

The Special Powers of the Chief Justice: Judicial Ethics

As the chief executive of the third branch of government, the Chief Justice wields enormous power over the development and implementation of ethical mandates. In addition to being the country's most influential judge, the Chief Justice heads the Judicial Conference,¹ assigns chairs and members for all Judicial Conference committees,² staffs the Administrative Office of the United States Courts, and serves as the judiciary's spokesperson on legislative and administrative reforms.

In the area of judicial ethics, Chief Justice Rehnquist aggressively employed each of these powers to defend the discretion of judges to make largely unreviewable decisions about the propriety of their own judicial conduct. In particular, under Chief Justice Rehnquist, the judiciary opposed a number of Congressional efforts to set ethical standards for judges.

I. Judicial Honoraria and Trips

A perfect example is Chief Justice Rehnquist's efforts to ensure that judges were permitted to receive honoraria for speeches and to take corporate funded trips, subject only to their personal discretion.

Chief Justice Rehnquist's work on the honoraria issue was particularly controversial because of the manner in which it took place. In 2000, Chief Justice Rehnquist wrote Senator Mitch McConnell supporting a repeal of the 1989 ban on honoraria for judges, and Senator McConnell quietly added this measure as a rider to an appropriations bill funding the federal judiciary.³ Once this provision came to light, it generated fierce bipartisan opposition, with Senate Ethics Committee Chairman Pat Roberts (R-KS) commenting: if the judiciary needed a pay raise it ought to be done "up front, not through the back door."⁴ This measure was ultimately dropped, and the honoraria ban remains in place.

Chief Justice Rehnquist also aggressively opposed efforts to ban corporate-funded trips, colloquially known as "junkets for judges." A significant controversy has developed in recent years over the efforts by corporations and other pro-business special interests to use lavish "educational" trips to resorts to essentially lobby federal judges on hot-button legal topics. These junkets have been harshly condemned by the nation's leading experts in legal ethics, former judges, members of Congress and dozens of newspaper editorial pages from across the country and across the

¹ The "fundamental purpose of the Judicial Conference today is to make policy with regard to the administration of the United States courts." <http://www.uscourts.gov/judconf.html>. In addition to the Chief Justice, membership in the Judicial Conference comprises the chief judge of each judicial circuit, the Chief Judge of the Court of International Trade, and a district judge from each regional judicial circuit.

² The "committees are policy-advisory entities" and the "Chief Justice has sole authority to make committee appointments." Available at http://www.uscourts.gov/judconf_committees.htm.

³ Dan Morgan, *Bill Would End Ban on Honoraria for Judges*, The Washington Post, Sept. 14, 2000, A1.

⁴ Eric Pianin, *Ban on Honoraria for Judges Stays Intact; After Stiff Resistance, Hill Negotiators Drop a Repeal Favored by Chief Justice*, The Washington Post, October 4, 2000, A05.

ideological spectrum. Several bills have been introduced that would limit judicial participation in these trips.

Chief Justice Rehnquist was an outspoken opponent of efforts to limit the discretion of judges to take such trips. In a speech before the American Law Institute, Rehnquist stated that the restriction in the legislation was “antithetical to our American system and its tradition of zealously protecting freedom of speech” and that such legislation “is contrary to the public interest in encouraging an informed judiciary and contrary to the American belief in unfettered access to ideas.”⁵

Additionally, shortly after an embarrassing ABC News 20/20 feature story on one of these trips, the Chief Justice appointed Judge William L. Osteen, a North Carolina District Judge who prominently featured on the golf course in the 20/20 program, to Chair the Judicial Conference’s Committee on Codes of Conduct. The Codes Committee is charged with developing the rules for judicial attendance at corporate funded seminars. Notwithstanding a request by Senator Leahy for a tightening of ethical mandates in this area,⁶ under the leadership of Judge Osteen the Codes Committee actually weakened the few restrictions that did exist, allowing “judges to take more corporate-funded trips and avoid disclosing their attendance.”⁷

Under Chief Justice Rehnquist’s leadership, the judicial branch has successfully opposed all efforts to tighten ethical mandates and limit participation in corporate-funded trips. It will fall to Rehnquist’s successor as Chief to determine whether the judicial branch will make any constructive effort to address the still-raging public controversy over these trips.

II. Recusal

The recusal process is a perfect example of how self-policing of ethics in the judicial branch works, and why the system can be controversial. If a party believes that a judge is biased, they may file a recusal motion. But these motions are heard, in the first instance, by the very judge whose partiality has been called into question. If the presiding judge denies recusal, the party may appeal that decision, but the appellate court will review the motion on the highly deferential “abuse of discretion” standard.⁸ For Supreme Court Justices, the process is even more one-sided: a recusal motion is heard by the justice whose recusal is sought, and there is no avenue for seeking review of that decision.

Chief Justice Rehnquist has defended the ability of individual judges to make determinations on the need for their own recusal and, as a justice, he set the bar for recusal high, placing the need for judges to preside in a case over the need to recuse in cases where questions are raised about impartiality.

⁵ Edward Walsh, *Rehnquist Assails Curbs on Seminars for Judges; Business-Paid Events Called Valuable*, The Washington Post, May 15, 2001, A15.

