U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

January 13, 2000

Patricia Mack Bryan, Esq.
Senate Legal Counsel
United States Senate
Hart Senate Office Building, Room 642
Washington, DC 20510-7250

Re: Hon. John H. McBryde v. Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States, et al., Civil Action No. 98-2457 (CKK) (D.D.C. Dec. 30, 1999)

Dear Ms. Bryan:

In accordance with 2 U.S.C. 288k(b), I am writing to advise you that I have decided not to appeal, on behalf of the United States as intervenor-defendant, the district court's decision in the case noted above. As explained below, although the court's decision "affect[s]" the constitutionality of an Act of Congress within the meaning of Section 288k, my decision not to appeal is based on factors unique to this case, and does not reflect a determination on the part of the Executive Branch that the statute in question is unconstitutional.

This case arises out of an investigation by a Special Committee of the Judicial Council of the Fifth Circuit into the conduct of the Honorable John H. McBryde, United States District Judge for the Northern District of Texas, pursuant to the Judicial Conduct and Disability Act of 1980, 28 U.S.C. 372(c). After a two-year investigation, the Special Committee reported its findings and recommendations to the full Fifth Circuit Judicial Council, which publicly reprimanded Judge McBryde for engaging in "conduct prejudicial to the effective administration of the business of the courts," and imposed certain remedial sanctions. The Council's order was substantially affirmed, on Judge McBryde's appeal, by the Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States. See 28 U.S.C. 331, 372(c)(10).

In October 1998, Judge McBryde filed suit in the United States District Court for the District of Columbia, raising procedural, statutory, and constitutional challenges to the disciplinary proceedings against him. His complaint named as defendants the Fifth Circuit Judicial Council, the Judicial Conference Review Committee, and their respective chairmen (the Honorable Henry A. Politz and the Honorable William J. Bauer). After consultation with the

Civil Division of the Department of Justice, the Administrative Office of the United States Courts retained private counsel to represent those defendants (the Judicial Branch defendants). See generally 28 U.S.C. 463. The Department of Justice sought and received the district court's leave to intervene as a defendant in the case on behalf of the United States as such, for the limited purpose of defending the constitutionality of Section 372(c). See generally Fed. R. Civ. P. 24; 28 U.S.C. 516-517, 2043(a).

On December 30, 1999, the district court granted the defendants' motions to dismiss or for summary judgment, with the exception of the limited First Amendment claim discussed below. In a 77-page opinion (a copy of which is attached as Exhibit A), the court determined that it had jurisdiction to consider Judge McBryde's constitutional claims, "whether facial or as-applied," and his allegations of "facial" violations of the Act itself. On the merits, however, the court held that the disciplinary provisions of the Act do not encroach on the power of impeachment; that they enhance, rather than jeopardize, the independence of the judiciary; and that they pose no threat to the ability of federal judges to carry out the judicial functions assigned to them by Article III of the Constitution. The court further considered and rejected Judge McBryde's claims that the Fifth Circuit Judicial Council and the Judicial Conference Review Committee committed "facial" violations of the Act, "with respect either to the scope of the investigation or to the nature of the material which [they] addressed," and his claim that they impermissibly reviewed the merits of his judicial decisions, rather than his "pattern of behavior toward attorneys and others, which they found demonstrates intemperance and abusiveness." The court concluded that the proceedings against Judge McBryde comported with due process, and that the sanctions imposed "did not transgress into the forbidden realm of impeachment, but rather were limited in scope and tailored to the problem that his behavior posed." See 12/30/99 slip opinion 3-4 (summarizing court's findings and holdings).

In the final section of its opinion (slip op. 63-76), the district court considered Judge McBryde's challenge to the Act's confidentiality provision, 28 U.S.C. 372(c)(14). Subsection (c)(14) provides in relevant part that "all papers, documents, and records of proceedings" related to disciplinary investigations shall remain confidential unless disclosure is authorized by the judge who is the subject of the investigation and by the Chief Judge of the relevant Circuit, the chairman of the Judicial Conference's Review Committee, or the Chief Justice of the United States. The court explained that since the Review Committee's affirmance of the sanctions against him, Judge McBryde "has sought to make public the entire record of the[] proceedings." Slip op. 64. Judges Politz and Bauer, in their respective capacities as chairmen of the Fifth Circuit Judicial Council and the Judicial Conference Review Committee, had agreed to disclosure of the record "with certain exceptions, including [certain] psychiatric materials and witness identities." Ibid. Judge McBryde sought a further determination by the Chief Justice, who ultimately authorized "disclosure of all portions of the record save 'the identity of the witnesses in the proceedings.' " Id. at 65 (quoting letter from the Chief Justice dated June 11, 1999). The district court ultimately determined, in accordance with the position taken by the Judicial Branch defendants, that the Chief Justice's letter "prohibits disclosure only of the names of the witnesses in the Section 372(c) proceedings," without requiring the additional redactions that would likely be necessary to prevent interested readers from ascertaining the witnesses' identities from other information in the record. See slip op. 66-67. Because the United States

