

JUDGES JUDGING JUDGES: THE FEDERAL JUDICIAL MISCONDUCT STATUTES AND THE BREYER COMMITTEE REPORT*

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The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 ushered in a new process for dealing with judicial misconduct—one of “decentralized self-regulation.” In 2002 Congress amended the Act and also gave the judicial misconduct provisions their own chapter in the United States Code, Chapter 16. This article examines the procedures by which the judiciary handles complaints of misconduct by judges and surveys the record of the results in part by focusing on the findings of a committee chaired by Supreme Court justice Stephen Breyer.

For most of the nation’s history, the only formal procedure for dealing with misconduct by federal judges was the cumbersome process of impeachment. That era ended with the enactment of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. The new law, with its awkward name, created a regime that has aptly been described as one of “decentralized self-regulation” (Barr and Willing, 1993:29). It established a detailed set of procedures for judicial discipline and vested primary responsibility for implementing them in the federal judicial circuits.

This article will examine the implementation of the Act by the federal judiciary. It will outline the procedures by which the judiciary handles complaints of misconduct by judges and will survey the record of the results. A principal focus will be the report on the operation of the Act issued in September 2006 by a committee chaired by Supreme Court justice Stephen Breyer. The article will summarize the report’s findings and will comment briefly on some of them.

The procedures established by the 1980 Act also provide the channel for raising concerns about mental or physical disability on the part of a judge. That aspect of the statutory scheme is outside the scope of this article, but two points deserve brief mention. First, the Breyer Committee found that almost all complaints filed under the Act allege misconduct rather than disability. Second, some of the confidentiality provisions in the statute may be more appropriate for dealing with disability than with misconduct.

AFTERMATH OF THE 1980 ACT

The 1980 Act was the product of compromise, and one element of the compromise was the assurance of continuing legislative oversight. Consistent with this commitment, Congress in 1990 enacted a modest package of amendments to the statute. The same

* Portions of this article are based on the author’s testimony at various hearings of the House Judiciary Committee.

legislation also created a National Commission on Judicial Discipline and Removal. In 1993 the National Commission published a thorough report as well as an extensive compilation of working papers (National Commission, 1993). Particularly noteworthy are the empirical studies carried out at the commission's behest by Barr and Willging (1993) for the Federal Judicial Center and by Professor Richard Marcus (1993).

The next major step in Congress's performance of its oversight role came in 2001 when a subcommittee of the House Judiciary Committee held a hearing on the "operation of [the] federal misconduct statutes" (House Misconduct Hearing, 2001). Following the hearing, Chairman Howard Coble (R., N.C.) and ranking minority member Howard Berman (D., Cal.) introduced the Judicial Improvements Act of 2002. Their bill became law in late 2002. The legislation further revised the provisions governing the handling of complaints against judges, primarily by codifying some of the procedures adopted by the judiciary through rulemaking. The new law also gave the judicial misconduct provisions their own chapter in the United States Code, Chapter 16.

The judiciary too has taken steps to fill in the contours of the misconduct legislation. In 1986 a committee of chief circuit judges prepared a set of Illustrative Rules Governing Judicial Misconduct and Disability. These Rules, accompanied by an extensive commentary, addressed many procedural and substantive issues that were not resolved by the statute itself. A revised set of Illustrative Rules was promulgated by the Judicial Conference of the United States in 2000. Most of the circuits have adopted rules based on the Illustrative Rules.

Perhaps more important than the procedural details in the Rules is the philosophy that the document articulates. The commentary to Rule 1 states that the purpose of the 1980 law "is essentially forward-looking and not punitive. The emphasis is on correction of conditions that interfere with the proper administration of justice in the courts" (Judicial Conference, 2000:2). This is not necessarily the impression that one would get from the legislative history of the Act. But the Illustrative Rules' rejection of a "punitive" purpose has been widely influential in the administration of the misconduct statutes.

In 2004 Chief Justice William H. Rehnquist appointed a committee chaired by Justice Stephen Breyer to assess how the Judicial Branch has administered the 1980 Act and whether "there are any real problems" in its implementation. The Breyer Committee issued a lengthy and detailed public report in September 2006. The committee's findings will be summarized later in this article.

