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JUDICIAL ETHICS — THE FEDERAL JUDICIARY SEEKS MODERN STANDARDS OF CONDUCT

*Robert A. Ainsworth, Jr.**

The May 1969 disclosure that Mr. Justice Fortas accepted payment (later returned) as compensation for services to be undertaken for a family foundation triggered an entire series of events concerned with the establishment of modern standards of conduct for the federal judiciary. An editorial in the *American Bar Association Journal* speculated that "it was the possible impropriety that appeared in the conduct of Justice Fortas, rather than any wrongdoing itself, that shook confidence in him and reflected upon the Supreme Court itself."[1]

Shortly afterward, Senator Joseph D. Tydings, chairman of the Senate Subcommittee on Improvements in Judicial Machinery, stated in an address to the Senate that "although on the whole the general caliber of the Federal judiciary has been extremely high, 'the problem of the unfit judge is a serious challenge to our judicial system.' "[2] He continued:

> Today, the Federal judiciary is facing a crisis of confidence, a crisis that threatens to gravely impair its strength and its effectiveness.
>
> To a large extent, the present crisis of confidence stems not only from the absence of effective machinery to investigate accusations of judicial unfitness but also from the judiciary's failure to keep its house in order. Aside from the totally inadequate impeachment process, no machinery now exists for a fair and expeditious evaluation of charges of judicial misconduct. . . . An exaggerated view of judicial independence and the customary inertia of the judiciary has [*sic*] deterred the judiciary from meaningful attempts to codify standards of judicial conduct or to require the disclosure of extra-judicial activity and compensation.[3]

In an earlier speech, Senator Tydings had noted that "[t]he record of the Federal judiciary has been an example of devotion and integrity in all but a relatively few instances."[4] Indeed, since the founding of this nation only eight judges have been impeached,[5] and only four of these were convicted: one for drunkenness, one for supporting secession, and two on charges involving corrupt politics.[6] Of the four judges impeached in this century, only two were convicted.[7] Despite this almost impeccable record, a rather critical view of the

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1 55 A.B.A.J. 648 (1969). Canon 4 of the ABA Canons of Judicial Ethics is directly applicable. It provides:

> A judge's official conduct should be free from impropriety and the appearance of impropriety . . . and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his every day life, should be beyond reproach.

ABA CANONS OF JUDICIAL ETHICS No. 4.

2 115 CONG. REC. S6044 (daily ed. June 5, 1969) (remarks of Senator Tydings).

3 *Id.*

4 114 CONG. REC. S1865 (daily ed. Feb. 28, 1968) (remarks of Senator Tydings).

5 *Id.*; 12 ENCYCL. BRITANNICA, *Impeachment* 118 (1959).

6 12 ENCYCL. BRITANNICA, *Impeachment* 118 (1959).

7 *Id.*

judiciary is reflected in a recent *Washington Post* article entitled "Public Is Starting to Judge the Judges."[8]

The receipt of compensation by judges for extrajudicial services has recently generated special public attention. A Harris poll taken after the Fortas incident revealed that "the American people believe that 'it would be wrong for justices to receive outside money in addition to their salaries,' by a margin of 55 to 34 percent."[9] Critics of the judiciary specifically disapprove of what they term the "moonlighting" activities of judges. This public outcry is probably responsible for the recent introduction of numerous bills in Congress proposing to regulate and require disclosure of compensation for such activities.[10]

The stage was thus set in June of 1969 for the Judicial Conference of the United States to take appropriate action to establish rules and guidelines for federal judges in connection with the performance of extrajudicial services for compensation. On June tenth the Judicial Conference held a special session and, upon the recommendation of its Committee on Court Administration, adopted a resolution prohibiting the acceptance of compensation, whether in the form of loans, gifts, gratuities, honoraria, or otherwise, for extrajudicial services.[11] The resolution provided, however, that a judge might accept extrajudicial compensation if, upon application to the judicial council of his circuit,[12] it was determined that the services would not interfere with the judge's judicial duties and would either be in the public interest or justified by exceptional circumstances.[13] If the judicial council of the circuit approved the application, the resolution required public disclosure of the services rendered and compensation received.[14]

A second resolution adopted on June tenth required each judge to file with the Judicial Conference an annual statement "of his investments and other assets held by him at any time during the year as well as a statement of income, includ-

8 MacKenzie, *Public Is Starting to Judge the Judges,* The Washington Post, Oct. 26, 1969, at B1, col. 1.

9 Harris, *Most Feel It's Wrong for Judges to Accept Any "Outside Money,"* The Philadelphia Inquirer, July 31, 1969, col. 1.

