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Unlocking the Chamber Doors: Limiting Confidentiality in Proceedings Before the Virginia Judicial Inquiry and Review Commission

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NOTES

UNLOCKING THE CHAMBER DOORS: LIMITING CONFIDENTIALITY IN PROCEEDINGS BEFORE THE VIRGINIA JUDICIAL INQUIRY AND REVIEW COMMISSION

I. INTRODUCTION

> The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. . . . I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent Judiciary.
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> — John Marshall[1]

In a Mississippi case, a judge imposed and collected criminal fines, then willfully and fraudulently documented the case as dismissed, keeping the money for himself.[2] In California, the Commission of Judicial Qualifications removed a judge for prodding an attorney with a "dildo," grabbing a court commissioner by his testicles in a public hallway, and habitually making offensive sexual remarks at his office.[3] A Massachusetts judge received public censure for making derogatory and obscene references to members of the bench and bar, becoming intoxicated and urinating in public, and setting unusually high bail for African-American defendants.[4] After a Federal Bureau of Investigation "sting" operation, four Dade County Circuit Court judges were indicted for allegedly accepting more than $250,000 in bribes for judicial favors.[5]

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1. John J. Parker, *The Judicial Office in the United States*, 20 TENN. L. REV. 703, 706 (1949) (quoting John Marshall in the debate on the U.S. Constitution at the Virginia Convention).

2. *In re* Stewart, 490 So. 2d 882 (Miss. 1986).

3. Cydney A. Hurowitz, Note, *Peeking Behind Judicial Robes: A First Amendment Analysis of Confidential Investigations of the Judiciary*, 2 HASTINGS COMM. & ENT. L.J. 708, 708 (1980) (citing Geiler v. Commission of Judicial Qualifications, 515 P.2d 1, 5 n.6 (Cal. 1973)).

4. *In re* King, 568 N.E.2d 588 (Mass. 1991).

5. Randall Samborn, *Judge-Corruption Moves Advance*, NAT'L L.J., Oct. 7, 1991, at 6. One judge pled guilty to racketeering and agreed to testify against the three other judges. *Miami Judge Pleads Guilty to Taking Payoffs*, L.A. TIMES, Aug. 9, 1991, at A38. The FBI

These examples of judicial misconduct demonstrate the need to maintain a check on the most powerful members of our legal system. As Socrates observed, "[f]our things belong to a judge: to hear courteously; to answer wisely; to consider soberly; and to decide impartially."[6] Almost all judicial officers espouse and maintain these virtues, and most interpret the law with fairness, impartiality, and wisdom. Unfortunately, occasions arise when some judges abuse their power or become mentally or physically unable to perform their duties. To address these situations, states created judicial conduct organizations to enforce judicial standards, to maintain public confidence in the judiciary, and to protect judges from frivolous allegations.

Until 1960, federal and state governments controlled judicial misconduct and incompetence solely through the methods of impeachment, address, or recall.[7] However, these procedures were too time consuming and failed to provide adequate supervision over judicial action.[8] Today, all fifty states,[9] the federal government,[10] and the District of Columbia[11] have established judicial conduct commissions which either supplement or replace the original constraints placed upon judicial conduct. Judicial conduct commissions are comprised of committees that receive complaints, investigate allegations, hold formal hearings, and then either file disciplinary recommendations with their respective state supreme courts or impose sanctions themselves.[12] The typical procedure begins with a

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operation, entitled "Operation Court Broom," uncovered stacks of marked $100 bills in some of the judges' offices and homes. *Id.* In addition, one judge was charged with "conspir[ing] to commit murder for allegedly divulging confidential information about a man marked for murder." *Three Judges, Ex-Judge Indicted in Miami*, CHI. TRIB., Sept. 25, 1991, at C13.

6. AMERICAN JUDICATURE SOCIETY, HANDBOOK FOR JUDGES 29 (1961) (quoting Socrates' classic definition of the qualities of a judge).

7. *See* WILLIAM T. BRAITHWAITE, WHO JUDGES THE JUDGES 12 (1971). Impeachment occurs when the legislature collectively acts to remove a judge. The recall method removes a judge by popular vote of the electorate. An address is a formal request by the state legislature to the governor for the removal of a judge. *Id.*

8. Jeffrey M. Shaman & Yvette Bégué, *Silence Isn't Always Golden: Reassessing Confidentiality in the Judicial Disciplinary Process*, 58 TEMP. L.Q. 755, 755 (1985). Removal from office, the only punishment under the methods of impeachment, address, and recall, proved to be too severe and inflexible in most cases. *Id.*

9. *See infra* notes 21-23.

10. *See* 28 U.S.C. § 372(c)(4) (1988).

11. *See infra* note 23.

12. JEFFREY M. SHAMAN, ET AL., JUDICIAL CONDUCT AND ETHICS 381 (1990). This system, known as the one-tier commission, is part of the state court system and has been adopted by forty-one states. The other system, the two-tier commission, operates independently of the state courts and precludes state supreme court review. In both systems, the panels consist of lawyers, judges, and members of the lay community. *Id.* at 383. Virginia adopted a one-tiered commission, known as the Judicial Inquiry and Review Commission, and it is composed of seven persons: three judges, two lawyers, and two non-lawyer citizens. VA. CODE ANN. § 2.1-37.3 (Michie Repl. Vol. 1987).

complaint, followed by a preliminary committee investigation.[13] If the committee determines that sufficient probable cause exists to support the complaint, it may initiate formal adjudicative proceedings in which it hears testimony and makes findings of fact.[14] After the formal proceedings, the committee may dismiss the case, impose sanctions, or recommend disciplinary action to the state supreme court which ultimately decides the outcome of the case.[15] In making a final decision, the state supreme court may rely on the opinions and conclusions of the committee, or it may initiate an open, formal hearing *de novo*.[16] State supreme courts, however, rarely initiate their own formal hearings. In Virginia, for example, the supreme court has conducted only six open hearings in the past twenty years.[17]

All states allow or require confidentiality throughout the preliminary investigations.[18] These confidentiality rules prevent the disclosure of information concerning the investigations of judicial officers and are commonly referred to as "gag rules."[19] However, the point at which confidentiality ceases during the subsequent proceedings varies among the several states. Analysts have categorized the different states' confidentiality provisions into three groups:[20] (1) twenty-six states allow public disclosure after the committee conducts a preliminary investigation and makes a determination that probable cause exists to warrant a formal hearing;[21] (2)

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13. *See, e.g.*, VA. CODE ANN. § 2.1-37.4.

14. *Id.*

15. *Id.*

16. The Supreme Court of Virginia and the JIRC have jurisdiction over these matters by virtue of the state constitution and the following section of the Code:

> In addition to the jurisdiction conferred upon the Supreme Court by § 1 and § 10 of Article VI of the Constitution, to conduct hearings and impose sanctions upon the filing by the [Judicial Inquiry and Review] Commission of complaints against justices of the Supreme Court, judges of other courts of record, and members of the State Corporation Commission, the Supreme Court by virtue of this chapter shall have the same jurisdiction, to be exercised in the same manner, upon the filing by the Commission of complaints against other judges as defined herein.

Id. § 2.1-37.2.

17. Frank Green, *Judicial Panel Isn't Closed, Leader Says*, RICHMOND TIMES-DISPATCH, Nov. 3, 1991, at B1. These six hearings resulted in five censures and one removal. Frank Green, *Judge Censured by Narrowest of Margins*, RICHMOND TIMES-DISPATCH, Jan. 11, 1992, at B1.

18. Shaman & Bégué, *supra* note 8, at 756. Thirty-nine commissions derive their authority to conduct confidential proceedings through constitutional mandate, while twelve commissions are authorized by state statute or case law. *Id.*

19. *See e.g.*, JUDITH ROSENBAUM, AMERICAN JUDICATURE SOCIETY, PRACTICES AND PROCEDURES OF STATE JUDICIAL CONDUCT ORGANIZATIONS, ch. 3 at 4 (1990).

