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THE LONG TERM VIEW

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JUDICIAL MISCONDUCT

ABUSE OF POWER ON THE BENCH

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Without Merit:

The Empty Promise of Judicial Discipline

Elena Ruth Sassower

Judicial independence is predicated on "good faith" decision-making. It was never intended to include "bad faith" decision-making, where a judge knowingly and deliberately disregards the facts and law of a case. This is properly the subject of disciplinary review, irrespective of whether it is correctable on appeal. And egregious error also constitutes misconduct, since its nature and/or magnitude presuppose that a judge acted willfully, or that he is incompetent.

Editors' note: *This article is a critique of the judicial discipline system which should be aired. Publication of the critique does not constitute an endorsement of the Center for Judicial Accountability's claims about particular cases.*

THE most serious misconduct by judges is that which is the least likely to subject them to discipline. It is not what they do in their private lives, off the bench, but what they do on the bench in the course of litigation. The obvious image is the judge who runs his courtroom as if he owns it, who looks down from his elevated bench and treats litigants and their attorneys in an imperious and abusive fashion. But even where a judge is, as he is supposed to be, patient and dignified in demeanor, every court appearance, just like every written motion, involves a judge ruling on a procedural or substantive aspect of a case. And there are judges who, while presenting a veneer of fairness, are intellectually dishonest. They make rulings and decisions which are not only a gross abuse of discretion, but which knowingly and deliberately disregard "clear and controlling law" and obliterate, distort, or fabricate the facts in the record to do so.

Why would a judge be intellectually dishonest? He may be motivated by undisclosed bias due to personal or political interest. Judicial selection processes are politically controlled and closed, frequently giving us judges who are better connected than they are qualified. And once on the bench, these judges reward their friends and punish their enemies. Although ethical codes require judges to disclose facts bearing upon their impartiality, they don't always do so. They sit on cases in which they have undisclosed relationships with parties, their attorneys, or have interests in the outcome, and do so deliberately because they wish to advantage either one side over another or sometimes themselves.

They exercise their wide discretion in that side's favor. That's the side for whom deadlines are flexible and for whom procedural standards and evidentiary rules don't apply. A common thread running through judicial misconduct cases is litigation misconduct by the favored side. Meanwhile, the other side struggles to meet inflexible deadlines, and has its worthy motions denied. In extreme cases, a judicial process predicated on standards of conduct, elementary legal principles, rules of evidence, simply ceases to exist.

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Intellectual Dishonesty

Every case has many facts, any of which may be inadvertently "misstated" in judicial decisions. But judicial misconduct is not about innocent "misstatement" of facts, and certainly not about peripheral facts. It involves a judge's knowing and deliberate misrepresentation of the material facts on which the case pivots. These facts determine the applicable law. If the applicable law doesn't allow the judge to do what he wants to do, he's going to have to change the material facts so that the law doesn't apply. When judges don't want to put themselves on record as dishonestly reciting facts, they just render decisions without reasons or factual findings.

The prevalence of intellectually dishonest decisions is described by Northwestern Law Professor Anthony D'Amato in "*The Ultimate Injustice: When the Court Misstates the Facts.*" He shows how judges at different levels of the state and federal systems manipulate the facts and the law to make a case turn out the way they want it to. D'Amato quotes from a speech by Hofstra Law Professor Monroe Freedman to a conference of federal judges:

> Frankly, I have had more than enough of judicial opinions that bear no relationship whatsoever to the cases that have been filed and argued before the judges. I am talking about judicial opinions that falsify the facts of the cases that have been argued, judicial opinions that make disingenuous use or omission of material authorities, judicial opinions that cover up these things with no-publication and no-citation rules.[1]

Afterward, when Professor Freedman sat down, a judge sitting next to him turned to him and said, "You don't know the half of it."

The Myth of Recusal

There's next to nothing you can do when you're before a dishonest judge. He's not going to respond to a recusal motion with "Hallelujah, you've shown me the light. I'll step down." His dishonesty will carry through to the recusal motion, which, while asserting his complete fairness and impartiality, he will deny from the bench, with no written decision or, if by a written decision, then one stating no reasons or misstating the basis for recusal. And just as making a formal recusal motion entails expense, as any motion does, so does taking an interim appeal, which may not be feasible.

Of course, there's a problem even before making a recusal motion. Your lawyer may not want to make one because it means taking on the judge by accusing him of biased conduct. A lawyer's ethical duty is to zealously represent each client, but lawyers have other clients whose cases may come before that judge. And it is not just their relationship with that judge that they want to protect, but with his judicial brethren, who are part of the judge's circle of friends and may be quite defensive of his honor, which they see as an extension of their own.

