

# A PRIMER ON REGULATING FEDERAL JUDICIAL ETHICS

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*This Article first summarizes the agencies of the federal judiciary involved in ethics regulation. Then, it describes mechanisms and policies (constitutional, statutory, and administrative) designed to deter or discourage judicial misconduct and performance-degrading disability, including but not limited to conflict-of-interest statutes and the (nonstatutory) Code of Conduct for United States Judges and controversies over its application (including whether it should apply to Supreme Court Justices in the same way it does to other federal judges). The Article next reviews constitutional, statutory, and informal methods of dealing with allegations of judicial misconduct and disability (in particular the Judicial Conduct and Disability Act). Finally, the Article briefly suggests some additional questions about the regulation machinery and steps the federal judiciary, including the Supreme Court, might take to enhance the regulation of federal judicial ethics.*

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## INTRODUCTION

Serious misconduct by federal judges is rare, but recent instances have made headlines:

“Victims Allege Years of Sexual Abuse by Federal Judge” (who pleaded guilty to lying in a disciplinary proceeding over his harassing a staff assistant);<sup>1</sup>

“Senate Prepares for Trial of Federal Judge,” (whom it eventually removed from office for accepting bribes);<sup>2</sup>

“[Judge] set to retire May 3 as misconduct investigation concludes”<sup>3</sup> (concerning the judge’s forwarding, on his chambers computer, a racist email about President Obama and, as it turned out, many more inappropriate messages).<sup>4</sup>

These and similar, less visible incidents have produced judicial and legislative responses. When a member of Congress charged that a chief judge had improperly dismissed a complaint the member had filed under the Judicial Conduct and Disability Act<sup>5</sup> (“Judicial Conduct Act”), Chief Justice William H. Rehnquist appointed a committee, chaired by Justice Stephen G. Breyer, to investigate the Act’s implementation. Two members of Congress have introduced the Judicial Transparency and Ethics Enhancement Act to create an Inspector General for the judicial branch.<sup>6</sup> Chief Justice John G. Roberts, Jr., devoted his entire 2011 Year-End Report on the Federal Judiciary to Supreme Court ethics policies and practices.<sup>7</sup>

Regulating judicial ethics is an effort to balance competing values: judges’ accountability in a democracy balanced against the need for independent decision-making; the need for impartiality as to the disputes that may come before judges

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1. Tom Cohen, *Victims Allege Years of Sexual Misconduct by Federal Judge*, CNN (June 3, 2009), <http://www.cnn.com/2009/POLITICS/06/03/judge.impeachment/index.html>.

2. David Ingram, *Senate Prepares for Trial of Federal Judge*, NAT’L. L.J. (Sept. 8, 2010), <http://www.alm.law.com/jsp/article.jsp?id=1202471736187&slreturn=20140228170200>; *Impeachments of Federal Judges*, FED. JUD. CTR., HISTORY OF THE FEDERAL JUDICIARY, [http://www.fjc.gov/history/home.nsf/page/judges\\_impeachments.html](http://www.fjc.gov/history/home.nsf/page/judges_impeachments.html) (last visited Mar. 10, 2014).

3. Clair Johnson, *Cebull Set to Retire May 3 as Misconduct Investigation Concludes*, BILLINGS GAZETTE (Apr. 3, 2013), [http://billingsgazette.com/news/state-and-regional/montana/judge-cebull-to-retire-on-may/article\\_64d09638-8b0e-5229-a1f3-725cc3d311fe.html](http://billingsgazette.com/news/state-and-regional/montana/judge-cebull-to-retire-on-may/article_64d09638-8b0e-5229-a1f3-725cc3d311fe.html).

4. John S. Adams, *Cebull Probe Finds More Emails: Hundreds Are Related to ‘Race, Politics, Gender’*, GREAT FALLS TRIBUNE (Jan. 18, 2014), [http://www.greatfalls.tribune.com/article/20140117/NEWS01/301170038?nclick\\_check=1](http://www.greatfalls.tribune.com/article/20140117/NEWS01/301170038?nclick_check=1).

5. 28 U.S.C. §§ 351–64 (2012).

6. S. 575, introduced April 15, 2013 by Senator Charles Grassley and HR 1203, introduced by Representative James Sensenbrenner.

7. JOHN ROBERTS, UNITED STATES SUPREME COURT, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY, 4-5 (2011) available at <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

balanced against the value to them and to society of having judges engaged in the life of the community and the law; the value of transparency as a servant of accountability balanced against judges' legitimate needs for privacy. The Code of Conduct for United States Judges advises judges that they "must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen."<sup>8</sup> That sound advice, however, is not a license for regulation of judges' affairs so unbridled as to deter responsible individuals from serving as federal judges.

The goal of this "primer" is not to discourse on how to balance these values, but rather to describe the landscape of federal judicial ethics regulation and to assess recent developments and proposals.

### I. THE PLAYERS

The major federal judicial administrative entities involved in formulating and administering ethics rules and guidelines are, first, each regional circuit's judicial council, comprising the chief circuit judge and an equal number of circuit and district judges.<sup>9</sup> Congress has assigned the councils general administrative oversight responsibilities as well as specific judicial misconduct and disability investigatory and disciplinary duties.<sup>10</sup> It has further granted them a plenary order-making authority, telling them to "make all necessary and appropriate orders for the effective and expeditious administration of justice within" their circuits.<sup>11</sup> By most accounts, the councils use this authority sparingly.

The Judicial Conference of the United States comprises the 13 chief circuit judges, 12 district judges elected by the circuit and district judges in each regional circuit, and the chief judge of the Court of International Trade. The Chief Justice is the presiding officer.<sup>12</sup> Much of the Conference's authority comes to it, indirectly, through the statutory mandate that the Administrative Office of the U.S. Courts ("A.O.") exercise its many duties under the Conference's "supervision and direction."<sup>13</sup> Congress has vested the Conference directly with a few responsibilities, such as authorizing it to prescribe rules for conducting proceedings under the Judicial Conduct Act<sup>14</sup> and to review some judicial council orders issued under the Act.<sup>15</sup> Unlike the councils, however, the Conference has no plenary order-making authority, and several years ago, it tabled a proposal to seek such authority from Congress.<sup>16</sup>

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8. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2A cmt. (2014).

9. 28 U.S.C. § 332.

10. *Id.* § 354(a).

11. *Id.* § 332 (d)(1).

12. *Id.* § 331.

13. *Id.* § 604(a).

14. *Id.* § 358.

15. *Id.* §§ 354(b), 355.

16. See Russell Wheeler, *A New Judge's Introduction to Federal Judicial Administration*, FED. JUD. CTR. 8–9 (2003).

The Conference does its work through 25 committees comprising over 200 members, almost all of them federal judges designated by the Chief Justice. Three committees are concerned with judicial ethics. The Judicial Conduct and Disability Committee oversees the administration of the Judicial Conduct Act and acts for the Conference in considering appeals of judicial council disciplinary orders.<sup>17</sup> The Codes of Conduct Committee proposes amendments to the Codes and provides judges with advice about how to comply with the Code.<sup>18</sup> The Financial Disclosure Committee reviews judges' and senior officials' annual financial disclosure reports.<sup>19</sup>

Chief circuit judges have specific investigatory responsibilities under the Judicial Conduct Act,<sup>20</sup> but chief judges at all levels—circuit, district, and bankruptcy—have also assumed informal responsibilities for regulating judicial ethics, principally in counseling, chiding, and encouraging judges to take or not take various actions.

It bears emphasis, especially for purposes of federal judicial ethics regulation, that the Supreme Court is not the federal courts' principal national administrative policymaker. In most state judicial systems, the supreme courts have the dominant administrative role.<sup>21</sup> In the federal system, the Judicial Conference plays that role, and the Conference is neither overseen by the Supreme Court, nor does it oversee the Court.

## II. POLICIES AND MECHANISMS TO DETER MISCONDUCT AND PERFORMANCE-DEGRADING DISABILITY

### A. *Constitutional Protections*

The Constitution, in Article III, Section 1, vests the judicial power of the United States in judges “who shall hold their Offices during good Behaviour” with salaries that may not be reduced during their continuance in office. The framers adopted those provisions to avoid the corruption that the Declaration of Independence attributed to the King’s making “Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.” These provisions protect the Justices of the Supreme Court, courts of appeal, district courts, and Court of International Trade. Article III’s good behavior and salary protections do not extend to bankruptcy, magistrate, and Federal Claims Court judges.

### B. *Conduct-Regulating Statutes*

Congress has supplemented the constitutional provisions that promote independent decision-making with several conduct-regulating statutes directed at high-ranking federal officials, including judges (such as annual financial disclosure

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17. 28 U.S.C. §§ 331, 356(b).

18. Discussed *infra* Part II.C.

19. Discussed *infra* Part II.B.3.

20. 28 U.S.C. §§ 352, 353.

21. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, STATE COURT ORGANIZATION 2004, tbl. 11 (2004), available at <http://www.bjs.gov/content/pub/pdf/sco04.pdf>.

requirements, discussed in Part II.B.3), along with statutes directed solely at judges, dealing, for example, with retirement (discussed in Part II.C), performance reporting (discussed in Part II.B.5), and conflicts of interest (discussed in Part III.B.4).

Most, but not all, of those provisions apply by their terms to the Supreme Court. There is little question that Congress has the authority to enact ethics regulations for the so-called lower federal judiciary. Congress created those courts pursuant to Article III's authorization of "such inferior Courts as Congress may from time to time ordain and establish."<sup>22</sup> It is an open question, though, whether Congress has the authority to regulate the behavior of the Justices. Chief Justice Roberts argued in his 2011 report that because the Constitution itself creates the Supreme Court, Congress may lack the authority to regulate its ethics. At the least, he said, "[t]he Court has never addressed whether Congress may impose . . . [ethical] requirements on the . . . Court."<sup>23</sup> On the other hand, Justice Breyer, during a Senate Judiciary Committee hearing, referred to rules on "what [income] you can take or can't take, . . . the reporting requirements, and some of the general ethics requirements—can't sit in [conflict-of-interest] cases—those are statutory, and I think they bind us, period."<sup>24</sup>

### *1. Retirement Provisions*

In the nineteenth century, Congress created the forerunners to today's judicial retirement statutes. Before their enactment, federal judges dependent on their judicial salaries sometimes served well past the age at which performance often deteriorates.<sup>25</sup> The statutes seek to deter performance-degrading disability by providing judges who have served an appropriate number of years (or who become disabled) a source of income without having to serve in full-time status when they may be unable to do so.

#### **a. Senior Status**

28 U.S.C. § 371 allows any district judge, circuit judge, or Supreme Court Justice judge to retire (to become what is called a "senior judge") under the "rule of

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22. See, e.g., Louis Virelli, III, *The (UN)constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1208, 1208 n.59 (citing long-standing Supreme Court precedent "explaining that the congressional power to 'ordain and establish' inferior federal courts 'carries with it the power to prescribe and regulate the modes of proceedings in such courts'").

23. See ROBERTS, *supra* note 7.

24. *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the Sen. Judiciary Comm.*, 112th Congress (2011); see also Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 449–50 (2013).

25. For debate on the 1869 provisions that authorized judges 70 years or older with at least ten years of service to retire on salary, see 1 DEBATES ON THE FEDERAL JUDICIARY: A DOCUMENTARY HISTORY, 1787–1875 at 256–57 (Bruce Ragsdale, ed., Federal Judicial Center 2013).

80”—which means that once the judge reaches 65, she can retire if the sum of her age and years of service is at least 80.

A judge who takes senior status and meets the annual statutory certification requirement (doing at least one-fourth the work of an active judge) receives any salary increases that come to judges in active service. Others receive the salary they were receiving when they went senior or when they were last certified. The court may decline to assign cases, or certain kinds of cases, to senior judges, and seniors may decline to take other cases.<sup>26</sup>

This provision has worked fairly well to encourage judges to give up full-time judicial work when they become eligible. Of the 1,308 federal district and circuit judges in office in mid-March 2014, 42% were on senior status.<sup>27</sup> The provision has had less of an impact with respect to the Supreme Court. Of the 12 living Justices in March 2014, only 25% were on senior status—O’Connor, Souter, and Stevens—even though 5 of the 9 active-status Justices were eligible (Breyer, Ginsburg, Kennedy, Scalia, and Thomas).<sup>28</sup> (Circuit and district judges may be more willing than Justices to take senior status because they can continue to serve, usually part-time, on their courts. Justices are ineligible to continue serving on the Supreme Court.)

#### **b. Disability**

28 U.S.C. § 372(a) authorizes any district judge, circuit judge, or Supreme Court Justice to retire from active service due to permanent disability by submitting to the president a certificate of disability signed by the Chief Justice (for Supreme Court Justices) or the chief circuit judge. A judge who retires on disability and has served ten years receives the salary of the office for life. One serving less than ten years receives half the salary of the office. Disability retirement is a fairly rare event.<sup>29</sup>

Section 372(b) authorizes a circuit judicial council to certify to the president that a judge is “permanently disabled from performing his judicial duties” even though that judge refuses to certify his or her disability. If the president agrees, he may appoint another judge, subject to Senate confirmation. The disabled judge goes to the bottom of the seniority list—the Constitution precludes removal from office except through the impeachment clause—and the vacancy created upon the disabled judge’s death or resignation stays empty. One presumes that courts or

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26. 28 U.S.C. §§ 43(b) and 132(b) provide that judges in active service “shall be competent to sit as judges of the court,” while § 371(e) clearly contemplates that senior judges may serve in a more limited capacity.

27. Calculated from a search on the Federal Judicial Center’s Biographical Directory of Federal Judges, *available at* [http://www.fjc.gov/history/home.nsf/page/research\\_categories.html](http://www.fjc.gov/history/home.nsf/page/research_categories.html).

28. Based on birth years. *Id.*

29. Based on an informal canvass of the biographies of circuit and district judges in senior status in early December 2013. *Id.*

judicial councils use their case-assignment authority<sup>30</sup> to not assign cases to judges who have been certified as disabled. The provision by its terms does not apply to the Supreme Court.

### 2. *Limitations on Outside Income, Employment, and Gifts*

The Ethics in Government Act limits the outside income and employment of high-ranking government officials (including federal judges and judicial branch officials),<sup>31</sup> as well as the gifts they may accept.<sup>32</sup> Congress authorized the Judicial Conference to issue regulations for the judicial branch, and the Conference has delegated to the Chief Justice its authority to issue such regulations for the Court.<sup>33</sup> Chief Justice Roberts has said that in “1991, the Members of the Court adopted an internal resolution in which they agreed to follow the Judicial Conference regulations as a matter of internal practice.” He cautioned, though, that the Court had not spoken on the regulations’ legal applicability to the Court.<sup>34</sup>

### 3. *Financial Disclosure*

An Ethics in Government Act provision requires all high-salaried government employees to file annual financial reports each May, covering aspects of their finances and gifts received in the previous calendar year.<sup>35</sup> Justices and judges file them with their clerks of court and with the Judicial Conference Financial Disclosure Committee—apparently the only instance of the Conference’s exercising administrative jurisdiction over the Justices. The reports are available for inspection at the A.O. in Washington, but they are not posted on the federal judiciary website, and judges, when notified of requests to review their reports, may redact statutorily required information if the Disclosure Committee agrees that release of the information could endanger the judges or their families.<sup>36</sup>

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30. See 28 U.S.C. § 137 (2012) (providing that the judges of each district court may provide for the division of business by rules and orders, and in the event the judges are unable to agree, the judicial council will make the appropriate orders).

