

**The Regulation of Judicial Ethics in the Federal System:
A Peek Behind Closed Doors***

Arthur D. Hellman**

Abstract

Ethical issues involving federal judges have been much in the news recently. Among other developments, the House Judiciary Committee held a hearing to consider impeaching a federal district judge; the Judicial Conference of the United States announced two major policy initiatives; and a committee chaired by Justice Stephen Breyer issued an in-depth report on the operation of the judicial misconduct statutes.

This article addresses two aspects of federal judicial ethics. The first involves conflict of interest and disqualification. Under the law, a federal judge is disqualified from hearing a case if (among other circumstances) the judge's impartiality "might reasonably be questioned," or if he or she has "a financial interest ... in a party to the proceeding." The first-quoted prohibition has generated a large body of case law. The second has proved to be a fertile ground for muckraking by investigative reporters, in part because judges can easily fail to remember or recognize that they own shares in corporations that are parties to cases on their dockets. In September 2006 the Judicial Conference of the United States directed all federal courts to institute "automatic conflict screening" using standardized hardware and software. This is a substantial step forward, but a purely internal screening program does not serve the interest in transparency.

The second set of issues involves the operation of the misconduct statutes. A 1980 statute, now codified as Chapter 16 of Title 28, creates a detailed set of procedures for handling complaints against judges and taking appropriate action in instances of judicial misconduct. The Breyer Committee found that in handling

* This article will be published in the University of Pittsburgh Law Review, Volume 69, No. 2 (forthcoming 2008). It should not be quoted without the permission of the author.

** Professor of Law and Sally Ann Semenko Endowed Chair, University of Pittsburgh School of Law. Portions of this article are based on the author's testimony at three hearings held by subcommittees of the House Judiciary Committee, see *infra* notes 2, 16, and 85, and on an article published in the Justice System Journal (volume 28 number 3). The author expresses his appreciation to Jeffrey N. Barr, Charles G. Geyh, Thomas E. Willging, and, especially, Russell Wheeler for comments on earlier drafts of this article.

the vast bulk of complaints, the judiciary has properly implemented the 1980 Act, but that in high-visibility cases, the rate of error is “far too high.” The committee’s report and other recent developments point to several aspects of the system that deserve scrutiny. Primary among these is the lack of visibility; neither the availability of the process nor the outcomes of proceedings are sufficiently publicized.

Introduction

On September 21, 2006, a remarkable spectacle unfolded in a hearing room in the Rayburn House Office Building in Washington. A few months earlier, the Chairman of the House Judiciary Committee had introduced a resolution impeaching Federal District Judge Manuel L. Real “for high crimes and misdemeanors.”¹ Now, sitting alone at the witness table, the 82-year-old judge defended himself vigorously against accusations that he had improperly intervened in a bankruptcy case to help a woman whose probation he was supervising after she was convicted of various fraud offenses. At one point a member of the Judiciary Committee directed his gaze at the judge and said, “Judge Real, because of your actions, arguably [a family trust involved in the bankruptcy case] lost tens of thousands of dollars in lost rent and also in attorneys’ fees. Did you feel any responsibility for the losses that were incurred by the ... trust?” The judge responded in a firm voice, “Mr. Smith, I don’t know anything about the loss.”²

The Congressman’s question did not come entirely out of the blue. It echoed one of the accusations in a complaint against Judge Real that had been filed more than three years earlier – a complaint that led to the initiation of disciplinary proceedings against the judge within the judiciary.³ Those proceedings are now in the final stage of appeal at the Judicial Conference of the United States.⁴

¹ H. Res. 916, 109th Cong. (2006).

² *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. Res. 916 Before the Subcommittee on Courts, the Internet and Intellectual Property of the House Committee on the Judiciary*, 109th Cong. 90 (2006) [hereinafter Real Impeachment Hearing].

³ See *id.* at 33 (reprinting complaint). The complaint would ordinarily not be a public document, but Judge Real included it in one of the appendices to his hearing statement.

⁴ See *infra* note 175.

The entire episode involving Judge Real was a rare public manifestation of a process that generally takes place behind closed doors and out of the public eye: the regulation of ethics in the federal judiciary. But it does not stand alone. Two days before the impeachment hearing, Chief Justice John G. Roberts, Jr., released a detailed report on the operation of the statutory scheme for regulating judicial misconduct.⁵ The report was prepared by a committee appointed by Chief Justice William H. Rehnquist and chaired by Associate Justice Stephen G. Breyer. On the same day, the Judicial Conference of the United States, the policymaking arm of the judiciary, announced two major policy initiatives relating to judicial ethics.

With this unusual convergence of events, the time is ripe for a fresh look at the regulation of judicial ethics in the federal system. Indeed, notwithstanding its obvious importance, the subject has received little attention from academics.⁶ This article examines the two principal areas of recent controversy. Part I deals with conflict of interest and disqualification, with particular focus on conflicts involving judges' financial interests. Part II describes and critiques the system established by Congress for identifying and remedying misconduct by federal judges.

In the past, controversy occasionally arose over a third aspect of federal judicial ethics: judges' attendance at privately funded educational programs. In September 2006 the Judicial Conference of the United States responded to the

⁵ See http://www.supremecourtus.gov/publicinfo/press/pr_09-19-06.html. See *infra* Part II-D.

⁶ A key document in the regulation of federal judicial ethics is a set of illustrative rules promulgated by the Administrative Office of United States Courts. See *infra* note 91 and accompanying text. A Westlaw search (JLR database) reveals that this document was cited in one law review article published in 2000; it has not been cited since.

criticism by promulgating stringent new disclosure rules.⁷ Under the new rules, most providers of educational programs must disclose sources of financial support, and judges must file public reports on the programs they attend.

The new regime got off to a bad start when the Administrative Office of United States Courts (AO) failed to post the relevant information on its web site “promptly” in accordance with the Conference directive.⁸ The AO acknowledged its error, and a detailed list of seminars, funders, and presenters has now been posted. The new policy – along with a 2004 revision to a Code of Conduct Advisory Opinion – appears to address most if not all of the concerns that have previously been raised.⁹ On that premise, this aspect of federal judicial ethics will not be further addressed in this article.¹⁰

I. Conflict of Interest and Disqualification

Two provisions of Title 28 of the United States Code deal with conflict of interest and the disqualification or recusal of federal judges. (“Disqualification” and “recusal” will be treated as synonymous.) Section 144 establishes procedures for assuring that no case is heard by a district judge who “has a personal bias or prejudice” against or in favor of any party. Section 455 lays down elaborate rules to govern the disqualification of judges and avoid conflicts of interest. Because

⁷ See Judicial Conference Policy on Judges’ Attendance at Privately Funded Educational Programs, available at http://www.uscourts.gov/Press_Releases/judbrappc906c.pdf.

⁸ See *Federal Judiciary Amends Implementation Of Junket Disclosures After Complaints*, 75 U.S.L.W. 2570 (2007).

⁹ A leading critic of judges’ attendance at private seminars called the new policy “a dramatic change for the better.” Linda Greenhouse, *Federal Judges Take Steps to Improve Accountability*, N.Y. Times, Sept. 20, 2006 at A20. For the current version of Advisory Opinion No. 67, issued by the Committee on Codes of Conduct of the Judicial Conference, see <http://www.uscourts.gov/guide/vol2/67.html>.

¹⁰ Full assessment of the new system will not be possible until the individual judges’ reports begin to appear on court web sites.

section 455 is so much broader in its definition of the circumstances that require disqualification, it is invoked far more often than section 144.

As explained in a comprehensive monograph prepared for the Federal Judicial Center, section 455 includes two “separate (though substantially overlapping) bases for recusal.”¹¹ Subsection (a) speaks in broad general terms; it requires recusal “in any proceeding in which [the judge’s] impartiality might reasonably be questioned.” Subsection (b) lists five specific circumstances that require recusal. These include personal bias, prior involvement with the case, and “a financial interest ... in a party to the proceeding.”

A. Conflict of interest based on stock holdings

The “financial interest” prohibition in the statute has proved to be a fertile ground for muckraking by investigative reporters. This is so for four interrelated reasons. First, the statutory bar is absolute. Section 455 defines “financial interest” as “ownership of a legal or equitable interest, *however small*.” (Emphasis added.) Thus, it does not matter whether the judge owns many shares or only one; it does not matter whether the party involved in the proceeding is a small partnership or a huge publicly held corporation like Microsoft. Second, the prohibition extends not only to the judge’s own financial interests, but also to financial interests of the judge’s “spouse or minor child residing in his household.” Third, the prohibition cannot be waived. Indeed, none of the specific circumstances listed in subsection (b) are subject to waiver.¹² Finally, although the statute requires judges to inform themselves about their “personal ... financial interests,” experience has shown that

¹¹ Federal Judicial Center, Recusal: Analysis of Case Law Under 28 U.S.C. §§ 455 & 144 at 5 (2002) [hereinafter FJC Recusal Study].

¹² See 28 USC § 455(e). In contrast, waiver is permitted when “the ground for disqualification arises only under” § 455(a).

judges can easily fail to remember or recognize that they own shares in corporations that are parties to cases on their dockets. When they proceed to adjudicate those cases, they are violating section 455, however inadvertent or unknowing their conduct.

Journalists, litigants, and other citizens can monitor judges' compliance with section 455, but doing so requires considerable effort. Judges, like other federal officials, are required to file annual financial disclosure statements listing their stock holdings. But the reports are not readily accessible by anyone outside the judiciary. The documents are filed only in Washington, and the Judicial Conference of the United States, citing security concerns, has resisted efforts to make their contents available on the Internet.¹³ Moreover, when investigators are able to review the reports, they often find that some of the required information has been omitted. And because the reports are filed annually in May and cover the previous calendar year, they will not necessarily reflect a judge's current holdings at the time of hearing a case.

Notwithstanding these obstacles, newspapers and advocacy groups have occasionally undertaken investigations to determine whether federal judges have participated in cases in spite of a conflict of interest that mandated disqualification under the statute. One well-known example is the study conducted by the Kansas City Star in 1998. The newspaper reported that federal judges in Kansas City and elsewhere "repeatedly have presided over lawsuits against companies in which they own stock."¹⁴ A year later, the Community Rights Counsel (CRC) publicized

¹³ See "Judges' Legitimate Need for Security Cited by Chief Justice," Third Branch, June 2000.

¹⁴ See "Stocks and ethics collide in courtroom: KC federal judges have ruled on cases while invested in a litigant." Kansas City Star, Apr. 5, 1998, at A1.

a research report indicating that in 1997 eight federal appellate judges took part in at least 18 cases in which they had a disqualifying conflict of interest.¹⁵

This evidence of repeated violations of section 455 was brought to the attention of Congress in September 2001. The occasion was a hearing of a Congressional committee – the Subcommittee on Courts, the Internet and Intellectual Property of the House Judiciary Committee – on operation of the misconduct statutes.¹⁶ No one seemed to dispute that the judges’ participation in the conflict cases came about because of innocent mistakes or memory lapses. Nevertheless, as I observed in my own statement, “episodes of this kind are harmful to the judiciary. At best, the judges – and perhaps the winning lawyers – suffer embarrassment. At worst, a cloud is cast over the judges’ integrity.”¹⁷

Shortly after the hearing, Subcommittee Chairman Howard Coble (R., N.C.) and Ranking Member Howard Berman (D., Cal.) wrote to Chief Justice Rehnquist in his capacity as presiding officer of the Judicial Conference of the United States.¹⁸ They pointed to the “questions [raised] in some minds about judges’ compliance with the laws governing disqualification.” They explained how the existing system makes it difficult for litigants to discover whether judges own stock that requires recusal in a particular case. And they suggested a concrete remedy. They proposed that the Judicial Conference should “require all federal courts to adopt the Iowa model” for posting “conflict lists” on court web sites.

¹⁵ Joe Stephens, “Judges Rule on Firms in Their Portfolios,” Wash. Post, Sept. 13, 1999, at A1.

¹⁶ *Operations of Federal Judicial Misconduct Statutes: Hearing Before the Subcommittee on Courts, the Internet and Intellectual Property of the House Committee on the Judiciary*, 107th Cong. (2001) [hereinafter 2001 House Misconduct Hearing].

¹⁷ *Id.* at 49 (statement of Professor Arthur D. Hellman).

¹⁸ The letter is reprinted in H.R. Rep. 107-459 at 16-18 (2002).

The “Iowa model” is an approach pioneered by the federal district court for the Northern District of Iowa. Under that model, the court web site posts separate lists for each judge of the court. Each list is preceded by this statement: “Pursuant to this court’s policy of disclosing relationships that pose potential or actual conflicts of interest, financial or otherwise, Judge [X] will not be handling cases involving ...” The list that follows may include names of corporations, individuals, and law firms. As the Chairman and Ranking Member explained, this method of disclosure offers substantial advantages in comparison with judges’ annual financial disclosure reports.

The benefits of this practice are manifest: the likelihood increases that genuine conflicts will be flagged earlier in the litigation process; journalists and advocacy groups will have greater access to relevant information that will enable them to monitor judicial compliance with conflict-of-interest requirements; the lists can be more easily updated than annual hard-copy disclosure filings; and the legitimate privacy and safety interests of judges [are] not compromised (since the lists only indicate that a judge is recused from cases involving specific corporations, and nothing more).

The Judicial Conference did not adopt this suggestion, and in 2006 history repeated itself: blogs and advocacy groups accused two district judges (James H. Payne of the Eastern District of Oklahoma and Terrence W. Boyle of the Eastern District of North Carolina) of failing to recuse themselves from cases involving companies in which they held investments. Neither Judge Payne nor Judge Boyle serve on one of the few courts that post judges’ conflict lists on their web sites. Both judges had been nominated to their respective courts of appeals. Judge Payne withdrew as a nominee, largely because of the conflict-of-interest accusations; Judge Boyle was not confirmed to the appellate court (though the alleged conflicts were not the major issue).

The new controversies did not lead the Judicial Conference to require adoption of the Iowa model, but in September 2006 the Conference took action of a different kind: it called upon all federal courts (except for the Supreme Court, over which the Conference has no jurisdiction) to institute “automatic conflict screening” using standardized hardware and software. The new policy – to be implemented and directed by the circuit councils – will require all federal judges to “develop a list identifying financial conflicts for use in conflict screening, [to] review and update the list at regular intervals, and [to] employ the list personally or with the assistance of court staff to participate in automated conflict screening.”¹⁹

The Judicial Conference initiative was widely applauded, and we can hope that the new policy will reduce to a minimum the instances in which judges participate in cases involving corporations or other entities in which they own stock. But only time will tell whether a purely internal mechanism will do the job effectively or whether, as the Chairman and Ranking Member suggested, external monitoring is a necessary supplement. Moreover, a purely internal screening program does not serve the interest in transparency. Transparency instills confidence and thus has value apart from the instrumental goal of minimizing inadvertent conflicts.

