AN EXAMINATION OF THE JUDICIAL CONDUCT AND DISABILITY SYSTEM

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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APRIL 25, 2013

AN EXAMINATION OF THE JUDICIAL CONDUCT AND DISABILITY SYSTEM

THURSDAY, APRIL 25, 2013

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 1:33 p.m., in room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Chabot, Issa, Marino, Holding, Collins, Watt, Conyers, Jackson Lee, Richmond, DelBene, and Jeffries.

Staff Present: (Majority) David Whitney, Counsel; Olivia Lee, Clerk; and Stephanie Moore, Minority Counsel.

Mr. COBLE. Good afternoon, ladies and gentlemen. The Subcommittee on Courts, Intellectual Property, and the Internet will come to order.

Without objection, the Chair is authorized to declare recesses of the Subcommittee at any time.

We welcome all of our witnesses today.

Now I am told that there will be a vote imminently forthcoming. So we can't always judge that accurately, but we will proceed in any event.

Good afternoon again, ladies and gentlemen. We welcome you to this important hearing into the operation of our Federal courts. "Equal justice under law," those four words are inscribed over the entrance to the U.S. Supreme Court. But for those words to have meaning to all Americans, they must be considered not merely an inspiring aspiration, but what is experienced in the day-to-day operation of our Federal judiciary.

Throughout my tenure in Congress, integrity and accountability within our Federal courts has been a priority for this Subcommittee and the judiciary. During this time, we have conducted many oversight hearings and implemented changes when necessary, most recently the Judicial Improvements Act of 2002.

At a time when communication is instantaneous and perceptions can be defined in a moment, it is more important than ever that we take appropriate steps to ensure the public is assured that the institutions and the individuals who serve them are accountable

and transparent. A few bad apples, as you know, can spoil the barrel, and that is certainly true when it comes to the courts where a few life tenured judges, some of whom engage in perjury, some who intimidated and sexually abused their own court employees, can inflict pain on others and negatively affect the public's perception of our system of justice.

To respond to cases like these as well—strike that. To respond to cases like these, as well as to deal with allegations of misconduct that do not rise to the level of an impeachable offense, Congress enacted the Judicial Conduct and Disability Act of 1980. That law provides a structure that permits the judiciary to engage in a larger decentralized self-regulatory system.

Though amended twice since 1980, the basic policy approach has remained substantially unchanged. Since 2006, however, there has been an increased recognition that the judiciary needs to do more to centralize implementation of the Act. Without stealing thunder from any of our witnesses today who will address these steps in greater detail, I will simply note that the publication of the Breyer Committee report granting a new authority to the Judicial Conference's Judicial Conduct Committee and the adoption of the first national rules governing review of misconduct allegations are positive developments.

But there remain both substantive and procedural reforms this Subcommittee and the court should consider implementing to improve the existing processes.

I look forward to receiving and considering the suggestions of Professor Hellman, who is perhaps our Nation's leading authority on the subject of judicial discipline. In addition to Professor Hellman, we are fortunate to have two distinguished jurists who have dedicated their entire professional lives not only to their services on the bench, but who are also widely recognized for their efforts to improve the administration and operation of the judiciary.

Finally, we are fortunate to have with us one of our own experts who was actively and intricately involved in preparing the Breyer Committee report, formulating its recommendations.

In conclusion, I want to just observe that the public, to have confidence in the judgment of the court, they must have confidence in both the judicial system and the integrity of its individual judges. With that, the stage is set for what I hope will be a fruitful and productive dialogue over coming months on how we can together better ensure that conduct prejudicial to the effective and expeditious administration of the business of the courts is prohibited in the first instance, or appropriately and rapidly corrected when it does occur in the second instance.

Now I assume there is a vote on now. Is that valid? Mel, you want to give yours before we go?

Mr. WATT. I think I can get it in.

Mr. COBLE. I am pleased to recognize the distinguished gentleman from North Carolina, Mr. Mel Watt, for his opening statement.

Mr. WATT. I thank the Chairman, and I welcome our witnesses, and I especially welcome my good friend in whose court I have appeared in an earlier life, Judge Sentelle. It is great to see him. He

is looking more judicial every day, which means his hair is getting like mine.

Mr. COBLE. Well, you both still have hair, unlike me.

Mr. WATT. That is very helpful, yes.

Mr. Chairman, this is the first hearing of this Congress under this Subcommittee's newly acquired jurisdiction involving the courts. So it is fitting that we have this distinguished panel before us.

As a practicing attorney for 22 years before coming to Congress, I have a healthy respect for our judicial system, a system which is envied around the world. The hallmark of our third co-equal branch of the Federal Government is its independence. That independence is safeguarded or at least augmented by the constitutional guarantee of service in office "during good behavior" and removal only through impeachment, which has been traditionally reserved, as it should be, for the most egregious cases.

Prior to 1980, non-impeachable yet serious offenses were handled through a patchwork of State laws. A uniform system for policing judicial misconduct and disability was necessary to ensure that errant judges did not betray the public trust or the integrity of the judiciary, and the new system was adopted and signed into law in 1980.

When signing the measure into law, President Jimmy Carter noted that, "It makes a sound accommodation between two essential values—preserving the independence of the Federal judiciary and making judges, as public servants, accountable under the laws for their conduct in office."

Since 1980, the mechanism for investigating and adjudicating complaints against Federal judges has undergone improvement, both statutorily under the able leadership of Chairman Coble and then-Ranking Member Howard Berman, as well as by the judiciary based on the 2006 Breyer Committee report and the subsequent adoption by the Judicial Conference of Uniform Mandatory Rules in 2008, which incorporated many of the Breyer Committee's recommendations.

Today's oversight hearing is an opportunity for Congress to assess how things are going. The men and women who serve on the Federal bench generally do so with distinction and honor and often after lengthy, contentious, sometimes partisan confirmation proceedings.

Vacancies resulting from failures to confirm or delays in confirmation impose additional burdens on those who serve. Prolonged vacancies are not good for the workload or the morale of incumbent judges and may also result in mediocre appointments as quality candidates withdraw from consideration.

Additionally, judicial salaries are often quickly surpassed by the salaries of former law clerks when they enter legal practice. Artificially low compensation and increased workloads, of course, do not excuse bad behavior. Although five Federal judges have faced impeachment within the past several years, Congress has only removed two judges since the last removal in 1989.

Although the details of each case vary, that statistical evidence suggests that the incidence of thoroughly unfit judges who should face the ultimate sanction of impeachment and removal from office

is low. This seems to confirm that the process by which judges are referred to Congress by the Judicial Conference is working.

The management of complaints that do not rise to the level of an impeachable offense are also vitally important to ensure that the public retains confidence in the judiciary. The Breyer Committee was charged with reviewing the implementation of the judicial misconduct mechanism to determine "whether the judiciary in implementing the Act failed to apply the Act strictly, as Congress intended, thereby engaging in institutional favoritism."

Effective enforcement of ethical codes of conduct requires that the judiciary self-regulate without preferential treatment to undue leniency in favor of accused colleagues. I expect that our witnesses will address many of the recommendations of the Breyer Committee that address adequate and unbiased self-regulation by the judiciary, as well as any gaps in implementation that may need attention.

I am equally interested in learning more about two aspects of the overall complaint process that I think serve the twin goals articulated by President Carter decades ago—preserving independence and commanding accountability. Specifically, I believe that a process that safeguards both the rights of the accused and the complainant will promote public confidence in that process regardless of the outcome.

Employees within the judicial branch must not only feel secure in disclosing what they believe to be improper conduct, they must also be adequately protected against retaliation when they make good faith allegations against powerful judges. These employees are often in a position to detect and prevent misconduct early, and robust whistleblower protections will serve that aim.

It is equally important to the process that judges who are unfairly or erroneously targeted and incur unwarranted legal fees in their defense get reimbursed. Still, while I understand that attorneys fees and other reasonable costs may be awarded, I am concerned that the reimbursement is authorized under—as authorized under 16 U.S.C. Section 361 only "from funds appropriated to the Federal judiciary."

We need to be sure that the language of Section 361 does not present a problem in these tight budget times, especially during this time of sequestration. I hope that the witnesses, either in their prepared remarks or the question and answer period, will have an opportunity to address these concerns, along with any other concerns and issues they have identified.

And I thank them again for being here. Great to see you again, Judge Sentelle. Great to see all of you. I am not—I might have to go back to his court sometime. So I am being especially nice to him. [Laughter.]

I yield back, Mr. Chairman.

Mr. COBLE. I thank the gentleman.

And this Subcommittee hearing will stand in recess, subject to our return from the floor.

[Whereupon, at 1:44 p.m., the Subcommittee recessed, to reconvene at 2:11 p.m., the same day.]

Mr. COBLE. I normally beat Mr. Watt back from the floor, but he was the winner today. So kudos to him.

We will resume our hearing, folks.

We have a very distinguished panel of witnesses today. Each of the witnesses' written statement will be entered into the record in its entirety, and I ask that each witness summarize his testimony in 5 minutes or less.

There is a clock monitor on your panel there. When the green light turns to amber, that gives you a minute's warning. The red light illuminates, that is your warning to stop. Now you won't be keelhauled if you violate it, but try to stay within the 5 minutes if you can. When the light switches on—as I just said that.

I will begin by swearing in our witnesses before introducing them. If you would, please, all rise, raise your right hands.

[Witnesses sworn.]

Mr. COBLE. Let the record reveal that all four witnesses responded in the affirmative.

As I said before, we have a very distinguished guest today, and we were glad to welcome each of you four. But I am particularly pleased to see Professor Hellman again, who has appeared on the Hill many times. Good to have you back, Professor. And not unlike Mr. Watt, I proudly claim a longstanding friendship with Judge Sentelle. But it is good to have the other two as well. I don't mean to diminish your presence.

Our first witness today is the Honorable Anthony J. Scirica.

Mr. ISSA. Mr. Chairman?

Mr. COBLE. Yes, sir?

Mr. ISSA. A point of privilege, Mr. Chairman. Since you are introducing your good friends, I would note the presence of the Chief Judge of the Southern District of California, Judge Moskowitz, is also with us today in the audience. And no stranger to the issues of my district and my region for decades.

And so, since I have known him since he was a baby magistrate, I just wanted to make sure I embarrassed him publicly in this hearing because he is a person I admire a great deal.

Mr. COBLE. Thank you, Darrell. I appreciate that.

And Your Honor, good to have you with us as well.

The Honorable Anthony J. Scirica, senior judge of the U.S. Court of Appeals, as Darrell just told us. And I think you pretty well covered it, Darrell. Prior to his appointment, he served as a State representative in the Pennsylvania General Assembly and also as assistant district attorney to Montgomery County in Pennsylvania.

Judge Scirica received his law degree from the University of Michigan and his bachelor's degree from Wesleyan University.

Our second witness today is the Honorable David B. Sentelle, our fellow North Carolinian, senior judge of the U.S. Court of Appeals for the District of Columbia Circuit. Judge Sentelle was appointed to the U.S. District Court for the Western District of North Carolina in 1985 by President Ronald Reagan and then served on the D.C. Circuit from 1987 until the present time.

Prior to his appointment, Judge Sentelle served as the assistant U.S. attorney in Charlotte, North Carolina. He also practiced law at two firms, first Ussell & Dumont, then Tucker, Hicks, Sentelle, Moon & Hodge.

Judge Sentelle is a double Tar Heel, having received both his law degree and bachelor's degree from the University of North Carolina at Chapel Hill.

Our third witness is Professor Arthur Hellman from the University of Pittsburgh School of Law. Professor Hellman serves as one of the Nation's leading academic authorities on Federal judicial ethics. He has testified multiple times before this Committee and this Subcommittee and has received public recognition for his work in helping draft the Judicial Improvements Act of 2002.

Professor Hellman is well recognized for his publications that include numerous articles and several books. In 2005, he was appointed as the inaugural holder of the Sally Ann Semenko Endowed Chair at the university. In 2002, he received the Chancellor's Distinguished Research Award. Professor Hellman received his J.D. degree from the Yale School of Law and his B.A. magna cum laude from Harvard University.

Our final and last witness is Mr. Russell Wheeler, visiting fellow in the Government Studies Program at the Brookings Institute. Mr. Wheeler joined the Federal Judicial Center in 1977 and served as Deputy Director from 1991 until 2005. His extensive research and publications deal with the United States courts, including judicial selection and judicial ethics.

Mr. Wheeler is currently an adjunct professor at American University's Washington College of Law and serves on the Academic Advisory Committee of the American Bar Association's Standing Committee on Federal Judicial Improvements.

Mr. Wheeler received his J.D. and M.A. in political science from the University of Chicago and his B.S. degree from Augustana College.

Welcome to all of you, and Judge, we will begin with you, Your Honor.

TESTIMONY OF THE HONORABLE ANTHONY J. SCIRICA, SENIOR JUDGE, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Judge SCIRICA. Thank you very much, Mr. Chairman. Thank you for inviting me to testify.

I am Anthony Scirica. I'm a judge on the United States Court of Appeals for the Third Circuit, and I chair the Judicial Conference Committee on Judicial Conduct and Disability.

For 7 years, I served as the chief judge of the Third Circuit. In that capacity, I received roughly two judicial conduct complaints a week. My job was to adjudicate and resolve these in a manner consistent with the Act and, after 2008, under the new procedural rules adopted that year by the Judicial Conference. I always believed that nothing I did as a chief circuit judge was more important than adjudicating these complaints.

By enacting the Judicial Conduct and Disability Act of 1980, Congress entrusted to the judiciary the responsibility to regulate judicial conduct and disability. With that responsibility comes the imperative of accountability. Judicial accountability and judicial independence are two sides of the same coin, as both are essential to establish and protect the rule of law.

At the end of the day, respect for the judgment and rulings of courts depends on public confidence in the integrity, competence, independence, and accountability of their judges. I appreciate this opportunity to set forth the steps we have taken to implement the Act. I will begin by noting that the complaint process is interrelated with the Code of Conduct for United States Judges.

The Judicial Conference has explicitly stated that the Code of Conduct provides the standards of conduct to apply in these proceedings. The Code of Conduct and the disciplinary system set forth in the Act, therefore, are complementary and act in tandem.

In 2004, Chief Justice William Rehnquist appointed a study committee known as the Breyer Committee after its chair, Justice Stephen Breyer, to evaluate implementation of the Act. It has been nearly 7 years since the Breyer Committee issued its report in 2006.

Now is a good time to review how the rules are operating and to consider adjustments. We welcome Congress' views on these issues. We value your perspective and oversight. We look forward to working together to improve our process.

Before the Breyer Committee report, the main work of the committee was primarily deciding petitions for review of judicial council actions taken under the Act. The Breyer Committee recommended that the committee become more active in several areas, including providing advice to chief circuit judges and circuit councils and guidance to chief circuit judges as to when they should initiate a complaint.

Also some questions had arisen over matters in which chief circuit judges had not appointed special investigating committees. In light of this, the Judicial Conference recognized the need for a set of mandatory and clarifying rules, and in 2008 adopted the first set of uniform mandatory rules governing the complaint process.

Significantly, the Conference expanded the authority of the Judicial Conduct and Disability Committee. These developments were important because in addition to mandating national uniformity, they established oversight and review. They centralized supervisory authority, created a hierarchy of accountability, and improved transparency of the judicial conduct complaint process.

The Judicial Conference also expanded the oversight role of the Judicial Conduct and Disability Committee to include monitoring the orders issued by chief circuit judges, circuit councils, and national courts under the Act. This enables the committee to step in to assist the circuit councils if requirements are overlooked and to ensure that the Act is functioning properly.

Self-regulatory systems impose significant responsibilities on those who must enforce the regulations. The disciplinary system is self-regulatory in a legitimate effort to preserve judicial independence. As stewards, we recognize that it is essential that we continually monitor and assess our disciplinary system to make sure that it is effective and that it adheres to the correct standards and procedures.

We want to make certain that our disciplinary system holds judges accountable for misconduct, but at the same time protects a vital judicial independence. If we deviate from the current disciplinary system, we would create the potential to alter the well-

balanced calibration in our constitutional system of checks and balances that has served our country so well.

As I noted, Mr. Chairman, we welcome the opportunity to work with you, with the Committee, and with Congress to improve the judicial system and in particular to improve our disciplinary and disability system. As chair of the committee, I am always available, and I welcome the opportunity to brief you and Members of the Judiciary Committee on the operation of the Act.

That concludes my prepared remarks, and I welcome any questions you may have.

[The prepared statement of Judge Scirica follows:]

JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF

JUDGE ANTHONY J. SCIRICA
U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT
CHAIR, JUDICIAL CONFERENCE COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY

BEFORE

THE SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND THE INTERNET

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

ON

"AN EXAMINATION OF THE JUDICIAL CONDUCT AND DISABILITY SYSTEM"

April 25, 2013

TESTIMONY OF JUDGE ANTHONY J. SCIRICA

Good afternoon, and thank you for inviting me to testify. I am Anthony Scirica, and I am a judge on the United States Court of Appeals for the Third Circuit. I chair the Judicial Conference Committee on Judicial Conduct and Disability, whose charter includes overseeing the administration of the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-364. For seven years I served as the chief judge of the Third Circuit. In that capacity I received roughly two judicial conduct or disability complaints a week. My job was to adjudicate and resolve these in a manner consistent with the Act, and after 2008, under the new procedural rules adopted that year by the Judicial Conference. I always believed that nothing I did as a federal judge was more important than adjudicating these complaints.

By enacting the Judicial Conduct and Disability Act of 1980, Congress entrusted to the Judiciary the responsibility to regulate judicial conduct and disability. With that responsibility comes the imperative of accountability. Judicial accountability and judicial independence—both decisional and institutional independence—are two sides of the same coin, as both are essential to establish and protect the rule of law. At the end of the day, respect for the judgments and rulings of courts depends upon public confidence in the integrity, competence, independence, and accountability of their judges.

I appreciate the opportunity to set forth the steps we have taken to implement the Act.

The Design and Purpose of the Act

The Judicial Conduct and Disability Act of 1980 proscribes behavior or "conduct prejudicial to the effective and expeditious administration of the business of the courts." It entrusts to the Judiciary the authority to adjudicate and resolve complaints of judicial conduct

and disability, and to create rules of procedure.[1] The 1980 Act empowers chief circuit judges, circuit councils, and the Judicial Conference to investigate and remedy complaints of judicial conduct and disability. The process is inquisitorial and administrative so that the Judiciary can become the active gatherer of evidence, and focus the objectives and nature of an inquiry. The Act enables the Judicial Conference to establish uniform procedures to adjudicate judicial conduct, to review judicial conduct and disability decisions by the circuit councils, and to monitor compliance with the Act and the rules of procedure through regular oversight.

The Act vests primary responsibility for complaint administration in chief judges of circuit and national courts, and in the circuit councils (or equivalent bodies) of the courts over which those chief judges preside. It draws upon the credibility and moral authority that judges have in the eyes of their judicial peers. Likewise, it taps judges' understanding of judicial work and of what courts require in order to function properly. By vesting authority in the Judiciary, the Act draws upon the collective experience of federal judges to ensure accountability without sacrificing the institutional independence that is essential to the judicial function. The Act uses the size and layering of the federal Judiciary so that any complaint can receive independent review by judges who are not colleagues of the judge who is under scrutiny.

The Judicial Conduct and Disability complaint process is interrelated with the Code of Conduct for United States Judges. The Judicial Conference adopted the Code of Conduct in 1973 as the standard of conduct for federal judges, and since then has amended the Code several times. Behavior that violates the Code of Conduct may constitute "conduct prejudicial to the

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[1]Professor Stephen Burbank has thoughtfully described the congressional deliberations on the Act. Stephen B. Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. Pa. L. Rev. 283, 293 (1982).

effective and expeditious administration of the business of the courts" under the Act. The Judicial Conference has explicitly stated that the Code of Conduct "provides standards of conduct for application in proceedings" under the Judicial Conduct and Disability Act. The Code of Conduct and the disciplinary system set forth in the Act are therefore complementary and operate in tandem.