20. SHAMAN, *supra* note 12, at 417.

21. ALA. CONST. amend. 328, § 6.17(b), ALA. R.P. JUD. INQUIRY COMM'N 5; ALASKA CONST. art. IV, § 10, ALASKA STAT. § 22.30.060 (1990), ALASKA R. COMM'N JUD. CONDUCT; ARIZ. CONST. art. 6.1, §§ 1-6, ARIZ. R. P. COMM'N JUD. CONDUCT 5; ARK. CONST. amend. 66, ARK. CODE ANN. § 16-10-121 (Michie 1987), R. P. ARK. JUD. DISCIPLINE AND DISABILITY COMM'N 7;

eighteen states allow public disclosure when the committee, after holding formal hearings, recommends to their respective supreme courts that disciplinary action be taken against a judge;[22] and (3) six states and the District of Columbia allow public disclosure only after their respective state supreme courts actually impose sanctions against a judge.[23]

The Commonwealth of Virginia currently follows the minority of jurisdictions that prohibit public disclosure until after the committee's formal proceedings result in a recommendation that the Supreme Court of Vir-

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CONN. CONST. art. 5, § 7, CONN. GEN. STAT. ANN. § 51-51-l (West Supp. 1991), CONN. JUD. REV. COUNCIL R. P.; GA. CONST. art. VI, § 7, para. 7(b)(4), GA. R. JUD. QUALS. COMM'N 20; ILL. CONST. art. VI, § 15(c); IND. CONST. art. 7, §§ 9, 11, IND. CODE ANN. § 33-2.1-6-6 (Burns Repl. Vol. 1985); KAN. CONST. art. III, § 15; MASS. ANN. LAWS ch. 211C, § 6 (Law. Co-op. Supp. 1991), R. COMM'N JUD. CONDUCT 5; MICH. CONST. art. VI, § 30(2), MICH. R. CT. 9.126; MINN. CONST. art. VI, § 9, MINN. STAT. ANN. § 490.16 (West 1990), MINN. R. BD. JUD. STDS. 5; MONT. CONST. art. VII, § 11(4), MONT. CODE ANN. §§ 3-1-1102, -1105, -1106, -1121 to -1126 (1991); NEB. CONST. art. V, §§ 28-31, NEB. REV. STAT. § 24-721 (1989); NEV. CONST. art. VI, § 21, ADMIN. & P. R. NEV. COMM'N JUD. DISCIPLINE 5; N.D. CONST. art. VI, § 12.1, N.D.R. JUD. CONDUCT COMM'N 4; OHIO S. CT. R. GOV'T BAR 5; OKLA. STAT. ANN. tit. 20, § 1658 (West 1991), OKLA. R. COUNCIL JUD. COMPLAINT; OR. REV. STAT. § 1.440 (1988); R.I. GEN. LAWS §§ 8-16-1 to 8-16-14 (1985 & Supp. 1990); TENN. CODE ANN. § 17-5-304 (1980 & Supp. 1991); TEX. GOV'T CODE ANN. § 33.032 (Vernon 1988), TEX. R. REMOVAL OR RETIREMENT JUD.; VT. CONST. ch. II, § 36, VT. R.S. CT. DISCIPLINARY CONTROL JUD. 6; WASH. CONST. art. IV, § 31, WASH. REV. CODE ANN. §§ 2.64.111, 264.113 (West Supp. 1991); W. VA. CONST. art. VIII, § 8, R. P. HANDLING COMPLAINTS AGAINST JUSTICES, JUD., MAGISTRATES, FAMILY MASTERS IIG; WIS. STAT. ANN. § 757.93 (West Supp. 1991).

22. CAL. CONST. art. VI, § 18, R. CAL. R. CT. 902; COLO. CONST. art. VI, § 23, COLO. REV. STAT. § 24-72-401 (Repl. Vol. 1988), COLO. R. JUD. DISCIPLINE 6(a); FLA. CONST. art. V, § 12(d) (notwithstanding that the state may not prohibit the complainant from disclosing the fact that she filed a complaint. *See* Doe v. Florida Judicial Qualifications Comm'n, 748 F. Supp. 1520 (S.D. Fla. 1990)); IDAHO CONST. art. V, § 28, IDAHO CODE § 1-2103 (1990); IOWA CONST. art. V, § 19, IOWA R.P. COMM'N JUD. QUALIFICATIONS 5; LA. CONST. art. V, § 25, S. CT. RULE 23, LA. R. JUD. COMM'N X; ME. REV. STAT. ANN. tit. 4, § 9-B (West 1989), ME. R. CT. R. COMM. JUD. RESP. & DISABILITY 6; MD. CONST. art. IV, § 4B, MD. R.P. COMM'N JUD. DISABILITIES 1227(e); MISS. CONST. art. VI, § 177A, MISS. CODE ANN. §§ 9-19-1 to 9-19-27 (Supp. 1990), R. MISS. COMM'N JUD. PERFORMANCE 4; MO. CONST. art. V, § 24, MO. R. CT. 12.21; N.J. CONST. art. VI, § 6, para. 4, N.J. STAT. ANN. §§ 2A:1B-1 to -9 (West 1987), N.J. CT. R. 2:15-20; N.M. CONST. art. VI, § 32; N.Y. CONST. art. VI, § 22, N.Y. JUD. LAW §§ 44, 45 (McKinney 1983 & Supp. 1990), N.Y.R. CT. § 7000.8; N.C. CONST. art. IV, § 17, N.C. GEN. STAT. § 7A-377(a) (Supp. 1990), N.C.R. JUD. STAND. COMM'N 4; PA. CONST. art. V, § 18(h), PA. CONS. STAT. ANN. tit. 42, §§ 2105, 3334 (Purdon 1981), PA. R.P. GOVERNING JUD. INQUIRY REV. BD. 20; S.D. CONST. art. V, § 9, S.D. CODIFIED LAWS ANN. § 16-1A-9 (1987), S.D.R.P. IMPLEMENTING POWERS & DUTIES JUD. QUALIFICATIONS COMM'N 4; VA. CONST. art. VI, § 10, VA. CODE ANN. § 2.1-37.13 (Michie Repl. Vol. 1987), VA. R. JUD. INQUIRY & REV. COMM'N Rule 10; WYO. CONST. art. V, § 6, WYO. JUD. SUPERVISORY COMM'N RULE 7.

23. DEL. CONST. art. IV, § 37, DEL. R.P. CT. JUD. 10; District of Columbia Self Government and Governmental Reorganization Act of 1973, P.L. 93-198, § 432, 87 Stat. 794-95 (1973), D.C. CODE ANN. §§ 11-1526 to -1528 (1989); HAW. CONST. art. VI, § 5, HAW. S. CT. RULE 8; KY. CONST. § 121, KY. R.S. CT. 4.130; N.H. REV. STAT. ANN. § 490:30 (Cum. Supp. 1990); S.C. CONST. art. V, § 17, S.C. APP. CT. RULE 502(33); UTAH CONST. art. VIII, § 13, UTAH CODE ANN. §§ 78-7-27, -30 (Supp. 1991).

ginia impose sanctions.[24] However, as this Note will discuss, Virginia must now revise its "gag rule" because the United States District Court for the Eastern District of Virginia recently declared it unconstitutional in *Baugh v. Judicial Inquiry & Review Commission.*[25]

The disparity among confidentiality rules reflects the conflicting policy considerations inherent in judicial disciplinary matters. Some legal scholars argue that confidentiality facilitates the investigatory process, protects the reputation of individual judges, and maintains public confidence in the judiciary as a whole. Others contend that imposing a gag rule on all participants in the proceedings clearly violates those citizens' First Amendment rights of free speech. Recent constitutional challenges to modify the confidentiality rules have resulted in the liberalization of some states' secrecy provisions.[26]

This Note explains why the General Assembly should revise section 2.1-37.13 of the Code of Virginia to comply with the United States Constitution. Section II of this Note describes the rule of confidentiality in Virginia as it existed before the *Baugh* decision. This section also discusses the policy considerations for secrecy during judicial disciplinary proceedings. Section III analyzes the constitutional arguments against absolute confidentiality rules and the federal court challenges to confidentiality leading up to the *Baugh* decision. Section IV explains the court's analysis in *Baugh* and projects the possible ramifications of this significant decision. Finally, Section V proposes rules that, in light of the *Baugh* decision, should adequately protect the competing interests involved in confidentiality.

