

2020

Avoiding Judicial Discipline

Veronica Root Martinez

Notre Dame Law School, vrootmartinez@nd.edu

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship



Part of the [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Veronica Root Martinez, *Avoiding Judicial Discipline*, 115 Nw. U. L. Rev. 953 (2020).

Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/1449

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Essay

AVOIDING JUDICIAL DISCIPLINE

Veronica Root Martinez

ABSTRACT—Over the past several years, several high-profile complaints have been levied against Article III judges alleging improper conduct. Many of these complaints, however, were dismissed without investigation after the judge in question removed themselves from the jurisdiction of the circuit’s judicial council—oftentimes through retirement and once through elevation to the Supreme Court. When judges—the literal arbiters of justice within American society—are able to elude oversight of their own potential misconduct, it puts the legitimacy of the judiciary and the rule of law in jeopardy.

This Essay argues that it is imperative that mechanisms are adopted that will ensure investigations into judicial misconduct are completed, even in the event that the individual is no longer serving as a judge in the circuit where the complaint has been filed. This Essay suggests two reforms. First, the adoption of customs that will refer any short-circuited investigation to the state bar and to Congress for additional inquiry. Second, the expansion of the judicial councils’ authority to investigate complaints so as to address the jurisdictional limitations that currently allow judges to circumvent attempts at judicial oversight over allegations of misconduct. The status quo that incentivizes avoiding judicial discipline must be reformed into one that allows for thorough and fair investigation of these important matters of public concern.

AUTHOR—Professor of Law, Robert & Marion Short Scholar, Director of Program on Ethics, Compliance & Inclusion, Notre Dame Law School. Many thanks to Samuel Bray, Stephen B. Burbank, Leah Litman, the Honorable Kenneth Ripple, Adam Sopko, and the Honorable Carl E. Stewart for helpful comments and suggestions. Special thanks to Caitlin-Jean Juricic for invaluable research assistance.

NORTHWESTERN UNIVERSITY LAW REVIEW

INTRODUCTION 954

I. AVOIDING JUDICIAL DISCIPLINE..... 958

 A. *Oversight for Article III Judges* 959

 B. *Short-Circuited Investigations* 963

II. THE PATH FORWARD 967

 A. *Legitimacy and Civility*..... 968

 B. *Simultaneous Referral to Additional Authorities* 972

 C. *Amend the Act*..... 978

III. ADDITIONAL CONSIDERATIONS 979

 A. *Impact on Members of the Judiciary*..... 979

 B. *Lifetime Pension* 981

 C. *The Supreme Court*..... 983

CONCLUSION 984

INTRODUCTION

One need not look further than the Bible to understand the longstanding importance of selecting judges who are beyond reproach—who arguably demonstrate the best of humankind and whose opinions will be viewed as legitimate authority worthy of respect. In Exodus, after Moses led the Israelites out of Egypt, his father-in-law, Jethro, comes for a visit. Jethro sees the effort Moses is engaged in from morning until evening serving as the lone judge for disputes that arose between and amongst the Israelites. Jethro admonishes Moses to find others to serve as judges. In doing so, Jethro encourages Moses to “select capable men from all the people—men who fear God, trustworthy men who hate dishonest gain—and appoint them as officials” to serve as judges for the people.¹ While it would be inappropriate to appoint only judges who fear God within the United States,² the tenor of Jethro’s admonition—that those elevated to the position of judge should be trustworthy, ethical individuals who are considered to be virtuous—remains important as society develops a set of expectations regarding appropriate conduct for those tasked with the awesome responsibility of serving as a judge.

The need for care when selecting judges is similarly evident within the founding story of the United States. In *Federalist No. 78*, Alexander Hamilton advocated the establishment of something that had been missing in government under the Articles of Confederation: a “judiciary department.”

¹ *Exodus* 18:21–22.

² U.S. CONST. art. VI, cl. 3 (colloquially known as the No Religious Test Clause).

He explained that “all the judges who may be appointed by the United States are to hold their offices during good behaviour.”³ Although “good behaviour” is conventionally understood⁴ as a term of art that secures the judge’s tenure in office, Hamilton connected it to the ethical quality of the judiciary:

The standard of good behaviour for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince: In a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws.⁵

A strong judiciary was essential to the democratic experiment the Founders were about to undertake. And as true then as it is today, democracies are bound to crumble absent a strong commitment to the rule of law by both civil society and organized government.

“Rule of law is a principle under which all persons, institutions, and entities are accountable to laws that are: [p]ublicly promulgated[,] [e]qually enforced[,] [i]ndependently adjudicated[,] [a]nd consistent with international human rights principles.”⁶ Accordingly, judges are essential to the belief in and adherence to this principle and play an integral role in the democratic ideals of freedom and justice. Indeed, the rule of law depends on an independent judiciary committed to objectively administering justice, but also a populace that respects those who have been given responsibility to oversee the adjudication of the claims, controversies, and disputes that naturally arise amongst and involving citizens and their government.

Much has changed since the time of both Moses and Hamilton, but the importance of selecting judges who are beyond reproach—who are the best of us—has endured. And most of the time, it seems to work.⁷ For Article III

³ THE FEDERALIST NO. 78, at 521–22 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis omitted).

⁴ Professors Saikrishna Prakash and Steven D. Smith have provided a historical account explaining that the term “good behavior” is rooted in concerns about the behavior of the judge and not limited as a proxy to mean “life tenure.” Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 88–105 (2006).

⁵ THE FEDERALIST NO. 78, *supra* note 3, at 522.

⁶ *Overview—Rule of Law*, U.S. CTS., <https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law> [<https://perma.cc/R9ZK-8G44>].

