CENTER for JUDICIAL ACCOUNTABILITY, INC.

P.O. Box 69, Gedney Station
White Plains, New York 10605-0069

Tel. (914) 421-1200
Fax (914) 428-4994

E-Mail: judgewatch@aol.com
Web site: www.judgewatch.org

BY FAX AND MAIL
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February 27, 1998

Jeffrey Barr, Assistant General Counsel
Administrative Office of U.S. Courts
One Columbus Circle
Washington, D.C. 20005

RE: Oversight Responsibilities of the Judicial Conference

Dear Mr. Barr:

For the record, it was quite obvious from your comments that you have ***not*** reviewed the materials in *Sassower v. Mangano, et al.*, #96-7805, transmitted to you under our November 24, 1997 coverletter -- or you would have known that the SOLE issue on appeal to the Second Circuit was the "pervasive bias" of the District Judge. Your appalling lack of professionalism and honesty as to the seriousness of the documentary materials before you -- materials that *empirically* establish the federal judiciary's subversion of the recusal statutes under 28 U.S.C. §§144 and 455 and of the judicial and appellate processes -- require Mr. Burchill's immediate supervisory attention.

Our January 27, 1998 letter to you asked you to provide these materials to Mr. Burchill -- in the event that Mr. Willging was not available to undertake their review. It appeared from our conversation that you had not even discussed this matter with Mr. Willging. Consequently, we have no choice but to turn to Mr. Burchill. I will telephone him next Friday, March 6th -- by which time I would hope he will have had an opportunity to examine the materials we sent you -- beginning with our Petition for Rehearing with Suggestion for Rehearing *In Banc* -- with which you were unfamiliar. You should be sure to tell Mr. Burchill that you have not only refused to present these materials to the relevant Committees of the Judicial Conference, but have refused to provide us with any written response to our November 24th coverletter -- or to *any* of our many other substantive letters to you over the past 2-1/2 years. This includes our October 1, 1995 letter, which asked you to locate any response to Chief Judge Wald's September 25, 1987 memo about §372(c) -- as quoted in my article "*Without Merit: The Empty Promise of Judicial Discipline*" (at p. 95).

As previously requested -- but still not provided -- please send us the Annual Report of the Administrative Office -- so that we can know precisely how many billions of dollars of taxpayer money are being spent to fund the costly superstructure of the federal judiciary.

Finally, so that the Judicial Conference will have before it further evidence of the destruction of the §372(c) disciplinary mechanism -- over and beyond what we provided it two years ago -- I enclose a copy of Chief Judge Winter's Order dismissing our §372(c) complaints on "merits-related" grounds -- which complaints it also appeared you had NOT read, while nonetheless opining that they, like the §1983 litigation, were frivolous.

Yours for a quality judiciary,

Elena Ruth Sassower

ELENA RUTH SASSOWER, Coordinator
Center for Judicial Accountability, Inc.

Enclosure

P.S. I will mail you a copy of our application to the U.S. Supreme Court extending our time to file our petition for a writ of certiorari to May 16th -- as well as Judge Walter Stapleton's April 27, 1989 testimony before the House Judiciary Committee on the subject of judicial discipline and conduct where he claims that the recusal statutes and ethics codes work well and that there's no need for change.

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JUDICIAL INDEPENDENCE: DISCIPLINE AND CONDUCT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY,
AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

H.R. 1620, H.R. 1930, and H.R. 2181

APRIL 27, JUNE 13 AND 28, 1989

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Mr. MOORHEAD. And I did wish to ask one question.

You know, two out of the last three cases we have had on impeachment have dealt with judges convicted of felonies that were sitting in prison. We can fight on all these other things, on changing things around, but is there any way that the court would agree that we could handle these cases where there has been a conviction on moral turpitude grounds or a felony and the judges are sitting in prison and still plan to come out and preside in court where they could not even practice law because they would have been disbarred? Is there any way we can handle that without going through this long ritual of impeachment that takes so much time?

