LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

March 2011, Wellington, New Zealand | ISSUES PAPER 21

TOWARDS A NEW COURTS ACT

A REGISTER OF JUDGES' PECUNIARY INTERESTS?

REVIEW OF THE JUDICATURE ACT 1908 FIRST ISSUES PAPER

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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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FOREWORD

The Law Commission has on foot a reference for the consolidation of the various legislative measures relating to the regular New Zealand courts of law into one Courts Act, to replace the present Judicature Act 1908. The principal focus of this review is on reorganisation, consolidation and modernisation of the relevant legislation. But as part of that review, any areas of the law which could usefully stand correction or improvement will be considered.

Since the reference was received the suggestion has been raised, through a Member's Bill, that there should be a publicly searchable register of judges' pecuniary interests in New Zealand. If such a measure, or one like it, was to be thought desirable for New Zealand, the most appropriate place for the measure would be to incorporate it as part of a new Courts Act.

The Law Commission has therefore decided to publish an Issues Paper on this question. It hopes this will better inform any public debate on this subject, and enable consultation by the Commission on this particular proposal.

There will be further Issues Papers later in 2011 on such other subjects as we think warrant them. For instance, an Issues Paper will be published relating to vexatious litigants; the process for appointment of judges; and another on technical issues such as jurisdictional and related problems in the various courts.

Hon Justice Grant Hammond

President of the Law Commission

Call for submissions

Submissions or comments (formal or informal) on this Issues Paper should be sent to Lecretia Seales, Senior Legal and Policy Adviser, by **1 June 2011.**

Law Commission,
PO Box 2590,
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or by email to judicatureactreview@lawcom.govt.nz

The Law Commission asks for any submissions or comments on this introductory Issues Paper. The submission can be set out in any format but it is helpful to specify which of the issues in Chapter 8 you are discussing.

Submitters may like to make a comment that is not in response to a direct issue raised in the paper, and this is also welcomed.

Official Information Act 1982

The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus copies of submissions made to the Law Commission will normally be made available on request, and the Commission may refer to submissions in its reports. Any requests for withholding of information on grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act 1982.

Towards a new Courts Act – a register of judges' pecuniary interests?

Review of the Judicature Act 1908 – First Issues Paper

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Introduction

THE LAW COMMISSION REFERENCE

1.1 The Law Commission has a reference from the Minister of Justice (which was supported by the Attorney-General) to review the legislation governing the general jurisdiction of the New Zealand courts (the District Court, the High Court, the Court of Appeal and the Supreme Court) with a view to creating a consolidated Courts Act.

1.2 The principal focus of the review is on reorganisation, consolidation, and modernisation. That is to say, it is not the intention of the reference to revisit major matters of policy underlying the present legislation (such as the structure of the courts or matters of that character).

1.3 The Commission will, however, address any specific concerns arising out of the present legislation which are thought to warrant recommendations for legislative correction or amendment in the course of this consolidation.

THE INTRODUCTION OF A MEMBER'S BILL

1.4 One matter has unexpectedly come into focus since the reference was given to the Commission. There is presently in New Zealand law no requirement on judges to provide details of their financial interests for inclusion on a publicly available register. This is unlike members of Parliament, who are required under the Standing Orders of the House of Representatives to make returns of their pecuniary interests, which are then maintained on a register. A summary of those returns is made publicly available.

1.5 On 11 November 2010 the Justice Spokesperson for the Green Party, Dr Kennedy Graham MP, introduced into Parliament, as a Member's Bill, the Register of Pecuniary Interests of Judges Bill. The explanatory note and the Bill are annexed to this paper as Appendix A.

1.6 Under the procedure in place in the New Zealand Parliament for Members' Bills, this particular Bill was drawn from the ballot. In accordance with the usual procedure it was placed on the Parliamentary Order Paper, but at the time of writing it has not yet had its first reading in Parliament.

1.7 In recent times, a series of events led to a complaint to the Judicial Conduct Commissioner, litigation and ultimately the resignation of Justice William Wilson from the Supreme Court of New Zealand over allegations that there had been inadequate financial disclosure by the Judge in relation to certain matters in *Saxmere Company Limited v Wool Board Disestablishment Company Limited*.[1] This case is discussed in more detail in Chapter 2.

1.8 It is apparent that one reason for the proposals contained in the Member's Bill is a concern for the judiciary arising out of the general circumstances of that incident. Dr Kennedy Graham has been quoted as saying:[2]

> The messy situation around former Justice Bill Wilson could have been avoided had New Zealand had a register. The primary purpose is to protect the judiciary by relieving each judge of the onerous and somewhat subjective burden of determining whether a conflict of interest exists with regard to each particular case.

1.9 The explanatory note to the Bill states:[3]

> Quite recent developments within New Zealand's judicial conduct processes suggest that application of the same practice[s] observed by the other two branches of government might assist in the protection of the judiciary in the future.

1.10 The Member's Bill and the explanatory note largely speak for themselves. The Bill has been brought forward at a time when there is a worldwide concern to improve governance by increased transparency and accountability in all branches of government. Later in this paper we identify some difficulties we see with this prospective legislation. However, there cannot possibly be, as a third arm of government, a "fortress judiciary". It is plainly in that spirit that the Member's Bill was introduced, and that should be acknowledged.

1.11 The judiciary does not exist in isolation. It is an institution in a particular society. Judges must have the respect and faith of the communities they serve to be effective. This is because in a democracy, the enforcement of judicial decrees and orders depends ultimately on public co-operation. The level of co-operation which is forthcoming must in turn depend upon a society-wide perception that judges decide cases impartially.

1.12 Should the citizens of New Zealand conclude – even if erroneously – that cases are being decided on the basis of favouritism or prejudice, rather than on findings of fact and the application of the law thereto, then it would be very difficult to enforce the law. Making judges accountable for their conduct is a vital aspect of maintaining public respect for judges and the rule of law.

1 *Saxmere Company Limited v Wool Board Disestablishment Company Limited* [2009] NZSC 72; [2010] 1 NZLR 35.

2 *New Zealand Herald*, 12 November 2010, at 4.

3 Register of Pecuniary Interests of Judges Bill 2010 240–1, (explanatory note) at 2.

Relationship to the Courts Act reference

1.13 If there is to be a statutory requirement for a register of judges' pecuniary interests, then the obvious place for its enactment would be in the Judicature Act 1908, or a new Courts Act. Further fragmentation of legislation pertaining to the judiciary would be contrary to the very purpose of the Law Commission's existing reference.

1.14 We have therefore prepared this Issues Paper with a view to informing the Commission's standing project on a new Courts Act, and to enable consultation on this subject area.

SCOPE OF THIS ISSUES PAPER

1.15 It is not our intention in this paper to revisit the merits of the events that led to the resignation of Justice Wilson. That matter was concluded with the Judge's resignation and the Judicial Conduct Commissioner's discontinuance of his investigation.

1.16 This paper sets out the present law relating to judges' pecuniary interests in New Zealand, England and Wales. It describes the features of judicial financial registers that have been established in the United States of America, India and South Africa. It also describes the register of pecuniary and other specified interests of members of Parliament in New Zealand. In the final chapter, we set out the arguments for and against a pecuniary interests register for judges in New Zealand, and raise some specific questions for consideration. We welcome submissions on these questions, and any other matters set out in this paper.

Chapter 2

The present law relating to pecuniary interests of judges in New Zealand

INTRODUCTION

2.1 When appointed to the Bench in New Zealand, a judge is required by statute to take an oath to do justice to all persons "without fear or favour, affection or ill-will". The words refer to the independence and impartiality required of a judge. These are the pillars on which justice according to the law stands.

2.2 After assignment to determine a particular case, circumstances may become apparent to a judge, or may be drawn to his or her attention, which make it questionable whether he or she should sit on that particular case. The judge may then have to stand down. The case is then left to the superintendence and decision of some other judge.

2.3 The term "recusal" is usually applied to this step. In the context of religion the term has a connotation of the rejection of authority. But in law, the term is more complex, and is applied to a process which is designed to support the authority of the rule of law.

2.4 A judge cannot simply choose not to sit on a case to which he or she has been assigned. There has to be a proper reason for a judge to take this course. The circumstances under which a judge should stand down have been the subject of much debate and continued anxiety for judges. "Anxiety", because no judge wishes to be accused of having exercised the very large powers of a judge when he or she ought not to be doing so. Neither should he or she decline to undertake a duty that he or she should fulfil.

2.5 There is the further problem that present-day recusal doctrine, which is designed to assure the quality of justice, may operate the opposite way. Recusal doctrine can provide a field for manipulation by litigants or their counsel, who for one reason or another may not want their case dealt with by a particular judge. It is a long-standing principle that litigants cannot hand pick their court.

2.6 This area of the law is marked by five kinds of problems. The first is, what are the substantive grounds on which recusal doctrine should operate? Secondly, by what process should this decision about who is to decide a case be made? Thirdly, what should be the ambit of recusal doctrine: should it extend only to trial and appellate judges in regular courts of law, or should it extend also to people like tribunal members and even court officials? Fourthly, is there a need for legislation as opposed to judicially-created solutions for the problems associated with recusal? Fifthly, would this general issue be assisted by the existence of a register of judges' pecuniary interests?

INFORMAL SELF-IMPOSED ETHICAL STANDARDS

2.7 Apart from any formal legal requirements, the judges in New Zealand, as elsewhere, have endeavoured to collectively articulate what are routinely referred to as "codes" of behaviour which are expected of judges, although they have no formal legal force.

2.8 For instance, in New Zealand the higher courts' Judges' Benchbook (copies of which are made available to all judges) provides, as a guide only:

> **Conflict of interest generally**
>
> Judges must disqualify themselves wherever they have personal knowledge of disputed facts in the proceedings, or wherever they have a personal view concerning a party or witness of disputed fact in the litigation.
>
> The question of disqualification is for the Judge. The Judge will sometimes be mindful of the burden passed on other Judges if disqualification is resorted to without need. But greater burdens are imposed if an appellate Court eventually takes the view that disqualification was appropriate. It is sensible for the Judge to decline to sit in cases of doubt.
>
> Conflict of interest arises in a number of different situations. The Judge must be alert to any appearance of bias arising out of connections with litigants, witnesses or their legal advisors. The parties should always be informed by the Judge of facts that might reasonably give rise to a perception of bias or conflict of interest.
>
> **Circumstances when the Judge should consider disqualification**
>
> The most important circumstances in which the Judge should consider disqualification are given below.
>
> - A Judge should always disqualify himself or herself whenever a party, lawyer or witness of disputed facts is:
> - a close blood relative or domestic partner of the Judge; or
> - a close relative of the Judge; or
> - a close friend or business associate of the Judge.
> - A judge should consider disqualification in cases where a witness of disputed facts is someone known to the Judge and about whom he or she has opinions.
> - Former clients may be people about whom the Judge has formed a view in the past.
> - Friendship or past professional association with lawyers engaged in the case is generally insufficient to result in disqualification.

Although a Judge may be disqualified for strong views publicly expressed on a matter in issue, the case would have to be extreme before a reasonable observer would think the Judge not able to have an open mind. An expression of opinion in an earlier case is not a ground for disqualification.

In cases of uncertainty it may be desirable for the Judge to discuss the matter with the Head of Bench or another Judge. Where the Judge is uncertain if disqualification is appropriate, it is usually necessary for the parties to be given an opportunity to make submissions on the point after full disclosure of the circumstances giving rise to the question of disqualification. The consent of the parties is not determinative. The Judge must decide whether disqualification is appropriate. Disclosure of any matter that might give rise to objection should always be undertaken, even if the Judge has formed the view that there is no basis for disqualification. There may be circumstances not known to the Judge that may be raised by the parties consequentially upon such disclosure.

Disclosure of shareholding

Shareholding in litigant companies or companies associated with litigants should be disclosed. They should always lead to disqualification if the shareholding is large or if the value of the shareholding would be affected by the outcome of the litigation. Where the shareholding is small, full disclosure should still be made.

2.9 This code does not appear to have been made available to the public. There is no specific mechanism for non-compliance.

THE LAW RELATING TO RECUSAL FOR PECUNIARY INTERESTS

2.10 In the British Commonwealth, the law relating to recusal has been made by the judges themselves. It is common law, or case law.

2.11 The starting point for disqualification of a judge for pecuniary interest is the highly influential English case of *Dimes v Proprietors of Grand Junction Canal*.[4] This mid-19th century case involved the then Lord Chancellor, Lord Cottenham. It turned out that His Lordship held shares in a canal company in whose favour he had decided a case brought by a litigious solicitor named Dimes. Mr Dimes had bought a piece of land in order to hold the canal company to ransom for crossing it. Dimes had litigated for more than a decade without success on this issue. Then it turned out that Lord Cottenham had shares in the canal company. The House of Lords unequivocally held that the Lord Chancellor should not have sat on the case, by reason of his ownership of shares in Grand Junction Canal Company. Lord Campbell famously observed that "no-one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern". But the House of Lords laid down a "no pecuniary interest principle" which requires a judge to be automatically disqualified even when there is neither actual bias nor even an apprehension of bias on the part of the judge. The fundamental philosophical underpinning of the case is therefore predicated on a conflict of interest approach.

4 *Dimes v Proprietors of Grand Junction Canal* (1852) 10 ER 301.

2.12 The House of Lords unanimously said:

> [Our decision] will have a most salutary influence on these [various] tribunals when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson *to all inferior tribunals* to take care not only that in their decrees they are not influenced by their personal interests, but to avoid the appearance of labouring under such an influence.

2.13 This is a particularly powerful – and blunt – principle, though undoubtedly it set an important tone for the future. A pecuniary interest in law has always been understood to be a monetary interest, or something sounding in money. Hence on a strict application of *Dimes,* one share out of a thousand in a company is disqualifying. Indeed, for a period after *Dimes* was decided, this "bright line" approach was taken.[5]

2.14 Subsequent case law around the British Commonwealth has introduced two kinds of qualifications. One is that some kinds of financial interest can be considered too remote or speculative to form the basis for disqualification. This requires that there be a sufficiently "direct" connection for the disqualification to operate.

2.15 The second qualification is a "*de minimis*" exception. The New Zealand Court of Appeal has said:[6]

> A firm and realistic rule of pecuniary disqualification is necessary to assist public confidence in the administration of justice and the impartiality of licensing bodies. The existence of an irrebuttable presumption in cases of direct pecuniary interest was assumed in argument. As already mentioned, we think that it may be subject to the *de minimis* rule.

2.16 Along similar lines, the English Court of Appeal has recognised a *de minimis* exception, but limited to situations where:[7]

> ... the potential effect of any decision on the judge's personal interest is so small as to be incapable of affecting his decision one way or the other; but it is important, bearing in mind the rationale of the rule, that any doubt should be resolved in favour of disqualification.

THE SAXMERE LITIGATION

2.17 The Supreme Court of New Zealand has recently revisited the circumstances under which a judge should recuse (in that case in the context of a business relationship which was sought to be impugned). The Court unanimously held that, subject to waiver and necessity, a judge is disqualified if a fair-minded lay observer might reasonably apprehend that there is a real and not remote possibility that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. There is to be no attempt to predict or enquire into the actual thought processes of the judge. Rather, it is necessary first to identify what it is said might lead a judge to decide a case other than on

5 See Grant Hammond *Judicial Recusal: Principles, Process and Problems* (Hart, Oxford, 2009) at 22.

6 *Auckland Casino Limited v Casino Control Authority* [1995] 1 NZLR 142, at 148.

7 *Locabail (UK) Limited v Bayfield Properties Limited* [2000] 2 WLR 870, at 882.

its legal and factual merits, and secondly, to articulate the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.[8]

2.18 Subsequently, on a recall application,[9] the Supreme Court held, in the context of shareholders' accounts in which a judge and one of the counsel had an interest, that the imbalance in the shareholders' accounts created a situation in which the objective lay observer could reasonably consider that the Judge was at the relevant time beholden to counsel because of the imbalance, and that this might have unconsciously affected the impartiality of the Judge's mind in deciding a case in which counsel was appearing. This, together with the fact that the Judge's involvement was not a mere passive investment but required co-operation over a land purchase, led to the conclusion that the case – here founded on apparent bias – had been made out and the particular judgment was recalled.

2.19 The practical effect of the recall was that the particular appeal had to be re-heard in the Court of Appeal. That has been attended to, but the case is still subject to a further application for leave to appeal to the Supreme Court of New Zealand.

2.20 The decision in the *Saxmere* case has settled the common law to be applied in New Zealand courts. And, importantly, it has done so on a basis which is consistent with the law in Australia,[10] Canada,[11] and the United Kingdom.[12] *Saxmere* also approved the approach which had been taken by the Court of Appeal in New Zealand in *Muir v Commissioner of Inland Revenue.*[13]

2.21 It has not been suggested that the formulation by these senior appellate courts is incorrect or deficient, although commentators have recognised, as has the judiciary itself, that the test is not always easy to apply insofar as it requires a court to anticipate how a fair-minded and informed lay observer would view matters. However, in relation to pecuniary interests it is hard to see how a fair-minded and informed lay observer would not regard a direct pecuniary interest as being disabling and disqualifying save where it is of the most minor and inconsequential kind.

2.22 Significantly, the Supreme Court of New Zealand saw the modern test as enunciated in these senior appellate decisions as being appropriate to the particular circumstances of New Zealand.

8 *Saxmere Company Limited v Wool Board Disestablishment Company Limited* [2010] 1 NZLR 35.

9 *Saxmere Company Limited v Wool Board Disestablishment Company Limited* (No.2) [2010] 1 NZLR 76.

10 *Ebner v Official Trustee in Bankruptcy* (2001) 205 CLR 337.

11 *R v S* (RD) [1997] 3 SCR 484.

12 *Helow v Secretary of State for the Home Department* [2008] UKHL 62.

13 *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 (CA).

PROCESS PROBLEMS

2.23 There is widespread agreement amongst commentators that the least satisfactory aspect of current recusal law lies in the processes adopted, or more accurately, not expressly formulated by courts. There is a range of procedural approaches around the common law world as to who initiates a concern over possible recusal, and how these issues are handled.

2.24 The overwhelming deficiency in the present practice is the relatively obvious concern that a judge, who is required to be impartial, must decide whether he or she is sufficiently impartial to decide the case. Such a proposition offends basic juristic principles. This has led to attempts to improve the process relating to recusal issues.

