THE JUDICIAL CONFERENCE OF THE UNITED STATES

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS

No. 82-372-001

In re:

Complaint of George Arshal

On Petition to Review an Order of Honorable Wilson Cowen, Acting Chief Judge of the Court of Claims

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Goerge Arshal, Claimant, Pro Se

Before HAYNSWORTH, DEVITT, and MEREDITH, Members

ORDER

The complainant is an inventor, who in 1967 obtained a patent upon a "directional computer." It describes and claims a missile guidance system, which allegedly is used in the Poseidon and Trident missiles. The complainant filed an action in the United States Court of Claims against the United States for infringement of his patent.

The trial judge filed an opinion in which he concluded that the patent was invalid as claiming only a mathematical formula. If the patent were valid, he found an infringement by the United States. On appeal, a three-member panel of the Court of Claims affirmed on the opinion of the trial judge insofar as it related to patent invalidity. Arshal v. United States, 621 F.2d 421 (Ct. of Cl. 1980).

Motions addressed to all of the active judges of the Court of Claims were denied. One was for a stay pending decisions in the Supreme Court of the United States in two cases which the complainant thought indistinguishable. A motion for rehearing and a request for rehearing en banc were denied as was a motion to vacate the judgment.

The complainant then filed a complaint under 28 U.S.C. § 372 against all of the active members of the Court of Claims.

At the request of Chief Judge Friedman, Senior Judge Wilson Cowen of the Court of Claims, its former chief judge, performed the duties placed by § 372 upon the Chief Judge. He concluded that the complaint was "directly related to the merits of a decision "within the meaning of § 372(c)(3)(A) and dismissed the complaint.

Under § 372(c)(2) if complaint is made of the conduct of the chief circuit judge, the circuit judge in regular active service next senior to him will be treated as the chief judge. There are no explicit provisions for a senior judge acting in that capacity. Congress explicitly contemplated disqualification however, and did not intend the process to break down by reason of disqualification. The congressional intent was that the next senior person, who was not disqualified, assume the role of chief judge when the chief judge was disqualified. We think that Senior Judge Cowen was authorized to perform the role of the chief judge when the complaint ran against all active members of that court.

The complainant did not seek review in the Judicial Concil of the Court of Claims but has sought review in the Judicial Conference. Since each member of the Judicial Council was charged with wrongdoing and each in fact had participated in acts of which the complainant complains, we are disinclined to require of this complainant the obviously futile step of applying to the Judicial Council for review.

The complainant feels that the trial judge and the active members of the Court of Claims were wrong. He feels it passionately. He charged the trial judge with misstating the facts and misconstruing the claims, focusing on only one element of the most relevant claim while ignoring the other two. In the opinion, arguments were attributed to the complainant which the complainant says he never made, the attribution of which complainant finds so disparaging as to be libelous. Of course, the complainant alleged that the trial judge misapplied the law; indeed, he contends he was denied due process.

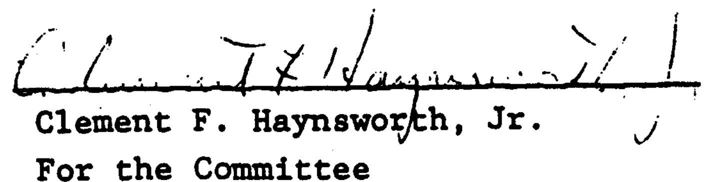
At the oral hearing before the three-judge panel, the complainant charged that two of the judges obviously had not read the trial judge's opinion or the briefs. One of them is said to have expressed his complete ignorance of the patent. One judge indicated familiarity with the trial judge's opinion, but the complainant charged that he had read nothing else. This is not necessarily a serious accusation, for it is well known that in the days of the Judges Hand the judges of the United States Court of Appeals for the Second Circuit did not read briefs before

hearing oral argument. However, all of the active judges of the Court of Claims are charged with condonation of the alleged wrongs of the trial judge and of the hearing panel members.

The complainant speaks in strong language, but it is undeniable that his complaint goes to the result of the litigation. His complaint is "directly related to the merits of a decision" within the meaning of § 372(c)(3)(A). His characterization of the alleged errors of the trial judge as if they were intentional, rather than inadvertent, does not help him. Nor is he assisted by the suggestion he throws out that the judges may have been influenced by the size of the award to which he would have been entitled had his patent been held valid and infringed. He criticizes the way in which the decisions were reached, but that is characteristic of many a disappointed litigant. His real complaint is with the result. It seems to him clearly inconsistent with his perception of the facts and law.

The complaint was properly dismissed under § 372(c)(3)(A).

PETITION DENIED.



Clement F. Haynsworth, Jr.
For the Committee

THE JUDICIAL CONFERENCE OF THE UNITED STATES

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS

No. 82-372-002

In re:

Complaint of Gail Spilman

On Petition to Review an Order of Honorable George Edwards, Chief Judge of the Court of Appeals for the Sixth Circuit

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Gail Spilman, Claimant, Pro Se

Before HAYNSWORTH, DEVITT and MEREDITH, MEMBERS

O R D E R

The complainant filed a complaint of judicial misconduct against the three members of the panel of the United States Court of Appeals for the Sixth Circuit which had heard her case and "John Doe Circuit Judges of the _En Banc_ Panel." The complaint was dismissed by order of Chief Judge Edwards upon the ground that it was directly related to the merits of a decision within the meaning of 28 U.S.C. § 372(c)(3)(A). She filed a petition for review with the Judicial Conference of the United States. She sought no review in the Judicial Council of the Sixth Circuit, feeling, as she stated in a letter, that any such action would be "absurd."

The complainant suffered personal injuries when struck by an automobile driven by one Harley. She filed a tort action against Harley in the Court of Common Pleas in Hamilton County, Ohio, and obtained a judgment for $207,748.95, apparently the amount requested in the complaint. Subsequently, Harley filed a petition for bankruptcy, listing the judgment as his principal debt. The complainant contends it was not dischargeable because Harley's conduct had been wilful and malicious within the meaning of § 17(a)(8) of the Bankruptcy Act.

The bankruptcy court had before it only the state court judgment. It recited a finding that Harley's conduct had not been wanton or wilful. On the basis of that finding, the bankruptcy judge held that there was preclusion by collateral estoppel of her claim that Harley's conduct was malicious and wilful within the meaning of the Bankruptcy Act.

The district court affirmed, but in an appeal during which the complainant represented herself, a panel of the Court of Appeals for the Sixth Circuit reversed. On the basis of the papers before it, it found that the complaint charged that Harley had acted wantonly and maliciously, that the judgment was for the entire amount demanded in the complaint but that punitive damages had not been demanded. It was of the opinion that if there was no

issue of punitive damages in the state court proceedings the finding of no wantonness or wilfullness was unnecessary to the state court judgment, and even if there were such an issue, the state court judgment was ambiguous since it appeared to have been entered upon the pleadings and the complaint alleged wantonness and maliciousness. It remanded the case with directions to the bankruptcy court to determine whether the underlying factual questions had been fully litigated in the state court and whether their resolution was necessary to the state court judgment. If either of those conditions was not satisfied, the claim of collateral estoppel was to be rejected. Spilman v. Harley, 656 F.2d 224 (6th Cir. 1981).

Though seemingly victorious in her appeal, the complainant filed a petition for rehearing with a suggestion of rehearing en banc. That petition was denied.

She thereupon filed her complaint of judicial misconduct, alleging that the panel had falsely characterized the state court judgment as a consent decree and that the judges had acted as partisan advocates for Harley and the lawyer who had represented her in the state court proceeding.

Under § 372(c)(10), a complainant aggrieved by a final order of the chief circuit judge may petition for review by the Judicial Council, A complainant aggrieved by an action of the Judicial Council may petition for review by the Judicial Conference of the United States. While we

are authorized to review orders of the Judicial Council, we are not authorized to review orders of the chief circuit judge.

In correspondence, the complainant has made it clear that she regards Chief Judge Edwards and all of the active members of the Court of Appeals for the Sixth Circuit, in addition to those sitting on the panel, as charged parties. It is far from clear, however, that membership of an en banc court can ever be made disqualifying on the basis of a "charge" that the request for the en banc rehearing was improperly denied. It is not the kind of substantive charge contemplated by the statute. Moreover, such requests are denied unless a majority of the circuit judges in regular active service affirmatively vote for it. Usually it will not be known how the chief circuit judge or any circuit judge member of a Judicial Council voted with respect to such a suggestion. Such questions of possible disqualification should be resolved, at least initially, by the judges concerned.

If we assume, however, that each circuit judge member of the Judicial Council would recuse himself in this instance, there remain the district judge members of that Council against whom there is no accusation whatever. They are competent to act upon a petition for review in the Council filed by this complainant.

The complainant may seek review in the Judicial Council of the Sixth Circuit, but her petition for review in the Judicial Conference of the United States of the order of the chief circuit judge is dismissed for want of jurisdiction.

PETITION DENIED.

Clement F. Haynsworth, Jr.
For the Committee.

THE JUDICIAL CONFERENCE OF THE UNITED STATES

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS

No. 82-372-003

In re:

Complaint of Thomas C. Murphy

On Petition to Review a Decision of the Judicial Council of the Second Circuit

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Thomas C. Murphy, Pro Se

Before HAYNSWORTH, DEVITT, and MEREDITH, Members

O R D E R

Murphy became involved in litigation in the Southern District of New York and in the Court of Appeals for the Second Circuit over his dismissal by a school board. He had been found by a psychiatrist to have psychotic tendencies; and the psychiatric evaluation, at least, played a part in his release. Not only was he so busy and active in the prosecution of his case that his lawyer requested the Court of Appeals to release him from his representation of Murphy, he also was interested in the cases of other similar plaintiffs and a collector of opinions and orders that resulted in the reinstatement of former employees who had been released entirely or partially on the basis of psychiatric evaluations.

Murphy filed a complaint under 28 U.S.C. § 372 against seven members of the United States Court of Appeals for the Second Circuit and a district judge of the Southern District of New York. He charged a number of judges with "conspiracy and obstruction of justice" on the basis of rulings in particular cases involving the admission and use of psychiatric reports and testimony. He asserted that municipal employers were visiting "psychiatric abuse" upon employees and that the accused judges were aiding and abetting it. He charged the judges with "psychiatric racketeering" and conducting a "psychic scam."

He wrote to two newly appointed judges of the Court of Appeals inquiring of them as to their position about "the Second Circuit's psychiatric racketeering." He wanted their responses, he said, to enable him to decide whether or not to oppose their confirmation. He got no response from either of them, but their silence is the basis of a charge that they joined the "conspiracy." He complained of "a hotbed of suppression of human rights involving psychiatric stigmatization" of those who dissented from official misconduct. One judge was charged with an attempt to disbar a lawyer for daring to bring an action "that psychiatry should be delegalized and extirpated from both medicine and the justice system." The district judge who ordered the psychiatric evaluation of him during his litigation against his former employer was charged with an offense based on that order.

Two of the Second Circuit judges were charged with wrongdoing in relieving Murphy's lawyer of further responsibility. Murphy charged that there was no jurisdiction to hear the motion and that the judges knew that the lawyer had violated his fiduciary duty by calling Mr. Murphy "irrational."

Finally, one judge was charged with improperly sitting in a case involving the chairman of a local Republican committee when a Republican senator had been instrumental in the judge's appointment.

Chief Judge Feinberg considered all of the charges and dismissed them. Insofar as they involved particular rulings of judges, or generalizations of rulings about the admission and use of psychiatric reports and testimony, he concluded that the complaint "directly related to the merits of a decision" within the meaning of § 372(c)(3)(A). The charge against the judge who had not recused himself was dismissed on the same ground since it was reasoned that each judge in each case must decide whether or not to recuse himself and that the complaint directly related to the judge's decision in that case. That charge also was dismissed as frivolous.

The charges against the two judges who had not responded to his inquiry were dismissed as frivolous.

In his appeal to the Judicial Council of the Second Circuit, he charged Chief Judge Feinberg with having withdrawn from the hearing of his appeal in his case against his former employer. He also charged him with having failed to publish a letter he claims to have written to Chief Judge Feinberg about his former lawyer's dismissal of a former associate of that law office.

The Judicial Council of the Second Circuit, Chief Judge Feinberg not participating, upheld Chief Judge Feinberg's dismissal of the charges against the other judges. It found the charges against Judge Feinberg frivolous. It stated that there was no evidence in the clerk's office that Judge Feinberg had been assigned to the panel to hear the complainant's case, and expressed the view that there would have been no wrongdoing if he had been assigned to it but withdrew with the result of the substitution of Judge Gurfein. As to the letter, it stated that no such letter could be found in Judge Feinberg's Chambers or in the clerk's office, and that the complainant had been requested to produce a copy but had been unable to locate one. It expressed the view that even if there had been such a letter, the Chief Judge was under no duty or obligation to "publish" it.

The complainant then sought review here.

All of these charges were properly dismissed. Those against the Chief Judge and the two judges who had

failed to respond to the complainant's inquiry are frivolous. So is the one against the judge who allegedly sought the disbarment of a lawyer, for a judge may properly bring to the attention of proper officials conduct that he thinks warrants consideration in a disciplinary proceeding. The remainder of the charges are simply a reflection of the complainant's disagreement with the court's rulings. Such was his charge leveled at the decision approving the withdrawal of his lawyer. His underlying complaint goes to decisions and rulings respecting psychiatric examinations and receipt into evidence and use of psychiatric testimony and reports. As such, these complaints are "directly related to a decision or procedural ruling" within the meaning of § 372(c)(3)(A). Such decisions and rulings are not reviewable under the complaint procedures provided by § 372, however much the complainant may attempt to characterize them as wrong or evil.

PETITION DENIED

Clement F. Haynsworth, Jr.
For the Committee

THE JUDICIAL CONFERENCE OF THE UNITED STATES

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS

No. 82-372-004

In re:

Complaint of Andrew Sulner

On Petition to Review a Decision of the Judicial Council of the Second Circuit

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Ronald Gene Wohl, Esquire (Ferziger, Wohl, Finkelstein & Rothman) for the Claimant

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Before HAYNSWORTH, DEVITT, and MEREDITH, Members

ORDER

Mr. Sulner is a lawyer admitted to practice in the United States District Court for the Southern District of New York. He is also a forensic handwriting expert. His complaint grew out of a drastic reduction in a claim for payment by the United States under the Criminal Justice Act for services and expenses as an expert witness.

A lawyer, by appointment under the Criminal Justice Act, representing an indigent charged with a crime in the United States District Court for the Southern District of New York, engaged Mr. Sulner to examine a large number of documents and to testify as an expert witness at the trial. He alleges

that he examined more than two hundred documents and made thirty-six photographic enlargements of documents. From those, he prepared several demonstrative exhibits and sixty-three photographs of those exhibits for circulation to each juror, the trial judge and counsel. He testified at the trial.

He submitted a voucher under the Criminal Justice Act in which he claimed a fee of $27,812.50, computed on the basis of his ordinary fee schedule, and expenses of $3,501, most of which was attributable to preparations of the exhibits and the photographic reproductions of them.

District Judge Leonard B. Sand reduced the fee to $2500. He allowed expenses in travel and miscellaneous expenses, but allowed nothing for the cost of preparing the exhibits and the photographic reproductions of them. He filed a memorandum in which he stated that he saw no reason to compensate the expert witness at a rate five times that payable to appointed counsel, though the fee allowed was at a rate substantially less than the maximum rates under the Criminal Justice Act, if the reported hours were accepted as correct. The memorandum also contained language which the claimant took as a slight and a reflection upon his professional reputation.

The claimant filed a complaint with the Chief Judge of the Second Circuit under the Judicial Councils Reform and Judicial Conduct Disability Act of 1980. He

complained particularly of the language in the district judge's memorandum, but also complained of the drastic reduction in his fee claim and the disallowance of the expenses in the preparation of the exhibits and the photographic reproductions of them.

Upon receipt of a copy of the complaint, Judge Sand amended his memorandum to remove the language to which the claimant had objected, but concluded that no other change in his action upon consideration of the voucher was called for.

The Chief Circuit Judge dismissed the claim as "directly related to the merits of the decision." As to the allegedly offensive language, dismissal was also based upon the ground that effective corrective action had been taken.

Under 18 U.S.C. § 3006A(e)(2), subject to later review, appointed counsel may obtain the services of an expert without prior judicial authorization only if the cost does not exceed $150 plus reasonable expenses. Under paragraph one of subsection (e), the lawyer may apply to the court for prior authorization to engage the services of such an expert. Such an application permits the court, in advance, to consider the need of such services, together with alternatives affecting their cost. No such application was made to the court in this instance.

Under paragraph three of subsection (e) the cost of such expert services may not exceed $300 unless payment in excess of that amount is certified by the court "as necessary

to provide fair compensation for services of an unusual character or duration," and payment of the excess amount is approved by the Chief Circuit Judge. The submission of the expert's voucher required the district judge to consider the need of the services, the reasonableness of the response of the lawyer and the expert to that need, and the reasonableness of the cost of so much of the services as seemed to the court necessary to provide adequate representation of the indigent defendant. To the extent, therefore, that the complainant complains of the reduction of his fee claim and the disallowance of the claimed cost of preparing the exhibits and the photographic reproductions of them, the complaint is "directly related to the merits of a decision" within the meaning of 28 U.S.C. § 372(c)(3)(A), which is not a proper subject of a complaint against a judge in a Judicial Council proceeding. The quality of the services is also a matter to be considered by the district judge, and any comment he makes relative to that is part of the decisional process.

That the complainant characterizes the action of the district judge as being unreasonable, arbitrary and beyond the limits of his discretion provides no answer. Whether or not it was unreasonable, arbitrary or beyond the limits of his discretion would be the question if his action was subject to direct review by appeal. In the Criminal Justice Act there is no provision for formal appeal on the part of a claimant who feels that a district judge cut his fee claim

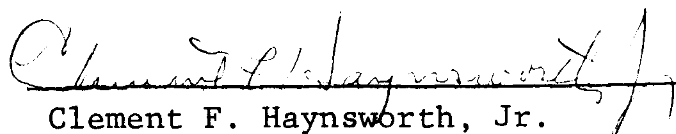
too drastically, though informal appeals to the Chief Circuit Judges may result in some reconsideration to the end that allowances have some uniformity. It is clear, however, that the statutory procedure for complaining of judicial "conduct prejudicial to the effective and expeditious administration * * * of the courts" does not provide an avenue of appeal to a Judicial Council to review the merits of a district judge's partial disallowance of a voucher claiming fees and expenses.

In the petition for review, complaint is made that the Judicial Council did not seek additional information from the claimant and made no direct reference to the disallowance of the expenses related to the exhibits and the photographs. The premise of that complaint is that the merits of the action of the district court were reviewable and under review first, by the Chief Circuit Judge, and then by the Council. That simply was not the case for, upon a finding that the complaint was directly related to the merits of a decision, the statute required dismissal.

Finally, complaint is made that if allowances for expert witnesses are inadequate, some indigents may not receive fair representation. Whatever responsibility the expert witness may have in that connection, the matter clearly goes to his contention that the award was inadequate and to the merits of the judicial action of which he complains.

The petition for review is denied.

<u>PETITION DENIED</u>



Clement F. Haynsworth, Jr.

For the Committee

THE JUDICIAL CONFERENCE OF THE UNITED STATES

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS

No. 82-372-006

In re:

Complaint of John A. Course

On Petition to Review a Decision of the Judicial Council of the Seventh Circuit

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John A. Course, Pro Se

Before HAYNSWORTH, DEVITT, and MEREDITH, Members

O R D E R

A panel of the United States Court of Appeals for the Seventh Circuit dismissed an appeal in which Dr. John A. Course was the appellant for failure to comply with Federal Rule of Civil Procedure 59(e) and Federal Rule of Appellate Procedure 4. They require, respectively, that a motion to alter or amend a judgment be served not later than ten days "after entry of the judgment," and that a notice of appeal be filed in the district court within sixty days of the entry of the judgment or order appealed from when the United States is a party. He contended that under the provisions of Rule 6(e) of F.R.C.P. and Rule 26(c) of F.R.A.P. he had three additional days for each step

He filed a complaint under 28 U.S.C. § 372 charging the panel members with a violation of their official oaths and the doctrine of separation of powers by willfully refusing to apply the rules as mandated by Congress. He also complained that the order of dismissal was ineffective, since his copy of it was not signed by the members of the panel and it did not bear the official seal of the court.

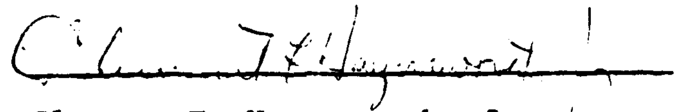
Chief Judge Cummings dismissed the complaint as "directly related to the merits of a decision or procedural ruling" within the meaning of § 372(c)(3)(A), and the Judicial Council of the Seventh Circuit affirmed. Dr. Course then sought review in the Judicial Conference of the United States.

Dr. Course simply rejects the settled view that the rules respecting the computation of time within which a litigant may or must do something after service of a paper upon him by mail simply do not modify the rules concerning the time within which a motion to alter or amend a judgment or notice of appeal may be filed. In each instance, those times are calculated from the date of entry of judgment, not from the date of the litigant's notice of it.

