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***439** PUTTING THE MICE IN CHARGE OF THE CHEESE: WHY FEDERAL JUDGES CANNOT ALWAYS BE TRUSTED TO POLICE THEMSELVES AND WHAT CONGRESS CAN DO ABOUT IT

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I. Overview

One federal judge called a female employee into his chambers and allegedly sexually assaulted her. [FN2] Another judge, while sitting on a panel overseeing the work of the Independent Counsel, leaked classified information to the media and delayed disclosing that he was the source of the leak until threatened with an investigation. [FN3] Still another awarded substantial fees to a former law partner and campaign treasurer in more than a dozen cases without disclosing his relationship to them. [FN4] Yet another reassigned a bankruptcy case to himself to help a criminal defendant under his supervision and froze the eviction proceedings against her, allowing the defendant to live rent-free, for three years, in a house to which she had no legal claim. [FN5] When asked to explain these actions, this jurist gave testimony that was inaccurate and misleading in material and significant respects. [FN6] Most recently, a judge's name and cell phone number were discovered on a client list seized by police investigating a prostitution ring. [FN7] All of these *440 judges continue to sit on the bench, enjoying the power and prestige of the office, [FN8] and only one of them is subject to any restrictions on the kinds of cases he may hear. [FN9]

In an institution as large as the federal judiciary, which counts more than 1200 judges among its members, [FN10] it is not surprising that there are a few bad apples. Nor is it surprising that, if left unchecked, those few could exact a cost disproportionate to their number by damaging the integrity of the branch as a whole. If, on the other hand, judges who cross the line are thoroughly investigated and appropriately sanctioned, public confidence in the federal judiciary will remain strong. Unfortunately, thorough investigations and appropriate sanctions are not always forthcoming because federal judges, whose job it is to police their colleagues, often fail to do so. This problem is a serious one. Unelected and virtually impossible *441 to remove, federal judges must maintain their integrity to have legitimacy; that is, they must embody justice by applying the law equally to everyone. When they fall short in the judicial disciplinary context, the error is not confined to allowing sanctionable misconduct to go unpunished. Judges' reluctance to police their own fosters a perception of institutional bias that gives ammunition to those seeking to impose ever greater restrictions on judicial independence.

In 1980, Congress passed the Judicial Conduct and Disability Act of 1980 (The Act), which vested judges with the exclusive authority to discipline poor behavior within their ranks, which, while problematic, did not rise to the level of an impeachable offense. [FN11] The Act requires that a special council of judges investigate credible complaints that accuse their brethren of having "engaged in conduct prejudicial to the expeditious adminis-

tration of the business of the courts.” [FN12] Upon finding that a judge has committed misconduct, the council can temporarily bar the offending judge from hearing cases, issue a public rebuke, recommend that the judge take early retirement, or forward the facts of the investigation to a national committee of judges with an impeachment recommendation. [FN13]

A commission created in 2004 to study the Act's enforcement concluded recently that, while judges do an excellent job of handling run-of-the-mill misconduct complaints, they botch high-visibility matters nearly thirty percent of the time, an error rate deemed “far too high.” [FN14] In these cases, judges often fail to follow internal procedures, [FN15] sweeping the embarrassing *442 allegations under the rug, issuing cryptic dismissal orders, or responding with sanctions that are inadequately severe and ill-justified. [FN16] While the high-visibility matters are a tiny fraction of the total, they are the public face of the judicial disciplinary system because of the attention they receive and the outrage they generate. [FN17] These mishandled cases not only give the judiciary a black eye, they “may discourage those with legitimate complaints from using the Act,” based on a belief that the system is unjust. [FN18]

This Article argues that the “far too high” error rate exists because judges have a tendency to let their accused colleagues off the hook out of favoritism, undue sympathy, and a desire to protect the reputation of their circuit. This problem, known as institutional bias, [FN19] persists due to four interrelated factors, all of which find support, to varying degrees, in the language of the Act or its legislative history. These factors—the secrecy that shrouds the disciplinary process; the lopsided allocation of rights between the complainant and the accused; the perception of the Act as serving a rehabilitative rather than a disciplinary purpose; and resistance to transferring high-profile cases out of circuit, where the judges are less likely to know, and sympathize with, the accused—have created a level of dysfunction in the Act's enforcement. And, because these problems are rooted in the language of the Act and its legislative history, it is not just judicial attitudes but the Act itself that must be reformed.

To remedy the corrosive effect of institutional bias, Congress must rewrite the Act in several significant respects, and the judiciary must be more vigilant in enforcing it. The secretive disciplinary proceedings should be open and accountable to the public, and the complainant as well as the judge should be given equal procedural rights. Rather than privileging self-correction, the Act should promote uniformity in the meting out of discipline to ensure that the punishment fits the misconduct. Finally, out-of-circuit transfers should be encouraged to reduce the risk that those sitting in judgment are good friends and trusted colleagues of the accused.

Failure to amend the Act in these critical respects has two serious and interlinking consequences: a perception that the federal judiciary is incapable of policing its members; and, responsive to that, the potential enactment of legislation by Congress transferring disciplinary authority *443 over judges to the executive or legislative branch. Neither is hypothetical. Public dissatisfaction with judicial self-policing has grown in recent years, [FN20] and Congress has responded with proposals to install an Inspector General to watch over the judiciary, [FN21] a solution that many feel would threaten judicial independence and implicate the separation of powers doctrine. [FN22]

This Article's critique of the judicial system of self-discipline is located within a broader discussion about the shifting power dynamic between Congress and the judiciary. Legal scholars who study the fraught and complex relationship between the two branches tend to focus on the ways in which congressional initiatives designed to gain greater control over federal judges affect the twin values of judicial independence and judicial accountability. [FN23] Defining, valuing, and striking the appropriate balance between independence and accountability

has generated a wealth of scholarship centered on the constitutional implications of empowering one branch at the expense of the other. [FN24] The goal of this Article is not to *444 retread this richly-mined ground, but rather to explore the issue of whether Congress can save the intrabranched judicial disciplinary system by making relatively modest amendments to its governing statute. By answering this question in the affirmative, the Article need not-and does not-confront the thorny questions of interbranch encroachment on Article III power. True, the reforms it proposes require a flexing of congressional muscle, but only-to paraphrase former President Clinton's assessment of a very different kind of legislation-as a means of mending the Act, not ending it. [FN25]

Part II of this Article provides brief history of the federal judiciary's disciplinary system, outlines the concerns animating the passage of the Act, and concludes with a discussion of how the judiciary has interpreted its salient provisions. Part III discusses the judiciary's mishandling of a misconduct complaint filed against federal district court judge Manuel Real, explains how the case came to symbolize the Act's deficiencies, and describes Congress's response, which was to explore impeachment proceedings against Real and propose legislation replacing the Act with an Inspector General. Part IV analyzes the judiciary's reaction to criticism that its disciplinary system was a failure: the establishment of a committee to study the effectiveness of the Act, the committee's findings and recommendations, and the judiciary's enactment of mandatory Rules designed to bring rigor and uniformity to the disciplinary process. Part V uses three recent cases to explain why, although necessary, the new Rules do not cure the problem of institutional bias. Part VI argues that only Congress can correct the problem by rewriting key parts of the statute to require that judges afford complainants equal rights, transfer high-profile cases out-of-circuit, conduct disciplinary proceedings in a public forum, impose mandatory punishments for serious misconduct, and report any findings of probable criminal conduct-impeachable or not-to the executive branch for prosecution.

*445 II. The Laws Governing Judicial Misconduct

A. Filling the Void Between Impeachment and "Doing Nothing at All"

Federal judges are appointed for life under the U.S. Constitution, subject to "good behavior," [FN26] and may not be removed from office except by impeachment, [FN27] an unwieldy political process that is rarely invoked. [FN28] In the entire history of the United States, only seven federal judges have been successfully impeached by the House of Representatives, convicted by the Senate, and removed from office: one for drunkenness and dementia, and the other six for committing illegal acts ranging from treason to tax evasion. [FN29]

The Framers provided for the lifetime appointment of federal judges to insulate them against the vagaries of public opinion and political pressure. [FN30] Jurists that need not worry about serving a particular constituency to safeguard their jobs, it was thought, would be better positioned to rule with neutrality, independence, and detachment. [FN31] This logic, while sound, is not flawless. As numerous scholars have discussed, there is an inherent tension between independence and accountability. [FN32] Judges are human beings, *446 and wearing a black robe does not divest them of their foibles. While most members of the judiciary exercise their authority with courtesy and restraint, [FN33] the power and privilege that comes with the office encourages a small number of them to behave intemperately, unethically, and, on occasion, outside the bounds of the law.

To be sure, federal judges-with the exception of the nine on the Supreme Court-have their rulings subjected to scrutiny, and potentially reversal. A litigant who can show that a lower-level judge misapplied the law or overlooked important facts stands a chance of prevailing the second time around. But not all judicial errors can

be categorized as mistakes of law or fact. There are also occasions when a litigant's concerns center on a judge's behavior rather than the legal soundness of a particular ruling. What relief is available, for example, to an individual who complains of unfair treatment because the judge who presided over the case displayed an obvious personal bias in favor of the other side? What should an attorney do about a suspicion that a sitting judge is acting unethically by misusing the powers of her office, communicating privately with one party in a case without the knowledge of the other, or mingling professional obligations with personal interests in a way that casts doubt on her integrity? Is there a recourse for lawyers who are subjected to habitual and unwarranted verbal abuse from a particular judge?

The traditional system of appellate review is not designed to deal with these sticky issues. [FN34] Nor is the U.S. Constitution. From 1798, when the Framers established the federal judiciary, until the late twentieth century, there was no system in place to deal with judicial misbehavior falling short of a "High Crime of Misdemeanor." [FN35] The Act was passed to fill this void, empowering the judges themselves to patrol the grey area separating impeccable conduct from impeachable offenses. [FN36] Congress purposely created a self-policing system to enable judges to punish misconduct that was previously beyond sanction while at the same time avoiding unwarranted and-possibly unconstitutional-intrusions on judicial independence. [FN37]

The Act has been subject to a variety of constitutional challenges nonetheless. Facial challenges posit that impeachment is the only *447 constitutionally permissible form of judicial policing, thus making an intra-branch disciplinary system an unlawful encroachment on a power granted exclusively to Congress. [FN38] As-applied challenges encompass a broader array of claims, some focusing on a perceived lack of due process, others on the punishments themselves, arguing, for example, that temporarily forbidding the assignment of new cases to a judge amounts to removal from office. [FN39] Every federal court to consider these facial challenges has rejected them, and with one slender exception, as-applied challenges have met the same fate. [FN40] While the Supreme Court has never directly confronted the question of the Act's constitutionality, it has suggested in dicta that the judiciary is authorized to take reasonable measures to "put [its] own house in order." [FN41] Thus, while several prominent scholars have suggested recently that Act's constitutionality is still "debatable," [FN42] it is a debate that remains liveliest in academia, rather than the courtroom.

B. The Judicial Council and Disability Act of 1980

1. Provisions of the Act.-The Act mandates that every federal circuit-there are thirteen-have its own judicial council, comprised of sitting district and appellate court judges and chaired by the chief judge of the circuit. [FN43] Along with a myriad of administrative functions, the members *448 of the judicial council are charged with disciplining their colleagues, a power that includes the ability to investigate complaints of misconduct by obtaining written statements from the parties, holding hearings, and subpoenaing witnesses. [FN44] If the council finds that a judge has committed misconduct, it can impose a range of sanctions that include public or private reprimands, suspensions from the bench, and requests that the offender take early retirement. [FN45] The list is illustrative, not exhaustive; the statute explicitly leaves the fashioning of any particular sanction to the judicial council's discretion. [FN46]

A complaint accusing a federal judge of misconduct may be filed by anyone--a litigant, another judge, a politician, or a member of the public with no obvious connection to the matter. [FN47] The complaint must be in writing and contain supporting facts. [FN48] The statute strictly limits the type of judicial conduct about which one may legitimately complain, however. A judge cannot be disciplined for making an unpopular decision, a

misguided decision, or even a series of decisions that are plainly wrong as a matter of law. Potential relief from these kinds of errors is available only through standard appellate review. Because many of the people who file complaints against judges fail to note this distinction, the vast majority of grievances are dismissed outright. [FN49]

To qualify as misconduct cognizable under the statute, the complained-of misbehavior must be “prejudicial to the expeditious administration of the business of the courts.” [FN50] Congress has defined this term to include *449 “willful misconduct in office, willful and persistent failure to perform duties of the office, habitual intemperance, and other conduct . . . that brings the judicial office into disrepute.” [FN51] Other examples include using the judicial office to benefit relatives and friends, taking bribes, engaging in ex parte communication with litigants, and engaging in conduct off the bench that reasonably tends to lower the public's respect for the judiciary as a whole. [FN52]

A complaint alleging judicial misconduct is reviewed first by the chief judge of the circuit, who may dismiss it outright if the accusations are plainly unfounded or relate solely to the substance of a ruling. The chief judge may also dismiss the complaint by finding it mooted by “intervening events” or resolved by “appropriate corrective action.” [FN53] Corrective action is defined broadly to include any voluntary redress on the judge's part that “acknowledges and remedies the problems raised by the complaint.” [FN54]

In deciding whether dismissal is appropriate, the Act permits the chief judge to “conduct a limited inquiry,” which may include reviewing any relevant transcripts and other court documents, or seeking a written response from the accused judge. [FN55] The Act makes clear, however, that the chief judge may not act as a factfinder at this preliminary stage. [FN56] If the complaint alleges misconduct based on facts “reasonably in dispute,” [FN57] the chief judge must appoint a “special committee” to conduct a further investigation. [FN58] The committee, which is made up of the chief judge and “equal numbers of circuit and district judges,” [FN59] has wide latitude to conduct “an investigation as extensive as it considers necessary.” [FN60] In addition to having subpoena power, the committee is authorized to conduct interviews, obtain written statements, or compel live testimony at a hearing. [FN61]

At the conclusion of its investigatory proceedings, the committee is required to submit a “comprehensive report” of its findings and recommendations to the Judicial Council. [FN62] The Judicial Council must review the report and either dismiss the complaint, conduct further *450 investigation, or find that misconduct has occurred and mete out punishment. [FN63] If the Judicial Council concludes that the judge is guilty of misconduct that may constitute grounds for impeachment, it must notify the Judicial Conference, which is the judiciary's national policymaking and disciplinary body. [FN64] If the Judicial Conference concurs in the council's conclusion, “it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary.” [FN65]

The Act provides both the accused judge and the complainant with avenues for appellate review. If the chief judge dismisses the complaint, the dismissal order may be appealed to the Judicial Council, which assesses the complaint independently. [FN66] If the Judicial Council denies the petition for review, the chief judge's order becomes final. [FN67] Any other action by the Judicial Council, from dismissal to discipline, may be appealed by either party to the Judicial Conference. [FN68] The new Rules enacted by the judiciary empower the Judicial Conference on Conduct and Disability, sua sponte, to take up the question of whether a special committee should have been appointed to further explore a misconduct allegation, regardless of whether this determination was the subject of an appeal. [FN69]

The Act contains a strict confidentiality provision. With limited exceptions, “all papers, documents, and records of proceedings related to investigations conducted under this chapter shall be confidential and shall not be disclosed by any person in any proceeding.” [FN70] While dismissal and disciplinary orders must be made public eventually, there is a built-in time delay: all orders remain sealed until a decision becomes final, meaning that it is no longer subject to appeal or pending review. [FN71] Months, even years, may go by before the public can view the written decision. [FN72] Special Committee *451 reports, testimony, affidavits, and other documentary evidence forming the bases for a disciplinary decision remain sealed unless the accused judge gives permission to unseal them. [FN73] The lack of a public record in nearly every judicial misconduct case suggests that permission is rarely granted.

2. Legislative History.-Congress's overriding concern in passing the Act was promoting the public's interest in an honest and accountable judiciary. [FN74] Judicial interests-individual and institutional-were subordinate to ensuring that citizen complaints against federal judges were taken seriously and handled fairly. [FN75] Congress characterized poor behavior by federal judges as infrequent but not unheard of, and concluded that judicial misconduct, left unremedied, shamed the branch as a whole. [FN76] While anticipating that the need for judicial self-discipline would be rare, Congress also expected that the exceptional case would be met with an appropriately severe response, using the procedures provided for in the Act. [FN77]

At the same time, Congress expressed a clear preference for remedying judicial misconduct with rehabilitative rather than punitive measures. The legislative history stressed that most complaints would be handled within the home circuit, and that “informal, collegial resolution of the great majority of meritorious disability or disciplinary matters is to be the rule rather than the exception.” [FN78] Left unaddressed was the inherent tension between allowing “the great majority of meritorious” misconduct complaints to conclude without any real consequences for the judge and creating a disciplinary system designed “to assure the public that valid citizen complaints are being considered in a forthright and just manner.” [FN79] *452 Congress's failure to address this tension laid the groundwork for the problems in the Act's enforcement that followed.

3. Judicial Interpretation of the Act.-Congress vested the judiciary with the power to design internal rules to interpret and implement the Act. [FN80] In 1986, a special committee of the Judicial Conference drafted a set of non-binding procedures called Illustrative Rules, which most circuit councils adopted with few changes. [FN81] In March of 2008, the Judicial Conference adopted the Rules for Judicial-Conduct and Judicial-Disability Proceedings to create “authoritative interpretive standards” and made them binding on all circuit courts. [FN82] Both the Illustrative Rules and the binding Rules express a preference for non-punitive resolutions in judicial misconduct cases. Citing an “implicit understanding that voluntary self-correction or redress of misconduct . . . is preferable to sanctions,” [FN83] the mandatory Rules encourage the chief judges of each circuit to “facilitate this process [of self-correction] by giving the subject judge an objective view of the appearance of the judicial conduct in question and by suggesting appropriate corrective measures.” [FN84]

The Rules' focus on self-correction is also apparent in the allocation of procedural rights. While the Act itself is not explicit on the subject, the legislative history reveals that Congress intended “that the court will give serious consideration to providing the complainant with same rights that are provided to the judge against whom a complaint has been filed.” [FN85] But the Rules do not treat the parties equally. [FN86] Unlike the judge, the complainant has no right to present evidence, to be present at a hearing to investigate the complaint, or to review the report of the special committee. [FN87] These rights are afforded or denied the complainant at the sole discretion of the special committee. [FN88]

The case law interpreting the Act is generally consistent with the non-punitive philosophy of the Rules. A long line of precedent holds that *453 “correcting” judicial misconduct without punishment is consistent with the Act’s purpose, which is “essentially forward-looking and not punitive.” [FN89] As an explanation for placing the accused judge and the complainant on unequal footing, these decisions also emphasize that misconduct proceedings are inquisitorial rather than adversarial in nature. [FN90]

While arguably consistent with the statute’s legislative history, the judicial interpretation of the Act as an informal means to a rehabilitative end contains a fundamental flaw of logic. It presumes that the twin goals of judicial rehabilitation and judicial integrity are complementary when they are often irreconcilable. Where egregious misconduct is met with little consequence, legitimate suspicion arises that the disciplinary system has failed in its most important goal: maintaining the integrity of the judiciary by holding its members accountable for their bad behavior. The perception that the judiciary has been insufficiently rigorous in enforcing the Act is shared by some powerful members of Congress. These individuals have argued for years that the intra-branch system of judicial discipline should be replaced with an exterior form of oversight. Congressional criticism of the judiciary’s willingness to enforce the Act came to a climax over a misconduct complaint filed against federal district court judge Manuel Real.

III. 2003-2006: The Misconduct Complaint Against Judge Real, The Judiciary’s Handling of the Complaint, and the Repercussions

A. The Misconduct Case Against Judge Real

In 2003, an attorney named Stephen Yagman filed a complaint under the Act against federal district court judge Manuel Real. The judiciary’s handling of the complaint received significant attention from the press and eventually, from Congress. The Real case became a lightning rod, symbolizing defects in the Act’s enforcement and galvanizing critics to clamor loudly for the Act’s overhaul. While no single misconduct case is responsible for the recent attempts to do away with the Act, the Real case was at the center of the controversy over its effectiveness and exerted a uniquely powerful influence on subsequent attempts at reform. [FN91]

*454 1. Disposition of the Complaint by the Ninth Circuit Judicial Council.-The 2003 complaint focused on Real’s actions on behalf of Deborah Maristina Canter, a criminal defendant whom he sentenced to probation in 1999, following her guilty plea to felony loan fraud and false statement charges. [FN92] Yagman alleged that Real, while Canter was still his probationer, took control of Canter’s unrelated divorce and bankruptcy cases, and issued rulings to benefit her after she asked for his help. [FN93] He asked for an investigation to determine the nature of the relationship between Real and Canter and whether any misconduct occurred. [FN94] Because Real was a judge in Los Angeles, the complaint fell under the jurisdiction of the Ninth Circuit and was subject to initial review by the chief judge at that time, Mary M. Schroeder.

