

---

# The State of Wisconsin

## LEGISLATIVE REFERENCE BUREAU

201 North, State Capitol  
Madison, Wisconsin 53702

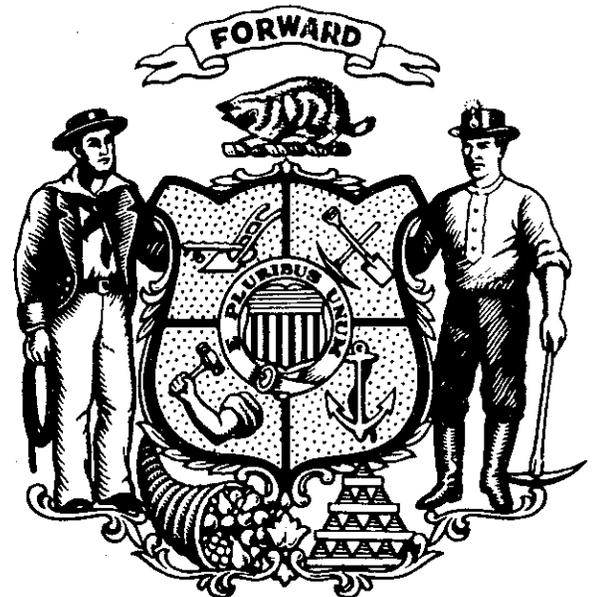
Telephone Area Code 608  
Reference: 266-0341  
Bill Drafting: 266-3561

Dr. H. Rupert Theobald, Chief

## THE POWERS OF THE WISCONSIN SUPREME COURT

Research Bulletin 76-RB-1

JANUARY 1976



# THE POWERS OF THE WISCONSIN SUPREME COURT

## Table of Contents

	<i>Page</i>
I. THE QUESTION AND THE CONTROVERSY .....	1
The Question .....	1
The Controversy .....	1
1. Supreme Court Order on Judicial Districts .....	1
2. The Supreme Court Budget .....	2
3. The Judicial Code of Ethics .....	3
4. New Rules of Civil Procedure .....	3
5. Regulation of the Bar .....	3
II. WISCONSIN LAW AND PENDING LEGISLATION .....	4
Wisconsin Constitutional Provisions .....	4
Constitutional Conventions: Debate on the Judicial Article .....	5
Wisconsin Statutory Provisions .....	6
History of Statutory Provisions .....	7
1975 Legislation .....	8
III. FEDERAL AND STATE LAWS ON SUPREME COURT RULE-MAKING AND MANAGEMENT AUTHORITY .....	11
Constitutional Provisions .....	11
1. Federal .....	11
2. Other States .....	11
Statutory Provisions .....	15
1. Federal .....	15
2. Other States .....	15
IV. THE SEPARATION OF POWER .....	22
What Is the Separation of Power? .....	22
The Federalist .....	22
Wisconsin Constitutional Conventions .....	22
The Doctrine Today .....	23
V. THE JUDICIAL POWER .....	24
What Is the Judicial Power? .....	24
Wisconsin Supreme Court Decisions .....	25
1. Decisions relating to Judicial Power Generally .....	25
2. Decisions relating to Superintending Control .....	27
3. Decisions relating to Rules of Pleading, Practice and Procedure .....	33
4. Decisions relating to Regulation of the Bar .....	35
Supreme Court Decisions of Other States .....	38
U.S. Supreme Court Decisions .....	40
VI. THE BUDGETARY RELATIONSHIP OF THE THREE BRANCHES .....	42
Wisconsin .....	42
Other States .....	46
The Federal Government .....	48
VII. CONCLUSION .....	48
VIII. SOURCES .....	51

## THE POWERS OF THE WISCONSIN SUPREME COURT

### I. THE QUESTION AND THE CONTROVERSY

#### The Question

How much power does the Supreme Court of Wisconsin possess under the separation of powers doctrine? In its recent activities has the court encroached upon legislative and executive functions, or have the legislative and executive branches encroached upon judicial functions?

Several incidents have occurred during 1975 which have caused renewed interest in and discussion of the powers, particularly the rule-making powers, of the Wisconsin Supreme Court. The main point of controversy has been the order issued by the court creating administrative districts for the trial courts of the state. Other disputes have arisen, however, over the extent to which the governor and the legislature can exercise control over the court's budget and over new codes of ethics and of civil procedure promulgated by the court.

Since the creation of the United States Constitution in 1787, the doctrine of the separation of powers has been a vital part of American governmental structure. Separation of powers has been incorporated into the several state constitutions, including the Wisconsin Constitution of 1848. Nevertheless, although the theory of the separation is seldom questioned, the practice is a constantly shifting and evolving concept which continues to pose many questions. Whether the questions involve presidential impoundment of funds vis-a-vis congressional powers of appropriation, or the extent of the veto power of the governor of Wisconsin, the relationship of the three branches — legislative, executive and judicial — to each other on both the national and state levels is subject to frequent debate. Maintaining a balance between the branches and preventing the encroachment of one on the others require ongoing scrutiny and delicate adjustments.

This study cannot purport to answer these questions, but will — in the hope of contributing toward a clarification of the issues — summarize the history of the relationship of the supreme court in this state to the other branches of state government under the separation of powers doctrine.

#### The Controversy

##### 1. Supreme Court Order on Judicial Districts

On June 30, 1975, the Wisconsin Supreme Court promulgated rules creating 14 administrative districts for the trial courts of this state. Based upon the recommendations of a study committee appointed by the Chief Justice, they were scheduled to become operational in January 1976. The order caused sufficient comment and criticism in the Wisconsin Legislature to result in the introduction of legislation opposing the new rules. On October 28, 1975, the court postponed the operational date until July 1, 1976 in 11 of the 14 districts.

The court's rules divide the state into 14 administrative districts for the purpose of administering the court system. Each district is constituted a single multi-judge trial court, which includes all the circuit and county courts within the district.

Each multi-judge trial court will have a designated chief judge, who is responsible for administering that court and who will be a member of the court he administers. Provision is also made for a deputy chief judge in each multi-judge trial court and a division presiding judge when the trial court is subdivided into functional multi-judge units. The chief judge is selected by his fellow judges in that multi-judge trial court, and the deputy and division presiding judges by the chief judge.

As administrative chief of the multi-judge trial court, the chief judge will assign judges, manage caseload, establish hours for court operation, appoint court committees, recommend policies and plans to his fellow judges, call and preside over meetings of the entire court, supervise vacation schedules, coordinate attendance by judges and other court personnel at conferences, supervise court finances, and provide for representation of the court in ceremonial functions and in its relations with other branches of government. Within his geographic area the chief judge shall exercise "the full administrative power of the judicial branch of government, subject to the superintending control of the Supreme Court. He shall have full authority to order that his directives and policies, and the rules of the multi-judge trial court be carried out."

In a statement on October 17, 1975, Chief Justice Wilkie asserted that the rules were promulgated "under the inherent and implied power of the Supreme Court and under the superintending power of Article 7, Section 3 of the Constitution, wherein the Supreme Court is established as the head of the judicial branch of government with the responsibility to look after the management of the court's business.

"The rules are an express recognition that the courts must do everything within their power to carry out this responsibility for management of the state's judicial business. As you know, the rules establishing the Judicial Administrative Districts are promulgated within the framework of the number of courts, their jurisdiction both as to geographical area and subject matter, and judicial election districts — all established by statutes enacted by the Legislature.

"The basic concept is to establish a system of trial court management utilizing administrative districts under a chief judge in each district with sufficient authority to carry out effectively his responsibilities."

The Chief Justice noted the great increase in court cases in recent years and concluded that "These rules are designed to meet the management challenge posed by the dual problems of volume and complexity of modern litigation."

Legislative opposition to the court's order was voiced by Representative Harout Sanasarian, who introduced a resolution asking the court to rescind its order. 1975 Assembly Resolution 35 declared the court's action "far exceeds any general superintending power over inferior courts as recognized by article VII, section 3 of the Wisconsin Constitution" and that the constitution "expressly grants to the legislature the power to alter the limits of or otherwise change the judicial circuits..." Proposed constitutional amendments, one by Senator Sensenbrenner and one by Representative Sanasarian, would place restrictions on the Supreme Court's administration of business in the court system.

In postponing the effective date for 11 of the 14 districts, the court indicated on October 28 it would have the benefit of the experiences of the 3 districts where the rules will go into effect as scheduled before proceeding further. Two of the districts have hired trial court administrators with federal funding provided through the state Council on Criminal Justice. Thus, the issue involves not only the court's right to set up the districts, but also its right to incur expenditures not appropriated by the legislature.

Inherent power and superintending control are discussed in detail in Section V of this report.

## 2. The Supreme Court Budget

A near confrontation between the judicial branch on the one hand and the legislative and executive branches on the other occurred in the spring of 1975, when the Governor's budget proposals provided a sum certain rather than the customary sum sufficient for the judiciary. The Governor's budget not only provided for a sum certain, that is, a fixed, specific appropriation for the 1975-77 biennium, but also reduced the size of the appropriation below that recommended by the court. Chief Justice Harold Wilkie maintained "that the court has inherent power to appoint the number of personnel it deems necessary to perform their constitutional functions." He stated that this has been basic doctrine in this and other states for more than a century. He also noted a recent decision of the U.S. Supreme Court which ruled that the state public defender should provide representation for indigents in probation and parole hearings. In order to do this, the state public defender needed more staff. The Wisconsin Supreme Court also intended to hold a hearing on making judicial education mandatory for all judges. A larger staff may be needed to carry out this program. "We will be prevented from carrying out our constitutional authority."

The Joint Committee on Finance, in preparing its version of the budget bill, approved an unrestricted budget for the court. In a compromise with the court, however, the committee agreed not to challenge the constitutional doctrine claimed in return for the Chief Justice's promise to exercise restraint in spending. The Chief Justice said, "The Supreme Court pledges to continue to make every effort to keep its staff to the absolute minimum consistent with its responsibility to insure that justice is administered fairly and expeditiously in the courts of this state." Contending that the court had a good record of fiscal responsibility, he concluded, "We will do our utmost to maintain this record."

Opposition to the court's position was summed up in a *Green Bay Press-Gazette* editorial of April 27, 1975, which raised the questions: "Did the chief justice have a good point in his resistance to control by the executive and legislative branches? Then, why was it not raised during the many years of the 19th Century when the court was definitely limited in its expenditures by legislative act? Should the legislature also have a sum sufficient? The governor? The state secretary of state and all the others? Whatever constitutional theorists may assert, the man in the ranks who pays the steadily rising tax bills will surely vote no."

One legislator, Rep. Marlin Schneider (D.-Wisconsin Rapids) was quoted as saying, "It seems to me if there is a separation of powers, the only power (of the Legislature) over the courts is the power of the purse. If we give up this power and provide a blank check, we are negligent in our duties." On the other hand, Sen. William Bablitch said, "I think there is no question that the court has the inherent authority to hire the personnel to carry out their functions."

Section VI of this report considers the budget question in further detail.

### 3. The Judicial Code of Ethics

Another controversy concerning the Supreme Court's administrative rules has arisen within the judiciary itself over the court's Judicial Code of Ethics. The judiciary has its own ethics code and is not included in the code for public officials enacted by the legislature. Under Rule 17 of the code, adopted by the court on June 28, 1974, judges are required to file annual financial disclosure statements. When a county judge declined to do so, the state Judicial Commission determined that the judge had violated the code and recommended to the court that it take appropriate action to ensure compliance. A hearing was held before the court in September 1975 in which the counsel for the judge maintained that the court lacked constitutional power to enforce its code. Stating that the public disclosure rule could be extended to include all kinds of information, Attorney Richard Cates said: "If you have the authority to order that man to make this disclosure, I challenge you to figure out where that authority ends." Further, "All sorts of personal facts are just as significant as to whether a judge will sit impartially."

Assistant Attorney General Betty Brown, representing the court, said that the court's supervisory power over attorneys was comparable to its inherent superintending power over judges. "I suggest that this court may well have police power...in the economic interests of judges." She contended that the court could punish the county judge for contempt, while Mr. Cates contended that the power of impeachment and removal of a judge lay solely in the legislature.

On November 25, 1975, the Supreme Court, in *In re Kading*, adjudged that Rule 17 is valid and ordered the judge's compliance. The decision is explained in detail in Section V of this report.

In December 1975, the first draft of the proposed conference substitute to the court reform constitutional amendment (1975 Assembly Joint Resolution 11) was issued. It includes a new section of the constitution which would permit the supreme court to reprimand, censure, suspend or remove for cause or disability any justice or judge, but this power would be subject to procedures established by the legislature by law.

### 4. New Rules of Civil Procedure

On February 17, 1975, the Supreme Court announced the adoption of comprehensive Rules of Civil Procedure to be used in Wisconsin courts effective January 1, 1976. A committee of the Judicial Council conducted a four-year study, and the court held two public hearings before promulgating the new rules. In a press release, Chief Justice Wilkie stated that the delay in the effective date was to help attorneys become familiar with the rules and to permit their review by the legislature. This was the first general revision of civil procedures since 1856.

At a Supreme Court hearing on the rules in October 1974, two legislators, Representatives Sensenbrenner and Niebler, questioned whether the court might be going beyond its authority, but the committee chairman, Mr. Reuben Peterson, Jr., said the rules were "purely procedural" and therefore within the court's authority. According to the *Milwaukee Sentinel*, October 22, 1974, Rep. Sensenbrenner said that about 170 specific statutes would be repealed by the rules; but Rep. Niebler said that there was no need for a constitutional confrontation between the court and the legislature. Court rules are discussed in Section V of this study.

### 5. Regulation of the Bar

From time to time during the state's history, dissention has arisen between the judicial and legislative branches over the regulation of attorneys, particularly their admission to the bar. Quite a few Supreme Court decisions have dealt with these matters. Regulation has been both by enacted law and by Supreme Court order. The Supreme Court contends that it possesses the right to regulate the bar and any tolerance on its part of legislative enactment has been purely a matter of comity.

On November 21, 1975, the court issued rules creating a State Board of Continuing Legal Education within the State Bar of Wisconsin. The board is directed to develop rules for mandatory continuing legal education and, after their approval by the Supreme Court, to supervise their administration. At the present time, the idea of continuing legal education for practicing attorneys does not seem to be creating any particular controversy in the legislature, although three justices of the court disagreed with the method for implementing continuing education. Justice Connor T. Hansen, joined by Justice Hanley and R.W. Hansen, advocated an incentive program rather than a

mandatory program. Nevertheless, legislation has been introduced in the 1975 Wisconsin Legislature which would affect the court's control of the bar. One measure would replace the court-appointed bar commissioners with one commissioner appointed by the governor, another would increase the number of nonlawyers on the bar commissioners board, another would replace the board with an examining board in the Department of Regulation and Licensing, while two proposed constitutional amendments would end the court-decreed membership by attorneys in the State Bar of Wisconsin. Section V of this study traces the historical development of bar regulation in this state.

## II. WISCONSIN LAW AND PENDING LEGISLATION

### Wisconsin Constitutional Provisions

The major constitutional provisions concerning the court system in Wisconsin are to be found in Article VII of the Wisconsin Constitution. Sections 2 and 3 of Art. VII are most pertinent as far as specific judicial authority is concerned. The former vests the judicial power in the court system, while the latter grants superintending control over the inferior courts to the Supreme Court. It should also be noted that some inferior courts are specifically named in the constitution, although the legislature may create municipal and additional inferior courts. The major inferior courts thus derive their existence from the constitution, while in the federal judicial system the inferior courts are created by Congress. The relevant sections read as follows:

**Judicial power, where vested.** SECTION 2. *[As amended April 1966]* The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, and courts of probate. The legislature may also vest such jurisdiction as shall be deemed necessary in municipal courts, and may authorize the establishment of inferior courts in the several counties, cities, villages or towns, with limited civil and criminal jurisdiction. Provided, that the jurisdiction which may be vested in municipal courts shall not exceed in their respective municipalities that of circuit courts in their respective circuits as prescribed in this constitution; and that the legislature shall provide as well for the election of judges of the municipal courts as of the judges of inferior courts, by the qualified electors of the respective jurisdictions. The term of office of the judges of the said municipal and inferior courts shall not be longer than that of the judges of the circuit courts. *[1963 SJR32; 1965 SJR26]*

**Supreme court, jurisdiction.** SECTION 3. The supreme court, except in cases otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state; but in no case removed to the supreme court shall a trial by jury be allowed. The supreme court shall have a general superintending control over all inferior courts; it shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other original and remedial writs, and to hear and determine the same.

In addition to the courts enumerated in Section 2 of Article VII, the text of the Wisconsin Constitution ratified in 1848 also provided for an office of "justice of the peace" in the municipalities throughout the state. That office was abolished by the constitutional amendment adopted in 1966. The reference to "courts of probate" is obsolete; the 1848 text of the constitution (Sec. 14 of Art. VII) already authorized the legislature to abolish the office of "judge of probate" and, based upon court reform legislation enacted in the mid-1950's today's county courts are "inferior" courts of general jurisdiction (in some metropolitan counties with a multi-branch county court, one of the branches of county court is popularly referred to as the probate court).

Sections 5, 6, 8 and 22 should also be noted. Sections 5 and 6 create judicial circuits and authorize the legislature to change them. Section 8 gives circuit courts supervisory power over inferior courts, while Section 22 stated that, upon adoption of the constitution, the legislature shall provide for the appointment of commissioners to revise the rules of practice, pleadings, forms and proceedings.

**Judicial circuits.** SECTION 5. The state shall be divided into five judicial circuits, to be composed as follows: The first circuit shall comprise the counties of Racine, Walworth, Rock and Green; the second circuit, the counties of Milwaukee, Waukesha, Jefferson and Dane; the third circuit, the counties of Washington, Dodge, Columbia, Marquette, Sauk and Portage; the fourth circuit, the counties of Brown, Manitowoc, Sheboygan, Fond du Lac, Winnebago and Calumet; and the fifth circuit shall comprise the counties of Iowa, LaFayette, Grant, Crawford and St. Croix; and the county of Richland shall be attached to Iowa, the county of Chippewa to the county of Crawford, and the

county of La Pointe to the county of St. Croix, for judicial purposes, until otherwise provided by the legislature.

**Alteration of circuits.** SECTION 6. The legislature may alter the limits or increase the number of circuits, making them as compact and convenient as practicable, and bounding them by county lines; but no such alteration or increase shall have the effect to remove a judge from office. In case of an increase of circuits, the judge or judges shall be elected as provided in this constitution and receive a salary of not less than that herein provided for judges of the circuit court.

**Circuit court, jurisdiction.** SECTION 8. The circuit courts shall have original jurisdiction in all matters civil and criminal within this state, not excepted in this constitution, and not hereafter prohibited by law; and appellate jurisdiction from all inferior courts and tribunals, and a supervisory control over the same. They shall also have the power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and all other writs necessary to carry into effect their orders, judgments and decrees, and give them a general control over inferior courts and jurisdictions.

**Commissioners to revise code of practice.** SECTION 22. The legislature, at its first session after the adoption of this constitution, shall provide for the appointment of three commissioners, whose duty it shall be to inquire into, revise and simplify the rules of practice, pleadings, forms and proceedings, and arrange a system adapted to the courts of record of this state, and report the same to the legislature, subject to their modification and adoption; and such commission shall terminate upon the rendering of the report, unless otherwise provided by law.

Of perhaps more than indirect significance to this study is Section 4 of Art. VII, which provides for the election, not the appointment, of justices, and Sections 7 and 14, providing for the election of circuit judges and probate judges respectively.

#### **Constitutional Conventions: Debate on the Judicial Article (Art. VII)**

Constitutional conventions in Wisconsin produced two constitutions — the Constitution of 1846, which failed of adoption by the people in April 1847, and the Constitution of 1848, which was adopted in March 1848. Three volumes of the *Wisconsin Historical Collections*, compiled by the State Historical Society, comprise a mixture of debate, proceedings and newspaper comment concerning the two conventions. The following is based upon these volumes.

##### **Sec. 2 (Art. VII)**

Sec. 2 vests the judicial power in the courts, names the courts, but also gives the legislature the authority to create further inferior courts.

Although additional provisions were added to Sec. 2 in the second convention, the provisions relating to vesting judicial power, naming the courts and the creating of lower courts remained the same in both constitutions. Sec. 2 of the Judicial Article, as reported by the Judiciary Committee to the 1846 convention was the same as that finally adopted up to the provision allowing the Legislature to create inferior courts. The original section reported out of committee, provided that the legislature should have power to establish municipal courts and courts of chancery.

The most controversial item in the Judicial Article related to the election versus appointment of judges. In reporting the committee's recommendations on the article, Mr. Baker urged the election of judges, stating that as a result of appointment: "The judicial power, a distinct coequal department, which should be wholly independent of the others, instead of emanating from the people, the true source of all political power, has been dependent for existence upon the executive or legislative will, or perhaps both. The necessary result, in a measure, must be the dependence of the judiciary upon one or both of the other branches of government and its independence of the people."

##### **Sec. 3 (Art. VII)**

Section 3 includes the provision that the Supreme Court shall have "a general superintending control" over all inferior courts. This provision, too, was identical in the original constitution to the one finally adopted.

##### **Sec. 5 (Art. VII)**

Section 5 created the judicial circuits "for judicial purposes, until otherwise provided by the legislature." As reported out of the Judiciary Committee in the 1846 convention, this phrase was not included, but was inserted before the completion of the Constitution of 1846. It was similar to a provision in the Judiciary Committee's minority report.

Sec. 8 (Art. VII)

Section 8 gave circuit courts "a supervisory control" over inferior courts. As reported out of the Judiciary Committee to the 1846 convention, it was substantially similar to the section finally adopted.

Sec. 22 (Art. VII)

Section 22 directed the legislature to appoint commissioners to revise the rules of practice, pleadings, forms and proceedings, "and arrange a system adapted to the courts of record of this state," report to the legislature and terminate unless otherwise provided by law.

As reported out of the Judiciary Committee at the first convention, it read:

"Section 25. The legislature as early as at its first session after the admission of this state into the Union shall provide for the appointment of three commissioners, whose duty it shall be to revise, simplify, and arrange the statute laws of this territory or state, with proposed amendments, to inquire into and ascertain the rules of practice, pleadings, forms, and proceedings most suitable to be adopted in the courts of record in this state, and to report thereon to the legislature, subject to their modification and adoption..."

The 1846 convention adopted this in almost identical form. In the second convention, this provision was not contained in the Judicial Article as reported out of committee (see pp. 246-250, *The Attainment of Statehood*, Wisconsin Historical Collections). It was proposed in substantially its present form in an amendment (p. 697). A proposed substitute amendment would have also provided for the revision of the statute laws (like the 1846 draft) and would have added to the reporting of the rules revision to the legislature: "...and to suggest and report to the legislature such amendments as they may deem proper; which amendments the legislature may adopt, or modify and adopt, and alter from time to time as in their judgment the public good may require." In defending his substitute, Mr. Harvey said that "it recognized the power in and enjoined the duty upon the legislature to perfect the work of judicial reform if one set of commissioners failed to do it." The substitute, however, was rejected.

