

REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL

THURSDAY, JULY 1, 1993

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY
AND JUDICIAL ADMINISTRATION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:07 a.m., in room 2226, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives William J. Hughes, Don Edwards, Howard L. Berman, Howard Coble, Hamilton Fish, Jr., and F. James Sensenbrenner, Jr.

Also present: Hayden W. Gregory, counsel; Edward O'Connell, assistant counsel; Veronica Eligan, secretary; and Joseph V. Wolfe, minority counsel.

OPENING STATEMENT OF CHAIRMAN HUGHES

Mr. HUGHES. The Subcommittee on Intellectual Property and Judicial Administration will come to order.

Good morning. The Chair has received a request to cover this hearing in whole or in part by television broadcast, radio broadcast and still photography, or other such methods of coverage. In accordance with rule 5(a), permission will be granted unless there is objection.

Hearing none, permission is granted.

Welcome to the hearing of the Subcommittee on Intellectual Property and Judicial Administration, on the draft report and tentative recommendations of the National Commission on Judicial Discipline and Removal.

The Commission was established under P.L. 101-650 in December 1990. It is chaired by our distinguished former colleague, Bob Kastenmeier, who for many years chaired with great distinction this subcommittee. The Commission formally commenced its work on January 30, 1992, and will file a final report by August 2 of this year.

The Commission's duties were to investigate and study the problems involved in the discipline and removal from office of lifetime tenured Federal judges. This encompassed an indepth analysis of the impeachment process and the Judicial Conduct and Disability Act of 1990. The recommendations of the Commission will be submitted to all three branches of government.

In regards to impeachment, the Constitution states that "Judges, both of the Supreme and inferior courts, shall hold their offices during good behavior and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their commission in office." This mandate has in recent times allowed Federal judges to continue in office and receive pay after conviction of a crime.

Public perception of the judiciary and the criminal justice system is damaged when Federal judges who were convicted of crimes remain in office and continue to receive a salary. There have been five indictments and four convictions of sitting Federal judges in the past decade. All these judges refused to resign their commission during the criminal and impeachment processes.

The only method of removing judges provided for in the Constitution is impeachment by the House and conviction by the Senate. Article II states that, and I quote, "... all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." end of quote. The sole power of impeachment lies in the House of Representatives. The authority to try all impeachments rests in the Senate. The Judicial Conference has recently certified to the House of Representatives that consideration of impeachment of U.S. District Judge Edward Collins may be warranted. Impeachment proceedings may also be sought against Judge Robert Aguilar of the Northern District of California.

It is, therefore, likely that the Committee on the Judiciary in the House will be called upon to again participate in impeachment proceedings in the very near future.

The Judicial Conduct and Disability Act of 1980 provides another formal mechanism through which disciplinary action can be sought against Federal judges. Any person is permitted to file a complaint alleging that a Federal judge has engaged in misconduct. Although the Supreme Court has not yet delivered a definitive statement on the constitutionality of the 1980 act, it has survived constitutional attack in several circuit courts. Removal from office is not an option under this act.

Other statutory reforms have been proposed that would allow removal of Federal judges upon conviction of a crime. Additional proposals have called for an automatic suspension of pay upon indictment or conviction. Others have argued that a judicial tribunal could be created by statute to remove Federal judges. The Commission has concluded that a proposal for removal of a Federal judge from office by means other than impeachment would require a constitutional amendment. The Commission counsels against any amendment to the Constitution at this time, and believes that with changes that do not require constitutional amendment, the present system can continue to serve effectively.

The recommendations of the Commission have been described by its Chairman, Robert Kastenmeier, as "fine-tuning existing laws and practices." These recommendations are primarily targeted at increasing the speed through which the impeachment process takes place.

The Commission also believes that the Judiciary Committee should not wait until all the avenues of direct appeal, including

writ of certiorari to the Supreme Court, have been exhausted before commencing impeachment proceedings. In this way, impeachment proceedings could occur prior to or simultaneously with criminal proceedings.

The independence of the three branches of government is critical to the balance of power achieved by our Constitution. Our Federal judicial system is presided over, for the most part, by extremely talented, qualified and honest judges. However, the judges who abuse the system must be dealt with effectively.

