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Judicial Discipline Process: An Overview

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Abstract. The current statutory structure with respect to complaints against federal judges and judicial discipline was enacted on November 2, 2002, as the Judicial Improvements Act of 2002, P.L. 107-273, 28 U.S.C. 351-364. These provisions are applicable to federal circuit judges, district judges, bankruptcy judges and magistrate judges. They do not apply to the justices of the U.S. Supreme Court. The U.S. Court of Federal Claims, the Court of International Trade and the Court of Appeals for the Federal Circuit are each directed to prescribe rules consistent with these provisions to address complaints pertaining to their own judges. The procedures under 28 U.S.C. 351-364 include a complaint process, review of complaints initially by the Chief Judge of the circuit within which the judge in question sits, and, if appropriate, referral of the complaint to a special investigating committee, to a panel of the judicial council of the circuit involved, and, if needed, to the Judicial Conference of the United States. At any point in the process, as deemed appropriate, action may be taken on the complaint. Where a complaint alleges conduct that may rise to the level of impeachable offenses, the Judicial Conference may certify that the matter may warrant consideration of impeachment and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers necessary.

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Summary

The current statutory structure with respect to complaints against federal judges and judicial discipline was enacted on November 2, 2002, as the Judicial Improvements Act of 2002, P.L. 107-273, 28 U.S.C. §§ 351-364. These provisions are applicable to federal circuit judges, district judges, bankruptcy judges and magistrate judges. They do not apply to the justices of the U.S. Supreme Court. The U.S. Court of Federal Claims, the Court of International Trade and the Court of Appeals for the Federal Circuit are each directed to prescribe rules consistent with these provisions to address complaints pertaining to their own judges. The procedures under 28 U.S.C. §§ 351-364 include a complaint process, review of complaints initially by the Chief Judge of the circuit within which the judge in question sits, and, if appropriate, referral of the complaint to a special investigating committee, to a panel of the judicial council of the circuit involved, and, if needed, to the Judicial Conference of the United States. At any point in the process, as deemed appropriate, action may be taken on the complaint. Where a complaint alleges conduct that may rise to the level of impeachable offenses, the Judicial Conference may certify that the matter may warrant consideration of impeachment and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers necessary. This report will be updated as needed.

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The present statutory structure governing complaints against federal judges and judicial discipline where appropriate stems from the Judicial Improvements Act of 2002, P.L. 107-273, Div. C, Title I, Subtitle C, 116 Stat 1856 (Nov. 2, 2002), 28 U.S.C. §§351-364. It replaced judicial discipline procedures in the Judicial Conduct and Disability Act of 1980, as amended, codified at the former 28 U.S.C. § 372(c). The current statutory procedures are applicable to complaints against federal circuit judges, district judges, bankruptcy judges, and magistrate judges. They are not applicable to justices of the U.S. Supreme Court. In addition, the U.S. Court of Federal Claims, the Court of International Trade and the Court of Appeals for the Federal Circuit are each required to prescribe rules, consistent with the provisions in 28 U.S.C. §§ 351-364, establishing procedures for the filing of complaints with respect to the conduct of judges of that court, for investigation of such complaints, and for taking appropriate action with respect to them. In investigating and taking action regarding complaints brought against their respective judges, each of these three courts has the powers granted to a judicial council in dealing with federal circuit judges, district judges, bankruptcy judges or magistrate judges.¹

The judicial discipline process under 28 U.S.C. §§ 351-364 is initiated by the filing of a complaint by any person, alleging that a judge has engaged in conduct “prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such judge is unable to discharge all the duties of the office by reason of mental or physical disability.”² A written complaint containing a brief statement of the pertinent facts is filed with the clerk of the court for the circuit within which the judge sits. Alternatively, the chief judge of the circuit, in the interests of effective and expeditious administration of the business of the courts and based on information available to him or her, may identify a complaint by written order stating the reasons for the complaint.³ The clerk of the court receiving a written complaint promptly transmits that complaint to the chief judge of the circuit unless the complaint concerns the chief judge. In the latter circumstance, the clerk shall transmit the complaint to the circuit judge in regular service on the court who is next most senior in date of commission. That circuit judge would then carry out the responsibilities of the chief judge with respect to that complaint in all matters under this judicial discipline process.⁴

