

For 'Maverick' Federal Judges, Life Tenure Is Largely Unfettered License

THE WALL STREET JOURNAL.

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Life tenure for federal judges aims to give them the independence to do what is right -- not protect them while doing wrong.

A string of recent transgressions by a federal judge in Los Angeles has some questioning whether the federal bench can adequately police itself.

In the most recent incident, the U.S. Federal Circuit Court of Appeals in Washington, D.C., last week ordered Judge Manuel Real to be removed from a patent-infringement case against Microsoft Corp. The appellate court said Judge Real, who ruled for Microsoft, improperly ignored evidence and failed to adequately state the reasoning behind his rulings. Trial judges are often reversed on appeal, but rarely found so lacking that they are removed from cases.

The very people charged with meting out carefully measured punishments are themselves subject to imprecise sanctions that are either too lax, according to some critics, or too severe to be used except in the rarest occasions. The U.S. Constitution allows judges to serve "during good behavior," which traditionally has been interpreted as "for life." The U.S. House of Representatives can impeach judges for "high crimes and misdemeanors," but only 13 judges have ever met this fate.

Defenders of the federal bench say the vast majority of federal judges are exemplary, in part because they are free to follow their consciences without worrying about losing their jobs. After all, federal judges, as one attorney noted, led the way in desegregating the South.

But the concerns come at a time when there are more serious-misconduct investigations of federal judges than at any time in recent years. Discipline short of impeachment, which typically results in a reprimand, is usually left to court-governing bodies, whose most severe penalty is to require misbehaving judges to take paid leaves of absence."

How many people in America hold jobs where, if you do them badly enough, the punishment is you have to stop working and collect your pay?" says Charles Geyh, a professor at the Indiana University School of Law, who specializes in judicial ethics. Public shaming is a sufficient sanction for most judges, he says, but probably not for "the maverick judge who doesn't give a damn.

"In state courts, judges can be voted out of office or removed by state supreme courts for misconduct. State judges are also subject to mandatory codes of conduct, unlike their federal counterparts, who operate under advisory conduct codes that can be loosely interpreted.

The Judicial Conference of the United States, a panel of judges who make policy for federal courts, adopted new procedures in March designed to make misconduct investigations more thorough and transparent. But the changes were modest, according to attorneys and academics.

Even so, the new rules should be amply tested. Currently, a Denver federal judge, Edward Nottingham, is being investigated for, among other allegations, "intemperate" behavior and viewing porn in his chambers. Mr. Nottingham's attorney declined to comment. In Texas, Samuel Kent, a Houston federal judge, was reprimanded last year and ordered to take a four-month leave of absence following allegations he attempted to sexually assault his former case manager. The judge has denied the charges.

But it is Judge Real, an 84-year-old President Lyndon Johnson appointee, who has most stoked the recent debate. He has been admonished repeatedly for allegedly favoring one side and for failing to provide sufficient reasoning behind his decisions. "What can you do with a judge like Real who repeatedly abuses his power?" asks Arthur Hellman, a judicial-ethics expert at the University of Pittsburgh School of Law. "Lifetime tenure makes it difficult."

Judge Real didn't return calls to his chambers. Stephen Miller, counsel to the judge, says disciplinary rules preclude him from commenting.

Judge Real had been stripped of a case before the latest Microsoft ruling. In March, the Ninth U.S. Circuit Court of Appeals in California removed him from a securities-fraud case, concluding he had entered "biased evidentiary rulings" in favor of prosecutors. And last month, the Ninth Circuit again yanked the judge, this time in a class-action suit against American Honda Motor Co., because he had issued a significant ruling without providing a sufficient factual basis.

The transgressions came despite Judge Real's own acknowledgment to a Ninth Circuit investigating committee, formed in 2006, that he sometimes failed to adequately state his rationale. He vowed to do better.

U.S. Supreme Court justices also have taken issue with Judge Real. In June, the court overturned a ruling by Judge Real in a suit alleging human-rights abuses by former Philippines President Ferdinand Marcos. In a rare move, two justices issued opinions recommending the case not be remanded back to Judge Real, who ruled against the Philippines, because his conduct raised questions about whether he could be fair toward the country.

The House Committee on the Judiciary held hearings in 2006 over whether to impeach Judge Real, but no action was taken. The effort was spurred by allegations he had improperly aided a woman in her bankruptcy case pending before another judge. Judge Real testified in Congress and denied wrongdoing. In the end, though, congressional critics couldn't muster enough votes for impeachment, as some members of Congress said they felt the matter should be left to the

Ninth Circuit to handle. A Ninth Circuit judge twice declined to penalize Judge Real, but a court disciplinary body did eventually issue a written reprimand.

Still, many believe more can be done to discipline the occasional stray federal judge. When congressional anger over Judge Real and others threatened to lead lawmakers to strip the courts of some disciplinary authority, the Judicial Conference of the U.S. responded. The new rules adopted in March grant the Judicial Conference more power to oversee misconduct investigations and allow appellate courts to publicly announce investigations, which have largely operated behind closed doors.

In June, Ninth Circuit Chief Judge Alex Kozinski recommended publicly that he should be investigated following press accounts that he had posted sexually explicit material to a Web site. Judge Kozinski has said he believed the site was private, yet he still recommended the matter be looked into. An investigation, by another appellate court, was later announced -- a public airing that likely would not have happened without the new procedures, Mr. Geyh says.

But the Judicial Conference only went so far. It didn't adopt stiffer sanctions for misconduct nor did it precisely define it. Thus, the problem remains unsolved. "Is the federal system well equipped to deal with incorrigible behavior by judges?" asks Mr. Geyh. "No, not where the behavior doesn't rise to the level of impeachment."

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