Judge GODBOLD. Congressman, I neglected to mention, and should have, that H.R. 1620 provides for the amendment of 372(c)(8) to provide that in the case of a judge who has been convicted of a felony and has exhausted all appeals that the Judicial Conference of the United States may, by majority vote and without waiting for the investigatory proceedings at the council level in the circuit and without waiting for action by the judicial council of the circuit, transmit directly to the House of Representatives a determination that consideration of impeachment may be——

Mr. MOORHEAD. But my point was, is there a way of avoiding the long and tortuous process that we have to go through in impeachment, which involves several weeks, at least, of the time of the U.S. Senate and time of the committees of the House, on something that should be quite obvious to most, whether he is competent or not? Obviously, for the respect of the court, he shouldn't be sitting on the bench.

Judge GODBOLD. Well, I think there are two layers to your question. The first is, should a judge be sitting at all while these matters are going on?

Mr. MOORHEAD. Or even afterwards.

Judge GODBOLD. Well, if afterwards, then I think this directly raises constitutional issues.

Mr. MOORHEAD. I am sure it does. I don't know whether the Constitution should be changed.

Judge GODBOLD. I must say that I am hesitant to express a view on the constitutionality of procedures that might be different from what traditionally have been viewed as the procedures required by the Constitution, whether the House could truncate its procedures, and whether the Senate can act by less than the whole, as you know, is a live issue at this time, and I must respectfully say I would be a little reluctant to express any views on those constitutional issues that I really haven't studied.

Mr. KASTENMEIER. If my colleague would yield, that is why we call for a study of this narrow area, to see what alternatives can be pursued. It is extremely difficult to see what alternatives can be pursued short of the constitutional form of impeachment we currently engage in. But I think the question should be examined. Hopefully, we will not go through a period in which we have a number of people affected, but nonetheless there always is that possibility.

Judge GODBOLD. I could say one thing about the first layer question which was, what happens to a judge who is under a serious charge while the charge is being investigated and before we know what is going to happen? Should he continue to sit? I will have to give you my own personal experience. As a chief judge, I have had three of these in which there were publicly known serious charges. Perhaps it gives you some flavor of how a chief judge can operate with the act as his platform.

In each of the three instances, I took the matter up with the chief district judge and said, "Look, this judge ought not to be sitting while this matter is going on." In each of the three instances, the chief district judge agreed, and in each of the three instances the judge voluntarily did not sit until the matter was brought to a conclusion. If we didn't have the act to give us this means of communication, it would be hard to do.

Mr. KASTENMEIER. Now, the third of our panel, Judge Walter Stapleton.

Judge Stapleton.

STATEMENT OF WALTER K. STAPLETON, CIRCUIT JUDGE, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, CHAIRMAN, COMMITTEE ON CODES OF CONDUCT, JUDICIAL CONFERENCE OF THE UNITED STATES

Judge STAPLETON. Mr. Chairman and members of the subcommittee, my assignment, as I understand it, is to provide you with an overview of the current system of assuring ethical conduct in the third branch.

I think it is a particularly apt time to be addressing this subject, because the President's Government-Wide Ethics Act of 1989 proposes some rather fundamental changes in the disqualification rules, recusal rules, and other rules that govern the judiciary, and the wisdom of those changes depends in large part on how well you think the present system is working. I am aware that that act is not currently before this committee. I do understand, however, that the committee's jurisdiction covers judicial disqualification and recusal, and I hope the committee will permit me at the end of my remarks to include a couple of comments about some serious concerns that the Judicial Conference has with the Government-Wide Ethics Act of 1989.

From an institutional point of view, any overview of judicial ethics has to cover three elements: The standards of ethical conduct, the education of the constituency about those standards, and, finally, the monitoring and enforcement of those standards.

As this subcommittee well knows, the principal legislation that establishes ethical standards for the judiciary is the Judicial Disqualification Act, section 455. That act spells out those instances in which a judicial officer has to disqualify him or herself as well as those limited situations in which the parties can waive a disqualification. The other principal source of ethical standards for folks that work in the judiciary are the codes of conduct that have been promulgated by the Judicial Conference of the United States.

Back in 1972, a distinguished panel of lawyers and judges headed by Chief Justice Trainer of California came up with a model ABA code of conduct for judges. The next year, the Judicial Conference modified it to reflect the unique situation of the Federal judiciary and adopted it as the code of conduct for U.S. judges, which gov-

erns all judicial officers—bankruptcy judges, magistrates, as well as judges. That code of conduct incorporates the rules of section 455.

