

Statement of

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

Hearing on

**An Examination of the  
Judicial Conduct and Disability System**

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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.<sup>1</sup> The other is an analysis of

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<sup>1</sup> 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.<sup>2</sup>

## 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.”<sup>3</sup> 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.”<sup>4</sup> District Judge Manuel Real was publicly reprimanded by the Ninth Circuit Judicial Council for

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<sup>2</sup> 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].

<sup>3</sup> 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).

<sup>4</sup> *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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> These Rules replaced the Illustrative Rules promulgated by the Administrative Office of United States Courts in 2000.<sup>8</sup> 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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<sup>5</sup> 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.

<sup>6</sup> *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*].

<sup>7</sup> *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](http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/Misconduct/jud_conduct_and_disability_308_app_B_rev.pdf) (hereinafter cited with Rule number).

<sup>8</sup> *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.<sup>9</sup>

### **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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<sup>9</sup> 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.”<sup>10</sup> All but a tiny fraction of complaints are disposed of on the chief judge track.<sup>11</sup>

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.<sup>12</sup> 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.”<sup>13</sup> 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.<sup>14</sup>

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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<sup>10</sup> More precisely, Track Two is the “chief judge/special committee track.” For ease of reference I will use the shorter label.

<sup>11</sup> See Breyer Committee Report, *supra* note 6, at 132.

<sup>12</sup> The judicial council may refer petitions to a panel composed of at least five members of the council.

<sup>13</sup> In fact, the statute says this twice. See 28 U.S.C. §§ 352(c), 357(c).

<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.”<sup>17</sup> 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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<sup>15</sup> 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).

<sup>16</sup> See Report of the Proceedings of the Judicial Conference of the United States, Mar. 13, 2007, at 5.

<sup>17</sup> 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.”<sup>18</sup> 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.<sup>19</sup> Further, no orders of any kind will be made public until the proceedings have concluded.

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<sup>18</sup> 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.

<sup>19</sup> 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.”<sup>20</sup>

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.<sup>21</sup> 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.<sup>22</sup>

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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.

<sup>20</sup> Illustrative Rules, *supra* note 8, at 55.

<sup>21</sup> 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.

<sup>22</sup> *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.<sup>23</sup>

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.<sup>24</sup> 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.<sup>25</sup>

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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<sup>23</sup> 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.

<sup>24</sup> 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.”

<sup>25</sup> 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.”<sup>26</sup> 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

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<sup>26</sup> 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.

### **I. 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.<sup>27</sup> 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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<sup>27</sup> 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.”<sup>28</sup> The Breyer Committee renewed and elaborated upon this recommendation. But no such compilation has been made available on the federal judiciary’s public website.<sup>29</sup>

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.<sup>30</sup>

### **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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<sup>28</sup> Report of the National Commission on Judicial Discipline and Removal, 152 F.R.D. 265, 352 (1993)

<sup>29</sup> 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.

<sup>30</sup> 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.”<sup>31</sup>

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

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<sup>31</sup> 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.”<sup>32</sup> 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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<sup>32</sup> 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.<sup>33</sup> 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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<sup>33</sup> 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.”<sup>34</sup> And there is no way of telling in advance whether a particular misconduct complaint will raise issues that bear upon those involved in the chief judge’s own case.

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.

### **I. 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

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<sup>34</sup> R. 25 cmt.

informed of the underlying facts.”<sup>35</sup> 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.”<sup>36</sup> 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.<sup>37</sup> 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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<sup>35</sup> United States v. Bayless, 201 F.3d 116, 126 (2nd Cir. 2000).

<sup>36</sup> Breyer Committee Report, *supra* note 6, at 119

<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup>

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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<sup>38</sup> 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.”

<sup>39</sup> 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.<sup>40</sup>

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.

I. **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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<sup>40</sup> 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.<sup>41</sup> 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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<sup>41</sup> 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.)

## **I. Background**

The impetus for the new review provisions came from a controversial and protracted proceeding involving District Judge Manuel Real of Los Angeles.<sup>42</sup> 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.<sup>43</sup> The complainant sought review by the Judicial Conference, but the Conduct Committee, by a vote of 3-2, determined that it had no jurisdiction.<sup>44</sup>

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.”<sup>45</sup>

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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<sup>42</sup> For a detailed account of the origins of the new provision, see Hellman, *Misconduct Rules*, supra note 2, at 339-43.

<sup>43</sup> *In re Complaint of Judicial Misconduct*, 425 F.3d 1179 (9th Cir. Jud. Council 2005).

<sup>44</sup> *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).

<sup>45</sup> 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.”<sup>46</sup> 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.<sup>47</sup>

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.<sup>48</sup> 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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<sup>46</sup> See 2008 Misconduct Rules, R. 10(a). The exception would not include orders that *prohibit* a complainant from future use of the procedure.

<sup>47</sup> For a brief discussion of judicial council authority to impose sanctions, see *infra* Part VII.

<sup>48</sup> 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.”<sup>49</sup> 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.<sup>50</sup>

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*.<sup>51</sup> Several

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<sup>49</sup> See Kozinski Website Opinion, *supra* note 4, 575 F.3d at 280 (quoting article posted on newspaper's website).

<sup>50</sup> *Id.* at 295.

<sup>51</sup> 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.”<sup>52</sup>

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.<sup>53</sup>

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.<sup>54</sup>

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.<sup>55</sup> 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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<sup>52</sup> See *In re Complaint of Judicial Misconduct*, 591 F.3d 638, 646 (U.S. Jud. Conf. Comm. on Judicial Conduct & Disability 2009).

<sup>53</sup> 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.

<sup>54</sup> 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.

<sup>55</sup> *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].<sup>56</sup>

[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.<sup>57</sup>

#### **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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<sup>56</sup> 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].”

<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> In two

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<sup>58</sup> See Breyer Committee Report, *supra* note 6, at 239.

<sup>59</sup> 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.<sup>60</sup> 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.”<sup>61</sup> 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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<sup>60</sup> 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).

<sup>61</sup> 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.