An Unfinished Dialogue: Congress, the Judiciary, and the Rules for Federal Judicial Misconduct Proceedings

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Abstract

Federal judges can be impeached and removed from office for "high crimes and misdemeanors," but what can be done to investigate and remedy less serious misconduct? Congress gave its answer 40 years ago when it passed the Judicial Conduct and Disability Act of 1980. The Act emerged from a series of complex interactions between Congress and the judiciary that could hardly be replicated today. Initially there was strong support, particularly in the Senate, for a centralized, "strictly adjudicatory" system, including a provision for removal of judges without impeachment. Over the course of several years, however, the judiciary persuaded Congress to build instead on the decentralized, "administrative" approach that the federal judicial circuits were already using. The key actors in the system would be the circuit chief judges and the circuit councils.

When the 1980 Act was passed, Congressional leaders emphasized the need for "continuing dialog between the legislative and judicial branches, and vigorous oversight by Congress." The ensuing decades have brought both dialogue and oversight. Of particular importance, in 2006, the chairman of the House Judiciary Committee scolded the judiciary for what he viewed as lax enforcement of the Act. The judiciary responded in 2008 by promulgating the first set of nationally binding rules for misconduct proceedings. Modest revisions were made to the Rules in 2015 and again in 2019; in both instances, expressions of concern from Congress played a role.

The 2008 Rules reflected some policy changes from the non-binding "Illustrative Rules" that preceded them, and the two sets of revisions implemented further policy changes (sometimes restoring the pre-2008 policy). But rarely do the commentaries explain or even acknowledge the revisions. The treatment of revisions exemplifies a broader problem: the reluctance of the

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Judicial Conference to acknowledge that some of the Rules reflect choices between competing values on matters where reasonable people could reach different conclusions.

This article examines some of the major policy issues raised by the Rules, particularly against the background of skepticism about the ability and willingness of judges to police misconduct within their own ranks. Part I traces the evolution of the current system for addressing judicial misconduct, with emphasis on the interplay of congressional and judicial action. Part II provides a brief outline of the system's operation today. The article then examines three aspects of the system: transparency and disclosure, with a particular focus on "high-visibility" cases (Part III); disqualification of judges (Part IV); and review of orders issued by chief judges and judicial councils (Part V). A common thread is that in each of these areas the judiciary has promulgated rules that reflect sound policy but are in conflict or tension with statutory language. Moreover, these elements are more than procedural; they determine who makes the decisions and how much information the public receives. Part VI addresses other issues relating to the misconduct system and suggests some additional steps that the judiciary can take to increase the likelihood that misconduct or disability will be identified and dealt with before further injury to court operations or public perceptions occurs.

The article concludes with reflections on the interplay between Congress and the judiciary, past and future. It predicts that the dialogue will continue, and that the judiciary will seek to preserve its independence by responding to concerns about accountability, particularly when the call for action comes from influential members of Congress.

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INTRODUCTION

Tensions between Congress and the judiciary have been part of American political life almost since the Founding, but confrontations between the two branches generally take place at a distance. Not so on the morning of March 16, 2004. The setting was the ornate East Conference Room of the United States Supreme Court. Twenty-six federal judges from all over the country had gathered for the semiannual meeting of the Judicial Conference of the United States, the administrative policymaking body of the federal judiciary.[1] Chief Justice William H. Rehnquist, carrying out one of his statutory responsibilities, presided. Shortly after the meeting began, the Chief Justice introduced a visitor from the legislative branch: Representative F. James Sensenbrenner of Wisconsin, the chairman of the House Judiciary Committee.[2] There was nothing unusual in that; the Conference regularly invites members of Congress with special responsibility for judiciary issues to report on current developments.

1. *See* 28 U.S.C. § 331 (2012).
2. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 3 (2004).

Sensenbrenner brusquely thanked the Judicial Conference for the invitation, then began reading from a prepared text.[3] He spoke rapidly in a flat Midwestern voice, barely looking up at his audience. After a brief discussion of recent congressional action regarding the federal sentencing guidelines, he turned to the sentencing practices of a particular judge, Chief Judge James M. Rosenbaum of the District of Minnesota.[4] He said Judge Rosenbaum had become the subject of oversight by the House Judiciary Committee for what Sensenbrenner called "misleading testimony before the Committee" and an "illegal departure" from the Sentencing Guidelines.[5]

The members of the Conference stiffened in their chairs. A few glanced covertly at their neighbors. The same thought was going through their minds: Did Sensenbrenner realize that Judge Rosenbaum was one of the judges sitting at the table? If he did, he gave no sign. Instead, he moved on to the general subject of judicial misconduct. He noted the "decidedly mixed record" of the judiciary in investigating alleged misconduct in its ranks; in particular, he complained that the acting chief judge of the Seventh Circuit (Richard Posner) had "whitewashed" a complaint that he had filed against Seventh Circuit Judge Richard Cudahy.[6] Sensenbrenner hinted that if the judiciary did not do a better job, Congress might reassess "whether the judiciary should continue to enjoy delegated authority to investigate and discipline itself."[7]

Finally, Sensenbrenner finished. The Chief Justice thanked him, and Sensenbrenner left the room. Quickly the Chief Justice introduced the next speaker, the chairman of the House Subcommittee on Courts, the Internet, and Intellectual Property, Representative Lamar Smith of Texas. Smith spoke only briefly, and when he left, the Chief Justice immediately turned to the next item on the agenda. No one expected him to invite discussion of Chairman Sensenbrenner's remarks, and he did not do so.

Although no one could have known it at the time, Chairman Sensenbrenner's appearance at the Judicial Conference meeting proved to be a turning-point in the history of the federal judicial misconduct system. Two months after the meeting, Chief Justice Rehnquist announced that he had appointed a committee to evaluate how the federal judiciary was dealing with judicial misbehavior and disability.[8] The committee issued its report in 2006. In March 2008, drawing upon that report, the Judicial Conference promulgated the first set of nationally binding rules to govern the handling of complaints against judges. In September 2015, the

3. *Sensenbrenner Remarks Before the U.S. Judicial Conference Regarding Congressional Oversight Responsibility of the Judiciary*, 150 CONG. REC. 4960 (2004) (statement of Rep. Feeney) [hereinafter Sensenbrenner Remarks]. The account here also draws on conversations with individuals who were present at the meeting.

4. *Id.*

5. *Id.*

6. *In re* Complaint Against Circuit Judge Richard D. Cudahy, 294 F.3d 947 (7th Cir. Jud. Council 2002) (Posner, C.J.).

7. Sensenbrenner Remarks, *supra* note 3, at 4960.

8. The developments summarized in this paragraph are recounted in detail *infra* Part I.

Conference approved a modest set of revisions to the Rules. Further revisions—also modest—were adopted in March 2019.

The 2015 and 2019 revisions brought somewhat greater transparency to the regulatory system and eliminated or limited some procedural anomalies. But even a casual glance at the redlined versions is enough to show that the 2015 and 2019 amendments left the 2008 Rules largely intact. This is therefore a propitious time to examine the Rules and the procedures now in place for handling complaints of misconduct by federal judges.

A close look at the Rules is timely for another reason. The 2008 Rules reflected some policy changes from the non-binding "Illustrative Rules" that preceded them, and the two sets of revisions implemented further policy changes (sometimes restoring the pre-2008 policy). But rarely do the commentaries explain or even acknowledge the revisions. Indeed, in some instances the commentary remains unaltered notwithstanding a modification of the Rule's text.

The treatment of revisions in the Rules exemplifies a broader problem: the reluctance of the Judicial Conference to acknowledge that some of the Rules reflect choices between competing values on matters where reasonable people could reach different conclusions. Even if one agrees with the position taken by the Rules, the arguments on the other side should be given their due.

This article considers some of the major policy issues raised by the Rules, especially in light of Representative Sensenbrenner's accusations of lax implementation by the judiciary of its statutory responsibilities. Part I traces the evolution of the current system for addressing judicial misconduct, with emphasis on the interplay of congressional and judicial action. Part II provides a brief outline of the system's operation today. The article then examines three aspects of the system: transparency and disclosure, with a particular focus on "high-visibility" cases (Part III); disqualification of judges (Part IV); and review of orders issued by chief judges and judicial councils (Part V). A common thread is that in each of these areas the judiciary has promulgated rules that reflect sound policy but are in conflict or tension with statutory language. Moreover, these elements are more than procedural; they determine who makes the decisions and how much information the public receives. Part VI addresses other issues relating to the misconduct system and suggests some additional steps that the judiciary can take to increase the likelihood that misconduct or disability will be identified and dealt with before further injury to court operations or public perceptions occurs. The article concludes with reflections on the interplay between Congress and the judiciary, past and future.[9]

9. The article does not address issues relating to the definition of cognizable misconduct. Among the questions warranting examination are these: What is the relationship between the misconduct system and the Code of Conduct for United States Judges? Under what circumstances should conduct outside the performance of official duties fall within the coverage of the Act? When is a judge's conduct so closely tied to the process of adjudication that it should be excluded from coverage as "directly related to the merits of a decision or procedural ruling?" *See* 28 U.S.C. § 352(b)(1)(A)(ii) (2012). What kind of conduct in the workplace should subject judges to sanctions under the 1980 Act? I hope to treat some of these questions in a future article.

I. EVOLUTION OF THE CURRENT SYSTEM

The system now in place for the handling of complaints against federal judges has taken shape over a period of more than forty years. The evolution of this system can usefully be divided into five stages, with a sixth now in progress.

A. THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980

For almost two centuries after the creation of the federal courts, the only formal mechanism for dealing with misconduct by federal judges was the cumbersome process of impeachment.[10] Criminal prosecution was a theoretical possibility, but up to 1980, "no sitting federal judge was ever prosecuted and convicted of a crime committed while in office."[11] A 1939 statute created judicial councils within the circuits, but their powers were vaguely defined, particularly with respect to authority over individual judges.[12]

That era ended with the enactment of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 ("1980 Act" or "Act").[13] The 1980 Act emerged from a series of complex interactions between Congress and the judiciary that could hardly be replicated today. A brief account of that history sheds important light on how the current system came to take the form that it did.[14]

1. THE RISE AND FALL OF NUNN-DECONCINI

Judicial discipline legislation was introduced in Congress as far back as the 1930s and 1940s,[15] but the origins of the 1980 Act can be traced to October 1974, when Senator Sam Nunn of Georgia introduced the first version of a bill called the Judicial Tenure Act.[16] The timing was propitious; driven in part by the Watergate scandal, there were calls for greater accountability by all governmental

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10. For discussion of judicial impeachments through 2009, see Arthur D. Hellman, *Impeaching a Federal Judge: Some Lessons From History*, U. of Pittsburgh Legal Studies Research Paper No. 2014-37 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2500786 [https://perma.cc/VZX6-F7FE].

11. NAT'L COMM'N ON JUDICIAL DISCIPLINE & REMOVAL, REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE & REMOVAL, 152 F.R.D. 265, 326 (1993) [hereinafter National Commission Report]. In 1939, Judge Martin T. Manton of the Second Circuit Court of Appeals was convicted of crimes committed while he served as a federal judge, but he resigned from the bench before the criminal prosecution began. *See* JOSEPH BORKIN, THE CORRUPT JUDGE: AN INQUIRY INTO BRIBERY AND OTHER HIGH CRIMES AND MISDEMEANORS IN THE FEDERAL COURTS 27, 45 (1962).

12. *See* Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1969); PETER GRAHAM FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 417–26 (1973).

13. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No 96-458, 94 Stat. 2035 (1980). The Act also broadened the membership of circuit judicial councils to include district judges as well as court of appeals judges. *Id*. That element of the legislation is not considered here.

14. For a somewhat more detailed account of the history of the legislation from a different perspective, see Stephen B. Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283, 291–308 (1982).

15. *See id*. at 291 n.24 (citing sources).

16. S. 4153, 93d Cong., 2d Sess. (1974).

institutions.[17] For the judiciary, the Nunn bill proposed to create a national "Council on Judicial Tenure" that would receive and investigate complaints of misconduct by federal judges.[18] Complaints not dismissed would be referred to the Judicial Conference of the United States, which would "sit as a court" and consider the matter de novo.[19] Subject to review by the Supreme Court, the Conference would have the power to impose sanctions; this included the power to remove judges from office for serious misconduct.[20]

In 1975, the chairman of the Senate Judiciary Committee asked the Judicial Conference to evaluate the proposal.[21] The Conference responded by approving the legislation "in principle."[22] It rejected the idea of *removing* federal judges except by the impeachment process, but it said that a judge who had committed serious misconduct could be "involuntarily retired" and "relieved of any further judicial duties" through the procedures proposed by Senator Nunn.[23]

Following the Conference action, the Senate Judiciary Committee held two sets of hearings on the Judicial Tenure Act, one in 1976[24] and one in 1977.[25] Witnesses supporting the bill included Attorney General Griffin B. Bell, himself a former federal judge,[26] and a representative of the American Bar Association.[27] No witnesses testified in opposition.

In February 1978, the Committee circulated a substantially revised draft of the bill, now S. 1423.[28] The new version, designated as a "Committee Print," proposed to create an extremely elaborate mechanism for judicial discipline,

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17. *See* 120 CONG. REC. 36,064 (1974) (statement of Sen. Nunn) (stating that one of the "many lessons [of] the recent experiences of the Watergate era" is that "all governmental officials must act to restore and maintain the public trust"). Other products of this era included the Ethics in Government Act of 1978, the Foreign Intelligence Surveillance Act of 1978, and the 1974 campaign finance law.

18. The bill covered disability as well as misconduct, and it included Supreme Court Justices within its scope. *See id*.

19. *Id*. at 36,066. The Conference was given the option of operating through "a committee of nine judges." *Id*.

20. *Id*. at 36,067. The removal power was limited to conduct "inconsistent with the good behavior required by Article III Section 1 of the Constitution." *See id*. (quoting bill).

21. *See* Warren Weaver Jr., *Burger Endorses Purge of Judges*, N.Y. TIMES, Mar. 8, 1975, at 30.

22. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: MAR. 6–7, 1975, at 5 (1975). However, the Conference took the position that all reference to Supreme Court Justices should be dropped from the bill.

23. *Id*. At a hearing in 1976, a representative of the Judicial Conference struggled to explain the distinction drawn by the 1975 response. *See Judicial Tenure Act: Hearings on S. 1110 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 94th Cong. 74–75 (1976) [hereinafter 1976 Senate Hearing] (testimony of Judge Robert A. Ainsworth, Jr.).

24. 1976 Senate Hearing, *supra* note 23.

25. *Judicial Tenure Act: Hearings on S. 1423 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 95th Cong. (1977) [hereinafter 1977 Senate Hearing]. The 1977 hearing involved a revised version of the bill. *See also infra* note 31.

26. 1977 Senate Hearing, *supra* note 25, at 83–84 (statement of Attorney General Griffin B. Bell).

27. *Id*. at 102 (statement of John A. Sutro). The ABA opposed the inclusion of Supreme Court Justices in the bill. *Id*.

28. S. 1423, 95th Cong., 2d Sess. (Committee Print Draft No. 2, Feb. 3, 1978) (on file with the author).

including three-judge panels in each of the circuits and two newly established national bodies: a "Judicial Conduct and Disability Commission" (replacing the Council on Judicial Tenure in earlier versions of the bill) and a "Court on Judicial Conduct and Disability" composed of seven members of the Judicial Conference.[29] The new court would have the power to remove judges (but not Supreme Court Justices) from office for serious misbehavior.[30]

Congress again asked the Judicial Conference for its views on the legislation, and in March 1978, the Conference, although expressing a "reservation . . . on the constitutionality of the removal feature," "approved in principle the objectives of S. 1423" as embodied in the Committee Print.[31] By that time, Senator Nunn had been joined by Senator Dennis DeConcini of Arizona as a sponsor of the bill, and the legislation was often referred to as "Nunn-DeConcini." In September 1978, the Committee Print version of S. 1423, slightly modified, passed in the Senate.[32]

Notwithstanding the Judicial Conference actions, not all judges agreed that a national disciplinary entity of any kind was necessary or desirable. The push for a different approach came primarily from the Ninth Circuit, both publicly and behind the scenes. In 1976, Judge J. Clifford Wallace published a law review article arguing that to enact the Nunn bill would be like "buying a piledriver to kill an ant."[33] He suggested that "problem judges" could be better dealt with by using an existing mechanism, the judicial councils of the circuits.[34] These councils are the regional units of governance established by Congress in 1939; at the time of the debate over the Nunn bill, each council was composed of the active judges of the circuit.[35]

In November 1978, shortly after Senate passage of the Nunn bill, the Ninth Circuit Judicial Council, under the leadership of Chief Judge James R. Browning, voted to establish a set of "procedures for processing complaints of judicial misconduct."[36] The system included two basic elements.[37] First, all complaints would

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29. The bill also provided for review by the Supreme Court of orders of the Court on Judicial Conduct and Disability. For a brief description of how the mechanism would have operated, see S. REP. NO. 95-1035, at 2 (1978).

30. As in the original Nunn bill, the removal power was limited to conduct "inconsistent with the good behavior required by Article III section 1 of the Constitution." *Id*. at 46 (quoting bill).

31. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: MAR. 9–10, 1978, at 6–7 (1978). The Conference statement said that "S. 1423 should be altered in some respects." It specified two amendments, both of which would have vested greater authority at the circuit level. *Id*. at 7.

32. *See* 124 CONG. REC. 28,321 (1978); *see also* S. REP. NO. 95-1035 (1978) (favorably reporting the bill). The Senate did not adopt either of the amendments proposed by the Judicial Conference. *See supra* note 31.

33. J. Clifford Wallace, *Must We Have the Nunn Bill? The Alternative of Judicial Councils of the Circuits*, 51 IND. L.J. 297, 309 (1976).

34. *Id*. at 298; *see also* J. Clifford Wallace, *The Nunn Bill: An Unneeded Compromise of Judicial Independence*, 61 JUDICATURE 476 (1978).

35. *See* Wallace, *supra* note 33, at 311–12. The 1980 Act altered this arrangement by providing for district judge membership on circuit councils. *See* H.R. REP. NO. 96-1313, at 7–8 (1980).

36. *See In re* Charge of Judicial Misconduct, 593 F.2d 879, 880 n.* (9th Cir. 1979) (Browning, C.J.) (quoting Procedures for Processing Complaints of Judicial Misconduct).

37. As will be seen, *infra* Part II-A, the two elements correspond to the two "tracks" of the system today.

be screened initially by the circuit chief judge, who could "reject" complaints that did not allege cognizable misconduct[38] and could "close" complaints if "appropriate corrective action" had been taken.[39] Second, complaints not rejected or closed would be referred to an ad hoc committee that would carry out an investigation and report to the circuit council.[40] The council could then take "such action . . . as [it] deems appropriate for the effective and expeditious administration of the business of the courts within its circuit."[41] In a speech to lawyers in 1979, Judge Browning candidly acknowledged that the council's newly adopted procedures formed a basis for a "legislative alternative" to the centralized and "strictly adjudicatory" regime contemplated by the Senate bill.[42]

Even before the Ninth Circuit formally adopted its new procedures, the Judicial Conference hinted that it might be rethinking its position.[43] But it was not until March 1979 that the Conference decisively embraced the "legislative alternative" that Judge Browning had put forward. At its meeting that month, the Conference adopted a resolution recommending congressional codification of procedures that closely tracked those implemented by the Ninth Circuit in

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38. Specifically, the chief judge could reject a complaint that "is frivolous, relates to the merits of any decision or procedural ruling of a judge, or relates to conduct of a judge not connected with his judicial office which does not prejudice the administration of justice by bringing the judicial office into disrepute." *In re* Charge of Judicial Misconduct, 593 F.2d at 880 n.*. The third basis for rejection appears to have been adapted from state disciplinary systems. *See* 1976 Senate Hearing, *supra* note 23, at 119 (testimony of Jack E. Frankel) (summarizing state laws).

39. *In re* Charge of Judicial Misconduct, 593 F.2d at 880 n.*.

40. In announcing the council's action, Judge Browning emphasized that the new procedures codified "informal administrative practice" already in use, with one new feature: referral to a committee of complaints not rejected or closed by the circuit chief judge. *Ninth Circuit Adopts Procedures for Judicial Misconduct Complaints*, THIRD BRANCH, Dec. 1978, at 4, 7.

41. *In re* Charge of Judicial Misconduct, 593 F.2d at 880 n.*.

42. JAMES R. BROWNING, [REPORT ON THE] STATE OF THE NINTH CIRCUIT 17–18 (July 24, 1979) [hereinafter Browning Report 1979] (on file with author).

43. At its September 1978 meeting—held two weeks after the Senate approved S. 1423—the Conference adopted two resolutions on judicial tenure. *See* JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: SEPT. 21, 22, 1978, at 49–50 (1978). The first resolution sought to "clarify" the Conference position on S. 1423. *Id*. at 50. But the resolution did no more than reaffirm opposition to any legislation that would authorize removal of a federal judge by a method other than impeachment. *Id*. It did not disavow the Conference's approval "in principle" of the 1974 and 1978 versions of the Nunn bill. *See id*. at 49–50; *supra* notes 22 and 31 and accompanying text.

The second resolution directed the Conference's Committee on Court Administration "to conduct a study to determine whether legislation is necessary to clarify the power of [circuit councils] to adopt procedures for the examination of judicial conduct in cases where it is warranted and to take appropriate action with respect to such instances." An article in the federal judiciary newsletter stated that the purpose of this second resolution was "obviously to recommend proposals which might be necessary to set up procedures which would make it possible for the Judicial Branch to deal with judicial misbehavior through revisions of existing administrative machinery." *Judicial Conference Calls for Changes in Judicial Tenure Bill*, THIRD BRANCH, Oct. 1978, at 2. Even if this logorrheic effort at interpretation could be read as expressing a preference for an "administrative" over an "adjudicative" approach, the resolution itself does not go that far.

With the benefit of hindsight, one can view the Conference's September 1978 actions as a harbinger of a change of position, but the actual change did not come until March 1979, as discussed in the text.