Since 1973, the Judicial Conference has adopted additional codes of conduct which pertain to the conduct of most other employees of the judicial branch. The codes of conduct provide not just rules for how a judge behaves in his official capacity but also how he or she must behave in an extrajudicial capacity. There are rules governing everything from personal financial activities, to participation in civic and charitable organizations, to writing and teaching, to receiving compensation for speeches and writing, to the propriety of receiving gifts, to a ban on virtually all political activity.

Standards, as this committee knows, are only helpful if those regulated understand what the rules are and are sensitive to the importance of complying. From the time a judge takes his or her oath, the Federal Judicial Center, headed by Judge Godbold, and my committee work together to make sure that he or she knows what the rules are, is impressed with the importance of compliance, and knows where to go to get help if he or she doesn't know what is required in a given particular context, which brings me to the role of my Codes of Conduct Committee.

We are sort of the keepers and the interpreters of the codes. We make recommendations to the Judicial Conference regarding amendments to the code, and we provide advice to covered officers and employees about what the codes require in the particular situation that faces them. They can write a letter to the committee, and they can receive a written letter commenting exactly on the problem that is before them and what the codes require in that situation. If there is not time for a written response, they can call me on the telephone, and I am authorized, if the committee has previously spoken on a similar issue, to share the committee's advice without, of course, revealing the previous inquiry.

I should say, these written inquiries and telephone inquiries are confidential inquiries unless the inquirer subsequently, for his own purposes, chooses to disclose what advice the committee gave.

Periodically, we publish opinions on the issues that come up most frequently, and we publish periodically a summary of the advice we have given in these confidential inquiries. There are now 82 published opinions, and they are put out in this desk book, that includes all the codes of conduct, all the applicable legislation, and all of the opinions of this committee interpreting the codes.

To give you an idea of how well this is used, in the last year we have processed 64 written inquiries for advice, and 93 telephonic inquiries. More of the inquiries are addressed to disqualification—whether a judge should or needs to disqualify him or herself—but they involve everything from how one must behave when one's spouse becomes a political candidate or a public official or whether one can receive a good citizen award or an outstanding jurist award at a banquet sponsored by the Boy Scouts or by a law school.

In recent weeks, the most frequent single question that has come to the committee is, how can I explore the opportunities for future nonjudicial employment while remaining on the bench and still stay in compliance with the codes of conduct? We have provided

advice on that, and I can tell you what it is, but it is not an easy situation to deal with.

My committee has no enforcement jurisdiction—that would be inconsistent with our confidential advisory function—but there are, as you know, others that effectively enforce both the statutes and the codes of conduct. The most important enforcers other than, of course, the individual judges themselves, are the courts. A judge performs in an open forum, and he has litigants there, and if a litigant thinks the judge is in breach of the codes of ethics—if he has a bias or if he has an interest—the party can file a motion, and the judge has to rule on that motion as to whether he or she should recuse him or herself, and that decision is reviewable by the court of appeals and ultimately by the Supreme Court of the United States. If the judge has erroneously failed to recuse himself or herself, the error of his or her ways is revealed in a published opinion and the judgment in the case may be set aside.

The enforcement role of the circuit councils has already been described, and I really have nothing to add to that. I do, however, need to mention the enforcement role of the Ethics Committee and of the circuit chiefs.

The Ethics Committee, which is a separate committee from mine, created by Congress, is charged by Congress with the responsibility of reviewing each year every judicial disclosure statement that is filed by a judicial officer or an employee, the judge personally reviews each of those. If there is any compliance problem reflected there, the committee takes appropriate action. Frequently, it is a referral to my committee suggesting to the judge that he get in touch with my committee and get some ethical advice. If compliance is not forthcoming, the Ethics Committee refers the matter to the judicial council of the appropriate circuit or, if necessary, to the Attorney General of the United States for appropriate action.

In 1971, the Judicial Conference charged circuit chiefs with the responsibility of monitoring outside teaching and writing and other outside activities to make sure those activities don't interfere with judicial performance, and the chiefs are enabled to do that because the disclosure forms that they have reveal all of those outside activities for which compensation is paid, and the other statistics that are available to the chief enable the chief to know whether the judge is behind in his work or not behind in his work.

