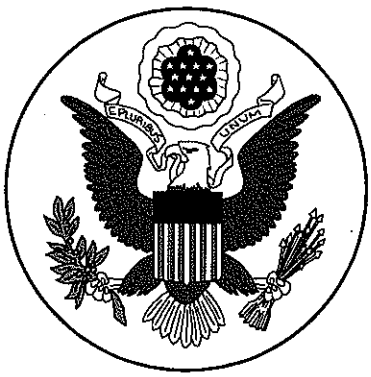
JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF

JUDGE ANTHONY J. SCIRICA
U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT
CHAIR, JUDICIAL CONFERENCE COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY



BEFORE

THE SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND THE INTERNET

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

ON

"AN EXAMINATION OF THE JUDICIAL CONDUCT AND DISABILITY SYSTEM"

April 25, 2013

TESTIMONY OF JUDGE ANTHONY J. SCIRICA

Good afternoon, and thank you for inviting me to testify. I am Anthony Scirica, and I am a judge on the United States Court of Appeals for the Third Circuit. I chair the Judicial Conference Committee on Judicial Conduct and Disability, whose charter includes overseeing the administration of the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-364. For seven years I served as the chief judge of the Third Circuit. In that capacity I received roughly two judicial conduct or disability complaints a week. My job was to adjudicate and resolve these in a manner consistent with the Act, and after 2008, under the new procedural rules adopted that year by the Judicial Conference. I always believed that nothing I did as a federal judge was more important than adjudicating these complaints.

By enacting the Judicial Conduct and Disability Act of 1980, Congress entrusted to the Judiciary the responsibility to regulate judicial conduct and disability. With that responsibility comes the imperative of accountability. Judicial accountability and judicial independence—both decisional and institutional independence—are two sides of the same coin, as both are essential to establish and protect the rule of law. At the end of the day, respect for the judgments and rulings of courts depends upon public confidence in the integrity, competence, independence, and accountability of their judges.

I appreciate the opportunity to set forth the steps we have taken to implement the Act.

The Design and Purpose of the Act

The Judicial Conduct and Disability Act of 1980 proscribes behavior or "conduct prejudicial to the effective and expeditious administration of the business of the courts." It entrusts to the Judiciary the authority to adjudicate and resolve complaints of judicial conduct

and disability, and to create rules of procedure.[1] The 1980 Act empowers chief circuit judges, circuit councils, and the Judicial Conference to investigate and remedy complaints of judicial conduct and disability. The process is inquisitorial and administrative so that the Judiciary can become the active gatherer of evidence, and focus the objectives and nature of an inquiry. The Act enables the Judicial Conference to establish uniform procedures to adjudicate judicial conduct, to review judicial conduct and disability decisions by the circuit councils, and to monitor compliance with the Act and the rules of procedure through regular oversight.

The Act vests primary responsibility for complaint administration in chief judges of circuit and national courts, and in the circuit councils (or equivalent bodies) of the courts over which those chief judges preside. It draws upon the credibility and moral authority that judges have in the eyes of their judicial peers. Likewise, it taps judges' understanding of judicial work and of what courts require in order to function properly. By vesting authority in the Judiciary, the Act draws upon the collective experience of federal judges to ensure accountability without sacrificing the institutional independence that is essential to the judicial function. The Act uses the size and layering of the federal Judiciary so that any complaint can receive independent review by judges who are not colleagues of the judge who is under scrutiny.

The Judicial Conduct and Disability complaint process is interrelated with the Code of Conduct for United States Judges. The Judicial Conference adopted the Code of Conduct in 1973 as the standard of conduct for federal judges, and since then has amended the Code several times. Behavior that violates the Code of Conduct may constitute "conduct prejudicial to the

[1]Professor Stephen Burbank has thoughtfully described the congressional deliberations on the Act. Stephen B. Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. Pa. L. Rev. 283, 293 (1982).

effective and expeditious administration of the business of the courts" under the Act. The Judicial Conference has explicitly stated that the Code of Conduct "provides standards of conduct for application in proceedings" under the Judicial Conduct and Disability Act. The Code of Conduct and the disciplinary system set forth in the Act are therefore complementary and operate in tandem.

As you might imagine, most complaints arise because someone—generally a disappointed litigant or criminal defendant—questions a judicial decision or is dissatisfied with the result. Such complaints must be dismissed under the Act because they relate to the merits of a case.[2] Experienced attorneys are familiar with the appeals process, but *pro se* litigants do not have the benefit of counsel and often seek to redress an adverse determination through the conduct and disability complaint process. More than ninety percent of complaints are filed by prisoners and other *pro se* litigants, and most complaints are merits-related. As a result, even though a substantial number of complaints are filed, very few are found to warrant remedial action.