31. Citations to various statutory restrictions on outside earned income, honoraria, and employment, as they pertain to the federal judiciary, are in section 1010 of the Judicial Conference’s implementing regulations. *Outside Earned Income, Honoraria, and Employment*, in 2 GUIDE TO JUDICIARY POLICY § 1010, (last revised Dec. 14, 2010), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02C-Ch10.pdf>.

32. Citations to various statutory restrictions on gifts as they pertain to the federal judiciary are in section 620 of the Judicial Conference’s implementing regulations. *Gifts*, in 2 GUIDE TO JUDICIARY POLICY, *supra* note 31, at § 620.

33. See *Outside Earned Income, Honoraria, and Employment*, in 2 GUIDE TO JUDICIARY POLICY, *supra* note 31, at §1020.50(b); *Gifts*, in 2 GUIDE TO JUDICIARY POLICY *supra* note 31, at § 620.65(a).

34. See ROBERTS, *supra* note 7, at 6–7.

35. See *supra* notes 6–7.

36. See *Filing Instructions for Judicial Officers and Employees*, COMMITTEE ON FINANCIAL DISCLOSURE (2010) (last visited Apr. 10, 2014), available at <http://www.judicialwatch.org/files/documents/2011/2010judicialfinancialdisclosureinstructions.pdf>.

The Act authorizes the Attorney General to bring a civil action against any individual who “knowingly and willfully” fails to file a report or fails to report any required information and directs the report-receiving entities, including the Conference, to refer to the Attorney General anyone whom they have “reasonable cause to believe has . . . willfully failed to file information required to be reported.”<sup>37</sup> In 2011, Justice Clarence Thomas released amended financial disclosure forms after interest groups pointed to several years of his filings that omitted required information on the source of his wife’s income (her employment by conservative policy organizations was well known) and a possible error in not reporting certain travel expenses; the interest groups petitioned the Judicial Conference to refer the matter to the Justice Department.<sup>38</sup> Some House Democrats made the same request.<sup>39</sup>

Informal inquiries that I undertook at the time uncovered no instance of the Conference’s referring any covered employee to the Attorney General. The Conference took no action on the request concerning Justice Thomas (at least none that surfaced publicly), likely concluding that even though the disclosure forms are not very complicated for those with modest investments, mistakes occur that fall short of the statute’s “willfully failed” standard. Furthermore, consider the precedent a referral would create: Encouraging a group of lower court judges to refer a Justice to the Attorney General for civil prosecution creates the potential for sucking them into the partisan skirmishes over the Justices’ behavior. And the Attorney General hardly needs the headache of deciding whether to pursue a civil action against a Justice, at least for what was likely an unintentional oversight.

Another form of financial disclosure, imposed under the Conference’s statutory authority to regulate gifts, concerns judges who receive reimbursement from sponsors of nongovernmental education programs they attend. The regulation requires them to disclose, on their courts’ websites, the program(s) attended and requires providers to disclose the sources of funds for the programs.<sup>40</sup> These requirements stem from controversy in the last decade and earlier over judges’ attendance at what some legislators and interest groups regarded as ideologically oriented educational programs.<sup>41</sup> A desire to stave off the proposed Federal Judiciary Ethics Reform Act of 2006<sup>42</sup> probably led to adoption of the policy. There have been

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37. 5 U.S.C. § 104 (2012).

38. Eric Lichtblau, *Thomas Cites Failure to Disclose Wife’s Job*, N.Y. TIMES, Jan. 24, 2011, at A16.

39. Julian Pecquet, *Dems Want Probe of Justice Thomas as Health Law Ruling Looms*, HILL (Sept. 29, 2011), <http://thehill.com/blogs/healthwatch/legal-challenges/184693-dems-raise-pressure-on-justice-thomas-as-high-court-ponders-ruling-on-health-law>.

40. See *Privately Funded Seminars Disclosure System*, U.S. COURTS, <http://www.uscourts.gov/RulesAndPolicies/PrivateSeminarDisclosure.aspx> (last visited Mar. 10, 2014).

41. A sense of the controversy is provided by Abner Mikva, *Judges, Junkets, and Seminars*, 28 LITIGATION 3 (2002), and A. Raymond Randolph, *Private Judicial Seminars: A Reply to Abner Mikva*, 29 LITIGATION 3 (2002).

42. 109th Congress, 2d Session, S. 2202 (2006).

more recent analyses of attendance at private seminars,<sup>43</sup> even though one of the main providers has ended its judicial education programs.<sup>44</sup>

#### 4. *Judicial Disqualification Statutes*<sup>45</sup>

Three years after Congress created the federal judiciary,<sup>46</sup> it enacted the first statute regulating judicial ethics, which it has amended over the years to what is now the main judicial disqualification statute, 28 U.S.C. § 455.<sup>47</sup> A canon of the Code of Conduct, discussed in Part II.C of this Article, repeats the disqualification statute almost verbatim.<sup>48</sup> Three other disqualification statutes are on the books but are invoked infrequently.<sup>49</sup>

Section 455 requires “[a]ny justice, judge [including a bankruptcy judge] or magistrate judge” to “disqualify himself” in two situations. Section (a) (waivable under section (e)) requires disqualification “in any proceeding in which his impartiality might reasonably be questioned.” Section (b) (not waivable) identifies five circumstances requiring disqualification: (1) personal bias or prejudice concerning a party or knowledge of evidentiary facts; (2) involvement in the matter as a material witness or when in private practice (involvement by the judge or by a lawyer “with whom he previously practiced law”); (3) involvement in the matter as a government employee; (4) a financial interest in the matter by the judge or a spouse or minor child; and (5) involvement in the proceeding by the judge, spouse, or relative in the third degree of relationship. Section (c) defines the disqualifying “financial interest” in part as “ownership of a legal or equitable interest, however small”—in other words, a single share of stock. Section (f), though, in the interest of judicial efficiency, excuses from disqualification a judge who becomes aware of a relevant financial interest only after the judge has devoted “substantial judicial time . . . to the matter,” and the judge divests himself or herself of the interest.

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43. See, e.g., Chris Young, Reity O’Brien & Andrea Fuller, *Corporations, Pro-Business Non-Profits Foot Bill for Judicial Seminars*, CENTER FOR PUBLIC INTEGRITY (July 13, 2013), available at <http://www.publicintegrity.org/2013/03/28/12368/corporations-pro-business-nonprofits-foot-bill-judicial-seminars>.

44. David Ingram, *Hundreds of Trips: Who’s Paying?*, NAT’L L.J. (October 17, 2011), <http://www.njlawjournal.com/id=1202519899372/Hundreds-of-trips:-who's-paying?-&slreturn=20140315185700>.

45. These statutes and associated case law are analyzed in CHARLES GEYH, *JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW* (2d ed. 2010), but almost all of the treatise concerns 28 U.S.C. § 455 (2012).

46. Judiciary Act of 1789, 1 Stat 73.

47. For the evolution of § 455, see GEYH, *supra* note 45, at 5–6; Virelli III, *supra* note 22, at 1185–91.

48. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(C) (2014).

49. 28 U.S.C. § 144 (authorizing parties to seek disqualification of a district judge by filing an affidavit alleging actual bias); *id.* § 47 (disqualifying court of appeals judges from sitting on appeals from decisions they rendered on a district court); *id.* § 2106 (allowing, essentially, an appellate court to remand a case to a different district judge for further proceedings if the court doubts the impartiality of the original judge).

### a. Disqualification Controversies

The statute directs judges to recuse themselves when they believe the statute requires it. But parties may also request disqualification and seek a mandamus order from a higher court if the judge declines. The courts of appeals permit interlocutory appeals in such situations.<sup>50</sup> On appeal after judgment, though, litigants may ask an appellate court to vacate the decision, claiming that the judge sat on the case despite a recusal-requiring conflict of interest, especially one that came to light after the conclusion of the underlying proceedings. An extensive body of judicial decisions has applied the disqualification statute in specific circumstances.<sup>51</sup> Disqualification controversies bubble up occasionally, often involving financial holdings, either when discovered by journalists;<sup>52</sup> during the course of litigation, sometimes with the appearance of tactical moves;<sup>53</sup> or during nomination battles.<sup>54</sup>

In any event, their disclosure reports are of limited help to some substantially invested judges in identifying possible conflicts of interest. Nor are they always of help to lawyers concerned that the judge assigned to their case may have a conflict; the reports, while publicly available, are not online, and they are subject to redaction by the judge. Moreover, a disclosure in, say, May 2014 of finances in the calendar year 2013 will not disclose any changes in judges' portfolios occurring after December 31, 2013. Thus, the Judicial Conference, in 2006, after news stories about judges participating in cases in which they should have recused themselves, requested the circuit councils to order each court to use software that keeps a list of each judge's current financial holdings that court staff can screen to flag potential conflicts of interest.<sup>55</sup> A few district courts post the judges' "conflicts" (i.e., stock holdings) on their public websites.<sup>56</sup>

Some have asked whether parties should have to prove that a judge has a conflict. Several years ago, after numerous reports about federal judicial conflicts

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50. GEYH, *supra* note 45, at 97.

51. *See, e.g., id.*

52. *See, e.g.,* Jennifer Gollan & Shane Shifflet, *Federal Judge's Rulings Favored Companies in Which He Owned Stock*, CAL. WATCH (Nov. 20, 2012), <http://californiawatch.org/money-and-politics/federal-judge-s-rulings-favored-companies-which-he-owned-stock-18680>.

53. *See e.g.,* Kent Faulk, *Alabama Power Says Federal Judge Should Not Recuse Herself from Clean Air Lawsuit*, AL.COM (April 10, 2012 12:42 PM), [http://blog.al.com/spotnews/2012/04/alabama\\_power\\_says\\_federal\\_jud.html](http://blog.al.com/spotnews/2012/04/alabama_power_says_federal_jud.html).

54. Will Evans, *Controversial Bush Judge Broke Ethics Law*, SALON (May 1, 2006), [http://www.salon.com/2006/05/01/boyle\\_6/](http://www.salon.com/2006/05/01/boyle_6/); Will Evans, *Bush Withdraws Nominees*, SALON (Mar. 8, 2006), [http://www.salon.com/2006/05/01/boyle\\_6/](http://www.salon.com/2006/05/01/boyle_6/).

55. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (Sept. 19, 2006).

56. *See, e.g.,* *Judges Information*, U.S. DIST. CT. N. DIST. OF IOWA, <http://www.iaud.uscourts.gov/e-web/home.nsf/65944fcb56773c56862573a30055c4f3/b722f1265f569f3a862573a3006983fb?OpenDocument> (last visited Mar. 10, 2014) (listing, under each judge, "Conflicts"); *Recusal List for Judges*, U.S. DIST. CT. S. DIST. OF W.VA., <http://www.wvud.uscourts.gov/recusal-list-judges> (last viewed Mar. 10, 2014).

and a 5–4 Supreme Court decision involving a state supreme court justice who declined to disqualify himself in a case involving a party who had contributed heavily to his campaign,<sup>57</sup> a House Judiciary subcommittee considered taking federal judges' recusal decisions partially out of their hands by allowing each party in the case one automatic disqualification, akin to some states' provisions for peremptory challenges of judges.<sup>58</sup> The Judicial Conference resisted the proposal, on the practical grounds that finding replacement judges in small districts would be difficult and on the policy grounds that giving parties the right of automatic disqualification was akin to permitting judge-shopping.

### b. Supreme Court Recusals

There has also been controversy over the recusal of Supreme Court Justices, both as to financial holdings and nonfinancial matters, such as public statements. The most visible recent example of such controversy surfaced in 2011 concerning the litigation over the Affordable Care Act. Liberals called for Justice Thomas to recuse himself because his wife was active in groups opposing the law, and conservatives pressed for Justice Kagan to recuse herself because, as Solicitor General, she may have had brief exposure to the administration's efforts to plot its litigation strategy.<sup>59</sup> Given the anticipated likelihood of a 5–4 ruling, both demands had a tactical taint.<sup>60</sup>

But these have hardly been the only recent allegations of possible conflicts. Journalists and others have alleged, for a few examples, possible conflicts stemming from a Justice's speaking too freely about his views on the rights of military detainees<sup>61</sup> (or later, litigation over gay rights);<sup>62</sup> Justices' serving as paid faculty at a law school whose dean was a frequent Supreme Court litigator;<sup>63</sup> attendance at the annual "Red Mass" at Washington's Cathedral of St. Matthew, where the archbishop

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57. Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).

58. David Ingram, *Federal Judges Push Back Against Recusal Proposals, Congress Considers Revising Rules on Judge Disqualifications*, NAT'L L.J. (Dec. 14, 2009), <http://www.law.com/jsp/article.jsp?id=1202436291667&slreturn=20130924141158>.

59. The press was full of reporting about these calls. See, e.g., Pecquet, *supra* note 39; Jerry Seper, *Probe Urged of Kagan's Health Care Role*, WASH. TIMES (Jun. 30, 2011), <http://www.washingtontimes.com/news/2011/jun/30/lawmakers-seek-probe-elena-kagan-health-care-work/print/>

60. *But see*, e.g., Eric Segal, *A Liberal's Lament on Kagan and Health Care*, SLATE (Dec. 8, 2011) [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/12/obamacare\\_and\\_the\\_supreme\\_court\\_should\\_elena\\_kagan\\_recuse\\_herself\\_single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/12/obamacare_and_the_supreme_court_should_elena_kagan_recuse_herself_single.html).

61. Michael Isikoff, *Supreme Court: Detainees' Rights—Scalia Speaks His Mind*, NEWSWEEK (April 3, 2006), <http://www.informationclearinghouse.info/article12511.htm>.

62. Peter Hardin, *To Another Impeachment Call, Just Say No*, GAVELGRAB (December 14, 2012), <http://www.gavelgrab.org/?p=49518>.

63. Tony Mauro, *High Court Advocate Ken Starr Is Justices' Summer Employer*, LEGAL TIMES (Mar. 27, 2007), [http://www.law.com/jsp/article.jsp?id=1174912592026\\_](http://www.law.com/jsp/article.jsp?id=1174912592026_)

commented on various litigation topics important to the Catholic Church;<sup>64</sup> heavily discounted memberships at private clubs;<sup>65</sup> attending, as featured guests, a dinner funded in part by the law firm of a key attorney in the challenge to the Affordable Care Act and in part by a large pharmaceutical manufacturer;<sup>66</sup> a Justice's attending and having named after her a lecture series sponsored by the NOW Legal Defense Group;<sup>67</sup> attending a fundraising dinner for a conservative publication (possibly problematic because the Justice had previously given a keynote address for the event);<sup>68</sup> trips funded by the Federalist Society and the American Civil Liberties Union;<sup>69</sup> accepting substantial gifts from a donor with a likely interest in the outcome of Supreme Court decisions, who also contributed to projects of manifest interest to the Justice;<sup>70</sup> and a Justice's son clerking on a prominent federal appeals court.<sup>71</sup>

As a practical matter, application of most ethics statutes to the Supreme Court is fairly straightforward. Both law and practicality, however, make more complicated the application of the judicial disqualification statute. Some have argued that Congress has no authority to say when the Justices must disqualify themselves, arguing that the "judicial power of the United States" as it is vested in the Supreme Court includes the sole authority to make recusal decisions.<sup>72</sup> Others argue that such regulation is well within Congress's authority, citing the Necessary and Proper Clause's authorization for Congress to bring the "Supreme Court into being," which it did, starting with the first Judiciary Act.<sup>73</sup> Subsequent statutes have defined the Court's term, its size, the Justices' oath of office, their former circuit-riding obligations, and the Court's support offices (the Marshal, Clerk of Court, Reporter of Decisions, and Librarian).<sup>74</sup>

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64. Marcy Hamilton, *Did the Six Supreme Court Justices Who Chose to Attend the 54th Annual "Red Mass" Exercise Bad Judgment?*, FIND LAW (Oct. 3, 2007), <http://www.kreplaw.com/2007/10/re-marci-hamilton-did-six-supreme-court.html>.