B. Other issues relating to disqualification and conflict of interest

Except for the “financial interest” provision, the specific prohibitions of § 455(b) seldom become the subject of media coverage, nor have they given rise to an extensive body of reported decisions. This is so in part because the other

¹⁹ See Judicial Conference Policy on Mandatory Conflict Screening, available at http://www.uscourts.gov/Press_Releases/report906appendixa.pdf.

circumstances that require recusal occur less frequently than financial conflicts, and in part because the criteria are easily applied. For example, under § 455(b)(2), a judge must not sit on a case if “in private practice he served as lawyer in the matter in controversy.” But after a judge has been on the bench for several years, such cases will be rare. Nor will there be many cases in which a judge must recuse because he or she “has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding.”²⁰ The statute also requires recusal where a judge or a close relative is a party to the proceeding or is acting as a lawyer in it. Circumstances of that kind will generally be so obvious that recusal will be immediate, automatic, and not worthy of notice anywhere outside the docket sheet.

A different situation is presented by § 455(b)(1), which provides that a judge must disqualify himself “[w]here he has a personal bias or prejudice concerning a party.” One would not expect to see many cases in which a federal judge was found to have an actual “personal bias or prejudice concerning a party,” and one

²⁰ Early in his tenure on the Supreme Court, then-Associate Justice Rehnquist denied a motion for disqualification based on testimony he had given at a Congressional hearing during his service as head of the Office of Legal Counsel at the Department of Justice. See *Laird v. Tatum*, 409 U.S. 824 (1972) (memorandum of Rehnquist, J.). At that time the statute did not have the specific reference to “governmental employment.” Justice Rehnquist first focused on the “mandatory” provision that required disqualification “in any case in which [the judge] has been of counsel, [or] is or has been a material witness.” That provision was inapplicable, he said, because “I have neither been of counsel nor have I been a material witness in *Laird v. Tatum*.” *Id.* at 828. Justice Rehnquist then turned to the statutory language that required recusal where the judge “is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.” Based on an extensive review of prior practice, Justice Rehnquist concluded: “My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench.” *Id.* at 831. Justice Rehnquist’s refusal to recuse in *Laird v. Tatum* has been severely criticized. See, e.g., Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 *Brooklyn L. Rev.* 589 (1987).

does not. As the Seventh Circuit said more than 20 years ago, “The disqualification of a judge for actual bias or prejudice is a serious matter, and it should be required only when the bias or prejudice is proved by *compelling evidence*.”²¹ That is an extremely stringent standard, and, not surprisingly, there are few decisions holding that a litigant has made the necessary showing.

As a practical matter, however, the difficulty of proving actual bias under § 455(b)(1) counts for little. The reason is that the concerns that underlie § 455(b)(1) are served by reliance on § 455(a), which requires disqualification “in any proceeding in which [a judge’s] impartiality *might reasonably be questioned*.” The courts have held that § 455(a) “adopts the objective standard of a reasonable observer.”²² To be sure, the reasonable observer is one who is “fully informed of the underlying facts.” As the Second Circuit has said, “the existence of the appearance of impropriety is to be determined ‘not by considering what a straw poll of the only partly informed man-in-the-street would show, but by examining the record facts and the law, and then deciding whether *a reasonable person knowing and understanding all the relevant facts* would recuse the judge.’”²³ But the courts also stress that “the hypothetical reasonable observer is not the judge himself or a judicial colleague but a person outside the judicial system.”²⁴ This external perspective elevates the standard at least to some degree, because “these outside observers are less inclined to credit judges’ impartiality and mental discipline than the judiciary itself will be.”²⁵

²¹ United States v. Balistreri, 779 F.2d 1191, 1202 (7th Cir. 1985) (emphasis added).

²² United States v. Bayless, 201 F.3d 116, 126 (2d Cir. 2000) (Calabresi, J.).

²³ Id. at 126-27 (emphasis added) (internal brackets omitted).

²⁴ United States v. DeTemple, 162 F.3d 279, 287 (4th Cir. 1998).

²⁵ Matter of Mason, 916 F.2d 384, 386 (7th Cir. 1990).

As a corollary of this approach, the courts are careful to emphasize that a finding that recusal is required under § 455(a) is not tantamount to saying that the judge harbors actual prejudice toward a litigant or class of litigants. Typical is this statement by the Third Circuit: “We underscore that we are not intimating that Judge Kelly actually harbors any illegitimate pro-plaintiff bias. The problem, however, is that regardless of his actual impartiality, a reasonable person might perceive bias to exist, and this cannot be permitted.”²⁶ In one high-profile case, the Eighth Circuit went so far as to say that “we have every confidence that” the judge would “handle the case in a fair and impartial manner.”²⁷ But that did not negate the necessity for reassigning the case based on “the risk of a perception of judicial bias or partiality.”

The statute’s focus on the reasonable observer’s *perception* of bias led the Supreme Court to conclude that when the circumstances create an appearance of partiality, recusal is required under § 455(a) “even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case.”²⁸ The case was *Liljeberg v. Health Services Acquisition Corp.*, and it involved a district judge whose failures of memory were aptly characterized by the Court as “remarkable.”²⁹ The Court rejected the argument that its interpretation of the statute “[calls] upon judges to perform the impossible – to disqualify themselves

²⁶ *In re School Asbestos Litigation*, 977 F.2d 764, 782 (3d Cir. 1992).

²⁷ *United States v. Tucker*, 78 F.3d 1313, 1325 (8th Cir. 1996). The case involved an indictment brought by Independent Counsel Kenneth W. Starr. The court noted the judge’s connections with President and Mrs. Clinton and the Clintons’ connection to the defendant.

²⁸ *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988) (quoting the opinion below).

²⁹ *Id.* at 865; see also *id.* at 866 (noting “unfortunate coincidence” that although judge “regularly attended” meetings of the board of trustees of a university affected by the case before him, he did not attend the meeting at which the transaction was discussed).

based on facts they do not know.”³⁰ Rather, the statutory requirement comes into play when the judge learns of the disqualifying facts; the judge is then “called upon to rectify an oversight and to take the steps necessary to maintain public confidence in the impartiality of the judiciary.” If the judge fails to do so, relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure may be available. In the case before it, the Court found that the circumstances were so suspicious that the court of appeals was justified in reopening the closed litigation and ordering a new trial.³¹ By way of postscript, three years after the Court’s decision, the judge whose memory allegedly failed him – Robert F. Collins – was convicted of bribery in an unrelated criminal prosecution. He resigned from the bench and thereby avoided impeachment.³²

The body of decisions applying § 455(a) is large and varied. Occasionally a court of appeals uses the case before it as a vehicle to establish a rule applicable to an entire class of cases. For example, the Third Circuit exercised its supervisory power to require that district judges within the circuit recuse themselves “from participating in a 28 U.S.C. § 2254 habeas corpus petition of a defendant raising any issue concerning the trial or conviction over which that judge presided in his or her former capacity as a state court judge.”³³ But that kind of categorical rulemaking is rare. Ordinarily, recusal motions under § 455(a) “are fact driven,” and the outcome will depend on the court’s “independent examination of the

³⁰ Id. at 861.

³¹ Id. at 865-70. Although the Court purported to accept the District Court’s finding that the judge “did not have actual knowledge of” the relevant facts, id. at 864, the opinion as a whole gives the strong impression that the Justices in the majority believed otherwise.

³² See *infra* Part II-A.

³³ *Clemmons v. Wolfe*, 377 F.3d 322, 329 (3d Cir. 2004).

unique facts and circumstances of the particular claim at issue.”³⁴ A few examples will be sufficient to give a sense of the kinds of judicial behavior that have generated published appellate or district court opinions.³⁵

A divided panel of the Fifth Circuit Court of Appeals found that a district judge should have recused herself from a criminal case where the record showed “no small amount of resentment and animosity, if not blind hatred,” between a close personal friend of the judge and the defendant.³⁶ The Third Circuit (also over a dissent) ordered a district judge to disqualify himself from further participation in complex asbestos-related bankruptcy litigation because of his close relationship with certain “consulting Advisors” who themselves had a conflict of interest.³⁷ In several cases, the courts of appeals have found that public comments by district judges have given rise to reasonable questions about the judges’ partiality, thus requiring recusal under section 455(a). Noteworthy examples are cases involving an abortion protest in Kansas,³⁸ racial assignments in the Boston public schools,³⁹ and the Government’s antitrust suit against Microsoft Corp.⁴⁰ In a prominent

³⁴ *United States v. Bremers*, 195 F.3d 221, 226 (5th Cir. 1999).

³⁵ Because the Federal Judicial Center monograph provides a thorough summary of the cases applying § 455(a), the discussion here is illustrative rather than comprehensive. See FJC Recusal Study, *supra* note 11, at 15-41.

³⁶ *United States v. Jordan*, 49 F.3d 152, 156 (5th Cir. 1995).

³⁷ *In re Kensington, Int’l Ltd.*, 368 F.3d 289 (3d Cir. 2004). The court explained: “The gravamen of the Petitions is that Judge Wolin was tainted by the involvement of two court-appointed advisors who, at the same time that they were supposed to be giving neutral advice in the Five Asbestos Cases, represented a class of tort claimants in another, unrelated asbestos-driven bankruptcy and espoused views therein on the same disputed issues that are at the core of the Five Asbestos Cases.” Shortly after the Third Circuit removed Judge Wolin from the asbestos case, the judge resigned from the bench and entered private practice.

³⁸ *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993).

³⁹ *In re Boston’s Children First*, 244 F.3d 164 (1st Cir. 2001).

⁴⁰ *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

Florida environmental case, the chief judge of the district court granted a motion to disqualify a district judge who had made a series of comments to newspapers manifesting apparent bias against the parties on one side of the litigation.⁴¹

On the other side, the Seventh Circuit held that a district judge was not required to recuse himself from hearing a Voting Rights Act suit even though he had made political contributions to two of the defendant officials before his appointment to the federal bench.⁴² The court said that, as a general matter, “prejudicial” political activity should not be viewed as “prejudicial.” The Second Circuit found that a district judge acted appropriately in presiding over a narcotics trial seven months after giving a videotaped lecture to a governmental task force in which she advised the assembled agents and prosecutors about steps they could take to increase the prospects for conviction in narcotics cases.⁴³ The court emphasized two significant countervailing facts: the lecture to the task force “included several emphatic criticisms of prosecutors;” and the judge also gave a lecture to criminal defense lawyers. A few years later, the same court held that a district judge was not required to recuse himself from hearing an environmental case against Texaco, Inc., after attending an expense-paid seminar on environmental issues sponsored by an organization that received some funding from Texaco.⁴⁴ The court relied on the “indirect and minor funding role” that Texaco played and on “the lack of a showing that any aspect of the seminar touched upon an issue material to the disposition of a claim or defense in the

⁴¹ United States v. South Florida Water Management Dist., 290 F.Supp.2d 1356 (S.D. Fla. 2003).

⁴² Matter of Mason, 916 F.3d 384 (7th Cir. 1990).

⁴³ United States v. Pitera, 5 F.3d 624, 626-27 (2d Cir. 1993).

⁴⁴ In re Aguinda, 241 F.3d 194 (2d Cir. 2000).

present litigation.”⁴⁵ Although the court said that the outcome of the case was “not in doubt,” the panel wrote “at some length” to provide judges with “general guidance as to when attendance at meetings, seminars, or other presentations may be problematic.”⁴⁶

An important limitation on § 455(a) was reaffirmed by the Supreme Court in the 1994 decision in *Liteky v. United States*.⁴⁷ The Court held in *Liteky* that the so-called “extrajudicial source” doctrine applies to § 455(a). Although the Court asserted that “there is not much doctrine to the doctrine,”⁴⁸ the opinion makes it very difficult for a litigant to secure recusal without relying on an “extrajudicial source.” This follows from two propositions endorsed by the Court:

First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they ... can only in the rarest circumstances evidence the degree of favoritism or antagonism required ... when no extrajudicial source is involved. ... Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.⁴⁹

Given this language, it is predictable that “courts of appeals rarely reverse refusals to recuse when the alleged partiality did not derive from an extrajudicial source.”⁵⁰

⁴⁵ *Id.* at 198.

⁴⁶ *Id.* at 202.

⁴⁷ 510 U.S. 540 (1994).

⁴⁸ *Id.* at 554.

⁴⁹ *Id.* at 555 (citation omitted).

⁵⁰ FJC Recusal Study, *supra* note 11, at 21.

The Court in *Liteky* was careful, however, to distinguish between *rulings* by a judge and *comments* that a judge might make incident to a ruling. In rare cases, comments in the course of a judicial proceeding can demonstrate bias requiring recusal. The point is illustrated by a recent Tenth Circuit decision involving a colloquy at a sentencing hearing following a plea agreement. The trial judge said, “I will not put up with this from these Hispanics or anybody else, any other defendants.” This was followed by another reference to “a Hispanic defendant” who was “lying” to the judge. The court of appeals held that the judge should have recused himself *sua sponte*, saying, “The judge’s statements on the record would cause a reasonable person to harbor doubts about his impartiality, without regard to whether the judge actually harbored bias against [the defendant] on account of his Hispanic heritage.”⁵¹

In another recent criminal case, the dissenting judge on a Third Circuit panel argued that the district judge’s judicial rulings, combined with questionable *ex parte* advocacy by the prosecution, sufficed to require recusal under the *Liteky* standard. The defendant in the case was Dr. Cyril Wecht, the well-known forensic pathologist. Wecht asserted that the charges against him were politically motivated and that a reasonable “man in the street” might perceive that “the Government and the court were actually in league.”⁵² The dissenting judge agreed that the record showed an appearance of partiality:

The circumstances of this case present the rare occasion when a judge’s judicial rulings demonstrate the appearance of bias because they began with and were possibly tainted by improper, or at least highly questionable, *ex parte* advocacy by the Government. This *ex parte*

⁵¹ United States v. Franco-Guillen, 196 Fed. Appx. 716, 719 (10th Cir. 2006).

⁵² Petition for Mandamus at 49, 27, United States v. Wecht (Dkt. No. 06-3704) (on file with author).

advocacy was tantamount to an extrajudicial source and permeated the rulings of the District Court such that one cannot avoid discerning the appearance of partiality.⁵³

However, the panel majority, although criticizing some of the district judge's actions and comments, found that the defendant had “fail[ed] to demonstrate the ‘high degree of favoritism or antagonism’ that is required under *Liteky*.”⁵⁴

As these citations illustrate, a trial judge's refusal to recuse is subject to appellate review.⁵⁵ Sometimes, as in the Tenth Circuit case involving comments about Hispanics, the issue is raised on appeal from a final judgment. More often, as in the *Wecht* prosecution, the party seeking recusal files an interlocutory appeal. “All courts of appeals permit a party to seek interlocutory review via mandamus, reasoning that, at least in some cases, the damage to public confidence in the justice system (or perhaps to the litigants) would not be undone by post-judgment appeal.”⁵⁶ Except in the Seventh Circuit, the courts of appeals apply an “abuse of discretion” standard.⁵⁷ On occasion, the reviewing court, rather than requiring a judge to step down from a case, will suggest that the judge reconsider his refusal to recuse.⁵⁸

⁵³ *United States v. Wecht*, 484 F.3d 194, 227 (3d Cir. 2007) (Bright, J., dissenting).