PROCEDURES UNDER CHAPTER 16

Chapter 16 of the Judicial Code delineates the procedures for dealing with possible misconduct by federal judges. Ordinarily, the process begins with the filing of a complaint about a judge with the clerk of the court of appeals for the circuit. "Any person" may file a complaint; the complainant need not have any connection with the proceedings that are the subject of the complaint, nor must the complainant have personal knowledge of the matter at issue. The clerk must "promptly transmit" the

complaint to the chief judge of the circuit. The chief judge, after “expeditiously reviewing” the complaint, has three options. He or she can (a) dismiss the complaint; (b) “conclude the proceeding” if he or she finds that “appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events”; or (c) appoint a special committee to investigate the allegations.

From a procedural perspective, options *a* and *b* are treated identically. The statute can thus be viewed as establishing a two-track system for handling complaints against judges. Track one is the “chief-judge track;” track two is the “special-committee track.”

If the chief judge dismisses the complaint or terminates the proceeding, a dissatisfied complainant may seek review of the decision by filing a petition addressed to the judicial council of the circuit. The judicial council may order further proceedings, or it may deny review. If the judicial council denies review, that is the end of the matter; in track-one cases, the statute provides that there is no further review “on appeal or otherwise.”

If the chief judge does not dismiss the complaint or terminate the proceeding, he or she must promptly appoint a “special committee” to “investigate the facts and allegations contained in the complaint.” A special committee is composed of the chief judge and equal numbers of circuit and district judges of the circuit. Special committees have power to issue subpoenas; sometimes they hire private counsel to assist in their inquiries.

After conducting its investigation, the special committee files a report with the circuit council. The report must include the findings of the investigation as well as recommendations. The circuit council then has a variety of options: it may conduct its own investigation; it may dismiss the complaint; or it may take action including the imposition of sanctions. The circuit council can refer serious matters to the Judicial Conference of the United States; in addition, a complainant or judge who is aggrieved by an order of the circuit council can file a petition for review by the Conference. If the Conference determines that “consideration of impeachment may be warranted,” it may so certify to the House of Representatives. As authorized by the statute, the Conference has delegated its review powers to a standing committee.

IMPLEMENTATION OF CHAPTER 16: THE STATISTICS

Each year, the director of the Administrative Office of United States Courts (AO) includes in the AO’s annual statistical report a tabulation, based on data submitted by the various circuits, of the number of complaints filed and concluded during the preceding year. In addition, the Breyer Committee carried out its own analysis of the raw data submitted to the AO for the years 2001-05. That analysis, along with data in the AO reports for earlier years, gives us a good picture of how the statutory procedures have been implemented by the judiciary.

The number of complaints filed against judges each year ranges from 600 to 800. (For reasons that are not clear, there was a “spike” in 1998, when the filings exceeded 1,000.) In the five years studied by the Breyer Committee, 2001-05, the total was

3,670. The overwhelming majority of the complaints—more than 95 percent—are dismissed by the chief judge. In a majority of the dismissals, the chief judge relies on the provision of the statute that authorizes dismissal of complaints that are “directly related to the merits of a decision or procedural ruling.” Another common reason for dismissal is that the complaint is “frivolous.” Many chief-judge orders give more than one reason, with “frivolous” and “merits-related” frequently paired. About half of the complainants ask the circuit council to review the dismissals, but almost none succeed; the Breyer Committee found only one instance in which the circuit council directed the chief judge to appoint a special committee.

Disposition other than dismissal is rare. In about 1 percent of the cases, the chief judge concludes the proceeding on the grounds that appropriate corrective action has been taken or that, because of intervening events, action is no longer necessary. Appointment of a special committee is even rarer. The Breyer Committee (2006:29) found that in 2001-05, chief judges appointed only nine special committees “to investigate 15 complaints filed against nine judges.” On the basis of the reports filed by the special committees, the circuit councils dismissed six complaints against five judges. There were only four instances in which discipline was imposed by a circuit council. Two judges were publicly censured (in proceedings involving seven complaints), and one judge was censured privately. “Other discipline” was imposed in the fourth case, but the case file is sealed, and no information is available about the nature of the misconduct.

EVALUATION OF THE ACT’S IMPLEMENTATION

The numbers are stark. Out of more than 3,500 complaints filed against federal judges in a five-year period, only fifteen led to the appointment of a special committee, and sanctions were imposed on only four judges. Based on this record, it is natural to ask: Are the chief judges and the circuit councils doing the job that Congress expected them to do? Can litigants and citizens rely on the judiciary to deal effectively with misconduct in its ranks? Two thorough and well-documented studies address those questions.

The first study, conducted by the Federal Judicial Center for the National Commission on Judicial Discipline and Removal, provides results that are reassuring. For example, in a field study that examined a sample of 469 complaints, the authors found only twelve “problem dispositions” (Barr and Willging, 1993:79).

