

TESTIMONY OF CHARLES G. GEYH
“JUDICIAL TRANSPARENCY AND ETHICS”
HEARING BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY’S
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE
INTERNET

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My name is Charles G. Geyh (pronounced “Jay”). I am the John F. Kimberling Professor of Law at the Indiana University Maurer School of Law, in Bloomington Indiana. My writings on judicial conduct, ethics, selection, independence, accountability, and administration include more than seventy books, book chapters, articles, reports, and other publications. I am a coauthor of the treatise *Judicial Conduct and Ethics* (Lexis Law Publishing, 5th ed. 2013), and author of *Courting Peril: The Political Transformation of the American Judiciary* (Oxford University Press 2016); *Judicial Disqualification: An Analysis of Federal Law* (Federal Judicial Center 2010); and *When Courts & Congress Collide: The Struggle for Control of America’s Judicial System* (University of Michigan Press 2006). In addition, I have served as co-Reporter to the ABA Joint Commission to Revise the Model Code of Judicial Conduct. Prior to entering academia in 1991, I was counsel to the House Judiciary Committee’s Subcommittee on Courts, Intellectual Property and the Administration of Justice, under Chairman Robert W. Kastenmeier.

INTRODUCTION

Our Constitution works only because we believe it works. We believe in the tripartite system of government that our founders framed. We believe in the checks and balances that system provides, and in the role that a strong, separate and independent judiciary plays in keeping the executive and legislative branches in check. As a consequence, we accept the judgments of our courts even if we do not agree with them.

If we lose faith in the judiciary, the system of government that has served us well for over two and quarter centuries falls like a house of cards. The judiciary cannot fund itself. It is dependent on Congress for that. Courts cannot enforce their own orders. They are dependent on the President for that. If we lose trust and confidence in the judiciary, court budgets can easily be gutted, court rulings defied, and the constitutional order—which depends on courts keeping Congress and the President in check via judicial review—will collapse.

In other words, the survival of our courts depends on their perceived legitimacy with the people they serve. The reason that President Trump’s recent reference to District Judge James Robart as a “so-called judge” raised concern, is because it transcended robust criticism of a judicial decision and challenged the legitimacy of the court itself. I share conservative scholar William Baude’s characterization of this development as “deadly serious,” because it reveals the judiciary’s vulnerability to defiance, and the fragility of the constitutional order if court rulings are not respected as legitimate.

The Robart episode underscores the vital role that this subcommittee plays in protecting and promoting the legitimacy of the courts—legitimacy upon which the nation depends. Unlike Congress and the President, federal judges are appointed. As a consequence, federal judges do not derive their legitimacy from the electorate. Rather, federal judges derive legitimacy from the respect they command as a result of their perceived competence, impartiality, independence, and integrity. Judicial competence, impartiality, independence, and integrity, in turn, are promoted by three mechanisms of relevance to this hearing: disqualification, codes of judicial conduct, and disciplinary processes. I will discuss each of these in order.

DISQUALIFICATION REFORM

For centuries, impartiality has been a defining feature of the Anglo-American judge’s role in the administration of justice. The reason is clear: in a constitutional order grounded in the rule of law, it is imperative that judges make decisions according to law, unclouded by personal bias or conflicts of interest. When the impartiality of a judge is in doubt, the appropriate remedy is to disqualify that judge from hearing further proceedings in the matter.

Disqualification has ethical and procedural dimensions. The ethical dimension is governed by Canon 3C of the Code of Conduct for United States Judges, as construed by the Codes of Conduct Committee of the Judicial Conference of the United States. The procedural dimension is governed primarily by sections 455 and 144 in Title 28 of the United States Code. The text of Canon 3C is substantially similar to 28 U.S.C. § 455; yet while both seek to promote public confidence in the judiciary, each maintains a separate focus. The Code of Conduct endeavors to inform federal judges of their ethical obligations to the end of advising them on how judges should conduct themselves. Section 455, however, is a procedural statute aimed at articulating disqualification standards to the end of preserving the rights of litigants to impartial justice.

