



**Sixth Circuit Nominee David W. McKeague
District Court Judge, Western District of Michigan**

Summary

Michigan District Court Judge David McKeague is a staunch conservative with a record suggesting a bias against some plaintiffs, a predisposition to grant summary judgment to civil defendants, and poor temperament. Like many of President Bush's federal judicial nominees, McKeague also has long-standing ties to the Republican Party and to the country's right wing establishment.

Several attorneys with whom we spoke believe that McKeague brings a bias to the bench against employment, civil rights, prisoner, and other plaintiffs, and he has a reputation as a judge with a bad temper; he is known for run-ins with lawyers and for harsh criticism of those who come before him. He is also quick to grant summary judgment to employers and others. Indeed, he often cites the need for trial-level judges to weed out as many cases as possible at the summary judgment level, ensuring that no "frivolous" or otherwise inappropriate cases go before a jury.¹

Equally troubling about the scheduled hearing, however, is the Senate Judiciary Committee's decision to break long-standing precedent and move a nomination that is opposed by both home-state senators. Ignoring a proposal by Senators Levin and Stabenow to resolve the impasse by establishing a bipartisan commission, the White House has pushed for McKeague's confirmation and Judiciary Committee Chair Hatch has scheduled a hearing. McKeague is only the second nominee ever to be granted a hearing over the objections of both home-state senators.²

Short Biography

Born in 1945 in Pittsburgh, Pennsylvania, David McKeague received his B.A., in 1968, and his J.D., in 1971, from the University of Michigan. He also served in the U.S. Army Reserve from 1969-75. He worked in private practice as an associate and later shareholder and director at Foster, Swift, Collins & Smith from 1971 through 1992. In 1992, he was appointed by President George H.W. Bush to the U.S. District Court for the Western District of Michigan. For the past four years, he has also been an adjunct professor at Michigan State University Detroit College of Law. He lives in East Lansing with his wife, Nancy and their six children.

Introduction

Judge McKeague is well connected both professionally and politically. He is a member of the Western Michigan Chapter of the Federal Bar Association, the State Bar of Michigan, and the District of Columbia Bar Association. He is also a member of the Federalist Society for Law and Politics. His wife, Nancy, is the Vice President of Administration for the Michigan Chamber of Commerce.

¹ See section below on Summary Judgment.

² The first was Michigan Appeals Court Judge Henry Saad, also nominated by President Bush to the Sixth Circuit, who also lacked approval of either of his home-state senators.

McKeague has been a major player in Republican Party politics for nearly twenty years. In 1984, as a 38-year-old lawyer, he was chair of the Ingham County Michigan Reagan-Bush campaign, helping Reagan win a landslide victory in the state. In 1986, he was on the judicial selection committee for the Western District of Michigan. And in 1988, McKeague worked on the Bush campaign, and was George H.W. Bush's lawyer for the 1988 Michigan primary in legal proceedings concerning state rules for selecting delegates to attend the county conventions that, in turn, choose delegates for the state convention.³ McKeague successfully represented Bush in the legal challenges brought by supporters of Pat Robertson and Jack Kemp. The dispute deeply divided the Michigan Republican Party, then headed by Spencer Abraham.⁴ In what may have been a reward, McKeague was appointed by Bush to the Western District of Michigan in 1992.⁵

Context of Nomination

On November 8, 2001, McKeague was nominated, along with Henry Saad and Susan Bieke Neilson, to the U.S. Court of Appeals for the Sixth Circuit. Two of President Clinton's nominees to that court – Michigan appeals court judge Helene White and Detroit attorney Kathleen McCree Lewis – had waited for years without ever receiving a hearing, despite frequent pleas from both Democratic Senator Carl Levin and the Sixth Circuit's chief judge. Republican Senator Spencer Abraham refused to return a blue slip for either one,⁶ and the nominations lapsed.

Michigan's two Democratic senators – Carl Levin and Debbie Stabenow – tried to strike a deal with the White House, whereby one of Clinton's nominees would be renominated to the Sixth Circuit and the other Clinton nominee named to the district court. However, Bush rejected the proposed compromise and chose instead to nominate Michigan Court of Appeals Judge Richard Griffin to the fourth seat. The senators are now advocating the creation of a bipartisan commission to recommend nominees acceptable to both the White House and Michigan's elected representatives.

