

Selected pages from:

<http://www.supremecourtus.gov/publicinfo/breyercommitteereport.pdf>

(Full document = 188 pp.)

# Implementation of the Judicial Conduct and Disability Act of 1980

## *A Report to the Chief Justice*

The Judicial Conduct and Disability Act Study Committee

Stephen Breyer, *Chair*

*Associate Justice, Supreme Court of the United States*

Sarah Evans Barker

*U.S. District Judge, Southern District of Indiana*

Pasco M. Bowman

*Senior U.S. Circuit Judge, Eighth Circuit*

D. Brock Hornby

*U.S. District Judge, District of Maine*

Sally M. Rider

*Administrative Assistant to the Chief Justice*

J. Harvie Wilkinson III

*U.S. Circuit Judge, Fourth Circuit*

September 2006

# Contents

---

<b>Foreword and Executive Summary, 1</b>
The Committee's charge, 1
Resources, 2
The Committee's method, 2
Major conclusions, 5
Findings, 6
Recommendations, 8
<b>Chapter 1: Committee Creation and Activities; Previous Studies; Act Provisions, 11</b>
The Committee, 11
Previous studies of the Act and its administration, 13
The Act's major provisions, 14
Illustrative Rules and Committee Standards, 17
<b>Chapter 2: Complaints Terminated; Source, Nature and Object; Types of Dispositions, 2001–2005, 19</b>
Source of data, 19
Complaints terminated, 20
Errors in the circuit-reported data, 30
<b>Chapter 3: How the Judicial Branch Administers the Act—Process, 31</b>
Providing information about the Act, 31
Initial analysis of the complaint, 33
Limited inquiries, 35
Monitoring petitions for review, 37
<b>Chapter 4: How the Judicial Branch Administers the Act—Results, 39</b>
Overall considerations, 40
593-case sample, 41
100-case sample, 66
Disposition of high-visibility complaints, 67
Comparison of assessments, comments, 95
<b>Chapter 5: Activity Outside the Formal Complaint Process, 99</b>
Extent of informal activity, 101
Typical objects of informal activity, 101
Dealing with problems not likely to produce complaints under the Act, 102
Possible other approaches, 103
<b>Chapter 6: Recommendations, 107</b>
Principal findings, 107
Summary of recommendations, 109
Recommendations aimed primarily at enhancing chief judges' and council members' ability to apply the Act, 109

Recommendations to encourage public and bar knowledge of the Act and its appropriate use,	119
Recommendations to promote accurate understanding by legislators, press, public, and judges of how the Act is (and should be) administered,	121
Clarifying the authority of the Conference vis-à-vis its Review Committee,	123
Programs to make counseling available to all judges in all circuits,	124
Additional commentary,	124
Summary of recommendations concerning the administration of the Act,	125
<b>Endnotes,</b>	<b>127</b>
<b>Figures</b>	
1 Flowchart of Major Steps in Complaint Processing,	15
2 Complaints Terminated by Year, 1982–2005,	22
<b>Tables</b>	
1 Complaints Terminated in 2001–2005,	21
2 Types of Complainants,	23
3 Types of Judges Named in the Complaints,	24
4 Annual Rate of Complaints for Different Types of Judges,	25
5 Types of Allegations,	26
6 Time to Disposition by Chief Judge,	27
7 Reasons Given in Chief Judge Dismissal Orders,	28
8 Special Committees and Council Action,	29
9 Percentage of Orders Restating Allegations and Giving Reasons, 2002 and 2004,	35
10 Types of Limited Inquiries in 593-Case Sample, 2001–2003,	37
11 Complaints in 593-Case Sample,	42
12 Filers and Dispositions in Sample and Population,	42
13 Distribution of Complaints in the Sample, by Circuit,	43
14 Filers and Dispositions in 100-Case Sample,	66
15 Distribution of Complaints in the 100-Case Sample, by Circuit,	66
16 Problematic Dispositions in Complaints Committee Examined, and Those Examined in the 1993 Study,	95
17 Measures of Circuit Judge Workload,	96
18 Summary of Committee Recommendations,	126
<b>Appendices</b>	
A Announcement of Committee Appointment,	131
B Committee Members,	133
C Key Staff,	135
D Judicial Conduct and Disability Act,	137
E Committee Standards for Assessing Compliance with the Act,	145
F AO Form 372,	153
G Tables 11 and S-22, <i>Judicial Business of the United States Courts</i> (2005),	155
H Selected Court of Appeals and District Court Website Homepages,	159
I Forms Used for Committee Review of Terminations,	161

# Foreword and Executive Summary

---

## The Committee's charge

The Judicial Conduct and Disability Act authorizes any person to file a complaint alleging that a federal judge has engaged in conduct “prejudicial to the effective and expeditious administration of the business of the courts.” The Act also permits any person to allege conduct reflecting a judge’s inability to perform his or her duties because of “mental or physical disability.”