**Wisconsin Statutory Provisions**

Section 251.18 directs the Supreme Court to promulgate rules of pleading, practice and procedure for the court system of the state. Relevant statutes may be modified or suspended by such rules. The legislature, however, can change the statutes or rules. It reads as follows:

**251.18 Rules of pleading and practice.** The state supreme court shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant. The effective dates for all rules adopted by the court shall be January 1 or July 1, but in no case shall a rule become effective until 60 days after its adoption. All such rules shall be printed by the state printer and paid for out of the state treasury, and the court shall direct the same to be distributed as it may deem proper. All statutes relating to pleading, practice and procedure may be modified or suspended by rules promulgated pursuant hereto. No rule modifying or suspending such statutes shall be adopted until the court has held a public hearing with reference thereto. The court may establish days certain in each year at which dates the public hearings shall be held. Said hearings shall be held at 1:30 o'clock in the afternoon, or at such other time as the court shall direct. Notice of public hearings shall be given by publication of a class 3 notice, under ch. 985, the expense of the publication to be paid out of the state treasury. Notice shall also be given in the official publication of the state bar of Wisconsin, said notice to be published not more than 60 days, not less than 30 days, before the date of hearing. The state bar of Wisconsin shall not charge the state treasury for publication of this notice. Proposed rules, including changes, if any, in existing rules, shall be set forth in full in the notice. Nothing in this section shall abridge the right of the legislature to enact, modify or repeal statutes or rules relating to pleading, practice or procedure. The judicial council shall act in an advisory capacity to assist the court in performing its duties under this section.

Section 251.182 authorizes the chief justice of the Supreme Court to assign judges to serve in other circuit or county courts temporarily, requires him to keep informed of the status of judicial business in all the courts, and authorizes the Supreme Court to promulgate rules to accomplish these purposes. It reads as follows:

**251.182 Assignment of judges.** The chief justice of the supreme court or an associate justice designated by the supreme court shall keep informed of the status of the administration of judicial business in the courts of the state and may designate and assign active circuit and county judges and county judges qualified under s. 253.195 to serve temporarily in either the circuit or county court and supreme court justices and circuit judges qualified under article VII, section 24 of the Wisconsin constitution to serve temporarily in circuit court.

(1) The supreme court may promulgate rules necessary to accomplish the purposes of this section.

(2) Active judges assigned to serve temporarily in another circuit or county court shall do so.

(3) While acting temporarily in another circuit or county, a judge has the power to hold court, try cases and exercise all the authority of a judge of that court.

Several sections of the Wisconsin Statutes regulating the bar were created by Supreme Court order. Among these are the following:

Section 256.28 admits attorneys to practice by graduation from a law school in Wisconsin or by examination and certification of the Board of State Bar Commissioners.

Section 256.281 and following sections create the Board of State Bar Commissioners, authorize it to conduct examinations for applicants to the bar and conduct investigations of complaints against attorneys.

#### **Legislative History of Statutory Provisions**

##### Section 251.18

Although Section 251.18 can be traced back only to 1858, a similar provision was already included in the Statutes of 1849 (the first statutes of the new state). Chapter 82, Section 1, required the justices of the Supreme Court to meet on a specific date in June 1849 and hold a term "for the purpose of preparing and promulgating a code of rules of practice for the different courts of the state...and all rules adopted and published by the supreme court, shall be taken and construed to have the same binding force and effect that is given to a law, until the said rules shall be amended or altered by the supreme court or the legislature."

Section 4 authorized the court to "have power to make, annul, alter, amend or modify any rule of practice of the circuit or supreme court, as they shall see fit, giving due notice thereof by publication." Sections 5 and 6 gave the court the power to issue writs and exercise appellate jurisdiction (both provided for in the constitution), while Section 7 gave it "all power and authority necessary for carrying into complete execution all its judgments, decrees and determinations in the matters aforesaid."

It can thus be seen that from the beginning it was a legislative authorization to the Supreme Court to make the rules for the court system, but that the legislature reserved some power to alter such rules.

Section 251.18 first appeared in the Revised Statutes of 1858 as Chapter 115, Sec. 4, and Chapter 117, Sec. 40.

Ch. 115, Sec. 4. "The supreme court shall have power to make, annul, alter, amend, or modify the rules of practice of the circuit or supreme court, from time to time, as they shall see fit, not inconsistent with the constitution and the laws: such rules shall be uniform, as near as may be, throughout the state."

Ch. 117, Sec. 40. "The supreme court of this state shall have power, from time to time, to make uniform rules for regulating the proceedings in all the county courts of the state, and to alter, amend, or modify the same as it may judge necessary, in all cases not expressly provided for by law."

Chapter 115, Laws of 1864, authorized and required the Supreme Court to revise and publish the rules of practice for the circuit courts of the state.

The Revised Statutes of 1878 combined the provisions for the circuit courts, other courts having concurrent jurisdiction therewith, and the county courts into Section 2413 and authorized the justices to appoint a committee to revise such rules of practice as the justices direct.

Chapter 404, Laws of 1929, expanded Section 251.18, which had been renumbered from Section 2413 in 1925, to read in part:

"The supreme court of the State of Wisconsin shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts of Wisconsin, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits...All statutes relating to pleading, practice and procedure shall have force and effect only as rules of court and shall remain in effect unless and until modified or suspended by rules promulgated

pursuant hereto...Nothing in this section shall abridge the right of the legislature to enact, modify or repeal statutes or rules relating to pleading, practice or procedure."

The law also reconstituted the advisory committee "to advise the supreme court from time to time as to changes in rules of pleading, practice and procedure which will, in its judgment, simplify procedure and promote the speedy determination of litigation upon its merits..."

Chapter 392, Laws of 1951, changed the sentence: "All statutes relating to pleading, practice and procedure shall have force and effect only as rules of court and shall remain in effect unless and until modified or suspended by rules promulgated pursuant hereto." to read "All statutes relating to pleading, practice and procedure may be modified or suspended by rules promulgated pursuant hereto." The Judicial Council replaced the advisory committee to assist the court in performing its duties under this section.

#### Section 251.182

Sec. 251.182, authorizing the assignment of judges by the Supreme Court to serve temporarily in another court, was created by Chapter 315, Laws of 1959. The original law specifically listed the reasons judges could be so assigned: to assist a judge whose calendar is congested, to act for a disqualified judge, and to hold court where there is a vacancy or the judge is on vacation.

Chapter 261, Laws of 1961, repealed and recreated the section.

Chapter 46, Laws of 1971, amended the section to read as it now does, including the creation of Subsection (1) authorizing the Supreme Court to promulgate rules to accomplish the purposes of this section.

#### Sections 256.28 and 256.281

A selected history of the more significant legislation enacted is given here.

Sec. 256.28, regulating admission to the bar, and Sec. 256.281, authorizing the Board of State Bar Commissioners to administer admissions and complaints, are both in the statutes by Supreme Court order. In the earlier history of the state, however, qualifications for admission to the bar were established by legislative enactment.

The 1839 Statutes of the Territory of Wisconsin authorized the district courts and the Supreme Court to admit an attorney to practice upon showing the court that he was a territorial resident, of good moral character and had the requisite knowledge of law.

Chapter 152, Laws of 1849, required a court to admit to the bar any person applying who was a resident of the state and of good moral character.

Chapter 189, Laws of 1861, required a circuit court to license an attorney to practice upon examination in open court by the judge or examiners appointed by him. A licensed attorney could practice in any court except the Supreme Court, which was to license on its own order.

Chapter 79, Laws of 1870, entitled graduates of the law department of the University of Wisconsin to be admitted to the bar upon presentation to the judge of their certificate of graduation.

Chapter 144, Laws of 1881, amended Ch. 117, Sec. 2586, Subdivision 3, to require the attorney being admitted to be a resident of the circuit wherein he applies for admission to the bar.

Chapter 63, Laws of 1885, amended Sec. 2586 by creating a board of examiners, to be appointed by the Supreme Court, for the examination of applicants for admission to the bar. The board was to examine applicants and issue a certificate of qualification for admission. The circuit judge's order for admission was made when the applicant produced the certificate.

The board was given its present name of State Bar Commissioners by Chapter 317, Laws of 1927 (amending Sec. 256.28), which also detailed provisions for disbarment procedures. The Supreme Court was to appoint a counsel for the State Bar Commissioners to prosecute disbarment proceedings.

Chapter 16, Laws of 1919, authorized the Board of Examiners to investigate complaints of misconduct by attorneys and file a complaint.

Chapter 69, Laws of 1933, amended Sec. 256.28 to provide for admission to the bar by the Supreme Court of a graduate of all law schools in the state (formerly only University of Wisconsin).

Section 256.28 appeared as a Supreme Court Order in 229 Wis. v (1939) in rules promulgated by the court in conformity to Section 251.18 of the statutes.

These sections were subsequently amended both by session laws enacted by the Legislature and by Supreme Court orders.

#### 1975 Legislation

The two incidents — the budget controversy and the order creating court administrative districts — coming so close together while the 1975 Wisconsin Legislature was in session resulted in the introduction of several measures relating to the question of the powers of the Supreme Court. In addition, as a result of long-term study, several constitutional amendments were introduced to revise

the structure of the courts in this state. The parts of these proposed revisions that relate more directly to the powers of the Supreme Court will be considered below along with the legislation introduced specifically in response to the situations noted.

### 1. Constitutional Amendments (first consideration)

#### a. Constitutional Amendments: Superintending Control

*1975 Assembly Joint Resolution 11*, introduced by the Committee on Judiciary, revises the structure of the judicial branch, specifically delineating the court structure. As introduced, and not affected by a substitute amendment adopted by the Assembly, Section 3 of Article VII of the Wisconsin Constitution would change the statement, "The supreme court...shall have a general superintending control over all inferior courts..." to "The supreme court shall have superintending and administrative authority over all courts of the state..."

As of the end of Floorperiod III on September 26, 1975, the joint resolution had passed the Assembly in the form of amended Assembly Substitute Amendment 3, was concurred in by the Senate in the form of Sen. Substitute Amendment 1, and is pending in the Assembly. The Senate, in anticipation of a conference committee, appointed conferees, while the Speaker of the Assembly appointed conferees to work informally during the interim. In December 1975, the first draft of a proposed substitute amendment to 1975 Assembly Joint Resolution 11 was issued. The superintending and administrative provision is the same as in the joint resolution.

*1975 Senate Joint Resolution 22*, introduced by Senators Murphy, Devitt, Knutson, *et al.*, revised the judicial article to provide for the establishment of inferior courts by law, but did not affect Section 3 of Article VII.

As of the end of Floorperiod III on September 26, 1975, the Senate had passed SJR 22 in the form of Sen. Sub. Amdt. 1, as amended, messaged it to the Assembly, where it was referred to the Assembly Judiciary Committee. Sen. Sub. Amdt. 1, as amended, is identical to Sen. Sub. Amdt. 1 to AJR 11.

*1975 Senate Joint Resolution 23*, introduced by Senators Murphy, Knutson, Hollander, *et al.*, revised the judicial article but does not affect Sec. 3.

It was referred to the Committee on Judiciary and Consumer Affairs, where a hearing

*1975 Assembly Joint Resolution 54*, introduced by Representative Sanasarian, revises the court structure and specifically amends Section 3 of Art. VII to read: "The supreme court shall have superintending and administrative authority over all courts of the state." This is identical to the provision in AJR 11.

It was referred to the Committee on Judiciary and was adversely disposed of pursuant to Assembly Joint Resolution 14.

#### b. Constitutional Amendments: Rules of Pleading, Practice, Procedure

*1975 Assembly Joint Resolution 33*, introduced by the Committee on Judiciary, amends Art. VII, Sec. 3, to add: "With the prior approval by joint resolution of the legislature the supreme court may promulgate rules for the administration of the business in all courts of this state, to govern the conduct of officers and employes in such courts, and to govern pleading, practice and procedure in all civil and criminal trials in the courts of this state."

It was referred to the Committee on Judiciary.

*1975 Assembly Joint Resolution 67*, introduced by Representative Sanasarian, amends Art. VII, Sec. 3, to provide that the Supreme Court's superintending control be "subject to rules authorized by law for the administration of the business in all courts of this state, to govern the conduct of officers and employes in such courts, and to govern pleading, practice and procedure in all civil and criminal trials in the courts of this state." The Supreme Court's power to issue writs was made a separate sentence instead of an independent clause in the sentence with the superintending power.

It was introduced on September 26, 1975, the last day of Floorperiod III, and referred to the Committee on the Judiciary.

*1975 Senate Joint Resolution 34*, introduced by Senator Sensenbrenner, amends Article VII, Section 3, to require prior approval by the legislature before the Supreme Court promulgates rules "for the administration of the business in all courts of this state, to govern the conduct of officers and employes in such courts, and to govern pleading, practice and procedure in all civil and criminal trials in the courts of this state."

As of the end of Floorperiod III, the joint resolution had passed the Senate, was referred to the Assembly Judiciary Committee, and Assembly Amendment 1 was offered by Rep. Sanasarian.

Assembly Amendment 1 would substitute "Subject to rules authorized by law" for "With the prior approval by joint resolution of the legislature the supreme court may promulgate rules".

c. Constitutional Amendments: Regulation of the Bar

*1975 Assembly Joint Resolution 34*, introduced by Representatives Barbee, Clarenbach and Tesmer, creates Art. VII, Sec. 25, to prohibit a license granted under the authority of the judicial branch of the government to engage in any occupation or profession to be denied on the ground that the person declines to belong to an organization of persons licensed to engage in such occupation. In effect, it would permit attorneys to practice law without being a member of the State Bar of Wisconsin.

It was introduced on March 26, 1975, referred to the Committee on Judiciary, where a public hearing was held.

*1975 Assembly Joint Resolution 37*, introduced by Representatives Sanasarian, Willkom, Barbee, *et al.*, and cosponsored by Senator Parys, *et al.*, is identical to the above joint resolution. Assembly Amendment 1, offered by Rep. Gower, would delete "the judicial branch" so that it would apply to any licensee of the government.

It was introduced on April 9, 1975, referred to the Committee on Judiciary, where a public hearing was held.

d. Constitutional Amendments: Regulation of the Judiciary

The first draft of a proposed conference substitute amendment to 1975 Assembly Joint Resolution 11 was issued by the informal conference committee in December 1975. It included a new section to be added to Article VII which would permit the supreme court to reprimand, censure, suspend, remove for cause or for disability a justice or judge pursuant to procedures established by the legislature by law.

2. Bills

a. Bills Amending Sec. 251.18, Wis. Stats.

*1975 Assembly Bill 680*, introduced by Representatives Sanasarian, Kedrowski, Schroeder, *et al.*, amends Sec. 251.18 of the statutes to require the Supreme Court to obtain the prior approval of the legislature in order to promulgate rules regulating pleading, practice and procedure. It reads in part: "With the prior approval by joint resolution of the legislature the supreme court may promulgate rules to regulate pleading, practice and procedure in judicial proceedings in all courts..." Subsection (3) is created to provide: "No rule adopted by the court under sub. (2) shall enter into effect until it has been approved by a joint resolution agreed to by both houses of the legislature. Such joint resolution shall set forth the full text of the rules proposed, and the text so set forth may be amended by the legislature." Sub. (4) is amended to read as follows (scored material is added):

"Nothing in this section shall abridge the right of the legislature to enact, modify or repeal statutes or rules relating to the administration of the business in all courts of this state, to govern the conduct of officers and employes in such courts, and to govern pleading, practice or procedure in all civil and criminal trials or appeals in the courts of this state.

The bill was referred to the Committee on Judiciary.

*1975 Assembly Bill 681*, introduced by Representatives Sanasarian, Lingren, Kedrowski, *et al.*, amends Sec. 251.18 by preventing the court from changing a statute relating to pleading, practice and procedure. At the end of the clause authorizing the court to issue such rules, it adds the clause: "but no rule may supersede, modify or suspend any statute relating to pleading, practice and procedure."

The bill was referred to the Committee on Judiciary.

b. Bills Amending Section 256.281, etc., Wis. Stats.

*1975 Senate Bill 165*, introduced by Senator Berger, amends Sec. 256.281 and other sections of the statutes to replace the Board of State Bar Commissioners with an Office of the State Bar Commissioner. The commissioner would be appointed by the governor (currently, the commissioners are appointed by the Supreme Court). A State Bar Advisory Board would also be created and its members appointed by the governor.

The bill was referred to the Committee on Judiciary and Consumer Affairs and a public hearing was held.

*1975 Assembly Bill 607*, introduced by Representatives Sanasarian, Jackamonis, Willkom, *et al.*, and cosponsored by Senator Berger, amends Section 256.281 of the statutes, to return the membership of the Board of State Bar Commissioners to 7, of whom 3 are to be nonlawyers. In October 1974 the Supreme Court had increased the membership from 7 to 9, of whom 2 were to be nonlawyers. The bill also provides for appointment by the governor rather than by the Supreme Court.

The bill was referred to the Committee on Judiciary and a hearing was held.

1975 Assembly Bill 608, introduced by Representatives Sanasarian, Jackamonis, Lato and Wahner, and cosponsored by Senator Berger, amends Sec. 256.281 and other sections of the statutes to abolish the Board of State Bar Commissioners and replace it with an Examining Board of Attorneys in the Department of Regulation and Licensing appointed by the governor, to eliminate membership in the State Bar of Wisconsin as a prerequisite to practicing law, and to eliminate the Supreme Court's authority to regulate attorneys.

The bill was referred to the Committee on Judiciary, a hearing was held, but the bill failed to pass pursuant to Assembly Joint Resolution 14.

### 3. Resolutions

Two resolutions were introduced asking the Supreme Court to rescind its rules of June 30, 1975, creating administrative districts.

1975 Assembly Resolution 35, introduced by Representatives Sanasarian, Jackamonis, Wahner, *et al.*, calls upon the Supreme Court to reconsider and rescind the adoption of the rules promulgated on June 30, 1975, creating judicial administrative districts.

On September 16, 1975, the Judiciary Committee recommended passage with Amendments 1 and 2, but the resolution was not reported out by the end of Floorperiod III.

1975 Senate Resolution 18, introduced by Senators Martin, Hollander, Petri and Krueger, by request of Miss Gladys Walsh, called upon the Supreme Court to reconsider and rescind the adoption of the rules creating the 14 administrative districts for the state's trial courts and invited the court to submit proposals for statutory changes to the legislature.

It was introduced on September 26, 1975, the last day of Floorperiod III, and referred to the Senate Judiciary Committee.

## III. FEDERAL AND STATE LAWS ON SUPREME COURT RULE-MAKING AND MANAGEMENT AUTHORITY

### Constitutional Provisions

#### 1. Federal

In certain respects the judicial provisions in the Wisconsin Constitution are similar to those in the U.S. Constitution. Art. III, Sec. 1, of the U.S. Constitution vests "the judicial power" of the United States in the Supreme Court and such inferior courts as Congress establishes. Section 2 provides that the judicial power extends "to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made..." and to other specific situations in which the Federal Government has jurisdiction. In certain specific types of cases the Supreme Court has original jurisdiction; in all other cases it has appellate jurisdiction, "both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

It can be seen, however, that in other respects the judicial provisions of the two constitutions differ. The judiciary in Wisconsin has more power derived from the Wisconsin Constitution than the federal judiciary has from the U.S. Constitution. Thus, Art. VII, Sec. 2, of the Wisconsin Constitution vests the "judicial power of this state, both as to matters of law and equity" in a supreme court, circuit courts and courts of probate. The inferior courts are specifically named, while the creation of inferior federal courts is at the discretion of Congress. There is nothing comparable in the United States Constitution to the Sec. 3 provision of the state constitution for the "superintending control over all inferior courts" by the supreme court. Furthermore, Congress can restrict the U.S. court's appellate jurisdiction, while the Wisconsin Legislature cannot so restrict the Wisconsin court. There is another major difference which bears directly upon the relation of the judiciary branch to the other branches of government: At the federal level, justices and judges are appointed by the President with Senate consent and serve for life. In Wisconsin, justices and judges are elected directly by the people (although vacancies are filled by appointment) and serve terms of specified duration.

#### 2. Other States

While the Wisconsin Constitution gives the Supreme Court superintending control over inferior courts, it does not contain a specific provision authorizing it to prescribe rules of pleading, practice and procedure. Several states place such authority specifically in their constitutions. In some instances this authority is modified to allow legislative action. The Florida Constitution, for example, permits judicial rules to be repealed by a two-thirds vote of the legislature, while in Missouri any rule may be annulled or amended by law.

Some states also authorize their supreme courts to exercise a superintending control; others authorize "administrative control". The New York Constitution gives administrative supervision of the court system to the administrative board of the judicial conference.

The Oklahoma Constitution provides for the creation by statute of judicial administrative districts and for the district judges to select one of their colleagues as presiding judge to administer the district. This is substantially similar to the Wisconsin Supreme Court order creating judicial districts.

The Ohio Constitution specifically states that the Supreme Court shall make rules governing admission to the bar.

The variety of provisions of the several state constitutions are listed below. They are based on citations compiled by the Council of State Governments in its "Criminal Justice Statutory Index."

Table 1: State Constitutional Provisions

State	Constitutional Provisions
Alabama:	Constitution. Art. 6, Sec. 150. The supreme court shall make and promulgate rules governing the administration of all courts and rules governing practice and procedure in all courts; provided, however, that such rules shall not abridge, enlarge or modify the substantive right of any party nor affect the jurisdiction of circuit and district courts or venue of actions therein; and provided, further, that the right of trial by jury as at common law and declared by section 11 of the Constitution of Alabama 1901 shall be preserved to the parties inviolate. These may be changed by a general act of statewide application.
Arizona:	Constitution, Art. VI, Sec. 5. The Supreme Court shall have: 5. Power to make rules relative to all procedural matters in any court. 6. Such other jurisdiction as may be provided by law.
California:	Constitution, Art. VI, Sec. 6...To improve the administration of justice the [Judicial] council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, not inconsistent with statute, and perform other functions prescribed by statute.
Colorado:	Constitution. Art. VI, Sec. 21. Rule making power. — The supreme court shall make and promulgate rules governing the administration of all courts and shall make and promulgate rules governing practice and procedure in civil and criminal cases, except that the general assembly shall have the power to provide simplified procedures in county courts for claims not exceeding five hundred dollars and for the trial of misdemeanors.
Florida:	Constitution. Art. V; Sec. 2. Administration; practice and procedure. — (a) The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature. (b) The chief justice of the supreme court shall be chosen by a majority of the members of the court. He shall be the chief administrative officer of the judicial system... (c) A chief judge for each district court of appeal shall be chosen by a majority of the judges thereof or, if there is no majority, by the chief justice. The chief judge shall be responsible for the administrative supervision of the court. (d) A chief judge in each circuit shall be chosen from among the circuit judges as provided by supreme court rule. The chief judge shall be responsible for the administrative supervision of the circuit courts and county courts in his circuit.
Iowa:	Constitution. Art. V, Sec. 4. The Supreme Court shall have appellate jurisdiction only in cases in chancery, and shall constitute a Court for the correction of errors at law, under such restrictions as the General Assembly may, by law, prescribe; and shall have power to issue all writs and process necessary to secure justice to parties and exercise a supervisory control over all inferior judicial tribunals throughout the State.
Kansas:	Constitution. Art. 3, Sec. 1. Judicial powers; seals; rules. The judicial power of this state shall be vested exclusively in one court of justice, which shall be divided into one supreme court, district courts, and such other courts as are provided by law; and all courts

of record shall have a seal. The supreme court shall have general administrative authority over all courts in this state.