As you might imagine, most complaints arise because someone—generally a disappointed litigant or criminal defendant—questions a judicial decision or is dissatisfied with the result. Such complaints must be dismissed under the Act because they relate to the merits of a case.[2] Experienced attorneys are familiar with the appeals process, but *pro se* litigants do not have the benefit of counsel and often seek to redress an adverse determination through the conduct and disability complaint process. More than ninety percent of complaints are filed by prisoners and other *pro se* litigants, and most complaints are merits-related. As a result, even though a substantial number of complaints are filed, very few are found to warrant remedial action.

Complaint Process

Before I address the Breyer Committee Report,[3] I would like to describe how the Act currently functions. The process begins with a complaint alleging that a judge engaged in "conduct prejudicial to the effective and expeditious administration of the business of the

[2] The entire panoply of rights under the appeals process is available for the correction of any merits-related errors. Generally, failure to recuse without more is not viewed as misconduct. But failure to recuse can generate a cognizable misconduct complaint if the recusal decision was based on an improper or illicit motive, such as a bias or prejudice against a person or a certain group of people. Moreover, any party may appeal a recusal decision, sometimes even during the pendency of a case.

[3] The Judicial Conduct and Disability Act Study Committee, Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice (2006).

courts," or that, due to a mental or physical disability, the judge "is unable to discharge the duties of office." A complaint can be filed by any person, including any member of the public and any member of Congress. Even if no one files a complaint, the chief circuit judge[4] is required to initiate a complaint whenever he or she becomes aware of improper conduct. After a complaint is filed, the chief circuit judge may conduct a limited, informal investigation, but may not make findings of fact about any matter that is reasonably in dispute. If there are reasonably disputed factual issues, the chief circuit judge must appoint a special committee to investigate.

If no special committee is warranted, the chief circuit judge may then "conclude" the complaint due to intervening events (such as resignation) or appropriate corrective action has been taken. The chief circuit judge may also "dismiss" the complaint if it has no actionable allegations, is related to the merits of a case, is frivolous, raises no inference of misconduct or disability, is unprovable, lacks any factual foundation or is conclusively refuted by objective evidence, is filed in the wrong circuit, or is "otherwise not appropriate for consideration under the Act."[5] As noted, however, if the complaint is not concluded or dismissed, the chief circuit judge must appoint a special committee (comprising the chief circuit judge and equal numbers of circuit and district judges in that circuit), to investigate the allegations. When circumstances warrant, the chief justice, at the request of a chief circuit judge or circuit council, may transfer the investigation and resolution of a complaint to a different circuit from the one where the judge in question sits.

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[4] Throughout the process, the chief circuit judge has specialized responsibilities under the Act. Of course, when the chief circuit judge is the subject of the complaint, a different judge of the court acts in this role.

[5] 28 U.S.C. § 352(b); Judicial Conference of the United States, Rules for Judicial-Conduct and Judicial-Disability Proceedings, Rule 11(c) (2008).

Following an investigation, the special committee submits a report with factual findings and recommendations to the circuit council, the basic governing body of a circuit under 28 U.S.C. § 332. The circuit council consists of the chief circuit judge, chief district judges and other experienced judges. The special committee is authorized to exercise the circuit council's subpoena power when investigating complaints under the Act. After review of the special committee's report, the circuit council may dismiss or conclude the complaint, return it to the special committee for more investigation, refer the complaint to the full Judicial Conference, or take remedial action.

The Act allows the complainant or the judge to petition the Judicial Conference to review the circuit council decision. The Judicial Conference delegated this review function to the Judicial Conduct and Disability Committee, but retains the authority to review all complaints considered by the Judicial Conduct and Disability Committee. I will come back to the review process.

The complaint consideration process first seeks to determine the facts and whether misconduct occurred or whether a judge is disabled and cannot fully perform his or her judicial functions. If the complaint allegations are substantiated, the circuit council or Judicial Conduct and Disability Committee orders an appropriate remedy. Remedial actions include ordering the temporary suspension of new case assignments, issuing a public or private censure or reprimand, asking a judge to retire voluntarily, and certifying a judge's disability so that a vacancy is created.[6] If the complaint is against a magistrate judge or bankruptcy judge, remedies can also include initiating the statutory process to remove that judge from office. If a circuit council finds

[6] The formal structure and sanctions set forth in the rules also serve to reinforce conduct norms and can induce voluntary remedial action.

that an Article III judge may have engaged in conduct that could constitute grounds for impeachment, it must refer the complaint directly to the Judicial Conference. If the Judicial Conference determines that impeachment may be warranted, it must certify that determination and transmit the record to the House of Representatives. Under the Act, the Judicial Conference may recommend the impeachment of a judge convicted of a felony without waiting for referral or certification from a circuit council. The rules expanded on the Act's reference to possible criminal conduct. For example, "[i]f the [special] committee's investigation concerns conduct that may be a crime, the committee must consult with the appropriate prosecutorial authorities to the extent permitted by the Act to avoid compromising any criminal investigation."

To protect complainants and witnesses, as well as subject judges, the process is confidential until a final order is issued and the period for review expires. Confidentiality is important because it encourages cooperation with investigation of the underlying allegations, and protects complainants and witnesses (who may include court employees and attorneys). All final orders under the Act are made public. Orders must give reasons for a complaint's disposition. The judge's name must be disclosed if there is a remedy ordered that exceeds private censure or reprimand. Publishing orders promotes transparency, develops precedent, enables the orders to function as a deterrent, and builds public confidence.

Breyer Committee

In 2004 Chief Justice William Rehnquist appointed a committee, chaired by Justice Stephen Breyer, to review the Act's implementation and to report findings and recommendations. The Judicial Conduct and Disability Act Study Committee, known as the Breyer Committee, issued its report in 2006 and found that the Act's implementation was largely

successful, with a two to three percent error rate out of the 2,000 complaints it reviewed. But the Committee found that five of the seventeen highly visible cases it studied were "problematic." Problems included a failure to appoint a special investigating committee to resolve disputed facts, and a failure of chief circuit judges to initiate a complaint upon learning of improper conduct.

The Breyer Committee issued twelve recommendations to improve implementation of the Act, judicial accountability and transparency:

1. The Judicial Conference should authorize the Committee on Judicial Conduct and Disability to provide advice and counsel regarding implementation of the Act.

2. In this advisory role, the Committee on Judicial Conduct and Disability should emphasize the desirability of identifying complaints, transferring complaints to other circuits for investigation, and appointing special committees.

3. The Committee on Judicial Conduct and Disability should create an orientation program for new chief circuit judges and an online compendium with suggested approaches and procedures, as well as guidance on the Act's terms.

4. The Committee on Judicial Conduct and Disability should make illustrative chief circuit judge and circuit council orders available online.

5. The Committee on Judicial Conduct and Disability should encourage courts to create committees of local lawyers who can serve as intermediaries between individual lawyers and the formal complaint process.

6. All courts should provide information on how to file a complaint on the home page of the court's website and take other steps to publicize the Act.

7. All courts should submit timely and accurate information about complaint filing and terminations to the Administrative Office.

8. The Committee on Judicial Conduct and Disability's annual reporting should tally the number of special committees appointed each year.

9. The Committee on Judicial Conduct and Disability should periodically monitor the Act's administration.

10. The Federal Judicial Center should seek to ensure all judges understand the Act and its procedures.

11. The Judicial Conference should make clear it has the authority to review the Judicial Conduct and Disability Committee's decisions on appeals from circuit council orders.

12. The councils and the Judicial Conference should consider programs to make advice available by phone (or otherwise) for chief circuit judges.

The Judicial Conference of the United States endorsed the full complement of the Breyer Committee's recommendations. Of the implementation actions taken, the most important change was the 2008 adoption of uniform mandatory rules governing the complaint process. Prior to the 2008 rules, each circuit council created its own complaint procedures, under the guidance of the Judicial Conference's Illustrative Rules. The Breyer Committee cited this lack of procedural uniformity. The Judicial Conference agreed, and in 2008 adopted uniform mandatory rules of procedure. In addition, the Conference expanded the authority of the Committee on Judicial Conduct and Disability. These developments were significant because in addition to mandating national uniformity, the Conference established oversight and review, centralized supervisory authority, created a clear hierarchy of accountability, and improved transparency of the judicial conduct complaint process.

The Act authorizes chief circuit judges to initiate complaints. The uniform rules expand on the Act by prescribing circumstances in which chief circuit judges must initiate a complaint on their own. The rules provide for the chief circuit judge to conduct an informal investigation to determine whether a complaint should be initiated. As noted, the uniform rules also require the appointment of a special investigatory committee if material facts are reasonably in dispute. The predecessor illustrative rules did not clearly require chief judges to act in such circumstances.

Significantly, the uniform rules impose up to three levels of review on decisions by the chief circuit judge: circuit councils review the chief circuit judge's orders, the Committee on Judicial Conduct and Disability reviews certain circuit council actions,[7] and the Judicial Conference may review the decisions of the Committee on Judicial Conduct and Disability.

The uniform rules now allow the Committee on Judicial Conduct and Disability to review any circuit council order to determine if a special committee should be appointed. The Committee on Judicial Conduct and Disability may exercise "reach down" authority to review whether a special committee should be appointed, even if no party seeks review. Moreover, the Committee may return any reviewable matter to the circuit council with directions to undertake an additional investigation. In extraordinary circumstances, the Committee may undertake its own investigation on reviewable matters, exercising the powers of the Judicial Conference.

Responding to the Breyer Committee Report, the Judicial Conference expanded the oversight role of the Committee on Judicial Conduct and Disability to include monitoring of orders issued by chief circuit judges, circuit councils, and national courts under the Act. This enables the Judicial Conduct and Disability Committee to step in to assist the circuit councils if requirements are overlooked, and to ensure that the Act is functioning properly. The Committee on Judicial Conduct and Disability annually reviews orders and other complaint-related documents for compliance with the Act, in a manner similar to the Breyer Committee's review. The Committee on Judicial Conduct and Disability receives information on all complaint-related orders and examines a number of them to confirm that all proper procedures were followed, and

[7] When a complainant petitions for review, the Committee on Judicial Conduct and Disability must review any decision by the circuit council when a special committee was appointed. The Committee must also review a decision not to appoint a special committee if a circuit council member dissented on the grounds a special committee should have been appointed.

to identify any orders that are novel in their underlying facts or could serve as models, and any documents associated with "high-visibility" complaints that could particularly affect the public's confidence in the Judiciary. The Committee reviews each such complaint for compliance with the Act and the procedural rules.

To facilitate review, the Judicial Conference created a mandatory procedure for electronic submission of complaint-related documents to the Committee. The Committee on Judicial Conduct and Disability also arranged for adjustments in the software that compiles statistics on judicial conduct and disability complaints to make tabulated data public each year.

The Committee on Judicial Conduct and Disability is also charged with informing the public and the bar about the Act, its procedures and their rights under the Act. Now every circuit court website has a link on its homepage to information on judicial conduct and disability. The Committee on Judicial Conduct and Disability created a guide for the public to assist with filing a complaint, which is readily accessible on the uscourts.gov website. That website has a section devoted to judicial conduct and disability. Committee decisions along with other information on the complaint process are now posted in this area of the uscourts.gov website. A majority of circuit courts also post published complaint-related orders online to make them more accessible to the public. Finally, chief circuit judges are in some extraordinary circumstances authorized to disclose the existence of a complaint before its resolution. These efforts seek to educate the public on enforcement of the Act and to improve transparency.

As the Breyer Committee recommended, the Committee on Judicial Conduct and Disability is now also an advisory body. The Committee on Judicial Conduct and Disability is frequently consulted by chief circuit judges and circuit council members on complaint-related

issues—for example, whether in a given case a complaint should be initiated, whether a special committee should be appointed, whether a complaint should be transferred to another circuit, and how to address other issues.

To further aid chief circuit judges confronted with possible judicial misconduct or disability, we created a compendium, the *Digest of Practical Advice*. This new resource draws upon extensive interviews of current and former chief circuit judges with long experience in the administration of the Act. The Judiciary has provided educational programs on the Judicial Conduct and Disability Act for judges and staff, including presentations, one of which was an orientation seminar on the 2008 Rules.

In addition to this guidance, the Committee on Judicial Conduct and Disability is developing the *Digest of Authorities*, a body of precedent in judicial conduct and disability cases. We expect this volume to be available this summer, and it will be published online. These opinions will not only provide advice, but serve as precedent for future cases. They create a common law, a body of precedents for all who are charged under the 1980 Act with adjudicating judicial conduct and disability complaints.

Self-regulatory systems impose significant responsibilities on those who must enforce the regulations. This disciplinary system is self-regulatory in a legitimate effort to preserve judicial independence. As stewards, the Judiciary recognizes that it is essential to continually monitor and assess our disciplinary system to ensure both its effectiveness and adherence to the appropriate standards and procedures. The Committee on Judicial Conduct and Disability sits at the intersection of judicial accountability and judicial independence. We want to make certain that our disciplinary system holds judges accountable for misconduct, but at the same time

protects a vital judicial independence. The current disciplinary system accomplishes this goal while preserving the well-balanced calibration in our constitutional system of checks and balances that has served our country so well.

Finally, as Chair of the Committee on Judicial Conduct and Disability, I am always available and welcome the opportunity to brief members of the Judiciary Committee on the operation of the Act. That concludes my prepared remarks. I welcome any questions you may have.

Mr. COBLE. Thank you, Judge Scirica.
Judge Sentelle?

TESTIMONY OF THE HONORABLE DAVID B. SENTELLE, SENIOR JUDGE, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Judge SENTELLE. Good afternoon.
Mr. COBLE. Check your mike, Judge.

Judge SENTELLE. I'm not accustomed to that. Thank you.

Good afternoon to the Chairman and Ranking Member Watt. Both of you were kind enough to acknowledge our long friendship. As you might guess from looking, Chairman Coble's and mine is longer than mine with Ranking Member Watt, but almost as long.

And since the commission of this hearing, another old friend, though not near the venue, the young gentleman in the front row there, Representative Holding has come in, whose hospitality I've enjoyed in Raleigh.

So to all the other Members of the Committee, I'm sure I'd like you equally well if I knew you. [Laughter.]

Mr. COBLE. Don't be too sure.

Judge SENTELLE. I am Dave Sentelle. I'm a judge of the United States Court of Appeals for the District of Columbia Circuit.

In February of this year, I completed my term as chair of the Executive Committee of the Judicial Conference of the United States, succeeding Judge Scirica. I also completed a 5-year term as chief judge of my court.

Although this hearing is, as I understand it, directed toward an examination of the judicial conduct and disability system, and my colleague Judge Scirica is the chair of the most relevant committee on that—and he's obviously the best qualified to discuss it. But our conduct and disability system does not operate in a vacuum. It's part of an interconnected web of judiciary programs regarding ethics, employee conduct, oversight, audit, review, complaint and dispute resolution, development and implementation of best practices.

Not infrequently, matters that are discovered in one of those areas lead to others so that both in practice and perhaps in the minds of those who set up the hearing. So my testimony on behalf of the conference today will outline briefly some of the work in those other areas and in a bit more detail in the written submission. I hope it will be helpful to the Subcommittee in its consideration.

An independent judiciary is one of the most valuable and admired assets of our 235-year-old democracy. In order to help preserve independence, our branch has been granted considerable powers of governance and oversight. We recognize that with that power comes responsibility and accountability, including the obligation to be able to explain ourselves to the public and to this Congress.

The Judicial Conference reaffirmed this guiding principle by identifying accountability as one of the six core values underlying the strategic plan for the Federal judiciary, which also happens to be known as the Breyer plan, although that's named after District Judge Breyer rather than Justice Breyer.

Specifically, the plan requires "stringent standards of conduct, self-enforcement of legal and ethical rules, good stewardship of public funds and property, effective and efficient use of resources." I'll give you a brief overview of the checks and balances that we have in place to ensure that the administration of the judicial branch is accountable.

To understand accountability mechanisms in the judiciary, it's important to recognize that our system is specifically designed to

reflect and capitalize on the unique nature and structure of judicial administration.

The decentralized nature of judicial administration is designed to support and complement independent judicial decision-making at the local court level where the judicial power is vested in individual judges and panels of judges. Local court mechanisms include, within appellate, district, and bankruptcy courts, chief judges and court unit executives who are primarily responsible for the review, oversight, and integrity of the court operations.

Certain duties and responsibilities are statutory responsibilities of the chief judge, or the court as a whole. Other authorities are delegated to the courts by the Director of the Administrative Office of the United States, what we refer to as the AO, but in accordance with statute, rules of court, Judicial Conference policies, and circuit judicial orders.

As my time is running, I will skip and tell you that there is a little further detail in the written submission. Our regional oversight responsibilities within the court reside in the circuit judicial councils. They carry out major oversight responsibilities. Each council has broad authority to make all necessary and appropriate orders for effective and expeditious administration of justice within the circuit.

The judicial councils play an important role in the administration of the judicial disability and misconduct complaint system. They hear the appeals from the chief judges from those complaints.

On the national level, the national entities and governing bodies include the Judicial Conference of the United States, which develops policies, provides support for courts, and performs necessary oversight. I see that my stop light is on, but I'll rush to say that that includes an appellate and a trial judge from each circuit.

I have further information in my written submission, and I, of course, stand ready to answer questions and to meet with the Committee at any time.

Thank you.

[The prepared statement of Judge Sentelle follows:]

JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF

JUDGE DAVID B. SENTELLE
U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BEFORE

THE SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND THE INTERNET

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

ON

"AN EXAMINATION OF THE JUDICIAL CONDUCT AND DISABILITY SYSTEM"

April 25, 2013

Good day, Mr. Chairman and members of the Committee. I am Judge David Sentelle of the United States Court of Appeals for the District of Columbia Circuit. In February of this year, I completed my term as Chair of the Executive Committee of the Judicial Conference of the United States. In February, I also completed a five-year term as chief judge of my court. Today's hearing is entitled, "An Examination of the Judicial Conduct and Disability System" and my colleague, Judge Anthony Scirica, as the chair of the Judicial Conference Committee on Judicial Conduct and Disability, is obviously best qualified to discuss that topic. But our conduct and disability system does not operate in a vacuum. Rather, it is part of an interconnected web of Judiciary programs regarding ethics, employee conduct, oversight, audit, review, complaint and dispute resolution, and development and implementation of best practices. Not infrequently, matters that are discovered in one of these areas lead to others, both in practice and perhaps in the minds of Congressional Committees. Therefore, my testimony today on behalf of the Judicial Conference of the United States will outline some of our work in these other areas, which I hope will be helpful to the Subcommittee.

An independent Judiciary is one of the most valuable and admired assets of our 235-year-old democracy. In order to help preserve independence, our branch has been granted considerable powers of self-governance and oversight. With such power, however, comes responsibility and accountability, including the obligation to explain ourselves to the public and to Congress. The Judicial Conference reaffirmed this guiding principle by identifying Accountability as one of the six core values underlying the *Strategic Plan for the Federal Judiciary*, adopted in September 2010. Specifically, the Plan requires "stringent standards of conduct; self-enforcement of legal and ethical rules; good stewardship of public funds and property; effective and efficient use of resources."[1] Today, I will provide a brief overview of the robust system of checks and balances that are in place to ensure that the administration of the judicial branch of the U.S. government is accountable.

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[1] *Strategic Plan for the Federal Judiciary*, September 2010, page 2. See also, Strategy 7.1, page 16.

Judiciary Mechanisms for Oversight and Accountability

To understand accountability mechanisms in the Judiciary, it is important to recognize that our system is specifically designed to reflect and capitalize upon the unique nature and structure of federal judicial administration. Unlike executive branch entities, the federal Judiciary is not a single agency, and critical administrative authorities and responsibilities are carried out locally, as well as regionally and nationally. The decentralized nature of judicial administration is designed to support and complement independent judicial decision-making at the local court level where the judicial power is vested in individual judges and panels of judges. 28 U.S.C. §§ 43(b), 132(b), 151.