Canter’s civil proceedings centered on a dispute over property. [FN95] During their married life, Canter and her husband, Gary, had lived in a home belonging to a trust established by Gary’s parents. In February 1999, two months before Canter was sentenced in her criminal case, Gary filed for divorce and moved out of the house. [FN96] That summer, the trust filed an unlawful detainer action to evict Canter. [FN97] Canter responded by filing for bankruptcy, which automatically stayed the eviction proceedings. [FN98] In January 2000, the bankruptcy judge, Alan Ahart, lifted the stay to allow the eviction to go forward, and Canter agreed to leave her former in-laws’ home. [FN99] Shortly after Ahart entered the order, Real took the bankruptcy case away from

him and assigned it to himself. [FN100] Twelve days later, Real stayed Ahart's order, preventing the trust from enforcing the eviction agreement. [FN101] *455 The trust filed a motion to vacate the stay, which Real denied. When asked by the perplexed litigants to explain the reason for the denial, Real replied, "Because I said it." [FN102]

Yagman, a prominent and controversial civil rights lawyer, [FN103] had a long-time adversarial relationship with Real and no direct involvement in Canter's criminal or civil cases. [FN104] The basic facts underlying Yagman's complaint were a matter of public knowledge; Canter's in-laws previously had appealed Real's judicial actions to the Ninth Circuit and won a reversal. [FN105] In a 2002 opinion, the appellate court characterized as an abuse of discretion Real's sua sponte, unexplained assumption of control over Canter's bankruptcy case and his subsequent order prohibiting Canter's eviction. [FN106] After finding that Real provided no notice or explanation to the parties, the opinion concluded that Real's actions had "derailed" the legal proceedings and "resulted in great delay and costs" to Canter's former *456 in-laws-\$35,000 in lost rental income, in addition to the expense of the litigation itself. [FN107]

But the Ninth Circuit's opinion had not answered the two central questions posed by Yagman's misconduct complaint: how did Real come to learn of Canter's litigation with her in-laws, and why did he take such extraordinary steps to assist her? Schroeder summarily dismissed the complaint without addressing these issues, stating in a written order that Yagman failed to support his misconduct allegations against Real with "any objectively verifiable proof." [FN108] Schroeder also rejected Yagman's suggestion that Real's decision to take over Canter's bankruptcy case was, in and of itself, the proper basis for a finding of misconduct. [FN109] Real's actions, Schroeder concluded, were "directly related to the merits" of the civil litigation between Canter and her former in-laws. [FN110] Because the Ninth Circuit had already corrected Real's legal errors, no further action was needed. [FN111]

Yagman sought review of Schroeder's dismissal with the Judicial Council. The Council, a panel consisting of five appellate judges and five district court judges, directed a member of its staff to interview Canter's bankruptcy attorney, Andrew Smyth, and his secretary. [FN112] Smyth stated that his secretary, at Canter's suggestion and without Smyth's knowledge, drafted a letter to Real asking him to help Canter avoid eviction. [FN113] Smyth's secretary confirmed that she wrote the letter, which she said was delivered to Real several days before he seized control of Canter's bankruptcy case. According to Smyth's secretary, Canter said that "the letter had 'worked.'" [FN114]

The Council also asked Real to explain his actions. In a written statement, Real responded that Canter had told him of her pending divorce and imminent eviction during a meeting to discuss her progress on probation. [FN115] He wrote: "[Canter] was contesting her right to occupancy in the divorce court and I felt it should be finalized there so I re-imposed the stay to allow the state matrimonial court to deal with her claim." [FN116] *457 According to Real, Canter's attorney had "abandoned her interest," thus leaving her effectively unrepresented in the housing dispute. [FN117]

A majority of the Judicial Council found that Real's explanation confirmed what Yagman had alleged: Real had taken over Canter's bankruptcy case "and entered an order in that case based on information he obtained ex parte from an individual who benefited directly from that order." [FN118] "That [Real] believed that his actions would help his probationer's rehabilitation is of no consequence," the Council stated. [FN119] "A judge may not use his authority in one case to help a party in an unrelated case." [FN120]

The undisputed facts established a violation of the Code of Conduct for federal judges, which forbids them from making decisions on the basis of *ex parte* communications. [FN121] This ethical violation resulted in a series of judicial decisions that the Ninth Circuit had previously found to be obstructive, legally baseless, and harmful to the Canter trust. [FN122] It thus appeared that Real was guilty of misconduct because, in the words of the Act, he had “engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.” [FN123] Yet the Judicial Council did not make that finding, stating that “[w]e need not decide whether that line was crossed in this case. We hold only that the Chief Judge erred in dismissing the complaint as frivolous or unsubstantiated; it is plainly neither.” [FN124] On December 18, 2003, the Council sent the case back to Schroeder, advising her to delve deeper into the allegations made by Smyth and his secretary. [FN125]

Schroeder sent Real a copy of the Council's order and asked him to respond. In a memorandum, Real denied receiving a letter from Canter but provided an explanation for his actions that differed significantly from the one he'd offered previously. [FN126] In this new explanation, Real stated that he took control of Canter's bankruptcy case out of concern that her confidential pre-sentence report, prepared by the probation department in *458 her criminal case, had been filed impermissibly as a public exhibit by the attorneys for her former in-laws. [FN127]

On November 4, 2004, Schroeder dismissed the complaint for a second time. [FN128] The chief judge concluded that there was no evidence of any “secret meetings or communications” between Canter and Real, and that Real's newly provided explanation for his actions was “arguably legitimate.” [FN129] Schroeder's order did not address the diametrically opposed account of events provided by Smyth and his secretary. In accepting Real's version, she implicitly resolved the credibility dispute in his favor. [FN130] Nor did Schroeder's order contend with Real's previous statement to the judicial council that he had taken over the bankruptcy case after Canter told him of her imminent eviction during a private meeting to discuss her progress on criminal probation.

Once again, Yagman sought review with the Judicial Council. This time, the judicial council sided with Schroeder, declining to overturn her “factual finding” that no improper communication between Real and Canter had occurred. [FN131] Turning to Real's acknowledged *ex parte* contact with Canter, the council wrote that this issue had been redressed by the Ninth Circuit in its decision reversing the judicial actions that Real had taken. [FN132] In the majority's view, there was no need to find Real guilty of misconduct because he had taken “appropriate corrective action” under the Act by submitting a letter in which he admitted “improper conduct” and made a “pledge not to repeat it.” [FN133] The “pledge” consisted of a letter written by Real's lawyers, which stated that Real should have explained his actions in the Canter case at the outset so that “misunderstandings by the parties could have been prevented,” and added, “[h]e does not believe that any similar situation will occur in the future.” [FN134]

Accompanying the majority's opinion was a far lengthier dissent written by Judge Kozinski, who argued that his colleagues ignored strong evidence of misconduct and failed to follow the procedures set forth in the statute. [FN135] He pointed out that the Act expressly prohibits the chief judge from making “findings of fact about any matter that is reasonably in dispute.” [FN136] By resolving the irreconcilable accounts of the nature of the *ex parte* contact in Real's favor, Kozinski argued, the chief judge had *459 overstepped her statutory authority. Rather than correct this legal error, the council had exacerbated it by accepting this unauthorized conclusion. [FN137]

Kozinski also took the majority to task for its conclusion that Real's “other impropriety”—his admission that he had acted based on information provided by Canter in a private meeting—had been redressed by the appellate court. [FN138] That determination, he argued, suffered from a similar misreading of the Act, which was de-

signed to address inappropriate behavior rather than errors of legal reasoning. [FN139] As the Council itself noted in its previous order remanding the Real misconduct complaint: “[W]here the complainant presents solid evidence that the judge’s ruling was the result of ‘conduct prejudicial to the effective and expeditious administration of the business of the courts,’ 28 U.S.C. § 351 (a), then such underlying conduct will not be deemed ‘directly’ related to the merits of the ruling.” [FN140] The Council, it appeared, was ignoring not just the requirements of the statute, but its own precedent construing those requirements.

The Council’s determination that Real had taken “appropriate corrective action” was yet another flawed application of the law, according to Kozinski. [FN141] Under the Act, “corrective action” is deemed “appropriate” when the offending judge, of his own volition, makes amends, usually by admitting the misconduct and promising not to do it again. [FN142] In Kozinski’s view, Real had not apologized or acknowledged making a mistake. [FN143] His lawyer-drafted statement said only that he should have provided a better explanation of his actions to avoid “misunderstandings.” [FN144] Real had not explained what “misunderstandings” a more thorough explanation might have corrected, or promised not to repeat his behavior; his statement said only that history was unlikely to repeat itself. [FN145] This, Kozinski said, was “hardly a commitment to act differently in similar circumstances.” [FN146]

*460 Kozinski’s dissent made waves, attracting the attention of reporters, politicians, and experts in judicial ethics. [FN147] By exposing the legal errors in the majority’s opinion and highlighting the uncontested facts establishing Real’s improper conduct, Kozinski made a strong argument that the council majority’s failure to find misconduct or impose punishment amounted to an abandonment of its disciplinary responsibilities. Indeed, Kozinski went further, arguing that the majority’s opinion was not a misreading of the statute but a misalignment of priorities: his colleagues were concerned primarily with sparing Real’s feelings and reputation rather than enforcing the rules. [FN148] The straightforward language of the Act and Real’s admitted *ex parte* communication offered support for this conclusion, and many people looking in on the judiciary from the outside agreed with it. [FN149]

2. Ruling of the Judicial Conference.-Yagman appealed the dismissal to the Judicial Conference. In October 2005, while his appeal was pending, Yagman filed a second misconduct complaint against Real, accusing him of misleading the Judicial Council by offering inconsistent explanations for taking over Canter’s bankruptcy case. The 2005 complaint went to Schroeder for review, where it lay dormant for seven months. [FN150]

The Judicial Conference delegated review of the 2003 complaint to a committee of five judges. [FN151] On April 28, 2006, by a vote of 3-2, the committee voted to uphold the Council’s dismissal on procedural grounds, finding that the Ninth Circuit’s failure to appoint a special committee prevented it from reaching the merits. [FN152] According to the majority, the failure of the chief judge and judicial council to follow the Act’s procedures rendered their substantive rulings unreviewable. [FN153] Only Congress, through the passage of “additional legislation,” could solve the jurisdictional problem. [FN154]

The two dissenters protested that while the statute did not expressly provide for jurisdiction where the complaint was dismissed without the appointment of a special committee, jurisdiction was implied in such cases. [FN155] To conclude otherwise created a perverse result, legitimizing a *461 decision by “those closest to an accused colleague to dismiss a complaint by actions that ignore statutory procedures and simultaneously render the tribunal of final review impotent.” [FN156]

B. Repercussions

1. Press Coverage and Public Reaction.-In accordance with the Act's confidentiality provisions, Real was not publicly named as the target of the complaint during the nearly three years that the misconduct proceedings were ongoing. [FN157] Because he was never found to have done anything wrong, he remained anonymous in the final order as well. [FN158] But while Real's name did not appear in the disciplinary orders and dissents published by the judiciary, the Ninth Circuit's 2002 decision identified him as the district court judge who had abused his discretion in seizing control of Canter's bankruptcy case. [FN159] Because the disciplinary orders discussed the Canter litigation in detail, it was easy to connect Real to the misconduct proceedings. The extraordinary facts of the complaint and its handling by the judiciary made the case newsworthy, and it received significant media coverage at every turn in the proceedings. [FN160] When the complaint was dismissed by the Judicial Council, the portions of Kozinski's dissent describing Real's behavior and castigating his colleagues for excusing it were quoted at length in the press. [FN161] Articles reporting the Judicial Conference decision affirming ***462** the Council's dismissal also focused on the dissent, and the experts who weighed in agreed that the two majority opinions were not simply wrong but harmful to the judiciary's reputation. [FN162] One law professor described the case this way: "Judges ignore the procedures that the law requires with the result that a fellow judge avoids the possibility of discipline, and then a panel of higher judges says that it has no power to review the violation . . . To the public, it may look like a system designed by the Mad Hatter with the rest of us in the role of Alice." [FN163]

2. Proposed Legislation.-The dismissal of the misconduct complaint against Real angered some members of Congress, who used it as a platform to argue that the intra-branch system of discipline needed to be supplemented or replaced with an outside monitor. [FN164] To these individuals, chief among them James Sensenbrenner (R-WI), then the Chairman of the House Judiciary Committee, the Real case validated what they had said all along-that the judicial policing system was a good-old-boys network moreconcerned with self-protection than self-discipline.

Sensenbrenner had long been dissatisfied with the judiciary's enforcement of the Act. [FN165] In 2002, he filed his own misconduct complaint against a federal judge, and labeled its subsequent dismissal by the judiciary a "whitewash." [FN166] In a meeting with members of the Judicial Conference in 2004, Sensenbrenner predicted that Congress would "begin assessing whether the disciplinary authority delegated to the judiciary has been responsibly exercised and ought to continue." [FN167] In 2005, Sensenbrenner and Senator Grassley introduced legislation to replace the intra-branch disciplinary system with an Inspector General mandated "to take complaints, prepare reports, and audit and investigate the administration ***463** of the courts." [FN168] Included in this broad grant of authority was the power to investigate misconduct complaints against federal judges and report them to Congress. [FN169] The bill failed to pass in either house.

For Sensenbrenner and some of his colleagues in Congress, the manner in which the judiciary handled-or, in their view, "bungled"-the Real complaint provided new fuel for the cause. [FN170] In late April 2006, several months after the Judicial Conference ruling, Sensenbrenner and Grassley once again introduced a bill to create an Inspector General authorized to investigate misconduct complaints against judges and report any findings of misconduct to the Justice Department. [FN171] Testimony in support of the bill, titled the Judicial Transparency and Ethics Enforcement Act, discussed in detail the judiciary's handling of the Real misconduct complaint and argued that it "both makes the case for reform, and pleads for statutory changes." [FN172]

***464** 3. Judicial Response.-The renewed effort to pass legislation creating an Inspector General elicited a condemning response from the judiciary. [FN173] Press accounts reported "widespread alarm" among federal judges that the bill, if enacted into law, would threaten their independence. [FN174] Many believed that shifting

the authority to discipline judges to Congress and the executive branch raised the specter of judicial sanctions based on politically unpopular decisions rather than objective determinations of misconduct. [FN175] In a speech to the American Bar Association, Associate Justice Ruth Bader Ginsburg described the bill as “a really scary idea” bringing to mind totalitarian regimes like that of the former Soviet Union. [FN176]

But while the Inspector General proposal met with a cool reception, there had been a previous acknowledgment at the judiciary's highest levels that the disciplinary system needed to be reviewed and, potentially, reformed. In May 2004, soon after Sensenbrenner first went public with his concerns about the effectiveness of judicial self-policing, [FN177] then-Chief Justice Rehnquist formed a committee “to evaluate and report on the way the Judicial Conduct and Disability Act of 1980 is being implemented.” [FN178] This initiative, Rehnquist stated, was undertaken in response to “criticism by members of Congress,” as part of an ongoing effort to improve what had become a strained relationship between the judicial and legislative *465 branches. [FN179] The group-chaired by Associate Justice Stephen Breyer and known as the Breyer Committee-was still studying the issue when the Inspector General legislation was introduced in April 2006.

Meanwhile, the disciplinary proceedings against Real began anew in the Ninth Circuit. Less than a month after Sensenbrenner and Grassley proposed the Inspector General legislation, Chief Judge Schroeder responded to Yagman's second misconduct complaint against Real, which he had filed seven months earlier. This time, Schroeder appointed a Special Committee, and asked its members to investigate the allegations that Real intentionally misled the Judicial Council by providing conflicting explanations for his actions in the Canter bankruptcy case. [FN180] Because the new misconduct allegations were inextricably bound up with the 2004 complaint, Schroeder directed the Committee to investigate that matter as well. [FN181] In August 2006, the Special Committee held a five-day hearing. [FN182] Eighteen witnesses testified under oath, and the Committee reviewed more than 8500 pages of documents and 136 exhibits. [FN183]

4. Impeachment Proceedings Against Judge Real.-For Sensenbrenner and others in Congress, the judiciary's renewed inquiry into the Real misconduct case was too little, too late. [FN184] On July 17, 2006, Sensenbrenner introduced a resolution on the House floor “calling for an inquiry into grounds for impeachment of U.S. District Judge Manuel L. Real, from the Central District of California.” [FN185] While Sensenbrenner acknowledged that the misconduct allegations against Real were “under further review” by the Judicial Council, his argument in support of a congressional *466 impeachment inquiry made clear that he had little faith in the outcome of that process. [FN186]

The hearing, which was held on September 21, 2006, was an extraordinary event. Unlike the private proceedings conducted by the judicial council the month before, the congressional probe was open to the public and broadcast live on the Internet. [FN187] Real, under subpoena, appeared with his lawyers and testified before the House Judiciary Committee, which was controlled by the Republicans and chaired by Sensenbrenner. [FN188]

The members of the committee split along partisan lines in their treatment of Real, revealing a sharp difference of opinion as to the true purpose of the impeachment inquiry. [FN189] In the Democrats' view, the Republicans were using the Real case to advance a broader agenda: exercising control over judges whose opinions they disliked-particularly judges in the Ninth Circuit where Real sat. [FN190] The Republican members of the Committee countered that they were obligated to explore the misconduct allegations further because the Judicial Council had failed to discharge its disciplinary responsibilities and a genuine issue existed as to whether Real had committed an impeachable offense. [FN191] Throughout the *467 hearing, Democratic members of the Committee expressed their view that the impeachment proceedings were unnecessary in light of the Judicial

Council's ongoing investigation. [FN192] One even apologized to Real, calling him a "victim." [FN193] The Republicans, by contrast, grilled Real about his handling of the Canter case [FN194] as well as on tangential subjects such as whether he considered Canter "attractive" [FN195] and what he made of the fact that he was widely reviled as a jurist. [FN196] Real emphatically denied any wrongdoing, stating that he never had "an improper personal relationship with [Canter]" and that Kozinski's conclusion to the contrary was "erroneous." [FN197] Real's testimony was followed by two law professors with expertise in the field of judicial conduct and ethics. [FN198] While acknowledging that the judiciary made serious errors in the Real misconduct case, both professors advised the committee to wait until the conclusion of the disciplinary process before taking further action. [FN199] They also agreed that, based on the *468 allegations, it did not appear that Real had committed a crime warranting impeachment. [FN200]

The hearing ended on an inconclusive note. The Committee did not vote on Sensenbrenner's impeachment resolution or schedule any further proceedings. [FN201]

IV. Reform From Within: The Report From the Breyer Committee, the Conclusion of the Real Misconduct Case, and Adoption of Its Recommended Changes By the Judicial Conference

A. The Breyer Committee Report

On September 19, 2006, the Breyer Committee issued a 180-page report entitled Implementation of the Judicial Conduct and Disability Act of 1980. [FN202] The report was the culmination of a two-year study of misconduct complaints designed to assess "whether the judiciary, in implementing the Act, has failed to apply the Act as strictly as Congress intended, thereby engaging in institutional favoritism." [FN203] Coincidentally, the Committee issued its findings only two days before Real's impeachment hearing before Congress—the most dramatic moment in the case that had become shorthand for precisely this issue. [FN204]

The Breyer Committee gave the judiciary's enforcement of the Act a mixed review. [FN205] On the one hand, "chief circuit judges and judicial councils are doing a very good overall job in handling complaints." [FN206] Cases *469 filed mainly by prisoners and disgruntled litigants were usually deemed meritless, [FN207] and cases were properly disposed of ninety-seven to ninety-eight percent of the time. [FN208] On the other hand, the judiciary frequently mismanaged high-profile complaints, many of which were filed by attorneys, court personnel, or public officials. [FN209] Between 2001-2005, the judiciary received seventeen high-profile complaints and mishandled five, an error rate of nearly thirty percent. [FN210] The committee was blunt in its criticism of the judiciary's record in these cases, calling the error rate "problematic" and "far too high." [FN211] The mismanaged, high-profile misconduct cases were a tiny fraction of the total, [FN212] but because they involved substantial allegations of wrongdoing and received attention from the media, they had a disproportionate impact. [FN213] The public did not read about the hundreds of frivolous complaints that the chief judges rejected out of hand each year. [FN214] But anyone with an Internet connection or a newspaper subscription could readily familiarize herself with the Real complaint and the other controversial misconduct cases covered by the press. The Committee expressed concern that the substantial error rate in the handling of these cases was fostering the perception that the system "may discourage those with legitimate complaints from using the Act." [FN215]

The Breyer Committee Report devoted an entire section to discussing the seventeen "high-visibility" complaints handled by the judiciary between 2001 and 2005, examining in detail the five mishandled complaints

within this subset. [FN216] But the report named no names; even where the judge had waived confidentiality he remained anonymous. [FN217] In four of the five mishandled cases, the committee determined that the breakdown in the disciplinary process occurred at the initial stage of review because the chief judge gave short shrift to the misconduct allegations by incorrectly *470 resolving, or simply ignoring, disputed factual issues rather than appointing a special committee to investigate them. [FN218] The 2003 Real misconduct complaint was among this group. [FN219] In assessing the defects in the Ninth Circuit's handling of the matter, the committee's critique echoed Kozinski's dissent, quoting from it several times. [FN220] In the Committee's view, both the chief judge and the Judicial Council were in error; the former for twice dismissing substantial allegations of misconduct without appointing a special committee and the latter for upholding the second dismissal. [FN221]

Yet, nowhere in its analysis of the Real complaint or the other mishandled, high-profile misconduct cases was there any mention of the committee's central inquiry: Was institutional bias the root cause of the problems affecting the Act's enforcement? [FN222] Instead, the Committee speculated that the error rate in the high-visibility complaints "may reflect the greater complexity of such cases and less familiarity with their proper handling as a result of their infrequent occurrence." [FN223] In essence, the Committee concluded that the problem lay with the nature of the cases, not the nature of the judges. [FN224] Not surprisingly, the reforms proposed in the Committee's report reflected that belief: to reduce the error rate, the Committee advocated for an infusion of resources and training to clarify the distinct roles of the chief judge and the Judicial Council in the disciplinary process and to provide guidance in the carrying out of their respective duties. [FN225]

The only one of the Committee's recommendations to address the issue of institutional bias did so indirectly and equivocally by suggesting that *471 in some cases, chief judges consider transferring misconduct complaints out of the circuit in which they originated. [FN226] The Committee stated: "Transfers should not be a regular occurrence, but some complaints might be better handled by judges outside the circuit. We can see reasons for and against doing so." [FN227] Potentially transferable cases included high-profile complaints "whose local disposition might create a threat to public confidence in the process—the view that judges will go easy on colleagues with whom they dine or socialize." [FN228] Also included in this list were well-supported complaints that named all of the judges within a circuit, attacked a circuit's internal procedures, or were "filed in a circuit beset by internal tension tied to the alleged misconduct." [FN229]

But the Committee found that an equal number of factors counseled against out-of-circuit transfers: a lesser ability among judges unknown to each other to determine the best way to dispose of a complaint or to enforce a sanction; less inclination to "go through the emotionally draining work of imposing tough sanctions on judges not of their own circuit"; and the delay and expense involved in handling disciplinary proceedings "from a distance." [FN230] The equal number of pros and cons on both sides, none weighted more than any of the others, suggested an endorsement of transfers that was, at best, lukewarm. [FN231]

The Committee proposed no changes to the Act's strict confidentiality provision. This was not surprising, for, as the Committee stated at the outset of the report, its responsibility was not "to rewrite the Act, and none of our recommendations requires statutory amendment." [FN232] But while the Committee was not charged with overhauling the language of the statute, it was committed to answering its critics' loudly voiced concerns that the judicial system of self-discipline was unable to function effectively because judges were more concerned with protecting their colleagues than policing them. [FN233] The secrecy cloaking the Act's procedures had long been *472 criticized as facilitating the whitewashing of valid complaints. [FN234] Despite the vital role of secrecy in the Act's administration, the Committee's report did not suggest that it contributed to the frequency with which judges dismissed legitimate complaints without conducting an inquiry or providing an explanation.