10 *E.g.,* S. 1506, 91st Cong., 1st Sess. (1969); S. 2109, 91st Cong., 1st Sess. (1969); H.R. 11369, 91st Cong., 1st Sess. (1969); H.R. 11370, 91st Cong., 1st Sess. (1969).

11 The full text of the Judicial Conference resolution follows:

> A judge in regular active service shall not accept compensation of any kind, whether in the form of loans, gifts, gratuities, honoraria or otherwise, for services hereafter performed or to be performed by him except that provided by law for the performance of his judicial duties. Provided however, the judicial council of the circuit (or in the case of courts not part of a circuit, the judges of the court in active service) may upon application of a judge approve the acceptance of compensation for the performance of services other than his judicial duties upon a determination that the services are in the public interest or are justified by exceptional circumstances and that the services will not interfere with his judicial duties. Both the services to be performed and the compensation to be paid shall be made a matter of public record and reported to the Judicial Conference of the United States.

JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 42 (1969).

12 This council is composed of all the judges of the United States Court of Appeals of each circuit.

13 See note 11, *supra.*

14 *Id.*

ing gifts and bequests, from any source, identifying the source, and a statement of liabilities."[15]

The two resolutions did not preclude judges from participating in such activities as teaching, lecturing, or writing for compensation if these services did not interfere with the performance of judicial duties. A number of people concerned with the law, especially in the nation's law schools, feel that federal judges must be permitted to continue their contribution toward the maintenance of high standards in legal education through teaching and writing. A recent editorial in the *Journal of the American Judicature Society* emphasized the importance of the judge's role in legal education.

> Many judges engage in law school teaching on the side, and they are better judges for it. Some law school deans have expressed apprehension that their students might be deprived of the teaching of some able judges whose very presence in the classroom dramatizes the interdependence between the making of the law and the teaching of it.[16]

The Judicial Conference resolutions regulate the conduct of federal judges only and are not applicable to justices of the Supreme Court. The legislative history of the statute creating the Judicial Conference[17] clearly indicates that the conference has no authority to regulate the activities of Supreme Court justices.[18] Nevertheless, four Supreme Court justices (Brennan, Stewart, White, and Marshall) announced through former Chief Justice Warren their agreement in principle with the standards of conduct adopted by the Judicial Conference on June tenth and their intention to act accordingly.

The action of the Judicial Conference at the June tenth session is historic in that the conference had never before attempted to adopt any comprehensive rules relative to the conduct of federal judges. In addition, the conference directed its Committee on Court Administration to begin the formulation of

15. JUDICIAL CONFERENCE REPORT, *supra* note 11, at 42. The full text of the resolution follows:

> Each judge shall file annually (commencing May 15, 1970 for the preceding calendar year) with the Judicial Conference of the United States, on forms to be approved by the Judicial Conference, a statement of his investments and other assets held by him at any time during the year as well as a statement of income, including gifts and bequests, from any source, identifying the source, and a statement of liabilities. The statements shall be kept on file with the Judicial Conference and available for such use as the Conference and the Judicial Councils of the circuits may require, as well as for public disclosure as determined by the Judicial Conference to be in the public interest, pursuant to regulations promulgated by the Conference.
>
> The Committee on Court Administration shall submit to the Judicial Conference of the United States at its September 1969 session a progress report on the preparation of forms and regulations necessary to implement this resolution. *Id* at 42-43.

16 *Judges Should Not Become Monastic,* 53 J. AM. JUD. SOC'Y 50 (1969).

17 28 U.S.C. § 331 (1964).

18 The Judicial Conference of the United States originated as the Conference of Senior Circuit Judges. Act of Sept. 14, 1922, ch. 306, § 2, 42 Stat. 837, 838. It consisted of the senior circuit judges of the then nine circuits presided over by the Chief Justice of the United States. Neither the statute creating the Conference of Senior Circuit Judges nor the subsequent amendments nor any of the annual reports beginning with the first meeting in 1922 intimated that the body would be concerned with the Supreme Court. Later, in 1957, the conference was enlarged to include district judge representatives and the chief judges of the two special courts, but at no time has the conference been directly concerned in any way with the administration of the Supreme Court. For a comprehensive study of the history of the Judicial Conference of the United States, see Chandler, *Some Major Advances in the Federal Judicial System, 1922-1947,* 31 F.R.D. 309 (1963).

comprehensive standards of conduct for federal judges.[19] Only once before had the Judicial Conference attempted such action: in 1963 it adopted a resolution that "[n]o justice or judge appointed under the authority of the United States shall serve in the capacity of an officer, director, or employee of a corporation organized for profit."[20] A separate code of conduct has never been written for federal judges, who have relied generally on the ABA Canons of Judicial Ethics.