November 1978.[44] As in the Ninth Circuit system, "primary responsibility" for considering complaints against judges would rest initially with the circuit chief judge; complaints not dismissed would be investigated by a committee that would report to the circuit council.[45] In addition to endorsing procedures that paralleled those adopted by the Ninth Circuit, the Conference explicitly repudiated "[a]ll previous . . . resolutions or comments upon legislation dealing with the conduct of Federal judges."[46] Finally, the Conference recommended that all of the circuit councils act quickly to formulate and promulgate rules for misconduct proceedings along the lines described in the recommendation for legislation.[47] Most of the circuits complied.[48]

A turning point came in July 1979, when the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee held a hearing on judicial tenure and discipline.[49] After five years of activity in the Senate, this was the first time that the House had considered the subject. Presiding over the hearing was the subcommittee chairman, Congressman Robert W. Kastenmeier (D. Wis.). The witnesses included Judge Browning, Judge Wallace, and Judge Elmo Hunter of the Western District of Missouri, chairman of the Judicial Conference Committee on Court Administration. Congressman Kastenmeier welcomed the judges as "old friends,"[50] and Judge Browning gave a powerful presentation demonstrating, with concrete examples, that procedures within the circuits—particularly informal procedures—could be "effective[]" in dealing with "problem judges."[51] Judge Browning also argued that utilizing the circuit councils would "ease the burden imposed upon the Congress by the impeachment process,"[52] in part because the judiciary could carry out the initial investigation of conduct that might constitute grounds for impeachment.[53]

Judge Browning, Judge Wallace, and Judge Hunter testified in a similar vein at a 1979 hearing of the Senate Judiciary Committee.[54] Later that year,

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44. *See* JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: SEPT. 21–22, 1979, at 5–6 (1979). The resolution first outlined the procedures, *id*. at 5; it then authorized the drafting of proposed amendments to 28 U.S.C. § 332 that would embody those procedures, *id*. at 6.

45. *Id*. at 5. The Judicial Conference's recommended procedures included two new provisions, both involving referral of matters to the Judicial Conference of the United States. *Id*.

46. *Id*. at 6.

47. *Id*. at 5. Under the statutes, the Conference has no power to issue orders to judges or to circuit councils. *See* Russell Wheeler, *A Primer on Regulating Federal Judicial Ethics*, 56 ARIZ. L. REV. 479, 482 (2014).

48. *See Judicial Tenure and Discipline 1979–80: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 96th Cong. 57 (1980) [hereinafter House Hearings] (statement of Judge Elmo Hunter).

49. *Id*.

50. *Id*.

51. *Id*. at 86–88.

52. *Id*. at 90.

53. *Id*. at 89–90.

54. *Hearings Before the Subcomm. on Judicial Machinery and Constitution of the Senate Comm. on the Judiciary on S. 295, S. 522, S. 678*, 96th Cong., 1st Sess. 22–68 (1979).

representatives of the Judicial Conference met with Senator Birch Bayh (D. Ind.) and other Senators who were attempting to find a middle ground.[55] The result was a new bill that was introduced as S. 1873. Senator Bayh described the bill as a "reasonable and successful compromise" and said that the Senate drafters had "made many accommodations" to the views of the Judicial Conference.[56] Indeed, the new bill contained no provisions authorizing removal of federal judges by a process other than impeachment. At the same time, the bill would have established a national "Court on Judicial Conduct and Disability" with broad powers, including the power to conduct de novo hearings.[57] In part because of the central role of this "special, national court," the Judicial Conference opposed the measure.[58]

On October 30, 1979, the Senate met to consider S. 1873. After some debate, Senator Nunn was recognized to propose an amendment in the nature of a substitute. The substitute, he told his colleagues, was "almost identical to the bill that passed the Senate [in 1978]."[59] But several Senators who had voted for the measure in 1978 had changed their position, and the substitute was defeated. That was the last stand for Nunn-DeConcini; the bill, with the removal provision that the judiciary opposed so strongly, never again came up for consideration. The Senate then passed S. 1873 by a vote of 56 to 33.[60]

2. A FRESH START IN THE HOUSE

Given the solid vote in the Senate for a bill that appeared to occupy a middle ground, one might have expected the House to take that bill as its starting-point. That is not what happened. Instead, Congressman Kastenmeier decided to take a new tack entirely. Early in 1980, he introduced H.R. 6330, a bill drafted by the Judicial Conference.[61] The bill adopted the basic framework of the system established by the Ninth Circuit: initial screening of complaints by the circuit chief judge, with investigation by a special committee of complaints not dismissed or closed.[62] Within that framework, the bill added several procedural protections,

55. *See* 125 CONG. REC. 30,062 (1979) (statement of Sen. Bayh).

56. *Id*. at 30,063. Senator Bayh also commented that "we have worked very closely and amicably with the judicial conference in our efforts to draft this legislation." *Id*.

57. *See* 125 CONG. REC. 30,101 (1979) (quoting bill).

58. *See id*. at 30,063 (statement of Sen. Bayh, responding to Judicial Conference objections); *see also* Burbank, *supra* note 14, at 297 n.52. The new Senate bill also differed from the Ninth Circuit/Judicial Conference model in that complaints would be considered initially by the judicial council, not by the circuit chief judge. It is not clear how the informal procedures emphasized by Judge Browning in his testimony would have fit into this scheme.

59. 125 CONG. REC. 30,084 (1979) (remarks of Sen. Nunn).

60. *Id*. at 30,100.

61. H.R. 6330, 96th Cong. (1980), *reprinted in* House Hearings, *supra* note 48, at 304. Kastenmeier later said that the bill was introduced "at the request of the Judicial Conference of the United States." House Hearings, *supra* note 48, at 126 (remarks of Rep. Kastenmeier).

62. *See supra* notes 36–41 and accompanying text. H.R. 6330 made two terminological changes that would carry over to the enacted bill. It replaced "reject" with "dismiss," and it used the term "*special* committee" to refer to the investigative body.

notably requirements of notice and an opportunity to be heard for judges under investigation. The bill also included provisions for review of chief-judge orders by the judicial council and of judicial-council actions by the Judicial Conference.

In May 1980, Congressman Kastenmeier's subcommittee held an informal meeting and decided "to draft a consensus piece of legislation incorporating many of the features of previously introduced bills."[63] The subcommittee members then wrote a new bill—H.R. 7974—that melded two separate measures regulating the judiciary. One part, dealing with judicial discipline, largely tracked the bill introduced by Kastenmeier earlier in the year. There were two significant modifications.[64] H.R. 7974 included a list of permissible sanctions, drawn largely from S. 1873.[65] Also borrowed from S. 1873 was language making clear that the statute covered performance-impairing disability as well as misconduct.[66] The other part of H.R. 7974 dealt with reform of judicial councils. The full House Judiciary Committee approved the bill without amendment on September 3, 1980.[67]

The Ninety-Sixth Congress was nearing its end, and time was running out on judicial discipline reform. Less than two weeks after the Judiciary Committee meeting, Congressman Kastenmeier brought H.R. 7974 to the House floor. With understandable pride, he pointed to the "virtually unanimous support" the bill had received from a wide range of organizations.[68] The House passed the bill on a voice vote,[69] then took up S. 1873, the bill that the Senate had passed almost a year earlier. The House agreed to strike the text of S. 1873 as approved by the Senate and to insert in its place the provisions of H.R. 7974.[70] It then passed S. 1873 and laid the House bill on the table.[71]

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63. H.R. REP. NO. 96-1313, at 6 (1980); *see also* Michael J. Remington, *Circuit Council Reform: A Boat Hook for Judges and Court Administration*, 1981 BYU L. REV. 695, 724–25 n.158 (describing the drafting process).

64. H.R. 7974 also made one change in terminology: upon finding that appropriate corrective action had been taken, the chief judge would "conclude the proceeding," H.R. 7974, 96th Cong. (1980), rather than "close the complaint," H.R. 6330, 96th Cong. (1980). The new language was carried forward to the bill as enacted.

65. *See* H.R. REP. NO. 96-1313, at 11 (1980) (summarizing permissible council actions). In March 1980, a representative of the Department of Justice had implicitly criticized H.R. 6330 for inadequate provisions on permissible sanctions. *See* House Hearings, *supra* note 48, at 173–74 (testimony of Assistant Attorney General Maurice Rosenberg); *see also id*. at 165 (listing sanctions authorized by S. 1873).

66. It is curious that H.R. 6330, introduced several months after the Senate passed S. 1873, did not include a counterpart provision for complaints alleging performance-impairing disability. This is evidence that Congressman Kastenmeier and the Judicial Conference, in drafting their bill, decided to start afresh rather than building on any of the Senate measures. For a brief discussion of the provision on disability in the bill as enacted, *see infra* Part II-C.

67. H.R. REP. NO. 96-1313, at 7 (1980).

68. 126 CONG. REC. 25,369 (1980) (remarks of Rep. Kastenmeier).

69. *Id*. at 25,372.

70. *Id*. at 25,373.

71. *Id*. at 25,373–74. The decision to use the Senate bill number and the text of the House bill (presumably with the thought of making the package look more attractive to the Senate) had one unfortunate consequence. The most readily available primary source for the legislative history of the 1980 Act contains only the report of the Senate Judiciary Committee on S. 1873, the 1979 bill that would have created a new Court on Judicial

S. 1873—containing the text of H.R. 7974—now returned to the Senate. Senator DeConcini led the debate. He acknowledged that he had "always preferred . . . a much stronger judicial discipline bill," and in particular "the removal sanction of the Judicial Tenure Act."[72] But he recognized that his views had not prevailed either in the House or the Senate, and he supported the pending measure that he regarded as "a compromise."[73]

Before the vote, Senator DeConcini presented a new "substitute amendment" that he said made "four major substantive changes" in the House version of the judicial discipline provisions.[74] The most noteworthy of these was a provision requiring that all written orders implementing sanctions against a judge must be made available to the public, accompanied by written reasons explaining the action.[75] Remarkable though it seems today, the House bill contained no provisions at all for public availability of orders in misconduct proceedings.[76]

The Senate agreed to the bill as amended, and the bill then returned to the House. Congressman Kastenmeier explained the Senate amendments, adopting Senator DeConcini's language almost verbatim and stating that the changes "strengthen the House provisions."[77] The House passed S. 1873 as amended by unanimous consent.[78]

The long process that began with Senator Nunn's introduction of the Judicial Tenure Act in 1974 had come to an end. The judiciary, with strong support from Congressman Kastenmeier and the House Judiciary Committee, had succeeded in its "efforts to demonstrate to Congress that more drastic legislative action [like Senator Nunn's bill] was not necessary."[79] Instead of the "highly centralized" and "strictly adjudicatory" system that was the Senate's initial preference, Congress had built upon the "informal, flexible" administrative approach that the circuits were already using.[80] To be sure, in the final Senate debate, Senator DeConcini emphasized the new statutory responsibilities of the Judicial Conference, and that aspect of the bill enabled him to describe the legislation as a "compromise."[81]

Conduct and Disability. *See* Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 1980 U.S.C.C.A.N. 4315. For an authoritative exposition of the legislation Congress enacted, one must look at the House Report, H.R. REP. NO. 96-1313 (1980).

72. 126 CONG. REC. 28,090 (1980) (remarks of Sen. DeConcini).

73. *Id*.

74. *Id*. at 28,092.

75. *Id*. at 28,093. The explanation could be withheld if "contrary to the interests of justice." *Id*.

76. Rules promulgated by the judiciary later expanded the scope of public disclosure. *See infra* Part III-B. For a description of the other Senate changes, see 126 CONG. REC. 28,092–93 (1980) (remarks of Sen. DeConcini).

77. 126 CONG. REC. 28,616–17 (1980) (remarks of Rep. Kastenmeier).

78. *Id*. at 28,617.

79. James R. Browning, *Evaluating Judicial Performance and Related Matters*, 90 F.R.D. 197, 203 (1981).

80. *See* Browning Report 1979, *supra* note 42, at 16–17 (comparing Nunn-DeConcini with procedures used in the circuits).

81. 126 CONG. REC. 28,090 (1980) (remarks of Sen. DeConcini).

The role of the Conference was limited, however, and the regime created by the Act has been aptly described as one of "decentralized self-regulation."[82]

B. THE 1990 ACT AND THE NATIONAL COMMISSION REPORT

Congress returned to the subject of judicial discipline in 1990. As part of a wide-ranging federal courts bill, Congress adopted a modest package of amendments to the 1980 Act.[83] Of particular importance, the legislation included a provision authorizing circuit chief judges to "identify a complaint" and thus to initiate formal proceedings under the Act even if no complaint had been *filed*.[84]

The 1990 Act also created a National Commission on Judicial Discipline and Removal.[85] In a sad irony, by the time the bill was enacted, Congressman Kastenmeier—who was primarily responsible for that bill as well as the 1980 Act—had lost his seat in the House. Kastenmeier was appointed as chairman of the National Commission, and under his leadership the Commission published a thorough report as well as an extensive compilation of working papers.[86]

C. THE ILLUSTRATIVE RULES AND THE JUDICIAL IMPROVEMENTS ACT OF 2002

The 1980 Act was quite specific on some matters (for example, consideration of the possibility of impeachment), but on others (notably the procedures to be followed in the early stages of routine cases) it spoke only in general terms. In 1986, a committee of chief circuit judges, assisted by the Federal Judicial Center, prepared a set of Illustrative Rules Governing Judicial Misconduct and Disability.[87] These Illustrative Rules addressed many procedural and substantive issues that were not resolved by the statute itself. A revised set of Illustrative Rules, accompanied by an extensive commentary, was promulgated by the Administrative Office of United States Courts in 2000.[88] Most of the circuits adopted rules based on the Illustrative Rules.[89]

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82. Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25, 29 (1993).

83. Judicial Improvements Act of 1990, Pub. L. No. 101-650, tit. IV, 104 Stat. 5089, 5122 (1990).

84. *Id.*; *see* Robert W. Kastenmeier & Michael J. Remington, *Judicial Discipline: A Legislative Perspective*, 76 KY. L.J. 763, 781–82 (1987–88) (explaining the origin of the provision).

85. Judicial Improvements Act of 1990, Pub L. No. 101-650, tit. IV, 104 Stat. 5089, 5122 (1990).

86. *See* National Commission Report, *supra* note 11.

87. The Rules are reprinted in *Judicial Independence: Discipline and Conduct: Hearings on H.R. 1620, H. R. 1930, and H.R. 2181 Before the Subcomm. on Courts, Intellectual Prop., and the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 813–88 (1989) [hereinafter 1986 Illustrative Rules]. *See also Illustrative Rules Governing Complaints of Judicial Misconduct and Disability*, in 2 RESEARCH PAPERS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 1761, 1761–86 (1993) (reprinting a slightly different version of the Illustrative Rules, without commentary).

88. ADMIN. OFFICE OF THE U.S. COURTS, ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY (2000) [hereinafter Illustrative Rules].

89. JUDICIAL CONDUCT & DISABILITY ACT STUDY COMM., IMPLEMENTATION OF THE JUDICIAL CONDUCT

The Illustrative Rules were brought to Congress's attention in November 2001 when a subcommittee of the House Judiciary Committee held an oversight hearing on the operation of the 1980 Act.[90] Based on the record of that hearing as well as the report of the National Commission, Chairman Howard Coble and Ranking Member Howard Berman introduced a bipartisan bill to further revise the statutory provisions governing the handling of misconduct complaints.[91] The bill codified some of the procedures adopted by the judiciary through rulemaking; it also gave the misconduct provisions their own chapter—Chapter 16—in Title 28 of the United States Code. The bill was signed into law as the Judicial Improvements Act of 2002 ("2002 Act").[92]

D. THE MANUEL REAL CONTROVERSY AND THE BREYER COMMITTEE REPORT

The 2002 Act moved through Congress with bipartisan support and no indication of any serious dissatisfaction with the way the judiciary was carrying out its responsibilities. Indeed, as part of the House Report on the bill that became the 2002 Act, Chairman Coble and Ranking Member Berman wrote a respectful letter to Chief Justice William H. Rehnquist in his capacity as chairman of the Judicial Conference, emphasizing that "the Third Branch . . . is highly regarded by the general public as well as by Congress."[93] The letter then offered a few modest suggestions, one of which was that chief judges and circuit councils should "send more of their non-routine dispositions of [misconduct complaints] for on-line publication."[94]

Soon afterwards, however, rumblings of discontent began to be heard. The opening salvo came from Chairman Sensenbrenner at the March 2004 meeting of the Judicial Conference described in the opening paragraphs of this article.[95] In sharp contrast to the low-key Coble-Berman letter, Chairman Sensenbrenner lectured the members of the Conference about the "decidedly mixed record" of the judiciary in investigating allegations of misconduct by judges. At least implicitly, he was threatening to alter the arrangements that gave the judiciary the "delegated authority to investigate and discipline itself."[96]

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and Disability Act of 1980: A Report to the Chief Justice, 239 F.R.D. 116, 132 (2006) [hereinafter BREYER COMMITTEE REPORT].

90. *Operations of Federal Judicial Misconduct and Recusal Statutes: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. (2001).

91. The bill was H.R. 3892. I testified at the 2001 hearing, and as the House Report indicates, the bill drew heavily on the suggestions in my testimony. *See* H.R. REP. NO. 107-459, at 8 n.4 (2002).

92. The legislation was enacted as part of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273. The standalone version, H.R. 3892, was passed by the House in July 2002. For the legislative history, see H.R. REP. NO. 107-459 (2002).

93. The letter is reprinted in H.R. REP. NO. 107-459, at 16–18 (2002).

94. *Id.*

95. *See supra* text accompanying notes 1–7.

96. Sensenbrenner Remarks, *supra* note 3.

A few weeks after the Judicial Conference meeting, Chief Justice Rehnquist announced that he had appointed a committee to evaluate "the way in which the [1980 Act] is being implemented."[97] The committee was chaired by Justice Stephen G. Breyer; the other members were two experienced circuit judges, two district judges (each of whom had served as a chief judge), and the administrative assistant to the Chief Justice. A spokesman for the Chief Justice confirmed that the panel had been created in response to Sensenbrenner's comments at the Judicial Conference meeting.[98]

The Breyer Committee went to work, but it did not hold hearings or otherwise seek public input. Meanwhile, a new controversy erupted that gave renewed force to Chairman Sensenbrenner's concerns. The controversy involved a misconduct complaint against District Judge Manuel Real of Los Angeles. The complaint alleged that Judge Real had improperly intervened in a bankruptcy case to help a debtor whose probation he was supervising after imposing sentence in a criminal prosecution.[99] The chief judge of the Ninth Circuit had dismissed the complaint, and in September 2005 the Judicial Council of the Ninth Circuit issued an order affirming the dismissal.[100] Circuit Judge Alex Kozinski filed a blistering dissent accusing the Council majority of shirking the "delicate and uncomfortable" responsibility of passing judgment on a colleague.[101] The complainant asked a committee of the Judicial Conference to review the Judicial Council's action, but in April 2006 the committee, by a vote of 3 to 2, held that it had no jurisdiction over the matter.[102] The dissenting judges asserted that the record "would support a finding of misconduct" by Judge Real; that the chief judge and the circuit council had failed to follow "mandatory statutory procedures;" and that the committee's decision would "fuel suspicions" about the inadequacy of the system of self-regulation established by Congress.[103]

The two dissenting opinions spurred Chairman Sensenbrenner to take action. In late April 2006, he introduced H.R. 5219, the Judicial Transparency and Ethics Enhancement Act of 2006.[104] The bill proposed to establish an Office of Inspector General within the Judicial Branch. The Inspector General (IG) would have authority to "conduct investigations of matters pertaining to the Judicial Branch, including possible misconduct in office of judges . . . that may require

97. *Chief Justice Appoints Committee To Evaluate Judicial Discipline System*, THIRD BRANCH, May 2004, at 8.

98. Mike Allen & Brian Faler, *Judicial Discipline to Be Examined: Rehnquist Names Panel in Response to Ethics Controversies*, WASH. POST, May 26, 2004, at A2. Chief Justice Rehnquist himself referred to "recent criticism from Congress about the way in which the [1980 Act] is being implemented." *Id.*

99. *In re* Complaint of Judicial Misconduct, 425 F.3d 1179, 1180 (9th Cir. Jud. Council 2005).

100. *Id.* at 1182.

101. *Id.* at 1183 (Kozinski, J., dissenting).

102. *In re* Opinion of Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, 449 F.3d 106, 109 (U.S. Jud. Conf. 2006).

103. *Id.* at 110, 117 (Winter & Dimmick, JJ., dissenting).

104. H.R. 5219, 109th Cong. (2006).

oversight or other action within the Judicial Branch or by Congress."[105] In July 2006, Sensenbrenner introduced a resolution to impeach Judge Real.[106] One subcommittee of the House Judiciary Committee held a hearing on the Inspector General bill;[107] another subcommittee held a hearing on the impeachment resolution.[108] Witnesses at the IG hearing included Senator Charles Grassley of Iowa, who had introduced a companion measure in the Senate (S. 2678).[109]

On September 19, 2006 (two days before the Real impeachment hearing), the Breyer Committee issued its long-awaited report.[110] The Committee reached two major conclusions. First, it found that "chief circuit judges and judicial councils are doing a very good overall job in handling complaints filed under the Act."[111] Second, in separately assessing a set of "high-visibility cases," the Committee found an "error rate" that was "far too high."[112] Among other problematic instances, the Committee faulted the Eighth Circuit's chief judge for his handling of the congressional criticism of Judge Rosenbaum and the Ninth Circuit's chief judge and judicial council for their handling of the complaint against Judge Real.[113]

In addition to its findings, the Committee provided extensive commentary on key statutory terms; it also made recommendations to all of the judiciary's institutional actors in the misconduct process.[114] Conspicuously, the Committee made no mention of any possible amendments to the statute, let alone the Inspector General bill. But the report seemed to acknowledge that the system would benefit from greater oversight and supervision at the national level—the basic thrust of the Sensenbrenner proposal.[115]

E. THE 2008 RULES AND THE 2015 AMENDMENTS

The Judicial Conference acted quickly to follow up on the Breyer Committee's recommendations. In March 2007, the Conference issued a series of directives to

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105. *Id*.

106. H.R. Res. 916, 109th Cong. (2006).

107. *Judicial Transparency and Ethics Enhancement Act of 2006: Hearing on H.R. 5219 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. (2006) [hereinafter Judicial Transparency Hearing].

108. *Impeaching Manuel L. Real, a Judge of the United States District Court for the Central District of California, for High Crimes and Misdemeanors: Hearing on H.R. Res 916 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. (2006) [hereinafter Real Impeachment Hearing].

109. *See* Judicial Transparency Hearing, *supra* note 107, at 1–5.

110. *See* BREYER COMMITTEE REPORT, *supra* note 89. Chairman Sensenbrenner issued a statement saying: "Today's report finds the Judicial Branch bungled all of the matters in which the House Judiciary Committee conducted extensive oversight." Sensenbrenner Statement on Judicial Conference's Report on Implementation of the Judicial Conduct and Disability Act of 1980 (Sept. 19, 2006) (on file with the author).

111. *Id*. at 107.