Once a complaint is filed or identified, the chief judge must review it expeditiously to determine whether appropriate corrective action has been or can be taken without the need for a formal investigation, and whether the facts stated in the complaint are either plainly untrue or incapable of establishment through investigation. The chief judge may ask the judge who is the focus of the complaint to file a written response, which is not shared with the complainant unless the judge responding authorizes its disclosure. The chief judge or his or her designee may also communicate orally or in writing with the complainant, the judge who is the focus of the complaint, or anyone else who may have pertinent information; and may also review any transcripts or documentary evidence. The chief judge may not make any findings of fact regarding matters reasonably in dispute. After this review, the chief judge, by written order, may dismiss the complaint if it is not in conformity with the requirements of 28 U.S.C. § 351(a), or if he or she finds that the complaint directly relates to the merits of a decision or procedural ruling or that it is frivolous, that is lacking sufficient evidence to raise an inference that misconduct has

¹ Action by the judicial council of a circuit is addressed in particular in 28 U.S.C. § 354.

² 28 U.S.C. § 351(a).

³ 28 U.S.C. § 351(b).

⁴ 28 U.S.C. § 351(c). For purposes of this discussion, the term “chief judge” will apply to the chief judge, or in the case of a complaint against the chief judge, to the circuit judge handling the complaint against the chief judge.

occurred, or that contains allegations that are incapable of being established through investigation. The chief judge may also conclude the proceeding if he or she finds that appropriate corrective action has been taken or that action on the complaint is no longer needed because of intervening events. Copies of the written order are to be transmitted by the chief judge to the complainant and to the judge involved.⁵ The complainant or the judge involved in the complaint may petition the judicial council of the circuit seeking review of the order of the chief judge. If the petition for review is denied, that decision is final and not subject to review.⁶ The judicial council may refer a petition for review to a panel of at least 5 members of the judicial council, 2 of whom must be U.S. district judges.⁷

If the chief judge does not dismiss the complaint or conclude the proceedings under 28 U.S.C. § 352(b), then he or she must promptly appoint himself or herself, along with equal numbers of circuit judges and district judges, to a special committee to investigate the facts and allegations in the complaint. The chief judge must also promptly certify the complaint and any other pertinent documents to each member of the special committee, and provide written notice of this action to the complainant and the judge involved. The committee must conduct such investigation as it finds necessary and then expeditiously file a comprehensive written report of its investigation with the judicial council of the circuit involved. In conducting its investigation, the special committee has full subpoena powers.⁸ The report of the committee must present both findings of the investigation and recommendations for necessary and appropriate action by the judicial council.⁹

Upon receipt of such a report, the judicial council of the circuit involved has several options available to it. It may conduct any additional investigation it deems necessary, and it may dismiss the complaint.¹⁰ If the complaint is not dismissed, it shall take appropriate action to assure effective and expeditious administration of the business of the courts in the circuit, including ordering that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint; censuring or reprimanding the judge by means of private communication; and censuring and reprimanding the judge by means of public announcement.¹¹ Like the special committee, the judicial council may exercise full subpoena powers in conducting its investigation.¹²

⁵ 28 U.S.C. § 352.

⁶ 28 U.S.C. § 352(c).

⁷ 28 U.S.C. § 352(d). The rules governing the conduct of judicial discipline proceedings by each judicial council or by the Judicial Conference of the United States, including a referral of a chief judge's order for review by a panel of a judicial council, are prescribed by that judicial council or by the Judicial Conference, respectively, under 28 U.S.C. § 358.

⁸ 28 U.S.C. § 356(a), relying upon subpoena powers under 28 U.S.C. § 332(d).

⁹ 28 U.S.C. § 353.

¹⁰ 28 U.S.C. §§ 354(a)(1)(A) and 354(a)(1)(B). If the complaint has been finally dismissed under 28 U.S.C. § 354(a)(1)(B), then, under 28 U.S.C. § 361, upon the request of the judge who is the subject of the complaint, the judicial council may recommend to the Director of the Administrative Office of the U.S. Courts that he award reimbursement for those reasonable expenses, including attorneys' fees, incurred by the judge during the investigation which would not have been incurred but for the requirements of the judicial discipline process. The reimbursement would be drawn from funds appropriated to the Federal judiciary.

¹¹ 28 U.S.C. §§ 354(a)(1)(C) and 354(a)(2).

¹² 28 U.S.C. § 356(a), citing subpoena powers under 28 U.S.C. § 332(d).