⁶ Statement of Senator Patrick Leahy, May 22, 2003. Available at <http://leahy.senate.gov/press/200305/052203a.html>

⁷ Carol D. Leonnig, *New Rules for Judges are Weaker, Critics Say*, The Washington Post, December 17, 2004, A31; See also, Editorial, *Green Light for Junkets*, The Washington Post, A28.

⁸ See *Aguinda v. Texaco, Inc.*, 241 F.3d 194, 200 (2d Cir. 2001).

The best known example is then-Justice Rehnquist's decision to deny recusal in *Laird v. Tatum*.⁹ *Laird* involved Vietnam-era surveillance techniques. As an Assistant Attorney General in the Nixon administration, Rehnquist testified before Congress in support of the constitutionality of these techniques.¹⁰ Relying heavily on what he called the “duty to sit” -- a judge-made rule described by Rehnquist as holding that a “federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified” -- Justice Rehnquist decided against disqualifying himself in *Laird*. He ended up casting the deciding vote in a 5-4 Supreme Court ruling upholding the constitutionality of the surveillance techniques.¹¹

Congressional reaction to *Laird* was swift. In 1974, Congress amended the disqualification statute, 28 U.S.C. § 455, eliminating what a House of Representatives Report called the “so-called duty to sit” and replacing the former subjective standard -- requiring recusal only where the judge herself believed that bias existed -- with an objective standard, requiring a judge to recuse when the judge's “impartiality might reasonably be questioned.”

Notwithstanding these changes, Chief Justice Rehnquist revisited the recusal issue in a 2000 case called *Microsoft Corp. v. United States*,¹² and again set a high bar for recusal motions, particularly for motions directed at Supreme Court justices. In *Microsoft*, the issue was whether Rehnquist could sit despite the fact that his son had worked as a lawyer for Microsoft in cases related to matters before the Supreme Court, though not the Supreme Court litigation itself. The Chief Justice decided his disqualification was not necessary, prominently citing the “negative impact that the unnecessary disqualification of even one Justice may have on our Court.”

The Chief Justice's decision in *Microsoft* was prominently cited by Justice Scalia in his controversial statement denying disqualification after it was revealed that he duck hunted in Louisiana with Vice President Cheney while a case involving the administration of Cheney's Energy Task Force was pending before the Court.¹³

III. The Judicial Misconduct System

Under Chief Justice Rehnquist's leadership, the judiciary has limited the effectiveness of what was intended by Congress to be a very important check on judicial misconduct. The “Judicial Councils Reform and Judicial Conduct and Disability Act of 1980,” Pub. L. No. 96-458 (1980), established judicial councils in every federal judicial circuit and required these councils to review complaints from “any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the judicial branch.” The law allows these judicial councils to take “such action as is appropriate to assure the effective and expeditious administration of the business of the courts.”

Intended by Congress as an important check on the unfettered ability of judges to self-police their own misconduct, this misconduct system is widely viewed as a failure. The system does not

⁹ 409 U.S. 824 (1972)

¹⁰ *Id.* at 826.

¹¹ *Laird v. Tatum*, 408 U.S. 1 (1972).

¹² 530 U.S. 1301 (2000).

¹³ *Cheney v. United States Dist. Court*, 541 U.S. 913 (2004).

apply to Supreme Court Justices, and the complaints filed against lower court judges almost never result in any action by the judicial councils. Between 1998 and 2003, 3,673 complaints against judges were resolved by the judiciary with disciplinary action taken against a judge in only 6 cases.

A significant part of the problem is that there is no fixed benchmark against which ethics complaints are judged. It is not sufficient to demonstrate that a judge's behavior runs afoul of the judiciary's Code of Conduct; action is reserved for the most "serious judicial transgressions." Based on the statistic regarding disposition of these complaints, this standard is almost never met in practice.

The failure of the misconduct review system has resulted in bipartisan criticism of the judiciary's self-policing, or lack thereof. House Judiciary Committee Chairman James Sensenbrenner (R-WI) warned the Judicial Conference that he would have to assess "whether the disciplinary authority delegated to the judiciary has been responsibly exercised and ought to continue." In response to this threat by a powerful Republican member of Congress, Rehnquist appointed a panel, headed by Justice Breyer, to review the judiciary's misconduct system. It is anticipated that the Breyer panel will issue a report in the summer of 2006. It will fall on the new Chief Justice to implement any recommendations.

IV. Conclusion

The issues discussed in this memorandum represent an ongoing debate between Congress and the judicial branch over important issues of judicial ethics. Congress has prohibited judges from taking honoraria, attempted to ban junkets, set standards for recusal, and established a mechanism for reviewing judicial misconduct. The judiciary under Chief Justice Rehnquist has opposed some of these reforms – specifically those regarding honoraria and trips – and its implementation of standards for recusal and the Conduct and Disability Act have been subject to congressional criticism. To the extent this debate can be summarized into a single question it is this: how much oversight should there be of decisions by judges regarding the propriety of their own judicial conduct. Senators concerned with increasing oversight of judicial ethics should carefully inquire into Judge Roberts' views on judicial ethics to determine whether he would support reforms to promote the integrity, impartiality, and independence of the federal judiciary.

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