B. The Conclusion of the Real Complaint

1. Congress.-Real's battle with Congress ended less than two months after the Breyer Committee issued its report, when mid-term elections changed the political climate dramatically in Washington. The elections, held in November 2006, handed control of both the House and the Senate to the Democrats. Now in the minority, the Republican's agenda-including the push for greater control over the judiciary-had been shelved indefinitely. [FN235] Congress' impeachment inquiry went no further than the September hearing, and Sensenbrenner's Inspector General bill met a similar fate. Although it was approved by the House Judiciary Committee in late September 2006, the legislation never came to the floor for a vote. [FN236]

2. The Judicial Council and the Judicial Conference.-Real's investigation by the judiciary, however, continued for another sixteen months. [FN237] On *473 November 16, 2006, the Ninth Circuit Judicial Council found Real guilty of misconduct. [FN238] Adopting the findings of the Special Committee, the Council concluded that Real, in defending himself against the allegations in the 2003 and 2005 complaints, made statements that were "inaccurate and misleading in material and significant respects." [FN239] The Judicial Council determined that Real's wrongdoing-his judicial actions based on an ex parte communication and his "not believable" statements about those actions-warranted a public reprimand. [FN240] The reprimand consisted of a letter, addressed to Real and available on-line, informing him that he had been found guilty of misconduct. [FN241]

Both Real and Yagman appealed to the Judicial Conference. [FN242] The conference, which assigned the appeal to a five-judge committee, [FN243] *474 upheld the Judicial Council's order in its entirety. [FN244] The unanimous decision, issued on January 14, 2008, concluded that the misconduct findings were supported by "overwhelming evidence." [FN245] Although the Ninth Circuit Judicial Council had made no mention of other possible sanctions-either more or less severe [FN246]-the conference opinion found that its decision to punish Real with a public reprimand "was arrived at through a full consideration of the available alternatives, and should not be overturned." [FN247]

C. The New Rules

In March 2008, the Judicial Conference announced that it had enacted twenty-nine rules to improve the disciplinary process by providing clear guidelines for judges to follow. [FN248] Unlike the Illustrative Rules, which had been in place since 1986, the new Rules were binding on all of the circuits. [FN249] An accompanying press release explained that the mandatory Rules, which incorporated all twelve recommendations in the Breyer Committee Report, were designed to bring "consistency and rigor" to the Act's implementation. [FN250] The press release also made clear, however, that the reforms were limited by the constraints of the Act itself. The statute's strict confidentiality requirements, for example, remained intact. [FN251] As always, the public was forbidden from attending misconduct hearings, reading special committee reports, or reviewing the evidence against an accused judge. [FN252]

The Rules set new restrictions on chief judges, but left their most significant powers undisturbed. Rule 5 required them to initiate a complaint against a colleague upon "clear and convincing" evidence of misconduct regardless of whether an outside party had made a formal charge. [FN253] But under Rule 11, the chief judges retained their broad discretion to resolve these and other misconduct complaints informally by concluding that the *475 accused judge voluntarily had taken "appropriate corrective action." [FN254] This type of mea culpa "should include steps taken by that judge to acknowledge and redress the harm, if possible, such as by apology, recusal from a case, or a pledge to refrain from similar conduct in the future." [FN255] While the volunteered

corrective action had to meet the chief judge's approval, the complainant was provided no means of participating in the process, nor was the complainant's consent a pre-condition for this informal-and confidential-dismissal. [FN256]

As justification for this method of resolving valid complaints without public airing or complainant participation, the commentary to the rules cited "the implicit understanding that voluntary self-correction or redress of misconduct or disability is preferable to sanctions." [FN257] The Rules did not cite to the Act as the basis for this "implicit understanding." [FN258] And, while the commentary also noted that the voluntarily undertaken corrective action should "be proportionate to any sanctions that the judicial council might impose," it did not explain how such a proportionality analysis might be undertaken. Nor did the commentary acknowledge that conducting a proportionality analysis might be difficult given that voluntary corrective action, by definition, bypassed the investigatory process designed to explore the full contours of the misconduct by obtaining and weighing the evidence. [FN259]

The new Rules also took a step toward expanding the power of the judicial conference, but stopped short of granting it the full authority of *476 a traditional appellate court. [FN260] Under Rule 21, the Judicial Conference could review any dismissal by a chief judge or Judicial Council regardless of whether a special committee had been appointed. [FN261] This put an end to the possibility of future Judicial Conference decisions dismissing uninvestigated complaints on jurisdictional grounds, as had occurred in the Real case. [FN262] Now complainants like Yagman would have the right to argue to a higher tribunal that the chief judge or Judicial Council had erred by ignoring or overlooking disputed material facts. But the Judicial Conference had only one alternative upon finding of this type of error-to send the case back to the chief judge with instructions to appoint a special committee. [FN263] The Judicial Conference could not mete out discipline on its own or make any factual findings outside the limited determination that further investigation was required. [FN264]

Only two of the twenty-nine Rules acknowledged the elephant in the room: the widespread perception that institutional bias too often impeded the Act's enforcement. [FN265] Rule 25, which dealt with disqualification, left almost entirely to the individual judge's "discretion" whether recusal was warranted in any given circumstance. [FN266] Disqualification was mandatory only as to the accused: the judge who was the subject of the misconduct complaint was barred from judging it. [FN267] The chief judge was not disqualified from membership on the council reviewing a decision that she authored, [FN268] nor were judges with familial relationships to the accused prevented from participating in the process of disciplining them. [FN269]

Rule 26, which addressed the issue of transfers, allowed the chief judge and the Judicial Council to request to transfer misconduct complaints out-of-circuit. [FN270] Transfer requests went to the Chief Justice of the Supreme Court, who had the unbridled authority to grant or deny them. [FN271] The short commentary accompanying the Rule suggested that out-of-circuit *477 transfers might be considered in cases where multiple Judicial Council members had disqualified themselves, in high-profile cases where the sensitivity or nature of the allegation might lead the public to question the home circuit's impartiality, or where the complainant herself raised the issue of home circuit bias. [FN272] But Rule 26 made it clear that transfers should be a last-resort option, invoked only "[i]n exceptional circumstances." [FN273]

V. The Judiciary's Reforms Are Necessary, But Insufficient to Address the Problem of Institutional Bias-Both As a Matter of Perception and a Matter of Fact

A. The Four-Factor Problem

The reforms undertaken by the judiciary fall short of correcting the most serious problems plaguing the Act's enforcement: the perception and reality that institutional bias infects the disciplinary process. As the Real complaint demonstrated, where favoritism triumphs over fairness, the consequences can resound far beyond the specifics of the case. The repercussions—the outcry over the chief judge and Judicial Council's erroneous decisions to dismiss the complaint; the Judicial Conference's order leaving these errors unremedied; and the spectacle of the accused judge hauled before Congress to defend himself in impeachment proceedings—call the integrity of the process into question.

The Breyer Committee Report underscored these concerns when it reached the broader and more unsettling conclusion that the Real case was part of a systemic problem rather than an aberration. That is, in high-profile cases, judges too frequently demonstrated an unwillingness or inability to follow the Act, a signal that institutional bias was infecting the proceedings and corrective measures were warranted. But the changes proposed by the Breyer Committee and incorporated into the new Rules failed to provide these corrective measures, because they left unaddressed the root causes of the problem.

Four interrelated factors allow institutional bias to flourish: the secrecy that shrouds the disciplinary process; the lopsided allocation of rights between the complainant and the accused; the lack of mandatory sanctions for willful and egregious misconduct; and the practice of having high-profile cases handled by the home circuit, where the judges are more likely to know, and sympathize with, the accused.

As to the first factor, it is true that the Act's strict confidentiality provisions tie judges' hands to some degree. But the judiciary takes the confidentiality provisions to an extreme that the Act never intended, *478 undermining confidence in the validity of the process. As to the remaining factors, the judiciary has broad discretion to level the playing field between the complainant and the accused, tighten its standards for recusal and out-of-circuit transfers, and mete out strict discipline for clear misconduct. Presented with the opportunity to address all of these issues in the wake of the Real scandal, the Breyer Committee Report, and the threat of oversight by an Inspector General, the judiciary addressed none.

Underlying the judiciary's reluctance to initiate these reforms appears to be the oft-stated “implicit understanding” that the purpose of judicial discipline is to rehabilitate the accused in private rather than call him to account public account. [FN274] This “implicit understanding” finds its strongest support in the Act's legislative history, which expresses a preference for the “informal, collegial resolution of the great majority of meritorious disability or disciplinary matters.” [FN275] The legislative history also states, however, that “[t]he foremost and primary obligation of the whole judicial disability and disciplinary system are the protection of the public and the administration of justice.” [FN276] In practice, the “informal collegial resolution” of valid misconduct complaints is frequently at odds with this “foremost and primary obligation.” Too often, the former is achieved at the latter's expense.

Thus, by continuing to promote a rehabilitative interpretation of the statute and, relatedly, by failing to address the problem of institutional bias, the judiciary has allowed a level of dysfunction in the Act's enforcement to persist. The final disposition of the Real complaint and the judiciary's mishandling of two subsequent misconduct complaints, discussed *infra*, provide additional support for this conclusion. Change must come both from within and without. Judges cannot shy away from passing public and unsparing judgment on their colleagues—no matter how disagreeable and uncomfortable that task may be. Congress also must provide much-needed guid-

ance in this process by amending the statute's provisions to ensure that the Act functions as intended: "to assure the public that valid citizen complaints are being considered in a forthright and just manner." [FN277]

B. Illustrations of the Four-Factor Problem: The Real, Kent, and Mahan Cases

1. The Real Complaint.-The Real case exemplifies the four-factor problem—secrecy, unfair allocation of rights, intra-circuit bias, and lack of mandatory sanctions. Secrecy was, perhaps, the least lasting legacy of the case because the Judicial Council's decision to adopt and publish the Special Committee's *479 report meant that the public could review the reasoning underlying the disciplinary decision. Still, the hearings were closed, the evidence remains sealed, and the disclosure of the Special Committee's report came too late—more than thirteen months after the Special Committee had issued its detailed findings of misconduct. Real, the presumptive beneficiary of the delay, was not helped by it; the press had outed him years earlier. If anything, the belated disclosure cast doubt on the validity of the judicial disciplinary process "by putting off the day when the public would see" how the Special Committee had dealt with the allegations. [FN278]

The lopsided allocation of procedural rights was also problematic. While the complainant had no personal stake in the case, [FN279] he stood in the shoes of the Canter trust, which had lost tens of thousands of dollars as a result of Real's misconduct. [FN280] As the aggrieved party, the Canter trust should have had a say in the fashioning of the sanction, but the trust's members had no voice in the process. [FN281] The Ninth Circuit's failure to transfer the case—an option even before the enactment of the new Rules [FN282]—was equally problematic. From the outset, the Ninth Circuit's handling of the case appeared biased: repeatedly, Real's circuit and district court colleagues showed an unwillingness to squarely confront the allegations against him and discipline him accordingly. By the time the decision was made to reopen the case in 2006, the Ninth Circuit's failure to follow the Act had been widely documented and roundly criticized. The chief judge or one of the Council members should have acknowledged the obvious—that the Ninth Circuit's loss of credibility meant there could be no public confidence in its judgment—and sought to have the case handled by judges from an outside circuit.

But of all the errors in the handling of the Real complaint, the most problematic was the judiciary's failure to impose a sufficiently severe sanction. In the Council's judgment, which the Judicial Conference affirmed, Real's misconduct merited only the short-lived embarrassment of a public reprimand, leaving all of his judicial powers intact. Rather than call Real's misconduct what it was—unethical and dishonest—the Ninth Circuit went out of its way to minimize and excuse it. None of Real's transgressions, in the Council's view, rose to the level of an impeachable offense because Real lacked any malicious intent. [FN283] His motivation in taking over Canter's bankruptcy case was kindhearted, not venal, and his *480 false statements to his colleagues were "motivated more by anger and self-deception than by a deliberate attempt to deceive others." [FN284]

The Council provided no explanation for its failure to consider more severe sanctions, such as recommending that Real retire from the bench or forcing him to take a leave of absence. Real was not even asked to apologize to the victims of his misconduct. The Council did not even require Real to complete an ethics course or bar him from meeting privately with his probationers to prevent a Canter-type situation from reoccurring. At the conclusion of the misconduct case, more than three years after the filing of the initial complaint, Real's daily life on the bench was unchanged: he continued to reside over a mixed docket of criminal and civil cases with no restriction on his judicial duties whatsoever.

The Council's reasoning does not stand up to scrutiny. Even assuming that the Council accurately characterized as benevolent Real's decision to come to Canter's aid, his motivations were irrelevant to the nature and

severity of the harm. When he enriched Canter at her ex-in-laws' expense based on a private communication, Real violated one of the most basic tenets of judicial ethics: to perform the duties of his office impartially. His actions were willful, protracted, and harmful, not just to the Canter Trust, but to the integrity of the judiciary as a whole. Reprimanding Real without any additional sanction minimized the severity of misconduct, and signaled to the public that judges are kinder to themselves than anyone else. This type of double-standard evinces the institutional bias that the judiciary needs to eradicate if it hopes to convince critics that it can police itself.

Moreover, the evidence in the record lends little support to the judiciary's interpretation of Real's actions as self-deceptive. Placed in context, Real's "inaccurate and misleading statements" [FN285] signal a calculated attempt to deceive others. They contradicted Real's original explanation conceding the ex parte communication and were offered only after it became clear that the council was taking the misconduct allegations seriously. At that point, Real's overriding interest lay in deceiving his colleagues to avoid punishment.

Moreover, Real's false statements were arguably criminal, and the Judicial Council was remiss for not recognizing this fact and taking appropriate action. Under federal law, it is a felony to "[make] any materially false, fictitious, or fraudulent statement or representation" in connection with any matter within the jurisdiction of the judicial branch. [FN286] A separate federal statute criminalizes perjury. [FN287] At the conclusion of the Council's investigation, there was at least some evidence that Real had committed both of these crimes. The judiciary should have forwarded the evidence of *481 its investigation to the Department of Justice with a recommendation that it conduct a thorough inquiry to determine whether criminal charges were warranted.

Consistent with its obligations under the Act, the Council was also obligated to inform the Judicial Conference that Real's misconduct "might constitute one or more grounds for impeachment." [FN288] The statute's use of the word "might" indicates that the council's finding needed to be based only on the possibility—not the probability or indisputability—that Real's misdeeds were impeachment-worthy. [FN289] Given the context in which Real made his false statements and the length of time he had to deliberate before making them, there was at least a possibility that his behavior might meet the "High Crimes and Misdemeanors" standard for impeachment. [FN290] The Council should have recognized as much and provided the full record of its investigation to the Judicial Conference, which, if it concurred, would be required to forward the case to Congress "for whatever action the House of Representatives considers to be necessary." [FN291]

2. The Kent Complaint.—On May 21, 2007, a misconduct complaint was filed against Samuel B. Kent, a federal district court judge in Galveston, Texas, within the Fifth Circuit. [FN292] Four months later, Chief Judge Edith Jones issued an order publicly reprimanding Kent. [FN293] The September 28, 2007 order, which barely exceeded two doubled-spaced pages, described the complaint as "alleging sexual harassment" and the complainant as "an employee of the federal judicial system." [FN294] The order provided no further details about the allegations or the accuser, whose name, job description, and gender were not identified. [FN295]

The information provided about the Council's decision to reprimand Kent was similarly sparse. The order stated that a Special Committee had been appointed to explore the charges, and at some later point, its *482 investigation broadened to include "alleged inappropriate behavior toward other employees of the federal judicial system." [FN296] No further information was provided about the "other employees," or why the Committee had decided to bring their allegations within the scope of the original complaint. [FN297] The Council stated only that the Special Committee had issued a report addressing all of the allegations, which the Judicial Council adopted "by a majority vote." [FN298] No mention was made of the numerical split among the judges, the basis for their disagreement, or the substance of the conclusions reached by the majority. [FN299]

The order stated cryptically that Kent was reprimanded “for the conduct that the report describes.” [FN300] It did not explain what that conduct entailed other than to say that it “violated the mandates of the Canons of the Code of Conduct for United States Judges and [was] deemed prejudicial to the effective administration . . . of justice.” [FN301] As punishment for this unspecified misconduct, Kent was required to take a four-month leave of absence from the bench, and agree to a “reallocation of the Galveston/Houston docket and other measures.” [FN302] No description of the “other measures” was provided other than to characterize them, in combination with the other sanctions, as “appropriate remedial action” that justified closing the case. [FN303] Citing the confidentiality provision of the Act, the order stated that the Committee's report would be kept under seal, as would the written response-presumably filed by Kent or his lawyers-although that was not made clear. [FN304]

In keeping with the Act's requirement that courts publish their final dispositions, the Fifth Circuit posted the order on its website. [FN305] But the very terseness of the document-the only one made available to the public-raised more questions than it answered. What had Kent done and to whom? Where had the misconduct occurred? What evidence did the Council rely upon to find him guilty? How had it reached the conclusion that *483 the sanctions it imposed-not all of which were enumerated-constituted “appropriate remedial action”? [FN306]

The unanswered questions, along with the incendiary nature of the allegations, quickly attracted the interest of the press. [FN307] The Kent case received extensive coverage by the Houston Chronicle and the Texas Lawyer, which made it their business to air fully the allegations that the Council had left obscure. [FN308] The day after the order was issued, The Chronicle identified the complainant as Cathy McBroom, a forty-nine-year-old woman who worked for Kent as his case manager. [FN309] Kent and McBroom, both of whom had retained counsel, steadfastly refused to comment, [FN310] but sources close to McBroom spoke out. They described Kent's actions as going far beyond the “sexual harassment” described in the court's order. [FN311] According to McBroom's mother and close friend, Kent forced up McBroom's shirt and bra, fondled her bare breast, and attempted to push her head toward his crotch, all the while “telling the married mother of three what he wanted to do to her in words too graphic to publish.” [FN312]

The press also dug out the facts underlying what the Judicial Council termed “alleged inappropriate behavior toward other employees of the federal judicial system.” [FN313] One article reported that Kent had a pattern of sexually harassing female subordinates that dated back to 2000. [FN314] McBroom's predecessor stated that when she worked as Kent's case manager, the judge subjected her to crude comments, sexual come-ons, and embraces. [FN315] Years earlier, McBroom, on behalf of herself and other *484 female co-workers, unsuccessfully tried to get help in addressing Kent's inappropriate behavior, complaining to a supervisor that the judge tried “to touch or kiss” them. [FN316]

The contrast between the Fifth Circuit's terse order and the media's detailed account of Kent's sexual misconduct was stark. Experts in judicial misconduct law criticized the Council's order as devoid of meaningful information. [FN317] McBroom's lawyer, Rusty Hardin, went further, stating that the Council's description of Kent's misdeeds as “sexual harassment” was “totally inappropriate,” because Kent's actions were far more serious and potentially criminal. [FN318] Hardin also criticized the quality of the Council's investigation and its treatment of his client, stating that the judges had refused McBroom's requests for a copy of the Special Committee's report or any other information about the investigation. [FN319]

The steady emergence of salacious new details kept the Kent case in the headlines for weeks after the judicial council declared the complaint officially closed. [FN320] Ultimately, Congress weighed in. In a bi-partisan

statement released on November 13, 2007, the three highest ranking members of the House Judiciary Committee called McBroom's allegations "shocking" and "of grave concern." [FN321] Strongly indicating their disagreement with the Fifth Circuit's handling of the complaint, the committee members encouraged McBroom to appeal to the Judicial Conference. [FN322] Noting that criminal charges against Kent were a possibility, the committee members indicated they would take a wait-and-see stance, but promised that if the *485 allegations were proven true, "there is no doubt that the committee will take action." [FN323]

On November 26, 2007, McBroom filed a motion asking the Council to reconsider the sanctions detailed in its previous order. [FN324] In early December, the press reported that the Department of Justice (DOJ) had issued a subpoena to the Judicial Council, demanding the sealed testimonial and documentary evidence relating to the misconduct proceedings against Kent. On December 20, 2007, the Judicial Council made its first public statement since the reprimand issued against Kent nearly four months earlier. [FN325] In a three-page order, the Council confirmed that the DOJ had launched a criminal investigation into the allegations against Kent and that the Council was "cooperating" with the prosecutors. [FN326] The order announced the Council's decision to defer ruling on McBroom's motion for reconsideration because further disciplinary proceedings "while a criminal investigation is underway, could prejudice that investigation or be perceived as interfering with it." [FN327] The order concluded by stating that if the criminal investigation was not resolved within ninety days, "the Council will revisit the issue." [FN328]

On August 28, 2008, the United States Attorney's Office obtained a three-count indictment against Kent, charging him with abusive sexual contact and attempted aggravated sexual abuse of McBroom. [FN329] At his arraignment several days later, Kent proclaimed his innocence vociferously and stated his intent "to bring a horde of witnesses" to testify in his defense. [FN330] On January 6, 2009, the prosecution filed a superseding indictment adding three charges involving a different woman, identified in the indictment and the press as "Person B." [FN331] According to the new allegations, Kent *486 committed the crimes of aggravated sexual abuse and abusive sexual contact this unidentified individual by "engage[ing] in repeated unwanted sexual assaults" against her. [FN332] The final count of the indictment charged that Kent had lied to the Fifth Circuit special committee during its investigation of McBroom's allegations by falsely stating that the "extent of his unwanted sexual contact with Person B was one kiss." [FN333] On February 23, 2009, the day his trial was scheduled to begin, Kent pleaded guilty to one count of obstructing justice. As part of his plea agreement, Kent admitted that he engaged in repeated "non-consensual sexual contact" with McBroom and Person B and lied to cover it up. [FN334]

Three days after the new indictment was filed, the Fifth Circuit Judicial Council issued an order stating that it was granting McBroom's motion for reconsideration. [FN335]

Stating that the new allegations exposed "additional serious misconduct of which the Special Investigating Committee and the Council were unaware," the council promised to investigate further at the conclusion of Kent's criminal trial and, if warranted, "impose further sanctions." [FN336]

In January 2008, Judge Kent resumed his judicial duties on the bench, to a limited degree. [FN337] By agreement, he does not preside over civil or criminal matters where the federal government is involved in the litigation, or over cases in which "sexual misconduct of any kind is alleged." [FN338]

The near-total secrecy that blanketed the Judicial Council's handling of the Kent complaint called into question the legitimacy of the process and the outcome. The only documents available for public viewing are the

Council's three orders—the two issued in 2007 and the final order issued in January 2009. Less than eight pages combined, they are a study in obliqueness, offering no insight into what Kent did, to whom he did it, what his exact punishment was, and how the Council arrived at these determinations. Nor did the Council's claim that it was “unaware” of the allegations against Person B appear plausible given that Kent testified about them before the Special Committee in 2007 after it expanded its investigation to *487 include accusations brought by individuals other than McBroom. [FN339] The Council's lack of transparency called into question both the legitimacy of its initial investigation and the proffered reasons for its belated grant of McBroom's reconsideration motion. The lack of transparency also appears to violate the Act, which requires that judicial orders imposing sanctions “be accompanied by written reasons therefore.” [FN340] The Council's orders provided no public “written reasons”; its factual findings and analysis were contained in a report that no one but Kent and his lawyer was allowed to read. [FN341] Nor did the information blackout serve any useful purpose. To the contrary, the blackout had profoundly negative consequences for Kent, his accuser, and most of all, for the judiciary. The press moved quickly into the vacuum, supplying the missing content by talking to the parties' surrogates who were not bound by the Act's confidentiality rules. Perhaps this was inevitable, for the words “sexual harassment,” when publicly linked to a federal judge, would likely incite a great deal of interest. It is at least arguable, however, that some of McBroom's sources would have been more circumspect had they felt that the Council was treating her fairly, thus diminishing the likelihood that Kent's attorney would have felt the need to respond in kind. But the perception of the sources was the opposite: they appeared to feel that the Council had understated the seriousness of Kent's misdeeds and treated McBroom like a second-class citizen. [FN342]

The Judicial Council's terse description of Kent's misconduct and the cold shoulder it offered McBroom gave credence to the perceptions of the sources. Under the Act, McBroom was allowed to receive copies of the Special Committee's report and Kent's response, but in a questionable exercise of its discretion, the Council refused her repeated requests for both documents. The Council's decision to keep McBroom in the dark, while providing Kent with access to the very information it denied her, was unnecessary as a matter of law and unwise as a matter of policy. The judges appeared to be playing favorites—siding with a privileged colleague against his far less powerful accuser. This unequal treatment enhanced McBroom's victim status and fueled suspicions that her more serious accusations had fallen on deaf ears.