The June tenth resolutions generated prompt reaction. An editorial in *The Washington Post* praised the resolution forbidding judges to accept payment for extrajudicial services but said it left "many questions unanswered."[21] The editorial continued: "The Conference has gone a long way in buttressing integrity in the courts. By any standard that may be applied, its action is formidable and courageous. Nevertheless, it is more of a beginning than an end."[22]

Another author expressed concern that the June tenth resolutions would cause judges to withdraw from important nonjudicial activities.

> Let's say a few more words about judges and ethics — despite today's continuing debate catalyzed by the Fortas case.
>
> There's just the point. Current efforts to cut off the bench from every conceivable conflict of interest could get so hysterical as to produce a kind of judicial sterility.
>
> The question is: Are our jurists to sit in isolated, cloistered legal splendor, or are they to keep in touch with the mainstream of the world?
>
> Never in the history of American jurisprudence have our courts been subject to more scrutiny than in the last decade. The trend has been to opt for improved methods of selection, judicial orientation courses, efficiency programs under lay court administrators, courts on the judiciary, and judicial review boards to handle citizen complaints.
>
> These programs suggest need for constant improvement of the skill, efficiency, and experience of our judges; but no question of their overall integrity has ever arisen.
>
> Reasonable disclosure of financial holdings to appropriate governmental bodies, in a form consistent with protection from unnecessary invasion of privacy, would appear to be the correct order of the day.
>
> . . . .

19 The full text of the Judicial Conference resolution relative to the direction of the Committee on Court Administration to formulate standards of judicial conduct follows:

> The Committee on Court Administration shall submit to the Judicial Conference of the United States at its September 1969 session a progress report on the formulation of standards of judicial conduct for federal judges. JUDICIAL CONFERENCE REPORT, *supra* note 11, at 43.

20 JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 62 (1963). The inclusion of the word "justice" was by pure inadvertence, having been copied out of a pending bill in the 88th Congress, H. R. 6048, introduced by Chairman Celler of the House Judiciary Committee. The conference has never attempted to speak with reference to the Supreme Court or its members.

21 The Washington Post, June 13, 1969, at A26, col. 1.

22 *Id.* A later editorial pointed out that

> [T]here is nothing whatever in the new rules to suggest that judges should withdraw from all contacts with the bar and the public.
>
> Judges no less than other men need to know what is going on in the world. Although they are expected to resist swaying with every wind that blows, they need to understand the human problems of the day and the trends of public thinking. Especially they need to look beyond the specific cases which go to them for decision to the larger problems of obtaining justice in a complex society. It would be a net loss if judges should interpret the current demand that they give up moonlighting as an indication that they should withdraw from the problems of their profession. The Washington Post, July 5, 1969, at A16, col. 1.

> However, a judge remains a citizen, no matter how sensitive his position. As such, he has certain rights and responsibilities in the community at large. In many areas, in and out of the law, he has abilities and opinions that need not lie fallow. Teaching, writing, charitable and civic leadership, speaking up on certain issues of public concern — these are often better regulated by a judge's own good judgment than by hard and fast rules. After all, our judges are selected because we can trust them to make deliberative and balanced judgments.[23]

Many federal judges disapproved of the conference's resolution requiring prior approval and public disclosure of the terms and conditions of such compensated activities as teaching, writing, and lecturing. Some complained that the resolutions were adopted without prior consultation with members of the federal judiciary and were enacted in haste and without mature consideration following the unfortunate Fortas incident. Others felt that it was demeaning for a judge to be required to obtain permission from his circuit council to engage in outside compensated activities and that the conference action was a serious interference with the basic independence of federal judges. We recognize that the law derives considerable benefit from the services of judges in teaching and writing, but a judge's highest priority is to his judgeship, which is a full-time job with full-time responsibilities. Thus a judge must recognize that the increasing demands being made on the courts by litigants and lawyers make it imperative that his outside activities not interfere with the performance of his judicial duties.