Complaint Process

Before I address the Breyer Committee Report,[3] I would like to describe how the Act currently functions. The process begins with a complaint alleging that a judge engaged in "conduct prejudicial to the effective and expeditious administration of the business of the

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[2] The entire panoply of rights under the appeals process is available for the correction of any merits-related errors. Generally, failure to recuse without more is not viewed as misconduct. But failure to recuse can generate a cognizable misconduct complaint if the recusal decision was based on an improper or illicit motive, such as a bias or prejudice against a person or a certain group of people. Moreover, any party may appeal a recusal decision, sometimes even during the pendency of a case.

[3] The Judicial Conduct and Disability Act Study Committee, Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice (2006).

courts," or that, due to a mental or physical disability, the judge "is unable to discharge the duties of office." A complaint can be filed by any person, including any member of the public and any member of Congress. Even if no one files a complaint, the chief circuit judge[4] is required to initiate a complaint whenever he or she becomes aware of improper conduct. After a complaint is filed, the chief circuit judge may conduct a limited, informal investigation, but may not make findings of fact about any matter that is reasonably in dispute. If there are reasonably disputed factual issues, the chief circuit judge must appoint a special committee to investigate.

If no special committee is warranted, the chief circuit judge may then "conclude" the complaint due to intervening events (such as resignation) or appropriate corrective action has been taken. The chief circuit judge may also "dismiss" the complaint if it has no actionable allegations, is related to the merits of a case, is frivolous, raises no inference of misconduct or disability, is unprovable, lacks any factual foundation or is conclusively refuted by objective evidence, is filed in the wrong circuit, or is "otherwise not appropriate for consideration under the Act."[5] As noted, however, if the complaint is not concluded or dismissed, the chief circuit judge must appoint a special committee (comprising the chief circuit judge and equal numbers of circuit and district judges in that circuit), to investigate the allegations. When circumstances warrant, the chief justice, at the request of a chief circuit judge or circuit council, may transfer the investigation and resolution of a complaint to a different circuit from the one where the judge in question sits.

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[4] Throughout the process, the chief circuit judge has specialized responsibilities under the Act. Of course, when the chief circuit judge is the subject of the complaint, a different judge of the court acts in this role.

[5] 28 U.S.C. § 352(b); Judicial Conference of the United States, Rules for Judicial-Conduct and Judicial-Disability Proceedings, Rule 11(c) (2008).

Following an investigation, the special committee submits a report with factual findings and recommendations to the circuit council, the basic governing body of a circuit under 28 U.S.C. § 332. The circuit council consists of the chief circuit judge, chief district judges and other experienced judges. The special committee is authorized to exercise the circuit council's subpoena power when investigating complaints under the Act. After review of the special committee's report, the circuit council may dismiss or conclude the complaint, return it to the special committee for more investigation, refer the complaint to the full Judicial Conference, or take remedial action.

The Act allows the complainant or the judge to petition the Judicial Conference to review the circuit council decision. The Judicial Conference delegated this review function to the Judicial Conduct and Disability Committee, but retains the authority to review all complaints considered by the Judicial Conduct and Disability Committee. I will come back to the review process.

The complaint consideration process first seeks to determine the facts and whether misconduct occurred or whether a judge is disabled and cannot fully perform his or her judicial functions. If the complaint allegations are substantiated, the circuit council or Judicial Conduct and Disability Committee orders an appropriate remedy. Remedial actions include ordering the temporary suspension of new case assignments, issuing a public or private censure or reprimand, asking a judge to retire voluntarily, and certifying a judge's disability so that a vacancy is created.[6] If the complaint is against a magistrate judge or bankruptcy judge, remedies can also include initiating the statutory process to remove that judge from office. If a circuit council finds

[6] The formal structure and sanctions set forth in the rules also serve to reinforce conduct norms and can induce voluntary remedial action.

that an Article III judge may have engaged in conduct that could constitute grounds for impeachment, it must refer the complaint directly to the Judicial Conference. If the Judicial Conference determines that impeachment may be warranted, it must certify that determination and transmit the record to the House of Representatives. Under the Act, the Judicial Conference may recommend the impeachment of a judge convicted of a felony without waiting for referral or certification from a circuit council. The rules expanded on the Act's reference to possible criminal conduct. For example, "[i]f the [special] committee's investigation concerns conduct that may be a crime, the committee must consult with the appropriate prosecutorial authorities to the extent permitted by the Act to avoid compromising any criminal investigation."

