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on the Judicial Conduct and Discipline System

Before the

Subcommittee on Courts, Intellectual Property and the Internet

Committee on the Judiciary, House of Representatives

April 25, 2013

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Chairman Coble, Ranking Member Watt, Vice-Chairman Marino, and members of the Subcommittee: Thank you for this opportunity to testify at this oversight hearing examining the federal judicial conduct and disability system, and thank you for the oversight itself. Proper legislative oversight of the other two branches is a vital part of the checks and balances embodied in the Constitution. By way of summary, I believe the judicial branch is doing, overall, a very good job of administering the Act, which largely involves sifting through a high number of insubstantial and often frivolous complaints to find the few that justify further investigation.

Since September 2005, I have been a Visiting Fellow in the Brookings Institution's Governance Studies Program and president of the Governance Institute—a small, non-partisan, non-profit organization that since 1986 has analyzed various aspects of interbranch relations. In both positions I have been especially interested, among other things, in various aspects of judicial ethics regulation.

Before assuming these positions I was with the Federal Judicial Center, the federal courts' research and education agency, serving as Deputy Director since 1991. While at the Judicial Center and for about a year at Brookings, I assisted the six-member Judicial Conduct and Disability Act Study Committee, appointed in May 2004 by Chief Justice William H. Rehnquist and often referred to as the "Breyer Committee," after its chairman, Associate Justice Stephen G. Breyer. The committee—Justice Breyer, two former chief circuit judges, two former chief district judges, and the Chief Justice's administrative assistant— reported to the Judicial Conference of the United States in September 2006,[1] after which a renamed Judicial Conference Judicial Conduct and Disability Committee developed new, mandatory rules governing the processing of complaints, rules that the Conference approved in March 2008. [2]

Credit for the report and the subsequent rules goes in part to the House Judiciary Committee and its then-chairman, Representative F. James Sensenbrenner, who called attention in early 2004 to what he regarded as an improper dismissal of a judicial conduct complaint he had filed (the Breyer Committee subsequently agreed that the dismissal was improper)[3]. Chief Justice Rehnquist said in announcing the committee appointments, "There has been some recent criticism from Congress about the way in which the Judicial Conduct and Disability Act ... is being implemented, and I decided the best way to see if there are any real problems is to have a committee look into it."[4]

The relatively few problems highlighted by the Breyer Committee, and the process enhancements in the 2008 rules, have no doubt led to improvements in how the federal

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[1] "Implementation of the Judicial Conduct and Disability Act of 1980, A Report to the Chief Justice," (Sept, 2006), available at http://www.fjc.gov/library/fjc_catalog.nsf/autoframepage!openform&url=/library/fjc_catalog.nsf/DPublication!openform&parentunid=C6CA3DC8B22AC2D78525728B005C9BD3

[2] Available at http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/Misconduct/jud_conduct_and_disability_308_app_B_rev.pdf

[3] See report, id at note 1, at 73-75.

[4] Id at 131.

courts handle complaints filed under the Act, although, as the Committee report documented, the courts had already been doing, overall, a very good job. In this statement, I describe the Breyer Committee's methods and principal findings, and then offer a few fairly modest suggestions to strengthen further the judicial conduct and disability system.

The Breyer Committee and Its Work

At the outset, let me make very clear that I speak only for myself and in no way claim to speak for the Breyer Committee (which went out of existence after it filed its report) or for any former members of the committee or its small research staff (or, for that matter, for my two current affiliations).