2.25 One possible approach was an Australasian protocol developed by the Council of Chief Justices of Australia (which also includes the Chief Justice of New Zealand). This protocol is as follows:

> **3.5 Disqualification procedure –**
>
> (a) If a judge considers that disqualification is required, the judge should so decide. Prior consultation with judicial colleagues is permissible and may be helpful in reaching such a decision. The decision should be made at the earliest opportunity.
>
> (b) In cases of uncertainty where the judge is aware of circumstances that may warrant disqualification, the judge should raise the matter at the earliest opportunity with:
>
> (i) The head of the jurisdiction;
>
> (ii) The person in charge of listing;
>
> (iii) The parties or their legal advisers;
>
> not necessarily personally, but using the court's usual methods of communication.
>
> (c) Disqualification is for the judge to decide in the light of any objection, but trivial objections are to be discouraged.
>
> (d) It will generally be appropriate in cases of uncertainty for the judge to hear submissions on behalf of the parties and that should be done in open court.
>
> (e) The judge should be mindful of circumstances that might not be known to the parties but might require the judge not to sit, and of the possibility of the parties raising relevant matters of which the judge may not be aware. It is not appropriate for a judge to be questioned by parties or their advisers.
>
> (f) If the judge decides to sit, the reasons for that decision should be recorded in open court. So should the disclosure of all relevant circumstances.
>
> (g) Consent of the parties is relevant but not compelling in reaching a decision to sit. The judge should avoid putting the parties in a situation in which it might appear that their consent is sought to cure a ground of disqualification. Even where the parties would consent to the judge sitting, if the judge, on balance, considers that disqualification is the proper course, the judge should so act.
>
> (h) Even if the judge considers no reasonable ground of disqualification exists, it is prudent to disclose any matter that might possibly be the subject of complaint, not to obtain consent to the judge sitting, but to ascertain whether, contrary to the judge's own view, there is any objection.
>
> (i) The judge has a duty to try cases in the judge's list, and should recognise that disqualification places a burden on the judge's colleagues or may occasion delay to the parties if another judge is not available.

> There may be cases in which other judges are also disqualified or are not available, and necessity may tilt the balance in favour of sitting even though there may be arguable grounds in favour of disqualification.

2.26 Under that protocol, disqualification still remains a decision for the judge to whom the concern is directed. However consultation with judicial colleagues is said to be permissible and may be helpful. Secondly, in cases of uncertainty, an open court hearing should be held with submissions. Thirdly, if the judge does decide to sit, the reasons for that decision should be recorded in open court. Fourthly, the consent of the parties is highly relevant, but not determinative in reaching a decision to sit. Fifthly, the obligation to sit is still given some real weight where it is necessary to do so.

2.27 There is no formal mechanism in the protocol for dealing with non-compliance.

2.28 In New Zealand, in the Court of Appeal there is now a "convention" that a recusal application is at least "discussed" with the other members of the hearing panel.[14] That caution has been further extended to the practice of the hearing panel of three judges deciding a recusal application, not just the impugned judge.

2.29 It is easier to deal with the process for recusal determinations in appellate courts, because there is a collegiate body to which reference may readily be had. In trial courts where judges may be faced with urgent applications, often on the very eve of trial, and sometimes in more remote courts, it is more difficult to develop satisfactory practices.

2.30 The particular circumstances of each bench on recusal processes may require different approaches. We consider there would be much to be said, both in principle and in practice, for each court to evolve a distinct recusal process. The Head of Bench could then gazette that process much in the same way that the President of the Court of Appeal is required to gazette cases of sufficient significance for a Full Court under section 58E of the Judicature Act 1908. This would enable the Bar and litigants to know what process is being adopted in a given court, and also allow the flexibility for that process to be reviewed from time to time without requiring a legislative amendment.

14 *R v Chatha* [2008] NZCA 466 at [16].

Chapter 3

The law relating to pecuniary interests of judges in England and Wales

3.1 We indicated in Chapter 2 that given recent case law developments in New Zealand, the law in this country is now substantially on the same footing as that to be found in England and Wales, Canada and Australia.

3.2 There are certain advantages to this. There are few recusal cases in New Zealand, and this similarity in approach enables New Zealand courts to refer to applications of the present principles by English and other courts.

3.3 As to the question of a register of judges' pecuniary interests in England, there is presently no such register, and senior judicial opinion has been against one.

3.4 In the House of Lords, the Lords of Appeal in Ordinary (commonly referred to as the Law Lords) participated in the Assets Register for the House of Lords because they were also members of that body in a legislative capacity. However, when that appellate jurisdiction was terminated and the apex court in the United Kingdom became the Supreme Court of the United Kingdom, the new Supreme Court judges decided not to maintain such a register.

3.5 Inquiries made of both Lord Phillips, the President of the Supreme Court of the United Kingdom, and the Lord Chief Justice of England and Wales, have confirmed that this decision was reached after discussion amongst members of that Court. Those senior judges took the view that it was inappropriate and not feasible to set up a comprehensive register of interests. Both these senior judges have thought it "impossible" to create an adequate register and keep it up to date.

3.6 The view taken was that individual responsibility of judges is the only practicable solution. This is entirely consistent with the present law in both the United Kingdom and New Zealand. There are mechanisms in place by which, ultimately, a judge can be removed from office for serious breaches. Individual litigants can have their position righted (in the rare cases in which a breach is found to have occurred) by re-hearings, and costs orders.

3.7 We are not aware of any current proposals for registers of judges' pecuniary interests in Canada or Australia.

Chapter 4

Compulsory financial registers for judges: the United States of America

EVOLUTION

4.1 In contrast to the jurisprudence of the British Commonwealth jurisdictions, there is a long tradition of Congressional regulation of Federal judges by statute in the United States of America.

4.2 A policy emphasis on formal regulation of government ethics was a matter of concern, even at the founding of the United States. The United States Constitution, for instance, contains at least three provisions aimed at government officials' conflicts of interest: one forbids Federal officials from accepting gifts, employment, or titles from foreign governments; another prohibits members of Congress from being appointed to a Federal office that was created, or whose salary was increased, during that member's term in Congress; and a third prevents members of Congress from receiving an increase in salary until after they stand for re-election.[15]

4.3 The first Federal judicial disqualification statute in America was passed as early as 1792.[16] That statute largely reflected the English common law: there was to be disqualification when a judge had a pecuniary interest in a proceeding over which he or she was to preside.

4.4 A wave of ethics reform legislation occurred in the mid-19th century, in the wake of wide scale influence-pedalling and procurement fraud during the Civil War.[17]

4.5 For present purposes, however, the relevant history of US Federal law begins with the Federal conflict of interest laws – of a very wide sweeping character – enacted after Watergate, with the passage of the Ethics in Government Act of

15 See United States Constitution, Article 1.

16 See Grant Hammond *Judicial Recusal: Principles, Process and Problems* (Hart, Oxford, 2009) at 14.

17 RN Roberts *Whitehouse Ethics: The History of the Politics of Conflict of Interest Regulation*, (Greenwood Press, Westport, CT, 1988) at 9-14.

1978.[18] In broad terms, this Act required certain employees of the government – including judges – to disclose their finances, placed restrictions on post-government employment for Executive Branch employees, and established the Office of Government Ethics. In response to continued perceptions of abuse in both the Executive and Legislative branches, Congress passed a further statute – the Ethics Reform Act 1989 – which imposed even tougher post-government employment restrictions on certain high level Executive Branch officials, created post-employment restrictions for members of Congress and highly paid congressional staff, established a rule restricting the ability of employees in all three branches of government to accept gifts, and banned honoraria for almost all government employees.

4.6 The current Federal ethics regulatory structure, which includes statutes, regulations and executive orders, is highly detailed and complicated. The director of the office charged with writing Executive Branch ethics regulations said at one hearing: "even an employee who sincerely wants to follow the rules doesn't have the remotest chance of understanding them". Examples include detailed regulations distinguishing doughnuts from sandwiches; compensation for giving a series of speeches from compensation for teaching; compensation for writing a chapter in a book from compensation for writing an article; and lobbying on behalf of a private university from lobbying on behalf of a private school.

4.7 As long ago as 1996 the Office of Government Ethics employed 87 people. Twelve hundred employees in other agencies spent more than half their time on ethics issues, and more than 13,000 other employees had some responsibility for government ethics. "In fact, an entire cottage industry has arisen to interpret the statutes, promulgate regulations, and provide guidance to employees."[19]

4.8 As at January 2011, there were 874 Federal judgeships in the United States (Supreme Court – 9; Court of Appeals – 179; District Courts – 677; Court of International Trade – 9). There are 28,000 judges in the 50 States, the District of Colombia and Puerto Rico.

4.9 As to judges, as a general observation, the United States is a laboratory of ethics to adjust judicial independence and accountability to one another. As noted there are a significant number of statutes and regulations which impact on this endeavour. The reason for the fundamental tension in that jurisdiction is that a fierce belief in judicial independence exists alongside an equally strong belief in democratic accountability. James Maddison noted during the ratification debate for the US Constitution that government must derive "all of its power directly or indirectly from the great body of the people".[20]

18 See Adams *Ethics in Government* (1993) 30 AM Crim L Rev 617.

19 Clark, "Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory" (1996), University of Illinois Law Review, 57.

20 The Federalist: Nos. 37–39.

THE ETHICS IN GOVERNMENT ACT 1978

4.10 The critical Federal provisions are contained in 5aUSC §101 and §102. §101 includes, as persons who are caught by the legislation, both a judicial officer and a *judicial employee* as defined under section 109 of the Code. In simple terms, this refers to Federal judges and certain court employees.

4.11 The contents of reports are laid down by §102. This is highly detailed and prescriptive. The provision is attached as Appendix B, and as can be seen, has been frequently amended.

4.12 Addressing the American Law Institute Annual Meeting in May 2000, the then Chief Justice of the United States, William Rehnquist, put the position pithily: [21]

> 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 publicise a list of judges' holdings for conflicts purposes.

4.13 What has to be reported extends not only to the assets, income and liabilities of the judge but also to their spouses and dependent children.

4.14 The statute also mandates that the Judicial Conference (which is a governing body for Federal judges in the United States) must establish a Judicial Ethics Committee which is responsible for administering this legislative scheme. Currently, the Judicial Ethics Committee will refer the name of any judge who has wilfully failed to file a financial disclosure report, or has wilfully falsified a report, to the Attorney-General for potential prosecution.

4.15 To demonstrate the fullness of the information required, it may be helpful to refer to the financial disclosure reports of two prominent American judges. The first is the 2009 report of Judge Richard Posner;[22] the second the 2007 report of Chief Justice Roberts of the United States Supreme Court (attached as Appendix C).

4.16 Certain features of those reports are apparent. First, they reveal that in terms of "reimbursements", senior United States judges do a great deal of visiting at American universities and elsewhere and often receive emoluments as well as expenses. Only a handful of New Zealand judges routinely undertake exercises of that kind, and just as routinely for no reimbursement.

21 William Rehnquist, Chief Justice, American Law Institute Annual Meeting, Mayflower Hotel, 15 May 2000, available on the US Supreme Court website: < www.supremecourt.gov/publicinfo/speeches > .

22 See < www.judicialwatch.org/judicial-financial-disclosure > for Judge Posner.

4.17 Secondly, the investments and trusts section (Part 7) is very detailed and the values can be calculated by reference to the table at the foot of each page. As a very general proposition, those disclosures are aimed at two kinds of things: any emolument or reimbursement which the judge is getting which is over and above his or her judicial emolument; and interests in the form of holdings in business entities. What might be termed "domestic assets" are of little interest. This pattern reflects the sort of concerns that predominantly show up in recusal cases in the Federal jurisdiction in the United States: judges receiving money outside their salary; and their holdings, whether small or large, in business corporations and trusts.

PROBLEMS WITH THE US FEDERAL SCHEME

Legal challenges

4.18 It is convenient to deal with the problems which have arisen in relation to the United States Federal scheme so far as it affects judges under two heads: legal and functional.

4.19 Many Federal judges were concerned about the prospect of being brought within legislation of this character. The various objections which were raised came to a head in litigation in the Federal Court in *Duplantier v United States*.[23]

4.20 The context of the case was that certain Federal judges brought a class action raising the question whether the provisions of the Ethics in Government Act 1978 requiring Federal judges to file annual personal financial statements available for public inspection violated the Constitution of the United States. The action was filed on 14 May 1979 in the Eastern District of Louisiana by six judges, as a class action on their own behalf and on behalf of all persons similarly situated. The final day which had been set by Congress for compliance with the disclosure provisions of the Act was 15 May, so the proceeding came before the trial court and then the Court of Appeals by way of an application for a temporary restraining order (which corresponds to an interlocutory injunction in the New Zealand jurisdiction) against enforcement of the Act, in addition to permanent injunctive relief. The District Court denied the application on 4 June 1979, on a variety of grounds, some of which were technical and went to jurisdiction. The case then went to the Appellate Court for that Federal District.

4.21 One of the first problems was that there was no Federal judge without an interest in this litigation. The Court of Appeals noted that if the judges of that court, and the District Judges, were disqualified because of their interest in the controversy, all other judges of the United States courts were similarly disqualified, leaving the plaintiffs with no effective forum to decide their constitutional complaints. It noted that "the law does not tolerate such a hiatus" and invoked the principle of necessity.

4.22 The first ground advanced by the judges was that of the "separation of powers". The plaintiff judges contended that the requirement that pertinent financial reports be filed by judges for public disclosure under the Act would intrude upon the independent decisional freedom of United States judges and thereby violate "the constitutional principle of separation of powers". They further argued that

23 *Duplantier v United States* 606 F 2d 654. (1979, Fifth Circuit, United States Court of Appeals). Certiorari denied: 449 US 1076.

the Act unconstitutionally interfered with judicial independence by subjecting Federal judges to familial disquiet, political pressure, and increased threats of physical or economic harm at the hands of criminals and disgruntled litigants.

4.23 The Court of Appeals had some sympathy with this:[24]

> Plaintiffs' objections to the reporting provisions required by the Act have substantial merit and are deserving of the most careful consideration. The presence of armed guards and sophisticated electronic weapons detection equipment in United States courthouses is mute testimony to the danger with which Federal judges are confronted. It likewise takes no vivid stretch of the imagination to believe that widespread public knowledge of their personal finances may subject Federal judges to possible pressure or importuning by family members, public and political interest groups, and others. Some of these dangers confront Federal judges even today, regardless of the impact of the Act.

4.24 The Court noted the well-established doctrine that the separation of powers doctrine does not require three airtight departments of government. The enquiry is into the proper balance between the co-ordinate branches of government and the inquiry has to focus on the extent to which it prevents the affected branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present is it then necessary to determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

4.25 The Court dealt with this difficult issue this way:[25]

> In the legislative history the Congressional purpose is explained in some detail as to the values served by the Act's financial disclosure requirements. Congress sought by the Act to increase public confidence in all three branches of the Federal Government, demonstrate the high level of integrity of the vast majority of government officials, deter conflicts of interest from arising, deter some persons who should not be entering public service from doing so, and better enable the public to judge the performance of public officials. Though plaintiffs argue that such legislative ends are impermissible when applied to the judiciary since Federal judges are not elected officials, none can doubt that Federal judges are important governmental officers in whom the public at large has a substantial interest. The decisions of the Federal judiciary today frequently have dramatic impact upon the lives of every citizen of this country. Thus we are not prepared to conclude that Congress' determination that personal financial disclosure by Federal judges will serve such "substantial Federal interests" as restoring public confidence and deterring conflicts of interest is constitutionally impermissible.

4.26 The second argument advanced for the judges was that the penalties which might be assessed against a judge for non-compliance with the financial disclosure provisions of the Act diminished the compensation of Federal judges (in violation of Article 3 of the Constitution). The argument was able to be run because the Ethics in Government Act authorises the Attorney-General of the United States to bring civil actions against individual Federal judges who lawfully or negligently

24 Ibid, at [32].

25 Ibid, at [36].

violated the financial reporting provisions of the Act. Penalties for wilful violations are not to exceed $5000 and negligent violations could attract a penalty of $1000.

4.27 This argument was easily disposed of. Under US law there would have had to have been a plan fashioned by the political branches ineluctably operating to punish the judges as judges. There was no such thing: Congress had imposed precisely the same penalty for failure to file financial reports on members of Congress.

4.28 The third argument revolved around suggestions about invasions of privacy. The judges contended that personal financial disclosure could provide threats of physical and economic harm such as murder, kidnapping and destruction of property, as well as the irritation of solicitation or the embarrassment of poverty. Additionally, disclosure could be destructive of close family relationships.

4.29 The Court of Appeals said that without doubting that privacy is an important personal interest "especially cherished in these days of electronic surveillance and computerised data banks", the matters relating to personal financial disclosure did not impermissibly intrude into the sphere of family life constitutionally protected by the right of privacy. Some influence on intimate decision-making was accepted but the Court concluded "that any influence does not rise to the level of a constitutional problem".

4.30 The judges had also argued that since they were appointed rather than elected officials, this should significantly decrease the public's interest in their personal finances. That argument too was rejected: regardless of whether a public official is elected or appointed "his or her legitimate expectation of privacy is necessarily circumscribed". And an argument that Congress had gone further than is necessary was rejected on the footing that "this court cannot invalidate an act of Congress merely because we disagree with the legislative prudence of the statute".[26]

4.31 The court rejected a fourth line of argument under the equal protection and due process provisions of the US Constitution.

4.32 The concluding remarks of the court are worth noting:[27]

> The judges have good reason to believe that, as to them, the financial disclosure provisions of the Act are unnecessary, that a remedy is being provided by Congress when none is needed. Incidents of judicial misconduct or impropriety in the Federal judiciary are extremely rare. Judges should not be harassed in the legitimate exercise of their duties, and we should tread softly before imposing publicity on their private financial affairs which may be a serious threat to judicial independence and may erode that independence so necessary to the proper functioning of the judiciary. Federal judges may properly enquire what necessity brought about the provisions of the Act of Congress which will cause many of their intimate personal and confidential financial affairs to be open to public inspection. It is not a complete answer to point out that the Act is applicable to officials not only in the judiciary but also in the executive and legislative branches of the government, and judges should therefore have no special

26 Ibid, at [58].

27 Ibid, at [62] – [64].

exemption from the Act's provisions. Clearly, the financial disclosure requirements are strong medicine and are not entirely palatable to the members of the Federal judiciary. Thus, we must test the constitutionality of the Act by enquiring whether it substantially furthers important governmental interests. In so doing so, we employ the time honoured balancing approach.

It is evident that there is a growing public demand for accountability and integrity of public officials and the Act is designed to carry out that purpose. There are only about 850 Federal judges, but it is clear that they occupy an expanding role in today's society. In the appropriate weighing of competing interests, it is significant that 23 states have enacted similar laws, and financial disclosure for judges in those states is now routine. In balancing judicial accountability with judicial independence, we are unable to hold that the Act's objectives so clearly intrude upon the judicial functions that they are unconstitutional. Balancing conflicting interests is therefore not an abdication of our authority but is a resort to a widely accepted judicial process of reasoning. If the Act's provisions serve the purpose of maintaining the public's confidence in the Federal judiciary, they will have served us well, despite the fact that we know such requirements undoubtedly chip away at judicial independence. Judges have a right to be concerned with any diminution of their freedom to act.

We might well remember the admonition of the distinguished Chief Judge of the Second Circuit, Irving R Kaulfman, who pointed out in his recent Yale Law Journal article, Chilling Judicial Independence, that "if there is any reason to be drawn from the political turmoil of recent years, it is the indispensible need for a judiciary able to serve, in the words of Edmund Burke, as a single 'safe asylum' during times of crisis."

4.33 Given the fact that the United States Supreme Court did not grant certiorari to review the case, *Duplantier v United States* effectively terminated judicial challenges to the legislation.

FUNCTIONAL PROBLEMS

4.34 A major problem in the United States with this legislation has been concern over judicial security. For this reason the Ethics in Government Act allows judges to redact information from their financial disclosure reports under certain circumstances. Congress passed this redaction provision in 1998 by adding a new subsection to the statute. Originally the redaction provision was to be for a limited period of time. There was real debate about allowing that exception. But the redaction provision has been extended, and is still in force today.