Local Accountability Mechanisms

Within appellate, district, and bankruptcy courts, chief judges and court unit executives are primarily responsible for the review, oversight, and integrity of court operations. Certain duties and responsibilities are the statutory responsibility of the chief judge or the court as a whole; other authorities are delegated to the courts by the Director of the Administrative Office of the U.S. Courts (AO). Each court carries out its business independently, but in accordance with statutes, rules of court, Judicial Conference policies, and circuit judicial council orders. For administrative purposes, each court has a chief judge, whose responsibilities include oversight activities in areas that do not impinge on the judicial independence of the court's judges.

Every federal court is held responsible for the effective stewardship of all public resources under its control and for appointing and removing its employees. Each court is required to have clearly defined procedures for making financial management decisions and producing timely financial reports. Courts must maintain management plans against which court operations can be monitored including, for example, a budget spending plan, internal controls plan, jury management plan, employment dispute resolution plan, Criminal Justice Act plan, and others that guide performance and effective, accountable administrative operations.

Regional Oversight Responsibilities

Regionally, circuit judicial councils carry out major oversight responsibilities.[2] Each council has broad authority to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." 28 U.S.C. § 332(d)(1). As Judge Scirica has already described, the judicial councils play an important role in the administration of the judicial disability or misconduct complaint system. In addition, the councils perform an array of other oversight responsibilities related to circuit governance and operations. To ensure enforcement of council mandates, Judiciary officers and employees of the circuit are statutorily required to "promptly carry into effect all orders of the judicial council." 28 U.S.C. § 332(d)(2).

National Entities

National entities and governing bodies, including the U.S. Judicial Conference and the AO, develop policies, provide support for courts, and perform necessary oversight. The Director of the AO is "the administrative officer of the courts," 28 U.S.C. § 604(a), and is vested with various powers and responsibilities for administering the branch's functions. In addition to coordinating the Judiciary audit program, the AO maintains an integrated management and financial planning system, with rigorous financial controls governing budget formulation and execution. The AO also conducts reviews and assessments of certain court operations and judicial workloads to enhance operational effectiveness and economy. National standards and guidelines are promulgated in an official administrative policy manual, and the AO prepares supplemental court guidance materials. The AO also is instrumental in conducting investigations of allegations about fraud, waste, and abuse regarding Judiciary operations that are raised by judges, Judiciary personnel, or members of the public.

[2] For each circuit, the membership of circuit judicial councils includes the chief judge of the court of appeals plus an equal number of circuit and district judges. Most circuit judicial councils also have non-voting bankruptcy judge and magistrate judge observers.

The Director of the AO is appointed by the Chief Justice and serves under the supervision and direction of the Judicial Conference of the United States. 28 U.S.C. §§ 601, 604(a). The Judicial Conference is the policy-making body for the federal Judiciary, 28 U.S.C. § 331, and much of its work, like that in Congress, is conducted by committees. Proposed policies are analyzed and considered at the committee level. The Judiciary's audit, review, and investigative assistance activities are overseen by the Judicial Conference Committee on Audits and Administrative Office Accountability.

External Oversight

In addition to these internal oversight mechanisms, Congress provides external oversight of Judiciary budgets, administrative functions, and operations. Today's hearing is an example of Congress exercising its legitimate oversight role specifically to hear about how our self-governance is functioning, to ask questions about our accountability systems, and to discuss suggested actions that the Judiciary can take to address any concerns you may have. Judiciary representatives are often called upon to testify before other Congressional committees that have oversight responsibilities over other aspects of our operations, including for example the Judiciary's budget requests and courthouse construction. In addition, the Government Accountability Office (GAO) regularly conducts studies of Judiciary operations. Nine GAO studies involving the federal Judiciary are either underway or recently completed. This year, the Judiciary has cooperated with GAO reviews on the following array of topics: shared administrative services, courthouse planning and use, patent litigation, judicial survivor benefits, the bankruptcy of large financial firms, and other matters.

Judiciary Audit Programs

28 U.S.C. § 604(a)(11) provides that the Director of the AO shall audit vouchers and accounts of the courts, the Federal Judicial Center, the offices providing pretrial services, and their clerical and administrative personnel. This responsibility requires the Director to audit the

courts' financial transactions to ensure the completeness, existence, accuracy, rights and obligations, valuation, and presentation of financial reporting. To carry out this function, the AO's Office of Audit oversees comprehensive audits of Judiciary funds through cyclical financial audits of Judiciary units, annual financial audits of Judiciary programs, and audits of major program expenditures, activities, and systems.

Most of these audits, including the cyclical audits of court units, audits of Criminal Justice Act grantees, bankruptcy trustees and debtors, and audits of the Judiciary's appropriation accounts, are conducted by independent certified public accounting (CPA) firms. These audits are performed in accordance with generally accepted auditing standards, and the standards applicable to financial audits contained in the *Government Auditing Standards*, issued by the Comptroller General of the United States. Use of CPA firms for these audits provides the assurance that the Judiciary has obtained an independent auditor's opinion on the related financial statements.

In addition to these regular audits, managers of federal court units, including federal defender organizations, may request special audits of their units or programs. The most common types of special audits are "change of clerk" and "change of financial administrator" audits. These audits provide assurance that new unit executives and financial administrators inherit financially sound operations. The AO may also initiate a special audit in certain circumstances if an issue is identified in an area for which the AO has oversight or audit responsibilities. Special financial audits are usually performed by an experienced staff financial auditor from the AO's Office of Audit.

Upon completion of all audits, final audit reports are provided to the court unit's chief judge, court unit executives and circuit executives, and relevant AO program managers and offices. These reports are used by the auditee to implement recommendations communicated in the report to address audit findings. In order to ensure that court units and other audited entities evaluate and implement corrective action to address audit findings or other issues identified in an

audit, the AO, under the guidance of the Committee on Audit and Administrative Office Accountability, has instituted a follow-up program in which auditees are asked to report on and verify the implementation of corrective actions. The Office of Audit tracks all findings identified in final audit reports until it has been verified that all issues have been resolved. Open findings and reports may be escalated to the relevant circuit judicial council for resolution if not addressed at the local level. In addition, all previous findings and corrective actions are reviewed and assessed as part of the next regularly scheduled audit.

Performance audits also are conducted. This type of audit provides information to improve program management and facilitate decision-making by management, as well as to oversee or initiate corrective actions and improve public accountability. Performance audits are generally national in scope and focus on programs, activities, or systems that support all of the courts. Typically, they are performed at the request of either AO or court unit management to review a specific operation or program or to ensure that a law, standard, or policy is adhered to or is operating effectively. Performance audits can be conducted by internal audit staff or by independent CPA firms, depending on the nature of the audit.

Program Reviews

The AO conducts a broad array of management and program reviews of court units and federal defender organizations. These review programs provide advice to court and defender organization managers regarding the effectiveness of their organizations, and determine whether the policies of the Judicial Conference are being followed. Review programs also assess whether AO responsibilities that have been delegated to the courts by the AO Director are being carried out in compliance with relevant policies.

Program reviews may be broad in scope or narrowly focused – they may address the operations and functions of the organization; human resource management; budget and finance; property management; procurement; jury administration; court reporting; court interpreting; and

information technology operations, management, and security. Most program reviews are conducted on site and include observations of office operations, interviews with key staff, and reviews of appropriate court records and files.

Most program reviews conclude with a set of findings and recommendations that are discussed with the court unit while they are in a preliminary stage, and are then included in a final report. Implementation of program review recommendations is generally the responsibility of the court unit or defender organization, in consultation with the relevant AO program office, which is also available to provide assistance as needed.

Investigations of Allegations of Fraud, Waste, and Abuse

In keeping with the decentralized nature of the federal Judiciary, the primary responsibility for addressing allegations of fraud, waste, or abuse rests with each Judiciary organization – at the local, regional, and national levels. The Committee on Audits and Administrative Office Accountability works with courts to ensure that local mechanisms for reporting and investigating fraud, waste, or abuse allegations are established and that these mechanisms are communicated to all Judiciary employees. For those who may not feel comfortable reporting an allegation locally, complaints may be lodged at the circuit level or with the AO, which maintains a confidential fraud, waste, and abuse online system that is available to all Judiciary employees and contractors.

Since 1988, the Judicial Conference has authorized the Director of the AO to provide investigative assistance to courts and federal public defender organizations, upon request of a chief circuit, district, or bankruptcy judge. The AO may receive allegations pertaining to the federal courts and its employees from court or AO employees, from executive branch agencies such as the Department of Justice, and from GAO's fraud hotline. Allegations of impropriety may also be received by the AO from members of Congress and the general public. If the

allegation involves court behavior, the AO brings these matters to the chief judge of the involved court and offers assistance, including investigatory assistance.

Although courts may elect to conduct their own investigations of alleged improprieties, the AO's investigation program was created to provide professional, impartial, fact-finding services. The investigation program enables an involved court to determine if a matter requires its administrative attention, generally by way of corrective action or, in some circumstances, referral to law enforcement officials. The AO follows up with the court regarding its investigation and resolutions are reported to the Committee on Audits and Administrative Office Accountability.

Whistleblower Protections for Judiciary Employees

To protect whistleblowers in the courts, in September 2012, the Judicial Conference approved an amendment to the Judiciary's Model Employment Dispute Resolution (EDR) Plan to provide more explicit protections for whistleblowers. A new chapter in the Model EDR Plan includes a policy statement that employees with certain personnel authority shall not take adverse action against an employee who in good faith discloses what that employee believes is evidence of a violation of any law, rule, or regulation, as well as certain other conduct constituting gross mismanagement or waste. The new chapter also defines adverse actions and describes reporting responsibilities, the investigation of allegations, and disciplinary actions. Claims of retaliation are adjudicated through the plan's dispute resolution procedures. The AO also has whistleblower protections for its employees, established pursuant to the AO Personnel Act, Pub. L. No. 101-474.

Conclusion

Accountability is a core value of the federal Judiciary, and a comprehensive array of Judiciary policies, procedures, and governance mechanisms provide thorough oversight and review of court and federal defender operations. A multi-tiered system of comprehensive checks

combined with decentralized authority has provided effective operational oversight and ensured that problems are prevented, and that when they do occur, they are promptly identified and addressed. Working together, these components have proven an effective deterrent against misconduct and misuse of public resources, fostered a culture of integrity and accountability, and contributed to the federal Judiciary's established record of sound stewardship.

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Mr. COBLE. Thank you, Judge Sentelle.

Professor Hellman, as I mentioned earlier and I will reiterate it, you are no stranger to Capitol Hill. Good to have you back here on the Hill.

TESTIMONY OF ARTHUR D. HELLMAN, SALLY ANN SEMENKO ENDOWED CHAIR, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW

Mr. HELLMAN. Well, thank you so much, Mr. Chairman, for holding this hearing, for giving me the opportunity to share my thoughts on this subject that I've been studying and writing about for more than a decade, and thank you especially for those generous words of welcome.

In my view, the system of decentralized self-regulation established by Congress in 2008 is sound and does not require fundamental restructuring. At the same time, the experience of the past few years has revealed a number of gaps and deficiencies in the regulatory regime that were not apparent before and that warrant attention today.

Some of these may be appropriately dealt with through revision of the rules that were promulgated by the judiciary in 1980 that have been mentioned here already. But others, in my view, should be addressed by amendments by Congress to Title 28.

In my statement, I suggest statutory amendments dealing with three aspects of the system. One, transparency and disclosure. Two, disqualification of judges. Three, review of the orders issued by chief judges and circuit councils. Now why those three elements?

One reason is that in each of those areas, the judiciary has promulgated rules, like the 2008 rules, that reflect sound policy but are in conflict or tension with the statutory language. And I will suggest to you that it is not healthy for the judiciary to be operating under rules that are or that appear to be at variance with the laws passed by Congress. That's true in any situation, but it's particularly unfortunate when the rules regulate a matter as sensitive as judicial ethics with the possibility of imposing sanctions on Federal judges.

Beyond that, each of these elements is, in a sense, structural. They determine who makes the decisions and whether the public and Congress itself are getting enough information to know with confidence whether the system is working as it should.

Now having said that, I don't mean to minimize the role of the judiciary in administering the system and improving that system. On the contrary, in my statement, I suggest a number of steps—quite a few, actually—that the judiciary can take today or very quickly without any further authorization by Congress. But I do think that for the judiciary to do its job right that it does need some help from Congress in the form of amendments to Title 28.

First, disclosure and transparency. From the beginning, the administration of the Act has been characterized by a lack of transparency and a bias against disclosure. But to some degree, the Act itself may be at fault because it includes a strict provision requiring confidentiality.

Now notwithstanding that confidentiality requirement, the 2008 rules include a new provision that authorizes the chief judge to disclose the existence of a proceeding under the Act when necessary to maintain public confidence in the administration of the Act and the Federal judiciary's ability to redress misconduct. I think that is a really good idea and that Congress should ratify it and build upon it, and there are some details on that in my statement.

I'll skip now to disqualification. On disqualification, there are two kinds of problems. The statute itself provides only limited guidance on when judges should disqualify themselves from taking part in particular misconduct proceedings.

The current rules have quite a bit to say on the subject, but one provision of those rules appears to be inconsistent with the statute, and others, in my view, do not adequately protect against conflict of interest.

I think that the rules on disqualification should be part of the statute and that there's a simple model, Section 455, which deals with litigation. Everybody is familiar with that.

Finally, review of chief judge and circuit council orders. There's a very strong limitation on review in the statute. The consequence of this has been that some high-visibility cases, the cases that shape public perceptions of whether the Act is working, have gone unreviewed. I think those can and should be dealt with.

I'll summarize and conclude by saying that all of the suggestions made in that unfortunately lengthy statement of mine—all of those suggestions are incremental. What they represent is the best practices developed by the judiciary, the institutional judiciary and some individual judges over the years.

And I think that by updating the Act to reflect these practices Congress can enhance accountability while fully respecting and maintaining the independence of the judiciary.

Thank you. I'd be happy to answer questions.

[The prepared statement of Mr. Hellman follows:]

Statement of

Arthur D. Hellman
Sally Ann Semenko Endowed Chair
University of Pittsburgh School of Law

House Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet

Hearing on

An Examination of the
Judicial Conduct and Disability System

April 25, 2013

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Outline of Statement

Statement of
Arthur D. Hellman

Chairman Coble, Ranking Member Watt, and Members of the Subcommittee:

Thank you for inviting me to express my views at this hearing on "An Examination of the Judicial Conduct and Disability System."

In my view, the system of decentralized self-regulation established by Congress in 1980 is sound and does not require fundamental restructuring. At the same time, the experience of the past few years has revealed gaps and deficiencies in the regulatory regime that warrant attention. Some may be appropriately dealt with through revision of the Rules promulgated by the judiciary, but others should be addressed by Congress through changes to Title 28.

In this statement I suggest statutory amendments (and also some Rules changes) dealing with three aspects of the system: transparency and disclosure; disqualification of judges; and review of orders issued by chief judges and judicial councils. A common thread is that in each of these areas the judiciary has promulgated rules that reflect sound policy but are in conflict or tension with statutory language. Moreover, these elements are more than procedural; they determine who makes the decisions and how much information the public receives. The statement concludes by briefly flagging other issues that may warrant attention by Congress or the Judicial Conference.

Before turning to these matters, I will say a few words by way of personal background. I am a professor of law at the University of Pittsburgh School of Law, where I was appointed in 2005 as the inaugural holder of the Sally Ann Semenko Endowed Chair. I have been studying the operation of the federal courts for more than 30 years. I have testified at several hearings of the House Judiciary Committee on various aspects of judicial ethics, including the 2001 hearing that led to the enactment of the Judicial Improvements Act of 2002. My writings include two articles of particular relevance to today's hearing. One is an overview of the regulation of federal judicial ethics.[1] The other is an analysis of

[1] Arthur D. Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*, 69 U. Pitt. L. Rev. 189 (2007) [hereinafter Hellman, Judicial Ethics].

the current rules for judicial misconduct proceedings, adopted by the judiciary in the spring of 2008.[2]

I. Background

For most of the nation's history, the only formal mechanism for dealing with misconduct by federal judges was the cumbersome process of impeachment. That era ended with the enactment of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (1980 Act or Act). This law created a regime that has aptly been described as one of "decentralized self-regulation."[3] Codified in a single subsection 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. In 1990, Congress adopted a modest package of amendments to the statute.

In November 2001, the predecessor of this Subcommittee held an oversight hearing on the operation of the 1980 Act. Based on the record of that hearing, Chairman Coble and Ranking Member Berman introduced a bipartisan bill to further revise the statutory provisions governing the handling of misconduct complaints. In particular, the bill codified some of the procedures adopted by the judiciary through rulemaking; it also gave the misconduct provisions their own chapter in the United States Code, Chapter 16. The bill was signed into law as the Judicial Improvements Act of 2002.

Much has happened since the 2001 hearing. Two federal district judges were impeached by the House of Representatives. One resigned to avoid a Senate trial; the other was convicted and removed from office. Chief Judge Alex Kozinski of the Ninth Circuit was "admonished" by the Judicial Council of the Third Circuit for "possession of sexually explicit offensive material combined with his carelessness in failing to safeguard his sphere of privacy."[4] District Judge Manuel Real was publicly reprimanded by the Ninth Circuit Judicial Council for

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[2] Arthur D. Hellman, *When Judges Are Accused: An Initial Look at the New Federal Judicial Misconduct Rules*, 22 Notre Dame J. L. Ethics & Pub. Pol. 325 (2008) [hereinafter Hellman, Misconduct Rules].

[3] 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).

[4] In re Complaint of Judicial Misconduct, 575 F.3d 279, 293 (3d Cir. Jud. Council 2009) [hereinafter Kozinski Website Opinion]. The proceeding was transferred to the Third Circuit after a request to the Chief Justice by the Ninth Circuit Judicial Council.

improperly interfering in a bankruptcy case – but only after protracted proceedings that included two dismissals of the complaint.[5] Just this year, Senior District Judge Richard F. Cebull resigned from the bench after a Special Committee in the Ninth Circuit completed its investigation of Judge Cebull's transmittal of an email containing racially offensive content.

Meanwhile, the regulatory landscape within the judiciary has altered considerably. In September 2006, a committee chaired by Associate Justice Stephen G. Breyer issued a detailed report on the implementation of the 1980 Act.[6] The report included extensive commentary on key statutory terms; it also made recommendations to all of the principal actors in the misconduct process. Although the report does not have the status of law, it is treated as a primary document; chief judges and circuit councils look to its analysis for guidance in handling misconduct complaints.

In March 2008, the Judicial Conference of the United States, the administrative policy-making body of the federal judiciary, approved the first set of nationally binding rules for dealing with accusations of misconduct by federal judges.[7] These Rules replaced the Illustrative Rules promulgated by the Administrative Office of United States Courts in 2000.[8] All of the circuits have now adopted the 2008 Rules.

Against this background, the time is ripe for a fresh look at the operation of the federal judicial misconduct statutes. I applaud the Subcommittee for initiating the process by holding this hearing.

II. Perspectives on Chapter 16

Before turning to the specifics, I offer three general observations to provide some context for my suggestions.

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[5] See In re Committee on Judicial Conduct & Disability, 517 F.3d 563 (U.S. Jud. Conf. Comm. on Conduct & Disability 2008). The conduct that led to the reprimand was also the subject of an impeachment hearing by the predecessor of this Subcommittee.

[6] 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].

[7] Rules for Judicial-Conduct and Judicial-Disability Proceedings (Mar. 11. 2008), available at http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/Misconduct/jud_conduct_and_disability_308_app_B_rev.pdf (hereinafter cited with Rule number).

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

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

In this statement I shall focus primarily on misconduct. But I will note here that in revising the statute, care should be taken not to include mandates that would interfere with the ability of circuit chief judges to deal with disability in a quiet, compassionate, but effective way.