112. *Id*. at 5.

113. *Id*. at 73–89, 184–89. The Breyer Committee followed a policy of not identifying any of the accused judges discussed in its report, even those that were the subject of "high-visibility" complaints.

114. *Id*. at 109–22.

115. *See* discussion *infra* Part V-C.

its newly renamed Committee on Judicial Conduct and Disability ("Conduct Committee").[116] The Conduct Committee responded with even greater celerity. In July 2007, the Committee published a draft of a comprehensive set of "Rules Governing Judicial Conduct and Disability Proceedings."[117] The draft drew heavily on the Breyer Committee report, adopting much of its language in the rules and, even more, in the commentaries. The committee invited public comments on the draft and heard testimony at a public hearing.[118] A revised draft was published in December 2007; further revisions were made in January and February 2008.[119]

The February draft was approved at the Conference's regular meeting in March 2008.[120] Unlike the Illustrative Rules, the 2008 Rules provided "mandatory and nationally uniform provisions" to govern all misconduct proceedings in the circuits.[121] Consistent with this directive, every circuit immediately adopted the Rules.[122]

Coincidentally, as the Judicial Conference was completing its work on the new rules, and for several years thereafter, one high-profile complaint after another drew attention to the misconduct process. For example, the Conduct Committee affirmed a public reprimand of Judge Real for his improper intervention in the bankruptcy proceeding.[123] Chief Judge Alex Kozinski of the Ninth Circuit was "admonished" by the Judicial Council of the Third Circuit for "possession of sexually explicit offensive material combined with his carelessness in failing to safeguard his sphere of privacy" when he posted the material on a website he

116. The committee formerly operated under the name "Committee to Review Circuit Council Conduct and Disability Orders." *See infra* notes 178–79 and accompanying text.

117. JUDICIAL CONFERENCE OF THE U.S., RULES GOVERNING JUDICIAL CONDUCT AND DISABILITY PROCEEDINGS UNDERTAKEN PURSUANT TO 28 U.S.C. §§ 351–364: DRAFT FOR PUBLIC COMMENT—6/13/07 (2007), https://www.uscourts.gov/sites/default/files/rules_draftpubliccomment.pdf [https://perma.cc/L55D-NZV3]. Although the draft bears the date of June 13, 2007, it was not made available for public comment until July 16.

118. I testified at the hearing. *See Draft Rules Governing Judicial Conduct and Disability Proceedings: Hearing Before the Comm. on Judicial Conduct & Disability of the Judicial Conf. of the U.S.* (2007), http://www.uscourts.gov/sites/default/files/transcriptsept2707_0.pdf [https://perma.cc/D6XN-4X32] [hereinafter 2007 Hearing].

119. As far as I am aware, none of the public drafts that preceded the one adopted at the Conference meeting, *see infra* note 120, are now available on the judiciary website.

120. JUDICIAL CONFERENCE OF THE U.S., RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS (2008), http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/Misconduct/jud_conduct_and_disability_308_app_B_rev.pdf [https://perma.cc/ND56-P9BJ] [hereinafter 2008 RULES].

121. *See* 2008 RULES, *supra* note 120, R. 2 cmt. The 1980 Act authorized the Conference to promulgate nationally binding rules, but the Conference had not previously exercised that authority. *See* 28 U.S.C. §§ 331, 358 (2012).

122. For discussion of the major issues raised by the 2008 Rules, see Arthur D. Hellman, *When Judges Are Accused: An Initial Look at the New Federal Judicial Misconduct Rules*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 325 (2008) [hereinafter Hellman, *Misconduct Rules*].

123. *In re* Comm. on Judicial Conduct & Disability, 517 F.3d 563, 568 (Jud. Conf. of the United States Comm. on Conduct and Disability 2008).

controlled.[124] Senior District Judge Richard F. Cebull of Montana left the bench through retirement after a special committee in the Ninth Circuit completed its investigation of Judge Cebull's transmittal of an email containing racially offensive content.[125] District Judge Mark Fuller of Alabama resigned when a judicial council investigation revealed that he had physically abused his wife at least eight times, both before and after marriage.[126] Two federal district judges were impeached by the House of Representatives. One (Samuel B. Kent), who had pleaded guilty to a charge of obstruction of justice, resigned to avoid a Senate trial;[127] the other (G. Thomas Porteous) was convicted and removed from office.[128]

In April 2013, a few weeks after Judge Cebull announced his resignation, but before the Conduct Committee had issued its final order in the matter, a subcommittee of the House Judiciary Committee held a hearing on "An Examination of the Judicial Conduct and Disability System."[129] Two witnesses—the author of this article and Russell Wheeler of the Brookings Institution—pointed to "gaps and deficiencies in the regulatory regime" and offered suggestions for dealing with them.[130] Judge Anthony Scirica, the chair of the Conduct Committee, also testified at the hearing. He indicated that his committee would respond positively to the suggestions.[131]

And so it did. In September 2014, the Committee issued a draft of proposed amendments to the 2008 Rules.[132] Most of the amendments involved matters of clarification or emphasis, but six revisions did reflect a change of policy.[133] All but one of the six implemented suggestions was made at the House Judiciary Committee hearing.

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124. *In re* Complaint of Judicial Misconduct, 575 F.3d 279, 293 (3d Cir. Jud. Council 2009). The proceeding was transferred to the Third Circuit after a request to the Chief Justice by the Ninth Circuit Judicial Council. *Id*. at 280.

125. *See In re* Complaint of Judicial Misconduct, 751 F.3d 611, 613, 615 (Jud. Conf. of the United States Comm. on Conduct and Disability 2014).

126. *See* Alan Blinder, *Mark Fuller, Former Federal District Judge Could Be Impeached*, N.Y. TIMES (Sept. 18, 2015), https://www.nytimes.com/2015/09/19/us/mark-e-fuller-former-judge-could-be-impeached.html [https://perma.cc/RZ24-UEXB].

127. *See* 155 CONG. REC. 18,696–97 (2009) (dismissing Articles of Impeachment after Judge Kent's resignation).

128. *See* 156 CONG. REC. 19,133–37 (2010) (finding Judge Porteous guilty on charges in four Articles of Impeachment and removing him from office).

129. *An Examination of the Judicial Conduct and Disability System: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 1 (2013) [hereinafter 2013 House Judiciary Hearing].

130. *Id*. at 34 (remarks of Arthur D. Hellman).

131. *Id*. at 7 (remarks of Judge Scirica).

132. Judicial Conference of the United States, Rules for Judicial-Conduct and Judicial-Disability Proceedings, Redlined Draft Reflecting Proposed Amendments (July 23, 2014) (on file with author).

133. *See* Statement of Arthur D. Hellman, Hearing on Draft Amendments to Rules for Judicial-Conduct and Judicial-Disability Proceedings 7–16 (2014), https://www.uscourts.gov/sites/default/files/arthur-hellman-statement.pdf [https://perma.cc/3FND-GE26] [hereinafter Hellman, 2014 Statement].

As with the 2008 Rules, the Committee invited public comments and held a hearing. Russell Wheeler and I (among others) testified at this hearing also.[134] In contrast to 2007–2008, the Committee did not publish any further drafts. Instead, on September 17, 2015 the Judicial Conference approved and published an amended set of rules.[135] The rules were published in final form in May 2016.[136]

F. THE WORKING GROUP REPORT AND THE 2019 AMENDMENTS

Even before the 2015 Amendments took their final form, new controversies involving serious allegations against federal judges received public attention. Two judges resigned or retired in 2016 in response to accusations of long-ago sexual misconduct.[137] And in late 2017, Judge Alex Kozinski of the Ninth Circuit resigned after several female law clerks alleged that he had subjected them to inappropriate sexual conduct or comments.[138]

The accusations against Judge Kozinski—following, as they did, in the wake of similar accusations against prominent men in other fields—generated a public outcry far greater than any previous allegations against a federal judge.[139] In response, Chief Justice John G. Roberts, Jr., asked the Director of the Administrative Office of United States Courts to create a working group to examine the Judiciary's procedures for protecting employees from inappropriate workplace conduct.[140] The Working Group was created, and in June

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134. The transcript of the hearing can be found at *Release of Draft Amendments to Judicial Conference Rules for Judicial-Conduct and Judicial-Disability Proceedings: Hearing Before the Comm. on Judicial Conduct and Disability of the Judicial Conf. of the United States* 2 (2014), https://www.uscourts.gov/sites/default/files/final_transcript_0.pdf [https://perma.cc/35BH-H29D].

135. *See* JUDICIAL CONFERENCE OF THE U.S., REPORT ON THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (2015), https://www.uscourts.gov/sites/default/files/2015-09-17_0.pdf [https://perma.cc/M5UM-7M9P].

136. 2 JUDICIAL CONFERENCE OF THE U.S., GUIDE TO JUDICIARY POLICY pt. E, ch. 3 (2016), http://www.uscourts.gov/sites/default/files/guide-vol02e-ch03.pdf [https://perma.cc/EWU8-3YZT] [hereinafter 2015 Rules]

137. The accused judges were District Judge Walter Smith of Texas and District Judge Richard Roberts of the District of Columbia. For accounts of the proceedings, see Letter from James C. Duff, Dir., Admin. Office of the U.S. Courts, to Charles E. Grassley, Chairman, Comm. on the Judiciary, U.S. Senate, and Dianne Feinstein, Ranking Member, Comm. on the Judiciary, U.S. Senate (Feb. 16, 2018), http://www.uscourts.gov/sites/default/files/letter_from_director_duff_to_senator_grassley_on_workplace_conduct_working_group_0.pdf [https://perma.cc/9FG8-BMBM] [hereinafter Duff Letter].

138. Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N. Y. TIMES (Dec. 18, 2017), https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html [https://perma.cc/YN5H-TSPY].

139. *See, e.g.*, Aileen Graef & Joan Biskupic, *Judiciary Leaders Want Action on Preventing Sexual Misconduct in Courts*, CNN (Feb. 2, 2011) https://www.cnn.com/2018/02/11/politics/grassley-feinstein-sexual-harassment-courts/index.html [https://perma.cc/NUB8-R52J].

140. *See* CHIEF JUSTICE JOHN G. ROBERTS, JR., 2017 YEAR-END REPORT ON THE FEDERAL JUDICIARY 11 (2017), https://www.supremecourt.gov/publicinfo/year-end/2017year-endreport.pdf [https://perma.cc/78ZJ-C7W4].

2018 it issued a report recommending various measures "to ensure an exemplary workplace for every judge and every court employee."[141]

Most of the Working Group's recommendations dealt with processes external to the 1980 Act, and those that did focus on the Act primarily concerned the definition of misconduct. To be sure, the report also recommended that the Judiciary "consider possible mechanisms for improving the transparency of [the process for considering complaints under the 1980 Act]."[142] But the report had little to say about particular rule changes that might promote that goal.

In September 2018, the Conduct Committee issued a draft of proposed amendments to the misconduct rules.[143] Consistent with the focus of the Working Group, the most important amendments were those dealing with the definitions of misconduct and disability. The Committee invited written comments on the draft, and in October 2018 it held a public hearing at which about 20 witnesses testified. Most of the testimony addressed issues of sexual harassment.[144] On March 12, 2019, the Judicial Conference issued a new set of amended Rules.[145] The final version largely tracked the September draft.

G. PERSPECTIVE: A STORY OF INTERBRANCH COOPERATION (MOSTLY)

Even a brief account of the history shows that the evolution of the current system has been characterized by frequent, generally harmonious—but occasionally tense—interactions between Congress and the judiciary. However, the interactions that preceded the 1980 Act were quite different from those that followed it.

The process that produced the 1980 Act was sui generis: over the course of several years, strong-minded members of the Senate, the House, and the judiciary fought in public and in private to gain acceptance of their very different visions of what the system should be. Initially, Senate supporters of a centralized, adjudicatory regime had the upper hand, but when a small group of judges secured the support of Congressman Kastenmeier and the House Judiciary Committee for a decentralized, administrative approach, their view ultimately prevailed.[146]

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141. FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 1 (2018) (citation omitted), https://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf [https://perma.cc/RV37-MJ6Y].

142. *Id*. at 31.

143. 2 JUDICIAL CONFERENCE OF THE U.S., GUIDE TO JUDICIARY Policy pt. E, ch. 3: DRAFT—9.13.2018 (2018), http://www.uscourts.gov/sites/default/files/jcd_rules_redline_-_proposed_changes_-_9.13.18_0.pdf [https://perma.cc/D9LV-YY6S] [hereinafter September 2018 Rules Draft].

144. The hearing was held jointly with the Committee on Codes of Conduct, which had issued a draft of proposed amendments to the Code of Conduct for United States Judges.

145. 2 JUDICIAL CONFERENCE OF THE U.S., GUIDE TO JUDICIARY POLICY pt. E, ch. 3 (2019), https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019_0.pdf [https://perma.cc/NP7N-9CAK] [hereinafter 2019 Rules].

146. *See supra* Part I-A.

No comparable narrative, even one less dramatic, can be drawn from the later history, but one theme does emerge: in the subsequent interactions, the House has been dominant. The overwhelming majority of post-1980 amendments to the Rules as well as the statutes can be traced to actions of the House Judiciary Committee and its leadership. At the same time, the larger pattern—Congress and the judiciary each reacting to initiatives by the other—continued. Consider:

- The 1990 amendments to the 1980 Act originated in an article co-authored by Congressman Kastenmeier.[147] It appears that the Judicial Conference did not participate in the drafting process, but a prominent member of the judiciary—the director of the Federal Judicial Center and former chief judge of the Eleventh Circuit—testified in support of the amendments.[148]
- When Congress revised the Act in 2002, it implemented suggestions made at a House Judiciary Committee hearing the preceding year. Those suggestions, in turn, drew upon the rules and practices in the circuits.[149]
- The judiciary's promulgation of binding national rules for misconduct proceedings in 2008 was a direct outgrowth of the Breyer Committee's report. As has already been noted, Chief Justice Rehnquist implicitly acknowledged that he had appointed the Breyer Committee in response to Chairman Sensenbrenner's warnings described at the outset of this article.[150]
- The 2015 amendments to the rules reflected only a small number of policy changes, but those policy changes largely implemented suggestions made at the 2013 hearing of the House Judiciary Committee.[151]

This pattern of interaction comports with Congress's expectation when it passed the 1980 Act. In October 1980, as the House was preparing to vote on the final Senate amendments, Representative Kastenmeier pointedly commented that "both the House and Senate Judiciary Committees believe that there should be a continuing dialog between the legislative and judicial branches, and vigorous oversight by Congress."[152] Senator DeConcini spoke in a similar vein on the Senate floor, promising "a vigorous oversight responsibility."[153] The preceding pages show that there has been both "dialog" and "oversight," with Congress generally taking the lead and the judiciary responding.

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147. *See* Kastenmeier & Remington, *supra* note 84.

148. *Judicial Independence: Discipline and Conduct: Hearing on H.R. 1620, H.R. 1930, and H.R. 2181 before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 86–89 (1989) (remarks of Judge John C. Godbold). The Judicial Conference later noted that the proposed amendments "would make a number of affirmative improvements or useful clarifications to the [1980] Act," and it did not oppose the legislation. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: SEPT. 20, 1989, at 80 (1989).

149. *See supra* notes 90–92 and accompanying text.

150. *See supra* note 98 and accompanying text.

151. *See supra* note 133 and accompanying text.

152. 126 CONG. REC. 28,617 (remarks of Rep. Kastenmeier).

153. 126 CONG. REC. 28,090 (remarks of Sen. DeConcini).

The judiciary has not always welcomed congressional initiatives relating to the misconduct system. For example, the judges have strongly resisted the Grassley-Sensenbrenner proposal for an "Office of Inspector General."[154] But for the most part the judiciary has recognized that to preserve its independence, it must accept a substantial measure of accountability.[155] Many of the changes adopted in the wake of the Breyer Committee report and discussed in this article reflect movement in that direction.

II. OPERATION OF THE SYSTEM TODAY

To set the stage for discussion of the policy issues raised by the 2008 Rules and the two sets of revisions, it will be useful to provide some basic information about the operation of the system today. I begin with an overview of procedures under the Act and the Rules. I then briefly explore two important distinctions: between "high-visibility" cases and routine complaints, and between complaints alleging misconduct and those alleging disability.

A. PROCEDURES UNDER THE ACT AND THE RULES

Under Chapter 16 and the implementing rules, the primary responsibility for identifying and remedying possible misconduct by federal judges rests with two sets of actors: the chief judges of the federal judicial circuits and the circuit judicial councils. A national entity—the Judicial Conference of the United States—becomes involved only in rare cases, and only in an appellate capacity.

There are two ways in which a proceeding may be initiated to consider allegations of misconduct by a federal judge. Ordinarily, the process begins with the filing of a complaint about a judge with the clerk of the court of appeals for the circuit. "Any person" may file a complaint; the complainant need not have any connection with the proceedings or activities that are the subject of the complaint, nor must the complainant have personal knowledge of the facts asserted.[156] The Act also provides that the chief judge of the circuit may "identify a complaint"

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154. *See* Judicial Transparency Hearing, *supra* note 107, at 61 (letter stating that Judicial Conference "strongly opposes . . . any . . . legislation creating an IG in the judicial branch"); Anthony J. Scirica, *Judicial Governance and Judicial Independence*, 90 N.Y.U. L. REV. 779, 794 (2015) ("[A]ll versions [of the IG bill] are problematic on several levels.").

155. *See generally* Scirica, *supra* note 154; *id*. at 781 ("[A]ccountability and independence . . . are actually two sides of the same coin. . . .").

156. The 2019 revision adds a sentence to the Commentary stating: "Traditional standing requirements do not apply. Individuals or organizations may file a complaint even if they have not been directly injured or aggrieved." 2019 Rules, *supra* note 145, at 6 (Commentary). This language reiterates a proposition that has been assumed since the earliest days under the Act. *See In re* Complaints of Judicial Misconduct, 9 F.3d 1562, 1564 (U.S. Jud. Conf. Comm. 1993) (noting "the common understanding of the circuits in implementing the Act over the last twelve years that traditional standing requirements do not apply"); Real Impeachment Hearing, *supra* note 108, at 156–57 (colloquy among Rep. Waters, Prof. Geyh, and Prof. Hellman).

and thus initiate the investigatory process even when no complaint has been filed by a litigant or anyone else.[157]

When a complaint has been either "filed" or "identified," the chief judge must "expeditiously" review it.[158] The chief judge "may conduct a limited inquiry" but must not "make findings of fact about any matter that is reasonably in dispute."[159] Based on that review and limited inquiry, the chief judge has three options. He or she can (1) dismiss the complaint, (2) "conclude the proceeding" upon finding that "appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events," or (3) appoint a "special committee" to investigate the allegations.[160]

From a procedural perspective, options (1) and (2) are treated identically (although their import can be quite different).[161] The statute can thus be viewed as establishing a two-track system for the handling of complaints against judges. What I call Track One is the "chief judge track;" Track Two is the "special committee track."[162] All but a tiny fraction of complaints are disposed of on the chief judge track.[163]

If the chief judge dismisses the complaint or concludes the proceeding, a dissatisfied complainant or judge may seek review of the decision by filing a petition addressed to the judicial council of the circuit.[164] The judicial council—responsible for all aspects of judicial administration within the circuit—is composed of the circuit chief judge and an equal number of circuit judges and district judges; however, under current Rules, the chief judge does not participate in review of his or her own orders.[165] The council may order further proceedings, or it may deny review.[166] If the council denies review, that is ordinarily the end of the matter; in Track One cases, the statute states that there is no further review "on appeal or otherwise."[167] However, the 2008 Rules included a provision for another level of review under limited circumstances. This innovation—retained in the current Rules—raises important issues that will be discussed in Part V of this article.[168]

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157. This provision was added in 1990 at the instigation of Rep. Kastenmeier. *See supra* note 84 and accompanying text.

158. 28 U.S.C. § 352(a) (2012).

159. 28 U.S.C. § 352(a) (2012). For further discussion of this provision, see *infra* Part VI-B.

160. 28 U.S.C. § 352(b) (2012); 28 U.S.C. § 353 (2012).

161. For a brief discussion of proceedings "concluded" on the basis of "voluntary corrective action," see *infra* Part III-B-2.

162. More precisely, Track Two is the "chief judge/special committee track." For ease of reference I will use the shorter label.

163. *See* BREYER COMMITTEE REPORT, *supra* note 89, at 132.

164. 28 U.S.C. § 352(c) (2012).

165. *See infra* Part IV-C. The judicial council may refer petitions to a panel composed of at least five members of the council. *See* 28 U.S.C. § 352(d) (2012).

166. 2019 Rules, *supra* note 145, at 39 (Rule 19).

167. In fact, the statute says this twice. *See* 28 U.S.C. §§ 352(c), 357(c) (2012).

168. To my knowledge, the new review provision has been invoked only once. *See infra* Part V-C.

If the chief judge does not dismiss the complaint or conclude the proceeding, he or she must promptly appoint a "special committee" to "investigate the facts and allegations contained in the complaint."[169] A special committee is composed of the chief judge and equal numbers of circuit and district judges of the circuit.[170] Special committees have power to issue subpoenas; sometimes they hire private counsel to assist in their inquiries.[171]

After conducting its investigation, the special committee files a report with the circuit council. The report must include the findings of the investigation as well as recommendations.[172] The circuit council then has a variety of options: it may conduct its own investigation;[173] it may dismiss the complaint; or it may take action including the imposition of sanctions.[174]

Final authority within the judicial system rests with the Judicial Conference of the United States. A complainant or judge who is aggrieved by an order of the circuit council after a special committee investigation can file a petition for review by the Conference.[175] In addition, the circuit council can refer serious matters to the Conference on its own motion.[176] If the Conference determines that "consideration of impeachment may be warranted," it may so certify to the House of Representatives.[177]

Congress has authorized the Conference to delegate its review power to a standing committee, and the Conference has done so.[178] Until 2007, the committee was known as the Committee to Review Circuit Council Conduct and Disability Orders. The name was changed in 2007 in order to reflect the Committee's more active role in overseeing the Act's implementation; it is now the Committee on Judicial Conduct and Disability.[179] I refer to it in this article as the "Conduct Committee."

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169. 28 U.S.C. § 353(a) (2012).

170. 28 U.S.C. § 353(a)(1) (2012).

171. *See, e.g.*, *In re* Complaint of Judicial Misconduct, 575 F.3d 279, 282 (3d Cir. 2009) (noting assistance of counsel in carrying out special committee investigation).

172. 28 U.S.C. § 353(c) (2012).

