legislature. The constitution authorizes the legislature "to name and settle biennially, or provide by fixed laws for the naming and settling, all civil officers within this state." N.H. Const.pt. II, art. 5. Since the legislature has the power to name a commissioner of health and welfare, it has the power to delegate the appointing power to either the Governor and Council or the advisory commission or both. **Opinion of the Justices,** 102 N.H. 195, 197, 152 A.2d 878, 880 (1959).

In previous answers to questions arising from the impasse between the Governor and Council and the advisory commission in the appointment of a commissioner of health and welfare under the present law (RSA 126-A:4 (Supp. 1973)), we have stated that the legislature may properly prescribe how and by whom the appointment shall be made. **Opinion of the Justices ,** 113 N.H. 675, 312 A.2d 702 (1973); N.H. Const.pt. II, art. 41 ; **Opinion of the Justices,** 114 N.H. 165, 316 A.2d 174 (1974); **Brouillard v. Governor,** 114 N.H. 541, 323 A.2d 901 (1974).

The legislative power to determine the limitations upon the delegation of the power of appointment is not restricted to the present statutory provisions that the Governor and Council appoint from the nominees of the advisory commission. RSA 126-A:4 (Supp. 1973). House bill 36, placing a time limit on the power of the Governor and Council to appoint a commissioner and transferring the power of appointment to the advisory commission upon expiration of that time limit, is within the legislative authority. **See Opinion of the Justices,** 90 N.H. 568 , 8 A.2d

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597 (1939).

Reliance is placed on part II , article 47 of the constitution for holding the present proposed legislation unconstitutional. Article *{*162}* 47 reads as follows: "The governor and council shall have a negative on each other, both in the nominations and appointments. **Every nomination and appointment shall be signed by the governor and council,** and every negative shall be also signed by the governor or council **who made the same.** " (Emphasis added.)

Article 47 does not restrict the authority of the legislature under part II , article 5 of the constitution but prescribes the procedure for appointment of officers authorized to be appointed by Governor and Council under part II , article 46 of the constitution.

We conclude that the proposed legislation is consistent with article 5 , part II of the constitution and is not in violation of other provisions of the constitution. Accordingly, the answer to both questions is "No".

Frank R. Kenison

Laurence I. Duncan

Edward J. Lampron

William A. Grimes

Robert F. Griffith

Governor Meldrim Thomson, Jr., by his legal counsel, **James J. Barry, Jr.,** filed a memorandum of law for affirmative answers to questions 1 and 2.

Miriam O. Page, by her attorneys, **McLane, Graf, Greene, Raulerson & Middleton** and **Charles A. DeGrandpre** and **Richard S. Snierson,** filed a memorandum of law in favor of negative answers to questions 1 and 2.

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Attachment 4

FILE

Opinion of the Justices

No. 7778
SUPREME COURT OF NEW HAMPSHIRE
117 N.H. 398, 374 A.2d 638
May 24, 1977

HEADNOTE

1. Constitutional Law--Executive Power--Encroachments

Proposed legislation which provided for establishment of a judicial selection commission consisting of chief justice of supreme court, five members of New Hampshire Bar Association, and five members of public not members of bar, and which required Governor to inform chairman of commission when a vacancy occurred, and for commission to screen all candidates and select at least three candidates for consideration by Governor and Council, and further provided that Governor and Council might nominate and appoint one of commission's selections or might nominate and appoint some other person, but that if one of commission's selections was accepted, appointment should be made within sixty days, would be an unconstitutional encroachment upon powers of Governor and Council by altering or changing selection process for judges. N.H. Const. pt. I, art. 37 ; pt. II, art. 46.

2. Constitutional Law--Executive Power--Encroachments

Proposed legislation which provided for establishment of a judicial selection commission consisting of chief justice of the supreme court, five members of New Hampshire Bar Association, and five members of public not members of bar, and which directed commission's chairman to convene commission not only when a vacancy occurred but also when a vacancy might be anticipated or at any time, and that commission screen all candidates and select at least three candidates for consideration by Governor and Council, and further provided that Governor and Council might nominate and appoint one of commission's selections, or might nominate and appoint some other person, would be an unconstitutional encroachment upon the powers of Governor and Council by altering or changing selection process for judges. N.H. Const. pt. I, art. 37 ; pt. II, art. 46.

3. Judges--Appointment and Removal

Power of nomination of judges is granted exclusively to governor, and power of appointment is granted exclusively to council. N.H. Const. pt. II, art. 46.

4. Constitutional Law--Executive Power--Encroachments

Method of selection of constitutional officers is provided by constitution and may not be altered by legislature. N.H. Const.pt. I, art. 37 ; pt. II, art. 46.

OPINION

The following resolution was adopted by the senate on February 10, 1977, and filed with the supreme court on April 22, 1977:

*{*399}* "WHEREAS, Senate Bill 42, An Act establishing a judicial selection commission to recommend at least 3 candidates for all judicial appointments is pending before the New Hampshire Senate; and

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"WHEREAS, said bill provides for the establishment of a commission consisting of the chief justice of the Supreme Court, 5 members of the New Hampshire Bar Association appointed by its Board of Governors and 5 members of the general public who are not members of the Bar appointed by the Governor and Council; and

"WHEREAS, said bill further provides that the Governor shall inform the chairman of the commission when a vacancy occurs in a judicial position and that the commission shall screen all candidates for a judicial office and select at least 3 candidates for consideration by the Governor and Council; and

"WHEREAS, said bill further provides that the Governor and Council may nominate and appoint one of the commission's selections to the judicial position or may nominate and appoint some other person to said position pursuant to Part II, Article 46 of the Constitution of New Hampshire, but if one of the commission's selections are [sic] accepted, the appointment shall be made within 60 days; and

"WHEREAS, an amendment to said Senate Bill 42 has been proposed which would remove the requirement that the Governor inform the chairman of the commission when a vacancy occurs and the requirement that the appointment of one of the commission's selections, if accepted, be made within 60 days; and

"WHEREAS, the Constitution of New Hampshire, Part II, Article 46 provides that all judicial officers shall be nominated and appointed by the Governor and Council; and

"WHEREAS, the constitutionality of Senate Bill 42 has been questioned, now therefore be it

"RESOLVED, that the Justices of the Supreme Court be respectfully requested to give their opinion upon the following questions of the law:

*{*400}* "1. Do the provisions of Senate Bill 42 conflict with the provisions of Part II, Article 46 of the Constitution of New Hampshire?

"2. Would the provisions of said bill, as amended by the proposed amendments, conflict with the provisions of Part II, Article 46 of the Constitution of New Hampshire?

"3. Do the provisions of said bill, as presently drafted or with the proposed amendments, conflict with any other provisions of the Constitution of New Hampshire?

"BE IT FURTHER RESOLVED, that the President of the Senate transmit 7 copies each of this resolution, Senate Bill 42, and the proposed amendment to Senate Bill 42 to the Clerk of the Supreme Court for consideration by said court."

The following answers were returned:

To The Honorable Senate:

The undersigned, justices of the supreme court, return the following reply to the questions presented in your resolution adopted February 10, 1977, but not filed in this court until April 22, 1977.

Senate bill 42 would establish an eleven-member judicial selection committee consisting of five appointees from the New Hampshire Bar Association, one person from each of the five councilor districts appointed by Governor and Council, and the chief justice of the state supreme

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court.

Whenever a vacancy occurs in a judicial position, the Governor is required to inform the commission, which then convenes, accepts suggestions for candidates, carefully screens all candidates and, within thirty days after the vacancy occurs, selects at least three candidates for consideration by the Governor and Council. The names of candidates (but nothing else) are to be kept in strict confidentiality by the commission, but presumably the Governor or any Councilor could disclose the names, and the findings and recommendations without names could apparently be disclosed by anyone.

The Governor is free at any time to nominate whomever he chooses but would be required to do so within sixty days of the submission if the nominee is one of the persons recommended by the commission.

*{*401}* An amendment to this bill would remove the two requirements to be imposed on the Governor, namely, notice of a vacancy and appointment of a recommended person within sixty days. The proposed amendment also would direct the chairman to convene the commission not only when a vacancy occurs but also when a vacancy may be anticipated or at any other time.

The issue before this court is whether Senate bill 42 as it is or may be amended conflicts with the Constitution of the State of New Hampshire and particularly part II , article 46 and part I , article 37.

[1, 2] We hold that the judicial selection commission proposed to be established by the legislature is an unconstitutional encroachment upon the powers of the Governor and the Council.

Our state constitution provides that state government shall consist of three separate branches:

In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity. N.H. Const. pt. I, art. 37.

[3] When it comes to judges, the power of nomination is granted exclusively to the Governor, and the power of appointment is granted exclusively to the Council:

All judicial officers... shall be nominated and appointed by the governor and council... N.H. Const. pt. II, art. 46.

Two years ago this court had before it a bill relating to appointments to the statutorily created post of health and welfare commissioner. In upholding the legislature's power under pt. II, art. 5 to "fix laws" for the naming of nonconstitutional officers this court distinguished such a post by saying:

[4] "The constitution provides for certain constitutional State officers and directs the manner in which they are to be appointed.... The method of selection of constitutional officers is *{*402}* provided by the constitution and **may not be altered by the legislature.**" **Opinion of the Justices,** 115 N.H. 159, 161, 335 A.2d 642, 643 (1975) (emphasis added).

This decision merely reaffirmed this court's earlier decision in **Brouillard v. Governor and Council,** 114 N.H. 541, 547, 323 A.2d 901, 905 (1974), that said judicial officers "must be

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appointed by the Governor and Council and **no change** can be made in that method of selection" (emphasis added).

In striking down an executive branch attempt to regulate conflicts of interests among executive branch appointees this court last year said that "(T)he separation of powers requirement of the constitution (N.H. Const. pt. I, art. 37) is violated by an encroachment by one branch of government upon a constitutional function of another... However desirable comprehensive legislation... may be, [such] is the prerogative and responsibility of the legislature and not of the executive." **Opinion of the Justices,** 116 N.H. 406, 413, 360 A.2d 116, 122 (1976). Should the Governor, as he has done, wish to set up a screening or selection mechanism on his own he is naturally free to do so.

By executive order the Governor of Massachusetts established a Judicial Nominating Commission in 1975. In upholding his purely voluntary action the Supreme Judicial Court of Massachusetts held "the Governor has the constitutional right to establish" such a commission because, like the legislature, "the Governor has broad discretion to select the means he will use in executing a constitutional duty." **Opinion of the Justices,** 334 N.E.2d 604, 609 (Mass. 1975). That court did not indicate such a board could have been imposed on the Governor by the legislature.

In the 1974 Constitutional Convention, Resolution 102 was offered along lines similar to the bill before us. It was not adopted by the convention and doubt has been expressed that a statute, rather than a constitutional amendment, would be constitutional. **See Report of Governor's Commission on Court System Improvement,** 16 N.H.B.J. 1, 69 (1974). Those states with such agencies have done so by constitutional amendment. **See , e.g. ,** Cal. Const. art. VI, § § 16 ; Mo. Const. art. 5 ; Alas. Const. art. IV, § § 5-9 ; Iowa Const. art. V., § § 15-18.

*{*403}* Regardless of the merits of the bill, it nevertheless encroaches on a constitutional power of the Governor by "altering" or "changing " the selection process for judges.

The first two questions are answered in the affirmative and, because of pt. I, art. 37 , so is the third.

William A. Grimes

Maurice P. Bois

Charles G. Douglas, III

To The Honorable Senate:

The undersigned justices of the supreme court return the following reply to the questions presented in your resolution adopted February 10, 1977, and filed in this court on April 22, 1977.

Senate bill 42, in both its original and amended form, proposes the creation of a judicial selection commission which would accept from various sources, including the Governor, the names of candidates recommended to fill vacant judicial offices. The commission would screen all candidates and recommend at least three individuals for each vacancy. The findings concerning each candidate would be submitted to the Governor and Council. All commission proceedings and recommendations would be kept strictly confidential. The Governor and Council would thereafter nominate and appoint to each vacant position either someone whom the commission recommended or anyone else, whether or not such person was considered by the commission.

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The bill in its original form contains three additional requirements that are deleted under the proposed amendment. First , the Governor shall inform the commission when a vacancy occurs, and the chairman shall then convene the commission. Second, the commission shall make its recommendation within thirty days after a vacancy has occurred. Third, if the Governor and Council accept one of the commission's recommended candidates, the appointment shall be made within sixty days of the receipt of the recommendations.

Questions No. 1 and 2 ask respectively whether the bill in its original and amended forms would violate part II , article 46 of the New Hampshire Constitution. This provision states that all judicial officers "shall be nominated and appointed by the Governor and *{*404}* Council; and every such nomination shall be made at least three days prior to such appointment; and no appointment shall take place, unless a majority of the council agree thereto."

In support of its conclusion that the bill is unconstitutional, the majority refers to several states that have amended their constitutions in order to effectuate changes in their judicial selection processes. For a more comprehensive list of such states, see Note, **Judicial Selection in the States: A Critical Study with Proposals for Reform,** 4 Hofstra L. Rev. 267, Table I at 284 (1976). What happened in these states is not relevant for two reasons. First, these states have adopted the so-called merit selection plan, **see id.** at 280-84; Note, **Judicial Selection and Tenure--The Merit Plan in Ohio,** 42 U. Cinn. L. Rev. 255, 262-63 (1973), which differs from the proposals before us in several significant respects. Although both the merit selection plan and the two versions of Senate bill 42 provide for a judicial selection commission which recommends candidates to the Governor, under the merit selection plan the Governor must appoint a candidate from the commission's list. Runkle, **The Judicial Nominating Commission,** 54 Jud. 114 (1970); Note, **Analysis of Methods of Judicial Selection and Tenure,** 6 U. Suffolk L. Rev. 955, 963 (1972). Furthermore, under the plan adopted in many states, if the Governor fails to appoint within a certain number of days, the Chief Justice of the Supreme Court becomes vested with the appointment authority. G. Winters, Selected Readings: Judicial Selection and Tenure 182, 188-89 (1967). In contrast to the merit selection plan, both proposals before us allow the Governor and Council to disregard entirely the commission's recommendations and nominate and appoint anyone they desire. Additionally, neither version provides for any transfer of authority from the Governor and Council to any other state official or group under any circumstances.