4.35 A judge's report may be redacted "(i) to the extent necessary to protect the individual who filed the report; and (ii) for so long as the danger to such individual exists." The Code charges the US Judicial Conference, in consultation with the Department of Justice, with the task of submitting to the House and Senate Committees on the Judiciary an annual report documenting redactions.

4.36 Just how this has worked can be seen from a Report by the Government Accounting Office.[28] This audit examined the financial disclosure of reports filed between 1999 and 2002 by more than 2000 judges. About 10% of judges who filed reports each year requested redactions and the relevant considering committee granted 592 of the 661 redaction requests in that period. As a general principle redactions were granted to prevent the disclosure of first, unsecured

28 GAO, 04-696NI June 30, 2004.

locations of judges and members of their families; and secondly, information that creates a clear concern for specific security threats. This process is a very full and obviously time consuming one. It includes sending the security request to the United States Marshalls Service for a security consultation.[29]

4.37 Practical problems have included processing response times (routinely towards 90 days) and inconsistent responses from the USMS to requests for security consultations. Unsurprisingly the Government Accounting Office made recommendations for improved procedures.

4.38 One specific incident caused significant national concern as to the judiciary's desire to protect judges' privacy and the public's right to access to information that might assist to prevent conflicts of interest. This is colloquially known as the AP News incident. A media site which was particularly focussed on criminal justice requested all financial disclosure reports filed by Federal judges in 1998. The Judicial Conference declined the request and AP filed suit in the Federal Court. The Judicial Conference then reversed its decision and said it would allow the relevant reports to be available on the internet, recognising that the statutory language did not permit withholding the reports in their entirety from news organisations. AP could not be refused access to the reports. But this then raised the problem that the Judicial Conference was faced with removing some personal information submitted by judges but which was not required by the Act, such as home addresses and the names of spouses and children. The whole affair became a prolonged and messy one which sadly, in the end, did little to enhance public confidence in the judiciary.

4.39 Today it is possible to go to the internet and look at the forms of all judges who have filed: see www.judicialwatch.org/judicial-financial-disclosure. There are routinely "investigative" articles on judges who are said not to have fully complied.[30]

29 The process is fully discussed in Goldstein, "Re-Examining Financial Disclosure Procedures for the Federal Judiciary" (2005) 18 Georgetown Journal of Legal Ethics 759.

30 See, as only one example, *Star Tribune* "Judges Fail to Fully Comply with Financial Disclosures" reviewing the reports of 9 Supreme Court Justices and the judges in three of the 12 US judicial circuits. See < www.startribune.com/stonline/html/westpub/disclose.htm > . This article is instructive as to the sort of evasions which were detected to have taken place.

Chapter 5

A voluntary register of judges' pecuniary interests – India

BACKGROUND

5.1 It is useful to now consider a regime where the judges have, albeit under some pressure, voluntarily undertaken disclosure of their pecuniary assets.

5.2 In the mid-1990s, the Indian judiciary began to endeavour to codify, in an essentially self-regulatory regime, the fundamentals of judicial ethics.

5.3 On 7 May 1997, a meeting of the Full Court of the Supreme Court of India resolved that every judge of that Court should make a full declaration to the Chief Justice of India of his or her assets. Declarations were to be made on appointment, or, in the case of sitting judges, within a reasonable time of the resolution being adopted. There was also to be continuous disclosure in the event of a judge acquiring significant assets not previously declared.

5.4 One commentator has suggested that the purpose of this provision was to "check whether a Judge has acquired wealth disproportionate to his known source of income after assuming office as a Judge". Clearly, attributing that purpose to the resolution implies that corruption was a primary objective. However the other provisions of the Code make it plain enough that the importance of avoiding conflicts of interest was another distinct objective.

5.5 The resolution contemplated that assets included real estate and investments. Declarations would be confidential, and the Chief Justice would also make a declaration for the purposes of the record.

5.6 At the May 1997 meeting, the judges also considered a draft "Restatement of Values of Judicial Life", which amounted to a code of judicial ethics. That draft code emphasised the importance of individual judges maintaining impartiality, both actual and perceived.

5.7 The code was revisited at the Conference of the Chief Justices of all High Courts of India in December 1999. It was adopted unanimously by the Conference, with special reference made to the 1997 resolution on asset declarations.

THE ADVENT OF THE RIGHT TO INFORMATION ACT 2005

5.8 The difficulty with this voluntary code approach was that there would likely have been no legal basis to bring proceedings against recalcitrant judges.

5.9 A 2005 Right to Information Act changed the whole context of things in India. That Act requires public authorities, through designated information officers, (a Central Public Information Officer (CPIO) or State Public Information Officer, depending on the context) to provide, on request, official information, unless a statutory exemption applies.[31] If an exemption applies and a request is thereby declined, the Information Officer acting for the public authority must give reasons for declining the request.[32] An appeal lies from the information officer's decision to a nominated "Appellate Authority" within the public authority, who must be an officer senior in rank to the information officer, from the information officer's decision.[33] There is then a second appeal to the relevant Information Commission from the Appellate Authority's decision.[34]

5.10 In November 2007 a Mr Subhash Agarwal, apparently a right to information activist, made a request to the Supreme Court of India's CPIO for a copy of the 1997 resolution and information on any declaration of assets made pursuant to that resolution. He also requested information about whether high court judges had made any such disclosures to the respective state chief justices.

5.11 The CIPO declined the request on the footing that the information was not held under the control of the Supreme Court Registry. The Appellate Authority remitted the matter to the CPIO on the basis that the CPIO had not considered whether to transfer the request to another public authority that might have the requested information, as required under section 6(3). The CPIO once again declined the request. It seems to have been diverted by the part of the request seeking information about asset declarations in the state high courts (suggesting that Mr Agarwal had taken an illegitimate short cut by approaching the Supreme Court directly for that information, rather than going to the state courts).

5.12 Mr Agarwal then took a second appeal to the Central Information Commission (CIC), which upheld the appeal and directed the CPIO to release the information.

5.13 The CPIO, together with the Registrar of the Supreme Court, then sought judicial review by the Delhi High Court of the CIC's determination. The case was heard by the Hon Mr Justice Bhat, who delivered a judgment on 2 September 2009.[35] His Honour noted at the outset that the petitioners were not seeking particular declarations of assets by judges, but rather to clarify, as a fundamental question of law, the scope of the Right to Information Act. It was said for the petitioners that the judges were "not opposed to declaring their assets", provided that such declarations were in accordance with due procedure laid down by law prescribing which office the declarations were to be made to; the form and content of declarations described with sufficient definition or clarity; and, providing for proper safeguards to prevent the misuse of the information made available.

31 Right to Information Act 2005 (India), s 7(1).

32 Ibid, s 7(8).

33 Ibid, s 19(1).

34 Ibid, s 19(3).

35 *The Central Public Information Office, Supreme Court of India v Agarwal*, HC of Delhi at New Delhi WP(C) 288/2009, 2 September 2009.

5.14 The judge declined to review the CIC's determination but ordered the CPIO to release the information about *the existence of* the declarations, noting that information about the contents of the declarations had not been sought.[36] But in doing so, the Judge entirely rejected the grounds for relief the petitioners had advanced.

5.15 In the course of his judgment, the High Court Judge dismissed arguments that the Chief Justice was not a public authority; that the declarations were not "information" for the purposes of the Act; that the Chief Justice held the information in a fiduciary capacity and as such owned a duty of confidence; and that the information was essentially private in nature and to require disclosure would be an unwarranted invasion of privacy in terms of the Act (but information about the declarations, for example whether there were any declarations, was not subject to the privacy exemption). Further, an argument that the resolution in failing to define assets and investments clearly enough was vague to the point of unenforceability was dismissed.

5.16 In a wide-ranging and grave postscript, the Judge discussed the wider issues facing India's judiciary and their impact on public perceptions of, and confidence in, the judiciary.

5.17 After this hearing, and what the *Times of India* suggested had been a "mammoth" internal debate, the Supreme Court judges themselves agreed to place the requested information on the Supreme Court website. That information is there and can be inspected today. It goes far beyond what Mr Agarwal had initially requested. In their declarations of assets, the judges listed their interests in real estate and in various investments, property, such as vehicles owned, life insurance policies, jewellery, cutlery and also detailed bank balances, and debts owed, including unpaid bills.

5.18 Bipartisan opposition blocked an attempt by the Minister of Justice to introduce the Judges' Declaration of Assets and Liabilities Bill 2009. But that opposition appears to have coalesced around the objection that the Bill as sought to be introduced would have prevented asset declarations from being made public.

5.19 Notwithstanding the judges' disclosure of their assets, Bhat J's decision was appealed to a Full Bench of the High Court. The issues on appeal were whether Mr Agarwal had a right to information; whether the Chief Justice held the information in a fiduciary capacity; and whether the privacy exemption applied. That appeal was dismissed outright in a judgment delivered on 12 January 2010.[37]

36 Ibid, at 7.

37 Secretary-General, *Supreme Court of India v Agarwal*, High Court of Delhi at New Delhi, LPA 501/2009, 12 January 2010.

The appeal goes ahead

5.20 The judgment is a wide ranging one, with reference to a wealth of material from a number of common law jurisdictions and international legal material. The appellate court reached its conclusion, essentially upholding the High Court on a number of bases, including the "Judges Restatement of the Values of Judicial Life" and international instruments such as the Bangalore Principles;[38] what it regarded as the tide of international legal development; and the application of the particular Indian statutes.

5.21 The Chief Justice concluded with an epilogue to the judgment, as follows:[39]

> It was Edmund Burke who observed that "all persons possessing a portion of power ought to be strongly… impressed with an idea that they act in trust and that they are to account for their conduct in that trust." Accountability of the judiciary cannot be seen in isolation. It must be viewed in the context of the general trend to render governors answerable to the people in ways that are transparent, accessible and effective. Behind this notion is a concept that the wielders of power – legislative, executive and judicial – are entrusted to perform their functions on condition that they account for their stewardship to the people who authorise them to exercise such power. Well defined and publicly known standards and procedures compliment, rather than diminish, the notion of judicial independence. Democracy expects openness and openness is concomitant of free society. Sunlight is the best disinfectant.

Other courts follow suit

5.22 Since the developments discussed above, a number of high courts (high courts being organised in districts in India) have now followed the lead of the Supreme Court of India and voluntarily make publicly accessible asset declarations.

CONCLUSION

5.23 These developments cannot simplistically be dismissed as a reaction to corruption, although sadly it appears to be accepted that there have been known instances of that vice within India. Nor can it be said that the judges "jumped before they were pushed". The developments that have taken place have been part of a decade-long period of development in Indian jurisprudence, and a concern for the enlargement of the greater accountability of the judiciary in contemporary Indian society.

38 Bangalore Principles of Judicial Conduct 2002.

39 Secretary General, above n 37, at [121-122].

Chapter 6

An emerging register of judges' pecuniary interests – South Africa

INTRODUCTION

6.1 The South African Judicial Service Commission Amendment Act was passed into law in late 2008, and came into force on 1 June 2010. In addition to establishing a Judicial Conduct Committee to receive and deal with complaints about judges, the Amendment Act provides for the development of a code of judicial conduct that judges must adhere to, and the establishment and maintenance of a register of judges' "registrable interests".

6.2 Although it has been over two years since the Amendment Act was passed, the South African scheme for the disclosure of judges' interests is still in the process of being implemented. Regulations detailing matters such as what constitutes a registrable interest, the format of the register, timing of disclosure, and associated forms, had yet to be finalised at the time this Issues Paper was sent for publication. A commentator has observed that "[i]t appears that contentious issues, including allowing extra-judicial work, especially in the case of retired judges, ... are contributing to stalling the final stages of the process."[40]

BACKGROUND

6.3 The development of a register of judges' registrable interests in South Africa needs to be seen in the context of the unique history of that country. The Institute for Democracy in South Africa has observed that a truly independent judiciary is a relatively new idea in South Africa, and that, prior to 1994, the apartheid-era judiciary "acted as an extension of executive power through its regular enforcement of repressive and racial biased legislation."[41] Measures to improve judicial accountability are therefore important in building and maintaining trust and confidence in the post-apartheid judiciary.

40 Shireen Mukadam "Verdict Still Out on South African Judicial Independence Versus Accountability", Institute for Security Studies News, (16 February 2011) < www.iss.co.za > .

41 Institute for Democracy in South Africa "Judicial Accountability Mechanisms: A Resource Document" March 2007 at 3.

6.4 Much of the impetus for the Amendment Act appears to have arisen from controversy surrounding a complaint to the Judicial Service Commission concerning Cape Town Judge President John Hlophe and his relationship with Oasis, a Cape Town financial services company.

6.5 Oasis issued a defamation claim against Judge Desai, claiming that the Judge had made a series of defamatory statements accusing it of fraud.

6.6 Litigants require the permission of a Judge President to sue a judge in South Africa. Hlophe granted Oasis that permission in October 2004.

6.7 It was subsequently revealed that Hlophe was receiving a R10,000 monthly retainer from Oasis. Reports suggested he received nearly R500,000 in payments from Oasis over several years, including the period during which he was deliberating on Oasis's application to sue Judge Desai.[42]

6.8 Hlophe denied being on a retainer, saying that he was given expense payments for providing his expertise.[43] Hlophe also claimed that the since deceased Justice Minister Dullah Omar had given him permission to hold outside business interests. Media reports stated that the Justice Department was unaware of any such permission, and there was no record of it in the Department.[44]

6.9 In May 2006 media suggested an asset register for judges was in the offing.[45] According to one report, the Justice Minister said his Department had "no clue" what the interests were of the various judges, or whether or not a judge was a director of "some company". He said the Department was promoting legislation about disciplinary matters applying to judges.[46]

6.10 The Judicial Service Commission was apparently divided over whether the complaint against Hlophe was serious enough to warrant a formal impeachment inquiry under the Constitution Act. Eventually, the Commission decided that Hlophe would retain his position on the Cape Bench. The Commission said the evidence was too limited to justify formal proceedings, although it found Hlophe's explanation "unsatisfactory in certain respects".[47] It was unanimous in its view that it was inappropriate for Hlope to have given permission to Oasis to sue Judge Desai without disclosing his relationship with Oasis.[48]

6.11 Following the Judicial Service Commission's decision, Hlophe was urged to resign by several high-ranking members of the Cape Bar, and was heavily criticised by former Constitutional Court Judge Johann Kriegler.[49] Media reports suggested the Hlophe row divided the legal profession over whether he had brought the judiciary into disrepute and whether he should resign.[50] The Judicial

42 "DA wants Hlophe-Oasis probe re-opened" *Legalbrief Today* (8 February 2007).

43 "Hlophe denies retainer allegation", *Legalbrief Today* (1 April 2006).

44 "Minister unable to confirm Hlophe's claim", *Legalbrief Today* (12 May 2006).

45 Ibid.

46 Ibid.

47 "Complaint against Judge President Hlophe" *Legalbrief Today* (4 October 2007).

48 Ibid.

49 "There cannot be public confidence in Judge Hlophe" *Legalbrief Today* (9 October 2007).

50 "Hlophe's clearance raises questions" *Legalbrief Today* (11 December 2006).

Service Commission's decision led to calls to accelerate the formulation of an appropriate complaints mechanism dealing with judges to cover the procedure to be followed and appropriate sanctions in cases of adverse findings.[51]

REGISTER OF JUDGES' REGISTRABLE INTERESTS

Legislative provisions

6.12 Section 11 of the Judicial Service Commission Amendment Act 2008 provides that a judge performing active service "may not hold or perform any other office of profit", and "may not receive in respect of any service any fees, emoluments or other remuneration or allowances apart from his or her salary and any other amount which may be payable to him or her in his or her capacity as a judge." With the consent of the Minister of Justice, acting after consultation with the Chief Justice, a judge may receive royalties for legal books written or edited by the judge. There are also detailed provisions regarding the position of judges who have been discharged from active service and the Ministerial consent required for them to hold other office of profit or do other remunerated work.[52]

6.13 Section 13 provides for the disclosure of judges' registrable interests. There is to be a Registrar, who is responsible for the register to record the particulars of judges' registrable interests. The Chief Justice supervises, controls and directs the Registrar."[53]

6.14 Every judge must disclose to the Registrar, in the prescribed form, particulars of all his or her registrable interests, and those of his or her immediate family members (that is, the judge's spouse or partner, dependent children, and family members living in the household with the judge). An initial disclosure is to be made within 60 days of a date fixed by the President by proclamation, and annually thereafter.

6.15 As part of its annual reporting requirements, the Judicial Service Commission is required to provide information on all matters relating to, including the degree of compliance with, the register of judges' registrable interests, as reported by the Registrar.[54]

6.16 The grounds upon which a complaint against a judge may be made include "any wilful or grossly negligent breach of the code of judicial conduct, including any failure to comply with any regulation concerning the register of judges' registrable interests."[55]

6.17 The Minister of Justice, in consultation with the Chief Justice, is required to make regulations regarding the content and management of the register, including:[56]

- the format of the register;
- the kinds of interests of judges and their immediate family members that are regarded as registrable interests;

51 "Complaints procedure against judges urged" *Legalbrief Today* (24 October 2007).

52 Judicial Service Commission Amendment Act 2008 (SA), s 11.

53 Ibid, s 37(3).

54 Judicial Service Commission Amendment Act 2008 (SA), s 8.

55 Ibid, s 14.

56 Ibid, s 15(5).

- the manner and instances in which, and the time limits within which, registrable interests must be disclosed to the Registrar;
- a confidential and a public part of the register, and the interests to be recorded in those parts respectively;
- the recording, in the public part of the register, of all registrable interests derived through the Ministerial consent process in section 11;
- a procedure providing for public access to the public part of the register, and a procedure for providing access to, and maintaining confidentiality of, the confidential part of the register; and
- the lodging of a complaint by the Registrar in the event of failure to register any registrable interest by any judge, including a failure to adhere to time limits, or disclosure of false or misleading information by any judge.

6.18 The regulations must be approved by Parliament. The Act provides that draft regulations are to be tabled in parliament and Parliament may, after obtaining and considering public comment, approve the regulations with or without any changes effected by Parliament.

6.19 The Minister was required to table the regulations for approval by Parliament within four months of the commencement of the empowering provision.

Draft regulations

6.20 News reports in January 2011 indicated that legislators were close to agreeing to the details of an enforceable judicial code of conduct, as well as a register of financial interests for judges.[57] The Justice Department has invited interested parties to submit written comments on the proposed code of judicial conduct, regulations to govern the declaration of judges' financial interests, and mechanisms to investigate complaints against members of the judiciary. In late 2010, Parliament established a multiparty ad-hoc committee to process submissions. Public hearings were held in Parliament on 19 January 2011.

6.21 The draft regulations provide that the following interests are to be declared by judges in active service:[58]

(1) Immovable property, including immovable property outside South Africa.

(2) Shares and other financial interests in companies and other corporate entities.

(3) Directorships or business interests in a company, close corporation, partnership or any other business enterprise.

(4) Any royalties, income or other benefits derived from the application of section 11 of the Act.

(5) Sponsorships, including financial assistance from any source other than income earned by a judge in his or her judicial capacity, or earned by an immediate family member in his or her personal capacity.

(6) Gifts, other than a gift received from an immediate family member, with a value of more than R1000 or gifts received from a single source with a cumulative value of more than R1000 in a calendar year, and including hospitality intended as such.