The complaint is clearly related directly to a decision of the Court of Appeals for the Seventh Circuit and was properly dismissed. His disagreement with the

ruling of the Court of Appeals is not a basis for a charge of misconduct on the part of the panel members.

PETITION DENIED.



Clement F. Haynsworth, Jr.

For the Committee

THE JUDICIAL CONFERENCE OF THE UNITED STATES

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS

No. 83-372-001

In re:

Complaint of Avabelle Baskett, et al.

On Petition to Review an Order of the United States Claims Court

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Charles S. Gleason, Esquire, for the Complaints

Before HAYNSWORTH, DEVITT, and MEREDITH, Members

ORDER

By counsel, the complainants in certain cases pending in the United States Claims Court filed charges against the judge to whom the cases were assigned and who previously had decided another case in which similar issues were presented. Chief Judge Kozinski dismissed the charges, concluding that all of them were either directly related to the merits of the decision or were frivolous, or both. The complainants then sought review by the full United States Claims Court, and the petition for review was denied by an order entered May 19, 1983. The complainants then sought further review in the Court of Appeals for the Federal Circuit, which, on June 7, 1983, also was denied for lack of jurisdiction. The complainants also sought a writ of mandamus in the United States Court of Appeals for the Federal Circuit,

and that petition was denied by an order entered on June 14, 1983.

The complainants have now sought review here.

In 28 U.S.C. § 372(c)(17), the United States Claims Court was directed to adopt rules establishing procedures for the filing of complaints with respect to the conduct of any judge of that Court and for the investigation and resolution of such complaints. Accordingly, the United States Claims Court adopted a rule which tracks § 372(c), and § 372(c)(17) confers upon the court the powers granted to judicial councils under that entire subsection.

Section 372(c)(10) confers upon the Judicial Conference of the United States, and this Committee of the Conference, jurisdiction to review actions of judicial councils taken under paragraph (6). In conferring upon the United States Claims Court the powers of a judicial council with respect to complaints of judicial misconduct, the evident intention of Congress was to provide the same procedures for complaints of misconduct on the part of a judge of that court as provided with respect to United States circuit and district judges. Part of the overall scheme was the jurisdiction of this Committee to review actions of judicial councils under paragraph (6), and we conclude that we have the same jurisdiction to review orders of the United States Claims Court entered under paragraph 6 of its rules.

However, we do not have jurisdiction to review orders of judicial councils or the United States Claims Court entered under paragraph 3. Paragraph (10) is quite explicit. When the Chief Judge of the United States Claims Court dismisses a complaint under paragraph 3, paragraph (10) provides a right of review by the full court, or a majority of the qualified members of that court. The only jurisdiction conferred upon the Judicial Conference of the United States and this Committee is to review orders of judicial councils under paragraph (6). Paragraph (6) orders are those of a judicial council entered after an investigation by a committee convened pursuant to the provisions of paragraph (4).

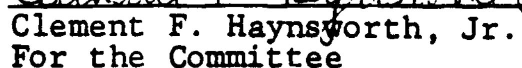
Congress was emphatic in the concluding sentence of paragraph (10). Review, as expressly provided in that paragraph, is to be available, but not otherwise. We conclude that we have no jurisdiction to entertain this petition for review.

Of course, we have no jurisdiction to review the orders of the United States Court of Appeals for the Federal Circuit denying a petition for review on jurisdictional grounds and denying a petition for a writ of mandamus.

Nor do we have any appellate jurisdiction of the United States Claims Court which would permit us to review the assessment of a fine against counsel and a public reprimand.

With the concurrence of Judge Devitt and Judge Meredith.

PETITION DENIED.



Clement F. Haynsworth, Jr.
For the Committee

THE JUDICIAL CONFERENCE OF THE UNITED STATES

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS

No. 84-372-001

In re: Complaint of Judicial Misconduct

This proceeding was commenced by the filing a complaint against a Bankruptcy Judge. The complainants were the female clerk of the Bankruptcy Court and four of the six deputy clerks. They charged the judge with sexual and other harassment of them. Later, a charge of other misconduct was added.

The Chief Judge of the Ninth Circuit inquired into the matter and concluded that the Bankruptcy Judge had not engaged in any censurable misconduct but had poorly administered his clerk's office. With the agreement of the Bankruptcy Judge, he placed responsibility for the administration of the Bankruptcy Court clerk's office upon the Clerk of the United States District Court. He then concluded the proceedings on the ground that appropriate remedial steps had been and were being taken.

Unhappy with that result, the complainants sought review by the Judicial Council for the Ninth Circuit under the provisions of 28 U.S.C. § 372(c)(10). The Judicial Council, in effect, remanded the matter to the Chief Circuit Judge for further consideration. The Chief Judge then appointed a circuit judge and a district judge

to serve with him as an Investigating Committee.

The Investigating Committee appointed a practicing lawyer from another state to conduct an evidentiary hearing. The lawyer had previously served as a bankruptcy judge and as an Assistant United States Attorney, and was said to have had experience in administrative investigations.

The investigating lawyer conducted an extended evidentiary hearing. He submitted a complete transcript of that hearing to the Investigating Committee, together with a report including findings and conclusions and recommendations. His assessment of the situation was in substantial agreement with the initial assessment of the Chief Circuit Judge.

The Investigating Committee, in turn, made a report to the Judicial Council. It found no basis for a conclusion that harassment or other misconduct had taken place, but it thought that the Bankruptcy Judge's occasionally recounting to individuals in his clerk's office of actual experiences or lines from a play or moving picture, in which there were explicit references to the sex organs of men and women, had contributed to a low moral tone in the office, which, in turn, contributed to the lack of morale and esprit de corps. It also reported that the administration of the clerk's office had been poor.

- 2 -

The Investigating Committee recommended a private letter of reprimand from the Chief Circuit Judge, and recommended continued supervision and administration of the office of the Bankruptcy Court Clerk by the Chief District Judge and the Clerk of the District Court.

The recommendations of the Investigating Committee were substantially adopted by the Judicial Council.

The matter was brought before this Committee and the Judicial Conference upon cross-petitions to review.

We find no merit in either petition for review.

I.

In their petition for review, the complainants challenged the manner in which the evidentiary hearing was conducted. They contend that their complaints and their positions would have been more coherently and effectively presented if the hearing had been conducted as a fully adversarial one. They ask that we remand the entire matter to the Judicial Council for the Ninth Circuit for a new evidentiary adversarial hearing to be conducted by the Judicial Council with full rights of confrontation and of examination and cross-examination by counsel. They did suggest that use of a special prosecutor, instead of their own lawyer, would be acceptable.

Pursuant to the provisions of 28 U.S.C. § 372(c)(11)(B), the hearing officer permitted the respondent Judge and his counsel to be present throughout the proceedings and to cross-examine adverse witnesses. Each complainant was allowed to be present only when she was giving testimony. Their lawyer was permitted to be present throughout the proceedings. He was not permitted to examine or cross-examine witnesses, though he was given the right to suggest to the hearing officer, who would examine or cross-examine the witness, additional lines of inquiry to be addressed to each complainant and each of the other witnesses presented in support of the complaint. This, they contend, substantially hampered the presentation of their case, and that the matter should have been handled as a fully adversarial trial.

As the complainants recognize, however, the hearing officer could have conducted his investigation in a substantially private manner in which the complainants did not participate by counsel and in which each would have participated only when inquiry was made of her. The complainants got more than they were entitled to demand, and we are satisfied that the written transcript that resulted is a reasonably full and complete presentation of the entire controversy.

We are not prepared to give carte blanche to an Investigating Committee initially delegating its authority to a non-judicial investigating officer and relying upon him to develop a record. In this case, however, there was a large measure of agreement as to events. Many of them were subject to interpretation, but there was little to turn upon resolution of the credibility of witnesses. There were a few exceptions. One of the complainants, who had served as courtroom deputy, testified that at one time the Bankruptcy Judge had suggested to her that, because of the shortage of hotel accommodations, when holding court in one city, they share the same bedroom. A lawyer testified that he had been present during the discussion of the shortage of hotel rooms and that it was he who, in jest, had suggested that the two share the same room. Ultimately, his version of the event was accepted.

Finally, the complainants contend that the hearing officer was so disposed to believe that a federal bankruptcy judge could do no wrong that he was not an impartial hearing officer. The Bankruptcy Judge, however, was entitled to be clothed with something akin to a presumption of innocence, and we find that the record was fairly developed and fairly assessed.

II.

In an avalanche of papers, the Bankruptcy Judge has presented us with forty separate contentions, several of which are directed to the constitutionality of the statute, facially and as applied.

We have no competence to adjudicate the facial constitutionality of the statute or its constitutional application to the speech of an accused judge, however inappropriate or offensive his words may be. We are not a court. Our decisions are not subject to review by the Supreme Court of the United States. We sit in review of the action of the Circuit Council. The courts of the United States are open for the adjudication of such questions. See Hastings v. Judicial Conference of the United States, 593 F. Supp. 1371 (D.C. 1984). The constitutional contentions can be made in an appropriate United States District court, the decision of which will be subject to review by the appropriate United States Court of Appeals and the Supreme Court of the United States.

III.

The Bankruptcy Judge has been cleared of the charge of sexual harassment. Indeed, there is no claim of any offensive or unwelcome touching, with one exception which seems trivial. A courtroom clerk testified that

while traveling with the Judge by air, she was seated by a window while the Judge was seated next to her. He undertook to take photographs from the air of a spectacular scene on their side of the airplane. In doing so, he leaned across her to bring the camera close to the window. In the process, she testified that, for a second or two, his elbow rested in her lap. She testified that she thought that the touching by the elbow was intentional and deliberate.

The Bankruptcy Judge testified that he thought no such incident had occurred, since the courtroom deputy usually sat in the smoking section of the plane while he sat in the non-smoking section. If any such incident occurred, however, he claimed the touching was entirely accidental. That position seems reasonable enough, given the complete absence of any other suggestion of suggestive or unwelcome touching.

Of course, there can be sexual harassment without touching, but the case for harassment depended only upon testimony that the Bankruptcy Judge liked for employees in the clerk's office to stay late to watch television news broadcasts with him and to engage in idle chatter, and to the very few occasional references to sex organs. There was testimony that he had told the most offensive of those to three employees in the clerk's

office over a period of a number of years. He had previously served as a part-time magistrate, and said that on one occasion, while conducting a preliminary hearing in a rape case, the prosecuting witness did not understand the use of technical terms for the sex organs. To establish the fact of penetration, the prosecutor had to resort to the use of four letter Anglo-Saxon words for the organs. The Bankruptcy Judge attempted to explain that he was only contrasting his work as a magistrate with the more intellectually stimulating work of a Bankruptcy Judge.

The Bankruptcy Judge now insists that he fully recognizes the inappropriateness of his having used such words.

Not all of the references to genitalia were salacious or suggestive. He talked to one of the deputy clerks of his married father's health problems. Among other things, he told her that his father was reluctant to undergo treatment for prostate cancer because of concern that the radiation might terminate his capacity to achieve erections. It would have been a thoroughly bland statement if he had spoken in terms of impotence, but, while one might question his taste in referring to the matter at all, it is not the kind of thing calculated to offend most women.

Having been substantially exonerated of the charge of harassment, however, the Bankruptcy Judge insists that he was improperly reprimanded. Except for his apology

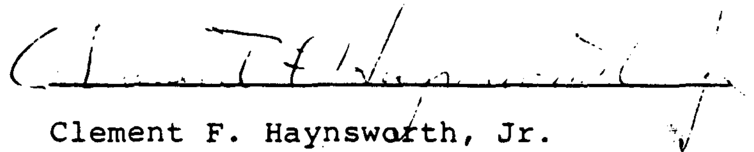
for the few instances in which he used words which would not be employed in polite dinner conversation, he finds no fault with himself. Instead, he strenuously contends that he was the victim of a conspiracy by the clerk of his court and four of her deputy clerks to drive him out of office.

The Bankruptcy Judge is said to be a highly capable lawyer and to perform his adjudicatory functions in a highly acceptable manner. The testimony also shows that he was thoroughly familiar with the proper procedures to be employed in his clerk's office. What he refuses to recognize, however, is that a competent administrator who is fair, though firm, almost invariably earns the loyalty and respect, even the affection,of his subordinates. There may be an occasional misfit who should not be retained, but it is most unlikely that a competent administrator will find that he has a group of subordinates almost all of whom are incompetent, disloyal, lazy and vengeful, frustrating the best efforts of an otherwise competent manager. There is no doubt that the Bankruptcy Judge knows the rules and the procedures that should be employed, but it is also patent that he had not managed the personnel well. There was ample basis for the conclusion that the lack of loyalty and cooperation by the subordinates was due, in substantial part, to the Judge's shortcomings in his performance as administrator.

IV.

There are numerous other contentions which we find unworthy of consideration. Finding no merit in either petition for review, each is dismissed.

FOR THE COMMITTEE:



Clement F. Haynsworth, Jr.

- 10 -

THE JUDICIAL CONFERENCE OF THE UNITED STATES

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS

No. 84-372-001

In re:

Complaint of Judicial Misconduct

ORDER

Upon consideration of the motion of the complainants for an order to release transcripts,

IT IS HEREBY ORDERED that the motion be, and it hereby is, denied.

Entered by direction of the Committee.

FOR THE COMMITTEE

10/31/84
Date

William R. Burchill, Jr.
Deputy General Counsel
Administrative Office of the U. S. Courts

THE JUDICIAL CONFERENCE OF THE UNITED STATES

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS

No. 84-372-001

In re:

Complaint of Judicial Misconduct

ORDER

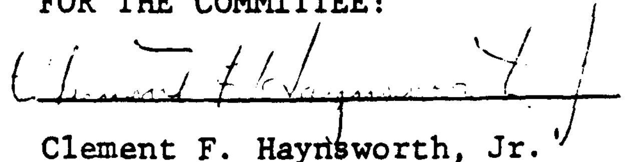
The order of this Committee of August 13, 1984 is modified in the following respects.

No document, letter or material of any sort considered by the Judicial Council of the Ninth Circuit, or developed in the course of the investigation by the Chief Circuit Judge and the subsequent proceedings before the Judicial Council, and not released by the Judicial Council of the Ninth Circuit to the complainants or their attorney, need be served by the respondent upon the lawyer for the complainants.

Any other exhibits filed by the respondent with this Committee may be withdrawn by him and all references thereto deleted from his other pleadings and memoranda, a copy of which is to be served upon the lawyer for the complainants. The Committee, of course, will not consider any such withdrawn material.

With the concurrence of Judge Devitt and Judge Meredith.

FOR THE COMMITTEE:



Clement F. Haynsworth, Jr.

THE JUDICIAL CONFERENCE OF THE UNITED STATES

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS

No. 84-372-001

In re:

Complaint of Judicial Misconduct

ORDER

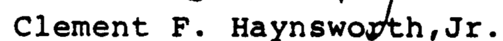
Upon consideration of the motion of the complainants for reconsideration of the Order of August 13, 1984, and deletion of the final paragraph of that Order,

IT IS NOW ORDERED that the motion be, and it hereby is, denied.

At the same time, the Committee recognizes that each of the complainants and each of their two lawyers has filed an affidavit in which he or she denies that he or she was the source of the published reports and that the complainants have identified other possible sources of that information.

With the concurrence of Judge Devitt and Judge Meredith.

FOR THE COMMITTEE



Clement F. Haynsworth, Jr.

THE JUDICIAL CONFERENCE OF THE UNITED STATES

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS

No. 84-372-001

In re:

Complaint of Candy Powers, Eleanor Wadsworth,
JoAnne Shanley, Debbie Pietrok and Peggy Gingras

ORDER

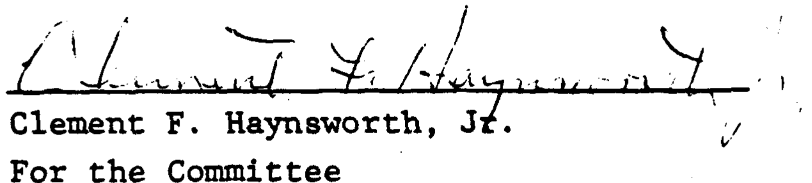
The accused bankruptcy judge has filed with this committee a petition to review an order of the Judicial Council of the Ninth Circuit, an amended petition to review, a memorandum in support of the petition to review, a motion to dismiss a cross petition for review, a response to that petition and other papers and documents. Claiming that all such papers are confidential and may not be disclosed by any person in any proceeding without his consent pursuant to the provisions of 28 U.S.C. 372(c)(14), none of those papers has been served upon the complainants or upon their counsel.

The provisions of paragraph 14 throw a cloak of confidentiality around all papers, documents and records related to an investigation under paragraph six. The intent was that those papers not be disclosed to strangers to the controversy except in those circumstances in which disclosure is authorized by paragraph 14. It was not intended to exclude complainants or their lawyers from participation in review proceedings.

If the judge wishes his amended petition to review his motion to dismiss the cross petition to review and his response to the cross petition to be considered, he should serve upon counsel for all the complainants a copy of all of the papers he has filed with this committee.

The committee, however, is deeply concerned by the flagrant violations of paragraph 14 which have occurred as demonstrated by press reports of the charges and subsequent developments in the course of processing the complaint and the conduct of the investigation. The papers and information upon which those press reports were based could have come only from the complainants. Of course, the complainants' lawyer may consult with his clients to the extent necessary to enable him to prepare any appropriate response or responses they may wish him to prepare and file, but if he fuels further disclosure of confidential material, this committee would consider the imposition of appropriate sanctions.

With the concurrence of Judge Devitt, Judge Meredith being temporarily out of the country.



Clement F. Haynsworth, Jr.
For the Committee

August 13 , 1984

BEFORE THE COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT
AND DISABILITY ORDERS
JUDICIAL CONFERENCE OF THE UNITED STATES

FRED W. PHELPS, SR.;
FRED W. PHELPS, JR.;
BETTY JOAN PHELPS;
MARGIE J. PHELPS;
SHIRLEY L. PHELPS-ROPER;
JONATHAN B. PHELPS; and
ELIZABETH M. PHELPS,

Complainants,

v.

THE HONORABLE PATRICK F. KELLY,

Respondent.

COMMITTEE MEMORANDUM
AND ORDER

No. 87-372-001

This matter is before the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders pursuant to a petition for review filed by the complainants dated April 17, 1987. The procedural history of the complaint resulting in this petition is as follows.

On November 23, 1985, the complainants filed a complaint against United States District Judge Patrick F. Kelly in the United States Court of Appeals for the Tenth Circuit, detailing a number of alleged acts of Judge Kelly which were claimed to be conduct prejudicial to the effective and expeditious administration of the business of the courts.

On October 17, 1985, the Chief Judge of the Tenth Circuit, pursuant to the rules of procedure adopted by that circuit for

the handling of complaints of judicial misconduct or disability, constituted and appointed a committee to investigate the facts and allegations in the complaint, directing the committee to conduct an investigation and to file a written report with the Judicial Council.

On December 5, 1985, Judge Kelly filed with the members of the committee, a *detailed response to the allegations in the* complaint.

On December 13 and 18, 1985, pursuant to 28 U.S.C. § 372(c)(5) and the rules of the Tenth Circuit, counsel were appointed to aid the Special Committee with its work and to function for the committee in the exercise of its duty.

On June 6, 1986, the complainants filed a detailed reply to the response to the complaint filed by Judge Kelly, and also filed a supplemental complaint.

On February 3, 1986, the complainants filed a supplement to "Reply to Response to Complaint and Supplemental Complaint."

On February 6, 1986, the Special Committee directed that the complaint be dismissed if not verified within 15 days.

On February 18, 1986, complainants filed a "Renewed, Supplemented, and Verified Complaint."

On March 10, 1986, complainants filed a second supplement to "Reply to Response to Complaint and Supplemental Complaint."

On November 4, 1986, the Special Committee filed a written report in three parts: I. Summary of proceedings, II. Findings,

and III. Recommendation. The report is signed by the three members of the Special Committee.

On January 7, 1987, the Judicial Council entered an order reciting that all but 6 judges of the Judicial Council had recused themselves, that the remaining 6 judges split 3-3 as to whether the complaint should be dismissed and 3-3 on the entry of an order proposed by the Special Committee for distribution to the parties and that there not being a majority in favor of further action, the proceedings were closed and concluded.

On January 28, 1987, complainants filed a "Motion for Reconsideration, Review, Clarification and/or Referral and Motion for Release of Report and Recommended Order and Motion for Leave to Supplement Upon Receipt of Report and Order."

On February 25, 1987, the 6 members of the council denied the motion for reconsideration by a vote of 3-3 and denied all other requests.

On April 17, 1987, complainants petitioned the Judicial Conference of the United States to review the action of the Judicial Council of the Tenth Circuit.

Committee Authority

Section 372 of Title 28 of the United States Code sets out the provision of the law relating to the imposition of discipline on judges. This statute provides the substantive basis for discipline as well as being the framework to determine if discipline should be imposed.

The substantive standard of conduct defined in the statute is whether or not the judge has "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts."