II. PRIVATE AND CONFIDENTIAL: THE GAG RULE IN VIRGINIA BEFORE *BAUGH* AND THE ARGUMENTS FOR NONDISCLOSURE

A. *Confidentiality Before the Virginia Judicial Inquiry and Review Commission*

Article VI, section ten of the Constitution of Virginia mandates confidentiality during the informal and formal proceedings before the Judicial Inquiry and Review Commission ("JIRC" or "Commission").[27] The Gen-

24. VA. CODE ANN. § 2.1-37.13 (Michie Repl. Vol. 1987).

25. No. 88-0867 (E.D. Va. Feb. 1, 1991), *remanded with instructions*, 907 F.2d 440 (4th Cir. 1990).

26. *See, e.g.*, Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); First Amendment Coalition v. Judicial Inquiry & Review Bd., 784 F.2d 467 (3d Cir. 1986) (construing Pennsylvania law); Doe v. Florida Judicial Qualifications Comm'n, 748 F. Supp. 1520 (S.D. Fla. 1990).

27. VA. CONST. art. VI, § 10. This provision reads in pertinent part: "Proceedings before the Commission shall be confidential. If the Commission finds the charges to be well-founded, it may file a formal complaint before the Supreme Court. Upon the filing of a complaint, the Supreme Court shall conduct a hearing in open court. . . ." *Id.*

eral Assembly codified this provision in section 2.1-37.13 of the Code of Virginia, which requires that all papers and proceedings before the Commission remain confidential.[28] Under this section, any person who either files a complaint with the JIRC, receives the complaint in an official capacity, or participates in the proceedings may not divulge any facts pertaining to the complaint.[29] This rule forbids the disclosure of the subject judge's identification and the fact that a complaint has been filed at all.[30] Anyone who violates this confidentiality provision risks being charged with a criminal misdemeanor.[31] Only Virginia and one other jurisdiction[32] impose criminal sanctions for public disclosure; the remaining jurisdictions charge violators with civil contempt of court.

Until the *Baugh* decision, only judges could divulge information regarding a complaint filed against them in order to obtain information necessary for their defense. The records compiled throughout the investigation and formal hearings lost their confidential character only if the JIRC filed them with the Supreme Court of Virginia. If the JIRC decided not to file the records of the proceedings with the Supreme Court, the Commission kept the files confidential indefinitely.[33]

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28. The specific language of this Code section provides:

> All papers filed with and proceedings before the Commission, and under §§ 2.1-37.11 and 2.1-37.12, including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged, other than to the Commission, by any person who either files a complaint with the Commission, or receives such complaint in an official capacity, or investigates such complaint, is interviewed concerning such complaint by a member, employee or agent of the Commission, or participates in any proceeding of the Commission, or the official recording or transcription thereof, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character. . . . All records of proceedings before the Commission which are not filed with the Supreme Court in connection with a formal complaint filed with that tribunal, shall be kept in the confidential files of the Commission.
>
> Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor. . . .

VA. CODE ANN. § 2.1-37.13 (Michie Repl. Vol. 1987); *see also* VA. R. JUD. INQUIRY & REV. COMM'N Rule 10.

29. *Id.*

30. *Id.*

31. *Id.* The Virginia Constitution, the Code of Virginia, and the Rules of the Virginia Judicial Inquiry and Review Commission fail to specify the particular class of misdemeanor with which to charge violators. Presumably, punishment under § 2.1-37.13 could be imposed under any one of the four classes of misdemeanors. The most serious misdemeanor, Class I, authorizes punishment of either a jail term of not more than twelve months or a fine of not more than $2,500, or both. The least serious misdemeanor, Class IV, authorizes a punishment of a fine of not more than $250. VA. CODE ANN. § 18.2-11 (Michie Cum. Supp. 1991). Therefore, any punishment under § 2.1-37.13 must fall within this range.

32. *See* COLO. REV. STAT. § 24-72-402 (Repl. Vol. 1988).

33. VA. CODE ANN. § 2.1-37.13.

B. *Policy Arguments for Maintaining Confidentiality During Judicial Disciplinary Proceedings and Their Critique*

Proponents of confidential proceedings before judicial conduct organizations argue that confidentiality serves the following functions: (1) to prevent self-serving complainants from harassing judges with unfounded or vexatious complaints; (2) to protect the reputation of the judiciary from meritless accusations and prejudicial assertions; (3) to maintain public confidence in judicial officers by preventing premature disclosure of unfounded facts; (4) to protect participants in judicial proceedings from undue pressure and recrimination; (5) to facilitate the investigatory process; (6) to protect the constitutional right of privacy of the subject judge; and (7) to allow judges the opportunity to resign voluntarily or retire without public embarrassment.[34]

The nature of our legal system places judges as initial targets of frustration from disgruntled litigants.[35] In an adversarial system, the final decision in a civil lawsuit will generally separate the "winners" from the "losers." Furthermore, many disappointed litigants fault "the system" — either the judge, jury, or lawyers — for their legal misfortunes instead of blaming themselves. Thus, the primary argument for maintaining confidentiality during judicial conduct proceedings revolves around protecting the reputation of the judge from frivolous or vexatious complaints.[36] In fact, a 1984 survey revealed that almost seventy-five percent of all complainants based their complaints on meritless allegations.[37] In recognition of this problem, all states attempt to protect a judge's reputation against unfounded complaints by mandating confidentiality at least during the preliminary investigations conducted after a complaint is filed.[38]

Proponents of confidentiality further contend that complainants and witnesses are more likely to come forward while the gag rule remains in

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34. *See* Doe v. Florida Judicial Qualifications Comm'n, 748 F. Supp. 1520, 1522-23 (S.D. Fla. 1990); *see also* Landmark Communications v. Virginia, 435 U.S. 829, 835 (1978); First Amendment Coalition v. Judicial Inquiry & Review Bd., 784 F.2d 467, 475 (3d Cir. 1986); Mosk v. Superior Court, 601 P.2d 1030, 1041-42 (Cal. 1979).

35. *See* BRAITHWAITE, *supra* note 7, at 161-62. Many complaints come from "jailhouse lawyers" and litigants against whom the judge has ruled. *Id.* at 162.

36. *Id.* Many complainants wrongfully use judicial conduct organizations to satisfy a personally therapeutic function by airing out their complaints or otherwise defaming an honest judge. *Id.* at 162-63. This represents a misuse of the system because it bypasses the proper channels of an appeal.

37. Shaman & Bégué, *supra* note 8, at 762 n.45 (citing 6 Jud. Conduct Rep. No. 3, at 3 (Fall 1984)). In addition, the study revealed that out of the 3040 complaints filed with Pennsylvania's Judicial Inquiry and Review Board in its fourteen-year history, only eighty-four (approximately three percent) resulted in formal charges. First Amendment Coalition v. Judicial Inquiry & Review Bd., 579 F. Supp. 192, 195 (E.D. Pa. 1984), *vacated*, 784 F.2d 467 (3d Cir. 1986).

