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2011 Year-End Report on the Federal Judiciary

In 1920, American baseball fans were jolted by allegations that Chicago White Sox players had participated in a scheme to fix the outcome of the 1919 World Series. The team owners responded to the infamous “Black Sox Scandal” by selecting a federal district judge, Kenesaw Mountain Landis, to serve as Commissioner of Baseball and restore confidence in the sport. The public welcomed the selection of a prominent federal judge to purge corruption from baseball. But Judge Landis’s appointment led to another controversy: Could a federal judge remain on the bench while serving as Baseball Commissioner? That controversy brought to the fore a still broader question: Where do federal judges look for guidance in resolving ethics issues?

Since 1789, every federal judge has taken the same solemn oath to “administer justice without respect to persons,” to “do equal right to the poor and to the rich,” and “to faithfully and impartially discharge and perform” the duties of judicial office. But for the first 130 years of the Nation’s

existence, federal judges had no formal source for guidance on the broad array of ethical issues that might arise in the course of judicial service. Judge Landis resolved his situation by resigning his judicial commission in 1922 to focus all his efforts on the national past-time. The controversy, however, prompted organized efforts to develop more guidance for judges. That same year, the American Bar Association asked the Nation's new Chief Justice, former President William Howard Taft, to chair a Commission on Judicial Ethics.

Within two years, Chief Justice Taft's commission produced the ABA's 1924 Canons of Judicial Ethics. The 1924 Canons were advisory. As Chief Justice Taft explained, their 34 general principles served as "a guide and reminder" that federal and state judges could consult in discharging their duties. Since that time, the Judicial Conference of the United States—the policy-making body for the lower federal courts—has adopted and regularly updated its own Code of Judicial Conduct to provide guidance to federal judges. The 1924 Canons provided the foundation for that ongoing undertaking.

Some observers have recently questioned whether the Judicial Conference's Code of Conduct for United States Judges should apply to the Supreme Court. I would like to use my annual report this year to address

that issue, as well as some other related issues that have recently drawn public attention. The space constraints of the annual report prevent me from setting out a detailed dissertation on judicial ethics. And my judicial responsibilities preclude me from commenting on any ongoing debates about particular issues or the constitutionality of any enacted legislation or pending proposals. But I can provide some clarification on how the Justices address ethical issues and dispel some common misconceptions.

A. The Code of Conduct for United States Judges

What is now known as the Judicial Conference of the United States was created by Congress in 1922 to provide national guidance to the lower federal courts. The Chief Justice chairs the Judicial Conference, which includes the chief judge of each of the 13 federal judicial circuits and a district judge from each circuit. The Judicial Conference conducts much of its work through 25 committees, including the Committee on Codes of Conduct. As noted, that committee has promulgated and periodically revises the Code of Conduct for United States Judges. It also provides advice, on a formal and informal basis, to judges and judicial employees on the meaning and application of the Code's provisions.

The Code of Conduct, by its express terms, applies only to lower federal court judges. That reflects a fundamental difference between the

Supreme Court and the other federal courts. Article III of the Constitution creates only one court, the Supreme Court of the United States, but it empowers Congress to establish additional lower federal courts that the Framers knew the country would need. Congress instituted the Judicial Conference for the benefit of the courts it had created. Because the Judicial Conference is an instrument for the management of the lower federal courts, its committees have no mandate to prescribe rules or standards for any other body.

Some observers have suggested that, because the Judicial Conference's Code of Conduct applies only to the lower federal courts, the Supreme Court is exempt from the ethical principles that lower courts observe. That observation rests on misconceptions about both the Supreme Court and the Code.

All Members of the Court do in fact consult the Code of Conduct in assessing their ethical obligations. In this way, the Code plays the same role for the Justices as it does for other federal judges since, as the commentary accompanying Canon 1 of the Code explains, the Code "is designed to provide guidance to judges." It serves the same purpose as the 1924 Canons that Chief Justice Taft helped to develop, and Justices today use the Code for precisely that purpose. Each does so for the same compelling practical

reason: Every Justice seeks to follow high ethical standards, and the Judicial Conference's Code of Conduct provides a current and uniform source of guidance designed with specific reference to the needs and obligations of the federal judiciary.

The Code of Conduct is not, of course, the only source of guidance for Justices or lower court judges. Because it is phrased in general terms, it cannot answer all questions. And because the Code was developed for the benefit of the lower federal courts, it does not adequately answer some of the ethical considerations unique to the Supreme Court. The Justices, like other federal judges, may consult a wide variety of other authorities to resolve specific ethical issues. They may turn to judicial opinions, treatises, scholarly articles, and disciplinary decisions. They may also seek advice from the Court's Legal Office, from the Judicial Conference's Committee on Codes of Conduct, and from their colleagues. For that reason, the Court has had no reason to adopt the Code of Conduct as its definitive source of ethical guidance. But as a practical matter, the Code remains the starting point and a key source of guidance for the Justices as well as their lower court colleagues.