My focus here is on sections 455 and 144 of Title 28. In my view, section 455 does an effective job of articulating substantive disqualification standards, which are largely uniform across federal and state court systems. I do, however, have some concerns with disqualification procedure, and recommend that the Committee consider legislation to address the problem inherent in having a judge who is accused of bias or conflict of interest be the judge who decides whether that accusation has merit. As it

stands, section 144, in contrast, is a virtual dead letter, and should either be eliminated or amended to serve its original purpose.

28 U.S.C. § 455 and Judicial Self-Disqualification

In the federal system, the norm is that disqualification motions are decided by the judge whose disqualification is sought.¹ While it may be a bit awkward to initiate the disqualification process by calling upon the party who seeks a judge's disqualification to raise the matter with that judge, it is a defensible approach. The target judge will be the most familiar with the facts giving rise to the motion, and can step aside without delay when circumstances warrant.

When, however, the judge is disinclined to step aside, asking that judge to resolve a contested disqualification motion becomes much more problematic. In effect, such an approach calls upon the judge to “grade his own paper”—to ask the judge who is accused of being too biased to decide the case, to decide whether he is too biased to decide the case. Unsurprisingly, two commentators observe that “the fact that judges in many jurisdictions decide on their own disqualification and recusal challenges . . . is one of the most heavily criticized features of U.S. disqualification law, and for good reason.”² Another commentator adds:

The appearance of partiality and the perils of self-serving statutory interpretation suggest that, to the extent logistically feasible, another judge should preside over [disqualification] motions. To permit the judge whose conduct or relationships prompted the motion to decide the motion erodes the necessary public confidence in the integrity of a judicial system, which should rely on the presence of a neutral and detached judge to preside over all court proceedings.³

And yet another commentator echoes that “[t]he Catch-22 of the law of disqualification is that the very judge being challenged for bias or interest is almost always the one who, at least in the first instance, decides whether she is too conflicted to sit on the case.”⁴

Over eighty percent of the public thinks that disqualification motions should be decided by a different judge.⁵ The assumption underlying the public's view—that a judge is ill-positioned to assess the extent of her own bias (real or perceived)—is corroborated

¹ *Schurz Communications, Inc. v. FCC*, 982 F.2d 1057, 1059 (7th Cir. 1992); *In re United States*, 158 F.3d 26, 34 (1st Cir. 1998) (citations omitted). *Accord* *United States v. Heldt*, 668 F.2d 1238, 1271 (D.C. Cir. 1981).

² James Sample, David Pozen, *Making Judicial Recusal More Rigorous*, 46 JUDGES' J. 17, 21 (2007).

³ Leslie W. Abrahamson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543, 561 (1994).

⁴ Amanda Frost, *Keeping Up Appearances: A Process Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 571 (2005).

⁵ Press Release, Justice at Stake Campaign, Poll: Huge Majority Wants Firewall Between Judges, Election Backers (Feb. 22, 2009) (on file with author). Is this on file with you?

by empirical research. Recent empirical studies in cognitive psychology have demonstrated that judges, like lay people, are susceptible to cognitive biases in their decision-making.⁶ But they have trouble spotting those biases. People typically rely on introspection to assess their own biases;⁷ however, “because many biases work below the surface and leave no trace of their operation, an introspective search for evidence of bias often turns up empty.”⁸ The individual thus takes his unfruitful search as proof that bias is not present and fails to correct for those biases.⁹

The peril of asking a person to assess the extent of her own bias is further exacerbated for judges, who are being asked to assess whether they harbor a real or perceived biases that their oaths of office and codes of conduct direct them to avoid. Conceding real or perceived bias in such circumstances can thus be misconstrued as failing their duty of impartiality, which helps to explain why some take umbrage at disqualification requests. In short, the tradition of calling upon judges to be the final arbiters of challenges to their own impartiality should be abandoned.