Cases/Areas of the Law

Judge McKeague has issued several rulings in different areas of the law that are troubling for his failure to acknowledge the facts or properly follow the law. In addition he demonstrates a particular eagerness to get rid of cases on summary judgment; indeed, in several opinions, he has noted the district court judge's important job of "weeding out" frivolous cases and his responsibility as a judge to eliminate such cases as often as possible.⁷ Summarized below are several of McKeague's more troubling decisions.

³ James Lyons, "Republican State Chairman Caught in Michigan Cross Fire," *Legal Times*, December 21, 1997.

⁴ James Lyons, "Bushwhacked in Michigan; How Crack Team Foiled Robertson," *Legal Times*, February 8, 1988.

⁵ Indeed, one of the lawyers we spoke with depicted McKeague as a political appointee who has been nominated by George W. Bush for elevation to the Sixth Circuit for the same reason.

⁶ Abraham did eventually return the blue slips, but only after it was too late in the Clinton term to confirm White or Lewis. At the time, under Judiciary Committee Chair Hatch (R-UT) the "blue slip rule" was sacrosanct, giving complete deference to even one home-state senator who objected to a nominee. Now, with a Republican in the White House, he has rewritten the rules. By moving the Michigan nominees, Hatch has made home-state senators' objections virtually irrelevant.

⁷ See, e.g., "The standard to be applied to the pending cross-motions for summary judgment is well-settled. As the Sixth Circuit has noted, *the federal courts have entered a 'new era' in summary judgment practice.... While preserving the constitutional right of civil litigants to a trial on meritorious claims, the courts are now vigilant to weed out unsupported claims before trial.*" [emphasis added] *Brewer v. Fortis Benefit Insurance Co.*, 2001 U.S. Dist. LEXIS 18341 (W.D. Mich.).

Prisoners/Civil Rights

In 1994, McKeague presided over a high-profile conflict between the state of Michigan and the United States Department of Justice (DOJ) over claims of sexual abuse in state prisons.⁸ Complaints were widespread, and after receiving numerous reports of abuse of women prisoners by guards, including systemic rape,⁹ the Justice Department informed the state in June 1994 that it intended to conduct an investigation of the prisons in question pursuant to the federal Civil Rights of Institutionalized Persons Act (CRIPA).¹⁰ The notification asserted that, “inmates confined at [two state prisons] are being subjected to unsafe and life-threatening living conditions as a result of sexual assaults, lack of protection from harm, inadequate medical care, including mental health care, and inadequate due process.”¹¹ The Justice Department then told the state that it would be bringing on the investigative tour a medical doctor, a physician, a psychologist, and an FBI photographer, and it requested documents that would be reviewed by DOJ before the tour and retained. The state denied access to the prison, and the meeting between the state and DOJ never took place, leading to a stand-off.¹²

In response, DOJ filed a motion for a temporary restraining order, which was denied. It then requested a preliminary injunction, stating that it could not possibly produce the detailed facts required to file a claim under CRIPA without access to the prisons and the inmates alleging the violations. Stressing that the purpose of a preliminary injunction is merely to “preserve the relative positions of the parties until a trial on the merits can be held,” McKeague denied DOJ’s motion.

Finding inapposite the statute’s notice section, which states that before the attorney general files a suit under CRIPA, he or she must “notif[y] in writing the Governor... and the director of the institution of his intention to commence an investigation of such institution,”¹³ McKeague asserted that, “[c]learly, this statutory language does not explicitly authorize the unique and plenary pre-litigation investigative powers asserted by plaintiff. If Congress intended to grant such investigative access, Congress clearly knew how to do so.”¹⁴ He also held, without statutory language to support the finding, that, “the language of CRIPA, taken as a whole, does not impliedly grant the Attorney General the power to enter and investigate secure State facilities without the State’s consent.”¹⁵

⁸ “In the early 1990s, the abuse of female inmates in Michigan and other state and federal prisons came under investigation by the U.S. Department of Justice, international non-governmental organizations... as well as the United Nations, resulting in several investigative reports and legal actions.” Martin A. Geer, “Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law – A Case Study of Women in United States Prisons,” *13 Harv. Hum. Rts. J.* 71, 81 (2000).

