

Calendar No. 263

107TH CONGRESS }
1st Session

SENATE

{ REPORT
107-111

MAKING PERMANENT THE AUTHORITY TO
REDACT FINANCIAL DISCLOSURE STATE-
MENTS OF JUDICIAL EMPLOYEES AND JU-
DICIAL OFFICERS

R E P O R T

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

H.R. 2336

TO MAKE PERMANENT THE AUTHORITY TO REDACT FINANCIAL
DISCLOSURE STATEMENTS OF JUDICIAL EMPLOYEES AND JUDI-
CIAL OFFICERS



DECEMBER 7, 2001.—Ordered to be printed

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DECEMBER 7, 2001.—Ordered to be printed

Mr. LIEBERMAN, from the Committee on Governmental Affairs,
submitted the following

R E P O R T

[To accompany H.R. 2336]

The Committee on Governmental Affairs, to which was referred the bill (H.R. 2336) to make permanent the authority to redact financial disclosure statements of judicial employees and judicial officers, having considered the same, reports favorably thereon and recommends that the bill do pass.

When ordering the bill reported, the Committee agreed that Members would further evaluate the bill prior to Senate consideration. That further evaluation has occurred, and, based thereon, an amendment to the bill will be offered, and a recommendation will be made that the Senate adopt the amendment and pass the bill as so amended. The purpose of the amendment will be to extend the redaction authority for 4 years instead of making it permanent.

I. PURPOSE AND SUMMARY

H.R. 2336 would make permanent the authority to redact financial disclosure statements filed by judges and other officers and employees of the federal judiciary when the Judicial Conference, in consultation with the United States Marshals Service, finds that revealing the information could endanger the filer. The bill would accomplish this by repealing section 105(b)(3)(E) of the Ethics in Government Act of 1978 (5 U.S.C. app.), which now provides that the authority to redact shall expire on December 31, 2001.

When ordering the bill reported, the Committee agreed that interested Members would further evaluate the bill before the bill would be considered by the Senate. Based on that further evaluation, an amendment to H.R. 2336 will be offered, and a rec-

ommendation will be made that the Senate adopt the amendment and pass the bill as so amended. As so amended, the bill would extend the authority to redact for an additional 4 years, until December 31, 2005.

II. BACKGROUND AND NEED FOR LEGISLATION

A. EXISTING LAW AND ITS IMPLEMENTATION

Under the Ethics in Government Act of 1978 (5 U.S.C. app.), judges and certain other officers and employees of the judiciary, like officers and employees in other branches of government, must file annual financial disclosure reports. However, considering the nature of the judicial function and the security risk it entails, the 105th Congress enacted section 7 of the “Identity Theft and Assumption Deterrence Act of 1998” (Public Law No. 105–318), adding a new subsection 105(b)(3) to the Ethics in Government Act, which provides that the financial disclosure reports filed by judges and other judiciary personnel may be redacted before being made available to the public “if a finding is made by the Judicial Conference, in consultation with the United States Marshals Service, that revealing personal and sensitive information could endanger that individual.”¹

The Judicial Conference has adopted regulations governing public access to financial disclosure reports filed by judges and other judicial employees under the Ethics in Government Act. Under these regulations, the Judicial Conference delegated to its Committee on Financial Disclosure the responsibility for implementing the financial disclosure requirements, and the regulations set forth the procedure by which members of the public may obtain access to the financial disclosure reports and by which decisions to redact the reports are made.

The regulations restate a requirement, which is established generally under the Ethics in Government Act, that any request from a member of the public for access to a financial disclosure form must be in writing and must identify the requester and any other person on whose behalf the request is made. The regulations further provide that, when a request is received, the Committee will immediately notify the judge (or other employee who filed the requested report) and will send the judge (or other filer) a copy of the request.

