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Should the Rooster Guard the Henhouse: A Critical Analysis of the Judicial Conduct and Disability Act of 1980

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SHOULD THE ROOSTER GUARD THE HENHOUSE: EVALUATING THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980

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I. INTRODUCTION

On September 21, 2006, Judge Manuel L. Real, a federal district court judge from the Central District of California, appeared before a subcommittee in the United States House of Representatives.[1] The hearing was to determine whether articles of impeachment should be recommended against Judge Real, a 1966 appointee of President Johnson. At the time of the hearing, Real had become the poster-judge for a federal judiciary out of control—with the perception that the bench was composed of judges serving for life with absolute power and no effective method of ensuring accountability for misconduct.[2]

The events leading Judge Real to the subcommittee hearing read like the plot of a John Grisham novel. The accusations centered on irregularities in the handling of the case of Deborah Canter.[3] Ms. Canter first appeared before Judge Real when she pled guilty to the criminal charges of making false statements and loan fraud.[4] In that case, Judge Real placed her on probation and sentenced her to community service.[5] At the time Canter was facing the criminal charges, she was also going through a contested divorce and faced eviction from the home she and her husband rented prior to their separation because she had stopped paying rent.[6] At that time Canter filed bankruptcy, and the bankruptcy court subsequently entered an Order lifting the automatic stay, allowing the owner of the property to evict Canter.[7]

At this point, "lightning struck" and "[w]ithout notice, without warning, without giving . . . an opportunity to oppose, without so much as a

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1. *Impeaching Manuel L. Real, A Judge of the United States District Court for the Central District of California, for High Crimes and Misdemeanors: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 5 (2006) [hereinafter *Hearings*] (statement of Sen. Lamar Smith, Chairman, Subcomm. on Courts, the Internet, and Intellectual Property).

2. After reading the transcript of the impeachment hearing before the Subcommittee, it becomes clear that this hearing, while certainly centered around the conduct of Judge Real, was focused on the process itself and on questioning how well the current disciplinary system works.

3. *Id.*

4. *Id.*

5. *Id. See also* Terry Carter, *Real Trouble*, A.B.A. J., Sept. 2008, at 45 (discussing Canter's case as well as other potential misconduct by Judge Real).

6. In re Canter, 299 F.3d 1150, 1152 (9th Cir. 2002).

7. *See id.* at 1152-56 (holding that Real's assumption of jurisdiction in the case was improper).

motion, [Judge Real] withdrew the case from the bankruptcy court."[8] Twelve days after assuming the bankruptcy case, Judge Real enjoined the judgment evicting Canter from her home—once again without the "usual processes to which we are accustomed in American courts"—such as notice and an opportunity to oppose the Order.[9] The entire process was shrouded in mystery. Judge Real's Order "gave no reasons, cited no authority, made no reference to a motion or other petition, imposed no bond, balanced no equities."[10]

The effect of Judge Real's Order staying the eviction was to allow Canter to stay in the home rent-free.[11] When lawyers for the owner of the home (a Trust) filed a motion seeking to have the stay lifted, Judge Real summarily denied the motion, shedding no light on the justification for his actions:

> MR KATZ: And the motion to lift the stay is denied?
> THE COURT: Denied, that's right.
> MR. KATZ: May I ask the reasons, your Honor?
> THE COURT: Just because I said it, Counsel.[12]

The Ninth Circuit ultimately held it was an abuse of discretion for Judge Real to assume oversight of Canter's bankruptcy case.[13]

The reason Judge Real assumed oversight of Canter's bankruptcy case and stayed the eviction is disputed. One theory was that Canter wrote a "secret letter" to Judge Real seeking his assistance with the eviction.[14] While both Canter and Judge Real deny that such a letter existed, Canter's former attorney stated that his secretary acted as a ghostwriter for Canter.[15] This entire episode would have gone unchallenged but for the fact that a lawyer (not involved in the Canter case) filed a judicial misconduct complaint against Judge Real, alleging:

> It would appear to a reasonable observer who knew all these facts that something inappropriate happened here, beyond what the court discussed. What I mean to say is that it appears that Judge Real acted inappropriately to benefit an attractive female whom he oddly had placed on probation to himself, and, if this occurred, then it would constitute extreme judicial misconduct.[16]

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8. In re Complaint of Judicial Misconduct, 425 F.3d 1179, 1184 (9th Cir. 2005).
9. *Id.*
10. *Id.*
11. *Id.* at 1195. It was estimated that rent would have been approximately $35,000 from the entry of Judge Real's Order until her ultimate eviction. *Id.*
12. *Id.* at 1184.
13. *In re Canter*, 299 F.3d at 1156.
14. *In re Complaint of Judicial Misconduct*, 425 F.3d at 1189.
15. *Id.*
16. *Hearings, supra* note 1, at Exhibit "B" (testimony of Manuel Real).

Judge Real claimed that the accusations were filed by a disgruntled attorney with a "personal vendetta" against him.[17]

The filing of the complaint triggered the procedures set out in the Judicial Conduct and Disability Act for handling allegations of judicial misconduct. The Chief Judge of the Ninth Circuit first received and reviewed the complaint. After reviewing the allegations, the Chief Judge made no investigation and dismissed the Complaint stating that the Complaint failed to state any "objectively verifiable proof" to substantiate the allegations.[18]

The dismissal was then appealed to the Judicial Council. The Judicial Council remanded to the Chief Judge for further investigation—specifically, whether Judge Real had acted to assist Canter because he had received the alleged secret letter.[19] On remand, the Chief Judge obtained the denials from Real and Canter and determined "there is no basis for a finding that credible evidence exists of a letter or other 'secret communication'" from Canter to Real (the Chief Judge did not contact the alleged ghostwriting secretary).[20]

The dismissal was then appealed to Judicial Council, and, in a two-page opinion, the Judicial Council stated that the "suggestion [in the complaint] of an inappropriate personal relationship with the petitioner is entirely unfounded"—relying on the factual findings of the Chief Judge.[21] Judge Kozinski wrote a strongly worded dissent questioning the handling of Judge Real's case. In his dissent he made the following prophetic statement regarding the handling of judicial misconduct complaints:

> Pleasant or not, it's a responsibility we accept when we become members of the Judicial Council, and we must discharge it fully and fairly, without favor or rancor. If we don't live up to this responsibility, we may find that Congress - which does keep an eye on these matters . . . . will have given the job to somebody else, materially weakening the independence of the federal judiciary.[22]

The Judicial Council order did not end the Judge Real saga however. After the Judicial Council affirmed the Chief Judge, the claimant appealed the dismissal to the Judicial Conference.[23] A committee was appointed to hear and decide the appeal.[24] The Committee's ultimate determination was that it had no authority to investigate the Complaint further because

17. *Hearings, supra* note 1 (testimony of Sen. Lamar Smith, Chairman, Subcomm. on Courts, the Internet, and Intellectual Property).

18. *Hearings, supra* note 1, at Exhibit "C" (testimony of Manuel Real).

19. *In re Complaint of Judicial Misconduct*, 425 F.3d at 1189.

20. *Id.*

21. *Id.* at 1180.

22. *Id.* at 1183.

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

24. *Id.*

the Chief Judge dismissed the Complaint without appointing a special committee to prepare a report.[25] The quirk of procedure which denied the Conference jurisdiction to consider the potential misconduct was not lost on the members of the committee: "Admittedly, under the statutory scheme . . . a chief judge may avoid review by the Judicial Conference . . . by the simple expedient of failing to appoint a special committee . . . and instead dismissing the complaint . . . ."[26] In dissent, Judge Winters raised questions about the current regulatory scheme itself: "A self-regulatory procedure suffers from the weakness that many observers will be suspicious that complaints against judges will be dissolved, will be disfavored. The Committee's decision in this case can only fuel such suspicions."[27] Thus, the judicial misconduct proceedings ended, and the Impeachment proceedings began.

The purpose of this Article is to critically examine the aspect of the Act which seems to invite the most criticisms and raise the most questions of impropriety – namely, the initial receipt, review, and investigation of misconduct complaints. If the complaint against Judge Real had received adequate attention at the outset, the outcome may not have been different, but judicial resources would have likely been saved and the black-eye the handling of the case gave the judiciary could have been avoided. This article proposes that the current process of receiving, reviewing, and investigating judicial misconduct complaints should be amended. Specifically, the Act should incorporate into the current system an initial review and investigation by a magistrate judge. To this end, Part II sets out the procedures of how complaints are currently handled under the Act. Part III then discusses the constitutional limitations for designing a judicial misconduct process, and the practical criticisms and limitations of the current process. Part IV looks at recent congressional proposal for altering consideration of judicial misconduct complaints—adoption of an inspector general. Finally, Part V proposes that instead of an inspector general, Congress should consider amending the current judicial misconduct Act to require the appointment of magistrate judges to initially receive, review, and investigate misconduct complaints.

II. THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A BRIEF LOOK AT THE PROCEDURE

Judge Real's case is simply the latest example that has caused Congress to question how complaints of judicial misconduct are handled.[28]

25. *Id.* at 109.

26. *Id.*

27. *Id.* at 117 (Winters, J., dissenting).

28. *See* Patrick Donald McCalla, *Judicial Disciplining of Federal Judges is Constitutional*, 62 S. CAL. L. REV. 1263, 1269-71 (May 1989) (discussing proposed congressional legislation authorizing procedures for judicial discipline short of impeachment); Stephen B. Burbank & S. Jay Plager, *Foreward: The Law of Federal Judicial Discipline and the Lessons of Social Science*, 142 U. PA. L. REV. 1, 2 (Nov. 1993) ("Politicians have been concerned about the difficulty of removing federal judges at least since Thomas Jefferson's failed attempt to make an example of Justice Chase. Proposals to make removal

While the fires of congressional concern are often stoked with regard to judicial discipline, very rarely does any change take place. The lack of any significant change to the current regulatory system stems from a number of factors. One is that while congressional interest peaks when a high profile case enters the public consciousness, the interest quickly dissipates—either because the issue leaves the headlines or because the issue is not sufficiently electorally salient to expend the resources to push for reform.[29] The result of these electoral realities is that a disgruntled member of Congress may demand a hearing, but any impetus to create real change is quickly overcome by other demands on the member's time. This reality changed however in the immediate aftermath of Watergate, when the momentum and inertia of that scandal made the question not *whether* to address judicial misconduct but *how* to fashion a system that maintained respect for judicial independence while at the same time ensuring that no one – including federal judges – were exempt from accountability for their actions.[30] This need to walk the "tightrope between independence and accountability" resulted the passage of the Judicial Conduct and Disability Act.[31]

The difficulty Congress faced when drafting the current Judicial Conduct and Disability Act, and will continue to face when considering any reform, is that issues of judicial misconduct are of constitutional proportions. The Constitution provides that officers – such as federal judges – may only be removed from office by impeachment. Article III judges "hold their Offices during good Behaviour . . ." and may be removed from office if impeached or convicted of "Treason, Bribery, or other high Crimes and Misdemeanors."[32] The question is whether any action or discipline less than formal impeachment proceedings violates this constitutional mandate.[33] For example, if a judge becomes incapacitated and cannot effectively handle her docket, may Congress authorize the removal of cases from her docket or suspend receipt of new cases so she receives no new cases? Does such conduct constitute an unconstitutional attempt to remove a judge in a manner short of impeachment? If the answer to the

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easier, substantively and procedurally, whether by constitutional amendment or statute, are common throughout our history."); Stephen B. Burbank, *Procedural Rulemaking under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283, 291-301 (Dec. 1982).

29. Robert W. Kastenmeier & Michael J. Remington, *Judicial Discipline: A Legislative Perspective*, 76 KY. L.J. 763, 764-66 (1988).

30. This is certainly not to say that attempts to regulate judicial conduct had not generated proposed legislation. There have been a number of laws proposed, but the post-Watergate political landscape provided both the opportunity and the electoral saliency to justify passage of an Act. *See* Patrick Donald McCalla, 62 S. CAL. L. REV. 1263, 1269-71 (May 1989) (discussing legislation proposed between 1936 and 1980).

31. Stephen Shapiro, *The Judiciary in the United States: A Search for Fairness, Independence, and Competence*, 14 GEO. J. LEGAL ETHICS 667, 678 (2001).

32. U.S. CONST. art. II, § 4. The Constitution places the power of impeachment in the House of Representatives and the power to try impeachments in the Senate. *See* U.S. CONST. art. I, § 2, cl. 5 *and* art I, § 3, cl. 6.

33. *See* Irving R. Kaufman, *Chilling Judicial Speech*, 88 YALE L. J. 681 (March 1979) (arguing that providing discipline for federal judges in any manner other than impeachment would compromise judicial independence).

latter question is "yes," then Congress is left solely with the formal impeachment process, which has been described as an "unwieldy and insufficient means of disciplining judges," because the process is cumbersome, and because rarely does conduct rise to the level set out by the Constitution as an impeachable offense.[34] In fact, impeachment charges have been brought against only thirteen federal judges in the history of the nation. Of these thirteen (including Supreme Court Justice Samuel Chase), four were acquitted, seven were removed from office, and two judges resigned prior to a trial on the articles of impeachment.[35]

With passage of the Judicial Conduct and Disability Act, Congress sought a method for dealing with deviant or disabled judges when their misconduct does not rise to the level of an impeachable offense. The 1980 legislation[36] provided a mechanism for addressing such misconduct which, while not impeachable, brings public disrepute to the judiciary.[37] The legislation ultimately adopted was a compromise between competing interests. The judicial branch lobbied for legislation that would protect the power and discretion of the judiciary to regulate itself.[38] Some members of Congress, on the other hand, offered alternatives which tended to give

34. Shapiro, *supra* note 31, at 680. Reasons for congressional reluctance to utilize the impeachment procedures include (a) the cost of a lengthy impeachment proceeding which is not likely to result in an equal political benefit when seeking reelection; (b) Congress is hesitant to engage in trial-like proceeding which is foreign to its institutional design; and (c) desire of members of Congress to avoid the appearance of interfering with the independence of the judiciary. Lynn A. Baker, *Unnecessary and Improper: the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 YALE L.J. 1117, 1139-40 (April 1985).

35. CONGRESSIONAL DIRECTORY 551 (110th Congress 2007-2008). The impeached judges include Samuel Chase, associate justice of the Supreme Court; acquitted March 1, 1805. John Pickering, judge of the U.S. District Court for New Hampshire; removed from office March 12, 1804. James H. Peck, judge of the U.S. District Court for Missouri; acquitted Jan. 31, 1831. West H. Humphreys, judge of the U.S. District Court for the Middle, Eastern, and Western Districts of Tennessee; removed from office June 26, 1862. Charles Swayne, judge of the U.S. District Court for the Northern District of Florida; acquitted Feb. 27, 1905. Robert W. Archbald, associate judge, U.S. Commerce Court; removed Jan. 13, 1913. George W. English, judge of the U.S. District Court for Eastern District of Illinois; resigned Nov. 4, 1926; proceedings dismissed. Harold Louderback, judge of the U.S. District Court for the Northern District of California; acquitted May 24, 1933. Halsted L. Ritter, judge of the U.S. District Court for the Southern District of Florida; removed from office April 17, 1936. Harry E. Claiborne, judge of the U.S. District Court for the District of Nevada; removed from office Oct. 9, 1986. Alcee L. Hastings, judge of the U.S. District Court for the Southern District of Florida; removed from office Oct. 20, 1988. Walter L. Nixon, judge of the U.S. District Court for Mississippi; removed from office Nov. 3, 1989. *Id.* Recently, Samuel B. Kent, judge of the U.S. District Court for the Southern District of Texas was impeached on June 19, 2009 and subsequently resigned on June 30, 2009. *See Impeachments of Federal Judges*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/topics_ji_bdy (last visited July 5, 2009).

36. 28 U.S.C. §§ 351-364 (West 2007).

37. Prior to 1981, discipline of federal judges (other than impeachment) was "handled as part of the general administrative responsibilities of the Judicial Councils of the various circuits under 28 U.S.C. § 332, which had been adopted in 1939." Richard L. Marcus, *Who Should Discipline Federal Judges, and How?*, 149 F.R.D. 375 (1993).

38. Stephen B. Burbank, *Procedural Rulemaking under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283, 291-308 (Dec. 1982). The representatives of the judiciary were concerned not only about attempting to achieve accountability through the enactment, but were also interested in addressing the administrative questions raised. For example, a disabled judge who continued to be assigned cases but did not promptly dispose of the cases, placed an administrative burden on the efficient administration of the courts. Thus, having a congressionally

Congress a greater role in oversight of the disciplinary process and in assessing and imposing of discipline.[39]

The disciplinary Act applies to all federal circuit, district, bankruptcy or magistrate judges.[40] It provides that "[a]ny" person who alleges that a judge "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" may file a written complaint containing a statement of the facts of the alleged misconduct.[41] The chief judge of the circuit can also initiate an investigation by filing a written order.[42] Once the complaint is received, the clerk forwards a copy of the complaint to the chief judge of the circuit, and also sends a copy to the judge who is the subject of the complaint.[43]

After receiving the complaint, the chief judge has an obligation to conduct a "limited inquiry" to determine: (a) whether corrective action has been or could be taken without a formal investigation; and (b) whether the facts stated in the complaint are "plainly untrue or incapable of being established through investigation.[44] In conducting the limited inquiry, the chief judge may request a response to the complaint from the judge named in the complaint (although this response is not made available to the claimant without authorization from the judge at issue).[45] The chief judge can also speak to the claimant, or any other individual with knowledge, and review any relevant documents.[46]

Once the chief judge has concluded this initial investigation, the chief judge may dismiss the complaint if it:

(1) is not in the form required by statute;[47]

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approved method for adjusting the workload of these judges (short of impeachment) was viewed positively by the judicial lobby. As with all compromises, the question of whether the ultimate outcome was a *good* compromise is a matter of perspective. Since passage of the Act, a number of members of Congress, agitated with the Act's perceived ineffectiveness, have proposed amendments and alternatives. *See* Stephen B. Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 KY. L. J. 643 (1988); Kastenmeier & Remington, *supra* note 29, at 763 (1988).