Maryland: Constitution. Art. 4, Sec. 18. It shall be the duty of the Judges of the Court of Appeals to make and publish rules and regulations for the prosecution of appeals to the appellate Courts...and shall regulate, generally, the practice of said Court of Appeals and any intermediate Courts of Appeal, so as to prevent delays, and promote brevity in all records and proceedings brought into said Courts, and to abolish and avoid all unnecessary costs and expenses in the prosecution of appeals therein...It shall also be the duty of said Judges of the Court of Appeals to devise, and promulgate by rules, or orders, forms and modes of framing and filing bills, answers, and other proceedings and pleadings in Equity...And all rules and regulations hereby directed to be made, shall, when made, have the force of Law, until rescinded, changed, or modified by the said Judges, or the General Assembly.

Sec. 18A. The Chief Judge of the Court of Appeals shall be the administrative head of the judicial system of the State....The powers of the Chief Judge under the foregoing provisions of this section shall be subject to such rules and regulations, if any, as the Court of Appeals may make. The Court of Appeals from time to time shall make rules and regulations to revise the practice and procedure in and the administration of the appellate courts and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law. The power of courts other than the Court of Appeals to make rules of practice and procedure, or administrative rules, shall be subject to the rules and regulations prescribed by the Court of Appeals or otherwise by law.

Missouri: Constitution. Art. V, Sec. 5. Rules of practice and procedure — duty of supreme court — power of legislature. — The supreme court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to the purpose.

New Jersey: Constitution. Art. VI, Sec. II. 3. The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

New Mexico: Constitution. Art. VI, Sec. 3. The Supreme Court...shall have a superintending control over all inferior courts...

New York: Constitution. Art. VI, Sec. 28. The authority and responsibility for the administrative supervision of the unified court system for the state shall be vested in the administrative board of the judicial conference. The administrative board shall consist of the chief judge of the court of appeals, as chairman, and the presiding justices of the appellate divisions of the four judicial departments. The administrative board, in consultation with the judicial conference, shall establish standards and administrative policies for general application throughout the state. The composition and functions of the judicial conference shall be as now or hereafter provided by law. In accordance with the standards and administrative policies established by the administrative board, the appellate divisions shall supervise the administration and operation of the courts in their respective departments.

Ohio: Constitution. Art. IV, Sec. 5. (A) (1)...the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.

(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

Oklahoma: Constitution. Art. VII, Sec. 6. Administrative authority — Director and staff. — ...general administrative authority over all courts in this State, including the temporary assignment of any judge to a court other than that for which he was selected, is hereby vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules. The Supreme Court shall appoint an administrative director and staff, who shall serve at its pleasure to assist the Chief Justice in his administrative duties and to assist the Court on the Judiciary....

Sec. 10. Judicial Administrative Districts. — (a) The State shall be divided into Judicial Administrative Districts, by statute, each consisting of one or more District Court Judicial Districts.

(b) The District Judges and Associate District Judges in each Judicial Administrative District shall select one of the District Judges to serve at their pleasure as Presiding Judge of such Judicial Administrative District. Subject to the authority of the Supreme Court, the Presiding Judge shall have general administrative authority over the Judicial Administrative District, including authority to provide for divisions, general or specialized, and for appropriate times and places of holding court subject to law...

Pennsylvania: Constitution. Art. V, Sec. 10. (a) The Supreme Court shall exercise general supervisory and administrative authority over all the courts and justices of the peace, including authority to temporarily assign judges and justices of the peace from one court or district to another as it deems appropriate.

(b) The Supreme Court shall appoint a court administrator...

(c) The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the judicial branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.

(d) The Chief Justice and president judges of all courts with seven or less judges shall be the justice or judge longest in continuous service on their respective courts...The president judges of all other courts shall be selected for five-year terms by the members of their respective courts...

South Carolina: Constitution. Art. V, Sec. 4. Jurisdiction of Supreme Court. — The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus and other original and remedial writs. And said Court shall have appellate jurisdiction only in cases of chancery, and in such appeals they shall review the findings of fact as well as the law, except in chancery cases where the facts are settled by a jury and the verdict not set aside, and shall constitute a Court for the correction of errors at law under such regulations as the General Assembly may by law prescribe.

Virginia: Constitution. Art. VI, Sec. 5. The Supreme Court shall have the authority to make rules governing the course of appeals and the practice and procedures to be used in the courts of the Commonwealth, but such rules shall not be in conflict with the general law as the same shall, from time to time, be established by the General Assembly.

Wyoming: Constitution. Art. 5, Sec. 2. The supreme court...shall have a general superintending control over all inferior courts, under such rules and regulations as may be prescribed by law.

## Statutory Provisions

### 1. Federal

Whereas Sec. 251.18 of the Wisconsin Statutes authorizes the Wisconsin Supreme Court to promulgate rules for the regulation of pleading, practice and procedure, and authorizes the Wisconsin Legislature to modify such rules, Sec. 2072 of the United States Code (Title 28) gives the United States Supreme Court the power to prescribe by general rule the practices and procedures of U.S. courts in civil actions (other sections regulate criminal actions), but provides that they do not take effect until reported to Congress. "Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

Section 2071 of the code provides: "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

### 2. Other States

A number of states, in addition to Wisconsin, provide statutory authorization for the adoption of rules of pleading, practice and procedure by their supreme courts. In Arizona the state bar acts as an advisory board to the court in this matter. Connecticut law — similar to several states — provides that when the Supreme Court adopts new rules, such rules shall be submitted to the General Assembly at the beginning of each regular session and may be voided by the General Assembly.

Some states provide "supervisory" control in their statutes rather than in their constitutions. Statutes commonly provide detailed provisions for court administrators or administrative directors and other administrative procedures. Colorado law authorizes the Supreme Court to prepare a personnel classification plan for all courts, including a compensation plan; set procedures for appointing and removing personnel; and establish other personnel policies. Utah authorizes its Judicial Council to establish policies for the operation of the courts. The chief justice of the Hawaii Supreme Court, as administrative head of the judiciary, is directed to make a report to the legislature at each regular session and present a budget and a six-year program and financial plan. Tennessee law gives the Supreme Court blanket authority to take appropriate action to remedy any situation adversely affecting the administration of justice.

The variety of provisions of the several state statutes are listed below. They are based on citations compiled by the Council of State Governments in its "Criminal Justice Statutory Index."

Table 2: State Statutory Provisions

State	Statutory Provisions
Alaska:	Sec. 20.05.150. Administrative director. The chief justice of the supreme court shall, with the approval of the supreme court, appoint an administrative director to serve at the pleasure of the supreme court and to supervise the administrative operations of the judicial system.
Arizona:	Sec. 12-109. A. The supreme court, by rules promulgated from time to time, shall regulate pleading, practice and procedure in judicial proceedings in all courts of the state for the purpose of simplifying such pleading, practice and procedure and promoting speedy determination of litigation upon its merits. The rules shall not abridge, enlarge or modify substantive rights of a litigant. 12-110. A. The state bar, or a representative group selected by the bar, shall act as an advisory board and shall either voluntarily or upon request of a majority of the judges of the supreme court, consult with, recommend to or advise the court on any matter dealt with or proposed to be dealt with in the rules. B. Any member of the state bar or a private citizen may object in writing to a rule or part thereof and may request changes. The court shall consider the objections and requests as advice and information only and may act thereon at its discretion. 12-111. All statutes relating to pleading, practice and procedure shall be deemed rules of court and shall remain in effect as such until modified or suspended by rules promulgated by the supreme court.

Arkansas: Sec. 22-242. The Supreme Court of the state of Arkansas shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings in criminal cases and proceedings to punish for criminal contempt of court in all the inferior courts of law in this state.

Sec. 22-245. ....in civil cases in all the courts of this state.

Sec. 22-142. The Chief Justice of the Supreme Court of Arkansas shall be the administrative director of the Judicial Department of the State and shall be responsible for the efficient operation thereof and of its constituent courts and for the expeditious dispatch of litigation therein and the proper conduct of the business of said courts. Under rules prescribed by the Supreme Court, he may require reports for all courts of the State and may issue such orders and regulations as may be necessary for the efficient operation of such courts to insure the prompt and proper administration of justice and may assign, reassign and modify assignments of judges of the circuit court, the chancery court and the probate court to hold, upon a temporary basis, regular or special sessions for the transaction of civil or criminal business within any other such court. The lower courts shall keep such adequate and uniform records as are now required by law or as may hereafter be required by rule or order of the Supreme Court...

California: Government Code, Sec. 68070. Every court of record may make rules for its own government and the government of its officers not inconsistent with law or with the rules adopted and prescribed by the Judicial Council. Such rules shall not: (a) Impose any tax, charge, or penalty upon any legal proceeding, or for filing any pleading allowed by law. (b) Give any allowance to any officer for services.

Colorado: Title 13, Art. 3. 13-3-101. State court administrator. (1) There is created, pursuant to section 5 (3) of article VI of the state constitution, the position of state court administrator, who shall be appointed by the justices of the supreme court at such compensation as shall be determined by them. The state court administrator is responsible to the supreme court and shall perform such duties as assigned to him by the chief justice and the supreme court.

(2) The state court administrator shall employ such other personnel as the supreme court deems necessary to aid the administration of the courts, as provided in section 5 (3) of article VI of the state constitution.

13-3-102. Surveys - conferences - reports. (1) The state court administrator under the direction of the chief justice shall make a continuous survey of the conditions of the dockets and the business of the courts of record, and shall make reports and recommendations thereon to the chief justice.

(2) The chief justice shall assemble the judges of the courts of record at least once yearly to discuss such recommendations and such other business as will benefit the judiciary and the expedition of the business of the several courts...

(3) The chief justice shall, at the beginning of every regular session of the general assembly, submit a written report to the governor and to the judiciary committees of both houses of the general assembly. Such report shall contain a review of the condition of the dockets and the business of the supreme court and the other courts of record, and such other information and recommendations concerning the administration of the courts as the chief justice deems appropriate.

13-3-104. State shall fund courts. On and after January 1, 1970, the state of Colorado shall provide funds by annual appropriation for the operations, salaries, and other expenses of all courts of record within the state, except for county courts in the city and county of Denver and municipal courts. On January 1, 1970, all supplies and equipment assigned or belonging to courts of record, except motor vehicles, shall be transferred to and become the property of the judicial department of the state. Such transfer of supplies and equipment shall not apply to the county court of the city and county of Denver or to municipal courts.

13-3-105. Personnel - duties - qualifications - compensation - conditions of employment. (1) The supreme court, pursuant to section 5 (3) of article VI of the state constitution, shall prescribe, by rule, a personnel classification plan for all courts of record to be funded by the state, as provided in section 13-3-104.

(2) Such personnel classification and compensation plan shall include:

(a) A basic compensation plan of pay ranges to which classes of positions are assigned and may be reassigned;

(b) The qualifications for each position or class of positions, including education, experience, special skills, and legal knowledge;

(c) An outline of the duties to be performed in each position or class of positions;

(d) The classification of all positions based on the required qualifications and the duties to be performed, taking into account, where applicable, the amount and kinds of judicial business in each court of record subject to the provisions of this section;

(e) The number of full-time and part-time positions, by position title and classification, in each court of record subject to the provisions of this section;

(f) The procedures for and the regulations governing the appointment and removal of court personnel; and

(g) The procedures for and the regulations governing the promotion or transfer of court personnel.

(3) The supreme court shall also prescribe by rule:

(a) The amount, terms, and conditions of sick leave and vacation time for court personnel, including annual allowance and accumulation thereof; and

(b) Hours of work and other conditions of employment.

(4) To the end that all state employees are treated generally in a similar manner, the supreme court, in promulgating rules as set forth in this section, shall take into consideration the compensation and classification plans, vacation and sick leave provisions, and other conditions of employment applicable to employees of the executive and legislative departments.

Connecticut: CGS, Section 51-14. Rule-making authority of supreme court judges. Disapproval by general assembly. Hearings. (a) The judges of the supreme court shall adopt and promulgate and may from time to time modify or repeal rules and forms regulating pleading, practice and procedure in judicial proceedings in all courts of the state for the purpose of simplifying the same and of promoting the speedy and efficient determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify any substantive right nor the jurisdiction of any of the courts. Subject to the provisions of subsection (b), such rules shall become effective on such date as the judges of the supreme court specify but not in any event until sixty days after such promulgation.

(b) All statutes relating to pleading, practice and procedure in existence on July 1, 1957, shall be deemed to be rules of court and shall remain in effect as such only until modified, superseded or suspended by rules adopted and promulgated by the judges of the supreme court pursuant to the provisions of this section. The chief justice shall report any such rules to the general assembly for study at the beginning of each regular session. Such rules shall be referred by the speaker of the house or by the president of the senate to the judiciary committee for its consideration and such committee shall schedule hearings thereon. Any rule or any part thereof disapproved by the general assembly by resolution shall be void and of no effect and a copy of such resolution shall thereafter be published once in the Connecticut Law Journal.

(c) The judges or a committee of their number shall hold public hearings, of which reasonable notice shall be given in the Connecticut Law Journal and otherwise as they deem proper, upon any proposed new rule or any change in an existing rule that is to come before said judges for action, and each such proposed new rule or change in an existing rule shall be published in the Connecticut Law Journal as a part of such notice. A public hearing shall be held at least once a year, of which reasonable notice shall likewise be given, at which any member of the bar or layman may bring to the attention of the judges any new rule or change in an existing rule that he deems desirable.

(d) Upon the taking effect of such rules adopted and promulgated by the judges of the supreme court pursuant to the provisions of this section, all provisions of rules theretofore promulgated by the judges of the superior court shall be deemed to be repealed.

Section 51-15. Rules of procedure in certain civil actions. Small claims. In accordance with the provisions of section 51-14, the judges of the supreme court shall make such orders and rules as they deem necessary or advisable concerning the commencement of process and procedure in flowage petitions, paternity proceedings, replevin, summary process, habeas corpus, mandamus, prohibition, ne exeat, quo warranto, forcible entry and detainer, peaceable entry and forcible detainer, for paying rewards and for the hearing and determination of small claims, including suitable forms of procedure in such cases, exclusive of fees...

Section 51-15a. Consultation between judiciary committee and rules committee of superior court. The senate and house chairmen of the joint standing committee on

judiciary shall appoint six persons from among the members of said committee who, with said chairmen, shall meet, on the call of the chief justice, but not less frequently than annually, with the rules committee of the superior court to confer and consult with respect to the rules of practice, pleadings, forms and procedure for all courts of record of this state and with respect to legislation affecting the courts pending before or to be introduced in the general assembly.

Hawaii: HRS, Section 601-2 Administration. (a) The chief justice shall be the administrative head of the judiciary. He shall make a report to the legislature, at each regular session thereof, of the business of the judiciary and of the administration of justice throughout the State. He shall present to the legislature a unified budget, six-year program and financial plan, and variance report for all of the programs of the judiciary. He shall direct the administration of the judiciary, with responsibility for the efficient operation of all of the courts and for the expeditious dispatch of all judicial business.

(b) He shall possess the following powers, subject to such rules as may be adopted by the supreme court:

(1) To assign circuit judges from one circuit to another;

(2) In a circuit court with more than one judge, (A) to make assignments of calendars among the circuit judges for such period as he may determine and, as deemed advisable from time to time, to change assignments of calendars or portions thereof (but not individual cases) from one judge to another, and (B) to appoint one of the judges, for such period as he may determine, as the administrative judge to manage the business of the court, subject to the rules of the supreme court and the direction of the chief justice;

(3) To prescribe for all of the courts a uniform system of keeping and periodically reporting statistics of their business;

(4) To procure from all of the courts estimates for their appropriations; with the cooperation of the representatives of the court concerned to review and revise them as he deems necessary for equitable provisions for the various courts according to their needs and to present the estimates, as reviewed and revised by him, to the legislature as collectively constituting a unified budget for all of the courts;

(6) To do all other acts which may be necessary or appropriate for the administration of the judiciary.

Section 601-3 Administrative director. The chief justice with the approval of the supreme court, shall appoint an administrative director of the courts to assist him in directing the administration of the judiciary...He shall, subject to the direction of the chief justice, perform the following functions:

(1) Examine the administrative methods of the courts and make recommendations to the chief justice for their improvements;

(2) Examine the state of the dockets of the courts, secure information as to their needs for assistance, if any, prepare statistical data and reports of the business of the courts and advise the chief justice to the end that proper action may be taken;

Section 602-21 Rules. The supreme court shall have power to promulgate rules in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law. Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant, nor the jurisdiction of any of the courts, nor affect any statute of limitations.

Idaho: Section 1-105. Criminal procedure — Supreme Court rules govern. — Procedures in the district court or magistrate's division of the district court involving criminal actions which, prior to January 11, 1971, were triable in the probate court, justice court or police court, shall be governed by rules of the Supreme Court.

North Carolina: Section 7A-33. The Supreme Court shall prescribe rules of practice and procedure designed to procure the expeditious and inexpensive disposition of all litigation in the appellate division.

7A-34...for the superior and district courts supplementary to, and not inconsistent with, acts of the General Assembly.

North Dakota: Criminal Code, Chapter 27-02-05.1. Administration by supreme court. — The supreme court shall have and exercise administrative supervision over all courts of this state and the judges, justices, or magistrates of such courts under such rules, procedures, and regulations as it shall from time to time prescribe. The supreme court shall provide to the extent it deems necessary or desirable, rules and regulations for:

1. Administrative supervision by the supreme court of all courts.

2. The assignment of judges, including consenting retired justices and judges, to temporary duty in any of the courts.

3. Administrative practice and procedure in all courts, including the required filing by all courts of all reports deemed necessary by the supreme court. All judges, clerks of court, and other officers or employees of the courts and of offices related to and serving the courts shall comply with all administrative practice and procedure regulations promulgated by the supreme court.

4. The transfer of any matter to any proper court when the jurisdiction of any court has been improvidently invoked.

5. Withdrawal of any case or other matter pending before any judge and to reassign said proceeding or case to another judge, when, in the opinion of the supreme court, such withdrawal and reassignment should be made in order to expedite and promote justice.

6. The times and places for holding court when, in the opinion of the supreme court, it is necessary to do so to expedite disposition of pending matters.

27-02-07. Rules relating to the practice of the law may be made in supreme court. — The supreme court of this state may make all necessary rules for:

1. The admission of persons to practice the profession of law in this state;

2. The disbarment, disciplining, and reinstatement of attorneys at law in this state;

and

3. The restraint of persons unlawfully engaging in the practice of the law in this state.

27-02-08. Rules of pleading, practice, and procedure may be made by supreme court. — The supreme court of this state may make all rules of pleading, practice, and procedure which it may deem necessary for:

1. The administration of justice in all civil and criminal actions, remedies, and proceedings in any and all courts of this state; and

2. The method of taking, hearing, and deciding appeals to the courts from all decisions of public officers, boards, commissions, departments, and institutions exercising quasi-judicial functions, in any case where an appeal from any such decision is allowed by law.

27-02-09. Statutes regulating procedure effective as rules of supreme court. — All statutes relating to pleadings, practice, and procedure in civil or criminal actions, remedies, or proceedings, enacted by the legislative assembly, shall have force and effect only as rules of court and shall remain in effect unless and until amended or otherwise altered by rules promulgated by the supreme court.

27-02-10. Limitation on rule-making powers of supreme court. — No rule promulgated under sections 27-02-07 and 27-02-08 shall abridge, enlarge, or modify in any manner the substantive rights of any litigant.

Tennessee: TCA, Section 16-112. Rules of practice and procedure — Power of Supreme Court. — The Supreme Court of Tennessee shall have the power to prescribe by general rules the forms of process, writs, pleadings and motions, and the practice and procedure in all of the courts of this state in all civil suits, actions and proceedings.

16-113. Rules not to affect substantive rights — Consistency with constitutions. — Such rules shall not abridge, enlarge or modify any substantive right, and shall be consistent with the constitutions of the United States and the state of Tennessee.

16-114. Effective date of rules — Approval of rules by general assembly. — The Supreme Court shall fix the effective date of all its rules, provided, however, that such rules shall not take effect until they have been reported to the general assembly by the chief justice at or after the beginning of a regular session thereof, but not later than the first day of February during such session, and until they have been approved by joint resolution of both houses of the general assembly.

16-116. Laws in conflict with rules nullified. — After such rules shall have become effective, all laws in conflict therewith shall be of no further force or effect.

16-117. Additional or supplementary rules of other courts. — Each of the other courts of this state may adopt additional or supplementary rules of practice and procedure not inconsistent with or in conflict with the rules prescribed by the Supreme Court.

16-118. Advisory commission on rules — Terms of members — Duties — Gratuitous service — Expenses — Employees. — There shall be an advisory commission of nine (9) members to be appointed by the Supreme Court whose duty it shall be to advise the Supreme Court from time to time respecting the rules of practice and procedure. The advisory commission shall have authority to employ, subject to the approval of the

executive secretary of the Supreme Court of Tennessee, such legal, clerical and other assistance as may be necessary to the efficient discharge of its duties.

16-324. Commissions to control Supreme Court buildings at Nashville and Knoxville. — There is hereby created a commission composed of the Chief Justice of the Supreme Court, the Presiding Judge of the Court of Appeals, and the attorney-general and reporter, which commission is vested with authority and jurisdiction to supervise and maintain the Supreme Court building at Nashville, to employ all necessary assistants and help for said building, and to make necessary contracts therefor.

There is created a commission composed of the Chief Justice of the Supreme Court, the member of the Supreme Court from East Tennessee, the Presiding Judge of the Court of Appeals from East Tennessee, the attorney-general, and the secretary of state, which commission is vested with authority and jurisdiction to supervise and control the new court and office building at Knoxville, and to employ all necessary assistants and help for said building and make necessary contracts therefor.

16-325. Office of executive secretary — Purpose. — There is created the office of executive secretary to the Supreme Court. The purpose of this office shall be to assist in improving the administration of justice in Tennessee by performing the duties and exercising the powers herein conferred.

16-326. Appointment, qualifications, salary. — The executive secretary to the Supreme Court shall be appointed by the Supreme Court and shall serve at the pleasure of said court...

16-327. Duties. — The executive secretary to the Supreme Court shall work under the supervision and direction of the chief justice and shall assist the chief justice in the administration of the judicial branch of government to the end that litigation may be expedited and the administration of justice improved. He shall serve as secretary of the judicial council and shall attend to such other duties as may be assigned to him by the Supreme Court or the chief justice thereof.

The executive secretary to the Supreme Court shall have the further duty of administering the accounts of the judicial branch of government, including all accounts related to the judicial branch as may be designated by the comptroller of the treasury and the Chief Justice of the Supreme Court. He shall prepare, approve and submit budget estimates of appropriations necessary for the maintenance and operation of the state judicial system and make recommendations with respect thereto. He shall draw and approve all requisitions for the payment of public moneys appropriated for the maintenance and operation of the state judicial system, and shall audit claims and prepare vouchers for presentation to the department of finance and administration, including payroll warrants, expense warrants, and warrants covering the necessary costs of supplies, materials and other obligations by the various offices with respect to which he shall exercise fiscal responsibility.

The executive secretary to the Supreme Court shall have authority, within budgetary limitations, to provide the judges of the trial courts of record with minimum law libraries, the nature and extent of which shall be determined in every instance by the executive secretary on the basis of need. All books thus furnished shall remain the property of the state of Tennessee, and shall be returned to the custody of the executive secretary by each judge upon the retirement or expiration of the official duties of each such officer.

All functions performed by the executive secretary to the Supreme Court which involve expenditures of state funds shall be subject to the same auditing procedures by the commissioner of finance and administration and the comptroller of the treasury as required in connection with the expenditure of all other state funds.

