# American Bar Association
# Commission on Separation of Powers and Judicial Independence

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Ex "E"

maybe think I shouldn't be questioning them applaud when I find waste in the Pentagon,"[119] and distributed the questionnaires as scheduled.[120]

Opinions of the witnesses were divided as to whether the Grassley questionnaire exemplified micromanagement. A representative of the Judicial Conference observed that "certain questions . . . were seeking such detail from the judges . . . that it would appear to be intruding into the [judicial] function and to that extent could be micromanagement."[121] Another witness acknowledged that "some judges would say that there were aspects of the Grassley questionnaire that point to [micromanagement]," but added that the Director of the Administrative Office of the United States Courts "in the end said that the questionnaire was constructive."[122] In contrast, another witness dismissed the micromanagement concern altogether: "If Congress wants to conduct a survey on judicial workload, that is its right, because Congress must make the ultimate budgetary and resource decisions concerning how large a judiciary the nation can afford."[123]

In a recent op. ed. column, Judge William W Schwarzer summarized several other recent developments concerning Congress' role in overseeing the judiciary's allocation of resources.[124] First, he quoted from a congressional committee report directing the Judicial Conference "to initiate an in-depth review of ways to make the courts more efficient and less costly," which was to be "performed by an independent, nonpartisan, professional organization outside the judiciary, but with the complete cooperation and support of the judiciary."[125] Second, Judge Schwarzer noted that "the Senate has passed an amendment that would prohibit the circuits from holding their judicial conferences outside their geographical boundaries, make the conferences optional, and limit the amount of funds each circuit can spend on its conference to $100,000."[126] Third, he referred to one Senator's proposal that an inspector general be assigned to the Administrative Office.[127] Finally, he pointed to hearings conducted by another Senator to determine whether there are judgeships that could be eliminated.[128]

Judge Schwarzer wrote that these developments "should energize the judiciary to examine its governance structure" to better enable it to "preserve and [protect] the essential elements of judicial independence, against both congressional intrusion and unwise measures of governance,"[129] a point that he reiterated before the Commission.[130]

### b. Judicial Discipline

In 1980, Congress passed the Judicial Conduct and Disability Act, thereby impos-

[119]Neil Lewis, *supra* note 117. It should be noted that Senator Grassley's remarks predated Chief Justice Rehnquist's Year-End Report, and were offered in response to other federal judges who raised similar concerns.

[120]Judicial Survey, January, 1996.

[121]February 21, 1997 Hearing at 156, 170 (testimony of Joseph Rodriguez).

[122]December 13, 1996 Hearing at 121, 139 (testimony of Robert Katzmann).

[123]Prepared statement of Professor John Choon Yoo, February 21, 1997 at 7.

[124]William W Schwarzer, *Court Administration*, THE RECORDER, December 22, 1995, at 6.

[125]*Id.*

[126]*Id.*

[127]*Id.*

[128]*Id.*

[129]*Id.*

[130]February 21, 1997 Hearing at 5, (testimony of William Schwarzer) ("I want to suggest to you that the criticism and questioning that we hear ought not to be so readily written off. Instead, I believe we might well view it not as an occasion for circling the wagons but as a challenge that deserves to be taken seriously and calls for a thoughtful response grounded [in] searching self-examination of the institution.").

ing a system of self-discipline on the federal courts.[131] The Act, as passed, embodied several elements to protect judicial independence: a disciplinary action cannot be brought against a judge because of disagreement with the merits of his or her decision; removal from office is excluded as an available sanction, and administration of the procedure is left within the judicial branch, authority for which is grounded in the administrative power of each judicial council to make all necessary orders for the effective administration of justice within the circuit. Nonetheless, at the time, many judges viewed the effort as an unwarranted and possibly unconstitutional encroachment upon the institutional independence of the judiciary.[132]

The 1980 Act permits any person to file a complaint alleging that a federal judge (including bankruptcy and magistrate judges, but not Supreme Court justices who are exempt from coverage) "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or...is unable to discharge all the duties of office by reason of mental or physical disability." Since 1990, the Act has also let a chief judge of a circuit dispense with a formal complaint and "identify a complaint on the basis of available information."

After considering a complaint, the chief judge may, by written order stating the reasons, dismiss the complaint if it is frivolous, "directly related to the merits of a decision or procedural ruling," not in conformity with the filing requirements of the Act, or corrective action has already been taken.