In 2004, Chief Justice William H. Rehnquist pointed out that there “has been some recent criticism from Congress about the way in which the Judicial Conduct and Disability Act of 1980 is being implemented.” The Chief Justice consequently created this Committee to look into the matter. He appointed to the Committee three judges who as former circuit chief judges had had considerable experience administering the Act, two district court judges who have served as chief judges and as members of their circuits’ judicial councils, and his administrative assistant, with experience in judicial branch administration. He asked the Committee to examine the Act’s implementation, particularly in light of the recent criticism, and to report its findings and any recommendations directly to him. Chief Justice John G. Roberts, Jr., asked the Committee to continue its work.

The federal judiciary, like all institutions, will sometimes suffer instances of misconduct. But the design of any system for discovering (and assessing discipline for) the misconduct of federal judges must take account of a special problem. On the one hand, a system that relies for investigation upon persons or bodies other than judges risks undue interference with the Constitution’s insistence upon judicial independence, threatening directly or indirectly distortion of the unbiased handling of individual cases that Article III seeks to guarantee. On the other hand, a system that relies for investigation solely upon judges themselves risks a kind of undue “guild favoritism” through inappropriate sympathy with the judge’s point of view or de-emphasis of the misconduct problem.

In 1980, Congress, in the Judicial Conduct and Disability Act, sought to create a discipline system that would prove effective while taking proper account of these competing risks. The Act creates a complex system that, in essence, requires the chief judge of a circuit to consider each complaint and, where appropriate, to appoint a special committee of judges to investigate further and to recommend that the circuit judicial council assess discipline where warranted. In a word, the Act relies upon internal judicial branch investigation of other judges, but it simultaneously insists upon consideration by the chief circuit judge and members of the circuit judicial council, using careful procedures and applying strict statutory standards.

The basic question presented is whether the judiciary, in implementing the Act, has failed to apply the Act strictly as Congress intended, thereby engaging in institutional favoritism. This question is important not only to Congress and the public, but to the judiciary itself.

The Committee soon realized that the only way it could answer this question was to review the complaints themselves, bringing its own judgment to bear upon other judges' handling of those complaints. The Committee sought, through statistical sampling, the use of strict objective standards, and the use of experienced staff, to make its own assessment as objectively as possible.

The question is a narrow one. It does not ask us to rewrite the Act, and none of our recommendations requires statutory amendment. It does not ask us to consider revisions of the ethical rules governing judicial conduct, or to study other similar proposals for change. It does not seek comparisons with state, foreign, or other disciplinary systems. It does not demand the assistance of academic experts. It does require us to undertake a practical task, namely to examine the actual implementation of the Act in practice and to provide the Chief Justice with our conclusions and recommendations for improvement.

We are aware of news reports alleging various ethical improprieties, such as judges' failures to report reimbursement for attending privately sponsored seminars and judges' failures to recuse in cases where they own stock. These issues are important ones. They may well merit inquiry. And we recognize that the Judicial Conference of the United States has asked other committees to make recommendations about these matters. They do not fall within the mandate of this Committee. Complaints, though, are nevertheless filed under the Act alleging that judges failed to recuse themselves when their financial holdings created conflicts of interest. Thus, after we present our recommendations, we endorse consideration of requiring judges to use conflict-avoidance software to reduce the number of recusal complaints filed under the Act.

## Resources

The Committee received no special funding. The Committee was assisted by experienced staff from the Federal Judicial Center and the Administrative Office of the United States Courts. We thank them for their work.

## The Committee's method

The Committee initially examined individual instances in which members of Congress had complained (to the Judicial Conference and the public) about the handling of allegations of judicial misconduct. This initial informal examination suggested that, in some of those instances, the judiciary's own handling of the complaint may

have been problematic. This indicated a need to determine how serious any such implementation problems were and how frequently they occurred. In particular, did the problems that had come to public attention so far amount only to the “tip of the iceberg”? In other words, were problems occurring frequently when the judiciary processed complaints brought under the Act?

The Committee determined that it must first evaluate that “iceberg,” i.e., how the judiciary handled the vast number of complaints filed, few of which would ever come to public notice. The total number of complaints filed each year, however, averages over 700. That number is not large compared to the total number of cases handled in the federal system annually (over 2 million in 2005—appeals, civil, criminal, and bankruptcy); but the number is large when considered in light of the Committee’s own ability to determine whether the courts have properly handled the complaint—an exercise that typically requires careful examination of the individual complaint and its disposition. Many complaints are handwritten, lengthy, and difficult to decipher. The Committee could not itself review the complaints filed over, say, three years—more than 2,000. Nor could it completely delegate to its staff the work of reexamining and evaluating the decisions of chief judges and the members of circuit councils—both because the staff was small and because the very point of the Committee was to obtain a judicial evaluation of those judge-made decisions.