Second, the states that have amended their constitutions to implement the merit selection plan had previously chosen judges through constitutionally mandated popular elections--Note, **supra,** 4 Hofstra L. Rev. at 280--84--a selection method that is not only very different from our own but also fundamentally at odds with the merit selection system. Adoption of the merit selection plan in these "election states" could be achieved, of course, only through *{*405}* a constitutional amendment. **See id.** at 316; Note, **Judicial Selection in North Dakota--Is Constitutional Revision Necessary** ? 48 N.D.L. Rev. 326, 328-29 (1971-72).

If any state's situation with respect to judicial selection reform is similar to our own it is that of Massachusetts. The Constitution of Massachusetts, like the New Hampshire Constitution, provides that "[a]ll judicial officers... shall be nominated and appointed by the governor...." Mass. Const. pt. II, ch. 2, § 1 , art. 9. Recently, the Supreme Judicial Court of Massachusetts held that the creation of a judicial nomination commission to advise the Governor on judicial appointments did not violate the constitutional provision quoted above. **Opinion of the Justices to the Council,** 334 N.E.2d 604 (Mass. 1975).

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Contrary to the impression that may have been created by the majority opinion, the Massachusetts court did not sustain the plan on the ground it was voluntarily undertaken by the Governor, as opposed to being undertaken by the legislature. The court did not even mention, let alone rely upon, the fact the commission was created by executive order rather than by statute. The court's statement, quoted by the majority, concerning the Governor's "broad discretion" was made in response to a question whether the Governor had the power to create such a commission. It was only after answering that question in the affirmative that the court went on to discuss the issue relevant to our inquiry today. The court stated that the Governor could delegate to others the power to investigate the qualifications of judicial candidates "as long as he does not surrender to them his responsibility to select a candidate and to make the nomination and appointment." **Opinion of the Justices to the Council,** 334 N.E.2d at 609. The court reasoned that, because the commission's recommendations were not binding on the Governor, his right and duty to select any qualified person he wishes were not "delegated, surrendered, abandoned or unduly restricted." **Id.** at 610. Thus, it was the nonbinding aspect of the commission's recommendations--not the fact that the Governor voluntarily instituted the program--that saved the constitutionality of the scheme.

Turning now to our own cases, in **Opinion of the Justices,** 115 N.H. 159, 335 A.2d 642 (1975), we sustained the constitutionality *{*406}* of a legislative proposal that (1) required the Governor and Council to appoint a health and welfare commissioner from a list of nominees submitted by an advisory commission, (2) fixed a time limit for such appointment, and (3) transferred the power of appointment to the advisory commission upon expiration of that deadline. In the context of that proposal, which bears no resemblance to the present ones, we stated parenthetically that "[t]he method of selection of constitutional officers is provided by the constitution and may not be altered by the legislature." **Id.** at 161, 335 A.2d at 643; **see Brouillard v. Governor and Council,** 114 N.H. 541, 547 , 323 A.2d 901, 905 (1974). We affirm this principle today and inquire only whether Senate bill 42 in either form alters the method of judicial selection in a manner inconsistent with the constitution. **We** conclude it does not.

The essence of the power to nominate and appoint is the unfettered power to choose any person for judicial office that the Governor and Council wish. Under both versions of Senate bill 42, this authority remains intact: The fact that the Governor and Council would be free to disregard the commission's recommendations and appoint someone who was rejected or not even considered by the commission means that they will continue to exercise complete control over the nomination and appointment process. The proposed commission would have no veto power over the final selection. If Senate bill 42 attempted to give the legislature veto power over the Governor's choice, a constitutional amendment would be necessary. Me. Const. art. 5 , pt. 1, § 8. Or if the bill proposed a transfer of appointment power to another officer, or department of government, the measure would be unconstitutional. **Curtis v. Cornish ,** 109 Me. 384, 84 A. 799 (1912). Also, if the bill called for binding recommendations, we would not sustain its constitutionality. But the proposed legislation would cause no such fundamental changes.

The amended bill does nothing more than create a citizens' committee to do what any citizen may do--namely, recommend to the Governor and Council persons deemed to be qualified for judicial office. The only purpose of creating such a system is to aid the Governor and the Council in fulfilling their constitutional duties. At present, the New Hampshire Bar Association screens candidates *{*407}* for appointments to state judicial positions. 3 N.H.L. Weekly, 103 & 279 (1976-77). The creation of a judicial selection commission would simply formalize the advisory efforts presently and previously undertaken by the bar association.

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The majority more than casually mentions that the bill may not guarantee complete confidentiality. One of the memos we received suggests that the bill's confidentiality provision might conflict with RSA ch. 91-A (Supp. 1975). Whether the bill provides too much or too little confidentiality is, of course, irrelevant to the constitutionality of the scheme.

The majority's reference to the **Report of Governor's Commission on Court System Improvement,** 16 N.H.B.J. 1 (1974), is both inaccurate and misleading. Even a casual reading of the **Report** reveals that the "doubts" expressed were with respect to the constitutionality of an adoption by statute of the merit selection plan as discussed in paragraph 5 of this opinion. In reference to that plan the **Report** states: "The imposition by statute of any limitation upon [the Governor and Council's right to nominate and appoint], such as by requiring that the appointment be made from two or more nominees by a statutory panel or committee, would have dubious validity." **Id.** at 69.

More importantly, the **Report** goes on to recommend the "statutory enactment of a merit selection plan which would contain all the elements of the statutory selection plans used elsewhere except the requirement that the Governor **must** appoint from the list of nominees recommended by the selection panel or committee." **Id.** (Emphasis in original.) It is obvious that the Governor's Commission regarded the statutory creation of a judicial selection commission as constitutional as long as the commission's recommendations did not bind the Governor and Council. Thus, the **Report's** conclusions, based upon careful and thorough research and study, are directly at odds with the majority opinion.

We are unable to find in the amended bill any substantive restriction or encroachment upon the power of the Governor and Council, and the majority has articulated none. The inescapable conclusion is that the bill in its amended form is constitutional. The answer to Question No. 2 is "No."

*{*408}* The additional requirements contained in the original version of Senate bill 42 do not violate part 2, article 46 and so the answer to Question No. 1 is also "No." The Governor's task of informing the commission that a vacancy exists does not diminish or interfere with his power to nominate and appoint the candidate of his choice. The requirement is merely a means of triggering the operation of the commission. That the commission must convene and make its recommendations within thirty days, is, of course, a command addressed to the commission and does not involve the Governor in any way. The bill contains no implicit requirement that the Governor postpone his decision for thirty days to give the commission an opportunity to make its decisions. Finally, the sixty-day period (within which the appointment must be made if the Governor and Council choose one of the commission's recommended candidates) is valid, subject only to the constitutional mandate that three days lapse between nomination and appointment. N.H. Const. pt. II, art. 46.

With respect to the separation of powers issue the majority relies upon our statement in **Opinion of the Justices,** 116 N.H. 406, 413, 360 A.2d 116, 122 (1976), to the effect that the constitution is violated when one branch of government encroaches upon a constitutional function of another. Without identifying any impermissible encroachment, the majority declares the proposed legislation to be contrary to the separation of powers provision. N.H. Const. pt. I, art. 37. It is difficult for us to comprehend how the nonbinding suggestions of an eleven-member commission, none of whom are legislators or appointed by legislators, five of whom are appointed by the Governor and only one of whom comes from the judiciary can possibly amount to an unconstitutional encroachment upon the authority of the Governor and Council. The answer

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to Question No. 3 is "No."

Frank R. Kenison

Edward J. Lampron

T. William Bigelow, legal counsel, filed memorandum in behalf of Governor Meldrim Thomson, Jr.

Charles H. Toll, Jr., and **William B. Roberts** filed memorandum.

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Attachment 5 FILE

§ 4:44. Hearing Prior to Confirmation of Judicial Appointment.

Prior to making any judicial appointment with the governor under the provisions of the constitution, the executive council shall hold a public hearing to allow any member of the public who so desires to offer testimony on the prospective judicial appointee. Notice of the hearing shall be provided at least 7 days prior to the date of the hearing in at least 2 newspapers of statewide circulation. Prior to making the judicial appointment, the executive council shall consider the testimony made at the public hearing.

History

Source. 1997, 159:2, eff. Aug. 8, 1997.

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Attachment 6

Art. 40. Chief Justice to Preside on Impeachment of Governor.

Whenever the governor shall be impeached, the chief justice of the supreme judicial court, shall, during the trial, preside in the senate, but have no vote therein.

Annotations

1. Nature of proceeding.
That the chief justice of the supreme court presides when a governor is impeached does not change the proceeding from a legislative to a judicial one. In re Mussman, 112 N.H. 99, 289 A.2d 403 (1972).

Cited. Opinion of the Justices, 66 N.H. 629, 33 A. 1076 (1891); Opinion of the Justices, 110 N.H. 359, 266 A.2d 823 (1970); Opinion of the Justices, 118 N.H. 582, 392 A.2d 125 (1978).

Library References

CJS States § 101.

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Attachment 2

Art. 73-a. Supreme Court, Administration.

The chief justice of the supreme court shall be the administrative head of all the courts. He shall, with the concurrence of a majority of the supreme court justices, make rules governing the administration of all courts in the state and the practice and procedure to be followed in all such courts. The rules so promulgated shall have the force and effect of law.

Amendments--1978. Added this article.

Annotations

Analysis

1. Construction.
2. Disciplinary proceedings.

1. Construction.

This article makes clear that the judiciary has the authority to promulgate and administer rules concerning practice and procedure in the courtroom. State v. LaFrance, 124 N.H. 171, 471 A.2d 340 (1983).

2. Disciplinary proceedings.

Mandatory feature of bill, which requires that supreme court suspend the salary and benefits of every judge suspended for misconduct, intrudes unduly upon court's superintendence power under part II, article 73-a, which includes the authority to exercise discretion in determining whether to suspend a judge without pay; as such, it impermissibly encroaches upon an exclusive judicial function in violation of the separation of powers mandate of part I, article 37. Opinion of Justices (Judicial Salary Suspension), 140 N.H. 297, 666 A.2d 523 (1995).

Since New Hampshire Constitution vests discipline of legal profession in supreme court and legislative branch regulates psychologists, and there are marked differences between the substantive practice of each profession and the manner in which they deal with the public, insofar as majority of psychologist's time is spent with individuals patient in a private office, and the only records created are the notes of the psychologist, a less stringent burden of proof in proceedings involving psychologist certificates is rational when assessing the difficulty of proof in disciplinary proceedings. Petition of Grimm, 138 N.H. 42, 635 A.2d 456 (1993).

Cited. State v. Wentworth, 118 N.H. 832, 395 A.2d 858 (1978); Nelson v. Public Service Company of New Hampshire, 119 N.H. 327, 402 A.2d 623 (1979); State v. Hastings, 120 N.H. 454, 417 A.2d 7 (1980); State v. Wheeler, 120 N.H. 496, 416 A.2d 1384 (1980); State v. Elbert, 121 N.H. 43, 424 A.2d 1147 (1981); State v. Preston, 124 N.H. 118, 467 A.2d 243 (1983); State v. Brown, 125 N.H. 346, 480 A.2d 901 (1984); State v. Cere, 125 N.H. 421, 480 A.2d 195 (1984); State v. Meister, 125 N.H. 435, 480 A.2d 200 (1984); State v. Cooper, 127 N.H. 119, 498 A.2d 1209 (1985); Rousseau v. Eshleman, 128 N.H. 564, 519 A.2d 243 (1986); State v. Hughes, 135 N.H. 413, 605 A.2d 1062 (1992); In re Tocci, 137 N.H. 131, 624 A.2d 548 (1993); In re Proposed N.H. Rules of Civil Procedure, 139 N.H. 512, 659 A.2d 420 (1995).

Library References

NH Practice 1 N.H.P. Criminal Practice and Procedure § 568.

2 N.H.P. Criminal Practice and Procedure §§ 734, 905.

CJS Courts § 170 et seq.

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Attachment 8

§ 490:1. Justices.

The supreme court shall consist of a chief justice and 4 associate justices, appointed and commissioned as prescribed by the constitution.

History

Source. RS 171:1. CS 181:1. 1855, 1659:1. 1859, 2211:4. 1874, 97:1. 1876, 25:1. GS 189:1. 1877, 25:1. GL 208:1. PS 204:1. 1901, 78:1. PL 315:1. RL 369:1. 1945, 174:3. RSA 490:1. 1978, 33:1, eff. June 23, 1978.

Amendments--1978. Deleted "and such justices as may be retired from regular active service because of permanent disability" following "constitution".

CROSS REFERENCES

Appointment and term of justices, see New Hampshire Constitution, Part 2, Article 73.

Annotations

Cited. Claremont Sch. Dist. v. Governor, 142 N.H. - , 712 A.2d 612 (1998).

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Attachment 9

§ 491:1. Justices.

For fiscal year 1992 and succeeding years, the superior court shall consist of a chief justice and 28 associate justices. Said justices shall be appointed and commissioned as prescribed by the constitution and shall exercise the powers of the court unless otherwise provided.

History

Source. 1901, 78:1. PL 316:1. 1927, 51:1. RL 370:1. 1945, 174:1. 1951, 221:1. 1953, 168:1. RSA 491:1. 1963, 260:1. 1969, 453:1. 1971, 456:7. 1977, 600:45. 1983, 381:1, 10; 383:20. 1991, 202:1, eff. July 1, 1991.

Amendments--1991. Deleted the former first sentence and substituted "1992" for "1986" and "28" for "24" and deleted "if affirmed by specific appropriation after January 1, 1985" following "justices" in the new first sentence.

--1983. Chapter 381:1 rewrote the first sentence.

Chapter 381:10 rewrote the first sentence.

Chapter 383 rewrote the first sentence and deleted the third sentence.

--1977. Rewrote the former first sentence as the first and second sentences.

--1971. Rewrote the first sentence.

--1969. Amended section generally.

--1963. Substituted "seven" for "six" preceding "associate justices".

Revision note. At the beginning of the section, deleted the former first sentence, which provided that "for fiscal year 1978 the superior court shall consist of a chief justice and 13 associate justices", and deleted "for fiscal year 1979 and succeeding years" at the beginning of the second sentence as no longer necessary.