⁹ “Between 1994 and 1996, Human Rights Watch (HRW) embarked upon a two and one-half-year study of women’s prisons in the United States involving five states... . The report found significant abuses of female prisoners in the Michigan system, including rape, sexual harassment, impregnation, forced abortions, privacy violations, and retaliation.” *Id.*

¹⁰ Such complaints had been filed by prisoners themselves for several years. In 1990, another Western District Court Judge, Judge Bell, heard a case involving a female prisoner, Jacqueline Urbina, who alleged that she had been raped by a prison guard. The guard confessed to having sexual relations with Urbina but then committed suicide. Urbina filed suit, but the state systematically refused to comply with any of the court’s orders to respond to motions, leading the court to finally sanction the state and threaten default judgment in Urbina’s favor. *Urbina v. Howes*, 1990 U.S. Dist. LEXIS 16848.

¹¹ *United States v. Michigan*, 868 F. Supp. 890, 891 (citing complaint) (W.D. Michigan, 1994).

¹² “[A]fter several exchanges of letters and phone calls between DOJ and the State, the parties’ positions became firm and clear: DOJ asserting its right to a full and unrestricted on-site investigation of the facilities, allegedly authorized by CRIPA; and the State’s denial of access to the facilities until DOJ provided it with specific allegations of the alleged constitutional violations which are the subject of this proposed investigation.” *Id.*

¹³ § 1997b(a)(c)(2).

¹⁴ *Id.* at 895.

¹⁵ *Id.* McKeague wrote that “it is wholly implausible to argue that CRIPA allows the Attorney General to merely make unsupported allegations, notify the State of her intent to investigate, and then authorizes the Attorney General

McKeague even went so far as to cite legislative history that seemed very clearly to support the argument made by the Attorney General,¹⁶ but then dismissed it as not supportive of the government's actions.¹⁷

The subsequent history of this case is relevant to an analysis of McKeague's judicial philosophy and temperament. While the Justice Department was wrangling with Judge McKeague in the Western District, the ACLU filed a class action suit on behalf of all female prisoners in the Eastern District. That class action drew Judge John C. O'Meara, who disagreed with McKeague, finding that the evidence showed substantial abuse of female prisoners, including sexual abuse and harassment.¹⁸ After its motion to investigate the allegations was denied, the Justice Department joined with the ACLU to file in the Eastern District,¹⁹ reportedly to avoid further action in McKeague's court.²⁰

Assertions from attorneys involved in the case that McKeague was dismissive of plaintiffs, and that he asserted that, although he believed that guards were having sexual intercourse with inmates, it was consensual in nature, merit an investigation by the Committee into McKeague's handling of this case. Given the many independent sources that substantiated the existence of systemic abuse, including sexual abuse, within the prison system, McKeague's dismissal of the case and apparent decision to take sides with the Governor to prevent a DOJ investigation seems inappropriate, if not outright disqualifying.

First Amendment/Establishment Clause

In this case, McKeague granted summary judgment to defendant school on claims brought by parents of several children enrolled at the Vanguard Charter School Academy, which is run by the for-profit National Heritage Academies Corporation, but receives public funding. National Heritage Academies, based in Grand Rapids, promised a "back to basic curriculum," including "strong moral development." The parents had sued the school, alleging illegal establishment of religion and indoctrination of their children.²¹

to force her (and her agents') way into secure State facilities over the objection of the State before suit has been filed or any of the certifications required by the Act have been met." In other words, DOJ is required to make the type of specific allegations that could likely be substantiated only through evidence discovered by investigation, but it must do so *prior* to conducting any such investigation.

¹⁶ "Congress recognizes that before initiating litigation with respect to a particular institution, the Attorney General must, of course, thoroughly investigate such institution. It is anticipated that the States and relevant officials will cooperate in the investigate process. If there is a failure to do so, the Attorney General may consider this factor in taking any actions under this Act." House Conference Report at 12 (U.S. Code Cong. & Admin. News at 836).