⁵⁴ *Id.* at 220.

⁵⁵ Occasionally, as in the Florida environmental case discussed in the text, a trial judge will refer a recusal motion to another judge of the district court rather than deciding the question himself or herself.

⁵⁶ FJC Recusal Study, *supra* note 11, at 68.

⁵⁷ *Id.* at 65.

⁵⁸ See, e.g., *Moran v. Clarke*, 296 F.3d 638, 648-49 (8th Cir. 2002) (en banc). This decision led to an ugly public dispute between the district judge – Charles A. Shaw of the Eastern District of Missouri – and the court of appeals. On remand from the Eighth Circuit, Judge Shaw recused himself but wrote an angry opinion asserting that “race played a role in the [en banc] majority's decision.” *Moran v. Clarke*, 213 F.Supp.2d 1067, 1075 (E.D. Mo. 2002). The Eighth Circuit responded with a unanimous en banc opinion that sharply rebuked the judge for his “baseless, personal, racially oriented speculations” that violated “the district court's own solemn obligation

When a Justice of the United States Supreme Court denies a motion to recuse, appellate review is not available. Indeed, under the Court's practice, decisions about recusal are made solely by the Justice whose participation is being challenged; the other members of the Court play no part (unless the Justice chooses to consult them).⁵⁹ On occasion, Justices write opinions explaining why they have declined to disqualify themselves. In 2003 Justice Scalia published a lengthy opinion explaining why he denied a motion to recuse himself in a case involving Vice President Cheney.⁶⁰ The motion was based on news reports about a duck hunting trip in which Justice Scalia and the Vice President participated.⁶¹

An unusual episode involving the possibility of recusal by Justice Stephen G. Breyer came to light early in 2005. Justice Breyer had served as counsel to the Senate Judiciary Committee in the 1970s when Congress was considering the legislation that became the Sentencing Reform Act of 1984 (SRA). Later he served as a member of the commission that formulated the initial set of Sentencing Guidelines. Now, in 2004, the Supreme Court was poised to hear cases that would determine the validity of the Guidelines under the Sixth Amendment. Was Justice Breyer required to recuse himself from taking part in the decisions? Uncertain, he consulted an academic expert on legal ethics, Professor Stephen Gillers. Gillers

[to] uphold the integrity of the judiciary.” *Moran v. Clarke*, 309 F.3d 516, 518 (8th Cir. 2002) (en banc) (per curiam).

⁵⁹ As then-Justice Rehnquist put it, “generally the Court as an institution leaves [disqualification] motions, even though they be addressed to it, to the decision of the individual Justices to whom they refer.” *Hanrahan v. Hampton*, 446 U.S. 1301 (1980) (Rehnquist, J.) .

⁶⁰ *Cheney v. United States District Court*, 541 U.S. 913 (2004) (Scalia, J.).

⁶¹ Some academics are troubled by the absence of a procedure for review of a Justice's decision not to recuse. See, e.g., Stempel, *supra* note 20; Caprice L. Roberts, *The Fox Guarding the Hen House?: Recusal and the Procedural Void in the Court of Last Resort*, 57 *Rutgers L. Rev.* 107 (2004).

concluded that there was “no ... reasonable basis to question [Justice Breyer’s] impartiality,” and that the Justice could participate in the cases. Other experts argued that Justice Breyer should not have played a role in “deciding on the life or death of his own brainchild.”⁶²

C. Reassignment “to preserve the appearance of justice”

Independent of section 455, when a case is remanded for further proceedings in the district court, the court of appeals has power to order that the case be reassigned to a different judge. This authority comes from 28 USC § 2106, which provides in general terms that all federal appellate courts, in reviewing cases, may “require such further proceedings ... as may be just under the circumstances.” When Judge Manuel Real testified at the House Judiciary impeachment hearing, he emphasized that “I have never been sanctioned for any judicial misconduct.” That was correct, but on several occasions the court of appeals had reassigned Judge Real’s cases “to preserve the appearance of justice.” In one of the cases Judge Real denied a litigant’s motions before they were even filed; the record also reflected “incidents of animosity” toward the party’s counsel.⁶³ The court of appeals thus used § 2106 as a device for enforcing an ethical standard almost identical to that of § 455(a).⁶⁴ The court did so again a few weeks after the

⁶² Tony Mauro, Breyer Sought Advice on Whether to Recuse in Sentencing Case, *Legal Times*, Jan. 18, 2005.

⁶³ *Beckman Instruments, Inc. v. Cincom Systems, Inc.*, 2000 WL 1023224 (9th Cir. 2000) (table opinion reported at 232 F.3d 893).

⁶⁴ The court acted similarly in a criminal case, albeit without explicitly invoking § 2106. The court found that “Judge Real exceeded his authority” in staying a bail order entered by a magistrate judge in another judicial district. The court’s order continued: “Because of the appearance of bias, the Chief Judge of the District Court ... shall assign the matter ... to a judge other than Judge Real.” *Nicherie v. United States District Court*, Dkt. No. 04-71066 (Mar. 9, 2004) (on file with the author). See Paul Lieberman & David Rosenzweig, *Judicial Battle Erupts Over Suspect’s Release*, *L.A. Times*, Mar. 11, 2004.

impeachment hearing. It found that Judge Real, presiding over an employment discrimination suit, “fail[ed] faithfully to apply our prior decision in [the] case.” The court acknowledged that the plaintiff had not satisfied the “demanding” test for proving actual judicial bias, but it ordered reassignment under § 2106 “to preserve the appearance of justice.”⁶⁵

Other courts of appeals have invoked their supervisory authority and § 2106 in a variety of circumstances involving evidence of bias or antagonism on the part of a district judge.⁶⁶ For example, the District of Columbia Circuit removed District Judge Royce C. Lamberth, Jr., from a long-running case brought by beneficiaries of Indian land trusts against the Department of the Interior as their trustee. The court found that Judge Lamberth had made a “parade of serious charges” against the Department, including accusations of racism, “all unconnected to the issues before the district court.”⁶⁷ The court also relied on an “unbroken string” of reversals, including one ruling in which the district court “both assumed the mantle of a prosecutor and authorized biased investigations.” The Fifth Circuit removed District Judge Samuel Fred Biery, Jr., from a criminal case “because of [the] judge’s brazen antagonism to both the tenets of the [sentencing] guidelines and to [the defendant].”⁶⁸ The appellate court condemned Judge Biery’s behavior in extraordinarily strong language: “we remove the district

⁶⁵ *Obrey v. England*, 215 Fed. Appx. 621 (9th Cir. 2006).

⁶⁶ In the Seventh Circuit, reassignment is the norm in any case tried by the district court. See 7th Cir. R. 36; *Cange v. Stotler & Co.*, 913 F.2d 1204, 1207-08 (7th Cir. 1990). The court of appeals thus avoids having to determine whether particular circumstances suggest “any bias or mindset” on the part of the district judge. *Id.*

⁶⁷ *Cobell v. Kempthorne*, 455 F.3d 317, 334 (D.C. Cir. 2006).

⁶⁸ *United States v. Andrews*, 390 F.3d 840, 851 (5th Cir. 2004).

judge from this case because he has breached the barrier between the rule of law and the exercise of personal caprice.”

It is not clear whether the *Liteky* guidelines apply to the exercise of supervisory power by courts of appeals under § 2106. The Supreme Court said in *Liteky* that § 2106 “may permit a different standard,”⁶⁹ and courts of appeals have sometimes ordered reassignment of cases based on an appearance of bias created by a judge’s prior rulings in the proceedings under review.⁷⁰

D. Financial-interest disqualification in perspective

At first blush, the disqualification statutes may appear schizophrenic in their application. On the one hand, the hundreds of decisions applying § 455(a) look closely at the particular circumstances and ask whether “a reasonable person *knowing and understanding all the relevant facts* would recuse the judge.”⁷¹ Thus, when Dr. Cyril H. Wecht filed a petition for mandamus seeking to disqualify District Judge Arthur Schwab from presiding over his criminal fraud prosecution, the appellate panel considered the case for seven months before issuing a lengthy decision rejecting the request on a 2-1 vote.⁷² On the other hand, a financial interest always requires recusal even if no reasonable person would fear bias on the particular facts – for example, where the judge owns a few shares of stock in a large publicly held corporation and the case barely meets the jurisdictional minimum.

⁶⁹ *Liteky*, 510 U.S. at 554.

⁷⁰ E.g., *Nicherie*, supra note 64; *United States v. Londono*, 100 F.3d 236, 242-43 (2d Cir. 1996), abrogated on other grounds.

⁷¹ See supra text accompanying note 23 (emphasis added).

⁷² *United States v. Wecht*, 484 F.3d 194 (3d Cir. 2007), discussed supra Part I-B.

The discrepancy exists, but for good reasons. Section 455(a) is necessarily fact-intensive, because no formula can adequately capture the varieties of judicial behavior that might cause a reasonable person to question a judge's impartiality. At the same time, there is sound justification for retaining the absolute rule for financial interests. Even with that rule, judges have had difficulty keeping track of their investments and recusing where a conflict exists. Without a bright-line rule, screening for conflicts would require a much more elaborate mechanism. And monitoring by litigants, outside observers, and the judiciary itself would be a much more complex undertaking. The absolute prohibition made good sense when Congress revised the statute in 1974; it makes good sense today.

II. Operation of the Misconduct Statutes

For most of the nation's history, the only formal procedure for dealing with misconduct by federal judges was the cumbersome process of impeachment.⁷³ 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."⁷⁴ A 1939 statute created judicial councils within the circuits, but their

⁷³ From 1789 through 1980, only 10 federal judges were impeached by the House. Four (Chase, Peck, Swayne, and Louderback) were acquitted by the Senate. Two (Delahay and English) resigned before the Senate held an impeachment trial. Four judges were convicted and removed from office (Pickering, Humphries, Archbald, and Ritter). For a detailed account, see Emily Field Van Tassel & Paul Finkelman, *Impeachable Offenses: A Documentary History from 1787 to the Present* (1999).

⁷⁴ Report of the National Commission on Judicial Discipline and 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* 27, 45 (1962). Since 1980, four federal judges have been convicted by juries of crimes committed while in office. Two (Claiborne and Nixon) were impeached and removed from office; the other two (Collins and Aguilar) resigned from the bench. See Part II-A infra.

powers were vaguely defined, particularly with respect to authority over individual judges.⁷⁵

That era ended with the enactment of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (to give it its full name).⁷⁶ The 1980 law was the product of compromise. Powerful members of the Senate favored a much more radical proposal, one that would have created a new national tribunal with power to remove judges who had committed serious misconduct. However, the Judiciary Committee leadership in the House was deeply skeptical of this approach. Ultimately the two Houses agreed on a more modest measure. The new law created a regime that has aptly been described as one of “decentralized self-regulation.”⁷⁷ Codified as section 372(c) of the Judicial Code, it established a new set of procedures for judicial discipline and vested primary responsibility for implementing them in the federal judicial circuits.⁷⁸

⁷⁵ See Peter Graham Fish, *The Politics of Federal Judicial Administration* 417-26 (1973); *Chandler v. Judicial Council*, 398 U.S. 74 (1969).

⁷⁶ As the name suggests, the Act, in addition to establishing a formal process for dealing with allegations of judicial misconduct, sought to reinvigorate the circuit judicial councils as instruments of circuit governance. See generally Robert H. Hall, *Federal Circuit Judicial Councils: A Legislative History and Revisions Needed Today*, 11 *Ga. St. L. Rev.* 1 (1994).

⁷⁷ 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) [hereinafter Barr & Willging].

⁷⁸ Unfortunately, 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 Conduct and Disability. See 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). See also 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) (recounting the origins of the 1980 Act).

A. Evolution of the regulatory framework

One element of the compromise that produced the 1980 Act was the assurance of continuing legislative oversight.⁷⁹ Consistent with this commitment, Congress in 1990 enacted a modest package of amendments to the statute. The same legislation also created a National Commission on Judicial Discipline and Removal. In 1993 the National Commission published a thorough report as well as an extensive compilation of working papers.⁸⁰ Particularly noteworthy are the studies carried out at the Commission's behest by the Federal Judicial Center and by Professor Richard Marcus.⁸¹ These studies constitute a rich source of detailed information that is enormously useful in showing how the 1980 Act was being implemented at the everyday operational level during its first decade.

The next major step in Congress's performance of its oversight role came in 2001 when a subcommittee of the House Judiciary Committee held a hearing on the "operation of [the] federal misconduct statutes."⁸² Following the hearing, Chairman Coble and Ranking Member Berman introduced the Judicial Improvements Act of 2002. Their bill became law in late 2002.⁸³ The legislation further revised the provisions governing the handling of complaints against judges,

⁷⁹ For example, when the House passed the final version of the legislation, Congressman Robert W. Kastenmeier stated: "[B]oth the House and the Senate Judiciary Committees believe that there should be a continuing dialog between the legislative and judicial branches, and vigorous oversight by Congress." 126 Cong. Rec. 28617 (1980). Rep. Kastenmeier was the sponsor and principal drafter of the compromise bill.

⁸⁰ See National Commission Report, *supra* note 74.

⁸¹ See Barr & Willging, *supra* note 77; Richard Marcus, *Who Should Discipline Federal Judges, and How?* 149 F.R.D. 375 (1993).

⁸² 2001 House Misconduct Hearing, *supra* note 16.

⁸³ The legislation was enacted as part of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273. The standalone version was passed by the House in July 2002 as H.R. 3892. For the legislative history, see H.R. Rep. 107-459 (2002).

primarily by codifying some of the procedures adopted by the judiciary through rulemaking. The new law also gave the judicial misconduct provisions their own chapter in the United States Code, Chapter 16.