Moreover, the cold shoulder the Council offered McBroom lent credence to the perception of the sources who spoke to the press. The *488 rich detail served up by the newspapers contrasted unfavorably with the opaque legalese provided by the Council, and the disparity suggested that the Council was purposefully withholding valuable information, thus calling into question the validity of the entire process. Not surprisingly, Congress responded by taking McBroom's side, encouraging her to appeal and making conspicuous mention of possible criminal charges. The drama roiled on, gathering more momentum with reports that prosecutors had issued subpoenas to the judiciary for the heretofore confidential evidence collected against Kent.

When the Council finally granted McBroom's motion for reconsideration—more than one year after she filed it and only after two separate indictments were sought against Kent—its actions seemed too little, too late. The belated acknowledgement of the seriousness of the allegations only added to the overall impression that the Council's initial characterization of them was seriously understated and its sanctions inadequate. The near-total lack of information or legal reasoning in all three orders underscored this impression. In short, the Council's unnecessary concealment of basic information from the public and from McBroom and its ill-explained decision to wait more than one year to reconsider its much-criticized approach to the misconduct complaint made its disciplinary process appear illegitimate and ultimately, irrelevant. The Council had lost the opportunity to air the allegations it found true and make its case for the sufficiency of the sanctions it imposed. The belated acknow-

ledgment that a criminal inquiry was underway, followed by Kent's indictment and ultimate guilty plea, only added to the overall impression that the Council's punishment did not fit the severity of the misconduct, and that the Council's lack of transparency was a means of preventing the public from assessing the affect of institutional bias on its judgment. In short, the Council's unnecessary concealment of basic information from the public and from McBroom made its disciplinary process appear illegitimate, and ultimately, irrelevant.

3. The Mahan Complaint.-In June 2006, the Los Angeles Times published three lengthy articles detailing a two-year investigation into judicial corruption in Las Vegas. [FN343] The series, titled Juice v. Justice, focused particular attention on James Mahan, [FN344] who was appointed to the federal district court in 2002 *489 after serving for three years as a state court judge in Nevada. [FN345] The Times' investigation reported that during his tenure as a state and federal judge, Mahan awarded nearly five million dollars in judgments and fees to close friends and political allies without disclosing his ties to those individuals. [FN346] The beneficiaries included Frank A. Ellis III, Mahan's former partner from his days in private practice, and George Swarts, a longtime friend who served as Mahan's campaign treasurer during two state judicial campaigns and whose political connections were instrumental to Mahan's appointment to the federal bench. [FN347]

More than a dozen times, Mahan appointed Swarts to serve as a special master or a receiver in business disputes; in the former capacity Swarts' job was to sort out liability; in the latter, it was to take over the company until the case concluded. [FN348] In the majority of those cases, Swarts brought in Ellis as his counsel, with Mahan's approval. [FN349] Swarts and Ellis earned an average of \$250 per hour; their combined services cost the parties to these disputes more than \$700,000. [FN350] Nothing in the court records indicated that Mahan told the parties about his ties to Swarts or Ellis in any of these cases. [FN351] Mahan, who agreed to be interviewed for the series, told the reporters that he felt no need to do so because "I don't see any conflict of interest." [FN352]

Three of the cases in which Mahan allegedly made judicial decisions to benefit of colleagues and friends occurred during his tenure on the federal bench. [FN353] In February 2002, Mahan appointed Swarts to serve as a special master in a lawsuit filed by shareholders alleging corporate mismanagement. [FN354] Mahan ordered the shareholders to pay Swarts \$250 *490 per hour for his services and a \$5000 advance. [FN355] With Mahan's approval, Swarts hired Ellis as his attorney at a rate of \$210 per hour. [FN356] In August 2002, Mahan dismissed the case [FN357] and ordered the shareholders to pay \$1582 to Ellis and \$17,267 to Swarts for services rendered. [FN358] The judge never informed the parties of his personal and professional connections to either man. [FN359] Also left undisclosed was the fact that, at the time Ellis served as counsel, he was representing one of Mahan's employees pro bono in a bankruptcy case. [FN360]

In the second case, two investors sued the president of a mortgage company and the company itself, claiming that they had been defrauded of more than \$100,000. [FN361] At the time that the plaintiffs filed their lawsuit, Swarts had been the mortgage company's receiver for more than two years, which made him a defendant and a potential defense witness in the lawsuit. [FN362] Ellis was also involved in the litigation as counsel for Swarts and the mortgage company. [FN363] In October 2002, Mahan dismissed the charges against the mortgage company. [FN364] The plaintiffs, who eventually received \$82,000 from the company's president-the sole remaining defendant- [FN365] were never told of Mahan's ties to Swarts and Ellis. [FN366]

That same year, Mahan presided over a trial involving a businessman named Howard Bulloch, who sued his mortgage broker for improperly charging him a \$3.8 million fee. [FN367] Bulloch and Mahan had worked closely together on a legal matter in 1997, when Mahan was still in private practice. [FN368] Mahan ruled in

Bulloch's favor and ordered the mortgage broker to pay Bulloch \$4.12 million—the full amount of the fee plus the interest. [FN369] The *491 court records showed no disclosure by Mahan of his relationship to Bulloch and the defendant's counsel confirmed that none was made. [FN370] Less than two months later, a state regulatory agency found that the broker's fees were legal. [FN371]

It is misconduct for a federal judge to use his judicial power “to obtain special treatment for friends.” [FN372] It is also unethical: Canon 3 of the Code of Conduct for United States Judges states that “[a] judge should not make unnecessary appointments and should exercise that power only on the basis of merit, avoiding nepotism and favoritism.” [FN373] Special masters and receivers are included among those judicial appointments. [FN374] A different provision of the same Canon provides that a judge should disqualify himself from a case where his “impartiality might reasonably be questioned.” [FN375] Mahan's appointment of Swarts, and his decisions to generously compensate Swarts and Ellis, arguably violated both the Act and the Canons.

At least one federal judge thought so. This judge, who, like Mahan presided over a trial court within the Ninth Circuit, asked the Judicial Council to initiate disciplinary proceedings. [FN376] Subsequently, a misconduct complaint against Mahan was “identified” by the chief judge, which allowed the disciplinary process to commence without a formal filing. [FN377] She appointed a special committee to look into Mahan's alleged misconduct, limiting the investigation to Mahan's actions while on the federal bench. [FN378]

In August 2007—more than one year after the allegations surfaced—the Judicial Council issued a two-page order dismissing the complaint. [FN379] The order stated that the dismissal was based upon the unanimous recommendation of the Special Committee, which, after reviewing voluminous evidence that included sixteen affidavits and more than two dozen witness interviews, unanimously concluded that no misconduct had occurred. [FN380] The interviews, the affidavits, and the report itself were sealed. The order contained no factual findings, only the conclusion that *492 the misconduct allegations were unsupported because the ties between Mahan, Swarts, Ellis, and Bulloch “were not of the nature of extent alleged,” and therefore, “did not reasonably call into question the district judge's impartiality or ability to preside fairly over the federal cases at issue.” [FN381] Because the Council found no wrongdoing, the order did not refer to Mahan by name. [FN382]

As with the Kent case, the secrecy that shrouded the disciplinary proceedings was the salient factor—so dominant as to make the impact of the others difficult to assess. The Judicial Council sealed the crucial evidence supporting its findings. Without access to the witness interviews, sworn statements, and thirty-three page report prepared by the Special Committee, it is impossible to evaluate the Council's decision to dismiss the complaint. Would an out-of-circuit transfer have been appropriate? Was the finding of no misconduct proper, or did the Council err in failing to sanction Mahan? The only publicly available document in the case is the dismissal order, and it does not fill the evidentiary void. It provides no facts to support the Council's determination that Mahan's ties to Swarts, Ellis, and Bulloch “were not to the nature or the extent alleged,” and that those ties—whatever their nature or extent—had no affect on his impartiality in the three cases where he ruled in their favor.

As in the Kent case, there was a profound disconnect between the detailed allegations in the media and the judiciary's unilluminating response. The misconduct allegations detailed in the newspaper reports were supported by enough evidence to warrant serious consideration. But the scanty information in the Council's order gave no assurance that the most troubling facts in the newspaper's coverage were addressed with the thoroughness necessary to have confidence in the result. While the Council correctly concluded that, under the Act, it could not consider any allegations of impropriety during Mahan's tenure as a state court judge, [FN383] it failed to explain why the special treatment he apparently gave certain friends and colleagues as a federal judge was not as prob-

lematic as it appeared. By keeping all of the evidence under seal and failing to explain its findings, the judiciary left itself vulnerable, once again, to charges of institutional bias.

VI. Rewriting the Act

The problem of institutional bias, which has hampered the effectiveness of the Judicial Conduct and Disability Act, cannot be resolved by the judicial rule-making for two reasons. First, all four factors—secrecy, *493 unequal allocation of rights, preference for home circuit resolution, and lack of mandatory sanctions—are, to some degree, written into the text or the legislative history of the Act itself. Second, while the judiciary is in the position to make some important changes, particularly as to the latter three factors, it has shown a deep-seated reluctance to do so.

Constraints imposed on the judiciary by Congress have typically met with concerns about the separation of powers. But, the congressionally imposed limits suggested in this Article are unlikely to set off a constitutional crisis. They are simply suggestions for improving legislation that has been in place—and upheld as constitutional—for nearly thirty years. Indeed, the proposed reforms are quite mild compared with the very real threat that Congress will do away with the Act altogether and administer judicial discipline in the form of an Inspector General.

The legislative changes to the Act outlined below are designed to address each factor in the four-factor problem:

A. Secrecy

More than any other factor, the near-total secrecy cloaking federal judicial disciplinary proceedings perpetuates the appearance and reality of institutional bias in the Act's enforcement. As written, the Act forbids disclosure of all evidence relating to misconduct investigations, requiring that only the final decisions be made public. The terse, unreasoned orders in the Kent and Mahan cases starkly illustrate the problem with this approach: when there is no transparency in the process, the judiciary is virtually unaccountable for its disciplinary decisions. Some might argue that the Act never intended such a result, and that the judicial councils in the Kent and Mahan cases violated section 360(b)'s directive that all disciplinary orders “shall be accompanied by written reasons therefore.” [FN384] While this argument may have merit, it is also true that “written reasons” is a standard so vague as to potentially encompass the Kent and Mahan Councils' interpretation of it. More importantly, there is no redress when Judicial Councils issue inscrutable decisions.

Nor does the Act's strict confidentiality provision serve the purpose for which it was intended—to “avoid possible premature injury to the reputation of the judge.” [FN385] In every high-profile misconduct complaint cited in the Breyer Committee Report the judge's identity was revealed by the media while the process was ongoing. [FN386] If anything, the secrecy with *494 which the Act is administered only harms the reputation of the accused judge. Sealing the evidence suggests that there is something worth hiding. And, because the Act does not prevent the complainant and others from speaking to the press, the judiciary is unable to dam the flow of information. As the sole source of information, the media becomes the de facto authority on the case. The judiciary's loss of control can be particularly problematic when the media, which has no access to the documentary or testimonial evidence and cannot speak directly with the accused judge, relies on inaccurate or unreliable sources, allowing rumor and innuendo to supplant the facts.

But, while the process must be made more accessible to the public to have legitimacy, it need not—and should not—be completely transparent. The vast majority of misconduct complaints are frivolous or not within the scope of the Act, and chief judges properly dismiss them as such. The current procedure, which is to make those dismissal orders public without revealing the name of the judge, is entirely proper. Publicizing unfounded accusations causes needless embarrassment for the accused judge and erodes public confidence in the efficacy of the system. [FN387]

It is only when a complaint alleges misconduct warranting further investigation that the public's right to know becomes paramount. This Article proposes, therefore, that Congress amend the confidentiality provision of the Act to make the disciplinary process public if and when the chief judge decides to appoint a Special Committee to explore an allegation of misconduct. [FN388] Only complaints with a “factual foundation [not] conclusively refuted by objective evidence” advance this far. [FN389] The decision to appoint a Special Committee is roughly analogous to a probable cause determination, the point at which criminal prosecutions become public. [FN390] As with a criminal prosecution, making the allegations public is not designed to provoke a premature determination of guilt, *495 but rather to make the process itself accountable. [FN391] Open hearings and access to evidence educate the public about the disciplinary system, instill confidence that the proceedings are fair, and dispel the harmful perception that judges are “anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed. [FN392]

California's judicial disciplinary system is a good model for this balanced approach. The rules employed by the Commission on Judicial Performance (CJP), [FN393] which handles all misconduct complaints against state court judges, provides for confidentiality in the complaint process at the preliminary stages. [FN394] If a complaint is dismissed outright or found meritless after a preliminary investigation, no public information is released. [FN395] In the event, however, that the CJP “institutes formal proceedings” against a judge, the process becomes transparent. Disciplinary hearings, documentary evidence, factual findings, sanctions, and written orders are open to the public. [FN396] The state of California maintains a Web site that explains the Commission's responsibilities, lists the names of the judges it has disciplined, the types of discipline imposed, and provides links to its written opinions. [FN397] The CJP has won praise for its transparency and effectiveness, and its methods have been adopted by a majority of the states. [FN398] Congress should follow suit. The transparency conferred by a more open procedure is crucial to the Act's legitimacy, and experience has demonstrated that the statute's confidentiality provision does nothing to mitigate the harm to the accused's reputation that it was intended to guard against.

***496 B. Leveling the Playing Field**

The legislative history of the Act clearly expressed Congress's intent that the judiciary “give serious consideration to providing the complainant with [the] same rights that are provided to the judge against whom a complaint has been filed.” [FN399] Nonetheless, throughout the Act's nearly three-decade-long history, the judiciary has treated the parties unequally, providing the accused judge with all of the rights guaranteed a criminal defendant, and giving the complainant only the right to notice of the proceedings. [FN400] As the Kent case demonstrates, leaving the complainant's level of involvement to the judiciary's discretion means that she may be shut out of the process entirely. Congress clearly did not intend this result. And, given that Congress did not extend the Act's confidentiality provision to the complainant, it is also unlikely that it would approve of the judiciary's conditioning the complainant's degree of participation on “the degree of the complainant's cooperation in preserving the confidentiality of the proceedings.” [FN401]

As justification for treating the parties unequally, the Rules state that the disciplinary process is “fundamentally administrative and inquisitorial,” rather than adversarial. But this assertion is undermined by the judiciary’s decision to put the accused judge, rights-wise, on the same footing as a criminal defendant. If the proceeding were truly “administrative and inquisitorial,” there would be no need to provide the subject of those proceedings with full Sixth Amendment coverage. And in any event, the negative consequences of treating the complainant unequally are great, and the benefits minimal, if nonexistent. Giving the judge a voice while silencing his accuser signals that the decision-makers believe that the former is worth listening to and the latter is not.

Amending the Act to open the disciplinary proceedings in the manner suggested above goes some way toward ameliorating the problem: as a member of the public, the complainant would be able to attend the disciplinary hearings and inspect the documentary evidence. But lifting the veil of secrecy is not enough; Congress must rewrite the Act to make good on its intent that the complainant enjoy the same rights as the accused. The complainant, like the judge, should have the right to counsel, to present evidence that she feels the judicial council may have overlooked, and to argue her case. Only by leveling the playing field can the judiciary dispel the appearance-and sometime reality-that the process is tilted in the judge’s favor. Nor is there a substantial likelihood that affording complainants equal rights at the investigatory stage of the proceedings will *497 flood the system, as the number of misconduct complaints that reach that stage are less than one percent of the total number filed annually. [FN402]

The complainant or aggrieved party (if different than the complainant) should also have a voice in any decision to dismiss a meritorious complaint because the accused judge has taken “appropriate corrective action.” [FN403] The Rules acknowledge that “[i]n some cases, corrective action may not be appropriate to justify conclusion of a complaint unless the complainant or other individual harmed is meaningfully apprised of the nature of the corrective action.” [FN404] But the complainant or aggrieved party has no right to notice of the corrective action and no right to participate in fashioning it. [FN405] As the Real and Kent cases demonstrate, ignoring the aggrieved party at this stage in the process can severely undermine the legitimacy of the complaint’s resolution. The inadequacy of Real’s lawyer-authored apology to redress the harms inflicted on the Canter trust was underscored by the trust’s inability to object to it, or even suggest an alternative. [FN406] And the unenumerated “other measures” deemed “appropriate remedial action” by the judicial council in the Kent case were publicly denounced as unacceptable by the complainant, who was never told what this purported self-correction entailed. [FN407]

This Article does not advocate for making every corrective action disposition contingent upon the complainant’s acceptance, but rather for a process in which judges are required to solicit and weigh the complainant’s opinion about the proposed corrective action before deeming it adequate to cure the harm. Because the complainant or aggrieved party, like the accused judge, is not a neutral arbitrator, the Act properly leaves to the judiciary’s discretion the decision to accept or reject the remedial measures undertaken. But critical to the public’s acceptance of voluntary judicial self-correction is the knowledge that the injured party had a voice in the process. Unless the Act is amended to allow the complainant or aggrieved party the opportunity to make its voice heard, the chances are great that corrective action will be viewed as a satisfactory resolution only in the eyes of the accused judge, who escapes serious punishment by agreeing to it.

***498 C. Mandatory Sanctions**

As presently written, the Act allows the chief judge and the Judicial Council, after finding a judge guilty of

misconduct, to deal with that judge in virtually any manner they choose. [FN408] A meritorious complaint may be dismissed if the judge takes corrective action, or redressed through intermediate sanctions such as a private or public rebuke. [FN409] Also possible, but rarely invoked, are the more serious punishments: suspension from the bench, a request for early retirement, and referral for an impeachment inquiry. [FN410]

There are two problems with this grant of unfettered discretion. The first, as demonstrated by the Real case, is the risk that judges will go too easy on their offending colleagues. Cabining the judiciary's discretion with specific, mandated sanctions will greatly reduce this risk. Equally important is amending the Act's legislative history, which allows for and even encourages this type of institutional bias by expressing a preference for "informal, collegial resolution" of valid complaints. [FN411] This language frustrates the Act's overriding purpose, which is to ensure that "the growing public demand for the accountability of public officials extend[s] to the judicial branch." [FN412]

Unfettered discretion also results in lack of uniformity. By failing to provide the judiciary with a yardstick by which to measure the seriousness of any given type of misconduct, the Act allows each circuit to treat the same misconduct differently. Under the current system, for example, a judge found guilty of sexual harassment, as in the Kent case, could be privately reprimanded in one circuit, asked to retire in another, and referred for criminal prosecution in a third. This plethora of potential options makes the ultimate sanction-whatever it is-appear arbitrary.

While it isn't possible to tie a specific punishment to every act of misconduct under the sun, broad parameters can be set. Congress should clarify the definition of misconduct in the Act by incorporating the list of examples enumerated in the Rules [FN413] and prescribe a minimum punishment for each type of violation. Where misconduct might also constitute criminal behavior, such as Real's false statements to the council or Kent's alleged sexual assault, the judiciary should be required to refer the case to the *499 DOJ for possible prosecution and suspend the offender from the bench during the duration of the ensuing investigation. Serious misconduct that is not criminal, such as using judicial power "to obtain special treatment for friends or relatives," [FN414] engaging in ex parte communications, [FN415] or treating litigants "in a demonstrably egregious and hostile manner," [FN416] should, at a minimum, result in a public reprimand and an order that the offending judge complete a course in judicial ethics and undergo psychological counseling. Less serious violations, such as publicly expressing political opinions, [FN417] fundraising for organizations, [FN418] or providing incomplete financial disclosures, [FN419] should meet with no lesser sanction than a private reprimand. Absent extraordinary circumstances, ethical violations, as defined in the Code of Conduct for United States Judges, should result in a finding of misconduct punishable by a public reprimand. [FN420] The burden should fall to the judge to argue that his or her case is the exceptional one meriting lesser punishment. Amending the Act to set these clear standards in the meting out of sanctions will promote uniformity and reduce the risk that institutional bias will result in watered-down punishments that erode public confidence in the Act's efficacy.

D. Out-of-Circuit Transfers

The commentary to the newly enacted Rules states that out-of-circuit transfers "may be appropriate . . . where the issues are highly visible and a local disposition may weaken public confidence in the process." [FN421] But the rule itself makes clear that such transfers should be considered only "[i]n exceptional circumstances," [FN422] and in practice, out-of-circuit transfers are exceedingly rare. [FN423] To reduce the appearance of institutional bias in the disciplinary process, Congress should amend the Act to make such transfers pre-

sumptive in cases where a complaint has received significant media attention. While there is always the possibility that institutional *500 bias will affect the handling of an obscure complaint, the risk is slight because most complaints of this type—which comprise the vast majority of the total number filed—are meritless. [FN424] Moreover, given the limited time and money allocated to the handling of misconduct complaints, a policy of presumptive out-of-circuit transfers for all complaints is impracticable. [FN425]

Well-publicized complaints, on the other hand, are exceptional and exceptionally important: infrequent, but frequently mishandled, unusual, but disproportionately influential by virtue of their high profile. [FN426] The judiciary's twenty-nine percent error rate in the handling of these cases lends credence to the perception that those called upon to do the judging have a personal or professional connection to the accused that renders them biased. [FN427] Nor is this perception without foundation. Judges within the same circuit have often known each other for years, sat on the same panels, attended the same conferences, and moved in the same social circles. As a result of these sustained personal and professional contacts, respect and affection may have developed, which would lead reasonable minds to question whether the home circuit judges were capable of rendering disinterested judgment. Conversely, if a home circuit judge has taken a personal or professional disliking to the accused judge, the disciplinary process may be tainted by the appearance, and perhaps reality, of bias against the accused. Judges from another circuit, by contrast, are far less likely to be affected by this type of institutional bias because the odds are great that they will have only a passing acquaintance with the accused.