16-328. Office staff — Law practice barred. — The executive secretary to the Supreme Court shall, subject to the approval of the Supreme Court, appoint and fix the compensation of such assistants, clerical staff, or other employees as are necessary to enable him to perform the duties of his office...

16-329. Office, equipment and supplies. — The executive secretary shall be provided with suitable office space in the Supreme Court building and with all office equipment and supplies necessary to perform the duties and functions of his office.

16-330. Inferior courts — Supervisory control. — In order to insure the harmonious, efficient and uniform operation of the judicial system of the state, the Supreme Court of Tennessee is hereby granted and clothed with general supervisory control over all the inferior courts of the state.

16-331. Supervisory procedures. — In addition to other constitutional, statutory and inherent power, but not restrictive thereof, the Supreme Court shall have the power:

a. To designate and assign temporarily any judge or chancellor to hold, or sit as a member of any court, of comparable dignity or equal or higher level, for any good and sufficient reason.

b. To maintain a roster of retired judges who are willing and able to undertake special duties from time to time and to designate or assign them appropriate judicial duties.

c. To require that the executive secretary of the Supreme Court make a careful and continuing survey of the dockets of the circuit, criminal, chancery and other similar courts of record, and to report at periodic intervals to the court, and annually to the general assembly. All such data and reports shall be public documents.

d. To take affirmative and appropriate action to correct or alleviate any imbalance in case loads among the various judicial circuits and chancery divisions of the state.

e. To take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state.

f. To take all such other, further and additional action as may be necessary to the orderly administration of justice within the state, whether or not herein or elsewhere enumerated.

16-332. Inherent power of court. — The general assembly hereby declares that Sections 16-330 — 16-333 are declaratory of the common law as it existed at the time of the adoption of the constitution of the state of Tennessee, and of the power inherent in a court of last resort.

16-333. Plenary and discretionary powers. — Sections 16-330 — 16-333 shall constitute a broad conference of full, plenary and discretionary power upon the Supreme Court.

Utah: Section 78-2-4 — The Supreme Court of the state of Utah has power to prescribe, deter and revise, by rules, for all courts of the state of Utah, the forms of process, writs, pleadings and motions and the practice and procedure in all civil and criminal actions and proceedings, including rules of evidence therein, and also divorce, probate and guardianship proceedings. Such rules may not abridge, enlarge or modify the substantive rights of any litigant...Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede or repeal any such rules heretofore prescribed by the Supreme Court.

Sec. 78-3-19. Purpose of Court Administrator Act. — The purpose of this act is to create an administrative system for district, city and justices' courts, subject to central direction by a judicial council, which will enable these courts to provide uniformity and coordination in the administration of justice.

Sec. 78-3-21. The judicial council (3) "shall be responsible for the development of uniform administrative policy for the courts throughout the state...The council shall have the following powers, duties and responsibilities:

(a) Establish general policies for the operation of the courts, including uniform rules and forms for practice and procedure, consistent with law and the provisions of this act.

(b) Publish and submit to the governor, the chief justice of the Supreme Court, and the legislature, an annual report of the operations of the courts, which shall include financial and statistical data and may include suggestions and recommendations for legislation.

Sec. 78-3-23 deals with the administrator of courts.

Vermont: 12 VSA 1 — The supreme court is empowered to prescribe and amend from time to time, general rules with respect to pleadings, practice, and procedure and forms for all actions and proceedings in all courts of this state. The rules thus prescribed or amended shall not abridge, enlarge or modify any substantive rights of any person provided by law. The rules when initially prescribed shall not take effect until they have been reported to the general assembly by the chief justice of the supreme court at any regular or special session thereof, and until after the expiration of 45 legislative days of that session, including the date of the filing of the report. Any amendment of the rules (including any repeal, modification or addition) shall take effect on the date provided by the supreme court in its order of promulgation and shall be reported by the chief justice of the supreme court to the general assembly at the next regular or special session following promulgation thereof. After the effective date of the rules as prescribed, or amended, all laws in conflict therewith shall be of no further force or effect.

Washington: 1974 RC of Washington — Sec. 2.04.190. The supreme court shall have the power to prescribe, from time to time, the forms of writs and all other process, the mode and manner of framing and filing proceedings and pleadings;...and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature by the supreme court, superior courts and justices of the peace...

2.04.200. When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect.

#### IV. THE SEPARATION OF POWER

##### What is the Separation of Power?

Since we are primarily concerned here with what powers the judicial branch, and specifically the Supreme Court, possesses in this state vis-a-vis the other two branches of the state government, the main thrust of this study is an examination of the separation of powers doctrine as it relates to the judiciary.

What do we mean, therefore, by the "separation of power"? Briefly, in United States and Wisconsin constitutional history, it is the powers granted to a government divided into 3 parts — legislative, executive and judicial — each part constituting a separate branch or, in the earlier usage, "department" of the government and each containing the plenary power for that particular function.

Neither the Constitution of the United States nor the Constitution of the State of Wisconsin specifically states that there shall be a separation of powers; they merely provide for it; and it is a major cornerstone of our constitutional philosophy. Thus, the U.S. Constitution grants "all legislative powers" to Congress, "the executive power" to the President, and the "judicial power" to one Supreme Court and "such inferior courts as the Congress may from time to time ordain and establish." The Wisconsin Constitution vests the "legislative power" in a Senate and Assembly, the "executive power" in a governor, and the "judicial power" in a Supreme Court, circuit courts, and courts of probate.

That part of the governmental power that is vested in the judiciary, the judicial power, is considered in some detail in the next section of this report.

##### The Federalist

When Hamilton, Madison and Jay wrote the articles that comprise *The Federalist*, they cited Montesquieu as the oracle on the subject of separation of powers and his text as the British Constitution. The authors of *The Federalist*, however, were careful to point out that, although they considered the separation of power as vital to liberty, neither in the British Constitution nor in the various state constitutions are the powers completely separate. There is always an intermixture of these powers. Although this is necessary, they affirmed the principle that none of the branches ought to possess, directly or indirectly, an overruling influence over the other, in the administration of their respective powers (Nos. 47 and 48).

Concerning the independence of the judiciary, they spoke of the necessity for long tenure for judges and a fixed salary that could not be diminished during their continuance in office (Nos. 78 and 79).

Their discussion of the authority of the judiciary related to the types of cases which the federal courts are specifically authorized to hear. They concluded: "From this review of the particular powers of the federal judiciary, as marked out in the Constitution, it appears that they are all conformable to the principles which ought to have governed the structure of that department [that is, the judiciary], and which were necessary to the perfection of the system. If some partial inconveniences should appear to be connected with the incorporation of any of them into the plan, it ought to be recollected that the national legislature will have ample authority to make such *exceptions*, and to prescribe such regulations as will be calculated to obviate or remove these inconveniences" (No. 80).

##### Wisconsin Constitutional Conventions

In the state's Convention of 1846, a delegate, reporting the judicial article from the Committee on the Organization and Functions of the Judiciary, stated: "It is conceded by all that government naturally resolves itself into the three branches, executive, legislative, and judicial, and that their appropriate spheres of action are so diverse that there is both a propriety and a necessity for keeping each not only distinct from but so far as possible entirely independent of the other." (The Convention of 1846, p. 288).

The convention arguments over the judicial article of the proposed constitution, however, dealt primarily with the election versus the appointment of judges, whether there should be a separate

supreme court, and judicial salaries. The argument over the election or appointment of judges did relate to the judicial power and was considered in Section II.

### The Doctrine Today

Writing in the *Harvard Law Review* in 1924, Felix Frankfurter and James M. Landis said:

"The accommodations among the three branches of the government are not automatic. They are undefined, and in the very nature of things could not have been defined, by the Constitution...There are vast stretches of ambiguous territory...the Supreme Court has consistently sustained congressional discretion when moving in the general legislative field not bound by specific limitations, even though the particular field may border on territory dominantly in control of another department of the government."

If there were "vast stretches of ambiguous territory" in 1924, there are far more such today. When the "Founding Fathers" created the Constitution of the United States, they provided for specific exceptions to the separation of powers. By the third quarter of the twentieth century, however, the increase in the legislative powers of the presidency, the delegation of powers to regulatory agencies by the Congress, and the sweeping interpretations of law by the U.S. Supreme Court have drastically blurred the lines of demarcation between the branches. Whether the political events of recent years are swinging the pendulum back toward a more traditional stance is yet to be seen.

Perhaps the nature of state government does not lend itself to the kinds of inroads that have occurred on the federal level, because the fading lines between the three branches have not been repeated on the state level in as pronounced or dramatic a manner. Nevertheless, the question remains to plague us, what are the prerogatives of each branch under the separation of powers doctrine? As Frankfurter and Landis said, they are fuzzy and ill-defined.

In the *Wisconsin Bar Bulletin*, December 1974, retired Chief Justice of the Wisconsin Supreme Court George R. Currie and retired Assistant Attorney General Warren H. Resh wrote on the status of the separation of powers between the judicial and legislative branches in Wisconsin today ("The Separation of Powers: Control of Courts and Lawyers"). They noted two particular areas in which the question has arisen in Wisconsin: (1) the regulation of the practice of law and (2) the rules of procedure.

Citing various cases which will be noted in more detail in the next section of this study, the authors stated that the State Constitution is silent on where the authority to regulate these two matters resides — whether in the legislature or in the courts. As a result, the Supreme Court may ignore a legislative enactment which may usurp judicial power "if the court feels that it is harmless or innocuous. However, if the court believes that the statute actually frustrates or interferes with judicial functioning it will not hesitate to strike it down." The court, maintained the authors, has inherent powers to regulate these matters.

When Chapter 152, Laws of 1849, for example, laid down qualifications for the admission of attorneys to the bar which were extremely liberal, the court did not object since, apparently, no one tried to become a member of the bar under its provisions. When the court denied admission to the bar of a woman under a later law, the legislature specifically enacted a law prohibiting sex discrimination in admissions to the bar, and a subsequent court decision allowed the woman in the suit to be admitted. In this case, *Application of Miss Goodell*, 48 Wis. 693, the court said it would waive the question of whether or not the courts have the ultimate power to determine who can be admitted to practice. In the 1932 case of *In re Cannon*, (260 Wis. 651), however, the court vigorously struck down a law which restored Cannon's license to practice law after the court had revoked it, saying: "This statute presents an assertion of legislative power without parallel in the history of the English-speaking people..." In a later case in 1960 (*State ex rel. Reynolds v. Dinger*, 14 Wis. (2) 193), the court asserted that its control of the practice of law also encompassed those who practiced law outside of actions and proceedings in court. The authors of the article concluded that the cases "clearly spell out the proposition that the definition and regulation of the practice of law is exclusively vested in the courts under their inherent powers." However, they qualified this by saying that the legislature may aid the judiciary "in exercising its inherent control over the practice of law as was done in the enactment of Sec. 256.30 (1), which makes the unlicensed practice of law a misdemeanor punishable by fine or imprisonment or both and which at the same time recognizes that this punishment of the violator is 'in addition to his liability to be punished as for a contempt' by the court".

Turning to the regulation of practice and procedure, the authors say it is well established that courts have inherent powers to prescribe rules of practice and proceedings as long as they don't modify substantive law or jurisdiction. They cited *Rules of Court* (1931) 204 Wis. 501, which held

that Sec. 251.18 is constitutional; however, the legislature can enact rules of procedure and delegate the power to the court.

## V. THE JUDICIAL POWER

### What Is the Judicial Power?

Under the separation of powers provided for in both the national and state constitutions, we are concerned with those powers vested in the judiciary. What, precisely, is the "judicial power" that is so vested? Innumerable court decisions have involved this question; some of them are cited below. Again, however, Frankfurter and Landis offer us a thoughtful guideline — or, perhaps, warning — as to the meaning of the term.

"The term 'judicial power' is not self-defining; it is not...a technical term of fixed and narrow meaning;...'Judicial power' sums up the whole history of the administration of justice in English and American courts through the centuries..."

"As an incident to their being, courts must have the authority 'necessary in a strict sense' to enable them to go on with their work. In doing their work, courts, like others, may encounter obstructions. They must, therefore, be invested with incidental powers of self-protection [court room interruptions, for example]. Courts, then, must have adequate authority to deal with such events. Either Congress must prescribe methods appropriate for such situations, or courts are thrown back upon their own resources. This manifestation of a court's activity is not a mystical emanation inhering in the unique nature of a court; it is referable solely to the fact that a court has business in hand and must get on with it."

Based on the many court decisions involving this topic, *Corpus Juris Secundum* has extracted the essence of the matter. The selected quotations below are from Vol. 16, Secs. 144 and 151.

1. "The term 'judicial power' as employed to designate one of the three great branches or departments in which the powers of government are divided may be broadly defined as the power to hear and determine those matters which affect life, liberty, or property, and the judiciary, or judicial department of the government as that branch thereof which is intended to interpret, construe, and apply the law."

2. "The judiciary department in this country is subservient only to the federal Constitution, to the established law of the land, and, if a state judiciary, to the state constitution. All powers, even though not judicial in nature, which are incident to the discharge by the courts of their judicial functions, are inherent in the courts, and under constitutional provisions establishing a judicial department, it has been held that it has such power as is necessary to the exercise of the judicial department as a coordinate branch of the government. The courts have, and should maintain vigorously, all the inherent and implied powers necessary properly and effectively to function as a separate department of government, and it has been held that whether the judiciary power to exercise a particular judicial function be regarded as implied or inherent is immaterial."

3. "Thus, under the constitutions of particular states, the judicial power has been vested solely in the courts of such states, and, when so vested, becomes plenary, so as to extend to all justiciable matters. Included in this grant are all powers necessary for complete performance of the judicial function, whether such powers be regarded as inherent or implied."

4. "Notwithstanding constitutional provisions prohibiting persons from one department exercising powers of another department of government, duties which are not judicial may be performed by judicial officers unless clearly such [duties] as are confided by the constitution itself to the executive or legislative department."

5. "...it is the duty of the judicial department to protect the jurisdiction of the judiciary at the boundaries of power fixed by the constitution, and to see that no one department of government encroaches on the prerogatives of another."

6. "The courts cannot encroach on, or interfere with, the proper exercise of the constitutional powers of the legislature."

7. "The courts have no power to legislate;...Nevertheless, to some extent, the courts do and must legislate, but they do so only interstitially; the function of the court when dealing with legislation does not go beyond that of filling in the small gaps left by the legislature in accordance with what appears to be the legislative purpose."

*American Jurisprudence*, 2nd edition, vol. 16, has furnished the following explanations of judicial power.

1. "Frequently, there are functions which are performed by one or another of these departments of such a character that their performance does not necessarily belong to it; and where such is the case the authority of the department is not necessarily exclusive, and another department may be required to perform the same or a similar function." (Sec. 214)

LRB-76-RB-1

2. "The rule is now well settled that under the various state governments, the constitution confers on the judicial department all the authority necessary to exercise powers as a co-ordinate branch of the government."

3. "In a general way the courts possess the entire body of judicial power." (Sec. 219)

4. "As a rule no effort is made in a constitution to accurately define the scope or nature of judicial powers. These matters are left to be determined in the light of the common law and the history of our institutions as they existed anterior to, and at the adoption of the constitution." (Sec. 220; *State ex rel. Ellis v. Thorne*, 112 Wis. 81).

5. "...on judges as such no functions can be imposed except those of a judicial nature...However, in many states nonjudicial administrative duties have been continually placed upon judges, and the power of the legislature to do this has been upheld." (Sec. 223).

*The Constitution of the United States of America, Analysis and Interpretation*, edited by the Congressional Research Service, also offers several definitions of "judicial power" extracted from various court decisions. Based on *Williams v. United States*, 289 U.S. 553 (1933), judicial power "is the totality of powers a court exercises when it assumes jurisdiction and hears and decides a case."

Judicial power is frequently described as encompassing inherent power, implied powers and supervising control. *Words And Phrases* defines these as follows (selected definitions):

*Inherent power* of the judiciary — "that which is essential to existence, dignity, and functions of court from very fact that it is a court." (Vol. 21A).

*Implied powers* — "An 'implied power' rests on necessity, finds justification in an express power, and functions as an essential and in fulfillment of purpose to which its parent power is directed." (*Chittenden v. Jarvis*, 297 N.W. 787, 789, 68 S.D. 5.) (Vol. 20).

"The 'implied powers' flow from a grant of expressed powers, and are those powers necessary or incidental to the exercise of the express powers." (*Skelly Oil Co. v. Pruitt & McCrory*, 221 P. 709, 710, 94 Okla. 232.) (Vol. 20).

*Superintending control* — "It must be regarded as settled, therefore, that by the constitutional grant of a general 'superintending control' over all inferior courts the Supreme Court was endowed with a separate and independent jurisdiction, which enables and requires it in a proper case to control the course of ordinary litigation in such inferior courts, and was also endowed with all the common-law writs applicable to that jurisdiction." (*State v. First State Bank of Jud*, 202 N.W. 391, 402, 52 N.D. 231) (Vol. 40A).

### Wisconsin Supreme Court Decisions

A variety of Wisconsin Supreme Court decisions involving the meaning and limits of judicial power is summarized below. The list is not — and is certainly not intended to be — all inclusive. It is a selective list, selected from among the many related cases on the basis of which opinions appeared to shed the most light on the general powers of the Supreme Court and the issues being considered in this study. For clarity, decisions have been divided into the following categories as they relate to: (1) judicial power generally, (2) superintending control, (3) rules of pleading, practice and procedure, and (4) regulation of the bar. Naturally, some overlapping occurs among these categories. Cases are presented in chronological order within their grouping.

#### 1. Decisions relating to Judicial Power Generally

A state law enacted in 1867 prohibited courts from trying an action to foreclose a mortgage, in which there were issues of fact, without the intervention of a jury. In *Callahan v. Judd* (1868) 23 Wis. 343, the state Supreme Court declared it invalid. The court stated that the system of jurisprudence established in this country and derived from England gave courts the power of determining questions of law and gave juries the power of determining questions of fact in matters of law. It was equally understood that a court of chancery determined questions both of fact and of law. When the constitution vested in courts judicial power as to matters of equity, "it clothed them with this power, as one of the established elements of judicial power in equity, so that the legislature cannot withdraw it and confer it upon juries."

This is an example of a situation in which the court has said that powers with which it is considered vested by virtue of long tradition at the adoption of the constitution are considered part of the judicial power and cannot be denied the court by subsequent legislative enactment.

In a frequently cited case involving the removal of the Supreme Court janitor by the state superintendent of public property (*In re Janitor of Supreme Court* (1874) 35 Wis. 410), the court, which had hired the janitor, held that it "is a power inherent in every court of record, and especially courts of last resort, to appoint such assistants; and the court itself is to judge of the necessity. This principle is well settled and familiar, and the power so essential to the expedition and proper conducting of judicial business, that it may be looked upon as very doubtful whether the court can be

deprived of it. As a power judicial and not executive or legislative in its nature, and one lodged in a co-ordinate branch of the government separated and independent in its sphere of action from the other branches, it seems to be under the protection of the constitution, and therefore a power which cannot be taken from the court, and given to either the executive or legislative departments, or to any officer of either of those departments." The court concluded that the power of appointment and removal of the janitor belongs to the court. If the janitor is omitted from the payroll, the next legislature must make an appropriation; if it failed to do so, the appointee can take action against the state. Thus, the Supreme Court was saying that at least its immediate administrative personnel is under its control and that control cannot be interfered with by the executive or legislative branch. As in so many of these cases, however, the court hedged with words like it is "very doubtful" whether the court can be deprived of its power in this situation, and the power "seems to be under the protection of the constitution."

The court, in *Van Slyke v. Trempealeau County Farmers' Mutual Fire Insurance Company* (1876) 39 Wis. 390, voided a state law that would have allowed a member of the bar to act as judge by stipulation of the parties involved instead of changing venue when a judge was considered prejudiced. Since the constitution vests all judicial jurisdiction in courts and justices of the peace and provides for the election of judges, the court declared that no one else can exercise the powers of judges.

*State ex rel. Ellis v. Thorne* (1901) 112 Wis. 81, involved the constitutionality of a law providing for the appointment by the circuit judge of commissioners to review tax assessments. The court, in declaring the law constitutional, said that an officer or board may act judicially and not do anything falling within the meaning of the term "judicial power as to matters of law and equity"; likewise, a judicial officer may also perform ministerial acts. "The constitution by no means provides that all authority to act judicially is or shall be vested in some one of the courts therein indicated."

In *Stevenson v. Milwaukee County* (1909) 140 Wis. 14, where the right of a circuit court to appoint a bailiff was being contested, the court held that the circuit courts are created by the constitution "and do not depend solely upon statute for their powers. Independent of statute such constitutional courts have inherent power to make such rules and orders as may be necessary to properly perform their functions." Furthermore, "The power to appoint necessary attendants upon the court is inherent in the court in order to enable it to properly perform the duties delegated to it by the constitution. This power has been recognized by the legislature in sec. 2431, Stats. (1898), as amended by ch. 224, Laws of 1903..." Although Milwaukee County did not seriously deny the right of the court to appoint court attendants, the county claimed that there was no necessity in this case. The court held, however, that the power to determine the necessity rested in the judge, "that a broad and liberal discretion is vested in the judge respecting this power."

A dissenting opinion in this case asserted that the written law amply provided for circuit court attendants through appointment by the sheriff. "It may well be that courts are not obliged to bow to the legislative will in such matters, but they ought to in all cases where their constitutional authority is not prejudicially interfered with. The written law does not leave any occasion for use of the court's inherent power, except in purely emergency cases, and it is manifest that no such case existed in the instance before us."

In a dispute over changing circuit court headquarters to a location considered unsuitable by the judge, the court said in *In re Court Room* (1912) 148 Wis. 109, that there was not only a law which required the county board to provide suitable and convenient quarters for the circuit court, but that "There was a duty to do so under the constitution, independent of and regardless of any statute, and it is not correct to say that there is a discretion vested in the County Board in reference to the selection of court rooms which is entirely beyond the control of the courts. If such were the case, it would be within the power of county boards to at least greatly curtail the usefulness of circuit courts by declining to furnish them quarters in which judicial business could be transacted. The authorities, in so far as they can be found on the subject, are to the effect that a constitutional court of general jurisdiction has inherent power to protect itself against any action that would unreasonably curtail its powers or materially impair its efficiency. A county board has no power to even attempt to impede the functions of such a court, and no such power could be conferred upon it. Circuit courts have the incidental power necessary to preserve the full and free exercise of their judicial functions, and to that end may, in appropriate cases, make *ex parte* orders without formally instituting an action to secure the desired relief."

In *State ex rel. Mueller v. Thompson*, (1912) 149 Wis. 488, which involved the constitutionality of the home rule act, the court stated that "there are three co-ordinate, substantially independent branches, namely, executive, legislative, and judicial. Each, so long as operating within

its legitimate field, is supreme. It is for the court, in the ultimate, to determine whether the boundaries of a particular field have been overstepped and, if so, to nullify or stay the transgression."

The court, in *Appleton v. Outagamie County* (1928) 197 Wis. 4, was asked to enjoin the county board from levying the county general tax in the amount levied. The court stated: "It is conceived to be a fundamental principle of our government that when one co-ordinate branch acts within its constitutional field, its action may not be inquired into or interfered with by another co-ordinate branch. Most certainly a court cannot inquire into the character of the intent with which a co-ordinate branch of the government exercises its powers and, if it deems that the co-ordinate branch of the government is not acting with proper intent, to set aside and nullify its acts...Until it [the county board] acts in violation of law its acts cannot be restrained by the courts. If the court should attempt to ascertain what sum the county needed and limit the amount of the levy to that sum, the power vested in the county board would be exercised by the court. The remedy for the evils which the trial court found to exist is political, not judicial."