As has been indicated, the chief judges perform an indispensable informal enforcement role. When some questionable conduct happens, the grapevine is such that the chief normally becomes aware of it, and usually an informal word to the alleged offender is sufficient to take care of the situation.

In summary, the Congress and the Judicial Conference have provided a comprehensive set of rules tailor-made to the judicial process. Our judicial officers and our employees are educated about what those rules involve and about the importance of compliance. If they don't know what is required of them, they know how to find out. If there is a problem, there is a procedure in place for responding to those problems, and the Judicial Conference, in short, believes the system is working well.

Finally, let me turn for just a minute to the proposed Government-Wide Ethics Act of 1989 and the President's Commission

report that it is based on. I have submitted for the committee's consideration a detailed statement that the Judicial Conference sent to the White House analyzing the proposals of the President's Commission. That detailed analysis really documents three principal points, and I will confine myself to those points.

First of all, as I have just said, the present system of judicial ethics works well. The commission has identified no general problem with the judiciary, and the Judicial Conference knows of no such problem. The proposed 15 percent cap on outside earned income, for example, is apparently aimed at making sure that outside activities are not adversely affecting judicial performance. But the commission doesn't claim that there is any problem with the performance of the handful of judicial officers that that 15 percent—and it is a small number—cap would affect.

In short, the Judicial Conference believes that if the system is not broken one shouldn't try to fix it.

The second point is that the judicial branch, as I have indicated, has a very significant investment in the current system of regulation. We have opinions, we have case law, we have committee opinions, we have judicial officers and employees who have been educated about the system, and to rewrite the rules simply to install a Government-Wide system of regulation would not only create uncertainty where none exists but would require an enormous commitment of scarce judicial resources just to re-educate everybody on what is expected of them.

Finally and most importantly, the Conference believes that regulation of ethics on a Government-wide basis is fundamentally unworkable because each branch has its own mission and its own process, and the judicial branch needs, and it currently has, rules that are fashioned with a view to the unique nature of the judicial process. I think this is particularly true in the context of disqualification, the subject on which this committee has expertise.

The Government-Wide Ethics Act would create a new set of conflict of interest rules applicable to the executive, to the judiciary, and to the employees of Congress, though not to its members. Violation of these rules would be a crime even if the judge did not realize that he or she was violating the law when he or she sat.

But there is an even more fundamental problem here, and that is that there is simply no way that a single set of rules can satisfactorily address the problems in the judiciary, the executive, and legislative. Frankly, I don't think the employees of Congress and the executive can live with a set of conflict of law rules that is restrictive enough to preserve the integrity of the judicial process. We are not asking for more lenient rules, we are just saying we are different.

There are two things about the judicial process that distinguish it—there are many, but there are two things in particular. One, the very heart of the process is that the judge has to be impartial and he has to be perceived as impartial. He is an empty vessel when he goes on to that bench and the parties get the opportunity to try to convince him or her one way or the other.

The second thing is that judges are fungible in the sense that we don't represent a constituency, and if I disqualify myself and a colleague steps into the case and takes my place, my colleague will do

as well at deciding that case as I will. So it makes no difference whether I recuse or not, and it is terribly important that I recuse if anybody could reasonably question my impartiality. But in the Congress and the executive, people are expected to come to problems with points of view, not to be completely empty vessels, and they do have constituencies, and when they disqualify themselves and somebody else has to make the decision, that is a problem because the constituency doesn't get represented in the same way.

I am over my allotted time. I appreciate the opportunity to share these views with the committee, and I am available now or any time in the future to answer any questions that you all may have.

Mr. KASTENMEIER. Thank you very much, Judge Stapleton.

