POINT I

The Appellate Division's right to seal a file is derived from the inherent powers of the Court. In a removal proceeding, its actions are supreme.

The Appellate Division, as would any other court, has certain inherent powers in the functioning of it as a court. These flow from the State Constitution, Art. VI, statute, Judiciary Law, § 85, the common law and traditional powers of the Supreme Court.

Simply to brush aside as "unpersuasive", as the opinion below did, a court's inherent power to seal its own records is to ignore the law. The decision below failed to consider Judiciary Law § 85 which gives the Appellate Divisions the power to "from time to time may provide rules as it may deem necessary generally to promote the efficient transaction of business and the orderly administration of justice therein." See also, *Danziger* v. *Hearst Corp.*, 304 N.Y. 244, at 248-249 (1952) (which saw the file sealing power as "an admissible exercise of the rule-making power of the New York Supreme Court"); *Hanna* v. *Mitchell*, 202 App. Div. 504, 512-513 (2d Dept. 1922), affd. 235 N.Y. 534 ("The power to make rules governing the procedure in the courts is a judicial and not a legislative power").

In *Werfel* v. *Fitzgerald*, 23 A D 2d 306 (2d Dept. 1965), the Second Department stated (p. 311):

> "A court may order papers sealed and inspection prohibited except by further order of the court, . . . and sometimes by use of power said to be inherent in the authority of the court (*Stevenson* v. *News Syndicate Co.*, 276 App. Div. 614, affd. 302 N.Y. 81)."

The *Werfel* case held (312) that files of the Criminal Court could be examined *unless* the papers have been

Exhibit "C"

sealed from public scrutiny *by the court* or by the terms of the statute. In the instant case, however, there was a clear order sealing the file.

The policy as to confidentiality of certain types of court and quasi-judicial proceedings has a sound basis in law. Thus the file in a matrimonial action is closed (*Cf.* Judiciary Law §4). This does not violate freedom of the press. *Danziger* v. *Hearst Corp., supra,* 304 N.Y. at 248-249. Furthermore the power of the Appellate Divisions in judicial disciplinary matters is supreme. The discretion vested in the Appellate Division is not subject to limitation. *Matter of Droge,* 197 N.Y.44, 53 (1909). While *Droge* has been limited to allow an appeal from the Appellate Division to the Court of Appeals, *Matter of Sarisohn,* 21 N Y 2d 36, 41 (1967), *Droge* still is good authority that the procedures followed are in the sound discretion of the lower court. The Court of Appeals function is limited (*Sarisohn,* 21 N Y 2d, 42).

There are certain quasi-judicial proceedings which are not generally considered to be public. See *Shiles* v. *News Syndicate Co.,* 27 NY2d 9, 17 (1970) 43 ALR 3d 620, *cert. denied* 400 U.S. 999. Courts also allow a party to move to seal a record. *Munzer* v. *Blaisdell,* 268 App. Div. 9 (1st Dept. 1944).

In other jurisdictions there are often circumstances which warrant restriction of access; 175 A.L.R. 1260, 1266 (§ 4). As was said there:

> "Since every court of record has a supervisory and protecting charge over its records and the papers belonging to its files, in the absence of *controlling* statute there would seem to be no doubt as to the power of the court to prevent an improper use of its records." (Emphasis supplied)

It is said to be within the discretion of the court to impound the file of a case and deny public inspection of them.

It is often done where justice so requires. *Cf. Sanford* v. *Boston Herald-Traveler Corp.*, 318 Mass. 156, 61 N.E. 2d 5 (1945).

The use by the press of sealed files to create a climate tending to show the Appellate Division acted improperly is not proper. See *State* v. *Kearney*, 109 N. J. Super. 502, 263 A. 2d 817 (1970).

POINT II

No controlling statute provides for inspection as of right of the file herein. Judiciary Law § 90 relates to attorneys, not judges.

A.

The reliance on Judiciary Law § 90(10) by the Third Department is simply a case of stretching a law beyond any reasonable intent. In stating that a "fair reading" of the subdivision make it applicable to judicial discipline, the court below engaged in judicial legislation. This has been condemned. As was said in *Bright Homes, Inc.* v. *Wright*, 8 NY 2d 157, 162 (1960):

> "Courts are not supposed to legislate under the guise of interpretation, and in the long run it is better to adhere closely to this principle and leave it to the Legislature to correct evils if any exist."

The provision in Judiciary Law § 90 only has to do with the discipline of attorneys. There is no similar statute as to judges. When a charge is sustained against an attorney it is based on the record and report laid before the Appellate Division. When and if it is confirmed, the public or prospective client has a right to know all the facts because such a person has a right to intelligently choose counsel. On the other hand a judge, if he is punished by censure and remains a judge, is in a different position vis-a-vis the public. A person or litigant who comes before

him has no right to decide whether he will or will not choose a judge except in limited situations, *cf.* Judiciary Law § 14, not relevant. The First Department has certified Judge Suglia fit to continue as a judge and stated the relevant facts. Further scrutiny of the files is not relevant to his fitness and only detrimental to the administration of justice. It should be remembered that judges are held to a much higher standard than attorneys and can be censured or punished for offenses which would not warrant action against an attorney.