More recently, the Breyer Committee undertook its own study using a “research plan” that enabled it “to examine both (1) the vast bulk of complaints that receive little or no public notice, and (2) the very few ‘high-visibility’ complaints.” Justice Breyer and his colleagues reached two major conclusions. They found that

chief circuit judges and judicial councils are doing a very good overall job in handling complaints filed under the Act. The overall rate of problematic dispositions is quite low and has not increased measurably over more than a decade despite steep increases in the number of complaints filed and the overall workload of chief circuit judges (Breyer Committee, 2006:107).

However, in separately assessing the “high-visibility cases,” the committee found “mishandling” in five out of seventeen—an “error rate” that it acknowledged is “far too high.”

In assessing the credibility of the findings from the two studies, two points deserve note. First, the data do not adequately reflect the informal corrective processes that may take place in the absence of a formal complaint. One of the most important findings of the research carried out for the National Commission is that informal processes often operate very effectively to deal with matters that fall within the potential reach of Chapter 16. Comments by two former chief judges capture the experience in most of the circuits that the authors visited: “In my experience, the most serious complaints never hit the complaint process” and “There are more remedial actions taking place outside the complaint process than following formal complaints” (Barr and Willging, 1993:131). A study by Professor Charles Geyh (1993:311) similarly noted how “successful” informal means were.

Although the Breyer Committee was not charged with studying informal mechanisms, the committee’s interviews made clear the continuing importance of activities outside the complaint process. As one chief judge told the committee, “The informal aspect is the most valuable part of the Act . . . , the most serious matters were not the subject of a complaint at all” (Breyer Committee, 2006:101). The committee also took note of a confidential counseling program in the Ninth Circuit that may help to “get to the genuine sources of problematic behavior” (2006:104-05).

Second, before a person becomes a federal judge, he or she will be investigated by the White House, the FBI, home-state senators, the Senate Judiciary Committee, the American Bar Association, and interest groups. Individuals with serious problems of character or temperament are not likely to make it through those many stages of scrutiny. Against that background, it would not be surprising if instances of misbehavior were rare.

CURRENT ISSUES IN THE ADMINISTRATION OF CHAPTER 16

The Federal Judicial Center study and the Breyer Committee report suggest that, overall, the system of decentralized self-regulation of federal judicial ethics has worked well. But no system is perfect, and recent events—as well as the Breyer Committee report—have pointed to several aspects of the Chapter 16 processes that deserve scrutiny. Three will be discussed here: the reluctance of chief judges to appoint special committees when they should do so; the undue bias against public disclosure; and the failure to make the process visible.

Failure of Chief Judges to Appoint Special Committees. As amended in 2002, the misconduct statute draws a clear line between the chief-judge track and the special-committee track. In language that was taken almost verbatim from the 2000 edition of the Illustrative Rules, the statute provides, “The chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute.” If the facts are “reasonably in dispute,” a special committee must be appointed to carry out the inves-

tigation. But experience reveals that, too often, chief judges have dismissed complaints or concluded proceedings notwithstanding genuine disputes over facts or their implications. A recurring theme in the Breyer Committee's account of "problematic" cases is the failure of a chief judge "to submit clear factual discrepancies to special committees for investigation" (2006:97).

One example cited by the Breyer Committee involves the protracted proceedings arising out of a complaint against District Judge Manuel L. Real of the Central District of California. The complaint alleged that Judge Real had improperly intervened in a bankruptcy case to help a woman whose probation he was supervising after she was convicted of various fraud offenses. (The same accusations prompted the chairman of the House Judiciary Committee to introduce a resolution of impeachment against Judge Real. A hearing was held on the resolution, but the House proceedings went no further.)

The chief judge of the Ninth Circuit initially dismissed the complaint upon finding that the charges were "unsupported" and that the complaint was "directly related to the merits of" the bankruptcy case. The circuit council vacated the dismissal order and remanded for further proceedings; the chief judge then dismissed the complaint again, this time on the grounds that the factual allegations were "not reasonably in dispute" and that Judge Real's assumption of jurisdiction over the bankruptcy case had a "legitimate basis." That ruling was affirmed by the circuit council, but on the basis that "appropriate corrective action has been taken."

As the Breyer Committee stated (2006:83-84), both the chief judge and the circuit council departed from the requirements of Chapter 16. The chief judge improperly engaged in fact-finding, and the circuit council went astray in finding that corrective action had been taken. Moreover, the chief judge's error was compounded by the action of the circuit council in its review of the first order dismissing the complaint. It is plain from the council's memorandum that it believed that there were factual issues that remained unresolved. But instead of directing the chief judge to appoint a special committee, the council undertook its own investigation.