Removing a high-profile complaint from the home circuit avoids another related problem: the disinclination on the part of local judges to discipline their colleague for fear it will reflect poorly on themselves. An *501 accused judge in the public eye is not only identified by name, but by circuit affiliation. That affiliation brings an unwanted degree of notoriety to the circuit as a whole, much to the embarrassment and chagrin of its members. In these circumstances, judges may be tempted to dismiss a meritorious complaint rather than expose their circuit to the additional and unwelcome media scrutiny that a finding of misconduct and the imposition of severe sanctions would inevitably attract. Placing the disciplinary responsibility in the hands of judges geographically removed from this intra-circuit concern has the added benefit of negating this type of bias.

An excellent example of the use of the inter-circuit transfer process arose recently. The pending misconduct complaint involves Alex Kozinski, the current Chief Judge of the Ninth Circuit, who had argued with such force and eloquence for a finding of misconduct in the Real case. On June 10, 2008, shortly after impaneling a jury in an obscenity trial (over which he was presiding by designation as a district court judge), [FN428] Kozinski admitted to uploading and exchanging pornographic images on his personal website, alex.kozinski.com. [FN429] Among the images was a picture of naked women on all fours painted to look like cows, an individual performing fellatio on himself, and a man being chased by a sexually aroused donkey. [FN430] While Kozinski believed that the website was private, it was relatively easy to access according to the individual who found the images and sent them to the Los Angeles Times. [FN431] The story attracted national attention, [FN432] and hundreds of readers emailed comments, most expressing disgust with Kozinski and concern over the integrity of judges in general. [FN433]

After recusing himself from the obscenity case and declaring a mistrial, [FN434] Kozinski called upon an out-of-circuit Judicial Council to investigate his *502 behavior as potential misconduct under the Act. [FN435] Citing “exceptional circumstances,” the Ninth Circuit Judicial Council reiterated the transfer request in an order addressed to Supreme Court Chief Justice John Roberts. [FN436] Roberts effected the transfer immediately, re-assigning the complaint to the Third Circuit Judicial Council for all further proceedings. [FN437] In September 2008, a Special Committee of Third Circuit judges appointed the head of the litigation division of a prominent

law firm to conduct an investigation, which remains ongoing. [FN438]

Kozinski's request for a transfer, his colleagues' support of that request, and the Chief Justice's action in granting it were all proper decisions and deserve commendation. The allegations are well known and salacious, ensuring that many people will closely scrutinize the outcome. Review of the complaint by a panel of judges at a physical and emotional distance from the accused is critical to giving that outcome-whatever it may be-a veneer of legitimacy. History demonstrates, however, that it is the rare judge who identifies a complaint against himself and takes affirmative steps to ensure its unbiased handling. Congress, therefore, should amend the Act to include a presumptive transfer provision in high-profile cases.

*503 VII. Conclusion

Institutional bias infects the Act as currently written and enforced. This Article identifies the four interrelated factors that allow institutional bias to flourish and recommends that Congress amend the statute to address them. Until these changes are made, a level of dysfunction in the judicial disciplinary system will persist, along with the public's perception that judges entrusted with disciplining their colleagues often look the other way when they behave in an unethical, abusive, or unlawful manner.

To remedy the problem of institutional bias, Congress must rewrite the Act to make the proceedings transparent, afford complainants the same rights as judges, provide for out-of-circuit transfers in high-profile cases where the home circuit's impartiality might be questioned, and provide for mandatory sanctions for specific misdeeds. Judges are human beings just like the rest of us, and putting on a black robe should not immunize them from legitimate punishment for cognizable misconduct.

[FN1]. Professor Bazelon graduated cum laude from New York University Law School in 2000 and received her undergraduate degree cum laude from Columbia University in 1996. She worked for more than six years as a trial attorney in the Office of the Federal Public Defender in Los Angeles, CA, before joining the law firm of Caldwell Leslie & Proctor. She has been an Adjunct Professor at Loyola University Law School since 2006.

[FN2]. See Lise Olsen, *Lawmakers Shocked By Kent Allegations*, *Hous. Chron.*, Nov. 14, 2007, at A1.

[FN3]. See The Judicial Conduct and Disability Act Study Comm., *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice*, 239 F.R.D. 116, 178 (2006) [hereinafter *Breyer Committee Report*].

[FN4]. See Michael J. Goodman & William C. Rempel, *Juice vs. Justice: For This Judge and His Friends, One Good Turn Led To Another*, *L.A. Times*, June 9, 2006, at A1.

[FN5]. See Special Comm., *Report to the Judicial Council of the Ninth Circuit from the Comm. Convened Pursuant to 28 U.S.C. §353(a) to Investigate the Allegations of Judicial Misconduct Docketed Under 05-89097 and 04-89039 Pertaining to Complaint 05-89097*, 5-9 (2006). www.ce9.uscourts.gov/misconduct/orders/report.pdf [hereinafter *Real Speciport*].

[FN6]. See *id.* at 20.

[FN7]. See Robert Boczkiewicz, *Ex-FBI Agent Aiding Probe of Federal Judge, Pueblo Chieftain*, Mar. 13, 2008, available at 2008 WLNR 4975193; Felisa Cardona, *FBI Talks To Judge's Ex-Wife*, *Denv. Post*, Aug. 12, 2007, at C1.

[FN8]. See Dan Christensen, *Judges, Lawyers Fire Back at GOP Critic in Congress*, *Broward Daily Bus. Rev.*, Apr. 28, 2004, at 1 (reporting that a complaint filed by two congressmen asking the Chief Judge of the Seventh Circuit to investigate the leak made by Judge Cudahy was disregarded); Pamela A. Maclean, *Judging Federal Judges*, *Nat'l L.J.*, Feb. 18, 2008, at 18 (reporting that Judge Kent returned to work on January 3, 2008, following a four-month paid suspension); Lise Olsen, *More Judges Under Inquiry*, *Hous. Chron.*, Oct. 13, 2008, at B1 (reporting that Judge Nottingham remains on the bench while under investigation for judicial misconduct after admitting that he "used a high-priced escort service"); Carri Geer Thevenot, *Complaint Against Judge Dismissed*, *Las Vegas Rev. J.*, Oct. 4, 2007, at B1 (reporting that the judicial council for the Ninth Circuit dismissed misconduct complaint against Judge James Mahan).

[FN9]. Kent was indicted by the U.S. Attorney's Office for one count of aggravated sexual abuse, three counts of abusive sexual contact, one count of attempted aggravated sexual abuse, and one count of obstructing justice. See *United States v. Samuel B. Kent*, CR No. 08-596-RV (Superseding Indictment filed Jan. 6, 2009). See Lise Olsen, Mary Flood, & Roma Khanna, *Judge Indicted On Sex Abuse Charges*, *Hous. Chron.*, Aug. 29, 2008, at A1. After the Department of Justice opened a criminal investigation, Judge Kent "agreed he (would) not handle any civil or criminal case in which the United States (was) a party or in which sexual misconduct of any kind (was) alleged." See *In re Complaint of Judicial Misconduct Against U. S. Dist. Judge Samuel B. Kent*, Under the Judicial Conduct and Disability Act of 1980, No. 07-05-351-0086 (5th Cir. Jud. Council Dec. 20, 2007) at 3, available at <http://www.ca5.uscourts.gov/news/SK.Order.pdf>. [hereinafter Second Kent Order]; see also Cindy George, *Kent's Docket Contains Only Civil Cases*, *Hous. Chron.*, Jan. 16, 2008, at B5. Judge Kent has now retired from the bench and, on February 23, 2009, agreed to plead guilty to obstruction of justice. While the charge can carry a maximum penalty of 20 years, the government is expected to only seek a three-year sentence for Judge Kent. Kate Murphy, *Federal Judge Accepts Deal, Ending a Sexual Abuse Case*, *N.Y. Times*, Feb. 24, 2009, at A14.

[FN10]. See Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justification for Federal Question Jurisdiction*, 97 *Cal. L. Rev.* 95, 116 (2009) (citing *Adm. Off. of the U.S. Courts, 2007, Judicial Business of the United States Courts: Annual Report of the Director* 42).

[FN11]. See *Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, Pub. L. No. 96-458, 94 Stat. 2035 (1980) (codified in scattered sections of 28 U.S.C.).

[FN12]. See 28 U.S.C. §§ 351(a), 352(a), 353(a)(1)-(3), (c) (Supp. 2005).

[FN13]. See *id.* § 354(a)(2)(A)-(B), (b)(1)-(2).

[FN14]. See Breyer Committee Report, *supra* note 3, at 122-23.

[FN15]. Often, but not always. A notable exception is the Fifth Circuit judicial council's handling of the misconduct complaint against Judge G. Thomas Porteous. The complaint alleged that Porteous lied repeatedly under oath, filed a bankruptcy petition under a false name, hid assets and gambling debts, accepted gifts from litigants, and engaged in fraud. See *In re Complaint of Judicial Misconduct Against U. S. Dist. Judge G. Thomas Porteous, Jr.* Under the Judicial Conduct & Disability Act of 1980, No. 07-05-351-0085 (5th Cir. Jud. Council

Dec. 20, 2007) at 3-4, available at <http://www.ca5.uscourts.gov/news/news/PorteousOrder/MEMORANDUM%20ORDER%C20AND%20CERTIFICATION.PDF>. After the judicial council concluded that “substantial evidence” supported the allegations, it forwarded the matter to the National Judicial Conference to investigate whether the misconduct was grounds for impeachment. See *id.* at 3-5. Since this order was issued, the National Judicial Conference recommended to the House of Representatives that Porteous be impeached. On September 10, 2008, the judicial council issued a final order in the case barring Porteous from receiving new cases for a two-year period “or until Congress takes final action on the impeachment proceedings, whichever occurs earlier.”

Order and Public Reprimand In re Complaint of Judicial Misconduct Against U.S. Dist. Judge G. Thomas Porteous, Jr., under the Judicial Conduct and Disability Act of 1980, No. 07-05-351-0085 (5th Cir. Jud. Council Sept. 10, 2008) at 4, available at <http://www.ca5.uscourts.gov/news/GTP%20ORDER%C20AND%C20PUBLIC%REPRIMAND>. In issuing this public reprimand and sanction, the council stated that it was “taking the maximum disciplinary steps allowed by law.” *Id.* at 5.

[FN16]. See Breyer Committee Report, *supra* note 3, at 173.

[FN17]. See *id.* at 123 (stating that “[b]ecause the matters at issue have received publicity, the public is particularly likely to form a view of the judiciary’s handling of all cases upon the basis of these few”).

[FN18]. *Id.*; see also Patricia A. MacLean, War Stories Over Blasts From the Bench, *Nat’l L. J.* Feb. 25, 2008 at 19 (reporting that lawyers rarely file misconduct complaints against federal judges because they believe that they will face indifference or retaliation).

[FN19]. The problem is also known as “guild favoritism” and “institutional favoritism.” Breyer Committee Report, *supra* note 3, at 119.

[FN20]. See In re Opinion of the Judicial Conference Committee To Review Circuit Council Conduct & Disability Orders, 449 F.3d 106, 117 (U.S. Jud. Conference Comm. 2006) (Winter, J., dissenting) (“A self-regulatory procedure suffers from the weaknesses that many observers will be suspicious that complainants against judges will be disfavored. The Committee’s decision in this case can only fuel such suspicion.”); Breyer Committee Report, *supra* note 3, at 119 (stating that the Committee’s mandate, in response to “recent criticism from Congress,” was to assess whether the Act’s enforcement was hampered by “institutional favoritism”); MacLean, *supra* note 8, at 1 (criticizing the Act, based on a study of recent disciplinary cases, as standardless, overly secretive, and likely to encourage “retaliation” against complainants).

[FN21]. This effort has been spearheaded by Congressman James Sensenbrenner (R-WI), who for years has publicly expressed the view that Congress needed to exercise more oversight over federal judges because they have failed to police themselves adequately. See Jesse J. Holland, GOP Probe of Judiciary After Schiavo Not Happening, *Fort Wayne J. Gazette*, Apr. 26, 2005, at 7 (“[Congress] will begin assessing whether the disciplinary authority delegated to the judiciary has been responsibly exercised and ought to continue.” (quoting Sensenbrenner speaking to the judiciary in 2004)). Congressional efforts to pass Inspector General legislation are discussed in *infra* Part III.B.

[FN22]. See Breyer Committee Report, *supra* note 3, at 119 (“[A] system that relies for investigation upon persons or bodies other than judges risks undue influence with the Constitution’s insistence on judicial independence, threatening directly or indirectly distortion of the unbiased handling of individual cases that Article III

seeks to guarantee.”) For an excellent discussion of the constitutional concerns arising from aggressive congressional oversight of the federal judiciary, see Todd David Peterson, *Congressional Investigations of Federal Judges*, 90 Iowa L. Rev. 1, 54-66 (2004).

[FN23]. See, e.g., Charles Gardner Geyh, *When Courts & Congress Collide: The Struggle for Control of America's Judicial System* (2006); *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Stephen B. Burbank & Barry Friedman, eds., 2002).

[FN24]. See generally Judith Resnik, *Interdependent Federal Judiciaries: Puzzling About Why & How to Value the Independence of Which Judges*, *Daedalus*, Fall 2008, at 24-47; Susan Bandes, *Judging, Politics, and Accountability: A Reply to Charles Geyh*, 56 *Case W. L. Rev.* 947, 955-64 (2006); Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 *Geo. L.J.* 909, 913-18 (2007); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 *N.Y.U. L. Rev.* 962, 966-76 (2002); Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 *Case W. L. Rev.* 911, 915-22 (2006); Jonathan Remy Nash, *Prejudging Judges*, 106 *Colum. L. Rev.* 2168 (2006).

[FN25]. See, e.g., Christopher Edley, Editorial, *Value Judgments*, *N.Y. Times*, Aug. 22, 1996, at A25 (stating that President Clinton said of affirmative action in a speech, “Mend it, don't end it.”).

[FN26]. U.S. Const. art. III, § 1.

[FN27]. Judges are civil officers who may be impeached for “Treason, Bribery, or other High Crimes and Misdemeanors.” U.S. Const. art. II, § 4. One noted scholar has defined impeachable offenses as “conduct amounting to a gross breach of trust or serious abuse of power,” such as obvious corruption, misapplication of funds, encroachment or contempt of legislative procedures, or the commission of other serious, illegal acts. Edward D. Re, *Article III Federal Judges*, 14 *St. John's J. Legal Comment* 79, 85-86 (1999) (quoting Harvard Law Professor Lawrence Tribe).

[FN28]. See *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1183 (9th Cir. Jud. Council Sept. 29, 2005) (Kozinski, J., dissenting) (“In the late 1970s, Congress became concerned that Article III judges were, effectively, beyond discipline because the impeachment process is so cumbersome that it's seldom used.” (citing 126 *Cong. Rec.* 28,091 (1980) (statement of Rep. DeConcini))); see also *United States v. Claiborne*, 727 F.2d 842, 848 (9th Cir. 1984) (“Indeed, it is all too well known that the impeachment process is particularly cumbersome, time consuming, and susceptible to political whim and emotional reaction.”).

[FN29]. Judge Pickering was impeached for drunkenness and dementia; Judge Humphreys for “incitement to revolt and rebellion against the nation;” Judges Archibald and Hastings for soliciting or accepting bribes; Judges Ritter and Claiborne for tax evasion; and Judge Nixon for lying to the grand jury. See *Re*, *supra* note 27, at 89.

[FN30]. See, e.g., *Claiborne*, 727 F.2d at 845 (“Article III of the Constitution affords members of the federal judiciary substantial protections to assure their freedom from coercion or influence by the executive and legislative branches.”); see also Russell R. Wheeler & Robert A. Katzmann, *A Primer on Interbranch Relations*, 95 *Geo. L. Rev.* 1155, 1157 (2007) (stating that Article III “protections serve a basic constitutional goal: impartial decisionmaking”).

[FN31]. See *Re*, *supra* note 27, at 80-83.

[FN32]. For a discussion of this tension in the judicial disciplinary context, see Alex B. Long, *Stop Me Before I Vote for This Judge Again: Judicial Conduct Organizations, Judicial Accountability, and the Disciplining of Elected Judges*, 106 W. Va. L. Rev. 1, 1-17 (2003).

[FN33]. See S. Rep. No. 96-362, at 3 (1979), as reprinted in 1980 U.S.C.C.A.N. 3415, 4319 (“The [Judiciary] Committee recognizes that the great majority of our existing federal judges perform their duties in a dedicated and capable manner.”).

[FN34]. See *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 435 n.2 (1985) (“[Judicial councils] exist to provide an administrative remedy for misconduct of a judge for which no judicial remedy is available.” (citing *In re Charge of Judicial Misconduct*, 595 F.2d 517 (CA 9, 1979))).

[FN35]. U.S. Const. art. II, § 4.

[FN36]. See S. Rep. No. 96-362, at 3 (1979), as reprinted in 1980 U.S.C.C.A.N. 3415, 4318 (stating that the Act was passed to “fill the void which currently exists in the law between impeachable offenses and doing nothing at all”).

[FN37]. See *id.* at 4320 (“The Committee believes that the Act succeeds in protecting the fragile independence required for federal judges.”).

[FN38]. See *In re Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488, 1502-15 (11th Cir. 1986), **superseded by statute**, 28 U.S.C. § 332 (Supp. 2005), **as recognized in** *In re McBryde*, 120 F.3d 519, 524 (5th Cir. 1997); *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders*, 83 F. Supp.2d 135, 151-56 (D.C. Cir. 1999), **aff’d in part and vacated in part**, 264 F.3d 52 (D.C. Cir. 2001); *Hastings v. Judicial Conference of the U.S.*, 593 F. Supp. 1371, 1379-85 (D.C. Cir. 1984), **aff’d in part and vacated in part**, 770 F.2d 1093 (D.C. Cir. 1985).

[FN39]. See *McBryde*, 83 F. Supp.2d at 164-65.

[FN40]. See *In re Certain Complaints*, 783 F.2d at 1502-15; *McBryde*, 83 F. Supp. 2d at 151-71; *Hastings*, 593 F. Supp. at 1378-85. The district court in *McBryde* found that the Act’s confidentiality provision, as applied, operated as a prior restraint on Judge McBryde’s freedom of speech, and granted relief on that single ground. See *McBryde*, 83 F. Supp. 2d at 171-78.

[FN41]. *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 82-86 (1970). *Chandler* involved a writ of mandamus challenging the constitutional challenge to the Act’s predecessor, a 1939 statute establishing administrative councils of federal judges within the judiciary empowered to “make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit.” *Id.* at 76 n.1 (citing 28 U.S.C. § 332 (2008)). The Court denied the writ and declined to rule on the merits, noting that the petitioner, a district court judge, should have sought relief first “from either the Council or some other tribunal.” *Id.* at 87.

[FN42]. See *Ferejohn & Kramer*, *supra* note 24, at 999.

[FN43]. See 28 U.S.C. § 332(a)(1). Congress first established judicial councils in 1939 to ensure “that the work of the district courts shall be effectively and expeditiously transacted.” Act of Aug. 7, 1939, Pub. L. No. 76-299, § 306, 53 Stat. 1223, 1224 (1939) (originally codified at 28 U.S.C. § 448). Nine years later, Congress revised and recodified the statute. The new version required the judicial councils to “make all necessary orders for the

effective and expeditious administration of the business of the courts within its circuit.” *In re McBryde*, 117 F.3d 208, 226 (5th Cir. 1997) (quoting 28 U.S.C. § 332). The statute remained unchanged until the passage of the Act. See *id.* Minor revisions were adopted in 1990, and in 2002, Congress enacted the Judicial Improvements Act of 2002, which recodified parts of the statute and “further revised the provisions governing the handling of complaints against judges, primarily by codifying some of the procedures adopted by the judiciary through rule-making.” Arthur D. Hellman, *Judges Judging Judges: The Federal Judicial Misconduct Statutes and the Breyer Committee Report*, 28 *Just. Sys. J.* 426, 427 (2007).

[FN44]. 28 U.S.C. §§ 352(a), 353(a), (c), 356, 358 (2008).

[FN45]. *Id.* § 354(a)(2)(A)(i),(iii)-(B)(ii).

[FN46]. See *id.* § 354(a)(1)(C), (a)(2) (stating that the judicial council “shall take such action as is appropriate” in response to finding of judicial misconduct and characterizing the sanctions listed in the statute as “possible actions”).

[FN47]. See *id.* § 351(a). If judicial misconduct comes to the attention of the chief judge outside of this formal channel, through, for example, an anonymous source who does not wish to become involved in the process, the chief judge is permitted, in his or her discretion, to “identify” the misconduct and investigate it even though no written complaint was filed. See *id.* § 351(b).

[FN48]. See *id.* § 351(a).

[FN49]. See Breyer Committee Report, *supra* note 3, at 123 (“[A]lmost all [misconduct] complaints are dismissed by the chief judge; 88% of the reasons given for dismissal are that the complaint relates to the merits of a proceeding or is unsubstantiated.”).

[FN50]. 28 U.S.C. § 351(a).

[FN51]. See S. Rep. No. 96-362, at 9 (1979), reprinted in 1980 U.S.C.C.A.N. 4315, 4323.

[FN52]. See Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 3(h) (2008).

[FN53]. 28 U.S.C. § 352(b)(1)-(2).

[FN54]. Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 11(d)(2) (2008).

[FN55]. See 28 U.S.C. § 352(a).

[FN56]. See *id.*

[FN57]. *Id.*

[FN58]. 28 U.S.C. § 353 (a)(1).

[FN59]. *Id.*

[FN60]. *Id.* § 353(c).

[FN61]. 28 U.S.C. §§ 356(a), 358(b).

[FN62]. 28 U.S.C. § 353(c).

[FN63]. 28 U.S.C. § 354(a)(1)(A)-(C), (a)(2)(A)-(B).

[FN64]. See *id.* § 354(b)(2)(A)-(B). The members of the National Judicial Conference are the Chief Justice of the Supreme Court, the thirteen chief judges of the courts of appeals, twelve district court judges, and the chief judge of the Court of International Trade. See Wheeler & Katzmann, *supra* note 30, at 1159.