Congress returned to the subject of judicial misconduct in 2006. Chairman James Sensenbrenner of the House Judiciary Committee introduced legislation to create an Inspector General for the Judicial Branch.⁸⁴ The primary task of the new Office would have been to “conduct investigations of ... possible misconduct in office of judges ... that may require oversight or other action within the Judicial Branch or by Congress.”⁸⁵ A hearing was held on the bill, and an amended version was approved by the House Judiciary Committee, but the legislation died with the 109th Congress.⁸⁶

In addition to evaluating and revising the laws governing judicial misconduct, Congress has continued to perform its constitutional role of considering impeachment of judges who are alleged to have committed “high crimes or misdemeanors.” In the late 1980s, three federal judges were impeached and removed from office – Judge Harry E. Claiborne of Nevada (1986), Judge

⁸⁴ H.R. 5219, 109th Cong. (2006). Chairman Sensenbrenner had been thinking about the subject for more than two years. For example, in remarks to the Judicial Conference of the United States in 2004, he raised the question “whether the disciplinary authority delegated to the Judiciary has been responsibly exercised and ought to continue.” Sensenbrenner Remarks Before the U.S. Judicial Conference Regarding Congressional Oversight Responsibility of the Judiciary (Mar. 17, 2004) (on file with the author). He referred to the “decidedly mixed record” of the judiciary in investigating and imposing appropriate discipline for misconduct.

⁸⁵ H.R. 5219, § 2. See *Judicial Transparency and Ethics Enhancement Act of 2006: Hearing on H.R. 5219 Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary* (2006) [hereinafter 2006 Judicial Transparency Hearing]. Senator Chuck Grassley introduced a companion measure in the Senate. S. 2678, 109th Cong. (2006). No hearings were held on that bill.

⁸⁶ A new bill has been introduced in the 110th Congress, along with a companion Senate measure. See H.R. 785, 110th Cong. (2007); S. 461, 110th Cong. (2007).

Alcee L. Hastings of Florida (1989), and Judge Walter L. Nixon of Mississippi (also 1989). All had engaged in conduct that involved criminality or corruption.⁸⁷ In 1993, the Chairman of the House Judiciary Committee, Jack Brooks (D. Tex.), took steps to initiate impeachment proceedings against District Judge Robert F. Collins, who had been convicted of bribery and obstruction of justice.⁸⁸ Before a hearing could be held, the judge resigned from the bench.⁸⁹ As already noted, in 2006 a resolution of impeachment was introduced against District Judge Manuel L. Real. A hearing was held, but the proceedings went no further, in part because a new inquiry was moving forward within the judicial branch.⁹⁰

The judiciary too has taken steps to fill in the contours of the misconduct legislation. In 1986 a committee of chief circuit judges prepared a set of Illustrative Rules Governing Judicial Misconduct and Disability. These Rules, accompanied by an extensive commentary, addressed many procedural and substantive issues that were not resolved by the statute itself. A revised set of Illustrative Rules was promulgated by the Administrative Office of United States

⁸⁷ See Real Impeachment Hearing, *supra* note 2, at 123 (statement of Professor Arthur D. Hellman). For a detailed account, see Van Tassel & Finkelman, *supra* note 73.

⁸⁸ See *United States v. Collins*, 972 F.2d 1385 (5th Cir. 1992). The impeachment resolution was H. Res. 207, 103d Cong. (1993). Judge Collins was the subject of the Supreme Court decision in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), discussed *supra* Part I-B.

⁸⁹ Mary Jacoby, *Judge Resigns and Kills Impeachment Hearings*, Roll Call, Aug. 12, 1993 (available on NEXIS, News library). An impeachment resolution was also introduced against Judge Robert P. Aguilar after he was convicted of endeavoring to obstruct justice and illegally disclosing a wiretap application. H. Res. 177, 103d Cong. (1993) (Rep. Sensenbrenner). Both convictions were ultimately overturned on appeal, but Judge Aguilar resigned from the bench in exchange for the Government's agreement not to pursue the prosecution further. See Eric Slater, *U.S. Drops Case Against Judge, Who Resigns*, L.A. Times, June 25, 1996, at A3 (available on NEXIS, News library).

⁹⁰ See *infra* note 174 and accompanying text.

Courts in 2000.⁹¹ Most of the circuits have adopted rules based on the Illustrative Rules.

Perhaps more important than the procedural details in the Rules is the philosophy that the document articulates. The commentary to Rule 1 states that the purpose of the 1980 law “is essentially forward-looking and not punitive. The emphasis is on correction of conditions that interfere with the proper administration of justice in the courts.”⁹² This is not necessarily the impression that one would get from the legislative history of the Act.⁹³ But the Illustrative Rules’ rejection of a “punitive” purpose has been widely influential in the administration of the misconduct statutes.⁹⁴

In 2004, Chief Justice William H. Rehnquist appointed a committee chaired by Justice Stephen Breyer to assess how the Judicial Branch has administered the 1980 Act and whether “there are any real problems” in its implementation. The Breyer Committee issued a lengthy and detailed public report in September 2006.⁹⁵ The committee’s findings will be summarized later in this article.

⁹¹ Administrative Office of the United States Courts, *Illustrative Rules Governing Complaints of Judicial Misconduct and Disability* (2000) [hereinafter *Illustrative Rules*].

⁹² *Id.* at 2.

⁹³ To be sure, there was support for the Illustrative Rules’ approach. For example, key players in both the House and the Senate quoted an American Bar Association report stating that “[t]he major purpose of judicial discipline is not to punish judges” See 126 Cong. Rec. 28091 (Sen. DeConcini); *id.* at 25370 (Rep. Railsback). But at least in the Senate, much attention focused on devising an alternative to impeachment as a means of disciplining judges who engage in misconduct. This may be forward-looking, but it is also punitive.

⁹⁴ For example, the Ninth Circuit Judicial Council emphasized the language quoted in the text when it endorsed the dismissal of a complaint against Judge Real alleging the same misconduct that was the subject of the impeachment hearing. See *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1182 (Judicial Council of Ninth Circuit 2005).

⁹⁵ *Judicial Conduct and Disability Act Study Committee, Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice*, 239 F.R.D. 116 (2006) [hereinafter *Breyer Committee Report*].

In July 2007, the Judicial Conference of the United States published a draft of a new set of “Rules Governing Judicial Conduct and Disability Proceedings Undertaken Pursuant to 28 U.S.C. §§ 351-364.”⁹⁶ The primary thrust of the proposed rules is to implement the Breyer Committee’s recommendations. The Judicial Conference invited comments on the draft and scheduled a public hearing in September 2007. When promulgated in their final form, the new rules will govern all proceedings under the Act.

A striking feature of the post-1980 history is the central role of the House Judiciary Committee and its leadership. The 1990 amendments originated with that Committee, as did the amendments in 2002. A request from two key Committee members in 2002 prompted the Federal Judicial Center to carry out a valuable supplementary study of how the Act was being implemented.⁹⁷ Chief Justice Rehnquist appointed the Breyer Committee in response to criticism by Chairman Sensenbrenner about the handling of several complaints against judges.⁹⁸

B. What constitutes “misconduct”?

Chapter 16 of the Judicial Code delineates the procedures for dealing with possible misconduct by federal judges.⁹⁹ The definition of misconduct in § 351(a)

⁹⁶ http://www.uscourts.gov/library/judicialmisconduct/Rules_DraftPublicComment.pdf [hereinafter Proposed Misconduct Rules].

⁹⁷ See Jeffrey N. Barr & Thomas E. Willging, Statement of Allegations and Reasons in Chief Judge Dismissal Orders Under the Judicial Conduct and Disability Act of 1980 (Federal Judicial Center 2002).

⁹⁸ The committee was appointed in May 2004, just two months after Chairman Sensenbrenner, at a meeting presided over by the Chief Justice, pointedly commented on the “decidedly mixed record” of the judiciary in administering the 1980 Act. See *supra* note 84.

⁹⁹ The procedures in Chapter 16 also provide the channel for raising concerns about mental or physical disability on the part of a judge. That aspect of the statutory scheme is outside the scope of this article, but two points deserve brief mention. First, the Breyer Committee found that

is as open-ended as it is terse: “conduct prejudicial to the effective and expeditious administration of the business of the courts.” In practice, however, the vagueness of the statutory language is mitigated in two ways.

First, Chapter 16 itself contains a significant limitation on the potential scope of the statute’s application. Section 352(b)(1) authorizes the chief judge to dismiss complaints that are “directly related to the merits of a decision or procedural ruling.” The purpose of this limitation, as the Breyer Committee has explained, is “to protect the independence of the judge in the course of deciding Article III cases and controversies.”¹⁰⁰ Circuit web sites typically underscore the point by warning would-be complainants that misconduct “does not include making wrong decisions – even very wrong decisions – in cases.”¹⁰¹ The courts add, by way of further emphasis:

The complaint procedure is not intended to provide a means of obtaining review of a judge’s decision or ruling in a case. The judicial council of the circuit, the body that takes action under the complaint procedure, does not have the power to change a decision or ruling; only a court can do that.¹⁰²

“Merits-related,” in this context, includes a judge’s failure to recuse. On this point, too, court web sites are explicit: “The complaint procedure may not be used to have a judge disqualified from sitting on a particular case. A motion for disqualification should be made in the case.”¹⁰³

almost all complaints filed under Chapter 16 allege misconduct rather than disability. Second, some of the confidentiality provisions in the statute may be more appropriate for dealing with disability than with misconduct.

¹⁰⁰ Breyer Committee Report, *supra* note 95, at [FRD] 239.

¹⁰¹ 9th Cir. Misconduct Rule 1(c).

¹⁰² *Id.* Rule 1(f).

¹⁰³ *Id.*

Notwithstanding these repeated admonitions, complainants continue to invoke the Act to challenge rulings in particular cases. Indeed, complaints of this kind account for a very substantial portion of the total number of complaints filed each year. They are typically filed by prisoners and other pro se litigants, and they are dismissed in accordance with the statute. In 2006, for example, about three-quarters of the complaints concluded by chief judges were dismissed as “directly related to the merits of a decision or procedural ruling.”¹⁰⁴

At the same time, it is important to emphasize that the “merits-related” exclusion does not cut as deeply into the statute’s coverage as one might expect. As the Breyer Committee has explained, an allegation is merits-related only if it does no more than call into question “the *correctness* of an official action of a judge.”¹⁰⁵ If the complaint alleges that judge’s action was the product of an illicit motive or a conspiracy or some other external circumstance, it is not merits-related for purposes of the statute.¹⁰⁶

A further complication is the relationship between the “merits-related” exclusion and the processes of appellate review. Most merits-related complaints are subject to correction on appeal, but the availability – or unavailability – of an appellate remedy is irrelevant to whether the complaint is cognizable under Chapter 16.¹⁰⁷ If a complaint challenges the correctness of a judge’s ruling, it must be dismissed even if the complainant has no appellate remedy. Conversely, if an

¹⁰⁴ 2006 Judicial Business of the United States Courts, tbl. S-22. For further discussion, see *infra* Part II-D.

¹⁰⁵ Breyer Committee Report, *supra* note 95, at [FRD] 239 (emphasis added).

¹⁰⁶ The Breyer Committee Report and the July draft of the National Rules contain excellent discussions of this point.

¹⁰⁷ See Breyer Committee Report, *supra* note 95, at [FRD] 240.

allegation is otherwise cognizable, it should not be dismissed merely because it involves a ruling that has been vacated on appeal.

The merits-related exclusion serves an important role in defining what does not constitute cognizable misconduct under the Act, but it does not help to identify judicial behavior that does fall within Chapter 16's scope. For that, the judges who administer the Act must look elsewhere. And they do – to the Code of Conduct for United States Judges.¹⁰⁸ The Code, promulgated by the Judicial Conference of the United States, consists of seven “canons,” most of which have numerous subparts. The canons and the accompanying commentary provide detailed guidance for the conduct of judges both on and off the bench.¹⁰⁹

The judiciary has emphasized that violation of the Code, of itself, does not necessarily constitute misconduct under the Act.¹¹⁰ Nevertheless, in administering the Act, the judges have repeatedly looked to the Code for guidance in determining whether misconduct has occurred. Here, by way of example, are some of the Code provisions that have been invoked by chief judges and circuit councils in considering complaints under the Act:

- Canon 2B: “A judge should not lend the prestige of the judicial office to advance the private interests of others...”¹¹¹

¹⁰⁸ The current version of the Code can be found at <http://www.uscourts.gov/guide/vol2/ch1.html>.

¹⁰⁹ In addition to the Code and commentary, the United States Judicial Conference Committee on Codes of Conduct has issued a collection of advisory opinions that interpret and apply the canons. Links to some of the opinions can be found at <http://www.uscourts.gov/guide/advisoryopinions.htm>.

¹¹⁰ See, e.g., *In re Charge of Judicial Misconduct*, 91 F.3d 1416, 1417 (Judicial Council of the 10th Circuit 1996) (Seymour, C.J.). The Code itself makes clear that disciplinary action is not necessarily appropriate “for every violation of its provisions.”

¹¹¹ See, e.g., *In re Complaint No. 329* (Judicial Council of the 1st Cir. 2002) (Boudin, C.J.) (on file with the author). This complaint involved District Judge Edward Harrington. For discussion see *infra* Part II-F-6.

- Canon 3A(3): “A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity...”¹¹²
- Canon 3A(4): “[Except as authorized by law, a judge should] neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding.”¹¹³
- Canon 5B: “A judge may serve as [a director] of an educational [or other] organization not conducted for the economic or political advantage of its members, [but not] if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court.”¹¹⁴
- Canon 7A(2): “A judge should not ... publicly endorse or oppose a candidate for public office.”¹¹⁵
- Canon 7A(3): “A judge should not ... solicit funds for or pay an assessment or make a contribution to a political organization or candidate ...”¹¹⁶

¹¹² See, e.g., In re Complaint of Judicial Misconduct, No. 99-6-372-48 (Judicial Council of the 6th Cir. 2001) (on file with the author). This complaint involved District Judge Jon P. McCalla. For discussion see *infra* Part II-F-6.

¹¹³ See, e.g., In re Complaint of Judicial Misconduct, No. 05-89097 (Judicial Council of the 9th Cir. 2006) (Report of the Special Committee) (on file with the author). This order – which at this writing has not been officially made public – involved District Judge Manuel Real. For discussion see *infra* Part II-F-5.

¹¹⁴ See, e.g., In re Complaint of Judicial Misconduct, No. 04-6-351-17 (Judicial Council of the 6th Cir. 2005) (Loken, Acting C.J.) (on file with the author). This order involved Chief Judge Danny Boggs of the Sixth Circuit.

¹¹⁵ See, e.g., In re Charges of Judicial Misconduct, 404 F.3d 688 (Judicial Council of the 2d Cir. 2005). This proceeding involved Judge Guido Calabresi of the Second Circuit Court of Appeals.

¹¹⁶ See, e.g., In re Complaint of Judicial Misconduct, No. 07-6-351-01 (Judicial Council of the 6th Cir. 2007) (Boggs, C.J.) (on file with the author). This complaint involved Judge Deborah L. Cook of the Sixth Circuit. For discussion, see *infra* Part II-F-2.