39. Stephen B. Burbank, *Procedural Rulemaking under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283, 291-308 (Dec. 1982). The representatives of the judiciary were concerned not only about attempting to achieve accountability through the enactment, but were also interested in addressing the administrative questions raised. For example, a disabled judge who continued to be assigned cases but not promptly dispose of the cases, placed an administrative burden on the efficient administration of the courts. Thus, having a congressionally approved method for adjusting the workload of these judges (short of impeachment) was viewed positively by the judicial lobby. As with all compromises, the question of whether the ultimate outcome was a *good* compromise is a matter of perspective. Since passage of the Act, a number of members of Congress, agitated with the Act's perceived ineffectiveness, have proposed amendments and alternatives. *See* Stephen B. Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 KY. L. J. 643 (1988); Kastenmeier & Remington, *supra* note 29, at 763 (1988).

40. 28 U.S.C. § 351(d)(1) (West 2007).

41. 28 U.S.C. § 351(a) (West 2007).

42. 28 U.S.C. § 351(b) (West 2007).

43. 28 U.S.C. § 351(c) (West 2007).

44. 28 U.S.C. § 352(a)(1)-(2) (West 2007).

45. 28 U.S.C. § 352 (West 2007).

46. *Id.*

47. 28 U.S.C. § 352(b)(1)(A)(i) (West 2007).

(2) "directly relate[s] to the merits of a decision or procedural ruling;"[48]
(3) is "frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred;" or contained facts that could not be established through an investigation;[49]
(4) "lack[s] any factual foundation or are conclusively refuted by objective evidence;"[50] or
(5) if the chief judge "finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events."[51]

If the complaint is dismissed, the judge at issue may request to be reimbursed for expenses (including attorneys' fees) from the Administrative Office of Courts.[52]

The claimant or the judge named in the complaint has the right to appeal the chief judge's decision to the judicial council of the circuit in which the misconduct is alleged.[53] The petition is then reviewed by a panel of no fewer than five (5) members of the judicial council.[54] There is no further appeal or judicial review if the judicial council denies the petition for review.[55]

If, instead of dismissing the complaint, the chief judge determines after the initial inquiry that the complaint should be investigated further, she appoints a special committee composed of the chief judge and an equal number of circuit and district court judges.[56] Thereafter, the committee conducts an investigation and files a written report with the judicial council including the committee's recommendations.[57] The judicial council, once it has received the report, may conduct an additional investigation, dismiss the complaint, or take action "as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit."[58] After a decision by the council, the claimant or the judge at issue has the right to petition the Judicial Conference for review.[59] If the Judicial

48. 28 U.S.C. § 352(b)(1)(A)(ii) (West 2007).
49. 28 U.S.C. § 352(b)(1)(A)(iii) (West 2007).
50. 28 U.S.C. § 352(b)(1)(B) (West 2007).
51. 28 U.S.C. § 352(b)(2) (West 2007).
52. 28 U.S.C. § 361 (West 2007).
53. 28 U.S.C. § 352(c) (West 2007).
54. 28 U.S.C. § 352(d) (West 2007). The committee must contain at least two (2) district judges selected from the district where the alleged misconduct occurred. *Id.*
55. 28 U.S.C. § 352(c) (West 2007).
56. 28 U.S.C. § 353 (a)(1) (West 2007).
57. 28 U.S.C. § 352 (c) (West 2007).
58. 28 U.S.C. § 354(a)(1)(A)-(C) (West 2007).
59. 28 U.S.C. 357(a) (West 2007). The Judicial Conference is a national body. The Chief Justice of the United States presides over the Conference. There are 26 members of the Conference other than the Chief Justice including the chief judge of each court of appeals, one district court judge from each regional circuit, and the chief judge of the Court of International Trade. The Conference appoints committees to handle appeals of misconduct complaints.

Conference denies a petition for review, the order is final and cannot be appealed.[60]

If the judicial council determines that action should be taken, it has the power to: (1) order that no further cases be assigned to the judge for a temporary period of time; (2) order a private censure or reprimand; or (3) order a public censure or reprimand.[61] If the judicial council determines that an Article III judge has engaged in conduct that "might constitute one or more grounds for impeachment" the council shall forward the complaint to the Judicial Conference of the United States.[62] If the Judicial Conference agrees that the judge's conduct constitutes an impeachable offense, the Judicial Conference must forward the record to the House of Representatives.[63] All records of the investigation and findings are confidential and are not to be disclosed.[64] The judicial council has the discretion to release a copy of a report of a special committee to the claimant and the judge who is subject to the complaint and shall release any documents necessary for an impeachment inquiry by Congress.[65]

III. BEGINNING AT THE BEGINNING: THE EFFECTIVENESS OF MAINTAINING JUDICIAL INDEPENDENCE AND ACCOUNTABILITY UNDER THE CURRENT SYSTEM

The procedures of the Act are designed to ensure both independence and accountability – two critical and sometimes contradictory principals.[66] The scholarship on whether the self-regulating system is effective at maintaining the proper balance between independence and accountability is divergent. Some argue that any discipline short of impeachment is an "ominous threat to the judicial independence so necessary to our form of government."[67] Proponents of this argument allege that any disciplinary

60. 28 U.S.C. § 357(c) (West 2007).

61. 28 U.S.C. § 354(a)(2)(A)(i)-(iii) (West 2007).

62. 28 U.S.C. § 354(b)(2)(A) (West 2007).

63. 28 U.S.C. § 355(b)(1) (West 2007).

64. 28 U.S.C. § 360(a) (West 2007).

65. 28 U.S.C. § 360(a)(1)-(2) (West 2007). For a very helpful diagram of the procedural operation of the Act, *see* Edward D. Re, *Judicial Independence and Accountability: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 8 N. KY. L. REV. 221 app. (1981).

66. Dennis F. Thompson, ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION 19-24 (The Brookings Institute 1995).

67. Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L. J. 681, 682-83 (1979); *see also* Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671 (1980) ("A law that stops short of providing for removal may be no less destructive of the constitutional scheme [than a statute setting out a procedure for removal other than impeachment] if it destroys the capacity of federal courts to execute their fundamental responsibilities."). In the article, Professor Kaufman also states: "While the constitutional text gives Congress the power to discipline its own members, the judiciary is not similarly vested with disciplinary authority. The separation-of-powers framework contemplates that the judiciary will hold its members accountable to the law and litigants through appellate review, rather than inquisitorial proceedings. In essence, the Act forces judges to adopt a procedure for reviewing their colleague's actions other than that established in the Constitution. Thus, the Act transgresses the separation of powers unless it is narrowly drawn to further weighty and legitimate countervailing interests." (footnotes omitted). *See also* Baker, *supra* note 34 (April 1985) (arguing that providing judicial councils the right to restrict assignment of cases to federal judges deprives the judge

procedures less than impeachment are unconstitutional[68] and specifically argue against certain aspects of the current Act – such as the ability to withhold cases from a judge's calendar for an unlimited amount of time.[69] This argument was clearly articulated by Justice Douglass in his dissent in *Chandler v. Judicial Council of Tenth Circuit*:

> An independent judiciary is one of this Nation's outstanding characteristics. Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge. He commonly works with other federal judges who are likewise sovereign. But neither one alone nor any number banded together can act as a censor and place sanctions on him. Under the Constitution the only leverage that can be asserted against him is impeachment, where pursuant to a resolution passed by the House, he is tried by the Senate, sitting as a jury . . . Our tradition even bars political impeachments as evidenced by the highly partisan, but unsuccessful, effort to oust Justice Samuel Chase of this Court in 1805. The Impeachment Provision of the Constitution indeed provides for the removal of "Officers of the United States,' which includes judges, on 'Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.' Art. II, s. 4 . . . . What the Judicial Council did when it ordered petitioner to 'take no action whatsoever in any case or proceeding now or hereafter pending' in his court was to do what only the Court of Impeachment can do.[70]

On the other end of the spectrum are those who argue that the best method to ensure true judicial accountability is to hold judges accountable through the political process.[71] For example, proposed periodic evaluation of judicial performance by congressional committees.[72]

Between these two extremes are those who argue in favor of some version of a self-regulatory system. Those promoting self-regulation argue

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of her constitutional right to "hold[ ] office" and equates to an improper removal of the judge from office).

