Report

of the National Commission on Judicial Discipline & Removal

August 1993

Exhibit "C"

actions that it authorizes. The 1980 Act assumes that investigations and disciplinary sanctions are to come entirely from within the judicial branch. The executive branch, however, could play a useful role in the implementation of the 1980 Act, and in informal processes as well.

First, because the Department of Justice investigates possible criminal violations by federal judges, it could be a source of referrals to the judicial councils in cases of misconduct or disability that do not rise to the level of prosecutable criminal conduct.

Second, as the most frequent litigant in the federal courts, the Department could be a significant source of information concerning judicial misconduct or disability. In the past, however, the Department of Justice has not played this role.

THE ROLE OF THE DEPARTMENT OF JUSTICE

The Public Integrity Section of the Criminal Division of the Department of Justice is the unit designated to handle cases of judicial wrongdoing. In appropriate circumstances the section has worked closely with the chief judges of the district and circuit courts, whose cooperation it may seek in carrying out an investigation. In turn, a chief judge may pass along to the Public Integrity Section for investigation complaints about judicial officers. Once the Public Integrity Section has completed a criminal investigation of a federal judge, it may, if it finds that the case is not a proper one for prosecution, pass on the results of its investigation to the appropriate chief judge for consideration under the 1980 Act.[1]

According to attorneys in the Public Integrity Section, however, these types of referrals have occurred no more than once or twice a year. None of the Public Integrity Section attorneys who were interviewed on behalf of the Commission knew of any attorney in the section who had ever filed a complaint against a judge before whom that attorney had appeared. These attorneys believe that a Justice Department attorney will not risk souring relations between the Department and a federal judge by making a complaint under the 1980 Act. A 1990 amendment to the 1980 Act permits a chief judge to enter an order identifying a complaint on the basis of information available, thereby dispensing with the filing of a written complaint. The government attorneys did not think this amendment would make Justice Department attorneys more willing to speak out about misconduct by federal judges. The attorneys expressed

doubt that the source of any Department complaint about a judge could long remain anonymous from a judge.

Justice Department attorneys were also skeptical whether the 1980 Act would effectively address their concerns about certain types of judicial conduct. Although various attorneys characterized the problem in different ways, in general they pointed to what they see as the arrogant and arbitrary exercise of authority by judges who had been in office for a long time and felt unaccountable for their actions. Complaints ranged from sexism and racism in the treatment of attorneys to arbitrary and unreasonable decisions on both procedural and substantive issues. Although the former are certainly cognizable under the 1980 Act, the latter are not.

In order to develop a more comprehensive picture of these matters, the Commission sent questionnaires to all litigating divisions within the Department of Justice as well as to the offices of every U.S. Attorney. These questionnaires requested information about the policies of these offices concerning complaints under the 1980 Act. The questionnaires asked whether any attorney in each office had made a complaint under the Act and whether the office had any suggestions for improving the procedures for judicial discipline under the 1980 Act. The Department sent to the Commission a single response for all of the litigating divisions in the Department. In addition, the Commission received responses from eighty-five of the ninety-three U.S. Attorneys.

In general, the responses indicate that the Department of Justice has paid little attention to the 1980 Act. Neither the Department nor any U.S. Attorney's office has a formal policy concerning complaints under the 1980 Act. A number of offices stated that no formal policy was necessary because the 1980 Act was never used. The Department does have a policy that "sensitive" matters routinely be referred to higher authority. A few U.S. Attorneys' offices indicated that complaints of judicial misconduct and disability, like other matters of significance to the office, would be reviewed personally by the U.S. Attorney.

The Justice Department has filed eight complaints under the 1980 Act. Two U.S. Attorneys' offices indicated that complaints had been made concerning the disability of district court judges, but they were unaware whether any formal action had been taken. Two complaints were reported concerning misconduct by district court judges, but the reports did not indicate whether the chief judge or the judicial council

had taken any action. In addition, two offices reported complaints made against magistrate judges, one of whom ultimately resigned as a result of the investigation. Here again, for all practical purposes, the Department has not played a significant role in calling attention to instances of misconduct or disability cognizable under the 1980 Act.[2]

In view of the major litigation role of the Department of Justice, there is no reason why its attorneys practicing before the federal courts should be less able than other attorneys to identify improper conduct by those judges before whom they appear. A few procedural changes might help. First, the Department could adopt an explicit policy concerning complaints under the 1980 Act and how they are to be made. Such a policy would alert the Department's lawyers to the disciplinary mechanisms contained in the 1980 Act and legitimate their use within the Department. This written policy would provide a formal structure through which complaints could be channeled in each office or division.

> ***The Commission recommends that the Justice Department promulgate guidelines and procedures for its attorneys regarding the circumstances under and the manner in which the mechanisms of the 1980 Act are to be utilized.***

Although an explicit formal policy would encourage use of the 1980 Act in appropriate cases, it would not eliminate litigators' understandable reluctance to risk alienating a judge before whom they regularly appear. This problem, not unique to government lawyers, is shared by the trial bar generally. Recommendations made elsewhere in this Report are aimed at enabling attorneys to come forward with meritorious complaints with less concern about possible retaliation.

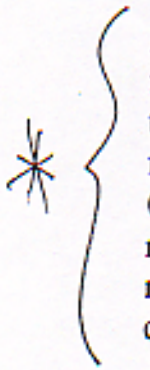
CRIMINAL PROSECUTION OF JUDGES

In the two hundred years of judicial history prior to 1980, no sitting federal judge was ever prosecuted and convicted of a crime committeed while in office. Judges who were accused of serious wrongdoing resigned rather than face an impeachment, and the resignation of an accused federal judge forestalled not only the impeachment proceeding but any criminal investigation and prosecution as well. Even among those judges who were impeached, or who after

group and a widely shared perception that some meritorious complaints are never filed.

