

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed February 1, 2002

No. 00-5016

The Honorable John H. McBryde,
United States District Judge for the
Northern District of Texas,
Appellant

v.

Committee to Review Circuit Council Conduct and
Disability Orders of the Judicial Conference of the
United States, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge, Edwards, Sentelle,
Henderson, Randolph, Rogers, Tatel and Garland, Circuit
Judges.

O R D E R

Appellant's petition for rehearing en banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular, active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY:

Michael C. McGrail

Deputy Clerk

Circuit Judges Sentelle, Rogers and Tatel would grant the petition for rehearing en banc.

A statement of Circuit Judge Tatel dissenting from the denial of rehearing en banc, in which Circuit Judge Sentelle joins, is attached.

Circuit Judges Edwards, Randolph and Garland did not participate in this matter.

Tatel, Circuit Judge, with whom Sentelle, Circuit Judge, joins, dissenting from denial of rehearing en banc:

In my view, this case warranted en banc review because the panel's decision conflicts with well-established precedent of both the Supreme Court and this circuit. In *Webster v. Doe*, the Supreme Court held "that where Congress intends to preclude review of judicial claims, its intent to do so must be clear. . . . We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." 486 U.S. 592, 603 (1988) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). See also *Griffith v. Fed. Labor Relations Auth.*, 842 F.2d 487, 494-95 (D.C. Cir. 1988); *Ungar v. Smith*, 667 F.2d 188, 193 (D.C. Cir. 1981); *Ralpho v. Bell*, 569 F.2d 607, 620-21 (D.C. Cir. 1977). Here, the panel reads section 372(c)(10) to preclude review of Judge McBryde's as-applied constitutional claims even though the statute contains no language expressly barring review, and even though the legislative history may as easily be read to permit as to preclude federal court jurisdiction over such challenges. See *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of the United States*, 264 F.3d 52, 73-76 (D.C. Cir. 2001) (Tatel, J., dissenting). According to the panel, the purported "substantial redundancy" between review by an Article III court and by the Judicial Conference reflects Congress's intent to preclude review of as-applied constitutional claims. *Id.* at 62. This position, however, rests not on primary evidence from the legislative history itself, but on a secondary inference drawn from the structure of the Act, and thus does not amount to the kind of "clear and convincing" evidence required by the Supreme Court and this circuit. See *Johnson v. Robison*, 415 U.S. 361, 371-75 (1974) (limiting its analysis of legislative history to affirmative statements of congressional intent); see also *Griffith*, 842 F.2d at 494-95 (same); *Ungar*, 667 F.2d at 193-96 & 195 n.2 (same); *Ralpho*, 569 F.2d at 620-22 (same). I respectfully dissent from the denial of rehearing en banc.