The next significant development in the area of judicial ethics occurred in August at the annual meeting of the American Bar Association — the ABA decided to revise its 45-year-old Canons of Judicial Ethics. Bernard G. Segal, President of the ABA, appointed Chief Justice Roger J. Traynor of the California Supreme Court to head a distinguished nine-member committee[24] of judges and lawyers to draft a new code. Hearings on the new code will be conducted at the ABA's annual meeting in August, 1970, and the revised canons will be submitted to the House of Delegates in February 1971.

The ABA Canons of Judicial Ethics have badly needed updating, and the members of the judiciary will welcome their revision. The Committee on Court Administration will continue its assignment of drafting standards of conduct for federal judges but will undoubtedly await the ABA draft before completing the job of writing a code. The federal judiciary is well represented in drafting the proposed ABA code of conduct, with three members on the panel.[25]

Immediately before the Judicial Conference was to meet in Washington last fall, chairman Traynor sent a letter to Chief Justice Warren Burger in which he said that his committee had undertaken

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23 TRIAL, June, 1969, at 8.

24 Other members of the committee appointed by Mr. Segal are Associate Justice Potter Stewart, United States Supreme Court; Judge Irving R. Kaufman, United States Court of Appeals for the Second Circuit; Chief Judge Edward T. Gignoux, United States District Court for the District of Maine; Judge Ivan Lee Holt, Circuit Court of the City of St. Louis; Whitney North Seymour of New York; William L. Marbury of Baltimore; E. Dixie Beggs of Pensacola; and Professor Robert A. Leflar.

25 See note 24, *supra.*

> to determine the professional and ethical standards of judges today, the nature of the ethical problems involved in the administration of justice, and suggested solutions, as uniform as feasible, for such problems. These studies will deal with the problems on both the state and the federal levels. . . .
>
> There will be obvious advantages if the rules finally developed for federal judges can take into account the work of our committee. It will be fortunate if both the federal and state judiciaries can eventually abide by the same set of basic canons, and if the federal judiciary can avoid the possible clash of Circuit Councils in interpreting what is considered appropriate nonjudicial services.[26]

Judge Traynor, therefore, suggested that the Judicial Conference suspend "any further action on all the resolutions adopted in June . . . so that the Conference . . . may have the benefit of the research and work of this committee."[27]

When the Judicial Conference met on November first, it modified the June tenth resolutions by suspending the requirements of prior judicial council approval and public disclosure.[28] It adopted, however, a resolution requiring federal judges to report to the Judicial Conference any extrajudicial compensation exceeding one hundred dollars in any quarterly period.[29] The resolution further provided that the Chief Justice designate a panel of three federal judges to scrutinize these reports, to be kept confidential except to the extent that the panel

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26 Letter from Roger J. Traynor to Chief Justice Warren E. Burger, Oct. 27, 1969.

27 *Id.*

28 JUDICIAL CONFERENCE REPORT, *supra* note 11, at 51-52. The November first resolution follows.

> *Resolution No. 1*
>
> *Whereas,* judges have, since June 10, 1969, been reporting their non-judicial activities to the judicial councils of the respective circuits in accordance with a resolution adopted by the Judicial Conference of the United States, and it now appears that since the Judicial Conference provided no guidelines or standards, the various judicial councils of the circuits acting without standards or guidelines have not acted uniformly, and
>
> *Whereas,* The American Bar Association is now conducting a study on the subject of judicial conduct, including the non-judicial activities of judges, and the ABA advises that this study will be substantially completed by the Summer of 1970 and that this study will permit a more thorough understanding of the subject matter, it is hereby resolved:
>
> That for the calendar year 1969 and the calendar year 1970, Resolution 1 of June 10, 1969, with respect to compensation for non-judicial services by judges be suspended, and instead,
>
> (a) That the Chief Justice be authorized to appoint a receiving officer to receive reports;
>
> (b) That any judge who in any quarterly period receives compensation for non-judicial services, in a total amount exceeding $100, shall report the same forthwith to the receiving officer, on forms to be furnished, with the details thereof;
>
> (c) That these reports be forwarded by the receiving officer to the members of a panel of three United States judges designated by the Chief Justice, but be at all times kept confidential by them except to the extent that the panel concludes that they should be brought to the attention of the Judicial Conference in executive session for consideration of any aspect as to which the panel feels there may be a question of conflict with standards of Judicial conduct, or except to any other extent that the Conference shall order;
>
> (d) Finally, that the Conference cooperate and collaborate with the American Bar Association Committee on the Code of Judicial Conduct and that the Chief Justice be authorized, in his discretion, to designate one or more representatives of the Conference to present the views of the federal judiciary to that Committee, if requested.