CROSS REFERENCES

Appointment and term of justices, see New Hampshire Constitution, Part 2, Article 73.

Designation of retired justices as judicial referees, see RSA 493-A.

Retirement of justices for disability, see RSA 491:2.

Library References

CJS Judges §§ 8, 12.

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Attachment 10

Art. 73. Tenure of Office To Be Expressed in Commissions; Judges to Hold Office During Good Behavior, Etc.; Removal.

The tenure that all commissioned officers shall have by law in their offices shall be expressed in their respective commissions, and all judicial officers duly appointed, commissioned and sworn, shall hold their offices during good behavior except those for whom a different provision is made in this constitution. The governor with consent of the council may remove any commissioned officer for reasonable cause upon the address of both houses of the legislature, provided nevertheless that the cause for removal shall be stated fully and substantially in the address and shall not be a cause which is a sufficient ground for impeachment, and provided further that no officer shall be so removed unless he shall have had an opportunity to be heard in his defense by a joint committee of both houses of the legislature.

Amendments--1966. Amended article generally.

--1793. Substituted "governor" for "president" preceding "with consent".

Annotations

Analysis

1. Tenure.
2. Removal.
3. Disciplinary action.

1. Tenure.

Where plaintiff's commission of office failed to accurately express the tenure of office provided by statute, plaintiff was entitled to protection commensurate with the extent of his reliance on the express terms of his commission. Blake v. State, 115 N.H. 431, 343 A.2d 223 (1975).

2. Removal.

The power to remove a state officer for cause involves an executive and legislative proceeding. In re Mussman, 112 N.H. 99, 289 A.2d 403 (1972).

3. Disciplinary action.

Suspending pay of a judge does not violate those provisions of state constitution providing for tenure and permanent salaries for judges. Opinion of Justices (Judicial Salary Suspension), 140 N.H. 297, 666 A.2d 523 (1995).

The powers of impeachment and removal for reasonable cause are not the exclusive remedies for judicial abuse, and the supreme court, under its general superintendence power over the courts of the state, has authority to take disciplinary action short of removal. In re Mussman, 112 N.H. 99, 289 A.2d 403 (1972).

Cited. Piper v. Supreme Court, 723 F.2d 110 (1st Cir. 1983), aff'd, 470 U.S. 274, 105 S. Ct. 1272, 84 L. Ed. 2d 205 (1985); Opinion of the Justices, 128 N.H. 17, 509 A.2d 746 (1986); Bastian v. Kennedy, 829 F.2d 1 (1st Cir. 1987); Witte v. Justices of N.H. Superior Court, 831 F.2d 362 (1st Cir. 1987); Opinion of Justices (Furlough), 135 N.H. 625, 609 A.2d 1204 (1992); Claremont Sch. Dist. v. Governor, 142 N.H. -, 712 A.2d 612 (1998).

Library References

Bar Journal The "people's right to reconstruct" the judiciary is provided by this article and article 4 of

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this part of the New Hampshire Constitution. The Independence of the Judiciary, 1 N.H.B.J. 28 (July 1959).

CJS Judges § 21 et seq.

States §§ 92, 98-101.

ALR Power of court to remove or suspend judge. 53 ALR3d 882.

Sexual misconduct as ground for disciplining attorney or judge. 43 ALR4th 1062.

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JUDICIAL REFORM STUDY

Listed below are some ideas which I feel might help in the judicial reform study of the committee:

I. The selection process for judges.

The most vital element in having an excellent judicial system is the selection of outstanding and excellent lawyers in the first place.

A more formal process should be initiated for the selection of judges, other than simply the recommendation of the governor and approval by the Executive Council.

A place to start would be to have each candidate submit a written application for a judgeship, outlining his or her qualifications and experience. I am attaching to this report an application that could be used as a model. This would be a public document, enabling those interested to judge the qualifications of the applicants. It would assure that all applicants are qualified by experience before the political aspect came into play.

The governor and executive council would then appoint and approve as usual.

An intermediary stage could also be initiated. In the past, the Bar Association used to submit a list to the governor and Council of lawyers that it felt were qualified to become judges. Rather than just the Bar Association, there might be a committee to present such a list. The committee would consist of representatives from the Bar Association, former judges, legislative members, etc. Whether or not the governor and council would be required to choose from the list is a matter for discussion.

II. Administrative Rules

Administrative rules of the Court are clearly left to the Court by Article 73a of the Constitution, which is an affirmation of the separation of powers in the Constitution. To change this would mean a Constitutional Amendment to amend the amendment of Article 73a. It would be a cumbersome process, to say the least.

A better way is also a simpler way. The Court should submit any change in its rules to a committee of the legislature, such as our own Committee on Administrative Rules. The Committee would review the rules to see if they contradicted any statutory law (Mr. Mirsky's complaint) and comment. This Review and Comment period would have to be completed within a certain time and then the new rules would be returned to the Court for action. It is clear that the judges would take seriously any adverse comment from a legislative Committee on Judiciary Rules and work to satisfy the Committee's objections (hopefully avoiding another bailiff-sheriff showdown).

This procedure would maintain the independence of the judiciary, while allowing communication with the legislature, the goal stated in the recent Bill of Address inquiry.

III. Seven Year Terms for Judges

There are 51 judges in our Supreme, Superior, District, and Probate Courts. This means that 7+ judges would be reviewed each year. This also means that in any two years a powerful Executive could get rid of 14 judges or, in four years, wipe out half of the appointed judges in the state. Clearly this is indefensible.

We have a system now where the Administrative Judges of the Courts are reviewing the judges. These reviews have not been in place for very long, not long enough to be evaluated. They should be given time to work. Certainly it must be keeping the judges on their toes, knowing that they are being reviewed each year. Reviews should be held at set times and all reviews should be held confidential, as I imagine they are now. However, all reviews should be in writing.

It has been suggested that more accurate evaluation of work loads, time spent on cases, etc. might result from a single judge being assigned to each single case and the name of the judge put on the docket. With a single judge taking the ultimate responsibility of each case, there would be accountability for moving cases along and speeding up any backlogs. It would be a matter of pride for a judge to have fewer longstanding open cases than his colleagues. This single judge for each single case is one of the outstanding achievements of the new family court and it is working well. By having more than one judge for any case, accountability is being sacrificed for flexibility.

The number of case loads and backlogs for each court would seem to be a good point of evaluation as to how the system is working. Perhaps each court could publish a list of backlogged cases semi-annually, if it is not being done now.

IV. The Judicial Conduct Committee

The Judicial Conduct Committee has come under fire for its zealous guardianship of confidentiality. However, in the past year, the Committee has made positive strides toward opening up the process and this should be given time to work. The Judicial Conduct Committee, it seems to me, has tried very hard to get qualified members of the public to serve, and is working to improve itself after the shock of the Fairbanks case. By the very nature of its ability to dismiss judges, it will always be a hard decision to bring a case before the committee, and nothing is going to change that.

However, at the Bill of Address inquiry, it was brought out that final reports are not only not made public, but that they have not been in writing. This should be corrected at once.

I believe that the Judge Fairbanks case was a wake-up call to the Judicial Conduct Committee and that the Committee has a renewed sense of responsibility about misconduct. I know that other states use the same system we do (how may can be found by our legislative assistant) and such a system is working in those other states. With its new openness and the addition of lay members, I believe that the present Committee should be continued.

V. The Docketing System

Comments were made by Atty. Caroline Douglas and Mr. Kamisinski about the docketing system being hard to follow. This may or may not be a problem, and probably what is needed most to improve the system is money provided for the purpose by the legislature.

VI. Outside Compensation

Just recently the subject of outside compensation for judges has been raised. There are conflicting ideas:

a) A sitting judge makes a wonderful teacher, not only of theory, but of the real life of the courts. His or her knowledge is extremely valuable to students in college or seminars and should be encouraged. If a judge is not neglecting his/her court responsibilities and has the energy, he or she should be encouraged to share his/her knowledge.

b) The State of New Hampshire has fairly compensated its judiciary according to the Constitution and judges should not seek outside work -- or at least a cap should be put on any outside compensation a judge should receive.

This may be a discussion point for the committee.

VII. Backlogs

When I served on Judiciary in 1988-1992, backlogs were a serious concern. This term I have not heard of serious backlogs, but they should be a continuing concern because of the Constitutional requirement for a speedy trial. The administrative judges of the courts shoud be consulted on this subject.

VIII. Continuing Education

The State of New Hampshire requires professionals in all fields to take continuing education. This is especially crucial to an up-to-date judicial system. I do not know if Judicial Rules require continuing education, but the committee should ensure that continuing education is a part of the requirements for judgeship.

IX Early Retirement - Options/Benefits

People We Might Want to Contact for Advice:

Sen. Ned Gordon
Senate Judiciary Committee
The Administrative Judges of the Courts
Former Judges
Public Defenders' Office/Atty. Duggan
Present Judges from each of the courts
The Judicial Conduct Committee/Nina Gardner

Should there be a public hearing?
Should we send out questionnaires for advice rather than asking people to come in?

Submitted by Rep. Nancy M. Ford
Judiciary Committee
8/18/99

Appendix E

Sample Application Form
United States Magistrate Judge*

Type or legibly print your answers. If a question is not applicable, indicate this by marking "N/A." Return completed form to Clerk of Court.

General

1. Full name: _____
2. All other names by which you have been known: _____
   _____
3. Office address: _____
   City _____ State _____ Zip _____
   Telephone _____
4. Residential address: _____
   City _____ State _____ Zip _____
   Telephone _____
5. Place of birth: _____
   Date of birth: _____
6. Length of residence in state: _____
7. If you are a naturalized citizen, state the date and place of naturalization.
   _____
8. Military service:
   Branch _____ Dates _____
   Rank or Rate at Discharge _____ Type of Discharge _____
   If still a reserve or national guard member, give service, branch, unit, and present rank _____

* This is a comprehensive list of questions that may be asked of applicants. The court should select those questions that it believes are appropriate for inclusion in its application form.

This Document did not include a Page 37

If yes, describe role: _____

15. If you have published any legal books or articles, list them, giving citations and dates: _____

16. List any honors, prizes, or awards you have received: _____

PROFESSIONAL ADMISSIONS

17. List all courts (including state bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case:
Court or Administrative Body _____
Date of Admission _____

LAW PRACTICE

18. State the names, addresses, and dates of employment for all law firms with which you have been associated in practice, all government agencies, and all private business organizations in which you have been employed. Also provide all dates during which you have practiced as a sole practitioner.

Organization	Address	Position	Dates

19. Describe the general nature of your current practice including any legal specialties and character of your typical clients; also, if your practice is substantially different now than previously, give details of prior practice.

20. a) Do you appear regularly in court? Yes _____ No _____

b) What percentage of your appearances in the last five years were in:

1. Federal courts _____%
2. State or local courts of record _____%
3. Administrative bodies _____%
4. Other _____%

21. During the past five years, what percentage of your practice has been trial practice? _____%

22. How frequently have you appeared in court?
_____ times per month.

23. How frequently have you appeared at administrative hearings?
_____ times per month.

24. What percentage of your practice involving litigation has been:

Civil	_____%
Criminal	_____%
Other:	
_____	_____%
_____	_____%
_____	_____%
_____	_____%

25. State the number of cases you have tried to conclusion in courts of record during the past five years, indicating whether you were sole, associate, or chief counsel. Give citations of any reported cases. _____

26. Summarize your courtroom experience for the past five years. _____

27. State the names and addresses of adversary counsel against whom you have litigated your primary cases over the past five years:

PUBLIC OFFICE

28. Have you ever run for, or held, public office? Yes _____ No _____
If yes, give details. _____

PRIOR JUDICIAL EXPERIENCE

29. a) Have you ever held judicial office or been a candidate for judicial office? If so, state the courts involved and the dates of service, or dates of candidacy:

b) If you have held judicial office, state the names and addresses of counsel who have appeared before you who would be knowledgeable of your work, temperament, and abilities. _____

c) Prior quasi-judicial service:
Name of agency _____
Position held _____
Hearings on what types of issues _____
Number of cases adjudicated _____
Dates of service _____

BUSINESS INVOLVEMENT

30. a) If you are now an officer, director, or otherwise engaged in the management of any business enterprise, state the name of such enterprise, the nature of the business, the nature of your duties, and whether you intend to resign such position immediately upon your appointment to judicial office. _____

b) Since being admitted to the Bar, have you ever engaged in any occupation, business, or profession other than the practice of law? Yes _____ No _____ If yes, give the details, including dates. _____

c) During the past five years have you received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise, institution, organization, or association of any kind? Yes _____ No _____ If yes, identify the source of such compensation, the nature of the business enterprise, institution, organization or association involved, and the dates such compensationwas paid. _____

31. a) Have you ever been arrested, charged, or convicted for violation of any federal law state law, county or municipal law, regulation, or ordinance? Yes _____ No _____ If yes, give details. (Do not include traffic violations for which a fine of $200 or less was imposed unless it also included a jail sentence.)

b) Have you, to your knowledge, ever been under federal, state or local investigation for possible violation of a criminal statute? Yes _____ No _____ If yes, give particulars. _____

32. a) Have you ever been sued by a client? Yes _____ No _____ If yes, give particulars. _____

b) Have you or your professional liability insurance carrier ever settled a claim against you for professional malpractice? Yes _____ No _____ If yes, give particulars, including the amounts involved. _____

33. Have you ever been charged in any civil or criminal proceedings with conduct alleged to involve moral turpitude, dishonesty, or unethical conduct? Yes _____ No _____ If yes, give particulars. _____

34. Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by any court, administrative agency, bar association, or other professional group? Yes _____ No _____ If yes, give particulars. _____

35. Have you filed appropriate tax returns as required by federal, state, local, and other government authorities? Yes _____ No _____ If no, explain. _____

36. Have any liens or claims ever been instituted against you by the federal, state or local authorities? Yes _____ No _____ If yes, explain. _____

Professional and Other Activities

37. a) List all bar associations and legal professional societies of which you are a member and give the titles and dates of any office you have held in such groups, and committees to which you belonged. _____

b) List all organizations and clubs, other than bar associations and professional societies identified in response to question 39a), of which you have been a member during the past ten years, including the titles and dates of any offices you have held in each such organization. _____

Supplemental Information

38. State any achievements or actions you have accomplished, demonstrating your commitment to equal justice under the law. _____

39. State any additional education or other experiences you believe would assist you in holding judicial office. _____

_____

_____

_____

40. State any other pertinent information reflecting positively or adversely on you which you believe should be disclosed to the district court and the selection panel in connection with your possible nomination as United States magistrate judge. _____

_____

_____

41. a) List three individuals as references who are familiar with your abilities.