Ultimately the Committee asked its staff of experienced researchers to design, and the Committee then approved, a research plan that would enable it to examine both (1) the vast bulk of complaints that receive little or no public notice, and (2) the very few “high-visibility” complaints. We began by examining the complaints resolved in the three years immediately prior to our appointment—a period during which more than 2,000 complaints were resolved. From this group of 2,000 cases, we created two samples. The first (the “stratified sample”) consisted of 593 cases drawn from the 2,000 that included *all* of those complaints most likely to have merit (those filed by attorneys, for example) and a random sample of other complaints. The second sample consisted of 100 cases drawn completely at random from the 2,000. As our research progressed, we decided to look at a third, far-smaller group of “high-visibility” complaints, i.e., those complaints that had received some public attention. For that third group, we looked at five years (not three years): cases from 2001 through 2005. We identified 17 cases—16 in which complaints had been filed or initiated by the chief judge and one case in which a complaint had not been filed but arguably should have been initiated and considered by the chief judge.

In order to evaluate the cases, we developed a set of “Standards for Assessing Compliance with the Act.” We based those Standards on the Act itself and upon orders of chief circuit judges and judicial councils implementing the Act. Staff researchers and the members of the Committee used those Standards to assess whether each complaint had, or had not, been properly handled. As the Committee’s work continued, the Committee revised the Standards slightly in light of experience to make clear that to be “inherently incredible” an allegation need not be literally impossible,

to clarify the standards for examining the merits of a judge's written opinion, and to add a Standard concerning chief judges' initiation of complaints (what the Act calls "identifying" a complaint).

In order to ensure that the researchers were applying the Committee Standards in the way that the Committee's judicial members would apply them, after the Committee staff examined 300 of the 593 cases in the stratified sample, the Committee reviewed 53 of them—40 drawn at random and all 13 that the researchers had identified up to that time as problematic. ("Problematic" means not that the complaint was meritorious, but that the handling of the complaint deviated from the Act's requirements; "problematic" includes, for example, dismissals without adequate investigation or for the wrong reasons.) We agreed unanimously with the researchers where they determined that handling was "nonproblematic"; we also agreed with the researchers unanimously or by a majority in respect to the 13 instances they had labeled problematic.

When the researchers concluded their review of all 593 cases, they had identified 25 as problematic. The Committee reviewed all 25. It agreed with the researchers in respect to 20 of the 25. The Committee also examined without comment from staff the 100 complaints drawn at random. The Committee identified two of those instances as involving problematic handling.

The Committee then conducted a separate assessment of the judiciary's handling of the "iceberg's tip," namely cases that had received some public notoriety. We looked for such cases by examining national and regional news sources over a five-year period. We found 17, including five that had been included in the three-year 593-case stratified sample. We had already found that two of those five cases involved problematic handling.

We then considered (or reconsidered) each of the 17 cases individually, first through examination by staff applying the same Committee Standards previously applied and then by the entire Committee proceeding case by case. The Committee ultimately determined that five of the 17 cases involved problematic handling.

In addition to the research already described, the judges on the Committee interviewed all current chief judges and one judge who had just stepped down as chief judge. Committee staff interviewed current and former chief circuit judges and circuit staff at length, and the Committee reviewed detailed reports of those interviews. And staff reviewed other relevant materials, such as information about the Act available on circuit and district court websites, and allegations of judicial misconduct sent to Congress and contained in the files of the House Committee on the Judiciary.

## Major conclusions

The Committee has reached two major conclusions. First, the chief circuit judges and judicial councils have properly implemented the Act in respect to the vast majority of the complaints filed, what we have referred to as the bulk of “the iceberg.” The Committee sought to determine whether each complaint in the samples was properly reviewed and resolved in accordance with the Act’s criteria. The Committee found that the relevant error rate, i.e., that of failing properly to process such complaints, is about 2% to 3%. While a perfectly operating system remains the goal, the Committee recognizes that no human system operates perfectly; some error is inevitable. And the Committee is unanimous in its view that a processing error rate of 2% to 3% does not demonstrate a serious flaw in the operation of the system—given the number of complaints filed, their occasional lack of clarity, and the judgmental nature of the decision as to whether further inquiry is required. Further, the Committee Standards are strict and we applied them strictly. For example, some complaints make far-fetched, but not totally implausible, allegations of fact, such as a complaint that alleged that an intern had impersonated a judge on the bench. Because the complaint pointed out that the hearing had been tape-recorded and listed specific witnesses, we concluded in that case that the chief judge could have checked, or directed circuit staff to check, the factual basis for the complaint and should have done so.

In sum, we find no serious problem with the judiciary’s handling of the vast bulk of complaints under the Act. The federal judiciary handles more than 2 million cases annually; 700 users of the system file complaints; the handling of 2% to 3% of those is problematic. We find this last number reflective of the difficulties of creating an error-free system. We nonetheless make suggestions that we believe will reduce this last-mentioned number further. But we conclude that there is no problem-riddled “iceberg” lurking below the “high-visibility” surface.

