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Letter to Roger J. Traynor Regarding *The Washington Post's* Article, "A Code of Ethics for Judges"

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Supreme Court of the United States
Washington, D. C. 20543

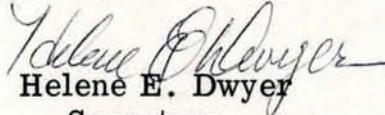
CHAMBERS OF
JUSTICE POTTER STEWART

May 27, 1971

Dear Judge Traynor,

Mr. Justice Stewart asked me to send
you the enclosed editorial from this morning's Post.

Sincerely yours,


Helene E. Dwyer
Secretary

Honorable Roger J. Traynor
Hastings College of Law
University of California
198 McAllister Street
San Francisco, California 94102

The Washington Post

AN INDEPENDENT NEWSPAPER

THURSDAY, MAY 27, 1971

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A Code of Ethics for Judges

The storm over the courts has quieted down a great deal in the two years since a special committee of the American Bar Association went to work on a new code of ethics for judges. But problems of the kind that led to both the storm and the formation of this committee still exist and the lawyers and judges still have much work ahead in restoring some of the luster to the tarnished reputation of the judiciary. In that sense, the draft canons of judicial ethics published over the weekend are a long step in the right direction.

The fundamental current issues in judicial ethics are, of course, what activities a judge can properly participate in off the bench and how his financial dealings are to be scrutinized. These were the issues on which the arguments were made against the nomination of Judge Haynsworth, for the resignation of Justice Fortas, and for impeachment of Justice Douglas. No matter how one feels about the outcome of those three affairs, the line between proper and improper conduct needs to be much more sharply drawn than it has been in the past, if only so the judges will have better advance warning of the standards by which they are measured.

On the first of these, the special committee has done about all that could be asked. Its proposed code would permit a judge to engage in many types of non-judicial activities but would require him to file a public report of any compensation he receives. It would also set out a rule of reason test, by saying that a judge should never receive more money for any such activity than a person who was not a judge would. While these provisions do not go as far in limiting off-the-bench activity as some critics of the judges would prefer, they seem to us to provide a mechanism—public disclosure—which in itself will operate to police improper activities while not pacing judges in a cloister.

The same broad disclosure provision is not recommended by the special committee about the financial dealings of judges because of its belief that this would unnecessarily impinge on their right of privacy. The committee, however, would tighten up the standards under which judges must disqualify themselves from sitting on cases in which the outcome may affect their financial holdings, would bar them from serving in any capacity that might affect their judicial performance, and would require them to have a better knowledge of the financial

dealings of members of their own families than some of them now have. While we would like to see a full disclosure provision so that no doubts would arise, this lesser requirement seems adequate particularly in light of the cloak of secrecy which so many members of Congress and other legislative bodies draw about their own outside income.

There are three other aspects of this proposed code that deserve comment. One is the outright ban on television and photography in courtrooms which it would impose; the ban would be broader than it is today in that it would exclude these means of communication even from ceremonial occasions. While we share some of the fears of lawyers and judges about possible abuses of television in courtrooms, this provision seems ostrich-like; television is going to be with us for a while and the courts ought to use it to inform the public rather than flee from it. The second unusual provision is one that would make it unethical for a judge to serve on a governmental commission except one involving the administration of justice. Such a provision would be welcome since it would do much to eliminate the kind of pressure that was applied to Chief Justice Warren to head the investigation into the assassination of President Kennedy, an assignment that greatly interfered with his judicial duties and which he should not have been asked to undertake and which he should have refused. A third provision strikes us as quixotic. It would make the appearance of a judge as a character witness in a criminal trial unethical on the grounds that such testimony "may be misunderstood as an official testimonial." If this is adopted, a similar reason could be advanced by almost anyone called a character witness and the judges would be in the position of either accepting it or ruling that it doesn't matter if the public misunderstands anyone other than judges.

A Code of Ethics, of course, is only an advisory document. But we suspect that this particular code, once the Bar Association has finished its work on it, will be basis on which binding rules about judicial behavior are legislated. Therefore we hope that the special committee, headed by Roger J. Traynor, retired chief justice of California, will do a little more tinkering with its proposals before submitting them next summer.