¹⁷ "The sentence relied upon by the Attorney General, when read in the context of the entire paragraph, clearly indicates that if a State refuses to cooperate in an investigation, which most certainly would include refusing access to its institutions, the State's lack of cooperation may properly be taken into consideration in the Attorney General's determination of whether to file suit. This section provides no support for the action taken by the Attorney General here – a lawsuit in advance of a CRIPA action seeking to compel such access." 868 F.Supp. at 896.

¹⁸ *Nunn v. Michigan Department of Corrections*, 1997 U.S. Dist. LEXIS 22970 (Judge O'Meara denied defendants' motion to dismiss on the grounds that the amendment to the relevant statute that barred prisoners from obtaining damages had been enacted after this suit was filed, and the state department of corrections was thus not entitled to qualified immunity. After an investigation of the plaintiff's allegations in this case, the state filed criminal charges against her alleged rapist.

¹⁹ "The class action case of *Nunn v. Michigan Department of Corrections* was filed in 1996 on behalf of all female prisoners under the State of Michigan's custody, alleging sexual assault and abuse by corrections officers. The United States Department of Justice joined the suit, which brought claims under the Civil Rights of Institutionalized Persons Act." See Martin A. Geer, *supra* note 6.

²⁰ One former ACLU lawyer who worked on the case in the Eastern District reported that line attorneys in the Justice Department found McKeague openly biased against them and DOJ and said that he had made derogatory remarks about women, and, in one meeting he held to discuss the case, which was attended by Governor Engler, stated that he believed that there was sex taking place between inmates and guards, but that it was consensual.

²¹ *Daugherty v. Vanguard Charter School Academy*, 116 F. Supp.2d 897 (W.D.Michigan, 2000).

McKeague held that, because the parents could not state a viable claim that extra tax dollars were spent to fulfill the school's religious intentions, they had no standing to sue as taxpayers. And although he found that plaintiffs did have standing as parents, he expressly limited that standing, stating that "[p]laintiffs may only obtain redress for wrongdoings which directly affected their children." He ruled that parents had no claim for unconstitutional activities conducted by the school that had a more general effect.

The parents – who collectively had six children at Vanguard – alleged that the school allowed the parents' room to be used for a "Moms' Prayer Group" from 8:30 to 10:00 am, during school hours, where students could hear the prayers and discussion of the Bible. In contrast, they asserted, the Free Thought Association, an agnostic group, was denied access to the room during school hours. McKeague found that designation of the room for use by the prayer group constituted no endorsement of religion and that denying the other group's request was reasonable, because only one parent belonged to that group. Plaintiffs also argued that, given the prayer group's extensive involvement – including sponsoring faculty luncheons and having members volunteer – students were likely to believe that the school sanctioned religion. McKeague refused to address this argument.

Plaintiffs also alleged that one of their children was upset after she observed a group of teachers and students holding a prayer meeting on the school premises before school. Instead of letting a jury decide the matter, McKeague ruled that, because the student had not attended the meeting, there was too little evidence to show a violation. In addition, plaintiffs alleged that religious materials were distributed during school hours, that mandatory teacher trainings were permeated with religious and Bible-related references, and that religious music and prayers were included at the annual NHA Christmas party. And they objected to the school's "Moral Focus Curriculum," which they claimed was based on religious tenets. McKeague dismissed all of the claims as baseless, finding that they did not prove any violation of the Establishment Clause. Finally, he dismissed two claims that teachers had explicitly or implicitly endorsed creationism or otherwise mixed religion with science.²²

McKeague listed this case in his Judiciary Committee Questionnaire as among his ten most important. Lawyers on the case purportedly said that McKeague belittled plaintiff's attorney and ridiculed their arguments.²³

State Liability/Foster Care

Deborah Coker's ten-year-old child, Craig, was placed by Michigan social workers in foster care in a private, state-authorized home in which Cimmeron Frye, a sixteen-year old with a history of sexually deviant behavior and assaults, had been placed the week before. Craig shared a room with Frye, who repeatedly sexually assaulted him. Deborah Coker sued the Michigan Department of Social Services, alleging on her son's behalf that defendants had failed to afford Craig due process, because they failed to properly provide the child with the protective services to which he was entitled under state law. McKeague granted summary judgment to the state on all counts.²⁴

Upon reviewing the relevant state statute – the Michigan Child Protection Law – McKeague found its mandate, that state agents – *i.e.* the social workers in this case – take necessary action to prevent abuse and safeguard the welfare of children in their care, too vague to create an entitlement by the child to actual protection. He contrasted the broad language of Michigan's statute with that of Kentucky's, which "required state officials to protect children in their custody, thoroughly investigate foster homes, supervise children in foster homes through visits made at regular intervals, and follow established

²² One student said of his science teacher, "He always just answered the questions that he wasn't certain on by using the word God."