A simple solution to the problem of calling upon a judge to evaluate her own qualification to sit is to assign the matter to a different judge. Such a procedure could be limited to courts of original jurisdiction (district judges, magistrates, bankruptcy judges), or extended to appellate courts. Illinois employs such a procedure with language that could be borrowed, with appropriate modifications to accommodate the vocabulary of section 455: “Upon the filing of a petition for substitution of judge for cause, a hearing to determine whether the cause exists shall be conducted as soon as possible by a judge other than the judge named in the petition.”¹⁰ The Illinois statute adds that the judge whose disqualification is sought “need not testify but may submit an affidavit if the judge wishes” to assist the judge evaluating the disqualification petition.¹¹

28 U.S.C. § 144 Reform

Section 144 of Title 28 states in its entirety:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in

⁶ Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in *Heuristics and Biases: The Psychology of Intuitive Judgment* 49, 49-50 (Thomas Gilovich et al., eds., 2002); Guthrie et al., *Inside the Judicial Mind*, 86 *Cornell L. Rev.* 777 (2001).

⁷ Emily Pronin et al., *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 *J. OF EXPERIMENTAL SOC. PSYCHOL.* 565, 565-67 (2007).

⁸ Ehrlinger, *supra* note 8, at 10.

⁹ Pronin, *supra* note 9, at 565–67.

¹⁰ 735 Ill. Comp. Stat. 5/2-1001 (a)(3).

¹¹ *Id.*

any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.¹²

A literal reading of section 144 suggests that a party can force disqualification automatically, simply by filing an affidavit alleging that the judge is biased against the affiant or in favor of the affiant's opponent. Such an interpretation would render section 144 akin to peremptory disqualification procedures adopted by judicial systems in a number of western states—and the legislative history of section 144 lends some support for this interpretation of the section.¹³

The federal courts have indeed held that under section 144 a judge must step aside upon the filing of a facially sufficient affidavit, but they have been exacting in their interpretations, not only of what a facially sufficient affidavit requires, but of the procedural prerequisites to application of the statute as well. Thus, motions have been dismissed because the motion was untimely, because the movant failed to submit an affidavit, because the movant submitted more than one affidavit, because the attorney rather than a party submitted the affidavit, because the movant's affidavit was unaccompanied by a certificate of counsel, because the affidavit failed to make allegations with particularity, and because the certificate of counsel certified only to the affiant's good faith, not counsel's.¹⁴

This is not accidental. As the First Circuit explained, “courts have responded to the draconian procedure—automatic transfer based solely on one side's affidavit—by insisting on a firm showing in the affidavit that the judge does have a personal bias or prejudice to a party.”¹⁵ In a similar vein, the Seventh Circuit has stated:

[T]he facts averred must be sufficiently definite and particular to convince a reasonable person that bias exists; simple conclusions, opinions, or rumors are insufficient. . . . Because the statute ‘is heavily weighed in favor of recusal,’ its requirements are to be strictly construed to prevent abuse.¹⁶

As a consequence, section 144 has been rendered a much more cumbersome tool to obtain disqualification than section 455, even though the latter calls upon judges to evaluate the merits of a movant's allegations and not simply the facial sufficiency of

¹² 28 U.S.C. § 144 (1949). Originally enacted as § 21 of the Judicial Code of 1911, the statute was recodified as § 144 in 1948 without significant change.

¹³ 46 Cong. Rec. 2627 (1911) (remarks of Representative Cullop).

¹⁴ See, e.g., *United States v. Barnes*, 909 F.2d 1059, 1072 (7th Cir. 1990) (counsel did not present certificate of good faith, “another requirement of section 144 with which Barnes failed to comply”); *In re Cooper & Lynn*, 821 F.2d 833, 838 (1st Cir. 1987) (“[N]o party filed an affidavit. . . . Rather the affidavit was filed by an attorney.”); *United States v. Merkt*, 794 F.2d 950, 961 (5th Cir. 1986) (“Elder's affidavit violates the one-affidavit rule . . . and need not be considered.”); *United States v. Balistreri*, 779 F.2d 1191, 1200 (7th Cir. 1985) (“Because of the statutory limitation that a party may file only one affidavit in a case, we need consider only the affidavit filed with Balistreri's first motion.”); *Roberts v. Bailar*, 625 F.2d 125, 128 (6th Cir. 1980) (motion rejected because counsel, not plaintiff, signed and filed affidavit); *United States ex rel. Wilson v. Coughlin*, 472 F.2d 100, 104 (7th Cir. 1973) (same); *Morrison v. United States*, 432 F.2d 1227, 1229 (5th Cir. 1970) (motion rejected because there was no certificate of good faith by counsel); *United States v. Hoffa*, 382 F.2d 856, 860 (6th Cir. 1967) (same).