⁷ It has not, however, traditionally worked to ensure that the judiciary is made up of a demographically diverse set of individuals who mirror the demographics of the communities in which

judges, the President, often in consultation with members of the Senate, nominates an individual to be appointed to a judgeship, the U.S. Senate conducts a confirmation hearing, the American Bar Association and others often provide information and guidance regarding the candidate's qualifications, and the individual is confirmed.⁸ Even in the world of increased political polarization,⁹ the general idea that the judiciary is an independent and essential component of democracy remains. The judicial enterprise relies upon its legitimacy, and its legitimacy turns on the character of its judges. Thus, the judicial enterprise rises and falls with the character of its judges.

Because of the important role judges play within the key functions of American society, safeguards have been put in place to ensure that concerns regarding allegations of judicial misconduct are addressed. This Essay focuses on one such safeguard, the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (Judicial Conduct and Disability Act), which governs concerns regarding the conduct or disability of federal judges.¹⁰ The Act has enabled the judiciary—through its own self-oversight and governance—to address allegations of improper conduct or disability of judges as they arise. On the one hand, there are judges who have engaged in irregular conduct and are subsequently found to be suffering from a physical or mental illness. In these instances, the Act allows for a dignified and often private resolution to the matter by the chief judge of the circuit seeking retirement of the judge, often on the basis of disability.¹¹ On the other hand, there have been judges who have engaged in outrageous, improper behavior who have been publicly reprimanded and disciplined by their colleagues via the circuit's judicial council.¹²

they serve. See Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 434–36 (2000).

⁸ Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 971–72, 1030–32 (2007).

⁹ Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261, 264–65 (2019). The beginnings of modern-day political polarization surrounding the judiciary often point to Robert Bork's nomination to the Supreme Court, but studies have demonstrated that the "current period of politicization originated in the 1960s." *Id.* at 264.

¹⁰ Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–64.

¹¹ This practice was confirmed in background comments provided to the author by a federal judge.

¹² For example, the actions taken against then-Judge Samuel B. Kent exemplify the power of a judicial council to investigate claims of misconduct and to levy discipline in response. Lise Olsen & Harvey Rice, *Judge Disciplined for Sexual Harassment*, HOUS. CHRON. (Sept. 28, 2007, 5:30 AM), <https://www.chron.com/news/houston-texas/article/Judge-disciplined-for-sexual-harassment-1672514.php> [https://perma.cc/34X9-ZUQM]; Lise Olsen, *Details Emerge in Judge Kent Scandal*, HOUS. CHRON. (Nov. 11, 2007, 6:30 AM), <https://www.chron.com/news/houston-texas/article/Details-emerge-in-Judge-Kent-scandal-1794470.php> [https://perma.cc/9Q5K-FMUN]. Judge Kent was eventually

This Essay focuses on a narrow question under the Act, which falls somewhere in between the two situations above. What happens, or perhaps what should happen, when allegations of improper conduct are levied against a judge, but the judge leaves the court prior to a full inquiry? Currently, under the Judicial Conduct and Disability Act, formal complaints regarding the conduct of Article III judges are referred to the chief judge of the circuit court where the judge holds office.¹³ In a typical matter, the chief judge of the circuit opens an inquiry, investigates the merits of the complaint, and the chief judge or the judicial council concludes with a decision.¹⁴

The Act's mandate, however, applies only to current judges, which has resulted in some judges stepping down from the bench after a complaint is levied against them. As the Second Circuit Judicial Council explained:

The Act is concerned with individuals who *currently* exercise the powers of the office of federal judge. Its emphasis is on correction of conditions that interfere with the effective and expeditious administration of the business of the courts. . . . Because the now former judge fully resigned the office of United States circuit judge, and can no longer perform any judicial duties, the former judge does not fall within the scope of persons who can be investigated under the Act.¹⁵

In recent years, several investigations into the conduct of Article III judges have been cut short when the judges left the court before the judicial council concluded its work.¹⁶ This limitation of the Act is problematic for a variety of reasons, in part because it allows judges—the literal arbiters of justice within American society—to avoid judgment.

convicted and sentenced to prison for lying during the judicial council investigation. James C. McKinley Jr., *Judge Sentenced to Prison for Lying About Harassment*, N.Y. TIMES (May 11, 2009), <https://www.nytimes.com/2009/05/12/us/12judge.html> [<https://perma.cc/6BEX-YRXW>].

¹³ 28 U.S.C. § 351(c).

¹⁴ *Id.* §§ 352(a)–(b), 354.

¹⁵ Order at 2, *In re Complaint of Judicial Misconduct*, Nos. 18-90204-jm, 18-90205-jm, 18-90206-jm, 18-90210-jm (2d Cir. Jud. Council Apr. 1, 2019) [hereinafter Barry Order].

¹⁶ *See, e.g., In re Complaint of Judicial Misconduct*, No. 17-90118-jm, slip op. at 2 (2d Cir. Jud. Council Feb. 5, 2018) [hereinafter Kozinski Order] (citing 28 U.S.C. § 351(d)(1)) (reasoning that Alex Kozinski no longer fit the definition of “judge” after retiring). “Accordingly, the Judicial Council must ‘conclude the proceeding because [of] . . . intervening events’” *Id.* at 2–3 (quoting 2E U.S. CTS., GUIDE TO JUDICIAL POLICY, ch. 3, Rule 20(b)(1)(B) (2019) [hereinafter JCDA RULES]); *see also In re Complaints Under the Judicial Conduct and Disability Act*, Nos. 10-18-90038 through 10-18-90067, 10-18-90069 through 10-18-90107, 10-18-90109 through 10-18-90122, slip op. at 2, 6–7, (10th Cir. Jud. Council Dec. 18, 2018) [hereinafter Kavanaugh Order] (citing 28 U.S.C. § 352(b)(1)(A)(i)) (dismissing judicial-conduct complaints against then-Judge Kavanaugh because a circuit court judge is no longer covered by the Judicial Conduct and Disability Act after being elevated to the Supreme Court).