²³ As per a member of the Wayne State faculty, who worked with the ACLU on case, on condition of anonymity.

²⁴ *Coker v. Henry*, 813 F.Supp. 567 (W.D. Mich. 1993).

guidelines.”²⁵ He then dismissed plaintiff’s second claim, which was brought under a statute requiring that the state determine, prior to placing a child in care, that a program is the appropriate resource. McKeague again ruled the statute’s mandate too vague to confer a right of action by the child.

Finally, he dismissed plaintiff’s claim of a violation of Coker’s federal substantive due process rights, stating that the officials at issue were entitled to qualified immunity. After noting that qualified immunity is a “judicially created doctrine” that renders parties immune from liability “as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated,” he also noted that the question as to whether the right of a child in foster care to due process was established at the time of this claim had not been firmly settled. Notwithstanding the clear evidence that the workers knew or should have known of the danger to Craig, McKeague found that defendants in this case *did* merit sovereign immunity: “[T]he Court cannot hold the right was so clearly established that a reasonable officer would have understood that placement of Craig Coker in the Meadow’s home was a violation of his due process rights.”²⁶ Although he called the case “a tragedy that could have been avoided,” McKeague refused to hold the agency liable.

Environmental Protection

In this case, McKeague ignored relevant facts in order to prevent citizen enforcement of environmental protections. Dale Pape, a private citizen and wildlife photographer, sued the U.S. Corps of Army Engineers under the federal Resource Conservation and Recovery Act of 1976 (RCRA). Pape alleged that the Corps had mishandled hazardous waste in violation of RCRA, destroying wildlife in a park near the site.²⁷ Even though RCRA specifically conferred the right for citizen suits against the government for failure to implement orders or to protect the environment or health and safety, McKeague dismissed the case, holding that plaintiff lacked standing to sue.²⁸

McKeague found plaintiff’s complaint insufficient on several grounds, in particular his inability to establish which specific site he planned to visit in the future. In *Lujan v. Defenders of Wildlife*,²⁹ the Supreme Court had dismissed plaintiffs’ claim for lack of standing, based on its conclusion that they had presented only vague information about their plans to visit the ostensibly damaged site in the future. Pape, conversely, stated in his complaint that he “has visited the ‘area around’ the RACO site ‘at least five times per year’ and that he has made plans to vacation in ‘Soldiers Park’ located ‘near’ the RACO site in early October 1998, where he plans to spend his time ‘fishing, canoeing, and photographing the area.’”³⁰ Despite the much more concrete plans presented by Pape than those of the *Lujan* plaintiffs, McKeague dismissed Pape’s as too speculative, based on the Court’s holding in *Lujan* that:

[Plaintiffs’] profession of an “intent” to return to the places [plaintiffs] had visited before – where they will, presumably, this time, be deprived of the opportunity to observe animals of the endangered species – is simply not enough to establish standing.... Such “some day” intentions – without any description of concrete plans, or indeed, even any specification of when the some day will be – do not support a finding of the “actual or imminent” injury that our cases require.³¹

²⁵ *Id.* at 570.

²⁶ *Id.* at 572-3.

²⁷ Section 7002 of RCRA, 42 U.S.C. § 6972(a)(1)(A) states that a citizen may initiate a civil action against a government agency to compel any person, including the United States, to comply with any “permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to [RCRA].”

²⁸ *Dale K. Pape Sr. v. U.S. Army Corps of Engineers*, 1998 U.S. Dist. Lexis 9253 (West. Dist. MI).

²⁹ 504 U.S. 555, 562-3 (1992).

³⁰ *Pape* at *9.

³¹ *Lujan* at 563.