C. Procedures under Chapter 16

Ordinarily, the process under Chapter 16 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.¹¹⁷ The clerk must “promptly transmit” the complaint to the chief judge of the circuit. The chief judge, after “expeditiously reviewing” the complaint, has three options. He or she can: (a) dismiss the complaint; (b) “conclude the proceeding” if he or she finds that “appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events;” or (c) appoint a special committee to investigate the allegations.

From a procedural perspective, options (a) and (b) are treated identically. The statute can thus be viewed as establishing a two-track system for the handling of complaints against judges. Track One is the “chief judge track;” Track Two is the “special committee track.”¹¹⁸

If the chief judge dismisses the complaint or terminates the proceeding, a dissatisfied complainant may seek review of the decision by filing a petition addressed to the judicial council of the circuit. The judicial council may order further proceedings, or it may deny review. If the judicial council denies review, that is ordinarily the end of the matter; in Track One cases, the statute provides that there is no further review “on appeal or otherwise.”¹¹⁹ However, the Judicial

¹¹⁷ For discussion of this aspect of the statutory scheme, see *infra* Part II-F-1.

¹¹⁸ More precisely, Track Two is the “chief judge/special committee track.” For ease of reference I will use the shorter label.

¹¹⁹ In the misconduct proceedings involving Judge Real, the Judicial Council of the Ninth Circuit “affirmed” the order of the Chief Judge dismissing a complaint. *In re Complaint of*

Conference of the United States may have authority to require further proceedings even when the chief judge and the circuit council have declined to do so.¹²⁰

If the chief judge does not dismiss the complaint or terminate the proceeding, he or she must promptly appoint a “special committee” to “investigate the facts and allegations contained in the complaint.” A special committee is composed of the chief judge and equal numbers of circuit and district judges of the circuit. Special committees have power to issue subpoenas; sometimes they hire private counsel to assist in their inquiries.¹²¹

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. The circuit council then has a variety of options: it may conduct its own investigation; it may dismiss the complaint; or it may take action including the imposition of sanctions.

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 can file a petition for review by the Conference; in addition, the circuit council can refer serious matters to the Conference on its own motion. If the Conference determines that “consideration of impeachment may be warranted,” it may so certify to the House of Representatives.

Judicial Misconduct, 425 F.3d 1179 (Judicial Council of Ninth Circuit 2005). This was technically incorrect. The statute says: “The *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.” (Emphasis added.) The implication is that if the Judicial Council finds the appeal to be without merit, it should deny the petition for review, not affirm.

¹²⁰ See *infra* Part II-F-4.

¹²¹ For example, when the Chief Judge of the Ninth Circuit belatedly appointed a special committee to investigate the allegations against Judge Manuel Real, the special committee retained a prominent San Francisco lawyer as its counsel.

Congress has authorized the Conference to delegate its review power to a standing committee, and the Conference has done so.¹²² Until 2007, the committee was known as the Committee to Review Circuit Council Conduct and Disability Orders. The name was changed in 2007; it is now the Committee on Judicial Conduct and Disability.

D. Implementation of Chapter 16: the statistics

Each year, the Director of the Administrative Office of United States Courts (AO) includes in the AO's annual statistical report a tabulation, based on data submitted by the various circuits, of the number of complaints filed and concluded during the preceding year.¹²³ In addition, the Breyer Committee carried out its own analysis of the raw data submitted to the AO for the years 2001-2005. That analysis, along with data in the AO reports for earlier years, gives us a good picture of how the statutory procedures have been implemented by the judiciary.¹²⁴

The number of complaints filed against judges each year ranges from 600 to 800. In the five years studied by the Breyer Committee, 2001-2005, the total was 3,670. (For reasons that are not clear, there was a “spike” in 1998, when the total exceeded 1,000.) The overwhelming majority of the complaints – more than 95% – are dismissed by the chief judge. In a majority of the dismissals, the chief judge relies on the provision of the statute that authorizes dismissal of complaints that

¹²² See 28 USC § 331; *In re Complaint of Judicial Misconduct*, 37 F.3d 1511 (U.S. Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders 1994).

¹²³ This information is compiled and published pursuant to an explicit Congressional mandate. See 28 USC § 604(h)(2) (originally enacted as part of the 1980 Act).

¹²⁴ The Breyer Committee found some errors in the data submitted by the circuits to the AO. The Committee expressed particular concern about “the apparent underreporting of matters not dismissed by the chief judge.” Breyer Committee Report, *supra* note 95, at 30.

are “directly related to the merits of a decision or procedural ruling.”¹²⁵ Another common reason for dismissal is that the complaint is “frivolous.”¹²⁶ (Many chief judge orders give more than one reason, with “frivolous” and “merits-related” frequently paired.) About half of the complainants ask the circuit council to review the dismissals, but almost none succeed; the Breyer Committee found only one instance in which the circuit council directed the chief judge to appoint a special committee.¹²⁷

¹²⁵ See *supra* Part II-B. Most of the orders dismissing complaints as “directly related to the merits of a decision” are brief and formulaic. One that is not is *In re Complaint of Judicial Misconduct*, J.C. No. 99-50 (Judicial Council of the 3d Cir. 2000) (Becker, C.J.) (on file with the author). The misconduct order does not identify the underlying case or the judge who was the target of the complaint, but a later opinion confirms that the case was *Lambert v. Blackwell*, 962 F. Supp. 1521 (E.D. Pa.), *rev’d*, 134 F.3d 506 (3d Cir. 1997), and the target was District Judge Stewart Dalzell. As Chief Judge Becker explained, the complaint was filed by “the parents of a young woman who was brutally murdered.” The woman convicted of the murder filed a habeas corpus petition, and the case was assigned to Judge Dalzell. After extended proceedings, Judge Dalzell not only agreed that the defendant’s constitutional rights had been violated; he ordered that she be released and “and that she should not be retried.” 962 F. Supp. at 1523. (That decision was reversed on appeal.) The judicial misconduct complaint alleged that Judge Dalzell “ignored the law,” “undermined our justice system,” and “severely damaged the lives and reputations of many dedicated and honest people.” Chief Judge Becker “studied the record in the underlying case with great care.” He found that Judge Dalzell had used language in his opinion that was “excessive,” “hyperbolic,” and even “intemperate.” But he concluded that “the offending language was merely part of ‘the decision making process’” and thus “directly related to the merits of” the judge’s decisions. He dismissed the complaint. The habeas proceedings continued in the district court, but Judge Dalzell ultimately recused himself from the case. See *Lambert v. Blackwell*, 205 F.R.D. 180 (E.D. Pa. 2002). The case was reassigned to another judge, who found that habeas relief was not warranted. The Third Circuit affirmed. *Lambert v. Blackwell*, 387 F.3d 210 (3d Cir. 2004).

¹²⁶ “Frivolous” complaints include those that are “lacking sufficient evidence to raise an inference that misconduct has occurred [or] containing allegations which are incapable of being established through investigation.” See Breyer Committee Report, *supra* note 95, at 28. Technically, the statute treats the latter two grounds as separate from frivolousness. See 28 U.S.C. §352(b)(1)(A)(iii).

¹²⁷ See Breyer Committee Report, *supra* note 95, at 30. As the Committee notes, this action was not reported by the circuit council to the Administrative Office. Based on the AO report, one would have concluded that review of dismissals was denied in *every* case in which it was sought. For a description of the complaint and its handling, see *id.* at 71-72; *Washington Post*, Feb. 27,

Disposition other than dismissal is rare. In about 1% of the cases, the chief judge concludes the proceeding on the ground that appropriate corrective action has been taken or that, because of intervening events, action is no longer necessary. Appointment of a special committee is even rarer. The Breyer Committee found that in the five years 2001-2005, chief judges appointed only nine special committees “to investigate 15 complaints filed against nine judges.”¹²⁸ On the basis of the reports filed by the special committees, the circuit councils dismissed six complaints against five judges. There were only four instances in which discipline was imposed by a circuit council. Two judges were publicly censured (in proceedings involving seven complaints), and one judge was censured privately. “Other discipline” was imposed in the fourth case, but the case file is sealed, and no information is available about the nature of the misconduct.

E. Evaluation of the Act’s implementation

The numbers are stark: in the five years 2001-2005, more than 3,500 complaints were filed against federal judges, but only 15 led to the appointment of a special committee, and sanctions were imposed on only four judges. Based on this record, it is natural to ask: are the chief judges and the circuit councils doing the job that Congress expected them to do? Can litigants and citizens rely on the judiciary to deal effectively with misconduct in its ranks? Two thorough and well-documented studies address those questions.

The first study was the one conducted by Jeffrey Barr and Thomas Willging for the National Commission on Judicial Discipline and Removal. The results of

2001, at A21 (available on NEXIS, NEWS library). The special committee and the circuit council ultimately found no misconduct.

¹²⁸ Breyer Committee Report, *supra* note 95, at 29.

that research are reassuring. For example, in a field study that examined a sample of 469 complaints, the authors found only 12 “problem dispositions.”¹²⁹

More recently, the Breyer Committee undertook its own study using a “research plan” that enabled it “to examine both (1) the vast bulk of complaints that receive little or no public notice, and (2) the very few ‘high-visibility’ complaints.” Justice Breyer and his colleagues reached two major conclusions. They found that “chief circuit judges and judicial councils are doing a very good overall job in handling complaints filed under the Act. The overall rate of problematic dispositions is quite low and has not increased measurably over more than a decade despite steep increases in the number of complaints filed and the overall workload of chief circuit judges.”¹³⁰ But in separately assessing the “high-visibility cases,” the Committee found “mishandling” in 5 out of 17 – an “error rate” that it acknowledged is “far too high.”

In assessing the credibility of the generally positive assessment that emerges from both studies, two other points deserve note. First, before a person becomes a federal judge, he or she will be investigated by the White House, by the FBI, by home-state Senators, by the Senate Judiciary Committee, by the American Bar Association, and by interest groups. Individuals with serious problems of character or temperament are not likely to make it through those many levels of scrutiny. Against that background, it would not be surprising if instances of misbehavior were rare.¹³¹

¹²⁹ Barr & Willging, *supra* note 77, at 79.

¹³⁰ Breyer Committee Report, *supra* note 95, at 107.

¹³¹ Readers of this article might think that “rare” is something of an overstatement, given the numerous instances of misconduct by federal judges that are chronicled in these pages. But the episodes reported here took place over a period of more than a decade. Today there are more than

Second, the data in the two studies do not adequately reflect the informal corrective processes that may take place in the absence of a formal complaint. One of the most important findings of the research carried out for the National Commission is that informal processes often operate very effectively to deal with matters that fall within the potential reach of Chapter 16. The Barr & Willging study quotes comments by two former chief judges that capture the experience in most of the circuits that the authors visited:

“In my experience, the most serious complaints never hit the complaint process.”

“There are more remedial actions taking place outside the complaint process than following formal complaints.”¹³²

A study by Professor Charles Geyh similarly noted how “successful” informal means were.¹³³

At the same time, it is worth emphasizing that the informal mechanisms derive some of their effectiveness from the existence of the formal complaint procedure. As Professor Geyh puts it, “the mere presence of more formal means for remedying judicial misconduct provides an incentive for judges to take seriously the informal suggestions of the chief circuit judge.”¹³⁴ Where the

2,000 federal judges (including active judges, senior judges, magistrate judges, and bankruptcy judges). In that light, I think the characterization “rare” is justified.

¹³² Barr & Willging, *supra* note 77, at 131. The full description in the study provides valuable insights into the operation of informal processes. See *id.* at 131-44.

¹³³ Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. Pa. L. Rev. 243, 311 (1993).

¹³⁴ *Id.* at 283.

misconduct is particularly serious, a judge may be persuaded to retire rather than face the prospect of a formal investigation and possible sanctions under the Act.¹³⁵

Although the Breyer Committee was not charged with studying informal mechanisms, the Committee's interviews made clear the continuing importance of activities outside the complaint process. As one chief judge told the Committee, “[t]he informal aspect is the most valuable part of the Act . . . , the most serious matters were not the subject of a complaint at all.”¹³⁶ The Committee also took note of a confidential counseling program in the Ninth Circuit that may help to “get to the genuine sources of problematic behavior.”¹³⁷

F. Current issues in the administration of Chapter 16

The research conducted by the Breyer Committee and by the National Commission suggests that, overall, the system of decentralized self-regulation of federal judicial ethics has worked well. But no system is perfect, and recent events – as well as the Breyer Committee report – have pointed to several aspects of the Chapter 16 processes that deserve scrutiny. Some of these issues are addressed in the proposed National Rules published by the Judicial Conference in July 2007.

1. Opportunity to file malicious complaints

The complaint that initiated the disciplinary proceedings against Judge Manuel Real was filed by a Los Angeles lawyer named Stephen Yagman. Yagman had no connection with the bankruptcy case that was the subject of the complaint, nor did he have any personal knowledge of the underlying facts. On the contrary,

¹³⁵ Id. at 284; see also Collins T. Fitzpatrick, *Misconduct and Disability of Federal Judges: The Unreported Informal Responses*, 71 *Judicature* 282 (1988) (“Over the last several years, there have been at least nine federal judicial officers who retired after a judicial misconduct complaint was filed or was looming in the background.”)

¹³⁶ Breyer Committee Report, *supra* note 95, at 101.

¹³⁷ Id. at 124. For a description of the program, see *id.* at 104-05.

as his complaint made clear, his allegations were based on his reading of the appellate opinion in the case and “a little district court docket research” motivated by his “curiosity [about] the opinion.”¹³⁸

Most lawyers would not file a complaint against a judge based on their reading of an appellate opinion and information on the public district court docket. Why did Yagman do so? As Judge Real explained at the impeachment hearing, there was a long history of antagonism between the two:

In 1984, I sanctioned Mr. Yagman \$250,000, the amount of the other side’s attorneys’ fees, for his persistent and willful disregard of the federal rules and his outrageous courtroom behavior in a defamation case I was handling. *Matter of Yagman*, 796 F.2d 1165 (9th Cir. 1986). Though the Court of Appeals reversed the sanction portion of my order, Mr. Yagman has had a personal vendetta against me ever since.¹³⁹

But under the current statutory scheme, none of that history makes any difference. “Any person” may file a complaint; motive (good or bad) and knowledge (or lack of it) are irrelevant.

At the House impeachment hearing, one member of the Judiciary Committee expressed concern about this aspect of the statutory arrangement. She noted that there seemed to be “an element of revenge” in the filing of the complaint against Judge Real, and she raised the question whether some limitation might be imposed on “those who [can] bring complaints.”¹⁴⁰

The concern is understandable, but it is not sufficient to justify a change in the law. Congress made a very considered and conscious decision in 1980 to let “[a]ny person” file a complaint. Congress made that choice because it thought that

¹³⁸ See supra note 3.