(7) Any other financial income not derived from the holding of judicial office.

57 "Judges under closer scrutiny" IOL News (11 January 2011) < www.iol.co.za > .

58 Draft regulations as provided on the site of the Parliamentary Monitoring Group < www.pmg.org.za > , Annexure A.

6.22 Virtually identical provisions apply to acting judges and immediate family members of judges.

6.23 The draft regulations also impose disclosure obligations on judges who have been discharged from active service, although they are not required to disclose immovable property or gifts. This has been criticised by some submitters.[59]

6.24 The Minister, acting after consultation with the Chief Justice, may issue guidelines regarding any other criteria to be applied when considering the granting of consent to a judge who has been discharged from active service.

6.25 The draft regulations specify the format of the register of judges' registrable interests, and contain forms for the disclosure of registrable interests, for consent in terms of Ministerial consent under section 11(1) and (2) of the Judicial Service Commission Amendment Act, and for access to information in the confidential part of the register of judges' registrable interests.

6.26 The draft regulations provide that subject to section 13(4) of the Act, a judge must lodge the first disclosure with the registrar within 30 days of his or her appointment as a judge, and thereafter within 30 days after acquiring, or learning of the existence of, a new registrable interest.

6.27 In the draft regulations, the Registrar is required to enter the particulars of a disclosure by a judge in the register and must give a copy of all entries to the relevant judge. All entries relating to the registrable interests of a family member of a judge must be made in the confidential part of the register. During March every year, a judge must inform the Registrar in writing whether the entries are accurate and, if applicable, make such further disclosures or inform the Registrar of any amendments.

6.28 The draft regulations provide that if the Registrar has reason to believe that a judge:

- has failed or is failing to comply with a provision of the regulations; or
- may have disclosed incorrect or misleading information,

the Registrar must immediately invite that judge in writing to comply with the provision in question or to correct any information so disclosed. If after 30 days the Registrar still has reason to believe that the judge has failed, the Registrar is obliged to lodge a complaint against that judge.

6.29 The public part of the register may be inspected by any person at the office of the Registrar during office hours and under the supervision of a person designated by the Registrar.

6.30 Only the Heads of Court, the Registrar and any official designated in writing by the Registrar have unrestricted access to the confidential part of the register. Any other person wishing to access information in the confidential part of the Register must apply in writing.

59 Cape Bar Council "Comment: Code of Judicial conduct and Regulations on Judges' Registrable Interests" (Capetown, 24 January 2011) at 4; Institute for Accountability in Southern Africa, submission on draft code and regulations < www.ifaisa.org > .

Public reaction

6.31 It appears the South African judiciary did not agree unanimously on the desirability or otherwise of an asset register, however some concerns seemed to have more to do with questions of degree and practicality than with issues such as independence.[60] An example cited was "given that a judge who takes a bribe is unlikely to disclose it regardless of the existence of a mandatory register, the requirement will likely accomplish little on a practical level to prevent corruption or dishonesty."[61]

6.32 Many people who support mandatory disclosure believe the obligation would strengthen judicial independence and public perceptions of impartiality:[62]

> An asset register would increase the public's faith in the impartiality of judges and assure litigants that their judge is not being inappropriately influenced by outside interests. Additionally, mandatory disclosure would prevent selectiveness in "outing" of judges with business interests.

6.33 The Institute for Security Studies recently stated that:[63]

> While it is acknowledged that there is a delicate balance between judicial independence and accountability, it is possible that the two can be mutually reinforcing, and result in the greater good. How the people of South Africa view the judiciary, whether they trust judges' rulings and believe that the judiciary serves as a reliable and easily accessible instrument for their protection against the government and the private sector is critical. Both government and the judiciary need to take cognisance that while there may be a lot at stake by the proposed Code and Register, there is much more to gain in terms of advancing transformation and the consolidation of democracy. Ultimately, power can only be legitimized if combined with accountability. It is time this theory was put into practice.

6.34 The effect of the South African register of judges' interests remains to be seen. The Law Commission will follow the developments concerning the implementation of the South African register over the coming months.

60 A Gordon and D Bruce "Transformation and the Independence of the Judiciary in South Africa" Centre for the Study of Violence and Reconciliation. www.csvr.org.

61 Ibid.

62 *Business Day* (South Africa) (16 May 2006).

63 Shireen Mukadam "Verdict Still Out on South African Judicial Independence versus Accountability" Institute for Security Studies, 16 February 2011.

Chapter 7

The register of pecuniary and other specified interests of Members of Parliament

7.1 In New Zealand, members of Parliament must make returns of pecuniary and other specified interests in accordance with the provisions of Part 1 of Appendix B of the Standing Orders of the House of Representatives.[64] These returns are maintained in a register by the Registrar.

7.2 The register was recently described by the Standing Orders Committee as follows:[65]

> The register is a public record of specified financial and other interests that are personal to each member. The register provides information of any interest or other material benefit that a member holds or may receive which might reasonably be thought by others to influence his or her action in Parliament or taken in their capacity as a member of Parliament.
>
> The purpose of the register is to strengthen public trust and confidence in the parliamentary process by improving transparency, openness and accountability. It seeks to achieve this purpose by making public the interests of all members of Parliament. This allows public scrutiny of the manner in which members keep their official and private capacities separate in general terms. It allows the public to identify members' financial and other business or personal interests that could influence the manner in which members undertake their public functions.
>
> The essential purpose of the register is achieved by members being transparent about their interests.

64 Standing Orders of the House of Representatives, SO 159.

65 New Zealand Parliament *Standing Orders Committee Review of Standing Orders Relating to Pecuniary Interests* Report of the Standing Orders Committee December 2010 AJHR; I.18A: 2010.

7.3 The functions of the Registrar are to:

- compile and maintain the register;
- provide advice and guidance to members of Parliament in connection with their obligations;
- receive and determine requests for an inquiry under clause 15A of Appendix B, and, if the Registrar thinks fit, conduct and report to the House on any such inquiry.

7.4 The Registrar is either the Deputy Clerk or a person appointed by the Clerk, with the agreement of the Speaker, to act as Registrar. Dame Margaret Bazley currently holds this position.

7.5 The Registrar must supply a copy of each member's return to the Controller and Auditor-General. The Auditor-General is authorised to review the returns and to advise the Registrar of any matters arising from the review.

7.6 All returns and information held by the Registrar or by the Auditor-General relating to an individual member are confidential. They must be destroyed after three terms of Parliament.

7.7 The Registrar must publish a summary of the returns of current members within 90 days of the due date for transmitting initial and annual returns. The summary must contain a fair and accurate description of the information contained in members' returns. The Speaker must present the summary to the House. It is available for inspection by any person and is also on Parliament's website.

7.8 Before the summary of returns is published, each member is given a copy of the summary of their own return and has the opportunity to correct any error of transcription.

7.9 The Registrar is not required to undertake checks in relation to items registered.

7.10 The Standing Orders define "pecuniary interest" as "a matter or activity of financial benefit to the member that is required to be declared under clause 4 or clause 7 [of Appendix B]". "Other specified interest" means "a matter or activity that may not be of financial benefit to the member and that is required to be declared under clause 4 or clause 7".

7.11 Members of Parliament are required to make an initial return and then an annual return each year as at 31 January.

7.12 Every return must contain the following information for the previous 12 months as at the effective date of the return:[66]

- the name of each company of which the member is a director or holds or controls more than five per cent of the voting rights, and a description of the main business activities of each of those companies;

66 Standing Orders Appendix B, cl 4.

- the name of every other company or business entity in which the member has a pecuniary interest, and a description of the main business activities of each of those companies or entities;[67]
- if the member is employed, the name of each employer of the member and a description of the main business activities of each of those employers;
- the name of each trust of which the member is aware, or ought reasonably to be aware, that he or she is a beneficiary or a trustee, (other than registered superannuation schemes);
- if the member is a member of the governing body of an organisation or a trustee of a trust that receives, or has applied to receive, Government funding, the name of that organisation or trust and a description of the main activities of that organisation or trust, unless it is a Government department, a Crown entity, or a State enterprise;[68]
- the location of each parcel of real property in which the member has a legal interest or in which any such interest is held by a trust which the member knows (or ought reasonably to know) he or she is a beneficiary of, but does not include land held by a member as a trustee only;
- the name of each registered superannuation scheme in which the member has a pecuniary interest;
- the name of each debtor of the member who owes more than $50,000 to the member and a description, but not the amount, of such of the debts that are owed to the member by those debtors; and
- the name of each creditor of the member to whom the member owes more than $50,000, and a description, but not the amount, of each of the debts that are owed by the member to those creditors.

7.13 Relationship property settlements and debts owed to the member by the member's spouse, domestic partner, parent, child, step-child, foster-child or grandchild do not have to be disclosed.[69] Nor do short term debts for supply of goods or services.[70]

7.14 Every return must also contain:[71]

- the name of each country the member travelled to;
- the purpose of such travel;
- the name of each person who contributed to the costs of travel to and from the country (unless paid for by the member, the member's spouse or partner, the member's parent, child,[72] or grandchild);
- the name of each person who contributed to the accommodation costs incurred by the member while in the country;

67 A member does not have a pecuniary interest in a company or business entity (entity A) merely because the member has a pecuniary interest in another company or business entity that has a pecuniary interest in entity A. (Appendix B, clause 4(2)).

68 A member who is patron or vice-patron of an organisation that receives, or has applied to receive, Government funding, and who is not also a member of its governing body, does not have to name the organisation, unless the member has been actively involved in seeking such funding during the period covered by the return.

69 SO 159, Appendix B, cl 5.

70 SO 159, Appendix B, cl 6.

71 Standing Orders Appendix B, cl 7.

72 This includes a step-child or foster child.

- a description of each gift received by the member that has an estimated market value in New Zealand of more than $500 and the name of the donor of each of those gifts;
- a description of all debts of more than $500 that were owing by the member that were discharged or paid by any other person and the names of each of those persons;
- a description of each payment received, and not previously declared, by the member for activities in which the member was involved, including the source of each payment, except that a description is not required of,
- any payment paid as a salary or allowances under the Civil List Act 1979, or the Remuneration Authority Act 1977, or as a funding entitlement for parliamentary purposes under the Parliamentary Service Act 2000; or
- any payment paid in respect of any activity in which the member concluded his or her involvement prior to becoming a member.

7.15 Any member who becomes aware of an error or omission in any return previously made by that member must advise the Registrar as soon as practicable after becoming aware of it. The Registrar may, at the Registrar's own discretion, publish amendments on a website to correct such errors or omissions.

7.16 It is the responsibility of each member of Parliament to ensure that he or she fulfils the obligations imposed by the appendix to the Standing Orders. The Registrar is not required to notify any member of that member's failure to transmit a return by the due date or of any error or omission in that member's return, or to obtain any return from a member.

7.17 A member who has reasonable grounds to believe that another member has not complied with his or her obligations to make a return may request that the Registrar conduct an inquiry into the matter. The Standing Orders set out detailed provisions relating to such an inquiry.[73]

7.18 It may be a contempt of Parliament for a member to:[74]

- knowingly fail to make a return of pecuniary and other specified interests by the due date;
- knowingly provide false or misleading information in a return of pecuniary and other specified interests; or
- request without reasonable grounds that the Registrar conduct an inquiry into another member.

7.19 Before participating in the consideration of any item of business, a member must declare any financial interest that the member has in that business, unless the interest is contained in the register.[75]

7.20 Members are not required to disclose the actual value, amount, or extent of any asset, payment, interest, gift, contribution, or debt.[76] The publicly available information is therefore of a very general nature.

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73 Appendix B, cl 15A.

74 SO 401.

75 SO 161.

76 Standing Orders Appendix B, cl 9.

7.21 To illustrate the level of detail presently required for the purposes of the Parliamentary register, we set out below an excerpt from the summary of returns pertaining to party leaders Rt Hon John Key and Hon Phil Goff:[77]

Hon John KEY (National, Helensville)

2 Interests (such as shares and bonds) in companies and business entities

Little Nell – property investment, Aspen, Colorado

Bank of America – banking

Cauldron (sold 16 February 2010) – mining

4 Beneficial interests in trusts

JP and BI Key Family Trust

Aldgate Trust (blind trust)

6 Real property

Family home, Parnell, Auckland

Office, Huapai, Auckland

Holiday home, Omaha, Rodney

Holiday home, Maui, USA

Apartment, London, England

Apartment, Wellington

7 Superannuation schemes

Individual Retirement Plan

8 Debtors

JP and BI Key Family Trust – trust loan – 0% interest

Bank of America – short term deposit

National Bank of New Zealand – short term deposit

10 Overseas travel costs

China – official visit

Australia – Pacific Islands Forum

Australia – official visit

Malaysia – official visit

Japan – official visit

Thailand – East Asia Summit

Singapore – APEC

Trinidad and Tobago – CHOGM

The primary expenses related to this travel were funded by the Crown. Some accommodation, internal flights, and/or other incidental expenses were met by the host government.

77 New Zealand House of Representatives Register of Pecuniary Interests of Members of Parliament: Summary of annual returns as at 31 January 2010 J7.

11 Gifts

Bottled water – Spring Fresh Limited

Tickets to Top Gear live show and dinner – Top Gear live/Paul Blomfield Consulting

Large silver A$30 Limited Edition Koala Coin – Grahame Jesus Maxwell Jeff Coldrey

Glass urns with gold embossing (x2), sterling silver photograph frame, bronze statute [sic] of horse – Their Majesties King Juan Carlos I and Queen Sofia of Spain

2009 signed All Blacks shirt – New Zealand Rugby Union

Iberico bellota ham – HM King Juan Carlos I of Spain

Selection of ties – Kia kaha

RW Williams shirt and boots (official clothing for pacific Islands Forum) – Government of Australia

Large framed photographs of ANZACs – Prime Minister of Australia

Trinket box made of 5000-year old red gum, with sterling silver ornament – The Committee for Economic Development for Australia

Greenstone mere – Pariroa Marae

Shirt, tie and cufflinks – Nicholas Jermyn

Pewter vase – Prime Minister of Malaysia

Whalebone carved ornament in shape of whale tail – Whale Watch Kaikoura

Tickets to All Black games in Hamilton, Wellington, Tokyo and Sydney – New Zealand Rugby Union

Hon Phil GOFF (Labour, Mt Roskill)

2 Interests (such as shares and bonds) in companies and business entities

Tower Limited – Life insurance

Mansfield Towers Limited – Wellington flat company shares

5 Organisations and trusts seeking Government funding

Business and Parliament Trust – promotes mutual understanding between members of Parliament and the business sector

6 Real property

Family home and farm property (jointly owned), Auckland

House (jointly owned), Mt Roskill

7 Superannuation schemes

Global Retirement Trust Superannuation Scheme

8 Debtors

Westpac – term deposit – market interest rate

Bank of New Zealand – term deposit – market interest rate

9 Creditors

Westpac – mortgage – market interest rate

10 Overseas travel costs

Chile – Progressive Governance Summit. Contributor to accommodation: Policy Network and Communications Limited

7.22 The register of judges' pecuniary interests envisaged in the Member's Bill appears to require a similar level of detail in judges' disclosures as is required for members of Parliament.

7.23 The operation of the scheme relating to the pecuniary and other specified interests of members of Parliament was reviewed in 2010.[78] The review indicated that returns by members of Parliament have always been timely. The biggest difficulty appears to relate to beneficial interests in trusts.[79] This term has been given an extended meaning for the purposes of this scheme: it is not now restricted to "actual, present interests", but also catches potential interests as a discretionary beneficiary.

78 New Zealand Parliament *Standing Orders Committee Review of Standing Orders Relating to Pecuniary Interests* Report of the Standing Orders Committee December 2010 AJHR; I.18A: 2010.

79 Ibid at 8.

Chapter 8

A pecuniary interests register for judges in New Zealand: the central issues

INTRODUCTION

8.1 In this chapter we set out what appear to the Commission to be the principal issues arising in this subject area, and advance some short commentary upon them. We seek submissions on these issues or any other matters which submitters think ought to be considered in this subject area.

8.2 The primary question is whether a register of judges' pecuniary interests is necessary or appropriate in New Zealand.

8.3 If the answer to this question is yes, there are a number of subsidiary questions about the scope and requirements of the register, such as who it will apply to, what level of detail is required, and how widely available the resulting information should be.

IS THE PRESENT LAW ON RECUSAL FOR FINANCIAL INTERESTS DEFICIENT?

8.4 New Zealand judges are presently subject to both ethical codes evolved by the judges themselves and formal common law requirements which have recently been reviewed by the Supreme Court of New Zealand. *Saxmere Company Limited v Wool Board Disestablishment Company Limited* therefore represents the law in New Zealand.[80] Further, a judge who does not comply with those obligations is potentially susceptible to a complaint under the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004. A well-founded complaint under that statute could ultimately lead to the dismissal of the judge by Parliament, pursuant to the provisions of section 23 of the Constitution Act 1986.

80 *Saxmere Company Limited v Wool Board Disestablishment Company Limited* [2009] NZSC 72; [2010] 1 NZLR 35.

8.5 The Commission is provisionally of the view that the substantive law relating to recusal for financial interests by a judge is now well settled in New Zealand, and is consistent with the law in comparable jurisdictions such as the United Kingdom, Australia and Canada. In our preliminary view, no legislative intervention is therefore required to this substantive law. We would be interested in the views of submitters in this regard.

8.6 We consider that the process by which recusal applications are entertained in the various courts could usefully stand refinement and publication. But those are issues which would normally be better dealt with by procedural vehicles such as rules of court, or a simple amendment in a revised Courts Act enabling (as we have tentatively suggested) the publication of *Gazette* notices as to the procedure the court will adopt on recusal applications.

WHAT PRECISELY IS SOUGHT TO BE CAUGHT AND ADDRESSED BY LEGISLATION RELATING TO A REGISTER OF JUDGES' PECUNIARY INTERESTS?

8.7 What precisely is sought to be caught and addressed by legislation relating to a register of judges' pecuniary interests? The objective(s) of the exercise of establishing a register will normally influence the character and shape of the particular legislation.

8.8 One reason for having such a register would be if there was any evidence of judicial corruption in New Zealand. Asset and interests disclosure has become a key global anti-corruption issue, as evidenced by its inclusion in the UN Convention Against Corruption, which states:[81]

> Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.

8.9 There are jurisdictions which have enacted judicial register legislation because of a concern with judicial corruption, and when they have done so, the reach of the legislation has usually gone so far as to include at least senior court officials and other persons who are in a position to impact upon the advancement of litigation and prosecutions.

8.10 There is no record of corruption by members of Government in New Zealand. Only one member of Parliament – Mr Taito Phillip Field – has ever been prosecuted for corruption as a member. He was convicted and is presently serving a prison sentence (although he has applied for leave to appeal both his conviction and sentence to the Supreme Court).[82] We know of no evidence of corruption within the normal meaning of that term in the history of the New Zealand judiciary.

81 United Nations Convention Against Corruption, Article 8.5 (October 2003).

82 [2010] NZCA 556; SC 3/2011.

8.11 A second possible rationale for legislation of this character is advanced in the Member's Bill which is currently before the New Zealand Parliament. This is "the protection of the judiciary in the future". As the explanatory note puts it:

> Being obliged under law to declare pecuniary interests that might be relevant to the conduct of a future case in which one is involved would relieve a judge from a repetitive weight of responsibility to make discretionary judgements about his or her personal affairs as each case arises.