68. Baker, *supra* note 34 (concluding that the Act's standard for misconduct, "'prejudicial to the effective and expeditious administration of the business of the courts' all too readily becomes a license for disgruntled litigants and fellow judges to harass the judicial maverick.").

69. McCalla, *supra* note 28 (arguing that while sanctions less than impeachment are not unconstitutional, allowing the judicial council to suspend a judge from receiving new cases for an unlimited amount of time is the equivalent of impeachment and therefore unconstitutional).

70. Chandler v. Judicial Council of the Tenth Circuit of the United States, 398 U.S. 74, 136 (1970) (Douglass, J., dissenting).

71. Howard T. Markey, *The Delicate Dichotomies of Judicial Ethics*, 101 F.R.D. 373, 375-77 (1984).

72. *See* S. 3018, 97th Cong. (1982). Bill 3018 sought to create a joint committee of Congress to evaluate performance of all federal judges every ten years to determine whether a judge's conduct met the constitutional standard of "good behavior."

that judicial "misconduct" in the large majority of cases is actually instances of Judges being unaware (or being unwilling to admit) their own short-comings.[73] Therefore relying on internal procedures—such as communication with the judge and making suggestions for corrections—is the preferred method to remedy judicial misconduct.[74] According to this approach, the primary purpose of the Act is not to punish wayward judges, but to allow chief judges in the circuits to informally correct deviant behavior.[75] In addition, self-regulation allows the judiciary to keep its own house—without interference from the other branches. Because fellow judges are better able to determine what conduct "crosses the line" and what conduct, although unpopular, is inherent in the process of judging, they are able to maintain the independence of the judiciary while at the same time addressing deviance by federal judges. In addition, proponents point out that self-regulation also benefits Congress if an impeachment inquiry becomes necessary by providing the House of Representatives with an "expert witness" to gather evidence and evaluate the judge's conduct prior to consideration by the House of Representatives.[76]

Even after adoption of the current system for addressing judicial misconduct was adopted in 1980, skepticism of the judiciary's ability to self-regulate is a recurring issue. In 1990, Congress authorized the National Commission on Judicial Discipline and Removal to investigate problems related to the discipline of Article III judges and propose alternatives to self-regulation under the Act.[77] While the Commission concluded that everything was "rosy" under the self-regulation procedures set out in the Act, it did recognize that, at times, considerations of complaints were less than ideal:

> This study has demonstrated that most of the complaints are meritless. As to others, it appears that they have usually been properly handled. There have been a number of instances of discipline under the Act, and many more in which the Act has led or contributed to administrative improvements and other corrective actions. All these factors paint a rosy picture.[78]

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73. Collins T. Fitzpatrick, *Building a Better Bench*, 1 JUDGES' J. 16, 17-18 (2005).

74. *Id.* at 18-19. Fitzpatrick also states that administering anonymous surveys of lawyers who practice before the judge can serve to both inform the judge of problems and allows for corrective action within the current self-regulating framework. *Id.*

75. 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, 93-94 (Nov. 1993). In discussing informal methods of judicial discipline, Professor Geyh found that even with regard to complaints that did not involve misconduct as defined by the Act, the information in the complaint provides chief judges an opportunity to informally address the conduct with a judge even if the conduct falls below what would be considered "misconduct" under the Act. Charles G. Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 249 (Nov. 1993).

76. Elbert P. Tuttle, *Preserving Judicial Integrity: Some Comments on the Role of the Judiciary Under the "Blending" of Powers*, 37 EMORY L.J. 587, 610-11 (Summer 1988).

77. NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL, REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 122 (1993).

78. Marcus, *supra* note 37, at 434.

The Commission did acknowledge areas that needed improvement, namely: (1) in "some possibly serious cases" the response was "less vigorous than it should have been;"[79] and (2) significant differences between the circuits in implementation of the Act.[80]

Thereafter, in 2004, former Chief Justice William Rehnquist recognized that there was "some recent criticism from Congress about the way the Judicial Conduct and Disability Act of 1980 is being implemented," and commissioned a committee to evaluate how the Act was being implemented.[81] The committee's report, completed two years after it was commissioned (and after Chief Justice Rehnquist's death), concluded that there were "no serious problem[s] with the judiciary's handling of the vast bulk of complaints under the Act."[82] The committee recommended twelve suggestions for improving implementation of the Act, but no changes to the statute itself or the self-regulation scheme.

Based on the foregoing, the current judicial misconduct procedure, which has been in place for more than twenty-five years, is either a glowing success or a shameful failure.[83] From the perspective of the judiciary, the Act is operating properly and needs only procedural tweaks (but no changes to the Act itself).[84] From the perspective of critics, the Act is inconsistently applied and should be reformed to ensure reliable handling of complaints. Recently, Representative J. James Sensenbrenner (R-Wis) and Senator Charles Grassley (R-Iowa) have proposed bills in the House and Senate, respectively, that would over-haul the misconduct statutes and create an office of Inspector General to review judicial misconduct complaints that are denied by the chief judge or judicial council.[85]

The purpose of this article is not to weigh in on the constitutional debate over the propriety of discipline less than impeachment. It also does not recommend a complete overhaul of the current system. Instead, this article's goal is both more limited and more pragmatic. It analyzes the role of the chief judge in the initial evaluation of judicial misconduct complaints and recommends that the initial complaints go to a magistrate who is charged with receiving, evaluating, and investigating complaints and recommending action to the chief judge. Modifying the system in this manner avoids the constitutional challenges that other proposals invite, and it also supplements and does not supplant the current system.

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79. *Id.*

80. *Id.*

81. THE JUDICIAL CONDUCT AND DISABILITY ACT STUDY COMMITTEE, THE IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE 1 (Sept. 2006).

82. *Id.* at 5.

83. Burbank, *supra* note 38 (evaluating Rules implemented by judicial councils two years after Act's passage and concluding that the rules were "deficient").

84. THE JUDICIAL CONDUCT AND DISABILITY ACT STUDY COMMITTEE, THE IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE 5 (Sept. 2006).

85. H.R. 785, 105th Cong. (1997).

Before moving into issues related to the current system and proposals for reform, perhaps it is worthwhile to consider how complaints have been handled under the Act. The following table shows how complaints have been handled over the last ten years.[86]

	9/30/99 to 9/30/00	9/30/00 to 9/30/01	9/30/01 to 9/30/02	9/30/02 to 9/30/03	9/30/03 to 9/30/04	9/30/04 to 9/30/05	9/30/05 to 9/30/06	9/30/06 to 9/30/07
Total Complaints Resolved:	715	668	780	682	784	667	619	752
Action Taken By Chief Judge Upon Receipt of Complaint								
Complaints Dismissed:								
— Not in Conformity with Statute	29	13	27	39	27	21	25	18
— Directly Related to Decision or Procedural Ruling	264	235	249	230	295	319	283	318
— Frivolous	50	103	110	77	112	41	63	56
— Appropriate Action already taken	6	4	3	3	3	5	5	3
— Action No Longer Necessary Because of Intervening Events	7	5	6	8	9	8	6	6
— Complaint Withdrawn	3	3	8	8	3	6	9	3
TOTAL:	**359**	**363**	**403**	**365**	**449**	**400**	**391**	**404**
Action Taken by Judicial Council – After Referral by Chief Judge:								
Directed Chief Judge to take Action (Magistrate only)	0	0	0	0	0	0	1	0
Publicly Censured	2	1	2	0	0	0	0	0
Ordered Other Appropriate Action	0	0	0	1	0	0	0	0
Dismissed the Complaint	354	303	375	316	335	267	227	344
Withdrawn	0	1	0	0	0	0	0	2
TOTAL:	**356**	**305**	**377**	**317**	**335**	**267**	**228**	**346**

Considering the judicial discipline complaints set out in the table above, two facts become clear. First, an extraordinary percentage of complaints dismissed by the chief judge are dismissed as either directly related to the merits of the case (70%) or frivolous (19%). Overall, dismissals on these grounds account for 89% of dismissals by the chief judge. Second, it is extremely unlikely there will be any action taken on complaints referred to the circuit's judicial council by the chief judge. Over the ten year period analyzed, an astounding 99.6% of complaints were dismissed by councils,

86. Data for chart taken from ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF US COURTS, TABLES S-22A AND S-22B, REPORT OF COMPLAINTS FILED AND ACTION TAKEN UNDER AUTHORITY OF 28 U.S.C. §§ 351-364 for the dates listed.

while only .4% received further action (where a public censure, the complaint was withdraw or other action). These statistics demonstrate the importance of the initial review and determination in the process. If the initial review and investigation are not adequate, the likelihood of further investigation by the judicial council is almost non-existent.