[The prepared statement with attachments of Judge Stapleton follows:]

PREPARED STATEMENT OF WALTER K. STAPLETON, JUDGE, U.S. COURT OF APPEALS, THIRD CIRCUIT, CHAIRMAN, COMMITTEE ON CODES OF CONDUCT, JUDICIAL CONFERENCE OF THE UNITED STATES

BIOGRAPHICAL SKETCH
WALTER K. STAPLETON
UNITED STATES CIRCUIT JUDGE

Judge Stapleton was appointed United States Circuit Judge for the Third Circuit on April 4, 1985. He has been a member of the Committee on Codes of Conduct of the Judicial Conference of the United States since 1985 and has chaired that Committee since 1987. He earned an A.B. degree from Princeton University in 1956, a LL.B. degree from Harvard Law School in 1959, and a LL.M degree from the Law School of the University of Virginia in 1984.

He served as United States District Judge for the District of Delaware from 1970-1985 and was Chief Judge from 1983-1985. He was a member of the Judicial Conference of the United States from 1984-1985. Prior to his appointment to the bench, he was Deputy Attorney General of the State of Delaware.

He is a member of the American Bar Association and the American Judicature Society.

Mr. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you, Mr. Chairman, and Members of this Subcommittee, for the opportunity to appear before you today as Chair of the Judicial Conference Committee on Codes of Conduct to provide an overview of the current system for assuring ethical conduct in the judicial branch and an evaluation of how well that system is functioning. I will briefly outline the existing statutes, codes of conduct, policies, and practices that govern judicial conduct.

I. Legislative Standards

There are several statutes that establish ethical standards for officers and employees of the judicial branch. The most important of these in the normal course of judicial business are the judicial disqualification statute, 28 U.S.C. § 455 (1986), and the financial disclosure provisions of the Ethics In Government Act of 1978. 28 U.S.C. app. § 301, et seq. (1986 & Supp. IV 1987). The judicial disqualification statute details all of the potential conflict of interest situations in which a judicial officer must disqualify himself or herself. The financial disclosure statute requires that all judicial officers and all judicial employees above a specified compensation level publicly disclose on an annual basis their assets, their financial transactions, the amount and source of any outside income or gifts, as well as other data relevant to compliance with the applicable ethical standards.

II. The Codes of Conduct

In 1972, a distinguished American Bar Association committee of fourteen lawyers and judges, based on three years of study and hearings and fifty years of experience with the original ABA Canons of Judicial Ethics, promulgated a Model Code of Judicial Conduct. That Code has since been adopted in most states. In 1973, it was adopted by the Judicial Conference of the United States, with certain modifications to meet the needs of the federal judiciary, as the Code of Conduct for United States Judges. Since that time the Judicial Conference has adopted additional Codes of Conduct for circuit executives, court clerks, probation officers, staff attorneys, public defenders, and law clerks. These Codes of Conduct provide comprehensive sets of ethical standards for all judicial officers and most employees of the judicial branch. These standards have been formulated with specific reference to the judicial function and to the responsibilities of the particular officers and employees involved.

III. Elements of the Judicial Branch with Responsibilities in the Area of Judicial Ethics

A. The Judicial Conference Committee on Codes of Conduct

This Committee provides advice to judicial officers and employees with respect to the application of the provisions of the Codes to specific situations. This advice is provided through published opinions regarding frequently confronted ethical issues and through individual responses to confidential inquiries. Periodically the advice provided in such responses is summarized and included in a published opinion. Over the years, the Committee has issued 82 published opinions and 630 written responses to individual inquiries.

The Committee also has the responsibility of making recommendations to the Judicial Conference regarding amendments to the Codes to assure that they remain current and effective regulators of judicial branch conduct.

B. The Judicial Ethics Committee

This Committee is charged by Congress with the responsibility of "conducting a review each year of financial statements filed in that year by judicial officers and employees to determine whether such statements reveal possible violations of applicable conflict of interest laws [. . .and of] recommending appropriate action." 28 U.S.C. app. §306(b) (1986). Each judicial officer's financial statement is personally reviewed by an Article III judge who serves as a member of this Committee. If the information submitted raises any compliance issues, the Committee, where appropriate, will request additional information, advise the filer of the necessary steps to correct the problem and suggest that the filer seek advice from the Committee on Codes of Conduct. If compliance is not forthcoming, the Committee will refer the matter to the appropriate Judicial Council. Finally, if necessary, the matter will be referred to the Attorney General of the United States for appropriate action.