This Essay focuses on Article III judges who have, allegedly, behaved badly, yet avoided judicial discipline by resigning¹⁷ from the bench.¹⁸ Part I frames the basic issue and problem by outlining the oversight regimes for Article III judges. It then discusses some recent examples of judges avoiding judicial discipline.

Part II articulates the Essay's thesis: an argument in favor of mechanisms that will ensure investigations into judicial misconduct are completed, even in the event that the individual is no longer serving as a judge or serving as a judge subject to the Act's mandate. It relies upon literature exploring legitimacy and the courts to explain why a lack of robust oversight of and investigation into complaints regarding members of the judiciary may delegitimize rule-of-law norms that are necessary to the proper functioning of the United States' democracy. Part II then turns to two proposals: (i) create a custom of automatic referrals regarding the need for an investigation into a judge's conduct from the judicial council to the state bars for which the judge is a member and to Congress, or (ii) amend the Act so that investigations can continue even if the judge is no longer on the court.

Part III takes into account some additional considerations raised by the Essay's argument, including (i) the impact of unsanctioned misconduct on the judiciary's members, (ii) what to do regarding the pension of a judge who has retired to avoid investigations of misconduct, and (iii) how best to address the expectations and conduct of Supreme Court Justices.

I. AVOIDING JUDICIAL DISCIPLINE

Currently, there are two ways in which Article III judges may be subject to discipline. The first is via congressional impeachment and removal from office. The second is under the Judicial Conduct and Disability Act. Under both avenues, the general result has been that inquiries into alleged judicial misconduct are terminated without pursuing the merits of the underlying complaint when judges step down from the bench. Indeed, while Congress may have the authority to continue to pursue the inquiry through its impeachment power, it has historically chosen not to do so. Over the past several years, the short-circuiting of investigations into judicial impropriety has played out in the public eye. The full ramifications of these closed

¹⁷ Resigning from the bench could mean leaving the bench altogether, but it might also include leaving the bench in the circuit where a complaint has been filed under the Act and moving to another court (e.g., the Supreme Court). See Kavanaugh Order, *supra* note 16, at 6–7.

¹⁸ The Act also applies to non-Article III federal judges, but because those judges are not subject to lifetime appointments, do not receive lifetime compensation, and are more easily removed from office, concerns regarding their potential misconduct are more easily remedied than misconduct of Article III judges. This Essay is agnostic on whether it makes sense to apply this Essay's proposals to non-Article III judges.

investigations are unknown. Nevertheless, there are many reasons to theorize that this approach both damages rule-of-law norms generally and, more specifically, public trust in the role of judges and the judiciary.

A. Oversight for Article III Judges

As required by the U.S. Constitution, Article III judges, who are nominated by the President and confirmed by the U.S. Senate, “hold their office during good behavior,” which has traditionally been interpreted as functioning as a lifetime appointment.¹⁹ When a question arises as to a judge’s good behavior, there are two potential avenues that can be pursued. First, congressional impeachment as outlined in the U.S. Constitution. Second, the Judicial Conduct and Disability Act, which governs the formal complaint and discipline procedures for judges accused of misconduct.

1. Impeachment

The U.S. Constitution grants Article III judges the ability to “hold their offices during good behaviour.”²⁰ This text is understood as giving judges lifetime tenure, subject to limited circumstances that justify removal.²¹ To date, the U.S. House of Representatives has only impeached fifteen judges; of that number, only eight have been convicted by the U.S. Senate.²² Congress has previously found the following professional, as well as personal, conduct and behavior impeachable as high crimes and misdemeanors: intoxication,²³ arbitrary and oppressive trial conduct,²⁴ abuse

¹⁹ *About Federal Judges*, U.S. CTS. (internal quotation marks omitted), <https://www.uscourts.gov/judges-judgeships/about-federal-judges> [<https://perma.cc/CYD3-4P74>].

²⁰ U.S. CONST. art. III, § 1.

²¹ See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955) (noting Article III courts “are presided over by judges appointed for life, subject only to removal by impeachment”); THE FEDERALIST NO. 79, at 473 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that Article III judges, “if they behave properly, will be secured in [their office] for life”).

²² *Impeachments of Federal Judges*, FED. JUD. CTR., <https://www.fjc.gov/node/7496> [<https://perma.cc/L66A-KV2G>]; *Judges and Judicial Administration—Journalist’s Guide*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/judges-and-judicial-administration-journalists-guide#:~:text=Only%20Congress%20has%20the%20authority,only%20eight%20have%20been%20convicted> [<https://perma.cc/7HL6-JZJH>].

²³ U.S. District Court Judge John Pickering for the District of New Hampshire was impeached on March 3, 1803 on charges of mental instability and intoxication on the bench; he was convicted and removed from office by the Senate on March 12, 1804. 13 ANNALS OF CONG. 333, 353, 367 (1804).