65. Terry Carter, *University Club 'Public Service' Discount for Justices Causing a Stir*, A.B.A. J. (Mar. 10, 2009), [http://www.abajournal.com/news/article/university\\_club\\_public\\_service\\_discount\\_for\\_justices\\_causing\\_a\\_stir/](http://www.abajournal.com/news/article/university_club_public_service_discount_for_justices_causing_a_stir/).

66. James Oliphant, *Scalia and Thomas Dine with Healthcare Law Challengers as Court Takes Case*, L.A. TIMES (Nov. 14, 2011), <http://articles.latimes.com/2011/nov/14/news/la-pn-scalia-thomas-20111114>.

67. See Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 533 n.7 (2005).

68. Jeff Shesol, *Should the Justices Keep Their Opinions to Themselves?*, N.Y. TIMES, June 28, 2011, at A23.

69. Editorial, *The Justices' Junkets*, WASH. POST (Feb. 20, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002961.html>.

70. Mike McIntire, *Friendship of Justice and Magnate Puts Focus on Ethics*, N.Y. TIMES, June 18, 2011, at A1.

71. *Justice Alito's Son's Clerkship Sparks Ethics Discussion*, SBM BLOG (June 3, 2013 10:21 AM), <http://sbmblog.typepad.com/sbm-blog/2013/06/justice-alitos-sons-clerkship-sparks-ethics-discussions.html#sthash.8SGkKBZ7.dpuf>.

72. See, e.g., Virelli, *supra* note 22, at 1208.

73. Judiciary Act of 1789, 1 Stat 73.

74. See Frost, *supra* note 24.

Others have asked whether the recusal decision should be left solely to the Justice in question, whether requested by a party or not. Appellate review of a Justice's refusal to recuse him or herself when requested to do so by one of the parties is not available for the obvious reason that the United States has no appellate court higher than the Supreme Court.

Another question is whether the Justices should weigh the factors counseling recusal differently than do other federal judges. The Supreme Court does almost all of its business en banc, so when a Justice steps aside, no replacement Justice is available, and Congress has made no provision for temporary assignment of other judges or retired Justices to the Court. If, after a recusal, the eight remaining Justices split on the resolution, the decision below stands and the considerable energy by lawyers and the Court to resolve what the Court regarded as a question needing national resolution essentially goes to waste.

Justice Breyer described the situation to the Senate Judiciary Committee:

When I was on the court of appeals, if I had a close question, I'd take myself out of the case. They'll put someone else in. One judge is as good as another, frankly. But if I take myself out of the case in the Supreme Court that could change the result, because there's no one else to put in. And . . . it's possible [the parties] could . . . try to choose [their] panel . . . [by removing a Justice.] So what that means is that there's an obligation to sit, where you're not recused, as well as an obligation to recuse. And sometimes those questions are tough and I really have to think through and I have to make up my own mind. Others can't make it up for me. And that's a . . . very important part, I think, of being an independent judge.<sup>75</sup>

Some facts about recent recusals are in the table below, which is based on a review of the online syllabi on the Supreme Court's website for five recent terms (October Terms 2008–2012).<sup>76</sup>

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75. *Considering the Role of Judges Under the Constitution of the United States: Hearing of the Senate Judiciary Committee*, 112th Cong. 27–28 (2012) [hereinafter *Considering the Role of Judges*] (statement of Stephen Breyer, Associate Justice of the Supreme Court of the United States).

76. *See generally Opinions*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/opinions/opinions.aspx> (last visited Mar. 9, 2014).

## RECUSALS, OTs 08–12

	2008	2009	2010	2011	2012	TOTAL
Roberts			1	1		2
Stevens		1				1
Kennedy				1		1
Breyer		1			1	2
Alito		2			1	3
Sotomayor		6	3	1	1	11
Kagan			29	4	2	35
TOTAL	0	10	33	7	5	55

The 417 cases that the Court accepted for review saw 55 recusals (in no case did more than a single Justice step aside). The number of recusals per term varied from none to 33, but 29 of those 33 were by Justice Kagan, who as Solicitor General had had contacts with many cases that went on to the Supreme Court; 3 more were by Justice Sotomayor, all involving cases that came from the Second Circuit court of appeals and with which we can presume she had had some contact while on that court. The next highest number, 10 in the 2009 term, included 6 by Justice Sotomayor (all in Second Circuit cases), 2 by Justice Alito (both from his former court in the Third Circuit), and 1 by Justice Breyer, from the Ninth Circuit, in which his brother may have been involved as a district judge. We do not know, of course, whether recusal in other cases might have been appropriate, but the Justice in question decided against recusal to avoid the four–four tie situation.

As to tie votes, the next table shows that 25 of the 55 cases with recusals were decided 8–0; 18 more were 7–1 or 6–2; 10 were 5–3. Two produced 4–4 ties, both in the 2010–2011 term and both involving Justice Kagan’s recusals.<sup>77</sup>

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77. *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011) (mem.); *Costco Wholesale Corp. v. Omega, S. A.*, 131 S. Ct. 565 (2010) (mem.).

## VOTE BREAKDOWN IN CASES WITH RECUSALS, OT 08–12

	2008	2009	2010	2011	2012	TOTAL
8–0		3	18	4		25
7–1		4	3		3	10
6–2			7	1		8
5–3		3	3	2	2	10
4–4			2			2
Total		10	33	7	5	55

This statement, though, is based simply on the count of Justices who joined the majority opinion or at least concurred in the judgment. It does not account for tie votes on particular questions implicated in the case. Justice Stevens, for example, recused himself prior to argument in a takings case involving Florida beachfront property, evidently because he learned that he owned property in an area similar to that involved in the litigation. The court was 8–0 in affirming the Florida Supreme Court but split on whether a judicial decision can constitute a taking.<sup>78</sup>

A fourth aspect of Supreme Court recusals is what Justices say or do not say about their recusal actions. Usually, they say nothing and the fact of recusal appears as a docket notation, confirmed by the recused Justice’s absence from oral argument and by the published opinions’ statements of participation. Not stating the reasons for recusals fuels curiosity in the press<sup>79</sup> that covers the court and from attorneys who argue before it. More broadly, some argue it “imperils [the Justices’] accountability and legitimacy,” especially because the Court regularly offers reasons for its other collective decisions.<sup>80</sup>

In the rare cases when a Justice honors an equally rare petition that he or she step aside, even if the Justice says nothing, it is sometimes reasonable to infer the reason from the petition, as when the appellant in the case involving the Pledge of Allegiance’s “under God” phrase petitioned for Justice Scalia’s recusal after he

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78. See *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Env'tl. Prot.*, 560 U.S. 702 (2010); see also, Tony Mauro, *Stevens' Recusal Makes Difference in Florida Property Ruling*, LEGAL TIMES (June 17, 2010, 2:33 PM), <http://legaltimes.typepad.com/blt/2010/06/stop-the-beach-the-difference-a-recusal-can-make-.html>.

79. See, e.g., Tony Mauro, *Why Does Justice Stevens Recuse in Agent Orange Cases*, LEGAL TIMES (Mar. 2, 2009, 2:45 PM), <http://legaltimes.typepad.com/blt/2009/03/why-does-justice-stevens-recuse-in-agent-orange-cases.html>; Mike Scarcella, *Disclosure Sheds Light on Justice Alito's Recusals*, LEGAL TIMES (Jul. 17, 2013, 4:13 PM), <http://legaltimes.typepad.com/blt/2013/07/disclosure-sheds-light-on-justice-alitos-recusals.html>.

80. Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535, 1552 (2012).

commented publicly that the courts were not the proper forum to resolve the matter.<sup>81</sup>

Reasons for other recusals can often be reasonably inferred. Of the 55 recusals in the 5 most recent terms, all but 5 involved either former Solicitor General Kagan; former circuit judges Sotomayor (in cases from the Second Circuit) and Alito (cases from the Third Circuit); or Justice Breyer (cases from the Ninth Circuit in which, we can assume, his brother, a Northern District of California judge, may have participated). And one of the five, in which Justice Stevens recused, involved the Florida beachfront property described earlier.<sup>82</sup> The four others<sup>83</sup> probably involved investments, but that is speculation. If a Justice recuses and the record reveals that a relative is working on the case as a lawyer or is closely associated with it, chances are that recusal is to comply with a statement of policy the Justices announced in 2003 concerning recusal in such cases and that at least some more recent appointees have said they would follow.<sup>84</sup>

One exception to the no-comment practice was then-Associate Justice Rehnquist's explanation for why he refused to step down when asked to do so by a certiorari-seeking respondent who had sued the Secretary of Defense over alleged surveillance of citizens. As an Assistant Attorney General, Rehnquist had testified about similar programs, but not the one at issue in the case. Rehnquist said, in an oft-cited memorandum order, that he declined to recuse himself because he believed the petitioner was acting on an erroneous understanding of the disqualification statute, not a misunderstanding of the facts of the case, which, he said, would be pointless to review absent an adversary context. He emphasized that he did not believe Justices' offering of such explanations "would be desirable or even appropriate in any but the peculiar circumstances present here."<sup>85</sup>

More recently, Justice Scalia declined, initially without comment, a recusal request by one of the parties—echoed by calls in the press—in a case involving a Bush administration energy policy group headed by Vice President Cheney, whom Scalia had recently joined on a hunting trip. After being battered in the press, Scalia issued a lengthy opinion explaining why the circumstances of the trip did not require recusal and asserting that, given the Washington, D.C. social scene, it was

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81. See Suggestion for Recusal of Justice Scalia, *Newdow v. United States*, App. No. 03-7 (Sept. 5, 2003), available at [http://supreme.lp.findlaw.com/supreme\\_Court/briefs/02-1624/03-7.recuse.pdf](http://supreme.lp.findlaw.com/supreme_Court/briefs/02-1624/03-7.recuse.pdf).

82. See generally *Stop the Beach Renourishment, Inc.*, 560 U.S. at 702; see also Mauro, *supra* note 79.

83. *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013) (Alito, J., recused); *RadLAX Gateway Hotel LLC v. Amalgamated Bank*, 131 S. Ct. 2065 (2012) (Kennedy, J., recused); *Credit Suisse Sec. v. Simmonds*, 131 S. Ct. 1414 (2012) (Roberts, C.J., recused); *Microsoft Corp. v. ISI Limited P'ship*, 131 S. Ct. 647 (2010) (mem.) (same).

84. See Lyle Denniston, *Roberts' Recusal Policy*, SCOTUSBLOG (Sept. 30, 2005, 4:54 PM), <http://www.scotusblog.com/2005/09/roberts-recusal-policy/>.

85. *Laird v. Tatum*, 409 U.S. 824, 824 & n.1 (1972).

impossible for the Justices to avoid contact with government officials who may be implicated in litigation.<sup>86</sup>

Needless to say, it would be highly unusual for a judge or Justice to respond to recusal demands by those not party to the litigation. Despite all the public calls for Justices Thomas or Kagan to recuse themselves in the Affordable Care Act case, neither said anything about it publicly.

### c. Proposals Regarding Supreme Court Recusals

#### i. H.R. 862

A 2011 bill—H.R. 862—would have required a Justice who recuses him- or herself to explain the reasons for the recusal on the record; required a Justice who denies a recusal motion to disclose the reasons for the denial; and required the Judicial Conference to create a “process” by which sitting or retired judges or Justices would hear appeals from unsuccessful recusal motions and “decide whether the justice . . . should be so disqualified.”<sup>87</sup> The bill (which had other provisions discussed in the next section)<sup>88</sup> was preceded by an open letter to Congress by over 100 law professors seeking legislation along the lines of the subsequently introduced bill.<sup>89</sup>

The legislation’s passage was never likely, but it generated a fair amount of commentary, in part because it came during the calls for Justices Thomas and Kagan to step aside in the then-brewing health care litigation, and in part because critics were pointing to what they regarded as other examples of ethical sloppiness on the part of some Justices, such as the those referenced in Part II.B.4.b.

H.R. 862’s recusal provisions may be seen as a specific effort to realize a more general proposal offered in 2005 by Professor Amanda Frost to establish a recusal procedure that reflects the key elements of good litigation. The procedure, she wrote, should enable litigants to frame the recusal question, provide an impartial decision-maker, encourage the challenged judge to respond to a disqualification motion, and require the judge to explain a recusal decision.<sup>90</sup>

Although Professor Frost’s itemization of these elements was well articulated, H.R. 862 (whether or not its drafters had her itemization before them) is instructive as to the difficulty of writing well-founded general concerns into specific legislation. The bill would have created what it called a “Process for Determining Recusal of Supreme Court Justices.” In fact, though, it would have created a judicial

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86. Memorandum from Justice Scalia on *Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 541 U.S. 913 (2004) (No. 03-475) (Justice Scalia’s recusal was requested by the Sierra Club, a respondent in another case consolidated with the principal case).

87. Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Congress (2011).

88. See Parts II.C & III.C.6.b.

89. Letter from Mark N. Aaronson, Professor of Law, Univ. of Cal. Hastings Coll. of Law et al., to Senator Patrick Leahy et al. (Mar. 17, 2011), available at [http://www.afj.org/wp-content/uploads/2011/03/judicial\\_ethics\\_sign\\_on\\_letter.pdf](http://www.afj.org/wp-content/uploads/2011/03/judicial_ethics_sign_on_letter.pdf).

90. See Frost, *supra* note 67, at 239–74.

body to consider the petitioner's arguments, similar to how an appellate court considers an argument that a district judge should not have denied a recusal petition. Some have argued that a judicial body of lower court judges would most likely violate the Constitution's Article III mandate that there be "one Supreme Court."<sup>91</sup> Others, however, have suggested that an individual Justice's recusal decision is not an action of the entire Supreme Court but of an individual Justice, and that a review of that individual action would not be a review of the Court's decision, even if it would be awkward policy at best.<sup>92</sup>

Some have proposed vesting the review decision in the entire Court,<sup>93</sup> and argue that a Conference-established "process" in which only active Justices participated clearly would not violate the "one Supreme Court" mandate. To say the least, we have little precedent on the "one Supreme Court" language. Chief Justice Charles Evans Hughes, however, in challenging President Roosevelt's 1937 proposal to add Justices to the Court, objected to the idea that the Court could sit in divisions if the extra Justices made it too large to sit as a single body. The "Constitution," he said, "does not appear to authorize two or more Supreme Courts or two or more parts of a Supreme Court functioning in effect as separate courts."<sup>94</sup> Hughes's view, though, is hardly the only word on the subject.<sup>95</sup>

Consider, however, the practical problems if H.R. 862's court were to survive a constitutional challenge: In the first place, only parties to the litigation may move for a recusal, and Supreme Court litigants rarely do. That may be because there is no transparent process for deciding the motions, but more likely because frequent Supreme Court litigators are reluctant to create satellite issues or appear to question a Justice's integrity. (For all the publicity surrounding calls in the press, in Congress, and among interest groups for Justices Thomas and Kagan to step aside in the health care litigation, apparently none of the many parties in the combined cases filed disqualification petitions.) So the bill, if enacted, would put in place a procedure that would almost never be invoked. That could be a serious problem to the degree it would augment the frustrations of the many Court observers who believe the Justices sit on some cases where they should not.