A. The Current System Is Too Subjective and Ambiguous

The first major concern with regard to the current system is that the statutory definition of misconduct is too subjective and ambiguous.[87] The Act states that a judge may be disciplined if she has "engaged" in "conduct prejudicial to the effective and expeditious administration of the business of the courts."[88] The meaning of this phrase is laced with ambiguity, requiring a complainant (who is often a non-lawyer) to communicate the alleged misconduct in a manner that fits within the statutory definition, while not verbalizing conduct (such as relating to the merits of the claim) which will result in a summary dismissal of the complaint without investigation.[89] To make matters worse, courts are inconsistent in delineating the scope of the Act's reach. For example, assume a judge takes an excessive amount of time to rule on a matter in a particular case and a complaint is filed. Depending on how the chief judge receiving the complaint views the allegation, she might: (1) dismiss the complaint because the *lack* of action by the judge is not the equivalent of "engag[ing]" in conduct under the Act (failure to act is not engaging in conduct); (2) dismiss the complaint because the delay in a singular case—even if the delay is termed excessive—does not rise to the level of "conduct prejudicial to the effective and expeditious administration of the business of the courts"; (3) dismiss the complaint because the complaint relates to the merits of the case—and the proper remedy is through the appellate process or through a writ of mandamus[90]; or (4) consider the complaint valid under the Act.[91]

The ambiguity of defining misconduct results in skepticism surrounding the integrity of the initial review of the complaint. To make matters worse, complaints dismissed by the chief judge have no precedential value.

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87. Ambiguity is found not only in the language of the Act itself, but also in the legislative history of the Act, which makes the precise scope of the Act's reach unclear. *See* Peter R. Ryan, *Counsels, Councils and Lunch: Preventing Abuse of the Power to Appoint Independent Counsels*, 144 U. PA. L. REV. 2537, 2562-65 (June 1986).

88. 28 U.S.C. § 351(a) (West 2007).

89. *See supra* notes 34-38.

90. In fact, as Professor Geyh points out, this approach to a disciplinary complaint can have the consequence of making the most egregious misconduct fall outside the Act:

> The operating assumption of this approach is that the Act serves a gap-filling function, in which its availability is limited to situations in which appeal or mandamus is unavailable. Given that appeal or mandamus is available when delays turn outrageous and when courtroom misconduct becomes so extreme as to deprive litigants of fundamental due process, the paradox of this approach is that the severity of the judicial misconduct becomes inversely related to the applicability of the Act. That is, the more outrageous the delay or the more extreme the courtroom misconduct, the more available becomes appeal or mandamus, and the less available becomes discipline. Geyh, *supra* note 74, at 255-56.

91. *Id.* at 243, 248-54.

This creates an environment in which the chief judge's actions are shrouded in mystery and largely based on the chief judge's own interpretation of what misconduct warrants further investigation on an *ad hoc* basis. Because of this ambiguity in language and uncertainty in interpretation, there is a concern that the chief judge, after reviewing a complaint against a colleague (particularly one in-artfully drafted by a non-lawyer), will resolve any ambiguity in favor of the judge and dismiss the complaint. Furthermore, there is a risk that any investigation that is ultimately undertaken is with the goal of clearing the judge, as opposed to objectively considering the facts.

Whether this concern is supported by the data of actual complaints depends on one's perspective. As the table above demonstrates, between September 30, 1999, and September 30, 2007, the chief judge dismissed complaints filed in their circuit—without referring the matter to the judicial council—55% of the time.[92] Proponents of the current system will point out that it is undisputed that a large number of complaints filed under the Act do not rise to the level of misconduct, and dismissal of only 55% demonstrates the chief judge's deference to judicial council in border-line cases. However, it is not at all clear the nature of the cases dismissed initially and those cases investigated or referred to the judicial council. It is the uncertainty that surrounds the chief judge's initial decision-making process that raises questions regarding the integrity of the disciplinary system.

This shortcoming of the current system is not attributable to maliciousness or malfeasance on the part of the chief judge. The concerns raised here are inherent in the system itself – which may result in unconscious denials of valid complaints or, at the very least, the appearance that valid complaints are being dismissed or that a chief judge is turning a blind-eye to on-going misconduct. Take for example the case of Judge John McBryde, which has been described as the most "significant application" of the Judicial Misconduct Act.[93] A special committee of the Judicial Council of the Fifth Circuit held hearings over a nine day period regarding the conduct of Judge McBryde. The committee concluded:

> When viewed in isolation, the incidents described above run the gamut from outrageous to inappropriate. When viewed together, the incidents bespeak several alarming patterns of conduct exhibited by Judge McBryde *over the course of his*

92. ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF US COURTS, TABLES S-22A AND S-22B, REPORT OF COMPLAINTS FILED AND ACTION TAKEN UNDER AUTHORITY OF 28 U.S.C. §§ 351-364. In fact, the percentage of complaints dismissed by the chief judge without referring the matter to the judicial council has remained fairly constant over time. The highest percentage of complaints dismissed by the chief judge was in 2005-2006, where the chief judge dismissed 63.1% of the complaints. The lowest percentage of complaints dismissed by the chief judge was in 1999-2000, where 50% of the complaints were dismissed by the chief judge [the range for these statistics is from 1999-2007]. *Id.*

93. McBryde v. Comm. to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States, 83 F. Supp. 2d 135 (D.D.C. 1999), *reversed by* 264 F.3d 52 (D.C. Cir. 2001), *cert denied*, 123 S. Ct. 99 (2002).

> *tenure on the bench.*" . . . These patterns fall into five categories: "Proclivity to Question Integrity," . . ., "Overreactions and Abusive Sanctions,". . ., "Obsessive Need to Control," . . ., "Inappropriate Conduct Toward Fellow Judges," . . . . . .,and "Effect on the Legal Community."[94]

Reading the facts of Judge McBryde's conduct, no one would deny that the conduct is both extreme and unusual. However, even in this extreme case, note Judge McBryde's "outrageous" and "inappropriate" conduct had occurred "over the course of his tenure on the bench"—or since 1990. Even more disturbing is that the investigation into McBryde's actions was initiated by a "Request for Assistance in Resolution of Dispute" filed by Judge McBryde himself after the chief judge in his district transferred two cases from McBryde.[95] Furthermore, when McBryde informed the chief judge that he would file a "Request for Assistance," the chief judge responded "that if he sought the assistance of the Judicial Council in resolving the legal issue at the heart of this dispute, his entire career as a judge would be explored."[96]

The case of Judge McBryde raises concerns about the ability of the current misconduct system to handle what may be called "piecemeal misconduct." Piecemeal misconduct occurs when the judge's actions, if considered in the larger context (either through prior complaints or evidence that arose in an investigation), would violate the Act, but when viewed through the prism of an individual complaint the conduct does not rise to conduct "prejudicial to the effective and expeditious administration of the business of the courts . . ."[97] When this type of piecemeal misconduct occurs, individual actions of misconduct may be dismissed and/or handled informally. If the judge fails to reform her actions, misconduct continues to reoccur until the conduct can no longer be kept private and the remedies informal. Once the misconduct becomes public, critics begin to ask, "how was this conduct allowed to go on so long when other judges knew it was occurring?" The risk of this type of piecemeal conduct should be recognized as a recurring problem and formally addressed at the initial review process. Without a modification to the current system to ensure that the initial review system includes a method for identifying and imposing formal sanctions to remedy piecemeal misconduct, the appearance of impropriety in the system will remain, and congressional questioning of the process itself will continue.[98]

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94. *Id.* at 148 (emphasis added).

95. In re McBryde, 117 F.3d 208, 217 (5th Cir. 1997), *cert denied*, 1185 S. Ct. 2340 (1998).

96. *McBryde*, 83 F. Supp. 2d at 141.

97. 28 U.S.C. § 351(c) (Westlaw 2007).

