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Judicial Misconduct: A View from the Department of Justice*

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Introduction

Few events cause more concern in the Department of Justice than the receipt of a credible allegation of serious wrongdoing by a sitting federal judge. The investigation of such an allegation can be controversial, can disrupt proceedings in the judge's district, and can cause difficulties between the Department and the bench. Nevertheless, the Justice Department firmly takes the position that these allegations must be pursued vigorously and thoroughly to ensure the integrity of the federal bench. By internal, administrative rule, all such allegations that the Department receives are directed to the Public Integrity Section of the Criminal Division. As a member of the Public Integrity Section from 1977 to 1987, my assignment was to supervise several investigations of federal judges, including two which resulted in prosecutions.[1] My purpose is to describe the Department's role in these matters, from the investigative stage through the decision to prosecute and through trial. Finally, I will have a few comments on the Department's role in enforcement of the Judicial Disability Act of 1980[2] and its involvement in the impeachment process.

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[1] The prosecutions were of Judge Alcee Hastings of the Southern District of Florida and Judge Walter Nixon of the Southern District of Mississippi. Hastings was acquitted in 1983, and Nixon was convicted in 1986.

[2] The Act is formally known as the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980) (codified at 28 U.S.C. §§ 331-332, 372, 604 (1982)).

I. THE INVESTIGATIVE STAGE

Most of the allegations against federal judges are made by prisoners who are unhappy with their sentences and seek to "trade" information with the government, or by disgruntled litigants who are convinced that "the fix" had to be in for the judge to have ruled against them. An extremely high percentage of these allegations are completely meritless and easily disproved. Indeed, the Public Integrity Section routinely and quietly closes the investigation and declines prosecution in numerous such allegations after an interview of the person making the allegation and a review of appropriate court documents. These cases rarely make the news, require a referral under the Judicial Disability Act,[3] or even come to the attention of the judge against whom the allegation is made.

When the Public Integrity Section determines that an allegation could have some merit, the Department has various investigative techniques available, including FBI interviews, use of the grand jury, search warrants, undercover operations, and electronic surveillance. Unusual problems arise with some of these techniques, however, when the subject of the investigation is a federal judge.

A. Getting Inside the Chambers

When investigating allegations of judicial corruption, the government frequently seeks to interview and to receive documents from individuals who work for a federal judge, including law clerks, secretaries, members of the clerk of court's office, bailiffs, and marshals. Crucial to the resolution of an allegation may be a determination of why the judge issued an order on a given day, why he ruled in favor of a particular party, or with whom he discussed a particular case. Efforts to receive such evidence may run afoul of a privilege protecting confidential communications among judges and their staffs in the performance of judicial duties. A court first applied this privilege in *In re Certain Complaints Under Investigation by an Investigating*

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[3] *See id.*

Committee of Judicial Council of Eleventh Circuit.[4] In this case, Judge Hastings challenged the Eleventh Circuit Investigating Committee subpoenas to his staff and thereby called into question the existence, applicability, and scope of a privilege protecting "against disclosure of confidential communications among an Article III judge and members of his staff regarding the performance of his judicial duties."[5] The special panel assigned to hear this case found a need for a judicial privilege protecting the confidentiality of judicial communications:

> Judges, like Presidents, depend upon open and candid discourse with their colleagues and staff to promote the effective discharge of their duties. The judiciary, no less than the executive, is supreme within its own area of constitutionally assigned duties. Confidentiality helps protect judges' independent reasoning from improper outside influences. It also safeguards legitimate privacy interests of judges and litigants.[6]

The panel concluded, therefore, that a privilege protecting confidential judicial communications exists. They found the privilege to be a qualified one, limited, "[i]n the main, ... to communications among judges and others relating to official judicial business such as, for example, the framing and researching of opinions, orders, and rulings."[7] Placing the burden on the party asserting the privilege to demonstrate that the privilege covers such matters, the panel held that the matters at issue—appointment diaries, calendars, travel itineraries, sign-in sheets, and telephone message books in Judge Hastings chambers—had not been shown to be within the judicial privilege.[8] The import of this decision is that the government cannot penetrate the confidential judicial decision-making process; however, it can gain access to other evidence in chambers that is relevant to its investigation.

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[4] 783 F.2d 1488 (11th Cir.), *cert. denied*, 106 S. Ct. 3273 (1986).
[5] *Id.* at 1518.
[6] *Id.* at 1519-20.
[7] *Id.* at 1520.
[8] *Id.*

B. Wiretaps

The idea of a wiretap in a judge's chambers causes uneasy feelings among lawyers in and out of the Justice Department. Few would disagree that the government should not overhear sensitive, privileged conversations between judges or between a judge and his or her law clerk about how cases should be decided. Nevertheless, it does not follow that electronic surveillance in a judge's chambers is *per se* unreasonable and therefore illegal. To the contrary, one can envision an extraordinary circumstance in which a well-placed, *judicially ordered, carefully supervised* wiretap is the only investigative technique that will allow the government to decide conclusively whether or not the judge is involved in criminal wrongdoing.