But when a party moved for recusal and the Justice declined, the H.R. 862 court would have to balance the motion against what some see as a judge's "duty to sit." Congress may have intended to eliminate the "duty to sit" requirement in an

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91. See Russell Wheeler, *What's So Hard About Regulating Supreme Court Justices' Ethics?—A Lot*, BROOKINGS INST. (Nov. 28, 2011), <http://www.brookings.edu/research/papers/2011/11/28-courts-wheeler>.

92. Amanda Frost, *Regulating the Supreme Court Justices' Ethics: A Response to Russell Wheeler*, ACSBLOG (Mar. 25, 2011), <http://www.acslaw.org/acsblog/regulating-the-supreme-court-justices-ethics-a-response-to-russell-wheeler>.

93. See, e.g., Jeffrey W. Stemple, *Rehnquist, Recusal, and Reform*, 53 BROOKLYN L. REV. 589, 644 (1987).

94. *Reorganization of the Federal Judiciary: Hearings Before the S. Comm. on the Judiciary*, 75th Cong. 488, 491 (1937) (statement from C.J. Charles Evans Hughes to Sen. Burton K. Wheeler).

95. See, e.g., Chris Guthrie and Tracy George, *Remaking the United States Supreme Court in the Courts of Appeals' Image*, 58 DUKE L. J. 1439 (2009).

amendment to the disqualification statute.<sup>96</sup> The Justices, though, have a special problem, as Justice Breyer explained, because there is no provision for a substitute Justice. It is one thing for an individual Justice to balance those considerations, but quite another for lower court judges on the H.R. 862 court to do it for them, or even for some or all of the other Justices to do so, creating inevitable suspicions of forum manipulation. Finally, H.R. 862 was aimed at recusal motions filed at the outset of the case in the Supreme Court.<sup>97</sup> But what if, after the decision, additional evidence of a possible conflict emerged? In the lower courts, parties may also raise disqualification challenges after the case's disposition. Thus, on H.R. 862's logic, should not the moving party in the Supreme Court be able to renew the recusal motion before the special court, trying to get the decision vacated and, in the process, add a new complication to constitutional adjudication?

ii. Applying the Code of Conduct to the Justices

H.R. 862 would also, in section 2(a), have applied the Code of Conduct for United States Judges to the Supreme Court. This Article discusses this proposal in the next section, which describes and analyzes the Code.<sup>98</sup> However, a bill in the 113th Congress, H.R. 2902 (and its Senate companion, S. 1424),<sup>99</sup> would simply have directed the Justices to adopt a code of conduct for themselves, based on the Judicial Conference's Code, including the Canon that basically repeats the disqualification statute verbatim.<sup>100</sup> It is hard to see how such a bill, if enacted, would do anything to change the Supreme Court recusal situation. The Court is already covered by the disqualification statute, although there is some disagreement concerning whether Congress has authority to bind the Justices.

iii. Temporary Assignment of Retired Justices

In 2011, Senate Judiciary Committee chair Patrick Leahy introduced legislation to allow retired Justices to fill in for recused Justices, in part to avoid the specter of four–four decisions.<sup>101</sup> (He evidently did so partly at retired Justice Stevens's suggestion.)<sup>102</sup> The proposal did not go very far and was criticized for its impracticality, and, to a degree, as a solution in search of a problem.<sup>103</sup> (Recall that of the 55 recusals in the 2008 through 2012 October Terms, only 2 produced ties.)

iv. Use of “Congress’ Indirect Constitutional Tools”

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96. See generally Frost, *supra* note 67.

97. Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Cong. § 3(b) (2011).

98. See Part II.C.

99. Both bills are titled the Supreme Court Ethics Act of 2013.

100. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3D (2014).

101. Lisa McElroy & Michael Dorf, *Coming off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81, 83 n.4 (2011).

102. *Id.*

103. *Id.*

Professor Louis Virelli has argued that although Congress lacks the constitutional authority to regulate Supreme Court recusal, Congress could still use other tools to encourage more considered and transparent practices.<sup>104</sup> Those tools include impeachment or the threat of it, procedural regulations (such as an admittedly unenforceable requirement for Justices to give reasons for a failure to recuse), screening Supreme Court nominees for their views on recusal, real or threatened retaliation through the annual appropriations process, and oversight investigations. He concedes, however, that “each of these constitutional approaches is limited in its scope and potential effectiveness with regard to individual recusal decisions.”<sup>105</sup> Beyond that, impeachment threats, funding reductions, even more explosive confirmation wars, and oversight investigations of alleged conflicts of interest will strike many as fueling interbranch contentiousness to deal with a comparatively minor problem.

##### 5. Internal and External Performance Monitoring

Chronic delay in resolving cases can be a form of judicial misconduct.<sup>106</sup> 28 U.S.C. § 604(a)(2) directs the A.O. to “transmit semiannually to the chief judges of the circuits, statistical data and reports as to the business of the courts.” Chief judges, judicial councils, and courts can use these reports to monitor performance and promote peer pressure on laggard judges.

The Office also publishes extensive reports based on these data, in particular, *Federal Court Management Statistics* and *Judicial Business of the United States Courts*.<sup>107</sup> These reports contain data for individual courts but not for individual judges. A 1990 statute<sup>108</sup> added a new public reporting requirement that directs the A.O. to publish reports twice a year, showing—for each district, magistrate, and bankruptcy judge—the number of motions and the number of bench trials pending more than six months, and the number of cases not terminated within three years of filing.<sup>109</sup>

The provisions have been at least modestly successful in encouraging judges to keep their dockets current and getting the press to spotlight judges with serious backlogs. An empirical study of civil case processing using federal court electronic docket entries found marked upticks in motions dispositions in the weeks

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104. Virelli, *supra* note 80, at 1587–99.

105. *Id.*

106. See RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS R. 3(h)(3)(B) (2008).

107. *Federal Court Management Statistics*, U.S. COURTS, <http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx> (last visited Mar. 28, 2014); *Judicial Business of the United States Courts*, U.S. COURTS, <http://www.uscourts.gov/Statistics/JudicialBusiness/2013.aspx> (last visited Mar. 28, 2014).

108. 28 U.S.C. § 476 (2012) (Enhancement of judicial information dissemination).

109. *Civil Justice Reform Act Report*, U.S. COURTS, <http://www.uscourts.gov/Statistics/civilJusticeReformActReport.aspx> (last visited Mar. 28, 2014) (providing links to the last seven Civil Justice Reform Act Reports).

leading up to the six month reporting deadlines.<sup>110</sup> And journalists scour the reports.<sup>111</sup> Every year, for example, the *Texas Lawyer* releases its “Slowpoke Report,” based on the A.O. data.<sup>112</sup>

### C. The Code of Conduct

The Judicial Conference in 1973 adopted what is now the Code of Conduct for United States Judges.<sup>113</sup> Violation of some of its provisions could meet the Judicial Conduct Act standard of “conduct prejudicial to the effective and expeditious administration of the business of the courts.”<sup>114</sup> The Code, though, by its terms, is advisory and aspirational rather than legally binding—a view that some dispute.<sup>115</sup> Because the Code necessarily speaks in general terms, the Conference has authorized its Codes of Conduct Committee (plural because there is also a code for judicial employees)<sup>116</sup> to provide advice to judges and employees who seek guidance about whether an activity is or would be consistent with the Code; many requests involve recusal. For matters likely to be of interest to other judges, the committee reformulates the advice into more general advisory opinions, which are available on the federal judiciary’s public website.<sup>117</sup>

The Conference adopted its Code during a period of revitalized national interest in judicial conduct. A year earlier, in 1972, the American Bar Association had promulgated its Model Code of Judicial Conduct (“ABA Code”), replacing its 1924 Canons of Judicial Ethics.<sup>118</sup> The ABA Code has been the basis for state codes, which differ from the U.S. Code by, for example, providing guidance to judges who

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110. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYSTEM, CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS 77–79 (2010), available at [http://iaals.du.edu/images/wygwam/documents/publications/PACER\\_FINAL\\_1-21-09.pdf](http://iaals.du.edu/images/wygwam/documents/publications/PACER_FINAL_1-21-09.pdf).

111. See, e.g., Joe Palazzolo, *The Slowest Federal Judge in the Land*, LEGAL TIMES (Jan. 14, 2008) (describing the backlogs of Southern District of New York judge Stephen Robinson, who resigned from the bench in 2010).

112. See, e.g., John Council, *The Slowpoke Report*, 28 TEXAS LAWYER 1 (2012).

113. See generally CODE OF CONDUCT FOR UNITED STATES JUDGES (2014).

114. 28 U.S.C. § 351(a) (2012).

115. See, e.g., Frost, *supra* note 67; Frost, *supra* note 24.

116. *Code of Conduct for Judicial Employees*, in U.S. COURTS, GUIDE TO JUDICIARY POL’Y (last revised Aug. 2, 2013), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch03.pdf>.

117. *Published Advisory Opinions*, in U.S. COURTS, GUIDE TO JUDICIARY POL’Y (last revised Sept. 5, 2013), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02.pdf>.

118. GEYH, *supra* note 45, at 6.

stand for election or retention. Most states also have advisory committees,<sup>119</sup> such as Arizona's Judicial Ethics Advisory Committee.<sup>120</sup>

The U.S. Code's "Introduction" lists the judges to whom it "applies"—all the judges in the federal judicial branch except the Justices. Allegations of misconduct by some of the Justices<sup>121</sup> have produced calls for applying the Code to them as well.<sup>122</sup> H.R. 862, the bill introduced in 2011 and discussed in a previous section,<sup>123</sup> provided that the Code "shall apply to the justices . . . to the same extent as such Code applies to circuit and district judges" and would have created the mechanism described below to receive complaints that a Justice had violated the Code and to determine what sanctions to impose.<sup>124</sup> Those provisions were rife with difficulties. The proposed mechanism was impractical and inconsistent with the structure of federal judicial administration, and the bill would have created one disciplinary standard for the vast majority of judges (the Judicial Conduct Act's standard) and another for Supreme Court Justices (the Code of Conduct).<sup>125</sup>

It is telling that H.R. 862's principal sponsor, then-Representative Christopher Murphy (D-Conn.), who was elected to the Senate in 2012, has not introduced the bill in the 113th Congress but instead introduced a much simpler bill, S. 1424, identical to H.R. 2902, introduced by Representative Louise Slaughter (D-N.Y.). Her Supreme Court Ethics Act of 2013 would direct the Court to "promulgate a code of ethics for the . . . Supreme Court that shall include the 5 canons of the Code of Conduct for United States Judges . . . , with any amendments or modifications thereto that the Supreme Court determines appropriate."

H.R. 2902 has no more chance of becoming law than did H.R. 862, but the issues raised by their supporters and critics are not likely to go away. The Justices, though, have tried to make them go away by noting that although the Code, by its terms, does not apply to them, they nonetheless observe its guidelines. Shortly after H.R. 862's introduction, Justice Breyer, at a Senate Judiciary Committee hearing, referred to the Code of Conduct provisions:

[I]f I had an ethical question of when I recuse myself or something,  
I'd go look and see what they say and I didn't distinguish in my mind

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119. See, e.g., Cynthia Gray, *Advisory Committees Let Judges Look Before They Leap*, 42 JUDGES' J. 29 (2003).

120. See *Judicial Ethics Advisory Committee*, COMM. ON JUDICIAL CONDUCT, <http://www.azcourts.gov/azcjc/JudicialEthicsAdvisoryCommittee.aspx> (last visited Mar. 10, 2014).

121. See Part II.B.4.b.

122. Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Congress (2011).

123. See Part II.B.4.c.i.

124. See Part III.C.6.b.

125. See Russell Wheeler, *What's So Hard About Regulating Supreme Court Justices' Ethics?—A Lot*, BROOKINGS INST. (Nov. 28, 2011), <http://www.brookings.edu/research/papers/2011/11/28-courts-wheeler>.

whether they're legally binding or something that I just follow . . . .  
[N]o one . . . wants to violate any of those rules.<sup>126</sup>

At a House Appropriations subcommittee hearing, Justice Anthony Kennedy said that the Code's provisions "apply to the justices in the sense that . . . by resolution we've agreed to be bound by them." And, he added, "We can ask for advice from the [Judicial Conference's Codes of Conduct] committee . . . . And we do ask for that."<sup>127</sup>

In his 2011 Year End Report, Chief Justice Roberts said:

All Members of the Court do in fact consult the Code of Conduct in assessing their ethical obligations. In this way, the Code plays the same role for the Justices as it does for other federal judges since, as the commentary accompanying Canon 1 of the Code explains, the Code "is designed to provide guidance to judges." . . . Every Justice seeks to follow high ethical standards, and the Judicial Conference's Code of Conduct provides a current and uniform source of guidance designed with specific reference to the needs and obligations of the federal judiciary.<sup>128</sup>

As explained later in this section, these statements of voluntary compliance have not satisfied critics, nor have the Justices' arguments that applying the Code to them would be legally dubious. Congress created the Judicial Conference, said Chief Justice Roberts, "for the benefit of the courts it had created" and thus it or its committees "have no mandate to prescribe rules or standards for any other body."<sup>129</sup> Justice Kennedy has also said:

making [the Code] binding . . . , there's an institutional dissonance problem. Those rules are made by the Judicial Conference of the United States, which are district and appellate judges, and we would find it structurally unprecedented for district and circuit judges to make rules that supreme court judges have to follow. There's a legal problem in doing this.<sup>130</sup>

In response, H.R. 2902's findings say that Congress has "the authority to regulate the [Court's] administration," citing Congressional regulation of the Court's size, its quorum, and the dates of its terms.

Professors Charles Geyh and Stephen Gillers, two leading judicial ethics experts, have suggested that the Court's adopting of its own code of ethics would be

126. *Considering the Role of Judges*, *supra* note 75, at 24 (Statement of Justice Stephen Breyer).

127. *U.S. Supreme Court Budget: Hearing Before the Subcomm. of Fin. Servs. and Gen. Gov't of the H. Comm. on Appropriations*, 112th Cong. 8 [hereinafter *Appropriations Hearing*] (statement of Anthony Kennedy, J.) (on file with author), available at <http://www.commoncause.org/site/apps/nlnet/content2.aspx?c=dkLNK1MQIwG&b=4773617&ct=9386305>.

128. ROBERTS, *supra* note 7, at 4–5.

129. *Id.* at 4.