The procedure outlined by the statute to determine if a judge has violated this standard in substance is as follows:

1. A complaint may be filed by any person in the court of appeals. 28 U.S.C. § 372(c)(1).

2. The chief judge of the court of appeals should review the complaint and he or she may, under circumstances described in the statute, dismiss the complaint or conclude the proceedings with a finding that corrective action has already been taken. 28 U.S.C. § 372(c)(3).

3. If he or she does not do either, he or she should constitute and appoint a three-judge special committee to investigate the facts and allegations and give notice to the complainant and the judge. 28 U.S.C. § 372(c)(4).

4. The committee shall conduct an investigation and file a written report with the judicial council of the circuit. The report shall present findings and recommendations. 28 U.S.C. § 372(c)(5).

5. The Judicial Council, on receipt of the report may conduct further investigation and may take "such action as is appropriate to assure the effective and expeditious administration of the business of the court within the circuit." Section 372(c)(6)(B) sets out various actions deemed appropriate including censuring and reprimanding either publicly or privately. 28 U.S.C. § 372(c)(6).

6. A complainant, or a judge aggrieved by action of the council in entering orders in response to the investigation of a complaint, may petition the Judicial Conference of the United States for review thereof and the Judicial Conference, or a standing committee established under § 331 of Title 28, may grant the petition filed by the complainant. 28 U.S.C. § 372(c)(10).

7. All orders and determinations including denial of petitions for review "shall be final and conclusive and shall not be reviewable on appeal or otherwise." 28 U.S.C. § 372(c)(10).

In this case, the procedures followed by the judges of the Tenth Circuit complied fully with the outlined procedures set out in the statute. The only problem was the fact that the judges split evenly on the entry of any kind of a substantive order.

The complainants have been aggrieved by the inability of the Judicial Council to reach a conclusion as to whether to accept the recommendation of the Special Committee or to dismiss the action. In such a case, on petition of the complainants, the Judicial Conference or a standing committee established under § 331 may grant or deny the petition.

This committee is a standing committee established pursuant to § 331 of Title 28 and pursuant to that section and § 372(c)(10) may grant or deny the complainant's petition and its orders in this respect are final and not appealable. It is contemplated in proceedings of this kind that the Judicial Conference should act through its committee and the actions of its committee are deemed final.

Thus, on the record made by the Special Committee and the Judicial Council, the first question before the committee is "Should the petition for review filed by the complainants be granted?" This question is not the same as "Should the allegations of the complaint be sustained and the judge disciplined?" The statute involves a two-step process. First, this committee must determine whether there are special reasons why the committee should consider the complaint. If the committee thinks that

there are special reasons to consider the complaint, and only then, the committee should determine whether under the appropriate standard of review the action of the judicial council should be sustained or other orders should be entered."

<u>Should the Committee Grant the Petition for Review</u>

The answer in this case is yes, in part. Clearly this committee should consider, under the appropriate standards for review, the matters that the Tenth Circuit Judicial Council was not capable of resolving because of an evenly divided vote. Congress, when it enacted the Judicial Conduct and Disability Act of 1980, intended to provide a procedure whereby each complaint of judicial misconduct should be resolved. In so doing, it provided a three-step procedure. First, it was expected that the chief judge of the circuit would be able to handle most of the complaints. As to those he could not handle, the judicial council of the circuit would resolve. Finally, the right was given to the aggrieved person to petition the Judicial Conference for action by the Conference or its standing committee.

In this case the procedure has broken down because of the even split on the Judicial Council. It is clear that the inability of the Judicial Council to make a definitive decision should be considered grounds to permit review and this committee should, on request of the complainants, step in and review the matter in order to provide a resolution.

On the other hand, it would not be appropriate to grant that part of the petition for review requesting the release of the recommended order to the complainants for further filings. The statute contemplates that the investigations should be confidential. To grant the petition for review including the request for release of the proposed order for the purpose of further filings by the petitioner would transform the hearing before this committee into a public trial, clearly not contemplated by the statute. What is contemplated by the statute is a full consideration by this committee of the record and the action of the Judicial Council, but without further embellishment of the record or argument. Thus, the petition for review is granted to the extent that it will permit this committee to consider the merits of the complaint based on the full record made before the Judicial Council of the Tenth Circuit.

Should the Recommended Action be Ordered or Should the Complaint be Dismissed, or Should Other Action be Ordered

The standard against which judicial conduct is to be tested is as follows: "Has [the judge] engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts?" Such conduct refers to conduct other than the substantive orders entered in the course of exercising judicial duties. The substance of such orders can be reviewed and corrected through the appellate process. Errors of substantive or procedural law or even judicial exercise of excessive judicial

power is not what should be involved in proceedings instituted pursuant to 28 U.S.C. § 372. What is involved in proceedings under the Judicial Conduct and Disability Act of 1980 are actions by judges involving the methods by which they act and carry out their duties as distinguished from whether the actions are correct under the substantive law. The standard as set out in the Act relates to conduct prejudicial to the effective and expeditious administration of the business of the courts. What is involved is a sensitivity to the public perception of fairness in connection with the carrying out of judicial functions.

The committee has before it the record before the Judicial Council and the report of the Special Committee which contains a summary of the proceedings, findings, and a recommended order. How the committee considers these matters, how much weight should be given to recommendations of the Special Committee, and how the committee should apply the standard of conduct set out in the statute against the record developed by the Special Committee and the Judicial Council is not altogether clear.

The Special Committee is provided for by statute. Its duties are designated by statute. It is directed by statute to make findings and recommendations for appropriate action by the Judicial Council. Clearly, the report and recommendation of the Special Committee is entitled to be considered by the Council and this Review Committee and to be given such weight as the Judicial Council or this committee deems appropriate.

It is also clear that the Judicial Council and by virtue of the granting of a petition for review, this committee is free to accept or reject the recommendations of the Special Committee based on their perception of whether the record indicates that the conduct was prejudicial to the effective and expeditious administration of the business of the courts and to take any action whether or not recommended by the Special Committee to assure the effective and expeditious administration of the business of the courts. However, a fair reading of the statute also leads to the conclusion that the recommendations of the Special Committee are not to be regarded lightly.

In this case, the Special Committee made an extensive investigation of the allegations in the complaint filed by the complainants. It found that there was no merit to all of the claims made by the complainant except one. As to that one, concerning a hearing on March 13, 1985, involving possible recusal in a particular case, the Special Committee made findings suggesting that the methods and procedures used to announce the judge's recusal were conduct prejudicial to the effective and expeditious administration of the business of the courts.

The committee has reviewed the entire record of the proceedings including the response by Judge Kelly and the investigation report. The committee finds that the recommendation of the Special Committee is supported by a reasonable and responsible reading of the record.

This committee therefore directs the entry of the following order which is the substance of the order recommended by the Special Committee:

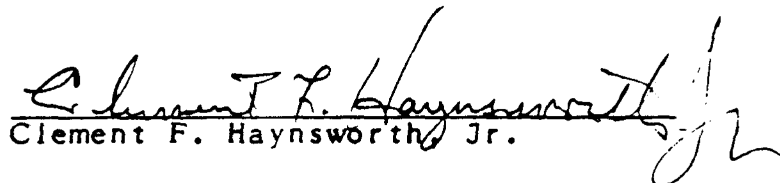
> The Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders has considered the report of the Judicial Council of the Tenth Circuit and the Special Committee which investigated the Complaint of Judicial Misconduct filed pursuant to 28 U.S.C. § 372, No. 83-10-372-9 of the Tenth Circuit, a complaint by Fred W. Phelps, Sr., and others against the Honorable Patrick F. Kelly. The Review Committee finds that the investigation conducted by the Judicial Council, its Special Committee, and its Special Counsel is, in the circumstances a sufficient proceeding to comply with 28 U.S.C. § 372(c) and the Rules of this Circuit for disposition of this complaint in accordance with the Act.
>
> The Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference finds and concludes that the Respondent Judge improperly conducted the hearing on March 13, 1985, a transcript thereof having been considered by the Review Committee. The Review Committee finds that the Respondent Judge had determined prior to the hearing that he would recuse from further participation in Winterburg v. Kansas Gas and Electric Co., No. 83-1800-K of the District of Kansas. From the circumstances, the Review Committee concludes that the hearing on March 13 was held for the purpose of chastisement and criticism of Fred. W. Phelps, Sr. Such chastisement and criticism were expressed in terms which were injudicious, intemperate and demeaning of Mr. Fred. W. Phelps, Sr., an officer of the court; that thereafter Mr. Phelps was not permitted to respond to said statements. The Review Committee concludes that the Respondent Judge thereby engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, within the meaning of 28 U.S.C. § 372(c)(1), and that the Respondent Judge should be reprimanded therefor. See In the Matter of Marvin F. Frankel, 323 N.W. 2d 911 (Mich. 1982); In re Inquiry Concerning a Judge, Honorable W. Fred Turner, 421 So. 2d 1077 (Fla. 1982); In re

Bernard B. Glickfeld, Judge, 479 P.2d 638 (Cal. 1971) (en banc).

Accordingly, the Judicial Conference Committee to Review Circuit Council Conduct and Disablity Orders does reprimand the Respondent Judge for the conduct described above at the hearing on March 13, 1985. The Review Committee concludes that the remaining allegations warrant no action.

We further direct that a copy of this committee memorandum and order and the order of reprimand be filed with the Clerk of the Court of Appeals for the Tenth Circuit and be transmitted to each of the complainants and to Judge Kelly by the Clerk of the Court of Appeals for the Tenth Circuit and to be made available to the public through the Clerk's Office pursuant to 28 U.S.C. § 372(c)(5).

FOR THE COMMITTEE:[1]



Clement F. Haynsworth, Jr.

[1]This opinion was prepared by Honorable Charles W. Joiner. Honorable Clement F. Haynsworth, Jr. and Honorable Edward J. Devitt concurred in the opinion and because of illness, Honorable James H. Meredith did not participate.

IN THE JUDICIAL CONFERENCE
OF THE UNITED STATES

BEFORE ITS STANDING COMMITTEE
TO REVIEW CIRCUIT COUNCIL
DISCIPLINARY ORDERS

In Re: Petition No. 88-372-001

ORDER

The Standing Committee has before it the petition of a United States District Judge for review of the disciplinary action taken against him by the Judicial Council pursuant to 28 U.S.C. § 372(c)(10).

It would serve no useful purpose to recite the facts and summarize the contentions of the parties. It is sufficient to say that on the record filed and submissions of counsel the Committee concludes that the United States District Judge engaged in injudicious conduct in connection with the proceedings before him and should be reprimanded.

The robe a judge wears as he sits upon the bench is not a license to excoriate lawyers or anyone else. On the other hand, a judge must be free to address and resolve issues properly before him for disposition, and he should not be censured by his peers for saying what need be said.

Quite apart from the boundary between those things that are censurable and those things that are not, a judge should be courteous and considerate of all people having reason to be in

his courtroom or to communicate with him. However, the Judicial Conduct and Disability Statute gives us no power to enforce a code of manners or even rules of common courtesy. Restraints each judge should feel and observe are not a straight jacket for us to apply.

Nevertheless, a judge may become so intemperate and inconsiderate as to warrant some reprimand from his fellow judges. The excesses of one judge may tarnish other judges; when they become flagrantly injudicious, they may warrant an official reprimand.

Here, the lawyers brought up the matter of the judge's earlier statement about the complainant. Whether or not it was necessary to his decision, it was not inappropriate for the judge to admit that he had made the statement attributed to him. His reiteration and reassertion of his earlier statement, however, were neither necessary nor appropriate. That gratuitous statement came shortly after another occasion, in the same proceeding, on which the judge engaged in intemperate criticism of persons in the courtroom.

Because the judge's conduct was far beyond the area within which a rule of courtesy may be applied and because we find it glaringly injudicious, we conclude that the Circuit Council properly found it an appropriate basis for a reprimand.

We are not unmindful, however, that speech of judges in the disposition of their judicial business must be free except to the extent it is subject to direct review by a superior court. A public reprimand is a drastic sanction. Judges should be given

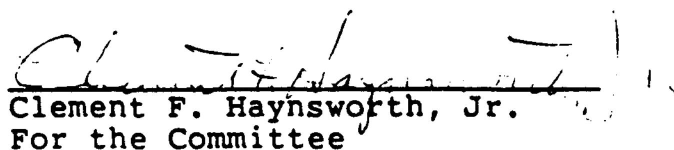
no cause to fear such a sanction unless the judge's conduct is more excessive, or more blatantly excessive, than was the judge's conduct here. The appropriate sanction, we conclude, is a private reprimand.

The Committee has issued a reprimand to the United States District Judge by private communication pursuant to 28 U.S.C. § 372(c)(6)(B)(v).

Complainant's cross petition for relief is denied.

ORDERED filed in the office of the Clerk of the United States Court of Appeals pursuant to 28 U.S.C. § 372(c)(15).

With the concurrence of Judge Edward J. Devitt and Judge Charles W. Joiner.



Clement F. Haynsworth, Jr.
For the Committee

December 27, 1988

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
WASHINGTON, D.C. 20544

JUDGE CHARLES W. JOINER
JUDGE PAUL H. RONEY

JUDGE LEVIN H. CAMPBELL
CHAIRMAN

WILLIAM R. BURCHILL, JR.
COUNSEL

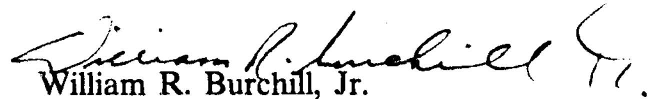
COM: (202) 633-6127
FTS: 633-6127

September 3, 1992

MEMORANDUM TO ALL CIRCUIT EXECUTIVES

SUBJECT: Order of Judicial Conference Committee on Conduct Complaint

I am providing herewith for your information the most recent memorandum and order issued by the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders. This memorandum and order (No. 92-372-001) is in response to a petition for review filed by complainants in recent proceedings before the Fifth Circuit against a district judge and two magistrate judges, brought under the Judicial Conduct and Disability Act, 28 U.S.C. § 372(c).


William R. Burchill, Jr.

Attachment

cc: w/attachment
Clerks, U.S. Courts of Appeals
Clerk, U.S. Court of International Trade
Clerk, U.S. Claims Court

BEFORE THE COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS JUDICIAL CONFERENCE OF THE UNITED STATES

DONALD GENE HENTHORN,

Complainant,

v.

FILEMON B. VELA, United States District Judge; WILLIAM M. MALLET, United States Magistrate Judge; and FIDENCIO C. GARZA, United States Magistrate Judge,

Respondents.

No. 92-372-001

COMMITTEE MEMORANDUM AND ORDER

This matter is before the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, pursuant to a document entitled: "Complaint," and identified as, "An Appeal From the Judicial Council of the Fifth Circuit Dismissing the Charges Against Judge Felemon B. Vela, Magistrates William M. Mallet and Fidencio G. Garza," filed by Donald Gene Henthorn, appealing the decision of the Judicial Council of the Fifth Circuit, entered on January 15, 1992, dismissing the complaint against the respondents.

This committee is a standing committee of the Judicial Conference established pursuant to 28 U.S.C. § 331. It is contemplated in proceedings of this kind that the Judicial Conference should act through this committee. Pursuant to 28 U.S.C. §§ 331 and 372(c)(10), its committee may grant or deny the complainant's petition, and its orders in this respect are final and not appealable.

Although the request for our action is called a "Complaint," and is identified as an "appeal,"[1] we construe it as a petition for review, which vests us with jurisdiction. 28 U.S.C. § 372(c)(10). The "Complaint" is sufficiently clear and meets the requirements of the Rules of the Judicial Conference of the United States for the processing of petitions for review of Circuit Council orders under the Judicial Conduct and Disability Act.. Rules of the Judicial Conference of the United States for the Processing of Petitions for Review of Circuit Council Orders Under the Judicial Conduct and Disability Act [54 Fed. Reg. p. 48951-01 (Nov. 28, 1989)].

This matter began with a document filed by Donald Gene Henthorn in the Court of Appeals for the Fifth Circuit called a "Complaint," and identified as a "Complaint pursuant to 28 U.S.C. 372(c)(1), that the respondents have engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, and that such respondents are unable to discharge all the duties of their respective offices by reason of mental disability. Request for grand jury investigation." The complaint is 14 pages in length, but contains the following matters of substance. The complainant alleges that he was incarcerated, pursuant to an illegal conviction in the court presided over by Judge Filemon B. Vela in Brownsville, Texas, and in a court from the Southern District of California.

Henthorn alleges (1) that Judge Vela, during the trial, lunched with members of the prosecution in full view of the petit jury; (2) that a juror was placed on the jury by the judge as a part of an effort to convict the defendant; (3) that the judge and his courtroom deputy listened to the deliberations of the jury to determine their vote, and gave this information to the assistant United States attorney and used this information to "browbeat" jurors into reaching a verdict; (4) that in the handling of the complainant's Rule 2255 motion, the judge and Magistrate Judge Mallet conspired with the assistant

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[1] The "complaint" is a curious document containing many irrelevancies so far as our jurisdiction is concerned. For example, the complainant requests that the respondents serve the time imposed on the complainant, and that he be given a list of the names and addresses of the petit jurors.

United States Attorney to cause the motion to be rejected, and that the magistrate judge did not properly conduct an appropriate hearing; (5) that Magistrate Judge Garza, in ruling on a recusal motion and a mandamus motion to adjudicate the Rule 2255 motion, deliberately misstated filing times and erred in denying the motion by covering up and hiding facts showing judicial misconduct; and (6) that on transfer of the complainant's civil rights suits from the District of Columbia District Court to the Texas District Court, the judge dismissed the suits and obstructed justice by covering up his illegal acts.

Thereafter, Chief Judge Clark dismissed most of the complainant's allegations on the grounds that they related to the actions of individuals who are not subject to the complaint procedure or that they directly related to the merits of decisions or procedural rulings. He ordered a response from the judge as to (1) the question of the judge's dining with the prosecution in full view of the jury, and (2) the question involving the courtroom deputy and the judge listening to the deliberations of the jury so as to inform the assistant United States Attorney in an effort to "browbeat" the jurors into reaching a verdict.

Judge Vela responded by (1) denying that the event regarding dining with the prosecution in full view of the jury took place, (2) asserting that he has a policy of never socializing with attorneys and litigants during a case before a jury, (3) denying that he ever dined with the alleged persons, (4) stating that he never had given any of his personnel instructions to have any contact with a deliberating jury except to respond to their inquiries and to attend to their needs, (5) stating that he had no knowledge of any contact his courtroom deputy may have had with the jury or the prosecution, except to inform them of inquiries relating to the schedule, and (6) that no communications were made with the jury outside the presence of the defendant and the prosecution.

Chief Judge Clark certified the portions of the complaint that were not dismissed, Judge Vela's response and Henthorn's reply to each member of the Fifth Circuit Special

Committee of the Judicial Council[2] set up to investigate facts and allegations in complaints filed with the court.

The Special Committee reported that it had investigated Henthorn's allegations regarding contact with the prosecution team during the lunch break in view of the jury. The Special Committee further reported that it investigated the complaint that the judge encouraged his courtroom deputy to listen to the jury deliberations and advise the prosecution of the details. The Committee concluded that both claims were totally baseless and without foundation in fact.

The Committee recommended that the Judicial Council find that Judge Vela had not engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts within the meaning of § 372(c), and that complainant's complaint be dismissed.

The Judicial Council found that the procedure used by the Committee was appropriate and, based upon the Committee's recommendation that the complaint was meritless, the complaint was dismissed. The Council denied Henthorn's request for the investigation report and concluded that no further investigation was necessary.

The issues before our Committee are (1) were the procedures taken by the chief judge and the Judicial Council in investigating and dismissing the complaint proper, and (2) was the substance of any of the decisions erroneous.

Procedure

The chief judge and the Judicial Council have followed the procedure outlined in the statute. In accordance with section 372(c)(3), the chief judge sorted through the complaint to determine if there was anything in it to support facts that would support a claim of mental or physical disability or of conduct prejudicial to the effective and expeditious administration of the business of the courts. He reported in an order that he

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[2] In addition to Chief Judge Charles Clark, the members of the Committee were Judges W. Eugene Davis, Jerry E. Smith, William Wayne Justice, and Neal B. Biggers.

found nothing to support such a claim. He also reported that most of the matters complained about directly related to the merits of a decision or a procedural ruling. He did all of this, as required by statute, in an expeditious manner, entering his order of dismissal within eight days of the filing of the complaint. The remainder of the claims were then certified to a committee established in accordance with section 372(c)(4). That committee made the investigation called for by section 372(c)(5), and its report fully complies with the requirements of that section. The action of the Judicial Council was fully in accordance with the procedures outlined in section 372(c)(6)(C).

The statute, 28 U.S.C. § 372(c)(14), directs that "all papers, documents, and records of proceedings related to investigations" shall be confidential and not disclosed, except that the Judicial Council is given discretion to release a copy of the investigation report to the complainant. The Committee's Commentary to Illustrative Rule 13 suggests that "Rule 13 does not contemplate that the complainant will be permitted to attend proceedings of the special committee except when testifying or presenting argument. Nor does it contemplate that the complainant will be given access to the special committee's report to the judicial council." The Judicial Council's action in denying Henthorn's access to the investigation report was not a breach of discretion.