38. *See supra* notes 21-23.

effect. They argue that, without confidentiality, a complainant may fear retribution from the subject judge, her associates, or colleagues. In addition, some individuals may hesitate to file a complaint or testify against a judge because the press may expose information that they wish to remain private.[39]

These arguments, however, fail to justify the necessity for confidentiality once a preliminary investigation reveals that an allegation has merit.[40] First, most complainants and witnesses do not expect inviolate confidentiality throughout the entire disciplinary proceedings.[41] If an allegation has merit, and the committee or state supreme court finds the judge guilty of misconduct, the names of complainants and witnesses inevitably become a matter of public record.[42] Second, once the committee uncovers evidence sufficient to warrant the commencement of formal hearings, the necessity for confidentiality to protect judges against frivolous complaints becomes a moot point.

Proponents of confidentiality argue that a premature disclosure of unwarranted claims may prove extremely embarrassing or prejudicial to individual judges, which in turn risks damaging the reputation of the entire judicial system.[43] Consequently, frivolous claims against judges result in undue prejudice and a subsequent degradation of our most visible symbol of justice: the judiciary itself. The persuasiveness of this argument explains why a number of states retain confidentiality beyond the preliminary investigations.[44]

The proponents' argument ironically espouses the notion that ignorance preserves public confidence in the law. But as Justice Black remarked in *Bridges v. California*:[45]

> [t]he assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. . . . [A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender

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39. Shaman & Bégué, *supra* note 8, at 760.

40. For additional arguments against secrecy during post-investigative proceedings, see Comment, *A First Amendment Right of Access to Judicial Disciplinary Proceedings*, 132 U. PA. L. REV. 1163, 1184-87 (1984).

41. For example, a study in Wisconsin revealed that only about ten percent of the complainants in judicial conduct proceedings requested anonymity. Tom Montgomery, Note, *Towards Greater Openness in Judicial Conduct Commission Proceedings: Temporary Confidentiality as an Alternative to Inviolate Confidentiality*, 64 WASH. L. REV. 955, 967 n.75 (1989) (citing Burnham, 10th National Conference Held, JUD. CONDUCT REP. 1, 3 (Fall 1986)).

42. Shaman & Bégué, *supra* note 8, at 760-61.

43. *Id.* at 760-66.

44. *See supra* notes 22-23.

45. 314 U.S. 252 (1941) (holding that contempt orders against the press for publicizing opinions on pending court matters violate the U.S. Constitution).

> resentment, suspicion, and contempt much more than it would enhance respect.[46]

Silencing public speech in the name of judicial protection, therefore, undermines one of the primary goals that the confidentiality rules were meant to achieve — preserving the reputation of the judicial system.

III. Arguments Against Nondisclosure and the Constitutional Challenges to Rules Mandating Absolute Confidentiality

A. *Arguments Against Inviolate Confidentiality*

Opponents of confidentiality in proceedings before judicial conduct organizations argue that a judge should receive no greater protection from public criticism than any other citizen.[47] They contend that states which allow secret proceedings use the concept of government paternalism[48] to "protect" the interests of its citizens. In other words, the state prevents the dissemination of sensitive information that may prove harmful to the public's confidence in the judiciary. This concept prevents citizens from making their own decisions and allows judges to hide behind an unwarranted shield of protection.

Allowing confidentiality for judges while denying the same privilege to other public figures creates an unjustified type of class favoritism. Referring to this type of favoritism, Justice Felix Frankfurter once denounced an attempt to abridge free speech in order "to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed."[49] More recently, Justice William Brennan has recognized that "[c]losed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law."[50] Applying these concepts to judicial conduct and incompetency proceedings, overbroad confidentiality rules may actually denigrate the judicial reputation that they were enacted to protect.

Citizens must rely on the fundamental rights entrenched in the United States Constitution to make their own decisions in their search for politi-

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46. *Id.* at 270-71.

47. *See* Comment, *supra* note 40, at 1181-82.

48. This principle, otherwise known as *parens patriae*, or "parent of the country," proposes that the state must care for those who cannot care for themselves. Black's Law Dictionary 1114 (6th ed. 1990).

49. Bridges v. California, 314 U.S. 252, 291-92 (1941) (Frankfurter, J., dissenting).

50. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 595 (1980). In *Richmond Newspapers* the Court held unconstitutional a Virginia statute that allowed a judge to deny public access to certain criminal trials.

cal truth.[51] Since the emergence of judicial conduct organizations, many complainants have contended that confidentiality provisions violate their constitutional rights.[52] These challenges rely on the First Amendment's mandate that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[53] Based on this mandate, the United States Supreme Court has recognized that the public has a fundamental right to gather information.[54] The Court has also established that the major purpose of the First Amendment is to "protect the free discussion of governmental affairs."[55] By engaging in informed discussion, citizens serve as a check on government officials acting in their authoritative capacities. In order to understand the First Amendment's limitations on confidentiality, the first step is to consider relevant case law analyzing the right of access and the freedoms of speech and press.

B. *The Right of Access to Information*

United States citizens hold a fundamental right to receive information and ideas required to maintain a free society.[56] All fifty states and the federal government have enacted freedom of information acts or "sun-

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51. Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 HARV. L. REV. 1899, 1903 (1978). Opinions by the Supreme Court indicate that First Amendment protection should extend "to listener's rights and [include] the imposition on the government of a duty to preserve the means by which free discussion and expression take place." *Id.*

52. *See, e.g.*, Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Baugh v. Judicial Inquiry & Review Comm'n, 907 F.2d 440 (4th Cir. 1990).

53. U.S. CONST. amend. I. The amendment states in full: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." *Id.*

54. *See, e.g.*, Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984)(recognizing a public right of access to criminal *voir dire* proceedings); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982)(recognizing a public right of access to criminal trials involving the testimony of a minor victim of sexual assault); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (recognizing a public right of access to criminal trials).

55. *Landmark Communications*, 435 U.S. at 838 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)). The Court has recognized the press as a "handmaiden of effective judicial administration. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Id.* at 840 (quoting Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)).

56. Stanley v. Georgia, 394 U.S. 557, 564 (1969); *see* Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Martin v. City of Struthers, 319 U.S. 141, 143 (1943). The rights of speech and press do not, however, guarantee an unrestricted right to gather information and ideas. Zemel v. Rusk, 381 U.S. 1, 17 (1965).

shine laws" that allow the public to obtain governmental information.[57] For example, in Virginia, the General Assembly recognized the critical need for public access to government information when it enacted the Virginia Freedom of Information Act in 1968.[58]

The United States Supreme Court has recognized a right of access to certain governmental activities that closely resemble the functions of judicial conduct organizations.[59] The Court first recognized this constitutional right of access in the 1980 case of *Richmond Newspapers, Inc. v. Virginia*.[60] In this monumental decision, a trial judge had denied public access to a widely publicized murder trial. The Supreme Court, however, held that the First Amendment rights of free speech and press "prohibit the government from summarily closing courtroom doors which had long been open to the public."[61] Justifying its recognition of a right of access to criminal trials, the Court relied on the affirmative history of openness in the criminal justice system.[62] The Court determined that " '[w]ithout publicity, all other checks are insufficient: in comparison of [sic] publicity, all other checks are of small account.' "[63] Applying this rationale to judicial conduct organizations, states should allow public access to formal judicial disciplinary proceedings. Public disclosure and scrutiny provide a critical check on judicial conduct and incompetency.

The Supreme Court expanded the right of access to criminal trials in *Globe Newspaper Co. v. Superior Court*.[64] In *Globe*, the Court used the same historical analysis it had employed in the *Richmond Newspapers* decision, and reiterated that the First Amendment protects the free dis-

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57. Shaman & Bégué, *supra* note 8, at 784. For a general discussion of state and federal freedom of information and privacy acts, see JUSTIN D. FRANKLIN & ROBERT F. BOUCHARD, GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS (2d ed. 1986).