130. *Appropriations Hearing*, *supra* note 127, at 8.

an important gesture in itself because such a “pledge . . . has great value . . . . Just as the public rightly expects judges to follow their oaths of office, it will also assume that a justice who vows to abide by ethics rules that the court itself adopted will do so.” They acknowledge, though, that “there is no workable way to enforce compliance.”<sup>131</sup>

The lack of a compliance mechanism is important, because advocates seem to think that applying the Code to the Justices would end the behavior they find objectionable. Part of the problem concerns the verbs “apply” and “bind.” A *New York Times* editorial said Chief Justice Roberts’s 2011 Year End Report “skirted the heart of the problem: the justices are the only American judges not bound by a code of ethics,” and that Roberts “misstate[d] the code’s authority. While a justice can ignore the code, all other judges must obey it.”<sup>132</sup> The Alliance for Justice said, “[t]he code is administered on other judges by the U.S. Judicial Conference, chaired by the Chief Justice.”<sup>133</sup>

Although the Code’s “Introduction” says it “applies” to the judges it lists, “applies” does not necessarily mean that it imposes rules of behavior that, when violated, can subject a judge to a sanction. And although the Conference, as the Alliance for Justice put it, “administer[s the Code] on other judges,” it does so through the advisory—repeat, advisory—opinions of its Codes of Conduct Committee. The U.S. Code itself says that it “provide[s] guidance to judges.” A former Codes of Conduct Committee chair described the Code as “advisory and aspirational.”<sup>134</sup> And the Committee does not provide advice to third parties about whether a judge’s behavior violates the Code. The Committee, in other words, is not on active police patrol regularly assessing the behavior of all judges.<sup>135</sup> “We are not,” said the former Committee chair, “in the discipline business.”<sup>136</sup>

Moreover, the Conference has no plenary authority to issue orders.<sup>137</sup> The only possible statutory authority for the Judicial Conference to issue binding disciplinary rules is the authorization to issue rules implementing the Judicial

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131. Charles Geyh & Stephen Gillers, *The Supreme Court Needs a Code of Ethics*, POLITICO (Aug. 8, 2013), <http://www.politico.com/story/2013/08/the-supreme-court-needs-a-code-of-ethics-95301.html>.

132. Editorial, *Judicial Ethics and the Supreme Court*, N.Y. TIMES, Jan. 5, 2012, at A24.

133. *Reformers, Senior Lawmaker Charge Justice Thomas and Federal Appellate Judge Diane Sykes with Violating Judicial Ethics*, ALLIANCE FOR JUSTICE (Nov. 13, 2013), <http://www.afj.org/press-room/press-releases/reformers-senior-lawmaker-charge-justice-thomas-and-federal-appellate-judge-diane-sykes-with-violating-judicial-ethics>.

134. *An Interview with Judge M. Margaret McKeown: Interpreting the Code*, THIRD BRANCH (July 2009), [http://www.uscourts.gov/News/TheThirdBranch/09-07-01/An\\_Interview\\_with\\_Judge\\_M\\_Margaret\\_McKeown\\_Interpreting\\_the\\_Code.aspx](http://www.uscourts.gov/News/TheThirdBranch/09-07-01/An_Interview_with_Judge_M_Margaret_McKeown_Interpreting_the_Code.aspx).

135. *Id.*

136. *Id.*

137. *See supra* Part I.

Conduct Act.<sup>138</sup> But the Conference’s Rules and their commentary<sup>139</sup> explicitly do not make the Code the standard by which to determine misconduct. Rather, the rules and commentary say that “[a]lthough the Code . . . may be informative, its main precepts are highly general; the Code is in many potential applications aspirational rather than a set of disciplinary rules. Ultimately, the responsibility of determining what constitutes misconduct under the statute is the province of the judicial councils” (subject to limitations in the statute and the Rules),<sup>140</sup> as they interpret whether a judge engaged in “conduct prejudicial to the effective and expeditious administration of the business of the courts.”

Note also the distinction the Code itself draws: It tells judges that “they *must* comply with the law and *should* comply with this Code.”<sup>141</sup> Compare those words with the Arizona Code of Conduct, which says that it consists of canons, “numbered rules,” and explanatory comments. Rule 1.1 of the Arizona Code states that “[a] judge shall comply with the law, including the Code of Judicial Conduct,” and “a judge may be disciplined . . . for violating a rule.”<sup>142</sup>

It is true that the Code for federal judges says that it “may also provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980,”<sup>143</sup> and chief judge and judicial council orders often cite the Code’s more specific provisions to justify a finding of “conduct prejudicial to the effective and expeditious administration of the business of the courts.” In fact, appellate courts sometimes cite the Code in assessing whether behavior of district judges merits reversal.<sup>144</sup> But that is hardly the same as saying that a violation of the Code is, *ipso facto*, “conduct prejudicial to the effective and expeditious administration of the business of the courts.”

Furthermore, a reading of the Code belies the *New York Times*’s caricature of it as “the rigorous code of conduct that applies to all other parts of the federal judiciary.”<sup>145</sup> Some of it is indeed specific; a judge, for example, “should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.”<sup>146</sup> Much of it, though, is hortative and aspirational: “[a] judge,” for example, “should . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”<sup>147</sup> Or a “judge should dispose promptly of the business of the court,” an admonition amplified by the commentary’s advising judges to “monitor and supervise cases to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs [and]

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138. 28 U.S.C. § 358 (2012).

139. RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS (2008).

140. *Id.* at cmt R. 3.

141. ARIZONA CODE OF JUDICIAL CONDUCT Canon 1 cmt. (2009) (emphasis added).

142. ARIZ. CODE OF JUDICIAL CONDUCT Canon 1 (2009).

143. *Id.* Canon 1 cmt (2009).

144. *Ligon v. City of N.Y.*, 736 F.3d 231 (2d Cir. 2013).

145. Editorial, *Cloud over the Court*, N.Y. TIMES, June 22, 2011, at A26.

146. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2C (2009).

147. *Id.* Canon 2A (2009).

to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission.”<sup>148</sup> These words, however, do little to clarify when making exceptions to these well-taken generalities constitutes misconduct, and none of the published advisory opinions provide any guidance, probably because no judge has sought any on this point.

Compare that to the Conference’s rules governing judicial misconduct proceedings: Misconduct cognizable under the Act, they say, does not include “an allegation about delay in rendering a decision or ruling unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases.”<sup>149</sup> The commentary to the rule elaborates: “[A] complaint of delay in a single case . . . may be said to challenge the correctness of an official action of the judge—in other words, assigning a low priority to deciding the particular case,” which is merits related and thus beyond the purview of the Act. “But . . . an allegation of a habitual pattern of delay in a significant number of unrelated cases, or an allegation of deliberate delay in a single case arising out of an illicit motive, is not merits-related.”<sup>150</sup>

This and other definitions in the rules come from standards adopted by the Breyer Committee, which, as noted at the outset of this Article, Chief Justice Rehnquist appointed to study the implementation of the Act. The Committee recognized that a “major problem faced by chief judges in implementing the Act was the lack of authoritative interpretive standards.”<sup>151</sup> That the rules do not spell out in chapter and verse the universe of actions that do or do not constitute misconduct under the Act makes all the more important the publication of chief judge and judicial council orders, organized systematically, that interpret the Act, as described in Part III.C.4.b of this Article.

The Code of Conduct is a valuable resource that provides help in divining what constitutes “conduct prejudicial to the effective and expeditious administration of the business of the courts.” But it is highly misleading to regard it as a cure for whatever ethical problems the Justices may exhibit.

### III. POLICIES TO DEAL WITH ALLEGATIONS OF MISCONDUCT AND DISABILITY

In addition to policies that seek to deter or avoid misconduct and performance-degrading disability, there are several policies and instruments to investigate allegations of misconduct and disability and impose punitive or remedial measures. These are in addition to the Constitution’s impeachment and removal provisions and include ordinary civil and criminal prosecutions and a mechanism to

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148. *Id.* Canon 3(A)(5), Canon 3(A)(5) cmt (2009).

149. RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS R. 3(h)(3)(B) (2008).

150. *Id.* at R. 3(h)(3)(B) cmt.

151. *Id.* at R. 1 cmt. The Rule’s definition of cognizable delay is based upon Standard 2 of Appendix E in THE JUDICIAL CONDUCT & DISABILITY ACT STUDY COMM., IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980, 239 FRD 116, 145–46 [hereinafter BREYER COMMITTEE REPORT].

receive and investigate allegations of misconduct and performance-inhibiting disability. In addition to these formal mechanisms, informal methods have long operated.

#### *A. Impeachment and Removal from Office*

The Constitution provides for the removal from office of the President, Vice President, “and all civil Officers of the United States” upon impeachment for and conviction of “Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>152</sup> The House of Representatives, over the history of the judiciary, has impeached 14 judges (almost all of them district judges but including one Supreme Court Justice). Of the 14, the Senate removed 9 from office and acquitted 2; 3 resigned to avoid a Senate conviction. Of the 14 impeachments, 5 occurred recently (since 1986), as did 4 of the 9 convictions; 1 of the 3 conviction-avoiding resignations was recent (in 2009).<sup>153</sup>

Commentators speak of a strong if unwritten assumption that Congress will not use its impeach-and-removal authority to punish judges for their judicial decisions.<sup>154</sup> That precedent dates to the 1805 acquittal of Justice Samuel Chase, whom the House had impeached for partisan and intemperate grand jury charges delivered while serving, as Justices did at that time, as trial judges on the circuit courts.<sup>155</sup>

#### *B. Prosecution Under General Civil and Criminal Statutes*

Federal judges are subject to state and federal civil and criminal statutes applicable to all persons. (Examples include a former federal judge sentenced to a month in prison for giving drug money to an ex-felon stripper while still a judge,<sup>156</sup> or, while hardly in the same league, a federal judge who settled a six-figure lawsuit with a municipality over some destroyed trees.<sup>157</sup>) Judges are, albeit rarely, objects of investigations by the Justice Department’s Public Integrity Section involving, for example, disputed reimbursement claims.<sup>158</sup>

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152. U.S. CONST. art. II, § 4.

153. *Impeachments of Federal Judges*, FED. JUD. CTR., [http://www.fjc.gov/history/home.nsf/page/judges\\_impeachments.html](http://www.fjc.gov/history/home.nsf/page/judges_impeachments.html) (last visited Feb. 25, 2014).

154. *E.g.*, BENJAMIN WITTES, CONFIRMATION WARS, PRESERVING INDEPENDENT COURTS IN ANGRY TIMES 104 (2006) Stephen G. Breyer, *Judicial Independence*, 40 ST. LOUIS U. L.J. 989, 990 (1996); William H. Rehnquist, *The Future of the Federal Courts*, 46 AM. U. L. REV. 263, 273 (1997).

155. *See, e.g.*, Richard Ellis, *The Jeffersonian Crisis, in COURTS AND POLITICS IN THE YOUNG REPUBLIC* 76–87, 96–107 (1971).

156. *Ex-judge Camp Sentenced to 30 Days in Prison*, SENT’G L. & POL’Y (Mar. 11, 2011), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2011/03/ex-judge-camp-sentenced-to-30-days-in-prison.html](http://sentencing.typepad.com/sentencing_law_and_policy/2011/03/ex-judge-camp-sentenced-to-30-days-in-prison.html).

157. Jennifer Langston, *Judge Pays Off Debt for Cutting Park Trees*, SEATTLE POST-INTELLIGENCER (May 26, 2006), <http://www.seattlepi.com/local/article/Judge-pays-off-debt-for-cutting-park-trees-1204642.php>.

158. Andrew Wolfson, *Federal Judge’s Retirement Ended Investigation into Travel Reimbursements*, LOUISVILLE COURIER-JOURNAL (Jan. 20, 2014), available at

### *C. The Judicial Conduct and Disability Act*

#### *1. Main Provisions*

The Judicial Conduct and Disability Act establishes a mechanism for receiving and acting upon complaints about judges. The Act,<sup>159</sup> enacted in 1980 and amended several times since, authorizes “[a]ny person” to file a complaint alleging that a federal judge—but not a Justice—“has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.”<sup>160</sup> (Complaints may also allege that a judge “is unable to discharge all the duties of the office by reason of mental or physical disability.”<sup>161</sup> As explained below,<sup>162</sup> such complaints are rare.) The statute also authorizes chief judges, without receiving a complaint, to “identify” (initiate) one based on information that has come to them.<sup>163</sup>

The chief judge may undertake a “limited inquiry” of the complaint, however received, including communicating with the judge and the complainant, and may “dismiss” the complaint if it is about behavior not covered by the Act; is directly related to the merits of a judicial decision; is “frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred”; or contains allegations that cannot be established through investigation or that lack any factual foundation as revealed by the limited inquiry. Or the chief judge may “conclude” the proceedings if the judge complained of has taken “appropriate corrective action” or because intervening events moot the complaint (e.g., the judge’s death or resignation).<sup>164</sup>

The statute is clear, however, that the chief judge “shall not undertake to make findings of fact about any matter that is reasonably in dispute.” For matters reasonably in dispute, the chief judge must appoint a “special committee” comprising the chief judge and an equal number of the circuit’s district and circuit judges to undertake an investigation and present a “comprehensive written report” to the circuit judicial council.<sup>165</sup> The circuit judicial council may then take a variety of actions, such as dismissing the complaint, issuing public and private reprimands, requesting retirement of “good-behavior tenured judges,” and initiating removal proceedings for term-limited judges.<sup>166</sup> It may also tell the Judicial Conference that there may be grounds for impeachment,<sup>167</sup> which the Conference may forward to the House of Representatives.<sup>168</sup> Other provisions of the Act provide for notice to the

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<http://www.courier-journal.com/article/20140120/NEWS01/301200041/Federal-Judge-Boyce-Martin-Jr-s-retirement-ended-investigation-into-travel-reimbursements>.

159. 28 U.S.C. Ch.16 (2012).

160. *Id.* § 351(a).

161. *Id.*

162. *See infra* Part III.C.2.

163. 28 U.S.C. § 351(b).

164. *Id.* § 352.

165. *Id.* § 353.

166. *Id.* § 354(a).

167. *Id.* § 354(b).

168. *Id.* § 355 (b)(1).

complainant and judge,<sup>169</sup> opportunity for either to seek Judicial Conference review of a judicial council action based on a special committee report,<sup>170</sup> a limited opportunity to appear and call witnesses once the proceeding moves beyond the special committee phase,<sup>171</sup> and council and Conference rulemaking to implement the Act.<sup>172</sup>

Complainants may seek judicial council review of a chief judge's order dismissing or concluding a complaint, but there is no appeal from a council decision affirming such an order.<sup>173</sup> Complainants often file such appeals, but the councils rarely reverse the chief judge, as explained in the next section.

Although the Supreme Court has not substantively reviewed the Act, it has been upheld in the U.S. Court of Appeals for the District of Columbia Circuit. The dispositive litigation<sup>174</sup> involved a challenge to a disciplinary order entered by the Fifth Circuit's judicial council and upheld by the Judicial Conference. The disciplined judge argued that federal judges are subject to only three types of discipline—impeachment and removal, criminal or civil prosecution, and appellate review. The district judge who heard the challenge noted that almost as soon as Congress created the federal judiciary it began to prescribe ethical rules for its members (the early disqualification statute).<sup>175</sup> As to appellate review, she explained that:

a court of appeals is not the appropriate forum to monitor and redress a judge's broad course of conduct consisting of abusive and intemperate behavior, unless it affects the merits in a given case . . . . [W]hile a court of appeals may review a lower court's legal conclusions and a given judge's conduct in isolated instances, a judicial council is able to examine a judge's course of conduct as it ranges over many interactions . . . . A judge's treatment of an attorney may not affect the outcome of a particular case or pending motion, thereby insulating it from review, and yet have a profound effect on the efficacy of the attorney's representation.<sup>176</sup>

## 2. Results—Basic Data

Pursuant to statute,<sup>177</sup> the A.O. publishes each year fairly detailed data on filings and terminations under the Act.<sup>178</sup> Data for the period 2011 to 2013 show

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169. *Id.* §§ 353(a)(3), 354(b)(3).

170. *Id.* § 357.

171. *Id.* § 358 (b)(2).

172. *Id.* § 358.

173. *Id.* § 352(c).

174. *McBryde v. Comm. to Review Cir. Council Conduct & Disability Orders of the Jud. Conf. of the U.S.*, 83 F.Supp.2d 135 (D. D.C. 1999), *aff'd in part and vacated in part*, 264 F.3d 52 (D.C. Cir. 2001).