intervened in this case only to defend the constitutionality of Section 372(c), the Department of Justice expressed no view concerning the proper interpretation of the Chief Justice's letter.

The district court noted that "the contours of Judge McBryde's First Amendment claim ha[d] shifted significantly" since the filing of this case, particularly in light of the subsequent determination that the Judge was free to release all record information other than the names of witnesses. See slip op. 64. Noting that public comment concerning "the judicial behavior of a federal judge" lies "at the center of the kind of expression the First Amendment must protect," and that Judge McBryde sought the release of records pertaining to "adversarial proceedings that ultimately engendered very public consequences," the court characterized the continuing restrictions on release of those records as a "prior restraint" on the Judge's speech that "targets particular content (the identities of the witnesses) which Judge McBryde deems essential to his [public] defense." Id. at 68-71.

Reviewing cases that had addressed First Amendment claims in somewhat analogous contexts, the court "emphasize[d] that in none of [those] cases did the challenged statute require confidentiality once the proceedings had reached their conclusion and the subject judge had been censured." Slip op. 73-74. Moreover, although the court acknowledged that the Act's confidentiality provision "serves a variety of legitimate state purposes," including protecting witnesses, complainants, and the judiciary as an institution, it took the view that "the paramount interest is that of the subject judge." Id. at 75. In particular, while the court understood the Chief Justice to have based his final restriction on disclosure on "a legitimate concern for witness privacy and the necessity of encouraging witnesses to come forward with complaints in other instances," it concluded that "at the point where the proceedings have long since concluded and Judge McBryde has undergone a public reprimand and sanctions, [that] interest loses much of its significance." Id. at 76. Finally, the court pointed out that "the names of many of the witnesses have already reached the public domain, through the internet or through newspaper accounts of the proceedings," while "[o]ther witnesses are easily identified through contextual information which Judge McBryde is permitted to disclose, in accordance with the Court's narrow interpretation of the Chief Justice's letter." Ibid. Under those particular circumstances, the court concluded that the government's interest in confidentiality, "while legitimate, is insufficient to justify the restriction on Judge McBryde's open and frank discussion of the proceedings once they have been concluded and sanctions have been imposed." Ibid. The court emphasized that its ruling was limited to the Act's confidentiality provision "as it has been applied to Judge McBryde," and specifically declined to reach the question "whether or not section 372(c)(14) itself is facially unconstitutional." Id. at 70 & n.23.

In light of its conclusion concerning Judge McBryde's First Amendment claim, the district court granted the Judge's motion for summary judgment with respect to that claim (while denying it in all other respects). The court sua sponte stayed the entry of its judgment until January 7, 2000, to permit the defendants to seek a further stay, pending any appeal, from the court of appeals. The United States requested an extension of the district court's stay to February 7, 2000, to allow for consultation within the government concerning whether to seek a further stay from the court of appeals and, concomitantly, whether to appeal on the First Amendment issue. The district court granted that request in part, extending its stay only until Friday, January 14.

In the limited time allowed by the district court's temporary stay, the Department of Justice has consulted with the private counsel who have represented the Judicial Branch defendants in this case. I have attached as Exhibit B a submission on behalf of those defendants, in response to the United States' motion to extend the temporary stay, informing the district court that the Judicial Branch defendants were unlikely to seek a stay from the court of appeals. That submission noted (at page 2) that the court's opinion "does not pass on the facial constitutionality of [the Act's] confidentiality provision," recognizes that that provision "serves a variety of legitimate government interests," and "is explicitly confined to the specific facts of this case at this particular point in the proceedings." Accordingly, the submission stated, although the Judicial Branch defendants do not agree with the district court's constitutional analysis, they "do not believe that institutional concerns with respect to future cases which underlay their position on Judge McBryde's claim are implicated by the Court's ruling" in this case. Ibid. We have since been informed by counsel for the Judicial Branch defendants that those defendants have now reached a firm determination neither to ask the court of appeals to stay the district court's order, nor to appeal from the portion of that order that permits Judge McBryde to release the records of the proceeding against him, including the names of witnesses.

