



Judges' Legitimate Need for Security Cited by Chief Justice

The following are the remarks of Chief Justice William H. Rehnquist to the American Law Institute Annual Meeting, which met last month in Washington, D.C.

The Judicial Conference of the United States is, I think I can say without fear of contradiction, not a well known organization. But one of the decisions reached by the Conference at its meeting last March has attracted considerable public interest—a decision relating to the publication of federal judges' financial disclosure reports on the Internet. This afternoon I would like to tell you some of the background of these deliberations.

The Judicial Conference of the United States was created by statute back in 1922 and today is composed of the 13 chief judges of the federal courts of appeals, 13 elected district court representatives from each of the circuits, and the Chief Justice. The Conference is assisted in its work by 19 committees. It meets here in Washington semi-annually, in September and March.

The Conference oversees the operation of the Administrative Office of the federal courts, an organization ably headed by its Director, Leonidas Ralph Mecham—who has been in his position longer than I have been in mine. The Administrative Office furnishes support systems for the federal courts throughout the country.

The Judicial Conference passes upon many matters relating to the administrative side of the federal Judiciary. Some of them are quite arcane, and of virtually no interest to the general public; I remember at one meeting we debated whether the second secretary for the chief judge of a district court should have a personnel classification of GS-11 or GS-12. But the Judicial Conference also debates matters of great importance to the judges and speaks for the Judiciary with respect to pending legislation in Congress.

The Ethics in Government Act requires that federal judges, among other federal employees, must file financial reports annually. The Act mandates that federal judges file their reports with the Judicial Conference's Financial Disclosure Committee. It also sets forth the general content requirements of the reports and provides for public access to the reports. There are, it seems to me, legitimate purposes served by the Act. Among them, insofar as judges are concerned, is to expose the judges' financial holdings to public scrutiny which assists judges in avoiding conflicts of interest. The requirement that publishing the full extent or even a range of the financial holdings may not be necessary because a judge should recuse himself whether he holds one share or a thousand shares of stock in a corporation that is a party in a case before his court. But few would argue that there is no need to publicize a list of judges' holdings for conflicts purpose.

Yet for all of the public benefits of the Ethics in Government Act, the Act also presents judges with troubling security issues as well and it may be in need of some legislative adjustments which I will discuss. The security issue presented by requirements in the Ethics in Government Act came to a head a few months ago when, pursuant to the Act's provision for public access, a news organizations sought copies of every Article III and federal magistrate judge's financial disclosure report for the express purpose of placing those reports on the organization's Internet website. The Financial Disclosure Committee of the Judicial Conference initially denied the company's request for all of the reports and withheld them from disclosure. Contrary to some press reports, the Financial Disclosure Committee's actions were not without some foundation.

First, in reviewing the company's request for the reports, the Financial Disclosure Committee concluded that the company's intentions to publish the reports on the Internet would contravene the requirements in the Act that prohibit

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disclosure to any person who has not made a written application. The written application requirement provides a mechanism to spot requests from individuals who have threatened judges. Additionally, the Committee thought that the all-encompassing request for Internet publication would thwart the Committee's authority to approve redactions of information in the reports when it determined (in consultation with the U.S. Marshals Service) that certain personal or sensitive information in the report could endanger the judge who filed the report.

Simply put, by placing all judges' financial disclosure reports on the Internet, there would no longer be a means to filter information on those reports that could endanger the individual judge. And anyone who wanted the financial information about the judge—in particular, those individuals who may pose a threat to the judge—could obtain it on the Internet without the judge's (or the Committee's) knowledge and opportunity to redact sensitive information.

The Financial Disclosure Committee's concern for the safety of judges was a well-founded one. Unfortunately, there are too many examples of federal judges—particularly trial judges—having been the targets of violence and threats in our country. Three federal judges—Robert Vance of Alabama, Richard Daronco of New York and John Wood of Texas—have been killed in recent years. Trial judges in general are exposed to the criminal element in our society in ways that most federal employees who must file financial disclosure reports, such as Senators, Congressmen (and appellate judges for that matter) are not. Sentencing judges sit face to face with the criminal defendant. Some of the disclosure requirements in the Ethics in Government Act may also expose where a judge's spouse works, the spouse's income, where a family member is attending school if the school has made a loan to the student, or even where a judge may reside if, for example, the judge is on a condominium board. Thus the risks to federal trial judges are real and deserving of careful consideration. The Financial Disclosure Committee's view was overwhelmingly supported by the Federal Judges Association, consisting of several hundred members.