Congress has passed two specific recusal statutes proscribing judicial bias and conflict of interest by federal judges. These have been gutted by the federal judiciary. One statute explicitly states that whenever a party files a "timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or preju-

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How can you make any assessment of how judicial misconduct mechanisms are working unless you reach out to the victims of judicial misconduct who have used them?

— Elena Ruth Sassower

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dice either against him or in favor of an adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding . . . ." It seems pretty clear on its face. Yet the federal courts have interpreted this to mean that the judge who is the subject of the recusal affidavit determines its timeliness and sufficiency. The result is predictable. The complained-of judge acts as a censor, ruling that a timely and sufficient affidavit is untimely and/or insufficient so as to prevent its being heard on the merits by another judge.

On top of that, the federal courts have interpreted the recusal statutes to require that the basis for recusal be "extrajudicial." This means that the facts giving rise to recusal can't come from the case itself, but from something outside the case. Thus, if the basis of the recusal motion is that the judge has been oppressive, bullying, and insulting, has wilfully disregarded black-letter law and falsified the factual record—in other words, that he has engaged in all the misconduct properly believed to be biased—that judge need not step down when a recusal motion is made. The litigant or his lawyer has the impossible burden of trying to ferret out information about the judge's personal, professional, and political life so as to figure out the "why" behind the egregious misconduct. Parenthetically, the U.S. Supreme Court, having long ago generated the "extrajudicial" source doctrine out of thin air, has implicitly approved a "pervasive bias" exception to it. This, of course, means nothing to a biased judge, who will pretend he is unable to discern *any* bias, let alone "pervasive bias."

The Chimera of Judicial Discipline

You would think that where a judge consistently abuses his discretion and renders dishonest rulings, including on recusal motions, a formal judicial misconduct complaint would be taken seriously by a disciplinary body. Each of the 50 states and the District of Columbia has a commission, committee, council, or review board, whose purpose is to address complaints of judicial misconduct by state judges within its jurisdiction. There is also a mechanism for complaints against federal judges, which is set forth at 28 U.S.C. §372(c). Because it was enacted by Congress in 1980, it is commonly called "the 1980 Act."

These disciplinary mechanisms frequently dismiss, out-of-hand, complaints of on-the-bench misconduct, including abusive courtroom behavior and fabricated judicial decisions. They do this on the pretense that they have no authority to review the "merits of matters within a judge's discretion, such as the rulings and decision in a particular case," which they assert can only be reviewed by an appeal to an appellate court. The theory here is that doing otherwise infringes upon judicial independence, the important principle that judges be free to decide cases based on the facts before them and applicable law, without outside pressure and influences. However, judicial independence is predicated on "good faith" decision-making. It was never intended to include "bad-faith" decision-making, where a judge knowingly and deliberately disregards the facts and law of a case. This is properly the subject of disciplinary review, irrespective of whether it is correctable on appeal. And egregious error also constitutes misconduct, since its nature and/or magnitude presuppose that a judge acted willfully, or that he is incompetent.

Under the 1980 Act, one of the statutory grounds upon which a Chief Judge may dismiss a judicial misconduct complaint is if he finds it to be "directly related to the merits of a decision or procedural ruling." Although a complaint alleging bad-faith, biased judicial conduct—including legally insupportable and factually dishonest rulings—should not be dismissed as "merits-related," it invariably is. Adding insult to injury, Chief Judges sometimes tack onto their dismissal orders another statutory ground for dismissal, "frivolousness." In their view, a bias claim supported *only* by erroneous rulings and decisions, no matter how egregious, is "frivolous."

The Illusory Remedy of Appeal

Faced with a dishonest judge, litigants often cave in at the trial level and never make it to appeal. It's too emotionally and financially

draining to continue before a biased and dishonest judge. This is not to say that justice is obtainable on appeal. Even with a reversal, the onus of the appeal is on the aggrieved litigant, who, at best, gets what he was entitled to at the outset, only years later after spending untold amounts of money on legal fees and costs. Beyond that, the appellate decision, if it even identifies the "error" as judicial misconduct, will likely minimize it. Notwithstanding their ethical duty, appellate judges rarely, if ever, take steps to refer an errant trial judge for disciplinary action. And this is where the appellate process "works"!

In the federal system and in most state systems, you get only one appeal as of right. After that it's at a higher court's option. And what happens when you file misconduct complaints against appellate judges for their dishonest decisions? Just like the dishonest decisions of trial judges, they'll be tossed out as "merits related."