B. Financial Disclosure and Gift Regulations

In addition to establishing the Judicial Conference, Congress has enacted legislation addressing a number of specific ethical matters. In particular, Congress has directed Justices and judges to comply with both financial reporting requirements and limitations on the receipt of gifts and outside earned income. The Court has never addressed whether Congress may impose those requirements on the Supreme Court. The Justices nevertheless comply with those provisions.

The Justices file the same financial disclosure reports as other federal judges. Those reports disclose, among other things, the Justices' non-governmental income, investments, liabilities, gifts, and reimbursements from third parties. For purposes of sound administration, the Justices, like lower court judges, file those reports through the Judicial Conference's Committee on Financial Disclosure. That committee provides guidance on the sometimes complex reporting requirements.

The Justices also observe the same limitations on gifts and outside income as apply to other federal judges. To provide additional guidance for lower court judges, the Judicial Conference has promulgated regulations governing both of those subjects. In 1991, the Members of the Court adopted an internal resolution in which they agreed to follow the Judicial

Conference regulations as a matter of internal practice. As a result, the Justices follow the very same practices on those subjects as their lower court colleagues.

C. Recusal

Congress has directed that federal judicial officers must disqualify themselves from hearing cases in specified circumstances. As in the case of financial reporting and gift requirements, the limits of Congress's power to require recusal have never been tested. The Justices follow the same general principles respecting recusal as other federal judges, but the application of those principles can differ due to the unique circumstances of the Supreme Court.

The governing statute, which is set out in Title 28, Section 455, of the United States Code, states, as a general principle, that a judge shall recuse in any case in which the judge's impartiality might reasonably be questioned. That objective standard focuses the recusal inquiry on the perspective of a reasonable person who is knowledgeable about the legal process and familiar with the relevant facts. Section 455 also identifies a number of more specific circumstances when a judge must recuse.

All of the federal courts follow essentially the same process in resolving recusal questions. In the lower courts, individual judges decide for

themselves whether recusal is warranted, sometimes in response to a formal written motion from a party, and sometimes at the judge's own initiative. In applying the Section 455 standard, the judge may consult precedent, consider treatises and scholarly publications, and seek advice from other sources, including judicial colleagues and the Judicial Conference's Committee on Codes of Conduct. A trial judge's decision not to recuse is reviewable by a court of appeals, and a court of appeals judge's decision not to recuse is reviewable by the Supreme Court. A court normally does not sit in judgment of one of its own members' recusal decision in the course of deciding a case.

The process within the Supreme Court is similar. Like lower court judges, the individual Justices decide for themselves whether recusal is warranted under Section 455. They may consider recusal in response to a request from a party in a pending case, or on their own initiative. They may also examine precedent and scholarly publications, seek advice from the Court's Legal Office, consult colleagues, and even seek counsel from the Committee on Codes of Conduct. There is only one major difference in the recusal process: There is no higher court to review a Justice's decision not to recuse in a particular case. This is a consequence of the Constitution's

command that there be only “one supreme Court.” The Justices serve on the Nation’s court of last resort.

As in the case of the lower courts, the Supreme Court does not sit in judgment of one of its own Members’ decision whether to recuse in the course of deciding a case. Indeed, if the Supreme Court reviewed those decisions, it would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate.

Although a Justice’s process for considering recusal is similar to that of the lower court judges, the Justice must consider an important factor that is not present in the lower courts. Lower court judges can freely substitute for one another. If an appeals court or district court judge withdraws from a case, there is another federal judge who can serve in that recused judge’s place. But the Supreme Court consists of nine Members who always sit together, and if a Justice withdraws from a case, the Court must sit without its full membership. A Justice accordingly cannot withdraw from a case as a matter of convenience or simply to avoid controversy. Rather, each Justice has an obligation to the Court to be sure of the need to recuse before deciding to withdraw from a case.

As with other ethical questions, Justices and lower federal court judges contemplating recusal can take good counsel from the principles set forth in Canon 14 of the original 1924 Canons of Judicial Ethics. That Canon addresses judicial independence. It provides that a judge “should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety, nor be apprehensive of unjust criticism.” Such concerns have no role to play in deciding a question of recusal.

I have complete confidence in the capability of my colleagues to determine when recusal is warranted. They are jurists of exceptional integrity and experience whose character and fitness have been examined through a rigorous appointment and confirmation process. I know that they each give careful consideration to any recusal questions that arise in the course of their judicial duties. We are all deeply committed to the common interest in preserving the Court’s vital role as an impartial tribunal governed by the rule of law.