8.12 The notion seems to be that having made disclosure in a generic manner "a judge may freely proceed in the knowledge that, if he or she is appointed to adjudicate, public confidence for participation has already been met".[83]

8.13 This rationale as so advanced is designed to support the judiciary and endeavours to better meet situations such as arose in the case of Justice Wilson. But the Member's Bill as it stands would not have avoided that incident, because it would not have disclosed the precise state of the shareholders' accounts at issue.

8.14 A third argument for legislation of this character is what might be termed "the argument from governance". Under New Zealand law the judiciary is expressly a branch – the third arm – of government. Both Ministers and members of Parliament are required to make financial disclosure to reinforce public confidence. Why should the judiciary not do likewise?

8.15 An argument along these lines can be traced, in philosophical terms, back at least as far as Plato. One starts with the question, why do people organise themselves into society? To which the answer is, "to give the members of that society, all the members, the best chance of realising their better selves". Such a conception of the State makes the duty of those who hold power in it an elevated one. In the case of judges, the persons who exercise power should be a trained professional body. But even then they must be deflected from abusing the power they necessarily have to perform their role. Those who would hold power, including judicial power, must therefore renounce the temptations of human affection or material things.

8.16 This line of argument not only serves as a prop for a vehicle against abuse of power; it also seeks to teach both the public and those who serve it that there are more than usually elevated duties on the holders of the offices of this kind.

8.17 There are distinct echoes of this kind of argument in the United States jurisprudence and the recent pronouncements of the Indian appellate courts in the judges' assets litigation there. The argument is less a functional one than an argument of very high principle which, it is said, should obtain regardless of how things actually function on the ground.

8.18 However, we note that if the argument from governance relies on the duty of the Executive and parliamentary arms of government to make financial disclosure, then it should be treated with some caution. The obligation on members of the Executive to publicly disclose their financial interests established by the Standing Orders only extends to Ministers of the Crown, in so far as they have duties as members of Parliament. There is no legislative requirement for senior Government officials to disclose their financial interests.

83 Register of Pecuniary Interests of Judges Bill 2010 (240–1) (explanatory note) at 2.

IS THERE A PRACTICAL NEED FOR A REGISTER OF PECUNIARY INTERESTS FOR JUDGES?

8.19 If it is correct that the existing substantive common law is adequate, why is the additional protective element of a register required, particularly when it would come at some real cost?

8.20 There are very few cases of challenges based on pecuniary interests in New Zealand. The difficulty in practice has been rather with "association" cases, which inevitably are troublesome in a small country, but again are covered by the present common law.

8.21 However, that in itself is not a complete answer to the proposal to establish a register. It may be that there have been few cases of challenges based on pecuniary interests in New Zealand partly because there has been insufficient information available on which to establish whether or not there is a possible conflict. Greater transparency could assist in this regard. We are not implying that judges withhold information; the danger is rather that information may be overlooked.

8.22 While the existence of a register may not necessarily prevent conflicts arising, it may alert counsel or other members of the judiciary to the possibility (depending on the content of the register), so that they can be properly explored and recusal considered by the judge and the parties.

8.23 Even if there are few cases of challenge, there is a value in transparency because it increases public confidence in the integrity of public officials, deters conflicts of interest from arising, ensures standards of conduct and integrity remain high, and enhances accountability.

DESIGN OF A REGISTER

8.24 If the case for establishing a register of judges' pecuniary interests is made out, there are a number of questions about the scope and ambit of the design of the register that need to be considered.

To whom should the legislation apply?

8.25 If there is to be legislation, should it apply to all judges, or only to judges of some levels, or to all judicial employees and officials such as prosecutors and registrars? An argument can be made that if there is to be financial disclosure it should be required of all officials whose positions give them sufficient potential to influence the outcome of a case, whether as a result of a bribe or other improper influence.

8.26 The Member's Bill would require disclosure by judges of all formally constituted courts in New Zealand (see the definition of "judge" in clause 5). There are, however, more than 50 tribunals in New Zealand, many of which require a legally qualified tribunal chairman, dealing with a wide range of legal obligations. In the United Kingdom, there is a steady line of authority up to the House of Lords which holds that the same sort of recusal test as applies to judges should apply to such tribunal members.[84] In *Gough*, Lord Goff put it this way:[85]

> [t]he same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators.

84 *R v Gough* [1993] AC 646 (HL).

85 At 670.

8.27 Why should people exercising at least quasi-judicial powers not also be covered? In the United Kingdom, under the Tribunals, Courts and Enforcement Act 2007, most legally qualified tribunal chairmen (who deal with areas as diverse as tax and child support) are now required to swear a judicial oath and become "judges" for this sort of purpose. In effect, thereby almost 2700 new judges were created at one fell swoop. In the United States, Federal tribunal chairmen and senior officials would be caught by the Ethics in Government provisions referred to earlier.

8.28 In short, it is hard to see why, if there is to be an obligation of the character suggested by the Member's Bill, it should not be cast much wider.

What must be disclosed?

8.29 We have set out the contents of the relevant United States legislation and used examples of the reports filed by two senior judges to show how detailed the disclosure is required to be in that jurisdiction. The regime includes elements similar to that required by income tax systems, including basic income from all sources, assets such as investment (stocks and shares, etc.) bank accounts, pensions and intangibles, and real property and major items of personal property. Requiring disclosure of fiduciary interests in an asset disclosure regime is also important to guard against real or potential conflicts of interest. Disclosure is also required to include any significant financial liabilities.

8.30 In our view, for a register to identify actual conflicts of interests in relation to the judges in New Zealand, that regime would have to be more prescriptive and in-depth than that applying to members of Parliament. This is because of the requirement in the existing law that there be a real connection between the interest which is put forward as being disqualifying, and the particular matter which is before the court. To give a simple example from the existing case law, in *Muir v Commissioner of Inland Revenue,*[86] the High Court Judge whose interest was under scrutiny had an interest in forestry investments. But that interest was not sufficiently close to the kind of forestry interest which was at stake in the proceeding. This required "close connection" cannot be ascertained from investments stated at a high level of generality.

8.31 However, arguably a register does not need to identify an actual conflict in order to operate effectively. It need merely identify potential conflicts so that the issue in the particular case can be explored more fully. On that argument, a register containing only a level of detail similar to that required of members of Parliament would suffice.

8.32 We note that under the current requirements of the register of pecuniary interests for members of Parliament, a beneficial interest in a trust must be disclosed, but there is no requirement to list the details of the trust's assets. In those situations, the disclosure of the mere existence of an interest in a trust may not assist with identifying potential conflicts of interest. That suggests that to be effective, a register would need to identify the assets of the trust (unless it was a blind trust).

86 *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495.

8.33 Another question includes the wider ambit of the judge's family. Disclosure regimes have to deal with this problem because without a sufficiently wide circle the assets of spouses and minor children could be utilised to allow judges to hide income and assets. However, a definition that is cast too broadly would necessarily raise privacy issues and overburden the disclosure mechanism.

8.34 A further issue is the frequency of disclosures. In principle it might be thought that disclosures should be made before employment begins, perhaps when employment ends, and at some intervals in between. The burdens attendant on this and costs of the exercise ought properly to be taken into account.

8.35 To take a simple example, drawing on the broad context of the *Saxmere* case, many investment schemes involve partnerships and current accounts. Until a full accounting exercise is undertaken in a current account situation, it may be difficult for a person to know precisely whether he or she is in credit or in debit. This is an exercise which can be quite complex, particularly if valuations have to be obtained. The administrative burden in the detailed exercise which would be required to meet the present recusal law would be considerable.

What should be the ambit of disclosure?

8.36 A critical feature of any financial disclosure regulation is the extent to which information is to be available to the public. Generally speaking, the more public the information, the more effectively conflicts of interest can be monitored, whether by affected litigants or by the public and interest groups. But this may infringe on the legitimate privacy interests of judges and their families. There is a difficult issue here of the conflict between privacy interests of individuals and the public interest in transparency.

8.37 Under the Member's Bill the postulated regime is fully "public". The registrar responsible for the scheme must, within 90 days, "publish on a website and in booklet form the information contained in those returns", by judges (see clause 19).

8.38 An alternative would be to adopt something like a two-tier system, whereby judges would disclose detailed information to an authorised monitoring body, but only relevant summary details (such as the names of business interests without amounts) are made publicly available.

8.39 Yet another option would be to have access to disclosed information in a sense technically "public", but only at limited locations and on a proper application, with valid reasons. For example, information relating to a specified judge might be made available only to parties appearing before that judge.

8.40 It may be thought that the learning of the United States experience with the Federal judges is that the United States legislation, which extends not only to the assets, income and liabilities of the judge, but also their spouses and dependent children, goes too far and is unduly burdensome.

Security of judges

8.41 As we have noted, issues about security have posed very real difficulties for the disclosure of financial interests of judges in the United States. The concern in New Zealand may not be of the same order – there have been more serious incidents involving Federal judges in that jurisdiction than have happened in New Zealand. To take one instance, it is the case that there have been murders of United States Federal judges (although there may be questions as to how closely these incidents related to information obtained from the register).

8.42 However, there have been threats to judges in New Zealand in a variety of circumstances. If a register of interests required publication of particulars such as domestic residential addresses, that would be a matter of great concern to the New Zealand judiciary.

8.43 There are a number of other issues which would have to be confronted. For example, on the United States returns we have referred to, the signatures of judges have been blacked out, to prevent those signatures being electronically captured and then attached to manufactured legal documents.

8.44 The United States' experience demonstrates that provision has to be made for redaction of information where judges' security is at issue. It also shows that how this is to be done is a somewhat vexing problem.

Administering and monitoring disclosure by the judges?

8.45 Whatever model is adopted, mechanisms are required for the administration of the system. Someone has to collate the information provided by judges, arrange its publication, and follow up on judges who do not comply. An enforcement mechanism is also required.

8.46 The Member's Bill would vest responsibility for administering and monitoring disclosure by the judges in the Judicial Conduct Commissioner as a registrar. Essentially the registrar would be required to compile and maintain the register, provide advice and guidance to judges in connection with their obligations under the Act, publish the information in the manner contemplated by the Bill, and seemingly the Judicial Conduct Commissioner would be enabled to enforce the obligations under the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004.

8.47 We have some concerns of a public law character relating to this proposed model. In our view it is most unusual, and in general undesirable, to conflate the roles of administrator, enforcer, and judge. The Judicial Conduct Commissioner exercises a quasi-judicial role, and is judicially reviewable in that role.

8.48 On a practical level, the Judicial Conduct Commissioner has acknowledged that his office is presently under-resourced. It would appear that a significant shift of resources to that office would be required to enable it to satisfactorily discharge these new obligations.

8.49 An alternative would be to create a new office to deal with the administration and monitoring of disclosure. While this would avoid the conflation of roles discussed above, it would have significant resource implications.

8.50 A third alternative would be to require judges to return their disclosure forms to their respective Heads of Bench who would then be responsible for collating and arranging for their publication, possibly through the Ministry of Justice. Heads of Bench would then be able (and perhaps obliged) to forward a complaint to the Judicial Conduct Commissioner in cases of non-compliance.

8.51 One disadvantage of this option is that it would place a considerable administrative burden on the Heads of Bench.

Impact on the recruitment of judges

8.52 One practical issue for consideration is whether introducing a system that requires judges to publicly disclose their financial interests will have an adverse impact on the recruitment and retention of judges.

8.53 In the regular trial and appellate courts of New Zealand there are five Supreme Court Justices; nine Court of Appeal judges, 36 High Court Judges, and 134 District Court Judges. There are a relatively small number of judges in the specialist courts such as the Employment Court, the Maori Land Court and the Environment Court.

8.54 From at least the early 1990s on, determined efforts have been made to broaden and diversify the judiciary in New Zealand. People now come to the judiciary in New Zealand from a wider range of backgrounds. It follows that the kinds of lifestyles and financial arrangements judges may have when they take up their role are more diverse.

8.55 Lawyers who are appointed to the Bench may have existing investment schemes, some of which depend on longevity to achieve financial returns. Unless the new judge dismantles such schemes on appointment, they will have to be disclosed and described.

8.56 Before 1992, judges were entitled to superannuation benefits along the lines of the then Government Superannuation Scheme. Since 1992, judicial appointees have been entitled to a contributory scheme under which the judge contributes a set percentage of salary, and the Government contributes according to a statutory formula. Those monies must go to a registered superannuation scheme. Some judges have set up their own registered superannuation scheme to which their contributions and those of the Government are directed. This may necessarily involve those judges making investment decisions for those monies. One consequence therefore of the 1992 changes, was that post-1992 judges have been necessarily drawn more closely into having to make investment decisions. Again, details of such investments would need to be disclosed on a register of judges' pecuniary interests.

8.57 There is a risk that recruitment to the Bench, particularly of senior counsel, may be inhibited if judicial appointment carries with it a requirement of extensive public disclosure of a person's financial position. A judicial system should seek to recruit and retain the best available persons for office and this factor may appropriately be seen as one of some concern.

IS LEGISLATION REQUIRED?

8.58 This subject area is one which raises classical issues as to self-regulation of a professional group versus external regulation. A self-regulatory scheme is one in which the rules that govern behaviour are developed, administered and enforced by the people whose behaviour is to be governed, rather than being imposed by the state.[87] Self-regulation usually has no or little government involvement, other than the general underlying legal framework. It is often cheaper and more flexible than government regulation. A code of practice is the most common form of self-regulation.[88]

8.59 External or government regulation has the advantages of universal coverage, compulsion, democratic accountability and legal enforceability. However it may also be expensive, inefficient, invite enforcement difficulties and focus on "end of pipe" solutions.[89] The issue of self- versus government regulation in turn raises important questions of judicial independence. There are significant values supported by judicial self-regulation. Given the acknowledged and vital value of judicial independence, is there a case for a formal regulatory response? Normally, there would only be a formal legislative response if it was thought that the judiciary was beyond self-redemption and a very clear case would need to be made out for external regulation.

8.60 Further, once a step is taken in the direction of external regulation there is the problem that it may become "rules based" rather than turning on broad principles. This can lead to an endeavour to be complete and to cover all worst case scenarios. Then the legislation itself could over-reach and become too draconian.

8.61 It is worth noting that the register of pecuniary and other specified interests of members of Parliament is a self-regulatory scheme.

8.62 In short, this subject area is one in which rigorous questions need to be asked as to whether formal regulation is required, and the debits of any such a scheme weighed against the prospective benefits. Is this appropriate in an area in which there is presently satisfactory substantive common law, which is likely to require greater and more effective disclosure than a legislative regime?

CONCLUSION

8.63 In recent years there has been a wide-spread concern in most countries to improve the transparency and accountability of government. The judiciary is one arm of government.

8.64 In many jurisdictions there is a requirement that there be a register of the pecuniary interests of politicians. That is the position in New Zealand. Some jurisdictions also now have such a requirement with respect to judges. A Member's Bill has been introduced into the New Zealand Parliament which would raise such a requirement in this country. The Bill has not yet been the subject of debate in the House of Representatives.

87 Ministry of Consumer Affairs *Market Self-Regulation and Codes of Practice* (Wellington April 1997) at 2.

88 Ministry of Consumer Affairs *Industry-Led Regulation* Discussion Paper (Wellington July 2005) at 11.

89 Fairman and Yapp "Enforced Self-Regulation, Prescription, and Conceptions of Compliance within Small Businesses: the impact of enforcement" (2005) 27 Law and Policy at 491.

8.65 The Law Commission has on foot a reference to consolidate the various statutes affecting judges in the regular courts of law into one Courts Act. This would replace the Judicature Act 1908. If the Member's Bill was supported by Parliament, it would likely be incorporated as part of the Judicature Act 1908 or a new Courts Act. The whole thesis of the present reference – which the Commission supports – is that fragmentation of the statute law relating to judges is inappropriate.

8.66 The Commission has therefore necessarily had to prepare this Issues Paper, as part of that larger exercise. There will be further Issues Papers on other aspects of the prospective Courts Act, before we issue a final report. This document is primarily designed to enable us to consult on the propositions raised by the present Member's Bill. Such views as the Commission presently holds are of a very preliminary character, and are as follows.

8.67 First, the present substantive law on when a judge should not sit by reason of a pecuniary interest is satisfactory, and in line with the law in other common law jurisdictions. No legislative correction would seem to be presently warranted.

8.68 Second, the procedural law as to recusal of a judge is much less satisfactory, and in need of attention. In particular there is a real issue of principle as to whether an impugned judge should sit on a recusal application. This is more easily dealt with in appellate courts, but is a particularly difficult issue to manage in very busy trial courts. The Commission will need to consult with the various Benches and others on this and related issues, before formulating specific suggestions.

8.69 Third, the critical issue is: notwithstanding the adequate present substantive law, should there be super-added, as it were, a requirement for a register of judges' pecuniary interests? If there is to be such a register, we note it may have to be more rigorous than the present Parliamentary register to achieve the stated objective of avoiding conflicts of interest, and thus very intrusive. American experience shows this may raise problematic questions.

8.70 Various answers have been given to this third question. The approach in the British Commonwealth to date has been to see the question of judicial recusal as essentially a matter of judicial self-regulation; in other jurisdictions highly refined legislative proposals have been emplaced, or are under consideration.

8.71 Each jurisdiction has necessarily to answer this question according to its own aspirations, and the felt necessities of that jurisdiction. It is for this reason that the Commission will need to consult widely in New Zealand on what has been a distinctly vexing issue, whenever it has arisen, and why it seeks comments and submissions.

Q1 Is the present law on recusal for financial interests deficient?

Q2 What precisely is sought to be caught and addressed by legislation relating to a register of judges' pecuniary interests?

Q3 Is there a practical need for register of judges' pecuniary interests?

Q4 To whom should the legislation apply?

Q5 What must be disclosed?

Q6 What should be the ambit of usage of disclosures?

Q7 What of the security of judges?

Q8 Who is to administer and monitor disclosure by the judges?

Q9 Would the enactment of legislation of this character have an adverse impact on the recruitment and retention of judges?

Q10 Is this subject area one which presently calls for legislation?

Appendices

Appendix A

Register of Pecuniary Interests of Judges Bill

Register of Pecuniary Interests of Judges Bill

Member's Bill

Explanatory note

General policy statement

It is a time-honoured principle of Western democracy that public servants of every kind must be beyond reproach, and suspicion thereof. Public confidence in the standard of behaviour and conduct observed by leading servants of the people is a cornerstone of social harmony and political stability. A threshold of confidence to that end should ideally be enshrined in constitutional and legislative form. Little scope should be available for individual discretion or subjective perception.

The principle of transparency in this respect pertains in particular to issues of financial (pecuniary) interest. Nothing undermines public confidence in a nation's institutions and procedures more than suspicion that a public servant may have, and especially proof that one has, suffered a conflict of interest arising from a pecuniary interest in a particular dealing in which he or she was professionally involved.

In New Zealand, members of the Executive (Cabinet) have been required under statute, since 1990, to provide statements of pecuniary interests pertaining to their personal financial affairs. Such statements are submitted to the Speaker and these are made available for public consumption.