58. VA. CODE ANN. § 2.1-340 to 346.1 (Michie Repl. Vol. 1987). The Act itself mandates that it "shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government." *Id.* § 2.1-340.1 (Michie Cum. Supp. 1991).

59. *See supra* note 54.

60. 448 U.S. 555 (1980) (plurality decision). In *Richmond Newspapers*, the Court distinguished the right of access to criminal trials from its decision in Gannett Co. v. DePasquale, 443 U.S. 368 (1979), in which the Court held that neither the public nor the press has a right of access to a pre-trial suppression hearing. *Id.* Until the *Richmond Newspapers* decision, the Court had failed to recognize a public right of access in four cases decided during the 1970s: Houchins v. KQED, Inc., 438 U.S. 1 (1978) (denying a right of access to photograph and film prison inmates for news broadcasts); Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) (denying a right of access to tape recordings used as evidence during a criminal trial); Saxbe v. Washington Post Co., 417 U.S. 843 (1974) (denying a right of access to interview federal prisoners); Pell v. Procunier, 417 U.S. 817 (1974) (denying a right of access to interview state prisoners).

61. *Richmond Newspapers*, 448 U.S. at 576.

62. *Id.* at 565.

63. *Id.* at 596 (quoting JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).

64. 457 U.S. 596 (1982).

cussion of governmental activities.[65] The *Globe* opinion addressed a Massachusetts statute that prohibited press access to the courtroom during the testimony of a minor victim of sexual assault.[66] The state had articulated two reasons for mandating confidentiality: (1) to protect the minor child from further trauma and embarrassment, and (2) to encourage minor victims to come forward and testify.[67] The Court determined that these state interests failed to justify the need for confidentiality during a minor's testimony in *all* situations, but rather that a trial judge should be able to make the confidentiality decision on a case-by-case basis. Since the statute was not narrowly tailored to allow disclosure in some cases, the Court held that the statute violated the public's right of access.[68]

The Court recognized that the right of access aids in the fact-finding process and heightens public confidence in the judicial system.[69] It determined that the right of access ultimately serves as a check on our system of government.[70] The Court did not recognize, however, an absolute right of access to information in all cases. The Court ruled that a state may prohibit access in certain situations if it first demonstrates a compelling interest narrowly tailored to meet the purpose of the restriction.[71] The Massachusetts statute failed this strict scrutiny test because it required *mandatory* confidentiality during the testimony of a sexually abused minor.[72]

Applying this analysis to judicial conduct proceedings, Virginia must be able to demonstrate a compelling state interest in preventing public access to formal judicial disciplinary proceedings. The Massachusetts mandatory closure rule attempted to protect the interests of sexually assaulted children. The statute, however, failed strict scrutiny because it did not allow judicial discretion in granting confidentiality to minor-aged

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65. *Id.* at 604.
66. *Id.* at 610-611.
67. *Id.* at 607.
68. *Id.* at 608-09.
69. *Id.* at 606-07.
70. *Id.* at 606. The pertinent language in the opinion states:
> [T]he right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process — an essential component in our structure of self-government. In sum, the institutional value of the open criminal trial is recognized in both logic and experience.

Id. (footnotes omitted).
71. *Id.* at 606-07. Thus, the Court effectively recognized strict scrutiny as the appropriate standard of review for statutes infringing on access to information.
72. *Id.* at 607-08.

victims of sex crimes. Whether the Commonwealth of Virginia can demonstrate a compelling interest in mandating confidentiality throughout the formal disciplinary proceedings remains undetermined. Arguably, Virginia can demonstrate compelling state interests in mandating confidentiality throughout the initial investigatory period.[73] Nevertheless, once the JIRC completes the preliminary investigation and either dismisses the case or files formal charges, confidentiality should cease.

C. *The Right of Access to the Records of Formal JIRC Proceedings*

No court has yet decided the constitutionality of absolutely denying access to formal judicial disciplinary proceedings. But, the United States Court of Appeals for the Third Circuit has considered the right of access to the records of these proceedings in *First Amendment Coalition v. Judicial Inquiry & Review Board.*[74] There, the majority held that a Pennsylvania constitutional provision which denied access to the records of judicial disciplinary proceedings did not violate the United States Constitution.[75] The Pennsylvania confidentiality rule permitted access to the records only if the Judicial Inquiry and Review Board ("JIRB") recommended disciplinary action to the Supreme Court of Pennsylvania.[76]

Although the court generally upheld the confidentiality provision, it struck down a JIRB procedural rule that prohibited witnesses from publicly disclosing the substance of their own testimony.[77] The court recognized that the rule violated the witnesses' right of free speech, a right broader than the right of access.[78] Yet, the court allowed the witnesses to disclose only the content of their own testimony, not that of other witnesses whom they might have heard testify or other information revealed in the hearings.[79] A federal court sitting in Virginia, as discussed below, arrived at a similar conclusion to this issue in *Baugh*; but the rules that forbid access to the records of formal JIRC proceedings remain unchallenged in Virginia.

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73. *See supra* notes 34-46 and accompanying text for a discussion explaining how confidentiality can protect a judge from unfounded allegations and undue public embarrassment, facilitate the investigatory process, and maintain confidence in the judiciary.

74. 784 F.2d 467 (3d Cir. 1986).

75. *Id.* at 477. The Court specifically avoided discussing the right of access to the Board's formal disciplinary proceedings. *See id.*

76. *Id.* at 468.

77. *Id.* at 479. For a discussion of how a state may not prohibit a witness from disclosing his testimony at a grand jury proceeding, see notes 124-131 and accompanying text.

78. *Id.* at 477. The court also recognized that "[a]ny prior restraint on expression comes to the court with a presumption of unconstitutionality." *Id.*

79. *Id.* at 479.

D. *Attacking Virginia's Absolute Confidentiality Mandate: The* Landmark Communications *Decision*

The United States Supreme Court recognized the dangers of blanket secrecy policies during proceedings before judicial conduct organizations in *Landmark Communications, Inc. v. Virginia.*[80] In *Landmark Communications*, a Virginia newspaper had published the name of a judge under investigation by the JIRC. The Commonwealth prosecuted the newspaper for illegally disclosing this information in violation of section 2.1-37.13 of the Code of Virginia.[81] A state circuit court found the newspaper guilty of a misdemeanor, which was upheld on appeal to the Supreme Court of Virginia.[82] On further appeal, the United States Supreme Court reversed, holding that this type of criminal prosecution violated the First Amendment of the United States Constitution. The Court ruled that a state may not impose a gag rule on the press or citizens who have no connection with the JIRC proceedings.[83]

In *Landmark Communications*, the Supreme Court examined the primary reasons espoused in support of confidentiality: (1) protecting a judge's reputation; (2) maintaining public confidence in the legal system; and (3) protecting complainants and witnesses from possible recrimination.[84] The Commonwealth's arguments emphasized the importance of stifling frivolous complaints against innocent judges. For example, addressing the possible injury to a judge's reputation, the Commonwealth contended that, "*at least until the time when the meritorious can be separated from the frivolous complaints*, the confidentiality of the proceedings protects judges from the injury which might result from publication of unexamined and unwarranted complaints."[85] In addition, the Commonwealth argued that "the judiciary as an institution is maintained by avoiding *premature announcement of groundless claims* of judicial misconduct or disability since it can be assumed that some frivolous complaints will be made against judicial officers who rarely can satisfy all con-

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80. 435 U.S. 829 (1978).

81. *Id.* at 831-32. The *Virginian-Pilot* was charged for violating the rule mandating confidentiality of proceedings before the JIRC. The Code of Virginia, at that time, provided in relevant part:

> All papers filed with and proceedings before the Commission . . . including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by *any person* to anyone except the Commission. . . . Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor.

VA. CODE ANN. § 2.1-37.13 (Michie 1973) (emphasis added).