Lawyers have argued frequently that wiretaps on their telephones are *per se* unreasonable because the government secretly may listen to privileged attorney-client conversations. Courts in *United States v Loften*[9] and *United States v King*[10] have found these arguments unpersuasive. Courts have held that title III, the wiretap statute,[11] creates a careful statutory scheme that fully protects the confidentiality of privileged communications without making criminal activity conducted in lawyers' offices or over lawyers' telephones absolutely immune from electronic surveillance.[12]

The primary protection set forth in the wiretap statute is the requirement that a judge must authorize all interceptions of wire or oral communications.[13] Moreover, wiretap applications must be designed to minimize the possible interception of "commu-

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[9] 507 F Supp. 108 (S.D.N.Y. 1981) (court denied motion to suppress recorded telephone conversations between attorney and defendant); 518 F Supp. 839 (S.D.N.Y. 1981) (court denied motion to dismiss indictment), *aff'd*, 819 F.2d 1130 (2d Cir. 1987).

[10] 335 F Supp. 523 (S.D. Cal. 1971), *aff'd in part, rev'd in part*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974).

[11] 18 U.S.C. §§ 2510-2521 (1982 & Supp. IV 1986).

[12] *See, e.g., King*, 335 F Supp. at 523. The government received authorization for and utilized a wiretap in a lawyer's office in the Hastings prosecution. The lawyer, Bill Borders, had telephone conversations with Hastings from his office which were recorded. Borders was later indicted with Hastings and his challenge to the wiretap was denied. Borders was convicted in a separate trial. *See* United States v. Borders, 693 F.2d 1318 (11th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983).

[13] 18 U.S.C. at § 2518(1) (1982 & Supp. IV 1986).

nications not otherwise subject to interception under this chapter."[14] Also, to ensure strict adherence to the statutorily-mandated minimization requirement, the statute provides for close judicial supervision of the wiretap.[15] If a privileged communication were intercepted in violation of a minimization order, then that communication would properly be suppressed.[16] Even privileged communications intercepted inadvertently or in good faith would nonetheless be inadmissible at trial.[17]

The same protections obviously would apply to communications intercepted in a judge's chambers, and a reviewing court probably would conclude that such protections sufficiently shield judges from unreasonable electronic surveillance. If a situation ever arose in which the government had probable cause to believe that specific criminal conversations would take place in chambers or over a judge's telephone, one would expect the government to seek and to receive authority for a wiretap. Also, one would expect that carefully trained, experienced agents would monitor the wiretap to minimize the possibility of either overhearing or recording legitimate, confidential conversations.

C. Undercover Operations: What Can the Government Do?

A defendant or his or her lawyer often report to the government that the defendant has received word, usually from some shadowy middleman, that, if he or she pays the judge a bribe, usually through the middleman, he or she will be acquitted, receive a light sentence, or receive some other benefit. The case is typically underway when the middleman makes his approach, usually with a key event, such as the trial or sentencing, in the near future. What can the government do to test these allegations without interfering with the case or with the defendant's sixth amendment right to effective assistance of counsel? May the government provide the money to the defendant to pay the

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[14] *Id.* at § 2518(5) (Supp. IV 1986).

[15] *Id.* at § 2518(6) (1982); *see* United States v. Bynum, 485 F.2d 490, 501 (2d Cir. 1973), *vacated,* 417 U.S. 903 (1974).

[16] *See* United States v. Scott, 516 F.2d 751, 760 n.19 (D.C. Cir. 1975), *cert. denied,* 425 U.S. 917 (1976); United States v. Cox, 462 F.2d 1293, 1301-02 (8th Cir. 1972), *cert. denied,* 417 U.S. 918 (1974).

[17] 18 U.S.C. at § 2517(4) (Supp. IV 1986).

middleman and then wait to see what happens? If the middleman instructs, and the government encourages, the defendant to plead guilty after the payment, does the defendant get his or her right to trial back if the judge is deemed not to be corrupt? If the defendant's attorney received the solicitation, may the government deal with the attorney and require that the attorney keep the client in the dark? Difficult questions abound in this area with little guidance provided in the case law

The government's lawyer should take particular care if he or she presents or encourages others to present false evidence to an unknowing court for the purpose of developing evidence for a subsequent prosecution. If the prosecutor encourages or permits the defendant or his or her attorney to lie or to mislead the court to induce the judge to incriminate himself or herself, he or she may run afoul of the bar's ethical standards and be subjected to disciplinary proceedings.[18]