²⁴ U.S. Supreme Court Associate Justice Samuel Chase was impeached on March 12, 1804 on charges of arbitrary and oppressive conduct of trials. The Senate acquitted him on March 1, 1805. 14 ANNALS OF CONG. 664–65, 669 (1805).

of the contempt power,²⁵ improper relations with litigants,²⁶ income tax evasion resulting in a criminal conviction,²⁷ perjury,²⁸ and sexual assault.²⁹

Article III judges convicted by the Senate face various consequences. First, and most notably, the judge or Justice will be removed from their office. Second, the conviction will result in a loss of salary, future pensions, and other benefits.³⁰ A Senate conviction may also prevent the judge from holding a similar office in the future.³¹ Whether the House may impeach, and whether the Senate may convict, an Article III judge who has retired before each body has concluded its proceedings are viewed as constitutional questions that only each chamber can answer.³² As a practical matter, Congress will generally end—or in the alternative, will not initiate—impeachment proceedings when an Article III judge retires or resigns since the primary objective, in the eyes of many, of removing her from office has already been accomplished, albeit through voluntary means.

²⁵ U.S. District Court Judge Charles Swayne for the Northern District of Florida was impeached on charges of abuse of contempt on December 13, 1904. He was acquitted on February 27, 1905. 39 CONG. REC. 214, 248 (1904); 39 CONG. REC. 1281, 1283, 3471–72 (1905).

²⁶ Third Circuit Court of Appeals Judge Robert W. Archibald was impeached on July 11, 1912 on charges of improper business relationships with litigants. On January 13, 1913, he was convicted and removed from office by the Senate. 48 CONG. REC. 8904, 8934 (1912); 49 CONG. REC. 1438, 1448 (1913).

²⁷ Judge Harry E. Claiborne for the U.S. District Court for the District of Nevada was impeached on July 22, 1986 on charges of income tax evasion and of remaining on the bench following a criminal conviction. He was convicted and removed from office by the Senate on October 9, 1986. 132 CONG. REC. 17,295, 17,305–06, 29,870–71 (1986).

²⁸ Judge Alcee L. Hastings for the U.S. District Court for the Southern District of Florida was impeached on August 3, 1988 on charges of perjury and conspiring to solicit a bribe, and was convicted and removed from office by the Senate on October 20, 1989. 134 CONG. REC. 20,208, 20,221–22 (1988); 135 CONG. REC. 25,329–30, 25,335 (1989).

²⁹ Samuel B. Kent, then-Judge for the U.S. District Court for the Southern District of Texas, was impeached on June 19, 2009 on charges of sexual assault, obstructing and impeding an official proceeding, and making false and misleading statements. 155 CONG. REC. 15,748, 15,759–61 (2009). However, he resigned from office on June 30, 2009. *Id.* at 16,226–27. The U.S. House of Representatives then passed a resolution on July 20, 2009 to no longer pursue the articles of impeachment. *Id.* at 18,331. The Senate dismissed the impeachment articles on July 22, 2009. *Id.* at 18,696–97.

³⁰ Alexa J. Smith, Note, *Federal Judicial Impeachment: Defining Process Due*, 46 HASTINGS L.J. 639, 657 n.121 (1995) (citing THE FEDERALIST NO. 65, at 399 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); see also David G. Savage, *Impeachment Hearings End for Federal Judge*, L.A. TIMES (Sept. 21, 2010, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2010-sep-21-la-na-judge-impeach-20100921-story.html> [<https://perma.cc/8434-R7ZG>] (noting that the Senate conviction of Judge G. Thomas Porteous Jr. would result in a loss of a \$174,000 yearly salary and future pension).

³¹ Not all impeachment convictions prevent judges from holding office again. See *Waggoner v. Hastings*, 816 F. Supp. 716, 719–20 (S.D. Fla. 1993) (stating that removing a judge from office and banning her from holding future office are discrete questions that must be decided during impeachment proceedings).

³² See 77 CONG. REC. 4058 (1933) (moving a resolution to the House floor for a vote regarding the question of whether a person who is no longer serving as a civil officer can be impeached).

2. *The Judicial Conduct and Disability Act*

As is relevant to this Essay, the Judicial Conduct and Disability Act lays out the process for reviewing whether a judge's conduct³³ has been "prejudicial to the effective and expeditious administration of the business of the courts."³⁴ Under the Act, the chief judge of the circuit where the judge at issue holds office has an extraordinary amount of power which allows her to initiate an investigation on her own, to initiate an investigation in response to a complaint, or to dismiss a complaint she receives.³⁵ When an individual is seeking review under the Act, she must first submit a brief statement regarding the misconduct with the clerk for the circuit court where the accused judge holds office.³⁶ Once submitted, the chief judge of the circuit will review the complaint to determine what, if any, action should be taken based on the allegations.³⁷ The chief judge may dismiss the complaint (i) for a lack of—or plainly untrue—submitted information by the complainant, (ii) for an inability to investigate, or (iii) if corrective actions have already been taken, and thus a formal investigation no longer seems required. The chief judge may also dismiss the complaint if there has been an "intervening event[]." ³⁸ Previous intervening acts have included, inter alia, self-imposed retirement of the judge under investigation or an appointment to the U.S. Supreme Court.³⁹ As one judicial council noted, "When the subject of the

³³ Cognizable misconduct under the Act includes, but is not limited to, violations of specific standards of judicial conduct (bribes, improper ex parte communications, partisan statements, income violations, granting preferential treatment to litigants, etc.) and abusive and harassing behavior (hostile work environment, discrimination, retaliation, sexual harassment or assault or other unwanted or unsolicited sexual contact, etc.). JCDA RULES, *supra* note 16, at Rule 4(a). Conduct not covered by the Act includes (1) allegations that "call[] into question the correctness of a judge's ruling," or (2) allegations about delay in rulings or decisions. *Id.* at Rule 4(b).