173. It is rare for circuit councils to conduct additional investigation after receiving a special committee report, but it happens occasionally. *See, e.g.*, *In re* Judicial Complaint Under 28 U.S.C. § 351, No. 04-16-90088, at 7 (4th Cir. Jud. Council Apr. 24, 2018). Unless otherwise noted, chief-judge and judicial-council misconduct orders cited in this article without a citation to the Federal Reporter can be found on the website of the circuit from which the order was issued. Orders of the United States Judicial Conference Committee on Judicial Conduct and Disability can be found on the federal judiciary website, https://www.uscourts.gov/rules-policies/judiciary-policies/ethics-policies/code-conduct-judicial-employees/judicial-conduct-disability-opinions.

174. *See* 28 U.S.C. § 354(a)(2) (2012) (listing permissible sanctions).

175. 28 U.S.C. § 357(a) (2012).

176. 28 U.S.C. § 354(b) (2012).

177. 28 U.S.C. § 355(b) (2012).

178. *See* 28 USC § 331 (2012); *In re* Complaint of Judicial Misconduct, 37 F.3d 1511, 1512 (U.S. Jud. Conf. Comm. to Review Circuit Council Conduct and Disability Orders 1994).

179. *See* JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: MAR. 13, 2007, at 5 (2007).

One final point deserves mention. What I have described is the formal process governed by the Act and the Rules. In addition, there is considerable informal activity, out of the public eye and with no public record, through which chief circuit judges (and chief district judges) can often resolve problems of judicial misconduct.[180] The potential efficacy of these informal efforts is strengthened by the existence of the formal process—a phenomenon that has been referred to as "bargaining in the shadow of the Act."[181] Because this article deals with the Rules, it will have little to say about the informal activity. It is sufficient to reiterate an observation made by both the National Commission and the Breyer Committee: "Informal approaches remain central to the system of self-regulation within the judiciary."[182] Or, as one chief judge put it, "The really thorny problems are dealt with informally."[183]

B. ROUTINE COMPLAINTS AND "HIGH-VISIBILITY" CASES

The vast majority of misconduct complaints are filed by litigants or former litigants (many of whom are prisoners) and do no more than challenge the merits of a judge's ruling or make totally unsupported allegations of bias, hostility, or conspiracy on the part of one or more judges.[184] The statute and the Rules make clear that such complaints should be dismissed summarily by the chief judge, and that is what happens.[185] The Breyer Committee, based on its review of staff analysis of structured samples of actual dispositions, found "no serious problems with the judiciary's handling" of these routine complaints.[186] That assessment comports with my independent observation of the Act's implementation. The 2015 amendments corrected one misguided policy judgment in the 2008 Rules;[187] with that modification, Chapter 16 in its current form provides a generally adequate framework for dealing with the routine complaints.

Non-routine complaints present a more complex picture. The Breyer Committee identified a category that it called "high-visibility" cases—complaints that have "received national or regional press coverage" or have "brought public and legislative attention to the Act."[188] These complaints are a tiny fraction of the total,

180. These informal processes are even more important in dealing with problems of performance-degrading disability. *See infra* Part II-C.

181. Barr & Willging, *supra* note 82, at 136 (initial capitalization omitted). For an account of these informal practices, see *id*. at 131–44, 183–84.

182. BREYER COMMITTEE REPORT, *supra* note 89, at 202 (quoting REPORT OF THE NAT'L COMM. ON JUD. DISCIPLINE AND REMOVAL 113 (1993)).

183. *Id*. at 203 (quoting unidentified chief judge).

184. *See* ADMINISTRATIVE OFFICE OF U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl.S-22 (2017).

185. BREYER COMMITTEE REPORT, *supra* note 89, at 123.

186. *Id*. at 122.

187. *See infra* Part IV-C.

188. BREYER COMMITTEE REPORT, *supra* note 89, at 123, 173. The Breyer Committee described these "high-visibility" complaints in various ways. For discussion of how the relevant category should be identified, see *infra* Part III-A.

but they are important out of proportion to their numbers, because those are the cases that shape public perceptions of whether the judiciary is adequately policing misconduct within its ranks. This article will focus largely, though not exclusively, on how chief judges and circuit councils should deal with the high-visibility cases.

C. JUDICIAL DISABILITY

When Congress established procedures for handling complaints against federal judges, it made no distinction between complaints alleging misconduct and complaints alleging mental or physical disability that affects a judge's ability to perform his or her judicial work.[189] However, experience has shown that allegations of disability raise very different issues from allegations of misconduct. Concerns about a judge's mental or physical decline are generally addressed through informal and totally private measures. Transparency is generally unnecessary and indeed harmful.

The most thorough examination of this aspect of the system was conducted by researchers for the National Commission on Judicial Discipline and Removal. In their interviews, "[c]hief judges and former chief judges from every circuit spontaneously discussed instances of disability that they faced during their tenure" and handled through informal proceedings.[190] The "typical approach" was illustrated by an episode involving an elderly judge with failing powers who denied the existence of a problem. The chief judge "met with the judge's spouse and persuaded her to convince the judge to end his career while his reputation remained outstanding."[191]

In this article I shall focus primarily on misconduct, but two points about disability are worth flagging. First, in revising the Rules (or amending the statutes), care should be taken not to include mandates that would interfere with the ability of circuit chief judges to deal with disability in a quiet, compassionate, but effective way.

Second, a recent decision by the Conduct Committee raises the question: under what circumstances may a special committee require an Article III judge to submit to psychological testing to determine whether the judge has a mental or emotional disability? The Conduct Committee found that the Sixth Circuit Judicial Council was justified in imposing the requirement on District Judge John R.

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189. It was not until rather late in the legislative process that the drafts began to include "disability" within the coverage of the proposed statute. *See supra* Part I-A-2. In March 1980, a representative of the Department of Justice urged the House Judiciary Committee to establish separate provisions for disclosure and confidentiality in proceedings involving disability rather than misconduct. House Hearings, *supra* note 48, at 168 (statement of Assistant Attorney General Maurice Rosenberg). The Committee did not follow up on the suggestion.

190. Barr & Willging, *supra* note 82, at 139.

191. *Id*. at 140. As this episode illustrates, informal action by the chief judge often involves "bargaining in the shadow of the Act." *Id*. at 136 (some initial capitalization omitted). Nevertheless, the ability to act without public disclosure remains essential.

Adams, but the Committee did not articulate a standard for future cases.[192] The question warrants careful consideration, but it is beyond the scope of this article.

III. TRANSPARENCY AND DISCLOSURE

The system of self-regulation established by Congress can work only if the public trusts the judges to resist the temptations of what the Breyer Committee called "guild favoritism"—"an inappropriate sympathy with the judge's point of view or de-emphasis of the misconduct problem."[193] This means that it is not enough that the judges carry out the task with rigor and impartiality; it is also necessary that their actions are *seen* as reflecting those qualities. In short, an effective system requires trust, and trust requires transparency.

The 2008 Rules and the two sets of amendments took some modest steps toward bringing greater transparency to the process, particularly in the high-visibility cases that shape public perception of the judiciary's implementation of the 1980 Act. But these were not part of a comprehensive scheme, nor did they respond adequately to the exigencies of our 24-hour-news-cycle world.

To some extent, this deficiency may be the consequence of constraints imposed by the 1980 Act. Thus, a comprehensive approach to the problem would require amendments to Title 28 as well as revisions of the judiciary's rules. Here I will address the substance of measures that would produce greater transparency, with only secondary attention to whether those measures are permissible under Chapter 16. The measures involve four aspects of the process: identifying complaints based on public reports, the nature and timing of public disclosure, the development of a body of interpretive precedent, and the judiciary's reports on the administration of the Act.

A. IDENTIFYING COMPLAINTS BASED ON PUBLIC REPORTS

The Breyer Committee report encourages chief judges to make greater use of "their statutory authority to identify complaints when accusations become public."[194] This is a sound recommendation. If there is substance to the allegations, the public will be reassured that the judiciary is truly committed to policing misconduct in its ranks. If the allegations are without merit, the process will help to remove the cloud that would otherwise hang over the judge's reputation.

But "accusations" is too narrow a word. Sometimes—as when a federal judge is arrested—there will be an actual "accusation." More commonly, there will be only a *report* (in print or online) of conduct that the chief judge recognizes as possibly falling within the ambit of the Act. For example, in 2009 Chief Judge Frank

192. *In re* Complaint of Judicial Misconduct, No. 17-01 (U.S. Jud. Conf. Comm. on Jud. Conduct & Disability Aug. 14, 2017), http://www.uscourts.gov/sites/default/files/c.c.d._no._17-01_august_14_2017_0.pdf [https://perma.cc/WCF8-VF2T].

193. BREYER COMMITTEE REPORT, *supra* note 89, at 119.

194. *See id*. at 209, 245–46.

H. Easterbrook of the Seventh Circuit "learned from a newspaper report" that a district judge had allowed live broadcasting of a civil proceeding.[195] This action violated a judicial council resolution and a local rule, so Judge Easterbrook identified a complaint and initiated a proceeding under the Act.

Rule 5 of the current Rules defines the circumstances under which a chief judge may or must identify a complaint. But the Rule itself has no provisions that specifically address situations where accusations become public. And the commentary has only a brief paragraph on high-visibility situations, saying that "it *may* be desirable for the chief judge to identify a complaint without first seeking an informal resolution . . . in order to assure the public that the allegations have not been ignored."[196]

I believe that this point should be treated in the Rules, not just the commentary. Specifically, when allegations or reports of possible misconduct have become public, the chief judge should be required to identify a complaint, even if it seems clear that the complaint will be dismissed. This situation will not occur frequently, but when it does, there is nothing to be gained by leaving the assertions unrefuted, and much to be lost. That was the conclusion reached by the Breyer Committee, and the Rules should be amended to reflect the Breyer Committee's judgment.[197]

Questions will arise about when an allegation or report has become "public" in a way that should trigger the obligation to identify a complaint. Today, any individual with a grudge can start a website—or simply post comments on someone else's blog. Does that make a report "public"? Not for this purpose. The Rules should adopt a functional approach: a report is "public" if it is published or posted in a print or electronic source in a way that could reasonably be expected to influence public perceptions of the regulation of ethics by the federal judiciary. Articles in mainstream news media (national or local) and postings on widely read websites would be "public reports" in this sense. Allegations on a website operated by an individual pursuing a vendetta against a particular judge generally would not be.

B. THE NATURE AND TIMING OF PUBLIC DISCLOSURE

Except in the rare case where the Judicial Conference determines that impeachment may be warranted, Chapter 16 provides for only limited public disclosure in misconduct proceedings. Written orders issued by a judicial council or by the Judicial Conference to implement disciplinary action must be made available to the public.[198] But unless the judge who is the subject of the accusation

195. *See In re* Complaint Against District Judge Joe Billy McDade, No. 07-09-90083, at 1 (7th Cir. Jud. Council Sept. 28, 2009) (Easterbrook, C.J.).

196. 2019 Rules, *supra* note 145, at 15 (emphasis added).

197. When a public report signals a possible problem of disability, it may be preferable for the chief judge to conduct an informal inquiry without necessarily identifying a complaint. For discussion, see *infra* Part VI-A.

198. 28 U.S.C. § 360(b) (2012). As noted *supra* Part I-A-2, this provision was added by the Senate very late in the Act's evolution.

authorizes the disclosure, 28 U.S.C. § 360(a) provides that "all papers, documents, and records of proceedings related to investigations conducted under [Chapter 16] shall be confidential and shall not be disclosed by any person in any proceeding."[199] The statute is silent on the publication of chief judge orders dismissing a complaint or concluding a proceeding.

The judiciary's rules have filled in some of the statutory gaps. The basic rule (part of Rule 24) is that orders entered by the chief circuit judge and the judicial council must be made public, but only "[w]hen final action on a complaint has been taken and it is no longer subject to review as of right."[200] This directive is supplemented by rules and commentary that address particular topics. Three of these warrant discussion here: interim disclosures, identification of the judge who is the subject of an order, and the manner in which orders are made public.

1. INTERIM DISCLOSURES

The rule prohibiting public release of chief-judge and judicial-council orders until "final action on a complaint has been taken" is derived from the Illustrative Rules. The commentary to those Rules made clear that one purpose of the restriction was to "avoid disclosure of the *existence* of pending proceedings."[201] That approach generally makes sense when the events underlying the complaint remain unknown to the public. But when the underlying events have become the subject of public reports, avoiding disclosure of the existence of the proceeding serves no purpose other than to fuel public cynicism about judges "protecting their own."

In apparent response to this concern, the 2008 Rules took a cautious step in the direction of allowing interim disclosures. The Judicial Conference added a single new sentence to Rule 23(a), the general rule on confidentiality: "In extraordinary circumstances, a chief judge may disclose the existence of a proceeding under these Rules when necessary to maintain public confidence in the federal judiciary's ability to redress misconduct or disability."[202] Within months of the promulgation of the rules, Chief Judge Anthony Scirica of the Third Circuit (the future chair of the Conduct Committee) made use of the new provision when he announced the appointment of a special committee to consider the complaint against Judge Alex Kozinski arising out of Judge Kozinski's maintenance of a website containing offensive sexually oriented material.[203]

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199. 28 U.S.C. § 360(a) (2012). As noted in the text, there is also a narrow exception for situations involving actual or potential impeachment proceedings.

200. 2019 Rules, *supra* note 145, at 54. The 2019 amendments added the phrase "as of right."

201. 1986 Illustrative Rules, *supra* note 87, at 55 (emphasis added).

202. 2008 Rules, *supra* note 120, at 34. This provision was not included in the draft Rules that were circulated for public comment in July 2007. It was added in the December 2007 draft.

203. *See supra* note 124 and accompanying text (discussing *In re* Complaint of Judicial Misconduct, 575 F.3d 279 (3d Cir. Jud. Council 2009)).

Six years later, when the Conduct Committee made public its draft of proposed revisions to the Rules, this provision remained unchanged. In my statement at the hearing on the draft, I suggested that the language set the bar too high, that there was no need to require "extraordinary circumstances," and that the Rule should authorize disclosures when "necessary *or appropriate* to maintain public confidence in the federal judiciary's ability to redress misconduct or disability."[204] The final version of the Rule adopted both suggestions.[205]

The Judicial Conference has not yet explained how this provision can be reconciled with the confidentiality language in Title 28,[206] but as a policy matter it is sound. Further, the Rules can and should specify particular interim actions that should ordinarily be disclosed. For example, when the chief judge identifies a complaint based on public allegations or reports of misconduct, the chief judge should announce that fact.[207] If the chief judge then appoints a special committee to consider the complaint, that decision too should be announced.[208] There should also be an announcement when the *filing* of a complaint has become the subject of a public report and the chief judge appoints a special committee to consider the matter. These announcements will necessarily disclose two other important pieces of information—whether an acting chief judge is handling the matter and whether the complaint has been referred to another circuit under Rule 26.[209]

The 2019 amendments made no change in the 2015 version of the interim disclosure provision (relocated to Rule 23(b)(1)), but they added a puzzling new paragraph to the Commentary to Rule 23. The new language authorizes "the disclosure of information about the consideration of [a] complaint, *including orders and other materials related to the complaint proceeding*," but only when "a complainant or other person has publicly released information regarding the existence of a complaint proceeding."[210]

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204. Hellman, 2014 Statement, *supra* note 133, at 45.

205. 2015 Rules, *supra* note 136, at 44.

206. *See supra* note 199 and accompanying text.

207. *See supra*. Part III-A.

208. As noted earlier, Chief Judge Anthony Scirica followed that practice in the proceeding involving Ninth Circuit Chief Judge Alex Kozinski. *See* text accompanying note 203 *supra*. In contrast, in the Mark Fuller matter, *see supra* note 126 and accompanying text, the public learned of the appointment of a special committee from comments to the media by the judge's lawyer.

209. These suggestions could not have been implemented under the 2015 version of Rule 24(a), which explicitly excluded orders identifying complaints and orders appointing special committees from the general rule on public availability of decisions. The September 2018 draft of proposed amendments deleted that language, and the Rules have now been amended in accordance with the draft. *See* September 2018 Rules Draft, *supra* note 143, at 59 (strikethrough).

210. 2019 Rules, *supra* note 145, at 53 (emphasis added). The Commentary says that the disclosure is authorized "in the interest of assuring the public that the judiciary is acting effectively and expeditiously in addressing the relevant complaint proceeding." But as a textual matter that does not seem to be a prerequisite to disclosure.

I fully agree that interim disclosures should, when appropriate, include "orders and other materials related to the complaint proceeding." But there are two problems with the approach taken by the 2019 Rules.

The first problem is that the Commentary explicitly grounds this new authorization, not in the renumbered Rule 23(b)(1), but in the separate paragraph—now Rule 23(b)(8)—that permits disclosure that "is justified by *special circumstances* and is not prohibited by the Act."[211] That is unnecessarily confusing. There are now two separate provisions—one in the Rule itself, one a combination of Rule and Commentary—that address topics that are closely related. Disclosure of the existence of a proceeding is governed by different standards from those for disclosure of the materials relating to that proceeding. To add to the confusion, the second provision seems to reintroduce the requirement of "extraordinary circumstances" that was jettisoned in the 2015 revisions.

The second problem is that the circumstances that, as a matter of policy, will justify interim disclosures are not limited to situations where "a complainant or other person has publicly released information regarding the existence of a complaint proceeding." That will often be the case, but the Rule should apply more broadly to situations where allegations or reports of possible misconduct have become public.

The preferable approach is to amend what is now the final sentence of Rule 23(b)(1) to make clear that the permitted disclosures include not only "the existence of a proceeding," but also orders and other materials related to the proceeding. Disclosure would remain discretionary, particularly with respect to the release of materials. But the Commentary should make clear that when allegations become the subject of a public report, *some* disclosure should be the norm.[212]

This prompts a further suggestion in the interest of promoting public understanding of the operation of the misconduct system. The Rules—and court websites—should include introductory commentary that will provide some context for public disclosures in high-visibility cases. Currently, the commentary on court websites is aimed almost exclusively at discouraging the filing of frivolous complaints.[213] That is important, but it is also important to explain how the system operates when a non-frivolous complaint is filed. Of course, no commentary

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211. *Id*. at 50 (emphasis added).

212. One other aspect of the rules on confidentiality and disclosure deserves attention. The Commentary on "special circumstances" mentions disclosure to prosecutors and licensing bodies. 2019 Rules, *supra* note 145, at 52. As Russell Wheeler has suggested, these provisions belong in the text of the Rule, and the Rule should specify that such disclosures may be appropriate even when a judge has resigned or retired after allegations of serious misconduct. *See* Statement of Russell Wheeler, September 2018 Proposed Changes to Judicial Conference Rules for Judicial-Conduct and Judicial-Disability Proceedings: Hearing Before the Comm. on Judicial Conduct & Disability of the Judicial Conf. of the U.S. (2018), https://www.uscourts.gov/sites/default/files/russell_wheeler_public_comment_proposed_changes_code_rules.pdf [https://perma.cc/Q43Q-XUL2].

213. Typically, the commentary emphasizes, in different ways, that "complaints about judges' decisions and complaints with no evidence to support them must be dismissed." This language was suggested by the Breyer Committee. *See* BREYER COMMITTEE REPORT, *supra* note 89, at 121.

can anticipate—let alone deflect—all possible misunderstandings. But when allegations of misconduct become the subject of public discussion, it will be helpful if there is a readily available source of information about the purposes and functions of the system, with emphasis on the importance of protecting judicial independence.

Finally, in his statement at the 2014 hearing, Russell Wheeler suggested that when a judicial-branch body issues an order that reasonable observers might regard as related to a complaint of misconduct or disability, the order should specify who is taking action and what the authority for that action is.[214] A requirement along those lines would be particularly valuable in high-visibility cases, and I agree that it should be incorporated into the Rules.

2. IDENTIFICATION OF THE SUBJECT JUDGE

When final action has been taken on a complaint, the orders of the chief judge and the circuit council must be made public. Should those orders identify the judge who was the subject of the complaint? From the earliest days under the 1980 Act, the judiciary has struggled with that question. The 2015 Rules, largely tracking the 1986 and 2000 Illustrative Rules, divided dispositions into three categories.

First, there was one (and only one) situation in which disclosure of the judge's name was mandatory: when the judicial council takes remedial action (other than private censure or reprimand) after a special committee report.[215] This provision was uncontroversial, and it remains intact in the 2019 Rules.

Second, the Rules specified two situations in which the judicial council has discretion to disclose or withhold the name of the subject judge: when "the complaint is concluded because of intervening events, or [when it is] dismissed at any time after a special committee is appointed. . . ."[216] The commentary noted one particular circumstance in which disclosure of the judge's name "may be in the public interest": when the judge "resigns in the course of an investigation."[217] These provisions too were uncontroversial, and they have been retained in the current Rules.

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214. Statement of Russell R. Wheeler on Proposed Amendments to Judicial Conference Rules for Judicial-Conduct and Judicial-Disability Proceedings at 6 (Nov. 3, 2014), https://www.uscourts.gov/sites/default/files/wheeler_statement_-_final_0.pdf [https://perma.cc/FF3L-LK77]. The suggestion was prompted by an episode involving District Judge Mark Fuller. After Judge Fuller was arrested on misdemeanor charges, an "Announcement" on the letterhead of the Eleventh Circuit Court of Appeals, posted on the court's website, ordered the reassignment of all cases on Judge Fuller's docket. Courts of appeals have no authority to make such reassignments, and knowledgeable observers could only speculate about the basis for the order. Misconduct proceedings against Judge Fuller ultimately led to his resignation. *See supra* note 126 and accompanying text.

215. *See* 2015 Rules, R. 24(a)(4).

216. 2015 Rules, R. 24(a)(2).

217. 2015 Rules, R. 24(a)(4) at 50 (commentary).

Finally, the Rules specified three situations in which "the publicly available materials must *not* disclose the name of the subject judge without his or her consent." These were when:

- "the complaint is finally dismissed . . . without the appointment of a special committee";
- "the complaint . . . is concluded under [§ 352(b)(2)] because of voluntary corrective action"; or
- "the complaint is finally disposed of by a privately communicated censure or reprimand."[218]

The overwhelming majority of complaints are dismissed without the appointment of a special committee, and of the small number remaining, some are concluded based on corrective action. Thus, under the 2015 Rules, in all but a tiny fraction of cases, the publicly available materials would not identify the judge, and any explanatory memoranda would omit details that would enable a reader to learn the judge's identity.[219] The 2019 amendments modified the language applicable to these situations, but, as will be seen, the Commentary indicates that only a modest change was intended.[220] In any event, the overall arrangements remain largely as they were. The question is thus raised: is the nondisclosure policy sound? The two classes of cases require separate analysis.

a. When the Complaint is Dismissed

Consider first the cases in which the complaint is dismissed without the appointment of a special committee. The commentary has little to say about the rationale for the non-disclosure rule, but a somewhat fuller explanation can be found in the commentary to the 1986 Illustrative Rules. That commentary referred to "the legislative interest in protecting a judge from public airing of unfounded charges," and it said that "the [1980] law is reasonably interpreted as permitting nondisclosure of the identity of a judicial officer who is ultimately exonerated and also permitting delay in disclosure until the ultimate outcome is known."[221]

From a policy perspective, it is unnecessary to inquire into Congress's intent in 1980; the question, rather, is whether the asserted interest in protecting judges from "public airing" should be given primacy over the interest in accountability.