2. *Routine and non-routine complaints*. The vast majority of misconduct complaints do no more than challenge the merits of a judge's ruling or make totally unsupported allegations of bias, hostility, or conspiracy on the part of one or more judges. The Breyer Committee, after careful study, found "no serious problems with the judiciary's handling" of these routine complaints. I agree with that assessment. By the same token, I believe that Chapter 16 in its current form provides a generally adequate framework for dealing with the routine complaints. Some tweaking of the procedures may be desirable, but no more.

Non-routine complaints present a more complex picture – in particular, what the Breyer Committee called "high-visibility cases" – complaints "that have received national or regional press coverage, including matters that have come to the attention of (or been filed by) members of Congress." These complaints are a tiny fraction of the total, but they are important out of proportion to their numbers, because those are the cases that shape public perceptions of whether the judiciary is adequately carrying out its responsibility to police misconduct within its ranks. In the high-visibility cases, the Breyer Committee found "an error rate of close to 30%," which the Committee deemed "far too high." The judiciary has taken steps to improve its handling of these cases, but more could be done, and some modest amendments to Chapter 16 could help.

3. *Fine-tuning the 2008 Rules*. The mandatory national Rules adopted by the Judicial Conference in 2008 draw heavily on the analysis in the Breyer Committee report. However, on two important points the Rules fall short of the Breyer Committee's recommendations. First, the Rules do not adequately delineate the circumstances under which a circuit chief judge should "identify a complaint" to initiate the misconduct process. Second, the Rules do not sufficiently define the

limited scope of the inquiry that the chief judge may undertake in his or her initial review of a complaint. There is no need to revise the statutory treatment of these matters, but I do think they should be addressed by the Conduct Committee and the Judicial Conference. I have discussed these points at length elsewhere and will not repeat the analysis here.[9]

III. Procedures under the Act and the Rules

To set the stage for discussion of the issues warranting attention by this Subcommittee, it will be useful to outline the current procedures for handling complaints against federal judges.

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

There are two ways in which a proceeding may be initiated to consider allegations of misconduct by a federal judge. Ordinarily, the process begins with the filing of a complaint about a judge with the clerk of the court of appeals for the circuit. "Any person" may file a complaint; the complainant need not have any connection with the proceedings or activities that are the subject of the complaint, nor must the complainant have personal knowledge of the facts asserted. The Act also provides that the chief judge of the circuit may "identify a complaint" and thus initiate the investigatory process even when no complaint has been filed by a litigant or anyone else.

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

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[9] See Hellman, Misconduct Rules, supra note 2, at 348-55. I will also note that the 2008 Rules are contained in a rather bureaucratic document, not easily navigable by the ordinary citizen. Some reorganization and restyling would be desirable.

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. What I call Track One is the "chief judge track;" Track Two is the "special committee track."[10] All but a tiny fraction of complaints are disposed of on the chief judge track.[11]

If the chief judge dismisses the complaint or concludes the proceeding, a dissatisfied complainant may seek review of the decision by filing a petition addressed to the judicial council of the circuit.[12] 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 states that there is no further review "on appeal or otherwise."[13] However, the 2008 Rules provide for another level of review under limited circumstances. This innovation raises important issues that will be discussed in Part VI of this statement.[14]

If the chief judge does not dismiss the complaint or conclude the proceeding, he or she must promptly appoint a "special committee" to "investigate the facts and allegations contained in the complaint." 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.

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 after a special committee investigation can file a petition for review by the Conference; in addition, the circuit council can refer serious matters to

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

[11] *See* Breyer Committee Report, *supra* note 6, at 132.

[12] The judicial council may refer petitions to a panel composed of at least five members of the council.

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

[14] To my knowledge, the new review provision has not yet been invoked.

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.

Congress has authorized the Conference to delegate its review power to a standing committee, and the Conference has done so.[15] Until 2007, the committee was known as the Committee to Review Circuit Council Conduct and Disability Orders. The name was changed in 2007 in order to reflect the Committee's more active role in overseeing the Act's implementation; it is now the Committee on Judicial Conduct and Disability.[16] I refer to it in this statement as the "Conduct Committee."

IV. Disclosure and Transparency

The system of self-regulation established by Congress can work only if the public trusts the judges to resist the temptations of what the Breyer Committee called "guild favoritism" – "an inappropriate sympathy with the judge's point of view or de-emphasis of the misconduct problem."[17] This means that it is not enough that the judges carry out the task with rigor and impartiality; it is also necessary that their actions are *seen* as reflecting those qualities. In short, an effective system requires trust, and trust requires transparency.

Unfortunately, from the beginning, the administration of the Act has been characterized by a lack of transparency and a bias against disclosure. The 2008 Rules take some small steps in the direction of making the process more visible, and I applaud them for that. But they do not go far enough. Moreover, the statute itself bears some of the blame. I'll look first at the rules governing disclosure, then at other aspects of transparency.

A. The nature and timing of public disclosure

Except in the rare case where the Judicial Conference determines that impeachment may be warranted, Chapter 16 provides for only limited public disclosure in misconduct proceedings. Written orders issued by a judicial council or by the Judicial Conference of the United States to implement disciplinary

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

[16] See Report of the Proceedings of the Judicial Conference of the United States, Mar. 13, 2007, at 5.

[17] Breyer Committee Report, supra note 6, at 119.

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."[18] The statute is silent on the publication of chief judge orders dismissing a complaint or concluding a proceeding.

The judiciary's rules have filled in some of the statutory gaps, but they too evince a bias against disclosure. The basic rule (part of Rule 24) is that orders entered by the chief circuit judge and the judicial council must be made public, but only "[w]hen final action on a complaint has been taken and it is no longer subject to review." This directive is supplemented by a series of rules governing the disclosure – or more accurately the non-disclosure – of the name of the subject judge. Of particular importance, the rules specify two situations in which "the publicly available materials must *not* disclose the name of the subject judge without his or her consent":

- "the complaint is finally dismissed … without the appointment of a special committee;" or
- "the complaint … is concluded under [§ 352(b)(2)] because of voluntary corrective action."

(Emphasis added.) There is only one situation in which the judge's name *must* be disclosed: when the judicial council takes remedial action (other than private censure or reprimand) after a special committee report.

The overwhelming majority of complaints are dismissed without the appointment of a special committee, and a large proportion of the remainder are concluded based on corrective action. Thus, in all but a tiny fraction of cases, the publicly available materials will not identify the judge, and any explanatory memoranda may omit details that would enable a reader to find out who the judge is.[19] Further, no orders of any kind will be made public until the proceedings have concluded.

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[18] 28 U.S.C. § 360(a). As noted in the text, there is also a narrow exception for situations involving actual or potential impeachment proceedings.

[19] See, e.g., In re Complaint Against a Judicial Officer, No. 07-7-352-55 (7th Cir. Judicial Council Sept. 30, 2008). The two-paragraph order informs us that the chief judge appointed a special committee, and the committee carried out an investigation. The committee recommended that complaint be "dismissed as factually unsubstantiated and/or concluded based

Is this policy sound? Consider first the cases in which the complaint is dismissed without the appointment of a special committee. The commentary has little to say about the rationale for the non-disclosure rule, but a somewhat fuller explanation can be found in the commentary to the Illustrative Rules. That commentary referred to "the legislative interest in protecting a judge from public airing of unfounded charges," and said that "the [1980] law is reasonably interpreted as permitting nondisclosure of the identity of a judicial officer who is ultimately exonerated and also permitting delay in disclosure until the ultimate outcome is known."[20]

For purposes of today's hearing, it is unnecessary to inquire into Congress's intent in 1980; the question, rather, is whether the asserted interest in protecting judges from "public airing" should be given primacy over the interest in accountability.[21] In the routine cases that make up the vast bulk of complaints, I think the tradeoff is a reasonable one, because neither interest is particularly strong. Take the typical case: the chief judge dismisses a complaint on the ground that the allegations are directly related to the merits of a decision. Is there really an injury to the judge's reputation if this "unfounded charge[]" of misconduct receives a "public airing"? At the same time, however, it is hard to see any serious threat to accountability if the judge's name remains undisclosed.

The calculus changes in what the Breyer Committee called "high-visibility cases" – cases that have received national or regional press coverage. A complaint filed against District Judge Charles A. Shaw in 2006 is illustrative. The complaint was based on a story in the St. Louis Post Dispatch reporting that Judge Shaw "urged the crowd [at a naturalization ceremony] to vote for a congressman who shared the stage." The article noted that the Code of Conduct for federal judges says that judges should not endorse candidates for public office. The chief judge dismissed the complaint, saying that the judge's statements did not constitute an "endorsement." The order did not identify the judge.[22]

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on voluntary corrective actions." The circuit council accepted the recommendation. But the judge is not identified, and the order gives no clue as to the nature of the alleged misconduct.

[20] Illustrative Rules, supra note 8, at 55.

[21] In the interest of brevity, I will summarize my conclusions in this statement. For a more extended analysis, see Hellman, Misconduct Rules, supra note 2, at 357-59.

[22] *In re* Complaint of John Doe, JCP No. 06-013 (8th Cir. Jud. Council Oct. 18, 2006) (Loken, C.J.) (on file with the author).

The accusations against Judge Shaw had already been aired in a major regional newspaper (including its website). Withholding his name from the dismissal order did not protect him from that airing; on the contrary, it obscured from the public the information that he had been exonerated. In this kind of situation, the policy of the Rules makes little sense.[23]

The "voluntary corrective action" cases present more difficult questions. Typically, these are cases in which the accusation of misconduct has some foundation, but the judge apologizes, and on that basis the chief judge concludes the proceeding. One can argue that, at least where the chief judge finds that the accused judge has violated the Code of Conduct or other ethical norms, the public has a legitimate interest in knowing the identity of the judge. On the other hand, if the apology (or other corrective action) did not carry with it a promise that the order would not identify the judge, the judge might be less willing to acknowledge fault and apologize.[24] That does not seem like a desirable outcome.

Of course, this implicit bargain makes sense only when the allegations have not received a "public airing." If the underlying conduct has already been reported in national or regional news media, it is hard to see what is gained by withholding the judge's name from the order. And including it allows the public to see that the judiciary has not swept the matter under the rug. Indeed, in this situation, chief judges today sometimes ask the apologizing judge to consent to being identified in the order.[25]

In my view, the policy should be this: When the substance of a misconduct complaint has been reported in news media, there should be a presumption that orders arising out of that complaint will disclose the identity of the judge. The presumption would apply when the complaint is dismissed on the merits and also

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

[24] Perhaps this is what the Rules commentary means when it says: "Shielding the name of the subject judge in this circumstance should encourage informal disposition."

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

when the proceeding is concluded based on corrective action. By the same token, in "high visibility" cases it will often be desirable to release interim as well as final orders.

I do not suggest that this policy be codified as part of Chapter 16. Rather, the statute should be amended to enable the judiciary to implement the policy (through rules or guidelines) without the constraints of the existing statutory provisions on confidentiality. The Judicial Conference has shown the way, in a provision that is new in the 2008 Rules: "In extraordinary circumstances, a chief judge may disclose the existence of a proceeding under these Rules when necessary to maintain public confidence in the federal judiciary's ability to redress misconduct or disability." Building upon that provision, here is one possible way of drafting the amendment (to § 360):

> When necessary or appropriate to maintain public confidence in the federal judiciary's ability to redress misconduct or disability, a chief judge, a judicial council, or the Judicial Conference may –
>
> (1) disclose the existence of a proceeding under this chapter;
>
> (2) make interim orders public; and
>
> (3) disclose the name of the judge who is subject of an order made public under [section 360].

B. Making the process more visible

"Concern over public awareness of the Act," the Breyer Committee observed, "is longstanding." Addressing this concern 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.

Thanks in part to stern prodding by the Breyer Committee, the federal courts now do a better job of publicizing the availability of the process. But improvement has been spotty. The Breyer Committee recommended that every federal court should display the complaint form and the governing rules "prominently" on its website – "that is, with a link on the homepage."[26] As of mid-June 2011, more than one-third of the district courts had failed to take this modest step toward greater visibility. A spot check in April 2013 suggests that

[26] Breyer Committee Report, supra note 6, at 218.

little has changed since then. Perhaps the time has come to incorporate the Breyer Committee recommendation into the National Rules.

Even less progress has been made in publicizing how the Act is administered. Here are some steps that might be taken.

1. Electronic posting of final orders

The 2008 Rules provide that final orders disposing of a complaint "must be made public by placing them in a publicly accessible file in the office of the circuit clerk *or* by placing such orders on the court's public website." (Emphasis added.) It is difficult to understand why the Rule does not require, without qualification, that all final orders must be posted on circuit web sites. The ubiquity of the Internet has changed the popular understanding of document availability; in today's world, availability means "available online." Yet today, only six of the 13 federal circuits post all misconduct orders on their websites.

It is desirable in any event to codify the Rule provision requiring that all final orders (including those issued by the chief judge under § 352) be made public. That being so, there is every reason to include a requirement that the orders be posted on the court of appeals' public website.[27] This could easily be done by amending 28 U.S.C. § 360(b).

One drawback of comprehensive posting is that orders of general public interest (e.g. those that interpret the Code of Conduct) are buried among the routine ones. The simple solution is to post the non-routine orders under a separate heading or on a separate page within the website.

2. Publishing orders with precedential value

The 2008 Rules also provide: "If [misconduct] orders appear to have precedential value, the chief judge *may* cause them to be published." (Rule 23(b); emphasis added.) If a misconduct order "appears to have precedential value," that means that it will provide guidance to other judges in administering the Act. That is enough to warrant publication.

The rule should also encourage chief judges and circuit councils to provide sufficient explanation in their orders to enable outsiders to assess the appropriateness of the disposition.

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[27] The E-Government Act of 2002 already requires all federal courts to provide access on their websites to "the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter."

3. Creating a national compendium of precedential orders

Two decades ago, the National Commission on Judicial Discipline and Removal, chaired by former Rep. Robert W. Kastenmeier, recommended that the judiciary develop "a body of interpretative precedents" that would enhance "judicial and public education about judicial discipline and judicial ethics."[28] The Breyer Committee renewed and elaborated upon this recommendation. But no such compilation has been made available on the federal judiciary's public website.[29]

The Breyer Committee's report provides a good blueprint for the content and organization of the compilation, and I need only refer to it here.[30]

4. A more detailed annual report on the Act's administration

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

I suggest that the judiciary supplement the statistical report with a narrative report that includes discussion of particular noteworthy complaints and their resolution. Models for such a report can be found in the annual reports issued by some state boards and commissions. The Minnesota Board on Judicial Standards provides "abridged versions" of cases to maintain confidentiality; the California Commission on Judicial Performance gives a wealth of detail.

The report should be signed by the chair of the Conduct Committee. And it should be posted as a separate document on the "Judicial Conduct and Disability" page of the Federal Judiciary's website. Taking these steps would not only

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[28] Report of the National Commission on Judicial Discipline and Removal, 152 F.R.D. 265, 352 (1993)

[29] The 2008 Rules state that the Conduct Committee "will make available on the Federal Judiciary's website … selected illustrative orders, appropriately redacted, to provide additional information to the public on how complaints are addressed under the Act." But the only orders published on the website are five opinions of the Conduct Committee.

[30] Breyer Committee Report, supra note 6, at 216-17. The Breyer Committee recommended that the precedential orders should be "published in broad categories keyed to the Act's provisions, and … with brief headnotes." I would add that the categories should also be keyed to provisions of the Code of Conduct for United States Judges.

enhance public understanding of the Act's administration; it would also show the judiciary's commitment to policing misconduct within its ranks.

V. Disqualification of Judges

In opting for a system of judicial self-regulation, Congress decided that, as a general matter, federal judges can be trusted to investigate allegations of misconduct by their fellow judges and to impose discipline where appropriate. Plainly, however, there are some situations in which particular judges should not participate in particular misconduct proceedings. Unfortunately, Chapter 16 provides only limited guidance on when judges should disqualify themselves. The 2008 Rules have quite a bit to say about the subject, but some of their provisions are themselves problematic. I'll begin by looking at the statute, then turn to some of the issues that the statute does not address.

A. Disqualification of judges under investigation

Section 359(a) provides that a judge who is the subject of an "investigation" for misconduct or disability is not permitted to participate in specified governance activities within the judiciary. (The statute does not restrict participation in adjudicative activities.) Section 359(a) reads:

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

This provision raises four issues that warrant the Subcommittee's attention.

First, the reference to "this chapter" in the opening phrase may be misleading. The only "investigation" authorized by Chapter 16 is an investigation by a special committee under § 353. But the reference in § 359(a) could be read as including the "limited inquiry" made by a chief judge under § 352. Thus, if the present phrasing is retained, I suggest replacing "this chapter" with "section 353."[31]

Second, the statute specifies that the disqualification continues "until all proceedings *under this chapter* relating to such investigation have been finally

[31] Perhaps out of caution there should also be a reference to § 355, but it is highly unlikely that the Judicial Conference would be carrying out an "investigation" with an eye to possible impeachment unless a special committee had been investigating in the circuit.

terminated." (Emphasis added.) This appears to mean that disqualification would not be required if the investigation has moved to Congress for consideration of possible impeachment. I believe that if disqualification is appropriate while the judiciary is investigating possible misconduct, it should continue during the pendency of related proceedings in Congress. Rule 18 of the Illustrative Rules offers an alternative formulation that eliminates any ambiguity. Using it as a model, § 359(a) would read:

> Upon the appointment of a special committee under section 353, the judge who is the subject of the investigation shall not serve upon [the specified bodies] until all proceedings relating to such investigation have been finally terminated.

Third, there is a question as to the scope of the disqualification mandated by § 359(a). The statute says that a judge who is the subject of a special committee investigation shall not "serve ... upon a judicial council, [or] upon the Judicial Conference." But the 2008 Rules provide that the subject judge is disqualified "from participating *in any proceeding arising under the Act* ... as a member of ... the judicial council of the circuit [or of] the Judicial Conference of the United States." (Emphasis added.) The commentary confirms that under the Rule the disqualification "relates only to the subject judge's participation in" misconduct proceedings; it does not "disqualify a subject judge from service of any kind on each of the bodies mentioned."

I believe that § 359(a) does "disqualify a subject judge from service of any kind on each of the bodies mentioned."[32] On that reading, the new Rule is in direct conflict with the statute. But Congress can amend the statute to conform to the Rule; the question for this Subcommittee is whether it should.

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

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

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[32] The drafters of the Illustrative Rules appear to have read the statute in the same way. See Illustrative Rules, supra note 8, at 56 (Rule 18(a)).

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

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

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

Taking all of these points into account, I suggest that § 359(a) be redrafted as follows:

> Upon the appointment of a special committee under section 353, and until all proceedings relating to the investigation have been finally terminated, the judge who is the subject of the investigation –
>
> (1) shall not serve upon a special committee appointed under section 353 or upon the standing committee established under section 331; and
>
> (2) shall not participate in any proceeding arising under this chapter as a member of the judicial council of the circuit or as a member of the Judicial Conference of the United States.

Finally, the statute does not address the question whether a circuit chief judge should be permitted to carry out his or her responsibilities under Chapter 16 while he or she is the subject of a special committee investigation under § 353. As far as I know, this situation has arisen only once since the procedures were established more than 30 years ago.[33] But if Congress thinks that the answer is "no," the statute should be amended accordingly.

I believe such an amendment would be desirable. First, it is unseemly for a judge whose own conduct is under investigation for possible violation of ethical norms to be passing judgment on other judges who have been accused of misconduct. Second, as the Rules commentary states in a related context,

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[33] Three separate complaints were involved.

"participation in proceedings arising under the Act … by a judge who is the subject of a special committee investigation may lead to an appearance of self-interest in creating substantive and procedural precedents governing such proceedings."[34] And there is no way of telling in advance whether a particular misconduct complaint will raises issues that bear upon those involved in the chief judge's own case.

For these reasons – and recognizing the rarity of the situation – I think it would be desirable to provide that, for the duration, the next-most-senior active judge will serve as acting chief judge for purposes of Chapter 16. Here is a possible way of putting this into the statute:

> A circuit chief judge whose conduct is the subject of an investigation under section 353 shall not participate in the consideration of any complaint under this chapter until all proceedings relating to such investigation have been finally terminated.