It is also interesting to note that Judiciary Law § 90(10) basically provides for confidentiality of records, leaving the divulging of attorneys' records to the discretion of the Appellate Division. The last sentence which petitioner and the court below relies on is obviously a specific exception to the general rule of confidentiality. There is no reason to analogize it to other sections of the Judiciary Law.

A more basic reason not to apply § 90(10) to judges is that not all judges are lawyers. They are a different class, including justices of the peace and town justices who are not required to be lawyers. Const., Art. VI, § 20. There is even a different provision for removal by the Appellate Division and there is no mention of any *records* or proceedings being public. Judiciary Law § 429 (formerly Code of Criminal Procedure § 132). See also Const., Art. VI, § 22 (i). Implicit in these provisions is the power of the Appellate Division to fashion its proceedings to fit the circumstances. 175 A.L.R. 1266, § 4, *supra.*

It clearly does not follow, as the Third Department said, that because the Legislature has failed to make an explicit provision for confidentiality in judicial discipline, that the Courts are without the power. It is as logical to say that the specific provision for publicity in Judiciary Law § 90(10) where charges are sustained shows that the lack of same in Judiciary Law § 429 and the Constitution indicates

the proceedings are required not to be public. The silence or failure of the Legislature to provide for publicity in § 429 reasonably indicates that the exclusion was intended, and a court should refuse to insert such a provision since it has no power to legislate or analogize. See *Matter of Thomas,* 216 N.Y. 426 (1915).

B.

Although not cited by the court below, the petitioner below assumed that Public Officers Law § 66 made all records in the custody of a public official "public records". The statute cited does not declare what records are open to the public. Rather it provides a procedure for inspection once a document is determined to be public, 1955 Opn. Att. Gen. 228.

Thus it is obvious that not all records kept by a public officer are "public records" as regards the right of inspection. *Natelson* v. *Portfolio,* 291 N.Y. 290, 295 (1943); *Matter of Blanford* v. *McClellan,* 173 Misc. 15, 17 (Sup. Ct., Erie Co., 1940). In the absence of a statute* expressly stating that the items sought to be examined are public records, the nature and purpose of the record and possibly custom and usage must be the guides in determining whether a record is a public record. *Matter of Looby* v. *Lomenzo,* 60 Misc 2d 16 (Sup. Ct., Albany Co., 1969). In the instant case, the order of the court and the applicable rule, 22 NYCRR 607.8, and custom, dictate that the record of confidential proceedings resulting in a charge, by the Judiciary Relations Committee (J.R.C.) or the Appellate Division itself are not public records.

The conclusion is inescapable that some parts of a judicial discipline proceeding may be public records and others not. Cf. *Matter of Sorley* v. *Lister,* 33 Misc 2d 471, 475-

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* In *New York Post Co.* v. *Leibowitz,* 2 N Y 2d 683, 687 (1957), there was found in Judiciary Law § 301 authority to transcribe a court record.

476 (Sup. Ct., Nassau Co., 1961) (urban renewal records). See also *Jordan* v. *Loos*, 204 Misc. 814 (Sup. Ct., Sullivan Co., 1953), affd. 283 App. Div. 983 (3rd Dept. 1954) (parole records).

As to what are public records, it has been held that "court records" are not within a "public records" statute, *Grand Forks Herald* v. *Lyons*, 101 N.W. 2d 543 (N.D. 1960). Although not controlling, the discretion of the courts in controlling its records should be respected. While the public may have a right to know of any action and the reasons for it taken against a judge, withholding the sources may be proper. *Minneapolis Star & Tribune Co.* v. *State*, 163 N.W. 2d 46 (Minn. 1968).

POINT III

The Appellate Division, First Department, has provided by rule that the file is confidential.

The rules of the Appellate Division, First Department (22 NYCRR 607.8) provide that "(a)*ll* complaints, correspondence, other papers and data, proceedings and records with reference to a complaint shall be confidential . . ." This reasonably encompasses the entire matter, including any subsequent proceedings in the Appellate Division where the Court so determines, excepting, of course, a public hearing. Any other reading would be illogical since the proceedings before the Judiciary Relations Committee constituted substantially the entire record before the Appellate Division in the instant case. To keep the Committee file confidential and the Appellate Division record open is impossible and, of course, the order below requires full disclosure.*

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* In the court below the petitioner posed the issue as one where the entire file was a "public record".

The decision at 36 A D 2d 326 was a *de novo* matter. As noted in the decision:

> "Respondent [the Judge], after service, admitted each of the facts in the charge, waived a public hearing and elected to stand upon the record without adducing any further proof."