The Report of the National Commission on Judicial Discipline and Removal

Created by Congress, the National Commission on Judicial Discipline and Removal was supposed "to investigate and study the problems and issues" relating to judicial discipline and removal in the federal system and to evaluate more effective alternatives. In August 1993, it issued a report concluding that existing mechanisms were sufficient to deal with misconduct by federal judges. All that was necessary was a little tinkering. With that, at a cost to taxpayers of nearly $1,000,000, the Commission passed out of existence, indefinitely setting back the cause of meaningful judicial reform.

How did the Commission reach its conclusions? Not by making any significant outreach to those having direct, first-hand experience with the key "problems and issues," most of which it dodged. Indeed, the Commission's researchers never interviewed anyone who had filed a judicial misconduct complaint with the federal judiciary under the 1980 Act or with Congress to initiate its impeachment procedures. How can you make any assessment about how these mechanisms are working unless you reach out to the victims of judicial misconduct who have used them? Yet the researchers who reviewed §372(c) complaints were not ashamed to admit, "We know little about complainants and what they seek. We did not design this research to address those issues."[2] This admission is buried deep within their underlying research study.

Instead, the Commission's researchers interviewed Circuit Chief Judges and Circuit Executives about their experience in administering the 1980 Act. And how did the Chief Judges explain the value of the 1980 Act when 95% of the complaints filed were dismissed, mostly on the statutory ground that they were "merits-related"? They made claims about how the Act served as a deterrent to misconduct, and that "informal" discipline was taking place behind the scenes, using phrases like "still water runs deep." The judges insisted on absolute anonymity and that their comments be camouflaged to prevent them from being traced back to their Circuit. The Commission gave scant recognition that judges' responses might be tainted by self-interest.

The judges' anonymous comments cannot be verified, nor can the Commission's conclusions about the judicial misconduct complaints it reviewed. This is because the complaints are inaccessible to the public.

The Commission's report fails to say that it was the federal judiciary which made §372(c) complaints confidential—not Congress—and does not explore how this has frustrated Congress' ability to exercise the "vigorous oversight" it promised when it passed the 1980 Act. There were fears that the federal judiciary would be unwilling to police itself. Yet not only does the report not alert Congress to its prerogative to amend the §372(c) statute to ensure public access to the complaints, but the Commission allowed the federal judiciary to undermine what was supposed to be the first real evaluation of the 1980 Act. It did this by permitting the federal judiciary to dictate the strict terms under which it would allow the Commission to review a sampling of §372(c) complaints: only designated court-connected researchers could review

them. The Commission should have objected, strenuously, so that the complaints could be independently reviewed by outside individuals. Instead, it capitulated to judicial interests, which were heavily represented on the Commission. As a result, its report is not based on a truly independent review of complaints filed under the 1980 Act.

As for complaints filed with Congress and referred to the House Judiciary Committee, the Commission's report states they "may be made available upon request." Quoting the report as authority, the Center for Judicial Accountability asked to examine the very complaints the Commission's researchers had reviewed. We were told that we would be notified when the Committee's policy for reviewing past complaints "was decided." That was *more than two years ago* and we're still waiting for word of the Committee's policy.

The House Judiciary Committee fully participated in the Commission's report. The list of members and counsel from the House Judiciary Committee involved in the Commission's work reads like a *Who's Who*. Its courts subcommittee held a hearing on the Commission's draft report. The natural assumption is that the report would be extremely accurate about the House Judiciary Committee's procedures. But accuracy would have exposed the Committee's dereliction.

The shameful facts about the House Judiciary Committee's operations are cut from the Commission's report. You see this when you compare it with the draft report that preceded it, and then compare them to the underlying research studies. The report depicts the House Judiciary Committee as professional and responsive. But a wholly different picture emerges when you turn back to the underlying research studies. Even the draft report discloses that over 80% of the complaints reviewed by the researcher had not even been responded to by the House Judiciary Committee. That statistic is gone from the final report. Likewise cut from the final report is the draft's statement that "well over 90% of the complaints [filed with the House Judiciary Committee] do not raise genuine issues pertinent to judicial discipline and impeachment." That means up to 10% do raise such issues. The obvious next question is what the House Judiciary Committee did with these serious complaints. The draft report doesn't have the answer. You have to turn back to an underlying study to find out that the Committee either did not respond to these complaints or, if it had, did nothing beyond that.