The Breyer Committee also cited a case from the Sixth Circuit that in some respects is even more troublesome. The case involved the legal challenge to the University of Michigan law-school affirmative-action plan that ultimately became *Grutter v. Bollinger* (2003) in the United States Supreme Court. The complaint alleged that the circuit chief judge manipulated the court's procedures for an en banc hearing to preclude participation by two circuit judges who might have been expected to oppose the chief judge's position. Obviously, the chief judge was recused from considering the complaint, so the matter was dealt with by an acting chief judge. The acting chief judge "found adverse facts to be undisputed and said those facts created an 'inference of misconduct.'" But she did not ask the accused judge if he disputed the facts—as indeed he did. Instead, she concluded the proceedings based on corrective action and intervening events. The result, as the Breyer Committee said (2006:76), "was a finding of misconduct and a public reprimand without a hearing."

In these and other cases, the chief judges appear to have misapprehended the import of the statutory language—and the structure of the system established by Congress. The standard for appointing a special committee is not a stringent one. Any genuine dispute over facts, whether small or large, requires that the complaint be placed on the special-committee track. At the same time, it is worth emphasizing that special-committee procedures need not be elaborate. If the factual issues are simple, the committee can proceed quickly, without hiring outside counsel. But the more formal procedure will provide reassurance that the facts have been developed and that dismissal of the complaint—if that is the result—is justified.

Undue Bias Against Public Disclosure. Except in the rare case where the Judicial Conference determines that impeachment may be warranted, Chapter 16 provides for only limited public disclosure in misconduct proceedings. Written orders issued by a judicial council or by the Judicial Conference of the United States to implement disciplinary action must be made available to the public. But unless the judge who is the subject of the accusation authorizes the disclosure, “all papers, documents, and records of proceedings related to investigations conducted under [Chapter 16] shall be confidential and shall not be disclosed by any person in any proceeding.” The statute is silent on the handling of chief-judge orders dismissing a complaint or terminating a proceeding.

The Illustrative Rules fill in some of the statutory gaps, but they too evince a bias against disclosure. The basic rule is that orders and memoranda of the chief judge and the judicial council will be made public only “when final action on the complaint has been taken and is no longer subject to review” (Judicial Conference, 2000:52). Moreover, in the ordinary case where the complaint is dismissed, “the publicly available materials will not disclose the name of the judge complained about without his or her consent.”

The consequences of the bias against disclosure can be seen in a later stage of the proceedings involving Judge Real. After the Judicial Conference of the United States determined that it had no power to review the Judicial Council decision affirming the dismissal of the complaint, the chief judge of the Ninth Circuit finally appointed a special committee to investigate Judge Real’s conduct. The special committee carried out a thorough inquiry; it heard testimony from eighteen witnesses and reviewed thousands of pages of documents. It found that Judge Real had committed misconduct, and it recommended the sanction of a public reprimand.

On November 16, 2006, the circuit council issued an order adopting the findings and recommendations of the special committee. But the order was not made public at that time. Rather, the order stated that it would be made public “when the order is no longer subject to review, or within 30 days of this order if no petition for review has been filed with the Judicial Conference of the United States.” Judge Real did file a petition for review, and at this writing the petition is still under consideration. As a result, the Judicial Council order has not been disclosed officially. Meanwhile, howev-

er, a copy of the order reached reporter Henry Weinstein of the *Los Angeles Times*, who published an article in December 2006 describing its contents (Weinstein, 2006).

In withholding immediate disclosure of its order, the Ninth Circuit Judicial Council relied on the council's Rule 17, which in turn is based on the Illustrative Rules. The underlying policy is that judges should be protected "from public airing of unfounded charges." As explained in the Illustrative Rules:

We believe that it is consistent with the congressional intent to protect a judge from public disclosure of a complaint, both while it is pending and after it has been dismissed if that should be the outcome. . . . In view of the legislative interest in protecting a judge from public airing of unfounded charges, . . . the law is reasonably interpreted as permitting nondisclosure of the identity of a judicial officer who is ultimately exonerated and also permitting delay in disclosure until the ultimate outcome is known.

