

Adopted: 2/94

AMERICAN BAR ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

TASK FORCE ON JUDICIAL REMOVAL
APPELLATE JUDGES CONFERENCE

NATIONAL CONFERENCE OF FEDERAL TRIAL JUDGES
SECTION OF LITIGATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS
STANDING COMMITTEE ON JUDICIAL SELECTION, TENURE AND COMPENSATION

RECOMMENDATION

RESOLVED that the American Bar Association supports efforts within the ABA and by state and local bar associations to increase the awareness and understanding among the practicing bar regarding the availability of procedures for handling complaints against and disciplining federal judicial officers under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. Sections 332, 372 ("the Act").

BE IT FURTHER RESOLVED that the American Bar Association supports the appointment by circuit judicial councils, either directly or by delegation, of one or more committees within the circuit, its districts or its divisions, broadly representative of the bar and, perhaps, including informed lay persons, (a) to provide a vehicle for presenting on behalf of others, complaints against federal judges which the committees deem suitable for referral to the appropriate chief judge, (b) to work with chief judges to identify instances or patterns of alleged judicial misconduct that might be resolved informally or otherwise, (c) to defend the judiciary against unjustified attacks and lawyers against retaliation by judges, and (d) to educate the profession and the public about procedures under the 1980 Act.

BE IT FURTHER RESOLVED that the American Bar Association urges a chief judge who dismisses a non-frivolous complaint or concludes a proceeding to prepare a supporting memorandum that sets forth the allegations of the complaint and the reasons for the disposition, which memorandum should not include the name of the complainant or of the judge or magistrate judge whose conduct was complained of; and requests that the Judicial Conference devise and monitor a system for the dissemination of information about these complaint dispositions with the goals of developing a body of precedent and enhancing judicial and public education about judicial discipline.

EX "J"

REPORT

At the behest of Congress, the National Commission on Judicial Discipline and Removal ("National Commission") was asked (1) to investigate and study problems and issues related to the discipline and removal from office of life tenured Federal judges; (2) to evaluate the advisability of proposing alternatives to current arrangements for responding to judicial discipline problems and issues; and (3) to submit to Congress, the Chief Justice and the President a report of its findings and recommendations. At the behest of the ABA House of Delegates, this ABA Task Force on Judicial Removal ("Task Force") was asked to monitor the work of the National Commission and report on it to the House of Delegates. The National Commission has now issued its Final Report and Recommendations. The Task Force now presents this Report and Recommendation for adoption by the House of Delegates.

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The conflict between Constitutional life tenure and the need for effective and prompt discipline of judges reflects an ongoing dilemma. The most recent substantive Congressional enactment addressing this subject was the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. 332, 372, an act which was designed to provide a mechanism for judicial self-discipline short of removal. Between the adoption of that legislation and the formation of the Commission, not only has thirteen years elapsed, but also the House of Representatives has been faced with not one, but three impeachments and the Senate with the same number of trials of federal district court judges, two following their convictions for felonies and one, that of Alcee Hastings, following an acquittal in the criminal courts. These events, in turn, led to the introduction in Congress of a broad range of reformatory legislation and proposed constitutional amendments designed to address one or more perceived evils in the present system. But the only legislation which passed was that establishing the National Commission whose charge has been described above.

The Commission's final report, running to 210 pages and 60 recommendations, was issued on August 2, 1993. It concludes that, while no constitutional amendments are justified at this time, a broad range of changes in practice and procedure on behalf of everyone involved in the removal or discipline process (the Executive, the Senate, the House and the Judiciary) should be implemented. These proposed recommendations include, simply by way of example, that the House make the impeachment process more efficient by employing issue preclusion, that the Senate consider the establishment of a standard of proof for conviction, that the Department of Justice consult with the House at appropriate times during an investigation and prosecution of criminal conduct of a federal judge, and that the Judicial Conference amend Canons 2 or 3 of the Code of Conduct to add an express prohibition against bias and discrimination. The entire set of recommendations is annexed hereto as Appendix "A."

The Task Force reviewed the Commission's report with care and studied each of its recommendations with a view to determining which, if any, particularly justified a response on the part of the American Bar Association. In doing so the Task Force concluded generally that the recommendations seemed sound and likely to make the processes of judicial discipline and removal more effective and efficient, at the same time preserving or enhancing fundamental fairness to those charged with misconduct. Because most of the proposals are rather specifically directed to the internal procedures of the House, the Senate, the Executive Branch, and the Judiciary, the Task Force did not view it as necessary or appropriate for the ABA to enter the arena by either formally lending its support to them or suggesting alternatives. Similarly, while noting with interest the Commission's strong stand that non-impeachment removal of federal judges would be unconstitutional, the Task Force saw no reason for the ABA to go beyond the position it took last February that significant constitutional questions were raised by proposals for statutory removal of judges, and that in the absence of an as-yet undemonstrated compelling need for such a remedy, the ABA should not support proposals for statutory removal.

Rather, it was the view of the Task Force that there were only two areas addressed by the recommendations which were sufficiently important and of special interest to the organized bar and which it thought were ripe for endorsement by the House of Delegates.

These recommendations address two concerns which were previously identified by the Task Force when it submitted its November 23, 1992 report and recommendations to the House of Delegates. At that time, the Task Force observed two problems with the 1980 Act: (a) the apparent unfamiliarity of the bar with its availability, let alone its procedures, and (b) a concern that lawyers who otherwise might file complaints were discouraged from doing so by the unavailability of a method for maintaining the complainant's anonymity.

AWARENESS AND EDUCATION REGARDING THE 1980 ACT

For Kevin Costner it was enough to build a Field of Dreams. "They will come" he was told and so it happened. For the 1980 Act, it is the perceived wisdom that this has not occurred. The Act permits any person to file a complaint alleging that a federal judge (including a bankruptcy or magistrate judge) "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 permitted the chief judge of the circuit to initiate a complaint on the basis of available information.

After considering a complaint, the chief judge may dismiss it by written order, stating reasons; e.g., the complaint is not in conformity with the Act, is directly related to the merits of a decision or procedural ruling or it is frivolous. If the chief judge does not enter an order dismissing a complaint or concluding the proceeding, he or she must appoint a special committee to investigate the complaint and to file a written

1. We should note that the Final Report and Recommendations address anti-bias issues which are already the subject of clear ABA policy. See Canon 3B(5), 1990 Revised Code of Judicial Conduct.