If a chief judge does not dismiss a complaint, he or she must appoint a special committee to investigate the complaint and file a written report which contains both the findings and recommendations with the circuit judicial council. The judicial council may conduct an investigation of its own and is required to "take such action as is appropriate to assure the effective and expeditious administration of the business of the courts." The Act specifies some of the actions a council may take, prohibiting, however, the removal of a judge from office. Actions include certifying disability of a judge, requesting that the judge retire, ordering that no more cases be assigned to that judge for a temporary time, and censuring or reprimanding such judge privately or publicly. The judicial council may also dismiss a complaint or refer it to the Judicial Conference for resolution. If the council concludes that the aggrieved behavior of a judge may constitute one or more grounds for impeachment, the case is automatically referred to the Judicial Conference for final action.

The Act permits a complainant or judge aggrieved by the order to petition the judicial council for review and also permits a petition for review to the Judicial Conference.

In the interest of public accountability, all council orders implementing action following the report of a special committee are to be made public and generally accompanied by written reasons. Implementation rules regarding confidentiality require that the name of the judge not be disclosed without his or her consent. The Administrative Office of the U.S. Courts is required to gather yearly statistics regarding the number of complaints filed, their general nature and their disposition.

In 1990, Congress created the National Commission on Judicial Discipline and Removal to investigate and study problems

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[131] Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. §372(c).

[132] *See, e.g.* Irving Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671 (1980). A congressionally imposed system of judicial discipline could conceivably affect decisional independence as well, to the extent that judges were subjected to discipline for the decisions they made in particular cases. The discipline statute is quite clear, however, that complaints concerning judicial conduct are to be dismissed if they are "directly related to the merits of a decision or procedural ruling." 28 U.S.C. §372(c)(3)(A)(ii).

and issues related to the discipline and removal from office of life-tenured federal judges and to evaluate current and proposed mechanisms for disciplining and removing federal judges. As part of its mission, the Commission, which was chaired by Robert W. Kastenmeier, who likewise serves on our Commission, undertook a rigorous study of the Act. In August 1993, the National Commission submitted its final report with recommendations to Congress, the Chief Justice and the President.[133]

In its final report, the National Commission stated that "the primary objection" to the 1980 Act "was that the discipline mechanisms. . . were inconsistent with the principle that federal judges are independent individually as well as collectively."[134] The National Commission rejected this argument:

> [T]he Act is within Congress' authority to make laws that will carry into execution the powers of the other two branches. The fact that individual judges enjoy life tenure and protected compensation does not, in the Commission's view, imply that they must be free from all internal sanctions, provided those sanctions do not threaten tenure and compensation. The Commission believes that a power in the judiciary to deal with certain kinds of misconduct furthers both the smooth functioning of the judicial branch and the broad goal of judicial independence.[135]

Since its enactment, Congress has amended the discipline statute twice. A House Judiciary subcommittee recently held hearings on court reform legislation which among other things, would amend the discipline statute to require that a complaint against a judge in one circuit be referred to the chief judge of a different circuit for investigation and resolution."[136]

### 3. Congressional Control Over Court Practice and Procedure

In recent years, Congress has taken an increasing interest in court practice and procedure. On several occasions, congressional forays into such matters have led to debates over the impact of congressional intercession on judicial independence.

#### a. Procedural Rulemaking

From 1934, when the Rules Enabling Act was passed, to 1973, the Supreme Court promulgated procedural rules with literally no congressional intervention. Since then, Congress has become involved in procedural rulemaking on an increasingly regular basis, prompting the charge that Congress is interfering with the judiciary's independence.[137]

#### b. The Civil Justice Reform Act of 1990

The Civil Justice Reform Act, as originally introduced in the Senate, would have required all district court judges to implement a model, multi-component case management plan in all civil actions. The Judicial Conference opposed the Act, on the grounds that it would micromanage the courts and threaten the judiciary's institutional independence.[138] As ultimately enacted, the district courts were directed to develop their own case management plans but were not

[133] REPORT OF THE NATIONAL COMMISSION ON JUDICIAL INDEPENDENCE AND REMOVAL (1993).
[134] *Id.* at 14.
[135] *Id.*
[136] H.R. 1252, 104th Cong., 1st Sess. § 4 ( 1997).
[137] Linda Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER LAW REVIEW 733 (1995).
[138] *The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings Before the Comm. on the Judiciary of the United States Senate*, 101st Cong., 2d Sess. 221 (statement of Judge Aubrey Robinson).

realized, moreover, that the health and well-being of the judiciary depended on furnishing judges with adequate compensation, and that inflation could render a once satisfactory compensation inadequate. Accordingly, they amended an early proposal foreclosing upward as well as downward adjustments of judicial pay, to permit the former. They did so, however, over the objection of James Madison, who was concerned that making judges beholden to Congress for periodic salary increases could create an undesirable dependence.

History has vindicated both sides in this debate. Without periodic, upward adjustments in judicial salaries to account for increases in the cost of living, it is difficult to imagine how the nation could have retained its ablest judges during periods of severe inflation. At the same time, the periodic spectacle of judges appearing, hat in hand, to request raises from Congress — which enacts the laws that judges are to interpret, and if necessary, invalidate — is at best unseemly, and at worst, destructive of the independence the framers sought to preserve.