What it did Working with two Judicial Center researchers and one from the Administrative Office of the U.S. Courts (and me as a coordinator of sorts), the committee selected two samples of complaints terminated from 2001-03: a 593-complaint sample, selected to overrepresent complaints most likely to have alleged behavior covered by the Act (e.g., the sample included a larger percentage of complaints filed by attorneys than in the initial unmodified sample and a lower percentage of complaints filed by prisoners) and a separate sample of 100 terminations drawn totally at random. It also identified 17 complaints terminated from 2001 to 2005 that received press or legislative attention—"high visibility complaints".[5]

The research staff reviewed the 593 complaints and terminations to identify "problematic" terminations, based on committee-approved definitional standards[6] and after committee review of a subset of initial staff reviews to ensure the staff was applying the standards as the committee wished. The committee members alone reviewed the smaller 100-case sample without staff assistance. (The various forms for reviewing the complaints are in the report appendices.)

The purpose of both reviews was not to determine if the subject judges had committed misconduct or displayed performance-degrading disabilities but rather to assess whether chief circuit judges and judicial councils applied the statute as intended—mainly whether the chief judge conducted a "limited inquiry" (as the Act authorizes) sufficient to justify dismissing the complaint or concluding the proceeding, but not an inquiry that invaded the investigatory role reserved for a special committee.

Finally, staff, using survey instruments approved by the committee, interviewed current former chief circuit judges and staff.

What it found The committee concluded that 3.4 percent of the 593 stratified sample of terminations were problematic, as were 2.0 percent of the terminations in the 100 straight random sample complaints (not surprising given the larger sample's oversampling of likely meritorious complaints). The Committee found a greater proportion of problematic dispositions among the high-visibility complaints (five of the seventeen), which it attributed to those complaints' greater likelihood to confront the chief judge or circuit council with more decisions, and thus a greater chance of at least one incorrect decision. The Committee expressed concern that these five problematic dispositions could take on

[5] Id at 39ff.
[6] Id at Appendix E, 144ff.

outsize importance because of their visibility, and convey an inaccurate impression to the public and would-be filers of the Act's effectiveness.

To be clear, this was a methodologically rigorous analysis that let the chips fall where they may. (The non-partisan American Judicature Society praised the report for "not hiding the federal judiciary's dirty linen in the closet," and for "thoroughly discuss[ing] situations in which the judiciary's performance was deficient [and] the causes that may be responsible".[7]) The committee imposed strict—some might even say too strict—criteria in its review of the terminations it assessed. For one example, a complaint by a prisoner alleged that the person on the bench in a hearing in his case was a young man, probably the judge's intern, not the judge. The judge informed the chief circuit judge that he had no intern at the time of the hearing and his law clerk was a middle-aged woman, after which the chief judge dismissed the complaint. The committee characterized the allegation as "bizarre, [but] not so outlandish as to be what our Standard 4 calls 'inherently incredible,'" and classified the disposition as problematic because the chief judge did not obtain, or order his staff to obtain, the electronic recording of the proceeding to verify that the voice on the tape was that of the judge.[8]

These findings suggest that, despite occasional problematic dispositions, proper administration of the Act is by and large engrained in the culture of federal judicial administration. One might ask whether a replication of the research conducted on a more recent sample of cases would find the same low level of problematic dispositions. Obviously, we cannot know that without the replication itself, but there are reasons to suspect that such a replication would find performance at least as favorable as that found by the committee. One reason is the mandatory committee rules and the tougher enforcement and oversight regime they mandate. Also, though, the Breyer Committee findings track very closely those of an earlier study, conducted in 1991-92, using the same basic methodology, for the statutory National Commission on Judicial Discipline and Removal, chaired by former Congressman Robert Kastenmeier. The earlier study used only one modified random sample (of 469 complaints) and found a 2.6 percent problematic disposition rate (compared to the 3.4 percent that the Breyer Committee found in its 593-case sample). The difference is not statistically significant.[9]

Informal discipline outside the Act Finally, the committee interviews tracked a widely shared view within the federal judiciary, namely that informal resolution of misconduct and disability, perhaps in the shadow of the Act, is more extensive than resolutions that result from formal complaints. This is especially so as to performance-degrading disability, which is rarely the basis for complaints under the statute.[10]