¹⁵ *In re Martinez-Catala*, 129 F.3d 213, 218 (1st Cir. 1997).

¹⁶ *United States v. Sykes*, 7 F.3d 1331, 1339 (7th Cir. 1993) (citation omitted).

those allegations. Judges who are loath to tolerate strategic manipulation of disqualification rules have imposed what many commentators have long regarded as an unduly stingy construction of section 144.¹⁷ An additional reason that section 144 has fallen into relative disuse is that it requires the more difficult showing of actual bias, whereas section 455(a) requires a mere appearance of bias. Section 455 thus subsumes section 144. As the Supreme Court has observed of section 144, it “seems to be properly invocable only when section 55(a) can be invoked anyway.”¹⁸ Moreover, many of the circumstances that might qualify as actual bias under section 144 are specifically enumerated in section 455(b), which explicitly addresses various conflicts of interest, in addition to actual bias.¹⁹ In short, while parties still file motions under section 144, they usually do so in tandem with section 455, with the latter section typically monopolizing the court’s attention.

Section 144 has been rendered a problematic and cumbersome tool for disqualification, leaving section 455 as the one workable mechanism for disqualification in the federal system. One simple solution is to decommission section 144 after nearly a century of service. A second possibility, however, is to return to the roots of section 144 and explore alternative means to achieve its objective. That objective was to provide a party with a relatively simple means to request a different judge without putting the original judge in a position to second guess the merits of the party’s request. The pitfall of section 144 was its requirement that the moving party submit a “timely and sufficient affidavit” charging the judge with personal bias. By hinging disqualification on a facially sufficient allegation of bias, the underlying truth of which could not be challenged, the statute simultaneously encouraged litigants to exaggerate their assertions of bias to meet the threshold of facial sufficiency, and angered judges targeted with exaggerated claims, who responded by making the threshold requirements more exacting.

The problems of section 144 could be avoided if the statute were amended to offer parties a limited opportunity to request a simple substitution of judges, much in the nature of the preemptory challenge in jury selection. Nineteen states currently employ a procedure of this kind. Typically it is limited to trial judges. It may only be invoked one time by each party. And it must be invoked early in the proceedings.

The primary objection to substitution procedures is that a party may use them strategically to avoid judges who, while impartial, are likely to be unsympathetic to the party’s claims on the merits. The short answer to this concern is that a party is entitled only to one substitution per case, which limits the harm—a harm more than offset by the benefit of avoiding the aggravation and expenditure of resources associated with litigating traditional disqualification claims. A secondary objection relates to the administrative burdens associated with implementing judicial substitution procedures. While this is a legitimate concern, it has not proved insurmountable in the nearly twenty jurisdictions that employ them (including rural jurisdictions like Alaska and Montana).

CODES OF JUDICIAL CONDUCT AND THE U.S. SUPREME COURT

¹⁷ John Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 629 (1947).

¹⁸ *Liteky v. United States*, 510 U.S. 540, 548 (1994).

¹⁹ *See id.* (“[S]ection 455 is the more modern and complete recusal statute.”).

In 1922 the American Bar Association established a Committee, then chaired by Chief Justice William Howard Taft, which promulgated Canons of Judicial Ethics that the ABA adopted in 1924²⁰—a series of thirty-four hortatory pronouncements “intended to be nothing more than the American Bar Association’s suggestions for guidance of individual judges.”²¹ In 1972, the ABA approved a “Model Code of Judicial Conduct,” comprised of seven broadly worded canons and a series of more specific provisions underlying each canon, specifying a judge’s ethical obligations in greater detail. The ABA substantially revised the Model Code in 1990 and again in 2007. Today, all fifty state judicial systems have promulgated codes of conduct applicable to their judges, based on one of the three ABA models.

For its part, the Judicial Conference of the United States adopted its Code of Conduct for U.S. Judges in 1973, based on the 1972 Model Code, and has modified its code several times in the years since. In addition, the Judicial Conference has authorized its Committee on Codes of Conduct to issue Ethics Advisory Opinions, 115 of which are available online.²² The Committee on Codes of Conduct, also known as the “Dear Abby Committee,” also offers confidential advice to judges upon request, in response to ethical questions they raise.