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In 2006, this practice was extended to all members of Parliament. Since then, members have been required to submit annual statements of pecuniary interests to a Registrar who makes the information publicly available. The Legislature's version of pecuniary interest statements was modelled along the lines of that of the Executive.

In both cases, a careful balance has been struck between transparent public knowledge of an individual's financial affairs and the preservation of personal privacy.

The correct balance in this respect appears to have been achieved over the years–the public interest in such annual statements is significant without appearing prurient, and few complaints have been voiced by those on whom the obligations are placed. There seems to be a general acceptance that such exercises are in the public interest and are neither unduly onerous nor revealing.

No such practice, however, has been observed in the case of the judiciary. Recent developments within New Zealand's judicial conduct processes suggest that application of the same practice observed by the other two branches of government might assist in the protection of the judiciary in future.

Being obliged under law to declare pecuniary interests that might be relevant to the conduct of a future case in which one is involved would relieve a judge from a repetitive weight of responsibility to make discretionary judgements about his or her personal affairs as each case arises. Having declared one's pecuniary interests once, in a generic manner independent of any particular trial, a judge may freely proceed in the knowledge that, if he or she is appointed to adjudicate, public confidence for participation has already been met. Yet care is to be exercised to ensure that the final decision is left to the individual judge whether to accept a case. There should be no intention of external interference into the self-regulation of the judiciary by the judiciary.

This is the reasoning behind this draft legislation–the Register of Pecuniary Interests of Judges Bill. The purpose of the Bill, as stated, is to promote the due administration of justice by requiring judges to make returns of pecuniary interests to provide greater transparency within the judicial system, and to avoid any conflict of interest in the judicial role.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 is the commencement clause. The Bill will come into force on the day after the date on which it receives the Royal assent.

Clause 3 sets out the purpose of the Bill, which is to promote the due administration of justice by requiring judges to make returns of pecuniary interests to provide greater transparency within the judicial system and to avoid any conflict of interest in the judicial role.

Clause 4 provides that nothing in the Bill is to be interpreted as compromising the constitutional principle of judicial independence guaranteed by the Constitution Act 1986 and respected by constitutional convention.

Clause 5 provides definitions for various terms in the Bill.

Clause 6 describes the two key components of the Bill, which are to require returns of pecuniary interests from judges and to establish a register of such returns.

Returns of pecuniary interests

Clause 7 imposes a duty on judges to make an initial return of pecuniary interests following appointment as a judge.

Clause 8 imposes a duty on all judges to make annual returns of pecuniary interests.

Clause 9 lists the contents of returns of pecuniary interests.

Clause 10 provides that relationship property settlements and debts owed to certain family members do not have to be disclosed in returns of pecuniary interests.

Clause 11 provides that short-term debts for supply of goods or services do not have to be disclosed in returns of pecuniary interests.

Clause 12 provides that where the obligation to make an annual return, in any particular case, arises prior to the obligation to make an initial return, the judge must make an initial return and is not obliged to make an annual return until the following year.

Clause 13 provides the period covered by returns of pecuniary interests.

Clause 14 provides that disclosure of the actual value, amount, or extent is not required in relation to any matter that is required to be disclosed.

Clause 15 provides that the registrar must prescribe the form of returns.

Register of pecuniary interests

Clause 16 establishes the register of pecuniary interests of judges.

Clause 17 provides that the registrar is the person holding the office of the Judicial Conduct Commissioner established under the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004.

Clause 18 sets out the functions of the registrar, which are to—

- compile and maintain a register of pecuniary interests of judges and publish the information contained in returns of pecuniary interests
- provide advice and guidance to judges in connection with their obligations under this Act

Publication of information contained in returns of pecuniary interests and name of any judge who fails to submit return

Clause 19 provides that the registrar must publish the information contained in both initial and annual returns of pecuniary interests.

Clause 20 provides that the registrar must publish the name of any judge who fails to submit any return.

Miscellaneous provisions

Clause 21 provides that it is the responsibility of each judge to ensure that their obligations under the Act are fulfilled and places limits on the responsibilities of the registrar.

Clause 22 provides that a complaint that a judge has failed to make a return of pecuniary interests is a matter that has a bearing on judicial functions or judicial duties for the purpose of section 16(1)(b) of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004.

Clause 23 provides for the destruction of returns and information relating to an individual judge when that person ceases to be a judge.

Dr Kennedy Graham

Register of Pecuniary Interests of Judges Bill

Member's Bill

Contents

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The Parliament of New Zealand enacts as follows:

1 Title
This Act is the Register of Pecuniary Interests of Judges Act **2010**.

2 Commencement
This Act comes into force on the day after the date on which it receives the Royal assent.

3 Purpose
The purpose of this Act is to promote the due administration of justice by requiring judges to make returns of pecuniary interests to provide greater transparency within the judicial system and to avoid any conflict of interest in the judicial role.

4 Judicial independence
Nothing in this Act is to be interpreted as compromising the constitutional principle of judicial independence guaranteed by the Constitution Act 1986 and respected by constitutional convention.

5 Interpretation
In this Act, unless the context otherwise requires,—

business entity means any body or organisation, whether incorporated or unincorporated, that carries on any profession, trade, manufacture, or undertaking for pecuniary profit, and includes a business activity carried on by a sole proprietor, but does not include any blind trust

company means—

(a) a company registered under Part 2 of the Companies Act 1993; or

(b) a body corporate that is incorporated outside New Zealand

government funding means funding from any one or more of the following:

(a) the Crown:

(b) any Crown entity:

(c) any State enterprise:

(d) any local authority

judge

(a) means—

(i) a Judge of the Supreme Court; or

(ii) a Judge of the Court of Appeal; or

(iii) a Judge or an Associate Judge of the High Court; or

(iv) a Judge of the Employment Court; or

(v) a Judge of the Court Martial; or

(vi) a Judge of the Court Martial Appeal Court; or

(vii) a District Court Judge; or

(viii) a Judge of the Environment Court; or

(ix) a Judge of the Maori Land Court; or

(x) a coroner

(b) includes a person who is acting in, or holds office on a temporary basis for, any of the roles in paragraph (a); but

(c) does not include a retired judge or a former judge

Judicial Conduct Commissioner means the position established under the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004

pecuniary interest for the purpose of this Act means any interest in anything that reasonably gives rise to an expectation of a gain or loss of money for a judge, or their spouse or part-

ner, or child or step-child or foster child or grandchild; and includes the matters listed in **section 9** whether or not such an expectation exists in relation to any of those matters in any particular case

register means the register of pecuniary interests of judges established under this Act

registrar—

(a) means the person holding the position of Judicial Conduct Commissioner; and

(b) includes every person who has been authorised by the registrar to act on his or her behalf.

6 Pecuniary interests

(1) Judges must make returns of pecuniary interests, being either initial returns or annual returns, in accordance with this Act.

(2) Returns of pecuniary interests made by judges are to be maintained in a register in accordance with the provisions of this Act.

Returns of pecuniary interests

7 Duty to make initial return of pecuniary interests

(1) Every judge must make an initial return of pecuniary interests setting out their pecuniary interests as at the date that is 90 days after the date on which the judge is appointed.

(2) An initial return must be transmitted by the judge to the registrar within 30 days of the date calculated under **subsection (1)**.

8 Duty to make annual return of pecuniary interests

(1) Every judge, whether he or she was appointed prior to or is appointed subsequent to this Act coming into force, must make an annual return of pecuniary interests in each year setting out their pecuniary interests as at 31 January of that year.

(2) The annual return must be transmitted by the judge to the registrar by the last day of February in each year in which an annual return must be made.

9 Contents of returns

(1) Every return of pecuniary interests must contain the following information as at the date specified in **section 7(1) or 8(1)** as the case may be:

(a) the name of each company of which the judge is a director or holds or controls more than 5% of the voting rights and a description of the main business activities of each of those companies:

(b) the name of each company or business entity in which the judge has a pecuniary interest and a description of the main business activities of each of those companies or entities:

(c) if the judge is employed, the name of each employer of the judge and a description of the main business activities of each of those employers:

(d) if the judge is the holder of any office (whether paid or not), a description of the office including whether it is paid or not:

(e) the name of each trust in which the judge has a beneficial interest, except as disclosed under **subsection (1)(h)**:

(f) if the judge is a member of the governing body of an organisation or a trustee of a trust that receives, or has applied to receive, government funding, the name of that organisation or trust and a description of the main activities of that organisation or trust:

(g) the location of each parcel of real property in which the judge has a pecuniary interest, including as a trustee or a beneficial owner:

(h) the name of each registered superannuation scheme in which the judge has a pecuniary interest:

(i) the name of each debtor of the judge who owes more than $50,000 to the judge and a description of each of the debts that are owed to the judge by those debtors:

(j) the name of each creditor of the judge to whom the judge owes more than $50,000 and a description of each of the debts that are owed by the judge to those creditors:

5

(k) the name of each member of the legal profession who holds a practising certificate with whom the judge has any business dealing comprising a value of over or equal to $50,000 in the aggregate in the period covered by the return:

(l) a description of all debts of more than $500 that were owing by the judge that were discharged or paid (in whole or in part) by any other person and the names of each of those persons:

(m) a description of each payment received by the judge for activities in which the judge is involved (other than the remuneration, allowances, and expenses paid to that person under the Remuneration Authority Act 1977 in relation to their judicial role), including the source of each payment.

(2) For the purposes of **subsection (1)(b)**, a judge does not have a pecuniary interest in a company or business entity (**entity A**) merely because the judge has a pecuniary interest in another company or business entity that has a pecuniary interest in entity A.

(3) The description of a debt under **subsection (1)(i) and (j)** must include disclosure of the rate of interest payable in relation to the debt if that rate of interest is less than the most recent rate of interest prescribed by regulations made under section ND 1F of the Income Tax Act 2004 (or any successor to that provision) as at the date specified in **section 7(1) or 8(1)** as the case may be.

10 Relationship property settlements and debts owed by certain family members do not have to be disclosed

A judge does not have to disclose—

(a) a relationship property settlement, whether the judge is a debtor or creditor in respect of the settlement; or

(b) the name of any debtor of the judge and a description of the debt owed by that debtor if the debtor is the judge's spouse or domestic partner, or any parent, child, step-child, foster-child, or grandchild of the judge.

11 Short-term debts for supply of goods or services do not have to be disclosed

A judge does not have to disclose the name of any debtor or creditor of the judge and a description of the debt owed by that debtor or to that creditor if the debt is for the supply of goods or services and payment is required—

(a) within 90 days after the supply of the goods or services; or

(b) because the supply of the goods or services is continuous and periodic invoices are rendered for the goods or services, within 90 days after the date of an invoice rendered for those goods or services.

12 Obligation to make annual return arises prior to obligation to make initial return

In any particular case where the obligation to make an annual return under **section 7(1)** arises prior to the obligation to make an initial return under **section 8(1)**, the judge must make an initial return and is not obliged to make an annual return until the following year.

13 Period covered by return

The period for which the information specified in **section 9** must be provided is the 12-month period ending on the date specified in **section 7(1) or 8(1)** as the case may be.

14 Actual value, amount, or extent not required

Nothing in this Act requires the disclosure of the actual value, amount, or extent of any asset, payment, interest, gift, contribution, or debt.

15 Form of returns

Returns must be in a form specifically prescribed by the registrar.

Register of pecuniary interests

16 Register of pecuniary interests of judges

(1) A register called the register of pecuniary interests of judges is established.

(2) The register comprises all returns transmitted by judges under this Act.

17 Office of registrar

The office of registrar is held by the person holding the office of Judicial Conduct Commissioner.

18 Functions of registrar

The functions of the registrar are to—

(a) compile and maintain the register, including publishing the information contained in returns of pecuniary interests:

(b) provide advice and guidance to judges in connection with their obligations under this Act.

Publication of information contained in returns of pecuniary interests and name of any judge who fails to submit return

19 Registrar must publish information contained in returns

(1) The registrar must, within 90 days of receipt of any initial return, publish on a website and in booklet form the information contained in the initial return that has been transmitted by any person who, at the date of publication, is a judge.

(2) The registrar must, within 90 days of the due date for transmitting annual returns, publish on a website and in booklet form the information contained in those returns that have been transmitted by persons who, at the date of publication, are judges.

(3) The published information referred to in **subsections (1) and (2)** must contain all information in any return that is required to be disclosed by **section 9** and only omit information that is included in a return and which is not required to be disclosed under **section 9**.

(4) The registrar must ensure that the published information referred to in **subsections (1) and (2)** is available for inspection by any person at the office of the Judicial Conduct Commissioner in Wellington on every working day between the hours of 10 am and 4 pm.

(5) A person may take a copy of any part of the published information referred to in **subsection (4)** on the payment of a fee (if any) specified by the office of the Judicial Conduct Commissioner.

20 Registrar must publish name of any judge who fails to submit return

(1) The registrar must within 30 days of the due date for transmitting any initial return that is required to be made following any judicial appointment, publish on a website and in booklet form the name of any judge who has failed to submit their initial return of pecuniary interests.

(2) The registrar must by 31 May each year publish on a website and in booklet form the name of any judge who has failed to submit an annual return of pecuniary interests.

Miscellaneous provisions

21 Responsibilities of judges and registrar

(1) It is the responsibility of each judge to ensure that he or she fulfils the obligations imposed on the judge by this Act.

(2) The registrar is not required to—

(a) notify any judge of that judge's failure to transmit a return by the due date or of any error or omission in that judge's return; or

(b) obtain any return from a judge.

22 Complaint under Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004

A complaint that a judge has failed to make a return of pecuniary interests in accordance with this Act is a matter that has a bearing on judicial functions or judicial duties for the purpose

of section 16(1)(b) of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004.

23 Destruction of returns and information

All returns and information held by the registrar relating to individual judges are to be destroyed when a judge resigns or retires or otherwise leaves or is removed from office.

Wellington, New Zealand:
Published under the authority of the House of Representatives—2010

Appendix B
US Code

TITLE 5 - APPENDIX
ETHICS IN GOVERNMENT ACT OF 1978
TITLE I - FINANCIAL DISCLOSURE REQUIREMENTS OF FEDERAL PERSONNEL

§ 102. Contents of reports

(a) Each report filed pursuant to section 101 (d) and (e) shall include a full and complete statement with respect to the following:

(1) **(A)** The source, type, and amount or value of income (other than income referred to in subparagraph (B)) from any source (other than from current employment by the United States Government), and the source, date, and amount of honoraria from any source, received during the preceding calendar year, aggregating $200 or more in value and, effective January 1, 1991, the source, date, and amount of payments made to charitable organizations in lieu of honoraria, and the reporting individual shall simultaneously file with the applicable supervising ethics office, on a confidential basis, a corresponding list of recipients of all such payments, together with the dates and amounts of such payments.

(B) The source and type of income which consists of dividends, rents, interest, and capital gains, received during the preceding calendar year which exceeds $200 in amount or value, and an indication of which of the following categories the amount or value of such item of income is within:

(i) not more than $1,000,

(ii) greater than $1,000 but not more than $2,500,

(iii) greater than $2,500 but not more than $5,000,

(iv) greater than $5,000 but not more than $15,000,

(v) greater than $15,000 but not more than $50,000,

(vi) greater than $50,000 but not more than $100,000,

(vii) greater than $100,000 but not more than $1,000,000,

(viii) greater than $1,000,000 but not more than $5,000,000, or

(ix) greater than $5,000,000.

(2) **(A)** The identity of the source, a brief description, and the value of all gifts aggregating more than the minimal value as established by section 7342 (a)(5) of title 5, United States Code, or $250, whichever is greater, received from any source other than a relative of the reporting individual during the preceding calendar year, except that any food, lodging, or entertainment received as personal hospitality of an individual need not be reported, and any gift with a fair market value of $100 or less, as adjusted at the same time and by the same percentage as the minimal value is adjusted, need not be aggregated for purposes of this subparagraph.

(B) The identity of the source and a brief description (including a travel itinerary, dates, and nature of expenses provided) of reimbursements received from any source aggregating more than the minimal value as established by section 7342 (a)(5) of title 5, United States Code, or $250, whichever is greater and received during the preceding calendar year.

(C) In an unusual case, a gift need not be aggregated under subparagraph (A) if a publicly available request for a waiver is granted.

(3) The identity and category of value of any interest in property held during the preceding calendar year in a trade or business, or for investment or the production of income, which has a fair market value which exceeds $1,000 as of the close of the preceding calendar year, excluding any personal liability owed to the reporting individual by a spouse,,[1] or by a parent, brother, sister, or child of the reporting individual or of the reporting individual's spouse, or any deposits aggregating $5,000 or less in a personal savings account. For purposes of this paragraph, a personal savings

account shall include any certificate of deposit or any other form of deposit in a bank, savings and loan association, credit union, or similar financial institution.

(4) The identity and category of value of the total liabilities owed to any creditor other than a spouse, or a parent, brother, sister, or child of the reporting individual or of the reporting individual's spouse which exceed $10,000 at any time during the preceding calendar year, excluding—

(A) any mortgage secured by real property which is a personal residence of the reporting individual or his spouse; and

(B) any loan secured by a personal motor vehicle, household furniture, or appliances, which loan does not exceed the purchase price of the item which secures it.

With respect to revolving charge accounts, only those with an outstanding liability which exceeds $10,000 as of the close of the preceding calendar year need be reported under this paragraph.

(5) Except as provided in this paragraph, a brief description, the date, and category of value of any purchase, sale or exchange during the preceding calendar year which exceeds $1,000—

(A) in real property, other than property used solely as a personal residence of the reporting individual or his spouse; or

(B) in stocks, bonds, commodities futures, and other forms of securities.

Reporting is not required under this paragraph of any transaction solely by and between the reporting individual, his spouse, or dependent children.

(6) **(A)** The identity of all positions held on or before the date of filing during the current calendar year (and, for the first report filed by an individual, during the two-year period preceding such calendar year) as an officer, director, trustee, partner, proprietor, representative, employee, or consultant of any corporation, company, firm, partnership, or other business enterprise, any nonprofit organization, any labor organization, or any educational or other institution other than the United States. This subparagraph shall not require the reporting of positions held in any religious, social, fraternal, or political entity and positions solely of an honorary nature.

(B) If any person, other than the United States Government, paid a nonelected reporting individual compensation in excess of $5,000 in any of the two calendar years prior to the calendar year during which the individual files his first report under this title, the individual shall include in the report—

(i) the identity of each source of such compensation; and

(ii) a brief description of the nature of the duties performed or services rendered by the reporting individual for each such source.

The preceding sentence shall not require any individual to include in such report any information which is considered confidential as a result of a privileged relationship, established by law, between such individual and any person nor shall it require an individual to report any information with respect to any person for whom services were provided by any firm or association of which such individual was a member, partner, or employee unless such individual was directly involved in the provision of such services.

(7) A description of the date, parties to, and terms of any agreement or arrangement with respect to

(A) future employment;

(B) a leave of absence during the period of the reporting individual's Government service;

(C) continuation of payments by a former employer other than the United States Government; and

(D) continuing participation in an employee welfare or benefit plan maintained by a former employer.

(8) The category of the total cash value of any interest of the reporting individual in a qualified blind trust, unless the trust instrument was executed prior to July 24, 1995 and precludes the

beneficiary from receiving information on the total cash value of any interest in the qualified blind trust.