98. Of course the concept of the "appearance of impropriety" is one that permeates judicial ethics. Canon 1 of the ABA MODEL CODE OF JUDICIAL CONDUCT states: "A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." MODEL CODE OF JUD. CONDUCT CANON 1 (1990). To determine whether conduct creates the "appearance of impropriety," the Model Code states the test is whether

B. *The "guild mentality" as a Limitation on Equitable Enforcement of the Misconduct Statutes*

The case of Judge McBryde also provides an example of how self-regulation can promote a "guild mentality" among the judiciary.[99] The chief judge in the McBryde case had knowledge of prior misconduct by McBryde, but no formal investigation was commenced until McBryde himself initiated what turned out to be his own misconduct investigation. Judges are no different than members of other professions, and

> any charge that a fellow professional is guilty of malpractice is a prima facie invitation to other professionals to retreat to a guild mentality, denying that the infraction took place. The impetus to cover up is not primarily due to friendship toward the accused but rather to a general perception that disclosure would lead to public disrespect of the profession as a whole.[100]

In fact, in the recent report on the implementation of the Judicial Misconduct Act, Justice Breyer, writing for the committee, acknowledged the potential for such a problem: "[A] system that relies for investigation solely upon judges themselves risks a kind of undue 'guild favoritism' through inappropriate sympathy with the judge's point of view or de-emphasis of the misconduct problem."[101]

Dennis Thompson found that the same issues arise in the legislative context when members of Congress seek to discipline their own:

> The obligations, loyalties, and civilities that are necessary, even admirable. . .make it difficult to judge colleagues objectively or to act on judgments even when objectively made. Furthermore, the less that a charge seems to resemble individual corruption [or misconduct], the harder it is for colleagues to come to a severe judgment even if it is warranted. The member implicated . . . showing no obvious signs of a guilty mind or unusually selfish motives, is seen as simply doing what the job requires or at least permits. Under such circumstances the sympathy of colleagues is

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"the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge." MODEL CODE OF JUD. CONDUCT CANON 2 cmt. 2. While the Act does not adopt an "appearance of impropriety" standard, this seems to be precisely what critics of the Act argue. The judiciary, in disciplining its own, creates in the minds of reasonable persons a perception that those involved in the process are not acting impartially.

99. *See* Marcus, *supra* note 37, at 391 (describing this as the "cover up" concern but finding that there was "no basis at present to conclude that there is a significant amount of coverup" in the system).

100. Anthony D'Amato, *Self-Regulation of Judicial Misconduct Could be Mis-Regulation*, 89 MICH. L. REV. 609, 609 (Dec. 1990).

101. IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE, 1 (Sept. 2006).

> maximized and their capacity for objectivity minimized. The circumstances are not favorable for the principle of independence, which calls for judgment on the merits.[102]

In the judicial misconduct context, the "guild mentality" has the effect of creating a bias against claimants and a presumption that complaints are not well-founded.[103]

The result of this guild mentality in the specific context of the judiciary is a desire to look inward when addressing a misconduct complaint. This means utilizing informal methods of addressing a complaint as opposed to the formal procedures and remedies set out in the Act. Such informal efforts certainly may be effective, and interviews with chief judges have demonstrated that the judges have not been hesitant to use informal channels to address misconduct.[104] In fact, Professor Geyh identified three primary arguments in favor of informal contact: (1) judges are dedicated to their work and the judiciary and bringing any misconduct to their attention is enough to cause a correction; (2) judges may react more positively to a "friendly" admonishment or suggestion than from an official complaint and investigation; and (3) the formal complaint process provides a "gun behind the door" and bolsters the likelihood that informal discussions will be effective.[105] Informal resolution of complaints however also raises two significant problems. The first is that informal sanctions undermine a fundamental purpose of the Act – to bring a sense of accountability to the judicial disciplinary process. Informal contact fails to provide this public oversight and fails to demonstrate to the public that the judiciary is willing to self-police misconduct.[106] Second, the growth of the federal judiciary decreases the likelihood that informal communications, and the judge's desire to remain in good standing with other judges, can shame a judge into changing her ways.[107]

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102. Thompson, *supra* note 65, at 132-33.

103. D'Amato, *supra* note 99, at 610.

104. Geyh, *supra* note 74, at 282-83.

105. *Id.*; Marcus, *supra* note 37, at 389 ("[O]ur survey of present and former circuit chief judges indicates that they believe the Act encourages judges to respond constructively to informal efforts by chief judges to remedy misconduct or disability. From the stick perspective, it seems that the existence of the Act is a valuable prod for chief judges who want other judges to take their concerns seriously.").

106. The use of discipline or sanction to uphold the image of the bench in the eyes of the public is commonly cited purpose of lawyer discipline, and there is no reason the same is not true for discipline of judges. *See* Eric Steele & Raymond Nimmer, *Clients and Professional Regulation*, 1976 A.B.F. RES. J. 917, 999-1014 (1976) (identifying the functions of disciplinary process as "(1) to identify and remove from the profession all seriously deviant members (the 'cleansing' function), (2) to deter normative deviance and maximize compliance with norms among attorneys (the deterrence function), and (3) to maintain a level of response to deviance sufficient to forestall public dissatisfaction (the public image function).").

107. Geyh, *supra* note 74, at 40-42 ("The rapidly increasing size of the federal judiciary in recent years has, in the minds of many judges, precipitated a decline in collegiality. Twenty-five of twenty-nine chief judges responding to the survey agreed. The possibility thus exists that a decline in collegiality may precipitate a decline in the significance of peer influence as a disciplinary mechanism. A plurality of eleven chief circuit judges believed that the decline in collegiality has reduced the impact of peer influence on judicial behavior, while nine saw no effect, and two correlated the decline in collegiality to an increase in the influence of peer pressure.").

A corollary to the "guild mentality" is the natural tendency to view the alleged misconduct through the prism of the norms of the judicial institution (regardless whether the actions constitute misconduct). In other words, the reviewing judge will naturally ask herself whether the actions are different from how other judges (including herself) ordinarily act. The result is that the chief judge, in reviewing a complaint, may choose to dismiss the complaint rather than do additional follow up because investigating the complaint could require the judge to question actions which a disinterested outsider may consider misconduct but which are so prevalent and accepted in the institution that the judge is resistant to challenging them.[108] Certainly this is an inherent risk in any self-regulating system; however, the goal is to minimize the insular nature of the review to the extent possible. Finally, from an institutional perspective, a judge may only serve as chief judge for seven years, and the position of chief judge is determined by seniority.[109] Thus, the current chief judge, aware of her limited term and that a colleague will soon be in the position, may be less inclined to investigate or take action out of fear of reprisal when her term expires.[110]

A final observation is pragmatic in nature. The current disciplinary procedure places the entire burden on evaluating and initially investigating complaints on the chief judge. While the opinions of chief judges vary with regard to the nature of the burden,[111] the increasing workload of federal judges since the current system was enacted[112] raises concerns about the ability of chief judges to devote sufficient attention to misconduct complaints.[113] In fact, the committee appointed to evaluate implementation of the Act found that some chief judges routinely have staff review the complaint and prepare draft orders of dismissal for complaints received.[114]

C. *Lawyers and Court Personnel Will Be Hesitant to Make Legitimate Complaints Under the Current System*

Concerns about the procedures under the current Act are not limited to conduct by the chief judge after receipt of the complaint. There is also a concern that those with the most legitimate complaints will be hesitant to come forward.[115] Professor Geyh breaks down potential complainants into

108. Thompson, *supra* note 65, at 133.

109. 28 U.S.C. § 45(a)(1) and 45(a)(3)(A) (Westlaw 2009).

110. 28 U.S.C. § 45(a)(3)(A) (Westlaw 2009); *see also*, Fitzpatrick, *supra* note 72, at 19-20.

111. Barr & Willging, *supra* note 74, at 40-42.

112. *See* Chief Justice John Roberts, 2006 Year-End Report on the Federal Judiciary (Jan. 1, 2007) (transcript available at http://www.supremecourtus.gov/publicinfo/year-end/2006year-endreport.pdf).

113. Marcus, *supra* note 37, at 397 ("Discipline is an additional chore for busy judges. Under § 372(c), much of that burden is imposed on the circuit chief judge, who is likely to be among the busiest of judges. Accordingly one cannot minimize the importance of this judicial burden.").

114. THE JUDICIAL CONDUCT AND DISABILITY ACT STUDY COMM., IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE 31 (2006).

115. Even those defending the current system of informal discipline acknowledge that such concerns are "widespread." Fitzpatrick, *supra* note 72, at 19 ("A widespread fear exists within the bar, unjustified in my view, that retailiation against lawyers, their firms, or their clients may occur if they are critical of a court or its members, so bar members are very reluctant to criticize.").

two categories: "outsiders" (consisting of lawyers, litigants, jurors, witnesses, observers) and "insiders" (fellow judges, clerks, and other court personnel).[116] Outsiders, such as lawyers, may be hesitant to file a complaint against a judge for fear of retaliation by the judge against the lawyer's current or future clients.[117] In the case of Judge McBryde, discussed above, examples of conduct toward attorneys included:

> (1) Attorney held in contempt of court when, due to a malfunctioning of the telephone system, the attorney's office was unable to initiate a prompt conference call with the Court and opposing counsel. Terrified of Judge McBryde after this incident, and fearful about testifying before the Committee, the attorney accepted a temporary transfer to another district following his appearance as a witness in the Special Committee hearings.[118]
> (2) Criminal defense attorney declined to answer a question which Judge McBryde posed because he believed that his response would waive his client's privilege to his client's detriment. Judge McBryde refused to recess the proceeding to allow the attorney an opportunity to consult with his client or to research the issue before responding to Judge McBryde. Instead, Judge McBryde ordered in open court that the attorney be incarcerated until he agreed to answer the question, holding the attorney in civil contempt of court for not responding to his question.[119]
> (3) Attorney received a call from chambers at 4:50 p.m. to inform him that, in response to his motion to continue a sentencing, the court had scheduled a hearing for 9:00 a.m. the following morning, and would require the physician to testify live at the hearing as to his client's medical condition necessitating continuance of the sentencing. The attorney was able only to arrange for the physician to participate in a telephone conference call before the physician left town. Judge McBryde first ordered the attorney ejected from the courtroom, and later, upon permitting him to reenter, questioned the attorney in a belittling fashion about his knowledge of the use of subpoenas.[120]

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116. Geyh, *supra* note 74, at 257.