[FN65]. 28 U.S.C. 355(b)(1).

[FN66]. See 28 U.S.C. § 352(c).

[FN67]. See *id.*

[FN68]. See 28 U.S.C. § 357(a).

[FN69]. See Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 21(b)(2) (2008). The commentary to Rule 21 states that the changes “are intended to fill a jurisdictional gap as to review of dismissals or conclusions of complaints.” *Id.* at R. 21 cmt.

[FN70]. 28 U.S.C. § 360(a).

[FN71]. See Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 24(a) (2008).

[FN72]. The Real case is one such example. More than thirteen months elapsed between the Ninth Circuit judicial council's decision to sanction Real for misconduct in November, 2006 and the publication of that decision in January, 2008.

[FN73]. 28 U.S.C. § 360(a)(3).

[FN74]. See S. Rep. No. 96-362, at 13 (1979), reprinted in 1980 U.S.C.C.A.N. 4315, 4327 (“The foremost and primary obligations of the whole judicial disability and disciplinary system are the protection of the public and the administration of justice.”).

[FN75]. See Nat'l Comm'n on Judicial Discipline & Removal, Report of the Nat'l Comm'n on Judicial Discipline & Removal 4 (1993) (stating that Congress was “principally concerned with assuring public accountability in the 1980 Act”).

[FN76]. See S. Rep. No. 96-362, at 5 (1979), as reprinted in 1980 U.S.C.C.A.N. 4315, 4319 (“There have been documented instances and allegations of judicial misconduct, however, that do not rise to the level of the constitutional prescription found in Article II, Section 4, but which do bring the federal judiciary into disrepute.”).

[FN77]. See 1980 U.S.C.C.A.N. at 4319-21. Signing the bill into law in the fall of 1980, then-President Jimmy Carter praised the Act as an effective disciplinary mechanism that left the balance of power undisturbed because “only Federal judges are involved in the process.” Alex Brauer & Tyng Loh, *Judicial Misconduct*, 14 *Geo. J. Legal Ethics* 963, 980 (2001). At the same time, Carter promised that the statute provided a way for the average citizen to participate and “be confident that a complaint filed under this system will receive fair and serious at-

tention throughout the process.” Id.

[FN78]. S. Rep. No. 96-362, at 3-4 (1979), reprinted in 1980 U.S.C.C.A.N. 4315, 4317.

[FN79]. 1980 U.S.C.C.A.N. at 4321.

[FN80]. See id. at 4316.

[FN81]. See Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 1 cmt. (2008) (citing the Illustrative Rules Governing Complaints of Judicial Misconduct and Disability (1986)). The Illustrative Rules were revised in 2000, but continued to be nonbinding. Arthur D. Hellman, *When Judges Are Accused: An Initial Look at the New Federal Judicial Misconduct Rules*, 22 *Notre Dame J. L. Ethics & Pub. Pol'y* 325, 327 n.10 (2008).

[FN82]. See Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 1 cmt. (2008).

[FN83]. Id. at R. 11 cmt.

[FN84]. Id.

[FN85]. S. Rep. No. 96-362, at 14 (1979), reprinted in 1980 U.S.C.C.A.N. 4315, 4328.

[FN86]. See Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 15 and 16 (2008).

[FN87]. See id. at R. 16.

[FN88]. See id.

[FN89]. *In re Complaints of Judicial Misconduct*, 9 F.3d 1562, 1566 (U.S. Jud. Conf. Nov. 2, 1993); see also Hellman, *supra* note 43, at 427 (stating that the “Rules’ rejection of a ‘punitive’ purpose has been widely influential in the administration of the misconduct statutes”). (quotation marks in original).

[FN90]. *In re Memorandum of Decision of Judicial Conf. Comm. on Judicial Conduct and Disability*, 517 F.3d 563, 567 (9th Cir. Jud. Conf. 2008) (mem.).

[FN91]. See T.R. Goldman, *Representative Sensenbrenner Flexes His Muscle: Outgoing House Judiciary Chairman Pushes for Judicial Impeachment Hearing on California Federal Judge*, *Legal Times*, Sept. 25, 2006, at 10 (“If you were going to pick an alleged judicial-misconduct case to use as an example of the federal judiciary’s inability to investigate complaints against one of its own, the case against Manuel Real would be difficult to ignore.”).

[FN92]. See *United States v. Deborah Maristina Canter*, CR No. 98-576-R (W.D. Cal. June 2, 1998) (Judgment & Commitment Order).

[FN93]. See *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1184 (9th Cir. Jud. Council 2005) (Kozinski, J., dissenting) (attaching as an appendix Judicial Council Order, No. 03-89037, 425 F.3d 1179, 1199 (9th Cir. Jud. Council Dec. 18, 2005)).

[FN94]. *Judicial Misconduct*, 425 F.3d at 1189. (“The gravamen of the complaint is that the judge acted

‘inappropriately,’ a term that includes judicial acts based on ex parte communications and the related misconduct that is amply demonstrated by this record.”) (Kozinski, J., dissenting) (quotation marks in the original). *Id.* at 1188 n.5. The judicial council characterized Yagman's complaint as follows: “Specifically, complainant alleges that the district judge acted improperly in withdrawing the reference from the bankruptcy court and then re-imposing the automatic stay that the bankruptcy court had vacated on the motion of certain creditors.” *Id.* at 1199 (attaching as an appendix the Judicial Council Order, No. 03-89037, 425 F.3d 1179, 1199 (9th Cir. Jud. Council, Dec. 18, 2003)).

[FN95]. Judicial Misconduct, 425 F.3d at 1184 (Kozinski, J., dissenting).

[FN96]. See Real Special Committee Report, *supra* note 5, at 5.

[FN97]. See *id.*

[FN98]. See *id.*

[FN99]. See *id.* at 5-6.

[FN100]. See *id.* at 6-7.

[FN101]. Judicial Misconduct, 425 F.3d at 1184 (Kozinski, J., dissenting).

[FN102]. See Real Special Committee Report, *supra* note 5, at 9.

[FN103]. See, e.g., Jessica Garrison, L.A. Officials Know To Expect Attorney's Call, L.A. Times, Mar. 22, 2006, at B1 (characterizing Yagman's success in bringing lawsuits against the LAPD as “legendary” and stating that Yagman “is also famous for making outrageous statements about those in power” including calling the former police chief “the personification of evil” and the former mayor an “Uncle Tom”). In 2006, Yagman was indicted on federal charges of tax evasion, bankruptcy fraud, and money laundering. See *United States v. Stephen Yagman*, 502 F.Supp.2d 1084, 1086, 1092 (D.C. Cal. 2007). The following year, Yagman was convicted on all counts and sentenced to thirty-six months in prison. *United States v. Stephan Yagman*, No. 06-227(A)-SVW (D.C. Cal. Nov. 27, 2007) (Judgment and Probation/Commitment Order). His appeal is pending before the Ninth Circuit.

[FN104]. Yagman's adversarial relationship with Real began in the mid-1980s in *Brown v. Baden*, a civil case brought by Yagman and presided over by Real. See *Yagman v. Baden*, 796 F.2d 1165, 1168-69 (9th Cir. 1986). After a trial, in which Real and Yagman “clashed” repeatedly, Real ruled for the defendants and fined Yagman \$250,000 for his “unreasonable and vexatious conduct.” *Id.* at 1181-82. Yagman appealed to the Ninth Circuit, claiming that Real's “patent hostility” and his “one-sided and arbitrary” rulings constituted “tyranny in its worst form.” *Id.* at 1178. The appellate court upheld the verdict but reversed the fine, characterizing it as “obviously inappropriate.” *Id.* at 1183-85, 1188. The court remanded the case and ordered that it be assigned to a different judge “to preserve the appearance of justice.” *Id.* at 1188. Rather than reassign the case, Real directed the lawyers to brief the legal question whether the Ninth Circuit had the authority to compel him to do so. Yagman appealed a second time, and the Ninth Circuit again directed Real to reassign the case. *Baden v. United States District Court for the Central District of California*, 815 F.2d 575, 576-77 (9th Cir. 1987). Real, through his attorney, appealed the Ninth Circuit's ruling to the U.S. Supreme Court, which declined to hear the case. *Real v. Yagman*, 484 U.S. 963 (1987).

In 1998, Real sanctioned Yagman in a different case, this time for engaging in “judge shopping.” *Fields v. Gates*, 233 F.3d 1174, 1175 (9th Cir. 2000). As punishment, Real ordered Yagman to “enroll in a course in legal ethics and professional responsibility given by an accredited law school.” *Id.* at 1175. Yagman appealed. On November 14, 2000, the Ninth Circuit reversed Real’s order. *Id.*

[FN105]. *In re Canter v. Canter*, 299 F.3d 1150, 1152 (9th Cir. 2002).

[FN106]. *Id.* at 1152, 1156.

[FN107]. *Id.* at 1154.

[FN108]. *In re Charge of Judicial Misconduct*, No. 03-89037 (9th Cir. Jud. Council July 14, 2003) (Schroeder, C.J.).

[FN109]. *Id.*

[FN110]. *Id.*

[FN111]. See *id.* (“A complaint will be dismissed if it is directly related to the merits of a judge’s ruling or decision in an underlying case.” (citing 28 U.S.C. § 352(b)(1)(a)(ii) (2008); Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 4(c)(1)(2008))).

[FN112]. See *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1189 (9th Cir. Jud. Council 2005) (Kozinski, J., dissenting).

[FN113]. See *id.* at 1200 (attaching as an Appendix the Judicial Council Order, No. 03-89037 (9th Cir. Jud. Council Dec. 18, 2003)).

[FN114]. *Id.*

[FN115]. See *id.* at 1186.

[FN116]. See *id.* at 1199-1200 (quoting from Real’s written response).

[FN117]. *Id.* at 1200.

[FN118]. *Id.* at 1201. The council decision was split 6-4. All five appellate court judges joined the majority, as did San Francisco Federal District Court Judge Marilyn Patel. The four judges in the minority were all district court judges. See Judicial Council Order, No. 03-89037 (9th Cir. Jud. Council Dec. 18, 2003) (attached as an appendix to *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1199-1203 (9th Cir. Jud. Council 2005)).

[FN119]. *Judicial Misconduct*, 425 F.3d at 1201.

[FN120]. *Id.*

[FN121]. See Model Code of Conduct Canon 3(A)(4) (2000), available at www.uscourts.gov/guide/vol2/ch1.html.

[FN122]. *In re Canter v. Canter*, 299 F.3d 1150, 1152 (9th Cir. 2002).

[FN123]. 28 U.S.C. § 351(a) (2008).

[FN124]. Judicial Misconduct, 425 F.3d at 1201 (Kozinski, J., dissenting) (attaching as an appendix the Judicial Council Order, No. 03-89037 (9th Cir. Jud. Council Dec. 18, 2003)).

[FN125]. *Id.* at 1190.

[FN126]. See Real Special Committee Report, *supra* note 5, at 12-13.

[FN127]. See *id.* at 13.

[FN128]. See *id.*

[FN129]. *Id.*

[FN130]. See Judicial Misconduct, 425 F.3d at 1190 (Kozinski, J., dissenting).

[FN131]. *Id.* at 1181 (majority opinion).

[FN132]. *Id.*

[FN133]. *Id.*

[FN134]. *Id.* at 1181-82.

[FN135]. *Id.* at 1198 (Kozinski, J., dissenting).

[FN136]. *Id.* at 1190. 28 U.S.C. § 352(a)(2) (2008).

[FN137]. Judicial Misconduct, 425 F.3d at 1192 (Kozinski, J., dissenting).

[FN138]. See *id.* at 1193-94.

[FN139]. See *id.* at 1193.

[FN140]. *Id.* at 1200 (attaching as an appendix Judicial Council Order No. 03-89037 (9th Cir. Jud. Council Dec. 18, 2003)).

[FN141]. *Id.* at 1194-97.

[FN142]. See Breyer Committee Report, *supra* note 3, at 244-45.

[FN143]. See Judicial Misconduct, 425 F.3d at 1196 (Kozinski, J., dissenting) (stating that Real “steadfastly refuses to admit any wrongdoing”); see also Real Special Committee Report, *supra* note 5, at 14 (quoting from the letter written to the judicial council by Real’s attorneys).

[FN144]. Real Special Committee Report, *supra* note 5, at 14.

[FN145]. See Judicial Misconduct, 425 F.3d at 1196 (Kozinski, J., dissenting) (“Nor does the judge’s statement contain a pledge not to repeat his wrongful conduct.”); Real Special Committee Report, *supra* note 5, at 14

(quoting from the letter written to the judicial council by Real's attorneys).

[FN146]. See *Judicial Misconduct*, 425 F.3d at 1196 (Kozinski, J., dissenting).

[FN147]. See *infra* notes 160-164 and accompanying text.

[FN148]. See *Judicial Misconduct*, 425 F.3d at 1198 (Kozinski, J., dissenting) (stating that the majority had failed in its responsibility to “maintain public confidence in the judiciary by ensuring that substantial allegations of misconduct are dealt with forthrightly and appropriately” by focusing on “not hurting the feelings of the judge in question”).

[FN149]. See *infra* notes 170-172, and accompanying text.

[FN150]. Real Special Committee Report, *supra* note 5, at 2.

[FN151]. See *In re Opinion of Judicial Conference Comm. to Review Circuit Council Conduct and Disability Orders*, 449 F.3d 106, 106-07 (U.S. Jud. Conf. 2006).

[FN152]. See *id.* at 109.

[FN153]. See *id.*

[FN154]. See *id.*

[FN155]. See *id.* at 111-12 (Winter, J., joined by Dimmick, J., dissenting).

[FN156]. See *id.* at 110-11.

[FN157]. See 28 U.S.C. § 360(a)-(b) (2008); see Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 23(a) (2008), (“The consideration of a complaint by the chief judge, a special committee, the judicial council, or the Judicial Conference Committee on Judicial Conduct and Disability is confidential.”).

[FN158]. See Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 24(a)(1) (2008) (stating that “if a complaint is finally dismissed under Rule 11(c) without the appointment of a special committee, or if it is concluded under Rule 11(d) because of voluntary corrective action, the publicly available materials must not disclose the name of the subject judge without his or her consent.”).

[FN159]. See *In re Canter v. Canter*, 299 F.3d 1150, 1151 (9th Cir. 2004).

[FN160]. See, e.g., Henry Weinstein, Judge May Face Sanctions: Federal Jurist Improperly Took Over Bankruptcy Case, *Judicial Panel Says*, L.A. Times, Jan. 18, 2004, at B1 (describing Real as “cantankerous and peremptory on the bench” and characterizing the judicial council's order remanding the misconduct complaint to the chief judge as unusual because “[m]ore than 99% of complaints filed against federal judges around the country are dismissed out of hand”); Justin Scheck, Kozinski Blasts L.A. Judge In Discipline Case, *San Francisco Recorder*, Oct. 3, 2005, at 1 (describing the misconduct complaint, its dismissal by the judicial council, and Judge Kozinski's “withering 39-page dissent”); Henry Weinstein, Complaint Against Judge Has Broader Ramifications: *Judicial Panel Says It Lacks Power To Sanction L.A. Jurist; Bill Would Create Inspector General*, L.A. Times, May 7, 2006, at B3 (reporting that the National Judicial Conference had affirmed the dismissal of the misconduct complaint, which “could influence legislation proposed by conservatives seeking to exert greater in-

fluence over the judiciary”).

[FN161]. See Henry Weinstein, L.A. Judge Avoids Sanctions by Panel, L.A. Times, Oct. 1, 2005, at B1; Scheck, *supra* note 160; Kenneth Olang, Ninth Circuit Panel Tosses Misconduct Case Against Manuel Real, Met. News-Enterprise (Los Angeles), Oct. 3, 2005, at 1 available at www.metnews.com/articles/2005/real100305.htm.

[FN162]. See Weinstein, Judge May Face Sanctions, *supra* note 160, at B1 (reporting that in 2004, “[f]our legal experts, after reading the council’s [remand] order and related material, said further action against Real was warranted” and quoting one professor as saying that Real had engaged in “the antithesis of impartial judging”).

[FN163]. Weinstein, Complaint Against Judge Has Broader Ramifications, *supra* note 160 (quoting NYU Law School Professor Stephen Gillers).

[FN164]. See Renee Montagne & Nina Totenberg, NPR Morning Edition, July 24, 2006, available at 2006 WL 22945546 (“Last week, [Representative Sensenbrenner] called for the impeachment of a federal judge here in California who is accused of unethical conduct, and last spring he proposed legislation to create a judicial inspector general. It’s an idea that is anathema to most federal judges.”).

[FN165]. See Christensen, *supra* note 8, at 98.

[FN166]. *Id.*

[FN167]. F. James Sensenbrenner, Chairman, House Judiciary Committee, Remarks Before the U.S. Judicial Conference Regarding Congressional Oversight Responsibility of the Judiciary (Mar. 16, 2004) (transcript available at <http://judiciary.house.gov/legacy/news031604.htm>).

[FN168]. See Mike Allen, GOP Seeks More Curbs on Courts: Sensenbrenner Proposes an Inspector General, Wash. Post, May 12, 2005, at A3.

[FN169]. See Press Release, U.S. House of Representatives Comm. on the Judiciary, Sensenbrenner, Grassley, Introduce Legislation Establishing Inspector General for the Judicial Branch (Apr. 27, 2006), available at <http://judiciary.house.gov>.

[FN170]. Representative Sensenbrenner Issues Statement on Judicial Conference’s Report on Implementation of Judicial Conduct and Disability Act of 1980, U.S. Fed. News, Sept. 19, 2006, available at 2006 WLNR 16313584 (“Today’s report finds the Judicial Branch bungled all of the matters [including the Real complaint] in which the House Judiciary Committee conducted extensive oversight.”). See also Weinstein, Complaint Against Judge Has Broader Ramifications, *supra* note 160 (“A long-running controversy involving a misconduct complaint against veteran Los Angeles federal judge Manuel L. Real has reached the nation’s capital, where it could influence legislation proposed by conservatives seeking to exert greater oversight of the federal judiciary.”); Bruce Moyer, Inspector General Bills Rile Judiciary, 53 Jun. Fed. Law 10 (2006) (quoting Sensenbrenner as stating that Inspector General legislation was necessary because “[p]ress accounts and Government Accountability Office reports indicate that the federal Judiciary’s self-policing is not up to snuff”); G.M. Filisko, Some System Failure in U.S. Judge Oversight, 5 No. 39 ABA J. E-Report 2 (Sept. 29, 2006) (reporting that the Real case “may have contributed to Sensenbrenner’s introduction of a bill in April calling for an Inspector General to oversee the federal courts”).

[FN171]. See Judicial Transparency and Ethics Enhancement Act of 2006, H.R. 5219, 109th Cong. (2006); S.

2678, 109th Cong. The bill did not specify whether the Inspector General was intended to replace the Chief Judge and the judicial councils as the judiciary's disciplinary arm or work in conjunction with them. See Hearing on H.R. 5219 Before the Subcomm. On Crime, Terrorism, and Homeland Security of the H. Comm. On the Judiciary, 109th Cong. (2006) (statement of Professor Arthur D. Hellman (voicing support for the legislation but noting that it failed to “explain how the functions of the new Office would be integrated into the existing statutory structure for dealing with complaints against judges”)).

[FN172]. Hearing on H.R. 5219 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 109th Cong. (2006) (statement of Professor Ronald D. Rotunda).

[FN173]. See Moyer, *supra* note 170, at 10; Montagne & Totenberg, *supra* note 164.

[FN174]. See Moyer, *supra* note 170, at 10.

[FN175]. See Hon. Ruth Bader Ginsburg, *Judicial Independence: The Situation of the U.S. Federal Judiciary*, 85 *Neb. L. Rev.* 1, 7-8 (2006) (stating that “judges have good cause for concern” about the threat to their independence posed by Sensenbrenner's Inspector General bill); Hon. Carolyn Dineen King, *Challenges to Judicial Independence and the Rule of Law: A Perspective from the Circuit Courts*, 90 *Marq. L. Rev.* 765, 772-73 (2007) (stating that “[j]udicial independence is undermined” by proposals, like Sensenbrenner's, to create an Inspector General); Hon. Lawrence L. Piersol, *The Role of the Judiciary in a Democratic Society*, 52 *S.D. L. Rev.* 444, 450 (2007) (describing Sensenbrenner's Inspector General bill as “extreme”); see also Howard J. Bashman, *Editorial, Policing the Bench*, *The Recorder* (San Francisco), May 19, 2006, at 4 (describing critics of the Inspector General bill as concerned about infringement on the separation of powers); Filisko, *supra* note 170 (quoting NYU School of Law Professor Stephen Gillers as saying that the Inspector General Bill “is written broadly enough to allow the inspector general to review decisions. . . . I think it's intended to whip federal judges into line and rule by fear”).

[FN176]. See Montagne & Totenberg, *supra* note 164; see also Saikrishna Prakash & Steven D. Smith, *Removing Federal Judges Without Impeachment*, 116 *Yale L.J. Pocket Part* 95, 98 n.13 (2006).

[FN177]. See Goldman, *supra* note 91, at 10 (reporting that the Breyer Committee was established “shortly after Sensenbrenner publicly questioned whether the judiciary should continue to discipline itself”); Piersol, *supra* note 175, at 450 (outlining the judiciary's response to the criticism of “Representative Sensenbrenner and others”).

[FN178]. Chief Justice William Rehnquist, *2004 Year-End Report on the Federal Judiciary* (Jan. 1, 2005), at 1, available at <http://www.supremecourts.gov/publicinfo/year-end/2004year-endreport.pdf>; see also Breyer Committee Report, *supra* note 3, at 126.

[FN179]. See Chief Justice Rehnquist, *supra* note 178, at 1; see also Bruce Moyer, *Judiciary Installs Measures to Improve Ethics Accountability*, 53 *Fed. Lawyer* 8 (Dec. 2006) (“According to press reports, Justice Breyer described his committee's work as a ‘direct response’ to criticism about lapses in judicial discipline.”).

[FN180]. See Real Special Committee Report, *supra* note 5, at 2-3 (quoting from Schroeder's order). The Special Committee was made up of five members: Circuit Judge Susan P. Graber, who presided, Circuit Judge Richard R. Clifton, District Court Judge Robert H. Whaley, District Court Judge Ronald M. Whyte, and Chief Judge Mary M. Schroeder. See *id.* at 1.

[FN181]. *Id.* at 1.

[FN182]. The hearing took place on August 21, 22, 23, 24, and 29, 2006, at the Ninth Circuit Court of Appeals Courthouse in Pasadena. *Id.* at 15.

[FN183]. *Id.* at 15-16.