In *John F. Jelke Co. v. Beck* (1932) 208 Wis. 650, the court stated that in Wisconsin [unlike the federal government] the jurisdiction and power of the courts are conferred not by act of the legislature but by the constitution itself. "While the legislature may regulate in the public interest the exercise of the judicial power, it cannot, under the guise of regulation, withdraw that power or so limit and circumscribe it as to defeat the constitutional purpose." The case arose when a lower court determined that the defendant, a commissioner of the Department of Agriculture and Markets, had violated a restraining order and adjudged him in contempt of court, from which judgment he appealed. The Supreme Court stated further: "Executive and administrative officers under our system of government cannot evade judicial authority by the interpretations which they place upon statutes conferring powers...Whether or not a public officer is acting within a statutory authority has from earliest times been held to be a judicial question. If he acts beyond his authority he acts as an individual, not as an officer, because as an officer he is without authority; consequently it is held that he is subject to judicial restraint. Even though the defendant claimed to act within his authority, having been enjoined by a court of competent jurisdiction from doing the acts complained of, it was his duty to await a final determination as to whether or not he was within or without his authority before proceeding in violation of the court's order and in contempt of the court itself."

## 2. Decisions relating to Superintending Control

While considering its jurisdiction over the issuance of a writ of *quo warranto* in *The Attorney General v. Blossom* (1853) 1 Wis. 317, the Wisconsin Supreme Court directed itself to the meaning of "superintending control." In doing so, the court gave a definition to the constitution sentence, "The Supreme Court shall have a general superintending control over all inferior courts", which has been quoted many times since. The clause, Justice Smith said, "contains a clear grant of power...It is unlimited in extent. It is undefined in character. It is unsupplied with means and instrumentalities. The Constitution leaves us wholly in the dark as to the means of exercising this clear, unequivocal grant of power. It gives, indeed, the jurisdiction, but does not pretend to intimate its instruments or agencies. How then is it to be exercised?" The Justice did not think the writs given in the next clause were meant to be used in exercising "a general superintending control over inferior courts." What means are used to exercise this control? "Clearly the ordinary means provided by the common law, or such as should be supplied by legislative enactment. The very force of the terms, Supreme Court; comprehending, naming, instituting the highest, the *dernier* judicial tribunal known to, and recognized by the common law, necessarily carries with it all the writs, instrumentalities, powers and agencies provided by the common law for the convenient and complete exercise of such superintending control. It is idle to say, that the enumeration of such writs as are mentioned, were made to supply such means of superintending control."

With regard to issuing writs, the court declared that "Under whatever aspect this court can view this clause of the third section, we are unable to harmonize the nature and office of the class of writs therein named, with an intention on the part of the authors of them, to render them merely ancillary to the exercise of a power of superintending control over inferior courts, lawfully established, or to provide them as mere instrumentalities of appellate jurisdiction. It is not the aim of the Constitution to provide the machinery by which the powers granted by it are to be exercised. That belongs appropriately to the legislative department. It would become an endless process, if attempted in the framing of a fundamental law."

Thus, the court decided that the power to issue writs given it by the constitution is an original power and not ancillary to its superintending control; while the vast uncharted domain of superintending control can be exercised through common law and legislative enactment.

Chief Justice Ryan, in *The Attorney General v. Railroad Companies* (1874) 35 Wis. 425, cited the *Blossom* case and stated: "To this court, as such, are given general appellate jurisdiction and

superintending control over all other courts throughout the state, because these are essential to the judicial supremacy of the court in all ordinary litigation; and original jurisdiction of certain writs..." Further, "there are three independent and distinct grants of jurisdiction, each compact and congruous in itself; each a uniform grant of analogous remedies, though to be exercised in several ways, by several writs...The three grants of jurisdiction proceed on one policy: appellate jurisdiction to decide finally all ordinary litigation; superintending jurisdiction over all other courts to control the course of ordinary litigation in them; and, outside of these, original jurisdiction of certain proceedings at law and in equity, to protect the general interest and welfare of the state and its people, which it would not do...to dissipate and scatter among many inferior courts."

Citing liberally from the *Blossom* case and the *Attorney General v. Railroad Cos.* case, Justice Winslow stated in *State ex rel. Fourth National Bank of Philadelphia and others v. Johnson*, (1899) 103 Wis. 591, that the propositions laid down in these cases have never been questioned. However, although superintending control is endowed with all the common-law writs applicable to that jurisdiction, what these writs are have not been decided; they must be considered in this case.

"It is very apparent that when the makers of the constitution used the words 'superintending control over all inferior courts' they definitely referred to that well-known superintending jurisdiction of the court of king's bench. In England it was a branch of the king's power lodged with the king's court; in this country it is a branch of the sovereign power of the people, committed by them as a sacred charge to this court, not to be exercised upon light occasion, or when other and ordinary remedies are sufficient, but to be wisely used for the benefit of any citizen when an inferior court either refuses to act within its jurisdiction, or acts beyond its jurisdiction to the serious prejudice of the citizen." The superintending jurisdiction was primarily exercised by the Court of King's Bench through the writs of *mandamus* and prohibition and sometimes exercised by the writs of *certiorari* and *procedendo*. "The conclusion is inevitable that with the constitutional grant of superintending control this court took at the same time all the ancient writs necessary to enable it to exercise that high power..."

He then continued by stating that the jurisdiction of "superintending control" had not been dormant but had been exercised by the use of the writs of *mandamus* and prohibition. Further, "There seems to have been no extended discussion of the general character and limits of the superintending jurisdiction of supreme courts in the decisions of other states, although the constitutions of Missouri, Michigan, and Colorado contain provisions very similar to our provision granting to the supreme court superintending control over all inferior courts while in Alabama, Arkansas, Iowa, North and South Carolina the superintending control is given in somewhat different phraseology. However, we have found no decisions nor intimations contradictory to the views hereinbefore expressed, while we find the writs of *mandamus* and prohibition to have been frequently used in the exercise of this jurisdiction."

Regarding the contention of the respondent in this case that issues of fact had been raised which must be tried in a circuit court under the law, the court said that there "were no true issues of fact raised by the return and answers thereto...Even admitting that issues of fact were raised by the answer, we cannot admit that the legislature has any power to deprive this court of any part of its constitutional jurisdiction to fully hear and try such questions. By the constitution this court was given power to exercise fully and completely the jurisdiction of superintending control over all inferior courts. This power carries with it not only the writs necessary to its exercise, but the right to hear and determine the cause when the writ has brought it before the court. No part of that power can be taken away by statute. This court will always pay all due deference to the legislative will, and upon mere questions of practice or orderly proceeding will heed and conform to the statute; but when the statute invades or attempts to take away any of the constitutional powers of the court the court would be untrue to itself, and to the people, from whom it holds its commission, if it permitted the statute to control. As said in *Klein v. Valerius*, 87 Wis. 54, 'It must be remembered that this court as well as the legislature gets its judicial power and jurisdiction directly from the constitution.'" If the *mandamus* proceeding involves a bona fide issue of fact, the court may order the preliminary trial of the issue to be held by the circuit court, but the statute cannot make this obligatory upon the court. This would be a "submission to legislative invasion of constitutional powers."

Thus, in this case Justice Winslow named the writs which could be used in exercising superintending control.

In *State ex rel. Tewalt v. Pollard* (1901) 112 Wis. 232, involving an application to the court to exercise superintending control over a justice of the peace, the Supreme Court described such control as "a high power, which enables this court, by the use of all necessary and proper writs, including the writ of prohibition, to control the course of litigation in inferior courts when such a court either refuses to act within its jurisdiction, or acts beyond its jurisdiction, to the serious prejudice of the

citizen. But this court will not exercise its jurisdiction when there is another adequate remedy, by appeal or otherwise, nor unless the exigency is of such an extreme nature as obviously to justify and demand the interposition of the extraordinary superintending power of the court of last resort of the state." *Pollard* thus emphasized that superintending control should be used only rarely. This case also involved the constitutionality of a law which deprived the circuit courts of the use of the writ of prohibition, and the court declared the law unconstitutional.

In *Seiler v. State* (1901) 112 Wis. 293, considering whether the legislature could confer original jurisdiction on the supreme court in the trial and disposition of criminal cases, the court held it could not. Reviewing its three specific grants of constitutional powers, the court stated that the legislature cannot extend or limit those powers. The power of superintending control cannot be resorted to to give effect to such statutes. Before the adoption of the constitution, the term "superintending control" had a well-defined meaning, which was carried into the constitution. "The power of superintending control, as has been decided and before indicated, has to do only with controlling inferior courts in the exercise of their jurisdiction by the use of instruments mentioned specifically in the constitution or authorized thereby; the same or similar means by which, before the adoption of our system, that power was exercised by the king's court under the English system of jurisprudence."

Although the court in this case said the nature of superintending control was decided by *Blossom, Railroad Cos.*, and *Johnson*, its own definition seems to follow the strand of the *Johnson* case which emphasized the use of writs in the exercise of superintending control.

The court, discussing the control of circuit courts over inferior courts as compared with the control of the supreme court, noted in *State ex rel. Milwaukee Medical College v. Chittenden* (1906) 127 Wis. 468:

"The exact scope of the jurisdiction denominated 'general control over inferior courts and jurisdictions' as to such courts [that is, circuit courts] has never been, so far as we can discover, defined authoritatively. The term or its equivalent may be found in most of the written constitutions of the land. The idea came to us from the judicial system of England. Doubtless in giving to circuit courts an equivalent to the jurisdiction of the English courts of King's Bench, Common Pleas, Exchequer and Chancery, it was designed to construct a system with the three grand divisions, original jurisdiction, appellate jurisdiction, and jurisdiction for supervisory control, the latter being coextensive with the similar jurisdiction formerly exercised by the court of King's Bench. The system for circuit courts is similar, as regards their legitimate field of operation, to that for this court, within its sphere of action, the latter being conferred by the term 'general superintending control.' That was defined for the first time by this court, speaking through Mr. Justice Winslow, in *State ex rel. Fourth Nat. Bank v. Johnson, supra*. As to circuit courts it is fenced about, so to speak, by the functions, in the aggregate, of the ancient writs used to exercise it prior to the constitution, and preserved thereby for the same purpose."

In *State ex rel. McGovern V. Williams* (1908) 136 Wis. 1, the Supreme Court decided it had superintending power to grant an imperative writ directing a circuit judge to perform his duty. The circuit court had refused to proceed with a case because it had considered the indictment void. The Supreme Court said that "though the resolution of either a jurisdictional question or of a preliminary one, which precedes the consideration of the main controversy proposed to the court, may be judicial in character, none the less the court refuses to perform its duty to that controversy when it resolves the preliminary question adversely and refuses further action, and the superintending court is not precluded from considering whether or not that duty exists." Furthermore, "The courts, English and American, agree with practical unanimity that such preliminary decision, however judicial in character, may be reviewed under the superintending power, and, in case of erroneous decision thereof by the inferior court, the latter should be required, by *mandamus*, to proceed to perform its duty by the principal controversy notwithstanding its decision upon the preliminary question."

In a somewhat similar situation, the Supreme Court was petitioned in *State ex rel. Umbreit v. Helms* (1908) 136 Wis. 432, to exercise its superintending control by directing a circuit court judge to set aside his order quashing and dismissing a criminal complaint. Speaking for the Supreme Court, Justice Kerwin cited the previous cases on the superintending control provision and particularly noted the *McGovern* case, *supra*. The court said that the principle in the two cases was the same, that it could order the trial court to reinstate the case. "Any erroneous disposition of a criminal case before a jury is impaneled and sworn by which the court refuses to further proceed with the trial upon a valid complaint, indictment, or information, where it appears 'that the duty of the court below was plain, the refusal to perform such duty clear, the result of the refusal prejudicial, and the remedy by writ of error or appeal utterly inadequate,' is sufficient to arouse the jurisdiction of this court under its power of superintending control. This court has repeatedly held that it should not exercise its powers of superintending control upon light occasions or when other and ordinary

remedies are sufficient." The court thereupon decided that this particular case was not sufficiently urgent to require it to exercise its superintending control.

A concurring opinion by Justice R.D. Marshall sought to clarify the term "superintending control." In a lengthy historical review, he stated that "it was as definitely determined as any question could well be that the power in question is not limited by the ordinary scope of any one or all of the writs specifically mentioned in the constitution; that the constitutional idea was that the power should be exercised by common-law instrumentalities other than such specified writs, or by legislative means; that the writs were given not ancillary to any grant of power, but for jurisdiction of an original character, though no definite light was shed on the scope, in detail, of the great power under discussion, consistent with the court's conception of the constitution as to ultimate judicial authority." Further, the *Railroad Cos.* case followed *Blossom* on superintending control. "Its broad and comprehensive character was emphasized at many points, the idea being made prominent that the instrumentalities for its exercise were to be discovered or invented, if need be, the power itself not to fail of efficiency in any given situation because of the ordinary restrictions upon the use of any particular writ or writs; that the constitutional grant was both 'compact and congruous in itself,' with its own 'uniform group of analogous remedies' to be exercised in ways of its own 'on many objects, in great variety of detail.'...No suggestion is found up to this point that the concept of the constitution makers, as understood by this court, was based upon any model or any idea other than that to so round out supreme judicial authority as to afford a means in any given circumstances of preventing a denial of justice."

Justice R.D. Marshall continued that in the *Johnson* case "for the first time the scope of the power and the proper instrumentalities for its exercise were called into question," and the court disfavored the earlier conception of the *Blossom* case that the power of superintending control "was given without instrumentalities for its exercise". Rather, he stated that the *Johnson* case declared the writs of *certiorari*, *procedendo* and *mandamus* were the ones used under the English system for superintending control and the ones contemplated by the framers of our constitution. He contended, however, that this "does not mean the idea was entertained that in their ancient scope they are the measure of the jurisdiction, but rather that in any situation liable to arise one or the other of such writs,...may be used regardless of whether its ancient use needs expansion beyond its ordinary scope to meet the case or not." Justice R.D. Marshall thought the *Johnson* case for the first time clearly defined the nature of the great power lodged in the supreme court. The Justice summarized his review of superintending powers as follows:

"(1) The second constitutional grant of power to this court, that of 'general superintending control over all inferior courts,' is not limited other than by the necessities of justice. It extends to judicial as well as jurisdictional errors.

"(2) The necessities of justice, in a legal sense, do not reach beyond the scope of governmental policy as to righting wrongs by judicial interference; as for example, it stops in criminal cases at the constitutional prohibition of a second jeopardy.

"(3) The grant of superintending control, though without specified means or instrumentalities for its exercise, includes by necessary implication, all common-law writs and means applicable thereto and all power necessary to make such writs and means fully adaptable for the purpose.

"(4) The extent of the power of superintending control as to any particular group of circumstances, is not measurable by that of the common-law writ most adaptable in its ordinary scope to vitalize such power in regard to such circumstances. Such extent is referable to the necessities of the case and the ordinary-use feature of the writ is to be expanded to meet the exigencies thereof.

"(5) The common-law writs with the power indicated to adapt them leave no part of the court's superintending control power to be necessarily dormant for want of means to vitalize it.

"(6) The existence of error in the field of the controlling power does not, necessarily, upon proper request in form, require the doors of the jurisdiction to open. When that should occur rests in sound judicial discretion.

"(7) By the policy of this court its superintending control power is to be exercised only when the right of the matter involved is plain, there is no other efficient remedy for its invasion or denial, such invasion or denial is prejudicial, and, generally, and especially as to errors not strictly jurisdictional, the case presents circumstances of exceptional or extraordinary hardship."

In another concurring opinion, Chief Justice Winslow stated that he thought the *Johnson* case had definitely held, and he still believed, "that the constitutional grant of the power of superintending control to this court meant only such power as was exercised by the court of King's Bench." Since the majority believed the *Johnson* case took a much broader ground, however, he yielded to their views. Nevertheless, "It is not to be supposed that the constitution conferred the power of superintending control on this court to be used as a sort of an addition to the ordinary

appellate jurisdiction in ordinary litigation, but rather as an extraordinary power to be wisely used only in cases where there has been a miscarriage of justice involving important public rights or great and widely extended private interests."

In another concurring opinion, Justice Dodge stated that while he concurred in the judgment of the court in dismissing the writ, "I cannot yield my assent to that portion of the opinion which declares that under some other circumstances we should have power to review such an order as this."

Concerning the question of a circuit court's jurisdiction (*Libby v. Central Wisconsin Trust Co.* (1924) 182 Wis. 599), the Supreme Court stated that it is the court's duty "to see that an orderly administration of justice is maintained, in accordance with the law of the state. Parties may not by their conduct or even by stipulation relieve this court from that duty. *Meyer v. Garthwaite* (1895) 96 Wis. 571. The rule applicable to the circuit court applies with even greater force to this court, for it is by the constitution vested with 'a superintending control over all inferior courts.' Art. VII, sec. 3."

In *Petition of Heil* (1939) 230 Wis. 428, the petitioner sought to invoke the superintending control by the court over inferior courts and was denied. The petitioner was not a party to the action. The purpose of superintending control "is the protection of a person in his rights as litigant. See *State ex rel. Hustisford L., P. & M. Co. v. Grimm*, (1932) 208 Wis. 366. The only two situations which may constitute exceptions are: (1) Cases where the exercise of the superintending control is necessary to the proper exercise of appellate jurisdiction. Where appellate jurisdiction has attached it is occasionally necessary to invoke the superintending control over inferior courts to insure remission of the record or the taking of other steps essential to the exercise of appellate jurisdiction. Even in such situations the action of the court is generally in response to the petition of one of the parties to the litigation, but the court upon its own motion may undoubtedly protect its jurisdiction by the exercise of superintending control. In this connection, see *In re Snyder*, (1924) 184 Wis. 10, 198 N.W. 616; *Jones v. Providence Washington Ins. Co.* (1912-13) 151 Wis. 274, 138 N.W. 1005. (2) The court may exercise superintending control as an aid to the exercise of its original jurisdiction when the latter is invoked to protect the sovereignty of the people or in any action under the so-called 'prerogative writs.' It is somewhat to be doubted whether this is a real exception to the rule stated for the reason that this court as part of the exercise of its original jurisdiction may obviously remove all obstacles to its determination whether these are the result of the acts of inferior courts or those of any other official or person..."

The court stated in *State ex rel. Koch v. Retirement Board* (1944) 247 Wis. 334, that it "does not exercise its original jurisdiction on appeal, nor is the matter one which comes within the superintending control as exercised by this court. This court does not exercise its jurisdiction of control over inferior courts merely to correct error...It is only in cases of extraordinary hardship, or where the remedy by appeal is not available or is utterly inadequate, or some grave exigency exists, that the court exercises its powers of superintending control to review the action of a trial court."

The superintending power of the Supreme Court (*State ex rel. Department of Agriculture v. Aarons* (1949) 248 Wis. 419), is "to protect the legal rights of litigants when the ordinary processes of action, appeal, and review are inadequate to meet the situation, and where there is need for such intervention to avoid grave hardship or complete denial of these rights...The superintending power is over the courts and not over the person who happens to be judge of the court acting in an administrative capacity...To warrant the exercise of superintending power there must be a clear legal right on the part of the applicant, a plain duty on the part of the inferior court, the remedy by appeal or writ of error must be inadequate, there must be an exigency calling for prompt action, the power is not to be used to perform the office of appeal or writ of error, and refusal to act and to exercise superintending control must result in grave hardship to the litigant..." Again, limitations on the use of superintending power was emphasized.

Similarly, in *Application of Sherper's, Inc.* (1947) 253 Wis. 224, the court said that "Consideration of the *Phelan*, *Shaughnessy*, and *Aarons* Cases, in which the matter was discussed, makes it clear that two important elements considered by this court as having an important bearing upon the propriety of exercising original jurisdiction and superintending control are, (1) the absence of any other adequate remedy and, (2) the fact that unless this court intervenes petitioner will suffer great and irreparable hardship. It necessarily follows, as held in the *Hustisford Case*, that each case must be judged on its facts and the character of the showing made upon a particular petition."

The court, in *State ex rel. Reynolds v. County Court* (1960) 11 Wis. 2d 560, said that the superintending power "includes the review of judicial actions of inferior courts and extends to judicial as well as jurisdictional errors committed by them. In exercising this power of superintending control, this court is not restricted to the use of common-law writs and is limited only by the necessities of justice. It may use such common-law writs and means as are applicable, or

expand the ordinary use of such writs to meet the exigencies and necessities of the case before it." *Pollard* and *In re Court Room, supra*, were cited.

The case involved the acquisition of an air conditioner by a county judge. The county purchasing agent refused to pay for it since it was not authorized by the county board. Subsequent proceedings ultimately involved questions of contempt by the agent and his confinement by the county court. Although the Supreme Court enjoined the county court from interfering with the liberty of the sheriff and of the purchasing agent, Justice Hallows stated that "the county court had the jurisdiction to institute on its own motion the proceedings to determine the question of the necessity for air conditioning and that was what it was ineptly doing."

On November 25, 1975, the Supreme Court handed down a decision, *In re Kading*, No. 75-154, involving its right to promulgate a judicial code of ethics, one of the problems noted in Section I of this report. In deciding that Rule 17 of the Code of Judicial Ethics, requiring a personal financial statement from judges, is valid, Chief Justice Wilkie said for the court that "both the adoption of the code [in 1967] and the later adoption of Rule 17 are actions of this court performed under its inherent power to function as the Supreme Court and also performed in carrying out the function of superintending control as expressly set forth in art. VII, sec. 3, of the Wisconsin Constitution..." The Chief Justice cited the two *Cannon* cases [discussed later in this section] on inherent power and continued, "The function of the judiciary is the administration of justice, and this court, as the supreme court within a statewide system of courts, has an inherent power to adopt those statewide measures which are absolutely essential to the due administration of justice in the state." He contended that the Code of Judicial Ethics is such a measure, because "One of its purposes is to eliminate the possibility that conflicts of interest will interfere with the fair and impartial administration of justice."

To the contention that the court's inherent power is limited to regulation of attorneys and the physical operation of the courtroom, the Chief Justice stated that "The inherent power of this court is shaped, not by prior usage, but by the continuing necessity that this court carry out its function as a supreme court."

He then turned to the court's superintending power as justification for its position, particularly its definition given in the *Blossom* case, and in the *Helms* case, concluding that "The superintending power is as broad and as flexible as necessary to insure the due administration of justice in the courts of this state...If this power were strictly limited to the situations in which it was previously applied [that is, as Judge Kading contended, to control courts in matters between parties to a litigation], it would cease to be superintending, since this word definitely contemplates ongoing, continuing supervision in response to changing needs and circumstances. The power of superintending control should not be ossified by an unduly restrictive interpretation of its extent."

Although the *Heil* case had said that the purpose of superintending power was to protect the person in his rights as litigant, the Chief Justice argued that the code is protecting the rights of all litigants. "If the superintending power can be used to protect particular parties to a particular litigation, then surely it can be used to protect the rights of litigants in general." Against the statement in the *Aarons* case, *supra*, that the superintending power is over inferior courts and not over judges, he contended the *Aarons* decision meant that the judge was beyond superintending power because he was not acting judicially but administratively. When a judge acts in a way that might influence his judicial performance, "he directly affects the administration of justice in 'inferior courts'. As such he is within the scope of the superintending power."