This rationale may be persuasive when, for example, a disgruntled litigant or a discharged employee has filed scurrilous—and baseless—accusations against a federal judge, and disclosure would cause injury to the judge without enlightening the public on a matter of public concern. But the current policy makes little sense in the setting of the proceedings against Judge Real. Even if one accepts "the legislative interest in protecting a judge from public airing of unfounded charges," delaying disclosure of the Judicial Council order did nothing to serve that interest. The allegations had already been the subject of published opinions by the judiciary and a televised hearing in Congress. What is even worse, adherence to the deferred-disclosure rule had the perverse consequence of putting off the day when the public would see the serious and conscientious way in which the judiciary dealt with the accusations.

In my view, the policy should be this, subject to debate over detail: When the substance of a pending complaint has become widely known through reports in mainstream media or responsible Web sites, there should be a presumption that orders issued by chief judges or circuit councils will be made public as soon as they are issued. In that circumstance there should also be a presumption that the order will disclose the identity of the judge.

Failure to Make the Process Visible. One purpose of the mechanism established by the 1980 Act is, of course, to foster public confidence in the federal judiciary. To that end, the mechanism must be visible. Visibility in this context entails two overlapping elements: the availability of the process must be made known to potential complainants, and the results of the process must be made known to all who are interested in the effective operation of the judicial system.

If there is a single glaring flaw in the administration of Chapter 16, it is the failure of judges at every level to make the process visible. This has been a problem for many years. In 1993 the National Commission reported (at 345): "Surveys conducted for the Commission demonstrate both widespread ignorance about the Act in virtual-

ly every respondent group and a widely shared perception that some meritorious complaints are never filed.” In 2001, at the House Judiciary hearing on the operation of the misconduct statutes, concerns about lack of visibility again came to the forefront.

Following the 2001 hearing, Chairman Coble and ranking minority member Berman wrote a letter to Chief Justice Rehnquist noting that the statute was “under-publicized.” They offered two specific suggestions for enhancing visibility. First, the Judicial Conference should require “that every federal court include a prominent link on its web site to the rules and forms for filing complaints . . . concerning any judge of that court.” Second, chief judges and circuit councils should make their rulings under the 1980 Act more widely available to the public.

In September 2002 the Judicial Conference endorsed both of these suggestions. But Judicial Conference policy does not necessarily translate into action at the local level. In 2005 Breyer Committee researchers could not find any information about the complaint procedure on a majority of district court Web sites (Breyer Committee, 2006:33). And of the forty-one sites that had some information, many presented it “in a way that would stump most persons seeking to learn about how to file a complaint” (Breyer Committee, 2006:109).

Nor has the Judicial Conference’s exhortation resulted in wider availability of misconduct rulings. Today, as in 2001, the orders and memoranda filed by the chief judges of the various circuits are available only at the clerk’s office of the circuit where they were issued and at the Federal Judicial Center, to which copies are sent. Even nonroutine dispositions are not provided to legal publishers like Westlaw and Lexis. Indeed, the only rulings that are generally available are some final orders of circuit councils and of the Judicial Conference Standing Committee.

It is understandable that judges do not wish to shine the spotlight on judicial misconduct, even when the overwhelming majority of complaints are plainly without merit. However, to the extent that the low visibility is the result of conscious choice, rather than indifference or inadvertence, the policy is misguided. At a practical level, the courts benefit if they learn about problems at the earliest possible stage, and complaints under Chapter 16 can help. But some meritorious complaints will never be filed if the existence of the process is insufficiently publicized. The courts can also benefit in another way—by learning how other courts are handling allegations of misconduct or disability.

CONCLUSION

Increased visibility will make for a better system, but more is at stake. In establishing a regime of decentralized self-regulation, Congress entrusted the judiciary itself with the task of policing misconduct within its ranks. But in doing so, it did not sign off permanently on the possibility of a more robust legislative role. On the contrary, the principal sponsor of the 1980 Act, Congressman Robert W. Kastenmeier (D., Wis.) stated, “[B]oth the House and the Senate Judiciary Committees believe that there should be a continuing dialog between the legislative and judicial branches, and vig-

orous oversight by Congress.” Against the background, it is not enough that the system operates effectively; it must be seen to be effective. That means that both the process and the results must be visible to citizens and to the press.

The Breyer Committee called for aggressive action on two fronts to that end. It recommended that judicial councils require the courts within their circuits to post information about the complaint process on the home pages of court Web sites. And it urged the Judicial Conference to make chief-judge and circuit-council orders more widely available. These are the same steps that were urged in 2002 by then-chairman Howard Coble and current chairman Howard Berman. The courts should implement the recommendations without further delay. By doing so, they will enhance public confidence in the judiciary and help to persuade Congress that further legislation need not go beyond fine-tuning the existing system. **jsj**

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