Second, we have separately assessed high-visibility cases—those that have received national or regional press coverage, including matters that have come to the attention of (or been filed by) members of Congress. Such cases were few—we identified 17 over a five-year period. But we found the handling of five of them problematic. The proper handling of high-visibility complaints has particular importance. Because the matters at issue have received publicity, the public is particularly likely to form a view of the judiciary’s handling of all cases upon the basis of these few. And the mishandling of these cases may discourage those with legitimate complaints from using the Act. We consequently consider the mishandling of five such cases out of 17—an error rate of close to 30%—far too high.

## Findings

Chapters 2 through 5 of this report each contain a set of findings. Those findings include:

### *Chapter 2: Complaints Terminated; Source, Nature, and Object; Types of Dispositions, 2001–2005*

1. The number of terminated complaints peaked in 1998 and has hovered between 600 and 800 per year since then.
2. Almost all complaints are filed by prisoners or litigants.
3. Almost all complaints allege misconduct rather than disability.
4. Almost all complaints are dismissed by the chief judge; 88% of the reasons given for dismissal are that the complaint relates to the merits of a proceeding or is unsubstantiated.
5. The circuits vary considerably in the time they take to terminate complaints.
6. There are mistakes in the data that circuits submit to the Administrative Office of the U.S. Courts for national statistical reports on the Act's administration; perhaps most serious, for the period we examined, the circuit data underreported the number of special committees that chief judges appointed.

### *Chapter 3: How the Judicial Branch Administers the Act—Process*

1. Many courts do not use their websites to provide the public with information about the Act and about how to file a complaint.
2. In most circuits, staff in the clerk's office or in the circuit executive's office analyze complaints and present them to the chief circuit judge, often with a draft order.
3. Chief judges report that, consistent with the Act, they reserve for themselves decisions whether to undertake further inquiries about complaint allegations, e.g., seeking a response from the judge, speaking to witnesses, or other inquiries that go beyond simple inspection of routine documents.
4. In the 593-case sample (i.e., the sample that overrepresents complaints most likely to allege conduct that the Act covers):
  - chief judge orders were ordinarily consistent with the statutory requirement that they state reasons and with Judicial Conference policy that they restate the complaint's allegations; and
  - in about half the instances chief judges undertook limited inquiries—the most common limited inquiry took the form of an examination of the record in the underlying court case.

*Chapter 4: How the Judicial Branch Administers the Act—Results*

1. Overall, terminations that are not consistent with our understanding of the Act's requirements are rare, amounting to about 2% to 3% of all terminations.
2. Chief circuit judges' rate of problematic dispositions is consistent with the rate reported in 1993 (for the period 1980–1991) by the National Commission on Judicial Discipline and Removal, despite the substantial increase since 1991 in the per-judge caseload of circuit judges (including chief judges) as well as in the number of complaints with which chief circuit judges must deal.
3. The rate of problematic dispositions is significantly higher, about 29%, for complaints that have come to public attention. The higher rate may reflect the greater complexity of such cases and less familiarity with their proper handling as a result of their infrequent occurrence. The high rate in such cases is of particular concern because it could lead the public to question the Act's effectiveness, and it may discourage the filing of legitimate complaints.
4. Most of the dispositions labeled "problematic" were problematic for procedural reasons, in particular the chief judge's failure to undertake an adequate inquiry into the complaint before dismissing it. We did not attempt to determine whether appropriate handling would have changed the substantive outcome.

*Chapter 5: Activity Outside the Formal Complaint Process*

1. Based primarily upon our interviews, we conclude that informal efforts to resolve problems remain (as the Act's sponsors intended) the principal means by which the judicial branch deals with difficult problems of judicial misconduct and disability.
2. The main problems that the informal efforts seek to address are decisional delay, mental and physical disability, and complaints about the judge's temperament.
3. The 1993 *Report of the National Commission on Judicial Discipline and Removal* recommended that committees of local lawyers serve as conduits between lawyers and judges to communicate problems of judicial behavior. The Judicial Conference endorsed the proposal but few committees have been created.
4. The Ninth Circuit has created a program to make counseling available at all times both to judges who may benefit from it and to other judges who may seek guidance as to how to deal with colleagues. Ninth Circuit judges report that the program has proved successful.

## Recommendations

1. The Judicial Conference should authorize the chair of its Review Committee, or a designee, to provide advice and counsel regarding the implementation of the Act to chief circuit judges and judicial councils. The role of the Committee, while advisory, should be sufficiently vigorous to address and ameliorate the kinds of problematic terminations, especially in high-visibility cases, that we describe in our report.
2. In dealing with chief judges and judicial councils in this more aggressive advisory role, Review Committee members should stress the desirability, in appropriate cases, of (1) chief judges' identifying complaints, (2) transferring complaints for handling in other circuits, and (3) appointing special investigative committees.
3. The Review Committee (aided by the Federal Judicial Center) should help chief circuit judges, judicial council members, and circuit staff—especially those new to their positions—to understand and administer the Act. This assistance should consist, at least, of (1) an individual in-court orientation program for new chief judges and (2) the development and maintenance of materials, including a compendium, based on chief judges' and councils' interpretations of the Act, designed to facilitate learning from past experience.