B. Other disqualification issues

Section 359(a) deals only with the disqualification of judges who are under investigation by a special committee. It says nothing about disqualification issues that may arise in misconduct proceedings in other contexts. Nor does any other provision of Chapter 16. One might think that the general disqualification statute, 28 U.S.C. § 455, would provide the governing law, but by its own terms it does not; it applies to "proceeding[s]," and "proceeding" is defined to include "pretrial, trial, appellate review, or other *stages of litigation*." (Emphasis added.) Misconduct proceedings are not "litigation."

Rule 25 of the 2008 Rules contains a lengthy set of rules governing disqualification. Three provisions (in addition to the one dealing with judges who are the subject of a special committee investigation) warrant discussion here.

1. The general standard

Rule 25 of the 2008 misconduct rules begins by laying out the general standard: "Any judge is disqualified from participating in any proceeding under these Rules if the judge, in his or her discretion, concludes that circumstances warrant disqualification." This standard contrasts sharply with the one codified in § 455(a) for "litigation": a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The courts have held that § 455(a) "adopts the objective standard of a reasonable observer" who is "fully

[34] R. 25 cmt.

informed of the underlying facts."[35] In addition, § 455(b) specifies several particular circumstances in which disqualification is required (e.g. financial interest).

Given the commands of § 455, it seems anomalous to say that a judge, when deciding whether to participate in considering a misconduct complaint against a fellow judge, should look only to "his or her discretion." One would think that, if anything, the bar to participation would be higher than it is in the context of litigation. This is so for two reasons. First, as the Breyer Committee recognized, the Act's system of self-regulation necessarily raises concerns about "guild favoritism."[36] Judges should therefore be especially vigilant to avoid the appearance of conflict. Second, a refusal to recuse in the context of litigation is generally subject to appellate review, while a refusal to recuse in a misconduct proceeding is generally not reviewable at all.

I do not think it is necessary to elevate the bar *above* that of § 455(a), but I do believe that the standard of § 455(a) should be applied in misconduct proceedings.[37] This can easily be done by adding a provision modeled on § 455(a) to § 357.

2. Chief judge participation in council review in Track One cases

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

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

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[35] United States v. Bayless, 201 F.3d 116, 126 (2nd Cir. 2000).

[36] Breyer Committee Report, supra note 6, at 119

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

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

Surprisingly, in the 2008 national Rules, this policy was reversed. New Rule 25(c) provides explicitly when a petition for review is filed, "the chief judge is *not* disqualified from participating in the council's consideration of the petition." (Emphasis added.) There is no explanation for the change.[38]

I believe that the policy of the Illustrative Rules is preferable. Congress decided that a complainant dissatisfied with a chief judge's final order should have one level of review as of right. Prohibiting the chief judge from participating in that review preserves the independence of that second look. The policy of the Illustrative Rules also has the benefit of encouraging the chief judge to make sure that all relevant information is part of the formal written record.[39]

I also believe that the disqualification rule should be incorporated into Chapter 16. There is a particular reason for this. The chief judge is, by statute, a member of the judicial council. (See 28 U.S.C. § 332.) It can be argued that the chief judge is therefore entitled to participate in all duties assigned by law to the council, including review of chief judge orders. This exception should therefore be specified by statute. Appropriate language can be drawn from Illustrative Rule 18(c).

3. Special committees and judicial councils

Rule 25(c) provides: "A member of the judicial council who serves on a special committee, including the chief judge, is not disqualified from participating in council consideration of the committee's report." There can be no legitimate objection to this rule. Unlike the chief judge, the special committee has no power

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

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

to enter orders. Its duties are to investigate, to report, and to make recommendations to the circuit council. It is not independent of the council, and there is no reason why a judge who has served on the committee should not participate in the council's consideration of the committee's report.

VI. Review of Chief Judge and Judicial Council Orders

Chapter 16 contains two – and only two – provisions authorizing review of orders issued by chief judges and judicial councils in misconduct proceedings. Review of chief judge orders is governed by § 352. That section, after defining the authority of the chief judge to screen and dispose of complaints, provides in subsection (c):

> A complainant or judge aggrieved by a final order of the chief judge under this section may petition the judicial council of the circuit for review thereof.

Review of judicial council orders is governed by § 357. That section provides:

> A complainant or judge aggrieved by an action of the judicial council *under section 354* may petition the Judicial Conference of the United States for review thereof.

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

Chapter 16 also contains two provisions *precluding* review. Section 352(c), after authorizing review in the language quoted above, adds:

> The [circuit council's] denial of a petition for review of the chief judge's order shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

This prohibition is repeated in § 357(c):

> Except as expressly provided in this section and section 352 (c) [quoted above], all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

Experience has revealed several flaws in the system of review created by these provisions. In the pages that follow, I outline the problems and suggest statutory amendments to correct them. The proposed amendments would:

- clarify the scope of judicial council review of final orders of the chief judge in Track One cases;
- provide statutory authority for limited Conduct Committee review in Track One cases, modeled after a novel provision in the 2008 Rules;
- create a channel of review when complaints are identified by the chief judge, thus filling a gap in the statutory arrangements; and
- make two small organizational changes.

A. Judicial council review of chief judge final orders

Section 352(b) authorizes the chief judge to issue two kinds of final orders: he or she may "dismiss the complaint," and he or she may "conclude the proceeding." Section 352(c) authorizes judicial council review of these final orders, but it does not specify the nature or scope of the council's authority when a petition for review has been filed. Rule 5 of the 2000 Illustrative Rules filled the gap. I believe that the substance of Illustrative Rule 5 should be incorporated into Chapter 16.[40]

Rule 5 was quite simple and straightforward. In relevant part, it read:

> The judicial council may affirm the order of the chief judge, return the matter to the chief judge for further action, or, in exceptional cases, take other appropriate action.

Each of the three elements of the rule warrants brief comment.

1. **Affirmance**. As reflected in the language quoted at the start of this discussion, § 352(c) and § 357(c) both refer to the "denial" of a petition for review. This is unfortunate. In the federal judicial system, the denial of review is associated with the Supreme Court's certiorari jurisdiction. The certiorari jurisdiction is discretionary, and a denial of certiorari, as the Justices have said on numerous occasions, is not a decision on the merits. But there is widespread agreement that, as stated in the commentary to the Illustrative Rules, the circuit judicial council "should ordinarily review the decision of the chief judge on the merits, treating the petition for review for all practical purposes as an appeal." That, indeed, is what the practice has been, both before and after the 2008 Rules:

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[40] Illustrative Rule 5 was superseded by Rule 19(b) of the new National Rules. However, for purposes of amending the statute, the simple language of Rule 5 is preferable to the elaborate specificity of Rule 19(b).

when a circuit council finds no error, it will generally *affirm* the chief judge's order. Chapter 16 should be amended to codify this approach, and Illustrative Rule 5 supplies appropriate language to that end.

2. **Returning the matter to the chief judge**. Everyone appears to have assumed that if the council does not affirm the chief judge's final order, it may return the matter to the chief judge with directions to reopen the proceedings in any way the council deems appropriate to the particular situation. New Rule 19(b) lists several specific actions that the council might direct the chief judge to take.[41] Whether or not such detail is desirable in the Rule, it is certainly not necessary in the statute. The language of old Rule 5 – "may … return the matter to the chief judge for further action" – serves the purpose very nicely.

3. "**Other appropriate action**." The two options listed thus far will suffice for the overwhelming majority of complaints. However, old Rule 5 also authorized the circuit council, "in exceptional cases, [to] take other appropriate action." New Rule 19(b) retains this language. The commentary to the Illustrative Rule explained that this provision "would permit the council to deny review rather than affirm in a case in which the process was obviously abused." And there may be other instances in which such authorization would be helpful. I would therefore incorporate it into the statute.

B. Conduct Committee review in Track One cases

As noted earlier, Chapter 16 states not once but twice that when a judicial council denies a petition for review of a chief judge's final order under § 352, the denial of review "shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." Nevertheless, the 2008 national rules authorize the Judicial Conference Conduct Committee to review council actions of this kind under limited circumstances.

I agree with the Judicial Conference that there should be some provision for review of judicial council orders affirming final orders of the chief judge under § 352. However, I believe that the availability of review should be somewhat broader than it is in the 2008 Rules. I also believe that the authority for this kind of review should be explicitly conferred by Congress by amendment to Chapter 16.

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[41] The council may direct the chief judge to conduct a further inquiry under § 352(a), to identify a complaint under § 351(b), or to appoint a special committee under § 353. (Note that the text of Rule 19(b) actually refers to the Rules that correspond to these statutory provisions.)

1. Background

The impetus for the new review provisions came from a controversial and protracted proceeding involving District Judge Manuel Real of Los Angeles.[42] In brief: the Judicial Council of the Ninth Circuit affirmed the dismissal of a misconduct complaint, over a blistering dissent by Judge Alex Kozinski, and notwithstanding substantial evidence that Judge Real had engaged in misconduct.[43] The complainant sought review by the Judicial Conference, but the Conduct Committee, by a vote of 3-2, determined that it had no jurisdiction.[44]

Not long after that, the Judicial Conference and the Conduct Committee reached a different conclusion. They decided that in cases where a circuit council has affirmed an order dismissing a misconduct complaint, the Judicial Conference does have the authority to determine "whether [the] complaint requires the appointment of a special investigating committee."[45]

New Rule 21(b) implements this decision. It permits a dissatisfied complainant or subject judge to petition for review "if one or more members of the judicial council dissented from the order on the ground that a special committee should be appointed." The Rule also provides for review of other council affirmance orders "[at the Conduct Committee's] initiative and in its sole discretion." In either situation, the Committee's review is limited "to the issue of whether a special committee should be appointed."

2. Availability and scope of review

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

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[42] For a detailed account of the origins of the new provision, see Hellman, Misconduct Rules, supra note 2, at 339-43.

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

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

[45] See Report of the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders at 3 (March 2007) (on file with the author).

dissent should be sufficient. And all such dissents are extremely rare, so concern about workload should not stand in the way.

I believe that review as of right should also be available in two other situations. The first is where the judicial council has affirmed an order *concluding the proceeding* under § 352(b)(2) rather than *dismissing the complaint* under § 352(b)(1). Typically, these are cases in which the accused judge has acknowledged violating ethical norms and has apologized. Such cases lie at or close to the line between conduct that warrants some kind of discipline and conduct that does not. Moreover, their numbers are small; for example, in SY 2012, only 8 complaints were "concluded," compared with nearly 1,300 that were dismissed. Providing for review as of right would add little to the burdens imposed on the Conduct Committee.

Review as of right should also be available when the judicial council, in addition to affirming the chief judge's dismissal order, has imposed sanctions upon the complainant. I would make an exception for orders that do no more than "restrict or impose conditions on the complainant's use of the complaint procedure."[46] But when more serious sanctions are imposed upon a complainant (such as a public reprimand), an added level of scrutiny – by a group of judges outside the circuit – will provide some assurance that the sanctions are not excessive and were imposed through fair procedures.[47]

What remains are unanimous orders of affirmance in cases where the chief judge has dismissed the complaint under § 352(b)(1). Rule 21(b) does not allow *petitions* for review in these cases, but it does authorize the Conduct Committee to *engage* in review "[at] its initiative and in its sole discretion." I think it makes more sense to allow petitions but to make the review discretionary, with no requirement of an explanation when review is denied. For one thing, the open-ended review provision in the new Rule potentially puts the case in limbo while the Conduct Committee decides whether this is one of the rare instances in which it should exercise its discretion.[48] For another, a petition for review can provide some guidance, however small, to aspects of the council decision that may be open to debate. And while it would be something of a burden for the

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[46] See 2008 Misconduct Rules, R. 10(a). The exception would not include orders that *prohibit* a complainant from future use of the procedure.

[47] For a brief discussion of judicial council authority to impose sanctions, see infra Part VII.

[48] There is also the potential for conflict with the provisions of Rule 24 on the public availability of decisions. See Hellman, Misconduct Rules, supra note 2, at 345.

Committee (or more accurately its staff) to sift through the many petitions for review, there would be no need to even look at the large number of cases in which no review is sought.

Putting all of this together, I suggest adding a provision to § 357 along these lines:

> (1) A complainant or judge aggrieved by an order of the judicial council affirming a final order of the chief judge under section 352 may petition the Judicial Conference of the United States for review thereof.
>
> (2) There shall be a right to review if –
>
> (A) one or more members of the judicial council dissented from the order; or
>
> (B) the chief judge concluded the proceeding in whole or in part under section 352(b)(2); or
>
> (C) the judicial council imposed sanctions on the complainant (other than an order imposing conditions on the complainant's use of the complaint procedure).
>
> (3) In all other cases, review shall be at the sole discretion of the Judicial Conference.

C. Review of orders in "identified" complaints

On June 11, 2008, the Los Angeles Times published an article reporting that Chief Judge Alex Kozinski of the Ninth Circuit had "maintained a publicly accessible website featuring sexually explicit photos and videos."[49] Judge Kozinski immediately (and publicly) asked the Ninth Circuit Judicial Council to initiate proceedings under the then-new national misconduct rules. The Council construed his request as the equivalent of identifying a complaint of judicial misconduct under 28 U.S.C. § 351(b). The matter was transferred to the Judicial Council of the Third Circuit, which carried out an investigation and issued a lengthy memorandum opinion "conclud[ing]" the proceeding.[50]

The Council decision was widely interpreted as a vindication of Judge Kozinski. For example, the Wall Street Journal's Law Blog posted a story aptly summarized by its headline: *A "Pleased" Kozinski Cleared of Wrongdoing*.[51] Several

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[49] See Kozinski Website Opinion, supra note 4, 575 F.3d at 280 (quoting article posted on newspaper's website).

[50] Id. at 295.

[51] WSJ Law Blog, July 2, 2009 (on file with the author).

months later, however, the Judicial Conference Conduct Committee, in an opinion addressing a different complaint, stated unequivocally that the Third Circuit proceeding "resulted in a finding of misconduct."[52]

If the Conduct Committee had directly reviewed the Third Circuit Judicial Council decision, it would have made clear that it did not interpret the ruling as a vindication of Judge Kozinski. And it would have issued an opinion of its own that hopefully would have provided a less ambiguous denouement to the proceeding. The public would then have had a solid basis on which to evaluate the judiciary's handling of the allegations. But because no complaint had been *filed*, there was no "complainant … aggrieved by the action of the judicial council" who could petition the Judicial Conference for review.[53]

This episode points up a serious gap in the statutory scheme: when a misconduct proceeding is initiated by action of the chief judge rather than by the filing of a complaint, there is no provision for review of final orders of the chief judge or the judicial council (unless the person aggrieved by the order is the judge who is the subject of the proceeding). The gap is especially troubling because "identified" complaints often involve "high-visibility cases" like those discussed by the Breyer Committee.[54]

Fortunately, a solution is at hand. It is suggested by a memorandum opinion issued by then-Chief Judge Doris Sloviter of the Third Circuit more than 20 years ago.[55] Judge Sloviter received an anonymous complaint alleging that a judge allowed close relatives to practice before him and failed to disqualify himself when required to do so. She found that the allegations "would state a cognizable claim" under the Act, but she concluded the proceeding based on intervening

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

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

[54] Another example is the proceeding involving District Judge James C. Mahan of Nevada, discussed supra note 23. Although the newspaper story that triggered the investigation provided a wealth of detail to substantiate its allegations (including names, dates, and dollar amounts), the Ninth Circuit Judicial Council's brief order dismissing the complaint failed to address any of the specifics. Outsiders thus had no way of assessing whether the matter had been handled properly. The Conduct Committee might have done a better job, but because the complaint had been identified by the chief judge, there was no one to seek review of the Judicial Council order.

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

events. She then noted that because the complainant was anonymous, the ordinary review process "may be pretermitted." She therefore "invoke[d] a sua sponte petition for review" and directed the deputy clerk to send the relevant materials "to the members of the Judicial Council with the request that they follow the ordinary review procedure." The Judicial Council did as she requested.

I believe that the equivalent of this procedure should be codified in Chapter 16. Here is some language that would accomplish the purpose:

> [A] If the chief judge dismisses a complaint that has been identified under section 351(b) or concludes the proceeding on such a complaint, the chief judge shall certify the final order to the judicial council of the circuit for review in accordance with [the procedure specified for review of chief judge orders].[56]
>
> [B] When a judicial council issues a final order under section 354 on a complaint identified by the chief judge under section 351(b), the council shall certify the order to the Judicial Conference of the United States for review.

The latter provision could easily be modified to allow Conduct Committee review of Track One cases in which the circuit council has affirmed the chief judge's final order disposing of an identified complaint.[57]

D. Matters of statutory organization

In addition to these substantive amendments, two small organizational changes would make the statutes more user-friendly.

First, the provisions governing review of chief judge orders by the judicial council are now included in section 352, which outlines the powers and responsibilities of the chief judge in reviewing complaints. It would make sense to transfer these provisions (as modified) to section 357, so that all provisions for

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[56] Here is another possible formulation: "If, after identifying a complaint under section 351(b), the chief judge dismisses the complaint or concludes the proceeding, the chief judge shall certify the final order to the judicial council of the circuit for review in accordance with [the procedure specified for review of chief judge orders]."

[57] The proposals in the text leave one gap. If, after accusations have surfaced in the news media, the accused judge (other than the chief judge of the circuit) files a complaint against himself or herself, there might not be an independent complainant who could file a petition for review. As far as I am aware, that situation has arisen only once in the history of the Act. It should not happen again if chief judges follow the recommendation of the Breyer Committee to make greater use of "their statutory authority to identify complaints when accusations become public." See Breyer Committee Report, supra note 6, at 209, 245-46.

review of orders and actions in misconduct proceedings would be found in a single section.

Second, the important provisions delineating the role of the Judicial Conference of the United States – including the authority to delegate its review power to a standing committee – are buried in an unnumbered paragraph (one of nine) in section 331, which deals with a wide range of matters involving the Judicial Conference. I think that these provisions should be moved to a new section (§ 365) that would be part of Chapter 16.

VII. Other Issues

Here I flag a few other issues that may warrant attention by Congress or by the Judicial Conference and conclude with some observations about the institutional arrangements for dealing with matters of federal judicial ethics.

- ***Judicial disqualification and the "merits-related" exclusion***. From the beginning, the judiciary has taken the position that "[a] mere allegation that a judge should have recused" is merits-related and thus not cognizable under the Act.[58] But an improper failure to recuse, unlike other erroneous decisions a judge might make, is a violation of the Code of Conduct. Should this entire class of ethical infractions be excluded from the ambit of the misconduct procedures?

- ***"Corrective action" and the apology***. As already noted, the Act authorizes the chief judge to "conclude the proceeding" upon finding that "appropriate corrective action has been taken." The 2008 Rules, following the lead of the Breyer Committee, makes clear that "corrective action" must be "voluntary action taken by the subject judge." Commonly, the "corrective action" is an apology. Should the apology be recognized as a distinct basis for concluding a misconduct proceeding?

- ***Sanctioning abusive complainants***. Rule 10(a) provides that a complainant who has "abused the complaint procedure" (for example, by filing repetitive or frivolous complaints) may be restricted or even prohibited from filing further complaints.[59] In two

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[58] See Breyer Committee Report, supra note 6, at 239.

[59] Before restricting the right to file, the circuit council must give the complainant an "opportunity to show cause" why the limitation should not be imposed.

recent cases, the Judicial Council of the Ninth Circuit has gone further than restricting the right to file; it has issued a "public reprimand" of a lawyer complainant.[60] Should Title 28 or the Rules be amended to explicitly authorize sanctions in addition to filing restrictions?

- ***Fear of retaliation***. Four years ago, the Task Force on Judicial Impeachment heard wrenching testimony by two employees of the federal court in Galveston, Texas, who were subjected to abusive treatment by District Judge Samuel B. Kent. Initially neither employee reported the abuse because of fear of retaliation. The Judicial Conference has recognized the importance of "assuring that justified complaints are brought to the attention of the judiciary without fear of retaliation."[61] Various systems have been suggested, but I believe that the most important element is the visible, emphatic, public commitment by the chief judge of the circuit to addressing legitimate complaints and protecting complainants from any form of reprisal.