The recommendations of the Commission are before us at a time when the need to remove a Federal judge, while still infrequent, is no longer an extremely rare event. We welcome the recommendations of the Commission and want to thank you, Bob, and the Commission, for an extremely good job. I know you did a lot of work and you have again, as always, conducted yourself in a fashion that we are all very, very proud of, and I congratulate you on your excellent work.

The Chair recognizes the distinguished gentleman from New York, the ranking Republican of the full Judiciary Committee, Mr. Fish, who is also a member of the Commission.

Mr. FISH. Thank you very much, Mr. Chairman. I am very pleased that our former colleague, Bob Kastenmeier, and Judge John Gerry are with us today to discuss the draft report of the National Commission on Judicial Discipline and Removal. During the past year and a half I have enjoyed the opportunity of serving on the Commission under Chairman Kastenmeier's able leadership. I would just like to tell you and members of this subcommittee that his chairmanship on the Commission was marked by the same mastery of issues, thoughtfulness and thoroughness that were familiar to all of us who had the chance to serve with him on this subcommittee in the Congress.

And I know that Chairman Kastenmeier shares my high regard for all our Commission colleagues and Judge Gerry, who chairs the Executive Committee of the Judicial Conference.

Judge, you will be surprised to learn that Circuit Judges Jay Plager and Levin Campbell made invaluable contributions to the work of the Commission.

I would like to add, Mr. Chairman, that we are joined today by—it seems like we are loading up this Commission with judiciary talent here, with our former chief counsel, Mike Remington, who was the chief counsel for the Commission as well. There are also liaison Judiciary Committee staff, Peter Levinson, who is with us this morning, along with Ed O'Connell, and Allen Erenbaum; all who contributed to the work of the Commission.

The Commission concluded for reasons that Chairman Kastenmeier will discuss in some detail that under present circumstances replacing the constitutional mechanism of two centuries' duration for impeaching and removing Federal judges would be both unnecessary and undesirable. This does not mean that we opt for maintaining the status quo. There are significant Commission recommendations that, if implemented, will substantially improve the impeachment process. And a few of the highlights are, the legislation and Federal rules change can facilitate the Judiciary Committee's access to material needed in an impeachment proceeding, ob-

viating the necessity of time-consuming legislation which has been experienced by the Congress in prior impeachments.

And as you mentioned, Mr. Chairman, the committee appropriately can initiate impeachment proceedings involving judges convicted of crimes at earlier points in future cases, than we have in the past, thus minimizing the potential for incarcerated judicial offenders to continue drawing salaries. Application of the issue of the doctrine of inclusion in House impeachment proceedings and in Senate trials can save both bodies the time and expense associated with relitigating facts necessarily determined by juries that have convicted judges after fair trials.

The committees of 12 Senators that hear the evidence firsthand in impeachment trials can, under our recommendations, compile proposed findings and recommendations, thus permitting the full Senate to have greater benefit from the work of their colleagues.

At present, as you know, the rule states that the committee does not vote itself after hearing the evidence. The addition of this recommendation by the Commission to be implemented in a form to be checked by the Senate, of course, will certainly allow their colleagues to know more firsthand the judgment of those who saw the witnesses and heard the testimony. In my view, this approach could only contribute to more informed consideration by the Senate at the trial.

Mr. Chairman, the Commission devoted substantial attention to the details of the Federal judiciary's internal disciplinary machinery and suggested a number of potential improvements. We recognized the importance of greater educational efforts to familiarize the bar and the public with the complaint mechanism and recommended steps to overcome disincentives to utilizing the process. At this point, with our report in draft form and our recommendations tentative, we look forward to as much input as possible in how to improve the final work product; and this hearing, by giving added public attention to the Commission's work, hopefully will encourage comments, suggestions or revisions.

Thank you.

Mr. HUGHES. I thank the gentleman.

The gentleman from California.

Mr. BERMAN. I have no opening statement, Mr. Chairman.

Just, it is good to see our former chairman here again in a new capacity, and I look forward to his testimony.