In my view, the Judicial Conference has done a good job of maintaining and explicating its Code. Three members of the federal judiciary participated actively in the 2007 ABA Model Code revision project, which underscores how seriously the federal judiciary takes the project. And the Committee on Code of Conduct’s ongoing efforts underscore that the Judicial Conference regards the Code as more than window-dressing—the Code is being revised and referenced on an ongoing basis.

Although the Judicial Conference is led by the Chief Justice of the United States, its jurisdiction is limited to the lower federal courts. Thus, the Code of Conduct for U.S. Judges applies to all federal judges except justices on the Supreme Court of the United States.²³ And therein lies the problem. I would encourage this subcommittee to consider legislation that calls upon the Supreme Court to promulgate a Code of Conduct applicable to itself.

There are 25,000 judicial officers in the United States, all but nine of whom—the most visible and influential nine in the nation—are subject to a code of judicial conduct. No ethics rule prevents a Supreme Court justice from engaging in political activity, participating in ex parte communications, or joining a club that discriminates based on race, sex, religion, or national origin. Yet ethics rules for all other federal judges forbid these activities.

²⁰ JOHN P. MACKENZIE, *THE APPEARANCE OF JUSTICE* 181–83 (1974).

²¹ Robert Martineau, *Enforcement of the Code of Judicial Conduct*, 1972 UTAH L. REV. 410, 411.

²² *Guide to Judiciary Policy, Vol. 2B, Ch. 2: Published Advisory Opinions* (2016), <http://www.uscourts.gov/sites/default/files/vol02b-ch02.pdf>.

²³ For an analysis and discussion of the issue of applying the Code of Conduct for U.S. Judges to the Supreme Court, see James J. Alfani, *Supreme Court Ethics: The Need for Greater Transparency and Accountability*, 21 PROF. LAW. 10 (2012).

Codes of ethics for judges fortify the administration of justice. They tell judges their ethical responsibilities and articulate high standards of conduct to which they should aspire. They assure litigants that the judges before whom they appear are committed to fairness and impartiality. They require judges to conduct their personal and professional lives in a manner that will foster respect for the courts.

In his 2011 year-end report on the federal judiciary, Chief Justice Roberts said that the Supreme Court did not need to adopt a code of conduct because the justices already “consult” the Code of Conduct for United States Judges, which governs other federal judges.²⁴ I have two concerns. First, it is unrealistic to think that judges will in fact consult a code they have not approved and agreed to follow, as reliably as one they have. Last year, Justice Ruth Bader Ginsburg publicly criticized then presidential candidate Donald Trump, only to express regret for those remarks shortly thereafter, explaining that, “[j]udges should avoid commenting on a candidate for public office.” Canon 5(A)(2) of the Code of Conduct provides that a judge should not “publicly endorse or oppose a candidate for public office.” Had Justice Ginsburg consulted the Code before, rather than after this episode, perhaps the problem could have been avoided.

Second, there is an obvious difference between consulting a code that a justice remains free to disregard, and binding oneself to a code that a justice is committed to follow. Justices Thomas and Scalia were widely criticized for serving as featured speakers at Federalist Society events, given commentary accompanying Canon 4(C) of the Code of Conduct for U.S. Judges, which states that “[a] judge may attend fund-raising events of law-related and other organizations although the judge may not be a speaker, a guest of honor, or featured on the program of such an event.” Insofar as the Code was called to the attention of the justices involved, it was apparently disregarded—which the justices were free to do. There is an argument to make that Supreme Court justices should be permitted to speak at such events: the public’s interest in what they have to say may offset the concern that they are lending the prestige of their offices to advance the interests of the organization that sells more tickets by hosting them. Indeed, the latest version of the ABA Model Code of Judicial Conduct allows judges to speak in such circumstances.²⁵ If the Supreme Court shares the ABA’s view and had simply adopted a code that followed the ABA Model on this point, it could have avoided the perception that its justices were behaving unethically.