In concluding that “the allegations contained in plaintiff’s first amended complaint fail to establish an actual injury because they do not include an assertion that plaintiff has specific plans to use the allegedly affected area in the future,”³² McKeague seemed to ignore the detailed fact description that Pape submitted in his amendment complaint. Finally, in two dismissive sentences, McKeague asserted that there was no causal connection between the injury and the activity complained of, and that, in any case, Pape had not proven that the alleged injury would likely be redressed by a favorable outcome from the court. He did not explain how he came to that conclusion or cite precedent to support it, but, in so deciding, McKeague prevented Pape from having a jury examine the facts.

Summary Judgment

McKeague exhibits a clear preference for granting summary judgment and has been reversed by the Sixth Circuit in several cases for abuse of discretion. For example, in *Northwoods Wilderness Recovery, Inc. v. United States Forest Service*,³³ McKeague had granted summary judgment to the United States Forest Service (USFS) on a challenge to its decision to allow a timber sale that conflicted with its Environmental Impact Statement for management of a national forest. The Sixth Circuit reversed with instructions to grant summary judgment to plaintiffs, holding that the USFS plan violated the National Environmental Policy Act (NEPA), and that the district court’s approval of the timber clearing project without the statutorily mandated analysis was arbitrary and capricious:

For projects to be properly approved under the [NEPA], they must be preceded by an Environmental Impact Statement that analyzes the impacts of the action on various resources within the forest. In this case, there was no scientific or other assessment under either the National Forest Management Act or the [NEPA] of permitting selection logging at the current levels, much less the additional acreage approved in the Rolling Thunder project.³⁴

McKeague was reversed by the Sixth Circuit on his grant of summary judgment for the state in a case brought by a prisoner claiming that his free exercise rights were violated by the prison’s refusal to allow him to prepare foods in keeping with his Hare Krishna faith.³⁵ Plaintiff had also claimed that his Equal Protection rights were violated, since Muslim inmates were allowed to prepare their own food during Ramadan, and Jewish prisoners had a separate, kosher kitchen, while his request to prepare his own food using separate dishes was denied. The Sixth Circuit held that summary judgment was inappropriate with regard to those claims, since the record did not contain sufficient information about the burden compliance with his requests would place on the prison, nor did it confirm or deny his contention that he was being treated more harshly than other, similarly situated, religious inmates.

In several other instances, the federal appeals court found McKeague’s grant of summary judgment inappropriate. Most involve the court’s disagreement with McKeague’s interpretation of law. In *Adams v. City of Battle Creek*,³⁶ the Sixth Circuit reversed McKeague’s grant of summary judgment for defendant police department. The department had surreptitiously tapped the pager of one of its officers, based on its suspicion that he was giving information to drug dealers, but McKeague found no violation

³² *Pape* at *11.

³³ 323 F.3d 405 (6th Cir. 2003).

³⁴ *Id.* at 412.

³⁵ *Turner v. Bolden*, 2001 U.S. App. LEXIS 8426 (6th Cir.).

³⁶ 1999 U.S. Dist. LEXIS 6151 (W.D. Mich.).

of the law. The Sixth Circuit held that such monitoring did not fall under the “ordinary course of business” exception to the Electronic Communications Privacy Act, and that the tapping was thus a violation of the officer’s rights. In *Rutlin v. Prime Succession, Inc.*,³⁷ the Sixth Circuit reversed McKeague’s holding that time that a funeral director was required to spend at home answering work-related calls was not overtime for which he should have been paid under the Fair Labor Standards Act. McKeague had reasoned that, because the employer gave some flexibility, such as trading “on-call” time or being able to forward calls, the assignments did not count as overtime. The Sixth Circuit disagreed.

In *Keweenaw Bay Indian Community v. United States*,³⁸ the Sixth Circuit again reversed McKeague’s grant of summary judgment, finding that his interpretation of the law was incorrect. McKeague had granted an Indian tribe its request for declaratory relief for approval of a gaming center it had opened on non-tribal land. He held that federal law did not require that gaming activities authorized by tribal-state compact must also undergo the federal statutory requirements, but the Sixth Circuit held that the law’s clear meaning contradicted McKeague’s interpretation. In *Strong v. Telectronics Pacing Systems, Inc.*,³⁹ McKeague dismissed plaintiffs’ state law claims against the manufacturer of an allegedly faulty pacemaker and the doctor who implanted it, on the grounds that federal law created a parallel federal cause of action that preempted the suit. The Sixth Circuit reversed on the grounds that the federal law at issue did not create an equivalent cause of action and thus did not preempt plaintiffs’ claim.