175. *Id.* at 153; *see also supra* Part II.B.3.

176. *McBryde*, 83 F.Supp.2d at 162.

177. 28 U.S.C. § 604(h)(2).

178. *See Complaints Against Judges*, U.S. COURTS, <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/complaints-against-judges.aspx> (last visited Mar. 12, 2014);

between 1,200 and 1,400 complaints each year, almost all of which were dismissed by the chief judge or the circuit council on appeal, and a handful in which the chief judge concluded the proceeding. Chief judges appointed one special committee in 2011, four in 2012, and two in 2013.

Circuit or district judges were the object of 975 of the 1,219 complaints filed in 2013. The overwhelming majority of the complaints were filed by what the A.O. calls “Litigants” and “Prison Inmates;” each group filed about half the complaints. Almost all of the inmates were no doubt complaining about some aspect of the proceeding that got them incarcerated. Complaints often cited multiple grounds, but the single most highly cited ground was “Erroneous Decision” (879) followed by “Delayed Decision” (106), although 297 cited what the A.O. lumped together in an “Other Misconduct” category. There were only 27 allegations of disability. Not surprisingly, the most frequent reason chief judges gave for dismissal was “Merits Related.”

### 3. Results—Extended Analysis

High dismissal rates have prompted some observers to charge that chief judges and judicial councils sweep complaints under the rug. In March 2004, then-House Judiciary Committee Chairman James Sensenbrenner asserted as much in remarks to the Judicial Conference.<sup>179</sup> He objected to the disposition of his complaint about a Democratic appointee on the since-lapsed panel that appointed independent counsels. Sensenbrenner alleged that the judge had leaked to the press, on the eve of Vice President Gore’s presidential nomination, that an independent counsel had impaneled a grand jury to investigate President Clinton. Sensenbrenner also complained that the judge had not admitted to the leak when Gore and his supporters publicly charged that the Republican-appointed independent counsel, or one of the other two panel judges (both Republican appointees), had leaked the information to embarrass Gore and the Democratic Party.

Sensenbrenner alleged in remarks to the Judicial Conference that the chief circuit judge:

only eight days after [receiving the complaint], simply whitewashed the matter regarding his colleague . . . *without conducting any investigation* . . . . This [and other matters] raise . . . profound questions with respect to whether the Judiciary should continue to enjoy delegated authority to investigate and discipline itself. If the Judiciary will not act, Congress will . . . begin assessing whether the disciplinary authority delegated to the judiciary has been responsibly exercised and ought to continue.<sup>180</sup>

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Table S-22, *Report of Complaints Commenced and Action Taken Under Authority of 28 U.S.C. § 351–364 During Twelve Month Period Ending September 30, 2013*, U.S. COURTS, (2013), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/tables/S22Sep13.pdf>.

179. *Remarks of House Judiciary Committee Chairman Sensenbrenner Before the U.S. Judicial Conference*, 16 FED. SENTENCING REPORTER 280, 281 (2004).

180. *Id.*

These remarks (despite the near-universal gasps they provoked among Conference members) launched more than the Congressman likely anticipated, including a major study of the Act's implementation and a series of recommendations, which led to, among other things, the judicial branch's first set of mandatory rules for administering the Act. The rules sought to make its administration more transparent and consistent, and to provide greater central oversight.

To head off the threatened Congressional inquiry, Chief Justice Rehnquist appointed, in May 2004, a committee to study the Act's implementation, chaired by Justice Breyer and comprising two former chief circuit judges, two former chief district judges, and the Chief Justice's administrative assistant; it worked with a handful of employees of the A.O. and the Federal Judicial Center.<sup>181</sup> The committee's object was not to determine how much judicial misconduct occurs but rather whether chief circuit judges (and judicial councils) had treated the complaints as the Act could be read to require. For the most part, that involved determining whether the chief judge had improperly terminated complaints without appointing a special committee to investigate matters reasonably in dispute.<sup>182</sup> With staff assistance, the committee identified two stratified samples that totaled over 700 complaints drawn from the over 2,000 complaints terminated in 2001–2003 and a much smaller universe of 17 high-visibility complaints from 2001–2005. “High-visibility complaints” received some press attention and, in some cases, legislative attention.<sup>183</sup>

The committee applied strict standards in determining whether a chief judge or council disposition was problematic. One case involved a prisoner's allegation that the judge allowed a young man, probably his intern, to conduct the proceedings. The judge unequivocally denied the charge and said that during the period in question he had no intern and that his law clerk was an older woman. The chief judge dismissed the complaint as “frivolous on its face,” but the committee said that “[t]he allegation, albeit bizarre, is not so outlandish as to be [considered] ‘inherently incredible.’” The chief judge should have inquired of the prosecutor and defense lawyer, who the complaint said had a tape recording of the proceeding.<sup>184</sup>

As to the two large samples of complaints, the committee found only 3.4% of the terminations to be “problematic,”<sup>185</sup> but found an error rate of 29.4% among the 17 high-visibility complaints.<sup>186</sup> It attributed this higher error rate to the fact that complaints that get press or legislative attention are more likely than most to contain some plausible—not necessarily true—allegations, thus presenting chief judges and

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181. BREYER COMMITTEE REPORT, *supra* note 151, at 119. Full disclosure: I served essentially as the committee's staff director, although there was no such formal title.

182. For descriptions of how the committee reviewed the staff's assessment of the complaint processing, *see id.* at 120–22.

183. For explanations of the sample, and high visibility case, identification, *see id.* at 150–53, 172–74, 253–54.

184. *Id.* at 161.

185. *Id.* at 153.

186. *Id.* at 199.

judicial councils with more difficult decisions and a greater likelihood of error.<sup>187</sup> The high-visibility complaints included many of the matters that called attention to federal judges' behavior during the period, including, for example, complaints about judges' serving on the board of the provider of free-market-oriented federal judicial educational programs,<sup>188</sup> which caused the Conference to adopt the reporting requirements described in Part II.B.3; complaints about a federal judge's charge that President Bush obtained the presidency in 2000 through Hitler-Mussolini-like methods;<sup>189</sup> an allegation of chief circuit judge procedural manipulation of litigation involving the University of Michigan law school's admission program;<sup>190</sup> and Representative Sensenbrenner's charge that the chief judge improperly dismissed his complaint (the committee agreed).<sup>191</sup>

Some post-Breyer Committee high-visibility cases include two complaints that judges filed against themselves once the behavior at issue surfaced in the press and the judges likely wanted a formal resolution of the allegations. One involved a chief circuit judge who maintained pornographic images in inadequately secured computer files (for which he was admonished).<sup>192</sup> Another involved the district judge (highlighted at the outset of the Article) who forwarded a racist email about President Obama on his government computer (he resigned from the bench).<sup>193</sup> Another highly visible complaint involved a district judge accused of misuse of government property, solicitation of prostitution, and parking illegally in a handicapped spot; he resigned while the council investigation was underway.<sup>194</sup>

The low rate of problematic dispositions—3.4%—accords with an earlier study using the same methodology to review terminations in the period 1980–1991, 2.6% of which, it concluded, were problematic.<sup>195</sup> These two rigorous studies suggest that, at least for the great majority of complaints, chief judges and judicial councils are implementing the statute as Congress intended. Furthermore, as a result of the Breyer Committee recommendations, the Judicial Conference Committee on Judicial Conduct and Disability has undertaken a more vigorous oversight and

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187. *Id.* at 200.

188. *Id.* at 175–77 (finding the determination nonproblematic).

189. *Id.* at 196–98 (finding the determination nonproblematic).

190. *Id.* at 180–83 (finding the determination problematic).

191. *Id.* at 178–80 (finding the determination problematic).

192. *See In re Complaint of Judicial Misconduct*, 575 F.3d 279, 293–94 (3d Cir. 2008); Cynthia Colts, *Ethics Panel Admonishes Kozinski, Closes Case*, BLOOMBERG (July 2, 2009, 5:25 PM), [http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a3gw\\_Q8QcoXA](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a3gw_Q8QcoXA).

193. *See* MEMORANDUM OF DECISION, PROCEEDING IN REVIEW OF THE ORDER AND MEMORANDUM OF THE JUDICIAL COUNCIL OF THE NINTH CIRCUIT 2 (2014), *available at* <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/ccd-13-01Order-final-01-17-14.pdf>.

194. *District Judge Nottingham Resigns, Apologizes*, DENVER POST, (Oct. 21, 2008, 2:49 PM), [http://www.denverpost.com/news/ci\\_10777031](http://www.denverpost.com/news/ci_10777031).

195. *See* BREYER COMMITTEE REPORT, *supra* note 151. The earlier study is Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25, 30–31, 79 (1993).

monitoring role. And the chair of the committee seemed responsive to suggestions at 2013 congressional oversight hearings that the committee publish periodic summaries of its monitoring to provide transparency and assurance that the judicial branch continues to implement the statute properly.<sup>196</sup>

#### *4. Breyer Committee Recommendations to Enhance Transparency, Monitoring, and Oversight*

The Breyer Committee offered twelve recommendations for a more transparent, centrally monitored, and uniformly administered implementation of the Act. The Judicial Conference, in Rules adopted in 2008<sup>197</sup> and through other administrative steps,<sup>198</sup> appears largely to have embraced the recommendations. Professor Arthur Hellman, a leading commentator on the federal disciplinary machinery, has faulted the rules for not doing enough to promote open disclosure of the process as to “high-visibility” complaints,<sup>199</sup> but he agreed with the Committee assessment of “no serious problems with the judiciary’s handling’ of routine complaints.”<sup>200</sup>

##### **a. Publicizing How to File a Complaint**

The Committee recommended that judicial councils order all courts within the circuit to put information on their websites’ home pages on how to file a complaint, including the complaint form, and to consider including an admonition not to use the procedure to complain about the merits of judicial decisions.<sup>201</sup> Rule 28 largely embodies this recommendation, although it says nothing about the admonition and does not specify placement on the sites’ home pages. Nevertheless, periodic random checks suggest that, due to the Rules and A.O. emphasis on

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196. See *An Examination of the Judicial Conduct and Disability System: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 7, 77–78 (2013) [hereinafter *An Examination of the Judicial Conduct and Disability System*] (statement of Hon. Anthony J. Scirica, Senior Judge, 3d Cir. Court of Appeals and Chair, Judicial Conference Comm. on Judicial Conduct and Disability), available at [http://judiciary.house.gov/\\_files/hearings/printers/113th/113-25\\_80544.PDF](http://judiciary.house.gov/_files/hearings/printers/113th/113-25_80544.PDF).

197. See generally RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS (2008).

198. See *An Examination of the Judicial Conduct and Disability System*, *supra* note 196, at 16–20 (statement of Hon. Anthony J. Scirica).

199. See Arthur D. Hellman, *When Judges Are Accused: An Initial Look at the New Federal Judicial Misconduct Rules*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 325, 351 (2008); *An Examination of the Judicial Conduct and Disability System: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 34 (2013) [hereinafter *Statement of Hellman*] (statement of Arthur D. Hellman), available at [http://judiciary.house.gov/\\_files/hearings/printers/113th/113-25\\_80544.PDF](http://judiciary.house.gov/_files/hearings/printers/113th/113-25_80544.PDF).

200. Statement of Hellman, *supra* note 199, at 41.

201. See BREYER COMMITTEE REPORT, *supra* note 151.

adhering to them,<sup>202</sup> the information is fairly easy to find on most court websites, a far cry from the situation the Breyer Committee staff found in 2005–2006.<sup>203</sup>

#### b. Publicizing Final Orders

The Rules require the circuits to “mak[e final orders] public,” but provide the option of “placing them in a publicly accessible file in the office of the circuit clerk *or* by placing the orders on the court’s public website. If the orders appear to have precedential value, the chief judge may cause them to be published.”<sup>204</sup> The rule itself offers two reasons for publicizing final orders, both consistent with Breyer committee recommendations, which in turn reflect transparency goals articulated by earlier commissions and judicial branch guidance.<sup>205</sup> One reason is to develop a body of precedents on how to apply the Act. The same rule promises that the Judicial Conduct Committee will make selected orders available on the federal courts’ website. At the April 2013 House Judiciary subcommittee hearings, the chair of the committee said that it would post on the website a “*Digest of Authorities*, a body of precedent in judicial conduct and disability cases.”<sup>206</sup>

The other reason for publicizing orders, in the words of the relevant rule, is “to provide additional information to the public on how complaints are addressed under the Act.”<sup>207</sup> Providing the option of *not* having to post orders on the courts’ public websites could be read as a conscious policy *not* to provide “additional information to the public on how complaints are addressed under the Act.” Four

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202. Tony Mauro, *Makeover Urged for Federal Court Web Sites*, BLT: BLOG OF LEGALTIMES (Feb. 10, 2011, 10:11 AM), <http://legaltimes.typepad.com/blt/2011/02/look-for-a-makeover-in-federal-court-web-sites.html>.

203. See BREYER COMMITTEE REPORT, *supra* note 151, at 144–45.

204. RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS R. 24 (2008) (emphasis added).

205. See BREYER COMMITTEE REPORT, *supra* note 151, at 216–17.

206. See *An Examination of the Judicial Conduct and Disability System*, *supra* note 196, at 20 (statement of Hon. Anthony J. Scirica). The statement anticipated the digest’s posting in the summer of 2013; it was not available on the federal courts’ public website in early March 2014.

207. RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS R. 24(b) (2008).

circuits have taken advantage of the paper-only option,<sup>208</sup> seven post all orders,<sup>209</sup> and two post only those that have precedential value.<sup>210</sup>

Another barrier to public understanding of the Act's operations is the failure of circuits that post orders to identify the nature of the orders. They simply list each order by date and case number only, making no distinction between the few nonroutine orders and the great majority of routine orders.<sup>211</sup> Sifting through extensive lists of chaff to identify the relatively small amount of wheat (the few substantive orders) is a major task.<sup>212</sup> Circuits could identify which orders the chief judge or council believes to have precedential value as well as those that are otherwise unusual. At the least, the list could include the number of pages of each posted order as a rough surrogate for orders that are likely not routine dismissals. A list of 18 chief judge orders and one judicial-council-affirming order have been lifted from the Ninth Circuit Judicial Council website and copied below. All but one were routine dismissals of only a single page or a few lines longer. The list gives no indication that the January 24 order was 38 pages and dealt with the conduct referenced in the third headline in the Introduction to this Article.

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208. The Fourth, Sixth, Eighth, and Eleventh Circuits, as of early March 2014.

209. See *Final Orders on Complaints of Judicial Misconduct*, U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT, <http://www.ca1.uscourts.gov/judicial-conduct-disability> (last visited Feb. 7, 2014); *Judicial Conduct and Disability Opinions – 2013*, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, <http://www.ca3.uscourts.gov/judicial-conduct-and-disability-opinions-2013> (last visited Feb. 7, 2014); *In re Complaint Against a Judicial Officer: Memorandum Decision*, JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT, [http://www.ca7.uscourts.gov/JM\\_Memo/jm\\_memo.html](http://www.ca7.uscourts.gov/JM_Memo/jm_memo.html) (last updated Feb. 14, 2014); *In re Complaint of Judicial Misconduct*, U.S. COURTS FOR THE NINTH CIRCUIT, <http://www.ca9.uscourts.gov/misconduct/> (last visited Feb. 7, 2014); *Misconduct Decisions*, THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT, <http://www.ca10.uscourts.gov/ce/misconduct/opinions> (last visited Feb. 7, 2014); *Judicial Misconduct and Disability – By Release Date*, U.S. COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT, <http://www.cadc.uscourts.gov/internet/misconduct.nsf/DocsByRDate?OpenView&count=100> (last visited Feb. 7, 2014); *Judicial Reports*, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, <http://www.cafc.uscourts.gov/judicial-reports> (last visited Feb. 7, 2014).