The Failure of the 1980 Act

Because the House Judiciary Committee does not investigate individual complaints, the 1980 Act is the only avenue for disciplining the federal judges. Yet the vast majority of complaints are dismissed on the Act's statutory ground that they are "directly related to the merits of a decision or procedural ruling." The Commission's report does not disclose this important fact.

Plainly, for Congress to exercise "vigorous oversight" over the federal judiciary's administration of the Act, which is what the Commission was supposed to facilitate, it needed to know how the federal judiciary was interpreting "merits-relatedness." This was all the more essential because the federal judiciary had made judicial misconduct complaints confidential. Most importantly, was the federal judiciary treating complaints alleging bias, including dishonest decisions, as "merits-related"? Additionally, because the statute does not actually require dismissal of "merits-related" complaints, but only that such complaints "may" be dismissed, Congress needed to know what factors the federal judiciary was considering in exercising its discretion.

Yet, the two paragraphs of the Commission's 150-page report devoted to "merits-relatedness" make it utterly impossible for Congress or anyone else to discern how the federal judiciary has interpreted that statutory ground or exercised its discretion. The first paragraph concedes confusion as to the relationship between "merits-relatedness" and an appellate remedy, which may or may not exist. The second paragraph then tries to minimize the fact that even where there is no appellate remedy, "merits-re-

lated" complaints are dismissed. It trumpets that the "core reason" for excluding such complaints from disciplinary review is "to protect the independence of the judicial officer in making decisions, not to promote or protect the appellate process. . . ." But this is rhetoric. "The independence of the judicial officer" does not extend to bad-faith conduct, including decisions motivated by bias or other illegitimate purposes. And disciplinary review is appropriate under such circumstances, whether or not there is an appellate remedy.

Not only did the Commission fail to articulate this appropriate standard, but the researchers did as well. Three of the Commission's separate underlying research studies quote from a 1987 memo by Patricia Wald, then Chief Judge of the D.C. Circuit, to Judge Elmo Hunter, who had been instrumental in developing the 1980 Act and was then chairman of the Court Administration Committee of the Judicial Conference, the federal judiciary's "top management":

> Since the vast majority of complaints we receive come out of judicial proceedings, some clarification . . .would be helpful. Is anything that arose in the course of a proceeding out of bounds for a complaint, or is behavior that might have been appealed as a fundamental deprivation of due process (i.e., the lack of an unbiased judge) still a permissible subject of a complaint?

Where is the answer to Judge Wald's straightforward question? The researchers, including those who had interviewed Chief Judges, do not refer to any answer from Judge Hunter or any other judge. Nor do they provide their own answer. How could the federal judiciary properly and consistently address §372(c) complaints if it was unable to answer that question *13 years* after passage of the 1980 Act?

The obvious conclusion, which the Commission chose to ignore and conceal, is that the federal judiciary had deliberately left the "merits-related" category vague in order to dump virtually every judicial misconduct complaint it receives. This is clear from the circuits' failure to develop and publish a body of decisional law relative to the 1980 Act, despite a 1986 recommendation by the Judicial Conference that it do so.

Direct, First-Hand Experience

The dishonesty of the National Commission is further exposed by the direct, first-hand experience of CJA and its personnel. Back in June 1993, when the Commission issued its draft report, purportedly for public comment, we responded to its conclusory claims that the appellate process constituted a "fundamental check" of judicial misconduct, as did "peer disapproval" among judges. To rebut such claims, we provided it with the appellate record of a case in which a district judge's factually-fabricated and legally insupportable decision was affirmed by a circuit court panel. Although the panel's decision rested on non-existent facts and was, on its face, aberrant, contradictory, and violated black-letter law of the circuit and the U.S. Supreme Court, attempts to obtain discretionary review by the full circuit and in the Supreme Court were futile.

We pointed out to the Commission that its draft report, expressing confidence in the formal mechanisms for discipline in the judicial branch, had stated that it would not recommend substantial change "absent a convincing demonstration of the inadequacy of the 1980 Act." We asked the Commission directly whether a complaint against the judicial authors of those fraudulent and lawless decisions was reviewable under the 1980 Act. If not, then there was no remedy in the judicial branch and the case should be designated by the Commission as providing the required "convincing demonstration" for a recommendation of more substantive changes.

But the Commission refused to answer whether such a complaint would be reviewable under the Act and directed us to seek review by the House Judiciary Committee. Three weeks later, the House Judiciary Committee's counsel—who was also its liaison to the National Commis-

sion—told us that "there has never been an investigation of an individual complaint in the history of the House Judiciary Committee," and that we shouldn't expect it to start now. It was then August 1993 and the Commission's final report was just published, touting the appellate process and "peer disapproval" as "fundamental checks," and the House Judiciary Committee as a proper recipient for complaints, with investigative capacity.