³⁴ 28 U.S.C. § 351(a). While these judges were subject to criminal prosecutions prior to the Act, virtually "no sitting federal judge was ever prosecuted and convicted of a crime committed [sic] while in office" in "two hundred years of judicial history prior to 1980." NAT'L COMM'N ON JUD. DISCIPLINE & REMOVAL, REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE & REMOVAL 72 (1993).

³⁵ 28 U.S.C. § 352(b)(1). But note, the chief judge has a significant amount of power and autonomy in her review of the allegations. JCDA RULES, *supra* note 16, at Rule 3(c)(2) (noting that a complaint may be "information from any source, other than a document [filed by or for a person] that gives a chief judge probable cause to believe that a covered judge . . . has engaged in misconduct . . . whether or not the information is framed as or is intended to be an allegation of misconduct" (emphasis added)); see also Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 244, 247–59 (1993) (noting that some have argued that "judges cannot be trusted to judge judges").

³⁶ 28 U.S.C. § 351(a).

³⁷ *Id.* § 352(a).

³⁸ *Id.* § 352(b).

³⁹ Kozinski Order, *supra* note 16, at 1, 3 (noting the resignation of former Ninth Circuit Judge Alex Kozinski); Barry Order, *supra* note 15, at 2 (noting the resignation of former Third Circuit Judge

complaint is no longer a judicial officer, he is beyond the reach of these procedures and the remedies [the Act] prescribe[s].⁴⁰

If the chief judge finds moving forward with the investigation is appropriate, she will then appoint herself, along with other judges, to a “special committee” to further investigate the complaint’s allegations.⁴¹ In some instances, the complaint is transferred to another circuit’s judicial council to ensure that the investigation looks, and is, objective.⁴² A complainant or the accused judge “may petition the judicial council” to review the decision if either is aggrieved with the chief judge’s decision to dismiss or proceed with an investigation.⁴³

Once formed, the special committee conducts an “investigation as extensive as it considers necessary.”⁴⁴ All documents, testimony, and evidence are made available to the accused judge. The judge is allowed to cross-examine witnesses and may submit arguments, orally or by writing, to the committee.⁴⁵ When the investigation is completed, the special committee submits its report to the circuit court judicial council that then decides whether to (i) conduct any additional investigation, (ii) dismiss the complaint, or (iii) take appropriate action “to assure the effective and expeditious administration of the business of the courts within the circuit.”⁴⁶

Discipline by the judicial council may include: (i) “requesting the judge to retire voluntarily,”⁴⁷ (ii) “censuring or reprimanding [the] judge by means of public announcement” or private communication, or (iii) temporarily ordering that the judge no longer be assigned cases.⁴⁸ The Act, however, does place certain limitations on the judicial council’s ability to discipline. Specifically, “[u]nder no circumstances may the judicial council order removal from office of any [Article III] judge appointed to hold office during good behavior.”⁴⁹

Maryanne Trump Barry); Kavanaugh Order, *supra* note 16, at 2 (noting the elevation of Justice Brett M. Kavanaugh).

⁴⁰ *In re Charge of Judicial Misconduct*, 782 F.2d 181, 181 (9th Cir. 1986).

⁴¹ 28 U.S.C. § 353(a)(1).

⁴² JCDA RULES, *supra* note 16, at Rule 26.

⁴³ 28 U.S.C. § 352(c).

⁴⁴ *Id.* § 353(c).

⁴⁵ *Id.* § 358(b)(2).

⁴⁶ *Id.* §§ 353(c), 354(a)(1).

⁴⁷ Under Rule 20, even if the Judicial Council orders a retirement, it may waive the ordinary length-of-service requirements. See JCDA RULES, *supra* note 16, at Rule 20(b)(1)(D)(v).

⁴⁸ 28 U.S.C. § 354(a)(2)(A)–(B).

⁴⁹ *Id.* § 354(a)(3)(A) (emphasis added).

Importantly, those facing misconduct inquiries can terminate the investigation, and place themselves outside of the Act’s jurisdiction,⁵⁰ by triggering an “intervening event[]”—for example, by voluntarily retiring before the investigation’s conclusion or being appointed to the U.S. Supreme Court.⁵¹

B. Short-Circuited Investigations

Judicial misconduct investigations sometimes result in discipline,⁵² but this Essay focuses on allegations that are made against Article III judges where an inquiry under the Act is commenced but cut short when the judge leaves the court, whether by retirement or some other reason. This Section reviews three investigations into Article III circuit court judges that have been initiated under the Judicial Conduct and Disability Act in the past few years. While the resolution of the complaints levied against each judge were similar—having been concluded without a determination on the merits—the judges’ lives after leaving the circuit courts look quite different.

1. Judge Maryanne Trump Barry

President Reagan appointed Maryanne Trump Barry to the U.S. District Court for the District of New Jersey in 1983. She was then elevated to the U.S. Court of Appeals for the Third Circuit by President Clinton in 1999.⁵³ Judge Barry went on senior inactive status in February 2017, weeks after her brother, Donald Trump, began his presidency.⁵⁴ On October 2, 2018, the *New York Times* published an article alleging that Donald Trump and his siblings—including Judge Barry—created numerous shell companies to pay lower taxes on the money they received from their father, Fred Trump.⁵⁵

⁵⁰ See Kozinski Order, *supra* note 16, at 3–4 (noting that the resignation of former Ninth Circuit Judge Alex Kozinski was an intervening event that ended the investigation); Barry Order, *supra* note 15, at 2 (noting that the resignation of Third Circuit Judge Maryanne Trump Barry was an intervening event that ended the investigation).

⁵¹ 28 U.S.C. § 352(b)(2); JCDA RULES, *supra* note 16, at 27.