Like the Judicial Branch defendants, the Department of Justice disagrees with the district court's analysis of the issues presented by Judge McBryde's First Amendment claim. In light of the Judicial Branch defendants' decision not to pursue those issues further in this case, however, I have concluded that the institutional interests of the United States do not require that we undertake independently to press the matter by seeking a stay in the court of appeals or taking an appeal. As the Judicial Branch defendants' submission to the district court notes, the district court expressly declined to consider any facial challenge to the constitutionality of Section 372(c)(14), and carefully limited its decision to the facts of this case. Those facts are ones that the court itself considered to be "unusual, to say the least." Slip op. 74. In particular, as a result of determinations by the Chief Judge of the Fifth Circuit and the Chief Justice of the United States made pursuant to 28 U.S.C. 372(c)(14)(C), all but a small portion of the official record of the proceedings may be released by Judge McBryde without regard to the district court's decision. And it appears that much of the information contained in that remaining portion may have been made public through other channels, or may be fairly inferred from other portions of the record that are subject to release. Although in our view the district court's analysis gives insufficient weight to the government's interest in the confidentiality of records under the Act, there is some force to the court's observation that the government's interest is diminished when the Judicial Branch officers invested by statute with the authority to make disclosure decisions, as well as the subject judge himself, have already agreed to allow that degree of disclosure.

It is also significant that the remaining records that the district court's decision now authorizes Judge McBryde to disclose could also have been released, at any time, with the authorization of the Chairman of the Judicial Conference Review Committee or the Chief Judge of the Fifth Circuit, under the terms of Section 372(c)(14)(C) itself. The decision by those two Judicial Branch officers (who are defendants in this action) -- and by the Review Committee and the Judicial Council -- not to seek a stay or to appeal the district court's ruling on the First Amendment issue produces, in the end, the same result. Because the Act was designed to respect the independence of the Judicial Branch on matters relating to the discipline of Article III judges,

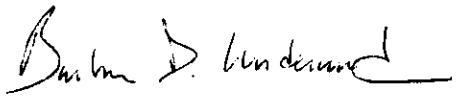
the Department of Justice would be reluctant to press on with a stay application and appeal on its own, despite the judgment of the responsible Judicial Branch bodies and officials that there is not a sufficient need to maintain a residual degree of confidentiality in this particular case, and at this stage of the proceedings, to justify seeking a stay or taking an appeal.

Finally, this litigation is collateral to a judicial disciplinary proceeding that has already been concluded, and it has resulted in a district court decision that broadly upholds both the facial constitutionality of the Judicial Conduct and Disability Act and the Act's application in this case. While we will continue to defend the constitutionality of the Act vigorously in any appeal that may be filed by Judge McBryde, it is my judgment that it is neither necessary nor advisable for us to file an independent motion for a stay in the court of appeals, or an independent appeal or cross-appeal from the district court's unfavorable ruling on a narrow and fact-bound aspect of the case. Accordingly, I have decided not to seek such a stay, or to authorize an appeal or cross-appeal by the United States in this case.

A notice of appeal from the district court's decision would be due on February 29, 2000, except that if Judge McBryde files a notice of appeal after February 15, 2000, a notice of appeal may be filed up to 14 days later. As explained above, however, the district court's temporary stay of its order expires on January 14, 2000. The justiciability of an appeal could, of course, be affected by the expiration of that stay, entry of the district court's judgment, and the release of records by Judge McBryde without redaction of the witnesses' names.

In accordance with Section 101(b) of the Legislative Branch Appropriations Act, 2000, Pub. L. No. 106-57, 106 Stat. 414 (to be codified at 2 U.S.C. 130f(b)), I am today sending a substantially identical letter to the General Counsel of the House of Representatives.

Sincerely,



Barbara D. Underwood
Acting Solicitor General*

* The Solicitor General has recused himself from participation in this case.