Committee Recommendations and Additional Steps

The Committee offered twelve recommendations, principally to provide additional information to chief judges and councils including a vigorous role for the Conduct Committee; to provide additional information about the Act to potential users; and to

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[7] "Politics and Progress in Federal Judicial Accountability," Judicature (Sep't., Oct., 2006), available at http://www.ajs.org/ajs/ajs_editorial-template.asp?content_id=530
[8] Id at 53.
[9] Id at 95ff.
[10] Id at ch. 5.

enhance publically available information about the Act and its implementation. The judicial branch, mainly through the new rules, has adopted many of the recommendations. I am also aware of Professor Arthur Hellman's specific proposals to improve the implementation of the Act, mainly in the areas of transparency, disqualification of certain judges in judicial conduct proceedings, and review of chief judge and council orders. Professor Hellman is probably the country's leading expert on the federal judicial and disability system. In general I share his concerns and endorse his proposals, and add here only a few additional comments.

The role of the Conduct Committee The Act is clear that the chief judge, upon receipt of a complaint, may undertake a "limited inquiry" but "shall not undertake to make findings of fact about any matter that is reasonably in dispute."[11] A complainant may appeal a chief judge's dismissal order to the judicial council, but a judicial council's "denial of a petition for review of the chief judge's order shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise."[12] Perhaps because of some reported instances in which chief judges appear to have dismissed complaints after making findings of fact of matters reasonably in dispute—dismissals affirmed by the respective judicial council—Rule 21 seeks, in the words of its commentary, "to fill a jurisdictional gap." It authorizes the Conduct Committee to consider, on petition of a dissenting council member or on its own initiative, whether the chief judge should have appointed a special committee. This is an important role for the Conduct Committee, even if it would be needed rarely. I tend to agree with Professor Hellman that a statutory change would help to clarify the Conduct Committee's authority in such situations, rare as they may be.

In a related vein, the Breyer Committee recommended that the judicial branch monitor the Act's administration periodically, but doubted that "a full-blown replication of our research would be necessary each time. This was a labor-intensive process for us, for our staff, and for the judges and supporting personnel in the circuits."[13] The Conduct Committee has taken an important step in this direction by examining of some of the universe of terminations it receives from the circuits and doing so in a manner the highly respected Committee chair, Judge Anthony Scirica, characterizes as similar to the Breyer Committee's review. Just as the Breyer Committee published summary data on its review of the terminations it examined and explained why some terminations were problematic, the Conduct Committee might release similar periodic summary analyses.

Providing information on how the Act has been interpreted The commentary to Rule 3 states that the "responsibility for determining what constitutes misconduct under the statute ["conduct prejudicial to the effective and expeditious administration of the business of the courts," 28 U.S.C. § 351(a),] is the province of the judicial council of the circuit subject to such review and limitations as are ordained by the statute and by these Rules."

The judicial branch needs a transparent way of accessing the decisions of the judicial councils (and chief judges) in order to allow chief judges, council members, and other process participants and observers a means of identifying and assessing the

[11] 28 U.S.C. §352(a)
[12] 28 U.S.C. §352(c)
[13] Report at 123.

determinations the councils are making—accessing what some have called the common law of judicial misconduct and disability.

One of the Breyer Committee's main recommendations was for selected orders to be posted on the judicial branch website "in broad categories keyed to the Act's provisions, and . . . with brief headnotes."[14] This recommendation is embodied to a degree in the Rules' promise that the Conduct Committee "will make available on the Federal Judiciary's website . . . selected, illustrative orders, appropriately redacted, to provide additional information to the public on how complaints are addressed under the Act."[15] The Conduct Committee's forthcoming on-line *Digest of Authorities* can make a valuable contribution to this end.