If the judge who is the subject of the complaint holds his or her office during good behavior, action taken by the judicial council may include certifying disability of the judge pursuant to procedures and standards under 28 U.S.C. § 372(b); and requesting that the judge voluntarily retire, with the provision that the length of service requirements under 28 U.S.C. § 371 shall not apply.¹³ The judicial council may not order removal from office of any judge appointed to hold office during good behavior.¹⁴

If the focus of the complaint is a magistrate judge, the action taken by the judicial council may include directing the chief judge of the district of the magistrate judge to take such action as the judicial council considers appropriate.¹⁵ Any removal of a magistrate judge by the judicial council must be in accordance with 28 U.S.C. § 631, while any removal by the judicial council of a bankruptcy judge must be in accordance with 28 U.S.C. § 152.¹⁶ The judicial council must provide immediate written notice of the action taken to the complainant and to the judge whose conduct is the subject of the complaint.¹⁷

The judicial council may also, in its discretion, refer any complaint under 28 U.S.C. § 351, along with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States. If the judicial council determines, based on a complaint and related investigation or on other information available to the judicial council, that a judge holding office during good behavior may have engaged in conduct which might constitute one or more grounds for impeachment under Article II, Sec. 4 of the U.S. Constitution, the judicial council must promptly certify its determination, together with any complaint and a record of any associated proceedings to the Judicial Conference of the United States. The judicial council must also promptly certify its determination, along with any complaint and a record of any associated proceedings, to the Judicial Conference if the council determines that a judge holding office during good behavior may have engaged in conduct which, in the interest of justice, is not amenable to resolution by the judicial council. If the judicial council makes a referral to the Judicial Conference of the United States, the judicial council must, unless contrary to the interests of justice, immediately provide written notice of its action to the complainant and to the judge involved.¹⁸ If dissatisfied with an action of the judicial council, the complainant or the judge may petition the Judicial Conference for review of that action. The Judicial Conference, or, should the Conference so choose, a standing committee appointed by the Chief Justice under 28 U.S.C. § 331 to exercise its authority under the judicial discipline process, may grant a petition filed by a complainant or a judge aggrieved by an action of the judicial council. If a petition for review is denied, that decision is final and conclusive and not subject to judicial review.¹⁹

Upon receipt of a referral or certification, the Judicial Conference considers any prior proceedings and engages in such further investigation as it deems appropriate. The Judicial Conference may exercise its authority under the judicial discipline provisions as a Conference, or through a standing committee appointed by the Chief Justice under 28 U.S.C. § 331. In conducting any investigation under the judicial discipline process, the Judicial Conference, or a standing

¹³ 28 U.S.C. § 354(a)(2)(B).

¹⁴ 28 U.S.C. § 354(a)(3). *Cf.*, U.S. Const., Art. III, Sec. 1 (life tenure during good behavior.)

¹⁵ 28 U.S.C. § 354(a)(2)(C).

¹⁶ 28 U.S.C. § 354(a)(3)(B).

¹⁷ 28 U.S.C. § 354(a)(4).

¹⁸ 28 U.S.C. § 354(b).

¹⁹ 28 U.S.C. § 357.

committee appointed by the Chief Justice for the purpose, may exercise full subpoena power under 28 U.S.C. § 356(b). After having reviewed the information before it, the Judicial Conference, by majority vote, may, if the complaint is not dismissed, take such action as is appropriate to assure the effective and expeditious administration of the business of the courts. This may include ordering that, on a temporary basis for a time certain, no further cases be assigned to the judge involved; censuring or reprimanding the judge by means of private communication; and reprimanding the judge by means of public communication. If the judge involved holds his or her office during good behavior, the options available to the Judicial Conference may include certifying disability of the judge under 28 U.S.C. § 372(b); and requesting the judge voluntarily retire, with the provision that the length of service requirements under 28 U.S.C. § 371 not apply. If the judge is a magistrate judge, the Judicial Conference may direct the chief judge of the district of the magistrate judge to take such action as the Judicial Conference deems appropriate.²⁰

If the Judicial Conference concurs in the judicial council's determination that impeachable offenses may be involved, or if the Judicial Conference makes its own determination that consideration of impeachment may be warranted, the Conference must certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House considers necessary. When the Judicial Conference's determination and record of proceedings are received by the House of Representatives, the Clerk of the House must make that determination and any reasons for the determination available to the public.²¹