The Justice Department's policy in these cases is to advise some judicial authority about the progress of the investigation. Advising a judge on the same court as the judge under investigation often will be awkward or unwise. In some instances, the Justice Department has gone to the chief judge of the appellate court which oversees the judge under investigation. Judicial supervision helps ensure that the government takes no misstep during the investigation and that timely judicial assistance is available, for example, to issue a warrant or to grant an immunity

II. THE CHARGING DECISION: VINDICTIVE PROSECUTIONS?

In the recent criminal trials of Judges Hastings, Claiborne and Nixon,[19] all three judges argued that the government was prosecuting them improperly because they had made rulings that the Justice Department did not like. Indeed, behind the primary argument that federal judges cannot be prosecuted, but only impeached, is the notion that judges must be shielded from

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[18] *See, e.g., In re* Friedman, 392 N.E.2d 1333 (Ill. 1979).

[19] Judge Harry Claiborne of the District of Nevada was convicted in 1984. *See supra* note 1.

possible prosecution by a vindictive and angry Justice Department.

My experience in the Justice Department causes me to believe that it is extremely unlikely that a prosecution of a federal judge could ever be triggered by an improper motive. Prior to approval of the presentation of an indictment to a grand jury, the case is meticulously and extensively reviewed at many levels, most of them involving participation by experienced, career prosecutors who analyze and challenge the case from every conceivable angle. The prosecutor who proposes presenting the indictment must be able to meet every challenge, or the case will not be brought. At the same time, the judge under investigation is given every opportunity to provide the Department with exculpatory evidence, mitigating circumstances, or reasons not to indict. In my experience, the process is fair and thorough, with the Department having no institutional bias whatsoever in favor of prosecution. Of course, after indictment, the defendant judge is free to raise his claims of vindictive or otherwise improper prosecution before the court; to date, courts have rejected all of the allegations of improper prosecution that Judges Hastings, Claiborne, and Nixon have raised.[20]

III. THE TRIAL

A. The Procedural Nightmare

The prosecution of a sitting judge in his own district causes serious procedural problems. The problem begins with the basic question of who should serve at the trial—judges, marshals, clerks, and court reporters who have worked with the defendant? This problem was exacerbated in the *Claiborne* and the *Nixon* cases by the fact that both defendants were chief judges of small districts with limited staffs available. First, the government's

[20] The defendant judges also have argued that the Constitution prohibits the executive branch from prosecuting a sitting federal judge and that Congress alone can punish a federal judge for high crimes and misdemeanors through the impeachment process. Courts have not found this argument persuasive. *See* United States v. Claiborne, 727 F.2d 842 (9th Cir.), *cert. denied,* 469 U.S. 829 (1984); United States v. Hastings, 681 F.2d 706 (11th Cir. 1982), *cert. denied,* 459 U.S. 1203 (1983).

response to this difficult predicament is to request the appellate court to appoint an outside judge to preside at the trial. In the three recent prosecutions, outstanding judges were given the difficult assignment.[21] Next, the government seeks to assure itself that the trial will not be compromised by the use of any court personnel who will not be or may not be fair and impartial. In some of the recent cases, this caused the Justice Department to bring in outside marshals from around the country at great expense to protect sequestered juries. Similarly, court reporters, clerks, and bailiffs have come from outside the district (usually with the assigned judge) to ensure a proper trial.

May a judge prepare the defense using the resources of his or her chambers? If the defendant is still a judge, nothing prevents him or her from working out of chambers except a sense of propriety May the judge use his or her staff to help prepare the defense? The law prohibits judicial resources, such as a law clerk's time or photocopying, from being used on a judge's personal business. Experience teaches that a judge's staff will rally around him or her during a prosecution and seek to help, particularly since an indicted judge will withdraw from active cases or will be stripped of his or her docket, leaving the staff with little to do. Of course, nothing prevents staff members from volunteering their time to the judge after-hours or during annual leave; the support from the staff may have been more extensive than this during the recent prosecutions. While the staff support of an indicted judge may be the subject of an investigation one day, thus far the Justice Department has not viewed this conduct as a serious problem.

B. Take Off the Robes

Undoubtedly, a federal judge is one of the most respected figures in our society A primary goal of the Justice Department during the trial of a federal judge is to get the jury to focus on the conduct of the defendant and not on his status. The govern-

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[21] Judge Edward Thaxter Gignoux of the District of Maine presided at the *Hastings* trial. Judge Walter Hoffman of the Eastern District of Virginia presided at the *Claiborne* trial. Judge James Meredith of the Eastern District of Missouri presided at the *Nixon* trial.

ment reminds the jury as often as possible that the judge should be treated like all other defendants. Defense counsel typically will try to convince the jury that a person of the judge's stature is unlikely to commit the crimes charged. The verdict can turn on which advocate is the more successful on this particular point.