The procedures outlined in the statute are designed to provide an adequate investigation of the complaints that are filed. They do not suggest that confrontational investigation, in the nature of a court proceeding, be used. They suggest, instead, that formal or informal investigation is sufficient to uncover the facts upon which the complaint is based, as well as to protect the complainant and the judicial officer. The statute is clear: "Each committee . . . shall conduct an investigation as extensive as it considers necessary." The Committee did that. It so reported. There is nothing in the record to suggest that the type of investigation used or the extent of it was an abuse of the discretion given in the statute.

Substance

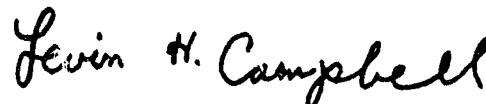
The petition for review is somewhat unclear as to the orders from which review is requested. If review is sought of Chief Judge Clark's dismissal of portions of the complaint without investigation, that would appear to be a matter beyond our statutory jurisdiction. Under 28 U.S.C. § 372(c)(10), we have jurisdiction to review only Judicial Council actions under section 372(c)(6), i.e., only Judicial Council actions after receipt of the report of a special investigating committee. In any event, even if we had jurisdiction, we would find that the chief judge was correct in dismissing those portions of the complaint that he dismissed pursuant to section 372(c)(3)(A). The procedures set forth in section 372 are not designed to be a substitute for appellate review nor an additional forum in which to raise questions that are "directly related to the merits of a decision or procedural ruling." For the most part, the matters dismissed by Chief Judge Clark in his order of June 17, 1991, filed on June 20, 1991, including all of the claims made against Magistrate Judge William M. Mallet and Magistrate Judge Fidencio C. Garza, either relate to the actions of individuals who are not subject to the complaint procedure or directly relate to the merits of decisions or procedural rulings. To the extent certain of these allegations against Judge Vela or the two magistrates may not have been merits-related -- the allegations that these judicial officers acted with illicit motives as part of a conspiracy against Henthorn -- the allegations were properly dismissed as frivolous. 28 U.S.C. § 372(c)(3)(A)(iii). The complaint supplied no factual substantiation whatsoever for the charge of conspiracy.

As to the matters investigated by the Special Committee alleged against Judge Filemon B. Vela, and found by the Committee to be meritless, we accept the findings of the Judicial Council. It acted according to the procedure prescribed by law. Its Committee conducted an investigation that we have held to be within its discretion, and that discretion was not abused. There is substantial evidence in the record to support the Judicial Council's factual finding that the allegations against Judge Vela were wholly

without factual foundation. Nothing suggests that we should make a further investgation, as is permitted by 28 U.S.C. § 372(c)(11) and Rule 12 of the Rules of the Judicial Conference of the United States for the Processing of Petitions for Review of Circuit Council Orders Under the Judicial Conduct and Disability Act [54 Fed. Reg. p. 48951-01 (Nov. 28, 1989)].

We find the petition for review to be without merit. It is dismissed.

FOR THE COMMITTEE:[3]



Levin H. Campbell
United States Circuit Judge

September 1, 1992

[3]This opinion was prepared by Honorable Charles W. Joiner, with Honorable Levin H. Campbell and Honorable Paul H. Roney concurring.

"phelps"

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

WILLIAM R. BURCHILL, JR.
GENERAL COUNSEL

November 3, 1993

MEMORANDUM TO ALL CIRCUIT EXECUTIVES

SUBJECT: Order of Judicial Conference Committee on Conduct Complaint

I am providing herewith for your information the most recent memorandum and order issued by the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders. This memorandum and order (No. 93-372-001) is in response to a petition for review filed by complainant in recent proceedings before the Tenth Circuit against a district judge, brought under 28 U.S.C. § 372(c).

William R. Burchill, Jr.

Enclosure

cc (w/enclosure):
Clerks, U.S. Courts of Appeals
Clerk, U.S. Court of International Trade
Clerk, U.S. Court of Federal Claims

A TRADITION OF SERVICE TO THE FEDERAL JUDICIARY

BEFORE THE COMMITTEE TO REVIEW CIRCUIT COUNCIL

CONDUCT AND DISABILITY ORDERS

JUDICIAL CONFERENCE OF THE UNITED STATES

No. 93-372-001

In Re: Complaints of Judicial Misconduct

COMMITTEE MEMORANDUM AND ORDER

This matter is before the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders pursuant to an undated petition for review received by this Committee on July 13, 1993. Complainant seeks review of the June 23, 1993 order of the Judicial Council of the Tenth Circuit dismissing for lack of standing complainant's complaints filed under 28 U.S.C. § 372(c) against a district judge.

Committee Authority

Under 28 U.S.C. § 372(c)(10), "A complainant, judge, or magistrate aggrieved by an action of the judicial council under

paragraph (6) of this subsection [-- the paragraph under which the judicial council may take action on a complaint of judicial misconduct following the report of a special investigating committee --] may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph."

Section 331 of 28 U.S.C., in turn, provides, "The Conference is authorized to exercise the authority provided in section 372(c) of this title as the Conference, or through a standing committee. If the Conference elects to establish a standing committee, it shall be appointed by the Chief Justice and all petitions for review shall be reviewed by that committee."

This committee is the standing committee established by the Judicial Conference pursuant to § 331 to act for the Judicial Conference in proceedings of this kind. Pursuant to §§ 331 and 372(c)(10), this committee may grant or deny complainant's petition for review, and the committee's orders in this respect are final and not appealable.

Background

Complainant filed a complaint on August 8, 1991, raising a number of allegations against the district judge arising out of the

judge's handling of certain litigation. Complainant filed subsequent complaints raising allegations against the same district judge, and arising out of the same judicial proceeding, on August 10, 1991, August 15, 1991, and October 10, 1991. None of the complaints alleged that complainant was a party to, or had any involvement in, the litigation in question. The chief judge of the Court of Appeals for the Tenth Circuit -- the judge charged with responsibility under § 372(c)(2)-(4) for the initial determination of complaints of judicial misconduct or disability filed under § 372(c) -- consolidated all four complaints under a single number.

The district judge filed a response to the complaints and also filed a motion to dismiss for lack of standing on the part of complainant, a suggestion of mootness, and a motion to supplement the record. In a June 5, 1992 order, the chief judge of the Court of Appeals for the Tenth Circuit denied the motions to dismiss for lack of standing and mootness, and took the motion to supplement the record under advisement. The chief judge dismissed a number of the complaints' allegations under § 372(c)(3)(A) on the grounds that they were factually unsupported, were directly related to the merits of decisions or procedural rulings, or did not allege conduct of the judge but rather of other persons not subject to § 372(c).

The remaining allegations in the complaints were that the judge had made extra-judicial comments about the litigation pending before the judge, in violation of Canon 3A(6) of the Code of Conduct for United States Judges. Finding no basis for dismissal

of these allegations under § 372(c)(3), the chief judge appointed a special committee under § 372(c)(4) to investigate these allegations.

After investigation, the special committee on its own motion recommended to the judicial council that the council reexamine the chief judge's denial of the motion to dismiss for lack of standing. In a June 23, 1993 memorandum, the judicial council ruled that its proceeding under § 372(c) constituted a "judicial" proceeding to which the constitutional requirements of a case or controversy applied. Even if Congress in § 372(c) had meant to confer standing to file complaints upon persons who had not suffered a concrete injury sufficient to confer standing under Article III of the Constitution, the council reasoned, such statutory broadening of standing requirements was impermissible under Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992). The council further found that complainant had not alleged injury sufficient to create a case or controversy under Article III. Accordingly, the council dismissed for lack of standing those portions of the complaints that had not already been dismissed by the chief judge. Complainant's petition for review of the council's order followed.

Discussion

Complainant's petition for review challenges both the chief

judge's dismissal of many allegations of the complaints without special committee investigation pursuant to § 372(c)(3), and the judicial council's dismissal of the remaining allegations of the complaints pursuant to § 372(c)(6)(C) for lack of standing. Section 372(c)(10), however, expressly limits the authority of the Judicial Conference, and hence of this committee, to the review of orders issued by judicial councils under § 372(c)(6) following receipt of the report of a special committee. With that express exception, "all orders and determinations . . . shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." § 372(c)(10). This committee, accordingly, lacks jurisdiction over complainant's challenge to the chief judge's June 5, 1992 order of dismissal. This committee has jurisdiction to review only the June 23, 1993 order of dismissal of the Judicial Council of the Tenth Circuit. To that review we now turn.

The question before us is the correctness of the Tenth Circuit Council's conclusion that in reaching a determination under § 372(c)(6) a judicial council exercises an Article III "judicial function" to which the standing requirements for an Article III case or controversy must apply. Our research has uncovered no case in which any court has ever considered this question. Nor are we aware that any judicial council has ever expressly addressed it in a § 372(c) order. However, § 372(c) orders which entertain allegations brought by complainants who lack traditional standing are legion, denoting the common understanding of the circuits in implementing the Act over the last twelve years that traditional

standing requirements do not apply.

To cite the most prominent example, the 1983 complaint filed in the Eleventh Circuit against Judge Alcee Hastings, which alleged that Judge Hastings had conspired to obtain a bribe in return for a judicial act and which ultimately contributed to Judge Hastings' impeachment and removal from office, was filed by two district judges. In the Matter of Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit, 783 F.2d 1488, 1492 (11th Cir.), cert. denied, 477 U.S. 904 (1986). It is doubtful that these two judges would have had standing, in the strict sense, to complain about Judge Hastings' alleged acceptance of a bribe. They had no more than the generalized interest of any federal judge in the integrity and reputation of the federal judiciary. Yet that complaint resulted in years of arduous investigation by a special committee of the Eleventh Circuit; a certification to the Judicial Conference by the Eleventh Circuit Judicial Council pursuant to § 372(c)(7)(B) of the council's determination that Judge Hastings may have engaged in conduct which might constitute one or more grounds for impeachment; and a certification to the House of Representatives by the Judicial Conference pursuant to § 372(c)(8)(A) that consideration of impeachment may be warranted. Hastings v. Judicial Conference, 829 F.2d 91, 96-97 (D.C.Cir. 1987), cert. denied, 485 U.S. 1014 (1988).

As another example, a complaint was filed by a police officer who, apparently as a spectator in a judicial proceeding, was offended by the peremptory tone used by the magistrate judge in

demanding that an elderly man in a wheelchair remove his cap. The matter was concluded after the magistrate judge agreed to corrective action. Barr & Willging, Administration of the Federal Judicial Conduct and Disability Act of 1980, at 74 (Report to the National Commission on Judicial Discipline and Removal, March 15, 1993).

In many cases bar groups file complaints on behalf of aggrieved individuals, in order to embolden the individual against feared retaliation and protect the individual if retaliation is attempted. No one has questioned this practice. Indeed, the National Commission on Judicial Discipline and Removal recently issued recommendations aimed at bolstering it. Report of the National Commission on Judicial Discipline and Removal, at 100-02 (August 1993). In an Eleventh Circuit matter, for example, two bar groups complained that a magistrate judge had ordered a lawyer arrested and hauled before him in handcuffs and chains because a conflict had made it impossible for the lawyer to appear at a hearing. The Eleventh Circuit Council issued a stern public reprimand of the magistrate. Complaint no. 88-2101 (11th Cir. Jud. Council, October 9, 1990). Is such bar participation now to be precluded for lack of standing?

Also, Congress amended the Act in 1990 to permit a chief judge to identify a complaint on the basis of information available to the chief judge. 28 U.S.C. § 372(c)(1). This provision, which clearly signals Congress' assumption that § 372(c) complainants should not have to overcome standing requirements would seemingly

be unconstitutional under the Tenth Circuit Council's reasoning.

Treating § 372(c) proceedings as strictly judicial proceedings under Article III might well have a host of other consequences just as bizarre as the imposition of traditional standing requirements. Is § 372(c)(10)'s bar to judicial review of § 372(c) determinations constitutionally suspect? Do perfectly sensible limitations on the rights of complainants in § 372(c) proceedings violate complainants' due process rights? Are the confidentiality restrictions of § 372(c)(14) unconstitutional? These various statutory provisions, like the recent amendment permitting chief judge identification of complaints, suggest that Congress did not intend a § 372(c) proceeding -- however "judicial" in actual character it might sometimes be -- to constitute a judicial proceeding for constitutional purposes.

The legislative history of § 372(c) provides further support for this view. The relevant House report stated as follows: "In the context of judicial discipline and disability, it did not appear that there had been a showing of a serious, pervasive and recurrent problem that could not be handled by administrative proceedings within the judiciary itself. Therefore, rather than create luxurious mechanisms such as special courts and commissions -- with all the trappings of the adversary process . . . -- the legislative solution crafted by this Committee . . . emphasized placing primary administrative responsibility within the judicial branch of government." H.R. Rep. No. 1313, 96th Cong., 2d Sess. 4 (1980). The report goes on to point out that "the legislation

creates much more of an 'inquisitorial-administrative' model than an 'accusatorial-adversary' one. In this regard, the judicial council is not to be thought of as a passive and impartial referee; rather, the council can become the active gatherer of evidence and can control the objectives and nature of the inquiry." Id. at 14.

Although no court has considered the standing issue, the Supreme Court in dictum in Chandler v. Judicial Council, 398 U.S. 74 (1970), did address whether an order of a circuit council under § 332 amounts to a "judicial decision." In that case Judge Stephen Chandler, a district judge in Oklahoma, sought to challenge in the Supreme Court an order of the Tenth Circuit Judicial Council under § 332 -- years before the enactment of § 372(c) -- directing that Judge Chandler not be assigned new cases. The threshold question for the Court was whether this was a judicial decision over which it would have appellate jurisdiction, or an administrative decision which it could not have original jurisdiction to review.

The Court, in an opinion joined by five Justices, stated that it "would be no mean feat" to find that "the challenged action of the Judicial Council was a judicial act or decision by a judicial tribunal . . . ." Id. at 86. "We find nothing in the legislative history to suggest that the Judicial Council was intended to be anything other than an administrative body functioning in a very limited area in a narrow sense as a 'board of directors' for the circuit. Whether that characterization is valid or not, we find no indication that Congress intended to or did vest traditional

judicial powers in the Councils. We see no constitutional obstacle preventing Congress from vesting in the Circuit Judicial Councils, as administrative bodies, authority to make 'all necessary orders for the effective and expeditious administration of the business of the courts within [each] circuit.'" Id. at 86 n. 7. The Court added that "the action of the Judicial Council here complained of has few of the characteristics of traditional judicial action and much of what we think of as administrative action." Id. at 88 n. 10.

Three Justices disagreed (the ninth Justice, Marshall, did not participate), and found the council order to be a "judicial" decision. Id. at 95-111 (Harlan, J., concurring), 133-35 (Douglas, J., dissenting), 141 (Black, J., dissenting). The Tenth Circuit Council relies heavily on the reasoning of Justice Harlan's concurrence, despite its rejection by a Supreme Court majority.

Two Eleventh Circuit decisions also suggest that § 372(c) functions and proceedings are not strictly "judicial." Judge Hastings' claim in one of these cases, In the Matter of Certain Complaints, supra, 783 F.2d 1488, was that the investigative and subpoena powers of special committees and circuit councils under § 372(c) were executive in character and therefore could not properly be exercised by judges. The court concluded that § 372(c) functions could be performed by judges because they were "ancillary court management tasks" that were "concerned solely with matters affecting the management and reputation of the judiciary itself." Id. at 1504-05.

The other case, In re Petition to Inspect and Copy Grand Jury Materials, 735 F.2d 1261 (11th Cir. 1984), was an appeal by Judge Hastings from a district court order permitting a special committee of the Eleventh Circuit Judicial Council to inspect grand jury records pertaining to Judge Hastings' criminal indictment. The court ruled that the district court permissibly exercised its inherent power, apart from the Federal Rules, in granting the committee's request. In addressing in dictum whether the committee's proceedings might also meet the exception in Fed. R. Crim. P. 6(e)(3)(C)(i), which permitted disclosure of grand jury records "in connection with a judicial proceeding," the court concluded that the committee's proceedings "may not be a 'judicial proceeding' in the strict sense, . . . but they are very similar." Id. at 1268. The court found that a council's proceeding, "whether or not it is a judicial proceeding in the strict legal sense," id. at 1272, had a "judicial character," id., and "fit within Justice Holmes's definition of a 'judicial inquiry': 'A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.'" Id. at 1271 (quoting Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908)).

While § 372(c) proceedings have an adjudicatory aspect, they also have an administrative and managerial character not present in traditional adjudication by courts. As Rule 1(a) of the Illustrative Rules Governing Complaints of Judicial Misconduct and Disability makes clear, the purpose of § 372(c) "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." In concluding that "[t]he only purpose [of its § 372(c) proceeding] can be to impose a sanction designed to penalize the judge for past conduct and to deter future conduct," the Tenth Circuit Council overlooks the importance of corrective action in the Act's scheme. The Council also overlooks the strong public interest in the integrity of the courts.

We believe, also, that the Tenth Circuit Council fundamentally misstates the alternatives when it says that "it is necessary to examine whether the Judicial Council is exercising an Article III function or, in the alternative, is exercising administrative duties delegated by Congress." We see a council as exercising neither Article III judicial functions nor administrative functions simply "delegated" by Congress. Rather, pursuant to legislation promulgated by Congress under its Article III power to "ordain and establish" federal courts, a council exercises administrative functions ancillary to the courts' exercise of their traditional "judicial" powers. In the Matter of Certain Complaints, supra, 783 F.2d at 1504-05. Implicit in the federal judiciary's authority under Article III to exercise the federal judicial power must be authority to perform internal administrative and managerial tasks reasonably deemed necessary to the smooth and effective exercise of the federal judicial power. Id. Efforts to uncover and correct judicial conduct that is "prejudicial to the effective and expeditious administration of the business of the courts" are, we

believe, among those permissible managerial tasks. Id. at 1506-10. In the absence of legislation, therefore, we believe the judicial councils would have had power under Article III to organize for themselves disciplinary procedures akin to those created for them by Congress in § 372(c). Sen. Rep. No. 362, 96th Cong., 2d Sess. 7 (1980), reprinted at 1980 U.S. Code Cong. & Ad. News 4315, 4321; Report of the National Commission on Judicial Discipline and Removal, at 14 (August 1993).

To say, simply, that Congress "delegated" § 372(c) powers to the judiciary may imply that these are powers Congress itself could have wielded or delegated elsewhere. We believe there are serious constitutional doubts, however, whether Congress itself or some non-judicial branch agency could properly administer a disciplinary system short of impeachment akin to § 372(c). In our view, these doubts exist not because the task is inherently purely "judicial" -- it's not -- but because of the potential for interference with the independence of a coordinate branch that such an arrangement would create. Id. at 1505-06 & n.13. That concern, of course, does not mean that Congress could not create such a system for the federal judiciary itself to administer.

Some would add that the exclusivity of the impeachment process would be a further obstacle to a congressionally-administered (and possibly to a judicially-administered) system of discipline short of impeachment. However, § 372(c)'s constitutional vulnerability on this ground, if any, would not turn in any way on whether § 372(c) proceedings are "judicial" or not.

The fact that the council's administrative authority fits compatibly within the scheme outlined in Article III does not mean that § 372(c) (or §332) proceedings are "judicial" and therefore require an Article III case or controversy. We see no merit in the proposition that the Act would be constitutionally suspect under the doctrine of separation of powers if a § 372(c) proceeding were characterized as something other than a purely judicial function. Courts have held, again, that circuit councils constitutionally may exercise such non-judicial functions, which relate solely to "matters affecting the management and reputation of the judiciary itself," id. at 1504, as ancillary to the Article III judicial powers of the courts. Id. at 1503-06; Hastings v. Judicial Conference, 593 F.Supp. 1371, 1379-81 (D.D.C. 1984), aff'd in part and vacated in part, 770 F.2d 1093 (D.C. Cir. 1985), cert. denied, 477 U.S. 904 (1986). "[A]ny argument that the Act delegates legislative authority to the judiciary . . . would be most implausible . . . ." Hastings, supra, 829 F.2d at 104 (dictum).

For all of the above reasons, we rule that a proceeding under 28 U.S.C. § 372(c) is not a judicial proceeding subject to the Article III requirement of a case or controversy. A complainant, therefore, need not satisfy the requirements of standing imposed in judicial proceedings by Article III in order to maintain a complaint of judicial misconduct under § 372(c). Such a complaint may instead be filed by "any person," § 372(c)(1), alleging misconduct or disability as defined by § 372(c)(1).

In light of this ruling, we need not consider the Tenth

Circuit Council's finding that the complainant here failed to allege sufficient injury to establish standing under Article III. We express no view on that issue.

The Tenth Circuit Council's June 23, 1993 order in this matter is reversed and the complaint is sent back to the Tenth Circuit Council with directions that the complaint be investigated and disposed of in the normal course pursuant to § 372(c).

FOR THE COMMITTEE[1]

Levin H. Campbell

United States Circuit Judge

November 2, 1993

[1]This opinion was prepared by Judge Levin H. Campbell, with United States Circuit Judge Paul H. Roney, United States District Judge John P. Fullam, and United States District Judge Gordon Thompson, Jr. concurring.