The judge (or other filer) may request redactions when filing the annual report, and may also request redactions upon receiving notification of a request from a member of the public for access to the report. In requesting a redaction, the filer must state specifically what material is sought to be redacted and provide detailed reasons justifying the redaction. The Committee on Financial Disclosure then determines, in consultation with the United States Marshals Service, whether the information sought to be redacted could endanger the filer and either grants or denies the request accordingly. A judge (or other filer) whose request for redaction is denied may appeal to a Special Redaction Review Panel of the Judicial Conference. The Committee may also redact information without a

¹ This quotation omits an apparent typographical error in the United States Code, which refers to the “United States Marshall Service.”

request if it receives evidence that release of information could endanger the filer. The regulations provide that the redaction is allowed to the extent necessary to protect the filer, and for as long as the reasons for redaction exist.

The Administrative Office of the U.S. Courts provided to the Governmental Affairs Committee detailed information about the implementation of the redaction authority. In the calendar year 2000, financial disclosure reports were filed by 2357 judges, of whom 179 requested redaction. Of these requests, 108 were granted in full by the Committee on Financial Disclosure, 32 were granted in part and denied in part, and 39 were denied in full. Sixteen judges appealed these decisions, and all 16 appeals were denied.

Of the 140 judges whose redaction requests were approved in full or in part, 59 judges' approved requests were based on specific threats such as high-threat trials, ongoing Marshals Service investigations, or continuing threats and financial harassment. For 81 judges, the approved redaction requests were based on what the Judicial Conference calls "general threats," without a specific identified threat against the judge, but these "general threat" redactions applied only to information that would disclose the workplace, school, home, or other unsecured locations of judges or their family members.

For the 140 judges whose reports were redacted during the year 2000, a total of 218 individual disclosure reports were partially redacted, and a total of 13 individual reports were totally redacted. In each instance where a report was redacted in its entirety, the Committee on Financial Disclosure had determined that the judge who filed the report or reports was subject to a specific, active security threat.

B. GOVERNMENTAL AFFAIRS COMMITTEE'S CONSIDERATION OF H.R.

2336

As enacted in 1998, the provision of the Ethics in Government Act authorizing the judiciary to redact financial disclosure reports included an approximately three-year sunset clause, under which the authority will expire on December 31, 2001, unless the authority is extended by Congress. H.R. 2336 would strike the sunset clause, thereby making the redaction authority permanent. H.R. 2336 was introduced on June 27, 2001 and passed the House of Representatives on October 16, 2001.

The Governmental Affairs Committee considered the bill at its business meeting on November 14, 2001. At that meeting, no Committee Member spoke in opposition to favorably reporting the bill, but certain Members did express concerns. Senator Thompson noted that in some instances the redaction authority was used to avoid revealing stocks and other financial assets owned by judges, gifts in the form of trips taken by judges, and other gifts received by judges. This is a problem, he said, because financial assets and gifts can produce a conflict of interest. He stated that the redaction authority should not be used for financial assets or gifts of this kind and that he expects the Judicial Conference and the Administrative Office of the Courts to take notice of these concerns. Senator Bunning raised the point as to why authority to redact financial disclosure statements was only granted for judges and other officers and employees of the judiciary. He noted that U.S. Attorneys,

Assistant U.S. Attorneys, and other federal personnel could be equally at risk from certain information in their financial disclosure statements. Redaction authority does not apply for them, and Senator Bunning raised the issue as to whether or not redaction authority should apply for those and other federal personnel.

The Committee decided to report the bill favorably to the Senate, but, in light of the concerns expressed, the Committee agreed that Members would have an opportunity to further evaluate the legislation and to resolve any doubts before the bill would be considered on the Senate floor. The Committee proceeded to convene a meeting with a representative of the Administrative Office of the Courts, to obtain additional information about the Judicial Conference's implementation of the redaction authority and to discuss the concerns that had been expressed about that implementation.