In addition to its many procedural suggestions, the Breyer Committee called upon the Judicial Conference to give the Conduct Committee "a new, formally recognized, vigorous advisory role" in guiding and counseling chief circuit judges and judicial councils in implementing the 1980 Act. The Breyer Committee also urged the Committee itself to consider "periodic monitoring of the Act's administration."

Implicit in these 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.

The Rules adopted in 2008 take modest steps in the direction of implementing these ideas, but more could be done. In particular, the Conduct Committee could be given a robust, visible role in monitoring the administration of the Act by chief judges and circuit councils and interjecting itself where the regional actors fall short. Meanwhile, by amending the statute, Congress can

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[60] See In re Complaint of Judicial Misconduct, 550 F.3d 769 (9th Cir. Jud. Council 2008); In re Complaint of Judicial Misconduct, 623 F.3d 1101, 1102-03 (9th Cir. Jud. Council 2010).

[61] See Breyer Committee Report, supra note 6, at 217 (quoting Judicial Conference proceedings).

update the Act to reflect the best practices developed by the institutional judiciary and individual judges over the years.

Mr. COBLE. Thank you, Professor Hellman.
Mr. Wheeler, good to hear from you.

TESTIMONY OF RUSSELL R. WHEELER, VISITING FELLOW, THE BROOKINGS INSTITUTION, AND PRESIDENT, THE GOVERNANCE INSTITUTE

Mr. WHEELER. Thank you, Mr. Chairman.
Mr. COBLE. Mike?
Mr. WHEELER. How's that?
Mr. COBLE. Better.
Mr. WHEELER. I won't take my full 5 minutes. I want to—I should say I endorse generally Professor Hellman's proposals. As I said in my statement, I added a few that complement them or add to them, which I won't repeat here.

I did want to emphasize one point about the oft-referenced Breyer Committee report. I was privileged to work with the Committee, and the point I want to emphasize is this was very much a "let the chips fall where they may" report. It was not undertaken with any conclusions already arrived at, and the methodology was quite rigorous, and I describe it very briefly in my statement.

And it did find, however, relatively low levels of problematic terminations. Less than 5 percent of the vast majority of terminations it looked at were problematic, meaning that in most cases, the chief circuit judge should have undertaken a more extensive, albeit limited inquiry before dismissing the case.

Now those results, along with the results of a 1991 study done for the national commission chaired by former Representative Kastenmeier, which used the same method and found basically the same results—a very low level of problematic terminations—lead me to conclude that with some exceptions, effective implementation of this act is now part of the culture of Federal judicial administration.

Now, obviously, we can't say for sure if the Breyer Committee study, were to be replicated today, whether it would find those same low levels of problematic terminations on the part of the courts, but I suspect it would, in part because of the enhanced rules that Judge Scirica's committee adopted. And I commend the committee as well for undertaking a periodic monitoring of the complaints and terminations which come to the committee on an annual basis in a method similar to what the Breyer Committee used.

And as I suggest in my statement, I think it might be helpful for the judiciary to publish a summary of that occasional monitoring in the same fashion as the Breyer Committee published its findings, obviously without identifying complainants or judges, but providing some sense beyond the raw numbers of how the courts are administering the Act.

That's all I have.
Thank you.
[The prepared statement of Mr. Wheeler follows:]

Prepared Statement of

Russell R. Wheeler
Visiting Fellow, The Brookings Institution
President, The Governance Institute

on the Judicial Conduct and Discipline System

Before the

Subcommittee on Courts, Intellectual Property and the Internet

Committee on the Judiciary, House of Representatives

April 25, 2013

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Prepared Statement of Russell R. Wheeler

Chairman Coble, Ranking Member Watt, Vice-Chairman Marino, and members of the Subcommittee: Thank you for this opportunity to testify at this oversight hearing examining the federal judicial conduct and disability system, and thank you for the oversight itself. Proper legislative oversight of the other two branches is a vital part of the checks and balances embodied in the Constitution. By way of summary, I believe the judicial branch is doing, overall, a very good job of administering the Act, which largely involves sifting through a high number of insubstantial and often frivolous complaints to find the few that justify further investigation.

Since September 2005, I have been a Visiting Fellow in the Brookings Institution's Governance Studies Program and president of the Governance Institute—a small, non-partisan, non-profit organization that since 1986 has analyzed various aspects of interbranch relations. In both positions I have been especially interested, among other things, in various aspects of judicial ethics regulation.

Before assuming these positions I was with the Federal Judicial Center, the federal courts' research and education agency, serving as Deputy Director since 1991. While at the Judicial Center and for about a year at Brookings, I assisted the six-member Judicial Conduct and Disability Act Study Committee, appointed in May 2004 by Chief Justice William H. Rehnquist and often referred to as the "Breyer Committee," after its chairman, Associate Justice Stephen G. Breyer. The committee—Justice Breyer, two former chief circuit judges, two former chief district judges, and the Chief Justice's administrative assistant— reported to the Judicial Conference of the United States in September 2006,[1] after which a renamed Judicial Conference Judicial Conduct and Disability Committee developed new, mandatory rules governing the processing of complaints, rules that the Conference approved in March 2008.[2]

Credit for the report and the subsequent rules goes in part to the House Judiciary Committee and its then-chairman, Representative F. James Sensenbrenner, who called attention in early 2004 to what he regarded as an improper dismissal of a judicial conduct complaint he had filed (the Breyer Committee subsequently agreed that the dismissal was improper)[3]. Chief Justice Rehnquist said in announcing the committee appointments, "There has been some recent criticism from Congress about the way in which the Judicial Conduct and Disability Act ... is being implemented, and I decided the best way to see if there are any real problems is to have a committee look into it."[4]

The relatively few problems highlighted by the Breyer Committee, and the process enhancements in the 2008 rules, have no doubt led to improvements in how the federal

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[1] "Implementation of the Judicial Conduct and Disability Act of 1980, A Report to the Chief Justice," (Sept, 2006), available at http://www.fjc.gov/library/fjc_catalog.nsf/autoframepage!openform&url=/library/fjc_catalog.nsf/DPublication!openform&parentunid=C6CA3DC8B22AC2D78525728B005C9BD3

[2] Available at http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/Misconduct/jud_conduct_and_disability_308_app_B_rev.pdf

[3] See report, id at note 1, at 73-75.

[4] Id at 131.

courts handle complaints filed under the Act, although, as the Committee report documented, the courts had already been doing, overall, a very good job. In this statement, I describe the Breyer Committee's methods and principal findings, and then offer a few fairly modest suggestions to strengthen further the judicial conduct and disability system.

The Breyer Committee and Its Work

At the outset, let me make very clear that I speak only for myself and in no way claim to speak for the Breyer Committee (which went out of existence after it filed its report) or for any former members of the committee or its small research staff (or, for that matter, for my two current affiliations).

What it did Working with two Judicial Center researchers and one from the Administrative Office of the U.S. Courts (and me as a coordinator of sorts), the committee selected two samples of complaints terminated from 2001-03: a 593-complaint sample, selected to overrepresent complaints most likely to have alleged behavior covered by the Act (e.g., the sample included a larger percentage of complaints filed by attorneys than in the initial unmodified sample and a lower percentage of complaints filed by prisoners) and a separate sample of 100 terminations drawn totally at random. It also identified 17 complaints terminated from 2001 to 2005 that received press or legislative attention—"high visibility complaints".[5]

The research staff reviewed the 593 complaints and terminations to identify "problematic" terminations, based on committee-approved definitional standards[6] and after committee review of a subset of initial staff reviews to ensure the staff was applying the standards as the committee wished. The committee members alone reviewed the smaller 100-case sample without staff assistance. (The various forms for reviewing the complaints are in the report appendices.)

The purpose of both reviews was not to determine if the subject judges had committed misconduct or displayed performance-degrading disabilities but rather to assess whether chief circuit judges and judicial councils applied the statute as intended—mainly whether the chief judge conducted a "limited inquiry" (as the Act authorizes) sufficient to justify dismissing the complaint or concluding the proceeding, but not an inquiry that invaded the investigatory role reserved for a special committee.

Finally, staff, using survey instruments approved by the committee, interviewed current former chief circuit judges and staff.

What it found The committee concluded that 3.4 percent of the 593 stratified sample of terminations were problematic, as were 2.0 percent of the terminations in the 100 straight random sample complaints (not surprising given the larger sample's oversampling of likely meritorious complaints). The Committee found a greater proportion of problematic dispositions among the high-visibility complaints (five of the seventeen), which it attributed to those complaints' greater likelihood to confront the chief judge or circuit council with more decisions, and thus a greater chance of at least one incorrect decision. The Committee expressed concern that these five problematic dispositions could take on

[5] Id at 39ff.
[6] Id at Appendix E, 144ff.

outsize importance because of their visibility, and convey an inaccurate impression to the public and would-be filers of the Act's effectiveness.

To be clear, this was a methodologically rigorous analysis that let the chips fall where they may. (The non-partisan American Judicature Society praised the report for "not hiding the federal judiciary's dirty linen in the closet," and for "thoroughly discuss[ing] situations in which the judiciary's performance was deficient [and] the causes that may be responsible".[7]) The committee imposed strict—some might even say too strict—criteria in its review of the terminations it assessed. For one example, a complaint by a prisoner alleged that the person on the bench in a hearing in his case was a young man, probably the judge's intern, not the judge. The judge informed the chief circuit judge that he had no intern at the time of the hearing and his law clerk was a middle-aged woman, after which the chief judge dismissed the complaint. The committee characterized the allegation as "bizarre, [but] not so outlandish as to be what our Standard 4 calls 'inherently incredible,'" and classified the disposition as problematic because the chief judge did not obtain, or order his staff to obtain, the electronic recording of the proceeding to verify that the voice on the tape was that of the judge.[8]

These findings suggest that, despite occasional problematic dispositions, proper administration of the Act is by and large engrained in the culture of federal judicial administration. One might ask whether a replication of the research conducted on a more recent sample of cases would find the same low level of problematic dispositions. Obviously, we cannot know that without the replication itself, but there are reasons to suspect that such a replication would find performance at least as favorable as that found by the committee. One reason is the mandatory committee rules and the tougher enforcement and oversight regime they mandate. Also, though, the Breyer Committee findings track very closely those of an earlier study, conducted in 1991-92, using the same basic methodology, for the statutory National Commission on Judicial Discipline and Removal, chaired by former Congressman Robert Kastenmeier. The earlier study used only one modified random sample (of 469 complaints) and found a 2.6 percent problematic disposition rate (compared to the 3.4 percent that the Breyer Committee found in its 593-case sample). The difference is not statistically significant.[9]

Informal discipline outside the Act Finally, the committee interviews tracked a widely shared view within the federal judiciary, namely that informal resolution of misconduct and disability, perhaps in the shadow of the Act, is more extensive than resolutions that result from formal complaints. This is especially so as to performance-degrading disability, which is rarely the basis for complaints under the statute.[10]

Committee Recommendations and Additional Steps

The Committee offered twelve recommendations, principally to provide additional information to chief judges and councils including a vigorous role for the Conduct Committee; to provide additional information about the Act to potential users; and to

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[7] "Politics and Progress in Federal Judicial Accountability," Judicature (Sep't.. Oct.. 2006), available at http://www.ajs.org/ajs/ajs_editorial-template.asp?content_id=530

[8] Id at 53.

[9] Id at 95ff.

[10] Id at ch. 5.

enhance publically available information about the Act and its implementation. The judicial branch, mainly through the new rules, has adopted many of the recommendations. I am also aware of Professor Arthur Hellman's specific proposals to improve the implementation of the Act, mainly in the areas of transparency, disqualification of certain judges in judicial conduct proceedings, and review of chief judge and council orders. Professor Hellman is probably the country's leading expert on the federal judicial and disability system. In general I share his concerns and endorse his proposals, and add here only a few additional comments.

The role of the Conduct Committee The Act is clear that the chief judge, upon receipt of a complaint, may undertake a "limited inquiry" but "shall not undertake to make findings of fact about any matter that is reasonably in dispute."[11] A complainant may appeal a chief judge's dismissal order to the judicial council, but a judicial 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."[12] Perhaps because of some reported instances in which chief judges appear to have dismissed complaints after making findings of fact of matters reasonably in dispute—dismissals affirmed by the respective judicial council—Rule 21 seeks, in the words of its commentary, "to fill a jurisdictional gap." It authorizes the Conduct Committee to consider, on petition of a dissenting council member or on its own initiative, whether the chief judge should have appointed a special committee. This is an important role for the Conduct Committee, even if it would be needed rarely. I tend to agree with Professor Hellman that a statutory change would help to clarify the Conduct Committee's authority in such situations, rare as they may be.

In a related vein, the Breyer Committee recommended that the judicial branch monitor the Act's administration periodically, but doubted that "a full-blown replication of our research would be necessary each time. This was a labor-intensive process for us, for our staff, and for the judges and supporting personnel in the circuits."[13] The Conduct Committee has taken an important step in this direction by examining of some of the universe of terminations it receives from the circuits and doing so in a manner the highly respected Committee chair, Judge Anthony Scirica, characterizes as similar to the Breyer Committee's review. Just as the Breyer Committee published summary data on its review of the terminations it examined and explained why some terminations were problematic, the Conduct Committee might release similar periodic summary analyses.

Providing information on how the Act has been interpreted The commentary to Rule 3 states that the "responsibility for determining what constitutes misconduct under the statute ["conduct prejudicial to the effective and expeditious administration of the business of the courts," 28 U.S.C. § 351(a),] is the province of the judicial council of the circuit subject to such review and limitations as are ordained by the statute and by these Rules."

The judicial branch needs a transparent way of accessing the decisions of the judicial councils (and chief judges) in order to allow chief judges, council members, and other process participants and observers a means of identifying and assessing the

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[11] 28 U.S.C. §352(a)
[12] 28 U.S.C. §352(c)
[13] Report at 123.

determinations the councils are making—accessing what some have called the common law of judicial misconduct and disability.

One of the Breyer Committee's main recommendations was for selected orders to be posted on the judicial branch website "in broad categories keyed to the Act's provisions, and . . . with brief headnotes."[14] This recommendation is embodied to a degree in the Rules' promise that the Conduct Committee "will make available on the Federal Judiciary's website . . . selected, illustrative orders, appropriately redacted, to provide additional information to the public on how complaints are addressed under the Act."[15] The Conduct Committee's forthcoming on-line *Digest of Authorities* can make a valuable contribution to this end.

The Act itself also requires each circuit to make available in the court of appeals clerks office all written orders implementing the Act's provisions.[16] The Rules bolster that provision by suggesting the courts' websites as an optional form for making the orders public, and, in terms of transparency and ease of access, website postings are obviously the better option.[17] A preliminary review of circuit practices as I prepared this statement suggest that these circuits do so[18]:

First	All orders from 2008 following, ranging in number from 14 to 45 per year.
Seventh	All orders since 2011 (93 in 2012, for example) with earlier years available on website archives.
Ninth	794 orders, from 2006 and later
Tenth	About 500, since January 2008
DC	Orders from 2011-2013 (53, for example in 2012).

Two other circuits (the Second and Fifth) have posted a small number of orders in high-visibility complaints, and the Federal Circuit has posted 24 orders from 2008, 2009, and 2010.

These postings are surely a positive, if complete, step. At the risk of sounding unappreciative of the posting circuits' efforts, however, analyzing the orders, to compare dispositions of similar complaints, or to assess how different chief judges and councils define or interpret the statute and the governing rules, would require wading into an undifferentiated mass of orders (including routine council orders affirming chief judge dismissals), identified only by date, case number, and, in some circuits, a generic description (e.g., "Order, Chief Judge" or "Order, Judicial Council"). A more helpful

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[14] Id at 117.
[15] Rule 24(b).
[16] 28 U.S.C. §360(b)
[17] Rule 24(b)
[18] The orders are available at these links:
http://www.ca1.uscourts.gov/?content=judicialmis.php;http://www.ca2.uscourts.gov/judmisconduct.htm;http://www.ca5.uscourts.gov/JudicialMisconductOrders.aspx;http://www.ca7.uscourts.gov/JM_Memo/jm_memo.html;http://www.ce9.uscourts.gov/misconduct/judicial_misconduct.html;http://www.ca9.uscourts.gov/misconduct/;http://www.ca10.uscourts.gov/misconduct.php;http://www.cadc.uscourts.gov/internet/misconduct.nsf/DocsByRDate?OpenView&count=100;http://www.cafc.uscourts.gov/judicial-reports;

typology is necessary (along with indicating the page length of each order as a rough way to identify non-routine orders).

Enhanced orientation for chief circuit judges

The Breyer Committee recommended an individual, in-court orientation program for each new chief circuit judge, provided by an experienced current or former chief judge and a member of the Administrative Office General Counsel's office who staffs the Conduct Committee, and that the Federal Judicial Center develop a common core curriculum for the program to promote uniformity in the Act's implementation. The recommendation, along with others, for on-tap resources, was designed to ensure "'that the chief judge is not out there alone'."[19] I do not believe the Conduct Committee to date has requested the Federal Judicial Center to develop such a program, or some other program toward the same end. It is worth exploring, however, whether the Center is in a position to develop and administer such a program and curriculum, and whether the Conduct Committee perceives a need for it in light of the other steps it is taking in its advisory role.

Providing information on the Act to potential users The courts, based on my most recent and admittedly non-exhaustive review have done a fairly good job with another transparency-related Breyer Committee recommendation, namely making information readily available on court website about the Act and how to file a complaint. Not all courts that post such material place it on the homepage, as the Committee recommended,[20] but for the most part I do not believe the information is hard to find. The Judicial Conference Committee on the Judicial Branch, under its former chair, Judge D. Brock Hornby, and current chair, Judge Robert A. Katzmann, with the assistance of its Administrative Office staff, has aggressively reminded the courts of the Rules requirements for such posting.[21] The Breyer Committee found, in 2006, only marginal compliance with a previous suggestion for such posting, and found that those courts that were posting the information on their websites did not experience a greater proportionate number of filings.[22] It accompanied its recommendation with a suggested paragraph warning would-be filers that the chief judge would dismiss their complaint if it related to the merits of an underlying decision, and a fair number of courts appear to have adopted that suggestion.

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Thank you for the opportunity to testify this afternoon. I will do my best to answer any questions you may have.

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[19] Report at 113
[20] Report at 120-21.
[21] Rule 28
[22] Report at 33

Mr. COBLE. Thank you, Mr. Wheeler. You overcame the illuminating light, difficult to do sometimes up here. Thank you, sir.

We try to comply with the 5-minute rule as well, gentlemen.

Let me start, Judge Sentelle, with you. In your statement, you noted that the AO was instrumental in conducting investigations of allegations about fraud, waste, and abuse. If you will, summarize for us some of the more significant investigations the AO has undertaken, the sums involved, the corrective actions taken, and provide us with a sense of how many such investigations are currently underway.

Judge SENTELLE. I'm not sure I can give you sums involved in each instance.

Mr. COBLE. And you could follow up subsequently if you can't do it today.

Judge SENTELLE. Let me consult my notes here just one moment. In the Southern District of Ohio, there was an investigation ordered by the chief judge that engaged a local attorney to conduct the investigation, who found that a clerk employee had—a clerk of the court had engaged with an improper relationship with an employee. The clerk admitted the relationship and resigned.

The chief judge requested an audit of the procurement actions conducted by that clerk for a conference, which was also a topic in the allegation. The Office of Audit and the Administrative Office of the Courts, the AO, conducted an audit. They found only about $2,000 in improper payments, but they found it. So it was not a big instance—amount in that case.

During the AO's cyclical review of a defender program under the Criminal Justice Act attorney panel, concerns were raised by one colleague that another one on the panel was padding his reimbursement voucher. Notification of the allegations to the AO, the chief requested investigative assistance. The AO investigator conducted a review of the panel attorney's vouchers.