The Twentieth Century Fund Task Force was correct in recommending various steps designed to increase public awareness of the Act, including the posting of explanatory notices, discussion of the Act at circuit conferences, and explanation of the Act's procedures in internal operating manuals and in the local rules of the district courts and courts of appeals. Public education about the Act is a responsibility that should be shared by the bar and the federal judiciary, and continuing education about judicial discipline and ethics within the judicial branch would serve the interests of both judges and the public.

> ***The Commission recommends that the bar and the federal judiciary increase awareness of and education about the 1980 Act among lawyers, judges, court personnel, and members of the public. As one part of such efforts, each circuit council that has not already done so should publish its rules under the Act in United States Code Annotated, and a reference to the 1980 Act and the circuit council's rules should be included in the local rules of each district court.***



The Act is obviously not serving its purpose to the extent that knowledgeable individuals with meritorious complaints are unwilling to file them because of fear of adverse consequences to themselves or to their clients once their identities are known. Lawyers are more likely to file meritorious complaints than non-lawyers. Yet, testimony before the Commission, surveys, and interviews with attorneys reveal a widespread reluctance among members of the bar to file a complaint. This type of risk aversion is common among those who appear frequently in federal court, notably government lawyers.

Congress was urged to permit anonymous complaints during the legislative process that led to the Act, but the statute is silent on the subject. Fairness to a judge accused of misconduct (or disability) ultimately requires that he or she be permitted to confront an accuser, although there is no logical imperative that an individual witness be identified as the initiator of the process. The Illustrative Rules provide that anonymous complaints "are not handled under these rules" but that they "will be forwarded to the chief judge of the circuit for such action as the chief judge considers appropriate." Taken together with a 1990

amendment to the Act permitting a chief judge to "identify" (i.e., dispense with the formal filing of) a complaint on the basis of available information, which is now implemented by Illustrative Rule 2(j), the Commission believes this procedure has promise in addressing the bar's unfortunate but understandable reluctance to incur a judge's hostility by filing a complaint of misconduct or disability.

Concern may persist, however, that even if the chief judge identifies a complaint, the ultimate source will be identifiable, particularly if the alleged misconduct is an isolated instance. One way to diminish such concern is through the birth and nourishment of a culture in which the bar stands together with other informed citizens both in defending the judiciary against unjustified attacks and in defending lawyers against retaliation by vindictive judges.

The Commission studied one situation in which a complaint validly alleging unauthorized use of contempt powers by a magistrate judge was filed by two bar associations after the individual attorney who had been held in contempt decided he could not risk filing. The Commission concluded that an informed group of lawyers and lay persons in each circuit could be available to assist in presenting to the chief judge serious complaints against federal judges. Such groups could work with chief judges in efforts to identify problems that may be amenable to informal resolution. They could also help provide anonymity for a complainant concerned about retaliation if the chief judge identifies a complaint, and provide a deterrent against retaliation if the complainant is identified. Such groups, although of course having no decision-making authority, could be especially useful in bringing patterns of alleged misconduct to the attention of the chief judge. Finally, such groups could shoulder some of the responsibility for initiating educational activities about the Act and judicial discipline more generally that lies with the bar as well as with the judiciary.

> ***The Commission recommends that each circuit council charge a committee or committees, broadly representative of the bar but that may also include informed lay persons, with the responsibility to be available to assist in the presentation to the chief judge of serious complaints against federal judges. Such groups should also work with chief judges in efforts to identify problems that may be amenable to informal resolutions and should initiate programs to educate***

lawyers and the public about judicial discipline. The Commission also encourages other institutions, including the organized bar, to take an active interest in the smooth functioning and wise administration of formal and informal mechanisms that address problems of judicial misconduct and disability.

Whether or not an individual is reluctant to file a complaint, a chief judge should not insist that the individual do so when information is available on the basis of which a complaint should be identified and it appears that the matter is capable of being resolved through investigation.

Powers of Chief Judges in Complaint Disposition.

Limited Factual Inquiry. Advised that some doubt exists about the power of a chief judge to conduct a limited inquiry into the factual support for a complainant's allegations prior to taking action on a complaint, the Commission decided that such power is necessarily contemplated by the Act's provision authorizing a chief judge to conclude a proceeding. For that and other reasons, the Commission agrees with the Illustrative Rules' treatment of this issue. Illustrative Rule 4(b) authorizes a chief judge to "conduct a limited inquiry for the purpose of determining (1) whether appropriate corrective action has been or can be taken without the necessity for a formal investigation, (2) whether intervening events have made action on the complaint unnecessary, and (3) whether the facts stated in the complaint are either plainly untrue or are incapable of being established through investigation." It also provides that a chief judge "will not undertake to make findings of fact about any matter that is reasonably in dispute." This represents a sensible accommodation of the policies and interests that are implicated. The existence of such power is, moreover, a necessary predicate for the recommendation earlier in this chapter of the Report that the Act be amended to add as a ground for dismissal by a chief judge "that the allegations in a complaint have been shown to be plainly untrue or incapable of being established through investigation."

The Commission endorses Illustrative Rule 4(b) and recommends that the 1980 Act be amended to provide that a chief judge may conduct a limited inquiry into the factual support for a complainant's allegations but may not make findings of fact about any matter that is reasonably in dispute.