The ease with which periodic cost-of-living adjustments might otherwise be approved is further hampered by the long-standing practice in Congress of tying proposals to increase judicial pay to more controversial proposals to increase congressional pay. The Commission is aware of and supports legislation introduced in Congress that would address these problems by furnishing judges with periodic and automatic cost-of-living adjustments.

**Recommendation: The Commission recommends that Congress de-link proposals to increase congressional pay from proposals to increase judicial pay, and make judicial salaries subject to periodic and automatic cost-of-living adjustments.**

### e. Judicial Discipline

In 1980, Congress passed the Judicial Conduct and Disability Act, 28 U.S.C.§ 372(c), to provide a formal supplement to the impeachment process for resolving complaints of misconduct or disability against federal judges. The 1980 Act was the culmination of years of discussion and compromise over the scope, design, and constitutionality of establishing a statutory disciplinary mechanism for the federal judiciary. Despite preliminary uneasiness among some judges that the Act threatened the judiciary's institutional independence, it is now generally agreed that the Act does no such thing.

The American Bar Association, which had established a special task force to monitor and evaluate the work of the National Commission on Judicial Discipline and Removal,[191] concurred with the Commission's overall views regarding the efficacy of the Act, and adopted policy reaffirming its support for the Act, while recommending some procedural modifications.[192]

Recognizing both the salutary effects of the Act in resolving meritorious complaints and providing a vehicle for informal resolution of a number of performance problems within the judiciary, and the general lack of knowledge among practitioners about the Act, the ABA also adopted policy urging that more vigorous efforts be made within the ABA and by state and local bars to increase awareness and understanding of the Act.[193] Unfortunately, these efforts have not been forthcoming.

[191] *See supra* notes, 133-135 and accompanying text.

[192] AMERICAN BAR ASSOCIATION, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES 5 ( Midyear Meeting,1993).

[193] AMERICAN BAR ASSOCIATION, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES 9 (Midyear Meeting, 1994).

The Judicial Conduct and Disability Act provides a powerful mechanism for holding judges accountable for misconduct, particularly that which does not rise to the level of an impeachable offense. We believe that if more people knew about the Act and how to invoke it in appropriate circumstances, allegations that federal judges are not held accountable for their actions except in the most egregious situations would diminish.

**Recommendation:**
**The American Bar Association, in conjunction with state and local bars, should take appropriate steps to inform the bar and the public of the procedures for handling complaints against and disciplining federal judicial officers under the Judicial Conduct and Disability Act of 1980.**

During recent congressional hearings on legislation which would amend the Act by requiring that a complaint against a judge be handled by the chief judge of a different circuit, some House Judiciary subcommittee members acknowledged that they were not aware of the Report of the National Commission on Judicial Discipline and Removal or its recommendations regarding the 1980 Act[194]. This is cause for concern, especially since many of the issues addressed by current legislative proposals involving the federal judiciary were examined in depth by the National Commission. For example, the National Commission concluded, among other things, that changes to the constitutional provisions for impeachment and removal were neither necessary nor desirable. After a careful, empirical study, it also concluded that the system of formal and informal discipline under the 1980 Judicial Conduct and Disability Act was working reasonably well and that perhaps one of the most important benefits of the Act was the impetus it has given to informal resolutions of problems of judicial misconduct and disability — a benefit that might be compromised if the proposed legislative amendment to the Act is enacted.

To our knowledge, Congress has not given serious attention to the National Commission's Report, including the recommendations addressed to the legislative branch. In that respect, this careful work, funded by the taxpayers, has been largely ignored, even though it bears directly on issues of current debate and controversy.

**Recommendation:**
**Congress should hold hearings on and consider appropriate responses to the 1993 Report of the National Commission on Judicial Discipline and Removal. That process should be completed before Congress considers any proposals for additional legislation or constitutional amendments in the area of judicial discipline and removal.**

### 3. Issues Affecting Public Confidence in the Judiciary

Public confidence in the judiciary — at both the federal and state level — is perceived by many to be in a dangerous state of decline. The Corporate Counsel for the District of Columbia, for example, recently told a task force of the D.C. Circuit that "[c]onfidence in our judicial system has probably never been shakier."[195]

*The Judicial Conduct and Disability Act provides a powerful mechanism for holding judges accountable.*

[194]The hearing in question was held on May 14, 1997 before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, U.S. House of Representatives, and concerned H.R. 1252, 105th Cong., 1st Sess.. A transcript of the hearing has not yet been published.

[195]*Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race and Ethnic Bias*, 64 GEO. WASH. L. REV. 189, 252 (1996).