29 *Id.* at 51.

concluded that they should be brought to the attention of the Judicial Conference.[30]

The November first resolution drew immediate reaction. Senator Tydings stated that the resolution was "a retreat from the monumental efforts made last June, a retreat that the nation can ill afford."[31] *The Washington Post* declared that "any retreat is a disservice at a time when judicial conduct is under widespread scrutiny."[32] *The Wall Street Journal*, on the other hand, found the Judicial Conference's action to be "a calm and reasonable approach."[33] *The Newark News* considered the action "a step backward,"[34] while *The St. Petersburg Times* felt that the Judicial Conference had chosen a poor time "to scrap a major move toward self-regulation that it adopted only last June."[35] *The Washington Star* commented that the action of the Judicial Conference was "an unfortunate step backwards."[36]

Following the November first session, the Chief Justice appointed two interim committees to deal with questions of financial reports and off-bench activities. The creation of these committees represented an important and progressive step in the evolution and search for proper standards of conduct for the federal judiciary. The Review Committee was to scrutinize information filed by judges concerning their outside compensated activities, and the Committee on Judicial Activities was to render advisory opinions, on request, to the eleven circuit councils and to individual federal judges. This function filled a long-felt need for proper advice on the compensated as well as gratuitous activities of judges.

On March 18, 1970, the Judicial Conference announced that it had modified the disclosure requirements established by the June tenth resolutions. The conference reversed the June resolution requiring federal judges to file annual financial statements, and adopted a new rule that

> requires six-month statements of income only for extra-judicial services, including lecturing, teaching and writing. Only payments in excess of $100 must be identified.
>
> The federal judges must list gifts worth more than $100 they or any members of their immediate household receive and any "interests" in parties to cases in which they "knowingly participated."[37]

These statements must be filed with the clerk of the judge's court and made available for public examination.[38] Perhaps this partial restoration of the public disclosure requirement will eliminate some of the adverse criticism that followed the November first resolutions.

30 *Id.*
31 Address by Senator Joseph D. Tydings, Catholic University Law Alumni luncheon, Nov. 7, 1969.
32 The Washington Post, Nov. 4, 1969, at A18, col. 1.
33 The Wall Street Journal, Nov. 7, 1969, at 16, col. 1.
34 The Newark (N.J.) News, Nov. 4, 1969, in 116 CONG. REC. S756 (daily ed. Jan. 28, 1970).
35 The St. Petersburg (Fla.) Times, Nov. 5, 1969, in 116 CONG. REC. S756 (daily ed. Jan. 28, 1970).
36 The Washington Star, Nov. 13, 1969, in 116 CONG. REC. S757 (daily ed. Jan. 28, 1970).
37 Chicago Sun-Times, Mar. 19, 1970, at 52, col. 1.
38 *Id.*

A real danger that arises in considering standards of conduct for judges is that those charged with the duty of preparing necessary guidelines may overreact to the needs of the times. Judges are extremely sensitive on the question of judicial ethics. Most judges are hard working, diligent, and above reproach. But they are easy targets for unwarranted criticism because the nature of the judiciary renders it impossible for judges to defend themselves adequately in the press; and it is obvious that they cannot engage in public debate when unfair and unfounded charges are leveled against them. Most judges ask only that they be treated fairly. In a recent editorial, Gerald C. Snyder, President of the American Judicature Society, pleads for fair treatment of the judiciary:

> It has become a popular pastime to attack [judges]. The most irresponsible sources do so, often motivated by the knowledge the attacker will have wide *personal* publicity.
>
> . . . .
>
> Experience has taught us, and history records the fact, that the overwhelming number of dedicated, ethical and reliable judges in America suffer from the acts of a few.
>
> . . . .
>
> I suggest that in fairness to all, and particularly the public, confidence in our Courts should not be undermined by such prejudged guilt.[39]

Conduct of judges can best be regulated by judges themselves, and since the judiciary is an independent and separate arm of the Government, it ought police itself. Formulation of proper ethical standards ought, therefore, be undertaken by judges themselves, with the assistance of the bar and especially the ABA. Though judicial independence must be respected, judges' conduct is not above reasonable regulation. But the question of judicial ethics is much too complex and involved to be hurried — despite the prodding of some members of Congress. Given adequate time for a thorough study of the problem, a modern version of standards of conduct for the federal judiciary will be adopted.

39 Snyder, *How About Some Fairness?* 53 AM. JUD. SOC'Y 136, 136-37 (1969).