(b) **(1)** Each report filed pursuant to subsections (a), (b), and (c) of section 101 shall include a full and complete statement with respect to the information required by—

(A) paragraph (1) of subsection (a) for the year of filing and the preceding calendar year,

(B) paragraphs (3) and (4) of subsection (a) as of the date specified in the report but which is less than thirty-one days before the filing date, and

(C) paragraphs (6) and (7) of subsection (a) as of the filing date but for periods described in such paragraphs.

(2) **(A)** In lieu of filling out one or more schedules of a financial disclosure form, an individual may supply the required information in an alternative format, pursuant to either rules adopted by the supervising ethics office for the branch in which such individual serves or pursuant to a specific written determination by such office for a reporting individual.

(B) In lieu of indicating the category of amount or value of any item contained in any report filed under this title, a reporting individual may indicate the exact dollar amount of such item.

(c) In the case of any individual described in section 101 (e), any reference to the preceding calendar year shall be considered also to include that part of the calendar year of filing up to the date of the termination of employment.

(d) **(1)** The categories for reporting the amount or value of the items covered in paragraphs (3), (4), (5), and (8) of subsection (a) are as follows:

(A) not more than $15,000;

(B) greater than $15,000 but not more than $50,000;

(C) greater than $50,000 but not more than $100,000;

(D) greater than $100,000 but not more than $250,000;

(E) greater than $250,000 but not more than $500,000;

(F) greater than $500,000 but not more than $1,000,000;

(G) greater than $1,000,000 but not more than $5,000,000;

(H) greater than $5,000,000 but not more than $25,000,000;

(I) greater than $25,000,000 but not more than $50,000,000; and

(J) greater than $50,000,000.

(2) For the purposes of paragraph (3) of subsection (a) if the current value of an interest in real property (or an interest in a real estate partnership) is not ascertainable without an appraisal, an individual may list

(A) the date of purchase and the purchase price of the interest in the real property, or

(B) the assessed value of the real property for tax purposes, adjusted to reflect the market value of the property used for the assessment if the assessed value is computed at less than 100 percent of such market value, but such individual shall include in his report a full and complete description of the method used to determine such assessed value, instead of specifying a category of value pursuant to paragraph (1) of this subsection. If the current value of any other item required to be reported under paragraph (3) of subsection (a) is not ascertainable without an appraisal, such individual may list the book value of a corporation whose stock is not publicly traded, the net worth of a business partnership, the equity value of an individually owned business, or with respect to other holdings, any recognized indication of value, but such individual shall include in his report a full and complete description of the method used in determining such value. In lieu of any value referred to in the preceding sentence, an individual may list the assessed value of the item for tax purposes, adjusted to reflect the market value of the item used for the assessment if the assessed value is computed at less than 100 percent

of such market value, but a full and complete description of the method used in determining such assessed value shall be included in the report.

(e) **(1)** Except as provided in the last sentence of this paragraph, each report required by section 101 shall also contain information listed in paragraphs (1) through (5) of subsection (a) of this section respecting the spouse or dependent child of the reporting individual as follows:

(A) The source of items of earned income earned by a spouse from any person which exceed $1,000 and the source and amount of any honoraria received by a spouse, except that, with respect to earned income (other than honoraria), if the spouse is self-employed in business or a profession, only the nature of such business or profession need be reported.

(B) All information required to be reported in subsection (a)(1)(B) with respect to income derived by a spouse or dependent child from any asset held by the spouse or dependent child and reported pursuant to subsection (a)(3).

(C) In the case of any gifts received by a spouse or dependent child which are not received totally independent of the relationship of the spouse or dependent child to the reporting individual, the identity of the source and a brief description of gifts of transportation, lodging, food, or entertainment and a brief description and the value of other gifts.

(D) In the case of any reimbursements received by a spouse or dependent child which are not received totally independent of the relationship of the spouse or dependent child to the reporting individual, the identity of the source and a brief description of each such reimbursement.

(E) In the case of items described in paragraphs (3) through (5) of subsection (a), all information required to be reported under these paragraphs other than items (i) which the reporting individual certifies represent the spouse's or dependent child's sole financial interest or responsibility and which the reporting individual has no knowledge of, (ii) which are not in any way, past or present, derived from the income, assets, or activities of the reporting individual, and (iii) from which the reporting individual neither derives, nor expects to derive, any financial or economic benefit.

(F) For purposes of this section, categories with amounts or values greater than $1,000,000 set forth in sections 102 (a)(1)(B) and 102 (d)(1) shall apply to the income, assets, or liabilities of spouses and dependent children only if the income, assets, or liabilities are held jointly with the reporting individual. All other income, assets, or liabilities of the spouse or dependent children required to be reported under this section in an amount or value greater than $1,000,000 shall be categorized only as an amount or value greater than $1,000,000.

Reports required by subsections (a), (b), and (c) of section 101 shall, with respect to the spouse and dependent child of the reporting individual, only contain information listed in paragraphs (1), (3), and (4) of subsection (a), as specified in this paragraph.

(2) No report shall be required with respect to a spouse living separate and apart from the reporting individual with the intention of terminating the marriage or providing for permanent separation; or with respect to any income or obligations of an individual arising from the dissolution of his marriage or the permanent separation from his spouse.

(f) **(1)** Except as provided in paragraph (2), each reporting individual shall report the information required to be reported pursuant to subsections (a), (b), and (c) of this section with respect to the holdings of and the income from a trust or other financial arrangement from which income is received by, or with respect to which a beneficial interest in principal or income is held by, such individual, his spouse, or any dependent child.

(2) A reporting individual need not report the holdings of or the source of income from any of the holdings of—

(A) any qualified blind trust (as defined in paragraph (3));

(B) a trust—

(i) which was not created directly by such individual, his spouse, or any dependent child, and

(ii) the holdings or sources of income of which such individual, his spouse, and any dependent child have no knowledge of; or

(C) an entity described under the provisions of paragraph (8),

but such individual shall report the category of the amount of income received by him, his spouse, or any dependent child from the trust or other entity under subsection (a)(1)(B) of this section.

(3) For purposes of this subsection, the term "qualified blind trust" includes any trust in which a reporting individual, his spouse, or any minor or dependent child has a beneficial interest in the principal or income, and which meets the following requirements:

(A) **(i)** The trustee of the trust and any other entity designated in the trust instrument to perform fiduciary duties is a financial institution, an attorney, a certified public accountant, a broker, or an investment advisor who—

(I) is independent of and not associated with any interested party so that the trustee or other person cannot be controlled or influenced in the administration of the trust by any interested party; and

(II) is not and has not been an employee of or affiliated with any interested party and is not a partner of, or involved in any joint venture or other investment with, any interested party; and

(III) is not a relative of any interested party.

(ii) Any officer or employee of a trustee or other entity who is involved in the management or control of the trust—

(I) is independent of and not associated with any interested party so that such officer or employee cannot be controlled or influenced in the administration of the trust by any interested party;

(II) is not a partner of, or involved in any joint venture or other investment with, any interested party; and

(III) is not a relative of any interested party.

(B) Any asset transferred to the trust by an interested party is free of any restriction with respect to its transfer or sale unless such restriction is expressly approved by the supervising ethics office of the reporting individual.

(C) The trust instrument which establishes the trust provides that—

(i) except to the extent provided in subparagraph (B) of this paragraph, the trustee in the exercise of his authority and discretion to manage and control the assets of the trust shall not consult or notify any interested party;

(ii) the trust shall not contain any asset the holding of which by an interested party is prohibited by any law or regulation;

(iii) the trustee shall promptly notify the reporting individual and his supervising ethics office when the holdings of any particular asset transferred to the trust by any interested party are disposed of or when the value of such holding is less than $1,000;

(iv) the trust tax return shall be prepared by the trustee or his designee, and such return and any information relating thereto (other than the trust income summarized in appropriate categories necessary to complete an interested party's tax return), shall not be disclosed to any interested party;

(v) an interested party shall not receive any report on the holdings and sources of income of the trust, except a report at the end of each calendar quarter with respect to the total cash value of the interest of the interested party in the trust or the net income or loss of the trust or any reports necessary to enable the interested party to complete an individual

tax return required by law or to provide the information required by subsection (a)(1) of this section, but such report shall not identify any asset or holding;

(vi) except for communications which solely consist of requests for distributions of cash or other unspecified assets of the trust, there shall be no direct or indirect communication between the trustee and an interested party with respect to the trust unless such communication is in writing and unless it relates only

(I) to the general financial interest and needs of the interested party (including, but not limited to, an interest in maximizing income or long-term capital gain),

(II) to the notification of the trustee of a law or regulation subsequently applicable to the reporting individual which prohibits the interested party from holding an asset, which notification directs that the asset not be held by the trust, or

(III) to directions to the trustee to sell all of an asset initially placed in the trust by an interested party which in the determination of the reporting individual creates a conflict of interest or the appearance thereof due to the subsequent assumption of duties by the reporting individual (but nothing herein shall require any such direction); and

(vii) the interested parties shall make no effort to obtain information with respect to the holdings of the trust, including obtaining a copy of any trust tax return filed or any information relating thereto except as otherwise provided in this subsection.

(D) The proposed trust instrument and the proposed trustee is approved by the reporting individual's supervising ethics office.

(E) For purposes of this subsection, "interested party" means a reporting individual, his spouse, and any minor or dependent child; "broker" has the meaning set forth in section 3(a)(4) of the Securities and Exchange Act of 1934 (15 U.S.C. 78c (a)(4)); and "investment adviser" includes any investment adviser who, as determined under regulations prescribed by the supervising ethics office, is generally involved in his role as such an adviser in the management or control of trusts.

(F) Any trust qualified by a supervising ethics office before the effective date of title II of the Ethics Reform Act of 1989 shall continue to be governed by the law and regulations in effect immediately before such effective date.

(4) **(A)** An asset placed in a trust by an interested party shall be considered a financial interest of the reporting individual, for the purposes of any applicable conflict of interest statutes, regulations, or rules of the Federal Government (including section 208 of title 18, United States Code), until such time as the reporting individual is notified by the trustee that such asset has been disposed of, or has a value of less than $1,000.

(B) **(i)** The provisions of subparagraph (A) shall not apply with respect to a trust created for the benefit of a reporting individual, or the spouse, dependent child, or minor child of such a person, if the supervising ethics office for such reporting individual finds that—

(I) the assets placed in the trust consist of a well-diversified portfolio of readily marketable securities;

(II) none of the assets consist of securities of entities having substantial activities in the area of the reporting individual's primary area of responsibility;

(III) the trust instrument prohibits the trustee, notwithstanding the provisions of paragraphs (3)(C)(iii) and (iv) of this subsection, from making public or informing any interested party of the sale of any securities;

(IV) the trustee is given power of attorney, notwithstanding the provisions of paragraph (3)(C)(v) of this subsection, to prepare on behalf of any interested party

the personal income tax returns and similar returns which may contain information relating to the trust; and

(V) except as otherwise provided in this paragraph, the trust instrument provides (or in the case of a trust established prior to the effective date of this Act which by its terms does not permit amendment, the trustee, the reporting individual, and any other interested party agree in writing) that the trust shall be administered in accordance with the requirements of this subsection and the trustee of such trust meets the requirements of paragraph (3)(A).

(ii) In any instance covered by subparagraph (B) in which the reporting individual is an individual whose nomination is being considered by a congressional committee, the reporting individual shall inform the congressional committee considering his nomination before or during the period of such individual's confirmation hearing of his intention to comply with this paragraph.

(5) **(A)** The reporting individual shall, within thirty days after a qualified blind trust is approved by his supervising ethics office, file with such office a copy of—

(i) the executed trust instrument of such trust (other than those provisions which relate to the testamentary disposition of the trust assets), and

(ii) a list of the assets which were transferred to such trust, including the category of value of each asset as determined under subsection (d) of this section.

This subparagraph shall not apply with respect to a trust meeting the requirements for being considered a qualified blind trust under paragraph (7) of this subsection.

(B) The reporting individual shall, within thirty days of transferring an asset (other than cash) to a previously established qualified blind trust, notify his supervising ethics office of the identity of each such asset and the category of value of each asset as determined under subsection (d) of this section.

(C) Within thirty days of the dissolution of a qualified blind trust, a reporting individual shall—

(i) notify his supervising ethics office of such dissolution, and

(ii) file with such office a copy of a list of the assets of the trust at the time of such dissolution and the category of value under subsection (d) of this section of each such asset.

(D) Documents filed under subparagraphs (A), (B), and (C) of this paragraph and the lists provided by the trustee of assets placed in the trust by an interested party which have been sold shall be made available to the public in the same manner as a report is made available under section 105 and the provisions of that section shall apply with respect to such documents and lists.

(E) A copy of each written communication with respect to the trust under paragraph (3)(C)(vi) shall be filed by the person initiating the communication with the reporting individual's supervising ethics office within five days of the date of the communication.

(6) **(A)** A trustee of a qualified blind trust shall not knowingly and willfully, or negligently,

(i) disclose any information to an interested party with respect to such trust that may not be disclosed under paragraph (3) of this subsection;

(ii) acquire any holding the ownership of which is prohibited by the trust instrument;

(iii) solicit advice from any interested party with respect to such trust, which solicitation is prohibited by paragraph (3) of this subsection or the trust agreement; or

(iv) fail to file any document required by this subsection.

(B) A reporting individual shall not knowingly and willfully, or negligently,

(i) solicit or receive any information with respect to a qualified blind trust of which he is an interested party that may not be disclosed under paragraph (3)(C) of this subsection or

(ii) fail to file any document required by this subsection.

(C) **(i)** The Attorney General may bring a civil action in any appropriate United States district court against any individual who knowingly and willfully violates the provisions of subparagraph (A) or (B) of this paragraph. The court in which such action is brought may assess against such individual a civil penalty in any amount not to exceed $10,000.

(ii) The Attorney General may bring a civil action in any appropriate United States district court against any individual who negligently violates the provisions of subparagraph (A) or (B) of this paragraph. The court in which such action is brought may assess against such individual a civil penalty in any amount not to exceed $5,000.

(7) Any trust may be considered to be a qualified blind trust if—

(A) the trust instrument is amended to comply with the requirements of paragraph (3) or, in the case of a trust instrument which does not by its terms permit amendment, the trustee, the reporting individual, and any other interested party agree in writing that the trust shall be administered in accordance with the requirements of this subsection and the trustee of such trust meets the requirements of paragraph (3)(A); except that in the case of any interested party who is a dependent child, a parent or guardian of such child may execute the agreement referred to in this subparagraph;

(B) a copy of the trust instrument (except testamentary provisions) and a copy of the agreement referred to in subparagraph (A), and a list of the assets held by the trust at the time of approval by the supervising ethics office, including the category of value of each asset as determined under subsection (d) of this section, are filed with such office and made available to the public as provided under paragraph (5)(D) of this subsection; and

(C) the supervising ethics office determines that approval of the trust arrangement as a qualified blind trust is in the particular case appropriate to assure compliance with applicable laws and regulations.

(8) A reporting individual shall not be required to report the financial interests held by a widely held investment fund (whether such fund is a mutual fund, regulated investment company, pension or deferred compensation plan, or other investment fund), if—

(A) **(i)** the fund is publicly traded; or

(ii) the assets of the fund are widely diversified; and

(B) the reporting individual neither exercises control over nor has the ability to exercise control over the financial interests held by the fund.

(g) Political campaign funds, including campaign receipts and expenditures, need not be included in any report filed pursuant to this title.

(h) A report filed pursuant to subsection (a), (d), or (e) of section 101 need not contain the information described in subparagraphs (A), (B), and (C) of subsection (a)(2) with respect to gifts and reimbursements received in a period when the reporting individual was not an officer or employee of the Federal Government.

(i) A reporting individual shall not be required under this title to report—

(1) financial interests in or income derived from—

(A) any retirement system under title 5, United States Code (including the Thrift Savings Plan under subchapter III of chapter 84 of such title); or

(B) any other retirement system maintained by the United States for officers or employees of the United States, including the President, or for members of the uniformed services; or

(2) benefits received under the Social Security Act [42 U.S.C. 301 et seq.].

Footnotes

[1] So in original.

(Pub. L. 95–521, title I, § 102, Oct. 26, 1978, 92 Stat. 1825; Pub. L. 96–19, §§ 3(a)(1), (b), 6 (a), 7 (a)–(d)(1), (f), 9(b), (c)(1), (j), June 13, 1979, 93 Stat. 39–43; Pub. L. 97–51, § 130(b), Oct. 1, 1981, 95 Stat. 966; Pub. L. 98–150, § 10, Nov. 11, 1983, 97 Stat. 962; Pub. L. 101–194, title II, § 202, Nov. 30, 1989, 103 Stat. 1727; Pub. L. 101–280, § 3(3), May 4, 1990, 104 Stat. 152; Pub. L. 102–90, title III, § 314(a), Aug. 14, 1991, 105 Stat. 469; Pub. L. 104–65, §§ 20, 22 (a), (b), Dec. 19, 1995, 109 Stat. 704, 705.)

References in Text

The effective date of title II of the Ethics Reform Act of 1989, referred to in subsec. (f)(3)(F), is Jan. 1, 1991. See section 204 of Pub. L. 101–194, set out as a note under section 101 of this Appendix.

The effective date of this Act, referred to in subsec. (f)(4)(B)(i)(V), probably means the effective date of title II of the Ethics Reform Act of 1989, which amended this title generally and is effective Jan. 1, 1991. See section 204 of Pub. L. 101–194, set out as an Effective Date of 1989 Amendment note under section 101 of this Appendix.

The Social Security Act, referred to in subsec. (i)(2), is act Aug. 14, 1935, ch. 531, 49 Stat. 620, as amended, which is classified generally to chapter 7 (§ 301 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables.

Codification

Section was formerly classified to section 702 of Title 2, The Congress.

Amendments

1995—Subsec. (a)(1)(B)(viii), (ix). Pub. L. 104–65, § 20(a), added cls. (viii) and (ix) and struck out former cl. (viii) which read as follows: “greater than $1,000,000.”

Subsec. (a)(8). Pub. L. 104–65, § 22(a), added par. (8).

Subsec. (d)(1). Pub. L. 104–65, § 22(b), substituted “(5), and (8)” for “and (5)” in introductory provisions.

Subsec. (d)(1)(G) to (J). Pub. L. 104–65, § 20(b), added subpars. (G) to (J) and struck out former subpar. (G) which read as follows: “greater than $1,000,000.”

Subsec. (e)(1)(F). Pub. L. 104–65, § 20(c), added subpar. (F).

1991—Subsec. (a)(2)(A). Pub. L. 102–90, § 314(a)(3), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: “The identity of the source, a brief description, and the value of all gifts other than transportation, lodging, food, or entertainment aggregating $100 or more in value received from any source other than a relative of the reporting individual during the preceding calendar year, except that any gift with a fair market value of $75 or less need not be aggregated for purposes of this subparagraph.”

Pub. L. 102–90, § 314(a)(1), (2), redesignated subpar. (B) as (A) and struck out former subpar. (A) which read as follows: “The identity of the source and a brief description (including a travel itinerary, dates, and nature of expenses provided) of any gifts of transportation, lodging, food, or entertainment aggregating $250 or more in value received from any source other than a relative of the reporting individual during the preceding calendar year, except that any food, lodging, or entertainment received as personal hospitality of any individual need not be reported, and any gift with a fair market value of $75 or less need not be aggregated for purposes of this subparagraph.”