If a judge has been convicted of a felony under federal or state law and has exhausted all avenues of direct review of that conviction, or if the time for direct review has passed and no review has been sought, the Judicial Conference, by majority vote and without any referral or certification from the relevant judicial council under 28 U.S.C. § 354, may transmit a determination that impeachment may be warranted, together with relevant court records, to the House of Representatives for whatever action the House deems necessary.²² If a judge has been convicted of a federal or state felony and has exhausted direct appeals of the conviction or if the time to seek further direct review has passed and no such review has been sought, then that judge shall not hear or decide cases unless the judicial council of the circuit in the case of federal circuit judges, district judges, bankruptcy judges or magistrate judges; or the U.S. Court of Federal Claims, the Court of International Trade, or the Court of Appeals of the Federal Circuit, respectively, in the case of a judge of one of those courts, determines otherwise. No service of such a convicted judge, once the conviction is final and the time for appeals has expired, may be included for purposes of determining years of service under 28 U.S.C. §§ 371(c), 377, or 178, or creditable service under 5 U.S.C., chapter 83, subchapter III, or chapter 84.²³

No judge whose conduct is the subject of an investigation under 28 U.S.C. §§ 351-364 may serve on a special committee under 18 U.S.C. § 353, upon a judicial council, upon the Judicial Conference, or upon a standing committee established under 28 U.S.C. § 331, until all proceedings relating to that investigation have been completed. Nor may anyone intervene or

²⁰ 28 U.S.C. § 355(a), cross-referencing 28 U.S.C. §§ 354(a)(1)(C) and 354(a)(2).

²¹ 28 U.S.C. § 355(b)(1).

²² 28 U.S.C. § 355(b)(2).

²³ 28 U.S.C. § 364.

appear as amicus curiae in any judicial discipline proceeding before a judicial council or the Judicial Conference.²⁴

Except for the public disclosure, under 28 U.S.C. § 355, by the Clerk of the House of Representatives of a determination by the Judicial Conference in a given case that impeachment may be warranted and any reasons for that determination, all papers, documents, and records of proceedings related to judicial discipline proceedings under 28 U.S.C. §§ 351-364 are to be kept confidential and not disclosed to any person in any proceeding unless certain criteria are met. Disclosure is permitted to the extent that (1) the judicial council of the circuit in its discretion releases a copy of a report of a special committee under 28 U.S.C. § 353(c) to the complainant and to the judge who is the subject of the complaint; (2) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House by resolution, releases any such material believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution; or (3) such disclosure is authorized in writing by the judge who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under 28 U.S.C. § 331. Each written order to implement any action on a complaint under 28 U.S.C. § 354(a)(1)(C), which is issued by a judicial council, the Judicial Conference, or the standing committee established under 28 U.S.C. § 331, is to be made available to the public through the clerk's office of the court of appeals for the circuit involved. Unless contrary to the interests of justice, each order must be accompanied by written reasons supporting it.²⁵

Statistical information is available regarding judicial complaints filed and action taken on them under "Judicial Business of the United States Courts" in the *Annual Report of the Director of the Administrative Office of the United States Courts*. In FY2004, 712 complaints were filed, 784 were concluded, and 177 were pending at the end of the fiscal year. Of those concluded, chief judges terminated 449 complaints, while judicial councils terminated 335. Of those concluded by chief judges, 66 percent were found not covered by 28 U.S.C. §§ 351-364 because they were directly related to the merits of decisions or procedural rulings. The remainder were terminated because they "did not conform with the statute, they were frivolous, appropriate action already had been taken, action was no longer necessary, or the complaint had been withdrawn."²⁶ Of the complaints that were addressed by judicial councils, all but two were terminated following review of a chief judge's dismissal, while the two remaining were concluded after reports made by an investigative committee. All of the complaints addressed by judicial councils in FY2004 were dismissed.²⁷

²⁴ 28 U.S.C. § 359.

²⁵ 28 U.S.C. § 360.

²⁶ 2004 Annual Report of the Director of the Administrative Office of the United States Courts at 32-33. The annual reports from 1997-2004 may be accessed on line at <http://www.uscourts.gov/judbususc/judbus.html>. Those reports predating passage of 28 U.S.C. §§ 351-364, deal with complaints under former 28 U.S.C. § 372(c).

²⁷ *Id.*

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