[FN184]. Henry Weinstein & Moises Mendoza, Ethics Charges a Bid for Revenge, U.S. Judge Says: Jurist Manuel Real Tells House Panel that Attorney Stephen Yagman's Claims of Misconduct Stem from a Personal Vendetta, L.A. Times, Sept. 22, 2006, at B1 (“Under fire, Mary M. Schroeder, the 9th Circuit's chief judge, revived the inquiry [into the misconduct allegations] in May, ordering a formal investigation. That did not deter Sensenbrenner from asking the [congressional] subcommittee to hold its own hearing.”).

[FN185]. Introduction of House Resolution 916, 152 Cong. Rec. E1420, E1421 (2006) (statement of Rep. Sensenbrenner).

[FN186]. See *id.* (stating, “When the judicial branch has failed to address serious allegations of judicial misconduct, as the Ninth Circuit arguably has in this matter, the Constitution provides the Congress only one course of action: opening an impeachment inquiry.”).

[FN187]. See Impeaching Manuel L. Real, A Judge of the United States Dist. Court for the Cent. Dist. of Cal., for High Crimes and Misdemeanors: Hearing Before the House Subcomm. on the Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 109th Cong. (2006), available at http://commdocs.house.gov/committees/judiciary/hju29969.000/hju29969_0.htm [hereinafter Real Impeachment Hearing].

[FN188]. See *id.*

[FN189]. See Goldman, *supra* note 91, at 10 (reporting on partisan split in view of impeachment inquiry).

[FN190]. Real Impeachment Hearing, *supra* note 187, at 47-48 (statement of Rep. Lofgren) (“[I] believe we are here today because of the animosity felt by the [Republican] majority toward the 9th Circuit, and that you are a victim of that animosity. And for that I apologize to you.”). The same week that the impeachment inquiry occurred, the Senate Judiciary Committee held week-long hearings to determine whether to split the Ninth Circuit into two smaller circuits. See Weinstein & Mendoza, *supra* note 184, at B1. This proposal, which was generally favored by Republicans and opposed by Democrats would, it was believed, weaken the influence of liberal judges on the court whose opinions on issues like the capital punishment and the Pledge of Allegiance had aroused great controversy in conservative circles. See *id.*; see also Henry Weinstein, Breyer Commission Finds Handling of Probe Involving L.A. Jurist “Inconsistent” With Law, L.A. Times, Sept. 20, 2006, at B3 (describing the Real case as unfolding against “a groundswell of voices calling for the U.S. 9th Circuit Court of Appeals, a frequent target of conservatives, to be split into two judicial districts, thus diluting its considerable influence and power”); Debra Rosenberg, The War On Judges, Newsweek, Apr. 25, 2005, at 23-25 (chronicling efforts by Republican-led Congress to “curb judicial power”).

[FN191]. See Real Impeachment Hearing, *supra* note 187, at 10-11 (statement of Rep. Smith, Member) (“Our goal here today is two-fold. First, we want to determine what actually occurred when Judge Real presided over the Canter case in 2000 and 2001. And second, we need to learn more about existing impeachment precedents

and whether they have application to Judge Real's alleged behavior. None of us . . . relishes this undertaking. . . . But this is one of the few ways available to Congress to ensure that the Federal judiciary retains its integrity and serves the public's interest.”); see *id.* at 45 (statement of Rep. Cannon) (“What we don't want are autocratic judges-judges that abuse their position. And a Federal judge has massive authority. And so, I hope this case is one that we will revisit after we have a little more information from the judicial council.”).

[FN192]. See *id.* at 11 (statement of Rep. Berman) (stating that “this congressional hearing on the impeachment of Judge Real is premature” because the judicial council was in the process of investigating his alleged misconduct); see *id.* at 33 (statement of Rep. Schiff) (repeating Representative Berman's concerns); see also *id.* at 46-47 (statement of Rep. Waters); see also *id.* at 87-88 (statement of Rep. John Conyers).

[FN193]. See *id.* at 47-48 (statement of Rep. Lofgren) (“[I] believe we are here today because of the animosity felt by the [Republican] majority toward the 9th Circuit, and that you are a victim of that animosity. And for that I apologize to you.”).

[FN194]. See *id.* at 30-32 (statement of Rep. Issa) (asking Real, “Why in the world did you choose to enrich [Canter] for \$35,000 of value?”).

[FN195]. See *id.* at 40 (statement of Rep. Cannon).

[FN196]. See *id.* at 43 (statement of Rep. Cannon) (saying, “There are a lot of people that dislike you, I take it.”).

[FN197]. See *id.* at 15-16 (statement of Judge Real) (stating, “I am here today because a complaint was made, accusing me of judicial misconduct in my handling of a bankruptcy case more than 6 years ago. I am here to tell you that I categorically deny that I have committed any misconduct in any aspect of that case.”). Real repeated the secondary explanation that he had offered the judicial council: he took control of Canter's bankruptcy case to ascertain whether her confidential criminal pre-sentence report had been misused by opposing counsel for her former in-laws. See *id.* at 17.

[FN198]. See *id.* at 51-54, 58-86. Canter's bankruptcy attorney, Andrew Smyth, also testified. See *id.* at 54-58.

[FN199]. See *id.* at 51-52 (statement of Professor Arthur Hellman) (stating that, although the Ninth Circuit previously failed to follow the procedures set forth in the Act, “the preferable course of action is to suspend proceedings on H. Res. 916 until the special committee has completed its work and the judicial council and/or Judicial Conference have acted upon its report”); see *id.* at 60 (statement of Professor Charles Geyh) (“The best solution is to turn to the judicial council, wait for them to be finished, and if, on the basis of their conclusions, you say there is more evidence of an impeachable offense there, that is the time to go after it, not before.”).

[FN200]. See *id.* at 52 (statement of Professor Arthur Hellman) (characterizing the grounds for impeachment as only “marginally” in existence because there was no evidence that Real had committed a crime); see *id.* at 60 (statement of Professor Charles Geyh) (stating that “I am a little bit leery of saying” that Real's actions rose to the level of impeachable offenses).

[FN201]. See generally Arthur D. Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*, 69 *U. Pitt. L. Rev.* 189, 209 (2007).

[FN202]. See Breyer Committee Report, *supra* note 3, at 116.

[FN203]. *Id.* at 119.

[FN204]. The Breyer Committee issued its report on September 20, 2006. See Henry Weinstein, Breyer Commission Finds Handling of Probe Involving L.A. Jurist “Inconsistent” with Law, *L.A. Times*, Sept. 20, 2006, at B3 (“On the eve of a long-awaited congressional hearing into the possible impeachment of a Los Angeles judge, a commission headed by U.S. Supreme Court Justice Stephen Breyer said Tuesday that the federal appeals court in San Francisco had bungled an investigation of 82-year-old jurist Manuel L. Real.”).

[FN205]. See Nina Totenberg, U.S. Judiciary Agrees to Greater Transparency, *NPR*, Sept. 20, 2006, available at <http://www.npr.org/templates/story/story.php?storyId=6108986> (reporting on the release of the Breyer Committee Report and stating that “[t]he conclusion, was that, overall, the current self-policing system works well, but not in the relatively few high visibility cases”).

[FN206]. Breyer Committee Report, *supra* note 3, at 206.

[FN207]. See *id.* at 123.

[FN208]. See *id.* at 122-23.

[FN209]. See *id.* at 122-23, 173.

[FN210]. See *id.* at 122.

[FN211]. *Id.* at 123.

[FN212]. See Hellman, *The Regulation of Judicial Ethics*, *supra* note 201, at 217-18 (reporting that between 600-800 complaints are filed annually, ninety-five percent are dismissed by the chief judge, and less than one percent result in the appointment of a special committee).

[FN213]. See Breyer Committee Report, *supra* note 3, at 122-123 (“The proper handling of high-visibility complaints has particular importance. Because the matters at issue have received publicity, the public is particularly likely to form a view of the judiciary’s handling of all cases upon the basis of these few.”).

[FN214]. See *Id.* at 123.

[FN215]. See *id.*

[FN216]. See *id.* at 149, 173 (discussing the mishandled high-profile cases in a thirty page section entitled *Disposition of High-Visibility Complaints*).

[FN217]. See *id.* at 122-23; see also Hellman, *The Regulation of Judicial Ethics*, *supra* note 201, at 234 (criticizing the Breyer Committee’s failure to disclose the names of the accused judges).

[FN218]. See Breyer Committee Report, *supra* note 3, at 200.

[FN219]. See *id.* at 184-89. The high-visibility complaints were labeled C-1 through C-17. The Real complaint was assigned the number C-7. *Id.* at 175-98.

[FN220]. See *id.* at 188.

[FN221]. See *id.* at 189 (“We believe that appointment of a special committee was called for in the first instance, as the council’s first order suggested but did not direct. Both chief judge dismissals of the complaint appear inconsistent with the Act, as does the judicial council’s second order.”).

[FN222]. *Id.* at 119 (“The basic question presented is whether the judiciary, in implementing the Act, has failed to apply the Act strictly as Congress intended, thereby engaging in institutional favoritism. This question is important not only to Congress and the public but to the judiciary itself.”).

[FN223]. *Id.* at 124.

[FN224]. The committee proposed a total of twelve reforms. Of those, ten were designed to provide additional guidance to judges in interpreting the Act, to potential complainants in invoking the Act, and to the press and public in understanding the Act. See *id.* at 208, 209, 217. Recommendation 11 suggested “clarifying the authority of the Judicial Conference to review decisions of its Committee to Review Circuit Council Conduct and Disability Orders,” presumably in reference to the failure of the entire conference to review the Committee’s decision to dismiss the Real appeal on procedural grounds. *Id.* at 208. The twelfth recommendation suggested that other circuits adopt a program pioneered by the Ninth Circuit, which provided a telephone hotline for judges in crisis. See *id.*

[FN225]. See *id.* at 208.

[FN226]. See *id.* at 209.

[FN227]. *Id.* at 214.

[FN228]. *Id.* at 214-15.

[FN229]. *Id.*

[FN230]. *Id.* at 215.

[FN231]. *Id.* at 214-15 (listing four factors favoring transfer and four factors disfavoring transfer).

[FN232]. *Id.* at 120.

[FN233]. See *id.* at 119 (stating that the Committee was formed in response to “recent criticism from Congress” and noting that a self-regulatory disciplinary system “risks a kind of undue ‘guild favoritism’ through inappropriate sympathy with the judge’s point of view or de-emphasis of the misconduct problem”); Tony Mauro, Judicial Conference OKs New Rules on Complaints, *The Recorder* (San Francisco), Mar. 12, 2008, at 3 (reporting that the Breyer Committee was established after Congress argued for more uniformity and transparency in the disciplinary process and debated passing an Inspector General law).

[FN234]. See Geoffrey P. Miller, *Bad Judges*, 83 *Tex. L. Rev.* 431, 465-69 (2004); John P. Sahl, *Secret Discipline in the Federal Courts—Democratic Values and Judicial Integrity at Stake*, 70 *Notre Dame L. Rev.* 193, 225-48 (1994).

[FN235]. See Bruce Moyer, *A Warmer Climate for the Federal Courts in the New Congress*, 54 *Fed. Law.* 10 (2007) (reporting that after the 2006 elections, “[l]egislation to establish an inspector general for the federal ju-

diciary is not expected to move in a Democratic Congress, nor are proposals to split the Ninth Circuit Court of Appeals”).

[FN236]. See Wheeler & Katzmann, *supra* note 30, at 1171-72. In January 2007, Sensenbrenner and Grassley once again tried to pass legislation to create an Inspector General for the federal judiciary. See H.R. 785, 110th Cong. (2007); S. 461, 110th Cong. (2007); see also Sen. Grassley, Rep. Sensenbrenner See Need for Inspector General for Judiciary, U.S. Fed. News, Jan. 31, 2007, available at 2007 WLNR 1906018. Once again, their efforts failed.

[FN237]. A third misconduct complaint against Real, also filed by Yagman, was resolved on December 12, 2008. See Order and Memorandum In re Complaint of Judicial Misconduct, Nos. 07-89000 and 89020 (9th Cir. Jud. Council Dec. 12, 2008), at 2-4 (mem.), available at <http://www.ce9.uscourts.gov/misconduct/orders.html>. The complaint accused Real of abusing his authority by failing, on numerous occasions, to follow explicit directives from the Ninth Circuit and provide the reasons for his decisions. See In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability, 517 F.3d 558, 559 (U.S. Jud. Conf. Jan. 18, 2008). A special committee appointed to investigate these allegations held a hearing in November 2006, after which it found Real guilty of misconduct for “engaging in a pattern and practice of not providing reasons [for his decisions] when required to do so.” *Id.* at 559-60. The committee issued a private reprimand. See *id.* Real and Yagman appealed, the former challenging the finding and the latter challenging the sanction. On January 14, 2008, the judicial conference reversed and remanded the case for reconsideration. *Id.* at 560-61. The conference concluded that the council needed to find that Real acted “willfully” before it could find him guilty of misconduct. See *id.* at 561-62. It further stated that if Real had acted willfully, a private reprimand was insufficient punishment, particularly in light of the “totality of recent misconduct by this judge.” *Id.* at 562. After reviewing an additional report by the special committee, the judicial council dismissed the complaint, concluding that it could not “find clear and convincing evidence of misconduct as defined by the Remand Order because of its stringent requirements for findings as to the District Judge’s state of mind.” In re Complaint of Judicial Misconduct, Nos. 07-89000 and 89020, at 2.

[FN238]. See Order and Memorandum In re Complaint of Judicial Misconduct, Nos. 07-89000 and 89020, at 1-2. The vote to find Real guilty of misconduct and to impose sanctions was 10-1. The lone dissenter, senior judge Terry J. Hatter, Jr., sat on the same district court as Real. *Id.* at 3-5.

[FN239]. See Real Special Committee Report, *supra* note 5, at 21-26. For example, in 2003, Real submitted a statement to the judicial council in which he wrote that he had taken control over Canter’s bankruptcy case because he believed a legitimate legal issue existed as to her right of occupancy and that her lawyer had “abandoned her interest” by failing to argue the issue on Canter’s behalf. *Id.* at 21. But the record revealed the contrary: “Real had no information that the ownership of the house was a disputed issue until after he withdrew the bankruptcy reference and issued the stay order” and likewise, no evidence that Canter suffered from deficient representation. *Id.* In another example, Real testified that he issued the stay, and twice denied the trust’s motions to lift it, out of concern that the Canter trust had improperly filed her confidential pre-sentence report as an attachment to its state court pleadings. See *id.* at 23-24. But the committee concluded no such concerns could have existed at that point, because Real had been assured, in pleadings submitted more than one year earlier, that the error had been corrected. See *id.* at 24. The “true explanation,” according to the council, was that Real acted without legal authority and in response to a private plea for help. *Id.*

[FN240]. *Id.* at 25, 31-32.

[FN241]. See Letter of Chief Judge Alex Kozinski to Hon. Manuel Real (Jan. 17, 2008), available at http://www.ce9.uscourts.gov/misconduct/orders/real_reprimand_letter.pdf.

[FN242]. See *In re Memorandum of Decisions of the Judicial Conference Committee on Judicial Conduct and Disability*, 517 F.3d 563, 564 (U.S. Jud. Conference Jan. 14, 2008).

[FN243]. The five judges, all members of the judicial conference, were as follows: Ralph K. Winter, Pasco M. Bowman II, Carolyn R. Dimmick, Dolores K. Sloviter, and Joseph A. DiClerico, Jr. None of the five judges sat in the Ninth Circuit. Judge Dimmick recused herself. See *id.* at 564.

[FN244]. See *id.* at 569.

[FN245]. *Id.*

[FN246]. See Real Special Committee Report, *supra* note 5, at 30-32 (incorporated by reference in the judicial council's order dated Nov. 16, 2006).

[FN247]. *In re Memorandum of Decisions of the Judicial Conference Committee on Judicial Conduct and Disability*, 517 F.3d 563, 569 (U.S. Jud. Conference Jan. 14, 2008).

[FN248]. See Press Release, National Rules Adopted for Judicial Conduct and Disability (Mar. 11, 2008), available at http://www.uscourts.gov/Press_Releases/2008/judicial_conf.cfm.

[FN249]. See *id.*

[FN250]. *Id.*

[FN251]. See *id.*

[FN252]. See Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 23(a)-(c), (g)-(h) (2008).

[FN253]. *Id.* at R. 5.

[FN254]. *Id.* at R. 11(a)(2), (d)(1)-(2).

[FN255]. *Id.* at R. 11 cmt.

[FN256]. See *id.* at R. 11 cmt. While the complainant has no right to any formal involvement, the commentary provides that “[i]n some cases, corrective action may not be ‘appropriate’ to justify conclusion of the complaint unless the complainant or other individual harmed is meaningfully apprised of the nature of the corrective action in the chief judge’s order, in a direct communication from the subject judge, or otherwise.” *Id.* at 17. The confidentiality rules that apply to dismissals of complaints as frivolous or falling outside the Act apply with equal force to complaints dismissed upon a finding of corrective action: the dismissal order “will be made public, usually without disclosing the names of the complainant or the subject judge.” *Id.* at 17-18.

[FN257]. See *id.* at R. 11 cmt.

[FN258]. The commentary to Rule 11 cited to the Breyer Committee Report as support for the proposition that the purpose of the Act was primarily correctional, not punitive. See *id.* (citing the Breyer Committee Report).

This portion of the Committee's report, entitled, Committee Standards for Assessing Compliance with the Act, essentially restated the proposition—" [t]erminating a complaint based on corrective action is premised on the implicit understanding that voluntary self-correction is preferable to sanctions imposed from without"—but, like the Rules, cited no supporting statutory authority or case law. Breyer Committee Report, *supra* note 3, at 244.

[FN259]. See Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 11 cmt.

[FN260]. See *id.* at R. 21 & 22.

[FN261]. See *id.* at R. 21(b)(2).

[FN262]. See *id.* at R. 21 cmt.

[FN263]. See *id.* at R. 21(b)(2).

[FN264]. See *id.*; see also MacLean, Federal Bench Reforms Fall Short, *Nat'l L.J.*, March 3, 2008, at 1, (reporting that the judicial conference "cannot make independent findings of misconduct");

[FN265]. See Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 25, 26 (2008).

[FN266]. *Id.* at R. 25(a).

[FN267]. See *id.* at R. 25(b), (e), and (f).

[FN268]. See *id.* at R. 25(c).

[FN269]. See *id.* at R. 25 cmt. (providing that, where a judge is related to the accused judge, the judge "may, in his or her discretion, conclude that disqualification [from participation in the disciplinary process] is warranted").

[FN270]. See *id.* at R. 26.

[FN271]. See *id.*

[FN272]. See *id.* at R. 26 cmt.

[FN273]. See *id.* at R. 26.

[FN274]. See *id.* at R. 11 cmt.; see also Breyer Committee Report, *supra* note 3, at 244.

[FN275]. S. Rep. No. 96-362, at 3 (1979), as reprinted in 1980 U.S.C.C.A.N. 4315, 4317 (1980).

[FN276]. 1980 U.S.C.C.A.N. at 4327.

[FN277]. *Id.* at 4321.

[FN278]. See Hellman, *supra* note 201, at 233-34.

[FN279]. See *id.* at 189.

[FN280]. See *id.*; *In re Canter v. Canter*, 299 F.3d 1150, 1154 (9th Cir. 2002); *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1197 (9th Cir. 2005) (Kozinski, J., dissenting) (estimating loss to Canter trust at “\$50,000 or more”).

[FN281]. See Real Special Committee Report, *supra* note 5, at 6-8, 10, 24-29.

[FN282]. See Breyer Committee Report, *supra* note 3, at 209.

[FN283]. See Real Special Committee Report, *supra* note 5, at 30.

[FN284]. *Id.*

[FN285]. See *id.* at 20.

[FN286]. 18 U.S.C. § 1001(a) (2008).

[FN287]. See *id.* § 1621.

[FN288]. 28 U.S.C. § 354(b)(2)(A) (2008).

[FN289]. See *id.*; see also U.S. Const. art. II, § 4.

[FN290]. U.S. Const. art. II, § 4.

[FN291]. 28 U.S.C. § 355(b)(1) (2008).

[FN292]. See *In Re Complaint of Judicial Misconduct against U.S. District Judge Samuel B. Kent under Judicial Conduct and Disability Act of 1980*, No. 07-05-351-0036 (5th Cir. Jud. Council Sept. 28, 2007), at 2 [*hereinafter* First Kent Order].

[FN293]. See *id.* at 2-3. According to the Houston Chronicle, the order was preceded by two terse directives. See Lise Olsen & Harvey Rice, *Judge Samuel Kent Has Been Reprimanded for “Inappropriate Behavior” Over Sexual Harassment Charges. But That Only Begins To Tell The Story. The Case of the Judge Who Went Too Far*, Hous. Chron., Sept. 11, 2007, at A1. The first directive, issued on May 25, 2007, reassigned just under one-third of Kent's docket to other judges; the second, issued on August 27, directed Kent to step down from the bench for four months at full salary. See *id.* No reason was provided for these orders. See *id.*

[FN294]. See First Kent Order, *supra* note 292, at 2.

[FN295]. See *id.* at 1-3.

[FN296]. *Id.* at 1-2.

[FN297]. *Id.* at 1-3.

[FN298]. *Id.* at 2.

[FN299]. See *id.* at 1-3.

[FN300]. *Id.* at 2.

[FN301]. *Id.*

[FN302]. *Id.*

[FN303]. *Id.*

[FN304]. See *id.* at 3 (citing 28 U.S.C. § 360(a) (2008), which provides that, with certain limited exceptions, “all papers, documents, and records of proceedings related to investigations conducted under this chapter shall be confidential and shall not be disclosed by any person in any proceedings”).

[FN305]. 28 U.S.C. §§ 360(b).

[FN306]. First Kent Order, *supra* note 292, at 2.

[FN307]. See, e.g., Brenda Sapino Jeffreys & John Council, 5th Circuit Judicial Council Reprimands Judge Samuel B. Kent: Statistics Show Rarity of Staff Complaints Against Federal Judges, 23 Tex. Law. 5 (Oct. 8, 2007); Brenda Sapino Jeffreys & John Council, DOJ Subpoenas Judicial Council Seeking Kent-Related Documents, 23 Tex. Law. 5 (Dec. 3, 2007); Brenda Sapino Jeffreys & John Council, Houston Heavyweights, 25 Tex. Law 41 (Dec. 17, 2007); Brenda Sapino Jeffreys & John Council, Judicial Council Reprimands Texas District Judge: Judge Samuel Kent Faced a Complaint of Sexual Harassment, 118 Tex. Law. 5 (Oct. 11, 2007); Lise Olsen, Harvey Rice, & Cindy George, Federal Judge Disciplined After Harassment Probe: Kent, Who's Been On Leave, Is Accused of Touching a Worker in his Chambers, Hous. Chron., Sept. 29, 2007, at A1; Olsen & Rice, *supra* note 293, at A1; Olsen, *supra* note 2, at A1.