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218. 2015 Rules, R. 24(a).

219. *See, e.g.*, *In re* Complaint Against a Judicial Officer, No. 07-7-352-55 (7th Cir. Jud. Council Sept. 30, 2008). The two-paragraph order informs us that the chief judge appointed a special committee, and the committee carried out an investigation. The committee recommended that complaint be "dismissed as factually unsubstantiated and/or concluded based on voluntary corrective actions." The circuit council accepted the recommendation. But the judge is not identified, and the order gives no clue as to the nature of the alleged misconduct or what the special committee investigated.

220. *See infra* Part III-B-2-c.

221. 1986 Illustrative Rules at 876; *see also* Illustrative Rules at 55.

In the routine cases that make up the vast bulk of complaints, I think the tradeoff is a reasonable one, because neither interest is particularly strong. Take the typical case: the chief judge dismisses a complaint on the ground that the allegations are directly related to the merits of a decision. Is there really an injury to the judge's reputation if this "unfounded charge[]" of misconduct receives a "public airing"? At the same time, however, it is hard to see any serious threat to accountability if the judge's name remains undisclosed.[222]

The calculus changes when the underlying events have been the subject of public reports. A complaint filed against District Judge Charles A. Shaw in 2006 is illustrative. The complaint was based on a story in the St. Louis Post-Dispatch reporting that Judge Shaw "urged the crowd [at a naturalization ceremony] to vote for a congressman who shared the stage."[223] The article noted that the Code of Conduct for federal judges says that judges should not endorse candidates for public office.[224] The chief judge dismissed the complaint, saying that the judge's statements did not constitute an "endorsement."[225] The order did not identify the judge.

The accusations against Judge Shaw had already been aired in a major regional newspaper (including its website). Withholding his name from the dismissal order did not protect him from that airing; on the contrary, it obscured from the public the information that he had been exonerated. In this kind of situation, a policy of non-disclosure makes little sense.[226]

This was not always so. In 1986, and perhaps even in 2000, there was some justification for assuming that published reports of "unfounded charges" would recede from memory, so that withholding the judge's name from the exoneration order would indeed help to protect the judge's reputation. Today, however, the reports will be available on the Internet and will be found through Google and other searches long after their initial posting. The judge's reputation will be best protected by making sure that the exoneration order—identifying the judge and explaining why the complaint was dismissed—will also be available.

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222. For a more extended discussion of this point, *see* Hellman, *Misconduct Rules*, *supra* note 122, at 357–59.

223. Tim O'Neil, *Judge Urges New Citizens to Vote for Rep. Clay; Code of Conduct Bars Federal Judges From Making Endorsements*, ST. LOUIS POST-DISPATCH, May 2, 2006, at B2.

224. *Id*.

225. *In re* Complaint of John Doe, No. 06-013, at 5–6 (8th Cir. Jud. Council Oct. 18, 2006) (Loken, C.J.) (on file with author).

226. The point is also illustrated by the proceedings involving District Judge James C. Mahan of Nevada. The Los Angeles Times published a front-page article accusing Judge Mahon of giving favorable treatment to friends and associates without disclosing "his relationships with those who benefited from his decisions." A special committee investigated the allegations and found no misconduct. The Ninth Circuit Judicial Council then dismissed the complaint in a brief, opaque order that did not identify the judge. *In re* Complaint of Judicial Misconduct, No. 06-89087 (9th Cir. Jud. Council Aug. 23, 2007) (on file with author). The anonymity was broken by Judge Mahon himself a few weeks later when he told his hometown newspaper that he was "very heartened" by the findings of the investigation. Carri Geer Thevenot, *Complaint Against Judge Dismissed*, L.V. REV.-J., Oct. 4, 2007, at 1B.

b. When the Judge Takes Voluntary Corrective Action

The "voluntary corrective action" cases present more difficult questions. Typically, these are cases in which the accusation of misconduct has some foundation, but the judge apologizes, and on that basis the chief judge concludes the proceeding.[227] One can argue that, at least where the chief judge finds that the accused judge has violated the Code of Conduct or other ethical norms, the public has a legitimate interest in knowing the identity of the judge. On the other hand, if the apology (or other corrective action) did not carry with it a promise that the order would not identify the judge, the judge might be less willing to acknowledge fault and apologize.[228] That does not seem like a desirable outcome.

But this implicit bargain makes sense only when the allegations have not received a "public airing." If the underlying conduct has already been reported in national or regional news media, it is hard to see what is gained by withholding the judge's name from the order.[229] And including it allows the public to see that the judiciary has not swept the matter under the rug. Indeed, in this situation, chief judges today sometimes ask the apologizing judge to consent to being identified in the order.[230]

A similar rationale applies when the underlying conduct has been the subject of a publicly available judicial decision. For example, a few years ago the Fourth Circuit Court of Appeals found that District Judge Robert G. Doumar had "crossed the line" with his "improper interference" with a criminal trial.[231] The court noted that this was not its first encounter with a case "replete with the district court's ill-advised comments and interference."[232] But the defendant had not raised a timely objection, so the court applied the "plain error" standard and found no prejudice.[233] The defendant then filed a misconduct complaint against Judge Doumar.[234] The judge acknowledged that his conduct was inappropriate,

227. *See, e.g.*, *In re* Complaint Filed by ___, No. 11-17-90024, at 16–19 (11th Cir. Jud. Council Mar. 22, 2018) (Carnes, C.J.) (at hearing, bankruptcy judge said to father of debtor, "I think you are the lowest form of life for putting your son through this. You are a despicable human being. . . .").

228. Perhaps this is what the Rules commentary means when it says: "Shielding the name of the subject judge in this circumstance should encourage informal disposition." 2019 Rules at 56 (commentary).

229. Consider, for example, the 2016 proceeding involving District Judge Peter C. Economus. Judge Economus wrote a letter to the editor of the local daily newspaper in which he endorsed one candidate in a contested election for county prosecutor. This was a textbook violation of the Code of Conduct. After a misconduct complaint was filed, Judge Economus wrote another letter retracting the endorsement and apologizing for his wrongdoing. Chief Judge R. Guy Cole, Jr., concluded the proceeding—which was certainly appropriate—but the order did not identify Judge Economus. *In re* Complaint of Judicial Misconduct, No. 06-16-90007 (6th Cir. Jud. Council Sept. 2, 2016) (Cole, C.J.).

230. *See, e.g.*, *In re* Complaint Against District Judge Joe Billy McDade, No. 07-09-90083 (7th Cir. Jud. Council Sept. 28, 2009) (Easterbrook, C.J.).

231. United States v. Martinovich, 810 F.3d 232, 239 (4th Cir. 2016).

232. *Id*. n.6. The footnote cited five cases; Judge Doumar was the district judge in four of them.

233. *Id*. at 238, 242.

234. In the Matter of a Judicial Complaint under 28 U.S.C. § 351, No. 04-17-90033 (4th Cir. Jud. Council Aug. 7, 2017) (Gregory, C.J.).

apologized, and committed himself to acting properly in the future.[235] On that basis, Chief Judge Roger Gregory concluded the proceeding.[236] But the order does not identify the judge. I think it should have done so. The court of appeals had criticized the judge in strong terms for improper interference in the complainant's criminal case, and the opinion implied that the judge was a repeat offender. It would promote public confidence in the judiciary to announce that the judge had recognized the impropriety of his behavior and had promised not to repeat it.[237] That could be done only by identifying the judge in the misconduct order.[238]

c. Revising the Policy

The analysis here suggests that the policy should be this: When the substance of a misconduct complaint has been the subject of a public report (as defined above) or a publicly available judicial decision, there will be a presumption that orders arising out of that complaint will disclose the identity of the judge.[239] The presumption would apply when the complaint is dismissed on the merits and also when the proceeding is concluded based on corrective action. Beyond that, there is no need to modify the 2015 provisions on identifying the subject judge.

The March 2019 amendments took a different approach, but the extent of the departure from the 2015 Rules is unclear. Rule 24(a)(1) now states that if either (1) the complaint is dismissed or (2) the proceeding is concluded because of voluntary corrective action, "the publicly available materials *generally should not* disclose the name of the subject judge without his or her consent."[240] This language suggests that in both situations, chief judges and circuit councils have some discretion to identify the subject judge when they think disclosure is appropriate – irrespective of consent and for whatever reason. But the Commentary conveys a very different message. With respect to the first situation, the Commentary unequivocally reiterates the position of the 2015 Rules: "If the final action is dismissal of the complaint, the name of the subject judge *must not be disclosed*."[241] The Commentary then states:

> Rule 24(a)(1) provides that where a proceeding is concluded under Rule 11(d) by the chief judge on the basis of voluntary corrective action, the name of the subject judge generally should not be disclosed, except where the complainant or another person has disclosed the existence of a complaint proceeding to the public.[242]

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235. *Id*.

236. *Id*.

237. A concurring opinion in the criminal case noted that conduct like Judge Doumar's "tends to undermine the public's confidence in the integrity of the judiciary." Martinovich, 810 F.3d at 246 (Wynn, J., concurring).

238. It would help, too, if orders like this one were posted separately from routine orders dismissing complaints. *See infra* Part III-B-3.

239. For discussion of the "public report," *see supra* Part III-A.

240. 2019 Rules, *supra* note 145, at 54 (emphasis added).

241. *Id*. at 56 (emphasis added).

242. *Id*.

Note the wording of the Commentary: it purports to reiterate what the Rule itself "provides," and it specifies a single exception to the prohibition on disclosure that otherwise applies "generally" to voluntary corrective action cases: when "the complainant or another person has disclosed the existence of a complaint proceeding to the public."

Whatever the intended purview of the exception, the standard in the Commentary is both under- and over-inclusive. It does not encompass all cases in which there has been a "public airing" of possible misconduct. And it may be read to include instances where the disclosure would not reach or influence a general audience. The more functional concept of the "public report" delineated above is preferable. And it should apply to dismissals as well as corrective action cases.

3. MANNER OF MAKING ORDERS PUBLIC

What does it mean to say that orders must be "made public"? Over the years, the Rules have taken successive steps toward greater transparency. But more can be done.

Under both sets of Illustrative Rules, orders were to be made public "by placing them in a publicly accessible file in the office of the clerk of the court of appeals" and by sending them to the Federal Judicial Center in Washington, where they would be "available for public inspection."[243] The 2008 Rules provided that final orders disposing of a complaint "must be made public by placing them in a publicly accessible file in the office of the circuit clerk *or* by placing such orders on the court's public website."[244] Finally, the 2015 Rules replaced "or" with "and."[245]

This change was long overdue.[246] The ubiquity of the Internet has changed the popular understanding of document availability; in today's world, availability usually means "available online." Yet until the Rules were amended in 2015, only seven of the thirteen federal circuits were posting all final misconduct orders on their websites.[247]

Comprehensive posting has one drawback, however: orders of general public interest—for example, those that interpret the Code of Conduct or resolve a high-visibility complaint—are buried among the routine ones. The simple solution, as Russell Wheeler has suggested, is that chief judges and circuit councils should "identify which orders [they believe] to have precedential value as well as those

243. 1986 Illustrative Rules, *supra* note 87, at 53.

244. 2008 Rules, *supra* note 120, at 36 (emphasis added).

245. 2015 Rules, *supra* note 136, at 49.

246. In his statement to the Conduct Committee in 2014, Russell Wheeler recommended reversing the sequence in which the Rule requires website posting and hard-copy availability. This was a good suggestion, but the Committee did not adopt it in the 2015 amendments. The 2019 Rules do so. *See* 2019 Rules, *supra* note 145, at 54.

247. Wheeler, *supra* note 47, at 513–14.

that are otherwise unusual."[248] In his statement at the 2014 hearing, Mr. Wheeler proposed that these orders should be designated with an asterisk.[249] While that would accomplish the purpose, the preferable approach is to post the non-routine orders under a separate heading or on a separate page within the website. That is the system used by most of the federal courts of appeals for distinguishing between precedential and non-precedential opinions, and it should work equally well in this context.

This suggestion can be implemented by revising the second sentence of Rule 24(b). That sentence now provides: "If [misconduct] orders appear to have precedential value, the chief judge may cause them to be published."[250] But what should "publication" mean when all misconduct orders are posted on the circuit's public website? Again, the court of appeals model provides the answer. Non-routine orders would be *designated* as "for publication." Such orders would then be posted under the separate heading or on the separate page.

Designating an order as "for publication" also means that the order will be published in the Federal Reporter and will be available in online databases like Westlaw and Lexis.[251] That will promote Rule 24(b)'s goal of "provid[ing] . . . information to the public on how complaints are addressed under the Act."[252] It would also facilitate access to the orders by chief judges seeking guidance and would assist scholars and journalists who seek to analyze the judiciary's implementation of the Act.[253]

The Rules should also expand upon the criteria for designating orders as "for publication." There are three kinds of circumstances in which publication will be desirable. First, of course, is precedential value. An order has value as precedent if it interprets the 1980 Act, the Rules, or the Code of Conduct for United States Judges. Second, publication is desirable if the conduct underlying the complaint has been the subject of public reports.[254] Third, an order will generally warrant publication if the procedural posture departs from the routine. This third category would include cases in which the chief judge identified a complaint, or a special committee was appointed, or the chief judge concluded the proceeding rather than dismissing the complaint.

Another step that chief judges and circuit councils can take to enable the public to identify orders in high-visibility cases involves the caption of the orders.

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248. Wheeler, *supra* note 47, at 514.

249. Statement of Russell R. Wheeler on Proposed Amendments to Judicial Conference Rules for Judicial-Conduct and Judicial-Disability Proceedings (Nov. 3, 2014), https://www.uscourts.gov/sites/default/files/wheeler_statement_-_final_0.pdf [https://perma.cc/7G4Y-57MV].

250. 2019 Rules, *supra* note 145, at R. 24(b).

251. From 2008 through early 2018, about 50 misconduct orders issued by chief judges and circuit councils were published in the Federal Reporter; they are also available on Westlaw. All but a handful of these are from the Ninth Circuit.

252. 2019 Rules, *supra* note 145, at R. 24(b).

253. To fully serve these latter goals requires a system of indexing. For discussion, *see infra* Part III-C.

254. For discussion of what constitutes a "public report" in this context, *see supra* Part III-A.

Within each circuit, orders in misconduct proceedings generally bear identical captions that do not identity the judge who is the subject of the order (e.g., "In re Complaint of Judicial Misconduct"). But when the order itself identifies the subject judge, the caption should do so also—not only on the order itself, but also on the link on the webpage. The Ninth Circuit has shown the way; for several months after the resignation of Judge Kozinski, the circuit home page featured the announcement "(12/19/17) In re Complaint of Judicial Misconduct, No. 17-90118 (Kozinski)."[255]

More generally, the Rules should impose a uniform format for orders in misconduct proceedings. In particular, the date of the order should appear on the first page, not at the end, as is done in some circuits today. And the Judicial Conference should insist on a standard caption, so that misconduct orders can easily be found in legal databases.[256]

Finally, the Rules should encourage chief judges and circuit councils to provide sufficient explanation in their orders to enable outsiders to assess the appropriateness of the disposition.[257]

C. DEVELOPING A BODY OF INTERPRETIVE PRECEDENT

A quarter-century ago, the National Commission on Judicial Discipline and Removal, chaired by former Representative Robert W. Kastenmeier, recommended that the judiciary develop "a body of interpretative precedents" that would guide judges in administering the Act and also enhance "judicial and public education about judicial discipline and judicial ethics."[258] The Breyer Committee renewed and elaborated upon this recommendation.[259] But no such compilation has been made available on the federal judiciary's public website. Chief judges, circuit councils, and the Conduct Committee can all play a role in developing the "body of interpretive precedents" that has long been lacking.

The first step has already been discussed: Rule 24(b) should be revised to require chief judges to identify and separately post orders that appear to have precedential value.[260] But circuit-by-circuit publication is not enough, as the judiciary has recognized. At the 2007 hearing on the first set of national rules, the

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255. As early as 2002, the Seventh Circuit included the subject judge's name in the caption of an order. *See In re* Complaint Against Circuit Judge Richard D. Cudahy, 274 F.3d 947 (7th Cir. Jud. Council 2002) (Posner, Acting C.J.).

256. Currently, for example, the Eighth Circuit uses "In re Complaint of John Doe." In the Tenth Circuit, the formula is "In re: Complaint under the Judicial Conduct and Disability Act." In the Fourth Circuit, it is "In the Matter of a Judicial Complaint Under 28 U.S.C. § 351." In the Fifth Circuit, misconduct orders have no caption at all; at the top of the first page is the notation "In the United States Court of Appeals for the Fifth Circuit"—notwithstanding the fact that the orders are issued by the judicial council, not the court of appeals.

257. For an example of an order that does not meet this standard, *see In re* Complaint Against a Judicial Officer, No. 07-7-352-55 (7th Cir. Jud. Council Sept. 30, 2008), discussed *supra* note 219.

258. National Commission Report, *supra* note 11, at 352.

259. BREYER COMMITTEE REPORT, *supra* note 89, at 117–19.

260. *See supra* Part III-B-3.

chair of the Conduct Committee said that the Committee was developing a compilation of precedent on what constitutes misconduct, and he seemed to agree that the compilation would be posted on the Federal Judiciary website.[261] This commitment was reflected in Rule 24(b) of the 2008 Rules, which stated that the Conduct Committee "will make available on the Federal Judiciary's website . . . selected illustrative orders, appropriately redacted, to provide additional information to the public on how complaints are addressed under the Act."[262] But as of December 2018, no such compendium was available.[263]

The failure to provide the long-promised compendium not only has denied valuable information to those interested in federal judicial conduct; it has also seriously impaired the judiciary's ability to effectuate the purposes of the Act. When Congress created the disciplinary mechanism in 1980, it defined misconduct in broad and open-ended terms: "conduct prejudicial to the effective and expeditious administration of the business of the courts."[264] The key language was taken from the 1939 Act defining the authority of the circuit judicial councils—authority that extends far beyond the conduct of individual judges.[265] But the sponsors of the legislation made little effort to explain how the language would apply in the narrower context of judicial misconduct. For example, a leading Senate participant said only that the purpose of the legislation was "to remedy matters relating to a judge's condition or conduct which interfere with his *performance and responsibilities*."[266] That helped a little, but not much.

The National Commission recognized "the indeterminacy of the Act's core substantive conduct standard" and the need of chief judges and circuit councils for "more concrete guidance."[267] Where was that guidance to come from? To some extent, from the Code of Conduct for United States Judges. But as the Commission pointed out, "the Code was not intended as a source of disciplinary rules, and not all of its provisions are appropriately regarded as enforceable under the Act."[268] Rather, the Commission recommended, in essence, the approach of

261. 2007 Hearing, *supra* note 118, at 28–29 (comments by Hon. Ralph K. Winter).

262. 2008 Rules, *supra* note 118, at 36. A similar statement appears in the 2019 Rules. 2019 Rules, *supra* note 145, at 54.

263. As of that date, the only orders published on the website were 16 opinions of the Conduct Committee. Opinions issued before 1993 and from 1995 through 2005 were not included.

264. 28 U.S.C. § 351 (2017). *See* Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035.

265. For a detailed account of the evolution of the statutory language, *see In re* Charge of Judicial Misconduct, No. 83-8037 (9th Cir. Jud. Council Mar. 5, 1986) (Browning, C.J.), reprinted in *In re* Complaint of Judicial Misconduct, 570 F.3d 1144, 1145–54 (9th Cir. Jud. Council 2009). The statutory language defining the authority of the circuit councils was revised and broadened by the 1980 Act. *See* H.R. REP. NO. 96-1313, at 8 (1980). But the new language was not used in the definition of misconduct.

266. 126 Cong. Rec. 28092 (1980) (remarks of Sen. DeConcini) (emphasis added).

267. National Commission Report, *supra* note 11, at 344.

268. *Id*.

the common law: clarification could be "expected to emerge on a case by case basis if dispositions under the Act are circulated and selectively published."[269]

To accomplish this purpose, the decisions must be organized and classified in a way that will enable users to easily find those that are relevant to a particular complaint. The Breyer Committee recommended that illustrative orders should be "published in broad categories keyed to the Act's provisions, and . . . with brief headnotes."[270] I offer two further suggestions. First, the categories should also be keyed to provisions of the Code of Conduct for United States Judges. Second, the categories should allow users to find cases involving particular kinds of alleged misconduct. The key variable is the relation to the judicial role. At one end of the spectrum is conduct on the bench or in judicial rulings. At the other end is off-the-bench conduct not involving the judicial function. In between are, for example, comments to the media about pending cases and conduct related to the judge's role as employer.

One possible objection to a retrospective compilation is that some of the orders will reflect decisions or practices that are inconsistent with the current Rules or the Conduct Committee's current views. A simple solution would be to include an introductory statement making clear that the orders are posted on the Judiciary website as a matter of historical record and that they do not necessarily reflect the view of the Judicial Conference or the Conduct Committee on how the complaints should have been handled. A better approach would be to provide commentary from the Committee for particular decisions that would include a notation of any divergences from current policy or practice. That is what the Breyer Committee did in its report,[271] and the Conduct Committee should follow its example.

D. REPORTING ON THE ADMINISTRATION OF THE ACT

Congress has required the Administrative Office of United States Courts (A.O.) to include in its annual report a statistical summary of the number of complaints filed under the Act and their disposition.[272] The Breyer Committee recommended refinements to that report, and the A.O. has complied.[273] But the report is still confined to numbers.