The orientation program and materials should emphasize, among other things, (1) the role of special committees, including their powers and limitations; (2) the meaning of statutory terms; (3) the chief judge's authority in an appropriate instance to identify a complaint, particularly where alleged misconduct has come to the public's attention through press coverage or other means; and (4) the desirability in an appropriate instance to transfer a complaint for handling outside the circuit and the mechanisms for doing so.

4. The Judicial Conference should ask its Review Committee to make available (on [www.uscourts.gov](http://www.uscourts.gov)) illustrative past and future chief judge dismissal orders and judicial council orders, appropriately redacted, in order to inform chief judges, judicial council members, and interested members of the media and the public how chief judges and councils have terminated complaints and why. Circuit staff should be encouraged to send orders promptly to be considered for public availability.
5. Circuit councils should ask all courts in the circuit to encourage the formation of committees of local lawyers whose senior members can serve as intermediaries between individual lawyers and the formal complaint process.
6. Circuit councils should require all courts covered by the Act to provide information about filing a complaint on the homepage of the court website, as well as to take other steps to publicize the Act's availability.

7. Circuit councils, through their circuit executives or the clerks of court, should take steps to ensure the submission of timely and accurate information about complaint filings and terminations.
8. The Administrative Office should refine two aspects of its annual report on the Act's administration. Table 11 should tally the number of special committees appointed each year. Table S-22 should report council actions in the same way that Table 11 does.
9. The Judicial Conference Review Committee should consider periodic monitoring of the Act's administration.
10. The Federal Judicial Center should seek to ensure that all judges understand the Act and how it operates.
11. The Judicial Conference should make clear that it possesses the authority to review its Review Committee decisions on appeal by complainants and judges from judicial council orders.
12. The councils and Judicial Conference should consider giving support to programs that provide telephonic or similar assistance for chief judges and others where judicial disability or lack of judicial temperament is at issue.

As noted earlier, committees of the Judicial Conference are examining other matters that fall under the rubric of "judicial ethics" but that do not directly involve the administration of the Judicial Conduct and Disability Act. One matter is compliance with statutory standards mandating a judge's recusal from a case when he or she has any financial holding in the parties in litigation. Although recusal decisions are almost always merits-related and thus not covered by the Act, litigants (and sometimes others) nevertheless file complaints alleging improper failure to recuse, and chief judges must act on the complaints even if only to dismiss them. To reduce this unnecessary burden, we encourage the Judicial Conference to consider mandating use of conflict-avoidance software and other steps to reduce potential conflicts of interest and complaints over failure to recuse. Our report notes other steps courts have taken to try to reduce other judicial behavior that produces either complaints under the Act or is presented to chief circuit judges informally, such as local rules designed to avoid circuit judges' delay in producing opinions assigned to them.

The body of this report and its appendices describe in detail our examination of the Act's implementation and set forth the bases for these findings and recommendations.

# Chapter 1

---

## Committee Creation and Activities; Previous Studies; Act Provisions

Congress enacted the Judicial Conduct and Disability Act in 1980.<sup>1</sup> The Act permits any person to file a complaint alleging misconduct by a federal judge or a federal judge's inability to discharge the duties of office because of a mental or physical disability and describes how such complaints are to be treated.

### The Committee

*Committee creation*—On May 25, 2004, Chief Justice Rehnquist appointed this six-member Committee to assess how the judicial branch has administered the Act. The Chief Justice said “[t]here has been some recent criticism from Congress about the way in which the Judicial Conduct and Disability Act of 1980 is being implemented, and I decided that the best way to see if there are any real problems is to have a committee look into it.” (See Appendix A.) Chief Justice Roberts asked the Committee to continue its work.

*Members*—Chief Justice Rehnquist appointed Associate Supreme Court Justice Stephen Breyer (chair), District Judge Sarah Evans Barker of the Southern District of Indiana, Senior U.S. Circuit Judge Pasco M. Bowman of the Eighth Circuit, U.S. District Judge D. Brock Hornby of the District of Maine, U.S. Circuit Judge J. Harvie Wilkinson III of the Fourth Circuit, and Sally M. Rider, administrative assistant to the Chief Justice. All appellate judges on the Committee had served as chief judges of their courts of appeals, and thus as chairs of their circuit judicial councils and members of the Judicial Conference of the United States. Both district judges on the Committee had served as members of the Judicial Conference and of its Executive Committee, and as members of their circuits' judicial councils. Ms. Rider was a litigator in the District of Columbia for 13 years, then served as Chief Justice Rehnquist's administrative assistant from August 2000 until September 2005, and she currently serves Chief Justice Roberts in the same capacity. Appendix B has biographical summaries for the Committee members.