C. The Federal Judicial Center

The Center educates new judges concerning the applicable ethical standards and the resources available to help them make sure their conduct conforms to those standards. It also provides continuing education to experienced judges in the ethics area. Every judicial officer is provided with a desk book containing the applicable statutes, the Codes of Conduct, and the published opinions of the Committee on Codes of Conduct.

D. The Courts

The ethical standards applicable to federal judicial officers are enforced by the federal courts. Any litigant who believes his or her judge has a real or potential conflict of interest, for example, is entitled to file a motion asking that the judge disqualify himself or herself. If he or she files an affidavit setting forth facts purporting to show such a conflict, the judge must accept those facts as true for the purposes of the motion. 28 U.S.C. § 144 (1986). If the judge declines to step aside, that decision is reviewable by the court of appeals and ultimately by the Supreme Court. See, e.g., Liljeberg v. Health Services Acquisition Corp., ____ U.S. ____, 108 S.Ct. 2194 (1988).

E. The Circuit Judicial Councils

Each Circuit has a judicial council, consisting of judges of the court of appeals and the district courts, that is charged by Congress with the responsibility of making "all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." 28 U.S.C. § 332(d)(1) (1986). Under the Judicial Conduct and Disability Act of 1980, this includes the responsibility of passing on complaints about a judicial officer filed under that Act. In such a proceeding, the judicial officer is subject to discipline ranging from private reprimand to reference to Congress for possible impeachment.

F. The Chief Judges of the Courts of Appeal

The Chief Judge of each court of appeals has been instructed by the Judicial Conference "to exercise close supervision over the extra-judicial teaching and lecturing commitments of the judges within [the] circuit . . . to insure that those activities are not being carried on to the detriment of the performance of official judicial duties." Conference Resolution of October 1971 (1971 Conf. Rept. 69). This monitoring function is facilitated by the data reported on the annual financial disclosure statements and by statistics that are maintained on such things as the number of case dispositions by each judge.

The Chief Judges monitor the conduct of the judicial officers and employees in their circuits with respect to other matters as well. When questionable conduct occurs, the "grapevine" is such that it will ordinarily come to the attention of the Chief Judge and in most instances a word from him or her on an informal basis is all that is required to remedy the matter.

IV. The Current State of the Judiciary in the Ethics Area

Thanks to Congress and the Judicial Conference, a comprehensive set of ethical standards is in place to regulate the conduct of officers and employees of the Judicial branch. Those officers and employees have been trained to be sensitive to the necessity of seeing that those standards are scrupulously observed. If they have any doubt about what is required of them in a particular factual context they can and do seek advice from the Codes of Conduct Committee or the Ethics Committee. Performance under these standards is monitored and a process is in place for responding to situations involving non-compliance. The Judicial Conference believes the current system is working well.

V. The President's Commission on Federal Ethics Law Reform and the Government-Wide Ethics Act of 1989

I would like to submit to the Subcommittee a statement of the Judicial Conference concerning the recommendations of the President's Commission on Federal Ethics Law Reform, most of which have been incorporated in the President's proposed Government-Wide Ethics Act of 1989. The Conference's statement contains a detailed analysis of the current law, the Ethics Commission's recommendations, and the deleterious impact on the judiciary if the recommendations were to be implemented. That analysis documents three principal points:

1. The present judicial ethical system works well; the Commission identified no specific problem and the Judicial Conference knows of none.

2. The judicial branch has a very significant investment in the current system of regulation. We have caselaw and Committee opinions interpreting the existing standards and we have a constituency of judicial officers and employees well educated in the existing ethics law. To rewrite the rules in order to impose a government-wide system of regulation would not only create uncertainty where none now exists, but would require an enormous commitment of scarce judicial resources just to reeducate those subject to regulation.

3. Regulation of ethics on a government-wide basis is fundamentally unworkable because each branch has its own distinct mission and process. The judicial branch currently has and needs ethical standards fashioned with the unique nature of the judicial process in mind.

Mr. Chairman, I appreciate this opportunity to appear before the Subcommittee. I am pleased to respond to your questions now, or at any time in the future.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

L. RALPH MECHAM
Secretary

March 29, 1989

The President
The White House
Washington, D.C. 20500

My dear Mr. President:

As Chairman of the Executive Committee of the Judicial Conference of the United States, I write to convey the views of the Conference regarding the report of your Commission on Federal Ethics Law Reform. The Conference appreciates the opportunity you have afforded us to comment on these recommendations.