82. 212 Va. 669, 233 S.E.2d 120 (1977).

83. *Landmark Communications*, 435 U.S. at 838.

84. *Id.* at 835.

85. *Id.* (emphasis added).

tending litigants."[86] However, the Court ruled that these arguments failed to demonstrate a compelling interest to justify the invasion of free speech.[87] The question now arises whether the Commonwealth's arguments for confidentiality, as articulated in *Landmark Communications*, can justify the need for a gag rule after the JIRC separates the frivolous complaints from the meritorious.

After the *Landmark Communications* decision, the General Assembly revised the Code of Virginia so that section 2.1-37.13 now imposes criminal sanctions only on actual participants in the JIRC proceedings who later divulge information regarding those proceedings.[88] However, this section of the Code still prohibited complainants and witnesses from publicly revealing their own testimony in JIRC proceedings. As discussed below, this flaw has resulted in a judicial declaration that portions of Code section 2.1-37.13 violate the U.S. Constitution.

Exemplified by the rulings in the *First Amendment Coalition* and *Landmark Communications* cases, the federal courts hold great disdain for gag rules that prohibit a citizen (or the press) from divulging legally obtained, truthful information. Although these decisions represent narrow victories for advocates of open judicial disciplinary proceedings, the results may cause some complications. These holdings effectively require the press and the public to rely on witnesses for information regarding disciplinary proceedings. Unfortunately, this rule may discourage some witnesses from coming forward with relevant information. Some witnesses may determine that testifying would result in harassment and overwhelming pressure by the media for information. The Commonwealth of Virginia could avoid this problem by allowing public access to formal JIRC proceedings.

IV. Cracking Open the Chamber Door: The *Baugh* Decision and its Anticipated Repercussions

A. *Recent Challenges to Confidentiality Rules as Invalid Time, Place, and Manner Restrictions*

In First Amendment analyses, the United States Supreme Court now requires that state regulation of free speech must qualify as a valid time, place, and manner restriction.[89] To meet this requirement, a statute that stifles free speech must represent a content-neutral attempt to further a

86. *Id.* (emphasis added).

87. The Court did recognize the benefits of confidentiality during the early stages of the investigation. *See id.* at 835-36.

88. *See supra* note 28.

89. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (upholding a city ordinance regulating the location of adult motion picture theatres as a proper time, place, and manner regulation of speech); Young v. American Mini Theatres, Inc., 427 U.S.

compelling state interest, while leaving alternative channels of communication open.[90] A proscription on speech is content-neutral if the limitation does not relate to the substantive content of the speech.[91] In other words, valid time, place, and manner restrictions on free speech must not unjustly restrict one particular type of speech or subject matter.

B. *The* Baugh *Decision and the Failure to Demonstrate Compelling State Interests for Absolute Confidentiality*

In *Baugh v. Judicial Inquiry & Review Commission*,[92] David P. Baugh, a Virginia attorney, and Dane Hess vonBreichenruchart filed separate complaints with the JIRC. The complaints involved two different cases of alleged judicial misconduct by state judges. After filing their complaints, both Baugh and vonBreichenruchart received letters warning them not to disclose any information concerning their complaints, including the fact that they had even filed complaints. The warning letters also stated that disclosure of any information pertaining to the complaints could result in criminal prosecution.[93]

Baugh and vonBreichenruchart challenged the portion of section 2.1-37.13 of the Code of Virginia that mandates absolute confidentiality unless the JIRC files a record of the case with the Supreme Court of Virginia.[94] Both alleged that the statute unconstitutionally violated their right of free speech and their right to petition the government under the First and Fourteenth Amendments of the United States Constitution.[95] The United States District Court for the Eastern District of Virginia originally dismissed the case, upholding section 2.1-37.13 of the Code as constitutional.[96]

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50 (1976) (holding that a city ordinance regulating the location and other activities of adult motion picture theatres did not violate the First Amendment).

90. *See Young*, 427 U.S. at 63-73. The Supreme Court has interpreted the Constitution as forbidding any restrictions on expressive activity based on its content. *See id.* at 65-66.

91. Baugh v. Judicial Inquiry & Review Comm'n, 907 F.2d 440, 444 (4th Cir. 1990). The court distinguished the theory of content-neutrality from viewpoint-neutrality. Viewpoint-neutrality forbids the regulation of speech that favors "some viewpoints or ideas at the expense of others." *Id.* (quoting Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984)).

92. No. 88-0867 (E.D. Va. Feb. 1, 1991), *remanded with instructions*, 907 F.2d 440 (4th Cir. 1990).

93. *Baugh*, 907 F.2d at 442.

94. *Id.*; *see supra* notes 28-31 and accompanying text.

95. *Baugh*, 907 F.2d at 442.

96. *See* Baugh v. Judicial Inquiry & Review Comm'n, No. 88-0867-R (E.D. Va. Apr. 19, 1989). In holding this section as content-neutral, the district court found that the statute "bans speech by defenders and critics [of the JIRC] alike, and does so not to muffle criticism but to encourage complainants and witnesses to speak fully and truthfully." *Id.*, slip op. at 5. The court determined that alternative means of communication were left open because complainants could "disclose the name of the judge and the events that led them to

On appeal, the United States Court of Appeals for the Fourth Circuit held that section 2.1-37.13 of the Code was not content-neutral, and deserved to be weighed against "the most exacting scrutiny."[97] The court of appeals ruled that the district court had erred by not applying the strict scrutiny test to section 2.1-37.13. Applying strict scrutiny to this statute was necessary because the confidentiality rule "silence[d] all speech related to the actual filing of a complaint with the Commission and thus [was] not a regulation that ha[d] only the 'secondary' or 'incidental' effect of restricting speech."[98] The court of appeals remanded the case to the district court and instructed it to determine whether the Commonwealth of Virginia could demonstrate compelling state interests sufficient to justify the restriction on speech.[99]

On remand, the district court declared that the JIRC's confidentiality rules violated the plaintiffs' freedom of speech under the First and Fourteenth Amendments of the U.S. Constitution. Specifically, the court ruled unconstitutional those portions of section 2.1-37.13 that: (1) prohibit complainants from disclosing the fact that they filed a complaint with the JIRC; (2) prohibit complainants and witnesses from disclosing the contents of their own testimony; (3) prohibit complainants from disclosing the outcome of the JIRC proceedings; and (4) declare such conduct to constitute criminal activity.[100] This decision marks the second time in thirteen years that portions of section 2.1-37.13 have been held unconstitutional.[101] The General Assembly of Virginia should revise this section to recognize finally the constitutional rights of individual citizens by opening the formal proceedings to the public.

C. *Following the* Baugh *Precedent by Dismantling Absolute Confidentiality in Florida*

In *Doe v. Florida Judicial Qualifications Commission*,[102] the United States District Court for the Southern District of Florida found unconstitutional a Florida confidentiality provision similar in scope to section 2.1-37.13 of the Code of Virginia.[103] The plaintiff in *Doe* had filed a complaint

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file the complaint, but [they] merely [could not] say that they filed a complaint or what action the JIRC took on the complaint." *Id.*, slip op. at 7-8. The court also reasoned that the "incidental restriction on speech does not impermissibly burden the plaintiff's right to petition the government." *Id.*, slip op. at 8.

97. *Baugh*, 907 F.2d at 444 (quoting Texas v. Johnson, 491 U.S. 397, 412 (1989) (citation omitted)).

98. *Id.*

99. *Id.* at 445.

100. *Baugh*, No. 88-0867, slip. op. at 2-3.

101. *See supra* notes 80-88 and accompanying text.

102. 748 F. Supp. 1520 (S.D. Fla. 1990).