Name_____
Address _____
Telephone _____

Name_____
Address _____
Telephone _____

Name_____
Address _____
Telephone _____

b) List three individuals as references who are familiar with your personal character

Name_____
Address _____
Telephone _____

Name_____
Address _____
Telephone _____

Name_____
Address _____
Telephone _____

Name_____
Address _____
Telephone _____

CONFIDENTIALITY STATEMENT

This form will be kept confidential and will be examined only by members of the merit selection panel and the judges of the district court. The individuals whom you have listed as references above may be contacted by the panel, but no other employers, colleagues, or other individuals will be contacted without your prior approval.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: Date _____

Signature of Candidate _____

FILE COPY

House Judiciary Committee
March 17, 1999
Testimony of Malcolm R. McNeill, Jr.
on CACR 22

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify today on CACR 22, which would limit the term of state judges to 7 years, as opposed to the present term of appointment to age 70.

My name is Malcolm R. McNeill, Jr. I live in Durham and practice law with the firm of McNeill & Taylor, P.A. in Dover. I have practiced for 28 years.

I regularly appear before the Superior and Supreme Courts of New Hampshire and I am frequently involved in highly contentious cases involving planning, zoning, land use and large real estate development projects that have significant impact on neighborhoods and municipalities.

I have been in the trenches, if you will, practicing law since 1971 and have had the first-hand opportunity to observe our judiciary at all levels of

the judicial system. It is because of this experience that I speak in opposition to the Constitutional Amendment proposed by CACR 22.

In my opinion, the proposed Constitutional Amendment will politicize the judiciary and will undermine the rights of every citizen of this State to "be tried by judges as impartial as the lot of humanity will admit."

Judicial independence, free of political intervention, is essential to the even-handed administration of justice in this State. Judicial independence is at the heart of the separation of powers between the legislative, executive and the judiciary.

Constitutionally, the courts were designed, in fact, to be removed from the politics of the moment and were required to seek just solutions, free from the pressures and influences of the political marketplace. In a real sense, the courts provide the proper balance between the rights of citizens and the power of government.

We are able to "Live Free or Die," only if that freedom is protected by an impartial judiciary that is free from the political control of a political majority.

The judiciary exists solely to answer society's recognized need to resolve disputes (both civil and criminal), with integrity, impartiality, predictability and confidence. They have been free in New Hampshire to reach results based on the law, rather than on the basis of political expediency. This is not judicial arrogance, but is rather the judiciary's constitutional duty.

Court decisions regarding segregation, voting rights, public housing, rights to privacy and personal liberty, unrestrained searches and seizures, the right to counsel would not have occurred except for the ability of the judiciary to reach independent and sometimes unpopular decisions based on the constitution and precedent as opposed to what may be the existing political will.

However, it is also true that judges don't always get it right. Courts are not perfect, but they are not unrestrained either. Judges are nominated and confirmed in an open and political process. They are restrained by the Constitution itself, and they are subject to complaint before a Judicial Conduct Committee which is increasingly open and increasingly proactive, and they are subject to constant administrative review.

If this Amendment is passed, the next logical step to appointing judges every 7 years would be to proceed one step further and provide for the election of judges. In my opinion, this would be a blueprint for the loss of integrity of the New Hampshire judiciary. Judges should not be required to make promises or represent particular constituents in order to keep or secure their positions. Their economic security should not be at risk every time they resolve an unpopular dispute. In fact, it is often impossible to both do justice and be popular. A judiciary infused with political contributions, bumper stickers, campaigns or other traditional political characteristics would undermine the integrity and independence which are its greatest attributes.

The judiciary has the responsibility to streamline its systems to be cost effective and to be user friendly. This is best accomplished by attracting the best possible lawyers to the judiciary and permitting them to serve without undue political interference.

At least 50% of the parties who appear in the Courts go away disappointed. I suspect that you would share my view that you would not want to appear before a judge facing a contentious re-election or re-

appointment hearing to decide an unpopular case, when the other side has greater political favor. Both sides of that case should be entitled to the judge's unbiased attention, and any system that may intermingle a judge's personal interest with people's right to justice should be rejected.

It could be you or your family member or your business on the wrong political side of a case at the wrong time, and such a result would severely undermine the integrity of our system.

What standards would be imposed for re-appointment? Would it be purely political? Would there be a score card? Would purely elected officials decide? Would litigants participate?

I think our system works; otherwise, I wouldn't be sitting here. The best and the brightest of the legal profession, in my opinion, would not be interested in giving up their legal career for the uncertainty of the proposed appointment process.

Most importantly, I think the system works because of my observation of non-judges and non-lawyers in the courtroom. In the courtroom, the

people who entrust their conflicts to the court and the people who serve on juries have a respect for the judiciary which the judiciary has earned; because, for the majority of the time, justice is done day-by-day in this State. That same justice would be compromised by the infusion of political consequences to judicial decisions.

I urge you to defeat CACR 22, not to protect the judiciary, but rather to protect the rights of all New Hampshire citizens.

FILE COPY

My name is Caroline Douglas.

I am a family law attorney. I have written several books on Family Law for practicing attorneys and am working on another. I previously wrote bill drafts for the legislature. I have experience with other states laws. And I have studied what is wrong with our present court system for the last two years.

I am speaking to support this CACR providing for term limits on judges with public review prior to re appointment. Our legal system needs reform, and this is one piece of the reform puzzle.

This proposal is similar to the Hawaii system, where I once lived. There, every six years judges terms expire, and if the judge seeks to be reappointed, there is a public review panel which evaluates and makes recommendations. Judges who have had many complaints or who want to avoid a public review simply do not apply and theire appointments lapse.

The Hawaii system permits more attorneys to serve as judges, and is a self-enfocing way of sorting out those who are unfit or ill-suited to judge others. Alcoholics or drug uses, ill-tempered people, those who take client funds or would prey on victims, those with excessive bias who favor friends and relatives, have a better chance of being removed from office.

Now there is no functionally adequate system to remove a judge. And people are being abused in the New Hampshire courtrooms by poor judges, daily.

This system is more in keeping with the spirit of New Hampshire than the current system of lifelong tenure with no review. Under the present system of no effective review of judges, we have established a elite royal class of people. Those people soon discovered that there could appropriate power, akin to the power of royalty.

In a state which esteems a citizen legislature, and seeks high turnover there - no one will ever get rich being a legislature, to maximize input of ideas, this present judiciary system is no only incongruous, but foreign by comparison. Locking out new ideas, new people (see the attached), and criticism, the courts have been evading constructive ideas, and hiding behind the flawed appellate and conduct committee processes to cover up judicial abuses and judicial accountability. A careful scrutiny of the present court system will reveal that many cases are badly decided, but people are powerless to obtain fair review and correction under the existing rules.

The court is a self-created font of power, without checks, without public review, without mechanism for adequate self-correction. This has been demonstrated. The court, in making rules of recusal, for example, has utilized its rule making power to first protect itself.

.One year statute of limitations.
.Secrecy.
.Informal discipline.
.Secret docketing.
.Dismissal for jurisdictional issues, questions which cannot be successful on appeal because of the nature of appeal and the broad powers that the abuse of discretion implies.

.Failure to invoke institutional memory, individual discretion,

.An inadequate public input on the Judicial conduct committee. The public is under-represented on the committee, and those members on the committee are not informed even as to the rules that they are to uphold.

It is necessary, in my opinion, to not only change the rules, but to establish a new, independent review, separate and apart from the Supreme Court's authority, to avoid the taint of self-protectionism.

The judges will not voluntarily change to limit their own terms in office. As lifetime appointees, with full perks and privilege of office, they will resist any attempts to limit that power. What I am concerned with is the attitudes and empowerment that comes with such appointments. I have seen judges figuratively thumb their noses with impunity at litigants who stand up for their rights in an abusive and biased courtroom. The judges have formed a brotherhood society, a guild mind of protectionism. It feed upon its own power, creating and bestowing that power on favored sons, whose appointment to the bench is an automatic ticket to power without review, censure, or benefit up and down the system, with appointments,

For several years now, I have seen first hand how the judges are circumventing law. How a **discretionary judicial system** enables courts to decide cases willy nilly, evading rules and statutes . . . egregious offenses, tolerated and **covered up by the legal system.**

. I experienced first hand how judges can alter facts to make a case fall a certain way;

. I observed how judges are able to skirt limitations on their authority and jurisdiction;

. And how judges are able to get away with misusing bonafide authority in purposeful ways to systematically abuse some hapless party in a case;

. I've analyzed tricks of using twisted false logic and reasoning or buzz words to suggest a thoughtfully reasoned result which is actually oppressive and illegal;

. And I've analyzed how excessive and illegal orders are craftily fashioned to evade review;

. I've studied court rules which empower and protect bad judges, and only secondarily function to do justice.

Seeing all this frankly has sickened me.

When abusive judicial behavior is tolerated in case after case because the highest court is unwilling or unable to act, then objective scrutiny is needed to determine how, why, and to what extent the legal system is failing and what can be done to fix it. If interlocutory appeals, regular appeals, conduct complaints, writs of mandamus and prohibition - every tool created to rectify the ongoing misuse of judicial power are all futile, then it is time for a new system. From listening to many people over the last two years, I am persuaded that judicial abuse happens to too many. When even one judge ignores law and the supreme court yawns, that is a reflection on the failure of the whole legal system. Judges, lawyers, bar all have assumed the duty of self-regulation which is not working. It is time to

wake up.

It isn't as though the Supreme Court isn't aware of serious problems in the halls of justice. Judicial abuse is repetitive, often with the same type of complaints surfacing year after year with variations. Once taught how to spot court abuse, people can see for themselves themes:

constitutional infringement,
acting in excess of jurisdiction or authority,
bias,
manipulation of power, and
denial of due process.

The judge in my case has been repeatedly overturned for problems which repeat today--*failure to recuse, failure to disclose possible conflict, bias, favoritism to friends and relatives, and interfering with a case after recusal.*

This judge continues to exceed his authority with more bad rulings. The Supreme Court now looks the other way, hides from their institutional knowledge, ducks from seeing the pattern of serious abuse because of his position and power. If forced by media scrutiny or common decency to correct the judge, the supreme court does so in the most parsimonious manner without adherence to minimum constitutional standards or binding precedent.

WHEN stare decisis and the thoughtful detailed legislative mandates are repeatedly ignored or applied in a cursory and biased manner,

WHEN the supreme court is so harnessed by the ties and bonds or loyalties to things other than law that they can·not or will not correct serious judicial abuses and errors,

THEN I am bound by my own oath to speak out to work to uphold the constitution and to correct abuses of it. After countless letters, legislative testimony, appointments with public and bar officials, letters and essays to the newspapers, countless pleadings and appeals, I have tried in every manner I could legally fathom to inform the Supreme Court of major fundamental flaws in this version of a court system as it currently operates. That operation is less than the constitutional mandates required by our state. The result are documented abuses of citizens rights in the name of justice. That is the basis of my decision to go to the people and the legislature for reform. Ergo, this book, generated by my absence of confidence in the integrity and the impartial administration of courts by judges.

This is the experience of one attorney in a family law practice in New Hampshire. It stems from my own detailed study and persistent attempts for over two years to bring to the attention of the chief judge, the bar, the supreme court, the message that I am observing the biased and improper use of judicial power in a way that violates law. The court appears oblivious to problems it created. It is my hope that my testimony may help the legislature to take back the powers that belong to the people which are being abused in the hands of the judiciary. My intent is to ultimately restore fairness and integrity to the legal system through long term solutions. This CACR is but one piece of that solution.

It is not my intent to debase an entire profession. There are fair judges and good attorneys, aware of these problems. But the are not suppose to speak ill of judges, and know that to do so is to risk conduct complaints, retaliation, and threats and lawsuits by the AG for disbarment.

The conduct rules are designed to chill criticism. This is not about one isolated case or abuse in one court but is about repeated patterns abuse of constitutional dimension which traverse the structure and framework of our entire legal system.

> *People respect the law and are willing to live by the law only as long as they believe it operates fairly and effectively.*
>
> **Quote by** The Honorable Judith Kaye
> Chief Judge New York Court of Appeals

March 15, 1999

Caroline Douglas, Esq.

douglas@totalnetnh.net

HOUSE JUDICIARY COMMITTEE
March 17, 1999

FILE COPY

Testimony of David H. Bradley on CACR 22

Chairman Mock and Members of the Committee.

My name is David H. Bradley. I live in Hanover and have practiced law in New Hampshire for almost 34 years. I served in the House 1 term and in the State Senate 3 terms in the 1970's. I had the honor of serving on this Committee when I was in the House and on the Senate Judiciary Committee where I was Chair for 2 terms.

I appear in opposition to CACR 22. Although I am close personal friends with several judges in this State, I appear in my personal capacity to speak for what I believe is in the best interests of the people in this State.

Winston Churchill once said:

"No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time."

I think the same thing can be said about New Hampshire's system of judicial selection and retention. What can be worse than the idea of appointing judges to serve until age 70 - often a period of 20 or 30 years or more - subject almost entirely to review and evaluation which is established by other judges. What is worse? All the other systems which the other states have tried.

Those other systems, to my simple mind, fall into 1 of 2 categories. Either (1) the system of electing judges, or (2) a system of limited terms where retention or reappointment is placed in the hands of one or both of the other two branches of government.

I submit to you that either of those systems is worse than New Hampshire's system. CACR 22, of course, falls in the second category.

My law firm practices in both New Hampshire and Vermont and I have been admitted to practice in the State of Vermont for about 14 years. The Vermont system is something like the system in CACR 22 in that Vermont judges are appointed for 6 year terms. If a Vermont judge so requests, his or her term continues for another 6 years unless a majority of both Houses vote against retention. The problem with the Vermont system and the problem with the system in CACR 22 is that inherently and inevitably such a process of judicial retention becomes political.