The judiciary should supplement the statistical report with a narrative report that includes discussion of particular noteworthy complaints and their resolutions. Models for such a report can be found in the annual reports issued by some state boards and commissions. The Minnesota Board on Judicial Standards, for

269. *Id*.
270. BREYER COMMITTEE REPORT, *supra* note 89, at 118.
271. *See id*. at 161–83.
272. 28 U.S.C. § 604(h)(2) (2012).
273. BREYER COMMITTEE REPORT, *supra* note 89, at 122, 155–57.

example, provides "abridged versions" of cases to maintain confidentiality,[274] and the California Commission on Judicial Performance gives a wealth of detail.[275]

The report should be signed by the chair of the Conduct Committee, and it should be posted as a separate document on the "Judicial Conduct and Disability" page of the Federal Judiciary's website. Taking these steps would not only enhance public understanding of the Act's administration; it would also show the judiciary's commitment to policing misconduct within its ranks.

Other, smaller steps could also help in this regard. For example, the Judicial Conduct and Disability web page should list the members of the Conduct Committee. Currently, there is no way for the public to know who serves on the Committee. Even Committee orders do not necessarily identify all current members.[276]

IV. DISQUALIFICATION OF JUDGES

In opting for a system of judicial self-regulation, Congress decided that, as a general matter, federal judges can be trusted to investigate allegations of misconduct by their fellow judges and to impose discipline where appropriate. Plainly, however, there are some situations in which, because of past or current relationships, particular judges should not participate in particular misconduct proceedings. Unfortunately, Chapter 16 provides only limited guidance on when judges should disqualify themselves. The 2008 Rules had quite a bit to say about the subject, but some of their provisions were themselves problematic. The 2015 amendments eliminated some of the anomalies, but others remain. The analysis here will begin with the statute and then address other issues relating to disqualification.

A. DISQUALIFICATION OF JUDGES UNDER INVESTIGATION

Chapter 16 includes only a single provision on disqualification in misconduct proceedings: section 359(a). It deals with judges who are the subject of a special committee "investigation" for misconduct or disability, and it provides:

> No judge whose conduct is the subject of an investigation under this chapter shall serve upon a special committee appointed under section 353, upon a judicial council, upon the Judicial Conference, or upon the standing committee established under section 331, until all proceedings under this chapter relating to such investigation have been finally terminated.[277]

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274. MINN. BD. OF JUD. STANDARDS, ANN. REP. 2010, at 9 (2010).

275. *See* STATE OF CAL. COMM'N ON JUD. PERFORMANCE, 2017 ANN. REP. 15–26 (2017).

276. *See, e.g., In re Complaint of Judicial Misconduct*, C.C.D. No. 14-01 (U.S. Jud. Conf. Comm. on Jud. Conduct & Disability Feb. 19, 2015) (noting that two members of the Committee were recused but not identifying them).

277. 28 U.S.C. § 359(a) (2012). Although the statute is not explicit, there has never been any doubt that the "investigation" referenced by this provision is limited to special committee investigations under § 353; it has no application to inquiries carried out by the chief judge. *See* 1986 Illustrative Rules, *supra* note 87, at 878.

What is the scope of the disqualification mandated by this language? The drafters of the Illustrative Rules seem to have assumed that the subject judge was disqualified from any kind of service on any of the four entities specified in the Act.[278] The 2008 Rules took a different approach, stating that the subject judge is disqualified only "from participating *in any proceeding arising under the Act* . . . as a member of . . . the judicial council of the circuit [or of] the Judicial Conference of the United States."[279] The commentary confirmed that under the Rule, the disqualification related "only to the subject judge's participation in" misconduct proceedings; it did not "disqualify a subject judge from service of any kind on each of the bodies mentioned."[280] The 2015 amendments changed the language of the Rule, but the commentary reaffirmed the limited scope of the disqualification.[281]

The language of § 359(a) is unambiguous, and it does "disqualif[y] a subject judge from service of any kind on each of the bodies mentioned."[282] On that reading, the current Rule is in direct conflict with the statute. But Congress can amend the statute to conform to the Rule; the policy question is whether it should.

The commentary to the Rule gives two reasons for limiting the disqualification to misconduct proceedings:

> [The broader] disqualification would be anomalous in light of the Act's allowing a subject judge to continue to decide cases and to continue to exercise the powers of chief circuit or district judge. It would also create a substantial deterrence to the appointment of special committees, particularly where a special committee is needed solely because the chief judge may not decide matters of credibility in his or her review under Rule 11.[283]

I am not convinced that these arguments, alone, carry the day. Ordinary judicial work is not likely to give rise to actual or perceived conflict with the judge's interest as the subject of an investigation. And special committees are so few in number that the deterrence concern seems overstated.

Nevertheless, I agree with the Judicial Conference's policy judgment that a judge who is under investigation should be allowed to participate in activities of the circuit council and the Judicial Conference that are unrelated to misconduct proceedings. The rationale for disqualification is that participation would give rise to an actual or apparent conflict of interest. When the council or the Conference is dealing with matters outside the realm of misconduct—matters such as budgets, space allocation, or personnel—there is little risk of such a conflict.

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278. *See* 1986 Illustrative Rules, *supra* note 87, at 878; *see also* Illustrative Rules, *supra* note 88, at 56.
279. 2008 Rules, *supra* note 120, at 38 (emphasis added).
280. *Id*. at 39.
281. 2015 Rules, *supra* note 136, at 53. The language remained unchanged in the 2019 Rules.
282. *See* 2008 Rules, *supra* note 120, at 39.
283. 2019 Rules, *supra* note 145, at 59.

This analysis applies only to the judicial council and the Judicial Conference. Special committees and the Standing Committee deal only with misconduct matters, so the disqualification should be comprehensive with respect to those bodies.

B. DISQUALIFICATION OF CIRCUIT CHIEF JUDGE UNDER INVESTIGATION

When a complaint alleging misconduct or disability is filed under the 1980 Act, the circuit chief judge exercises a wide range of unique responsibilities in determining its disposition. In particular, the chief judge can dismiss the complaint or conclude the proceeding, subject only to review by the circuit council; if the proceeding goes forward, the chief judge selects the members of the special investigating committee.[284] But the Act has nothing to say about whether a chief judge should be permitted to carry out these responsibilities while he or she is the subject of a special committee investigation under § 353. The Illustrative Rules and the 2008 Rules were also silent on the point.

As far as I know, this situation has arisen only once since the procedures were established more than 30 years ago.[285] But the gap in the statute and the Rules was called to the attention of the House Judiciary Committee at the oversight hearing in 2013.[286] And when the Judicial Conference amended the Rules in 2015, it modified the language of the disqualification provision to close the gap.

Remarkably, the 2015 amendment addressed the situation without ever referring to the circuit chief judge, either in the Rules or in the commentary. The 2008 Rules provided that a judge under investigation by a special committee was disqualified from participation in misconduct proceedings "as a member of any special committee, the judicial council of the circuit, the Judicial Conference of the United States, and the [Conduct Committee]."[287] The amended Rule omits all reference to the specific entities; instead, it states that a judge who is under investigation is disqualified from "participating in the *identification or consideration* of any complaint . . . under the Act or these Rules."[288] The commentary spells out the consequences of this broader prohibition: "the subject judge cannot initiate complaints by identification, conduct limited inquiries, or choose between dismissal and special-committee investigation as the threshold disposition of a complaint."[289]

These three functions are, of course, the functions performed by the chief judge (or acting chief judge). Thus, although the revised language never uses the term "chief judge," its effect is to adopt a rule that a circuit chief judge should not be

284. *See supra* Part II-A.

285. The chief judge was Alex Kozinski of the Ninth Circuit, and three separate complaints were involved. At least two *former* chief judges have been the subject of investigations by special committees.

286. 2013 House Judiciary Hearing, *supra* note 129, at 53–54 (statement of Arthur D. Hellman).

287. 2008 Rules, *supra* note 120, at 38.

288. 2015 Rules, *supra* note 136, at 51–52 (emphasis added).

289. *Id*. at 53.

permitted to carry out his or her responsibilities under Chapter 16 while he or she is the subject of a special committee investigation under § 353.

This is a sound policy change. First, it is unseemly for a judge whose own conduct is under investigation for possible violation of ethical norms to be passing judgment on other judges who have been accused of misconduct. Second, as the commentary to the Rule states, "participation in proceedings arising under the Act . . . by a judge who is the subject of a special committee investigation may lead to an appearance of self-interest in creating substantive and procedural precedents governing such proceedings."[290] This rationale is fully applicable to the chief judge's unique responsibilities under the Act. And there is no way of telling in advance whether a particular misconduct complaint will raise issues that bear upon those involved in the chief judge's own case.

C. INDEPENDENT REVIEW OF CHIEF-JUDGE FINAL ORDERS

The pre-2008 Illustrative Rules contained a very strong prohibition against any participation by a chief judge in judicial council review of final orders issued by that chief judge under § 352. Rule 18(c) provided:

> If a petition for review of a chief judge's order dismissing a complaint or concluding a proceeding is filed with the judicial council pursuant to [§ 352(c)], the chief judge who entered the order will not participate in the council's consideration of the petition. In such a case, the chief judge may address a written communication to all of the members of the judicial council, with copies provided to the complainant and to the judge complained about. The chief judge may not communicate with individual council members about the matter, either orally or in writing.[291]

The commentary acknowledged that the question of chief judge participation had "engendered some disagreement," but it explained why the mandatory disqualification rule had been chosen: "We believe that such a policy is best calculated to assure complainants that their petitions will receive fair consideration."[292]

Surprisingly, in the 2008 national Rules, this policy was reversed. The 2008 version of Rule 25(c) provided that when a petition for review is filed, "the chief judge is *not* disqualified from participating in the council's consideration of the petition."[293] The commentary gave no explanation for the change.[294]

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290. *Id*.

291. Illustrative Rules, *supra* note 88, at 56.

292. *Id*. at 57.

293. 2008 Rules, *supra* note 120, at 37 (emphasis added).

294. The initial draft of the national Rules, circulated for public comment in June 2007, retained the disqualification policy of the Illustrative Rules. The December 2007 draft, circulated after the public comment period, reversed the policy without explanation. Indeed, the commentary stated (as it did in the final adopted version) that "Rule 25 is adapted from the Illustrative Rules."

The 2015 Rules reverted to the pre-2008 policy.[295] The Conduct Committee accomplished this by the simple device of deleting the word "not" from the text of the Rule. Once again, no explanation was provided.[296] But the decision was the correct one. Congress decided that a complainant dissatisfied with a chief judge's final order should have one level of review as of right. Prohibiting the chief judge from participating in that review preserves the independence—and the appearance of independence—of that second look. The 2015 Rule also has the benefit of encouraging the chief judge to make sure that all relevant information is part of the formal written record.[297] Chief judges will not be tempted to omit relevant facts, secure in the knowledge that they will have an opportunity for oral explanation if the ruling is appealed.

The current Rules do not include the provisions in the Illustrative Rules (quoted above) that defined and limited the methods by which the chief judge can communicate with the members of the judicial council in connection with the review process.[298] The clarification was helpful, and similar language should be included in the next iteration of Rule 25(c).[299]

D. THE GENERAL RULE ON DISQUALIFICATION

As discussed above, the 2015 amendments made two desirable changes in the specific disqualification provisions in Rule 25. But the Conduct Committee and the Judicial Conference left untouched the general rule stated in Rule 25(a): "Any judge is disqualified from participating in any proceeding under these Rules if the judge, *in his or her discretion*, concludes that circumstances warrant disqualification."[300]

This subjective, discretionary standard for misconduct proceedings contrasts sharply with the standard that Congress enacted in 28 U.S.C. § 455(a) for litigation: a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The courts have held that § 455(a) "adopts the objective standard of a reasonable observer" who is "fully informed of the underlying facts."[301] In addition, § 455(b) specifies several particular circumstances,

295. 2015 Rules, *supra* note 136, at 51. This provision remains unchanged in the 2019 Rules.

296. Reversion to the policy of the Illustrative Rules was suggested in testimony at the 2013 hearing of the House Judiciary Committee. 2013 House Judiciary Hearing, *supra* note 129, at 55–56 (statement of Arthur D. Hellman).

297. The current Rule – unlike the 2008 version – is also consistent with a congressional directive whose substance has been part of the Judicial Code for more than a century: "No judge shall hear or determine an appeal from the decision of a case or issue tried by him." 28 U.S.C. § 47 (2012). I do not suggest that this provision applies of its own force to misconduct proceedings, but I think that the underlying rationale does.

298. *See supra* text accompanying note 291.

299. In 2019, members of the Tenth Circuit Judicial Council disagreed over the application of Rule 25(c) in a proceeding involving complaints against Judge (later Justice) Brett M. Kavanaugh. *See infra* Part V-C.

300. 2015 Rules, *supra* note 136, at 51 (emphasis added).

301. United States v. Bayless, 201 F.3d 116, 126 (2d Cir. 2000).

such as financial interest, in which disqualification is required and non-waivable.[302]

Given the commands of § 455, it seems anomalous to say that a judge, when deciding whether to participate in considering a misconduct complaint against a fellow judge, should look only to "his or her discretion." One would think that, if anything, the bar to participation in a misconduct proceeding would be higher than it is in the context of litigation. This is so for two reasons. First, as the Breyer Committee recognized, the Act's system of self-regulation necessarily raises concerns about "guild favoritism."[303] Judges should therefore be especially vigilant to avoid the appearance of conflict. Second, a refusal to recuse in the context of litigation is generally subject to appellate review, while a refusal to recuse in a misconduct proceeding is generally not reviewable at all.

The weak disqualification standard of Rule 25(a) is especially questionable in light of the bright-line rule that applies when the Conduct Committee considers a petition for review after action by the judicial council of the circuit. Rule 21(c) provides: "*Any member of the Committee from the same circuit as the subject judge* is disqualified from considering or voting on a petition for review related to that subject judge."[304] Thus, if the subject judge sits in the Central District of California, a Conduct Committee member from Alaska is disqualified even if the two judges barely know one another and have met only at circuit judicial conferences.

Perhaps this bright-line prophylactic rule can be justified by ease of administration, but ultimately it must rest on a concern for the appearance of impartiality in the administration of the Act. That concern should also be reflected in the basic disqualification standard of Rule 25(a).

While it is not necessary to elevate the bar *above* that of § 455(a), sound policy calls for applying the standard of § 455(a) in misconduct proceedings.[305] That was also the view of Chief Judge Browning and his colleagues when they circulated a draft of the first set of Illustrative Rules in December 1985. The draft rule read:

> A judge will disqualify himself or herself from participating in any consideration of a complaint in the same circumstances in which disqualification would be appropriate in any other matter under 28 U.S.C. § 455 or other ethical precepts. No waiver of any ground for disqualification may be accepted.[306]

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302. For brief discussion of § 455 and the decisions applying it, *see* Arthur D. Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*, 69 U. PITT. L. REV. 189, 192–206 (2007).

303. BREYER COMMITTEE REPORT, *supra* note 89, at 119.

304. 2019 Rules, *supra* note 145, at 46 (emphasis added).

305. In the past, the Conduct Committee has taken the position that § 455 is "not a template for recusals in misconduct proceedings" because the latter "are administrative, and not judicial, in nature." *In re* Complaint of Judicial Misconduct, 591 F.3d 638, 647 (U.S. Jud. Conf. Comm. on Jud. Conduct & Disability 2009). I do not think the "administrative" characterization responds to the points made above in the text.

306. Model Rules Covering Complaints of Judicial Misconduct and Disability, Draft of Dec. 2, 1985, at 75 (on file with author).

But when the final version of the 1986 Illustrative Rules was made public, this provision had disappeared, without explanation. Nothing replaced it until the adoption of the current provision, quoted above.[307]

I believe the best approach is to use the *language* of § 455(a), rather than to incorporate § 455, as was proposed in the 1985 draft. The full panoply of decisions applying § 455 may not be appropriate for the system that Congress established in the 1980 Act—a system in which judges are passing judgment on other judges who are part of the same circuit and who often will have interacted professionally. Thus, I would rewrite Rule 25(a) along these lines: "Any judge is disqualified from participating in any proceeding under these Rules if the judge's impartiality might reasonably be questioned."[308] As with § 455(a), this standard would adopt "the objective standard of a reasonable observer" who is "fully informed of the underlying facts."[309] That perspective would also take into account the context—the system of self-regulation established by Congress.[310]

The 2019 amendments modified Rule 25(a), but only by deleting the words "in his or her discretion."[311] There may be some utility in de-emphasizing the element of discretion, but this modest adjustment does not cure the fundamental flaw discussed here, which is that the standard is completely subjective. Indeed, the Commentary retains the reference to discretion.[312] Incorporation of the language of § 455(a) remains the preferable mode of revision.

The point is illustrated by an order issued in connection with a misconduct complaint against Judge (later Justice) Brett M. Kavanaugh growing out of the hearings on his nomination to the United States Supreme Court. Chief Justice Roberts transferred the proceedings from the District of Columbia Circuit to the Tenth Circuit.[313] Tenth Circuit Chief Judge Timothy M. Tymkovich was asked to recuse himself from consideration of any complaints against Justice Kavanaugh on the ground that Justice Kavanaugh had advocated for Judge Tymkovich's confirmation while working in the White House in 2003.[314] Judge Tymkovich denied

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307. This provision first appeared in the December 2007 draft. *See supra* note 119. It was not included in the draft circulated for public comment in the summer of 2007. *See* JUDICIAL CONFERENCE OF THE U.S., *supra* note 117.

308. It may also be desirable to amend Rule 25(a) so that it would apply to "any proceeding under *or relating to* these Rules." Addition of the italicized language would make clear that informal proceedings such as those contemplated by the first sentence of Rule 5(a) would be covered. For discussion of Rule 5(a), *see infra* Part VI-A.

309. United States v. Bayless, 201 F.3d 116, 126 (2d Cir. 2000).

310. Section (e) of § 455 allows waiver by "the parties" of disqualification otherwise required under section (a). 28 U.S.C. § 455(a), (e). In agreement with the 1985 draft, I see no need for a waiver provision here.

311. *See* 2019 Rules, *supra* note 145, at 57 (omitting quoted language).

312. *Id*. at 59.

313. *See* Letter from Chief Justice John G. Roberts, Jr. to Chief Judge Timothy M. Tymkovich (Oct. 10, 2018), https://assets.documentcloud.org/documents/5000238/Letter-from-Chief-Justice-Roberts-referred.pdf [https://perma.cc/W3KH-W4SD].

314. *In re* Complaint Under the Judicial Conduct and Disability Act, No. 10-18-90118 (10th Cir. Jud. Council Dec. 18, 2018) (Tymkovich, C.J.).

the request, noting the minimal involvement of Justice Kavanaugh in the 2003 appointment process.[315] Under those facts, Judge Tymkovich's participation easily satisfied the objective standard of § 455(a). But because Judge Tymkovich invoked only the discretionary language of Rule 25(a), the order was not as reassuring to the public as it might have been.

V. REVIEW OF CHIEF-JUDGE AND JUDICIAL-COUNCIL ORDERS

Chapter 16 contains two—and only two—provisions authorizing review of orders issued by chief judges and judicial councils in misconduct proceedings. Review of chief judge orders is governed by § 352. That section, after defining the authority of the chief judge to screen and dispose of complaints, provides in subsection (c): "A complainant or judge aggrieved by a final order of the chief judge under this section may petition the judicial council of the circuit for review thereof."[316]

Review of judicial council orders is governed by § 357. That section provides: "A complainant or judge aggrieved by an action of the judicial council *under section 354* may petition the Judicial Conference of the United States for review thereof."[317]

Section 354 delineates the actions that a judicial council may take upon receipt of a report by a special committee. Nothing in § 354 (or elsewhere) provides for review of council orders in cases in which a special committee is *not* appointed—what I have called "Track One" cases.[318]

Chapter 16 also contains two provisions *precluding* review. Section 352(c), after authorizing review in the language quoted above, adds: "The [circuit council's] denial of a petition for review of the chief judge's order shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise."[319] This prohibition is repeated in § 357(c): "Except as expressly provided in this section and section 352(c) [quoted above], all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise."[320]

Experience has revealed several flaws in the system of review created by these provisions. The 2008 Rules and the 2015 amendments took important steps in filling in some of the gaps, but one key provision cannot be reconciled with the statute. Four aspects of the review provisions warrant discussion: review of orders in "identified" and self-filed complaints, Conduct Committee review in Track One cases, review after transfer to another circuit, and the possibility of sua sponte intervention by the Conduct Committee in proceedings at the circuit level.

315. *See id.*
316. 28 U.S.C. § 352(c).
317. 28 U.S.C. § 357(a) (emphasis added).
318. *See supra* Part II-A.
319. 28 U.S.C. § 352(c).
320. 28 U.S.C. § 357(c).

A. REVIEW OF ORDERS IN "IDENTIFIED" AND SELF-FILED COMPLAINTS

On June 11, 2008, the Los Angeles Times published an article reporting that Chief Judge Alex Kozinski of the Ninth Circuit had "maintained a publicly accessible website featuring sexually explicit photos and videos."[321] Judge Kozinski immediately (and publicly) asked the Ninth Circuit Judicial Council to initiate proceedings under the then-new national misconduct rules.[322] The Council construed his request as the equivalent of identifying a complaint of judicial misconduct under 28 U.S.C. § 351(b).[323] The matter was transferred to the Judicial Council of the Third Circuit, which carried out an investigation and issued a lengthy memorandum opinion "conclud[ing]" the proceeding.[324]

The Council decision was widely interpreted as a vindication of Judge Kozinski. For example, the Wall Street Journal's Law Blog posted a story aptly summarized by its headline: "*A 'Pleased' Kozinski Cleared of Wrongdoing*."[325] Several months later, however, the Judicial Conference Conduct Committee, in an opinion addressing a different complaint, stated unequivocally that the Third Circuit proceeding "resulted in a finding of misconduct."[326]

If the Conduct Committee had directly reviewed the Third Circuit Judicial Council decision, it would have made clear that it did not interpret the ruling as a vindication of Judge Kozinski. And it would have issued an opinion of its own that hopefully would have provided a less ambiguous denouement to the proceeding. The public would then have had a solid basis on which to evaluate the judiciary's handling of the allegations. But because no complaint had been *filed*, there was no "complainant . . . aggrieved by the action of the judicial council" who could petition the Judicial Conference for review.[327]

This episode pointed up a serious gap in the statutory scheme: when a misconduct proceeding is initiated by action of the chief judge rather than by the filing of a complaint, there is no provision for review of final orders of the chief judge or the judicial council (unless the person aggrieved by the order is the judge who is the subject of the proceeding). The gap is especially troubling because "identified" complaints often involve "high-visibility cases" like those discussed by the Breyer Committee.[328]

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321. *See In re* Complaint of Judicial Misconduct, 575 F.3d 279, 280 (3d. Cir. Jud. Council 2009) (quoting article posted on newspaper's website).

322. *Id*. at 297 n.2 (quoting announcement posted on circuit website).