210. See *Judicial Conduct*, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, [http://www.ca2.uscourts.gov/judges/judicial\\_conduct.html](http://www.ca2.uscourts.gov/judges/judicial_conduct.html) (last updated Jan. 17, 2014); *Judicial Misconduct Orders*, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT, <http://www.ca5.uscourts.gov/JudicialMisconductOrders.aspx> (last visited Feb. 7, 2014).

211. This statement is based on my review of the various courts of appeals websites.

212. The partial list of orders were copied, as noted, from the Ninth Circuit Judicial Council Website on March 12, 2014.

Results: 1 - 500 of 837      Pages: |<< <<1 2>> >>|      Page size: 500 ▾

CASE NO:	DATE OF DECISION	
12-90100	January 31, 2014	Order, Chief Judge
12-90089	January 31, 2014	Order, Chief Judge
12-90027 - 12-90031, 12-90033 - 12-90035, 12-90039, 12-90042, 12-90043, 12-90050	January 24, 2014	Order, Chief Judge
13-90067 - 13-90069	January 17, 2014	Order, Chief Judge
13-90060	December 03, 2013	Order, Chief Judge
13-90105 & 13-90106	December 02, 2013	Order, Chief Judge
13-90053	November 20, 2013	Order, Chief Judge
12-90129	November 19, 2013	Order, Chief Judge
13-90064	November 18, 2013	Order, Chief Judge
13-90024	February 11, 2014	Order, Judicial Council
13-90024	November 18, 2013	Order, Chief Judge
13-90043	November 13, 2013	Order, Chief Judge
13-90041	November 06, 2013	Order, Chief Judge
13-90050 - 13-90052	November 04, 2013	Order, Chief Judge
13-90047 - 13-90049	November 04, 2013	Order, Chief Judge
13-90032	November 04, 2013	Order, Chief Judge
12-90163	October 28, 2013	Order, Chief Judge
13-90000, 13-90001, 13-90076, 13-90090, 13-90092 - 13-90094 and 13-90155	October 16, 2013	Order, Chief Judge
12-90164	September 25, 2013	Order, Chief Judge

Partial list of Judicial Conduct and Disability Act final orders on the Ninth Circuit Judicial Council Website, visited Mar. 12, 2014, <http://www.ca9.uscourts.gov/misconduct/>.

### c. Chief Judges' Identifying Complaints

The Breyer Committee called for greater education for chief circuit judges about their responsibilities under the Act, including “[w]hen to identify a complaint” based on information available to the chief judge. The Committee concluded that normally the best course for the chief judge upon receiving such information is to seek an informal resolution.<sup>213</sup> It pointed, though, to one of the high-visibility cases it examined, in which a chief judge declined to identify a complaint because he thought that, had he done so, he then would have dismissed the allegations. The Committee concluded that the better course would have been to identify the complaint, conduct a limited inquiry, and if it indicated dismissal, dismiss the

213. BREYER COMMITTEE REPORT, *supra* note 151, at 214.

complaint with a public order. Doing so would show that the judiciary takes complaints seriously, and, if there is a dismissal, it would protect the judge against rumors of wrongdoing.<sup>214</sup>

The Judicial Conference Rules have adopted the Committee recommendation,<sup>215</sup> but given the limited information on the courts' websites about disciplinary orders, it is difficult to assess the extent of compliance with the rule. Press coverage brought to light two recent examples of chief judge-identified complaints<sup>216</sup>—separate incidents several years ago in two circuits, in which judges contributed respectively to state and federal political campaigns, contrary to the Code of Conduct. The chief circuit judges promptly identified complaints and sought responses from the judges, who admitted having made the contributions while confessing ignorance of the prohibition. The chief judges took the confessions as corrective action and concluded the proceedings, putting the matters to rest.<sup>217</sup>

It would have been difficult to identify either incident without the press reports, i.e., merely by surfing the circuits' websites. One of the orders referred to above was in a circuit that does not post orders electronically. The other circuit posts its orders, but the order in question was simply listed as “Decision in Case Number 10-08-90999,” one of eight similarly labeled decisions released on November 11, 2008 and one of many hundreds of similarly labeled orders listed since January 2008. It would take an intrepid researcher to go through each of the hundreds of orders to identify others in which the chief judge identified the complaint.

#### d. Greater Oversight by the Judicial Conduct Committee

The Judicial Conduct Committee has adopted a general oversight function and, according to its chair, “receives information on all complaint-related orders and examines a number of them to confirm that all proper procedures were followed” as well as to identify novel orders and orders in high-visibility cases.<sup>218</sup> The Committee released two 2014 orders emphasizing, as explained in the footnote, the importance of transparency with respect to serious allegations.<sup>219</sup>

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214. *Id.* at 213.

215. *See* RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS R. 5–7 (2008).

216. Matt Canham, *Chief Utah Federal Judge Apologizes for Rule-Violating Obama Donation*, SALT LAKE TRIBUNE, (Oct. 24, 2008, 2:26 PM), [http://www.sltrib.com/News/ci\\_10806793](http://www.sltrib.com/News/ci_10806793); Will Evans, *Judge Apologizes*, CTR. FOR INVESTIGATIVE REPORTING (Jan. 11, 2007), <http://cironline.org/reports/judge-apologizes-2163>.

217. In re: Complaint of Misconduct, No. 07-6-351-01 (Judicial Council of the 6th Cir. 2007) (on file with author); In re: Charge of Judicial Misconduct, No. 10-08-90099 (Judicial Council of the 10th Cir. 2008) (on file with author).

218. *See An Examination of the Judicial Conduct and Disability System*, *supra* note 196, at 18–19 (statement of Hon. Anthony J. Scirica).

219. In re: Complaint of Judicial Misconduct, C.D.D. No. 13-01, (Comm. on Judicial Conduct and Disability Jan. 17, 2014), *available at* <http://www.uscourts.gov/RulesAndPolicies/ConductAndDisability/JudicialConductDisability.aspx> (follow “January 17, 2014 (C.C.D. No. 13-01)” hyperlink) (granting petitions

The Breyer Committee recommended that the Judicial Conference's Judicial Conduct Committee make clear that council members could alert the Committee chair if they believe appointment of a special committee would be warranted; the chair of the Committee could then provide any advice to the respective chief judge that the chair believed was warranted.<sup>220</sup> The Rules go further, vesting the Committee with what the Committee chair characterized as "'reach down' authority,"<sup>221</sup> which is basically the authority to determine whether a chief judge should have appointed a special committee.<sup>222</sup> Such authority can prevent chief circuit judges from making decisions about matters reasonably in dispute under the guise of a limited inquiry and then dismissing the complaint rather than appointing a special committee. Doing so shields the chief judge's factual findings from review by the Judicial Conference because a complainant may not appeal a chief judge order dismissing or concluding a proceeding beyond the circuit council.<sup>223</sup>

One of the Breyer Committee's high-visibility cases presented such a situation.<sup>224</sup> A district judge had intervened *sua sponte* in a bankruptcy proceeding involving a probationer whom the judge was supervising; the case included allegations of an *ex parte* communication. Although the case presented, in the Breyer Committee's view, "matters reasonably in dispute," the chief circuit judge, after investigating the matter, dismissed the complaint—a dismissal affirmed by a divided judicial council. Despite the statutory ban on such appeals, the complainant sought relief from what is now the Judicial Conference Judicial Conduct Committee. That Committee, in a divided vote, determined, as summarized by the Breyer Committee,

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seeking review of orders of the Ninth Circuit judicial council for failure to release orders documenting hundreds of inappropriate emails and for failure to make public the name of the judge); In re: Complaint of Judicial Misconduct, C.D.D. No. 13-01, (Comm. on Judicial Conduct and Disability Jan. 17, 2014), *available at* <http://www.uscourts.gov/RulesAndPolicies/ConductAndDisability/JudicialConductDisability.aspx> (affirming the order of the Second Circuit judicial council, to whom the Chief Justice transferred a complaint initiated by the Chief Judge of the Sixth Circuit, making public the name of a judge alleged to have sought unwarranted travel reimbursements and referring the matter to the Justice Department's Office of Public Integrity).

220. BREYER COMMITTEE REPORT, *supra* note 151, at 223.

221. *An Examination of the Judicial Conduct and Disability System*, *supra* note 196, at 18 (statement of Hon. Anthony J. Scirica). See RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS R. 21(b)(1) (2008).

222. See *generally* RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS (2008).

223. See *supra* Part III.C.1.

224. BREYER COMMITTEE REPORT, *supra* note 151, at 184–89. The decision and opinions of the Judicial Conference Committee in this matter, Opinion of the Committee to Review Circuit Council and Disability Orders, April 28, 2006, are available at <http://www.uscourts.gov/RulesAndPolicies/ConductAndDisability/JudicialConductDisability.aspx> (follow "April 28, 2006" hyperlink). The Judicial Conference Executive Committee in March 2007 changed the name of the committee from that immediately above to the Committee on Judicial Conduct and Disability. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 5 (Mar. 13, 2007), *available at* <http://www.uscourts.gov/judconf/07MarchProceedings.pdf>.

“that the Act is clear that the Conference may only review council actions taken pursuant to a special investigative committee; the chief judge had not appointed such a committee . . . , but instead had dismissed the complaint under section 352, a dismissal upheld by the council’s . . . order.”<sup>225</sup>

A possibly similar incident occurred in another circuit as the Breyer Committee was completing its September 2006 report, but before the Conference adopted its rules governing judicial conduct proceedings. A May 2006 news article reported that a district judge, at a naturalization ceremony, described to the citizens-to-be the “good work” of a local congressman who had just addressed them.<sup>226</sup> It further reported that the judge said ““for [him] to continue doing his good work, he needs your vote, OK?””<sup>227</sup> A person other than the reporter<sup>228</sup> filed a complaint, which the chief circuit judge dismissed in a six-page October 2006 order.<sup>229</sup>

The subject judge, in responding to the complaint—in particular to the article’s “he-needs-your-vote” allegation—said that he emphasized the importance of voting and told the new citizens that they could register to vote outside the auditorium and added: “If they liked what [the congressman] was doing, they could vote for him too.”<sup>230</sup> The chief judge’s order said:

[T]he judge’s prepared remarks . . . did not go beyond praise of [the congressman’s] prior public service, praise that would have been appropriate in introducing any elected official. In this context, the judge’s unrecorded impromptu remark following the congressman’s speech—whether quoted more accurately by the journalist or by the judge in his response—did not convert the judge’s conduct in presiding over this important judicial ceremony into the public endorsement of a candidate for public office [and] clearly did not constitute the type of willful misconduct in office that is prejudicial to the effective and expeditious administration of the business of the courts within the meaning of 28 U.S.C. § 351.<sup>231</sup>

There is a fair argument that “a matter reasonably in dispute” is whether the judge said “they could vote for” the Congressman or said the Congressman “needs your vote.” The order referred to “the judge’s unrecorded impromptu remark,” but did not describe any efforts the chief judge may have directed his staff to undertake to ascertain if in fact there was no available recording of the event—or to interview the reporter. A special committee might have investigated the incident.

225. BREYER COMMITTEE REPORT, *supra* note 151, at 187–88.

226. Tim O’Neil, *Judge Urges New Citizens to Vote for Rep. Clay Code of Conduct Bars Federal Judges from Making Endorsements*, ST. LOUIS POST-DISPATCH, May 1, 2006, at B2.

227. *Id.*

228. John Stoeffler, *Judge Loken’s Loose Logic*, ST. LOUIS TODAY (Nov. 14, 2006, 12:00 PM), [http://www.stltoday.com/suburban-journals/judge-loken-s-loose-logic/article\\_90f526b5-2f89-50fb-919a-c481c3b0725f.html](http://www.stltoday.com/suburban-journals/judge-loken-s-loose-logic/article_90f526b5-2f89-50fb-919a-c481c3b0725f.html).

229. In re: Complaint of John Doe, Judicial Council of the Eighth Circuit, JCP No. 06-013, October 11, 2006 (on file with author).

230. *Id.* at 3.

231. *Id.* at 5–6.

If it concluded the judge offered an endorsement, even if impromptu and not overtly partisan, it might have recommended a very mild sanction. It might have concluded that a judge's saying "he needs your vote" may have come across to new citizens from totalitarian countries differently than it might have to two federal judges. Or it might have tried to determine if this was an isolated incident or whether the judge had offered endorsements of political candidates on other occasions.

The Judicial Conference's 2008 rules for processing judicial conduct complaints provide that the Conduct Committee "may review any judicial-council order [affirming a chief judge order dismissing a complaint or concluding a proceeding], but only to determine whether a special committee should be appointed."<sup>232</sup> "If [after reviewing the council's and chief judge's explanations of why a special committee should not have been appointed], the Committee determines that a special committee should be appointed, the Committee must issue a written decision giving its reasons."<sup>233</sup> None of the Committee's published opinions as of mid-March 2014<sup>234</sup> deal with similar situations.

#### 5. Other Recommendations

Two other recommendations about the Act, neither made by the Breyer committee, merit brief comment.

##### a. Involving Nonjudges in Complaint Review

One recommendation comes from the 1993 report of the statutorily created National Commission on Judicial Discipline and Removal.<sup>235</sup> The Commission's Report<sup>236</sup> dealt with the fact (without mentioning it explicitly) that the investigatory bodies that implement the Judicial Conduct Act (the special committees, judicial councils, and Judicial Conference) consist exclusively of federal judges. By contrast, every state has some form of judicial disciplinary mechanism, and in each state, the investigating body consists of judges, lawyers, and nonlawyers. The mechanisms in some states have two bodies—an investigating body (similar to the federal system's special committees) and an adjudicatory body (similar to the judicial councils)—or a single body that both investigates and adjudicates.<sup>237</sup> In Arizona, the Commission on Judicial Conduct performs both roles. Its members include six judges appointed by the Arizona Supreme Court from the state's various

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232. RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS R. 21 (2008).

233. *Id.*

234. Based on author's review of the seven opinions published on the U.S. Courts website: <http://www.uscourts.gov/RulesAndPolicies/ConductAndDisability/JudicialConductDisability.aspx>.