When the Chicago White Sox took the field in 1919, they surely had no idea that their play would trigger a chain of events that would lead to the development of a code of conduct for federal judges. The public’s confidence in the integrity of the federal courts led to the appointment of a

federal judge to address the Black Sox Scandal. And when the federal judiciary encountered an ethical issue of its own, it took the lead in articulating ethical standards to bolster that confidence. Since that time, the judiciary has continued to revisit and revise those standards to maintain the public's trust in the integrity of its members.

As Alexander Hamilton put it in *The Federalist* No. 78, federal judges must “unite the requisite integrity with the requisite knowledge” to carry out their duties under the Constitution and laws. Throughout our Nation's history, instances of judges abandoning their oath “to faithfully and impartially discharge and perform” the duties of their office have been exceedingly rare. Judges need and welcome guidance on their ethical responsibilities, and sources such as the Judicial Conference's Code of Conduct provide invaluable assistance. But at the end of the day, no compilation of ethical rules can guarantee integrity. Judges must exercise both constant vigilance and good judgment to fulfill the obligations they have all taken since the beginning of the Republic.

I end this year once again with gratitude to our federal judges and court staff throughout the country for their selfless commitment to public service in the face of demanding dockets and tightened budgets. I am also grateful to Congress, in these times of fiscal constraint, for its careful

consideration of the judiciary's financial needs. Despite the many challenges, the federal courts continue to operate soundly, and the Nation's federal judges continue to discharge their duties with wisdom and care. I remain privileged and honored to be in a position to thank the judges and court staff for their dedication to the ideals that make our Nation great.

Best wishes in the New Year.

Appendix

Workload of the Courts

In 2011, caseloads increased in the U.S. district courts and in the probation and pretrial services offices, but decreased in the U.S. appellate and bankruptcy courts. Total case filings in the district courts grew 2% to 367,692. The number of persons under post-conviction supervision rose 2% to 129,780. Cases opened in the pretrial services system also went up 2%, reaching 113,875. In the U.S. courts of appeals, though, filings dropped 1.5% to 55,126. Filings in the U.S. bankruptcy courts, which had climbed 14% in 2010, declined 8% this year to just below 1.5 million petitions.

The Supreme Court of the United States

The total number of cases filed in the Supreme Court decreased from 8,159 filings in the 2009 Term to 7,857 filings in the 2010 Term, a decrease of 3.7%. The number of cases filed in the Court's *in forma pauperis* docket decreased from 6,576 filings in the 2009 Term to 6,299 filings in the 2010 Term, a 4.2% decrease. The number of cases filed in the Court's paid docket decreased from 1,583 filings in the 2009 Term to 1,558 filings in the 2010 Term, a 1.6% decrease. During the 2010 Term, 86 cases were argued and 83 were disposed of in 75 signed opinions, compared to 82 cases argued and 77 disposed of in 73 signed opinions in the 2009 Term.

The Federal Courts of Appeals

Filings in the regional courts of appeals fell 1.5% to 55,126. Growth occurred in original proceedings and bankruptcy appeals. Appeals arising from the district courts decreased. Although civil appeals remained fairly stable, reductions occurred in many types of criminal appeals. Appeals of administrative agency decisions declined as a result of the continued drop in filings related to the Board of Immigration Appeals.

The Federal District Courts

Civil filings in the U.S. district courts grew 2% to 289,252 cases. Fueling this growth was a 2% increase in federal question cases (i.e., actions under the Constitution, laws, or treaties of the United States in which the United States is not a party in the case), which resulted mainly from cases addressing civil rights, consumer credit, and intellectual property rights.

Cases filed with the United States as a party climbed 9%. Those with the United States as plaintiff increased in response to a surge in defaulted student loan cases. Cases with the United States as defendant rose largely because of growth in Social Security cases.

Although criminal case filings (including transfers) remained stable (up by 12 cases to 78,440), the number of criminal defendants increased 3% to set a new record of 102,931. Growth in filings occurred for defendants

charged with drug crimes, general offenses, firearms and explosives offenses, sex offenses, and property offenses.

Filings for defendants charged with immigration offenses fell for the first time since 2006, decreasing 3%. The southwestern border districts accounted for 74% of the Nation's total immigration defendant filings, up from 73% in 2010.

The Bankruptcy Courts

Filings of bankruptcy petitions declined 8% to 1,467,221. This was the first reduction since 2007, when filings plunged after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 took effect. Filings for 2011 were lower in 87 of the 90 bankruptcy courts. Nonbusiness petitions fell 8%, and business petitions dropped 14%.

Bankruptcy petitions decreased 10% under chapter 7, 16% under chapter 11, and 4% under chapter 13.

The Federal Probation and Pretrial Services System

The 129,780 persons under post-conviction supervision on September 30, 2011, represented an increase of 2% over the total from the previous year. The number of persons serving terms of supervised release after their departure from correctional institutions grew 2% to 105,037, and amounted to 81% of all persons under supervision.

Cases opened in the pretrial services system in 2011, including pretrial diversion cases, rose 2% to 113,875.