The information considered by the Committee indicates that the judiciary's current implementation of the redaction authority is prudent and responsible overall. However, to address specific concerns raised by certain Committee Members, the following steps are being taken. An amendment to H.R. 2336 will be offered, and a recommendation will be made that the Senate adopt the amendment and pass the bill as so amended, to extend the redaction authority for 4 years, until December 31, 2005, rather than now making the authority permanent. This 4-year sunset period will give the Committee or interested Members an opportunity to inquire further into specific areas of concern regarding the implementation of the redaction authority, to evaluate any responses by the judiciary to these concerns, and to consider whether any legislative changes to the redaction authority are necessary.² This will also provide an opportunity to look into whether the redaction authority, which is an exception to the generally applicable provisions of the Ethics in Government Act, should apply only to the judiciary, as it does now, or whether the authority should also apply to U.S. Attorneys or others outside of the judicial branch.

Although the judiciary has generally exercised the redaction authority well, the Committee has some specific concerns about certain ways in which the redaction authority has been used since it was enacted three years ago with a three-year sunset. The Committee hopes that the judiciary will examine whether any of the Committee's observations might warrant changes in the operative regulations.

The Committee understands that, although the redaction authority has not been used often to withhold a judge's entire financial disclosure report, such complete withholding has, upon the recommendation of the United States Marshals Service, occurred on occasion. The Committee believes that the intent of the legislation is to authorize withholding only that specific information that could endanger judges. Even if the information in one section of a report must be redacted, it may be safe to release another section of the report that either contains information posing no danger or that is blank because the judge had nothing relevant to disclose. The Committee questions whether it would ever be necessary to withhold every part of a judge's report. The Committee has shared this view

²A representative of the Administrative Office of the U.S. Courts also advised the Committee that copies of the annual reports required by section 105(b)(3)(C) of the Ethics in Government Act will in the future be sent to the Committee.

with the Administrative Office of the U.S. Courts, which has indicated that the judiciary plans to use redaction authority in the future with a careful, section-by-section review and decision so that only the information that could endanger the filer would be redacted from a disclosure report. The Committee appreciates that position and hopes that the Judicial Conference will consider modifying its regulations to clarify its intent in that regard.

The Committee also believes that the judiciary might desire to review its practices with respect to the redaction of financial assets. A judge's financial assets can potentially create a conflict of interest. Redaction of those assets could therefore prevent the public from learning that a conflict was present in a case. On the other hand, under some circumstances, disclosing financial assets might enable a hostile person to learn a judge's home address or might otherwise pose a danger. But there may be ways to maintain judicial safety through ways other than redacting the holdings. For instance, it may be worth considering whether holding assets in a brokerage account in "street name,"³ or using a mailing address other than the judge's home address in connection with ownership of the assets, might eliminate danger that might otherwise arise from publicly identifying the assets. The judiciary might consider whether, if measures like these were used, redaction of financial assets might be unnecessary.

Additionally, some redactions have been made with respect to reimbursement for travel to various conferences. The Committee has some difficulty understanding why this redaction has occurred, and has communicated its reservations to the Administrative Office of the U.S. Courts. Although a judge could be harmed by someone learning that a judge was attending a conference as it was occurring, the judge would have long since left that location by the time the reimbursement of the expense was reported. The Administrative Office has advised that no judge has asked that reimbursed travel be redacted, but that such items have been redacted in several occasions where the financial disclosure report was redacted in its entirety. (Concerns about some reports having being redacted in their entirety were discussed above.) Especially in light of the fact that a number of reimbursements have inadvertently not been reported at all, the Committee suggests that the judiciary review its policies for redacting information of that type, and consider whether to strengthen its enforcement or other compliance policies for assuring that judges comply with the legal obligation to disclose reimbursed travel.

In considering the rationale for the redaction authority, the Committee understands that the need to reveal information that can potentially create a conflict of interest may be outweighed when disclosing the information might reveal the location of a judge or family member at an insecure location or might otherwise endanger the individual physically. But, in extending the program, the Committee believes that where the reason stops, so should the rule. Thus, redactions made not to protect a judge from a threat to his or her person, but to stop false liens from being placed on a piece of property or to prevent "theft of identity," may not fit within the

³Holding securities in "street name" means that the broker holds the securities in its name or in the name of another nominee, rather than the securities being held in the name of the real, or "beneficial," owner.

rationale for the redaction authority. The Committee believes that the judiciary might want to review its use of the redaction authority in this context. The judiciary might also want to evaluate whether decisions to grant waivers to disclosure should be made public.