Let me share with you this one personal experience I have had with the Vermont system. It happened some years ago, but it still leaves a bad taste in my mouth. I was trying a case against a Vermont attorney who happened to be a member of the Legislature. During an in-chambers conference with the judge, the judge reminded the other attorney that he was coming up for a vote on his retention before the Legislature in the near future. The attorney thereupon told the judge not to worry because everything was "all set." Perhaps it was the matter of factness of the conversation which has stuck in my mind and makes the incident even more appalling to me. I can tell you that I struggled long and hard with whether I was ethically required to share the conversation with my clients or report it as misconduct. I chose not to because I wanted to believe and did believe that the conversation had no effect in my case. But that is not a system to be proud of, and I shudder to think we would import anything like it into New Hampshire.

Judges are human and we will never have a judicial system which is "perfect or all-wise." But I state with confidence that whether you consider the judicial system as a whole or as compare judge to judge, the New Hampshire judiciary is stronger and gives us more to be proud of than the Vermont judiciary.

Yes, the politics involved in reappointment of judges by the Governor and Executive Council will be different from the politics of the Vermont Legislature. But I don't think I am happy about the difference. Just think, if either the sitting Governor or any 3 Executive Councillors decide against reappointment of a judge, under CACR 22, that judge is off the bench.

The clause in the New Hampshire Constitution relating to the judiciary which I most cherish is contained in Part I Article 35 - "It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit." If CACR 22 becomes law, I am afraid that litigants who appear before judges who are nearing the end of their 7 year term will not really enjoy this right in any case which is controversial or highly publicized or involves one or more parties with political clout.

FILE COPY

Table 4.4
SELECTION AND RETENTION OF JUDGES

State or other jurisdiction	*How selected and retained*
Alabama	Appellate, circuit, district and probate judges elected on partisan ballots. Municipal court judges appointed by the governing body of the municipality (majority vote of its members).
Alaska	Supreme Court, court of appeals, superior court and district court judges appointed by governor from nominations submitted by Judicial Council. Supreme Court, court of appeals and superior court judges approved or rejected at first general election held more than three years after appointment. Reconfirmation every 10, eight and six years, respectively. District court judges approved or rejected at first general election held more than one year after appointment. Reconfirmation every four years. District court magistrates appointed by and serve at pleasure of presiding judge of superior court in each judicial district.
Arizona	Supreme Court justices and court of appeals judges appointed by governor from a list of not less than three nominees submitted by a nine-member Commission on Appellate Court Appointments. Superior court judges (in counties with population of at least 150,000) appointed by governor from a list of not less than three nominees submitted by a nine-member commission on trial court appointments. Judges initially hold office for term ending 60 days following next regular general election after expiration of two-year term. Judges who file declaration of intention to be retained in office run at next regular general election on non-partisan retention ballot. Superior court judges in counties having population less than 250,000 elected on non-partisan ballot; justices of the peace elected on partisan ballot; police judges and magistrates selected as provided by charter or ordinance; Tucson city magistrates appointed by mayor and council from nominees submitted by non-partisan Merit Selection Commission on magistrate appointments.
Arkansas	All elected on partisan ballot.
California	Supreme Court and courts of appeal judges appointed by governor, confirmed by Commission on Judicial Appointments. Judges run unopposed on non-partisan retention ballot at next general election after appointment. Superior court judges elected on non-partisan ballot or selected by method described above; judges elected to full term at next general election on non-partisan ballot. Municipal court and justice court judges initially appointed by governor and county board of supervisors, respectively, retain office by election on non-partisan ballot.
Colorado	Supreme Court and court of appeals judges appointed by governor from nominees submitted by Supreme Court Nominating Commission. Other judges appointed by governor from nominees submitted by Judicial District Nominating Commission. After initial appointive term of two years, judges run on record for retention. Municipal judges appointed by municipal governing body. Denver County judges appointed by mayor from list submitted by nominating commission; judges run on record for retention
Connecticut	All nonelected judges appointed by legislature from nominations submitted by governor exclusively from candidates submitted by the Judicial Selection Commission. Judicial Review Council makes recommendations on nominations for reappointment. Probate judges elected on partisan ballots.
Delaware	All appointed by governor from list submitted by a judicial nominating commission (which is established by executive order) with consent of majority of Senate.
Florida	Supreme court and district courts of appeal judges appointed by governor from nominees submitted by appropriate judicial nominating commission. Judges run for retention at next general election preceding expiration of term. Circuit and county court judges elected on non-partisan ballots.
Georgia	Supreme Court, court of appeals and superior court judges elected on non-partisan ballots. Probate judges and justices of peace elected on partisan ballots. Other county and city court judges appointed.
Hawaii	Supreme Court and intermediate court of appeals justices and circuit court judges nominated by Judicial Selection Commission (on list of at least six names) and appointed by governor with consent of Senate. Judges reappointed to subsequent terms by the Judicial Selection Commission. District court judges nominated by Commission (on list of at least six names) and appointed by chief justice.
Idaho	Supreme Court and court of appeals justices and district court judges elected on non-partisan ballot. Magistrates appointed on non-partisan merit basis by District Magistrates Commission and run for retention in first general election next succeeding the 18-month period following initial appointment; thereafter, run every four years.
Illinois	Supreme Court, appellate court and circuit court judges nominated at primary elections or by petition and elected at general or judicial elections on partisan ballot. Judges run in uncontested retention elections for subsequent terms. Circuit court associate judges, once appointed by circuit judges for four-year terms, are being converted to full circuit judges.
Indiana	Supreme Court justices, court of appeals judges and tax court judges are appointed by governor from list of three nominees submitted by seven-member Judicial Nominating Commission. Judges serve until next general election after two years from appointment date; thereafter, run for retention on record. Circuit, superior and county judges in most counties run on partisan ballot. Marion County municipal judges appointed by governor from nominees submitted by county nominating commission.
Iowa	Supreme Court, court of appeals and district court judges appointed by governor from lists submitted by nominating commissions. Judges serve until initial one-year term until January 1 following next general election, then run on records for retention. Full-time judicial magistrates appointed by district judges in judicial election district from nominations submitted by county judicial magistrate appointing commission. Part-time magistrates appointed by county judicial magistrate appointing commission.
Kansas	Supreme Court and court of appeals judges appointed by governor from nominations submitted by Supreme Court Nominating Commission. Judges serve until second Monday in January following first general election after one year in office; thereafter run on record for retention every six (Supreme Court) and four (court of appeals) years. District judges in most judicial districts selected by non-partisan commission plan.
Kentucky	All judges elected on non-partisan ballot.
Louisiana	All justices and judges elected on non-partisan basis, but state has open primary which requires all candidates to appear on a single ballot.
Maine	All appointed by governor with confirmation of the senate, except probate judges who are elected on partisan ballot.

See footnotes at end of table.

SELECTION AND RETENTION OF JUDGES — Continued

State or other jurisdiction	How selected and retained
Maryland	Court of Appeals and Court of Special Appeals judges nominated by Judicial Nominating Commission, and appointed by governor with advice and consent of Senate. Judges run on record for retention after one year of service. Judges of circuit courts and Supreme Bench of Baltimore City nominated by Commission and appointed by governor. Judges run in first general election after year of service (may be challenged by other candidates). District court judges nominated by Commission and appointed by governor, subject to Senate confirmation.
Massachusetts	All nominated and appointed by governor with advice and consent of Governor's Council. Judicial Nominating Commission, established by executive order, submits names on non-partisan basis to governor.
Michigan	Nominated in party conventions, all are elected on non-partisan ballot, except remaining municipal judges who are selected in accordance with local procedures for selecting public officials.
Minnesota	All elected on non-partisan ballot.
Mississippi	All elected on partisan ballot, except municipal court judges who are appointed by governing authority of each municipality.
Missouri	Judges of Supreme Cou. , court of appeals and several circuit courts appointed initially by governor f nominations submitted by judicial selection commissions. Judges run for retention after one year in office. All other judges ted on partisan ballot.
Montana	All elected on non-partisan ballot. Judges unopposed in reelection effort, run for retention. Water cou judges are appointed by chief justice; Workers' compensation judges are appointed by the governor.
Nebraska	All judges appointed initially by governor from nominees submitted by judicial nominating commissions. Judges run for retention on non-partisan ballot in general election following initial three-year term; subsequent terms are six years.
Nevada	All elected on non-partisan ballot.
New Hampshire	All appointed by governor and confirmed by majority vote of elected five-member executive council.
New Jersey	All appointed by governor with advice and consent of Senate, except judges of municipal courts serving a single municipality who are appointed by the governing body. Judges are reappointed by the governor (to age 70) with the advice and consent of Senate.
New Mexico	Supreme Court, Court of Appeals, district and metropolitan judges appointed by governor from list submitted by a judicial nominating commission. At next general election, after appointment, judges run for full terms in partisan, contested election. The elected judge runs for subsequent terms in uncontested retention elections.
New York	All elected on partisan ballot, except judges of Court of Appeals who are appointed by governor with advice and consent of Senate. Governor also appoints judges of court of claims and designates members of appellate division of supreme court. Mayor of New York City appoints judges of criminal and family courts in the city from list submitted by a judicial nominating commission, established by mayor's executive order.
North Carolina	All elected on partisan ballot, except special judges of superior court who are appointed by governor.
North Dakota	All elected on non-partisan ballot.
Ohio	All elected on non-partisan ballot, except court of claims judges who may be appointed by chief justice of Supreme Court from ranks of Supreme Court, court of appeals, court of common pleas or retired judges.
Oklahoma	Supreme Court justices and Court of Criminal Appeals judges appointed by governor from lists of three submitted by Judicial Nominating Commission. Judges run for retention on non-partisan ballot at first general election following completion of one year's service. Judges of court of appeals, and district and associate district judges elected on non-partisan ballot. Special judges appointed by district judges within judicial administrative districts. Municipal judges appointed by governing body of municipality.
Oregon	All judges elected on non-partisan ballot for six-year terms, except municipal judges who are generally appointed and serve as prescribed by city council.
Pennsylvania	All initially elected on partisan ballot and thereafter on non-partisan retention ballot, except magistrates (Pittsburgh) who are appointed by mayor.
Rhode Island	Supreme Court justices elected by legislature. Superior, district and family court judges appointed by governor with advice and consent of Senate. Probate and municipal court judges appointed by city or town councils.
South Carolina	Supreme Court, court of appeals, circuit court and family court judges elected by legislature from names submitted on a non-partisan basis by judiciary committee of legislature. Probate judges elected on partisan ballot. Magistrates appointed by governor with advice and consent of Senate. Municipal judges appointed by mayor and alderman of city.
South Dakota	Supreme Court justices appointed by governor from nominees submitted by Judicial Qualifications Commission. Justices run for retention at first general election after three years in office. Circuit court judges elected on non-partisan ballot. Magistrates appointed by presiding judge of judicial court with approval of Supreme Court.
Tennessee	Judges of intermediate appellate courts appointed initially by governor from list of three nominees submitted by Appellate Court Nominating Commission. Judges run for election to full term at biennial general election held more than 30 days after occurrence of vacancy. Supreme Court judges and all other judges elected on partisan ballot, except some municipal judges who are appointed by governing body of city.
Texas	All elected on partisan ballot (method of selection for municipal judges determined by city charter or local ordinance).
Utah	Supreme Court, district court, circuit court and juvenile court judges appointed by governor from list of at least three nominees submitted by Judicial Nominating Commission. Judges run unopposed for retention in general election following initial three-year term; thereafter run on record for retention every 10 (Supreme Court) and six (other courts of record) years.
Vermont	Supreme Court justices, superior court and district and family court judges nominated by Judicial Nominating Board and appointed by governor with advice and consent of Senate. Judges retained in office unless legislature votes for removal.

SELECTION AND RETENTION OF JUDGES — Continued

State or other jurisdiction	*How selected and retained*
Virginia	All full-time judges elected by majority vote of legislature.
Washington	All elected on non-partisan ballot (municipal judges are appointed by mayor).
West Virginia	Supreme Court of Appeals judges, circuit court judges and magistrates elected on partisan ballot.
Wisconsin	Supreme Court, court of appeals and circuit court judges elected on non-partisan ballot.
Wyoming	Supreme Court justices, district and county court judges appointed by governor from list of three nominees submitted by judicial nominating commission. Judges run for retention on non-partisan ballot at first general election occurring more than one year after appointment. Justices of the peace elected on non-partisan ballot. Municipal (police) judges appointed by mayor with consent of Council.
Dist. of Columbia	Court of appeals and superior court judges nominated by president of the United States from a list of persons recommended by District of Columbia Judicial Nominating Commission; appointed upon advice and consent of U.S. Senate.
American Samoa	Chief justice and associate justice(s) appointed by the U.S. Secretary of the Interior pursuant to presidential delegation of authority. Associate judges appointed by governor of American Samoa on recommendation of the chief justice, and subsequently confirmed by the Senate of American Samoa.
Guam	All appointed by governor with consent of legislature from list of nominees submitted by Judicial Council; thereafter, run on record for retention every seven years.
No. Mariana Islands	All appointed by governor with advice and consent of Senate.
Puerto Rico	All appointed by governor with advice and consent of Senate.
U.S. Virgin Islands	All appointed by governor with advice and consent of legislature.

Sources: Warrick, *Judicial Selection in the United States: A Compendium of Provisions*, 2nd Edition (Chicago: American Judicature Society), 1993; "Judicial Selection in the States: Appellate and General Jurisdiction Courts," American Judicature Society, 1996; National Center for State Courts, *State Court Organization 1993, 1995*; and state constitutions and statutes.

Note: Unless otherwise specified, judges included in this table are in the state courts of last resort and intermediate appellate and general trial courts.

FILE COPY

Vermont judges face legislative scrutiny

MONTPELIER, Vt. (AP) — Justice John Dooley talked about his reluctance to legislate from the bench. Justice James Morse talked about the "humbling" nature of public criticism of the court's decisions.

But it wasn't until Justice Denise Johnson of the Vermont Supreme Court took the witness chair before the Legislature's Judicial Retention Committee that the issue was addressed squarely.

"I feel like there's a big elephant in this room and nobody's saying very much about it," Johnson said. She added moments later: "I stand firmly behind the Brigham decision."

Brigham was the Feb. 5, 1997, ruling by the court that struck down Vermont's then existing method of paying for public schools. It prompted the Legislature to pass Act 60, which seeks to equalize the ability of towns to raise money for schools.