To protect complainants and witnesses, as well as subject judges, the process is confidential until a final order is issued and the period for review expires. Confidentiality is important because it encourages cooperation with investigation of the underlying allegations, and protects complainants and witnesses (who may include court employees and attorneys). All final orders under the Act are made public. Orders must give reasons for a complaint's disposition. The judge's name must be disclosed if there is a remedy ordered that exceeds private censure or reprimand. Publishing orders promotes transparency, develops precedent, enables the orders to function as a deterrent, and builds public confidence.

Breyer Committee

In 2004 Chief Justice William Rehnquist appointed a committee, chaired by Justice Stephen Breyer, to review the Act's implementation and to report findings and recommendations. The Judicial Conduct and Disability Act Study Committee, known as the Breyer Committee, issued its report in 2006 and found that the Act's implementation was largely

successful, with a two to three percent error rate out of the 2,000 complaints it reviewed. But the Committee found that five of the seventeen highly visible cases it studied were "problematic." Problems included a failure to appoint a special investigating committee to resolve disputed facts, and a failure of chief circuit judges to initiate a complaint upon learning of improper conduct.

The Breyer Committee issued twelve recommendations to improve implementation of the Act, judicial accountability and transparency:

1. The Judicial Conference should authorize the Committee on Judicial Conduct and Disability to provide advice and counsel regarding implementation of the Act.

2. In this advisory role, the Committee on Judicial Conduct and Disability should emphasize the desirability of identifying complaints, transferring complaints to other circuits for investigation, and appointing special committees.

3. The Committee on Judicial Conduct and Disability should create an orientation program for new chief circuit judges and an online compendium with suggested approaches and procedures, as well as guidance on the Act's terms.

4. The Committee on Judicial Conduct and Disability should make illustrative chief circuit judge and circuit council orders available online.

5. The Committee on Judicial Conduct and Disability should encourage courts to create committees of local lawyers who can serve as intermediaries between individual lawyers and the formal complaint process.

6. All courts should provide information on how to file a complaint on the home page of the court's website and take other steps to publicize the Act.

7. All courts should submit timely and accurate information about complaint filing and terminations to the Administrative Office.

8. The Committee on Judicial Conduct and Disability's annual reporting should tally the number of special committees appointed each year.

9. The Committee on Judicial Conduct and Disability should periodically monitor the Act's administration.

10. The Federal Judicial Center should seek to ensure all judges understand the Act and its procedures.

11. The Judicial Conference should make clear it has the authority to review the Judicial Conduct and Disability Committee's decisions on appeals from circuit council orders.

12. The councils and the Judicial Conference should consider programs to make advice available by phone (or otherwise) for chief circuit judges.

The Judicial Conference of the United States endorsed the full complement of the Breyer Committee's recommendations. Of the implementation actions taken, the most important change was the 2008 adoption of uniform mandatory rules governing the complaint process. Prior to the 2008 rules, each circuit council created its own complaint procedures, under the guidance of the Judicial Conference's Illustrative Rules. The Breyer Committee cited this lack of procedural uniformity. The Judicial Conference agreed, and in 2008 adopted uniform mandatory rules of procedure. In addition, the Conference expanded the authority of the Committee on Judicial Conduct and Disability. These developments were significant because in addition to mandating national uniformity, the Conference established oversight and review, centralized supervisory authority, created a clear hierarchy of accountability, and improved transparency of the judicial conduct complaint process.

The Act authorizes chief circuit judges to initiate complaints. The uniform rules expand on the Act by prescribing circumstances in which chief circuit judges must initiate a complaint on their own. The rules provide for the chief circuit judge to conduct an informal investigation to determine whether a complaint should be initiated. As noted, the uniform rules also require the appointment of a special investigatory committee if material facts are reasonably in dispute. The predecessor illustrative rules did not clearly require chief judges to act in such circumstances.

Significantly, the uniform rules impose up to three levels of review on decisions by the chief circuit judge: circuit councils review the chief circuit judge's orders, the Committee on Judicial Conduct and Disability reviews certain circuit council actions,[7] and the Judicial Conference may review the decisions of the Committee on Judicial Conduct and Disability.