*Staff and budget*—Chief Justice Rehnquist requested the directors of the Administrative Office of U.S. Courts and the Federal Judicial Center to assign members of the agencies' staffs to assist us. Four Center employees and one Administrative Office employee provided principal support, and other staff of both agencies provided ad-

ditional assistance, including Federal Judicial Center editorial assistance. Appendix C has biographical information about key staff.

We did our work with no special appropriation or grant of funds. The Federal Judicial Center and Administrative Office absorbed the salary and travel costs of their employees' work for the Committee; the Center funded several small contract research projects. Committee members' travel for meetings came from funds appropriated for the operation of the courts. Our individual interviews with chief circuit judges took place when members and chief judges were both in Washington for other business, or by telephone.

*The Committee's assignment*—Chief Justice Rehnquist asked us to examine, in his words, “the way in which the Judicial Conduct and Disability Act of 1980 is being implemented.”

Because the great majority of complaints are resolved by dismissal by chief circuit judges, the central task was to assess the degree to which the actions of chief judges (and on rare occasion, judicial councils) complied with the Act.

We undertook both quantitative and qualitative research to inform our assessment of the Act's implementation by

- assessing the number and types of complaints filed and the types of dispositions provided by chief judges and judicial councils for statistical reporting years 2001 through 2005, based primarily on data supplied by the Administrative Office of the U.S. Courts (see Chapter 2);
- documenting the processes and procedures that chief judges, judicial councils, and their staffs use to process complaints filed under the Act, based largely on our interviews and our staff's interviews of current and former chief circuit judges, and circuit staff, and also surveying court websites to learn how, if at all, the websites provide information about the Act (see Chapter 3);
- analyzing three different sets of complaint dispositions for compliance with the Act and measuring the actions of chief judges and judicial councils against standards we developed for assessing compliance with the Act (see Chapter 4); and
- seeking to learn, through our interviews, about informal efforts to identify and resolve allegations of misconduct and disability (see Chapter 5).

We present recommendations in Chapter 6.

The Committee met five times, each time in Washington, D.C., starting with an organizational meeting on June 10, 2004. The last meeting was on June 28, 2006, to review findings and recommendations for this final report.

As of August 14, 2006, we received 105 unsolicited submissions from 48 individuals (for example, one individual sent us six separate packets over several months objecting to a chief judge's dismissal of his complaint, which we later realized was

case C-9, discussed in Chapter 4). Of the 48 individuals who communicated by letter or fax, as best we can determine:

- 22 protested a judicial decision or sent copies of filings in litigation;
- nine protested the disposition of a misconduct complaint under the Act;
- five alleged federal judicial misconduct (e.g., bias or conspiracy);
- 11 alleged misconduct by state judges or non-judicial officials (e.g., a U.S. attorney); and
- five asked to meet with the Committee.

We sent a postcard acknowledging receipt of each submission and giving the citation of the Act as the proper vehicle for filing misconduct and disability complaints; because we had no authority to act on individual complaints, we took no other action.

## Previous studies of the Act and its administration

The Act's administration has been the object of one major inquiry: that of the National Commission on Judicial Discipline and Removal, which Congress created in 1990<sup>2</sup> and which filed its report in 1993.<sup>3</sup> The Commission's statutory charge, size, and funding, and thus its report and numerous supporting studies, went well beyond our narrower mandate: The report and studies covered the varied means available and potentially available to Congress and the executive branch in dealing with judicial misconduct and disability, as well as the administration of the 1980 Act and related actions within the judicial branch. The Commission made various recommendations, principally to the judicial branch, concerning the Act, its administration, and related matters, most of which have been implemented.

As to the Act's administration, the Commission observed:<sup>4</sup>

It would be surprising if a rigorous evaluation of experience under the 1980 Act had unearthed no instances where those charged with its implementation failed to treat complaints with the seriousness they deserved. The Commission identified such instances, but not many.

The Commission based this conclusion on its own analysis, informed by several research inquiries undertaken for the Commission, including Jeffrey Barr's and Thomas Willging's Federal Judicial Center study of chief judges' disposition of complaints and their informal resolution of allegations,<sup>5</sup> Charles Geyh's analysis of methods of judicial discipline other than those provided in the Act,<sup>6</sup> and Richard Marcus's review of public orders relating to complaints and the products of the Barr/Willging interviews.<sup>7</sup>

In 2002, the chair and ranking member of the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property asked the Federal Judicial Center for some follow-up research on chief circuit judge orders dismissing complaints, which

the study found were generally in compliance with a specific statutory requirement and another Judicial Conference recommendation.<sup>8</sup>

Beyond the National Commission report, supporting research, and the 2002 FJC follow-up study of the Act's administration, there have been several case studies on the disposition of highly publicized complaints filed under the Act in the 1980s,<sup>9</sup> and at least two articles describing how real or asserted misconduct or disability problems were handled informally in the shadow of the Act.<sup>10</sup>

## The Act's major provisions

Congress enacted the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 to make circuit judicial councils more effective governance agencies by broadening their membership and enhancing their authority, including providing a formal means by which individuals could seek review of judicial behavior apart from decisions in cases. The sections that constitute the Judicial Conduct and Disability Act came after more than ten years of debate about the most appropriate federal judicial administrative structure to receive and process complaints of judicial misconduct and disability and the constitutional permissibility of various types of sanctions that could be statutorily authorized.<sup>11</sup> The Act has been amended only twice. Congress enacted minor revisions in 1990,<sup>12</sup> and in 2002 recodified the Act as a separate chapter in title 28.<sup>13</sup> Appendix D reproduces the Act in its codified form.