⁵² See, e.g., Mibir Zaveri, *Federal Judge in Kansas Resigns After Reprimand for Sexual Harassment*, N.Y. TIMES (Feb. 19, 2020), <https://www.nytimes.com/2020/02/19/us/judge-carlos-murguia-sexual-harassment.html> [<https://perma.cc/C656-53CA>]; Bill Mears, *Judge Kozinski Admonished for Explicit Items on Web Site*, CNN (July 2, 2009), <https://www.cnn.com/2009/CRIME/07/02/judge.explicit.files/> [<https://perma.cc/ZA4E-HN39>].

⁵³ Barry, *Maryanne Trump*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/barry-maryanne-trump> [<https://perma.cc/9WJ-PR3U>].

⁵⁴ Russ Buettner & Susanne Craig, *Retiring as a Judge, Trump’s Sister Ends Court Inquiry into Her Role in Tax Dodges*, N.Y. TIMES (Apr. 10, 2019), <https://www.nytimes.com/2019/04/10/us/maryanne-trump-barry-misconduct-inquiry.html> [<https://perma.cc/8QCT-UGT5>].

⁵⁵ David Barstow, Susanne Craig & Russ Buettner, *Trump Engaged in Suspect Tax Schemes as He Reaped Riches from His Father*, N.Y. TIMES (Oct. 2, 2018), <https://www.nytimes.com/>

Based on the allegations in the *New York Times* story, Judge Barry would have received a “windfall” of over \$180 million from the sale of her properties.⁵⁶

The *New York Times* article prompted the filing of four judicial misconduct complaints against Judge Barry that were then transferred to the Second Circuit Judicial Council. However, on February 11, 2019, shortly after Judge Barry was officially notified of the investigation, she submitted her retirement papers.⁵⁷ Once her retirement went into effect, the Judicial Council issued an order, stating that it was ending the investigative proceedings against her given its lack of jurisdiction.⁵⁸ She does not appear to have pursued any professional opportunities since retiring.

2. *Judge Alexander Kozinski (2017 Allegations)*

Judge Alexander Kozinski started his federal judicial career as a U.S. Court of Federal Claims judge in 1982.⁵⁹ After Judge Kozinski resigned from the court in 1985, President Reagan nominated—and the Senate later confirmed—him to fill a new seat on the U.S. Court of Appeals for the Ninth Circuit.⁶⁰

On December 8, 2017, the *Washington Post* published accusations from two former law clerks that Judge Kozinski engaged in sexual misconduct.⁶¹ On December 14, 2017, the Judicial Council of the Ninth Circuit issued an order disclosing that a complaint was filed against Judge Kozinski based on the *Washington Post*'s reporting, and that it was transferring the case to another circuit for review.⁶² On December 15, 2017, nine more women came forward accusing Judge Kozinski of sexual misconduct that included claims

interactive/2018/10/02/us/politics/donald-trump-tax-schemes-fred-trump.html [https://perma.cc/36HM-2VKQ].

⁵⁶ Buettner & Craig, *supra* note 54.

⁵⁷ *Id.*

⁵⁸ Barry Order, *supra* note 15, at 2.

⁵⁹ *Kozinski, Alex*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/kozinski-alex> [https://perma.cc/CFB5-JWX6].

⁶⁰ *Id.*

⁶¹ Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html [https://perma.cc/HK3J-NJWW]. Two former clerks identified themselves for the article while four others remained anonymous out of fear of reprisal. *Id.*

⁶² *In re Complaint of Judicial Misconduct*, No. 17-90118, slip op. at 1–2 (9th Cir. Jud. Council Dec. 14, 2017), <http://cdn.ca9.uscourts.gov/datastore/ce9/2017/12/14/17-90118order.pdf> [https://perma.cc/YV8H-GULA]; Maura Dolan, *Judges to Investigate Alex Kozinski as More Women Allege Sexual Misconduct*, L.A. TIMES (Dec. 15, 2017, 6:15 PM), <http://www.latimes.com/local/lanow/la-me-ln-kozinski-misconduct-probe-20171215-story.html> [https://perma.cc/SMZ6-DVYN].

of unwanted touching and kissing.⁶³ On December 18, 2017, Judge Kozinski issued a statement explaining that he was retiring effective immediately.⁶⁴ He noted that it “grieve[d]” him to know that his “broad sense of humor and . . . candid way of speaking” caused his “clerks to feel uncomfortable” and that it was never his intent to do so.⁶⁵

In its February 2018 opinion, the Second Circuit Judicial Council acknowledged the effect that his resignation had on their investigation, noting that it “preclud[ed] any inquiry by the Judicial Council” because he was now “outside the parameters of the Act.”⁶⁶ Accordingly, the Judicial Council was forced to end its investigation.⁶⁷ However, given the gravity of the accusations, the Council requested that the Committee on Judicial Conduct and Disability of the Judicial Conference forward the opinion to appropriate congressional committees.⁶⁸

One year after opting into retirement, Judge Kozinski reentered the private sector serving as counsel in a copyright case before the court he once presided over.⁶⁹ He has also attended events within the legal community⁷⁰

⁶³ Avery Anapol, *Nine More Women Accuse Prominent Appeals Court Judge of Sexual Misconduct*, HILL (Dec. 15, 2017, 9:03 PM), <https://thehill.com/legal/365209-nine-more-women-accuse-prominent-appeals-court-judge-of-sexual-misconduct> [<https://perma.cc/SBP9-SXXW>].

⁶⁴ Statement of Judge Alex Kozinski (Dec. 18, 2017), <https://assets.documentcloud.org/documents/4332061/Alex-Kozinski-s-full-statement-announcing-his.pdf> [<https://perma.cc/XS45-FBR9>].