323. *Id*. at 280.

324. *Id*. at 280, 295.

325. Posting of Ashby Jones to WSJ Law Blog (July 2, 2009, 11:34 AM EST) (on file with the author).

326. *In re* Complaint of Judicial Misconduct, 591 F.3d 638, 646 (U.S. Jud. Conf. Comm. on Jud. Conduct & Disability 2009).

327. Of course, Judge Kozinski could have filed a petition for review, but having declared himself "pleased" with the result, he had no reason to do so.

328. Another example is the proceeding involving District Judge James C. Mahan of Nevada, discussed *supra* note 226. Although the newspaper story that triggered the investigation provided a wealth of detail to substantiate its allegations (including names, dates, and dollar amounts), the Ninth Circuit Judicial Council's brief

The Kozinski proceeding could also be seen as illustrating another gap in the statutory scheme: if, after accusations have surfaced in the news media, the accused judge files a complaint against himself or herself, there might not be an independent complainant who could file a petition for review.[329]

The 2015 amendments filled both of these gaps. A sentence added to Rule 11(g)(3) provides that if a chief judge issues a final order on a complaint that was identified by the chief judge or filed by the subject judge, "the chief judge must transmit the order and supporting memorandum . . . to the judicial council of the circuit for review in accordance with [the rules governing judicial council review when a petition is filed]."[330] Similarly, a new sentence in Rule 20(f) provides that when the judicial council of the circuit takes action on a special committee report dealing with a complaint that was identified by the chief judge or filed by the subject judge, the council "must transmit the order and supporting memorandum to [the Conduct Committee] for review in accordance with [the rules governing Conduct Committee review when a petition is filed]."[331]

These amendments codify a procedure adopted by then-Chief Judge Dolores Sloviter of the Third Circuit more than twenty years ago.[332] Judge Sloviter received an anonymous complaint alleging that a judge allowed close relatives to practice before him and failed to disqualify himself when required to do so.[333] She found that the allegations "would state a cognizable claim" under the Act, but she concluded the proceeding based on intervening events.[334] She then noted that because the complainant was anonymous, the ordinary review process "may be pretermitted."[335] She therefore "invoke[d] a sua sponte petition for review" and directed the deputy clerk to send the relevant materials "to the members of the Judicial Council with the request that they follow the ordinary review procedure."[336] The Judicial Council did as she requested.

As far as I am aware, Chief Judge Sloviter's order has never been published, and no other chief judge or circuit council ever "invoke[d] a sua sponte petition for review." As a consequence, at least two high-profile cases—the Third Circuit

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order dismissing the complaint failed to address any of the specifics. Outsiders thus had no way of assessing whether the matter had been handled properly. The Conduct Committee might have done a better job, but because the complaint had been identified by the chief judge, there was no one to seek review of the Judicial Council order.

329. That might have happened in the Cebull matter, *see supra* note 125 and accompanying text, because the proceeding began when Judge Cebull filed a complaint against himself. However, soon afterwards, a judge from another circuit filed a complaint based on "the same incident" as the self-filed complaint. *In re* Complaint of Judicial Misconduct, 751 F.3d 611, 614 (U.S. Jud. Conf. Comm. on Conduct & Disability 2014).

330. 2015 Rules, *supra* note 136, at 19.

331. *Id*. at 39.

332. Anonymous v. Hon. [Name Redacted], J.C. No. 92-03 (3d Cir. Jud. Council Mar. 4, 1992) (Sloviter, C.J.) (on file with the author).

333. *Id*. at 2.

334. *Id*. at 3.

335. *Id*. at 5.

336. *Id*. at 5–6.

Judicial Council's order in the Kozinski matter and the Ninth Circuit order in the proceeding involving Nevada District Judge James Mahan—escaped review by the Conduct Committee.[337] With the 2015 amendments, orders like these are assured of scrutiny at the national level.

B. CONDUCT COMMITTEE REVIEW IN TRACK-ONE CASES

As discussed in Part II, the 1980 Act created what is, in essence, a two-track system for handling complaints of judicial misconduct or disability. One of the most important differences between the two tracks involves the availability of review at the national level. In Track-Two cases—those in which the chief judge appoints a special committee—the orders of the circuit judicial council are subject to review by the Conduct Committee.[338] In Track-One cases—those in which the chief judge dismisses the complaint or concludes the proceeding—the orders of the judicial council are "final and conclusive."[339] Thus, in Track-One cases, there is no role at all for the Conduct Committee—or so one would think from simply reading the statute.

Notwithstanding the twice-repeated prohibition, the 2008 Rules authorized the Conduct Committee to review judicial council orders in Track-One cases under limited circumstances.[340] The 2015 amendments modestly expanded the circumstances in which review is allowed.

I agree with the Judicial Conference that there should be some provision for review of judicial council orders affirming final orders of the chief judge under § 352. Indeed, as explained below, I believe that the availability of review should be somewhat broader than it is, even after the 2015 revision.[341]

1. EVOLUTION OF THE RULE

The impetus for the 2008 review provisions came from the controversial and protracted proceedings involving District Judge Manuel Real of Los Angeles.[342] In brief: the Judicial Council of the Ninth Circuit affirmed the chief judge's dismissal of a misconduct complaint, over a sharply worded dissent by Judge Alex

337. For discussion of the complaint against Judge Mahan, *see supra* notes 226 and 328.

338. This arrangement is the product of three separate provisions of the Act. Subsection (a) of 28 U.S.C. § 357 provides for review by the Judicial Conference of the United States of actions taken by a judicial council under § 354. Section 354 delineates the actions that may be taken by a judicial council after receiving the report of a special committee. And § 331 (fourth unnumbered paragraph) authorizes the Judicial Conference to exercise its powers under Chapter 16 through a standing committee.

339. 28 U.S.C. § 352(c). Although the statute refers to the "*denial* of a petition for review of the chief judge's order" (emphasis added), judicial councils typically *affirm* chief-judge orders, and the Rules endorse this practice. *See* 2019 Rules, *supra* note 145, at 40 (commentary).

340. *See infra* text accompanying notes 346–48.

341. Ideally, authority for this kind of review should be explicitly conferred by Congress. Here I discuss only the policy issues.

342. For a detailed account of the origins of the new provision, *see* Hellman, *Misconduct Rules*, *supra* note 122, at 339–43.

Kozinski, and notwithstanding substantial evidence suggesting that Judge Real had engaged in misconduct.[343] The complainant sought review by the Judicial Conference, but the Conduct Committee, by a vote of 3-2, determined that it had no jurisdiction.[344]

Not long after that, the Judicial Conference and the Conduct Committee reached a different conclusion. They decided that in cases where a circuit council has affirmed an order dismissing a misconduct complaint, the Judicial Conference does have the authority to determine "whether [the] misconduct complaint requires the appointment of a special committee."[345]

Rule 21(b) implemented this decision. As adopted in 2008, it permitted a dissatisfied complainant or subject judge to petition for review "if one or more members of the judicial council dissented from the order on the ground that a special committee should be appointed."[346] The Rule also provided for review of other council affirmance orders "[at the Conduct Committee's] initiative and in its sole discretion."[347] In either situation, the Committee's review was limited "to the issue of whether a special committee should be appointed."[348]

The 2015 amendments made two small, but not insignificant, changes in this provision. Review is now authorized whenever one or more members of the judicial council dissent from the affirmance order, whatever the ground of the dissent.[349] Further, when there is a dissent, the Committee's review is no longer limited "to the issue of whether a special committee should be appointed."[350] No further changes were made when the Rules were amended in 2019.

2. AVAILABILITY AND SCOPE OF REVIEW

It certainly makes sense to allow review as of right by the Conduct Committee when one or more members of the circuit council have dissented from affirmance of the chief judge's order. The fact that even one Article III judge has expressed dissatisfaction with the status quo created by a circuit council decision is surely sufficient to justify a second look by the Conduct Committee. By the same token, however, there is no reason to limit review to cases in which the dissenter asserts that a special committee should have been appointed. Any dissent should be sufficient, as it is under the current version of the Rule.

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343. *In re* Complaint of Judicial Misconduct, 425 F.3d 1179 (9th Cir. Jud. Council 2005).

344. *In re* Op. of Judicial Conference Comm. to Review Circuit Council Conduct and Disability Orders, 449 F.3d 106 (Judicial Conference of the U.S. 2006).

345. *See* Report of the Judicial Conference Comm. to Review Circuit Council Conduct and Disability Orders at 3 (Mar. 2007) (on file with the author).

346. 2008 Rules, *supra* note 120, at 30.

347. *Id*.

348. *Id*.

349. 2015 Rules, *supra* note 136, at 41.

350. *See* 2015 Rules, *supra* note 136, at 41 (Rule 21(b)(1)(B)).

Review as of right should also be available in two other situations. The first is where the judicial council has affirmed an order *concluding the proceeding* under § 352(b)(2) rather than *dismissing the complaint* under § 352(b)(1). Typically, these are cases in which the accused judge has acknowledged violating ethical norms and has apologized.[351] Such cases lie at, or close to, the line between conduct that warrants some kind of discipline and conduct that does not. Moreover, their numbers are small; for example, in 2017 only twenty-seven complaints were "concluded," compared with nearly 1,000 that were dismissed.[352] Providing for review as of right would add little to the burdens imposed on the Conduct Committee.

Review as of right should also be available when the judicial council, in addition to affirming the chief judge's dismissal order, has imposed sanctions upon the complainant. I would make an exception for orders that do no more than "restrict or impose conditions on the complainant's use of the complaint procedure."[353] But when more serious sanctions are imposed upon a complainant (such as a public reprimand), an added level of scrutiny—by a group of judges outside the circuit—will provide some assurance that the sanctions are not excessive and were imposed through fair procedures.[354]

What remains are unanimous orders of affirmance in cases where the chief judge has dismissed the complaint under § 352(b)(1). Rule 21(b) does not allow *petitions* for review in these cases, but it does authorize the Conduct Committee to *engage* in review "[at] its initiative and in its sole discretion."[355] The Committee's review is limited to determining "whether a special committee should be appointed."[356]

I think it makes more sense to allow petitions but to make the review discretionary, with no requirement of an explanation when review is denied. For one thing, the open-ended review provision in the new Rule potentially puts the case in limbo while the Conduct Committee decides whether this is one of the rare

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351. A good example is the bankruptcy case discussed *supra* note 227.

352. Administrative Office of U.S. Courts, Judicial Business of the United States Courts, tbl.S-22 (Sept. 30, 2017), https://www.uscourts.gov/statistics-reports/complaints-against-judges-judicial-business-2017 [https://perma.cc/ZMX2-EHXC]. This figure includes all cases, not just those reviewed by the judicial council.

353. *See* 2015 Rules, *supra* note 136., at R. 10(a). The exception would not include orders that *prohibit* a complainant from future use of the procedure.

354. The discussion in the text assumes that sanctions of that kind are permissible. The current Rule – Rule 10 – makes no mention of them, and there is a serious question as to whether they are authorized by the statute. Nevertheless, on at least three occasions when Alex Kozinski was chief judge, the Judicial Council of the Ninth Circuit imposed a public reprimand or a fine as a sanction for abusing the complaint process. *See In re* Complaint of Judicial Misconduct, 623 F.3d 1101, 1102–03 (9th Cir. Jud. Council 2010) (reprimand); *In re* Complaint of Judicial Misconduct, 601 F.3d 1005 (9th Cir. Jud. Council 2010) (fine); *In re* Complaint of Judicial Misconduct, 550 F.3d 769 (9th Cir. Jud. Council 2008) (same). It may be desirable to amend the Rules to make clear that sanctions are limited to those now specified in Rule 10—restrictions on using the complaint process.

355. 2019 Rules, *supra* note 145, at 46.

356. *Id*.

instances in which it should exercise its discretion.[357] For another, a petition for review can provide some guidance, however small, to aspects of the council decision that may be open to debate. And while it would be something of a burden for the Committee (or more accurately its staff) to sift through the many petitions for review, there would be no need to even look at the large number of cases in which no review is sought.

C. REVIEW AFTER TRANSFER TO ANOTHER CIRCUIT

In the fall of 2018, more than 80 misconduct complaints were filed against Judge Brett M. Kavanaugh of the Court of Appeals for the District of Columbia Circuit. The complaints primarily alleged that during the hearings on his nomination to the United States Supreme Court, Judge Kavanaugh gave false testimony and made inappropriately partisan comments that demonstrated bias and a lack of judicial temperament. Chief Justice Roberts transferred the complaints to the Tenth Circuit Judicial Council under Rule 26.[358] The Tenth Circuit Council "retained the matter and assumed the initial role ordinarily assigned to the chief circuit judge" under the Act and the Rules.[359] The Council concluded that Justice Kavanaugh's elevation to the Supreme Court took the matter outside of the jurisdiction of the statute, and it dismissed the complaints.[360]

The final paragraph of the Tenth Circuit decision noted that "any complainant has a right to seek review of this Order by filing a petition for review by the Judicial Council as provided in Rule 18(a) and (b)." This was a strange invitation. The Judicial Council had already considered the matter.[361] Moreover, since the Council had "assumed the initial role ordinarily assigned to the chief circuit judge," Rule 25(c) would appear to preclude Council members from sitting in review of the order they had issued.[362]

Notwithstanding Rule 25(c), in March 2019 the Tenth Circuit Judicial Council accepted petitions for review and reaffirmed its initial decision.[363] The council rejected the complainants' argument that "since the Judicial Council assumed the initial role of the chief circuit judge, then under Rule 25(c), it should be disqualified from participating in the consideration of the petitions for review."[364] The

357. There is also the potential for conflict with the provisions of Rule 24 on the public availability of decisions. *See* Hellman, *Misconduct Rules*, *supra* note 122, at 345.

358. For discussion of transfer criteria, *see infra* Part VI-C.

359. *In re* Complaints Under the Judicial Conduct and Disability Act, No. 10-18-90038++at 2 (10th Cir. Jud. Council Dec. 18, 2018).

360. *Id*. at 9. For brief discussion of the Council's jurisdictional holding, *see infra* Part VI-E.

361. Conceivably the Council could have invited a "motion for reconsideration," but the Rules do not provide for such a motion. In any event, reconsideration by the same judges is hardly a substitute for review by a different group of judges.

362. For discussion of Rule 25(c), *see supra* Part IV-C.

363. *In re* Complaints Under the Judicial Conduct and Disability Act, No. 10-18-90038++ (10th Cir. Jud. Council Mar. 15, 2019).

364. *Id*. at 4.

council insisted that "[t]he idea that judges review their own decisions is not novel."[365] Circuit Judge Mary Beck Briscoe dissented. She said that the examples cited by the council majority were not comparable, because they were "not the equivalent of appeals."[366] She argued that the council's review of its own order frustrated the purpose of Rule 18, which is to "effectively afford[] a complainant *full appellate review, by a different body*, of an initial order dismissing or concluding a complaint.[367]

Judge Briscoe has the better of this argument. Indeed, the Kavanaugh proceeding would seem to be an a fortiori case for the application of Rule 25(c). In the ordinary case, only one member of the council would be reviewing his or her own order; all of the other members would be considering the matter afresh. Here, all members of the reviewing body had participated in the initial decision.

As Judge Briscoe pointed out, because there was now a dissent from the order denying the petitions for review, Rule 21(b)(1)(B) provides for review as of right by the Conduct Committee.[368] Presumably the complainants will file petitions, and the matter will reach the Conduct Committee through that route.

Nevertheless, the Kavanaugh episode has revealed another gap in the review provisions of the current Rules. If, after a complaint has been transferred under Rule 26, the transferee council assumes the initial role ordinarily assigned to the circuit chief judge but does not appoint a special committee, neither a dissatisfied complainant nor the subject judge will ordinarily have a right to review by the Conduct Committee.[369] This gap is particularly troublesome because transferred cases are generally cases that have generated high public interest.

One solution would be to amend Rule 21(b)(1) to authorize a complainant or subject judge to file a petition for review by the Conduct Committee in the circumstances just described. Another, and simpler, approach would be to authorize Conduct Committee review of any final order of the judicial council, not otherwise reviewable as of right, in any proceeding that has been transferred under Rule 26. That would avoid the need to anticipate all possible variations on the procedures followed in the Kavanaugh matter.

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365. *Id*. at 5.

366. *Id*. at 4 (Briscoe, J., dissenting).

367. *Id*. (emphasis added).

368. *Id*. at 5 n.1; *see supra* Part V-B.

369. When the council "assume[s] the initial role ordinarily assigned to the chief circuit judge," it is, in substance, telescoping what are ordinarily two steps – chief judge consideration and council review – into one. But when no special committee has been appointed, the proceeding remains a Track One case. Review by the Conduct Committee is available under Rule 21(b)(1)(B) if there is a dissent, but not if the council decision is unanimous.

D. A "MORE AGGRESSIVE ADVISORY ROLE" FOR THE CONDUCT COMMITTEE

The 1980 Act established a system of *decentralized* self-regulation.[370] One significant feature of the Breyer Committee report is its implicit conclusion that decentralization had been carried too far and that self-regulation, to be effective, required a greater degree of top-down control than had heretofore existed. That judgment is reflected in recommendations that contemplate a "more aggressive advisory role" for the Conduct Committee—or, as elsewhere stated, "a new, *formally recognized*, vigorous advisory role."[371] To accomplish that formal recognition, the Breyer Committee said, the Judicial Conference should use its rule-making authority to "foster [that] role."[372]

How might this new, more aggressive advisory role be implemented? There are two possibilities. In the more modest version, the Conduct Committee would offer advice to chief judges and circuit councils in a more peremptory way, but would not do anything until its counsel was requested. In the more aggressive version, the Committee would consider itself free to intervene without being asked.

Much of the discussion in the Breyer Committee report seems to assume that advice will be offered in response to requests from chief judges and circuit councils. For example, the report notes that chief judges and circuit councils can "alert" the chair of the Conduct Committee to situations in which there is disagreement over whether a special committee should be appointed.[373] But no "rule-making authority" is needed to enable that kind of consultation.

Nor is rule-making authority required to implement another of the Breyer Committee's suggestions: that the Conduct Committee chair inform circuit chief judges about "public allegations of misconduct that have not led to a complaint filed under section 351(a)."[374] It is not clear whether the Breyer Committee assumed that the Conduct Committee or its staff would actively monitor the Internet and press reports to learn about such allegations or whether the report refers to allegations that happen to come to the Conduct Committee's attention. Either way, the Conduct Committee chair does not need any formal authority to share information or to suggest that the circuit chief judge act upon that information.

If the Conduct Committee and its chair are doing no more than responding to requests for advice and informing circuit chief judges about public reports, one would not view that as a particularly "aggressive" advisory role. Nor would any formal rule-making be required. What else did the Breyer Committee have in mind?

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370. *See supra* note 82 and accompanying text.

371. BREYER COMMITTEE REPORT, *supra* note 89, at 208–09 (emphasis added).

372. *Id*. at 209.

373. *Id*. at 210. Statutorily, of course, appointment of a special committee is the responsibility of the chief judge alone. But perhaps some chief judges have consulted their circuit councils before making the decision.

374. *Id*. at 209.

One clue may lie in the provision of Rule 21(b)(2), already described, that authorizes the Conduct Committee, "*[a]t its initiative*," to review orders in which a judicial council has unanimously affirmed a chief-judge decision dismissing a complaint or concluding a proceeding.[375] By definition, this provision comes into play *after* the chief judge and the judicial council have taken final action. The regional judges have not asked for advice, and the dissatisfied complainant has not filed a petition for review.[376] But under Rule 21(b)(2), the Conduct Committee may intervene sua sponte to instruct the chief judge to appoint a special committee to investigate the complaint further.

I am aware of only one instance in which the Conduct Committee has exercised this authority. The complainant, a former career law clerk to the subject judge, alleged both misconduct and disability on the part of the judge.[377] In support of the latter claim, the complaint pointed to a variety of episodes, including "senior moments" and behavior that the complainant characterized as a "break with reality."[378] The chief judge of the Tenth Circuit carried out a "limited inquiry," as authorized by the Act,[379] and wrote a 14-page opinion dismissing the complaint.[380] On June 10, 2011, the Tenth Circuit Judicial Council denied the petition for review without dissent or further analysis.[381]

Ordinarily, that would have been the end of the matter. The complainant, even if dissatisfied with the chief-judge and judicial-council decisions, could not have filed a petition for review by the Conduct Committee. Nevertheless, in May 2012 the Conduct Committee reviewed the matter under Misconduct Rule 21(b)(2) and "suggested to Chief Judge Briscoe that the Judicial Council reopen the proceedings to investigate whether the judge might be suffering from a mental disability."[382] The chief judge acted in accordance with the suggestion. The special committee carried out an extensive investigation and found that the subject judge "did not have a mental disability that would prevent the judge from fulfilling the duties of office."[383] The Judicial Council agreed with the special committee and dismissed the complaint.[384]

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375. *See supra* Part V-B.

376. Actually, those outside the process could not be sure that no petition was filed. The Rules do not authorize a petition for review in these circumstances, but that would not necessarily stop the dissatisfied complainant from filing one anyway.

377. *In re* Complaint under the Judicial Conduct and Disability Act, No. 10-10-90056 at 2 (10th Cir. Jud. Council Apr. 7, 2011) (Briscoe, C.J.) [hereinafter Briscoe Order].

378. *Id*. at 2–3.

379. *See* 28 U.S.C. § 351(a); *see also supra* text accompanying note 159.

380. Briscoe Order, *supra* note 377.

381. *In re* Complaint under the Judicial Conduct and Disability Act, No. 10-10-90056 (10th Cir. Jud. Council June 10, 2011).

382. *In re* Complaint under the Judicial Conduct and Disability Act, No. 10-10-90056 (10th Cir. Jud. Council Jan. 15, 2014).

383. *Id*. at 2.

384. *Id*. at 2–3.

The outcome thus did not change from the initial round of proceedings. Nevertheless, the Conduct Committee was justified in suggesting that this was not a matter that should have been handled by the chief judge alone. Although the complainant's motives may have been suspect, the detailed allegations by an individual who had worked with the judge over a period of years warranted close scrutiny. To be sure, the inquiry undertaken by Chief Judge Briscoe may not have exceeded the statutory bounds. But the more thorough and systematic investigation carried out by the special committee gives greater confidence that the complaint was properly dismissed and that litigants do not have to fear that their case is being decided by a mentally disabled judge.

Rule 21(b)(2) also states that if the Conduct Committee determines that a special committee should be appointed, the Conduct Committee "must issue a written decision giving its reasons."[385] If the Conduct Committee issued a written decision in the Tenth Circuit case, it has not been made public. Given that the chief judge's order and the judicial council decision had already been made public, it is hard to see why the Conduct Committee decision should not have been published also.