In at least one other case, however, the Sixth Circuit reversed on the grounds that McKeague had decided facts that should have been brought before a jury. In *Hardin v. Fox*,⁴⁰ the Sixth Circuit affirmed and reversed in part McKeague’s grant of summary judgment in a prisoner civil rights action, finding that questions of fact remained, precluding summary judgment on one due process claim and one retaliation claim.⁴¹

Several lawyers who have practiced before McKeague and were interviewed stated that he is aggressive in encouraging settlement rather than subjecting the court to jury trials: “He’s very interested in cases being settled;” “He is a big fan of voluntary mediation;” and “He’s very assertive. He’s very forceful in enforcing settlement discussions.”⁴² Indeed, the only two articles McKeague has published since he graduated from law school in 1971 concern alternative dispute resolution (ADR).⁴³ Both appear designed to help courts and judges determine which cases should be resolved through ADR, rather than in the courtroom, and neither appears to advocate for aggressive resolution of cases outside of traditional litigation.

However, McKeague’s strong interest in resolving cases quickly and efficiently – in the 1994 article, he refers several times to the use of a “cost-benefit” analysis to determine when a case should be sent to ADR for resolution⁴⁴ – is consistent with his enthusiasm for deciding cases on summary judgment. In addition, McKeague was the founding member of the Ingham County Bar Association’s Commercial Mediation Panel Steering Committee and a mediator, from 1988-1992.

³⁷ 29 F.Supp.2d 794 (W.D.Mich. 1998).

³⁸ 136 F.3d 469 (6th Cir. 1998).

³⁹ 78 F.3d 256 (6th Cir., 1996).

⁴⁰ 51 F.3d 272 (6th Cir., 1995).

⁴¹ McKeague noted this case in his questionnaire but did not explain the factual basis for the Sixth Circuit’s reversal.

⁴² *Almanac of the Federal Judiciary*, 2001 Aspen Law & Business, 6th Circuit, p.42.

⁴³ *Differentiated Case Management Can Help Make ADRI More Than an “Intermediate Irritating Event,”* Federal Judicial Center, Directions. 12 FJC Directions, No.7, December 1994; and *Guide to Judicial Management of Cases in ADR*, Advisory Committee Member, Federal Judicial Center. Fall 2001.

⁴⁴ “[E]arly scheduling conferences and joint status reports permit a careful cost-benefit analysis of ADR assignment,” *Id.* at 12; and “There clearly appear to be certain cases that, because of the culture in each district, seldom go to trial regardless of the case-management of ADR technique employed by the court.... There seems to be little cost-benefit justification for referring these cases to ADR unless requested by the parties.” *Id.* at 13.

Temperament

According to the Almanac of the Federal Judiciary, some lawyers who know McKeague found his demeanor unacceptable. Among the comments from lawyers who had practiced before him were: “He can be kind of impatient. Sometimes he’s rude;” “I’d rate his demeanor as a D;” “He treats lawyers very badly;” “He interrupts. He belittles and picks on them unmercifully;” “He’ll ask a question. You’ll think he’s done. When you continue to speak, he’ll accuse you of interrupting him;” and “I think his demeanor is terrible. He’s very abrupt and discourteous. He interrupts. I’d give him an F.”⁴⁵

Conclusion

The record of District Court Judge David McKeague can best be characterized as evincing an eagerness to resolve cases on summary judgment, thereby barring access to trial for broad categories of litigants. He is also known for his hostility, volatility, and rudeness, which call into question whether he possesses the temperament that should be an absolute prerequisite for a federal appellate judge. The cases highlighted above also suggest an unwillingness to carefully examine the facts before coming to a conclusion. In the prisoners’ rights case brought by the Justice Department, McKeague’s actions suggest a predisposition against one of the most marginalized and powerless populations in our society. His conduct in that case raises real questions about his fitness for the bench and certainly whether he deserves promotion to a court one step below the Supreme Court. In sum, McKeague’s record gives rise to significant concern, and senators should scrutinize it carefully before voting on his nomination.

⁴⁵ *Supra* note 42.