With respect to whether a judicial code of ethics is a matter for legislative action, the legislature "has specifically chosen not to adopt a code of ethics for judges." Regardless of this, the court has power to promulgate its code.

Concerning other points of contention, the Chief Justice said that the court can impose sanctions short of removal, since there are no explicitly constitutional barriers to its exercise. The constitutional provisions on removal do not prevent action by the court short of removal. To the question of the possible invasion of privacy of Rule 17, the court said that a public official "is legitimately much more subject to reasonable scrutiny and exposure than a purely private individual." From a perusal of the cases, "it is extremely doubtful that a public official has a fundamental constitutional right to economic privacy." Even if such a right exists, "There are compelling public interests behind the adoption of Rule 17." The judiciary must be impartial, and the public must have confidence in it and must be informed of the economic interest of judges. "Since such public confidence is absolutely crucial to the due administration of justice, the adoption of Rule 17 was well within the scope of this court's inherent and supervisory power."

In a dissenting opinion, Justice Robert Hansen, with Justice Hanley and Justice Connor Hansen joining in the dissent, saw "the whole area of the consequences of judicial misconduct, from reprimand to removal, as having been constitutionally delegated to the legislative branch of our

government. Such interpretation is supported by the provision in the impeachment constitutional provision, providing that the penalty may 'not extend further than removal from office.'...the grant of disciplinary power to the legislature over judges may not extend further than removal from office, but includes the sole and exclusive right to censure or reprimand, as well as the sole and exclusive right under the constitution to remove judges from office." There is no express constitutional authority for the supreme court to censure or reprimand.

Citing the *Aarons* and *Heil* cases, Justice Hansen contended that superintending control 'will be exercised only at the behest of a party to a proceeding in an inferior court and then for his protection.' Superintending control can be broadened "only up to the limit of the constitutional authority delegated." He cited the limitations imposed by the *Seiler* case that "The power of superintending control is the power to 'control the course of ordinary litigation in inferior courts,' as exercised at common law by the court of King's bench, and by the use of writs specifically mentioned in the constitution and other writs there referred to or authorized." The limitation in the constitution "is not in the word 'superintending.' The limitation is in the phrase 'over all inferior courts.' Disregard of precedent in statutory or constitutional construction is hardly the general rule, but, if done, ought not to include going beyond a constitutional authority as expressly granted and expressly limited." Since superintending control is given to the supreme court over inferior courts and supervisory control to circuit courts over inferior courts, "It is difficult to see why the meaning or purpose would be any different in either reference." Although the construction given in the *Seiler* case can be altered, "what cannot be altered is the constitutional creation of this court as one with appellate jurisdiction only, given a superintending control only over inferior courts, not judges or their wives, and with original jurisdiction to be exercised only by certain named writs."

The majority's claim as to the court's scope of inherent power, contended Justice Hansen, is "mind-boggling. Can it be seriously asserted that four members of this court can adopt any 'statewide measures' that they consider 'absolutely essential' to the 'due administration of justice?'

"Where in the Wisconsin Constitution is there any basis or foundation for so caesarean a claim to an unlimited and unqualified power to do whatever it considers 'essential' without regard to the grant and limits to its authority in the state constitution itself?" The desirability of the ends sought cannot be confused with "the legitimacy or constitutionality of means used".

"...it is for the legislature to enact the laws, for the executive branch to administer them, and for the judicial branch to interpret and, within constitutional limits, apply them. Ours is a government of checks and balances, with powers thus separated between legislative, executive and judicial branches. No one such branch is to enact the law, administer the law, interpret the law and impose the penalty for its violation, at least not in the absence of specific constitutional authorization so to do." Therefore, this court lacks authority to promulgate Rule 17, provide a penalty for noncompliance, and apply the penalty. In this case, the court "makes the law, provides the penalty, administers the law and imposes the sanction for noncompliance."

To summarize the cases pertaining to superintending control, the 1853 *Blossom* case clearly laid out guidelines for its interpretation. The court said that superintending power is unlimited, that the writs named in the third grant of power in the constitutional article are not necessarily the means for exercising it, but that common law and legislative enactment are such means. The *Railroad Companies* and *Johnson* cases, while reiterating the *Blossom* description, spoke of superintending control as jurisdiction to "control the course of ordinary litigation" in the inferior courts. The *Johnson* and *Seiler* cases emphasized that superintending control was exercised by the instruments of the writs used by the court of King's Bench. The lengthy, concurring opinion in *Umbreit v. Helms*, followed the strands begun by *Blossom* and interpreted the *Johnson* case more broadly than did a minority of the court. In the *Heil* case, the court stated that superintending control "is the protection of a person in his rights as litigant" and rejected a petitioner who was not a party to an action. The majority of the court in the *Kading* case followed the most liberal interpretation of superintending control as first enunciated in *Blossom*.

### 3. Decisions relating to Rules of Pleading, Practice and Procedure

The court held in *Attorney General ex rel. Cushing v. Lum* (1853) 2 Wis. 371, an early case in this area, that a clerk of circuit court must obey the requirements of the law or the mandate of the Supreme Court even though directed otherwise by the circuit judge. The circuit court has "no power to repeal or abrogate a rule which the statute declares shall have the force of law, until the same shall be amended or altered by the Supreme Court, or the Legislature..." At the time of this court decision the statutes provided for the Supreme Court to make any rule of practice of the circuit or supreme court.

The constitutionality of Sec. 251.18 of the statutes, providing for promulgation of rules by the Supreme Court, was considered in *Rules of Court Case* (1931) 204 Wis. 501. The section was

attacked on the basis that it delegated legislative power to the Supreme Court. The court noted, however, that "The fact that the legislature has acquired a power, whether by express constitutional provision or otherwise, does not inevitably characterize the power as purely legislative. The power may be essentially a judicial power and, if it is such a power, it may be delegated to the courts. The question as to what powers are essentially judicial and what legislative is to be solved by ascertaining the definition and scope of such powers at the time the constitution was adopted. 'What constitutes judicial power, within the meaning of the constitution, is to be determined in the light of the common law and of the history of our institutions as they existed anterior to and at the time of the adoption of the constitution.' *State ex rel. v. Harmon*, 31 Ohio St. 250.

"The authorities clearly establish that the power to regulate procedure was at that time considered a judicial power, or at least that it never was considered to be a purely or distinctively legislative power."

The court further cited an article, "Judicial Regulation of Court Procedure," 2 *Minn. Law Rev.* 1918, pp. 81-93 by a Professor Morgan, which seems to summarize its position:

"It is therefore apparent that both in England and in our federal governmental system the regulation of procedure has not been regarded as an exclusively legislative function. And such has been its history in Minnesota also. In the Northwest Ordinance of 1787 and the act of August 17, 1789, to provide for the government of the Northwest Territory, there was no original separation of powers; for the governor and judges had legislative powers until the organization of a general assembly. In 1800 Indiana Territory was carved out of the Northwest Territory, and in 1805 Michigan Territory was carved out of Indiana Territory. In December, 1820, the governor and judges of Michigan Territory adopted an act concerning the supreme and county courts of the territory, sec. 12 of which gave the courts power to make 'all such rules respecting the trial and conduct of business both in term and vacation as the discretion of said court shall dictate,' and in order that the rules might be uniform the county courts were directed to make their rules conform as near as might be to the rules of the supreme court. In 1825 the general assembly enacted a more elaborate bill, sec. 18 of which made it the duty of the supreme court to prescribe rules and orders for the proper conducting of business in said court and in the circuit courts and for the regulating of the practice of said courts, 'so as shall be fit and necessary for the advancement of justice, and especially for preventing delay in proceedings.' A direction to the county courts similar to that contained in the former act was made for the sake of securing uniformity.

"This law was in force when, in 1836, Wisconsin Territory was established by an act which, among other things, continued the laws of Michigan Territory in force until changed by the proper authorities. The policy of regulating the practice of the supreme and circuit courts by rules adopted by the supreme court was continued in the legislation of the state of Michigan. And in 1850 a similar provision was written into the constitution of Michigan.

"In 1836 the legislative assembly of Wisconsin Territory passed an act concerning the supreme and district courts which, in terms almost identical with those of the Michigan enactment of 1820, conferred upon the courts the power to make rules, and directed the district courts to conform their rules to those of the supreme court. When Wisconsin was admitted to the Union in 1848, this act was in force...

"It will, consequently, be seen that in Minnesota and in the jurisdictions from which she inherited her laws, as well as in England and the federal government, the power to regulate procedure has been regarded not as an exclusively legislative power, nor yet as an exclusively judicial power, but certainly as a power properly within the judicial province when not otherwise directed by the legislature."

The court also addressed itself to the contention that the section was unconstitutional because the legislature had both delegated and retained the power to regulate rules of procedure and that the power could not exist simultaneously in both the court and the legislature. The court concluded that "assuming the power of the legislature to enact rules of procedure and to delegate this power, it must follow, we think, that it can take back whatever it can give, and we have been unable to discover any rule that compels it either to give or to take back the whole rather than a part. The law is intended to free the courts from the obligation to follow precedent, which is assumed to have been a major factor in prior failures of courts successfully to regulate procedure, and, on the other hand, to relieve against the inflexibility and difficulty of repeal or modification, which has constituted the principal objection to regulation by legislative code."

When a power is not exclusively committed to either branch, "there should be such generous co-operation as will tend to keep the law responsible to the needs of society."

The court also affirmed that the supreme court, not the lower courts, has authority to make the rules.

LRB-76-RB-1

A few years later, the court reaffirmed in *Spoos v. State* (1935) 219 Wis. 285, that "The court, as well as the legislature, at least when there is no conflicting legislation, has equal power with the legislature to improve practice and procedure, and should not hesitate to do so in the interest of justice and law enforcement."

In a case relating to appeals, *Benton v. Institute of Posturology, Inc.* (1943) 243 Wis. 514, the court noted that "Appeals being statutory in their origin, they confer a right which did not exist theretofore and for that reason cannot be dealt with by this court under its rule-making power." Whether the statute should be amended was said to be a matter for the legislature.

A petition for the abrogation of a court rule and the reinstatement of an earlier one was the subject of *In Re Petition of Doar* (1945) 248 Wis. 113. Discussing its rule-making power, the court stated: "It is the purpose of the court to limit itself strictly to procedural matters, and to consider those matters with the sole purpose of insuring that our procedural law may not be encumbered by useless or unfair rules which complicate and confuse the trial of cases or add to the expense of litigation."

In *Estate of Delmady* (1946) 250 Wis. 389, the court endorsed a U.S. Supreme Court decision (*Kring v. Missouri*, 107 U.S. 221), which adopted a statement in Bishop on Criminal Procedure: "Practice means 'those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in.'" The court stated: "We regard this statement as sound and applicable. The subject matter of the amendment involved here is procedural because designed and calculated to promote the fair, expeditious, and economical administration of appeals in order that the substantial rights of the parties may be determined without delay, confusion, or vexation. We appreciate the need for exercising care and discrimination because some rules of substantive law are couched in terms of procedure...The amendment in question merely regulates the manner of bringing parties before this court upon an appeal. It neither creates nor conditions a litigant's right to appeal...We conclude that the amendment is safely within the rule-making power. We are also of the view that since rules of court are statutory in form the principle that obtains as to statutes changing procedural rules is applicable to them. Such rules have always been applied to pending cases although enacted after the decision of the trial judge."

The court declared in *State ex rel. Thompson v. Nash* (1964) 227 Wis. (2d) 183, that its rule-making power does not extend to prescribing procedures to be followed by administrative agencies. It referred to *Gray Well Drilling Co. v. State Board of Health* (1953) 263 Wis. 417, in which the court stated: "The functions of administrative agencies and courts are so different that the rules governing judicial proceedings are not ordinarily applicable to administrative agencies, unless made so by statute. It is not the province of courts to prescribe rules of procedure for administrative bodies, as that function belongs to the legislature."

The court noted in *Mosing v. Hagen* (1966) 33 Wis. (2d) 636, that it has held "that at the time of the adoption of the state constitution the power to regulate procedure was considered to be essentially a judicial power or at least not a strictly legislative power. The court held that there is no constitutional objection to the delegation of this power to the court by the legislature. *Rules of Court Case* (1931) 204 Wis. 501, 510, 236 N.W. 717. While the court held that sec. 251.18, Stats., is not an unlawful delegation of legislative power, the court recognized the not strictly judicial nature of this power and used a wealth of authority to explain the legitimacy of the court's exercise of this power within the framework of separation-of-powers government. *Rules of Court Case, supra*, pages 503-514. Almost since statehood the court has recognized that its rules regulating practice before it and before the circuit courts are the law of the land and are binding upon all courts, officers and parties until changed by the court or the legislature. *Attorney General ex rel. Cushing v. Lum* (1853) 2 Wis. 371."

*Mosing v. Hagen* seems to synthesize the general opinion of the supreme court on its rule-making powers. Although rule making is essentially a judicial power, the legislature can legislate on the subject and can delegate all or part of it to the court.

#### 4. Decisions relating to Regulation of the Bar

Under an 1861 law, a Miss Goodell was admitted to practice before the lower courts of this state. *In re Goodell* (1875) 39 Wis. 232, involved the first application by a woman — Miss Goodell — to be admitted to the bar of the Supreme Court for the practice of law. The court denied the application. In doing so, the court stated that all the judicial power of the state is vested in the courts. "The constitutional establishment of such courts appears to carry with it the power to establish a bar to practice in them...And admission to the bar appears to be a judicial power. It may therefore become a very grave question for adjudication here, whether the constitution does not entrust the rule of admissions to the bar, as well as of expulsion from it, exclusively to the discretion of the courts."

The legislature has prescribed rules for admission to the bar. "When these have seemed reasonable and just, it has generally, we think, been the pleasure of the courts to act upon such statutes, in deference to the wishes of a coordinate branch of the government, without considering the question of power." The 1849 act, which required admission of anyone of good moral character, was apparently never tested. "If, unfortunately, such an attack upon the dignity of the courts should again be made it will be time for them to inquire whether the rule of admission be within the legislative or the judicial power." The court's decision in this case was not based upon whether the 1861 act was binding, but upon its construction.

Four years later, under a new statute, the Supreme Court did admit Miss Goodell to the practice of law before it (*Application of Miss Goodell* (1879) 48 Wis. 693). The statutory authority which the court said on the previous application was lacking now existed. Again the court said: "It may admit of serious doubt whether, under the constitution of this state, the legislature has the absolute and exclusive power to declare who shall be admitted as attorney to practice in the courts of this state; or whether the courts themselves, as a necessary and inherent part of their powers, have not full control over the subject." The court, however pursued the same course as in the previous decision, acting upon the new statute and "waiving for the present the question whether or not the courts are vested with the ultimate power under the constitution of regulating and determining for themselves as to who are entitled to admission to practice." The court found no objection to her admission.

The question of whether the Supreme Court has jurisdiction in disbarment proceedings arose in *State v. Cannon* (1928) 196 Wis. 534. Prior to 1927, statutory law provided for disbarment proceedings to be tried in circuit courts; Chapter 314, Laws of 1927, provided that disbarment proceedings should be brought exclusively in the supreme court. The court said "From time immemorial, certain powers have been conceded to courts because they are courts. Such powers have been conceded because without them they could neither maintain their dignity, transact their business, nor accomplish the purposes of their existence. These powers are called inherent powers.

"Due to the fact that in this country the legislative department of government has presumed to prescribe qualifications for the admission of attorneys to practice law, some confusion exists as to whether the power to admit and disbar attorneys is inherent in courts." While in the *Goodell* and other cases the court refrained from holding that it had inherent powers to admit and disbar attorneys, its view was clear. The court continued, "It is not a power derived from the constitution or the statutes of this state. It is a power which is inherent in this court. It is a power that inheres because attorneys at law are officers of the court...Under our form of government, where the judicial constitutes an independent branch, the character of those who stand in this relation [that is, as a lawyer does] to the court should be of the court's choosing and under the supervision of the court, and other branches of the government should not be permitted to embarrass or frustrate judicial functions by intrusion of incompetent or improper officers upon the courts. Courts will defer to reasonable legislative regulation, but this deference is one of comity or courtesy rather than an acknowledgment of power. This view is without doubt supported by the great weight of authority.

"Prior to legislative action [in 1903], our courts acted under their inherent power to disbar. The fact that since such legislation they have deferred to the practice prescribed by the legislature should cast no doubt upon their inherent power in the premises.

"It follows from what has been said that the statute confers no jurisdiction upon this court to entertain the present proceeding. That jurisdiction inheres in the court. It exists by virtue of the fact that this is a court, and the power sprang into being independent of any written law when the court was created."

Justice Crownhart, however, dissented, objecting to the court's assumption of inherent powers. He said they were "undefined and undefinable. They are arbitrary power to be used when and in the manner desired by the court. The court is the sole judge of its powers, without guide or compass. I would think that this court would not wish such arbitrary power, for arbitrary power begets arbitrary use or abuse of power.

"Ever since the state has been organized under the constitution, the whole practice of the courts has been regulated by legislative acts...By the opinion of this court we now are informed, in effect, that this great code of simplified practice was accepted by the judiciary through courtesy or comity; and that it may be cast aside at the will of the court. I think it is a mistake to speak of the deference to be shown a co-ordinate department of government as courtesy or comity. Such deference is part of the law of constitutional construction. It is binding upon the courts as a uniform rule of construction. An act passed by the legislature will not be declared unconstitutional unless it is clear beyond a reasonable doubt that it is so..."

"The constitution provided that the common law should here prevail, except as prohibited by the constitution, until changed by the legislature, Art. XIV, sec. 13, Const. At common law the legislature was supreme. The court's sole office was to construe the law.

"As I have pointed out, it is an elementary rule of construction of our constitution that the executive and judicial departments have only such powers as the constitution grants to them, either expressly or by necessary implication, but that the legislature has all legislative powers not limited by the state or federal constitutions.

Justice Crownhart cited *Vernon County Bar Association v. McKibbin* (1913) 153 Wis. 350, to the effect that the power of the court "is derived from the constitution and not from any inherent power outside the constitution, and that such power as it has is subject to reasonable regulation by the legislature." Justice Crownhart believed there should be no doubt as to the validity of the legislative enactment regulating admission and disbarment of attorneys. "...there is nothing in the constitution that prohibits any reasonable legislation in respect thereto; that the legislation in question is reasonable and valid; that such legislation is obligatory on this and all other courts of this state...If courts may assert one power outside the constitution, may they not assert another, and yet another?...I deny inherent power in any public official. It is near kin to arbitrary power, and arbitrary power is a dangerous power to be lodged in any governing body."

A second Cannon case, *In re Cannon* (1932) 206 Wis. 374 voided a state law which would have restored to Cannon the right to practice law previously revoked by the Supreme Court. The question of legislative versus judicial power was directly confronted, and the case is considered of some significance. It was decided that although the power to prescribe the ultimate qualifications of attorneys has been uncertain, "in England and in every state of the Union the act of admitting an attorney at law has been expressly committed to the courts, and the act of admission has always been regarded as a judicial function...That there is a field within which the prescribing of such qualifications constitutes a legislative function, cannot be doubted." However, "The relation of the bar to the courts is a peculiar and intimate relationship...Throughout all time courts have exercised a direct and severe supervision over their bars, at least in the English-speaking countries."

The use of the term "court" in the Wisconsin Constitution meant "that governmental institution known to the common law possessing powers characterizing it as a court and distinguishing it from all other institutions. This power has been referred to by all legal scholars and writers as the inherent power of courts."

"For more than six centuries prior to the adoption of our constitution the courts of England...had exercised the right of determining who should be admitted to the practice of the law...If the courts and the judicial power be regarded as an entity, the power to determine who should be admitted to practice law is a constituent element of that entity...There is no express provision in the constitution which indicates an intent that this traditional power of the judicial department should in any manner be subject to legislative control." Legislative qualifications "do not constitute the ultimate qualifications beyond which the court cannot go in fixing additional qualifications deemed necessary by the courts for the proper administration of judicial functions."

Admission requirements to the bar have also involved the question of the integration of the bar, which means requiring practicing attorneys to be members of the State Bar of Wisconsin. Chapter 315, Laws of 1943, directed the supreme court to provide for the organization and government of such an association. The court said in *Integration of Bar Case* (1943) 244 Wis. 8: "It has been held by every court to which the question has been presented that the court has power to integrate the bar and that the integration of the bar is a judicial and not a legislative function...The power to integrate the bar is an incident to the exercise of the judicial power which is vested by the constitution of the State of Wisconsin in the supreme court, circuit courts, courts of probate, and justices of the peace. Judicial power is not reposed by the constitution in the legislature, hence it cannot delegate it.

"Throughout the history of the state this court in dealing with matters which lie in the zone between the legislative and judicial departments, has always exercised great care to avoid any controversy with the legislature. While the power to make procedural rules is undoubtedly a judicial power, and may be exercised by the court without legislative sanction, nevertheless the court over a long period of time accepted the procedural rules made by the legislature largely because they related to substantive as well as to procedural matters. The late Justice Stevens while a member of this court was active in procuring the adoption of ch. 404, Laws of 1929, authorizing the court to make procedural rules and providing that all statutes relating to pleading, practice, and procedure should thereafter have the force and effect of rules of court. It was the opinion of those charged with the duty of acting that the rules of practice and procedure require revision and amendment from time to time, that the court was in a better position to act promptly and more familiar with the need for revision and amendment. In order that there might be no conflict between the two

departments as to which had the right to exercise the power, ch. 404, Laws of 1929, was enacted. In the exercise of the rule-making power this court has exercised great caution to the end that no changes be made in the substantive law."

From the record the court said it appeared that the court had deferred to the legislature in matters relating to admission to the bar. In the *Cannon* and *Janitor* cases, however, the court felt that the legislative power had so far invaded the judicial field as to impair its proper functioning. Although the power to integrate resides in the judicial department, "so far as the integration of the bar involves the matters affecting the general welfare, the legislature in the exercise of its powers may act subject to review by the court to determine whether the administration of justice is embarrassed or the constitutional powers of the court invaded."

After thus asserting its authority for integrating the bar, the court declined to do so at that time since so many attorneys were in military service.

Justice Fowler, dissenting, thought the court should not, either on its own motion or pursuant to the act, integrate the bar, because he was "unable to perceive that an integrated bar or membership therein has any bearing whatever on the qualifications of a person to act as an attorney..."

The inherent powers of the judiciary concerning the bar were also considered in *State ex rel. Junior Association of Milwaukee Bar v. Rice*, (1940) 236 Wis. 38., relating to the unauthorized practice of law and involving several statute sections, including Sec. 256.30 (2). The court held that Rice was engaged in the unauthorized practice of law under this section of the statutes, but stated:

"We need not presently consider whether the legislature in enacting sec. 256.30 (2), Stats., unconstitutionally trespassed upon the judicial department which, according to a number of decisions, has exclusive power to define what is the practice of law..."

"A number of courts hold that similar statutes are properly enacted under the police power and are in aid of the judicial power vested in the courts. It has been said that although the courts have the inherent or implied power finally to decide and determine what constitutes the practice of the law, there is no occasion for the exercise of that power provided a statute passed by the legislature is constitutional and applicable and in no way frustrates or interferes with judicial functioning."

