STATEMENT OF BERTRAM R. GELFAND

AT

PUBLIC HEARING ON JUDICAL CONDUCT AND DISCIPLINE

HELD AT

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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My name is Bertram R. Gelfand. Until July, 1987 I was Judge of the Surrogate's Court , Bronx County. Even prior to my own experience with the State Commission on Judicial Conduct, as a member of the Judicial Conference of the State of New York I harbored an interest in the obvious deficiencies in the State Commission as a fair, effective and non-political instrument for immunizing our Courts from corruption and impropriety.

It is impossible to have a fair and effective monitoring of judicial conduct when the sole agency charged with this function is seriously flawed, both in structure and in operation. Bluntly, the State Commission on Judicial Conduct has been for many years an exercise in institutional corruption. It is able to function in this manner because it is ensconced in a statutory structure under which its operations are not subject to oversight by any agency of government, legislative, executive, or judicial, nor is its operation open to public scrutiny. The only single curb upon its unfettered authority is that in those few cases where it takes public action, this public action is subject to a review being sought from the Court of Appeals. No other aspect of its

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operation, including the refusal, without stated reason, to investigate a complaint, is subject to any review, oversight, or demand for an explanation.

The State Commission on Judicial Conduct has unfettered authority to arbitrarily determine, *in camera* what cases it will pursue and what matters it will ignore. No other agency in a democratic society, with governmental responsibility, has such unfettered power. Even the Central Intelligence Agency, with its highly sensitive responsibilities involving foreign espionage, is subject to its internal operations being examined by select committees of the United States House of Representatives and the United States Senate.

The capacity for power cliques and staff to misuse the State Commission's unusual powers is enhanced by the body itself consisting of part-time individuals from throughout the state. This creates the necessity for reliance on staff and allows actual power in the Commission to rest excessively in staff and lawyer-members of the Commission from the City of New York.

In December, 1989, the then Comptroller of the State of New York, Edward V. Regan, was publicly critical of the absence of oversight over the State Commission's operations and its immunity from audit. His comments were met by a vehement defense of the Commission by then Chief Judge Wachtler. By that time Judge Wachtler had evolved from a critic of the Commission into a vociferous protector of its unique ability to suppress complaints when it chose to so proceed.

In 1989, the Committee on Modern Courts reported that between 1978 and 1989 the Commission had secretly disposed of 312 actual findings of judicial

misconduct without any of these findings being subject to any oversight. There is no way of telling how many thousands of allegations of misconduct it had suppressed by simply not acting on complaints.

In the brief time allotted me, I present to you three illustrative cases characteristic of Commission failure:

The first involves Rudolph L. Mazzei. He was a District Court Judge who by assignment exercised criminal jurisdiction for many years in Suffolk County Court. The Commission first addressed his gambling problems, money problems, and open association with known persons of questionable character with a private letter of admonition. Despite the clear integrity questions presented by the initial information before it, the Commission chose to permit Judge Mazzei to continue to exercise jurisdiction in criminal matters, and to not shine public light on what it concluded was improper conduct. Complaints as to his conduct continued to be presented to the Commission. It dragged its feet in the matter until December 23, 1992, eight days before Judge Mazzei was due to leave office due to the expiration of his term on December 31, 1992. In an after the fact decision, that it delayed until it was meaningless, it found Judge Mazzei totally unfit for judicial office and removed him from the Bench. What was not apparent in the December 23, 1992 display of false sanctimony is that for over two years the Commission had avoided appropriate action in the *Mazzei* case, while he continued to exercise jurisdiction in criminal cases. The belated decision to remove him, at a point when removal meant nothing, came only in response to media questioning as to why the Commission had not acted on the case.

Presently no one has the power to inquire into why the Commission chose to protect Judge Mazzei and the veracity of the excuses it may concoct to explain its macabre conduct.

The Commission's course in the Mazzei case was totally consistent with a pattern of tolerance of the use of judicial office to influence determinations by other judges, or in the vernacular of the street, to improperly influence a result. Repeatedly it has found such conduct worthy of no more than, at most, an admonition not to get caught again. Just two of the many other cases illustrative of this are Matter of McGee and Matter of Calabretta. In the McGee case a Bronx Supreme Court Justice went to the Criminal Court to pressure the Judge and Assistant District Attorney with reference to the disposition of the arrest of his nephew. His explanation of his conduct was found to lack the ring of truth. Lacking the ring of truth is apparently less severe to this Commission than finding "lack of candor", which it frequently uses to sustain removals. Basically what the commission said in that case is that lying is all right, but not being forthcoming is inconsistent with judicial service. In the Calabretta case a Supreme Court Judge persisted in pressuring another Judge with reference to a case in which his cousin was counsel. Among the suspect aspects of the McGee and Calabretta cases, and the Commissions tolerance of attempts to fix judicial dispositions, is that both of these judges involved had civil jurisdiction in Court's where the firm of the Commissions long time member, and briefly Chairman, was viewed as enjoying special status in the exercise of his firm's primary area of practice as a negligence defense firm. The firm also blossomed from negligence into trusts and

estates after the Commission pursued several favorable courses involving complaints against New York County Surrogate Marie Lambert. The details on this can be presented, but would take more time then is available today.

