



*Report*  
*of the*  
*National*  
*Commission*  
*on Judicial*  
*Discipline*  
*& Removal*

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*August 1993*

*exempted under Canon 2(c) of which the judge is a member.*

Research on state systems of judicial discipline reveals widespread concern that state officials are not informed on a timely basis about criminal investigations or litigation involving state judges. Although the Commission believes that some of the same concerns are warranted in the federal system, those concerns do not extend to judges involved in civil litigation. Presumably, the indictment of a federal judge would quickly come to the attention of the judge's colleagues. A judge's arrest or receipt of a target letter, however, might not so quickly become known. In the Commission's view, the appropriate authorities within the judicial branch should be informed, on a confidential basis, when a federal judge is seriously implicated in the criminal process.

*The Commission recommends that the Judicial Conference adopt a mandatory self-reporting rule that requires federal judges to inform designated authorities (e.g., the circuit chief judge), on a confidential basis, whenever they have been indicted, arrested, or informed that they are the target of a federal or state criminal investigation. Such a rule should not apply to minor offenses.*

### THE SUPREME COURT

The Justices of the Supreme Court are protected by the same constitutional guarantees of judicial independence as are all other federal judges, and they too are subject to impeachment and removal from office under Article II. The Court itself, however, enjoys special constitutional status, a consideration that has rendered the extension of additional checks on abuses of judicial independence to the Justices a delicate and difficult business.

Fortunately, in a group of public servants distinguished for integrity, the Justices have set a particularly high standard. It is also true, however, that the controversy surrounding Justice Fortas's financial dealings played a part in changing societal expectations and in the development of supplements to the impeachment process. Many of those supplements do not by their own terms apply to members of the Court, which reflects the unique position of the institution and the difficult legal

and practical issues that the techniques of judicial self-regulation adopted would raise if applied to the Court. Congress has been sensitive to the problem of subjecting Supreme Court Justices to processes controlled by members of inferior federal courts. The Judicial Conference has been understandably reluctant to assert authority over members of the Court.

Fortunately, as well, the Court itself has been sensitive to the importance of appearances in these matters and through voluntary action has filled most of the gaps. Although the Code of Conduct for United States Judges, which was adopted by the Judicial Conference, is not formally binding on members of the Court, the Commission has been informed that the Court and the Justices use it for guidance on applicable ethical standards, that as a matter of practice, Supreme Court Justices consult the Court's Legal Counsel, as well as the General Counsel of the Administrative Office, for advice and guidance on ethical matters, and that both of these individuals typically look to the Code of Conduct, among other sources, in providing that advice and guidance.

Similarly, the Commission has learned that in January 1991 the Court in Conference passed a resolution stating that Justices, Retired Justices, and Officers of the Court would comply with the substance of Judicial Conference regulations concerning outside earned income, honoraria, and outside employment. This followed the March 1990 action of the Judicial Conference delegating to the Chief Justice its authority under the Ethics Reform Act of 1989 to adopt regulations for the Supreme Court. An internal procedure has been established whereby the Chief Justice exercises supervisory authority over the Court's adherence to these ethical standards.

The Commission considered whether, even though Congress chose not to subject Supreme Court Justices to the 1980 Act, the Court itself should consider the development and dissemination of policies and procedures regarding complaints of misconduct or disability against the Justices. Under current practice a complaint is referred to the Justice to whom it relates.

The Commission assumes that any publicly made (non-frivolous) allegation of serious misconduct or disability against a Supreme Court Justice would receive intense scrutiny in the press and would come to the attention of the House Judiciary Committee. On the other hand, the importance and visibility of the Court's judicial work prompt numerous letters that might be construed as complaints, although they are directly

related to the merits of the Court's decisions. The Commission also realizes that because of the personal relationships required among the nine Justices, it may not be easy to design a workable internal disciplinary mechanism.

Commission members did not reach a consensus on whether a formal process for the Supreme Court would be desirable. One concern is that a formal process seems likely to attract a flood of improper complaints going to the merits of the important national issues in litigation before that Court. Nonetheless, it may be in the Court's best interest, as contributing to the public's perception of accountability, to devise and adopt some type of formal procedure for the receipt and disposition of conduct and disability complaints.

*The Commission recommends that the Supreme Court may wish to consider the adoption of policies and procedures for the filing and disposition of complaints alleging misconduct against Justices of the Supreme Court.*

#### GENERAL OBSERVATIONS

The system of formal and informal approaches to problems of misconduct and disability within the federal judicial branch is working reasonably well. It is by no means a perfect system, and the Commission identified numerous areas where it believes improvements could and should be made. It is, however, a system that both in design and execution strives to accommodate core constitutional values -- judicial independence and judicial accountability -- that are in tension. Any alternative system proposed for the federal judiciary should be evaluated according to its potential to strike that balance. The Commission is not aware of any that would do it as well.

The 1980 Act, which is the principal formal mechanism within the judicial branch, has yielded substantial benefits both in those few instances where it was necessary for the judicial councils to take action and, more importantly, in the many instances where the existence of its formal process enabled chief judges to resolve complaints through corrective action and, indeed, to resolve problems before a complaint was filed. These benefits have entailed costs, to be sure, but in the Commission's view those costs have been acceptable.