An interesting issue would arise if a defendant judge insisted on wearing his robes to court during his trial; however, this did not occur during any of the three recent trials of federal judges. Presumably, the trial court's inherent power to control the courtroom could result in an order to the defendant to disrobe if the trial court found the robe sufficiently distracting or prejudicial to the government.

Another interesting issue is how the defendant is to be addressed at trial. "Your Honor" certainly seems inappropriate. If the defendant is still a judge during the trial, that he be addressed as "Judge ——-" seems natural; this was the government's practice at the recent trials.

Nothing prevents the defendant judge from playing an active role in his or her defense at trial. Indeed, Judge Hastings represented himself. Nevertheless, no matter what the defendant's role is at trial, the government will seek figuratively to take his or her robes off and to keep the jury's attention directed to the conduct for which he or she stands charged.

IV JUDICIAL DISABILITY ACT

Occasionally, the Justice Department will receive an allegation of a federal judge's misconduct, investigate it, and then conclude that the conduct is not criminal but that it is unethical or inappropriate. At this point, the Department will make a referral pursuant to the Judicial Disability Act of 1980 to the appropriate circuit.[22] Some may be concerned that the Department's discretion in its referral decision is dangerous, arguing that the Department will make referrals on judges it dislikes, and not make referrals on judges it likes.

There are several answers to these concerns. First, the 1980 Act makes referrals discretionary, not mandatory [23] Second, the

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[22] *See* 28 U.S.C. § 372(c)(1) (1982).

[23] *See id.*

judicial review mechanism would be completely overwhelmed if every allegation received, irrespective of merit, required the judiciary's response. Finally, the judiciary, not the Justice Department, resolves any improper referrals by the government. I know of no instance when the judiciary has concluded that any referral made by the Justice Department was inappropriate.

The Department standard for referring judicial misconduct is similar to the standard for referring allegations of agency employee misconduct to internal disciplinary units. During the course of a criminal investigation, however, the Department does not refer the judge to the judiciary pursuant to the 1980 Act or refer the agency employee to the agency disciplinary unit. While this policy may delay an administrative remedy to a serious problem, it ensures that the criminal investigation is not disturbed.

V THE IMPEACHMENT PROCESS

The Justice Department obviously has no formal role in the impeachment process of a federal judge. Usually, however, the Department will have a substantial informational role because the files of a government prosecutor or the FBI may contain the evidence to support the impeachment. Congress expects the Justice Department to cooperate completely with Congress during an impeachment. Nevertheless, Congress has subpoena power and can force the government to turn over evidence, even evidence produced before a grand jury.[24]

A major legal issue that arose during the *Claiborne* impeachment was whether the Senate could rely exclusively on the court record to find an impeachable offense or whether it had to prove the impeachable evidence in the Senate chamber. To my surprise, the Senate chose the latter, and was burdened with a laborious evidentiary hearing in which many of the same witnesses who had testified at the criminal trial appeared. This approach raises obvious questions. What if the Senate disagreed with the jury

[24] The U.S. House of Representatives Committee on the Judiciary successfully obtained an order to receive the record of the grand jury that indicted Judge Hastings. *See In re* Grand Jury Proceedings of Grand Jury No. 81-1 (Miami), 669 F Supp. 1072 (S.D. Fla. 1987).

and concluded that Judge Claiborne had not committed tax evasion? Would Judge Claiborne have been permitted to resume his seat on the bench after he served his two-year prison sentence? Of course, a decision not to impeach would not have reversed his conviction. I suggest that the Senate should rely on the criminal trial court record to prove the offense, allow the judge to rebut the record with live evidence if appropriate, and then make the decision on whether the whole case amounts to impeachable conduct. Otherwise, the Senate may face long, difficult impeachment trials that follow long, difficult jury trials. Besides being tedious and time-consuming for Senators, serious evidentiary problems inevitably will nag at the process; for example, witnesses will die and memories will dim. Few tasks are as difficult as a retrial, and having the Senate as venue for the second proceeding makes retrial no easier. The Senate should avoid this burden, particularly when a retrial does not make the impeachment process any fairer.

CONCLUSION

The investigation and the prosecution of federal judges is a difficult part of the job at the Department of Justice. Nevertheless, such investigations and prosecutions are necessary and important tasks that help to ensure the integrity of the federal bench. The very great percentage of allegations of wrongdoing by federal judges that the government receives are completely meritless and easily disproven. The recent spate of prosecutions of judges is not a cause for alarm and does not indicate a trend toward increased judicial corruption. It means only that there will be a few bad apples in any lot, no matter how outstanding the majority, and that the Public Integrity Section of the Justice Department is vigilant in ferretting out the bad ones.