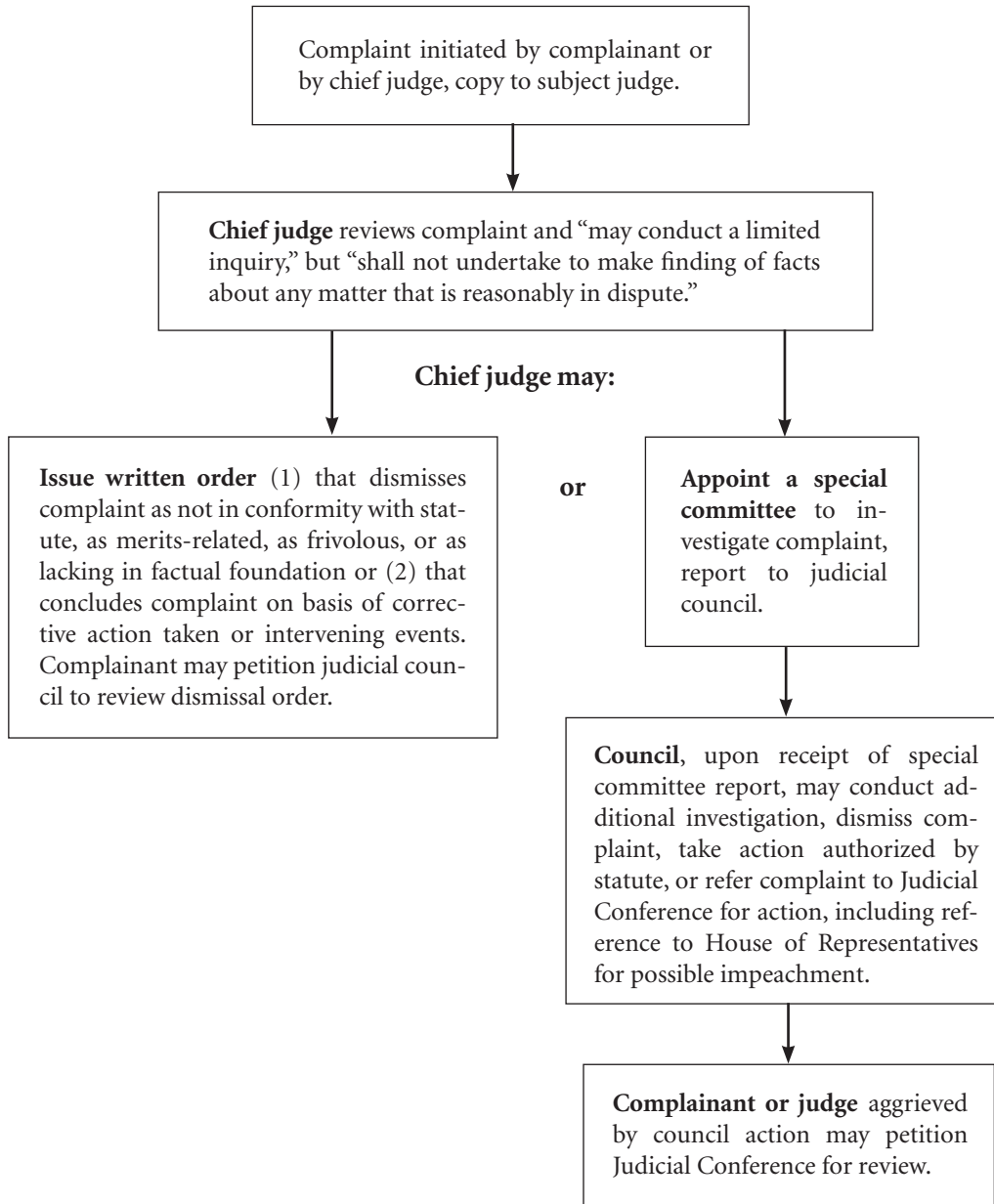
Figure 1 provides an overview of the Act's process for presenting and dealing with complaints of judicial misconduct and disability. The great majority of complaints end with the chief judge dismissal order or council refusal to upset that order.

Because of the complexities of processing a complaint, we describe the statutory steps in some detail.