117. Professor Geyh quotes chief judges as saying the following: (1) "Lawyers are reluctant to file complaints and will do it only in a serious case"; and (2) "It's very difficult for a practicing lawyer to file a complaint, they're in constant practice before the judge. Yet those are the complaints that tend to require some action or caution on my part." *Id.*

118. *McBryde*, 83 F. Supp. 2d at 143.

119. *Id.*

120. *Id.*

These examples raise a glaring question: why did these attorneys—humiliated by Judge McBryde in open court—not report these clear examples of misconduct? The fact is that attorneys are repeat players before judges. Judges make rulings which directly affect their clients and the outcome of cases. An attorney is unlikely to report that a judge has engaged in misconduct when lawyer believes (whether validly or not) that reporting the misconduct could have significant negative impact on himself or his client in the future. Ironically, the more egregious the judge's conduct, the more likely the judge would seek revenge, and the less likely that an attorney will report the misconduct.[121] The Act does not provide as a potential reassignment of cases involving lawyers making legitimate complaints against a judge. The same hesitation exists for those "insiders" who may see repeated misconduct by the judge, but fail to take any action. These individuals run the risk of retaliation in the work-place—where they will encounter the judge on a day-to-day basis.

The situation is exacerbated by the fact that the claimant must sign the complaint alleging misconduct under oath. The Rules for Judicial-Conduct and Judicial-Disability Proceedings, adopted by the Judicial Conference of the United States, provides:

> **6(d)Complainant's Address and Signature; Verification.** The complainant must provide a contact address and sign the complaint. The truth of the statements made in the complaint must be verified in writing under penalty of perjury. If any of these requirements are not met, the complaint will be accepted for filing, but it will be reviewed under only Rule 5(b).[122]

The requirement of the claimant's name and address on the complaint, which is then sent to the judge, is a particularly strong deterrent for lawyers.

IV. REEVALUATING THE MISCONDUCT PROCEDURES: THE PROPOSAL FOR AN INSPECTOR GENERAL

High-profile cases such as those of Judges Real and McBryde have resulted in legislative proposals to overhaul the disciplinary system. The most recent proposal is to establish an office of Inspector General for the judiciary (inspector generals currently exist in the executive and legislative branches). The Inspector General would be responsible for overseeing the implementation of the Act, particularly those complaints which are dismissed without investigation. In January 2007, Representative Sensenbrenner (R-WI) introduced the Judicial Transparency and Ethics Enhancement

121. These consequences are even more dire for court staff. The staff relies on the court for their livelihood. If a staff member files a complaint he/she runs the real (or legitimately perceived) risk of facing serious consequences.

122. RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS 6.

Act of 2007 (H.R. 785—110th Congress 1st Session) to create an office of Inspector General for the judicial branch.[123] Representative Sensenbrenner, in a statement regarding the proposed bill, opined that the current self-policing statutes are not "up to snuff" and that the Inspector General would "root out waste, fraud, and abuse and ensure. . .taxpayer-funded resources are utilized in an appropriate manner. . . ."[124] Senator Grassley supported Representative Sensenbrenner's assessment: "[An] inspector general is just the right kind of medicine that the Federal judiciary needs to ensure that it is complying with every ethics rule."[125] There are currently approximately 60 inspector generals throughout the government.[126]

Looking at the procedure of the Sensenbrenner bill, an Inspector General would be appointed by the Chief Justice of the Supreme Court, "after consultation with the majority and minority leaders of the Senate and the Speaker and minority leader of the House of Representatives."[127] The Inspector General would serve for four years and would be subject to reappointment and removal by the Chief Justice.[128] Thus, the bill gives the Chief Justice a great deal of authority in hiring and firing the judicial inspector general. However, if the Chief Justice removes an Inspector General, he/she must communicate the reasons for removal to both Houses of Congress.[129] The Inspector General's office would commence an investigation on a complaint alleging judicial misconduct only after a denial of a petition for review by the circuit judicial council or upon referral or certification of a complaint to the Inspector General.[130] However, the Inspector General is expressly precluded from investigating "any matter that is directly related to the merits of a decision or procedural rule" by the judge and is prohibited from disciplining any judge.[131] This provision is meant to ensure the independence of the judiciary.

Once the Inspector General's powers are triggered, she would have the express authority to "make investigations and reports," obtaining information from Federal, State, or local governmental agencies.[132] The Inspector General would also have subpoena power to compel the testimony of

123. Judicial Transparency and Ethics Enhancement Act of 2007, H.R. 785, 110th Congress § 1021 (1st Sess. 2007). This is not the first time a bill has been introduced proposing an inspector general for issues relating to the judicial branch – including oversight of judicial discipline. *See* Diane M. Hartmus, *Inspection and Oversight in the Federal Courts: Creating an Office of Inspector General*, 35 CAL. W.L. REV. 243 (Spring 1999).

124. Bruce Moyer, Inspector *General Bills Rile Judiciary*, 53 JUN FED. LAW. 10, 10 (June 2006).

125. *Id.*

126. *Hearing on the Jud. Transparency and Ethics Enhancement Act of 2006 before the Comm. on the Jud. H.R., Subcomm. on Crime, Terrorism, and Homeland Security*, 109th Cong. 5 (2006) (statement of Rep. Coble: "There are too many questions about how conflicts and financial interests are reported and how recusal lists are compiled and kept up to date.").

127. H.R. 785, 105th Cong. § 1022(a) (1997).

128. H.R. 785, § 1022(b).

129. H.R. 785, § 1022(c).

130. H.R. 785, § 1023(b).

131. H.R. 785, § 1024(c)(1)-(2).

132. H.R. 785, § 1024(a)(2) ,(5)-(7) (expressly provides that the Inspector General would have the power to obtain information from the Judicial Conference of the United States, the judicial councils of

witnesses and production of "books, records, correspondence memoranda, papers, and documents."[133] This would include the right to obtain affidavits and other affirmations.[134]

The Inspector General would make an annual report setting out the activities of the Inspector General's office to the Chief Justice and Congress.[135] The Inspector General must also "report expeditiously" to the Attorney General when the Inspector General has "reasonable grounds" to believe there has been a violation of federal criminal law.[136] The bill provides protection for "whistleblowers." No "officer, employee, agent, contractor or subcontractor" in the judicial branch "may discharge, demote, threaten, suspend, harass or in any other manner discriminate" any employee who assists the Inspector General in carrying out his/her duties.[137] The Act provides for a civil cause of action for retaliating against whistleblowers.[138]

Members of Congress opposed to the creation of an inspector general position argued that the purpose of the bill was to provide "a means of intimidating judges into political compliance."[139] In addition, the judiciary greeted the proposal of an Inspector General as a direct attack on judicial independence. Associate Supreme Court Justice Ruth Bader Ginsburg sounded the alarm when she described the Inspector General bill: "[i]t sounds to me very much like the Soviet Union was . . . . That's a really scary idea."[140]

Opponents of the Sensenbrenner-Grassley proposal have legitimate concerns. The bill as written gives the Inspector General, vague, and puzzling powers. For example, the bill gives the Inspector General the authority to "prevent and detect waste, fraud, and abuse."[141] The statute does not set out precisely what "waste, fraud, and abuse" the Inspector General is charged with—is he charged with not only detecting but also *preventing* (presumably with the power to take preemptive action)? The drafters of the bill argue that these powers are fiscal and relate to wasteful spending by the judiciary. As Senator Grassley stated, "I rely on I.G.s and

circuits, the Administrative Office of the United States Courts, and the United States Sentencing Commission).

133. H.R. 785, § 1024(a)(3).

134. H.R. 785, § 1024(a)(4).

135. H.R. 785, § 1025(a)(1).

136. H.R. 785, § 1025(c).

137. H.R. 785, § 1026(a).

138. H.R. 785, § 1026(b).

139. *Hearing on the Jud. Transparency and Ethics Enhancement Act of 2006 before the Comm. on the Jud. H.R., Subcomm. on Crime, Terrorism, and Homeland Security*, 109th Cong. 8 (2006) (statement of Rep. Conyers). In a hearing on the Inspector General bill before the House Subcommittee on Crime, Terrorism, and Homeland Security, Senator Grassley made it clear what conduct he believed needed to be "snuffed" out—judges' ruling in cases in which they have a conflicts of interest and judges' failure to disclose financial holdings. *Id.* at 2 (statement of Sen. Grassley: "There are too many questions about how conflicts and financial interests are reported and how recusal lists are compiled and kept up to date.").