¹³⁹ Real Impeachment Hearing, supra note 2, at 15-16 (statement of Hon. Manuel L. Real).

¹⁴⁰ Id. at 155 (remarks of Rep. Waters).

if the process was available only to insiders or people with personal knowledge, some misconduct would never come to light. The consequence is that complaints can be filed solely for revenge or with other malicious motives. But circuit chief judges can and do deal with such abuses by dismissing plainly insubstantial complaints. Moreover, a malicious motive does not necessarily mean that the complaint will be without merit. Yagman’s accusations may well have been the product of a “personal vendetta,” but two months after the House impeachment hearing, the Judicial Council of the Ninth Circuit found that Judge Real had indeed engaged in misconduct, and it ordered a public reprimand.¹⁴¹ The Council would never have investigated the matter if Yagman had not filed the complaint.

2. Under-use of chief judge authority to “identify a complaint”

A noteworthy feature of the misconduct statutes is that § 351(b) permits the chief judge to “identify a complaint” and thus initiate the investigatory process even if no complaint has been filed by a litigant or other citizen. This provision enables a chief judge to take preemptive action to cut short controversy – and also to create a formal public record that will guide and warn judges in the future. The value of this tool can be seen by comparing the responses of two chief judges to similar allegations against judges within their respective circuits.

In 2006 the Center for Investigative Reporting disclosed that two federal judges had made campaign contributions after their appointment to the federal bench.¹⁴² This was a violation of Canon 7(A)(3) of the Code of Conduct for

¹⁴¹ See *infra* Part II-F-5. At this writing the Judicial Council’s decision has not yet been officially released.

¹⁴² Will Evans, Judge Apologizes, http://www.muckraker.org/pg_one_investigation-1258-7-0.html. The account in this article is based on that report and the links at the web site.

United States Judges.¹⁴³ One of the judges was from the Sixth Circuit; the other, from the Ninth. The chief judge of the Sixth Circuit identified a complaint under § 351(b) and issued a formal order concluding the proceeding. The order was accompanied by a detailed memorandum and a letter from the judge acknowledging the misconduct and apologizing for it. The judge – Deborah L. Cook – had previously served as an elected state judge. In her letter, she explained that she had not attended “the New Judges School offered ... shortly after my confirmation” and thus was unaware of the federal rule, “which differs from the strictures on my previous position.”¹⁴⁴

In contrast, the chief judge of the Ninth Circuit “made an inquiry” but did not identify a complaint under Chapter 16. Thus, no formal order was ever issued. Rather, a press spokesman responded to a reporter’s inquiry by saying that the chief judge “accepted [the judge’s] explanation that his wife had made the donations through a joint checking account.”

Superficially, this is not very different from what happened in the Sixth Circuit. But by not identifying and concluding a complaint, the chief judge of the Ninth Circuit missed an opportunity to reinforce not only the norms but also their practical implications. A formal order describing the circumstances that created the impression of misconduct would have served as a warning to other judges to maintain separate checking accounts or otherwise to arrange their financial affairs to avoid violations of the prohibition.¹⁴⁵

¹⁴³ See supra note 116 and accompanying text.

¹⁴⁴ In re Complaint of Judicial Misconduct, No. 07-6-351-01 (Judicial Council of the 6th Cir. 2007) (Boggs, C.J.) (on file with the author).

¹⁴⁵ In fact, the Ninth Circuit district judge’s explanation did not account for all of the circumstances detailed in the investigative report. One donation listed the judge as the donor and

Identifying a complaint can serve a purpose even when it is unlikely that the disposition will assist judges in complying with their ethical obligations. The point is illustrated by a case described in the Breyer Committee report. The controversy grew out of a hearing held by the House Judiciary Committee in July 2002 to consider proposed sentencing legislation. One witness at the hearing was James M. Rosenbaum, Chief District Judge of the District of Minnesota. In October 2002, the Judiciary Committee issued its report on the bill. The report accused Judge Rosenbaum of making multiple misrepresentations in his testimony at the hearing.¹⁴⁶ Sometime later, the Director of the Administrative Office of the U.S. Courts telephoned the chief judge of the Eighth Circuit to inform him that the chief counsel to the Judiciary Committee had suggested that the chief judge review the committee report “with an eye toward instituting judicial misconduct proceedings against” Judge Rosenbaum. The chief judge declined to do so. Instead, he wrote a letter to the AO director explaining that Judge Rosenbaum’s allegedly false testimony could not constitute misconduct under the Act because Judge Rosenbaum was not testifying as “part of his official duties as a United States District Judge.”

This conclusion is at odds with the generally accepted view of the Act’s scope. For example, in 1998 the Judicial Council of the Ninth Circuit publicly reprimanded District Judge James Ware for misrepresentations about his family history that he made in comments to reporters and in public speeches.¹⁴⁷ Although

“federal judge” as his occupation. But the judge’s wife had made other donations in her own name, listing her occupation as “homemaker” or “not employed.”

¹⁴⁶ H.R. Rep. 107-769 (2002). The Report made other accusations against the judge as well, but these were not so clearly within the scope of the Act.

¹⁴⁷ In re Charge of Judicial Misconduct, No. 97-80629 (Judicial Council for the Ninth Circuit, Aug. 7, 1998) (hereinafter Ware Misconduct Order) (on file with the author). Judge Ware

these falsehoods were much further removed from official duties than Judge Rosenbaum’s testimony at the House Judiciary Committee hearing, the Ninth Circuit Council had no doubt that the judge’s conduct fell within the Act.¹⁴⁸ Yet even if the Eighth Circuit Chief Judge’s assessment was correct, he showed poor judgment in declining to initiate the formal process under the Act. As the Breyer Committee states, in a case with such high visibility, “the better course would have been ... to identify a complaint, undertake whatever limited inquiry was necessary, and dismiss any elements that merited dismissal.”¹⁴⁹

The Breyer Committee report encourages chief judges to make greater use of “their statutory authority to identify complaints when accusations become public.”¹⁵⁰ 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.

The proposed National Rules would implement the Breyer Committee’s recommendation. Under the draft rules, if a chief judge obtains “information from any source” that gives “reasonable grounds to inquire into possible misconduct” by a judge, the chief judge “*must* identify a complaint and, by written order stating

falsely stated that his brother had been shot dead in Alabama in 1963 in a racially motivated murder. The victim of the crime had a brother named James Ware, but that was not the judge.

¹⁴⁸ As the special committee said in the report adopted by the Circuit Council, “The misrepresentations reflect negatively not only on Judge Ware’s integrity but quite possibly have had a regrettable effect on public confidence in the judiciary.”

¹⁴⁹ Breyer Committee Report, *supra* note 95, at 87. In the Ware matter, the complaint was identified by the chief judge, “prompted by a number of events that were reported widely in the media.” Ware Misconduct Order, *supra* note 147.

¹⁵⁰ Breyer Committee Report, *supra* note 95, at 110.

the reasons,” initiate the review process under Chapter 16.¹⁵¹ This language makes clear that the threshold for identifying a complaint is very low, and that doubts should be resolved in favor of instituting formal proceedings under the Act. For the reasons already given, the proposed approach is a good one and should be adopted (subject to fine-tuning in matters of detail) by the Judicial Conference.

3. Failure of chief judges to appoint special committees

As amended in 2002, the misconduct statute draws a clear line between the “chief judge track” and the “special committee track.” The statute provides: “The chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute.”¹⁵² If the facts are “reasonably in dispute,” a special committee must be appointed to carry out the investigation. But experience reveals that, too often, chief judges have dismissed complaints or concluded proceedings notwithstanding genuine disputes over facts or their implications. A recurring theme in the Breyer Committee’s account of “problematic” cases is the failure of a chief judge “to submit clear factual discrepancies to special committees for investigation.”¹⁵³

One example cited by the Breyer Committee is the complaint against Judge Manuel L. Real that later became the subject of the impeachment hearing. As previously noted, the complaint alleged that Judge Real had improperly intervened in a bankruptcy case to help a woman whose probation he was supervising. Chief Judge Mary M. Schroeder of the Ninth Circuit initially dismissed the complaint upon finding that the charges were “unsupported” and also that the complaint was

¹⁵¹ See Proposed National Rules, *supra* note 96, at 3, 8 (Rule 3(a)(2) and Rule 5(a)(1)).

¹⁵² 28 USC § 352(a). This language was not new; it was taken almost verbatim from the 2000 edition of the Illustrative Rules.

¹⁵³ Breyer Committee Report, *supra* note 95, at 97.

“directly related to the merits of” the bankruptcy case.¹⁵⁴ The Circuit Council vacated the dismissal order and remanded for further proceedings; the Chief Judge then dismissed the complaint again, this time on the grounds that the factual allegations were “not reasonably in dispute” and that Judge Real’s assumption of jurisdiction over the bankruptcy case had a “legitimate basis.” That ruling was affirmed by the Circuit Council, but on the basis that “appropriate corrective action has been taken.”¹⁵⁵

As the Breyer Committee stated, both the Chief Judge and the Circuit Council departed from the requirements of Chapter 16.¹⁵⁶ The Chief Judge improperly engaged in fact-finding, and the Circuit Council went astray in finding that corrective action had been taken. Moreover, the chief judge’s error was compounded by the action of the circuit council in its review of the first order dismissing the complaint. It is plain from the council’s memorandum that it believed that there were factual issues that remained unresolved.¹⁵⁷ But instead of directing the chief judge to appoint a special committee, the council undertook its own investigation.¹⁵⁸

¹⁵⁴ The order was never published officially, but it is included in the record of the impeachment hearing. See Real Impeachment Hearing, *supra* note 2, at 38.

¹⁵⁵ *In re Complaint of Judicial Misconduct*, 425 F.3d 1179 (Judicial Council of the Ninth Circuit 2005).

¹⁵⁶ The misconduct complaint itself may have contributed to this mishandling. The complaint described the debtor as “comely” and said “it appears that Judge Real acted inappropriately to benefit an attractive female whom he oddly had placed on probation to himself.” See Real Impeachment Hearing, *supra* note 2, at 33, 35. The unsubstantiated insinuation of sexual impropriety may well have led the judges to treat the allegations of abuse of power less seriously than they would have done if the complaint had been limited to the latter.

¹⁵⁷ See *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1199-2101 (Judicial Council of Ninth Circuit 2005) (reprinting order of Dec. 18, 2003).

¹⁵⁸ The Breyer Committee found numerous faults in the handling of the complaint against Judge Real. See Breyer Committee Report, *supra* note 95, at 80-85. The report states: “The chief

The Breyer Committee also cited a case from the Sixth Circuit that in some respects is even more troublesome. The case involved the legal challenge to the University of Michigan law school affirmative action plan that ultimately went to the United States Supreme Court.¹⁵⁹ The complaint alleged that the circuit chief judge manipulated the court's procedures for en banc hearing in order to preclude participation by two circuit judges who might have been expected to oppose the chief judge's position. Obviously the chief judge was recused from considering the complaint, so the matter was dealt with by an acting chief judge. The acting chief judge "found adverse facts to be undisputed and said those facts created an 'inference of misconduct.'"¹⁶⁰ But she did not ask the accused judge if he disputed the facts – as indeed he did.¹⁶¹ Instead, she concluded the proceedings based on corrective action and intervening events.¹⁶² The result, as the Breyer Committee said, "was a finding of misconduct and a public reprimand without a hearing."¹⁶³

In these and other cases, the chief judges appear to have misapprehended the import of the statutory language – and also the structure of the system established by Congress. The standard for appointing a special committee is not a stringent one. Any genuine dispute over facts – whether small or large – requires that the complaint be placed on the special committee track.

judge and judicial council actions are inconsistent with our Standards in respect to the chief judge's fact finding and the council's finding of corrective action." *Id.* at 83.

¹⁵⁹ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹⁶⁰ Breyer Committee Report, *supra* note 95, at [FRD] 181.

¹⁶¹ "In fact, the subject judge's petition for council review of the [acting] chief judge's order disputed all four sets of facts that the order declared 'undisputed.'" Breyer Committee Report, *supra* note 95, at 76.

¹⁶² *In re Complaint of Judicial Misconduct No. 03-6-372-07* (Judicial Council of the 6th Cir. 2003) (Batchelder, Acting C.J.) (on file with the author).

¹⁶³ Breyer Committee Report, *supra* note 95, at [FRD] 181.

At the same time, it is worth emphasizing that special committee procedures need not be elaborate. If the factual issues are simple, the committee can proceed quickly, without hiring outside counsel. But the more formal procedure will provide reassurance that the facts have been developed and that dismissal of the complaint – if that is the result – is justified.

The proposed National Rules are consistent with the approach suggested here, although the rules themselves may not sufficiently emphasize the narrow scope of the “limited inquiry” that the chief judge may undertake. The commentary states that a matter is *not* “reasonably” in dispute – and thus may be resolved by the chief judge – “if a limited inquiry shows the allegations to lack any factual foundation or to be conclusively refuted by objective evidence.”¹⁶⁴ The implication is that if the allegations have *some* factual foundation, or if objective evidence leaves *some* room for crediting them, a special committee must be appointed. It would be better to make this standard explicit.

4. Limited powers of the Judicial Conference review committee

After the Ninth Circuit Judicial Council affirmed the dismissal of the complaint against Judge Real, attorney-complainant Stephen Yagman asked the Judicial Conference of the United States to review the Council’s action. The Conference referred the matter to its Committee to Review Circuit Council Conduct and Disability Orders (later renamed the Committee on Conduct and Disability).¹⁶⁵ By a 3-to-2 vote, the Committee found that it had no jurisdiction “to

¹⁶⁴ Proposed Misconduct Rules, *supra* note 96, at 16.

¹⁶⁵ For accuracy as well as symmetry, the committee should really be named the Committee on *Misconduct* and Disability. In the remainder of this subsection, I shall use the shorthand “Conduct Committee.”

address the substance of the complaint.”¹⁶⁶ The majority explained: “[T]he statute gives the Committee no explicit authority to review the Judicial Council’s order affirming the chief judge’s dismissal of the complaint. We believe it inappropriate to find that we have implicit authority.”¹⁶⁷ The panel also noted the language of 28 USC § 352(c): “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.”

Two committee members, dissenting, objected that the majority’s holding “means that chief circuit judges and circuit judicial councils are free to disregard statutory requirements. In fact, by disregarding those requirements, they may escape review of their decisions.” The dissent described in some detail the factual issues left unresolved by the proceedings in the Ninth Circuit. It added: “The absence of a special committee has left the record in this matter something of a black box.” Implicitly, the dissent was saying that the circuit council had undertaken to perform the investigative functions of the special committee – but without the procedural protections and appellate rights that are part of that track.