Two of the five justices who reached the unanimous decision have retired. Dooley, Morse and Johnson this year all face the judicial retention process, in which the Legislature holds hearings and votes in joint assembly on whether they should be given new six-year terms.

Of the three, Johnson addressed Brigham most directly. She said the Code of Judicial Conduct requires that judges not engage in public debate about their decisions.

Judges should remain silent, she said, "even when the arguments are outrageous, unfounded and factually incorrect, because it demeans the judicial office when judges get into an argument over the decision with its critics.

"Therefore, the fact that the court has not responded to the claims of its critics in the Brigham case should not be taken as assent to those claims," she added. "To the extent that a response is required for retention purposes, I stand firmly behind the Brigham decision."



AP Photo

VERMONT SUPREME COURT Associate Justices John Dooley, center, James Morse and Denise Johnson wait to testify before the Judicial Retention Committee in Montpelier yesterday.

Much of the testimony from the three covered broad issues, especially their concerns about Vermont's family court system being overwhelmed and often unable to resolve disputes effectively.

All three said they would support more "alternative dispute resolution," particularly to replace courts being asked to settle fights that come up after a divorce about the day-to-day details of child custody.

Dooley began the hearing by reading from a statement he presented to the Senate Judiciary Committee in 1987 as he was first going through the confirmation process after Gov. Madeleine Kunin nominated him to the court.

In that statement, he vowed to defer to previous court decisions unless there were compelling reasons not to, and he promised to leave making new law to the Legislature.

"I would answer the same today," Dooley said of the questions the committee put to him in 1987.

UNION LEADER
2/9/99

FILE COPY

TESTIMONY on CACR 22

relating to 7-year terms for state judges.
Providng that all state judges appointed on or after January 1, 2001
be commissioned for 7-year terms, which may be renewed.

JUDICIARY COMMITTEE

Wednesday, March 17, 1999 – 9:30 a.m.
Room 208, LOB

by Representative Bruce F. Hunter
Hillsborough County, District 7

Article 35 of Part First of the New Hampshire Constitution, the bill of rights for New Hampshire citizens, states that every individual has the right to be tried by judges as impartial as the lot of humanity will admit. Judges are after all only human beings with the same prejudices and temperaments as we all have. This same article stresses that judges should hold their terms of office "so long as they behave well."

This does not mean that if we disagree with a decision they might make, we will throw them out of office. This bill, this CACR, does nothing to those judicial people who now sit on the bench. This CACR will limit the terms of future judges to seven years and does not preclude a reappointment for another seven years and so on and so on.

A term of office will make judges more accountable for their actions and a judge who might otherwise be subjected to an attempt to remove him from the bench, might just not be re-appointed rather than be subjected to removal.

Nothing could damage the integrity and dignity of the court system any more than repeated attempts to change the system, remove the judges or, as has happened several times in the past, a wholesale dismantling of the third branch of government.

The secrecy surrounding the disciplining of judges and lawyers breeds distrust and sometimes contempt for a system that is likely the best yet devised by man for the settling of disputes. The rash of bills dealing with these issues has prompted the court to open the process to more public scrutiny so that the Legislature would not be forcing the courts to better police their house.

Article 73 of Part Second of our New Hampshire Constitution would be amended to allow for seven-year appointments to the bench and allow subsequent appointments to be made up to the mandatory 70 years of age limitations. If such an amendment can be successful, attempts to remove judges would not likely be made because the terms are relatively short and the messy procedure is harmful whether it is successful or not. Much damage can occur when the only way to address judicial misconduct is to impeach or otherwise attempt to prove an individual may be corrupt or senile or whatever.

I believe that this approach makes considerable good sense and would allow the citizens to feel that the judges of our state are finally accountable much as all the other officials of our government are now.

FILE COPY Ariz

CANON 1

A Judge Shall Uphold the Integrity and Independence of the Judiciary

A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this code are to be construed and applied to further that objective.

CANON 2

A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

C. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.

CANON 3

A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

B. Adjudicative Responsibilities.

1. A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

2. A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

3. A judge shall require order and decorum in proceedings before the judge.

4. A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

5. A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

6. A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

7. A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:
   (a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

      (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
      (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

   (b) A judge may obtain the advice of a disinterested ex pert on the law applicable to a proceeding.
   (c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.
(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

8. A judge shall dispose of all judicial matters prompt ly, efficiently and fairly.

9. A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge is a litigant in a personal capacity.

10. A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

11. A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

12. A judge shall participate actively in judicial education programs and shall complete mandatory judicial education requirements.

C. Administrative Responsibilities.

1. A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

2. A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

3. A judge with supervisory responsibility for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

4. A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

D. Disciplinary Responsibilities.

1. A judge who has knowledge or who receives reliable information that another judge has committed a violation of this code shall take or initiate appropriate action. A judge who has knowledge or who receives reliable infor mation that another judge has committed a violation of this code that raises a substantial question as to the judge's honesty, trustworthiness or fitness as a judge in other respects shall inform the appropriate authority.

2. A judge who receives information indicating a substantial likelihood that a lawyer has

committed a violation of the Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.

3. Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

E. Disqualification.

1. A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;
the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding or any other interest that could be substantially affected by the proceeding;
the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

   (i) is a party to the proceeding, or an officer, director or trustee of a party;
   (ii) is acting as a lawyer in the proceeding;
   (iii) is known by the judge to have an interest that could be substantially affected by the proceeding;
   (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

2. A judge shall keep informed about the judge's personal and fiduciary financial interests, and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

F. Remittal of Disqualification. A judge disqualified by the terms of Section 3E may, instead of withdrawing from the proceeding, disclose on the record the basis of the disqualification. If the parties and their lawyers after such disclosure and an opportunity to confer outside of the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement should be incorporated in the record of the proceeding.

CANON 4

A Judge Shall So Conduct the Judge's Extra-judicial Activities as to Minimize the Risk of Conflict with Judicial Obligations

A. Extra-judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

1. cast reasonable doubt on the judge's capacity to act impartially as a judge;
2. demean the judicial office; or
3. interfere with the proper performance of judicial duties.

B. Avocational Activities. A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the admini stration of justice and non-legal subjects, subject to the requirements of this code.

C. Governmental, Civic or Charitable Activities.

1. A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when act ing pro se in a matter involving the judge or the judge's interests.
2. A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.
3. A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the admin istration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund-raising activities. A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.
4. A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of the judge's judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

   (a) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court.
   (b) A judge should not solicit funds for any educational, religious,

charitable, fraternal, or civic organization, or use or permit the use of the prestige of office for that purpose, but a judge may be listed as an officer, direc tor, or trustee of such an organization, so long as the listing is not used for fund-raising purposes. A judge should not be a speaker or the guest of honor at an or ganization's fund-raising events, but may attend such events.

(c) A judge should not give investment advice to such an organization, but a judge may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

D. Financial Activities.

1. A judge shall not engage in financial and business dealings that:

   (a) may reasonably be perceived to exploit the judge's judicial position, or

   (b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

2. A judge may, subject to the requirements of this code, hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity.

3. A judge shall not serve as an officer, director, manager, general partner, advisor or employee of any business entity except that a judge may, subject to the requirements of this code, manage and participate in:

   (a) a business closely held by the judge or members of the judge's family, or

   (b) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

4. A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

5. A judge shall not accept, and shall urge members of the judge's family residing in the judge's household not to accept, a gift, bequest, favor or loan from anyone except for:

   (a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the im provement of the law, the legal system or the adminis tration of justice;

   (b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's house hold, including gifts, awards and benefits for the use of

both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;
(c) ordinary social hospitality;
(d) a gift from a relative or friend, for a special occa sion, such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;
(e) a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under Section 3E;
(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;
(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or
(h) any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and, if its value exceeds the statutory minimum for financial disclosure, the judge reports it in the same manner as the judge reports compensation in Section 4H.

E. Fiduciary Activities.

1. A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family and then only if such service will not interfere with the proper performance of judicial duties.

2. A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

3. The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

F. Service as Arbitrator or Mediator. A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

G. Practice of Law. A judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

H. Compensation, Reimbursement and Reporting.

1. Compensation and Reimbursement. A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this code, if the source of such payments does not give the appearance of influencing the judge's

performance of judicial duties or otherwise give the appearance of impropriety.

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.
(b) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

2. Public Reports. A judge shall report compensation for extra-judicial activities as required by law.

I. Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this Canon and in Sections 3E and 3F, or as otherwise required by law.

J. Wedding Ceremonies.

1. The performance of wedding ceremonies by a judge is a discretionary function rather than a mandatory function of the court.

2. A judge shall not interrupt or delay any regularly scheduled or pending court proceeding in order to perform a wedding ceremony.

3. A judge shall not advertise his or her availability for performing wedding ceremonies.

4. A judge shall not charge or accept a fee, honorarium, gratuity or contribution for performing a wedding ceremony during court hours.

5. A judge may charge a reasonable fee or honorarium to perform a wedding ceremony during non-court hours, whether the ceremony is performed in the court or away from the court.

CANON 5

A Judge or Judicial Candidate Shall Refrain from Inappropriate Political Activity.

A. Political Conduct in General

1. A judge or a candidate for election to judicial office shall not:

   (a) act as a leader or hold any office in a political or ganization;
   (b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;
   (c) solicit funds for, pay an assessment to or make a contribution to a political organization or candidate, or make contributions to a political party or organization or to a non-judicial candidate in excess of a combined total of Two Hundred Fifty Dollars per year; or
   (d) actively take part in any political campaign other than his or her own election, reelection or retention in office.

2. A judge or a non-judge who is a candidate for judicial office may speak to political gatherings on his or her own behalf.

3. A judge may purchase tickets for political dinners or other similar functions but attendance at any such functions shall be restricted so as not to constitute a public endorse ment of a candidate or cause otherwise prohibited by these canons.

4. A judge shall resign from judicial office upon be coming a candidate for a non-judicial office either in a primary or in a general election, except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law to do so.

5. Except as otherwise permitted in this code, a judge shall not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

B. Judicial Campaign Conduct.

1. A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit selection system or retention election:

   (a) shall maintain the dignity appropriate to judicial of fice and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;
   (b) shall prohibit employees and officials who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the sections of this

Canon;
(c) shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the sections of this Canon;
(d) shall not:

(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court;
(iii) knowingly misrepresent the identity, qualifica tions, present position or other fact concerning the candidate or an opponent; or
(iv) announce the judge's views on disputed political or legal issues.

(e) may respond to personal attacks or attacks on the candidate's record as long as the response does not vio late Section 5B.

2. A candidate, including an incumbent judge, for a judicial office, whether by a contested election or seeking the retention of the office according to law, shall comply with the Arizona statutes relating to the financial aspects of the candidacy. All candidates should refrain from personally soliciting campaign contributions. They should refer prospective contributors to the candidate's campaign committee.

3. An incumbent judge who is a candidate for retention in or re-election to office may campaign for retention in or re-election to office; may obtain publicly stated support; and in the manner provided in subsection B(2) may obtain campaign funds.

C. Applicability. Canon 5 generally applies to all incumbent judges and judicial candidates. A successful candidate, whether or not an incumbent, is subject to judicial discipline for his or her campaign conduct; an unsuccessful candidate who is a lawyer is subject to lawyer discipline for his or her campaign conduct. A lawyer who is a candidate for judicial office is subject to ER 8.2(b) of the Arizona Rules of Professional Conduct.

FILE COPY

Speech by David A. Brock, Chief Justice
N.H. Bar Mid-winter Meeting
January 22, 1998

Good afternoon. Thank you for inviting me to speak to you today.

I will begin with a review of some of the highlights in the work of the Judicial Branch during the past year, and continue with a discussion of an issue that should be of concern to all citizens: the role of the Judicial Branch in a free society, and end with some late-breaking news of interest to the bar membership.

In 1997, the Judicial Branch renewed its continuing efforts to improve the service that it renders to the citizens of this state. We continually scrutinize the rules and procedures followed in our courts, seeking fairness and uniformity wherever possible. While we who work in the Judicial Branch recognize that the task of improving the court system is never complete, from time to time, we do enjoy reflecting on some of the successes that we have had in making the court system more user friendly, more accessible, and more responsive to the people that we serve.

During the past two years, one of the major undertakings of the Legislature and the Judicial Branch has been to make the court system more accessible and responsive to the needs of families. In 1995, the Legislature directed the Supreme Court to establish a Family Division Pilot Project in two counties within the State. The pilot project in Rockingham and Grafton Counties began on July 1, 1996. In mid-1997, the pilot program was evaluated by a nationally recognized court management consultant, who surveyed more than 800 lawyers who had participated in Family Division cases, as well as the parties themselves. The consultant found that the Family Division had met or exceeded the legislative objectives. The consultant specifically praised the effort that had been made to make the process easier to understand, citing the program's easy-to-understand forms and case manager assistance for pro se parties. The report also lauded the use of mediation and alternative dispute resolution to resolve matters, resulting in a process that was less adversarial.

Because the assessment of the Family Division program was based on only one year's experience, however, the Administrative Council, consisting of Justices Broderick, Nadeau, Kelly and Maher and Director Goodnow, and the Supreme Court recommended to the Legislature that the pilot program be continued for another year. Whatever decision is finally made concerning continuation or expansion of the pilot project, many of its innovations and the lessons learned from the project will enable us to improve the quality of service we render in family law matters. I am told that the use of alternative dispute resolution methods has already been expanded so that neutral evaluation is available in all courts handling family matters.

The problems attending pro se representation in the courts continue to grow. As you know, here in New Hampshire, we rely heavily on IOLTA funds to complement the bar's pro bono program and federal funding for legal services to low income persons. We await with great interest and concern the U.S. Supreme Court's decision on whether IOLTA programs are constitutional. A positive development in this area, during 1997, was the fact that our Legislature, for the first time, appropriated funds to support legal services to the needy -- the sum of $200,000.

The court system and the bar association have collaborated on another program which is designed to assist pro se parties in the area of family law, the SCOPE program. For those of you unfamiliar with the program, once or twice a month a program is presented at most Superior Courts to explain the procedure in divorce cases, explain some of the services available to parties, such as mediation, and answer questions about the mechanics of court proceedings and filing documents. The program is presented by volunteer lawyers and court staff and has been invaluable to the courts in dealing with the increasing number of pro se litigants.