⁶⁵ *Id.*

⁶⁶ Kozinski Order, *supra* note 16, at 3–4.

⁶⁷ *Id.* (citing JCDA RULES, *supra* note 16, at Rule 20(b)(1)(B)).

⁶⁸ Kozinski Order, *supra* note 16, at 4. It should be acknowledged, however, that after the allegations about Judge Kozinski and other members of the judiciary regarding sexual impropriety, a number of actions were taken by the federal judiciary. The full breadth of the judiciary’s response is beyond the scope of this Essay, but both nationally and within the Ninth Circuit new policies and procedures have been implemented to allow for safer and clearer protocols for reporting allegations of sexual harassment and misconduct. *See, e.g., Workplace Conduct in the Federal Judiciary*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/workplace-conduct-federal-judiciary> [<https://perma.cc/439M-SWVQ>]; NINTH CIR. JUD. COUNCIL, NINTH CIRCUIT EMPLOYMENT DISPUTE RESOLUTION POLICY AND COMMITMENT TO A FAIR AND RESPECTFUL WORKPLACE 3 (2019), <http://cdn.ca9.uscourts.gov/datastore/general/2019/06/18/NinthCircuitEDRPolicyApproved-12272018.pdf> [<https://perma.cc/FFV2-KS5F>].

⁶⁹ Debra Cassens Weiss, *Afternoon Briefs: Alex Kozinski Returns as Litigator; Judge Blocks Firm’s Defamation Suit Against Ex-Partner*, ABA J. (Dec. 6, 2019, 4:20 PM), <https://www.abajournal.com/news/article/afternoon-briefs-alex-kozinski-returns-as-litigator-judge-blocks-firms-defamation-suit> [<https://perma.cc/89S2-7RPY>].

⁷⁰ *See* Kathryn Rubino, *The Biglaw Firm Taking Disgraced Former Judge Kozinski to Dinner*, ABOVE THE L. (Nov. 18, 2019, 1:34 PM), <https://abovethelaw.com/2019/11/the-biglaw-firm-taking-disgraced-former-judge-kozinski-to-dinner/> [<https://perma.cc/9BPN-J6W4>] (noting that Judge Kozinski attended an Association of Business Trial Lawyers event as the featured guest of Jenner & Block LLP).

and has participated in public speaking engagements.⁷¹ He remains an active, practicing member of the California Bar and is listed as working at the “Law Office of Alex Kozinski.”⁷²

3. *Then-Judge Brett Kavanaugh*

Justice Brett Kavanaugh became an Article III judge in 2006 after President George W. Bush nominated him to serve on the U.S. Court of Appeals for the D.C. Circuit.⁷³ In 2018, President Donald Trump nominated then-Judge Kavanaugh to serve on the U.S. Supreme Court.⁷⁴ During his Supreme Court nomination hearings, he was publicly accused of sexually assaulting a woman while in high school.⁷⁵ The Senate confirmed Justice Kavanaugh to the Supreme Court on October 6, 2018 by a 50–48 vote.⁷⁶

The allegation and his testimony during the nomination process prompted a total of eighty-three judicial complaints filed against him. Chief Justice John Roberts then referred the allegations to the Tenth Circuit for review.⁷⁷ The complaints included allegations that:

⁷¹ See Ryan Torok, *Dershowitz and Shrum Debate Impeachment, #MeToo and BDS*, JEWISH J. (Feb. 19, 2020), <https://jewishjournal.com/community/310887/dershowitz-and-shrum-debate-impeachment-metoo-and-bds/> [https://perma.cc/D3JD-XPMT] (stating that Judge Kozinski moderated the discussion).

⁷² *Attorney Licensee Profile: Alex Kozinski #66473*, STATE BAR OF CAL., <http://members.calbar.ca.gov/fal/Licensee/Detail/66473> [https://perma.cc/DZ9A-92XW]. An individual who filed an earlier misconduct complaint against Judge Kozinski has since filed suit against him, alleging Judge Kozinski lied to the Third Circuit Judicial Council during investigative proceedings. The case is still ongoing. *Complaint, Sanai v. Kozinski*, No. 19-cv-08162-JCS (N.D. Cal. Dec. 16, 2019), ECF No. 1.

⁷³ *Kavanaugh, Brett M.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/kavanaugh-brett-m> [https://perma.cc/MD7G-3XFG].

⁷⁴ *Remarks by President Trump Announcing Judge Brett M. Kavanaugh as the Nominee for Associate Justice of the Supreme Court of the United States*, THE WHITE HOUSE (July 9, 2018, 9:03 PM), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-announcing-judge-brett-m-kavanaugh-nominee-associate-justice-supreme-court-united-states/> [https://perma.cc/T7WG-TE7F].

⁷⁵ Emma Brown, *California Professor, Writer of Confidential Brett Kavanaugh Letter, Speaks Out About Her Allegation of Sexual Assault*, WASH. POST (Sept. 16, 2018, 9:28 PM), https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b_story.html [https://perma.cc/F293-Y9AX].

⁷⁶ Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html> [https://perma.cc/QG2G-QLDV].

⁷⁷ Samuel Chamberlain & Bill Mears, *Roberts Refers Ethics Complaints Against Kavanaugh to Federal Judges*, FOX NEWS (Oct. 10, 2018), <https://www.foxnews.com/politics/roberts-refers-ethics-complaints-against-kavanaugh-to-federal-judges> [https://perma.cc/57NT-Q46N]; *Tenth Circuit Judicial Council Issues Order on Complaints Against Justice Brett M. Kavanaugh*, 10TH CIR. CT. OF APPEALS, <https://www.ca10.uscourts.gov/ce/misconduct/kavanaugh-complaints> [https://perma.cc/DR57-Q3SG].