[FN308]. See *supra* note 307, and accompanying text.

[FN309]. See Olsen, et al., *supra* note 307, at A1.

[FN310]. See *id.*

[FN311]. See *id.*

[FN312]. Olsen & Rice, *supra* note 293, at A1.

[FN313]. First Kent Order, *supra* note 292, at 1-2.

[FN314]. Olsen & Rice, *supra* note 293, at A1. In a subsequent article, the Houston Chronicle revealed the sources as Mary Ann Schopp, McBroom's mother; Felicia Williams, McBroom's predecessor as Kent's former case manager; and, Charlene Clark, McBroom's childhood friend. *Id.* According to the article, dated November 11, 2007, all three women spoke with McBroom within “hours or days” of Kent's alleged inappropriate fondling of McBroom. *Id.*

[FN315]. *Id.*

[FN316]. See *id.*

[FN317]. See Olsen & Rice, *supra* note 293, at A1 (interviewing Northwestern Law School Professor Steven Lubet and quoting James Alfini, President of South Texas College Law, co-authors of a textbook on judicial ethics).

[FN318]. Jeffreys & Council, DOJ Subpoenas Judicial Council Seeking Kent-Related Documents, *supra* note 307, at 5.

[FN319]. See *id.*; see also Jeffreys & Council, Houston Heavyweights, *supra* note 307, at 5; Jeffreys & Council, 5th Circuit Reprimands Judge Samuel B. Kent, *supra* note 307, at 5.

[FN320]. First Kent Order, *supra* note 292, at 1-2 (stating that the Judicial Council “concluded the proceedings [against Kent] because appropriate remedial action had been and will be taken”); Olsen & Rice, *supra* note 293, at A1; Olsen, *supra* note 2; Jeffreys & Council, DOJ Subpoenas Judicial Council Seeking Kent-Related Documents, *supra* note 307, at 5.

[FN321]. Olsen, *supra* note 2. The statement was signed by Rep. John Conyers, Jr., a Democrat and the chairman of the House Judiciary Committee; Rep. Lamar Smith, the ranking Republican member of the committee; and Rep. Howard Berman, a Democrat and chairman of the subcommittee on federal courts. See *id.* Rep. Sheila Jackson, a Democrat, also pledged to work with Conyers, Smith, and Berman to “closely monitor the review of the allegations [against Kent] to determine if any further committee action is necessary.” *Id.* (quoting a spokeswoman for the committee); see also Jeffreys & Council, DOJ Subpoenas Judicial Council Seeking Kent-Related Documents, *supra* note 307, at 5 (reporting that the statement was issued on Nov. 13, 2007).

[FN322]. See Olsen, *supra* note 2.

[FN323]. *Id.*

[FN324]. *In re Complaint of Judicial Misconduct against District Court Judge Samuel B. Kent under Judicial Conduct and Disability Act of 1980, No. 07-05-351-0086* (5th Cir. Jud. Council Jan. 9, 2009) [hereinafter *Third Kent Order*].

[FN325]. See *Second Kent Order*, *supra* note 9, at 1-3.

[FN326]. *Id.* at 2.

[FN327]. *Id.* at 2-3.

[FN328]. *Id.* at 3.

[FN329]. See Olsen et al., *supra* note 9, at A1.

[FN330]. Mary Flood, Kent Forcefully Pleads not Guilty to Sex Abuse Counts in Federal Court: U.S. Judge Says He'll Take Stand, Provide Witnesses, *Hous. Chron.*, Sept. 3, 2008, at A1. Media coverage of the arraignment noted that Kent was treated with an unusual level of courtesy and respect by court personnel: “U.S. marshals in the courtroom were calling him ‘Your honor,’ one asked how he was feeling, the officer overseeing his release was deferential while they worked out the details and the general tone was far less formal and more convivial than these hearings usually are.” *Id.*

[FN331]. See *United States v. Samuel B. Kent*, CR No. 08-596-RV (Superseding Indictment filed Jan. 6, 2009); Lise Olsen & Mary Flood, Judge Facing New Sex Charges: Kent Is Also Accused of Lying to Appeals Court's Judicial Panel, *Hous. Chron.*, Jan. 7, 2009, at A1.

[FN332]. See Kent, CR No. 08-596-RV.

[FN333]. *Id.*

[FN334]. United States v. Samuel B. Kent, No 4:08CR0596-RV (S.D. Tex. Feb. 23, 2009) (Plea Agreement); Mary Flood and Lise Olsen, Kent Plea Avoids Trial, *Hous. Chron.*, Feb. 24, 2009, A1, A5.

[FN335]. See Third Kent Order, *supra* note 324, at 1-2.

[FN336]. *Id.* at 2.

[FN337]. See Pamela A. MacLean, Judging Federal Judges, *Nat'l L.J.*, Feb. 18, 2008, at 1 (“In Galveston, Texas, U.S. District Judge Samuel B. Kent returned to work on Jan. 3 after a month-month suspension, with pay, following a 5th Circuit Judicial Council finding of ‘sexual harassment’ of a female employee. Kent was transferred to Houston, but so was his accuser.”); Second Kent Order, *supra* note 9, at 1-3 (enumerating the limitations on Kent’s judicial duties).

[FN338]. Second Kent Order, *supra* note 9, at 1-3.

[FN339]. See First Kent Order, *supra* note 292, at 1-3; Third Kent Order, *supra* note 324, at 1-2.

[FN340]. 28 U.S.C. § 360(b) (2008).

[FN341]. See First Kent Order, *supra* note 292, at 1-3; Second Kent Order, *supra* note 9, at 1-3.

[FN342]. See, e.g., Rick Casey, Judging the Judges Who Judged Kent, *Hous. Chron.*, Aug. 29, 2008, at A1 (characterizing as “absurd” the Judicial Council’s handling of McBroom’s misconduct complaint and calling on Congress to “investigate how the Judicial Council handled the matter, give a public accounting, and take steps to fix what is clearly a flawed system of investigating federal judges”).

[FN343]. See Goodman & Rempel, *supra* note 4, at A1; Michael J. Goodman & William C. Rempel, Juice v. Justice: A Times Investigation; Special Treatment Keeps Them Under the Radar, *L.A. Times*, June 10, 2006, at A1; Thevenot, *supra* note 8, at B1 (reporting that the investigation lasted two years); Michael J. Goodman & William C. Rempel, Juice v. Justice: A Times Investigation; In Las Vegas, They’re Playing With a Stacked Judicial Deck, *L.A. Times*, June 8, 2006, at A1.

[FN344]. The June 8, 2006 Times article devoted two paragraphs to Judge Mahan. See Goodman & Rempel, In Las Vegas, They’re Playing With a Stacked Deck, *supra* note 344, at A1. The June 9, 2006 Times article, which totaled over 7446 words, focused exclusively on Judge Mahan. See Goodman & Rempel, *supra* note 4. The June 10, 2006 article did not mention Mahan. See Goodman & Rempel, Special Treatment Keeps Them Under the Radar, *supra* note 344, at A1. Interviewed by the Las Vegas Journal Review, Judge Mahan stated that the Los Angeles Times reporters who authored the three-part series “wanted to attack the Las Vegas judiciary, and I was the poster boy.” Thevenot, *supra* note 8, at B1; see also Tony Cook, Jaded Justice, *Las Vegas Sun*, June 17, 2006, at A1 (reporting that “The Times dedicated an entire story in the series to James Mahan”).

[FN345]. See Goodman & Rempel, *supra* note 4, at A1.

[FN346]. See *id.*

[FN347]. *Id.*

[FN348]. *Id.*

[FN349]. *Id.*

[FN350]. *Id.*

[FN351]. *Id.*

[FN352]. *Id.*

[FN353]. See *Desert Land v. Owens Financial Group, Inc.*, No. 00-01406-JCM-PAL, rev'd, 154 F. App'x 586 (9th Cir. 2005); *Gamble Trust v. E-Rex, Inc.*, No. 02-00145-JCM-LRL, rev'd, 84 F. App'x 975 (9th Cir. 2004); *Rogers v. Interstate Mortgage et. al.*, No. CV-5-00-00885-JCM-PAL (D. Nev. May 16, 2003), available at 2003 WL 25778950.

[FN354]. See *Gamble Trust v. E-Rex, Inc.*, 84 F. App'x 975, 975 (9th Cir. 2004).

[FN355]. See *Gamble Trust v. E-Rex, Inc.*, No. 02-00145-JCM-LRL (D.Nev. Mar. 7, 2002) (Minutes of the Court); see also *Goodman & Rempel*, supra note 4, at A1.

[FN356]. See *Goodman & Rempel*, supra note 4, at A1.

[FN357]. See *Gamble*, No. 02-00145-JCM-LRL (D.Nev. Aug. 2, 2002) (Order Granting Defendants' Motion to Dismiss).

[FN358]. See *id.* (Order Granting Application for Approval of Fees entered Aug. 16, 2002).

[FN359]. See *Goodman & Rempel*, supra note 4, at A1; see also *Gamble*, No. 02-00145-JCM-LRL, passim.

[FN360]. See *Gamble*, No. 02-00145-JCM-LRL, passim.

[FN361]. *Rogers v. Interstate Mortgage Group et. al.*, No. CV-5-00-00885-JCM-PAL (D.Nev. May 16, 2003), available at 2003 WL 25778950.

[FN362]. See *Goodman & Rempel*, supra note 4, at A1.

[FN363]. See *id.*

[FN364]. *Rogers*, No. 00-00885-JCM-PAL (D.Nev. Oct. 11, 2002) (Order Granting Motion to Dismiss Against Interstate Mortgage Group, Inc.).

[FN365]. See *id.* (Judgment entered May 9, 2003).

[FN366]. See *id.* passim; see also *Goodman & Rempel*, supra note 4, at A1.

[FN367]. See *Desert Land, Inc. v. Owens Financial Group, Inc.*, No. 00-01406-JCM-PAL (D. Nev. Nov. 15, 2005).

[FN368]. Goodman & Rempel, *supra* note 4, at A1.

[FN369]. See Desert Land, No. 00-01406-JCM-PAL.

[FN370]. See *id. passim*; see also Goodman & Rempel, *supra* note 4, at A1.

[FN371]. Goodman & Rempel, *supra* note 4, at A1.

[FN372]. Rules for Judicial-Conduct, *supra* note 52, R. 3(h)(1)(A).

[FN373]. Model Code of Jud. Conduct, Canon 3(B)(4) (2008).

[FN374]. See *id.* at 3(B)(4).

[FN375]. *Id.* at 3(C)(1).

[FN376]. See Don Woutat, *Inquiry Sought Into Vegas Jurist*, L.A. Times, June 25, 2006, at A5.

[FN377]. See Memorandum and Order In re Complaint of Judicial Misconduct, No. 06-89087, at 1 (9th Cir. Jud. Council Aug. 23, 2007) (mem.) (citing 28 U.S.C. § 351 and the Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability).

[FN378]. See *id.* at 1-2.

[FN379]. See *id.*

[FN380]. See *id.*

[FN381]. *Id.*

[FN382]. See *id.* at 1-2.

[FN383]. The Act applies only to a judge serving on the federal bench, defined as “a circuit judge, district judge, bankruptcy judge, or magistrate judge.” 28 U.S.C. § 351(d)(1) (2008).

[FN384]. 28 U.S.C. § 360(b) (2008).

[FN385]. S. Rep. No. 96-362, at 3 (1979), as reprinted in 1980 U.S.C.C.A.N. 4330 (1979).

[FN386]. Recognizing the possibility of such “leaks,” the Act’s legislative history provides that the judiciary may want to respond publicly, with a written statement explaining the disciplinary process and making clear that an investigation into a misconduct complaint is not the equivalent of a finding of guilt. See 1980 U.S.C.C.A.N. at 4330.

[FN387]. See, e.g., Miller, *supra* note 234, at 468-69.

[FN388]. In *Secret Discipline in the Federal Courts—Democratic Values and Judicial Integrity at Stake*, Sahl, *supra* note 234, at 250-56, Professor John Sahl argues for “opening the entire process.” *Id.* at 250-51. This Article takes a more moderate approach.

[FN389]. 28 U.S.C. §§ 352(b)(1)(B), 353(a) (2008).

[FN390]. The Supreme Court has held that the public has a First Amendment right to attend criminal trials. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). The Court has never squarely addressed the question whether this right extends to attendance at judicial misconduct hearings, although it has spoken approvingly of confidentiality provisions in this context. See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 835-36 (1978); see also *First Amendment Coalition v. Judicial Inquiry and Review Board*, 784 F.2d 467, 472-77 (3d Cir. 1986) (upholding the constitutionality of private judicial disciplinary hearings). For a discussion of the relevant caselaw and an argument in favor of extending the right of attendance to judicial disciplinary proceedings, see Comment, *A First Amendment Right of Access to Judicial Disciplinary Proceedings*, 132 U. Pa. L. Rev. 1163 (1984).

[FN391]. See *Globe Newspaper Company v. Superior Court*, 457 U.S. 596, 606 (1982) (holding that public access to criminal trials “enhances the quality and safeguards the integrity of the factfinding process” and “fosters an appearances of fairness, thereby heightening public respect for the judicial process”).

[FN392]. *Bridges v. California*, 314 U.S. 252, 291-92 (Frankfurter, J., dissenting); see also Sahl, *supra* note 234, at 246-57.

[FN393]. The California Commission on Judicial Performance, established by constitutional amendment in 1960, was the nation's first state judicial disciplinary organization. See Cal. Const. art. IV, § 18(i); Sambhav N. Sankar, *Disciplining the Professional Judge*, 88 Cal. L. Rev. 1233, 1261-62 (2000). The eleven-member commission is composed of judges, attorneys, and six lay citizens appointed to four-year terms. See Cal. Const. art. VI, §8(a).

[FN394]. See State of California Commission on Judicial Performance, *Rules of the Commission on Judicial Performance*, R. 102(a)-(b), (e) (2009), available at <http://cjp.ca.gov/commrules.htm>. [hereinafter CJP Rules].

[FN395]. *Id.* at R. 102(e).

[FN396]. *Id.*

[FN397]. See State of California Commission on Judicial Performance, Home Page, http://web.archive.org/web/*/http://cjp.ca.gov/pubdisc.htm (Last viewed Oct. 16, 2008).

[FN398]. See Long, *supra* note 32, at 23 (“[I]n a majority of states, complaints concerning judicial misconduct become public upon a finding by the [Judicial Disciplinary Committee] that there is indicia of misconduct warranting a formal hearing.”); Sankar, *supra* note 393, at 1267-69 (listing among the CJP's advantages that its proceedings “appear fairly open to public view”).

[FN399]. See S. Rep. No. 96-362, at 3 (1979), as reprinted in 1980 U.S.C.C.A.N. 4328 (1979).

[FN400]. Compare Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 8(b), 11(f), 14(a)-(c), & 15 with *id.* R. 16 (2008).

[FN401]. See *id.* R. 16(e).

[FN402]. See Hellman, *supra* note 201, at 218.

[FN403]. 28 U.S.C. § 352(b)(2) (2008).

[FN404]. Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 11 cmt.

[FN405]. See *id.* R. 11 & cmt.

[FN406]. See *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1196-99 (9th Cir. Jud. Council 2005) (Kozinski, J., dissenting).

[FN407]. See *First Kent Order*, *supra* note 292, at 2; see also Council & Jeffreys, *Houston Heavyweights*, *supra* note 307; Council & Jeffreys, *5th Circuit Reprimands Judge Samuel B. Kent*, *supra* note 307.

[FN408]. See 28 U.S.C. §§ 352, 354, 355 (2008).

[FN409]. See *id.* §§ 352(b)(2); 354(a)(1)(B)-(C); (a)(2)(A)(ii)-(iii).

[FN410]. See *id.* §§ 354(a)(2)(A)(i), (b)(2)(A), 355(b); see also S. Rep. No. 96-362, at 3 (1979), as reprinted in 1980 U.S.C.C.A.N. 4315, 4316 (1980).

[FN411]. See S. Rep. No. 96-362, at 3 (1979), as reprinted in 1980 U.S.C.C.A.N. 4315, 4317 (1980).

[FN412]. *Id.* at 4319.

[FN413]. See Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 3(h)(1)-(2) (2008).

[FN414]. See *id.* R. 3(h)(1)(A).

[FN415]. See *id.* R. 3(h)(1)(C).

[FN416]. *Id.* R. 3(h)(1)(D).

[FN417]. See *id.* R. 3(h)(1)(E).

[FN418]. See *id.* R. 3(h)(1)(F).

[FN419]. See *id.* R. 3(h)(1)(G).

[FN420]. Noted scholar Charles Gardner Geyh has long advocated for making the Code of Judicial Conduct for United States Judges part of the definition of judicial misconduct. See *Real Impeachment Hearing*, *supra* note 200 (statement of Professor Geyh).

[FN421]. See Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 26 cmt (2008).

[FN422]. See *id.* at 40-41 (R. 26).

[FN423]. See Breyer Committee Report, *supra* note 3, at 214 (identifying “eight instances since 1980” in which a misconduct complaint was transferred out of circuit).

[FN424]. See *id.* at 122.

[FN425]. See *id.* at 215 (noting that “transfers may increase time and expense if there is the need to ship files, arrange witnesses, and handle other matters from a distance”).

[FN426]. See *id.* at 123 (stating that “the public is particularly likely to form a view of the judiciary's handling of all cases upon the basis of these few”).

[FN427]. See *id.* at 206 (stating that “legislative and public confidence in the Act's administration is jeopardized by less-effective handling of the small number of complaints that are in the public eye”); Anthony D'Amato, *Self-Regulation of Judicial Misconduct Could Be Mis-Regulation*, 89 Mich. L. Rev. 609, 615 (1990) (“[T]he very procedures set up by the judiciary betray a distinctly unfavorable disposition toward complaints about misbehavior of their fellows.”); Charles G. Geyh, *Informal Methods of Judicial Discipline*, 142 U. Pa. L. Rev. 243, 244 n.3 (1993) (documenting widespread belief that “judges cannot be trusted to judge judges”); Long, *supra* note 32, at 18-19 (stating that “the history of judicial councils regarding disciplinary actions against judges has largely been one of inaction”); Carol T. Rieger, *The Judicial Councils Reform and Judicial Conduct and Disability Act: Will Judges Judge Judges?* 37 Emory L.J. 45, 94 (1988) (stating that “the judiciary's response to the Act raises serious questions about judges' willingness to judge other judges”); Pamela A. MacLean, *Judging Federal Judges*, Nat'l L.J., Feb. 18, 2008 (quoting former chairman of American Bar Association's committee on Model Judicial Conduct as describing the judicial self-disciplinary system as “an old boys' network”).

[FN428]. See Scott Glover, *Trial to Gauge What L.A. Sees as Obscene*, L.A. Times, June 9, 2008, at A1, available at 2008 WLNR 10846103 (describing the case as involving movies “which feature acts of bestiality and defecation”).

[FN429]. See Scott Glover, *Porn Trial in L.A. is Halted; Judge Grants Stay After Conceding He Maintained His Own Website with Sexually Explicit Images*, L.A. Times, June 2, 2008, at A2, available at 2008 WLNR 11046400.

[FN430]. See Scott Glover, *Judge Maintained Web Site with Explicit Photos*, L.A. Times, June 12, 2008, at B1.

[FN431]. See *id.*; see also Scott Glover, *Probe of Judge Shifted to Court in East: The U.S. 3rd Circuit Names a Special Panel to Investigate Possible Misconduct of Federal Jurist Alex Kozinski*, L.A. Times, June 17, 2008, at B1.

[FN432]. See *All Things Considered: Judge in Obscenity Trial Linked to Porn Web Page* (NPR radio broadcast June 12, 2008); Adam Liptak, *Chief Judge Contributed to Racy Website*, N.Y. Times, June 12, 2008, at A21; Michael R. Blood, *Turned Tables in Porn Case Put Judge in the Spotlight*, Ledger-Star (Norfolk, Va.) June 15, 2008, at N4, available at 2008 WLNR 11293631.

[FN433]. See Lara A. Bazelon, *Editorial, Kozinski Disciplines Himself: The Misconduct Standards the Porn-Collecting Judge Advocated Might Now Be Used Against Him*, L.A. Times, June 17, 2008, available at <http://www.latimes.com/news/opinion/la-ow-bazelon17-2008jun17,0,4396754.story>.

[FN434]. See Scott Glover, *U.S. Judge in Obscenity Trial Steps Down; Alex Kozinski Recuses Himself Amid an Uproar Over Sexually Explicit Material that He Posted on His Website*, L.A. Times, June 14, 2008, at B1, available at 2008 WLNR 11230206.

[FN435]. Letter of Chief Judge Alex Kozinski to the Court of Appeals for the Ninth Circuit (June 12, 2008),

available at www.ce9.uscourts.gov/misconduct.orders.CJA_6-12-08.pdf. While Kozinski did not specify why his conduct might fall within the Act's purview, the Uniform Rules define misconduct as including behavior off the bench that results in "a substantial and widespread lowering of public confidence in the courts among reasonable people." Rules for Judicial-Conduct, *supra* note 52, at R. 3(h)(2). Kozinski is also potentially vulnerable to a misconduct finding if the judicial council concludes that he violated the canon of judicial ethics which provides that a "judge should participate in establishing, maintaining, and enforcing high standards of conduct, and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved." Model Code of Jud. Conduct Canon 1 (2008).

[FN436]. See Order In Re Complaint of Judicial Misconduct, No. 08-90035 (9th Cir. Jud. Council June 16, 2008), available at www.ca9.uscourts.gov/misconduct/orders/08_90035.pdf.

[FN437]. See Letter from Chief Justice John Roberts to Chief Judge Anthony J. Scirica (June 16, 2008), available at http://www.uscourts.gov/library/Rule_26_Transfer_letter.pdf.

[FN438]. Dechert Attorney Hired to Run Kozinski Probe, Nat'l L.J., Sept. 29, 2008 at 3. In early December 2008, the former chief of the Administrative Office of the federal courts filed a misconduct complaint against Kozinski with the Third Circuit accusing him of illegally disabling the federal judiciary's Internet security software in 2001. Michael Doyle Appellate Judge in the Hot Seat Over Internet Imagery: Former Court Chief Claims "Felonies and Other Crimes," Merced Sun-Star, Dec. 2, 2008, at B1. Describing Kozinski's conduct as felonious, the former AO chief alleged that after Kozinski disabled the security system court officials and employees visited 1100 adult Web sites and downloaded pornography. See *id.*
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