Another area of the law that has received too little attention in the past is the field of juvenile law. During 1996, the New Hampshire District Court, led by Judge Kelly, organized a task force on juvenile law to examine the dramatic increase in the number and types of juvenile cases, and to study approaches for handling the increased caseload. The task force, which consisted of legislators, members of the law enforcement community, and members of the Judicial Branch and legal profession, agreed upon an action plan which includes recommendations for legislative action such as the funding of diversion and mediation programs, and recommendations for community action. A juvenile law conference, which is expected to be attended by over 400 people, representing all disciplines involved in juvenile law, is scheduled for March.

During the past year, the Probate Court has taken a number of steps to make practice in the Probate Court easier. Many of the court's estate forms are now available on the Internet. The Probate Court's procedure committee, which includes a number of bar association members, has attempted to make the practice and procedure in the various counties more consistent. In addition, the court is in the process of implementing a case flow management system, which will allow the court to handle and dispose of cases more efficiently and consistently. Bar association members will be included in the task force charged with implementing this system.

The Superior Court has continued its efforts to improve its efficiency in handling and disposing of civil and criminal cases. A recent study by the National Center for State Courts reported that New Hampshire's Superior Court had the highest case clearance rate in the country for criminal cases, and was second in the country, after Maine, in disposing of civil cases. Also deserving great credit for the Superior Court's success on this score are the many lawyers who have volunteered their time to serve as mediators and arbitrators in the Superior Court's ADR program. This program has been remarkably successful because it has encouraged early and voluntary resolution of disputes, resulting in a savings of time, money, and other costs that are not quantifiable, to everyone involved. The Superior Court recently decided to expand the ADR program, and will soon begin training additional lawyers to serve as neutrals in the program.

I would like to take this opportunity to thank all of you who have served without compensation as neutrals in the ADR program. Most of the lawyers that I have talked to about the program are pleased to provide this public service. It allows them to offer their talents and expertise to serve their profession and the public. They receive great satisfaction from knowing that they assisted in resolving a case in a manner that is acceptable to everyone involved. This volunteer service is an example of the best of our profession. While the public as a whole may never acknowledge your service, you should be proud of your contribution to your profession and to the public.

As some of you may know, the Superior Court is conducting a pilot project in Grafton County to determine whether, and to what extent, audio teleconferencing can replace in-court conferences. While it is unlikely that teleconferencing will entirely replace conferences at the courthouse, we hope to determine through this pilot project those circumstances in which teleconferencing can be used. We anticipate that teleconferencing will result in substantial savings in time and expense for everyone, clients, lawyers, and the court system. In fact, this year the Supreme Court itself used teleconferencing for the first time. Justice Thayer participated in a case conference by telephone last July while he was in England teaching.

At the Supreme Court, in 1997, we set a new record for the number of appeals filed -- 915. This does not include disciplinary or administrative cases. Despite the increase in caseload, the Supreme Court disposed of 907 cases, also a record, meaning that we essentially kept pace with filings. We will soon resume the use of Judicial Referee Panels in the hope of reducing the existing backlog of cases.

In our effort to make information about the court system more accessible to lawyers and to the public, we continue to expand our presence on the Internet. Each level of court has a presence on the net. You can find the forms used by many of the courts, administrative orders and rules, and in the case of the Supreme Court, oral argument lists and opinions. I am told that the Claremont decision on the court system's web page received over 1700 hits since the decision, over seven times the norm for a decision. In an effort to be more responsive to the Legislature, the media, and the public, **the court appointed Eileen Fox to serve as Counsel to the court. One of her roles as counsel is to serve as liaison to the Legislature and the media. She will also participate in efforts to increase public understanding of the court system.**

During its last session, the Legislature approved construction of a new building for the Administrative Office of the courts, the administrative arm of the Supreme Court. As any of you who have visited us in the past few months knows, the building will be located next to the Supreme Court parking lot. Construction is underway, and we anticipate that the building will be complete by July of this year.

My review of the events of 1997 would be incomplete without a mention of the tragedy in Colebrook. We mourn the death of two state troopers, a newspaper editor, and one of our judges. With the death of Vickie Bunnell, the court system lost a dedicated and caring judge, and the bar association lost a bright, energetic, and committed attorney and advocate. Vickie Bunnell affected the lives of countless people in the North Country and throughout our State. She made the North Country and New Hampshire a better place to live. We will not forget her.

Finally, I would like to discuss an issue that I believe should be of concern to all citizens of the State. As lawyers, you understand better than most, the role of the Judicial Branch in our society -- to resolve disputes -- both civil and criminal - with integrity, impartiality, predictability and confidence. Courts are expected to dispense justice in cases large and small, celebrated and unknown, and to do so efficiently, fairly and consistently. Citizens appearing before our courts are entitled to "equal justice under law," no matter who they are or whether their cause is popular.

Some of the issues that come before the courts are controversial. Courts are called upon to limit and define the proper role of government in our lives, and to protect the rights of all citizens from the potential excesses of temporary political majorities. Given the frequently contentious nature of such cases, we are not surprised that people sometimes disagree with our decisions or that a particular decision is unpopular.

This is not to say that the court system doesn't make mistakes. As human beings, we are fallible. Criticism of a court decision is not necessarily bad. It can be a healthy and valuable part of the democratic process. We in the judiciary must ensure that ***meritorious complaints*** and criticisms are addressed.

But critics go too far when they fail to acknowledge the proper role of the courts in resolving the disputes that come before them. They go too far when they question the motives of judges and seek to generate hostility toward the judiciary. Recent public commentary describes judges of the New Hampshire Supreme Court as tyrannical and at least one of their decisions as illegitimate. When the court is interpreting our Constitution, the statutes passed by our Legislature, or court rules, it is performing the essence of the judicial function - interpreting the law. Criticizing that interpretation is healthy for, and a part of, a democratic society. What is not appropriate, and what I speak out against today, is miscasting the judicial role as tyrannical or illegitimate. Such criticism is dangerous in a free society, for it will erode public respect for and confidence in the judicial system and the rule of law, which are the foundation of our society.

As lawyers, your training and education focuses on the rule of law, and the role of an independent judiciary in our scheme of constitutional government. Because you have this knowledge, I would encourage you to explain the role of the courts and the importance of the rule of law whenever you believe that the courts are being unfairly criticized.

Now that I have completed updating you on developments within the past year and have discussed the role of courts in our society, I have some up to the moment news. As I speak, the court is issuing its opinion on the proposed Public Protection Fund Rule, upon which we solicited comments and heard oral argument last spring. The decision was not an easy one since the court knew the membership was divided on this issue. Valid arguments were raised pro and con. After considerable discussion, the court has decided to promulgate the Public Protection Fund Rule. We consider the fund to be the collective responsibility of all dues-paying members of the bar, whether active or inactive; private practice, public practice, or corporate practice; judge or practitioner. We all have the duty to protect the public from the few of our membership who have acted criminally with respect to client funds. As we stated in the opinion:

> *Recently, the legal profession has received considerable criticism, much of it unfair, following the actions of a few corrupt members of the bar. Dispelling these misconceptions and rejuvenating public confidence is in the interest of all lawyers. This important task will be made easier by the creation of the Public Protection Fund.*

Contributions to the fund range from $5 annually for inactive retired members to $50 for those who have been members of the association for more than five years. The contributions will be payable with your dues on or before July 1. Now that this difficult decision has been made, I trust we will all put aside our differences on this issue, work to make the fund a success in protecting the public, and be vigilant to the unscrupulous conduct of the few among us who have made the fund necessary. That vigilance can protect the public and ourselves by keeping claims on the fund to a minimum.

Thank you.

FILE COPY

New York State Bar Journal
March/April 1997

Should the Rules be Changed to Allow Judges to Respond to Criticism?

By Abraham G. Gerges*

An independent and honorable judiciary is indispensable to justice in our society.

(Code of Judicial Conduct, Sec. 100.1).

A judge shall abstain from public comment about a pending or impending matter in any court...

(Code of Judicial Conduct, Sec. 100.3(a)(6)).

A judge shall be unswayed by partisan interests, public clamor, or fear of criticism.

(Code of Judicial Conduct, Sec. 100.3(a)(1)).

A judge shall respect and comply with the law and shall conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

(Code of Judicial Conduct, Sec. 100.2(a)).

In recent months there has been intense public interest in and scrutiny of a number of judicial decisions. Judges are quite correctly held to a higher standard of behavior than other public officials. They face daunting challenges daily and are not immune to making mistakes despite their best efforts. Recent media criticism of the judiciary and controversy surrounding some judges and judicial decisions highlights the sad fact that the public is generally not knowledgeable about our justice system and the function of a judge.

A judge is a special category of public servant. Judges are called upon to interpret the law and to insure that the rights of citizens are recognized and respected. Sadly, current criticism of the judiciary is not combined with an understanding of the problems they are called upon to resolve, and the many constraints under which they work. Judges understand only too well public frustration at unpopular decisions. In a courtroom there are clearly two sides to every case. It is the judiciary's difficult task to decide how best to protect the rights of all parties in each particular case.

Judges are constrained by the boundaries of a case and by precedent. They depend upon many sources of information about each case before them. Judges labor under ever-increasing caseloads. This affords them little time in which to come to decisions; yet, they make thousands of decisions yearly. If the information given to a judge is inaccurate or incomplete, mistakes can surely happen.

In the wake of such intense media scrutiny of the judiciary it maybe appropriate to reexamine the rule prohibiting judges from comment. It is axiomatic that citizens should be fully informed regarding matters of public interest and importance. Wouldn't the public, therefore, be better informed if judges could comment on the legal basis for a particular decision?

In many instances, especially of late, media attention is slanted in the most headline-grabbing fashion. When mistakes occur, there is a great hue and cry in the newspapers as well as a good deal of finger-pointing. Essential facts are ignored or omitted. There are many nuances to a criminal proceeding and the subtleties are lost in the summaries compiled for the quick sound-bite. Is the public interest served by such distortion? Public confidence in government as a whole and in the judiciary in particular is, thereby, eroded.

In recent years the proliferation of television news programs, Court TV and the coverage of the OJ Simpson trial has brought judicial proceedings before millions of American viewers. To a great extent video and television coverage distorts the very process it attempts to convey. Unfortunately, the parties involved often tend to play to the cameras.

Since these canons regarding the Code of Judicial Conduct went into effect, times have changed and so has public sentiment. There has been a general erosion of public confidence in the competency of its government and in its judiciary. Each unfortunate instance of judge-bashing further exacerbates the problem. In this way, the public gets some very mistaken impressions. Education, perhaps in the form of judicial comment and response to criticism, might ameliorate some of the problems. For this reason, it seems essential that we reexamine these prohibitions.

* **Abraham G. Gerges** is a New York State Supreme Court Justice in Brooklyn, New York

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Remarks of Chief Justice David A. Brock

FILE COPY

Communities and Courts

1998 William H. Rehnquist Award Dinner

October 26, 1998

U.S. Supreme Court

Washington, D.C.

I am delighted to be with you this evening as we bestow the prestigious William H. Rehnquist Award on a distinguished member of our State judiciary. In doing so, we also celebrate the accomplishments of our state courts which, with the highly professional support of the National Center for State Courts, continue to make great progress in improving the quality of justice available to our Nation's citizens. Among other organizations deserving of our recognition are the State Justice Institute, the Institute for Court Management, and the American Judicature Society.

The Rehnquist award honors those who have promoted innovations of national significance to the state courts. And if you look at the accomplishments of those who have received the award, you'll notice one recurring theme--all have, in some way, worked to make their state court more responsive to the community it serves. Make no mistake about it--our continuing progress requires that our court systems, judges and staff alike, commit themselves to improving their connection to their communities and to improving their court's humanity.

We hear frequently on the news that the Internet is creating a global community. How anyone with access to a computer and a telephone line has the world at his or her fingertips. How your neighborhood can extend from Concord, New Hampshire, all the way to London, Paris, Istanbul, and beyond.

But innovations, no matter how beneficial, often have their downside. Recent studies show that, despite the inescapable benefits of our increasingly wired world, spending too much time online can actually increase our feeling of isolation. Imagine--the more time you spend in our electronic, global community, the more alienated from your own immediate community you can become. The resulting paradox is that the closer our more efficient, high-speed communications bring us, the farther apart we become.

Why? Because we still need that personal connection with others. We need the humanizing benefits of personal contact.

In this sense, I ask, have our courts spent too much time "online"? -- talking with one another. We know that we have made great strides in streamlining our operations and in making the courts more efficient during the twentieth century. During the past few decades, unification and consolidation of court systems has been in vogue.

No one will argue that making courts more efficient is a bad thing. Reducing delay and getting control of our caseloads are central to efficient court operations. But like the computer users who spend most of their waking hours online, are our courts, in their quest for efficiency, becoming too distant from the public and the communities they serve? Are they losing their humanity?

Many of our citizens suspect that this is so. **A Gallop poll published in the *ABA Journal* in 1994 indicated that only 15 percent of the public believed that our courts were meeting society's needs then or would do so in the future.** Many who work in the courts have similar misgivings. At the National Conference on the Future of the State Judiciary in 1996, 87 percent of the participants believed that the greatest challenge facing the state courts is strengthening our relationship with the public. They described this -- the need to strengthen court-community relations -- as the #1 priority for the judiciary.

The public, much earlier, had sent strong signals that they expected their court systems to be more accountable. For instance, in the sixties and seventies, large numbers of citizens participated in the justice system, whether invited or not, through court-watching programs. These decades also saw the creation of judicial discipline commissions and an array of court advisory committees with public representation. These were largely means by which the public could communicate their concerns to the courts.

There is another development in the judiciary which bodes well for keeping -- or in some cases reinstituting -- its connection with the public. During my 22 years on the bench, I have observed a remarkable transformation--a sea-change--in the role expected of our judges and courts. *The judge of thirty years ago worked in a protected, cloistered atmosphere -- one marked by judicial provincialism and formality. He, and it almost always was a he, was reluctant to emerge from his chambers to involve himself in the* ***family and social problems confronting the people*** in their daily lives. Courts refused to employ either formal or informal Alternative Dispute Resolution mechanisms to respond to the needs of our citizens and businesses to have their disputes resolved in a timely and economical fashion. This was the norm and accepted.