Mr. HUGHES. Our first witness, as has been indicated, is Robert Kastenmeier, Chairman of the National Commission on Judicial Discipline and Removal. Bob served with great distinction in the House for some 32 years as a Representative from Wisconsin, and was chairman of this subcommittee for many years.

Bob was also a member of the Select Committee on Intelligence. He is currently a distinguished fellow at the Governance Institute, a board member of the American Judicature Society, and a member of the Carnegie Task Force on Science and Technology in Judicial and Regulatory Decisionmaking.

Bob has received numerous awards throughout his distinguished career, including, for example, the Judicature Award and the Burger Award from the Institute of Court Management.

It is truly a pleasure, Bob, to have you back. It is good to see Mike Remington, who served with great distinction as chief counsel for you many years here in the House, and served as the Director of the Commission during this past year or so. We are just delighted to have you.

We have your statement. Without objection, it will be made a part of the record, and you may proceed as you see fit. I think this is your first voyage back to the subcommittee since you left us, and we are delighted to have you.

**STATEMENT OF ROBERT W. KASTENMEIER, CHAIRMAN,
NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND
REMOVAL, ACCOMPANIED BY MICHAEL REMINGTON,
DIRECTOR**

Mr. KASTENMEIER. Thank you, Mr. Chairman, for those kind remarks. I appreciate them very much. I will give only part of my prepared testimony, as necessary background, but I will try to abbreviate it.

I am accompanied, as you pointed out, by Michael Remington, who is Director of the Commission, who unlike the rest of us who are part-time as Commissioners, is our full-time, really our guiding light in terms of the Commission with respect to everyday operations and with respect to the report itself. He has worked tirelessly.

And I take this opportunity to acknowledge that there were many other liaisons to the Commission, some who are sitting in the audience and some there with you, Ed O'Connell, and certainly Peter Levinson. And I know Bill Burchill is in the audience, among others. These people contributed a great deal.

Needless to say, I appreciate this opportunity. I was a member of this subcommittee for nearly three decades. I served as Chair from 1969 to 1991. And I am enormously proud to see the subcommittee so ably led by my successor, Chairman Bill Hughes, and the ranking member, Carlos Moorhead, with whom I served so long.

This is my first appearance before your subcommittee, Mr. Chairman. I and several other subcommittee members, I am sure, remember as though it were yesterday, October 9, 1986, when the U.S. Senate removed from office Harry Claiborne, a judge of the U.S. District Court of Nevada. I well remember it because this subcommittee had been referred Jim Sensenbrenner's impeachment resolution in June 1986, and we were obliged to drop all other legislative business in order to hold a hearing into the conduct of Judge Claiborne and the drafting of articles of impeachment.

Prior to that removal, the Senate last removed a judge 50 years before, April 17, 1936. And that removal of Judge Claiborne was only the fifth judicial removal in the Nation's history. Yet within 25 months, two other district judges, Alcee Hastings and Walter Nixon, were removed from their offices by the Senate. And certainly members of your subcommittee served as managers and served as chairs to accomplish that—Don Edwards, who is here, and others. The chairman of the full committee, Jack Brooks, served as manager in the latter two impeachments; and of course

scheme, perhaps based on a misunderstanding of the administration of the current scheme.

Also congressional oversight could be useful in developing a mechanism for communication between the House of Representatives and the Department of Justice. In the three impeachments of the 1980's, there was apparently no timely communication to enable the House to have any meaningful say in the decision that criminal prosecution would proceed impeachment. That should change, as the Commission recommends. In addition, there have been explicit and implicit commitments made during impeachment trials to examine alleged prosecutorial misconduct in the criminal cases of the Federal judges. Oversight is necessary in such matters to assure the Congress that its own impeachment powers are not being manipulated improperly.

In conclusion, I commend you for conducting an oversight hearing on the National Commission on Judicial Discipline and Removal. I hope our report, when finalized, will assist your future research and forecasting for the judiciary. The Commission is a living example of interbranch communications and Federal-State cooperation to study and identify problems on a thorny and serious societal issue, what to do about impeachment and removal and discipline of misbehaving Federal judges.