Subsec. (a)(2)(B). Pub. L. 102–90, § 314(a)(2), (4), redesignated subpar. (C) as (B) and substituted “more than the minimal value as established by section 7342 (a)(5) of title 5, United States Code, or $250, whichever is greater” for “$250 or more in value”. Former subpar. (B) redesignated (A).

Subsec. (a)(2)(C), (D). Pub. L. 102–90, § 314(a)(2), (5), redesignated subpar. (D) as (C) and struck out “or (B)” after “(A)”. Former subpar. (C) redesignated (B).

1990—Subsec. (a)(1)(A). Pub. L. 101–280, § 3(3)(A)(i), substituted “the reporting individual” for “such individuals”.

Subsec. (a)(3). Pub. L. 101–280, § 3(3)(A)(ii), substituted “, or by a parent, brother, sister, or child of the reporting individual or of the reporting individual’s spouse,” for “parent, brother, sister, or child”.

Subsec. (a)(4). Pub. L. 101–280, § 3(3)(A)(iii), substituted "spouse, or a parent, brother, sister, or child of the reporting individual or of the reporting individual's spouse" for "relative".

Subsec. (e)(1)(E). Pub. L. 101–280, § 3(3)(B), inserted "of subsection (a)" after "(3) through (5)".

Subsec. (f)(3)(A)(i)(II). Pub. L. 101–280, § 3(3)(C)(i)(I), struck out comma after "involved in".

Subsec. (f)(3)(A)(ii)(II). Pub. L. 101–280, § 3(3)(C)(i)(II), amended subcl. (II) generally. Prior to amendment, subcl. (II) read as follows: "is not or has not been a partner of any interested party and is not a partner of, or involved in any joint venture or other investment with any interested party; and".

Subsec. (f)(3)(F). Pub. L. 101–280, § 3(3)(C)(i)(III), substituted "title II of the Ethics Reform Act of 1989" for "this section".

Subsec. (f)(6)(A), (B). Pub. L. 101–280, § 3(3)(C)(ii), substituted "and willfully, or negligently," for "or negligently".

Subsec. (i). Pub. L. 101–280, § 3(3)(D), added subsec. (i).

1989—Pub. L. 101–194 amended section generally, substituting subsecs. (a) to (h) for former subsecs. (a) to (g) which related, respectively, to Members of Congress, legislative officers and employees, non-legislative personnel and Congressional candidates, categories of value; interests in real property and other items needing appraisals, information respecting spouses and dependent children, trusts or other financial arrangements including qualified blind trusts, political campaign funds, and gifts and reimbursements.

1983—Subsec. (e)(5)(A). Pub. L. 98–150, § 10(b), inserted provision that this subparagraph shall not apply with respect to a trust meeting the requirements for being considered a qualified blind trust under paragraph (7) of this subsection.

Subsec. (e)(7). Pub. L. 98–150, § 10(a), amended par. (7) generally. Prior to amendment, par. (7) read as follows: "Any trust which is in existence prior to the date of the enactment of this Act shall be considered a qualified blind trust if—

"(A) the supervising ethics office determines that the trust was a good faith effort to establish a blind trust;

"(B) the previous trust instrument is amended or, if such trust instrument does not by its terms permit amendment, all parties to the trust instrument, including the reporting individual and the trustee, agree in writing that the trust shall be administered in accordance with the requirements of paragraph (3)(C) and a trustee is (or has been) appointed who meets the requirements of paragraph (3); and

"(C) a copy of the trust instrument (except testamentary provisions), a list of the assets previously transferred to the trust by an interested party and the category of value of each such asset at the time it was placed in the trust, and a list of assets previously placed in the trust by an interested party which have been sold are filed and made available to the public as provided under paragraph (5) of this subsection."

1981—Subsec. (a)(1)(A). Pub. L. 97–51 inserted "including speeches, appearances, articles, or other publications" after "honoraria from any source".

1979—Subsec. (a)(2)(B). Pub. L. 96–19, § 3(b)(2), struck out provision that a gift need not be aggregated if, in an unusual case, a publicly available request for a waiver is granted.

Subsec. (a)(2)(D). Pub. L. 96–19, § 3(b)(1), added subpar. (D).

Subsec. (a)(6). Pub. L. 96–19, § 9(b), substituted "The identity of all positions held" for "The identity of all positions".

Subsec. (a)(7). Pub. L. 96–19, § 9(j), struck out a colon following "arrangement with respect to".

Subsec. (b). Pub. L. 96–19, § 9(c)(1), substituted provisions that the information required by pars. (3) and (4) of subsec. (a) be as of the date specified in the report but which is less than thirty-one days before the filing date and that the information required by par. (6) and, in the case of reports filed under section 101 (c), par. (7) of subsec. (a) be as of the filing date but for periods described in such paragraphs for provisions that required that the information covered by pars. (3), (4), (6), and, in the case of reports filed pursuant to section 101 (c), par. (7) of subsec. (a) be as of a date specified in such report, which could not be more than thirty-one days prior to the date of filing.

Subsec. (d)(1)(B). Pub. L. 96–19, § 6(a)(1), (2), substituted "any gifts received by a spouse which are" for "any gift which is" and "and a brief description" for "or a brief description".

Subsec. (d)(1)(C). Pub. L. 96–19, § 6(a)(3), (4), substituted "reimbursements received by a spouse which are" for "reimbursement which is" and "description of each such reimbursement" for "description of the reimbursement".

Subsec. (d)(1)(D). Pub. L. 96–19, § 6(a)(5), substituted "represent the spouse's or dependent child's sole financial interest" for "represent the spouse or dependent child's sole financial interest".

Subsec. (e)(3). Pub. L. 96–19, § 7(a)–(d)(1), substituted "a broker, or an investment adviser" for "or a broker" in subpar. (A) preceding cl. (i), substituted "is not or has not been" for "is or has not been" in cl. (ii) of subpar. (A), and,

in provisions following subpar. (D), substituted "section 78c (a)(4) of title 15" for "section 78 of title 15", substituted "the reports" for "their reports", and inserted definition of "investment adviser".

Subsec. (e)(5)(D). Pub. L. 96–19, § 7(f), substituted "shall apply with respect to such documents and lists" for "shall apply".

Subsec. (g). Pub. L. 96–19, § 3(a)(1), added subsec. (g).

Effective Date of 1995 Amendment

Amendment by section 20 of Pub. L. 104–65 effective Jan. 1, 1996, see section 24 of Pub. L. 104–65, set out as an Effective Date note under section 1601 of Title 2, The Congress.

Section 22(c) of Pub. L. 104–65 provided that: "The amendment made by this section [amending this section] shall apply with respect to reports filed under title I of the Ethics in Government Act of 1978 [section 101 et seq. of Pub. L. 95–521, set out in this Appendix] for calendar year 1996 and thereafter."

Effective Date of 1991 Amendment

Amendment by Pub. L. 102–90 effective Jan. 1, 1993, see section 314(g)(2) of Pub. L. 102–90, as amended, set out as a note under section 31–2 of Title 2, The Congress.

Effective Date of 1989 Amendment

Amendment by Pub. L. 101–194 effective Jan. 1, 1991, except that subsec. (f)(4)(B) of this section, as amended by Pub. L. 101–194, is effective Jan. 1, 1990, see section 204 of Pub. L. 101–194, set out as a note under section 101 of this Appendix.

Effective Date of 1983 Amendment

Section 13 of Pub. L. 98–150 provided that: "The amendments made by this Act [enacting sections 211 and 407 of Pub. L. 95–521, set out in this Appendix, amending sections 102, 201–203, 210, 302, and 401–405 of Pub. L. 95–521, set out in this Appendix, and enacting provisions set out as a note under section 402 of this Appendix] shall take effect on October 1, 1983."

Appendix C

Financial Disclosure Report of Chief Justice Roberts

AO 10
Rev. 1/2008

FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 2007

Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)

1. Person Reporting (last name, first, middle initial)	2. Court or Organization	3. Date of Report
Roberts, Jr., John G	Supreme Court of the U.S.	05/15/2008
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type** (check appropriate type) ☐ Nomination, Date ☐ Initial ☑ Annual ☐ Final **5b.** ☐ Amended Report	**6. Reporting Period** 01/01/2007 to 12/31/2007
Chief Justice		
7. Chambers or Office Address	**8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.**	
One First Street, NE Washington, DC 20543	Reviewing Officer_____ Date_____	

IMPORTANT NOTES: *The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.*

I. POSITIONS. *(Reporting individual only; see pp. 9-13 of filing instructions.)*

☑ NONE *(No reportable positions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
1.		
2.		
3.		
4.		
5.		

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II. AGREEMENTS. *(Reporting individual only; see pp. 14-16 of filing instructions.)*

☐ NONE *(No reportable agreements.)*

	DATE	PARTIES AND TERMS
1.	9/21	I agreed to serve as the Distinguished Visiting Jurist at the School of Law at St. Mary's University -- Institute on World Legal Problems, Innsbruck, Austria,
2.		from July 5 - 15, 2008, for a salary of $15,000.
3.		

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Name of Person Reporting	Date of Report
Roberts, Jr., John G	05/15/2008

III. NON-INVESTMENT INCOME. *(Reporting individual and spouse; see pp. 17-24 of filing instructions.)*

A. Filer's Non-Investment Income

☐ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1.	1/31-2/2	Northwestern University School of Law, Chicago, Illinois -- served as the Howard J. Trienens Visiting Judicial Scholar; delivered	$ 7,500
2.		Trienens Lecture; taught Constitutional Law class and joint Supreme Court Simulation/Supreme Court Clinic Seminar.	
3.	7/5-15	Penn State, The Dickinson School of Law, Vienna Austria -- taught a course on How the Role and Operation of the Supreme Court	$ 15,000
4.		Have Changed Over Time.	

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

☐ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE
1.	2007	Pillsbury Winthrop Shaw Pittman LLP salary
2.	2007	Major, Lindsey & Africa LLC salary
3.		
4.		

IV. REIMBURSEMENTS -- *transportation, lodging, food, entertainment.*
(Includes those to spouse and dependent children; see pp. 25-27 of filing instructions.)

☐ NONE *(No reportable reimbursements.)*

	SOURCE	DATES	LOCATION	PURPOSE	ITEMS PAID OR PROVIDED
1.	Northwestern University	1/31-2/2	Chicago, Illinois	Served as the Howard J.	Air transportation, meals, and lodging
2.				Trienens Visiting	
3.				Judicial Scholar;	
4.				delivered Trienens	
5.				Lecture; taught	
6.				Constitutional Law	

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Name of Person Reporting	Date of Report
Roberts, Jr., John G	05/15/2008

7.				class and joint	
8.				Supreme Court	
9.				Simulation/Supreme	
10.				Court Clinic Seminar	
11.					
12.	Washington University School of Law	2/6	St. Louis, Missouri	Taught Constitutional	Air transportation and meals
13.				Law I (combined classes	
14.				from Wash. U. School of	
15.				Law and St. Louis U.	
16.				School of Law); judged	
17.				the Wiley Rutledge Moot	
18.				Court Final Round	
19.					
20.	University of Texas School of Law	3/7	Dallas, Texas	Delivered Third	Air transportation, meals, and lodging
21.				Tex Lezar Lecture	
22.					
23.	University of Richmond	4/13-14	Richmond and Jamestown,	Spoke at William Green	Meals and lodging
24.			Virginia	Award ceremony; delivered	
25.				remarks at unveiling of	
26.				plaque commemorating	
27.				400th Anniversary of	
28.				the Founding of Jamestown	
29.					

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Name of Person Reporting	Date of Report
Roberts, Jr., John G	05/15/2008

30.	Alaska Bar Association	5/2-6	Fairbanks, Alaska	Keynote speaker at	Air transportation, meals, and lodging
31.				Alaska Bar Assn. annual	
32.				meeting; attended and	
33.				spoke at naturalization	
34.				ceremony;	
35.				participated in CLE panel	
36.					
37.	College of the Holy Cross	5/24-25	Worcester, Massachusetts	Received honorary degree	Air transportation, meals, and lodging
38.				and delivered	
39.				commencement address	
40.					
41.	Penn State, The Dickinson School of Law	7/5-15	Vienna, Austria	Taught course on How the	Air transportation, meals, and lodging
42.				Role and Operation of	
43.				the Supreme Court Have	
44.				Changed Over Time	
45.					
46.	University of Montana School of Law	9/12-15	Missoula, Montana	Delivered Jones-Tamm	Air transportation, meals, and lodging
47.				Lecture and taught law	
48.				school classes	
49.					
50.	Syracuse University	9/19	Syracuse, New York	Participated in student	Air transportation and meals
51.				seminar; delivered	
52.				address at dedication	

FINANCIAL DISCLOSURE REPORT Page 5 of 12	Name of Person Reporting Roberts, Jr., John G	Date of Report 05/15/2008

53.				of Newhouse III	
54.				Building	
55.					
56.	Brigham Young University	10/22-24	Provo, Utah	Delivered Forum	Air transportation, meals, and lodging
57.				Assembly address;	
58.				remarks and Q&A	
59.				with Law School students	

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Name of Person Reporting	Date of Report
Roberts, Jr., John G	05/15/2008

V. GIFTS. *(Includes those to spouse and dependent children; see pp. 28-31 of filing instructions.)*

☐ NONE *(No reportable gifts.)*

	SOURCE	DESCRIPTION	VALUE
1.	Robert Trent Jones Golf Club, Gainesville, Virginia	Honorary Membership (not used in 2007) (Annual Dues)	$ 12,600
2.	University Club of Washington, DC	Honorary Membership (not used in 2007) (Annual Dues)	$ 3,240
3.			
4.			
5.			

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 32-33 of filing instructions.)*

☑ NONE *(No reportable liabilities.)*

	CREDITOR	DESCRIPTION	VALUE CODE
1.			
2.			
3.			
4.			
5.			

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Name of Person Reporting	Date of Report
Roberts, Jr., John G	05/15/2008

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date Month - Day	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
1. Time Warner (Common)	C	Dividend	M	T					
2. Becton Dickinson & Co. (Common)	A	Dividend			sold all	6/29	K	E	
3. Cisco Systems (Common)		None			sold all	9/18	L		
4. Citigroup (Common)	A	Dividend			sold all	3/20	L		
5. Dell (Common)		None	M	T					
6. Freddie Mac (Common)	A	Dividend	J	T					
7. Hewlett-Packard (Common)	A	Dividend	L	T					
8. Hillenbrand (Common)	A	Dividend	K	T					
9. Intel (Common)	B	Dividend	L	T					
10. AlcatelLucent (Common)	A	Dividend	J	T					
11. Merck (Common)	A	Dividend			sold all	12/11	J	C	
12. Microsoft (Common)	C	Dividend	N	T					
13. Nokia (Common)	A	Dividend	L	T					
14. Novellus (Common)		None	J	T					
15. Pfizer (Common)	A	Dividend	J	T					
16. Texas Instruments (Common)	B	Dividend	M	T					
17. TMO (Common)		None	L	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

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Name of Person Reporting	Date of Report
Roberts, Jr., John G	05/15/2008

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date Month - Day	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
18. XMSR (Common)		None	L	T					
19. Washington *REIT*	B	Dividend	K	T					
20. Am Cent Gr Fund	A	Dividend	K	T					
21. Davis Ser Real Est Fund	D	Dividend	K	T					
22. Fidelity Contrafund Fund	A	Dividend	L	T					
23. NB Kaminsky II (frmrly Fidelity Frdm. 2010 Fd) See Part VIII		None	J	T					
24. Fidelity Low Priced Stock Fund	E	Dividend	N	T					
25. Spartan U.S. Equity Index	E	Dividend	N	T					
26. Fidelity Growth Company		None	L	T					
27. Fidelity Overseas Fund		None	M	T					
28. Fidelity Select Energy Fund	B	Dividend	K	T					
29. Franklin Mut Beac Z Fund	B	Dividend	J	T					
30. Franklin Mut Disc Z Fund	A	Dividend	J	T					
31. Janus Ent Fund		None	K	T					
32. Janus Fund	A	Dividend	K	T					
33. Janus WW Fund	A	Dividend	K	T					
34. Blackrock Int'l	D	Dividend	L	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

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Name of Person Reporting	Date of Report
Roberts, Jr., John G	05/15/2008

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date Month - Day	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
35. Lord Abbett Dev Gr Fund	C	Dividend	K	T					
36. Putnam New Opp Fund		None	J	T					
37. Putnam Voyager Fund		None	J	T					
38. Seligman Common A Fund		None	K	T					
39. Torray Fund	E	Dividend	M	T	bought	5/11	L		
40. TR Price Euro Stock Fund	B	Dividend	K	T					
41. TR Price SCi & Tech Fund		None	J	T					
42. Vanguard Int'l Gr Fund	D	Dividend	M	T	bought	10/17	L		
43. Vanguard Sm Cap Index Fund	B	Dividend	M	T					
44. Ing Em Countries A Fund	B	Dividend	K	T					
45. M&T Bank account	A	Interest	J	T	closed out	12/7	J		
46. MTB Money Mkt account	C	Dividend	L	T					
47. CMA Money Fund	D	Dividend	L	T					
48. C. Schwab Money Mkt Fund	A	Dividend	J	T					
49. C. Schwab Muni M. Fund	A	Dividend	K	T					
50. Wachovia account	A	Interest	J	T					
51. Chevy Chase Bank accounts	A	Interest	J	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

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Name of Person Reporting	Date of Report
Roberts, Jr., John G	05/15/2008

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date Month - Day	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
52. 1/8 interest in Cottage, Knocklong, Limerick, Ireland		None	J	W					
53. Shaw Pittman Investors Fund -- 2000 LLC (Y)									
54. TR Price Prime Res Fund	B	Dividend	J	T					
55. Blackrock S&P	C	Dividend	M	T					
56. Midcap SPDR Tr Series 1	A	Dividend	M	T					
57. Allied Capital (Common)	A	Dividend	J	T					
58. Utah Educ. Svgs Plans, Vanguard Inst. Index Fund Plus	A	Dividend	M	T					
59. Utah Educ. Svgs Plans, Vanguard Mid-Cap Index Fund	A	Dividend	L	T					
60. Utah Educ. Svgs Plans, Vanguard Small-Cap Index Fund	A	Dividend	L	T					
61. Utah Educ. Svgs Plans, Vanguard Int'l Growth Fund	B	Dividend	J	T					
62. Utah Educ. Svgs Plans, Vanguard Int'l Value Fund	B	Dividend	J	T					
63. Pillsbury Winthrop Ret. Plan Fid.Mgd.Inc.Part II (bond fund)	B	Dividend	K	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

FINANCIAL DISCLOSURE REPORT Page 11 of 12	Name of Person Reporting Roberts, Jr., John G	Date of Report 05/15/2008

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

Part VII – #23. The Fidelity Freedom 2010 Fund previously noted was held in a retirement/401(k) account, and the administrator of the account eliminated this investment option and transferred Freeedom 2010 Fund investments to NB Kaminsky II. This change was effective as of April 23, 2007.

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Name of Person Reporting	Date of Report
Roberts, Jr., John G	05/15/2008

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. § 501 et. seq., 5 U.S.C. § 7353, and Judicial Conference regulations.

Signature [redacted]

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544