The Committee believes that the judiciary is undertaking strong efforts to ensure that assets and reimbursements are disclosed, but recognizes that public confidence in that process is necessary even if all information required to be disclosed is in fact disclosed. This is true for redacted information as well. Ultimately, a well-functioning redacting process is in the interest of both the judiciary and the public. The Committee believes that the Judicial Conference has been conscientious in its review of judicial requests for individualized redactions, and appreciates that appeals of rulings adverse to individual judges have not been granted when the Conference believes they are not warranted.

These suggestions are offered in an effort to be helpful, rather than critical. The judiciary can determine for itself which, if any, it might choose to consider. The Committee appreciates the reactions it has received to some of these ideas from the Administrative Office of the U.S. Courts, and looks forward to further reviewing the operation of the program.

III. LEGISLATIVE HISTORY

H.R. 2336 was introduced on June 27, 2001, by Congressman Coble, for himself and Congressman Berman, and was referred to the House Committee on the Judiciary. No hearings were held, and on October 2, 2001, the House Judiciary Committee ordered the bill favorably reported by voice vote. The bill was then considered in the House on October 16, 2001, under suspension of the rules and passed by voice vote.

In the Senate, H.R. 2336 was referred to the Committee on Governmental Affairs. No hearings were held on the legislation. H.R. 2336 was considered by the Committee at its business meeting on November 14, 2001, and was ordered reported favorably, without amendment, by voice vote. When ordering the bill reported, the Committee agreed that Members would further evaluate the bill before the bill would be considered by the Senate. Committee members present were Senators Akaka, Durbin, Cleland, Carper, Carnahan, Thompson, Voinovich, Cochran, Bunning, and Lieberman.

Based on that further evaluation, it was decided that an amendment to H.R. 2336 will be offered, and a recommendation will be made that the Senate adopt the amendment and pass the bill as so amended. As so amended, the bill would not make the redaction authority permanent, but would instead extend the authority for 4 years, until December 31, 2005.

IV. REGULATORY IMPACT STATEMENT

Paragraph 11(b)(1) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate the "regulatory impact which would be incurred in carrying out this bill." Carrying out H.R. 2336 would have no regulatory impact.

V. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 19, 2001.

Hon. JOSEPH I. LIEBERMAN,
Chairman, Committee on Governmental Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2336, a bill to make permanent the authority to redact financial disclosure statements of judicial employees and judicial officers.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Lanette J. Walker.

Sincerely,

STEVEN LIEBERMAN
(For Dan L. Crippen, Director).

Enclosure.

H.R. 2336—A bill to make permanent the authority to redact financial disclosure statements of judicial employees and judicial officers.

H.R. 2336 would repeal the sunset provision in the Ethics in Government Act of 1978 relating to the authority of certain judicial employees and judicial officers to revise their financial disclosure statements. CBO estimates that implementing H.R. 2336 would have no significant impact on the federal budget. The bill would not affect direct spending or receipts; therefore, pay-as-you-go procedures do not apply. H.R. 2336 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

On October 12, 2001, CBO transmitted a cost estimate for H.R. 2336 as ordered reported by the House Committee on the Judiciary on October 3, 2001. The two versions of the legislation and our cost estimates are identical.

The CBO staff contact for this estimate is Lanette J. Walker. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

VI. CHANGES TO EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by H.R. 2336, as reported, are shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE**TITLE 5—GOVERNMENT ORGANIZATION
AND EMPLOYEES**

* * * * *

TITLE 5—APPENDIX

ETHICS IN GOVERNMENT ACT OF 1978

TITLE I—FINANCIAL DISCLOSURE RE-
QUIREMENTS OF FEDERAL PER-
SONNEL

* * * * *

§ 105. Custody of and public access to reports

* * * * *

(b)(1) * * *

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(3)(A) * * *

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【(E) This paragraph shall expire on December 31, 2001, and apply to filings through calendar year 2001.】