Skeptics have argued that it would be an empty gesture for the Supreme Court to adopt a code because there is no workable way to enforce compliance. But the pledge itself has value. Just as the public rightly expects judges to follow their oaths of office, it will also assume that a justice who vows to abide by ethics rules that the Court itself adopted will do so.

²⁴ *2011 Year-End Report on the Federal Judiciary*, <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

²⁵ ABA Model Code of Judicial Conduct, Rule 3.7(A)(4).

The Chief Justice has said that constitutional limits on congressional power to regulate the Supreme Court are largely untested. But the U.S. Constitution delegates to Congress the powers to regulate the Court's appellate jurisdiction and to make laws necessary and proper for "carrying into execution" all powers vested by the Constitution in the government of the United States. Advocates of original intent might note that the founding generation interpreted those powers broadly to permit Congress to regulate the size of the Supreme Court, where, when and how often the Court meets, how many justices constitute a quorum, and the duties of the justices themselves—including a duty to "ride circuit" and hear cases as trial judges. Legislation requiring the Court to write its own code of ethics falls well within this congressional power.

This is not a partisan issue. Judges appointed by presidents of both parties confront ethical dilemmas. Codes of judicial conduct proliferated in the Watergate era amid pervasive suspicion of government that has not dissipated in the ensuing forty years. It would be unfortunate if the only judges in the United States who see no need for a code of ethics were those on the nation's most powerful tribunal.

THE DISCIPLINARY PROCESS AND ITS DISCONNECTION FROM THE CODE OF CONDUCT

In the federal system, circuit judicial councils were established in 1939 to administer the federal courts in each of the regional circuits.²⁶ The circuit judicial councils exercised limited informal regulatory authority over judicial conduct, until their disciplinary role was formalized in 1980, when Congress enacted the Judicial Councils Reform and Judicial Conduct and Disability Act.²⁷ That Act authorized judicial councils in each of the thirteen federal circuits to investigate complaints against federal judges and administer discipline for conduct deemed "prejudicial to the effective and expeditious administration of the business of the courts."²⁸ In 1993, the National Commission on Judicial Discipline and Removal issued a report on the disciplinary system, which concluded that it was working "reasonably well."²⁹

As of the turn of the new millennium, however, circumstances had changed. The infrequency of formal judicial self-discipline aroused suspicion among members of the House Judiciary Committee and the general public. Congressman Sensenbrenner introduced legislation to establish an Inspector General within the Judicial Branch³⁰ to

²⁶ Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 261–71 (1993).

²⁷ Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980).

²⁸ 28 U.S.C. § 351(a).

²⁹ Robert W. Kastenmeier, *Report of the National Commission on Judicial Discipline & Removal*, 152 F.R.D. 265, 280, 362, 363 (1994).

³⁰ Justice for All Act of 2004, Pub. L. No. 108-405 (2004), <https://www.congress.gov/108/plaws/publ405/PLAW-108publ405.pdf>.

oversee the disciplinary process, and the Committee initiated an impeachment inquiry into the conduct of a district judge whose disciplinary proceedings had languished.³¹

The Chief Justice responded by appointing a Committee headed by Justice Stephen Breyer, which issued a report in 2006.³² The Breyer Committee Report found fault with the disciplinary process, particularly in high-profile cases, and recommended reforms that the Judicial Conference implemented in 2008. In 2014, the Judicial Conference Committee on Judicial Conduct and Disability proposed additional changes that the Judicial Conference approved in 2015.³³

I credit this Committee's efforts a decade ago, with jump-starting the disciplinary process that had stalled and fallen into disrepair. Given the Judicial Conference's renewed sense of vigilance, I see no continuing need to add a layer of government in the form of an inspector general.

I do, however, have one lingering concern with the disciplinary process that is better addressed via oversight than legislation. Under the statute, judicial conduct is assessed with reference to whether it is "prejudicial to the effective and expeditious administration of the business of the courts." So general a standard offers no clear guidance as to what does or does not constitute misconduct, and contributes to under-enforcement, insofar as judicial councils are reluctant to impose sanctions on judges for conduct that the judges may not know violates the statute.