235. Judicial Improvement Act of 1990, Pub. L. 101-650, §§ 408–18, 104 Stat. 5122 (1990),

236. REPORT OF THE NAT'L COMM. ON JUDICIAL DISCIPLINE & REMOVAL, 152 F.R.D. 265 (1994).

237. BUREAU OF JUSTICE STATISTICS, *supra* note 21.

appellate and trial courts, two lawyers appointed by the state bar, and three nonlawyers appointed by the governor after Senate confirmation.<sup>238</sup>

The 1993 National Commission proposed no change to the judicial council statute but did recommend that “each circuit council charge a committee or committees, broadly representative of the bar but that may also include informed lay persons, with the responsibility to be available to assist in the presentation to the chief judge of serious complaints” as well as to “work with chief judges to identify problems that may be amenable to informal resolution.”<sup>239</sup> This proposal has never been embraced, although the Breyer Committee recommended something slightly similar, discussed below.<sup>240</sup>

### b. A Complaint Mechanism for the Supreme Court

The other recommendation comes from H.R. 862, discussed above with respect to disqualification and recusal of Supreme Court Justices.<sup>241</sup> A provision of the bill would have directed the Conference to investigate “complaints . . . that a justice . . . has violated the Code of Conduct,” and to take “appropriate” action, using procedures “modeled after” the Judicial Conduct Act. This provision reflects a misunderstanding of the binding nature of the Code of Conduct, discussed in the previous section.<sup>242</sup>

The provision is also at odds with the administrative configuration of the federal courts. Most state supreme courts are integral parts of their state judicial system’s administration, and the judicial discipline mechanism can usually discipline a member of the state supreme court. The Alabama Court on the Judiciary, for example, with no Alabama Supreme Court members,<sup>243</sup> (similar to Arizona’s Commission on Judicial Conduct),<sup>244</sup> removed Chief Justice Roy Moore from office for disobeying a federal court order to dismantle a carving of the Ten Commandments that he had installed in the courthouse.<sup>245</sup>

As explained earlier in Part I, the U.S. Supreme Court is not administratively part of the federal judiciary in the same sense as the district and appellate courts. In 1939, Congress considered making the Supreme Court the administrative head of the federal judicial system. At the urging of, among others, the Court itself, Congress instead vested that authority in what is now the United States Judicial Conference.<sup>246</sup> There would seem no constitutional reason why

238. ARIZ. CONST. art. 6.1, § 1(A).

239. REPORT OF THE NATIONAL COMMISSION OF JUDICIAL REMOVAL, NAT’L COMM’N OF JUDICIAL REMOVAL, 152 F.R.D. 265, 346 (1994).

240. See *infra* Part III.D.3.

241. See *supra* Part II.B.4.c.(1).

242. See *supra* Part II.C.

243. See *Court of the Judiciary Overview*, ALA. APPELLATE COURTS, <http://judicial.alabama.gov/judiciary/judiciary.cfm> (last visited Mar. 10, 2014).

244. See ARIZ. CONST. art. 6.1, § 1(A).

245. See *In re Matter of Roy S. Moore*, Chief Justice of the Supreme Court of Alabama, Final Judgment, Court of the Judiciary, Case No. 33, Nov. 13, 2003, available at [http://www.foxnews.com/projects/pdf/111303\\_moore.pdf](http://www.foxnews.com/projects/pdf/111303_moore.pdf).

246. See PETER GRAHAM FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 128, 138–42 (1973).

Congress could not integrate the Supreme Court into a unified federal judicial administrative machinery as head of the system (and eliminate the Judicial Conference or make it an advisory body). But Congress has not done so and there is no pressure to do so.

Unless it does, though, the current arrangement is at odds with making the Conference the overseer of complaints about the Justices' ethics. And consider the impracticality of having lower court judges decide what behavior by Justices is not acceptable and what to do about it. The Judicial Conduct Act authorizes councils to suspend a judge's case assignments. A Conference order telling a Justice to sit out a few cases could create a constitutional crisis. Given the Supreme Court's visibility, the Conference likely would be flooded with complaints, almost none of which would be meritorious. The high dismissal rate would breed more cynicism, and perhaps stoke unjustified legislative antagonism. And, while it is highly unlikely that lower court judges would take any action against members of the Supreme Court, there would be little benefit in pulling those judges into partisan battles over Supreme Court Justices.

#### *D. Informal Controls and Guidance*

The Breyer Committee concluded that the great bulk of possible misconduct (and performance-degrading disability) does not surface in complaints filed under the Judicial Conduct Act. It highlighted several means of dealing with such conduct and disability.

##### *1. Counseling Services*

The Judicial Council of the Ninth Circuit several years ago established a Private Assistance Line Service (P.A.L.S.), under which a private counselor, by contract with the circuit, is available to provide advice to chief judges dealing with delicate matters of perceived or actual misconduct or disability, or to judges and their families in need of assistance.<sup>247</sup> The P.A.L.S. program receives about four to six calls per year. Most come from chief district judges or another judge calling at the chief judge's request. Some come from family members, but very few come from judges seeking assistance for their own circumstances.<sup>248</sup> Although the Breyer Committee recommended that other judicial councils consider establishing similar programs,<sup>249</sup> it appears that only one other circuit has done so: the Tenth Circuit's JHealth, which the judicial council put into effect apparently in 2011. The program was created and is operated and supervised by the council's Judicial Health and Assistance Committee.<sup>250</sup>

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247. Richard Carlton, *Addressing Disability and Promoting Wellness in the Federal Courts*, 90 JUDICATURE 26, 28 (2006).

248. Information provided in a November 14, 2013 email from Tina Brier, Assistant Circuit Executive, Ninth Circuit (on file with author).

249. BREYER COMMITTEE REPORT, *supra* note 151, at 221–22.

250. Information provided in a November 21, 2013 email from Victoria Giffin, Assistant Circuit Executive, Tenth Circuit (on file in redacted version with author).

### 2. *Informal Chief Judge Action, in the Shadow of the Judicial Conduct Act*

The Breyer Committee and its staff conducted interviews with current and former chief circuit judges, one of whom referred to the Judicial Conduct Act as “a bargaining chip the chief judge could use, hanging in the background.”<sup>251</sup> Another reported that there “have been no special committees during my time as chief judge. That underscores how much the formal process interacts with, but does not necessarily govern, the most serious cases.”<sup>252</sup> Another referred to the “three primary problems of delay, aging, and temperament: it’s amazing how seldom they pop up in formal complaints. The informal process is the best way to deal with those. The really thorny problems are dealt with informally.”<sup>253</sup> Because confidentiality is often the key to successful interventions, it would be difficult to test this assertion.

There are other limits to formal action under the statute. One is that a judge’s objectionable behavior may not meet the statutory standard of “conduct prejudicial to the effective and expeditious administration of the business of the courts” or be caused by a “mental or physical disability” that creates an inability to discharge all the duties of the office. One chief judge told the committee:

Some people have abusive temperaments . . . . You pick that up on the grapevine, at a judicial conference, at a bar meeting. In temperament cases, sometimes it works if you reverse the judge in a real sharp way. This has to be approached very carefully. You don’t want to look as if you’re moving against a judge because of stylistic differences or—God knows—because of the judge’s views. You could easily compromise the independence of the courts, doing that.<sup>254</sup>

Also, some behavior that may appear initially as misconduct may in fact be conduct related to the merits of a case, which the Act puts off limits from its purview.<sup>255</sup> One obvious example is a judge’s failure to recuse herself when requested by one of the parties; that is, in almost all cases, a judicial act subject to appellate review. Chief judges, though, can use informal methods to persuade judges to maintain up-to-date conflict-of-interest lists as requested by the Judicial Conference.<sup>256</sup>

### 3. *Anonymous Reporting by Individuals or Bar Committees*

The machinery created by the Judicial Conduct Act may never get engaged because only the local bar is aware of specific instances of possible misconduct or disability. One chief judge told the committee:

If someone on the court of appeals is losing it or is out of control, his colleagues see that . . . . If it’s a district judge, often the judge’s

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251. BREYER COMMITTEE REPORT, *supra* note 151, at 202.

252. *Id.* at 203.

253. *Id.*

254. *Id.* at 204.

255. 28 U.S.C. § 352(b)(1)(A)(ii) (2012).

256. *See supra* Part II.B.3.

colleagues are the last to know, so lawyers will come to me. [But attorneys and the bar don't want to file complaints against judges . . . . The lawyer's business is to appear before the judge. The lawyer can't blithely file a complaint.<sup>257</sup>

The Breyer Committee endorsed the call by some judges for bar committees to report possible misconduct or disability to chief circuit judges.<sup>258</sup> At least one chief circuit judge picked up, partially, on that recommendation. Then-Chief Judge Frank Easterbrook of the Seventh Circuit Court of Appeals told lawyers and judges at the circuit's 2008 conference to let him know directly, through the circuit executive, or anonymously through the circuit bar association, of judges who may have behaved improperly or showed signs of performance-degrading disability. "The more I know about how well the courts of this circuit are functioning, the better we can administer justice."<sup>259</sup>

A variation on this theme is the proposed use on the federal level<sup>260</sup> of judicial conduct or performance commissions,<sup>261</sup> which some states have created to undertake periodic "judicial performance evaluations" of judges on such measures as punctuality, courtesy toward litigants, and clear explanations of their actions. The main use of the evaluations, though, is to inform voters about judges up for reelection.<sup>262</sup> There has been little interest in such evaluations on the federal level, just as there has been little interest in electing federal judges.

#### IV. CONCLUDING OBSERVATIONS AND A FEW SUGGESTIONS

##### A. *In General*

Federal judicial ethics regulations do not need any major overhaul. We have no reliable survey data assessing the extent and seriousness of federal judicial misconduct and performance-degrading disability, and it is hard to imagine how to collect them. Were such a thing possible, though, it is unlikely it would find patterns of serious misbehavior, the examples cited in this Article notwithstanding. For one thing, potential federal judges at all levels undergo extensive vetting prior to selection. Once on the bench, they have a strong interest in behaving properly and just as strong an interest in not being the subject of press coverage based on accusations of improper behavior. The existing machinery—informal as well as formal—seems by and large capable of dealing with what misconduct and disability there is.

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257. BREYER COMMITTEE REPORT, *supra* note 151, at 205.

258. *Id.*

259. Lynne Marek, *An All-Points Bulletin: Be on the Lookout for Aging, Cranky Judges*, NAT'L L.J. (May 21, 2008), <http://www.alm.law.com/jsp/article.jsp?id=1202421574442&slreturn=20140316132821>.

260. Rebecca Love Kourlis & Jordon M. Singer, *A Performance Evaluation Program for the Federal Judiciary*, 86 DENV. U. L. REV. 7, 9 (2008).

261. See BUREAU OF JUSTICE STATISTICS, *supra* note 21, at tbl. 10; see also Rebecca White Berch & Erin Norris Bass, *Judicial Performance Review in Arizona: A Critical Assessment*, 56 ARIZ. L. REV. 353 (2014).

262. Kourlis & Singer, *supra* note 260, at 10.

Small changes may be worth considering. Are the conflict-of-interest-avoidance mechanisms described in Part II working as well as they could? Should courts publish their judges' conflict lists, as a few have done?<sup>263</sup> Has the Judicial Conference struck the right balance between judges' privacy and security interests in their financial disclosure reports and their public availability?

Do the Judicial Conduct Act and the implementing Rules undermine the transparency of the proceedings by providing that the names of judges remain confidential except when the judicial council imposes a sanction other than private censure or reprimand,<sup>264</sup> or when referred to the House of Representatives for possible impeachment, or when the judge authorizes disclosure?<sup>265</sup> By contrast, 38 of the states and Puerto Rico provide for disclosing the judge's identity when the complaint moves to adjudication<sup>266</sup> (akin to submission of a special committee report to the judicial council). Keeping confidential the name of the judge in cases where the complaint is dismissed or concluded makes, in Professor Hellman's words, "little sense" in high-visibility cases such as that of the judge who spoke at the naturalization ceremony.<sup>267</sup> In a few cases, press reports may hint at an investigation and speculate on the judge. Disclosure by the chief judge or judicial council in such cases could serve to clarify matters.

As to the Judicial Conduct and Disability Act, the rules adopted by and the additional steps taken by the Judicial Conference Committee on Judicial Conduct and Disability have done much to realize the recommendations of the Breyer Committee, although, as I argued in Part III.C.4, the judicial councils could do more to make their orders more transparent. Professor Hellman has offered several additional suggestions.<sup>268</sup>

### ***B. The Supreme Court***

A major source of recent interest in federal judicial ethics regulation has been less the behavior of the over 1,000 lower federal court judges and more what some argue are ethical missteps by members of the Supreme Court and the lack of mechanisms to deal with them. Several comments:

First, imposing additional formal regulatory mechanisms on the Court may be a cure worse than the disease. The efforts in the 112th Congress to do so by creating a court to hear appeals from Justices' denying recusal motions was of questionable constitutionality and was impractical. Most of the furor over alleged conflicts of interest is created by the press and Congress, not by parties in litigation

263. See *supra* Part II.

264. See RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS R. 24(a)(4) (2008).

265. 28 U.S.C. §§ 355 (b)(1), 360 (2012).

266. See BUREAU OF JUSTICE STATISTICS, *supra* note 21, at tbl. 11.

267. See *supra* Part III.C.4.d.

268. *An Examination of the Judicial Conduct and Disability System: Hearing Before the Subcomm. on Courts, Intellectual Prop. & the Internet of the Comm. of the Judiciary*, 113th Cong. 48–51 (2013) (statement of Arthur D. Hellman, Sally Ann Semenko Chair, Univ. of Pittsburgh Sch. of Law).

before the Court, who are the only entities who could invoke the proposed procedure. The efforts in the same Congress to create a mechanism similar to judicial council review of Judicial Conduct and Disability Act complaints was likewise impractical and, if not unconstitutional, inconsistent with the statutory separation of the Court from the rest of the federal judicial administrative machinery.

Second, especially with Gallup reporting the Court's approval rating at 46% (which is the second lowest since 2000 and due of course to more than ethics controversies),<sup>269</sup> the Court might seriously consider steps to ameliorate some of the criticism directed at some of the Justices from both sides of the aisle, tactical though much of that criticism might be.

For example, if the Justices have adopted resolutions agreeing to abide by disclosure statutes even without conceding whether Congress may require compliance, why not release those resolutions? They have released the policy that they adopted several decades ago concerning recusal in cases in which a relative is a lawyer in the case.

The Court could, as suggested in Part II.C, adopt its own Code of Conduct, not on mandate by Congress, but on its own volition. Even though there would be no compliance enforcement mechanism, there would be symbolic value to that step.

The Justices could also reconsider whether explaining recusal refusals is almost always a bad idea. When Justice Scalia explained why his hunting trip with Vice President Cheney did not require recusal in the case involving the Vice President, many responded that he was right but asked why it took almost a month to respond to the recusal motion, which was preceded by considerable press commentary.<sup>270</sup> And, while no one would expect the Justices to respond to every crackpot claim in the press and social media that they have conflicts of interest, the world would not end if, in special cases, they explained why recusal is not in order.

It is important to the credibility of the Justices' assertions of self-compliance that they demonstrate familiarity with the various federal judicial ethics regulations and guidelines. For example, in his 2011 testimony to the House Appropriations Subcommittee, Justice Kennedy said that the Justices had agreed by resolution to follow the Code of Conduct. It appears, however, that the resolution to which he referred does not concern the Code but rather the financial disclosure resolution that Chief Justice Roberts mentioned in his 2011 Year-End Report.<sup>271</sup>

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269. Andrew Dugan, *Americans Still Divided on Approval of U.S. Supreme Court*, GALLUP POLITICS, (Oct. 14, 2013), <http://www.gallup.com/poll/165248/americans-still-divided-approval-supreme-court.aspx>.

270. *See supra* Part II.B.4.b.

271. *See supra* notes 34, 127 and accompanying text; *See also* Letter from Bob Edgar, President of Common Cause, to Chief Justice Roberts, May 19, 2011, citing a May 3, 2011 letter from a court official suggesting that "the resolution referred to by Justice Kennedy deals with the Court's compliance with Judicial Conference regulations on gifts, outside earned income, honoraria and outside employment, rather than with the Code." <http://www.commoncause.org/site/apps/nlnet/content2.aspx?c=dkLNK1MQIwG&b=4773617&ct=9386305>.

Finally, the Justices, like all judges, would do well to keep in mind, and to demonstrate that they have in mind, the Code of Conduct's admonition quoted at the outset of the Article—namely that judges “must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen.”<sup>272</sup>

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272. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2A cmt. (2014).