In considering whether a rule of the Wisconsin Real Estate Brokers' Board authorized the practice of law by real estate brokers, the court, in *State ex rel. Reynolds v. Dinger* (1960) 14 Wis. (2d) 193, concluded that although the rule did permit the practice of law by nonlawyers to a limited extent, it considered the particular rule a "salutary one which in its essentials continues a practice of laymen which we have long tacitly permitted and which has worked reasonably well. The Rule has not enlarged the practice of law by laymen which we have hitherto permitted. When we consider that such practices should be discontinued it will be time for us to use our power." The court did affirm, however, "that the regulation of the practice of the law is a judicial power and is vested exclusively in the supreme court; that the practitioner in or out of court, licensed lawyer or layman, is subject to such regulation; that whenever the court's view of the public interest requires it, the court has the power to make appropriate regulations concerning the practice of law in the interest of the administration of justice, and to modify or declare void any such rule, law, or regulation by whomever promulgated, which appears to the court to interfere with the court's control of such practice for such ends."

The above cases indicate that the Supreme Court always considered admission to and regulation of the bar to be within the judicial power. In the early years, however, the legislature did enact laws on this subject, and the court did not categorically deny its right to do so. In the first *Cannon* case, however, the court stated that it has inherent power to admit and disbar attorneys, but would defer to reasonable legislative regulation out of courtesy. In the second *Cannon* case, the court specifically voided a law, and in more recent cases the court has asserted more positively its inherent powers in the area, saying in the *Dinger* case, for example, that the regulation of the practice of law is exclusively vested in the Supreme Court. In the *Rice* case, however, the court conceded that the legislature could enact legislation on the practice of law if it did not interfere with judicial functioning.

### Supreme Court Decisions of Other States

A handful of decisions of other state supreme courts which have been cited in Wisconsin literature in this area are given below. It obviously represents a very small sampling of what the courts of other states have concluded with regard to the authority of the judicial branch.

#### 1. Decisions relating to Judicial Power Generally

Pennsylvania and Michigan high courts have rendered two decisions of considerable interest concerning the power of courts to spend money which they consider necessary for their proper functioning.

LRB-76-RB-1

*Wayne Circuit Judges v. Wayne County*, 383 Mich. 10 (1969), involved a mandamus issued by a circuit court compelling the county to appropriate money for the salaries of various additional court employes and other public employes.

The Supreme Court observed that "Judicial power is the power to decide cases between contending parties and to determine legal rights in other cases where permitted by law." However, "It is the imperfections of human institutions which give rise to our notions of inherent power. It is simply impossible for a judge to do nothing but judge; a legislator to do nothing but legislate; a governor to do nothing but execute the laws. The proper exercise of each of these three great powers of government necessarily includes some ancillary inherent capacity to do things which are normally done by other departments.

"Thus, both the legislative department and the judicial department have certain housekeeping chores which are prerequisite to the exercise of legislative and judicial power. And, to accomplish these housekeeping chores both departments have inherently a measure of administrative authority not unlike that primarily and exclusively invested in the executive department.

"The inherent power of the judiciary is a judicial power, but only in the sense that it is a natural necessary concomitant to the judicial power.

"The inherent power of the Court is non-adjudicatory. It does not deal with justiciable matters. It relates to the administration of the business of the Court.

"In the constitutional scheme of things, the largest measure of this inherent power is vested in the Supreme Court. To this Court falls the constitutional responsibility to superintend the administration of justice throughout the State. The assignment of judges, the advancement of judicial education, the maintenance of judicial statistics, the division of judicial business, the supervision of the Bar, are all technically administrative functions, but they are reposed in the Court by the same Constitution which declares the absolute separation of governmental powers. That this Court has inherent power to fulfill its mandate cannot be doubted."

The opinion went on to declare that the supreme court can assess the needs for the administration of justice, submit a judicial budget, and urge relevant measures to the executive and legislative branches. This does not usurp legislative final authority, but "courts have inherent power to bind the State or the county contractually." Under appropriate circumstances, a circuit court may exercise its inherent power to employ law clerks, but in this particular case they were not needed. "The test is not *relative need*, but *practical necessity*." In this decision the court said it did not decide "whether the judges are empowered by statute to employ law clerks in the absence of an appropriation for that purpose." The circuit court had employed a judicial assistant, which the Supreme Court deemed necessary. Although in some circumstances a court could exercise inherent powers to employ a probation officer, the Supreme Court said it was not called upon to determine whether the circuit judge should exercise such powers in this case. "...we are not prepared to say that a court should exercise inherent power to take direct contractual action to augment the probation staff..."

One partial dissent stated: "I would use the inherent power of the courts only in those cases where it is essential to assure the continued existence or basic functioning of the courts. The test I would apply would be the ability of a court to operate a court, not whether the court can operate more conveniently or expeditiously if it has some additional means to carry out its functions." He summarized: "(1) This case is not an appropriate one for the exercise of the inherent power of the courts. It does not invoke basic needs for the performance of the judicial function and does involve a direct confrontation with the legislative power; (2) none of the statutes under consideration contain an authorization which permits the courts to proceed solely upon their own authority without legislative appropriation of the necessary funds."

A 1971 Pennsylvania high court case, *Commonwealth ex rel. Carroll v. Tate*, 442 Pennsylvania 45 (1971), was even more forceful concerning the powers of the court. The City of Philadelphia had reduced the budget request of the Court of Common Pleas, which proceeded to bring a mandamus action to compel the appropriation.

The Commonwealth Court (supreme court) stated: "...the Judiciary must possess the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal independent Branch of our Government. This principle has long been recognized, not only in this Commonwealth but also throughout our Nation."

The court cited *In re Surcharge of County Commissioners*, 12 Pa. D. & C. 471, where it was held that a judge could appoint a secretary or clerk when no statute existed, and *Leahey v. Farrell*, 362 Pa. 52, "we reaffirmed the inherent powers of the Judiciary to mandamus the payment of sufficient funds out of the public treasury for the efficient administration of the Judicial Branch of Government."

Although Philadelphia was conceded to be in financial difficulties, "Nevertheless, the deplorable financial conditions in Philadelphia must yield to the Constitutional mandate that the Judiciary shall be free and independent and able to provide an efficient and effective system of Justice."

"The Court does not have *unlimited* power to obtain from the City whatever sums it would like or believes it needs for its proper functioning or adequate administration. Its wants and needs must be proved by it to be 'reasonably necessary' for its proper functioning and administration, and this is always subject to Court review."

Citing Marshall's famous statement in *McCulloch v. Maryland*, 17 U.S. 316, that "the power to tax is the power to destroy", the court continued: "A Legislature has the power of life and death over all the Courts and over the entire Judicial system. Unless the Legislature can be compelled by the Courts to provide money which is reasonably necessary for the proper functioning and administration of the Courts, our entire Judicial system could be extirpated, and the Legislature could make a mockery of our form of Government with its three co-equal branches — the Executive, the Legislative and the Judicial."

A concurring opinion nevertheless pointed out that "The majority fails to realize the full import of its standard. If this Court holds that funds must be afforded the Judiciary if 'reasonably necessary,' could a future majority, while stressing the fundamental coequality of all three branches of government, logically deny this same standard to the Executive branch of government (the Legislative branch already controlling the power of the purse)? Unless that majority is prepared to nominate the Judiciary for a *primus inter pares* status, this question must be answered in the negative..."

## 2. Decision relating to Rules of Pleading, Practice and Procedure

The New York court in *Herman v. Mitchell*, 196 N.Y.Supp. 43 (1922), concluded "that the power to make rules of practice is a judicial power inherent in, and expressly conferred upon, the Supreme Court, and that the act creating the convention to adopt rules of civil practice merely provided a method and means whereby the court could conveniently and expeditiously exercise its judicial duty, and it was in no sense a delegation of legislative power by the Legislature."

## 3. Decisions relating to Regulation of the Bar

In a question involving unethical conduct by an attorney, the Minnesota Supreme Court said in *In re Disbarment of John D. Greathouse* (1933) 189 Minn.51, "An attorney is not an officer of the state in a constitutional or statutory sense of that term, but he is an officer of the court, exercising a privilege during good behavior. This privilege is granted by the court in the exercise of judicial power, not as a mere ministerial power."

"The power to admit applicants to practice law is judicial and not legislative, and is of course vested in the courts only. Originally the courts alone determined the qualifications of candidates for admission; but, to avoid friction between the departments of government, the courts of this and other states have generously acquiesced in all reasonable provisions relating to qualifications enacted by the legislature." He cited the *Wisconsin Cannon* (196 Wis.) case.

"The judicial power of this court has its origin in the constitution; but when the court came into existence it came with inherent powers. Such power is the right to protect itself, to enable it to administer justice whether any previous form of remedy has been granted or not. This same power authorizes the making of rules of practice."

"It is well settled that a court which is authorized to admit attorneys has inherent jurisdiction to suspend or disbar them. This inherent power of the court cannot be defeated by the legislative or executive department. The removal or disbarment of an attorney is a judicial act."

In 1943 the Supreme Court of Minnesota also considered integration of the bar and, like Wisconsin, postponed it until the end of the war. In its decision, *In re Petition for Integration of the Bar of Minnesota* (1943) 216 Minn. 195, the court stated that the power to govern the bar was intended to be vested exclusively in the Supreme Court and that the Constitution specifically provided that "...no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, except in the instances expressly provided in this constitution." The court continued, "...the court has not only the power, but the responsibility as well, to make any reasonable orders, rules or regulations which will aid in bringing this about, [that is, the administration of justice and the protection of rights] and that the making of regulations and rules governing the legal profession falls squarely within the judicial power thus exclusively reserved to the court."

## U.S. Supreme Court Decisions

As noted earlier in this study, the judicial power vested in the federal judiciary is circumscribed somewhat differently from that vested in the Wisconsin judiciary. Inferior federal courts are created

by Congress, while the Wisconsin Constitution prescribes major inferior courts for the state; federal judges are appointed, while state judges are elected; and there is no provision in the U.S. Constitution for superintending control over inferior courts. Furthermore, Congress has considerable control over the jurisdiction of federal courts, which is not the case in this state.

Nevertheless, there are sufficient similarities to make it worthwhile to consider a few U.S. Supreme Court decisions in matters relating to judicial power. A small, selected group of cases is summarized below.

### 1. Decisions relating to Judicial Powers Generally

It was noted in *McNabb v. United States*, 318 U.S. 332 (1943), that "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence..."

The court stated in *Griffin et al. v. Thompson*, 43 U.S. 244 (1844), that "There is inherent in every court a power to supervise the conduct of its officers, and the execution of its judgments and process. Without this power, courts would be wholly impotent and useless."

In a decision in which the Supreme Court concluded that the appointment by a district court of an auditor in a law case did not deprive a party of the right of trial by jury, *Ex parte Peterson*, 253 U.S. 300 (1920), Justice Brandeis stated that the trial by jury amendment "does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices may be used to adopt the ancient institution to present needs and to make it an efficient instrument in the administration of justice."

There is "no legislation of Congress which directly or by implication forbids the court to provide for such preliminary hearing and report. But, on the other hand, there is no statute which expressly authorizes it. The question presented is, therefore, whether the court possesses the inherent power to supply itself with the instrument for the administration of justice when deemed by it essential.

"Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. Compare *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80, 87-90. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause. From the commencement of our Government, it has been exercised by the federal courts, when sitting in equity, by appointing, either with or without the consent of the parties, special masters, auditors, examiners and commissioners..."

"Reference of complicated questions of fact to a person specially appointed to hear the evidence and make findings thereon has long been recognized as an appropriate proceeding in an action at law. *Hukers v. Fowler*, 2 Wall. 123. The inherent power of a federal court to invoke such aid is the same whether the court sits in equity or at law."

### 2. Decisions relating to Rules of Pleading, Practice and Procedure

*Wayman v. Southard*, 23 U.S. 1 (1825), was described by Prof. Edward Corwin, the late constitutional law authority, as a landmark case. Although it dealt with the efforts of a state legislature to regulate the practice of federal courts, a situation quite different from any we are concerned with in this study, it, nevertheless, contains interesting comments on the relationship of the federal Congress to the federal judiciary. The decision stated that Congress has the exclusive authority to regulate the proceedings in U.S. courts (the states having none over federal courts). Since Congress can establish federal courts and set their jurisdiction, the means for arriving at the decision "are necessarily included in the grant." The power of Congress in establishing federal courts "and the means to be employed by them for effectuating the design of their establishment was plenary..." Further, "...the maker of the law [the Congress] may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily."

In another case involving federal-state jurisdiction, *Bank of the United States v. Halstead*, 23 U.S. 51 (1825), the court declared that "Congress might regulate the whole practice of the Courts, if it was deemed expedient so to do; but this power is vested in the Courts; and it never has occurred to anyone that it was a delegation of legislative power. The power given to the Courts over their process is no more than authorizing them to regulate and direct the conduct of the Marshal, in the execution of the process. It relates, therefore, to the ministerial duty of the office; and partakes no more of legislative power, than that discretionary authority intrusted to every department of the government in a variety of cases."

Speaking on the rules of the court in *Washington — Southern Co. v. Baltimore Co.*, 263 U.S. 629 (1924), the court stated:

"The function of rules is to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regulation of the forms, operation and effect of process; and the prescribing of forms, modes and times of proceedings. Most rules are merely a formulation of the previous practice of the courts. Occasionally, a rule is employed to express, in convenient form, as applicable to certain classes of cases, a principle of substantive law which has been established by statute or decisions. But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law..."

*Sibbach v. Wilson*, 312 U.S. 1, 14-16 (1941), involved a question as to whether a court rule was within the mandate of Congress to this court. Justice Roberts stated:

"Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States; but it has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose..."

"...it is to be noted that the authorization of a comprehensive system of court rules was a departure in policy, and that the new policy envisaged in the enabling act of 1934 was that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth. The challenged rules comport with this policy. Moreover, in accordance with the Act, the rules were submitted to the Congress so that that body might examine them and veto their going into effect if contrary to the policy of the legislature."

"The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose...That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found."

In *McDonald v. Pless*, 238 U.S. 264 (1915), although it affirmed a lower court decision that a juror could not impeach his own verdict, the Supreme Court nevertheless said that a court can inquire into the conduct of jurors. "In the very nature of things the courts of each jurisdiction must each be in a position to adopt and enforce their own self-preserving rules."

### 3. Decisions relating to Regulation of the Bar

In *Ex parte Secombe*, 60 U.S. 9 (1857), the court said: "And it has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed."

In a question involving a federal act which would have disbarred an attorney previously admitted to practice before the U.S. Supreme Court, the court said "The question in this case is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution." The law was an *ex post facto* law. Furthermore, the attorney in question had been pardoned by the President. "It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency." (*Ex Parte Garland*, 71 U.S. 333 (1867)).

The Supreme Court said in *Ex parte Bradley*, 7 Wall. 364 (1869): "We do not doubt the power of the court to punish attorneys as officers of the same, for misbehavior in the practice of the profession."

Again, in *Randall v. Brigham*, 7 Wall. 523 (1869): "The authority of the court over its attorneys and counsellors is of the highest importance. They constitute a profession essential to society..."

## VI. THE BUDGETARY RELATIONSHIP OF THE THREE BRANCHES

### Wisconsin

#### Current Wisconsin Practice

In the biennial state budget act, most state agencies in Wisconsin receive a sum certain appropriation; that is, a fixed amount which is allocated either for each year of the biennium, for the biennium, or on a continuing basis. A minority of agencies or functions within agencies receive a sum sufficient appropriation, an indefinite amount which is not specific because of the difficulties of determining the exact amount that will be needed for their operations. Also placed in this sum sufficient category are the appropriations for the supreme court, some of its agencies and inferior courts, the legislature and the Executive Office, but not legislative service agencies or agencies attached to the Executive Office. The supreme court and Executive Office proper probably receive a

sum sufficient because of the traditional wide discretion which the legislature has accorded the heads of the coordinate branches of government to determine their own needs. This latitude can be seen in Section 16.42 of the Wisconsin Statutes, which requires all departments "other than the legislature and the courts, prior to each budget period" to send to the Department of Administration specified program and financial information, and in Section 16.50, which requires each department "except the legislature and the courts" to submit to the Secretary of Administration a quarterly estimate of its proposed expenditures for the quarter. In spite of these exemptions, however, in recent years the supreme court has participated in the regular budget process, submitting its budget to the executive branch in October and appearing before the Joint Committee on Finance during budget hearings.

As requested by the Governor, the original 1975 budget bill, Assembly Bill 222, provided a sum sufficient for Supreme Court proceedings, but a sum certain for staff salaries and supporting agencies. In his "Budget In Brief, 1975-77", Governor Lucey said: "The budget will make a major change in the method of financing support staff for the judicial branch in order to provide better fiscal accountability and to make its financing more consistent with other branches of government. At present, judicial staff costs are financed with an open-ended or sum sufficient appropriation. The budget would shift this open-ended appropriation to a sum certain or fixed appropriation in order that a ceiling for such expenditures may be established.

"While it is impossible to calculate actual savings from this shift, it would provide the Court with the ability to provide sounder fiscal management controls. A similar change is proposed for several legislative and executive branch expenditures."

The Supreme Court objected to this, the court's Executive Officer Robert Martineau stating in a paper prepared for the Joint Committee on Finance:

"The argument of consistency with the other branches of government applies only to the executive branch since the Legislature has not yet accepted the Governor's proposal to put it on a sum certain budget. But the reasons for placing executive branch agencies are not applicable to the judicial branch. These executive agencies are legislatively created to carry out programs adopted by the Legislature. Legislative authority over the appropriations for these agencies is part of the traditional checks and balances system of government.

"The judicial branch, on the other hand, is not a legislatively created agency carrying out legislatively adopted programs which can be abolished at the discretion of the Legislature. The judicial branch was created by the Constitution as a separate and independent branch of government to carry out its constitutionally mandated function. It is this constitutional status that has resulted in the establishment of the doctrine of the inherent power of a court to provide the personnel and materials it deems necessary for it to fulfill its functions. This doctrine has been recognized in Wisconsin since *In Re Janitor of Supreme Court*, 35 Wis. 410, decided in 1874. The same view has been taken by almost every other state supreme court that has considered the question. The sum certain budget for a court must be recognized, consequently, as being 'certain' only to the extent that it provides adequate funds for the courts to operate. If it does not, the courts must spend such additional sums as they deem necessary." He continued that the power to decide the number of the court's employees "is at the heart of the inherent power doctrine. If the Supreme Court loses the power to decide how many employees it must have to carry out its functions, it loses its power to function as a separate and independent branch of government." He further noted that the court has submitted to the budget procedures, has been careful about the size of its staff, and that the Legislature already exercises substantial control over the court's budget through its setting of salaries and retirement benefits of justices and regulating to some extent salaries of court employees.

As the budget bill was finally enacted, Chapter 39, Laws of 1975, the appropriations for the Supreme Court and most of its agencies continued to be sum sufficient. The following extracts from Chapter 39 show the type of appropriation for the judicial branch, the legislative branch, and the Executive Office in the executive branch. Abbreviations: S — sum sufficient; C — continuing appropriation; A — annual appropriation.

Table 3: 1975-77 Appropriations

STATUTE, AGENCY AND PURPOSE	SOURCE TYPE	1975-76	1976-77
<b>JUDICIAL</b>			
<b>25.624 CIRCUIT AND COUNTY COURTS</b>			
<b>(1) COURT OPERATIONS</b>			
(a) Circuit courts	GPR S	3,007,900	2,985,400
(b) County courts	GPR S	4,709,500	4,734,100
(m) Federal aid	PR-F C	127,500	0

(2)	AID TO COUNTIES FOR CRIMINAL TRIALS OF INDIGENTS					
(a)	General program operations	GPR	S	150,000	150,000	
<b>20.645 JUDICIAL COUNCIL</b>						
(1)	ADVISORY SERVICES TO THE COURTS AND LEGISLATURE					
(a)	General program operations	GPR	A	69,800	70,300	
(m)	Federal aid	PR-F	C	0	0	
<b>20.680 SUPREME COURT</b>						
(1)	SUPREME COURT PROCEEDINGS					
(a)	General program operations	GPR	S	944,400	976,400	
(m)	Federal aid	PR-F	C	38,400	0	
(2)	ADMINISTRATOR OF COURTS					
(a)	General program operations	GPR	S	372,400	393,600	
(m)	Federal aid	PR-F	C	176,900	138,100	
(3)	PUBLIC DEFENDER					
(a)	General program operations	GPR	S	343,800	370,700	
(m)	Federal aid	PR-F	C	56,800	28,100	
(4)	BAR COMMISSIONERS					
(a)	Examination	GPR	A	5,600	5,600	
(b)	Enforcement	GPR	S	49,300	49,300	
(5)	LAW LIBRARY					
(a)	General program operations	GPR	A	107,500	107,500	

**LEGISLATIVE**

<b>20.710 BUILDING COMMISSION</b>						
(1)	STATE OFFICE BUILDINGS					
(a)	Principal repayment & interest	GPR	S	0	17,700	
(g)	Agency collections	PR	C	0	0	
(h)	Lease rental payments	PR	S	1,721,400	1,704,300	
(i)	Principal repayment and interest	PR	S	1,319,100	1,282,100	
(2)	BUILDING TRUST FUND					
(f)	Construction program	GPR	B	5,578,100	5,578,100	
(u)	Aids for buildings	SEG	C	0	0	
(x)	Building trust fund	SEG	C	0	0	
(y)	Advance planning	SEG	C	0	0	
(3)	STATE BUILDING PROGRAM					
(a)	Principal repayment & interest	GPR	S	0	0	
(b)	Principal repayment & interest	GPR	S	122,800	154,000	
(c)	Lease rental payments	GPR	S	0	0	
(g)	Principal repayment & interest	PR	S	0	0	
(h)	Principal repayment & interest	PR	S	0	0	
(w)	Bonding services	SEG	S	0	0	

**20.725 JOINT COMMITTEE ON FINANCE**

(1)	GENERAL FUND SUPPLEMENTS					
(a)	General program supplementation	GPR	B	380,000	380,000	
(2)	SEGREGATED FUNDS					
(u)	General program supplementation	SEG	S	0	0	
(3)	SCHOOLS IN FINANCIAL DISTRESS					
(a)	General purpose revenue	GPR	S	0	0	

**20.765 LEGISLATURE**

(1)	ENACTMENT OF STATE LAWS					
(a)	General program operations	GPR	S	7,440,400	7,565,200	

(b) Contingent expenses	GPR	B	5,000	5,000
(c) Legislative data processing	GPR	A	275,100	313,200
(d) Legislative documents	GPR	S	896,900	1,274,300
<b>(2) SPECIAL STUDY GROUPS</b>				
(a) Joint survey comm. on retirement systems	GPR	A	69,700	69,700
(b) Commission on uniform state laws	GPR	A	11,400	11,000
(c) Interstate cooperation comm.	GPR	B	23,100	23,100
(ca) Interstate cooperation comm., contingent expenditures	GPR	B	500	500
(cb) Membership in national associations	GPR	S	61,200	63,900
(e) Menominee Indian committee	GPR	B	19,100	0
(em) Menominee restoration study	GPR	C	0	0
(f) Insurance laws study comm.	GPR	C	0	0
(h) Gifts and grants, Menominee Indians committee	PR	C	0	0
(i) Gifts and grants, insurance laws study committee	PR	C	0	0
(u) Highway problems study comm.	SEG	B	21,500	21,500
<b>(3) LEGISLATIVE SERVICE AGENCIES</b>				
(a) Revisor of statutes bureau	GPR	A	108,400	104,800
(b) Legislative reference bureau	GPR	B	591,500	597,300
(c) Legislative audit bureau	GPR	A	872,300	886,200
(d) Legislative fiscal bureau	GPR	B	413,600	414,000
(e) Legislative council	GPR	B	445,100	494,500
(ec) Council contingent expenses	GPR	B	500	500
(f) Joint committee on legislative organization	GPR	C	0	0
(g) Gifts and grants to service agencies	PR	C	0	0
(m) Federal aid	PR-F	C	10,000	10,800
<b>(4) OFFICE OF THE LIEUTENANT GOVERNOR</b>				
(a) General program operations	GPR	S	129,700	129,700
(b) Nursing home ombudsman	GPR	A	176,300	176,300
(c) Council for consumer affairs	GPR	A	49,800	49,800
(m) Federal aid	PR-F	C	0	0

**EXECUTIVE (Executive Office only)****20.525 EXECUTIVE OFFICE**

<b>(1) EXECUTIVE OFFICE AND RESIDENCE OPERATIONS</b>				
(b) General program operations	GPR	S	547,700	561,000
(c) Contingent fund	GPR	S	55,000	55,000
(d) Governors' conference dues	GPR	S	16,200	16,200
(e) Disability board	GPR	S	0	0
(m) Federal aid	PR-F	C	0	0
<b>(2) HIGHWAY SAFETY COORDINATION</b>				
(m) Federal aid, state operations	PR-F	C	156,400	154,500
(n) Federal aid, local assistance	PR-F	C	1,460,100	1,563,600
(o) Federal aid, state agencies	PR-F	C	619,900	566,400
Allocated to other departments	PR-F	C	-619,900	-566,400
<b>NET APPROPRIATION</b>			0	0
(p) Fed. aid, hwy safety promotion and local activities	PR-F	C	197,800	197,800
(q) General program operations	SEG	A	156,400	154,500
<b>(3) COUNCIL ON CRIMINAL JUSTICE</b>				
(a) General program operations	GPR	A	76,200	76,200
(b) Planning & admin. project aid, local assistance	GPR	A	20,000	20,000

(c)	Law enforcement improvement project aid, local asst.	GPR	A	334,500	334,500
(d)	Law enforce. improve. project aid, state operations	GPR	A	364,800	364,800
(h)	Gifts and grants	PR	C	0	0
(m)	Federal aid, plan. & admin., state operations	PR-F	C	685,800	685,800
(n)	Federal aid, plan. & admin., local assistance	PR-F	C	457,200	457,200
(o)	Federal aid, law enforcement improve., state operations	PR-F	C	4,813,200	4,813,200
(p)	Federal aid, law enforcement improvement, local asst.	PR-F	C	6,689,800	6,689,800
(5)	MANPOWER PLANNING COUNCIL				
(a)	General program operations	GPR	A	15,800	15,800
(m)	Federal grants and contracts	PR-F	C	395,000	395,000
(n)	Federal aid, local asst.	PR-F	C	0	0

### Historical Practice

The Wisconsin Constitution authorizes the legislature to set salaries of the Supreme Court justices and circuit judges, but establishes a minimum (Art. VII, Sec. 10).