There is an easy and obvious solution: the Judicial Conference can tether its interpretation of the statute more tightly to its Code of Conduct. The ABA Model Code of Judicial Conduct expressly states that it is designed for use by judicial conduct organizations in disciplinary proceedings, and its use for that purpose is ubiquitous among state systems. The Judicial Conference, however, has resisted a move in that direction, with the explanation that:

³¹ *Impeaching Manuel L. Real, a Judge of the United States District Court for the Central District of California, for High Crimes and Misdemeanors: Hearing on H. Res. 916 Before the Subcommittee on Courts, the Internet, and Intellectual Property*, 109th Cong. (2006), <https://www.gpo.gov/fdsys/pkg/CHRG-109hrg29969/pdf/CHRG-109hrg29969.pdf>.

³² The Judicial Conduct and Disability Act Study Committee, *Implementation of the Judicial Conduct and Disability Act of 1980*, SUPREME COURT.GOV (2006), <https://www.supremecourt.gov/publicinfo/breyercommitteereport.pdf>.

³³ *Guide to Judiciary Policy, Vol. 2E, Ch. 3: Rules for Judicial-Conduct and Judicial-Disability Proceedings* (2016), <http://www.uscourts.gov/sites/default/files/guide-vol02e-ch03.pdf>. Professor Arthur Hellman analyzes these amendments in *Proposed Amendments to the Federal Judicial Misconduct Rules: Comments and Suggestions* (U. of Pittsburgh Leg. Stud. Research Paper No. 2015-10, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554596. Professor Hellman, who has appeared before this subcommittee numerous times over the years, and with whom the subcommittee would be well advised to consult moving forward, has recommended a number of legislative reforms worth the subcommittee's consideration. See Arthur D. Hellman, *The Federal Judicial Conduct and Disability System: Unfinished Business for Congress and for the Judiciary* (U. of Pittsburgh Legal Studies Research Paper No. 2014-19, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2435287.

Although the Code of Conduct for United States Judges may be informative, its main precepts are highly general; the Code is in many potential applications aspirational rather than a set of disciplinary rules. Ultimately, the responsibility for determining what constitutes misconduct under the statute is the province of the judicial council of the circuit, subject to such review and limitations as are ordained by the statute and by these Rules.³⁴

Such an assessment is patently incorrect: As just noted, state judiciaries across the country routinely rely on code of conduct violations as a basis for discipline. However “highly general” the Code of Conduct may be (and I do not think it is much of the time), it is much less general than the statutory language.

That said, I fully understand where minor or inadvertent Code violations may not give rise to misconduct sufficient to meet the statutory standard and warrant discipline. But I have *never* come upon a case of judicial misconduct warranting discipline that did not violate the Code of Judicial Conduct. Hence, the appropriate approach is to begin with the Code of Judicial Conduct, to determine if it was violated, and if so, whether the violation was egregious enough to meet the statutory standard. Such an approach gives the Code of Judicial Conduct added muscle and reassures the public that the decision to discipline a judge or not is guided by a code, and not just the unguided discretion of the judge’s brethren in the judge’s circuit.

CONCLUSION

The survival of our courts depends on their perceived legitimacy with the people they serve. Federal judges derive legitimacy from the respect they command as a result of their competence, impartiality, independence, and integrity. Those values are promoted through an ethics infrastructure that includes disqualification procedures, codes of judicial conduct, and disciplinary processes. In my view, that infrastructure is sound. The federal judiciary deserves our respect as a corps of honorable and dedicated women and men who are committed to upholding the rule of law. That is not to suggest that there are no problems. There are—and I have made several recommendations. First, I recommend that 28 U.S.C. § 455 be amended to limit the practice of judges “grading their own homework,” by ruling on their own disqualification. Second, I recommend that 28 U.S.C. § 144 be removed or amended to serve its original purpose as a limited mechanism to permit one-time substitution of judges. Third, I recommend legislation that calls upon the Supreme Court of the United States to join every other court in the nation and adopt a code of conduct. Fourth, I recommend that this committee work with the Judicial Conference to clarify its disciplinary standards by tethering them more tightly to the Code of Conduct for U.S. Judges.

³⁴ Guide to Judicial Policy, Ch. 3: Rules for Judicial Conduct and Judicial Disability Proceedings 7 (2016), <http://www.uscourts.gov/sites/default/files/guide-vol02e-ch03.pdf>.