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
WASHINGTON, D.C. 20544

JUDGE WILLIAM J. BAUER
JUDGE JOHN P. FULLAM
JUDGE CORNELIA G. KENNEDY
CHIEF JUDGE HENRY A. POLITZ
JUDGE GORDON THOMPSON, JR.

JUDGE LEVIN H. CAMPBELL, CHAIR

WILLIAM R. BURCHILL, JR.
COUNSEL
(202) 273-1100

October 5, 1994

MEMORANDUM TO ALL CIRCUIT EXECUTIVES

SUBJECT: Order of Judicial Conference Committee on Conduct Complaint

I am providing herewith for your information the most recent memorandum and order issued by the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders. This memorandum and order (No. 94-372-001) is in response to a petition for review filed by complainant in recent proceedings before the District of Columbia Circuit against a district judge, brought under 28 U.S.C. § 372(c).

William R. Burchill, Jr.

Attachment

cc (w/enclosure):
Clerks, U.S. Courts of Appeals
Clerk, U.S. Court of International Trade
Clerk, U.S. Court of Federal Claims

BEFORE THE COMMITTEE TO REVIEW CIRCUIT COUNCIL
CONDUCT AND DISABILITY ORDERS

JUDICIAL CONFERENCE OF THE UNITED STATES

No. 94-372-001

In re: Complaint of Judicial Misconduct

COMMITTEE MEMORANDUM AND ORDER

This matter is before the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders pursuant to a petition for review dated April 18, 1994. Complainant seeks review of the April 7, 1994 order of the Judicial Council of the District of Columbia Circuit dismissing his complaint of judicial misconduct filed under 28 U.S.C. § 372(c) against a district judge.

Committee Authority

Under 28 U.S.C. § 372(c)(10), "A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection [-- the paragraph under which the

judicial council may take action on a complaint of judicial misconduct following the report of a special investigating committee --] may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph."

Section 331 of 28 U.S.C. provides, "The Conference is authorized to exercise the authority provided in section 372(c) of this title as the Conference, or through a standing committee. If the Conference elects to establish a standing committee, it shall be appointed by the Chief Justice and all petitions for review shall be reviewed by that committee."

The Judicial Conference has established this committee to be the standing committee authorized to act for the Judicial Conference under § 331 in proceedings of this kind. Pursuant to §§ 331 and 372(c)(10), this committee may grant or deny complainant's petition for review, and the committee's orders in this respect are final and not appealable.

Background

Complainant filed a complaint with the clerk of the Court of Appeals for the District of Columbia Circuit on May 11, 1993, alleging that the district judge, in the course of recusing himself from a lawsuit in which complainant was a party, had issued a

public order revealing that the reason for his recusal was that complainant, who was named, had filed a previous complaint of judicial misconduct against him under § 372(c). Complainant's previous complaint had already been dismissed by the chief judge of the District of Columbia Circuit. Complainant also charged the judge with having distributed to the press copies of the recusal order mentioning his name in conjunction with the prior complaint.

Complainant argued that the judge's disclosure that he had been the complainant against the judge in a prior matter violated Rule 16(a) of the D.C. Circuit Rules Governing Complaints of Judicial Misconduct or Disability. Rule 16(a) -- which is identical to Illustrative Rule 16(a), that has been adopted by all of the circuits and courts covered by the Act -- provides, "Consideration of a complaint by the chief judge, a special committee, or the judicial council will be treated as confidential business, and information about such consideration will not be disclosed by any judge, magistrate, or employee of the judicial branch . . . except in accordance with these rules." The district judge did not seek the chief judge's consent to disclose the complainant's identity pursuant to Rule 16(g), which, mirroring § 372(c)(14)(C) of the statute, provides that "[a]ny materials from the files may be disclosed to any person upon the written consent of both the judge or magistrate complained about and the chief judge of the circuit."

At the chief judge's request, the district judge filed a written response to the complaint on October 4, 1993. On October

18, 1993, the chief judge notified complainant of the appointment of a special committee to investigate the complaint. On January 7, 1994, the special committee recommended to the circuit council that a letter be sent to the district judge, with a copy to complainant, pointing out that "it was a violation of the rules [i.e., the D.C. Circuit Rules Governing Complaints of Judicial Misconduct or Disability] to issue the order disclosing [complainant] as a complainant without the approval of the Chief Judge." This letter, the special committee recommended, would constitute appropriate corrective action to remedy the problem raised by the complaint.

Instead, the circuit council, on April 7, 1994, by a vote of five members to four, dismissed the complaint. The five-member majority reasoned that the district judge, pursuant to a resolution adopted by the district court "that any judge who recuses from a case must set forth the reason or reasons for said recusal on the reassignment form of the Calendar Committee," had a duty to state the reasons for his recusal. Noting that the commentary to Rule 17 states that "it may not always be practicable to shield the complainant's identity," the majority concluded that it was not practicable for the district judge to seek the chief judge's approval for this disclosure, since it might violate ethical standards for a district judge to discuss a proposed ruling with a court of appeals judge. In any event, according to the majority, the complaint's allegations were not cognizable under the Act because the district judge's alleged misconduct arose "out of the performance of judicial duties as an Article III Judge."

The four-member dissent argued that the district court resolution provided no basis for the district judge's public disclosure of complainant's name, since the judge "could have obeyed the resolution without disclosing [complainant's] identity even to the Calendar Committee; nothing in the resolution, after all, requires that the recusing judge specifically identify the persons whose presence in the case triggered the recusal." The dissenters rejected the majority's view that actions arising out of the performance of judicial duties were not cognizable under the complaint process, pointing out that § 372(c)(3)(A)(ii) establishes a much narrower standard calling for dismissal of allegations that are "directly related to the merits of a decision or procedural ruling." In addition, the dissenters rejected the district judge's arguments, articulated in his response to the complaint, that the confidentiality requirement of Rule 16(a) does not extend to the complainant's identity and does not apply to the judge complained against. The dissent concluded: "We do not doubt Judge Y's entire good faith. In fact, we would not support any action more severe than a letter informing Judge Y that the disclosure of Mr. X's name violated Rule 16(a) (and, like this dissent, withholding the names of complainant and judge)."

Governing Legal Principles

In his petition for review, complainant argues that the action of the circuit council was defective both procedurally and

substantively. Procedurally, complainant primarily asserts that in contravention of Rule 13(b), the special committee never accorded him an interview. As to substance, complainant repeats the arguments made by the circuit council dissenters.

We conclude that the D.C. Circuit Council did err in both respects: (1) procedurally, in that complainant was never interviewed by the special committee, as D.C. Circuit Rule 13(b) requires; and (2) substantively, in that the district judge's disclosure violated the D.C. Circuit Rules, and the circuit council's rationale for its finding that any such violation was not cognizable under § 372(c) was incorrect.

Rule 13(b) uses mandatory, not discretionary, language when it states, "The complainant is entitled to be interviewed by a representative of the [special] committee." It is true that the commentary to D.C. Circuit Rule 13 states that "these rules . . . leave the complainant's role largely within the discretion of the special committee." But the commentary goes on to explain that the guarantee of an interview is an exception: "However, rule 13(b) promises complainants that, where a special committee has been appointed, the complainant will at a minimum be interviewed by a representative of the committee. . . . We believe . . . that it is helpful to provide the assurance in the rules that complainants will have an opportunity to tell their stories orally." Complainant is right, therefore, when he complains that the special committee's failure to offer him an interview violated the rules.

Complainant is also correct that the circuit council's

procedures violated the rules in two other, lesser respects. The special committee did not notify complainant that the committee had filed its report with the council and that the matter was before the council for decision, as required by Rule 13(a). Furthermore, the council did not notify complainant of his right to petition the Judicial Conference for review of the council's order, as required by Rule 14(i).

Turning to the substance of the complaint, Rule 16(a)'s confidentiality rule -- requiring that "[c]onsideration of a complaint . . . will be treated as confidential business, and information about such consideration will not be disclosed" -- plainly extends to the identity of the complainant. In the absence of any indication elsewhere in the rules to the contrary, the phrase "information about the consideration of a complaint" is most reasonably construed to include the identity of the complainant (as well, of course, as the identity of the judge complained against).

Other provisions in the rules strongly support this construction. Rule 17(a)(4)'s provision that "[t]he name of the complainant will not be disclosed in materials made public under this rule unless the chief judge orders such disclosure," would make no sense if the name of the complainant were public information from the outset under Rule 16(a). The same is true of Rule 16(g)'s provision that, when the chief judge and the judge complained against agree to disclose materials, "The chief judge may require that the identity of the complainant be shielded in any materials disclosed." The rules, therefore, clearly evince an

intention that the identity of the complainant be kept confidential, except insofar as the rules may otherwise provide.

Policy considerations likewise support confidentiality. The complaint mechanism of the Act will serve its purpose less well if persons who may have meritorious grievances are afraid to file a complaint because they fear retaliation, or other adverse consequences, if they do so.[1] While the identity of the complainant will necessarily become known to the judge complained against, a complainant may also fear retaliation from the judge's judicial colleagues, former law clerks, and other associates, as well as other adverse consequences, such as acquiring a reputation as a malcontent. One need only imagine a hypothetical complaint of sexual harassment against a judge to envision a situation in which a complainant might well feel the need for confidentiality. That some complainants may wish their complaints to be aired as publicly as possible does not detract from other complainants' legitimate interest in confidentiality. Indeed, complainant here makes specific allegations as to certain harms he has suffered as a result of the district judge's disclosure.

The district judge asserts that the confidentiality proscriptions of Rule 16(a) do not include the judge complained against as one of the persons barred from making disclosure. This position is incorrect. The commentary to Rule 16(a) states that

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[1] Concern that fear of retaliation may deter the filing of well-founded complaints under section 372(c) was discussed prominently in the recent Report of the National Commission on Judicial Discipline and Removal (1993), at pp. 100-01.

the confidentiality requirement "of course includes judges and magistrates who may be the subjects of complaints."

The district judge could have complied with the district court's resolution to disclose to the court's Calendar Committee the reasons for his recusal without revealing that it was complainant who had filed a complaint of judicial misconduct against him. He could simply have stated that a party or attorney involved in the case had filed such a complaint. Also, we know of no reason why any disclosure the district judge made to the Calendar Committee had to take the form of a public order in the case revealing complainant's identity to a much wider circle.

The circuit council majority further argues that for the district judge to have sought the chief judge's permission to reveal complainant's identity "may well have violated the Code of Judicial Conduct and the Protocol of Article III Courts in communicating with another Judge a proposed decision when the other Judge might have to sit in review of such decision." There are at least two answers to this contention. First, as there was no need for the district judge to reveal complainant's identity in the first place, he could easily have avoided any necessity to seek the chief judge's permission to do so. Secondly, had disclosure nonetheless been thought essential, we do not believe that a limited communication with the chief judge of the court of appeals for the sole purpose of complying with Rule 16(g) would have violated any ethical standard. The chief judge retained the option of later recusal had any information disclosed to him so required.

The circuit council majority suggests that even if the district judge violated the D.C. Circuit Rules Governing Complaints of Misconduct or Disability, his conduct nonetheless is not cognizable under § 372(c) because that section does "not cover complaints arising out of the performance of judicial duties as an Article III Judge." This suggestion is based upon a misapprehension of the scope and purposes of § 372(c) and its cognizability provisions.

Section 372(c)(3)(A)(ii) makes it clear that allegations "directly related to the merits of a decision or procedural ruling" are not cognizable under the Act. This provision was intended to protect the independence of a judge in making decisions by precluding use of the complaint mechanism to collaterally attack rulings. H.R. Rep. No. 1313, 96th Cong., 2d Sess. 10 (1980); Report of the National Commission on Judicial Discipline and Removal 93 (1993) ("Commission Report"). The exception carved out by the majority would be far broader. It would exempt from the Act a wide range of conduct that has nothing to do with the merits of judicial rulings. Under the majority's formulation, for example, any misconduct by a judge that occurred while a judge was performing judicial duties -- accepting bribes, uttering ethnic slurs, or communicating ex parte -- would not be cognizable under the Act.

In fact, the central thrust of the Act is to make judges accountable for precisely this sort of conduct: conduct not related to the merits of rulings that arises in the course of the

performance of judicial duties (as distinguished from a judge's conduct in his or her purely private life, which might or might not be a proper subject for complaint, depending on the particular circumstances). See Commission Report at 96-97. The dissent is right that "[o]n the majority's view, . . . the system of judicial self-discipline contemplated by Congress would be wholly eviscerated."

Factual Issues

Because the circuit council dismissed the complaint without any factual investigation, the council did not make a factual determination as to whether the district judge violated the D.C. Circuit Rules in good faith or, as complainant contends, deliberately and maliciously. The council's resolution of that factual dispute, of course, would likely affect its ultimate determination of the appropriate course of action under § 372(c)(6).

Complainant alleges that when the district judge issued his order of recusal identifying complainant as having filed the prior misconduct complaint, the district judge sent copies of the order to a number of publications. If this allegation were true, the district judge's conduct would be more serious, since the extraordinary step of releasing the order to the press might suggest an improper, vindictive desire to retaliate against complainant.

The district judge, however, flatly denies the allegation, stating that journalists apparently learned of the order from other sources and obtained copies themselves. In support of his position, the judge points out that the story in one publication did not appear until twelve days after the issuance of the order.

Accordingly, we direct the circuit council, on remand, to undertake such investigation into the complaint's allegations as it deems appropriate to resolve these factual disputes. The investigation -- which may be conducted either by the special committee or by the council itself pursuant to Rule 14(b) -- shall include, at the very least, an interview with complainant pursuant to Rule 13(b). The special committee and/or the council will, of course, grant complainant all the rights afforded him by the D.C. Circuit Rules, including Rules 13(a) and 14(i).

Conclusion

We remand this matter to the Judicial Council for the District of Columbia Circuit with instructions (1) to vacate the dismissal; (2) to conduct such investigation as it considers appropriate, including an interview with the complainant pursuant to Rule 13(b), into the allegations that the district judge acted in bad faith; and (3) to take such action as it considers appropriate -- consistent with the principles set forth in this opinion -- pursuant to 28 U.S.C. § 372(c)(6) and D.C. Circuit Rule 14.

FOR THE COMMITTEE[2]

Levin H. Campbell

Levin H. Campbell

United States Circuit Judge

September 29 , 1994

[2] This opinion was prepared by Judge Levin H. Campbell, with United States Circuit Judge William J. Bauer, United States Circuit Judge Henry A. Politz, United States Circuit Judge Cornelia G. Kennedy, United States District Judge John P. Fullam, and United States District Judge Gordon Thompson, Jr. concurring.

BEFORE THE COMMITTEE TO REVIEW CIRCUIT COUNCIL

CONDUCT AND DISABILITY ORDERS

JUDICIAL CONFERENCE OF THE UNITED STATES

No. 95-372-001

In re: Complaint of Judicial Misconduct and Disability

COMMITTEE MEMORANDUM AND ORDER

This matter is before the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders pursuant to a petition for review received on March 28, 1995.[1]

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[1] Under 28 U.S.C. § 372(c)(10), "A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection [-- the paragraph under which the judicial council may take action on, or may dismiss, a complaint of judicial misconduct or disability following the report of a special investigating committee --] may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph."

Section 331 of 28 U.S.C. provides, "The Conference is authorized to exercise the authority provided in section 372(c) of this title as the Conference, or through a standing committee. If the Conference elects to establish a standing committee, it shall be appointed by the Chief Justice and all petitions for review shall be reviewed by that committee."

The Judicial Conference has established this committee to be the standing committee authorized to act for the Judicial Conference under § 331 in proceedings of this kind. Pursuant to §§ 331 and 372(c)(10), this committee may grant or deny complainant's petition for review, and the committee's orders in this respect are final and not appealable.

Complainant filed the instant complaint with the clerk of the Court of Appeals for the Ninth Circuit on April 5, 1993. The complaint, denominated no. 93-80015, alleged that a district judge (1) arrived over an hour late for a hearing in a case in which complainant was a pro se plaintiff, and gave no explanation for his tardiness; (2) "had trouble directing himself steadily to the bench," and had to be assisted; (3) "appeared confused and unable to grasp the legal concepts presented to him by the parties," and required his assistant to explain the arguments to him; (4) showed improper bias against complainant, and in favor of complainant's opponents, because complainant was appearing without an attorney; (5) became "angry and abusive" to complainant, literally threatening to imprison complainant "for simply expressing [complainant's] legal opinions;" and (6) after the hearing, deliberately delayed issuing an order granting or denying complainant's motion for leave to proceed in forma pauperis on appeal, for the purpose of denying complainant a free copy of the transcript of the judge's proceedings in time for complainant to present that transcript to the court of appeals for review of the judge's conduct. Complainant argued that the judge's actions constituted misconduct and demonstrated mental disability.

On July 29, 1994, the chief judge of the Ninth Circuit appointed a special committee under section 372(c)(4) to investigate the allegations of the complaint. The same special committee was also charged with investigating other allegations brought against the judge in a second complaint, complaint no. 93-80288. That second complaint is not before this committee, no petition for review from its disposition having been filed.

On August 5, 1994, complainant sent a letter supplementing his complaint. In the letter, complainant alleged that although he had filed an order for the transcript of the

hearing before the judge, court staff subsequently "denied any knowledge of it." Complainant charged that the judge had deliberately prevented him from obtaining a copy of the transcript to place before the court of appeals.

Following receipt of the report of the special committee, the circuit council, in an August 18, 1994, public order pertaining to both complaints, reported that the chief judge had met with the named judge and discussed the charges that the named judge had made intemperate remarks from the bench. The council stated that the named judge "was very penitent, and acknowledged the inappropriateness of his conduct. He promised to be careful to avoid such conduct in the future in all cases . . . ." The council confirmed and adopted the judge's voluntary decision not to accept cases arising under 42 U.S.C. § 1983. The council further reported that it had "also taken other appropriate disciplinary action, pursuant to 28 U.S.C. § 372(c)(6)(B)."

The council dismissed complainant's charges of mental disability, stating, "Based on a review of the record and the chief judge's interview with the judge, the special committee concluded, and the judicial council agrees, that there is no evidence that the judge is disabled and unable to comprehend arguments made to him."

The council dismissed all of complainant's remaining allegations. The council found that complainant's allegation that the judge was biased against him was conclusory and unsupported by evidence; that the charge that the judge was late for the hearing was unsupported by the record; and that there was no evidence that the judge was in any way responsible for complainant's problems in obtaining a transcript of the hearing before the judge.

Complainant's petition for review reiterates the complaint's factual allegations; argues that the circuit council's finding of no mental disability was incorrect and that the circuit council's remedies were too mild; and asks that the judge be terminated or retired from the bench. Complainant also contends, citing a newspaper article, that the judge has not kept his promise to refrain from similar behavior in the future.

Complainant has given no reason to doubt the circuit council's decision, based on personal contact with the named judge, that the named judge is fully capable mentally. The transcript of the hearing that is the focus of complainant's allegations contains nothing to suggest any mental incapability.

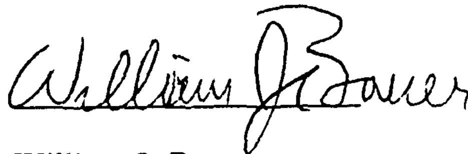
The transcript also contains nothing to show that the judge was late for the hearing. Even assuming, arguendo, that he was, the mere fact that a judge arrived over an hour late for a hearing does not, without more, amount to misconduct cognizable under section 372(c).

Complainant, furthermore, has presented no reason to believe that any delay in the judge's ruling on complainant's in forma pauperis motion resulted from any improper motive, or that the judge played any role in court staff misplacing complainant's transcript order (if they did).

The transcript of the hearing does reveal that the judge's tone in addressing complainant may have been somewhat intemperate. There is no suggestion, however, that the judge's remarks reflected any bias against complainant on account of complainant's pro se status. To the extent the judge's conduct may have been objectionable, the measures taken by the circuit council in its August 18, 1994 order constitute a sufficient remedy.

The petition for review is denied.

FOR THE COMMITTEE[2]



William J. Bauer

United States Circuit Judge

December 19, 1995

[2] This opinion was prepared by Judge William J. Bauer, with United States Circuit Judge Henry A. Politz, United States Circuit Judge Cornelia G. Kennedy, and United States District Judge Gordon Thompson, Jr., concurring.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

WILLIAM R. BURCHILL, JR.
Associate Director
and General Counsel

September 29, 1998

MEMORANDUM TO ALL CIRCUIT EXECUTIVES

SUBJECT: Order of Judicial Conference Committee on Conduct Complaint

I am providing herewith for your information the most recent memorandum and order issued by the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders. This memorandum and order (No. 98-372-001) is in response to petitions for review filed by United States District Judge John H. McBryde from an order of the Judicial Council of the Fifth Circuit in recent proceedings brought under 28 U.S.C. § 372(c).

William R. Burchill, Jr.