Thus, while the Judge could have had a hearing which might have been public, he elected not to, and did not controvert the facts. The Committee was in the position of a Grand Jury. The Judge, in effect, pleaded no contest. We should note that the deliberations and records of a Grand Jury are secret. Crim. Proc. Law § 190.25, subd. (4). Properly viewed the J.R.C. proceeding should be confidential.

The Appellate Division, First Department, directed that the file be sealed. This flows from an exercise of inherent power as well as a reading of 607.6(d) and 607.8. It is a reasonable interpretation of the First Department's own rules and should not be interfered with. *Matter of Howard* v. *Wyman,* 28 N Y 2d 434, 437-438 (1971). It was clearly within the First Department's discretion. If there had been full hearing before the Appellate Division then it might have been made "public", at the request of the judicial officer. See *Suglia* at 326.* It should be noted that the Appellate Division, Third Department has a rule similar to that of the First Department as to judicial in-

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* Cf. the procedure in the Court on the Judiciary. 22 NYCRR 580.3. In *Matter of Schweitzer,* 29 N Y 2d (a), Rule III at (e) provides "(t)he hearing before this Court shall be public." However the proceedings or sessions which led to the formulation of charges are not public. The proceedings were closed with Justice Schweitzer's resignation (rr-ss). As in *Schweitzer,* there never was any hearing in the instant case. The Third Department's statement that the "proceedings" are public is, we submit, not correct. By the current rules the *hearing* is public. And they may be changed from time to time.

vestigations. 22 NYCRR 800.29. No public examinations of any papers filed with the court relating to investigations or proceedings involving public offices or public officials are permitted except by order of the court.

The opinion below's simplistic conclusion that reliance of Rule 607.8 is misplaced on the grounds the rule applies only to proceedings before the Judiciary Relations Committee is totally unwarranted and begs the question. The file sought to be examined is the Committee's although it includes the First Department's disposition. The decision also ignored the Third Department's own rule, 22 NYCRR 800.29 which prohibits the clerk from allowing examination of papers relating to investigations or *proceedings* involving public offices or public officials by anyone other than a person directly affected or his attorney. There can be no doubt that this rule applies to judges. 22 NYCRR 800.29 is entitled "Information as to details of judicial investigations." A court has a right to decide certain preliminary proceedings are confidential.*

POINT IV

There is no constitutional right of access to all files in a courthouse.

The petitioner below attempted to place a constitutional gloss on her activities herein. While not germane, the opinion below did cite former N.Y.S. Const. Art. VII, § 22 as providing that judicial proceedings are public. It quoted *Matter of New York Post Corp.* v. *Leibowitz*, 2 N Y 2d 677, 684 (1957). This constitutional provision is an erroneous authority.

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* Petitioner's reliance on *Matter of DiLorenzo*, 38 A D 2d 401 (2d Dept. 1972), where the Second Department opened its file is inapposite. The Court there had not sealed the file. Closing the file only when the press requested access could be construed as punishing the Fourth Estate. *Cf. infra, Matter of Oliver* v. *Postel*, p. 15.

The Art. VI, § 22 discussed therein was repealed, eff. Sept. 1, 1962. It has not been carried forward into the new "Judiciary" article. See Historical Note on Art. 6, § 22, 2 McKinney's, Const. (Art. 3 to end), p. 345. To rely on repealed constitutional provisions clearly warrants the conclusion that the opinion below is incorrect.

The attempt to place this application within the parameters of freedom of the press should also fail. The instant disciplinary proceeding was not closed to punish the press, *Matter of Oliver* v. *Postel,* 30 N Y 2d 171, 179 (1972). Rather, in large part, the proceeding was closed in the interest of public decency and a considered opinion that this was the type of proceeding in which the file should not be open. This is similar to *United Press Assn.* v. *Valente,* 308 N.Y. 71 (1954). This case is still appropriate authority that court hearings and records may be closed. It should be noted that the file herein was sealed at the conclusion of the matter and not simply when the petitioner showed her interest. In other words sealing was not directed against the press.*

The petitioner, as a newsperson, acquires no greater rights to inspect documents not open to the public. *United Press Assn.* at 77, 66 Am. Jur. 2d 352, *Records, etc.* § 16. There is no right to secure the assistance of the court in procuring information that she desires to print or any privilege of attending the closed sessions which resulted in censure. *Cf. Trimble* v. *Johnston,* 173 F. Supp. 651, 658 (D.D.C. 1959).

It seems anomalous that the courts of the State of New York should abdicate their responsibility and power over their own records when the federal courts are asserting their authority over same. *Billick* v. *Dudley,* 356 F. Supp. 945 (S.D.N.Y. 1973).

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* In this respect it is open to question whether the petitioners have standing to challenge the order herein, *Oliver, supra* at 179, or whether they have an enforceable right.

CONCLUSION

The judgment below should be reversed.

Dated: New York, New York, December 6, 1973.

Respectfully submitted,

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