With deference to the distinguished members of your Commission, the Judicial Conference must express its fundamental disagreement with the Commission's conclusion that a single statute should dictate the ethical mores of the separate branches of government. No other branch can claim to be more sensitive to the absolute obligation to serve with honor than the judiciary. We resist a single set of controls because each branch has fundamentally distinct roles which are performed in very different ways.

The neutral, impartial arbiter is the heart and soul of the judicial function. Litigants are limited in outside contact with judges, yet due process demands that their views be fully heard when they are in court. The legislative branch, on the other hand, often acts for its constituents based on contacts that are both informal and ex parte. The executive branch influences and executes the laws by drawing on private and public advice as to the nature of the popular mandate of the President. Uniform governance of the divergent ethical values inherent in these dissimilar functions is not feasible.

Our opposition to "parity" in regulations is also based upon the fact that time-tested provisions already in place in statutes and in the Code of Conduct for United States Judges assure ethical performance by judicial officers. The Commission has noted no problem with judicial ethics in its report. Revising or replacing these laws and Code that work with a unique uniform enactment is unnecessary.

If your administration is considering drafting legislation that would cover the judiciary, I hope you will afford us the opportunity to review and comment on the proposal prior to its transmission to the Congress.

The enclosed statement provides an in-depth discussion of our views. Thank you for allowing us to express them.

Respectfully,

Charles Clark

Charles Clark

Enclosure

the other two branches of government. Judges function as neutral arbitrators. Their proceedings are now subject to statutory challenge for conflict of interest and may be voided if it is present. Judges serve courts. Congress fixes the limits of each court's jurisdiction. When litigants choose a forum, the judge must adjudicate or recuse. This process occurs hundreds of times each year with different litigants and different interests every time. The other branches function in a completely different manner. Procedures to assure ethical probity for the judiciary are now and should remain distinct. No member of the other branches, who frequently appears as a litigant before courts, should be able to influence the ethical process of the judiciary. It should continue to be self-regulating to conform to long established precedent and constitutionally intended independence.

The Conference has no objection to Commission Recommendation No. 10. It is unable at this time to comment on Commission Recommendation No. 8. With respect to the Commission's recommendations regarding financial disclosure, the Conference has reservations about Recommendation No. 18, and objects to Recommendation No. 17 and to that portion of Recommendation No. 16 that would require Article III judges to report home mortgages and loans from specified relatives.

Dated: March 29, 1989

Mr. KASTENMEIER. I think the committee and others will agree that the three of you constitute a remarkable resource in terms of discussion of this panoply of questions related to judicial discipline, tenure, et cetera.

I will just ask one or two questions and yield to my colleagues. I may have some further questions at the end.

I take it, to summarize—and may I say that the statements also of Judge Godbold as well as Judge Stapleton, as was the case with Judge Coffin, will be received in their entirety and made part of the record, and I would like to also receive for the record, offered for the record regarding judicial misconduct, a piece by Judge Harry T. Edwards, without objection.

[Letter to Hon. Robert W. Kastenmeier (April 18, 1989) and the article by Judge Edwards follows:]

Mr. KASTENMEIER. Judge Stapleton, other than the refinements in the act as discussed by Judge Godbold, is it your view that we do not, in fact, need further code of conduct or ethics statutory promulgations for the judiciary? Is that correct? As far as you are concerned, the current state of affairs is adequate.

Judge STAPLETON. Yes. I am sure that there is no human system that couldn't be improved by some minor changes here and there, and indeed the ABA is currently engaged in a comprehensive review of the ABA model code of conduct for judges, and I am sure that once that becomes available we will take a hard look at our code of conduct to see if it could possibly be improved. But in terms of changes in approach or the structure for enforcement, we do not foresee the need for change.

Mr. KASTENMEIER. The outside earnings cap of 15 percent—is that what the President's Commission suggests?

Judge STAPLETON. Yes.