The uniform rules now allow the Committee on Judicial Conduct and Disability to review any circuit council order to determine if a special committee should be appointed. The Committee on Judicial Conduct and Disability may exercise "reach down" authority to review whether a special committee should be appointed, even if no party seeks review. Moreover, the Committee may return any reviewable matter to the circuit council with directions to undertake an additional investigation. In extraordinary circumstances, the Committee may undertake its own investigation on reviewable matters, exercising the powers of the Judicial Conference.

Responding to the Breyer Committee Report, the Judicial Conference expanded the oversight role of the Committee on Judicial Conduct and Disability to include monitoring of orders issued by chief circuit judges, circuit councils, and national courts under the Act. This enables the Judicial Conduct and Disability Committee to step in to assist the circuit councils if requirements are overlooked, and to ensure that the Act is functioning properly. The Committee on Judicial Conduct and Disability annually reviews orders and other complaint-related documents for compliance with the Act, in a manner similar to the Breyer Committee's review. The Committee on Judicial Conduct and Disability receives information on all complaint-related orders and examines a number of them to confirm that all proper procedures were followed, and

[7] When a complainant petitions for review, the Committee on Judicial Conduct and Disability must review any decision by the circuit council when a special committee was appointed. The Committee must also review a decision not to appoint a special committee if a circuit council member dissented on the grounds a special committee should have been appointed.

to identify any orders that are novel in their underlying facts or could serve as models, and any documents associated with "high-visibility" complaints that could particularly affect the public's confidence in the Judiciary. The Committee reviews each such complaint for compliance with the Act and the procedural rules.

To facilitate review, the Judicial Conference created a mandatory procedure for electronic submission of complaint-related documents to the Committee. The Committee on Judicial Conduct and Disability also arranged for adjustments in the software that compiles statistics on judicial conduct and disability complaints to make tabulated data public each year.

The Committee on Judicial Conduct and Disability is also charged with informing the public and the bar about the Act, its procedures and their rights under the Act. Now every circuit court website has a link on its homepage to information on judicial conduct and disability. The Committee on Judicial Conduct and Disability created a guide for the public to assist with filing a complaint, which is readily accessible on the uscourts.gov website. That website has a section devoted to judicial conduct and disability. Committee decisions along with other information on the complaint process are now posted in this area of the uscourts.gov website. A majority of circuit courts also post published complaint-related orders online to make them more accessible to the public. Finally, chief circuit judges are in some extraordinary circumstances authorized to disclose the existence of a complaint before its resolution. These efforts seek to educate the public on enforcement of the Act and to improve transparency.

As the Breyer Committee recommended, the Committee on Judicial Conduct and Disability is now also an advisory body. The Committee on Judicial Conduct and Disability is frequently consulted by chief circuit judges and circuit council members on complaint-related

issues—for example, whether in a given case a complaint should be initiated, whether a special committee should be appointed, whether a complaint should be transferred to another circuit, and how to address other issues.

To further aid chief circuit judges confronted with possible judicial misconduct or disability, we created a compendium, the *Digest of Practical Advice*. This new resource draws upon extensive interviews of current and former chief circuit judges with long experience in the administration of the Act. The Judiciary has provided educational programs on the Judicial Conduct and Disability Act for judges and staff, including presentations, one of which was an orientation seminar on the 2008 Rules.

In addition to this guidance, the Committee on Judicial Conduct and Disability is developing the *Digest of Authorities*, a body of precedent in judicial conduct and disability cases. We expect this volume to be available this summer, and it will be published online. These opinions will not only provide advice, but serve as precedent for future cases. They create a common law, a body of precedents for all who are charged under the 1980 Act with adjudicating judicial conduct and disability complaints.

Self-regulatory systems impose significant responsibilities on those who must enforce the regulations. This disciplinary system is self-regulatory in a legitimate effort to preserve judicial independence. As stewards, the Judiciary recognizes that it is essential to continually monitor and assess our disciplinary system to ensure both its effectiveness and adherence to the appropriate standards and procedures. The Committee on Judicial Conduct and Disability sits at the intersection of judicial accountability and judicial independence. We want to make certain that our disciplinary system holds judges accountable for misconduct, but at the same time

protects a vital judicial independence. The current disciplinary system accomplishes this goal while preserving the well-balanced calibration in our constitutional system of checks and balances that has served our country so well.

Finally, as Chair of the Committee on Judicial Conduct and Disability, I am always available and welcome the opportunity to brief members of the Judiciary Committee on the operation of the Act. That concludes my prepared remarks. I welcome any questions you may have.