I should note at this point that all judges' financial disclosure reports have always been available to the public, but only by request to the Administrative Office. Typical requesters under this regime are reporters covering the courts, attorneys participating before cases before the courts, and perhaps an occasional litigant.

But, as many of you probably realize, publication on the Internet makes these statements "publicly available" not just to those who seek them out by way of request to the Administrative Office, but to anyone who wishes to make a "hit" on the Internet site. This surely illustrates one of the changes wrought by the so-called "technological revolution" and illustrates the difference between requiring some effort to acquire public information, and requiring virtually no effort to acquire it. It was this far broader disclosure—albeit of the same material—that raised the concerns of the judges and of the Financial Disclosure Committee.

Without in any way desiring to minimize or downgrade those concerns, when the matter came up for discussion at the March meeting of the Judicial Conference, a large majority of the members, myself included, felt that the Financial Disclosure Committee's willingness to withhold financial disclosure reports in their entirety—well intentioned as it might be—could not be supported in view of the statutory language. Congress specifically provided in the Ethics in Government Act an exemption from the prohibition on use of the reports for commercial purposes to "news and communications media for dissemination to the general public." That is to say that the news media can use the reports for "commercial purposes" to disseminate the reports to the public. And there are no exceptions to this for the Internet.

The statute also provides that the disclosure statements can be redacted if the Judicial Conference, in consultation with the U.S. Marshals Service, finds that "revealing personal and sensitive information could endanger" the judge. The reports may be redacted "only to the extent necessary . . . and for as long as the danger . . . exists." Clearly, these provisions contemplate some production of some portion of the reports at some point in time. They provide only for delay in production, conditions on the production, and redaction in the production of the reports, and do not provide for withholding the production entirely.


So the Executive Committee of the Judicial Conference, in cooperation with the Financial Disclosure Committee, undertook to prepare a set of regulations which would, in their view, fully conform to the current statute. These regulations are being designed to facilitate redacting the sensitive information in the reports to avoid an en masse production, that in the words of the statute, "could endanger" the judges.

The Judicial Conference may also request Congress to consider amendments to the Ethics in Government Act filing requirements so as to reduce security risks to federal judges. That Act already provides that individuals engaged in intelligence activities—such as the CIA, for example—need not make their reports publicly available. I don't think the Judicial Conference has any desire to obtain a complete exemption for judges, but simply wishes to assure its membership that their legitimate concerns are adequately addressed in the Act.

For the most part, the Judicial Conference of the United States operates in relative anonymity. Occasionally, however, an issue arises that captures the public's attention. With regard to the issue of posting all judges' financial disclosure statements on the Internet, I believe the Judicial Conference has acted responsibly and demonstrated a good faith effort to comply with a law that frankly poses some risks to judges. The Conference now hopes that Congress will also act responsibly and balance the legitimate needs for public disclosure of judges' financial holdings with the judges' needs for security.

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Authority Gives Some Protection From Unreasonable Risk

On May 3, 2007, the Judicial Disclosure Responsibility Act, was signed into law by the President as P.L. 110-24. The new law reinstates through December 31, 2009, the authority of the Judicial Conference to redact information from financial disclosure reports where the release of that information would endanger the filer. The Act also expands the authority to allow redaction where the release of the information could endanger a member of the filer's family. The authority was needed to protect the safety of judges and their families.

"The purpose of the financial disclosure reports is to reveal to litigants where there may be potential bias or a conflict of interest by a judge," said Judge Ortrie Smith (W.D. Mo.), chair of the Judicial Conference Committee on Financial Disclosure. "The reason for redaction authority is to allow judges to exclude information that, if made public, may expose judges and family to unreasonable risk."

As an example, Smith said that judges are required to disclose revenue-producing assets. "However, excluding the location of a vacation home generating rental income," he said, "does not generally interfere with this requirement. Revealing the location where a spouse teaches or works also would not be necessary to the disclosure requirements."

Listing work locations or residences where they or family members might be found is a sensitive topic for judges, especially following the murders of members of the family of Judge Joan Lefkow (N.D. Ill.) in 2005.

"We deal with civil issues that affect large sums of money, and with criminal cases that affect an even more important issue—personal freedom," Smith said. "Both often result in very passionate demonstrations that could result in a person doing or threatening harm to a judge or a judge's family members. The ability to redact sensitive information may shield a judge and family members from that threat."

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