In the early years of the state, various statutory provisions provided the salaries of justices, Supreme Court reporters and clerks. The 1911 Statutes, for example, set the salaries of Supreme Court justices and circuit court judges (Sec. 170), authorized the Supreme Court to fix such fees for services of the clerk as it deemed proper, and allowed an additional per diem for the clerk of \$5 per day. "The amount for per diem and for all fees allowed by law in criminal and state cases, accompanied by an itemized bill of costs in each case, shall on being fixed and allowed by the justices of the court or a majority of them, be paid semiannually in the months of June, and December out of the state treasury." (Sec. 2417). Each justice was allowed to appoint a stenographer and a copyist and fix their compensation, not to exceed \$125 per month. The justices could also appoint a messenger at a salary of \$75 per month. The trustees of the state library were authorized to appoint one or more janitors for service in and about the library and rooms of the justices, and fix his or their compensation. "There is hereby appropriated a sum sufficient to carry out the provisions of this section." (Sec. 2400). Sec. 20.71 directed the Supreme Court to appoint a court reporter, who could, with the court's approval, appoint an assistant at not exceeding \$2,000 per year. The court could authorize the reporter to hire necessary additional help at not exceeding \$5,000 per year.

Thus, the salaries and the positions were rather carefully spelled out in the statutes. Yet, a sum sufficient was thereupon provided to meet some of these expenses.

It was not until 1913, when Chapter 675, Laws of 1913, was enacted that we find appropriations made to state agencies consolidated in any way comparable to our modern budget acts. Section 172-1 of the chapter provided an annual appropriation to the legislature of "such sums as may be necessary, payable from any moneys in the general fund not otherwise appropriated, for the legislature to carry into effect the powers, duties and functions provided by law for said body, including contingent expenditures as provided in section 127-1."

Section 172-2 made a specific annual appropriation to the executive department, but also provided an additional appropriation of \$2,000 as a contingent fund.

Section 172-5 made an annual appropriation of "such sums as may be necessary...for the supreme court to carry into effect the powers, duties and functions provided by law for said supreme court."

Thus in the case of the legislature and the supreme court, sum sufficient were provided, while a sum certain appropriation was made to the executive office.

### Other States

Most other states do not appear to have any specific provisions in their statutes regarding the judicial budget process. At least two states, however, definitely and specifically spell out judicial budget procedures.

Colorado statutes direct the court administrator, subject to the approval of the chief justice, to prepare a budget for all courts, which then goes through standard budget procedures. The governor includes his recommendations for the court in his budget message, and the General Assembly, upon

recommendations of its budget committee, makes appropriations "based on an evaluation of the budget request and the availability of state funds." Colorado's statutory provisions are as follows:

13-3-106. Judicial department operating budget — fiscal procedures. (1) (a) The court administrator, subject to the approval of the chief justice, shall prepare annually a consolidated operating budget for all courts of record subject to the provisions of section 13-3-104, such budget to be known as the judicial department operating budget.

(b) The court administrator, subject to the approval of the chief justice, shall prepare an annual budget request upon forms and according to procedures agreed to by the executive director of the department of administration and the joint budget committee of the general assembly. The budget request documents and such additional information as may be requested shall be submitted to the department of administration and the joint budget committee according to the same time schedule for budgetary review and analysis required of all executive agencies. The governor shall include his recommendations for court appropriations as part of his regular budget message and according to section 24-30-303, C.R.S. 1973. The general assembly, upon recommendation of the joint budget committee, shall make appropriations to courts based on an evaluation of the budget request and the availability of state funds.

(2) The court administrator, subject to the approval of the chief justice, shall prescribe the procedures to be used by the judicial department and each court of record subject to the provisions of section 13-3-104, with respect to:

(a) The preparation of budget requests;

(b) The disbursement of funds appropriated to the judicial department by the general assembly;

(c) The purchase of forms, supplies, equipment, and other items as authorized in the judicial department operating budget; and

(d) Any other matter relating to fiscal administration.

(3) The court administrator shall consult with the state controller in the preparation of regulations pertaining to budgetary fiscal procedures and forms, and the disbursement of funds.

Hawaii law also provides a specific budgetary procedure for the courts. The chief justice prepares the budget "provided that all expenditures of the judiciary shall be in conformance with program appropriations and provisions of the legislature." The chief justice submits his budget to the governor and the Legislature.

Section 601-2 gives the chief justice, subject to such rules as may be adopted by the supreme court power:

(5) To exercise exclusive authority over the preparation, explanation, and administration of the judiciary budget, programs, plans, and expenditures, including without limitation policies and practices of financial administration and the establishment of guidelines as to permissible expenditures, provided that all expenditures of the judiciary shall be in conformance with program appropriations and provisions of the legislature;...

(c) The budget, six-year program and financial plan, and the variance report of the judiciary shall be submitted by the chief justice to the legislature in accordance with the schedule of submission specified for the governor in chapter 37 and shall contain the program information prescribed in that chapter. By November 1 of each year preceding a legislative session in which a budget is to be submitted, the chief justice shall provide written notification to the governor of the proposed total expenditures, by cost categories and sources of funding, and estimated revenues of the judiciary for each fiscal year of the next fiscal biennium.

The budget documents of a number of states were examined to determine the influence of the governor on judicial budgets. Not all state budgets were perused, but of the considerable number that were, it can be said that at least four states specifically prohibit tampering with judicial requests. It is stated in the Arizona budget, for example; "The Judiciary is not subject to control of the Governor. The requested amount was placed in the recommendation column for summarization purposes only." The supreme court data in the Nevada budget included the statement: "This budget is not subject to the usual executive review." The Washington budget phrased it: "In accordance with Budget & Accounting Act (RCW 43.88), budget requests for judicial agencies are not revisable and appear as submitted." while the New York budget included: "The schedule of appropriations desired by the Judiciary is transmitted without review in accordance with Art. VII, Sec. 1 of the Constitution." In the Wyoming budget the Governor's figures were the same as the Supreme Court's request and were submitted "without recommendation."

At least 19 state budgets, however, gave the supreme court or judicial department requests together with the governor's recommendations. These budgets did not all cover the same fiscal year or years, but of those examined, governors' recommendations were below judicial or supreme court

requests in 14 states, above such requests in 2 states, and the same in 3 states. Other budgets looked at did not indicate agency requests.

### The Federal Government

Title 31, Section 11 (a) (5) of the United State Code requires the President to submit a budget to Congress during the first 15 days of each regular session. Included in the budget are the "estimated expenditures and proposed appropriations necessary in his judgment for the support of the Government for the ensuing fiscal year, except that estimated expenditures and proposed appropriations for such year for the legislative branch of the Government and the Supreme Court of the United States shall be transmitted to the President on or before October 15 of each year, and shall be included by him in the Budget *without revision*".

When the budget reaches Congress, however, there do not appear to be any such restraints. In the 94th Congress, 1st Session, the appropriation bill for the State, Justice and Commerce Departments and the Judiciary was H.R. 8121. The budget request for the Judiciary was \$351.4 million; as it passed the House the total changed to \$330.0 million; and in the Senate-passed version it became \$334.8 million. The final compromise version, enacted as Public Law 94-121, was \$333.3 million, which was \$18 million less than the original amount requested. For the Supreme Court itself, the budget request was \$8.1 million, while the final appropriation was \$8.0 million.

## VII. CONCLUSION

Numerous court decisions over the years have dealt with the relationship of the judiciary to the legislature. In many of these cases, the supreme court has claimed to possess inherent power or superintending power. It has also said, however, that it would not interfere with legislative enactments which could be considered an infringement on such powers if such enactments did no harm to the judiciary. The legislature, in turn, has given the court considerable latitude in its operations. Why, then, have instances of friction noticeably resurfaced recently, both between the branches and within the judicial branch itself over the supreme court's powers?

One possible answer may lie, at least partially, in the increasing attention being given to courts and their role in the administration of justice. As both criminal and civil litigation have increased and the caseload of courts has expanded, a spotlight has been directed toward the efficiency and effectiveness of our system of justice. In Wisconsin the report of the Citizens Study Committee on Judicial Organization and subsequent legislation for court reform in the 1975 Legislature attest to heightened interest in the subject. This was further emphasized by the unusual appearance in January 1975 of the Chief Justice of the Wisconsin Supreme Court before the Legislature to deliver a speech on the state of the judiciary. At that time, he spoke of the "critical needs of the Wisconsin judicial system." For example, the backlog in appeals to the court, that is, the cases carried over to the next term, increased by 162% in the last four years. Thus, both the court and the Legislature have been giving thought to improvements in the court system. As the court has sought to make such improvements through its own actions, latent questions have arisen anew over where authority to act lies, and, in the process, sharply differing judicial philosophies have become evident.

The questions concerning the court's creation of judicial districts, the judicial budget, a code of ethics for judges, and regulation of the bar all involve the supreme court's inherent and implied powers.

Historically, it has claimed inherent power in such areas as the appointment of judicial staff and control over the physical facilities of courts. If it expressed any reservations in the *Janitor* case (1874) it expressed itself more forcefully in *Stevenson v. Milwaukee County* (1909) on the power of courts to appoint personnel. The dissent in this case proffered a note of caution, contending that if "constitutional authority is not prejudicially interfered with", the court ought to bow to legislative desire. The inherent power of courts to appoint personnel was pronounced even more sweepingly by the Michigan court in *Wayne Circuit Judges v. Wayne County* (1969). The more restrained viewpoint expressed in the dissent recommended use of inherent power "only in those cases where it is essential to assure the continued existence or basic functioning of the courts."

In the noncase matter of the Wisconsin Supreme Court's 1975-77 budget, the contention was strongly made that the judicial branch is constitutionally, not legislatively created, and therefrom derives its inherent power to spend such sums as it deems necessary. The power of the court to determine its expenditures was forcefully stated in the Pennsylvania court's decision, *Commonwealth ex rel. Carroll v. Tate* (1971). There, although the court disclaimed unlimited power over judicial budgets and said that its needs must be "reasonably necessary", it nevertheless concluded that the court must be able to provide "an efficient system of Justice." A concurring opinion, however, observed that this might lead the other branches of government to claim a similar privilege.

In the early days of statehood at least, there was some question of who exercised control over the bar — the courts or the legislature. The 1875 *Goodell* case indicated that the courts claimed this power, but that reasonable legislation would not be opposed. By 1928, however, the court was ready to state unequivocally, in the first *Cannon* case that the power to admit or disbar attorneys is an inherent power of the court. Deference to "reasonable" legislation is only a matter of "comity or courtesy." The second *Cannon* case (1932) was even more definite. Later the court declared that integration of the bar is incidental to the judicial power and cannot be delegated to the court by the legislature. Again, however, the court said the legislature may act, but subject to court review. Thus, the court has claimed inherent power to regulate the bar, but has left the door open for legislation that it does not consider harmful or inappropriate.

The right to create judicial districts and promulgate a code of ethics for judges has also been claimed by the supreme court on the basis of its superintending control. On the subject of superintending control, the court has followed, with some reservations along the way, the broad interpretation first laid down in the *Blossom* case (1853), which described it as "unlimited" and "undefined". There were some attempts, notably in the *Johnson* (1899) and *Seiler* case (1901) to limit the power to the use of certain writs, but the *Helms* case (1908), vigorously advanced every claim that had been made for a broad interpretation of supervising control up to that time. When we reach the 1975 *Kading* case (1975), superintending control is interpreted to be almost whatever the court says it is. In *Kading*, the court has now said that the power is not bound by previous situations, but will be applied to changing circumstances. Furthermore, superintending power need not be used only to protect the rights of a specific litigant (see the *Heil* case (1939), but may be used on behalf of litigants generally. Although *Aarons* (1949) said the superintending power was over inferior courts, not over judges, the *Kading* decision stated it is over judges when their actions influence their judicial performance. Since the *Kading* decision was a 4 to 3 verdict, it can be seen that the court is split on the limits of judicial authority.

With regard to rules of pleading, practice and procedure, they have been generally considered by the court to be "essentially a judicial power", but the legislature can legislate in the area and can delegate the power to the court. It does not appear to be completely judicial or completely legislative in nature.

It would seem that the Supreme Court is taking a more activist stance in matters relating to its judicial powers. Both in the areas of inherent power and of superintending control, the court appears to be showing less restraint than it has frequently exercised in the past, although the threads of judicial activism versus judicial restraint have shown up throughout our history. Yet in spite of a more vigorous assertion of its right to manage its own affairs, the court is still evidently somewhat reluctant or undecided about how far it wants to carry its point. This is indicated by the so-called compromise with the Legislature on its budget and by its decision not to put the complete judicial district program into effect immediately, but test it in three jurisdictions.

What does this all mean as far as the Legislature is concerned? It was observed at the beginning of this study that maintaining a balance between the three branches of government is an ongoing effort which must be exercised with restraint and accommodation of all parties concerned. To the extent that this can be done, the judiciary in its relations with the legislature and the executive can continue as before with only occasional, and probably minor, clashes. If any of the three branches becomes too activist, obviously that increases the chances for a definite, constitutional confrontation. Certainly the skirmishes over the judicial districts and the judicial budget do raise the question of the legislature's power of the purse. If the legislature were to put the court on a sum certain basis or lower its budget in an overall austerity program, could — or would — the court claim an inherent power to spend such sums as it deems necessary and compel its appropriation? The legislature has the constitutional power to appropriate funds, and the court has the judicial power. If the court were to construe its powers liberally, it could presumably compel its appropriation; if it were to construe them strictly and not question its allotment as long as it assured "the continued existence or basic function of the courts", the legislature's authority over appropriations would not be impinged. Again, if the court can spend such sums as it deems necessary because it is constitutionally created, does this mean that other agencies created by the constitution can do likewise? Several executive branch officials besides the governor are constitutional officers — the secretary of state, the state treasurer, the attorney general, and the state superintendent of public instruction. How does this doctrine affect them?

Normally, the court has the last word in any confrontation over its powers, because it has the power to interpret the constitution. As Chief Justice Charles Evans Hughes said while governor of New York, "...the Constitution is what the judges say it is..." A serious infringement on its powers could evoke such a response. On the other hand, a serious infringement by the court on legislative

and executive powers, could evoke the ultimate response of a constitutional amendment to clarify the court's authority in these matters.

## VIII. SOURCES

- The Council of State Governments, "Criminal Justice Statutory Index, 1975."
- Currie, George R. and Warren H. Resh, "The Separation of Powers: Control of Courts and Lawyers," *The Wisconsin Bar Bulletin*, December 1974 (341.14/W75a, vol. 47, no. 6).
- Hamilton, Alexander, John Jay and James Madison, *The Federalist*, No. 47, 78, 81 and 82.
- United States, "The Budget of the United States Government, Fiscal Year 1976" (336.02/X6/1975-76/pt.1).
- United States 92nd Congress, 2d Session, *The Constitution of the United States of America: Analysis and Interpretation*, Senate Document No. 92-82, 1973 (Ref. 342.2/X7).
- Wisconsin Administrative Committee of the Courts, Chief Judge Study Committee, "Report and Recommendations", Parts I, II and III, December 5, 1974.
- Wisconsin Legislative Reference Bureau, CLIPPINGS: *Ethics in Wisconsin Government* (322/W7z/Pt.6).
- , CLIPPINGS: *Legal Education* (374.34/Z/Pt. 2).
- , CLIPPINGS: *Reform of Procedure* (345.1/Z, Pt. 2).
- , CLIPPINGS: *State Courts* (344.3/Z, Pt. 6).
- , CLIPPINGS: *State Finance -- Budgets* (336.121/W7z).
- , CLIPPINGS: *State Supreme Courts* (344.32/Z, Pt.3).
- Wisconsin State Historical Society, *The Attainment of Statehood*, Milo M. Quaife, 1928 (Hist., vol. 29).
- , *The Convention of 1846*, Milo M. Quaife, editor, 1919 (H5c2, vol. 27).
- , *The Struggle Over Ratification, 1846-1847*, Milo M. Quaife, ed., 1920 (H5c2, vol. 28).
- Wisconsin Supreme Court, "In re: Hon. Charles E. Kading," No. 75-154, 1975.
- Wisconsin Supreme Court order "In the Matter of a Supreme Court Rule Requiring Continuing Legal Education of Members of the Wisconsin Bar," November 21, 1975.
- Wisconsin Supreme Court order promulgating "Rules relating to the creation of the office of chief judge in every multi-judge trial court and the creation of administrative districts for the trial courts," June 30, 1975.
- Wisconsin Supreme Court, Executive Officer Robert Martineau, "The Sum Sufficient Appropriation for the Judicial Branch," presented to the Joint Committee on Finance, 1975.
- Budgets of the various states cataloged under the subject heading, "State - Finance - Budgets," and filed in the Legislative Reference Bureau under the catalog number - 336.121.

## RECENT LEGISLATIVE REFERENCE BUREAU PUBLICATIONS

Many of the titles are still available for distribution.

### Research Bulletins

- RB-72-1 Metropolitan Government: Is Bigger Better? May 1972
- RB-72-3 Privacy: Its Substance, Applications and Legal Status. July 1972
- RB-72-4 Disposition of Constitutional Amendment Proposals - 1961-1971 Wisconsin Legislatures. April 1972
- RB-72-6 The Wide, Wide World of Housing. November 1972
- RB-73-1 State Lotteries. May 1973
- RB-73-2 State Aid to Nonpublic Schools: The Legal Problems. May 1973
- RB-73-3 The Death Penalty: Legal Status Since Furman. September 1973
- RB-74-1 Campaign Finance Reform. January 1974
- RB-74-2 Summary of Bills Approved by the 1973 Wisconsin Legislature Through June 13, 1974 (Chapters 1 to 338, Laws of 1973). September 1974
- RB-75-1 The Wisconsin Presidential Primary: Open or Closed? August 1975
- RB-76-1 The Powers of the Wisconsin Supreme Court. January 1976

### Informational Bulletins

- IB-71-1 State Taxes: Wisconsin Legislative History, 1947-1969. January 1971
- IB-71-5 Determining the Limits of Free Expression: A New Look at the Obscenity Issue. April 1971
- IB-71-7 State Steps to Better Housing — A Look at Uniform Building Codes. July 1971
- IB-71-8 Mail Order Selling. November 1971
- IB-72-2 Motor Vehicle Taxation in Wisconsin. May 1972
- IB-73-2 The Status of News Shield Legislation. July 1973
- IB-73-3 Open Meetings in Wisconsin Government. September 1973
- IB-73-4 A Cabinet Is Proposed. October 1973
- IB-73-5 Reforming the Property Tax: An Overview of the Assessment Process. October 1973
- IB-73-6 Statewide Land Use Programs. October 1973
- IB-74-1 Obscenity Redefined: The Search for a Workable Standard. January 1974
- IB-74-2 No-Fault Auto Insurance: A Status Report. February 1974
- IB-74-3 Transportation Departments in the Several States. February 1974
- IB-74-4 In Pursuit of Absent Fathers. February 1974
- IB-74-5 Welfare Reform — A Look at Three States. March 1974
- IB-74-6 The Mortgage Interest Controversy. March 1974
- IB-74-7 Recent Developments in Transportation Financing. July 1974
- IB-74-8 Traffic Safety: Six States in Perspective. July 1974
- IB-74-9 Science, Technology and the Legislative Process. October 1974
- IB-74-10 Auto Repair Regulation: A Status Report. October 1974
- IB-74-11 The Legislative Reference Bureau Can Help You. November 1974
- IB-74-12 Constitutional Amendments Given "First Consideration" Approval by the 1973 Wisconsin Legislature. November 1974
- IB-74-13 Fiscal Note Manual. December 1974
- IB-75-1 Rape Law Revision: A Brief Summary of State Action. April 1975
- IB-75-2 State Regulation of Nonreturnable Beverage Containers. April 1975
- IB-75-3 Personalized License Plates. July 1975
- IB-75-4 Wisconsin Constitution As Amended April 1, 1975. July 1975
- IB-75-5 Motor Vehicle Taxes in Wisconsin and Other States. September 1975.
- IB-75-6 The Use of the Partial Veto in Wisconsin. September 1975.
- IB-75-7 Recent Changes in Voter Registration. November 1975.
- IB-75-8 The Ground Rules of a Special Session. November 1975.
- IB-75-9 Municipal Borrowing in Wisconsin. December 1975.