Attachment

cc: Clerks, United States Courts of Appeals (w/enclosure)
Clerk, United States Court of International Trade (w/enclosure)
Clerk, United States Court of Federal Claims (w/enclosure)

A TRADITION OF SERVICE TO THE FEDERAL JUDICIARY

BEFORE THE COMMITTEE TO REVIEW CIRCUIT COUNCIL

CONDUCT AND DISABILITY ORDERS

JUDICIAL CONFERENCE OF THE UNITED STATES

No. 98-372-001

In re: Complaints of Judicial Misconduct or Disability

COMMITTEE MEMORANDUM AND ORDER

This matter is before the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders pursuant to petitions for review received on March 16, 1998.[1]

Background

We will not attempt to recite in detail here all the long history of these proceedings. We merely summarize below some major aspects of that history that we deem especially relevant to our memorandum and order. In addition, we will not discuss the specifics of the factual underpinnings of the charges against the named judge and the judicial council's findings

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[1]Under 28 U.S.C. § 372(c)(10), "A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection [-- the paragraph under which the judicial council may take action on, or may dismiss, a complaint of judicial misconduct or disability following the report of a special investigating committee --] may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph."

Section 331 of 28 U.S.C. provides, "The Conference is authorized to exercise the authority provided in section 372(c) of this title as the Conference, or through a standing committee. If the Conference elects to establish a standing committee, it shall be appointed by the Chief Justice and all petitions for review shall be reviewed by that committee."

The Judicial Conference has established this committee to be the standing committee authorized to act for the Judicial Conference under § 331 in proceedings of this kind. Pursuant to §§ 331 and 372(c)(10), this committee may grant or deny complainant's petitions for review, and the committee's orders in this respect are final and not appealable.

thereon. The judicial council has determined that, at least at the present time, these matters should remain confidential, and we defer to that determination.

On July 5, 1995, an attorney filed a complaint against United States District Judge John McBryde of the Northern District of Texas under section 372(c) alleging that the judge's conduct during a trial had been "obstructive, abusive and hostile." On September 13, 1995, Chief Judge Henry Politz of the Fifth Circuit appointed a special committee, consisting of himself and four other judges, to investigate the allegations of this complaint. He also identified as a complaint a letter he had received criticizing Judge McBryde's conduct in another case, and referred this identified complaint to the special committee for investigation. Subsequently, by orders dated January 31, 1996, and March 19, 1996, Chief Judge Politz identified as complaints three additional complaints or letters he had received objecting to Judge McBryde's conduct in these or other cases, and referred all three complaints to the special committee.

The special committee originally scheduled evidentiary hearings on these allegations to commence on May 19, 1997. On May 5, 1997, special committee counsel notified counsel for Judge McBryde of the witnesses the special committee intended to present, and stated that the special committee might add to the record transcripts and court decisions from thirteen cases handled by Judge McBryde that had not been the subject of any complaint. After the judge moved to strike these latter exhibits or, in the alternative, to continue the hearings, the special committee continued the hearings until August 25, 1997.

The special committee counsel on July 25, 1997, sent counsel for Judge McBryde a letter notifying the judge of a number of matters the investigation would be expanded to include, listed under the headings "conduct involving lawyers" and "conduct involving other judges." Each matter was accompanied by a paragraph of explanation.

Later, on August 20, 1997, the special committee's counsel faxed Judge McBryde's counsel a letter adding three additional witnesses, with a brief explanation of the subject matter about which each would testify. The letter added that the special committee's counsel might present evidence concerning the judge's unspecified conduct in another named case. After Judge McBryde protested that he needed more time to prepare to defend himself against all these additional allegations, further hearings were scheduled for September 29, 1997.

The special committee conducted evidentiary hearings from August 25, 1997, through August 29, 1997. On September 17, 1997, the special committee's counsel sent counsel for Judge McBryde a letter listing the four witnesses he intended to call at the resumed September

29 hearings, and setting forth the projected subject matter of the testimony of each. The hearings then resumed and concluded from September 29, 1997 through October 2, 1997.

The special committee submitted its report to the judicial council on December 4, 1997. The judicial council met to consider the report on December 17, 1997, and issued its Order and Public Reprimand on December 31, 1997.

The judicial council's Order and Public Reprimand ordered sanctions against Judge McBryde: (1) under 28 U.S.C. § 372(c)(6)(B)(vi), a public reprimand; (2) under 28 U.S.C. § 372(c)(6)(B)(iv), an order that no new cases be assigned to Judge McBryde for a period of one year; and (3) under 28 U.S.C. § 372(c)(6)(B)(vii), an order that Judge McBryde not participate for a period of three years in certain defined cases involving certain listed attorneys. The Order and Public Reprimand states, in part, as follows:

> "To the extent relevant to the action taken below, the Council adopts by a clear majority vote the Special Committee's Report, Findings of Fact, and Recommendations. Based thereon:
>
> "1. The Council hereby PUBLICLY REPRIMANDS Judge McBryde, pursuant to 28 U.S.C. § 372(c)(6)(B)(vi), for conduct prejudicial to the effective and expeditious administration of the business of the courts within the Circuit and inconsistent with Canon 2(A) and Canon 3(A)(3) of the Code of Conduct for United States Judges.
>
> "Judge McBryde has engaged in a continuing pattern of conduct evidencing arbitrariness and abusiveness that has brought disrepute on, and discord within, the federal judiciary. This conduct is unacceptable and damaging to the federal judiciary.
>
> "Judge McBryde's intemperate, abusive and intimidating treatment of lawyers, fellow judges, and others has detrimentally affected the effective administration of justice and the business of the courts in the Northern District of Texas. Judge McBryde has abused judicial power, imposed unwarranted sanctions on lawyers, and repeatedly and unjustifiably attacked individual lawyers and groups of lawyers and court personnel. This pattern of behavior has had a negative and chilling impact on the Fort Worth legal community and has, among other things, prevented lawyers and parties from conducting judicial proceedings in a manner consistent with the norms and aspirations of our system and is harmful to the reputation of the courts.
>
> "2. Pursuant to 28 U.S.C. § 372(c)(6)(B)(iv), no new cases are to be assigned to Judge McBryde for a period of one (1) year from the effective date of this Order; and

"3. Pursuant to 28 U.S.C. § 372(c)(6)(B)(vii), Judge McBryde, for a period of three (3) years from the effective date of this Order, is not to participate in (i) cases now pending before him (other than any as to which there are appellate proceedings) in which any of the attorneys listed on Attachment A are currently involved, and (ii) any and all cases filed after the effective date of this order in which the initial notice of appearance includes any of the attorneys listed on Attachment A."

The judicial council stayed implementation of its Order and Public Reprimand for thirty days so that Judge McBryde could appeal to, and seek to obtain an additional stay from, this committee. The council further directed that its Order and Public Reprimand would remain sealed during the period of any stay.

On motion by Judge McBryde, this committee issued an order on February 6, 1998 (modifying this committee's prior order of January 29, 1998), staying the judicial council's Order and Public Reprimand, with the exception of paragraph 3 thereof, on the condition that Judge McBryde file his intended petition for review of the judicial council's actions on or before March 16, 1998. This committee permitted paragraph 3, the directive that Judge McBryde not participate for a period of three years in certain defined cases involving certain listed attorneys, to take effect as of the February 6, 1998 date of this committee's order.

On March 16, 1998, Judge McBryde filed seven petitions for review of the judicial council's actions: five petitions for review of the judicial council's handling of each of the five complaints filed or identified against Judge McBryde; a petition for review of the judicial council's decision not to disqualify certain of its members from participating in its consideration of the special committee's report; and an omnibus petition for review treating all other aspects of the challenged actions of the judicial council. After this committee granted the judicial council's request to file a response to Judge McBryde's petitions, the council filed such a response on April 16, 1998. Subsequently Judge McBryde filed a reply to the judicial council's response and a supplemental memorandum, and the judicial council filed a response to the supplemental memorandum.

We now turn to our consideration of the petitions for review.

The Committee's Standard of Review

Judge McBryde and the judicial council dispute the standard of review that should be applied by this committee to a judicial council's findings of fact and to the judgments made by a judicial council in assessing the appropriateness of particular sanctions under the circumstances. According to the judge, the committee should undertake a searching, de novo review of all of the judicial council's determinations. The council responds "that at a

minimum, substantial deference should be accorded its factual findings and that something approaching an abuse of discretion standard should apply to the remedies adopted in the December 31 Order. . . . The Review Committee [should] take into account the extensive efforts undertaken in developing, evaluating, and acting upon the record in this matter."[2]

In its past decisions on petitions for review, this committee has never precisely articulated its standards for reviewing orders issued by circuit judicial councils under 28 U.S.C. § 372(c). The committee did, in no. 92-372-001 (1992), uphold a judicial council order because there was "substantial evidence in the record to support the Judicial Council's factual findings." This statement certainly makes clear that the committee was not reviewing the council's factual findings de novo.

A fair reading of the committee's past rulings suggests that the committee has not in the past applied either a de novo standard or an abuse-of-discretion standard in reviewing judicial council remedies, but something in between. The committee's most substantial assay at delineating a standard of review occurred in no. 87-372-001 (1987), in which the Tenth Circuit Judicial Council had split by a 3-3 vote on whether to accept the recommendation of the special committee that the judge be reprimanded. The committee stated as follows:

> "[H]ow much weight should be given to recommendations of the Special Committee, and how the committee should apply the standard of conduct set out in the statute against the record developed by the Special Committee and the Judicial Council is not altogether clear. The Special Committee is provided for by statute. Its duties are designated by statute. It is directed by statute to make findings and recommendations for appropriate action by the Judicial Council. Clearly, the report and recommendation of the Special Committee is entitled to be considered by the Council and this Review Committee and to be given such weight as the Judicial Council or this committee deems appropriate.
>
> "It is also clear that the Judicial Council and by virtue of the granting of a petition for review, this committee is free to accept or reject the recommendations of the Special Committee based on their perception of whether the record indicates that the conduct was prejudicial to the effective and expeditious administration of the business of the courts and to take any action whether or not recommended by the Special Committee to assure the effective and expeditious administration

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[2] There is no dispute between Judge McBryde and the judicial council that the committee, like a court of appeals, will review determinations of law de novo.

of the business of the courts. However, a fair reading of the statute also leads to the conclusion that the recommendations of the Special Committee are not to be regarded lightly.

. . .

". . . The committee finds that the recommendation of the Special Committee is supported by a reasonable and responsible reading of the record."

In no. 87-372-001 this committee was not addressing the degree of deference to be accorded findings and conclusions of a judicial council, but rather the weight to be given a special committee recommendation in a situation where the council vote had been deadlocked. This committee accorded the special committee's recommendation substantial deference. Presumably judicial council findings and conclusions, arrived at following consideration of the report of a special committee, should be accorded at least as much deference as mere special committee recommendations. Thus, no. 87-372-001 provides precedent for this committee to apply a standard of substantial deference to the judicial council's findings and choice of remedies, if not an abuse of discretion standard.

The statute contains nothing that is suggestive of any particular standard of review. The Judicial Conference Rules for the Processing of Petitions for Review do state, in Rule 13, "In recognition of the review nature of petition proceedings under 28 U.S.C. § 372(c)(10), no additional investigation shall ordinarily be undertaken by the Judicial Conference or the Committee. If such investigation is deemed necessary, the Conference or Committee may remand the matter to the circuit judicial council that considered the complaint, or may undertake any investigation found to be required."

As a practical matter, de novo review of factual findings would require, at least sometimes, that this committee conduct further investigation to see and hear the testifying witnesses itself. The policy of the Conference rules that additional investigation shall not ordinarily be undertaken, and when undertaken can be done by the judicial council on remand, further strongly suggests that the rules presuppose a standard of review of factual findings more deferential than the de novo standard urged by Judge McBryde. If ordinarily it is the special committee that actually sees and hears the witnesses, for the traditional reasons it would make little sense, and would be highly unusual, for this committee to review de novo fact findings of the special committee adopted by the judicial council.

The committee concludes, therefore, that an intermediate standard — "substantial deference"-- should be applied to the judicial council's factual findings. The committee will accord the degree of deference the committee deems proper given the underpinnings of the particular factual determination. For example, a factual determination based on live testimony, or on inferences deriving from the circuit council's first hand knowledge of local personalities or circumstances, may therefore be accorded greater deference than a factual determination based solely on written materials equally available to the committee.

The committee will also apply a similar standard of "substantial deference" in the committee's review of the judicial council's remedies. De novo review of judicial council remedies, as urged by the named judge, would be inappropriate because it would fail to take any account of the familiarity of the judicial council members, on the spot, with the personalities and circumstances surrounding the allegations against the disciplined judge. A de novo standard would tend to undercut some of the very reasons why, under the current decentralized system of judicial discipline, disciplinary authority is primarily conferred upon local judges.

Procedural Issues

The special committee's expansion of the investigation. Judge McBryde points out that, for the most part, the judicial council's sanctions against him are not grounded upon any of the specific incidents alleged in the five complaints that were originally filed or identified against him. Instead, the lion's share of the special committee's findings adverse to Judge McBryde concerned matters not raised in those complaints that were reached as a result of the special committee's expansion of its investigation pursuant to Rule 9(A) of the Rules Governing Complaints of Judicial Misconduct or Disability adopted by the Judicial Council of the Fifth Circuit.

Rule 9(A) states as follows:

> "Each special committee will determine the extent of the investigation and the methods to be used. If the committee concludes that the judge may have engaged in misconduct beyond the scope of the complaint, it may expand that scope to encompass such misconduct, timely providing written notice of the expanded scope to the subject judge."

The statute itself does not expressly mention such expansion of a committee investigation. It simply states, "Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit." 28 U.S.C. § 372(c)(5).

Judge McBryde argues that Rule 9(A) is improper because it is inconsistent with the statute. He reads the statute to mean that a special committee shall conduct an investigation of the complaint as extensive as it considers necessary, and no more.

Although the statute certainly does not expressly state that a special committee investigation may be expanded beyond the four corners of the original complaint, the statute

does say that "[e]ach judicial council . . . may prescribe such rules for the conduct of proceedings under this subsection . . . as each considers to be appropriate." 28 U.S.C. § 372(c)(11). The statute thereby invites each judicial council to adopt any reasonable elaboration of the statutory procedures that it thinks proper, as long as the result is not inconsistent with the statute.

The Fifth Circuit, in the light of its experience under the statute, has exercised the discretion preserved to it by Congress to determine that special committee expansion of an investigation should be permissible. That determination does not fly in the face of any express statutory commandment and therefore does not exceed the bounds of appropriate circuit discretion.

Suppose there had been no Fifth Circuit Rule 9(A). In the midst of a special committee investigation the chief judge could, in effect, expand the special committee's investigation by identifying a new complaint under the statute, assigning it to the existing special committee for investigation, and so notifying the judge complained against. The special committee in turn could simply consolidate the new complaint or complaints with the existing complaint or complaints. Under the Fifth Circuit rule, the special committee essentially does the same thing.[3]

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[3] Under section 372(c)(1), it is true, the chief judge may identify a complaint "by written order stating reasons therefor," whereas Fifth Circuit Rule 9(A) requires that the judge complained against be accorded "timely . . . written notice of the expanded scope . . ." These two procedural requirements admittedly are not precisely co-extensive, since Rule 9(A) does not require the special committee to state its reasons for expanding the scope of the investigation. This is not an important difference. The reasons for expansion of an investigation will always be implicit: that the special committee has developed reason to believe there may have been conduct prejudicial to the effective and expeditious administration of the business of the courts, or some disability, not alleged in a complaint. Under Rule 9(A), therefore, the named judge is accorded the same fundamental procedural rights that the judge would have been accorded if the chief judge had identified a new complaint or complaints under the statute. In other words, Rule 9(A) is not rendered inconsistent with the statute by virtue of any failure to accord the named judge fundamental procedural rights the statute would mandate.

In fact, as Judge McBryde points out, in the three orders in which Chief Judge Politz identified four complaints against the named judge, Chief Judge Politz did not state his reasons for doing so, as section 372(c)(1) required him to do. This procedural error did not perpetrate any fundamental unfairness on the named judge; the reasons for identifying the complaints were plain enough. A technical, harmless error of this kind surely does not call into question all of the proceedings that followed.

The named judge arguably enjoys somewhat greater protection under Rule 9(A) than under a procedure of identifying additional complaints. Under Rule 9(A), a special committee of (in this case) five judges must agree to expand the investigation, whereas the statute permits the chief judge alone to identify a complaint and assign it for investigation by a special committee.

Judge McBryde further argues that even if Fifth Circuit Rule 9(A) is valid, "it requires that a committee may go outside the scope of a complaint only if it has specific information indicating misconduct by the judge; it by no means provides that a committee may engage in an unfettered investigation in order to develop such information in the first instance." This misconstrues the nature of the complaint investigation process.

Where the complaint suggests there may be a pattern of objectionable conduct, the special committee may conduct some inquiry into whether or not such a pattern may exist. If there appears to be evidence that it may indeed exist, the committee may then formally expand the investigation to include other instances in which the pattern of objectionable conduct may have manifested itself, with notice to the judge complained against as required by Fifth Circuit Rule 9(A).

Not only is it permissible for a special committee to do this, it is affirmatively desirable. An individual complainant will often be in a poor position to allege or substantiate patterns of misconduct beyond his or her particular experience with the judge complained against. Where a complaint has some apparent substance, often the special committee would be shirking its statutory responsibility for the effective and expeditious administration of the business of the courts if it failed to make some inquiry into whether there was indeed a pattern of similar objectionable conduct.[4]

This does not permit the special committee to conduct an "unfettered investigation" "outside the scope of the complaint," as Judge McBryde would have it. The committee's inquiry is confined to the pattern of conduct raised in the complaint. The judge is charged with

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[4] The purpose of this complaint process is to promote the effective and expeditious administration of justice, and as such the process works in tandem with informal and corrective mechanisms. Thus, when the chief judge receives a complaint, whether formal or informal, that charges a judge with abusive treatment of counsel in a particular case and that appears to have some substance, it is entirely appropriate for the chief judge to inquire into whether or not the judge has engaged in a pattern of similar abusive conduct that has manifested itself in other proceedings. If the inquiry suggests there may indeed be such a pattern, the chief judge may properly identify a complaint to trigger an investigation of the matter, or the chief judge may choose to deal with the problem informally. There is no reason why the same kind of process cannot be followed once a complaint has been given to a special committee for investigation.

abusing counsel in a case; has he done so in other cases? Certainly the special committee cannot, in investigating a complaint of abusive treatment of counsel, conduct an inquiry into wholly unrelated matters such as whether the judge has demonstrated ethnic prejudice, engaged in ex parte contacts, or participated in political fundraising. But the special committee has not done so here.

In other words, Judge McBryde is correct when he argues that a special committee investigation is limited to the matters properly before the special committee, and that a special committee cannot range beyond the allegations of the complaint, fish for potential charges unrelated to the complaint, and then formally expand the investigation to encompass these new and unrelated charges. But the judge takes too narrow a view of what constitutes an investigation limited to the complaint. Where the complaint alleges abusive treatment of counsel, the special committee may permissibly inquire into other possible instances of such abuse, even though these other instances are not specified in the complaint. If evidence of a possible pattern of misconduct is found, the committee may then expand its investigation accordingly.

Judge McBryde complains that the judicial council ultimately ordered sanctions against him based entirely on incidents that were not the subject of any of the original five complaints filed or identified against him. Even if this assertion were true, it is of no consequence. The original five complaints unquestionably were sufficient under the statutory standards to justify the chief judge's appointment of a special committee to investigate their allegations. Once the special committee was in place, it properly expanded its investigation beyond the original five complaints. The matters raised in the expanded investigation were legitimately before the judicial council to precisely the same extent as the matters raised in the original complaints.

Notice to Judge McBryde of the expansion of the investigation. We will now turn to Judge McBryde's claim that the circuit council failed to give him timely and adequate notice of the expansion of its investigation, as Rule 9(A) requires.

On July 25, 1997, the special committee's counsel sent counsel for Judge McBryde a nine-page letter notifying the judge of a number of matters the investigation would be expanded to include, listed under the headings "conduct involving lawyers" and "conduct involving other judges." Each matter was accompanied by a paragraph of explanation. This was done in preparation for the special committee's hearings scheduled for August 25-29, 1997.

Only five days before the onset of those hearings, on August 20, 1997, the special committee's counsel faxed Judge McBryde's counsel a letter adding three additional witnesses, with a brief explanation of the subject matter about which each would testify. For two of the witnesses, this explanation consisted of a statement that the witness would testify about Judge McBryde's conduct in a named case, without specifying the alleged conduct in question. The

letter added that the special committee's counsel might present evidence concerning the judge's unspecified conduct in another named case.

After Judge McBryde protested that he needed more time to prepare to defend himself against all these additional allegations, further hearings were scheduled for September 29, 1997. Thus, when he asked for more time, he was given more time, an additional month. The hearings resumed September 29, 1997, through October 2, 1997.

In the meantime, on September 17, 1997, the special committee's counsel sent counsel for the named judge a letter listing the four witnesses he intended to call at the resumed hearings, and setting forth the projected subject matter of the testimony of each. Only two of these witnesses were new.