As time moved on, however, society demanded more of its courts and judges. **The Chief Justice of Connecticut Ellen Peters, addressing the American Law Institute, in 1992, described this change:**

> **"The reality for state courts today is that the delivery of social services has become a major part of our judicial and administrative responsibilities. It is a commonplace among state court judges that we increasingly find ourselves engaged not only in adjudicating court cases but in providing ancillary social services to families, to the elderly, to victims, to all those who need structural assistance in coping with societal demands."**

More and more, our courts are called upon to deal with society's seemingly intractable problems; all too frequently involving drug abuse and domestic or juvenile violence.

The era of therapeutic justice has now taken hold, requiring the highest degree of intergovernmental, interbranch and interdisciplinary communication and cooperation if we in the judiciary are to be relevant to and meet the expectations of the public we serve.

With this development we have also learned the value of specialization. Some categories of cases, particularly in the area of family law and drug abuse, became marginalized in central courthouses. These and other types of so-called lesser cases were forced to compete for priority with larger criminal and civil dockets for judicial and staff attention.

What we know now, and this is reflected by the rise of specialized calendars or dockets for family law and drug cases, is that these cases require close judicial attention--and judges of a particular temperament and specific expertise. Families and defendants involved in these cases can benefit from a direct relationship with their judges both during and after adjudication.

Fortunately, the National Center has been helping the state courts to prepare for this new era for some time. For example, the *Trial Court Performance Standards,* published in 1990, outline the essential mission of a court. In particular, the *Standards* provide "an authoritative framework within which courts and communities can discuss why they should and how they can collaborate." They provide a way to measure and improve court performance in five essential areas, with the first four areas—public access, timeliness, fairness, and accountability--being essential to the fifth--public trust and confidence. The end result of applying the standards is a court system that is not only relevant to the needs of the public, but has as its hallmark humanity.

Public trust and confidence is what court and community collaboration comes down to; after all, if the public is to trust the courts, the courts must show that they trust the public. The Conference of Chief Justices recognizes this fact, and stated so in a resolution passed at its 1997 annual meeting on "Realizing the Potential of Community-focused Courts." Success in promoting court and community collaboration, and, as a consequence, building public trust and confidence, is why we are honoring Presiding Judge Veronica Simmons McBeth this evening.

Wisconsin Chief Justice Shirley Abrahamson, in her opening remarks at the first National Town Hall Meeting on court and community collaboration in 1995, charted our future course well when she said:

> **Court and community collaboration is a sustained, two-way commitment to ensuring that the justice system is open and effective for all. It is not a one-shot event aimed at solving one isolated problem or satisfying one special interest group.**

Let us never forget that the courts are an institution not only of laws and rules, but also of and for the people.

Voting Sheets

HOUSE COMMITTEE ON JUDICIARY

EXECUTIVE SESSION on CACR 22

BILL TITLE: **relating to 7-year terms for state judges. Providng that all state judges appointed on or after January 1, 2001 be commissioned for 7-year terms, which may be renewed.**

DATE: 3/23/99

LOB ROOM: 208

Amendments:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, ITL, Re-Refer, Interim Study (Please circle one.)

Moved by Rep. Mithee

Seconded by Rep. Rivard

Vote: (Please attach record of roll call vote.)

Motions: OTP, OTP/A, ITL, Re-Refer, Interim Study (Please circle one.)

Moved by Rep. [illegible]

Seconded by Rep. [illegible]

Vote: (Please attach record of roll call vote.)

CONSENT CALENDAR VOTE:

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. Loren J. Jean, Clerk

JUDICIARY 1999 SESSION

CACR-22 Bill #

Public Hearings _____ Executive Session ✓

COMMITTEE REPORT: _____

	YEAS	NAYS
Mock, Henry P, Chairman	✓	
Peterson, Andrew R, V Chairman	✓	
Jacobson, Alf E		✓
Keans, Sandra B		✓
Bergin, Peter F	✓	
Dokmo, Cynthia J	✓	
Jean, Loren J, Clerk	✓	
Rowe, Robert H	✓	
Ford, Nancy M		✓
Withee, Dennis J	✓	
Dudley, Terri C	✓	
Picconi, Al J	✓	
Soltani, Tony F		
Woods, Phyllis L	✓	
Wall, Janet G	✓	
DePecol, Benjamin J		✓
Pratt, John M		✓
Craig, James W		
Lasky, Bette R		✓
Mitchell, McKim W		✓
Solow, Martha S		
Wood, Jane		✓
TOTAL VOTE	11	8

Appeared in Favor | Appeared in Opposition

Committee Report

COMMITTEE REPORT

COMMITTEE: **Judiciary**

BILL NUMBER: **CACR 22**

TITLE: relating to 7-year terms for state judges. Providng that all state judges appointed on or after January 1, 2001 be commissioned for 7-year terms, which may be renewed.

DATE: March 24, 1999 CONSENT CALENDAR YES ☐ NO ☒

☐ OUGHT TO PASS

☐ OUGHT TO PASS WITH AMENDMENT

☐ INEXPEDIENT TO LEGISLATE

☒ RE-REFER

☐ REFER TO COMMITTEE FOR INTERIM STUDY
(Available only in second year of biennium.)

STATEMENT OF INTENT
(Include Committee Vote)

This amendment seeks to change the constitution so that judges must be re-appointed, commissioned, and sworn to subsequent 7-year terms. Excellent testimony supporting both sides of the issue was received and considered by the committee. Since the committee will be studying similar legislation this summer, the majority voted to have the contents of CACR 22 as part of its judicial reform package. The minority of the committee believes that this amendment should be found ITL because the house has already re-referred HB 53 which contains similar material.

Vote 11-8.

Rep. Dennis J. Withee
FOR THE COMMITTEE

Original: House Clerk
cc: Committee Bill file

USE ANOTHER REPORT FOR MINORITY REPORT

Judiciary

CACR 22, relating to 7-year terms for state judges. Providng that all state judges appointed on or after January 1, 2001 be commissioned for 7-year terms, which may be renewed. RE-REFER

Rep. Dennis J. Withee for **Judiciary:** This amendment seeks to change the constitution so that judges must be re-appointed, commissioned, and sworn to subsequent 7-year terms. Excellent testimony supporting both sides of the issue was received and considered by the committee. Since the committee will be studying similar legislation this summer, the majority voted to have the contents of CACR 22 as part of its judicial reform package. The minority of the committee believes that this amendment should be found ITL because the house has already re-referred HB 53 which contains similar material. Vote 11-8.

COMMITTEE REPORT

COMMITTEE: **Judiciary**

BILL NUMBER: **CACR 22**

TITLE: relating to 7-year terms for state judges. Providng that all state judges appointed on or after January 1, 2001 be commissioned for 7-year terms, which may be renewed.

DATE: 3/23/99 CONSENT CALENDAR YES ☐ NO ☑

☐ OUGHT TO PASS

☐ OUGHT TO PASS WITH AMENDMENT

☐ INEXPEDIENT TO LEGISLATE

☑ RE-REFER

☐ REFER TO COMMITTEE FOR INTERIM STUDY
(Available only in second year of biennium.)

STATEMENT OF INTENT
(Include Committee Vote)

Vote {Type VOTE}. 11 – 8

Withee

Rep. {Type NAME}
FOR THE COMMITTEE

Original: House Clerk
cc: Committee Bill file

USE ANOTHER REPORT FOR MINORITY REPORT

CACR 22 RE REFER

Rep. Dennis J. Withee

→ This amendment seeks to change the constitution so that judges must be re-appointed, commissioned and sworn to subsequent 7 year terms.

→ Excellent testimony supporting both sides of the issues was received and considered by the committee. Since the committee will be studying similar legislation this summer, the majority voted to have the contents of CACR 22 as part of its judicial reform package.

→ The minority of the committee believes that this amendment should be found ITL because the house has already re-referred HB53 which contains similar materials. The minority does not ~~support~~ ~~have any objection~~ to the re-referral.

OR HOUSE

Both sides of the committee felt that, although a significant minority favored killing the bill, it should be among the issues included in the ~~study~~ ordered judicial study slated for this summer.

COMMITTEE REPORT

COMMITTEE: **Judiciary**

BILL NUMBER: **CACR 22**

TITLE: relating to 7-year terms for state judges. Providng that all state judges appointed on or after January 1, 2001 be commissioned for 7-year terms, which may be renewed.

DATE: October 20, 1999 CONSENT CALENDAR YES ☐ NO ☒

☐ OUGHT TO PASS

☐ OUGHT TO PASS WITH AMENDMENT

☒ INEXPEDIENT TO LEGISLATE

☐ RE-REFER

☐ REFER TO COMMITTEE FOR INTERIM STUDY
(Available only in second year of biennium.)

STATEMENT OF INTENT
(Include Committee Vote)

This bill was studied by a subcommittee this summer. The subcommittee and a majority of the full committee felt that this bill was not good for the judicial process or for the retention of competent judges. The prospect of having to undergo a reappointment process could interject the political process into decision-making by a judge and the committee feels that judicial decisions must be made as independently as possible. Further, it would be difficult for top grade candidates to give up a law practice to sit as a judge knowing that they may be out of work in seven years just at the time when they may be facing family student tuition and other personal expenses.

Vote 13-3.

Rep. James W. Craig
FOR THE COMMITTEE

Original: House Clerk
cc: Committee Bill file

USE ANOTHER REPORT FOR MINORITY REPORT

Judiciary

CACR 22, relating to 7-year terms for state judges. Providng that all state judges appointed on or after January 1, 2001 be commissioned for 7-year terms, which may be renewed. INEXPEDIENT TO LEGISLATE

Rep. James W. Craig for **Judiciary:** This bill was studied by a subcommittee this summer. The subcommittee and a majority of the full committee felt that this bill was not good for the judicial process or for the retention of competent judges. The prospect of having to undergo a reappointment process could interject the political process into decision-making by a judge and the committee feels that judicial decisions must be made as independently as possible. Further, it would be difficult for top grade candidates to give up a law practice to sit as a judge knowing that they may be out of work in seven years just at the time when they may be facing family student tuition and other personal expenses. Vote 13-3.

COMMITTEE REPORT

COMMITTEE: **Judiciary**

BILL NUMBER: **CACR 22**

TITLE: relating to 7-year terms for state judges. Providng that all state judges appointed on or after January 1, 2001 be commissioned for 7-year terms, which may be renewed.

DATE: October 20, 1999 CONSENT CALENDAR YES ☐ NO ☒

☐ OUGHT TO PASS

☐ OUGHT TO PASS WITH AMENDMENT

☒ INEXPEDIENT TO LEGISLATE

☐ RE-REFER

☐ REFER TO COMMITTEE FOR INTERIM STUDY
(Available only in second year of biennium.)

STATEMENT OF INTENT
(Include Committee Vote)

This bill was studied by a subcommittee this summer. The subcommittee and a majority of the full committee felt that this bill was not good for the judicial process or for ~~reelection and~~ retention of judges. The prospect of having to undergo a reappointment process would interject the political process into decision-making and the committee feels that judicial decisions must be made as independently as possible. Further, it would be difficult for top grade candidates to give up a law practice to sit as a judge knowing that they may be out of work in seven years when they may be facing student tuition and other personal expenses.

Vote 13-3.

Rep. James W. Craig
FOR THE COMMITTEE

Original: House Clerk
cc: Committee Bill file

USE ANOTHER REPORT FOR MINORITY REPORT

SCACR 22 RELATING TO SEVEN YEAR TERMS FOR STATE JUDGES. INEXPEDIENT TO LEGISLATE

THIS BILL WAS STUDIED BY A SUBCOMMITTEE THIS SUMMER. THE SUBCOMMITTEE AND a majority of the FULL COMMITTEE FELT THAT THIS BILL WAS NOT GOOD FOR THE JUDICIAL PROCESS OR FOR selection and retention of JUDGES. THE PROSPECT OF HAVING TO UNDERGO A REAPPOINTMENT PROCESS WOULD INTERJECT THE POLITICAL PROCESS INTO DECISION MAKING AND THE COMMITTEE FEELS THAT JUDICIAL DECISIONS MUST BE MADE AS INDEPENDENTLY AS POSSIBLE. FURTHER, IT WOULD BE DIFFICULT FOR TOP GRADE CANDIDATES TO GIVE UP A LAW PRACTICE TO SIT AS A JUDGE KNOWING THAT THEY MAY BE OUT OF WORK IN SEVEN YEARS WHEN THEY MAY BE FACING STUDENT TUITION AND OTHER PERSONAL EXPENSES.

J. Craig Hall

COMMITTEE REPORT

COMMITTEE: Judiciary

BILL NUMBER: CACR 22

TITLE:

DATE: 10/20/99 CONSENT CALENDAR: YES ☐ NO ☑

☐ **OUGHT TO PASS**

☐ **OUGHT TO PASS W/ AMENDMENT**

☑ **INEXPEDIENT TO LEGISLATE**

☐ **RE-REFER**

☐ **INTERIM STUDY** (Available only 2nd year of biennium)

Amendment No. _____

STATEMENT OF INTENT:

Same

COMMITTEE VOTE: 13 - 5

- **Copy to Committee Bill File**
- **Use Another Report for Minority Report**

RESPECTFULLY SUBMITTED,

Rep. Craig
For the Committee

Rev. 07/30/99

JUDICIARY 1999 SESSION

CACR 22 Bill #

Public Hearings Executive Session

COMMITTEE REPORT: Ought To Pass

	YEAS	NAYS
Mock, Henry P, Chairman	✓	
Peterson, Andrew R, V Chairman	✓	
Jacobson, Alf E	✓	
Keans, Sandra B	✓	
Bergin, Peter F	✓	
Dokmo, Cynthia J		
Jean, Loren J, Clerk		✓
Rowe, Robert H		
Ford, Nancy M		
Withee, Dennis J	✓	
Dudley, Terri C		
Picconi, Al J	✓	
Soltani, Tony F		✓
Woods, Phyllis L		✓
Wall, Janet G		
DePecol, Benjamin J		
Pratt, John M	✓	
Craig, James W	✓	
Lasky, Bette R	✓	
Mitchell, McKim W	✓	
Solow, Martha S	✓	
Wood, Jane	✓	
TOTAL VOTE	13	3

Appeared in Favor	Appeared in Opposition