The second illustration involves Francis M. Pecora. He was a New York County Civil Court Judge, sitting as an Acting Supreme Court Justice in New York County. While complaints against Justice Pecora were pending before the Commission, he assigned a receivership to Commission Chairman John J. Bower and awarded him a fee of $7.7 million dollars for less than one month's work. The reduction of this fee by the Appellate Division by only approximately 35 percent, is itself a tribute to the fear of the power of Mr. Bower. The fee fixed by Justice Pecora was 60 times the largest fee ever previously fixed in a receivership in New York County. The case even being assigned to Justice Pecora, so that he could assign Mr. Bower, involved a whole complex of apparent irregularities that should have been investigated by the Commission, and were ignored. When the matter became public Mr. Bower resigned from the Commission. His resignation came a mere three months after he had succeeded Victor Kovner, another Manhattan power broker, as chairman. Justice Pecora retired from the Bench before the expiration of his term. The window into the multiple highly questionable acts surrounding this assignment were never explored by the Commission. The scope of what was ignored by the Commission in this case is well summarized in the comment of then Supreme Court Justice James Leff:

> "Any person familiar with the Court system must have a queasy feeling about the system's integrity when they have described to them the razzle dazzle that went into the selection of the trial Judge in this case."

Lorraine Backal was a Bronx County Civil Court Judge sitting as an Acting Supreme Court Justice. She was belatedly "removed" by the Commission after she had resigned. Her resignation came after the disclosure of FBI gathered information about her involvement with drug dealers and money laundering. Her belated "removal" followed a long history of the Commission not only failing to investigate numerous items of misconduct involving her, but in overtly lending itself to affirmatively assist her in furthering her ambitions to achieve judicial office. Proper inquiry into Backal would have touched on delicate subjects like buying judgeships, why the Commission affirmatively assisted her quest for judicial office, her relationship with a powerful administrative judge, the deluge of lucrative assignments she received from Surrogate Lambert, that were not publicly reported as required by the applicable rules, and why she was pushed so persistently for elevation from the Civil Court to the Supreme Court as an Acting Justice, despite her known limited competence, laziness, and absenteeism.

The Commission handled the Backal matter in a highly unusual manner patently designed to prolong her tenure on the Bench and immunize her from testifying under oath. Even after the FBI disclosures the Commission did not

exercise its power to force Judge Backal to testify under oath or face removal for refusing to testify. Instead it permitted her to remain on the Bench and her investigation to languish, while it followed the unusual practice of allowing her and her lawyers to answer Commission questions with unsworn and patently false responses. This was a practice not followed in other cases and immunized Backal from prosecution for perjury. The apparent reasons for the Commission choosing to prolong this associate of criminals on the Bench is a subject whose complete explanation would take more time than is here available. The handling of Backal hardly supports the existence of the Commission as the keeper of judicial virtue, nor is it supportive of the integrity of its administration.

RECOMMENDATIONS

1. To accurately address all of the flaws in the Commission's performance, and arrive at a structure of optimum integrity and effectiveness, requires the appointment of a special prosecutor empowered by the Legislature to examine the extent to which the present structure has lent itself to corruption. This special counsel should examine the past conduct of the Commission and review the extent to which its vast powers have been used for purposes which if not in fact criminal, have fausted, protected, and promoted corruption.

2. Legislation should be enacted that allows legislative and executive oversight into the operations of the Commission. This can be achieved without jeopardizing the privacy of jurists who are the object of unjust accusations. Oversight as to the CIA has been achieved without jeopardizing national security. Oversight of the Commission is achievable without jeopardizing the rights of judges.
3. Without identifying judges it should be mandated that the Commission indicate in writing the reason why it declines to investigate a matter. At the present time it simply need state to the person lodging the complaint that the Commission has determined that the matter should not be pursued.
4. In its annual reports the Commission should no longer bunch in a single category dismissed complaints as to Appellate Division Justices and Judges of Court of Appeals. This practice of the Commission precludes insight into the extent that it is dismissing matters involving the only Judges who can criticize its performance, decisions, and methods. Upon information and belief past and present members of the Court of Appeals may have had significant conflicts of interest in reviewing the conduct of the State Commission on Judicial Conduct.
5. The term of Commission members should be staggered with no person serving more than five years on the Commission. This will

prevent the development of self serving power structures in which members of the Commission use their membership to enhance their business interests.

6. Referees who hear the formal complaints lodged against Judges by the Commission should be selected at random from a list. At the present time the Commission has the sole power to arbitrarily select who adjudicates its cases. I know of one case in which the Commission chose a Referee who was of counsel to a firm representing a Judge who the Commission was seeking to remove from office. This Judge was a friend of the Referee. After the Referee had performed his task under questionable circumstances, not the least of which was improperly supplying the Commission staff with an advance copy of his decision, the Referee's friend was let off with a slap on the wrist.

In closing I would like to state that you may wonder why on a subject so critical to the professional life and death of jurists it is so difficult to obtain public input from sitting judges. I can assure you the commission is a subject that is frequently, deeply and regularly discussed by sitting judges in privacy. These judges fear to express their views in public. This understandable timidity is evidenced by a comment made to me by the Commission's Administrator Gerald Stern. His comment was that he has a file on every judge in the State and that he can get any judge of any

court at any time. He warned me that trial judges should not draw any security from the review authority of the Court of Appeals.

I thank you for this opportunity and will be happy to answer any questions, or to provide this committee with further information. I assure you that I possess a vast amount of material that could support beyond a reasonable doubt the testimony that I have presented today.