Apparently perturbed by this result, the Executive Committee of the Judicial Conference asked the Conduct Committee to consider “possible legislative or other action to address the jurisdictional problem” that the opinions in the Real matter had identified. The Conduct Committee did so at its meeting in January 2007. By that time, the Committee membership had changed. The reconstituted Committee concluded that in Track One cases the Judicial Conference does have

¹⁶⁶ In re Opinion of Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, 449 F.3d 106, 108 (Judicial Conference of the U.S. 2006).

¹⁶⁷ *Id.* at 109.

the authority to determine “whether a particular misconduct complaint requires the appointment of a special investigating committee.”¹⁶⁸ The Committee urged the Judicial Conference to “take action to explicitly authorize the Committee” to exercise this authority. Under the Committee’s proposal, review would be mandatory “if any member of a judicial council expressly requests such review” or argues in dissent that appointment of a special committee is warranted. In other cases, review would be available “at the discretion of the Committee.”

The Judicial Conference considered the Committee recommendations at its March 2007 meeting. It asked the Committee “to prepare for Conference consideration” rules that would implement the Committee’s recommendations. The Committee did so, and the July 2007 draft rules include provisions for review along the lines of the January 2007 proposal.

In support of its conclusion that the Judicial Conference has a power of review even when no special committee has been appointed in the circuit, the Conduct Committee relied on two provisions of Title 28. First, the Committee cited 28 USC § 331, the statute that defines the powers of the Judicial Conference. One sentence in the statute authorizes the Judicial Conference to “prescribe and modify rules for the exercise of the authority provided in chapter 16.” The Committee also relied on 28 USC § 358(a). That section empowers the Conference to “prescribe such rules for the conduct of proceedings under [Chapter 16], including the processing of petitions for review, as [it] considers to be appropriate.”

¹⁶⁸ Report of the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders at 4 (2007) (on file with the author).

The Conduct Committee did not explain how its recommendation could be reconciled with the seemingly explicit prohibition in 28 USC § 352(c), quoted earlier: “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.” Perhaps the most plausible explanation is that the Committee views the proposed exercise of authority as a separate proceeding rather than as a review of the circuit council’s disposition.¹⁶⁹ Under this rationale, if the Judicial Conference (or its Conduct Committee) concludes that the circuit council was wrong in denying review of a chief judge dismissal order, it would not reverse the denial; rather, it would simply direct that a special committee be appointed.¹⁷⁰

Or would it? The Conduct Committee is actually rather circumspect in defining the precise scope of the review power it contemplates. In its report to the Judicial Conference, the Committee repeatedly states that upon adoption of its proposal the Committee would have authority to “examine” whether a misconduct complaint requires the appointment of a special committee. But what would the Committee do if, after examining a complaint, it finds that a special committee should be appointed? The Committee does not say. In particular, it does not say that the Committee would order the appointment. Nor do the proposed rules. The draft Rules provide only that “[i]f the committee determines that a special

¹⁶⁹ Another possibility is that the Committee reads the reference to “judicial[] review[]” in section 352(c) as referring only to case-and-controversy adjudication by judges acting in their judicial capacity. But that rationale would not explain how its proposal allows the Conference to take a second look at a disposition that Congress has said is “final and conclusive.”

¹⁷⁰ The proceeding would thus be analogous to federal habeas corpus as a device for reviewing state criminal convictions. The federal habeas court does not “reverse” the judgment of conviction; it directs the state (typically through the warden) to release the defendant unless a new trial is held within a specified period.

committee should be appointed, the Committee must issue a written decision giving its reasons.”¹⁷¹

Probably the Committee takes the approach it does because it is relying on two provisions of Title 28 that authorize the Judicial Conference to prescribe rules, but not to issue orders. I suspect that the Committee anticipates that a declaration by the Committee would be sufficient to persuade a circuit chief judge or circuit council to reverse course without the need for a formal order designated as such. And probably it would be.

At the hearing on the bill to create an Inspector General for the federal judiciary, I suggested that the proposed new office could serve to fill the “gap” in Chapter 16 that was revealed by the Conduct Committee’s conclusion that it had no jurisdiction over the complaint involving Judge Real. The Conduct Committee has now changed course, and it believes that it can fill the gap within the framework of the existing legislation. The proposed new approach represents sound policy, both in general outline and in the provision for mandatory review if any member of the circuit council requests it. But the preferable way of implementing the suggestion would be through statutory amendment. The proposed rule appears to stretch the language of Title 28, with the purpose of allowing the reopening of disciplinary proceedings that would otherwise have concluded. In that setting, there should be no room for doubt as to the legitimacy of what is being done.¹⁷²

¹⁷¹ Proposed Misconduct Rules, supra note 96, at 34 ((Rule 21(b)(2)).

¹⁷² The commentary in the July draft says only that the proposed rules “are intended to fill a jurisdictional gap as to review of dismissals or conclusions of complaints [within the circuit].” Proposed Misconduct Rules, supra note 96, at 35 (commentary). Nothing in the commentary explains how the review scheme can be reconciled with the language of Chapter 16.

5. Undue bias against 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 of the United States to implement disciplinary action must be made available to the public. But unless the judge who is the subject of the accusation authorizes the disclosure, “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.” The statute is silent on the handling of chief judge orders dismissing a complaint or terminating a proceeding.

The Illustrative Rules fill in some of the statutory gaps, but they too evince a bias against disclosure. The basic rule is that orders and memoranda of the chief judge and the judicial council will be made public only “when final action on the complaint has been taken and is no longer subject to review.”¹⁷³ Moreover, in the ordinary case where the complaint is dismissed, “the publicly available materials will not disclose the name of the judge complained about without his or her consent.”

The consequences of the bias against disclosure can be seen in a later stage of the proceedings involving Judge Real. After the Judicial Conference of the United States determined that it had no power to review the Judicial Council decision affirming the dismissal of the complaint, Chief Judge Mary M. Schroeder appointed a special committee to investigate Judge Real’s conduct.¹⁷⁴ The special

¹⁷³ Illustrative Rules, *supra* note 91, at 52 (Rule 17).

¹⁷⁴ Technically, this order did not direct the special committee to investigate the allegations contained in the original complaint against Judge Real; rather, it initiated an investigation of two

committee carried out a thorough inquiry; it heard testimony from 18 witnesses and reviewed thousands of pages of documents. It found that Judge Real had committed misconduct, and it recommended the sanction of a public reprimand.

On November 16, 2006, the circuit council issued an order adopting the findings and recommendations of the special committee. But the order was not made public at that time. Rather, the order stated that it would be made public “when the order is no longer subject to review, or within 30 days of this order if no petition for review has been filed with the Judicial Conference of the United States.” Judge Real did file a petition for review, and at this writing the petition is still under consideration. As a result, the Judicial Council order has not been disclosed officially.¹⁷⁵ Meanwhile, however, a copy of the order reached reporter Henry Weinstein of the Los Angeles Times, who published an article in December 2006 describing its contents.¹⁷⁶

In withholding immediate disclosure of its order, the Ninth Circuit Judicial Council relied on the Council’s Rule 17, which in turn is based on the Illustrative Rules. The underlying policy is that judges should be protected “from public airing of unfounded charges.” As explained in the Illustrative Rules:

later complaints. But Chief Judge Schroeder stated explicitly that the investigation “should cover all matters reasonably within the scope of the ‘facts and allegations’ of complaint No. 05-89097 including the nature and extent of any ex parte contact with [Judge Real], as well as *any related matters raised by the Judicial Council in its remand to me after my first dismissal of [the initial complaint against Judge Real].*” In re Complaint of Judicial Misconduct, No 04-89030 (Judicial Council of the 9th Cir. 2006) (Schroeder, C.J.) (on file with the author) (emphasis added.)

¹⁷⁵ Some observers anticipated that the Judicial Conference would announce its decision at its semiannual meeting in March 2007. That did not occur. Given the thoroughness of the Special Committee investigation, it remains something of a mystery why the Conduct Committee and the Conference are taking so long to complete the appellate process.

¹⁷⁶ Henry Weinstein, Web error reveals censure of U.S. judge, Los Angeles Times, Dec. 23, 2006.

We believe that it is consistent with the congressional intent to protect a judge from public disclosure of a complaint, both while it is pending and after it has been dismissed if that should be the outcome. ... In view of the legislative interest in protecting a judge from public airing of unfounded charges, ... the 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.¹⁷⁷

This rationale may be persuasive when (for example) a disgruntled litigant or a discharged employee has filed scurrilous – and baseless – accusations against a federal judge, and disclosure would cause injury to the judge without enlightening the public on a matter of public concern.¹⁷⁸ But the current policy makes little sense in the setting of the proceedings against Judge Real. Even if one accepts “the legislative interest in protecting a judge from public airing of unfounded charges,” delaying disclosure of the Judicial Council order did nothing to serve that interest. The allegations had already been the subject of published opinions by the judiciary and a televised hearing in Congress. What is even worse, adherence to the deferred-disclosure rule had the perverse consequence of putting off the day when the public would see the serious and conscientious way in which the judiciary dealt with the accusations.

¹⁷⁷ Illustrative Rules, *supra* note 91, at 54. The authors concede that this is not necessarily the only way of reading the statute: “[P]ublic availability of orders under [28 U.S.C. § 354(a)] is a statutory requirement. The statute does not prescribe the time at which these orders must be made public, and it might be thought implicit that it should be without delay. Similarly, the statute does not state whether the name of the judge must be disclosed, but it could be argued that such disclosure is implicit.”

¹⁷⁸ Even in that circumstance, the non-disclosure policy is debatable. Certainly other public officials do not enjoy protection from “public airing of unfounded charges.” But just as the Supreme Court has recognized that not all speech by government employees about the operation of government offices deserves First Amendment protection, see *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), one can argue that there is no legitimate public interest in learning the identity of a judge who has been the subject of a totally meritless accusation of misconduct.

The bias against disclosure can also be seen in the report of the Breyer Committee. The report analyzes 17 “high-visibility” complaints from the period 2001-2005. For each complaint the report provides a detailed account of the allegations and the procedures followed by chief judges and circuit councils in considering them. But not a single one of the judges is identified. This is so even though the complaints had been selected for the very reason that they had become the subject of discussion in the media or in Congress. Of course these other sources do name the judges. Indeed, the judges’ names are given in several of the orders that the Breyer Committee quotes.

Why then the reticence on the part of the Committee? The Report cites Rule 16(h) of the Illustrative Rules, which calls for “appropriate steps . . . to shield the identities of the judge complained against, the complainant, and witnesses from public disclosure.”¹⁷⁹ But it hardly seems appropriate for the Committee to shield the identity of the judges in its report when the information has already been disclosed publicly elsewhere. And the attempt to preserve the judges’ anonymity exacts a cost. First, other researchers are put to unnecessary labor to carry out follow-up studies or simply to make their own assessment of how the complaints were handled. Second and more important, by withholding the judges’ names, the report reinforces the perception that the judiciary is more concerned with protecting its members than it is with transparency and accountability.

In my view, the policy should be this: When the substance of a pending complaint has become widely known through reports in mainstream media or responsible web sites, there should be a presumption that orders issued by chief judges or circuit councils will be made public as soon as they are issued. In that

¹⁷⁹ Breyer Committee Report, *supra* note 95, at 40 (quoting Illustrative Rules).

circumstance there should also be a presumption that the order will disclose the identity of the judge. And once the information has become part of the official record, the judiciary should not withhold it from later reports or official documents.¹⁸⁰

The proposed National Rules do not adopt this approach. Rather, they embrace the restrictive policy of the Illustrative Rules: 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 is no longer subject to review.”¹⁸¹ There is no exception for situations where the existence of the proceedings has been disclosed, irrespective of the nature or extent of the disclosure. Based on the analysis above, I believe that this approach is short-sighted, and that a more flexible policy would be preferable.

6. Failure to make the process visible

One purpose of the mechanism established by the 1980 Act is, of course, to foster public confidence in the federal judiciary. To that end, the mechanism must be visible. Visibility in this context entails two overlapping elements: the availability of the process must be made known to potential complainants, and the results of the process must be made known to all who are interested in the effective operation of the judicial system.

If there is a single glaring flaw in the administration of Chapter 16, it is the failure of judges at every level to make the process visible. This has been a problem for many years. In 1993, the National Commission reported: “Surveys

¹⁸⁰ The suggestions here are couched in broad terms; obviously, there are many details that could be the subject of debate. If adopting this policy would require amending the statute, Congress should take that course.

¹⁸¹ Proposed Misconduct Rules, *supra* note 96, at 40 (Rule 24(a)).

conducted for the Commission demonstrate both widespread ignorance about the Act in virtually every respondent group and a widely shared perception that some meritorious complaints are never filed.”¹⁸² In 2001, at the House Judiciary hearing on the operation of the misconduct statutes, concerns about lack of visibility again came to the forefront.

Following the 2001 hearing, Chairman Coble and Ranking Member Berman wrote a letter to Chief Justice Rehnquist noting that the statute was “under-publicized.”¹⁸³ They offered two specific suggestions for enhancing visibility. First, the Judicial Conference should require “that every federal court include a prominent link on its web site to the rules and forms for filing complaints ... concerning any judge of that court.” Second, chief judges and circuit councils should make their rulings under the 1980 Act more widely available to the public.

In September 2002 the Judicial Conference endorsed both of these suggestions. But Judicial Conference policy does not necessarily translate into action at the local level. In 2005, when Breyer Committee researchers examined district court websites, they could not find any information about the complaint procedure on a majority of the sites.¹⁸⁴ And of the 41 sites that had some information, many presented it “in a way that would stump most persons seeking to learn about how to file a complaint.”¹⁸⁵

¹⁸² National Commission Report, *supra* note 74, at 345.

¹⁸³ The letter is reprinted in H.R. Rep. 107-459 at 16-18 (2002).

¹⁸⁴ Breyer Committee Report, *supra* note 95, at 33. All of the court of appeals websites contained information about the Act, but it would not occur to most people that the court of appeals website is the place to go to file a complaint about a district judge.

¹⁸⁵ *Id.* at 109.

Nor has the Judicial Conference's exhortation resulted in wider availability of misconduct rulings. Today as in 2001, the orders and memoranda filed by the chief judges of the various circuits are available only at the clerk's office of the circuit where they were issued and at the Federal Judicial Center, to which copies are sent.¹⁸⁶ Even non-routine dispositions are usually not posted on court web sites, nor are they provided to legal publishers like Westlaw and Lexis. Of the [16] final orders of chief judges or circuit councils discussed in the Breyer Committee Report's compilation of "high-visibility" complaints, only [4] can readily be found in the Federal Reporter or any on-line database.¹⁸⁷

Two of the cases are particularly noteworthy in this context. One involved a district judge's intervention in a federal sentencing proceeding. On July 31, 2002, Senior District Judge Edward F. Harrington of the District of Massachusetts wrote a letter on official court stationery to another judge on his court urging him to be lenient in sentencing a retired FBI special agent who had been convicted on racketeering charges. The letter became public the next day, and it aroused considerable criticism.¹⁸⁸ On August 5, Judge Harrington withdrew the letter, but he insisted that he had done nothing wrong. "I believed that my letter was entirely

¹⁸⁶ The Breyer Committee suggested that "the better repository for such orders [might be] the Office of General Counsel in the Administrative Office." Breyer Committee Report, *supra* note 95, at 119. To outsiders, of course, it makes little difference which room in the Thurgood Marshall Judiciary Building serves as the repository if the orders are not available on line.