Mr. KASTENMEIER. You wouldn't say it is unreasonable, but you would say it is unnecessary for the judiciary. The judiciary has separate problems and should be considered quite separately from the executive and legislative branches?

Judge STAPLETON. I do believe that it is unnecessary. I also believe it would be unfortunate.

There is a relationship between the judiciary and academia that I think is somewhat unique, and judges in our country since the outset have provided intellectual leadership and educational leadership to the bar as a whole, to the profession. We believe that judges teaching and writing scholarly treatises not only make a fantastic contribution to education and the profession but they enrich their ability to be judges when they are doing that.

Now the cap, as I said—I don't have the figures, but my guess is it would affect maybe 15 judges. But the judges who can command that kind of outside income for their scholarly work obviously have a lot to offer. They are very talented men. Most of them were in academia before they came to the bench and probably would not have come to the bench if they thought they could not continue to teach and write. In terms of judicial performance, they are simply not a problem group, or at least in my experience, 18 years on the Federal bench, I have not seen it.

Mr. KASTENMEIER. Yes. I'm not sure everyone would agree, but I can see the point that we are really talking about some of the brightest and ablest judges. Those who teach and write are usually in a very special class, although quite a few judges do do that. I think as a general rule we can appreciate that that isn't at the expense of their judicial work. But there is a perception. That is, of course, why we have a judicial disqualification statute. I am wondering whether it is really necessary for a judge to, say, earn $50,000 as a teacher, at the same time, perhaps, earning $95,000, and hopefully that will be increased during some time in the near future.

Let me ask you this. Would a judicial salary increase affect your view about a cap on outside earnings taken as a whole? Would you think it would be less necessary for a judge to earn a considerable amount above 15 percent over judicial salary if the judicial salary were substantially above $100,000?

Judge STAPLETON. Let me make myself clear. It is not necessary for somebody to make more than 15 percent over the salary. But the issue, as I see it, is whether it is in the interest of the judiciary as an institution to cut off what has been a pretty steady flow of judges from academia to courts of appeals and other courts who have made, really, an outstanding contribution to the judicial system, who, I am afraid, if they felt they weren't going to be able to continue substantial teaching and writing, would be discouraged from coming.

The answer to your question about if there is a judicial salary increase: It would substantially help the problem that would be created by the cap, and the primary way it would be helpful is, as Judge Coffin has said, we have got a very demoralized constituency at the moment. These 15 judges are not all that important compared to the total constituency. Even if it doesn't affect you, with the current state of affairs, they look at the efforts to impose these new restrictions as sort of adding insult to injury. The landscape would indeed be dramatically transposed if judges thought they were being appreciated and that sense of appreciation were communicated in the form of a salary increase.

Mr. KASTENMEIER. We have seen waves of this over particularly the past 20 years. There have been little waves. I know even this subcommittee had a judicial disqualification statute.

The general statute that you referred to on ethics, which statutorily created an ethics committee, also required financial disclosure, as well as the 1980 Judicial Tenure Act; all of those, many judges actually challenged those on the basis of going beyond what the Constitution would permit in terms of curtailment of the judiciary in some general sense and would argue that only impeachment was available as an outside limitation on the exercise of discretion by article 3 judges. I think that is somewhat diminished, but I think that concern is still extant among some judges in the system.

I only have one other question, and then I will yield to the gentleman from North Carolina, and that is on judicial disqualification. You indicated that many judges call the Code of Conduct Committee for advice, and I guess my question is, is the small statutory statement on the question inadequate? Are judges entitled to more specific statutory explanation so as to be able to make a judgment without checking in with other people, with other entities? Is there something wrong with the statute? I guess the question is in that connection.

Judge STAPLETON. The answer is no. It doesn't just address the subject briefly. Section 455 really spells out in some detail the applicable rules, and of those 82 published opinions that are in this book for every judge to look at on his desk, half of them involve interpretations of those statutory criteria. So I don't think we are in need of help there.

Mr. KASTENMEIER. Thank you.

I will yield to the gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman. I have a couple of comments and then perhaps a couple of questions.

It is good to have you all with us this morning, gentlemen.

Judge Coffin, you alluded earlier to what you regard as "Black Tuesday." For the record, there are many, many people in my dis-