The Act itself also requires each circuit to make available in the court of appeals clerks office all written orders implementing the Act's provisions.[16] The Rules bolster that provision by suggesting the courts' websites as an optional form for making the orders public, and, in terms of transparency and ease of access, website postings are obviously the better option.[17] A preliminary review of circuit practices as I prepared this statement suggest that these circuits do so[18]:

First	All orders from 2008 following, ranging in number from 14 to 45 per year.
Seventh	All orders since 2011 (93 in 2012, for example) with earlier years available on website archives.
Ninth	794 orders, from 2006 and later
Tenth	About 500, since January 2008
DC	Orders from 2011-2013 (53, for example in 2012).

Two other circuits (the Second and Fifth) have posted a small number of orders in high-visibility complaints, and the Federal Circuit has posted 24 orders from 2008, 2009, and 2010.

These postings are surely a positive, if complete, step. At the risk of sounding unappreciative of the posting circuits' efforts, however, analyzing the orders, to compare dispositions of similar complaints, or to assess how different chief judges and councils define or interpret the statute and the governing rules, would require wading into an undifferentiated mass of orders (including routine council orders affirming chief judge dismissals), identified only by date, case number, and, in some circuits, a generic description (e.g., "Order, Chief Judge" or "Order, Judicial Council"). A more helpful

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[14] Id at 117.
[15] Rule 24(b).
[16] 28 U.S.C. §360(b)
[17] Rule 24(b)
[18] The orders are available at these links:
http://www.ca1.uscourts.gov/?content=judicialmis.php;http://www.ca2.uscourts.gov/judmisconduct.htm;http://www.ca5.uscourts.gov/JudicialMisconductOrders.aspx;http://www.ca7.uscourts.gov/JM_Memo/jm_memo.html;http://www.ce9.uscourts.gov/misconduct/judicial_misconduct.html;http://www.ca9.uscourts.gov/misconduct/;http://www.ca10.uscourts.gov/misconduct.php;http://www.cadc.uscourts.gov/internet/misconduct.nsf/DocsByRDate?OpenView&count=100;http://www.cafc.uscourts.gov/judicial-reports;

typology is necessary (along with indicating the page length of each order as a rough way to identify non-routine orders).

Enhanced orientation for chief circuit judges

The Breyer Committee recommended an individual, in-court orientation program for each new chief circuit judge, provided by an experienced current or former chief judge and a member of the Administrative Office General Counsel's office who staffs the Conduct Committee, and that the Federal Judicial Center develop a common core curriculum for the program to promote uniformity in the Act's implementation. The recommendation, along with others, for on-tap resources, was designed to ensure "'that the chief judge is not out there alone'."[19] I do not believe the Conduct Committee to date has requested the Federal Judicial Center to develop such a program, or some other program toward the same end. It is worth exploring, however, whether the Center is in a position to develop and administer such a program and curriculum, and whether the Conduct Committee perceives a need for it in light of the other steps it is taking in its advisory role.

Providing information on the Act to potential users The courts, based on my most recent and admittedly non-exhaustive review have done a fairly good job with another transparency-related Breyer Committee recommendation, namely making information readily available on court website about the Act and how to file a complaint. Not all courts that post such material place it on the homepage, as the Committee recommended,[20] but for the most part I do not believe the information is hard to find. The Judicial Conference Committee on the Judicial Branch, under its former chair, Judge D. Brock Hornby, and current chair, Judge Robert A. Katzmann, with the assistance of its Administrative Office staff, has aggressively reminded the courts of the Rules requirements for such posting.[21] The Breyer Committee found, in 2006, only marginal compliance with a previous suggestion for such posting, and found that those courts that were posting the information on their websites did not experience a greater proportionate number of filings.[22] It accompanied its recommendation with a suggested paragraph warning would-be filers that the chief judge would dismiss their complaint if it related to the merits of an underlying decision, and a fair number of courts appear to have adopted that suggestion.

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Thank you for the opportunity to testify this afternoon. I will do my best to answer any questions you may have.

[19] Report at 113
[20] Report at 120-21.
[21] Rule 28
[22] Report at 33