¹⁸⁷ Curiously, in one of the Breyer Committee's high-visibility cases the circuit published the initial order of the chief judge dismissing the complaint, but not the final order of the circuit council issued after appointment of a special committee. This was the complaint alleging improper assignment of certain criminal cases by Chief Judge Norma Holloway Johnson of the District Court. See *In re Charge of Judicial Misconduct or Disability*, 196 F.3d 1285 (Judicial Council of the D.C. Circuit 1999); *In re Charge of Judicial Misconduct or Disability*, Feb. 26, 2001 (No. 99-11) (on file with the author).

¹⁸⁸ Shelley Murphy, *US Judge Asks for Connolly Leniency*, *Boston Globe*, Aug. 2, 2002, at B1 (available on Nexis).

proper as it was requested by the defendant, relates specialized knowledge I acquired as a federal prosecutor, and concerns the type of information traditionally considered by sentencing courts,” he wrote.

Notwithstanding the withdrawal of the letter, on August 15 Chief Judge Michael Boudin of the First Circuit invoked his authority to “identify a complaint” against Judge Harrington. He asked Judge Harrington to respond, and within days, Judge Harrington did so. No longer did he deny wrongdoing. Instead, he wrote:

Upon reflection, I did commit a clear violation of Canon 2(B) of the Code of Conduct for United States Judges in writing a letter to District Judge Tauro relating to the sentencing in a criminal matter. For this act, I am exceedingly sorry and sincerely apologize to the Judicial Council and to my fellow judges in the First Circuit.

Based on Judge Harrington’s response, Chief Judge Boudin determined that “appropriate corrective action has been taken without the necessity of a formal investigation.” He relied on “Judge Harrington’s withdrawal of his July 31 letter, his admission of a clear violation of the Code of Conduct, his sincere apology, and his agreement to allow all complaint materials to be made public.”¹⁸⁹

As the Breyer Committee aptly observes, the handling of this matter “is a model for the effective administration of the Act.”¹⁹⁰ The Committee gives some of the reasons: “The corrective action was action taken by the [accused] judge himself, was commensurate with the violation, was tailored to provide whatever benefit was possible to persons directly affected by the violation, and was swiftly made public.” To this I would add that the Chief Judge deserves credit also for initiating the process without waiting for a complaint from a Member of Congress

¹⁸⁹ *In re Complaint No. 329* (Judicial Council of the 1st Cir. 2002) (Boudin, C.J.) (on file with the author).

¹⁹⁰ Breyer Committee Report, *supra* note 95, at 92.

or other outsider. Yet this “model” disposition is virtually invisible. It was never published officially, and if the Breyer Committee had not featured it in its report it would have disappeared down the memory hole.

The complaint against Judge Harrington illustrates the effective handling of a single act of misconduct that generated public attention at a particular moment in time. The Breyer Committee also describes the effective handling of a complaint involving a pattern of misconduct over a period of years. The judge in question was District Judge Jon P. McCalla of the Western District of Tennessee. Judge McCalla’s courtroom behavior came to public attention in March 2000, when a Sixth Circuit appellate panel, in a strongly worded opinion, reprimanded him for “intemperate demeanor toward [a criminal defendant’s] counsel.”¹⁹¹ The court condemned a “lengthy harangue” by Judge McCalla and said that it created an appearance of bias. At about the same time, formal complaints were filed against Judge McCalla under the 1980 Act. The complaints “portray[ed] the ... judge as erratic and obsessed with courtroom ethics.”¹⁹²

Sixth Circuit Chief Judge Boyce F. Martin, Jr., appointed a special committee to investigate the allegations. The special committee hired an outside counsel, who interviewed numerous witnesses. On August 29, 2001, the special committee prepared to hold a formal hearing. Instead, Judge McCalla appeared personally, apologized for his misbehavior, and agreed to take a leave of absence for a minimum of six months. He also agreed to undergo behavioral counseling. The special committee filed a report endorsing this resolution, and the Judicial

¹⁹¹ United States v. Whitman, 209 F.3d 619, 624 (6th Cir. 2000).

¹⁹² Louis Graham, Lawyer Examines McCalla’s Behavior, Memphis Commercial Appeal, July 15, 2001, at A1 (available on Westlaw).

Council adopted an order implementing the terms of the settlement. The order included an unusual provision giving the special committee “continuing jurisdiction to monitor Judge McCalla’s progress and the authority to approve on behalf of the Council Judge McCalla’s return to the bench upon the advice of the [committee’s] expert after consultation with Judge McCalla’s treating psychiatrist.”¹⁹³

Judge McCalla complied with the terms of the settlement, and after six months he asked the special committee to allow him to resume his judicial duties. The committee did not do so immediately, but in September 2002 it released Judge McCalla from his suspension, and Judge McCalla returned to the bench (although he was prohibited from hearing cases involving certain lawyers “because of past conflicts.”)¹⁹⁴ Eight months later, he was receiving “glowing” reviews from lawyers practicing in his courtroom. An editorial in the leading local newspaper commented that Judge McCalla’s return to the bench demonstrated that “[b]eing a judge is apparently what he was meant to do.”

The Breyer Committee justifiably characterizes the Sixth Circuit’s handling of this matter as “a deft resolution of a difficult problem, giving full effect to the statutory policies of reforming judicial misconduct, maintaining public confidence in the judiciary, and preserving judges’ independence.”¹⁹⁵ Yet this order, too, has not been posted on any judiciary website, nor was it made available to legal

¹⁹³ In re Complaint of Judicial Misconduct, No. 99-6-372-48 (Judicial Council of the 6th Cir. 2001) (on file with the author).

¹⁹⁴ Lawrence Buser, *McCalla’s New Disposition Ruled Totally in Order*, Memphis Commercial Appeal, May 7, 2003, at B1 (available on Westlaw). The Judicial Council order simply names the attorneys and the offices; it does not give a reason for the prohibition.

¹⁹⁵ Breyer Committee Report, *supra* note 95, at [FRD] 196.

publishers. Like the “model” disposition involving Judge Harrington, this one is virtually invisible.

It is understandable that the judiciary does not wish to shine the spotlight on misconduct within its ranks; no institution does. However, to the extent that the low visibility is the result of conscious choice (rather than indifference or inadvertence), the policy is misguided. The courts benefit if they learn about problems at the earliest possible stage, and complaints under Chapter 16 can help. But some meritorious complaints will never be filed if the existence of the process is insufficiently publicized or if would-be complainants see no evidence that complaints are taken seriously. Failure to publicize dispositions hurts in another way: circuit councils and chief judges lose the opportunity to learn how other courts are handling allegations of misconduct or disability. More than a decade ago, the National Commission emphasized the importance of “developing a body of interpretive precedents” that would help fill in the interstices of the Act.¹⁹⁶ That need remains largely unfilled today.

The most compelling reason for greater visibility, however, is external. At a recent conference on the operation of appellate courts, a lawyer commented that in the current political climate, judges cannot argue for judicial independence by saying simply, “Just trust us.”¹⁹⁷ This observation is even more apt in the context of regulating ethics in the judiciary. It is not enough that the misconduct procedures work; they must be *seen* to work.

¹⁹⁶ National Commission, *supra* note 74, at 352.

¹⁹⁷ See Arthur D. Hellman, *The View from the Trenches: A Report on the Breakout Sessions at the 2005 National Conference on Appellate Justice*, 8 J. App. Prac. & Pro. 195 (2006) (quoting conference participant).

Even when judges acknowledge the importance of visibility, their actions do not always comport with their words. I have already mentioned that in 1998 the Judicial Council of the Ninth Circuit reprimanded District Judge Ware for “publicly misrepresent[ing] himself as the James Ware whose younger brother, Virgil, was shot and killed in 1963 while both were riding a bicycle in Birmingham, Alabama.” The special committee report, which was adopted by the circuit council, pointedly states: “Because of the very public nature of the original tragedy and the public nature of the misrepresentations, as well as their discovery, it is important that discipline of Judge Ware be public and *a part of the historical record.*”¹⁹⁸ Yet anyone looking in the places where one would expect to find “the historical record” of a judicial ruling – the Ninth Circuit Court of Appeals website or the legal databases – would come away empty-handed.

The Breyer Committee called for aggressive action to enforce the two September 2002 exhortations of the Judicial Conference. It recommended that judicial councils require the courts within their circuits to post information on the home pages of court websites.¹⁹⁹ And it urged the Judicial Conference to make misconduct orders more widely available – specifically, to post “non-routine” dispositions on the judicial branch’s public website.²⁰⁰ These modest steps are long overdue.

And more can be done. The Illustrative Rules now provide: “In cases in which [chief judge or circuit council] memoranda appear to have precedential

¹⁹⁸ Ware Misconduct Order, *supra* note 147 (emphasis added).

¹⁹⁹ See Breyer Committee Report, *supra* note 95, at 120-21.

²⁰⁰ See *id.* at 117-19.

value, the chief judge may cause them to be published.”²⁰¹ This is too grudging. First, publication should be encouraged not only when dispositions “appear to have precedential value,” but also when they resolve complaints that have been the subject of discussion in the media or in Congress. Second, the rule should encourage chief judges and circuit councils to provide sufficient explanation in their orders to enable outsiders to assess the appropriateness of the disposition. If – as in the McCalla case – a detailed account might interfere with the effectiveness of the remedy, the detail can be omitted. But that situation will not be common.

Visibility-enhancing measures like these serve a purpose irrespective of the outcome of the proceedings. If the judge is found to have engaged in misconduct, the media and interested citizens can ascertain whether the circuit council has dealt with the matter appropriately. If the judge is exonerated, people will be able to find out why. A thorough explanation will help build confidence in the courts; it will also help to clear the judge’s name.

III. Conclusion

In the overwhelming majority of cases, the federal judiciary acts conscientiously and effectively to assure that judges comply with the high ethical standards we expect of them. But as the Breyer Committee pointed out, it is the few high-visibility controversies that shape public perceptions, and as to those, the record is more mixed.

If there is a single thread that runs through the various lapses chronicled by the Committee and other observers, it is this: at each stage of the process, the chief judge or circuit council opts for the action that is less structured and less public.

²⁰¹ Illustrative Rules, *supra* note 91, at 53. The proposed National Rules speak in similar terms.

The chief judge conducts an inquiry but does not identify a complaint. The chief judge investigates factual matters that are in dispute but does not establish a special committee. The chief judge or circuit council resolves a complaint but does not post the opinion on the court's web site or make it available to on-line services.

To remedy these failings, the Breyer Committee offers a number of specific recommendations that point in the direction of greater procedural formality and enhanced visibility. But the Committee's most important recommendation is, in essence, organizational. The recommendation is addressed in the first instance to the Judicial Conference of the United States, and it involves the responsibilities and powers of the committee then known as the Committee to Review Circuit Council Conduct and Disability Orders. Justice Breyer and his colleagues call upon the Conference to give the Committee "a new, formally recognized, vigorous advisory role" in guiding and counseling chief circuit judges and judicial councils in implementing the 1980 Act.²⁰² In addition, the Breyer Committee urges the Committee itself to consider "periodic monitoring of the Act's administration."²⁰³

The Judicial Conference has already taken steps to implement these suggestions. As already noted, the Conference changed the name of the Review Committee; the committee is now known as the Committee on Judicial Conduct and Disability. The revised nomenclature appears to contemplate a broader assignment of responsibilities and perhaps also a more forward-looking perspective. Consistent with that assessment, the Conference directed the newly renamed committee "to recommend guidelines and, if necessary, new rules for

²⁰² Breyer Committee Report, *supra* note 95, at 109.

²⁰³ *Id.* at 122.

implementing the judicial disability statute in a uniform manner throughout the federal court system.”²⁰⁴ The Committee did as requested; the proposed National Rules would “provide mandatory and nationally uniform provisions governing the substantive and procedural aspects of misconduct and disability proceedings under the Act.”²⁰⁵

Implicit in the Breyer Committee’s organizational recommendations is a twofold judgment: first, that self-regulation of federal judicial ethics requires a somewhat greater degree of centralization than now exists; and, second, that it is desirable to have an entity within the judiciary whose single function is – and is known to be – that of strengthening judicial ethics and enhancing transparency.²⁰⁶ In these respects, the Breyer Committee’s prescription bears a close resemblance to the approach taken by Chairman Sensenbrenner in his proposal to establish an Inspector General for the Judicial Branch.²⁰⁷ I do not minimize the other features of the bill – the ones that the Judiciary denounced in such strong terms. But I believe that these elements could have been modified in an acceptable way if both sides had looked for common ground.²⁰⁸ In any event, if the judiciary wholeheartedly implements the Breyer Committee recommendations, further legislation need not go beyond fine-tuning the existing system.

²⁰⁴ See http://www.uscourts.gov/Press_Releases/judconf031307.html.

²⁰⁵ Proposed Misconduct Rules, *supra* note 96, at 3 (commentary).

²⁰⁶ To be sure, there are other Conference committees that focus on ethics – the Codes of Conduct Committee and the Committee on Financial Disclosure. But these committees operate almost completely out of the public eye.

²⁰⁷ See 2006 Judicial Transparency Hearing, *supra* note 85, at 41 (statement of Arthur D. Hellman).

²⁰⁸ The version of the Inspector General bill introduced in the 110th Congress incorporates several of the suggestions made by academic witnesses (including the author of this article) at the 2006 hearing.

But more is at stake than the effective operation of the procedures that govern the regulation of federal judicial ethics. There is widespread concern today about threats to the independence of the judiciary. My own view is that the perception of threats is overdrawn,²⁰⁹ but if the judiciary is to defend itself successfully against incursions on its independence, the public must believe that the system of self-regulation is working. At a minimum, the Judicial Conference and the circuit councils should adopt the recommendations of the Breyer Committee. But what is more important is that the judiciary internalize a genuine commitment to transparency and visibility in the regulation of ethics. Today's technology readily provides the means; all that is required is the will.

²⁰⁹ See Arthur D. Hellman, Justice O'Connor and "The Threat to Judicial Independence": The Cowgirl Who Cried Wolf? – Ariz. St. L. J. – (forthcoming 2007).