It is hard to think that the amount of explanation given Judge McBryde as to each new matter to be investigated was deficient. The letters sent by the special committee's counsel gave plain notice of the subject matter to be investigated. Portions of the notice given, it is true, merely referred to the judge's unspecified conduct in a named case. As a practical matter, though, it is hard to think that the judge would not be aware of what was meant. Ideally, perhaps, a fuller description could have been given, but we are by no means convinced that the judge's rights actually were prejudiced by any failure to provide a more detailed explanation.

It is true that when the judge was notified on July 25 of the expansion of the investigation, the judge had only a month until August 25 to prepare a defense to these new charges. Subsequently, however, the committee scheduled new hearings for September 29 to give him an additional month. As for the additional matters specified in the special committee's counsel's August 20 fax, the judge had five weeks until September 29. Committee counsel's September 17 letter gave the judge only twelve days until the hearing, but it listed only two additional witnesses. On its face this seems adequate, and we see nothing specific in the judge's voluminous filings to suggest that the judge in fact was prejudiced by any lack of time to prepare.

<u>Other procedural issues</u>. Judge McBryde also objects to the lack of time he was afforded to file a response with the judicial council to the special committee's report and recommendation. He was served with a copy of the special committee report on December 4, 1997, with the judicial council scheduled to meet to consider the matter on December 17. This gave the judge less than two weeks to respond. The judge on December 8 filed a motion for enlargement of time to respond and for postponement of the meeting, which the special committee denied. When the judge did file a response, along with a motion to dismiss and a motion for recusal or disqualification, on December 15, the council members had only a day before their meeting to consider his filings.

At that December 15 meeting, however, no resolution was reached as to how to resolve the complaints against Judge McBryde. No vote was taken on the matter. The judge was given time to supplement his responses after the meeting, and he did file supplemental and "corrected" responses on December 22. The council's final order issued on December 31, so the council members had over two weeks to review and consider the judge's responses and motions before the matter was finally disposed of.

Considering that the special committee's report is 159 pages long and that it recommends, among other things, the one-year suspension of case assignments to an Article III judge, this is, to be sure, an expedited schedule. On the other hand, by December 15 counsel for Judge McBryde did manage to submit a 134-page response, a 62-page memorandum in support of their motion to dismiss, and a 93-page second motion for recusal or disqualification. It is hard to take seriously the judge's charge that he did not have an adequate opportunity to prepare a response to the special committee's report when his attorneys in fact generated almost 300 pages of responsive argument.

A little over two weeks, it is true, was not a long time for the members of the judicial council to review almost 300 pages of argument. The council, however, has discretion to set its deadlines without regard to the possibility that it will be inundated with argument far in excess of the length limitations ordinarily imposed upon parties to an appeal. Only in extraordinary circumstances would this committee review a circuit council's scheduling of its deliberations. If the council believed it had adequate time to consider the judge's arguments — and clearly it did believe so — we see no occasion here to look further.

Judge McBryde's other procedural objections lack substance. Since the judicial council did not rely on any finding with respect to them, all of the judge's grievances regarding them are moot.

The judge's quarrels with an October 19, 1995 hearing held by the special committee are all meritless because that hearing was not part of these section 372(c) proceedings. Judge McBryde had filed with the judicial council a request that the council redress the reassignment, by Chief Judge Jerry Buchmeyer of the United States District Court for the Northern District of Texas, of two cases from Judge McBryde to himself. The council decided to hold a hearing on Judge McBryde's request, and further decided that since a special committee already had been convened to consider independent section 372(c) complaints against the judge, it would be efficient and convenient for the special committee to conduct this hearing. The judge was informed from the outset that the purpose of the hearing was to consider the judge's request for assistance pursuant to the council's section 332 authority, and that it was not part of the section 372(c) complaint proceedings.

At the hearing, once Judge McBryde had testified, he was told he could not be present for the remainder of the testimony. This was done because the committee feared the other witnesses would be intimidated by his presence. Such a procedure would have been

impermissible in a section 372(c) proceeding as a violation of both the statute and the Fifth Circuit Rules, but it was perfectly within the discretion of the judicial council in the exercise of its section 332 authority.

At a later time, certainly, the judges who presided over this section 332 hearing may have been influenced in their handling of the section 372(c) investigation by testimony they heard there, just as Judge McBryde alleges. But there is nothing wrong with this. As we will discuss in the next section, these are quasi-administrative/quasi-judicial proceedings, not judicial ones. Judges may bring to bear in section 372(c) proceedings information and impressions they may have gained in prior attempts to resolve the problems at issue. In fact, the statutory scheme encourages them to do so.

Disqualification of Certain Judicial Council Members

Judge McBryde argues that Chief Judge Politz and a few other judges (the members of the special committee and a district judge from Judge McBryde's district) should have recused themselves from the judicial council in this matter. Judge McBryde points out that Judge Politz was involved in Chief Judge Buchmeyer's reassignment to himself of two cases from Judge McBryde's docket, although Judge Politz was not involved in the underlying cases themselves. Judge McBryde also argues that Judge Politz and the other judges he wanted disqualified brought to the judicial council's proceedings information they gained outside the formal section 372(c) process.

In December 1997 the judicial council, in response to Judge McBryde's motion, ruled unanimously that there was no cause for any of the challenged judges to be disqualified from participating in the council's proceedings. We do not review that determination de novo. It is a mixed question of law and fact, as to which we give substantial deference to the judicial council's finding.

Judge McBryde's position misapprehends the nature of a section 372(c) proceeding. A chief judge need not recuse from participation in complaint proceedings merely because the proceedings involve matters with which the chief judge was concerned in the course of performing his administrative responsibilities as chief judge. This will often be the case. Indeed, the current system of judicial discipline strongly encourages informal and corrective action by the chief judge to solve problems without resort to formal complaint proceedings. It would undermine this system if the chief judge were discouraged from doing his job at the informal and corrective stages for fear that he would later be required to recuse himself in any formal investigation.

In addition, an important reason that authority to investigate complaints is assigned to local judges under the current system is that local judges are expected to bring to bear their

knowledge of the judge complained against, the complainant, and local circumstances. Under this system, the chief judge is ordinarily expected to be involved in and to inform himself about the matter at an early or pre-complaint stage, and to use the information and impressions gained thereby to help shape any later decisions in formal complaint proceedings. This is not a traditional judicial proceeding, in which a judge must recuse himself if he has extra-judicial knowledge about the case at bar. This is a quasi-judicial, quasi-administrative proceeding. A judge need not recuse from judicial council participation merely because the judge has precisely the knowledge of local personalities and circumstances the system wants him to have.[5]

This conclusion is strongly suggested on the face of the statute itself. The Act gives the chief judge authority to identify complaints on the basis of available information, section 372(c)(1), and to conclude proceedings on the ground that appropriate corrective action has been taken, section 372(c)(3)(B). Yet the statute directs the chief judge to appoint himself to any special committee convened to investigate a complaint. Section 372(c)(4)(A). Clearly the statute does not contemplate that the chief judge ordinarily should be precluded from service at the investigatory stage because of earlier efforts to resolve the matter short of investigation.

Indeed, Fifth Circuit Rule 17(a) states that even where the chief judge identified the complaint (here, Chief Judge Politz identified several of the complaints against Judge McBryde), "A chief judge who has identified a complaint under rule 2(J) will not be automatically disqualified from participating in the consideration of the complaint but may disqualify as a matter of personal discretion." Chief Judge Politz did not abuse that discretion by declining to disqualify here.

Judge McBryde makes much of the role Chief Judge Politz played in the dispute surrounding the reassignment of two cases to Chief Judge Buchmeyer. Assuming, arguendo, the truth of Judge McBryde's factual assertions regarding Chief Judge Politz's role in

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[5] Indeed, even if Judge Politz's recusal were sought in a traditional judicial proceeding rather than in a section 372(c) proceeding, there is authority that the kind of knowledge Judge Politz brought to the proceeding still would not require recusal. In Duckworth v. Department of the Navy, 974 F.2d 1140 (9th Cir. 1992), the Ninth Circuit held that the fact that then-Chief Judge Wallace had previously dismissed a section 372(c) complaint filed by the plaintiff against the district judge in that case did not require Judge Wallace to recuse himself from sitting on the panel hearing the plaintiff's appeal. Although Judge Wallace did have some prior knowledge of facts relevant to the appeal by virtue of ruling on the misconduct complaint, this was not "extrajudicial" knowledge requiring recusal under 28 U.S.C. § 455. Instead, the court ruled that "[t]he administrative actions of a judge in his or her official capacity [are] judicial, rather than extrajudicial" for recusal purposes, id. at 1143, so that information obtained by a chief judge in performing administrative functions under section 372(c) is not disqualifying as "extrajudicial" knowledge.

attempting to settle that dispute, we see no impropriety. At that time a special committee already had been appointed to investigate complaints against Judge McBryde. Chief Judge Politz apparently attempted to persuade Judge McBryde to modify his behavior to moot the whole matter and spare both himself and the Fifth Circuit what might be a long and costly investigation. This is precisely the kind of attempt at suasion the system means to foster and encourage.

For the same reasons, there is no substance to Judge McBryde's disqualification claims vis a vis other judges besides Judge Politz. Members of a special committee who are also members of the judicial council need not ordinarily recuse themselves from judicial council consideration of the special committee's report. There is no exceptional circumstance here that would dictate recusal. The fact that judicial council members may have had knowledge of the matter gained outside the section 372(c) proceedings, but in their capacity as members of the council, does not disqualify them.

The Judicial Council's Findings

Merits-relatedness. A central theme of Judge McBryde's submissions to this committee has been that essentially all of the conduct for which he is to be sanctioned is "directly related to the merits of a decision or procedural ruling," section 372(c)(3)(A)(ii), and therefore not cognizable under the Act at all. In response to the argument that he is being sanctioned not for the substance of his rulings but for a pattern of conduct, he replies that a judge cannot be sanctioned because of a pattern of allegedly improper rulings, any more than a judge could be sanctioned for a single allegedly improper ruling. Allegations are no less merits-related, he contends, because they challenge the merits of many rulings and not just some particular one.

Although a judge indeed may not be sanctioned out of disagreement with the merits of rulings, a judge certainly may be sanctioned for a consistent pattern of abuse of lawyers appearing before him. The fact that that abuse is largely evidenced by the judge's rulings, statements, and conduct on the bench does not shield the abuse from investigation under the Act. To the contrary, allegations that a judge has been habitually abusive to counsel and others may be proven by evidence of conduct on the bench, including particular orders or rulings, that appears to constitute such abuse.

To say that abuse of lawyers, or other forms of misconduct, that finds expression in a judge's rulings may be remedied under the Act is not to say that a judge's rulings themselves may be challenged under the Act. That of course remains the sole province of the court of appeals.

For the same reasons, sanctions in these circumstances do not trammel judicial independence. The sanctions are not based upon the legal merits of the judge's orders and rulings on the bench, but on the pattern of conduct that is evidenced by those orders and rulings.

The same principle holds true when it is alleged that a judge has accepted a bribe, has been motivated by racial, ethnic, or religious bias, or has issued rulings as part of an improper vendetta or some other illicit or vindictive motive. A judge could not evade discipline for such a pattern of conduct by arguing that this was an attack on his rulings, and that if litigants believed his rulings were incorrect and the product of improper motivation, that was properly a matter for appeal, not for a misconduct proceeding. If a judge's behavior on the bench, including directives to counsel and litigants, were wholly beyond the reach of the Act, the Act would be gutted.

This view of the Act is amply supported by past decisions of this committee. In No. 94-372-001, 37 F.3d 1511 (1994), the complaint was that a district judge, in the course of recusing himself from a lawsuit in which the complainant was a party, issued a public order revealing that the reason for his recusal was that the complainant, whom the judge named, had previously filed a complaint of judicial misconduct against him under section 372(c). Complainant alleged that in so doing the judge violated the local D.C. Circuit rule imposing confidentiality on section 372(c) proceedings, including the identity of the complainant. This local rule served the purpose of protecting a complainant who desired confidentiality from fear of retaliation or other adverse consequences from the filing of a complaint.

The Judicial Council of the D.C. Circuit, by a 5-4 vote, dismissed the complaint in part because the judge's alleged misconduct arose "out of the performance of judicial duties as an Article III Judge." Indeed, the basis for the complaint was that certain aspects of the judge's order had constituted misconduct.

This committee soundly rejected the judicial council's position. This committee stated that the judicial council's

> "suggestion is based upon a misapprehension of the scope and purposes of § 372(c) and its cognizability provisions. . . .
>
> "It would exempt from the Act a wide range of conduct that has nothing to do with the merits of judicial rulings. Under the majority's formulation, for example, any misconduct by a judge that occurred while a judge was performing judicial duties — accepting bribes, uttering ethnic slurs, or communicating ex parte — would not be cognizable under the Act.

> "In fact, the central thrust of the Act is to make judges accountable for precisely this sort of conduct: conduct not related to the merits of rulings that arises in the course of the performance of judicial duties . . . ."

Id. at 1515.

In No. 88-372-001 (1988), this committee affirmed a reprimand (albeit reducing it from a public reprimand to a private reprimand) of a district judge for stating, in the course of a judicial proceeding, that he would not permit the complainant, a well-known attorney, to practice in his courtroom. On Judge McBryde's logic, the district judge's statement would amount to a ruling regulating the appearance of attorneys in that judge's court. Once this ruling was applied in a particular case in which the complainant sought to appear, the ruling could be reviewed by the court of appeals, and if improper it could be vacated. Instead, both the Judicial Council of the First Circuit and this committee assumed, without explicitly discussing the point, that since the judicial council had found the district judge's statement to have been made as part of a personal vendetta directed at the complainant, the statement was subject to discipline, regardless of whether it could be characterized as a judicial ruling.[6]

Judge McBryde cites a host of orders issued by chief judges dismissing complaints on grounds of merits-relatedness. In some of these, it is true, the complainant went beyond merely attacking the merits of rulings, and raised allegations that particular rulings had resulted from some form of illicit motive or were examples of improper conduct. In those cases, however, the complainant failed to provide adequate supporting factual substantiation to justify an investigation into his or her claims of improper animus or conduct. Absent such factual support, these complaints' allegations were reduced to mere attacks on the merits of the rulings themselves, and thus were properly dismissed. The instant matter, of course, is quite different in that the claims of improper conduct were supported by considerable substance.

The burden of proof. Judge McBryde argues that a judicial council may take the "drastic step" of punishing a federal judge only when the evidence is "clear and convincing" that the judge has committed conduct prejudicial to the effective and expeditious administration of the business of the courts. In his view, application of the preponderance-of-the-evidence

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[6] Another instructive example -- in a matter that did not come before this committee is No. 88-2101 (Jud. Council 11th Cir. 1990). There a magistrate judge was publicly reprimanded by the Judicial Council of the Eleventh Circuit for ordering U.S. Marshals to take into custody a criminal defense attorney and bring that attorney, in handcuffs and chains as required by the Marshals' policies, to a hearing before the magistrate judge. In a sense, this directive constituted a "ruling" by the magistrate judge. Yet the magistrate judge's conduct, as evidenced by this "ruling," was deemed sanctionable because it was so palpably abusive toward counsel.

burden of proof commonly employed in civil litigation would be inappropriate.

There is nothing in the statute or the Fifth Circuit Rules that addresses this question. Nor is this committee aware of any decision in the eighteen years of the Act — whether by this committee, a judicial council, or a chief judge— delineating such a standard.

Judge McBryde points to authority that a clear and convincing evidence standard governs disciplinary proceedings against attorneys, citing In re Medrano, 956 F.2d 101, 102 (5th Cir. 1992). It is generally true, also, that a clear and convincing evidence standard is applied in most states' disciplinary proceedings against state judges. See, e.g., In re Deming, 108 Wash. 2d 82, 109, 736 P.2d 639, 653 (1987).

Even so, it is by no means clear that the clear and convincing evidence standard is the appropriate one. There are important distinctions between attorney discipline and discipline of most state judges, on the one hand, and federal judicial discipline short of impeachment on the other. The Fifth Circuit noted in Medrano, supra, that "[a] disbarment proceeding is adversarial and quasi-criminal in nature," and therefore "[a] federal court may disbar an attorney only upon presentation of clear and convincing evidence sufficient to support the finding of one or more violations warranting this extreme sanction." Id. at 102. A section 372(c) proceeding against a federal judge is neither adversarial nor quasi-criminal. The functional equivalent of disbarment, i.e., removal of the judge from office, is beyond the authority of the judicial council. In most states, by contrast, the state judges do not enjoy a guarantee of life tenure, and removal from office is a possible outcome of the judicial discipline process.

It is of course true that suspension of the assignment of new cases to a judge for one year is a very severe sanction. Nonetheless these are not unequivocally "judicial" proceedings. They do not involve the adjudication of an Article III case or controversy. As this committee has stated, "While section 372(c) proceedings have an adjudicatory aspect, they also have an administrative and managerial character not present in traditional adjudication by courts." No. 93-372-001, 9 F.3d 1562, 1566 (1993). The circuit council's actions are taken in furtherance of the council's responsibilities for the administration of the courts. The matter is thus more administrative than quasi-criminal, so that a standard more exacting than the usual preponderance standard may not be necessary. It would be hard to argue that a chief judge and judicial council must be restrained by a clear and convincing evidence standard in whatever factual determinations they must make in the everyday process of administering the business of the circuit.

In any event, this committee need not determine this issue here. The evidence adduced by the special committee permits this committee to conclude that whether a preponderance standard or a clear and convincing evidence standard is applied, that standard was met here, as we will discuss in the next section.

The factual basis for the judicial council's sanctions. In its December 31, 1997 Order and Public Reprimand, the judicial council made the following findings of fact as to Judge McBryde's conduct:

> "Judge McBryde has engaged in a continuing pattern of conduct evidencing arbitrariness and abusiveness that has brought disrepute on, and discord within, the federal judiciary. This conduct is unacceptable and damaging to the federal judiciary.
>
> "Judge McBryde's intemperate, abusive and intimidating treatment of lawyers, fellow judges, and others has detrimentally affected the effective administration of justice and the business of the courts in the Northern District of Texas. Judge McBryde has abused judicial power, imposed unwarranted sanctions on lawyers, and repeatedly and unjustifiedly attacked individual lawyers and groups of lawyers and court personnel. This pattern of behavior has had a negative and chilling impact on the Fort Worth legal community and has, among other things, prevented lawyers and parties from conducting judicial proceedings in a manner consistent with the norms and aspirations of our system and is harmful to the reputation of the courts."

The judicial council, out of concern for the confidentiality interests of the witnesses who had testified before the special committee, opted not to make public any of the specific incidents that underlie this finding. As we conclude in the next section, this committee will not disturb the judicial council's determination that this degree of public disclosure, and not more, is appropriate at this time. This committee therefore cannot comment specifically on the evidence that supports the judicial council's findings, because that evidence remains confidential.

This committee has reviewed the record in detail, applying a review standard of substantial deference to the judicial council's fact finding. The committee concludes that whatever standard of proof might be required to support the judicial council's fact finding -- whether a clear-and-convincing-evidence standard or a preponderance-of-the-evidence standard -- the evidence adduced regarding Judge McBryde's patterns of conduct is more than sufficient to support the judicial council's findings. As to certain matters, the evidence is undisputed; as to many, Judge McBryde has disputed testimony and evidence against him. In all instances, however, there was more than ample evidence to permit the special committee, judging the credibility of the live witnesses before it, to reach the factual conclusions that it did.

The judge did, to be sure, present testimony from a number of lawyers who said they have been treated fairly by the judge, do not feel intimidated by him, and are happy to appear before him. The judge also presented testimony from jurors who have sat on cases presided over by him -- including jurors who sat on cases alleged to exemplify the judge's pattern of mistreatment of counsel -- who said that they saw no mistreatment, that they appreciated the

judge's efforts to move cases along, and that they enjoyed being impaneled on his jury. Even if this testimony is believed, however, there is nothing in it that undercuts the impressive mound of evidence that Judge McBryde has frightened and intimidated a significant portion of the local bar. The special committee and judicial council also were entitled to discount the testimony of jurors, who as laypersons without significant court experience cannot ordinarily be expected to understand the proper contours of the judge-counsel relationship and evaluate a judge's conduct in the light of that understanding.

The Judicial Council's Sanctions

The public reprimand. Judge McBryde argues that the public reprimand that the judicial council intends to issue would be improper because it does not adequately specify the conduct that gives rise to the reprimand. Although the special committee recommended that its long report be made public and appended to any public reprimand, the judicial council's order did not accept this recommendation, and would keep the report private. As a result, all that is public about the basis for the reprimand is the two-paragraph finding, that we quoted in the previous section, about the judge's conduct that appears in the text of the judicial council's Order and Reprimand. The council's public Order and Reprimand would not describe any of the specific incidents that underlie the reprimand.

To this Judge McBryde objects, stating, "Basic fairness dictates that if a man is to be held up before his community as a wrongdoer, there should at least be some explanation of what he has done and why it is wrong, so that the public can evaluate the merits of the reprimand and the subject of the reprimand can respond appropriately."

The judicial council's sanctions do not rest on only one or two specific incidents of misconduct, which one might ordinarily expect to be referred to in the text of a public reprimand. They are based instead on a broad pattern of conduct that manifested itself in many specific incidents, none of which standing alone may have justified a sanction. We think that where sanctions are based upon such a pattern of conduct, a judicial council may provide the public a short general description of the pattern of conduct, rather than a litany of all the specific underlying details.