Now this one has a happy ending. They reviewed thousands of dollars worth of vouchers and found that the defense attorney had not been in that case padding his vouchers.

But there was an actual embezzlement investigation in the Northern District of Illinois based on allegations that an employee was making questionable purchases with the credit card of the court. At the request of the chief judge, the AO conducted an investigation.

The investigation determined that the employee had circumvented the court's procedures and embezzled approximately $35,000 in goods and funds. The AO referred the matter to the Department of Justice, and the employee ultimately pled guilty to the charge of embezzling Government funds.

That's three that are readily available. There are others, but fortunately, they're usually not big amounts of money. If we're doing it right, we're going to catch them when they're still pretty small, most of them.

Mr. COBLE. Thank you, Judge.

Listen, let me start with Professor Hellman. Professor, what are the most important steps Congress and the judiciary can take to promote greater transparency in the processing of judicial mis-

conduct complaints and to, furthermore, assure that those complaints are expeditiously and impartially reviewed?

Mr. HELLMAN. Is the microphone on? Yes.

I think that from the standpoint of transparency, there are two simple steps that I would like to see the judiciary take, and it doesn't need any further authorization. The Breyer Committee recommended that every district court should post on its—the home page of its website a link to the forms and rules for misconduct. That has been done by a majority of the districts, a substantial majority. But there are some that are not yet in compliance, and I hope that Judge Scirica's committee will see to it that all districts are in compliance with that.

Second thing involves the publication of misconduct orders. Under the current rules, the circuit councils have the option of putting the rules on their websites, publishing them there, or making them available in the clerks' offices.

About half of the circuits now only make them available in the circuit's office. It seems to me that it's an easy call—these should be online. They should be available to everyone. Frankly, everyone will now see that most of them are, in fact, frivolous, unsubstantiated, and are handled in exactly the way that they should be.

So I think that by putting these orders in a place where people can readily see them, that will substantially enhance confidence in the judiciary's ability and willingness to police misconduct within it.

Mr. COBLE. Thank you, Professor.

Mr. Wheeler, let us try. Will you try to beat the red light again, same question?

Mr. WHEELER. Well, I endorse what Professor Hellman said. I think that the court records in posting information about the Act, the rules and the forms, may be a little—my sense is it's a little better than he thinks it is if we just don't assume that the material has to be exactly on the home page of the court. But obviously, it should be available to everybody, readily available on the website.

As to the posting of orders, I also agree with him that it's a bit of a no-brainer that they be posted on the website, as opposed to simply available in the clerk's office. But I would—at the risk of sounding ungrateful, I'd go on to say because there are so many orders—there are 900-some orders on the Ninth Circuit website—some sort of typology that would allow somebody like Professor Hellman, who's trying to figure out how the courts are doing, would make a lot of sense.

That doesn't require a rule change, I don't think. It just requires organizing these orders in such a way that the many routine orders can be overlooked and let scholars and judges and others get to the orders that make a difference.

Now I commend the committee for posting on the judiciary's website what it calls a digest of authorities, which is a summation creating a sort of a common law for Federal judicial discipline that was recommended by the Breyer Committee, and I understand they're going to post that this summer. And that's a good step in the right direction.

Mr. COBLE. Thank you, Mr. Wheeler.

Judge Scirica, I know you want to respond. Let me get to you later on. It is just my red light appears. Do you want to proceed now?

Judge SCIRICA. Yes, sir.

Mr. COBLE. Go ahead, even though my red light is on, they won't penalize me too severely.

Judge SCIRICA. Thank you very much.

These are good suggestions, Mr. Chairman. And I think that we can accomplish these. Courts are moving toward putting all of their orders online, and there have been some additions just in the last month. And I think this is something we can do with dispatch.

[Pause.]

Mr. COBLE. Were you finished, Judge?

Judge SCIRICA. Yes, sir.

Mr. COBLE. I thank you for that.

The Chair recognizes the gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

And as has started to be my policy, I decided to generally defer to my co-counsel before I go and go last. So I think Mr. Jeffries was the first one here. So I will defer to him.

Mr. JEFFRIES. Well, thank you, Congressman Watt, and thank you, Mr. Chairman.

I thank the distinguished members of the panel and the two distinguished judges for your testimony.

This question is directed to either of the two distinguished members of the bench. As was pointed out in one of your presentations, the system of government that we have has been very strong and robust, 235 years, sets forth three coequal branches of government. An independent judiciary is clearly important in the context of the robustness of our democracy, us being a Nation of laws, not men.

What do you think is the appropriate role of congressional oversight, balancing the interests of our obligation as representatives of the people, direct representatives of the people, in the context of our democracy with the constitutional prescription of an independent judiciary that is a coequal branch of government?

Judge SENTELLE. If I might, I can't give you a short answer on that. I think if you look back to 1701 to the Act of Settlement, the rider on that act that established the succession of the British crown created a judiciary that was protected in its tenure from removal and reduction in income by the king because the people of England had lost faith that the judges would take their cases and rule with justice against the crown.

In the time of the Declaration of Independence, the crown had violated that principle in the appointment of colonial judges so that, again, one of the grievances set forth in the Declaration of Independence is that the judges do not serve independently. They're under the thumb of the crown.

So the general principle would be that you need enough independence in the judiciary so that the public does not perceive that the political branches—and I use "political" not in a disparaging sense, but in the sense of the branches who are politically accountable—would not—are not controlling the independence of the judiciary.

Now that's a very general answer, but I understand that Congress has to have the role of deciding are we spending the people's money wisely, for example? And if we're not, you need to find that out. You have to have oversight to find that out, and you have the responsibility of doing something about it.

If we are not obeying the laws that you have set forth, or if those laws are not properly managing what the courts are doing, then, of course, you have the responsibility as the representatives of the people to correct that.

Mr. JEFFRIES. With respect to, Judge, if I might—and I don't generally get the opportunity to actually interrupt a judge. So I do it respectfully.

Mr. WATT. That is the prerogative of being in Congress now?

Mr. JEFFRIES. I am a new Member. So I am learning that prerogative. [Laughter.]

Thank you, Congressman.

With respect to the management of the people's money, what has the impact of the sequestration cuts been, in your view, on the ability of the judiciary to provide for generally the efficiencies of its operation in the administration of justice? But specifically on this issue, how might it impact your capacity to provide for the type of self-governance that currently is the system that is in place?

Judge SENTELLE. Do you want that one? The impact of the sequestration on the judiciary is as broad as the judiciary is. Just as you see in the executive branch and in the legislative branch, every area is impacted.

We have clerk of courts offices that have people who are—either are or expecting to be furloughed, losing days a week. We have the problem in the defender system, which is funded through the courts that, actually, defender lawyers, as well as prosecutors over in the U.S. attorney's office—that's the Justice Department. But the defender lawyers are being furloughed so that we cannot hear—many districts cannot hear criminal trials but 4 days a week because of the furlough of the defender.

So that justice is being delayed in that regard and then will be denied. Because justice delayed is justice denied. So far as that affects the governance as such, Congressman, I'm not sure that I can say that I see a way in which it affects self-governance as such at this point.

But it affects us in a myriad of ways in that we can't get our job done in a lot of ways as efficiently and as effectively as we'd like to do. The most disturbing to me is the effect on the defender system because you have the average defendant in Federal court now is in custody awaiting trial.

Now some of—all of those people are presumed to be innocent. Some of those people may be innocent. So that you have people who ultimately are acquitted who stayed in jail longer than they should have because the system could not get to their trial because the defenders had to be laid off a day a week.

Now that's not directly governance, but perhaps you got somewhere close to what you were asking for.

Mr. JEFFRIES. Well, it certainly relates to the fair administration of justice within the system.

I thank you.

Mr. COBLE. Thank you, Mr. Jeffries.

The Chair recognizes the gentleman from Pennsylvania, Mr. Marino.

Mr. MARINO. Thank you, Chairman.

Good afternoon, gentlemen. It is a pleasure.

I am going to invoke what I learned from Justice—Judge Caputo and Judge Munley in the Third Circuit of Pennsylvania. "Tom, keep your questions short and make sure your witnesses keep their answers even shorter."

So I am going to try and have each of you address this. So the question is—I will start with Professor Hellman. Sir, do you see any way, short of impeachment, any system by which Congress can investigate a particular Federal judge?

Mr. HELLMAN. I think that there are opportunities for investigating what the courts do. Investigating non-impeachable behavior I think would raise very troublesome questions under the Constitution.

If I understand your question correctly?

Mr. MARINO. Yes.

Mr. HELLMAN. Yes.

Mr. MARINO. Mr. Wheeler, please?

Mr. WHEELER. I have nothing to add to that. It's fairly rare that such occasions arise in which I think Congress might want to undertake that kind of investigation. But I think Professor Hellman is right that it would create problems fairly soon, especially when I think the judiciary is doing a pretty good job of taking care of itself.

Mr. MARINO. And if the judges concur with that, just nod, and I will go on to my next question unless you want to specifically address the issue.

Judge SCIRICA. I do concur. But let me just add a little footnote to that. If our disciplinary system is investigating a particular judge and we believe that that person may have committed a crime, we have an obligation to talk to the prosecutors about that and to make sure that nothing in our system is going to impede the proper prosecution of that particular individual.

So there is some relationship. There is some back and forth between the judiciary and, let's say, the U.S. attorney on some of these matters.

Mr. MARINO. Judge Sentelle, anything to add, sir?

Judge SENTELLE. I fear that if I talk, I'd subtract rather than add. I think everything has been well said, and I would simply do what's wise for a preacher sometimes to say amen and shut up.

Mr. MARINO. Hallelujah. I had—I practiced in the Third Circuit as a U.S. attorney and tried my cases before a distinguished court in the Middle District of Pennsylvania. And what advice or recommendations would you two judges give we in Congress about making the system more efficient and more equal for the American citizens?

Judge SCIRICA. If——

Judge SENTELLE. You backed off. You're asking what can Congress do to make the system more equal or more effective for the citizens?

Mr. MARINO. Yes.

Judge SENTELLE. I'll risk being a little controversial, I guess. For one thing, not long ago when we were wanting to have some additional bankruptcy judges to get bankruptcies handled, we were told we had to come up with the money. And it was suggested that we might get that by raising the fees in bankruptcy.

Raising of fees generates money perhaps, but part of what a government provides is an effective court system that is reasonably accessible to its citizens. And I think perhaps sometimes we're asked to use fee levels to an extent that may make the system less equal by making it less accessible to the breadth of the citizenry.

That was a very small, esoteric, and perhaps controversial matter that comes to mind, but I believe that——

Mr. MARINO. I happen to agree with you.

Judge SENTELLE [continuing]. Pay as you go, PAYGO is not always a good way to approach the dispensation of justice.

Mr. MARINO. Anything to add, Judge Scirica?

Judge SCIRICA. No, I do not.

Mr. MARINO. Gentlemen, thank you very much.

And I yield back my time.

Mr. COBLE. I thank the gentleman.

The Chair recognizes the distinguished gentleman from Louisiana, Mr. Richmond.

Mr. RICHMOND. Thank you, Mr. Chairman.

Thank you to the Ranking Member.

I am trying to separate what I remember regarding attorney discipline and judiciary discipline. Is there a database or does every circuit keep track of every complaint that is filed against a judge?

Judge SCIRICA. Yes.

Mr. RICHMOND. And the final disposition of each one of those becomes public?

Judge SCIRICA. Yes, sir.

Mr. RICHMOND. So there would be no instances of, for lack of a better description, a deferred adjudication for judges where there is a private letter of reprimand or something of that nature? That doesn't exist on the Federal level?

Judge SCIRICA. There could be—there could be a private letter of reprimand where the judge's name was not made public. Yes, that is correct.

Mr. RICHMOND. And in a sense of transparency and just, I guess, transparency, what is the purpose behind that?

Judge SCIRICA. Well, I think that if a private reprimand were issued, at least to me, it would be an indication that the matter had not been that serious. Perhaps it had been a one-time transgression, and perhaps it had not even hit the public eye.

I've—I was chief judge for 7 years, and I never issued a private reprimand or a private censure. And I think that it is pretty rare, but it certainly does happen. I think when matters are more serious, a public reprimand is called for, and in those instances, the judge's name is made public.

Mr. RICHMOND. Do you think there is still a justifiable need or purpose served by having a private letter or private reprimand?

Judge SCIRICA. Well, I've often wondered about that myself. Because chief judges typically talk to judges who have gotten into trouble and counsel them, guide them, and sometimes end up tak-

ing action that's going to result in more serious—in more serious action, where there is an actual public reprimand or could result in a judge having cases suspended so that no cases would be sent to that judge for a period of time or, in the more serious instance, ask the judge to voluntarily resign.

Mr. RICHMOND. And Judge, please feel free to weigh in if you would like. It appears to me, especially with Federal judges because the likelihood of removal or the obstacles to get to removal are so great, the hurdles are so great, that removal is not usually the final outcome why there would be a need to keep it private.

When judges that are elected, then it can be used in campaigns and things of that nature. But a judge that is appointed basically for life, barring something very, very serious and our action, what is the public purpose of keeping any disciplinary action private would be my general question? And Judge, if you have more to add to it, please feel free, either judge.

Judge SENTELLE. Judge Scirica has more expertise on this than I. I think you make a very good point. There is a reason—now let me say at the outset, this may not be a good enough reason. But as Professor Hellman pointed out, the vast majority of the complaints that are filed are frivolous.

They're rather like some mail that you know that you get in all your congressional offices from somebody who thinks that the CIA is stealing their brainwaves. Well, these people think that because the judge has ruled against them, it must have been a conspiracy with some vast left or rightwing conspiracy against him.

And I think the sense is that we don't want to gratify those people by or aggrandize those people by publishing or publicizing the frivolous attacks on the judge. The other reason, and again, I don't know if it's good enough or not, is that if the complaint is not frivolous, but rather is scurrilous, that is it's false—it would be a legitimate complaint if it were true, but it's false—that again, we don't want to spread the slander.

Now it may not be that those are good enough reasons, but they are two reasons that are sometimes assigned.

Mr. RICHMOND. Well, with the complaint, I would tend to agree. But any private letter of discipline, I would—that is what I am having——

Judge SENTELLE. Private letter of discipline, I think you have a very good point. I was chief for 5 years. I never issued a private letter of discipline, but I did on one occasion take other remedial action with a judge when there was a legitimate complaint that he just wasn't getting his work out. And I went and met with him and tried to help him come up with ways to get his work out.

I did not enter any kind of order that went on the public record on that, but as far as an actual reprimand privately, I haven't done it. But I know that shortly before I came onto the court, which was 1987, there had been a private reprimand issued against a judge. And since the complainant has a right to know what happened to his complaint, he knew about it. And so, the complainant actually made it public.

The judge was irate, said these are supposed to be confidential. And we—by then I was on the court, and we said, look, we can't

stop the public from releasing this information. If he knows it, he has a First Amendment right.

If there's a reprimand there and the complainant knows it, they could make it public. And I don't know that there is a very good reason for not making it public to begin with.

Mr. RICHMOND. Thank you, Judge.

And thank you, Mr. Chair.

Mr. COBLE. Thank you, Mr. Richmond.

The gentleman from North Carolina, Mr. Holding, is recognized.

Mr. HOLDING. Thank you, Mr. Chairman.

Judge Sentelle, it is always a pleasure to see you. Judge Scirica, your reputation precedes you, and it is a pleasure to meet you.

I would point out, as a matter of trivia, that the Chairman, the Vice Chairman, Judge Sentelle, and myself all served as assistant United States attorneys at one point or another, and there might be some other Members of the Committee who did so as well. So my question harkens back from that experience.

I guess there are 93 Federal districts, and each one has their own local rules and local traditions of practice. In some of those Federal districts where colleagues of mine were serving as U.S. attorneys, they had a pervasive problem with frivolous complaints about ethics or prosecutorial misconduct. And the way the Department of Justice worked with the Office of Professional Responsibility that whenever one of these complaints would go in, it would go up to main Justice and trigger an investigation and a process which was kind of a one-size-fits-all process that could be very onerous, and it could put an assistant United States attorney out of commission for a long time complying with the investigation.

Oftentimes, they were found to be trivial, but it is a one-size-fits-all investigation. So my question is, is anything being contemplated here, change wise, that would foster a situation where those types of compliance could become burdensome on the judiciary?

Judge Scirica?

Judge SCIRICA. I don't—yes. I don't think so. I think that all of these complaints are taking—taken seriously. Ninety-five percent of the complaints on an annual basis are filed by either prisoners or by pro se litigants in civil cases.

And as Judge Sentelle mentioned, most of them allege some form of corruption or collusion or bias, but without any facts, without any reference to the record, or anything that can be checked. And when you read the complaints, you see that folks are angry or upset because of the result in the case, because they may be serving a long prison term, or some are just mentally ill and they can't let go of a loss or of a prison sentence.

I think the system does pretty well. Sometimes we do get abusive complaints. That is serial complaints from the same individual. When that happens, after a period of time, we have show cause orders that work in order to prevent them from filing more complaints.

But in our circuit, we take the complaints and—but we have to approve the filing. That is we review it before we allow the complaint to go ahead if somebody has filed several complaints.

I don't think there's any real effective sanction that you can impose on these individuals. Most of them don't have money. Many

don't have jobs. Many are in prison. And, but each one is entitled to have his or her complaint heard, and that is what is done.

The fact that there are so few complaints that reach a special committee and reach my committee, which is in some degrees the end of the road, I think is pretty good evidence that the Federal judges are doing their jobs properly, that the great majority of these complaints are not founded. But they all get a hearing, and they're dealt with, I think, appropriately.

Mr. HOLDING. Thank you.

Professor Hellman, I want to follow up quickly on Mr. Marino's question. I think we are all in agreement that it would be difficult for Congress to do non-impeachment hearings of Federal judges. But what about in the instance—there are 93 Federal districts. They have local rules.

What about investigations of local rules in particular districts? For instance, you might have a district that has local rules that cause a litigation outcome or a litigation process that is different from any other district in the United States and, as such, is a magnet for a particular type of litigation.

What would the proper role of Congress be in looking at that from an oversight perspective?

Mr. HELLMAN. One of the things——

Mr. COBLE. Mike?

Mr. HELLMAN. One of the things Congress certainly has control over is venue, where suits can be brought. And in fact, Congress has from time to time changed the venue statutes when it has felt that people were using particular districts as a magnet for litigation that didn't necessarily belong there.

But the other thing I would say is that a separate process of the Judicial Conference is the review of the rules made by the districts for litigation. And I think that probably the first step if there are concerns about local rules that are inconsistent from one district to another is to bring that to the attention of the Rules Advisory Committee because they play a very active role in trying to bring uniformity to the procedures in the various Federal courts.

Mr. HOLDING. Thank you, Professor.

Mr. COBLE. Thank you, Mr. Holding.

The Chair recognizes the gentlelady from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Thank the Chair and the Ranking Member.

Thank the witnesses very much. Good to see you, Judge and professors.

I am going to ask a specific question, then go into a policy question that I hope you all will just comment on. The specific question deals with the 2008, the judiciary rules included a strong provision that prohibited a chief judge who had entered a final order from participating in any subsequent consideration of a petition for review of that order by the Judicial Council.

That policy provided an assurance to the petitioner that the decision of the Judicial Council would not be unduly influenced by the chief judge who had already rendered an order. And in the 2008 national rules, the policy was completely reversed, and the judiciary provided, to my understanding, no explanation in doing so.

The two judges, would you comment on that?

Judge SCIRICA. Yes. You are certainly correct. The rules changed the prior practice that was set forth in what were called the illustrative rules. And the reason, I think, was because it was decided that this process should be mainly an inquisitorial or an administrative process.

Obviously, there is some adversarial nature to it, but it should be more in the nature of an inquisitorial process to try to get at the facts. And for the judge who is directing the investigation making certain findings, making references to a special committee, for example, dealing or sitting on the council, it was thought that they could play both roles.