VI. OTHER ISSUES IN THE OPERATION OF THE MISCONDUCT SYSTEM

A recurring theme in the Breyer Committee report is that circuit chief judges (and, to a lesser extent, circuit councils) were too timid in using the authority vested in them by the 1980 Act to undertake inquiries and investigations. That failing is less common today, in no small part because chief judges and circuit councils appear to have taken to heart the Breyer Committee's recommendations. But the Rules, even as revised in 2015 and 2019, do not fully reflect the more aggressive approach that the Committee favored. Modest amendments would bring the Rules more in line with that approach. Here I offer two suggestions along these lines and also address some other recurring issues in the operation of the misconduct system.

A. CHIEF JUDGE'S DUTY TO INVESTIGATE NON-PUBLIC ALLEGATIONS

For reasons discussed in Part III-A, the authority of the chief judge to identify a complaint plays a particularly important role when allegations of misconduct become public. But the utility of early intervention by the chief judge is not limited to "high-visibility" situations. On the contrary, when the chief judge receives private information suggesting that a judge has engaged in questionable behavior, responsive action may avoid the embarrassment and awkwardness of a public controversy.

The current provisions of Rule 5 deal adequately with these non-public situations—with one exception. Rule 5(a) now begins with this sentence:

385. 2019 Rules, *supra* note 145, at 46. The same language appeared in the 2015 Rules. 2015 Rules, *supra* note 136, at 41.

> When a chief judge has information constituting reasonable grounds for inquiry into whether a covered judge has engaged in misconduct or has a disability, the chief judge *may* conduct an inquiry, as he or she deems appropriate, into the accuracy of the information even if no related complaint has been filed.[386]

This language makes it too easy for the chief judge to do nothing in the face of evidence pointing to possible misconduct or disability. It is important to emphasize that we are not dealing here with the standard for identifying a complaint and thus initiating the formal process under Chapter 16. The Commentary to the Rule explains persuasively why a chief judge should be accorded some discretion at that stage: "[t]he matter may be trivial and isolated, based on marginal evidence, or otherwise highly unlikely to lead to a [finding of misconduct]."[387]

But that rationale does not apply at this earlier stage. On the contrary, in order to determine whether any of the specified circumstances exist, the chief judge must conduct some sort of inquiry. For example, the chief judge might informally ask the district chief judge to look into the matter. Thus, the "may" in the opening sentence of the Rule should be replaced with "must" or "should." The Rule should also make clear that the inquiry should encompass not only "the accuracy of the information," but also whether that information could lead a reasonable observer to think that misconduct might have occurred.

In offering this suggestion, I do not minimize the value of informal measures, particularly when the allegations point to disability rather than misconduct. This point was made by Chief Judge Browning in 1979 when the House Judiciary Committee was considering the legislation that ultimately became the 1980 Act, and it remains valid today.[388] But informal measures require that someone take the initiative, and under the Act that responsibility falls to the circuit chief judge.

There may also be circumstances involving a public report in which it will be desirable for a chief judge to engage in informal investigation without identifying a complaint. Again, the concern is actual or incipient disability. For example, in February 2014, local media reported that District Judge Patricia Minaldi of the Western District of Louisiana was arrested for driving while intoxicated.[389] She pleaded guilty to first-offense DWI.[390] Three years later, after an embarrassing series of in-court interruptions and mistakes, Judge Minaldi acknowledged an "alcohol problem."[391] The Fifth Circuit Judicial Council found "compelling and

386. 2019 Rules, *supra* note 145, at 13 (emphasis added).

387. *Id*. at 14.

388. *See* House Hearings, *supra* note 48, at 86–88 (testimony of Chief Judge James R. Browning). *See also* BREYER COMMITTEE REPORT, *supra* note 89, at 201–06.

389. *Federal judge charged with first-offense DWI, dash cam video released*, KPLC (Lake Charles, La.) Feb. 14, 2014, http://www.kplctv.com/story/24729006/update/./ [https://perma.cc/D568-GVKG].

390. *Federal judge pleads guilty to DWI in Lake Charles*, ASSOCIATED PRESS, Mar. 3, 2014.

391. Michael Kunzelman, *US Judge Says Her Alcoholism Didn't Affect Case Resolutions*, AP ONLINE, Apr. 14, 2017 (available on Westlaw).

uncontroverted medical evidence" showing that Judge Minaldi was permanently disabled, and she retired for disability under 28 U.S.C. § 372(a).[392] If the chief judge of the Fifth Circuit had initiated an inquiry after the DWI arrest, Judge Minaldi's "alcohol problem" might have been caught much sooner, and at least some of the disruption and embarrassment might have been avoided.

B. CHIEF JUDGE'S OBLIGATION TO APPOINT A SPECIAL COMMITTEE

If there is any single defect that has marred the judiciary's record in administering the 1980 Act, it is the failure of chief judges to appoint special committees in the face of genuine disputes over facts or their interpretation. Both Congress and the judiciary have taken steps to address this problem. The 2002 revision of the Act added a provision, drawn from the Illustrative Rules, stating: "The chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute."[393] The 2008 Rules added a provision, already discussed, that authorizes limited review by the Conduct Committee when the circuit council affirms a chief judge's order dismissing a complaint or concluding the proceeding rather than appointing a special committee.[394]

The 2015 revision added some language by way of emphasis to Rule 11(b), and that is a step in the right direction.[395] But the text of the Rule does not otherwise seek to clarify or delineate the limitations on the chief judge's authority to dismiss a complaint or conclude a proceeding. More is needed. For example, the Rule should make clear that the chief judge may not dismiss a complaint on the ground of insufficient evidence without communicating with all persons who might reasonably be thought to have knowledge of—or evidence about—the matter.[396] In addition, the Rule itself—not simply the commentary—should remind the chief judge that even if the facts are undisputed, a special committee is required as long as there are "reasonably disputed issues as to whether [those facts] constitute misconduct or disability."[397]

I have discussed this point in greater detail elsewhere.[398] Here I will add that the Conduct Committee's experience in carrying out its oversight role over the last few years may help the Committee to formulate other directives that would further define the "limited inquiry" contemplated by Chapter 16. Consider, for

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392. *In re* Complaint of Judicial Disability Regarding United States District Judge Patricia H. Minaldi, Under the Judicial Improvements Act of 2002, No. 05-16-90075 at 1 (5th Cir. Jud. Council Aug. 23, 2017).

393. 28 U.S.C. § 352(a); *compare* 1986 Illustrative Rules, *supra* note 87, at 15.

394. *See supra* Part V-B.

395. The 2015 revision added what is now the final sentence of Rule 11(b), stating that any determination of a "reasonably disputed issue" must be left to a special committee . . . and to the judicial council that considers the committee's report. *See* 2019 Rules, *supra* note 145, at 20.

396. The Commentary does say (in the course of presenting a lengthy example) that "if potential witnesses who are reasonably accessible have not been questioned, then the matter remains reasonably in dispute." 2019 Rules, *supra* note 145, at 24. But the point is important enough that it should be part of the Rule itself.

397. *Id*. at 23.

398. *See* Hellman, *Misconduct Rules*, *supra* note 122, at 351–55.

example, the case in which the Committee suggested to the chief judge of the Tenth Circuit that she reopen a complaint alleging disability on the part of a judge.[399] What, exactly, was there about the record of the initial proceeding that alerted the Committee to the desirability of additional investigation?

Finally, it would be helpful if the Rules were to authorize the appointment of a "standing special committee" that would consider borderline complaints not warranting a full-scale investigation. A small standing committee could provide a second opinion for the chief judge in those matters, while ad hoc committees would consider complex or high-profile complaints.[400]

C. TRANSFER TO ANOTHER CIRCUIT COUNCIL

Rule 26 authorizes chief judges and circuit councils to request the Chief Justice to transfer a misconduct proceeding "to the judicial council of another circuit."[401] This provision implements a recommendation of the Breyer Committee.[402] I have two suggestions for amendments to the Rule and the Commentary.

First, the Rule authorizes a request for transfer only in "exceptional circumstances."[403] This predicate makes sense if one considers (in the Breyer Committee's phrase) "the bulk of the iceberg" of complaints.[404] But it may not be quite as appropriate if one focuses on the much smaller universe of cases in which a request would be a realistic possibility. To be sure, the Breyer Committee stated that transfers "should not be a regular occurrence."[405] Nevertheless, the Committee's report seems to contemplate a somewhat broader use of the device than the phrase "exceptional circumstances" suggests. Moreover, the specific circumstances listed in the Commentary to the Rule (e.g., "the issues are highly visible and a local disposition may weaken public confidence in the process") might not necessarily be viewed as "exceptional."

The best approach is simply to omit the prefatory phrase. All that the Rule needs to do is to authorize the procedure. Explanation of the circumstances that might justify a request can be left to the Commentary. The Commentary could note that transfers "should not be a regular occurrence."

Second, over the last few years, chief judges have consistently followed the practice of requesting a transfer when serious allegations have been raised about a judge of the court of appeals.[406] This makes sense, because a (slight) majority of

399. *See supra* Part V-C.

400. I am indebted to Russell Wheeler of the Brookings Institution for suggesting the idea of a "standing special committee."

401. 2019 Rules, *supra* note 145, at 61.

402. BREYER COMMITTEE REPORT, *supra* note 89, at 116–17.

403. 2019 Rules, *supra* note 145, at 61.

404. BREYER COMMITTEE REPORT, *supra* note 89, at 5 (internal quotation marks omitted).

405. *Id*. at 116.

406. The practice has been followed in several of the cases discussed in this article, including two separate proceedings involving Judge Alex Kozinski of the Ninth Circuit and the complaints against Judge Brett M. Kavanaugh of the District of Columbia Circuit.

the members of the circuit council will be colleagues who regularly sit with the subject judge. I think the time has come to codify this practice. Either the Rule or the Commentary should provide that when a non-frivolous complaint is filed against a court of appeals judge, or a complaint is identified against a court of appeals judge, the chief judge should request the Chief Justice to transfer the proceeding to another circuit.

D. BURDEN OF PROOF IN JUDICIAL-COUNCIL FACTFINDING

In a 2014 decision on a complaint that had received substantial public attention, the Judicial Council of the District of Columbia Circuit noted that neither the 1980 Act nor the 2008 Rules "expressly indicates what burden of proof a judicial council should apply in its factfinding in a judicial misconduct proceeding."[407] The Council found one provision in the Rules suggesting indirectly that "the standard must at least be preponderance of the evidence."[408] But the opinion pointed out that in the "analogous context of attorney disciplinary proceedings," most jurisdictions require that misconduct be established "by clear and convincing evidence."[409] The Council found no need to choose between the two standards, because the disposition would be the same under either one. But sooner or later a case will arise where the burden of proof does make a difference.

The answer is not obvious. Although the D.C. Circuit Council looked for guidance in rules governing *attorney* disciplinary proceedings, it did not consider what would seem to be a closer analogy: judicial disciplinary proceedings in the states. Unfortunately, no clear answer can be found there either. As the leading treatise comments, "many courts base their decisions on whether or not the proceeding is of a criminal nature."[410] That is a rather abstract way of approaching the problem.

Policy arguments can be made on both sides. On the one hand, a finding of misconduct is a serious stain on a judge's reputation.[411] One can argue that a judge should not be stigmatized in that way on the basis of a mere preponderance of the evidence. On the other hand, it might also be troubling to see a judicial council saying that even if it is more likely than not that a judge engaged in

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407. *In re* Charges of Judicial Misconduct, 769 F.3d 762 (D.C. Cir. Jud. Council 2014). The complaint involved Fifth Circuit Judge Edith Jones.

408. *Id*. at 766. The Council cited Rule 20(b)(1)(A)(iii), which states that a judicial council may dismiss a complaint because "the facts on which the complaint is based have not been *established*." (Emphasis added by the council).

409. *Id*. at 767.

410. GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 12.08 (5th ed. 2013).

411. I vividly remember that when the House Judiciary Committee held a hearing to consider the possible impeachment of Judge Manuel Real. Judge Real proudly told the Committee, "I have never been sanctioned for any type of judicial misconduct." He could not say that today. *See In re* Committee on Judicial Conduct and Disability, 517 F.3d 563 (U.S. Jud. Conf. 2008).

misconduct, the complaint will be dismissed because the evidence is not clear and convincing.

One judicial council explicitly applies a "clear and convincing standard of proof in determining whether a judge has engaged in misconduct."[412] Another council, without discussing the burden of proof, has dismissed a complaint upon finding that the allegations "were not supported by clear and convincing evidence."[413] Now that the D.C. Circuit Council has flagged the issue publicly, the Conduct Committee should include it on its agenda for review of the Rules.

The D.C. Circuit Council decision also illustrates why it is a good idea for the Conduct Committee to make available, as Rule 24(b) contemplates, a compilation of "illustrative orders" that will demonstrate "how complaints are addressed under the Act."[414] Even if the Conduct Committee adopts a rule on burden of proof (and certainly until it does), councils will benefit from a readily available assemblage of orders of other circuits that develop and apply burden of proof standards.[415]

E. EFFECT OF RESIGNATION OR RETIREMENT BY SUBJECT JUDGES

Section 351(d)(1) of Title 28 specifies the judges who are covered by the Act: "the term 'judge' means a circuit judge, district judge, bankruptcy judge, or magistrate judge."[416] Rule 1(b) tracks the statute and defines the "covered judge."[417] But what happens if a covered judge retires or resigns after a complaint is filed?

The text of the Rules does not address this question, but the Commentary to Rule 11 does.[418] That Commentary was significantly revised by the 2019 amendments.

The Commentary to the 2015 Rules stated that the chief judge may "conclude the proceeding" under § 352(b)(2) of the Act if the judge resigns from judicial office, but that the complaint must be addressed as long as the subject judge "*performs judicial duties*."[419] The 2019 amendments retained the first provision but rewrote the second to say that the complaint must be addressed as long as the subject judge "*retains the judicial office and remains a covered judge as defined in*

412. *In re* Judicial Complaint Under 28 U.S.C. § 351, No. 04-16-90088 at 8–9 (4th Cir. Jud. Council Apr. 24, 2018).

413. *In re* Complaint of Judicial Misconduct, No. 93-6-372-14 at 1 (6th Cir. Jud. Council Nov. 10, 1993) (on file with the author).

414. 2019 Rules, *supra* note 145, at 54.

415. For discussion of the compilation described in Rule 24(b), *see supra* Part III.C.

416. 28 U.S.C. § 351(d)(1).

417. 2019 Rules, *supra* note 145, at 3. In the 2015 Rules, the substance of this provision was contained in Rule 4. 2015 Rules, *supra* note 136, at 10.

418. 2019 Rules, *supra* note 145, at 27. Rule 11 is a lengthy Rule delineating the responsibilities of the chief judge in reviewing a complaint. The Commentary to Rule 1(b) addresses the question, but only indirectly. *See id*. at 4.

419. 2015 Rules, *supra* note 136, at 23 (emphasis added).

Rule 1(b)."[420] This new language clarifies the policy on two important points.

The first part of the new language ("retains the judicial office") applies to judges who retire from regular active service under either 28 U.S.C. § 371(b) or § 372(a) but are not currently performing judicial duties. This is a desirable change. As long as a judge "retains the judicial office," he or she may be called upon to perform judicial duties in the future, and when that possibility exists, allegations about misconduct or disability should be addressed.

The second element is more important. The Commentary now specifies that a complaint must be addressed only as long as the subject judge "*remains a covered judge as defined in Rule 1(b)*." This new language eliminates any ambiguity for situations where, for example, a district judge resigns from the federal bench to serve as a justice on a state supreme court. It also makes clear that when a covered judge is elevated to the Supreme Court, as happened with Judge Brett Kavanaugh in 2018, the judicial council loses authority to pursue an investigation, because Supreme Court Justices are not covered by the Act. The Rule thus codifies the December 2018 decision of the Tenth Circuit Judicial Council dismissing the complaints against Justice Kavanaugh growing out of the hearings on his nomination to the Supreme Court. [421] As the Council order explained, "[a]lthough . . . a judge remains subject to the Act as long as he or she 'performs judicial duties,' those judicial duties . . . must be the duties of a [covered judge]."[422]

One further amendment is desirable. The Rules should make clear that if the subject judge *does* resign from judicial office, the chief judge *must* conclude the proceeding. To be sure, the governing statute says "may," not "must."[423] But for this particular "intervening event," there is no discretion to do otherwise. As the Second Circuit Judicial Council has put it, when a judge "permanently and irrevocably" relinquishes his judicial office, he places himself "outside the parameters of the Act and preclud[es] any action by the Judicial Council."[424]

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420. 2019 Rules, *supra* note 145, at 27 (emphasis added).

421. *In re* Complaint Under the Judicial Conduct and Disability Act, No. 10-18-90038 (10th Cir. Jud. Council Dec. 18, 2018). A total of 83 complaints were filed; some also challenged other conduct by Judge Kavanaugh. As already noted, *see supra* Part IV-D, Chief Justice Roberts transferred the complaints to the Tenth Circuit from the District of Columbia Circuit.

422. *Id*. at 7. In referring to "judicial duties" rather than "judicial office," the council was of course using the language of the Commentary to Rule 11 as it stood before the 2019 revision. On March 15, 2019 – three days after the Judicial Conference adopted the 2019 amendments – the Tenth Circuit Judicial Council issued a new order in the Kavanaugh proceeding. *In re* Complaints Under the Judicial Conduct and Disability Act, No. 10-18-90038++ (10th Cir. Jud. Council Mar. 15, 2019). The council reiterated its previous conclusion that Judge Kavanaugh's elevation to the Supreme Court "resulted in the loss of jurisdiction." *Id*. at 7. The discussion on this point did not cite the new Rules, and it quoted the 2015 language on "perform[ing] judicial duties." *Id*. at 6.

423. *See* 28 U.S.C. §352(b).

424. *In re* Complaint of Judicial Misconduct, No. 17-90118-jm at 3–4 (2d Cir. Jud. Council Feb. 5, 2018) (citing authorities). This was the proceeding involving former Ninth Circuit Judge Alex Kozinski.

These matters should be addressed in the text of the Rules, not just in the Commentary. Any case in which a judge resigns, thus aborting proceedings under the 1980 Act, is likely to be of considerable public interest, and the governing rules should be easy to find.

CONCLUSION: CONGRESS AND THE JUDICIARY, PAST AND FUTURE

Two years after his memorable appearance at the meeting of the Judicial Conference, Congressman Sensenbrenner introduced his Inspector General bill. The bill was never enacted; in fact, it did not even make it to a vote on the House floor.[425] Nor was there ever a vote in the Senate on Senator Grassley's companion measure. But if Sensenbrenner lost the battle, it is fair to say that he won the war. His remarks at the Judicial Conference meeting led directly to the Breyer Committee report, and that in turn led to the mandatory Rules promulgated in 2008.

The 2008 Rules, particularly after the 2015 amendments, have changed the system in significant ways. They have provided for greater transparency; they have also laid the groundwork for a more aggressive oversight role by the Judicial Conference's Conduct Committee. For example, when the Ninth Circuit Judicial Council prepared to publish a sanitized version of its order describing "hundreds of inappropriate email messages that were received and forwarded from Judge [Richard] Cebull's court email account," the Conduct Committee insisted on full public disclosure, even though Judge Cebull had resigned from the bench before the period for review had elapsed.[426]

More important than changes in the Rules or the institutional arrangements, there has been a change in atmosphere. Whether or not the Breyer Committee's concerns about "guild favoritism" were justified in 2006,[427] they would not be warranted today, at least with respect to the judges who administer the misconduct system. Members of Congress may not be aware of this, but judges accused of serious misconduct certainly are. The proof is in the pattern of resignations by judges who were facing the prospect of sanctions or investigation by a judicial council.[428] Particularly telling is the resignation of Judge Alex Kozinski only four days after Ninth Circuit Chief Judge Sidney Thomas announced that he had identified a complaint against Judge Kozinski based on newspaper reports of accusations of sexual harassment going back many years.[429]

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425. The bill reached its high-water mark in 2006, when it was approved by the House Judiciary Committee. *See* House Judiciary Committee Passes IG Bill, Third Branch, October 2006, at 3.

426. *In re* Complaint of Judicial Misconduct, 751 F.3d 611, 617 (U.S. Jud. Conf. Comm. on Jud. Conduct & Disability 2014).

427. *See supra* note 193 and accompanying text.

428. *See* Duff Letter, *supra* note 137, at 9–17 (discussing six judges accused of sexual or other misconduct who "are no longer on the bench").

429. Chokshi, *supra* note 138; *see In re* Complaint of Judicial Misconduct, No. 17-90118 (9th Cir. Jud. Council Dec. 14, 2017) (Thomas, C.J.).

Judge Kozinski's resignation ended the investigation, but it did not put a stop to demands for action from influential members of Congress.[430] The judiciary responded quickly. In his 2017 year-end report, Chief Justice Roberts announced his plan for a "working group" to examine workplace issues,[431] and six months later the Working Group issued its report.[432] In September 2018, as already noted, the Conduct Committee released a draft of proposed changes to the misconduct rules.[433] Three months later, the judiciary announced the appointment of a "judicial integrity officer" to provide judiciary employees with "advice and assistance about workplace conduct matters."[434] In March 2019 the Judicial Conference approved not only amendments to the misconduct Rules but also amendments to the Code of Conduct for United States Judges.[435] The package of amendments dealt largely with workplace conduct.

We cannot know how these developments will affect the future operation of the system established by Congress in the 1980 Act. What is certain is that the "dialog" and "vigorous oversight" envisaged by Representative Kastenmeier will continue, and that the judiciary will seek to preserve its independence by responding to concerns about accountability, particularly when the call for action comes from influential members of Congress.

430. *See* Graef & Biskupic, *supra* note 139.

431. 2017 Year-End Report on the Federal Judiciary, https://www.supremecourt.gov/publicinfo/year-end/2017year-endreport.pdf [https://perma.cc/LKH9-PFFJ].

432. *See supra* note 141 and accompanying text.

433. *See supra* note 143 and accompanying text.

434. Judicial Integrity Officer Named for Federal Judiciary, https://www.uscourts.gov/news/2018/12/03/judicial-integrity-officer-named-federal-judiciary [https://perma.cc/G4HX-MFGA].

435. Judicial Conference Approves Package of Workplace Conduct Reforms, https://www.uscourts.gov/news/2019/03/12/judicial-conference-approves-package-workplace-conduct-reforms [https://perma.cc/D6TJ-BARJ].