103. *Id.* at 1529. The State of Florida's Constitution mandates confidentiality during proceedings before the Florida Judiciary Qualification Commission. The relevant section of the

with the Florida Judicial Qualifications Commission ("JQC") against a county court judge. The JQC issued a letter to the plaintiff explaining that the complaint was a confidential matter and warning that the disclosure of any information relating to the complaint would violate the Florida constitution.[104]

Under Florida's confidentiality mandate, a complainant could not reveal the fact that he filed a complaint or disclose the details of the alleged offense until the JQC conducted formal proceedings, found probable cause, and filed formal charges with the Florida Supreme Court.[105] After the JQC received this particular complaint, but before filing formal charges with the Florida Supreme Court, the subject judge resigned.[106] Consequently, the resignation prohibited the plaintiff from ever disclosing the fact that he had filed a complaint. The court concluded that the confidentiality mandate violated the First Amendment of the Constitution as an overly broad and unjustified limitation on free speech.[107]

The court in *Doe* relied on the Fourth Circuit's analysis in *Baugh* to determine that the Florida confidentiality rule did not represent a content-neutral time, place, and manner restriction.[108] First, the court held that the confidentiality rule "[was] not justified without reference to the content of the speech which the government [sought] to prohibit."[109] Second, the court ruled that the state, by prohibiting free speech, had failed to set forth any interests compelling enough to justify the prohibition.[110] The court also held that Florida's confidentiality provision — enacted to protect judicial reputations, to guard against frivolous complaints, to facilitate investigation, and to protect privacy interests — was not narrowly tailored to meet those interests.[111]

Florida's confidentiality rules contained almost identical provisions to those in Virginia that mandate absolute confidentiality. States with similar nondisclosure rules should expect the federal courts to use *Baugh* and *Doe* as persuasive precedent to invalidate overly restrictive confidentiality mandates. These decisions, however, do not invalidate rules that mandate temporary confidentiality during preliminary investigations. States can demonstrate compelling interests for *temporarily* prohibiting complain-

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constitution provides that "all proceedings by or before the commission shall be confidential; provided, however, upon a finding of probable cause and the filing by the commission with said clerk of such formal charges against a justice or judge such charges and all further proceedings before the commission shall be public." FLA. CONST. art. V, § 12(d).

104. *Doe*, 748 F. Supp. at 1521.

105. *See supra* note 103.

106. *Doe*, 748 F. Supp. at 1522.

107. *Id.* at 1529.

108. *Id.* at 1524.

109. *Id.*

110. *Id.* at 1529.

111. *Id.* at 1526-29.

ants and witnesses from disclosing facts relating to a complaint. Nevertheless, under the First Amendment, states cannot *permanently* restrict citizens from disclosing this information.

V. Picking Up the Pieces in Virginia and Adopting the Proper Confidentiality Rules for JIRC Proceedings

A. *Redrawing the Line Where Confidentiality Ceases*

The General Assembly should revise section 2.1-37.13 of the Code of Virginia so that it no longer infringes upon constitutional freedoms. The new provisions of section 2.1-37.13 should (1) allow complainants to disclose the contents of their complaint or the fact that they had filed a complaint *after* the preliminary investigation; (2) allow witnesses to disclose the content of their testimony before the JIRC, *after* the preliminary investigation; (3) abolish criminal sanctions for disclosure of such information; (4) maintain confidentiality throughout the preliminary investigations and impose a punishment of civil contempt for violations of this rule; and (5) permit the JIRC, should the subject matter or the filing of a complaint become public knowledge, to issue press releases and other statements,which would either confirm or deny the charge(s), explain the procedural aspects of the case, and defend the judge's right to a fair hearing.

The changes in (1)-(3) above will replace the portions of 2.1-37.13 of the Code that the *Baugh* decision declared unconstitutional. The *Baugh* court did not address the proposed changes in (4) and (5) above;[112] however, these changes would place Virginia in accord with the majority of states that already allow greater openness in judicial disciplinary proceedings.[113]

A recent national study by the American Judicature Society documents the growing trend toward openness in proceedings of judicial conduct organizations.[114] The study reveals that "[t]he number of jurisdictions in which confidentiality ceases on the filing of formal charges has steadily increased from fourteen in 1980, to nineteen in 1985, to twenty-four in 1987[.] The number in mid-1990 is now twenty-seven."[115] The American Judicature Society itself has recognized the need for confidentiality during the preliminary investigatory process, but suggests that the need for

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112. The Court of Appeals for the Fourth Circuit specifically noted that the issue of confidentiality during the proceedings before the JIRC was *not* addressed in *Baugh*. Baugh v. Judicial Inquiry & Review Comm'n, 907 F.2d 440, 443 (4th Cir. 1990). The court stated in a footnote that "the statutory requirement that the actual proceedings before the Commission are to be confidential is not before us." *Id.* at 443 n.1.

113. *See supra* note 21 and accompanying text.

114. Rosenbaum, *supra* note 19, ch. 9 at 5.

115. *Id.*

confidentiality diminishes once a determination of probable cause has been made.[116]

The American Bar Association also recommends a limit on confidentiality in its Model Rules for Judicial Discipline and Disability Retirement.[117] Model Rule nine states that "[a]ll proceedings prior to a determination of probable cause and the filing of formal charges shall be confidential."[118] The Model Rules also call for explanatory public statements by the judicial commission if the disciplinary matter becomes public knowledge.[119] By adopting these standards, the Commonwealth of Virginia could adequately protect judges from vexatious or frivolous complaints while allowing for public access when warranted.

B. *Public Access During the Formal Proceedings*

Once a judicial conduct commission files formal charges and schedules a formal hearing, the public right of access becomes an important issue and raises certain questions. From a policy standpoint, should the right of access allow the press and citizens to attend the hearings? Or, should the commission allow public access only to the official records of the hearing? The answers to these questions should be decided on a case-by-case basis, by the commission in its discretion. In some cases, an individual judge may welcome the opportunity to "clear" her name publicly. On other occasions, a case may involve such sensitive subject matter that it warrants access only to the official records of the hearings. In Virginia, the JIRC should retain discretion in deciding the appropriate method of public access to the formal proceedings.

C. *Formal Hearings and the Rules of Evidence*

According to the American Judicature Society, seventy-five percent of the jurisdictions require that their own judicial commissions follow state rules of civil procedure, the civil rules of evidence, or both during formal hearings.[120] Abiding by the rules of evidence during formal proceedings is critical to maintain a judge's procedural due process rights. A judge

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116. *Id.*

117. AMERICAN BAR ASSOCIATION, PROFESSIONAL DISCIPLINE FOR LAWYERS AND JUDGES (1979).

118. *Id.* at 157, Rule 9A.

119. *Id.* at 158, Rule 9B(3). The rule provides:

> [I]n cases in which the subject matter or the fact of the filing of charges has become public, if deemed appropriate by the commission it may issue a statement in order to confirm the pendency of the investigation, to clarify the procedural aspects of the proceedings, to explain the right of the judge to a fair hearing, and to state that the judge denies the allegations. . . .

Id.

120. ROSENBAUM, *supra* note 19, ch. 9 at 23.

should have an opportunity to conduct discovery, confront her accuser, and introduce and cross-examine witnesses.

Under the present system in Virginia, the rules do not require the JIRC to follow any particular rules of evidence during formal proceedings.[121] The Commonwealth of Virginia should require the JIRC to apply the Virginia Rules of Civil Procedure for formal hearings. Such a provision would restrict the amount of admissible evidence that could unfairly prejudice the judge in the public's eye.