And, but let me say that I think that is a—that is a legitimate and fair criticism of the rules now, and as a matter of fact, I can tell you that some circuit chiefs on their own have disqualified themselves under the disqualification provision in the rules. That they choose not to sit when the matter is being reviewed by the circuit council, and this is something that we can take up as well.

Ms. JACKSON LEE. I would encourage that, and I appreciate the comment, Judge.

Judge?

Judge SENTELLE. Well, before I begin my direct answer, I've connected with all the North Carolina Members on the panel, and I would say that you and I have a connection that I'm sure you're not aware of, in that my daughter is a professor at the University of Houston.

Ms. JACKSON LEE. Very much have a connection. Thank you.

We very much have a connection. I hope they are treating you well. One of the great schools of this Nation.

Judge SENTELLE. Good.

Ms. JACKSON LEE. Thank you.

Judge SENTELLE. I would pretty much echo what Judge Scirica said. I had never thought about the chief judge passing on the matter that he had just passed on until I became chief judge. And although it is the case that nearly all of these complaints are frivolous and valueless, it still seemed to me more than passing strange that I was receiving a vote sheet on our computerized program to vote to affirm or reverse or vacate my own decision.

Ms. JACKSON LEE. Your own decision, yes.

Judge SENTELLE. I think you're raising a very legitimate concern there.

Ms. JACKSON LEE. And I thank you for that, and if we can leave that matter open, I think the judges were forthright in their assessment. And that is the thought as I had raised this question of the potential conflict and/or bias, not determined biased.

I am going to now ask some policy questions, and I would appreciate it if you both, the professor and Mr. Wheeler, along with our judges. Just a broad issue on judicial discretion. Of course, we have mandatory sentencing in some aspects of the court. But have we so restrained the court that discretion now—and when I think of discretion, I think of mercy—is not a viable option.

And I give as an example, this was a case dealing generically with alleged Medicare fraud. This is pervasively dealing with African-American doctors and an individual who was tried. The court said, "And I am going to make an example out of you."

Now Members of Congress sit at this dais and say a lot of things, but I wonder how that relates to justice? And just quickly, I would appreciate what do you think the number of vacancies we have on the Federal bench does to justice?

Mr. HELLMAN. Mr. Wheeler is the expert on vacancies. So he can give us some information about that.

Mr. WHEELER. Well, the vacancy rate now you know is around 10 percent. It's more serious in some districts than it is in others. In your home State, for example, I think there are six vacancies.

Ms. JACKSON LEE. Very serious, yes.

Mr. WHEELER. And in a State that's dealing with an overload of immigration and border crossing litigation. So I think some courts can handle the vacancies. There's always going to be a few vacancies. I think at 10 percent, it's pretty serious.

And it's not the House's responsibility, but I think both the White House and the Senate have some work to do. I can't say anything much more beyond that.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

If I can get my other answer, if any of the witnesses would care to—care to answer the policy question on discretion maybe in writing if my time is——

Mr. MARINO [presiding]. Without objection.

Ms. JACKSON LEE. Thank you.

Mr. MARINO. The Chair now recognizes the Ranking Member, Congressman Watt.

Mr. WATT. Thank you, Mr. Chairman.

And thank all of my colleagues for their excellent questions. I generally try to go last because a lot of times they have other obligations and need to leave, and as the Ranking Member, I am kind of obligated to be here whether I need to leave or not. So, and they clean up a lot of interesting issues that I don't have to deal with.

Judges Scirica and Sentelle, Professor Hellman, and by affirmation Mr. Wheeler have made a number of suggestions for us moving forward. I am wondering whether there are any of those suggestions to which you react either overwhelmingly favorably or, even more important, probably overwhelmingly unfavorably? And so, that would be my first question.

I am particularly interested, I think, in—not that I am not interested in the rest of Professor Hellman's recommendations, but I am especially interested in the area that might be a little bit more controversial, and that is with respect to recusal of judges, which in my experience has been an area in which judges have tended to want to have less outside involvement than their own particular judgment about whether they have a conflict, perceived or real, or not.

So if you all could address whether you have any particular negative or countervailing—maybe not negative responses to what Professor Hellman is—but maybe some countervailing arguments on the other side of what he has suggested might be a more appropriate way to frame the question.

Judge SCIRICA. Well, recusal has always been a matter that is handled on direct appeal. It is part of the merits of the case. That is not to say that certain conduct might not also constitute judicial

misconduct and could, in effect, be prosecuted under both the Misconduct Act and the rules we have before us.

If the judge, for example, exhibited some bias toward an individual or toward a group of people, or acted in a certain way that really was offensive in a certain manner, that person might very well be subject to a misconduct complaint, as well as to a direct appeal, because that individual did not recuse.

So I'm not sure that I completely understand the thrust of Professor Hellman's remarks in this area, but it seems to me that the system now is working quite well. People can even take interlocutory appeals on recusal issues during the pendency of a case. And I probably handle one of these a month, if not—if not more. And sometimes we grant them during the course of pendency of the action.

Mr. WATT. Judge Sentelle?

Judge SENTELLE. In common with Judge Scirica, I'm not sure that I'm fully understanding the thrust of Professor Hellman's point. I don't see that there is a great problem that needs to be fixed. Maybe there is, but I'm not seeing it at this point.

We get apparently a good deal less recusal litigation than does the Third Circuit because I rarely see one, and I don't think I would know——

Mr. WATT. Well, I think I am more concerned about the litigation aspects of it than the appearance aspects of it, and I would expand the question perhaps to include some appearances that are taking place on the Supreme Court, which—from which there can be no appeal, where there appear to be financial interests.

And so, what do we do in that situation, I guess, is—and Professor Hellman, if you care to weigh in to clarify your suggestions in this area, I think the Chair would grant me a minute or two——

Mr. MARINO. Most definitely.

Mr. HELLMAN. Thank you, Mr. Watt. I appreciate that.

Actually, I have made no suggestions about changing the handling of disqualification motions in the district courts. I raised the question whether the current rule—which is that judicial disqualification decisions can never be the subject of a misconduct complaint unless there's a real pattern or unless there is a bad motive—I raised the question whether that should be reconsidered.

My suggestions about disqualification and recusal relate solely to the misconduct process itself, and the suggestion I made is that in the misconduct process itself, judges should follow the same rules that they do in litigation, namely they should disqualify themselves and should be required to disqualify themselves whenever their impartiality could reasonably be questioned.

Right now, what the rule says, the judge, in his or her discretion, decides whether he or she should recuse. That's it. I think the Section 455 standard should be applied in misconduct proceedings. That's the only suggestion I made on that specific point.

Mr. WATT. Responses?

Judge SCIRICA. Very shortly, I've always believed that in certain circumstances a judge could run afoul of the recusal statute and the Misconduct Act at the same time. There can be overlap. And just because it's a recusal motion does not necessarily mean that

a misconduct complaint, a valid misconduct complaint, might not lie.

Mr. WATT. So are you suggesting perhaps some clarification on that might be appropriate?

Judge SCIRICA. Well, I always thought it was completely clear, and I've applied it that way.

Judge SENTELLE. Yes, I'm thinking of an example, Congressman, with respect to where a judge's failure to recuse could be the subject of a misconduct complaint but was not directly appealed. Anybody can bring the misconduct complaint. You don't have to be a party to the lawsuit.

If you're in the court and you see the judge committing misconduct, you can complain about it without being a party to the lawsuit. So that a person not—you don't have to have standing like you do in an Article III proceeding. So that a person not a party to the lawsuit might see the lawsuit settle after she had seen the judge commit some gross act of failure to recuse, could still come in and make the complaint to the chief. And the chief could still take action as judicial misconduct.

Now the broader principle of what Professor Hellman is saying, as far as making it plain how the judges should recuse in the misconduct proceedings, I don't find troubling.

Mr. WATT. Could I just ask one more question, Mr. Chairman? Just to clarify what happens in the Supreme Court now. There is no appeals process there. Do they have an internal process for kind of ferreting out potential appearances of conflicts, or is it solely in the discretion of a member of that high court whether to disqualify or recuse one's self from a case?

Judge SCIRICA. I certainly don't want to speak on behalf of the Court, but the Court has said that it looks to the Code of Conduct that applies to all Federal judges. It looks to precedent. It looks to other treatises. They—like other judges—they may discuss these matters amongst themselves.

They feel that these are the sources from which they have to derive guidance, and so I think that just like with us, that an individual judge decides whether or not he or she should recuse under a certain circumstance. And that is subject to review.

Mr. WATT. I appreciate the response. I want to make it clear on the record that I am not questioning any particular decision that has been made by any of the Supreme Court Justices. We are just trying to see whether there might be some other process.

Mr. Wheeler, did you have a point to make on that?

Mr. WHEELER. Well, just very briefly, there was, as you may know, a bill introduced last year in the House that would have tried to regulate that. And I can certainly understand the frustration of some Members about some of the behavior they observed.

But I think this may well be an area in which you just have to live with the results, that any kind of legislation is going to do more damage than putting up with the occasional instance in which a justice, whomever it may be, perhaps does something that raises the eyebrows.

Mr. WATT. I thank the Chairman for his—yield back.

Mr. MARINO. I believe that Congressman Holding would like to be recognized for a moment?

Mr. HOLDING. I want to thank the witnesses very much. And Judge Sentelle, as I said, it is always a pleasure to see you. I will be with Judge Whitney this evening, and I will convey your regards to him.

I am going to submit a question to the record to flesh out a bit more on the local rules and review of local rules because it is something that interests me.

So thank you all very much. I yield back.

Mr. MARINO. The Chair recognizes the Chairman.

Mr. COBLE. I also want to express my thanks to the panel. We appreciate you all being here, and we will do—we will plow this field again, I am sure.

Yield back.

Mr. MARINO. Thank you.

This concludes today's hearing. I want to thank all of our witnesses for attending. I would like to thank also the people in the audience for being here as well.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

Again, gentlemen, thank you very much.

This hearing is adjourned.

[Whereupon, at 3:26 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Response to Questions for the Record from Thomas F. Hogan, Secretary, Judicial Conference of the United States

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE THOMAS F. HOGAN
Secretary

June 12, 2013

Honorable Howard Coble
Chairman
Subcommittee on Courts,
Intellectual Property, and the Internet
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I am writing on behalf of the Judicial Conference in response to the question for the record from the April 25, 2013, Committee on the Judiciary, Subcommittee on Courts, Intellectual Property, and the Internet hearing entitled: "*An Examination of the Federal Judicial Conduct and Disability Process*."

Question 1. The Eastern District of Texas ("District") is well-known as an attractive venue for plaintiffs in patent infringement cases, and particularly for patent assertion entities, or "patent trolls." While the America Invents Act of 2011 successfully impeded patent trolls' activities in many courts, these cases still thrive in the District. This is due in part to the fact that the District waits to examine whether venue there is proper until much of the litigation has already occurred. The District then claims that it would be improper to change venue so late in the litigation and allows the case to proceed. Thus, the District's unique local rules and practices encourage abusive patent litigation.

As we are discussing today, Congress has some authority to oversee the activities of the Judiciary. What role can Congress play in reviewing and regulating the various districts' local rules? Does it have the power to enact legislation to that end?

Answer:

Congress has authorized the district courts to promulgate local rules through the Rules Enabling Act of 1934. 28 U.S.C. §§ 2071-2077. Pursuant to that law, Congress has prescribed that local court rules must be enacted by a majority of the district judges in a particular district, but not behind closed doors. Each district must have an advisory committee to make recommendations to the judges. 28 U.S.C. § 2077(b). And, any proposed rules must be published for notice and comment from local practitioners, scholars, and the general public before they may be enacted. 28 U.S.C. § 2071(b).

Congress, likewise through legislation, has established the oversight process for reviewing national and local rulemaking activities of the Judiciary. For more than three quarters of a century, the Federal Rules have been scrutinized under the strictures of the Rules Enabling Act, which reserves for Congress a seven-month period to review all such nationwide rules of procedure prior to their taking effect. Congress also provided a review mechanism to monitor the local rules of district courts, through section 332 of title 28. Under section 332, each judicial council must review the rules enacted by district courts within its circuit for consistency with the national rules prescribed under section 2072 of the Rules Enabling Act. Congress vested in the judicial councils the authority to modify or abrogate any local rule found inconsistent with or duplicative of the national rules or Acts of Congress. Sections 2071 and 332 of title 28, as well as Federal Rule of Civil Procedure 83, contemplate that the judicial councils will examine the local rules of their circuit and districts—including those in current operation and all proposed changes—with an eye toward determining whether the rules are valid and consistent with Acts of Congress and the Federal Rule. Such examinations promote inter-district uniformity and efficiency, and ensure adherence to the basic objectives of the Federal Rules—simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay.[1]

In the first paragraph of your question you express concerns about how local rules and practices affect venue determinations and the transfer of cases in the United States District Court for the Eastern District of Texas. Venue is currently governed by legislation, not by either the Federal Rules or the local rules of district courts. Congress granted a privilege to plaintiffs to first select venue in civil cases, including patent cases, thereby establishing that multiple courts may have jurisdiction over a particular case. The privilege of initial venue selection is tempered by the considerations of inconvenience

[1] The Judicial Conference Committee on Rules of Practice and Procedure and its advisory committees, which study the Federal Rules, have also periodically reviewed the local rules throughout the United States to ensure their compliance with section 2071 and Civil Rule 83, and notify the Chief Judges of district courts when an arguable conflict with national law is identified.

specified in 28 U.S.C. § 1404(a). Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to another district court or division where it might have been brought." The Federal Rules of Civil Procedure do not supplement, extend, or limit the jurisdiction of the district courts or the venue of actions in those courts. Fed. R. Civ. P. 82. As discussed above, local rules must be consistent with the Federal Rules and Acts of Congress, and therefore they too must not extend or limit the venue of actions in the district courts.

Any local rule or standing order promulgated by the United States District Court for the Eastern District of Texas that would purport to extend or limit the venue of actions in that district would be inconsistent with the present venue statute and the Federal Rules. Research by the Administrative Office of the United States Courts indicates that in this particular circumstance there is no local rule of procedure of that court which operates to extend or limit the venue of actions. Research further indicates that there is no local rule or standing order discussing venue or motions practice that is inconsistent with federal statutes or the Federal Rules. One related local rule of the Eastern District of Texas provides that "[a]bsent court order to the contrary, a party is not excused from responding to discovery because there are pending motions to dismiss, to remand, or to change venue." E.D. Tex. Local Civil Rule CV-26(a). However, local rules by design supply important details, and it appears that this rule serves as a clear warning to counsel that automatic, universal stays of discovery cannot be triggered by the mere filing of the motions specified.

Complicated questions of law or fact often arise when the venue of a case is challenged. This is perhaps why Congress afforded some discretion to plaintiffs when it comes to choosing where to file a lawsuit. Judges are likewise granted broad discretion under existing law in deciding fact-specific and case-specific questions such as where the best or most convenient location may be for trial of a case. Experience has shown that case management priorities are best set on a case-by-case basis as dictated by the circumstances of the case and the status of the court docket. Congress sanctioned this policy in 28 U.S.C. § 1657, which directs that "each court of the United States shall determine the order in which civil actions are heard and determined," with a handful of exceptions that are not relevant to the question at hand. Delay in resolving genuine disputes over proper selection of venue is nevertheless an appropriate cause for concern for litigants. If a court has clearly abused its discretion to prioritize its own motions docket or when there has been a clear abuse of discretion in deciding the merits of a motion to change venue, petitions for writs of mandamus have been granted by the courts

of appeals. In recent years, such appellate review and oversight has been exercised with respect to venue transfer motions in the Eastern District of Texas, including in patent cases.[2] It is possible that these mandamus actions will resolve the concerns you have identified.

I hope this response to the Committee's question is helpful. If we may be of additional assistance, please do not hesitate to contact the Office of Legislative Affairs, Administrative Office of the United States Courts, at (202) 502-1700.

Sincerely,

Thomas F. Hogan
Secretary

[2] *See* 16 Charles Alan Wright & Arthur R. Miller, *Fed. Prac. &Proc. Juris.* § 3935.4 n.9 (3d ed.) (collecting cases).

Response to Questions for the Record from Arthur D. Hellman, Sally Ann Semenko Endowed Chair, University of Pittsburgh School of Law

RESPONSE OF PROFESSOR ARTHUR D. HELLMAN

TO

QUESTIONS FOR THE RECORD OF THE HONORABLE GEORGE HOLDING (NC-13)

COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET, U.S. HOUSE OF REPRESENTATIVES

"AN EXAMINATION OF THE FEDERAL JUDICIAL CONDUCT AND DISABILITY PROCESS"

April 25, 2013

1. The Eastern District of Texas ("District") is well-known as an attractive venue for plaintiffs in patent infringement cases, and particularly for patent assertion entities, or "patent trolls." While the America Invents Act of 2011 successfully impeded patent trolls' activities in many courts, these cases still thrive in the District. This is due in part to the fact that the District waits to examine whether venue there is proper until much of the litigation has already occurred. The District then claims that it would be improper to change venue so late in the litigation and allows the case to proceed. Thus, the District's unique local rules and practices encourage abusive patent litigation.

   As we are discussing today, Congress has some authority to oversee the activities of the Judiciary. What role can Congress play in reviewing and regulating the various districts' local rules? Does it have the power to enact legislation to that end?

Brief response: Congress has extensive authority to review and regulate the various districts' local rules, and it has considerable power to enact legislation to address perceived abuses in the administration of the rules and the handling of litigation.

Additional comments: First, venue is a matter entirely within the control of Congress. For example, in the Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, Congress substantially revised the law governing venue in the federal courts. Congress can certainly make further revisions, including measures specific to 28 U.S.C. § 1400, the patent venue statute.

Concern about abuse of venue in the Eastern District of Texas is long-standing. Some earlier versions of the bill that became the America Invents Act of 2011 (AIA) included provisions designed to curb these abuses. Indeed, at various times during the AIA's lengthy gestation period I worked with some of the stakeholders

in writing a venue provision for the bill. But we were never able to get a consensus, and eventually the provision was dropped entirely. In part, this was because a series of mandamus rulings by the Court of Appeals for the Federal Circuit had cut back on abuse of venue in the Eastern District of Texas. However, if Congress thinks that abuses have continued, it can make a fresh start on writing patent venue legislation.

Second, Congress has acted in 28 U.S.C. § 2071 to control local rule-making power, and it could certainly add additional restrictions. In addition, if Congress believes that particular rules or practices in some judicial districts have resulted in abuses, Congress can enact legislation to require a different approach nationally. For example, as part of the AIA, Congress added a new statutory provision on joinder of parties in patent cases. The statute overrides not only local rules but also the Federal Rules of Civil Procedure.

Response to Questions for the Record from Russell R. Wheeler, Visiting Fellow, The Brookings Institution, and President, The Governance Institute

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June 10, 2013

Response to Question for the Record Submitted by the Honorable George Holding

("An Examination of the Federal Judicial Conduct and Disability Process," April 25, 2013)

Response Submitted by Russell Wheeler:

Congress, in the Rules Enabling Act,, specifically 28 U.S.C. § 2071, has authorized U.S. district courts to prescribe rules for the conduct of their business, providing however that such rules must be consistent with federal statutes and with the national rules prescribed under 28 U.S.C. §2072.

Congress may and does legislate to abrogate or modify the national rules. Arguably, it has the authority to abrogate or modify a local rule, although such a practice could lead to the kind of inconsistency in the local rules that the Rules Enabling Act seeks to avoid.

A better course, it seems to me, would be to inquire of the Judicial Conference as to inconsistencies in any particular area between local and national rules and statutes, perhaps starting with an oversight hearing on the subject.

I note that according to the Administrative Office's Judicial Business of the United States Courts, available at http://www.uscourts.gov/Statistics/JudicialBusiness/2012.aspx, Table C3, that in 2002, the 60 intellectual property cases filed in the Eastern District of Texas constituted 0.7% of the 8,222 such filings nationally. In 2012, its 1,096 filings were 9.4% of the 11,637 intellectual property cases filed nationally.

Respectfully,

Russell Wheeler