Also, the judicial council argues in justification that "not releasing the Report protects the privacy interests of the many witnesses who participated in this proceeding and whose testimony and experiences are summarized in the Report." Given that the council's order does at least provide a general description of Judge McBryde's misconduct, this committee defers to the judicial council's judgment as to the need to protect the privacy interests of witnesses.

Judge McBryde has a remedy under 28 U.S.C. § 372(c)(14)(C) for his concern that more of the confidential proceedings be made public. If, under that section, he requests in

writing that all or any portion of the proceedings be made public, it can be done with the assent of the chief judge of the circuit. The chief judge's assent is required in order to protect any confidentiality interests that witnesses or complainants may have in the proceedings. If the chief judge were to grant such a request, in whole or in part, the chief judge could redact any materials to be made public in whatever manner the chief judge considered appropriate in order to preserve these privacy interests.

Judge McBryde argues that he has already pushed to make public the entire record of the proceedings, and the chief judge has not agreed. Judge McBryde does not wish to make public only the special committee report, with what he considers to be its one-sided view of the matter. Nonetheless, whatever the chief judge's position may have been in the past, Judge McBryde of course may renew his request in the future, when the circumstances surrounding the request conceivably may change.

The one-year suspension. Judge McBryde argues that the judicial council's order directing that no new cases be assigned to him for one year is an unconstitutional interference with the powers and prerogatives of an Article III judge.

As Judge McBryde acknowledges, however, this committee in the past has refused to consider challenges to the constitutionality of the Act, either on its face or as applied. In no. 84-372-001, which involved a complaint of sexual harassment filed by clerk's office employees against a judge, the judge argued before this committee that the Act was unconstitutional on its face and that it would violate the Constitution to apply the Act to punish the conduct he was found to have engaged in. This committee declined to entertain these contentions, stating:

> "We have no competence to adjudicate the facial constitutionality of the statute or its constitutional application to the speech of an accused judge, however inappropriate or offensive his words may be. We are not a court. Our decisions are not subject to review by the Supreme Court of the United States. We sit in review of the action of the Circuit Council. The courts of the United States are open for the adjudication of such questions."

We similarly decline to undertake constitutional adjudication here.[7]

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[7] No court has ever adjudicated the constitutional validity of the Act's sanction of a temporary suspension, for a time certain, of the assignment of cases to a federal judge. Indeed, the instant matter is the first time this suspension sanction, as authorized by 28 U.S.C. § 372(c)(6)(B)(iv), has ever been invoked.

Chandler v. Judicial Council, 398 U.S. 74 (1970), did involve United States District Judge Stephen Chandler's challenge to a pre-Act order of the Judicial Council of the Tenth

Judge McBryde further contends that the statutory provision authorizing a judicial council to "order . . . that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint," 28 U.S.C. § 372(c)(6)(B)(iv), was intended by Congress to be used only for a "remedial" suspension of cases, whereas the judicial council's suspension here is impermissibly "punitive" in its goals.[8]

Circuit suspending the assignment of new cases to Judge Chandler. The Supreme Court, however, declined to reach the merits of this issue.

Judge McBryde quotes at length from Justices Black and Douglas who, in dissent in Chandler, argued that such a suspension worked an unconstitutional infringement on the independence of an Article III judge. The Court majority, by contrast, stated that for "a complex judicial system [to] function efficiently," judges need a "statutory framework and power whereby they might 'put their own house in order.' . . . But if one judge in any system refuses to abide by such reasonable procedures it can hardly be that the extraordinary machinery of impeachment is the only recourse." Id. at 85. Although the majority opinion drew back from attempting to define the permissible extent of a judicial council's power, it did state, We see no constitutional obstacle preventing Congress from vesting in the Circuit Judicial Councils, as administrative bodies, authority to make 'all necessary orders for the effective and expeditious administration of the business of the courts within [each] circuit.'" Id. at 86 n.7

[8]Judge McBryde points to Senate legislative history, discussing an earlier version of the legislation that became the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c), which stated,

> "It is important to point out the Committee's clear intention to use the word 'temporary' in this subsection. Serious constitutional problems may be raised concerning the power of the circuit council to prohibit the assignment of further cases to the judge in question. The use of the word 'temporary' is designed to convey the clear intention of the Committee that this sanction is to be used only on rare occasions and only as an interim sanction. For example, the refusal of the council to allow a judge to accept further cases while undergoing treatment for alcoholism or until the reduction of an excess backlog of cases are examples where this sanction may be invoked."

S. Rep. No. 96-362 (96th Cong., 1st Sess. 1979) at 10, reprinted in 1980 U. S. Code Cong. & Ad. News 4315, 4323-24. Legislative history from the House side also stated, "It is the view of the Committee that all the sanctions relating to the discipline or disability treatment of tenured judges mentioned above are temporary in nature; implicitly, a judge who has recovered from a disease or who has remedied the conditions that caused the sanction can and should be

Thus, he argues, its use for punitive purposes is not only unconstitutional but also in excess of the statutory authority granted to judicial councils by the Act. The judicial council has conceded, in its filings before this committee, that indeed it did have both punitive and remedial goals in mind in invoking the sanction.

We need not consider Judge McBryde's objections to the punitive aspects of the suspension of case assignments because we decline to affirm the suspension insofar as it was intended to punish Judge McBryde for past misconduct. Even with substantial deference to the judicial council's firsthand judgment about what constitutes an appropriate punishment, this committee believes that the judicial council's public reprimand — a serious sanction — is a sufficient punishment for the judge's past pattern of abusive conduct.

We do, however, affirm the suspension, in modified form, as a remedial measure intended to ameliorate Judge McBryde's behavior in the future. The special committee made it clear in its report that it did intend the suspension of new case assignments to serve very substantial remedial purposes. The special committee expressed its concern that during the committee's hearings,

> "Judge McBryde evinced no reflection or remorse concerning the totality of his conduct. . . . Aside from one or two instances . . . , Judge McBryde refused to acknowledge the impropriety of his actions. His repeated responses that his actions were proper and appropriate bespeak both of denial and the probability that, absent self-reappraisal, such conduct will not abate.
>
> "Depriving Judge McBryde of new assignments for this period will not prevent continued abuse, but it will provide him some opportunity for deep reflection, which is necessary and desirable."

The judicial council adopted the special committee report in this regard, since the council adopted that report "to the extent relevant to the action below."

We have thoroughly reviewed the evidence and we find that it justifies the judicial council's conclusions that Judge McBryde has generally refused to acknowledge the impropriety of his actions, and that an "opportunity for deep reflection" is desirable to permit him to consider the need to reform his conduct in the future. The judge has yet to give any indication that he accepts he has a problem, and until he does so there is little hope for improvement. A lightening of his case load will permit him to engage in the "self-appraisal"

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restored to office." H.R. Rep. No. 96-1313 (96th Cong., 2d Sess. 1980), at 12.

and "deep reflection" referred to by the special committee. The purpose of this suspension of new case assignments, therefore, is the same as in the case of a remedial suspension of new cases for a judge with a substance abuse problem, or with some other physical or mental problem, who refuses to take steps to confront the problem. Thus, we uphold the suspension as aimed at modifying Judge McBryde's pattern of behavior toward attorneys, court personnel, and others, not as punishing him for past misbehavior.

As formulated by the judicial council, the suspension is for the definite period of a year. In keeping with the purely remedial nature of the suspension, however, the suspension should not continue once it has fairly achieved its remedial purpose. The suspension should terminate in the event that, during the year, Judge McBryde shows significant signs of modifying his conduct. In the analogous situation of a one-year suspension of case assignments to a judge with a substance abuse problem, for example, one would expect the suspension to abate if the judge completed successful treatment for the problem within the year. We therefore modify the terms of the suspension of new case assignments in order to bring it within Judge McBryde's power to effect an end to the suspension before the expiration of a year.

The committee directs the judicial council to terminate the suspension of new case assignments before the expiration of the year if the council finds, either upon an application by Judge McBryde or on its own motion, that Judge McBryde's conduct indicates that he has seized the opportunity for self-appraisal and deep reflection in good faith, and that he has made substantial progress toward improving his conduct.

The committee notes, in affirming the one-year suspension as purely remedial, that we cannot be sure that all of the members of the judicial council who voted for the suspension (which was approved by a vote of 13 to 6) would have voted for a purely remedial suspension. It is possible that some council members may have supported the suspension only for purposes of punishment, or for both punitive and remedial purposes. Nonetheless we see no need to remand this matter to the judicial council for the council's consideration of the advisability of a purely remedial suspension. The judicial council of course may reconsider its suspension at any time it sees fit to do so. It goes without saying that if the judicial council concludes, for example, that a remedial suspension is not appropriate, that a one-year suspension is too lengthy for purely remedial purposes, or that the period of time that has elapsed since Judge McBryde learned of the council's decision to impose a public reprimand has been sufficient to give the judge an opportunity to reflect, this committee's affirmance of a one-year remedial suspension in no way precludes the judicial council from revisiting the matter.

The reassignment order. There is plenty of evidence in the record to support the judicial council's implicit conclusion that there was a significant risk that Judge McBryde might attempt to retaliate in some fashion against witnesses who had testified against him, or at least that witnesses reasonably perceived such a risk. The judicial council has a strong interest in protecting the integrity and effectiveness of its investigation, which could be seriously

hampered if witnesses believed they would be left unprotected against such retaliation. Thus, the judicial council ordered that "Judge McBryde, for a period of three (3) years from the effective date of this Order, is not to participate in (i) cases now pending before him (other than any as to which there are appellate proceedings) in which any of the attorneys listed on Attachment A are currently involved, and (ii) any and all cases filed after the effective date of this order in which the initial notice of appearance includes any of the attorneys listed on Attachment A."

Judge McBryde argues that the judicial council lacks authority to order the recusal of a judge from any case. Such authority, he asserts, is reserved to the court of appeals on review of determinations by the district judge on recusal motions properly brought under 28 U.S.C. §§ 144 and 455. These recusal decisions are decisions on the merits just like any other rulings handed down by a district judge. Thus, "[t]he complaint procedure may not be used to have a judge disqualified from sitting on a particular case. A motion for disqualification should be made in the case." Rule 1(e) of the Illustrative Rules Governing Complaints of Judicial Misconduct and Disability.

We do not quarrel with the proposition that it is for the courts, not for a non-court such as the judicial council, to determine the application of sections 144 and 455 in particular cases. That is not, however, what the council's reassignment order does.

A judicial council, exercising its authority under 28 U.S.C. § 372(c)(6)(B)(vii) to "order . . . such other action as it considers appropriate under the circumstances," may reassign cases as a result of a complaint proceeding if to do so is appropriate to foster the effective and expeditious administration of judicial business. Such a reassignment order is an entirely different thing from recusal under the recusal statutes, and is not governed by the standards set out in those statutes.[9] The council properly exercised just such authority by issuing the order for the purpose of protecting the integrity of its proceedings by guarding its witnesses against what it concluded was a genuine or reasonably perceived risk of retaliation by Judge McBryde.

Judge McBryde counters that nevertheless the judicial council is not a court, cannot exercise judicial power, and cannot issue rulings that dispose of issues in Article III cases and controversies. If Congress has given the courts of appeals authority to order reassignment of a district judge on some basis other than application of the recusal statutes, there is no question that those courts may properly exercise that authority. If, however, case reassignment amounts

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[9] The judicial council analogizes its reassignment order to an order issued by a court of appeals under 28 U.S.C. § 2106, which has been interpreted to permit the court of appeals to reassign cases from one district judge to another. Such an order under section 2106 is an entirely different thing from a recusal order under the recusal statutes. As such, a section 2106 order is adjudicated under a different standard than the recusal standards applicable under 28 U.S.C. §§ 144 and 455. Liteky v. United States, 510 U.S. 540, 554 (1994).

to a ruling in a case, involving exercise of the judicial power, then, the judge argues, the judicial council may not issue such an order.

The short answer is that the matter of case assignments is an administrative one, and does not involve the exercise of judicial power. Under 28 U.S.C. § 137, for example, where the judges of a district court do not agree on a system for case assignments among district judges, the judicial council, by exercise of its administrative authority, may impose a case assignment system. This does not inject the judicial council into judicial rulings in particular cases.

The council's reassignment order is akin to action under section 137. The council is exercising its administrative authority, not case-decisional authority, to protect the integrity of its proceedings by directing that Judge McBryde not participate in cases where his participation would threaten that integrity, i.e., in cases where witnesses adverse to him appear as counsel. Thus its action has nothing whatsoever to do with the circumstances of the particular cases in which those witnesses happen to appear. The council does not purport to direct Judge McBryde how to decide motions to recuse or how to apply the recusal statutes.

Only the judicial council is in a realistic position to take this action. The possibility of subsequent piecemeal rulings by the court of appeals, entered only months later in one or more cases, directing Judge McBryde not to participate in such cases would be less effective in protecting the integrity of the section 372(c) proceedings. Adverse witnesses awaiting such rulings would have much less assurance that they would be protected against feared retaliation.

Finally, Judge McBryde argues that the judicial council's reassignment order is unwise in its details and in its practical effects. He contends that the order gives the affected attorneys and their clients the kinds of opportunities for judge-shopping that the federal judicial system ordinarily frowns upon.

It is for the judicial council to determine how best to balance concerns about judge-shopping against the need it sees to protect witnesses against feared retaliation. The Act confers upon the judge complained against the right to seek Judicial Conference review in order to ensure the fairness and propriety of circuit council proceedings and orders affecting the judge's interests. When a judge argues that aspects of a council order — wholly apart from their impact on the judge — manifest an unwise and ill-considered approach to judicial administration, this begins to take the committee's review proceeding beyond its intended purpose.

This is not to say that this committee lacks authority to examine and modify the practical details and implementation of the council's reassignment order. We are loathe to exercise any such authority in the absence of some extraordinary circumstance, and we see nothing to justify such intervention here. As the council has pointed out, if the reassignment order causes problems, the council can issue additional supplemental orders to address them.

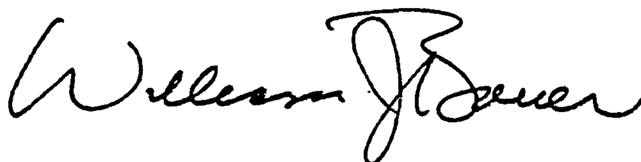
We have considered all of Judge McBryde's other arguments and find them meritless.

Conclusion

This committee affirms the December 31, 1997 Order and Public Reprimand issued by the Judicial Council of the Fifth Circuit in all respects except the following. Section 2 of the Order and Public Reprimand is modified to state: "Pursuant to 28 U.S.C. § 372(c)(6)(B)(iv), no new cases are to be assigned to Judge McBryde for a period of one (1) year from the effective date of this Order, unless and until the Council finds that Judge McBryde's conduct indicates that he has seized the opportunity for self-appraisal and deep reflection in good faith and that he has made substantial progress toward improving his conduct;".

This committee's stay of the judicial council's Order and Public Reprimand is hereby terminated.

FOR THE COMMITTEE



William J. Bauer
United States Circuit Judge[10]

September 18, 1998

[10] This opinion was prepared by Judge William J. Bauer, with United States Circuit Judge Stephanie K. Seymour, United States Circuit Judge Cornelia G. Kennedy, United States District Judge Gordon Thompson, Jr., and United States District Judge Anthony A. Alaimo concurring.

BEFORE THE COMMITTEE TO REVIEW CIRCUIT COUNCIL

CONDUCT AND DISABILITY ORDERS

JUDICIAL CONFERENCE OF THE UNITED STATES

No. 01-372-001

In re: Complaint of Judicial Misconduct or Disability

COMMITTEE MEMORANDUM AND ORDER

This matter is before the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders pursuant to a petition for review dated April 26, 2001.[1]

Complainant filed the instant complaint with the clerk of the Court of Appeals for the District of Columbia Circuit on August 5, 1999. The complaint alleged, among other things, that the judge complained against, while serving as chief judge of a district court, had bypassed

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[1] Under 28 U.S.C. § 372(c)(10), "A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection [-- the paragraph under which the judicial council may take action on, or may dismiss, a complaint of judicial misconduct or disability following the report of a special investigating committee --] may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph."

Section 331 of 28 U.S.C. provides, "The Conference is authorized to exercise the authority provided in section 372(c) of this title as the Conference, or through a standing committee. If the Conference elects to establish a standing committee, it shall be appointed by the Chief Justice and all petitions for review shall be reviewed by that committee."

The Judicial Conference has established this committee to be the standing committee authorized to act for the Judicial Conference under § 331 in proceedings of this kind. Pursuant to §§ 331 and 372(c)(10), this committee may grant or deny complainant's petition for review, and the committee's orders in this respect are final and not appealable.

the district court's random case assignment system to assign "highly-charged criminal cases to recent Clinton appointees." Complainant argued that these cases did not come within the district court's local rule which authorized the chief judge to specially assign criminal cases that would be "protracted." According to complainant, the district judge acted improperly out of partisan political motives, or at least reasonably appeared to have so acted.

On March 14, 2000, the acting chief judge of the District of Columbia Circuit appointed a special committee pursuant to 28 U.S.C. § 372(c)(4) to investigate these allegations of the complaint. The special committee was also charged with investigating similar allegations brought against the judge complained against in a second complaint. That second complaint is not before this committee, no petition for review from its disposition having been filed.

To investigate the allegations of these two complaints, the special committee retained as its counsel a former Republican-appointed United States Attorney and Department of Justice official. On December 18, 2000, counsel for the special committee, following an extensive investigation, submitted to the special committee a 136-page report. The report concluded, "As a result of a detailed and thorough six-month investigation, we have determined that the evidence does not support the contention that the assignments at issue were made in furtherance of a political agenda favoring the Clinton Administration and the defendants in those cases." On February 1, 2001, the special committee, adopting the findings of counsel for the special committee, submitted its report to the Judicial Council of the District of Columbia Circuit, recommending that the complaint be dismissed.

In a February 26, 2001, memorandum and order, the Judicial Council of the District of Columbia Circuit dismissed both complaints. The judicial council stated that it found counsel's report to the special committee to be "persuasive." The judicial council concluded, "A preponderance of the evidence available suggests that the subject judge did not assign cases with a political or partisan motivation, or engage in any deliberate or even clear violation of any rules." Along with its memorandum and order the judicial council issued the report of the special committee, which included counsel's report to the special committee.

Complainant filed its petition for review of the judicial council's order on April 26, 2001. Subsequently, the committee received memoranda from complainant and from the judge complained against.

We have carefully reviewed the record and the filings of complainant and the judge complained against, and we see no reason to disturb the conclusions of the judicial council. The investigation conducted by counsel for the special committee was extensive and thorough. As did the judicial council, we find the conclusions of that investigation persuasive. We affirm the judicial council's dismissal of complainant's complaint for the reasons stated by the judicial council in its February 26, 2001, memorandum and order.

Of the nine cases alleged to have been specially assigned by the judge complained against on a partisan basis, in only three did the evidence developed by counsel for the special committee show that the judge actually played any role in the case assignment. As to these three, the evidence did not suggest that the judge acted with any partisan motive, or that the judge deliberately, or even clearly, violated local rules governing case assignments.

Complainant's petition for review argues that, even if the judge complained against did not act with any improper motivation, the judge's actions created an improper appearance of politically-motivated case assignments. Accordingly, complainant argues, the judge's actions created an "appearance of impropriety" in violation of Canon 2 of the Code of Conduct for United States Judges, and therefore a finding of misconduct should be made on the basis of this purported ethical violation.

The commentary to Canon 2 of the Code of Conduct for United States Judges explains, however, that "[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception" of impropriety. We conclude, based on the surrounding "relevant circumstances" as persuasively found by the judicial council, that no reasonable observer would perceive an improper partisan basis for the judge's actions.

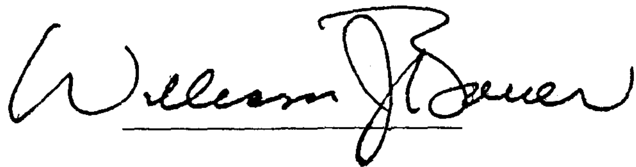
Complainant also argues that the judge complained against, by conducting the judge's own investigation into the case assignments at issue, improperly "coached, intimidated, and sought to influence the testimony of witnesses in this inquiry." Our review of the record, however, reveals no basis to question the findings of the judicial council that the judge did not act with any improper purpose and that the witnesses interviewed by the judge "did not feel intimidated, coerced, or otherwise improperly influenced."

We also reject, for the reasons stated by the judicial council, complainant's arguments that the judge's alleged failures of memory constituted misconduct and that the judge

improperly attempted to mislead the judicial council and its investigators. The evidence of record does not support these allegations.

The petition for review is denied.

FOR THE COMMITTEE[2]



William J. Bauer

United States Circuit Judge

October 10, 2001

[2] This opinion was prepared by Judge William J. Bauer, with United States Circuit Judges Stephanie K. Seymour and Pasco M. Bowman and United States District Judges Anthony A. Alaimo and Barefoot Sanders, concurring.