The three branches of the Federal Government are represented in the Commission's appointive authorities, in its membership and in its report responsibility. The Commission has worked with representatives of the three branches to satisfy its assignments in a fair, open, effective and expeditious manner. Most particularly, the Commission is grateful for the warm and productive relationship that has existed with the House Committee on the Judiciary, and most particularly this subcommittee, including its chairman, all members of the subcommittee, and both majority and minority staff.

Mr. Chairman, I am available to answer any questions you or the members of your subcommittee may have. Perhaps some questions may be directed to Mr. Remington.

Mr. HUGHES. Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Kastenmeier follows:]

PREPARED STATEMENT OF ROBERT W. KASTENMEIER, CHAIRMAN, NATIONAL
COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL

Mr. Chairman, I appreciate the opportunity to testify on behalf of the National Commission on Judicial Discipline and Removal at this oversight hearing. Allow me to make a personal observation at the outset. I was a member of this subcommittee for nearly three decades, and I served as its chair from 1969 until 1990. I am proud beyond words to see the subcommittee so capably led by my successor, Chairman Bill Hughes, and the Ranking Minority Member, Carlos Moorhead, with whom I served. This is my first appearance before the subcommittee.

I. BACKGROUND

I—and several subcommittee members (including Chairman Hughes, Romano Mazzoli, and Hamilton Fish)—remember as though it were yesterday the day (October 9, 1986) that the United States Senate removed from office Harry E. Claiborne, a judge of the United States District Court of Nevada. I well remember this subcommittee being referred Jim Sensenbrenner's impeachment resolution in June of 1986, and being obliged to drop other legislative business in order to hold a hearing into the conduct of Judge Claiborne and drafting articles of impeachment.

is something I was not aware of the sort of bias that isn't explicit, but yet affects you by what the court does—failure to recognize religious holidays and that sort of thing.

Mr. FISH. Chairman Kastenmeier, what triggered the introduction of the setting up of the Commission was that after a century of no impeachments, we had three involving Federal judges in recent years.

Now, as you say, we are embarking on a fourth impeachment investigation and may before long be considering a fifth. Now, four of these five Federal judges were convicted in criminal cases; and looking down the road, do these figures suggest to you that there may be weaknesses in the Senate selection and confirmation process?

Mr. KASTENMEIER. The Commission, as you know, did look at that question. We were very interested both in terms of the executive branch and the Senate.

We did make a recommendation that the Justice Department examine, as well as the Senate should examine, past cases to see whether there was any pattern wherein discernability of shortcomings of these judges was available at the time they were nominated. We made that recommendation.

As to whether there is a significant corruption problem in the judiciary, we concluded there is not. Despite the fact that one of the major issues which the Commission was designed to look at was: Are the several recent impeachments unique or does this describe the future. The Commission could find nothing to suggest that the future is full of impeachable conduct problems for the Congress or for the judiciary.

As a matter of fact, one of our consultants—and I want to offer his report to you because it deals with the House of Representatives—Warren S. Grimes, professor at Southwestern University School of Law, was one of our consultants. He had previously worked as counsel with the House Judiciary Committee. One of the things that he discovered was that—as far as serious misbehavior, there were many more cases investigated in other periods, historically, of 50 years intervals—22 in one series of 50 years, 17 in another, 32 in another, and I think only 7 in the last 50 years by the House. This suggests that with respect to serious misbehavior, whether they result actually in impeachment removal or not, there are fewer of these cases in our time reaching the House of Representatives. Despite the several cases of impeachment because of criminal convictions, we were not able to statistically conclude that this is going to be a serious problem in the future. Our conclusion on page 77 states as much.

Mr. FISH. Thank you very much, Mr. Chairman.

Mr. HUGHES. The gentleman from California.

Mr. EDWARDS. Well, thank you, Mr. Chairman. And I am really pleased to welcome Chairman Kastenmeier and our friend Mike Remington here today; and I just congratulate the Commission on doing a really excellent job. They worked very hard and I think we are—the whole country is the better for having this excellent study.

Chairman Kastenmeier was kind enough to ask me to testify before the Commission, and I did; and I am pleased to see that the valuable suggestions that they have—and they are very good sug-

gestions—don't do was to cut short impeach a judge. doms, which is li make impeachme didn't do it in the

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