D. *Maintaining Confidentiality Throughout JIRC's Preliminary Investigations*

1. Temporary Confidentiality

The Commonwealth of Virginia should adopt a rule of temporary confidentiality throughout the JIRC's preliminary investigations.[122] Under this rule, neither complainants, witnesses, nor JIRC members may disclose any information regarding a complaint filed with the Commission during the initial investigatory process. Without this temporary confidentiality, judges may suffer irreparable harm to their reputations as a consequence of frivolous allegations. Only after the JIRC completes the preliminary investigation should complainants and witnesses be allowed to disclose publicly information related to the complaint.[123]

This temporary gag rule would also eliminate the unfair advantage held by a vexatious complainant who leaks his allegation to the media before the JIRC has had an opportunity to evaluate the case. Without temporary confidentiality, irresponsible members of the media could disclose absolutely meritless allegations about individual judges, which in turn would damage public confidence in the entire judiciary. By the time the JIRC or a judge publicly responds to the unfounded allegations, the public may have prematurely decided that the incident of misconduct or disability had actually occurred. Therefore, the judge effectively stands guilty without an opportunity to have a fair hearing or a formal charge ever being filed.

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121. The rules promulgated by the JIRC state that "all evidence . . . [shall] be reliable and relevant to the issue. Oral evidence shall be taken only on oath or affirmation." VA. R. JUD. INQUIRY & REVIEW COMM'N Rule 5. In addition, the rules allow the subject judge an opportunity to defend against the charges by the introduction of evidence, to be represented by counsel, and to examine and cross-examine witnesses." *Id.* Rule 6. These rules, however, fail to mandate specifically the use of any state rules of evidence.

122. For an in-depth discussion on the merits of temporary confidentiality throughout preliminary investigations of judicial conduct, see Montgomery, *supra* note 41, at 964-73.

123. The policy arguments for maintaining confidentiality specified in Section II, part B of this Note should qualify as compelling state interests for this rule. *See supra* notes 34-46 and accompanying text.

To avoid this unfair advantage, complainants and witnesses should not be allowed to disclose information regarding the allegations until the JIRC has had an opportunity to evaluate the merits of the complaint. At the close of the investigation, the complainant or witness may disclose information regarding the complaint, including the name of the subject judge. However, if the JIRC has determined that the complaint has no merit, it should issue an informed statement explaining why it dismissed the complaint. If the JIRC concludes that substantial evidence exists to support the complaint, then it should inform the public that it has filed formal charges and that it intends to initiate formal public hearings. In either case, temporary confidentiality allows for simultaneous public disclosure of both sides of the story; thereby reducing the possibility of unfair, irreparable harm to a judge's reputation.

2. The JIRC Functioning as a Grand Jury

The United States Court of Appeals for the Third Circuit made the analogy that a judicial disciplinary commission serves the same function as a grand jury in the criminal justice system.[124] The grand jury serves to determine whether probable cause exists to warrant a trial for an alleged criminal offense. It protects citizens against unfounded accusations and frivolous claims by the prosecution.[125] The Code of Virginia requires the presence of a grand jury for each term of every state circuit court unless the court and the commonwealth's attorney decide otherwise.[126]

Generally, four reasons exist for confidentiality during grand jury proceedings: (1) to prevent the escape of those who may be indicted; (2) to prevent undue influence on the grand jurors during their deliberations; (3) to prevent subornation of perjury or tampering with witnesses; and (4) to protect those falsely accused from public embarrassment if the grand jury decides that the charges are without merit.[127] The investigations and formal hearings of the JIRC function like grand jury proceedings by determining whether enough evidence exists to justify probable cause that

124. First Amendment Coalition v. Judicial Inquiry & Review Bd., 784 F.2d 467, 473 (3d. Cir. 1986). The court determined that since the JIRB could only recommend sanctions, not impose them, its "functions are similar to those of the grand jury". *Id. But see* McGraw v. West Virginia Judicial Review Bd., 264 S.E.2d 168, 170 (W.Va. 1980) (distinguishing judicial disciplinary proceedings from grand jury proceedings because disciplinary proceedings do not provide the same safeguards as criminal prosecutions).

125. *Ex parte* Bain, 121 U.S. 1 (1886).

126. VA. CODE ANN. § 19.2-193 (Michie Repl. Vol. 1990).

127. *See* Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); United States v. Proctor & Gamble Co., 356 U.S. 677 (1958); United States v. Colonial Chevrolet Corp., 629 F.2d 943 (4th Cir. 1980); *see also* Tim A. Baker, Note, *Grand Jury Secrecy v. The First Amendment: A Case for Press Interviews of Grand Jurors*, 23 VAL. U. L. REV. 559, 566 (1989).

an offense has occurred.[128] For public policy reasons, proceedings before a grand jury are privileged information, and members of a grand jury are sworn to secrecy.[129] However, courts have held that states may not impose an obligation of secrecy on witnesses who testify before grand juries.[130]

For example, the State of Oklahoma recognizes the similarities between the preliminary investigations of judicial conduct organizations and the functions of grand juries. In Oklahoma, the Council of Judicial Complaints applies the rules of secrecy for grand juries to formal judicial conduct proceedings.[131] Once the Council makes a determination of probable cause and files formal charges against a judge, however, confidentiality ceases.

The above comparison of grand juries to judicial conduct organizations supports the maintenance of confidentiality throughout the preliminary JIRC investigations. In effect, judges and citizens will receive the same protections against vexatious or unfounded complaints. Unlike witnesses in grand jury proceedings, complainants and witnesses testifying about judicial misconduct or incompetency should be restricted from disclosing information pertaining to a complaint until *after* the JIRC's preliminary investigation. The fact that judicial conduct organizations were created, in part, to protect the reputation of the judiciary as an institution justifies imposing this temporary gag rule during preliminary judicial conduct investigations.

E. *Other Confidentiality Considerations*

Maintaining confidentiality during the JIRC's preliminary investigations would also permit the JIRC to resolve privately a case of minor judicial misconduct or incompetency, rather than institute formal proceedings.[132] This proposal allows a judicial conduct organization some leeway in correcting minor judicial indiscretions. Furthermore, a judge suffering from a disability due to health or age would have the opportunity to resign with dignity instead of having charges levied against her. Such a

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128. *See* VA. CODE ANN. § 2.1-37.4.

129. Baker, *supra* note 127, at 559 n.1.

130. *See In re* Vescovo Special Grand Jury, 473 F. Supp. 1335, 1336 (C.D. Cal. 1979) (stating that a witness may publicly disclose testimony given before a grand jury under Fed. R. Crim. P. 6(e)); *In re* Petition for Disclosure of Evidence, 184 F. Supp. 38 (E.D. Va. 1960). The United States Supreme Court has recognized that a grand jury witness may not be prohibited from disclosing the content of his testimony after the term of the grand jury has ended. Butterworth v. Smith, 110 S. Ct. 1376 (1990).

131. *See* OKLA. STAT. ANN. tit. 20, § 1658 (West Supp. 1991). This section provides that "[a]ll proceedings under this section shall be held in secrecy to the same extent as proceedings before a grand jury." *Id.*

132. ROSENBAUM, *supra* note 19, ch. 9 at 1.

rule would protect the reputation of the judiciary as an institution and allow judges to avoid unreasonable public embarrassment.

VI. Conclusion

The General Assembly should revise section 2.1-37.13 of the Code of Virginia in a manner consistent with the *Baugh* decision. In addition, the General Assembly should redraw the line delineating where confidentiality ceases during proceedings before the JIRC. The revised rules should mandate temporary confidentiality throughout the preliminary JIRC investigations. Such a temporary restriction on free speech would protect judges from unfair attacks on their character and would maintain the integrity of the judiciary as a whole. However, the public right of access and the constitutional right of free speech mandate the opening of formal judicial conduct proceedings after the investigatory period.

The United States Supreme Court has recognized that states must not protect the judiciary as a "mystical entity" or judges as "anointed priests." Retaining Virginia's system of overly broad limitations on public access may breed distrust in the judicial disciplinary process and perpetuate the notion of the judiciary as a "mystical entity" or judges as "anointed priests." Adoption of a less stringent standard would place the Commonwealth of Virginia with the majority of states that recognize the growing trend of openness in government activities.

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