***Initiating the complaint***—Section 351(a) authorizes “[a]ny 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 office by reason of mental or physical disability” to “file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.” Section 351(c) directs the clerk to transmit the complaint to the chief circuit judge (or, if the chief judge is the object of the complaint, to the active judge on the court of appeals who is senior in service) and to the judge complained against. (Complaints against International Trade Court or Federal Claims Court judges are handled by those courts' chief judges.)

Section 351(b) authorizes the chief judge, by written order, to “identify” a complaint (begin the process) on the basis of “information available to the chief judge” and “thereby dispense with filing of a written complaint.”

Figure 1. Flowchart of Major Steps in Complaint Processing



**Chief judge review**—Section 352(a) directs the chief judge to “expeditiously review” every complaint. The purpose of the review is “not . . . to make findings of fact about any matter that is reasonably in dispute.” The purpose is to determine if the complaint should be dismissed or the proceedings concluded, or, alternatively, if a special committee should investigate disputed facts. Section 352(a) authorizes the chief judge to “conduct a limited inquiry” to determine “whether appropriate corrective action has been or can be taken without the necessity for a formal investigation” or whether the complaint states facts that “are either plainly untrue or incapable of being established through investigation” by a special committee. The Act says a limited inquiry may include the chief judge’s seeking a response from the subject judge; oral or written communications by the chief judge or staff with the judge, the complainant, or other witnesses; and examination of relevant documents.

After completing the section 352(a) review, the chief judge, under section 352(b), must either:

- Terminate the complaint by (1) dismissing it as (a) “not in conformity with section 351(a)” (i.e., alleging conduct not covered by the Act); (b) “directly related to the merits of a decision or procedural ruling”; (c) “frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or containing allegations which are incapable of being established through investigation”; or (d) “lack[ing] any factual foundation or . . . conclusively refuted by objective evidence”; or (2) “conclud[ing] the proceeding” because “appropriate corrective action has been taken or . . . action on the complaint is no longer necessary because of intervening events.” Section 352 directs the chief judge to dismiss the complaint or conclude the proceeding by “written order, stating his or her reasons” and provide the order to the complainant and subject judge. Either may petition the judicial council to review the order; a council’s denial of a petition is, as interpreted to this point, “final and conclusive.”

*or*

- Appoint “a special committee to investigate the facts and allegations contained in the complaint” and so advise the complainant and subject judge. The chief judge is to serve on the committee and to appoint to the committee “equal numbers of circuit and district judges of the circuit” (section 353(a)).

**Special committee investigation and judicial council action**—Section 353(c) directs the special committee to “conduct an investigation as extensive as it considers necessary” and expeditiously to “file a comprehensive written report thereon” with the circuit council, presenting the committee’s findings and its recommendations for council action.

Section 354 authorizes the council to undertake any additional investigation it finds necessary and to either dismiss the complaint or take any of a range of actions

as to the subject judge, including the following: a temporary halt in case assignments; a private or public censure; certifying a district or circuit judge's disability pursuant to 28 U.S.C. § 372(b); requesting such a judge's voluntary retirement; or ordering the removal from office of term-limited judges (according to statutory procedures). Section 357 authorizes the complainant or subject judge to petition the Judicial Conference to review council actions taken under section 354. The council may also refer judicial misconduct to the Judicial Conference for its action, including advising the House of Representatives that impeachment may be warranted.

**Judicial Conference action**—Section 354 authorizes the judicial council to refer any action to the Judicial Conference for resolution and to advise the Conference of any judicial conduct that may constitute grounds for impeachment, which the Conference may refer to the House of Representatives. Section 331 of title 28 authorizes the Judicial Conference to establish a “standing committee” to exercise its functions under the Act, and, pursuant to that authority, the Conference established its Committee to Review Circuit Council Conduct and Disability Orders (Review Committee).

Other provisions deal with written notice requirements; subpoena power of special committees, councils, and the Judicial Conference and its Review Committee; confidentiality of proceedings; and the effect of felony convictions on judges' authority to decide cases and creditable service for taking senior status. Section 359(a) bars a judge who is the subject of special committee, judicial council, or Judicial Conference proceedings from serving on the circuit judicial council, the Judicial Conference, or the Conference's Review Committee.

## Illustrative Rules and Committee Standards

Section 358 authorizes judicial councils to adopt “rules for the conduct of proceedings” under the Act. In 1986, a special committee of the chief judges of the courts of appeals formulated *Illustrative Rules Governing Complaints of Judicial Conduct and Disability* (AO 2000) for circuit councils to consider adopting; the Review Committee revised them in 2000. Most circuit councils have adopted the Illustrative Rules verbatim or with slight modifications.

For our research, we developed “Standards for Assessing Compliance with the Act,” in order to promote uniformity in Committee and staff assessments of complaint dispositions. The Standards (see Appendix E) draw from the Illustrative Rules and observed patterns of chief judge and judicial council actions in applying the Act. Chapter 4's assessments of complaint terminations quote the Standards applicable to the particular aspect of the Act at issue.