140. Moyer, *supra* note 124, at 10.

141. H.R. 785, § 1023(3).

whistleblowers to ensure that our tax dollars are spent according to the letter and spirit of the law."[142] Even if it is understood that the Inspector General is intended to operate as a "waste watchdog," this limitation is not set out in the bill and appears to undermine the very purpose of the bill—reviewing complaints of judicial misconduct. The investigative powers of the Inspector General are not triggered until after a "denial of a petition for review by the circuit judicial council or upon referral or certification of a complaint to the Inspector General."[143]

The role of the Inspector General does not seem to be limited to ensuring that claims of judicial misconduct are properly investigated. However, this is precisely what the proponents of the bill advertised:

> Under the proposed legislation, judges will be able to respond that the Inspector General has investigated and found the complaints to be fruitless. And if the complaint is valid? Then the judges will know that there is a problem, and that it needs correcting. The proposed Inspector General, "will not have any authority or jurisdiction over the substance of a judge's opinions. The proposed law would not interfere with judges' independence to write their opinions.[144]

Unfortunately, the bill is not written "as advertised." As written, a denial of a petition for review releases the Inspector General to audit the judge subject to the complaint—searching for elusive "waste, fraud, or abuse."

To put it simply, the Sensenbrenner-Grassley proposal is a bad idea. Not only is it likely unconstitutional,[145] it also fails to address the primary concerns of those who are skeptical of the procedures under the current Act. The underlying concern is that valid complaints are being dismissed and not investigated. The Inspector General approach simply adds a new level of vague and uncertain review—adding not only cost to the review and the time necessary to complete the review of a complaint, but also

142. *Hearing on the Jud. Transparency and Ethics Enhancement Act of 2006 before the Comm. on the Jud. H.R., Subcomm. on Crime, Terrorism, and Homeland Security*, 109th Cong. (2006) (statement of Sen. Grassley); *Sensenbrenner, Grassley Introduce Legislation Establishing an Inspector General for the Judicial Branch*, NEWS ADVISORY (U.S. H.R. Comm. On the Jud., Washington, D.C.), April 27, 2006 ("[A]n IG will serve as a public watchdog to root out waste, fraud, and abuse and ensure the Third Branch's taxpayer-funded resources are utilized in an appropriate manner. . . .").

143. H.R. 785, § 1023(b).

144. *Hearing on the Jud. Transparency and Ethics Enhancement Act of 2006 before the Comm. on the Jud. H.R., Subcomm. on Crime, Terrorism, and Homeland Security* 19 109th Cong. (2006) (prepared statement of Rotunda).

145. Lara A. Bazelon, *Putting the Mice in Charge of the Cheese: Why Federal Judges Cannot Always be Trusted to Police Themselves and What Congress Can Do About It*, 97 KY. L. J. 439, 446-47 (2009).

adding the concern that the Inspector General will use her position as a method of intimidating a judge for a particular decision.[146]

V. PROPOSAL FOR REFORM: UTILIZING A MAGISTRATE JUDGE TO RECEIVE AND REVIEW MISCONDUCT COMPLAINTS

The Sensenbrenner bill and the continuing congressional concern over the disciplinary process demonstrates discontent with the process for evaluating complaints of judicial misconduct. However, a disruption to the self-regulating nature of the current system is not the solution to the concerns.[147] A better approach is to implement a more limited reform to the current system—to address the limitations of the current system while at the same time maintaining the independence of the judicial branch.[148] As discussed above, criticisms of the current system can be placed in one of two categories. First, the chief judge may have a tendency to dismiss a complaint without adequate investigation. Second, there is a sense that the current system does not provide any continuity from one complaint to the next because the resolution of a complaint has no precedential value with regard to future complaints. Any revisions to the system should seek to ensure that these limitations (whether real or perceived) are addressed. Both of these concerns could be addressed through appointment of a magistrate judge to hear and consider misconduct complaints.

Currently magistrate judges are authorized to perform a number of activities when designated by an Article III judge—from deciding certain pretrial matters to conducting certain trials.[149] Federal judges have not been hesitant to designate magistrate judges to make recommendations in a number of types of cases.[150] In fact, magistrate judges are commonly designated to hold hearings on and make recommendations on prisoner claims challenging their confinement pursuant to 42 U.S.C. § 1983.[151]

Utilization of a magistrate judge, appointed by the chief judge of the circuit, to initially review misconduct complaints, hold hearings on the complaints, and make a written recommendation to the chief judge could provide a sense of independence and credibility to the system that some believe is currently lacking. When the chief judge receives the magistrate judge's recommendation, she would have the option of doing one of three things: (a) accept the magistrate's recommendation in full; (b) accept part of the magistrate's recommendation and reject part of the finding; or (c)

146. The complaint in the Real investigation was filed in February 2002, and the case was decided in September 2005. *In re Complaint of Judicial Misconduct*, 425 F.3d at 1179.

147. For a proposal for more significant modifications to the current disciplinary system, see Bazalon, *supra* note 144.

148. Although this article has focused on the misconduct aspect of the Act, the Act also addresses judicial disability. While this subject is not expressly discussed, the procedures set out here apply equally to complaints alleging judicial disability as judicial misconduct.

149. *See* 28 U.S.C. § 636 (West 2005).

150. *See generally*, Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (July 1983).

151. D. Utah Civ. R. 72-1 – 72-3.

reject the magistrate's finding. If the chief judge rejects the recommendation of the magistrate in whole or in part, she should be required to state in writing the reasons for rejecting the findings. Once the chief judge has either accepted or rejected the magistrate's recommendation, the appeal procedures set out in the current act would remain unchanged.

Implementing a system of magistrate review also addresses some of the inherent concerns in the current system. Magistrate judges, who are Article I judges, would be one step removed from the "guild mentality" that currently faces the chief judge. The magistrate would be charged with investigating and making a written recommendation to the chief judge. While the recommendations would likely result in a similar number of dismissals as are occurring with chief judge review, the review by the magistrate will result in a written recommendation for each complaint filed. While the chief judge may act simply to adopt the recommendation of the magistrate judge, the recommendation itself will address the specific issues raised in the complaint – replacing the form dismissals currently used by some chief judges. By providing more detailed explanations to complainants, the public concern or perception that the judiciary is ignoring misconduct is lessened.

To implement the magistrate review into the current system, the Act will need to be amended to provide that the chief judge shall appoint a magistrate to receive complaints related to judicial misconduct and disability. Under the current system, upon receipt of a complaint, the court clerk is directed to transmit the complaint to the chief judge of the circuit.[152] This could easily be amended to provide that upon receipt of a complaint it would be transmitted to a magistrate judge, and that the magistrate judge is responsible for conducting an investigation, holding a hearing (if necessary), and submitting a written recommendation to the chief judge.

While adopting an initial review by a magistrate will remedy many of the problems with the current system, some of the problems under the Act cannot be addressed merely by incorporating a magistrate to review complaints. The concern regarding piecemeal misconduct and the hesitancy of "insiders" to file complaints against judges are inherent in a self-regulating system. However, both of these concerns can be addressed to some extent with the adoption of magistrate judge review. First, there is nothing in the Act (or Rules adopted by the Judicial Conference to govern complaints under the Act) that excludes consideration of a judge's cumulative conduct in determining misconduct. The Rules could easily be amended to add an express provision that consideration past conduct should be considered when evaluating a complaint.

VI. CONCLUSION

The current system for addressing judicial misconduct in the federal system is flawed. The primary criticisms are directed at how complaints are

152. 28 U.S.C. § 351(c) (West 2002).

initially reviewed and investigated. Currently, the chief judge of each circuit receives the initial complaint and either dismisses the complaint or refers it to the circuit's judicial council. The system has raised questions regarding the effectiveness of allowing judges to regulate the conduct of other judges. The examples of Judges Real and McBryde seem to justify the concern of those who are that the current system of regulation needs to be reevaluated. In fact, members of Congress have introduced legislation to modify the current system to include an outside review (in the form of an inspector general).

The congressional concerns may be well-founded, but the proposed legislative cure is more harmful than the disease. This article proposes a limited modification of the current system to incorporate an initial review of misconduct complaints by a magistrate appointed by the chief judge. The magistrate will then make recommendations to the chief judge after reviewing the complaint and conducting an investigation if necessary. This provides a modest but significant change to the current system of complaint resolution. The incorporation of magistrate judges into the process can provide more assurance to congressional leaders who want to know that every complaint is being taken seriously. However, the proposal retains the self-regulatory nature of the current process and incorporates procedures that are familiar to the judiciary and are utilized in similar contexts.