At that point the National Commission was defunct. So we wrote to the House Judiciary Committee, asking that it clarify what it does with the judicial misconduct complaints it receives. If it was not investigating them, why did the Commission's report not say that? For nearly two full years, the House Judiciary Committee ignored all our many follow-up letters and phone calls. Finally in June 1995, successor counsel reiterated that the House Judiciary Committee does not investigate complaints of judicial conduct filed with it, but confines itself to legislation. He explained that the Committee simply doesn't have the budget for investigations. The Committee might have had the money if the Commission's report had been more forthright, rather than dodging the issue with a vague recommendation that the House "ensure that its Committee on the Judiciary has the resources to deal with judicial discipline matters."

According to the Commission's report, the standard practice of the House Judiciary Committee is to direct complainants' attention to the 1980 Act. It cautioned the Committee to "tell complainants that the 1980 Act does not contemplate sanctions for judges' decisions or issues relating to the merits of litigation." Since the House Judiciary Committee had not directed us to file a complaint under the 1980 Act, we asked it whether this meant that it did not believe our complaint was reviewable under the Act. But the Committee, like the National Commission before it, would not tell us. Ultimately, it became obvious that it had not the foggiest idea. And, again, the reason is attributable to the Commission's report which is wholly uninformative on the subject of "merits relatedness."

Meanwhile, our growing expertise and persistence paid off with the House Judiciary Committee. In February 1996, its counsel met with us and agreed that if the federal judiciary rejected our complaint as "merits-related," the House Judiciary Committee would have to undertake an investigation. So we filed our complaint.

What happened? Our complaint was improperly dumped as "merits-related" in an order which itself was a prime example of a dishonest decision. For this reason, we sought review by the Circuit Council. Our petition demonstrated that the dismissal order was legally and factually insupportable and that it contemptuously disregarded the National Commission's recommendation that dismissal orders be reasoned and nonconclusory and that the circuits resolve ambiguity in the interpretation of the 1980 Act. We pointed out that the Judicial Conference had endorsed each of these recommendations and that our complaint was ideally suited for building interpretive precedent to make clear, once and for all, that complaints alleging biased, bad-faith conduct are not "merits-related," and additionally that even "merits-related" complaints are not required to be dismissed under the statute. The Circuit Council's response? It denied our petition in one sentence. The cover letter informed us that, under the Act, there was no further review.

But the Judicial Conference has oversight responsibility—and we turned to it. The Assistant General Counsel to the Administrative Office of the U.S. Courts is the liaison to the Judicial Conference's disciplinary committee. His refusal to take any steps on our documented showing that the circuit is subverting the Act and the recommendations of the National Commission and Judicial Conference bears directly on the integrity of the National Commission's review of §372(c) complaints, since he was one of the two court-connected researchers who examined those complaints for the National Commission. He was not Assistant General Counsel at the time he examined complaints for the Commission. He was promoted to that position afterwards, presum-

ably because the federal judiciary liked his conclusions so well.

In the end, we have empirically proven more than the "inadequacy of the 1980 Act" resulting from an over-expansive judicial interpretation of "merits-relatedness." We have demonstrated that the 1980 Act is a facade behind which the federal judiciary dismisses fully-documented complaints of dishonest judicial decisions by decisions which are themselves dishonest and which, properly, should be the subject of disciplinary review—if there were any place to go for redress.

That's yet another reason why we are trying again with the House Judiciary Committee. We are now preparing a formal presentation to it based on our §372(c) complaint, as well as the §372(c) complaints of our members. These, likewise, have been dishonestly dismissed as "merits related" in conclusory orders which similarly misrepresent the serious misconduct issues presented. Based on this evidence, and the first-hand testimony of people who have brought complaints, the House Judiciary Committee will get a good look at what the federal judiciary, working through the National Commission, did not want it to see: flagrant judicial misconduct and corruption which the federal judiciary was able to cover-up when it made §372(c) complaints confidential. We believe it will be the basis for ending that confidentiality and for creating an alternative disciplinary mechanism, one outside the federal judiciary, to review judicial misconduct.

References

[1] Anthony D'Amato, "The Ultimate Injustice: When the Court Misstates the Facts," *Cardozo Law Review*, 11:1313 (1989).

[2] Research Papers of the National Commission on Judicial Discipline and Removal, Vol. I, 625.