- Justice Kavanaugh made false statements related to his underlying conduct that formed the basis of these accusations during his confirmation hearings in 2004, 2006, and 2018;
- Justice Kavanaugh made inappropriate partisan statements that demonstrated bias and lack of judicial temperament; and
- Justice Kavanaugh treated members of the Senate Judiciary Committee with disrespect.⁷⁸

The Judicial Council noted, however, that under the Judicial Conduct and Disability Act, covered judges include “circuit judge[s], district judge[s], bankruptcy judge[s], [and] magistrate judge[s].”⁷⁹ Because Justice Kavanaugh was no longer subject to the Act, the Judicial Council no longer had jurisdiction and thus concluded its proceedings against him, but it did acknowledge that the “allegations contained in the complaints are serious.”⁸⁰ He has since been serving on the Supreme Court and has largely maintained a posture outside the public eye.⁸¹

II. THE PATH FORWARD

The short-circuited investigations of the past few years demonstrate the challenges and shortcomings in the existing procedures for handling alleged judicial misconduct of Article III judges. This Essay argues it is imperative that mechanisms are adopted that will ensure investigations into judicial misconduct are completed, even in the event that the individual has, for example, retired from the bench or been elevated to the Supreme Court. To do otherwise has serious implications for rule-of-law norms in this country. As scholars have demonstrated, when people perceive decision-makers, like judges, as legitimate, it impacts their level of compliance with those decision-makers’ pronouncements and orders.⁸² But who will obey a judiciary that fails to police itself?

⁷⁸ Kavanaugh Order, *supra* note 16, at 3–4.

⁷⁹ *Id.* at 5 (internal quotation marks omitted) (emphasis removed) (quoting 28 U.S.C. § 351(d)(1)).

⁸⁰ Kavanaugh Order, *supra* note 16, at 8–9; Nina Totenberg, *Federal Panel of Judges Dismisses All 83 Ethics Complaints Against Brett Kavanaugh*, NPR (Dec. 18, 2018, 6:28 PM), <https://www.npr.org/2018/12/18/678004085/federal-panel-of-judges-dismiss-all-83-ethics-complaints-against-brett-kavanaugh> [<https://perma.cc/2NA4-6DH3>].

⁸¹ It appears he has engaged in just one public appearance since joining the Supreme Court. Ariane de Vogue, *Kavanaugh Expresses “Gratitude” to Conservative Gala for Support Through Controversial Confirmation Process*, CNN (Nov. 14, 2019, 11:45 PM), <https://www.cnn.com/2019/11/14/politics/brett-kavanaugh-washington-federalist-society-speech/index.html> [<https://perma.cc/8ZCZ-AKZK>].

⁸² James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 *LAW & SOC’Y REV.* 469, 487 (1989) (citing Kenneth Rasinski, Tom R. Tyler &

This Part begins by considering how the cessation of an investigation into a judge's alleged misconduct might impact the populace's view of courts and judges as legitimate sources of authority, and the ways in which concerns regarding civility may have contributed to the status quo. This Part next outlines steps that could be taken by various members of the legal profession and policymakers in an attempt to address the jurisdictional limitations within the Act that permit Article III judges to retire or leave the circuit prior to the conclusion of a full and complete investigation into complaints of alleged misconduct. The proposal starts with the most feasible and easy-to-implement suggestion and ends with one that would require action on the part of Congress—a rarity given today's political realities. There are other avenues, of course, that could be pursued to improve the quality and robustness of investigations into potential judicial misconduct. However, this Essay's priority is to communicate the importance of adopting mechanisms that will ensure investigations into judicial misconduct are fully and fairly completed and not short-circuited by jurisdictional limitations within the legal rules and procedures that govern judicial conduct.

A. *Legitimacy and Civility*

Despite allegations that they acted improperly, the aforementioned federal judges have been able to continue their careers or transition to retirement without undergoing thorough investigations into their actions. The limitations imposed by the Judicial Conduct and Disability Act restricting judicial councils from investigating those judges who have retired, plus Congress's traditional reluctance to use its impeachment power to discipline rogue judges, have resulted in a system where judges are able to act without fear of meaningful oversight or sanction much of the time. In short, it is often the case that the only discipline judges face is the stain on their reputation when they resign in the midst of a pending investigation.⁸³

Kim Fridkin, *Exploring the Function of Legitimacy: Mediating Effects of Personal and Institutional Legitimacy on Leadership Endorsement and System Support*, 49 J. PERSONALITY & SOC. PSYCH. 386 (1985).

⁸³ While some members of Congress have put forth proposals, no bills have been passed, leaving the Act's limitations in place. *See, e.g.*, Press Release, U.S. Sen. Sheldon Whitehouse, Senate Democrats Back Strong Ethics Guidance for Judges (May 12, 2020), <https://www.whitehouse.senate.gov/newsroom/record/press-release/senate-democrats-back-stronger-ethics-guidance-for-judges> [https://perma.cc/U9FR-42F8] (supporting a rule banning judicial membership in advocacy organizations that potentially implicate judicial impartiality and legitimacy); Zack Budryk, *Warren Judicial Ethics Plan Would Allow New Investigations into Kavanaugh*, HILL (Oct. 7, 2019, 4:10 PM) <https://thehill.com/homenews/campaign/464721-warren-judicial-ethics-plan-would-extend-code-of-conduct-to-supreme-court> [https://perma.cc/KJR8-2VRZ] (describing U.S. Senator Elizabeth Warren's plan to allow investigations of misconduct to continue after judges leave the bench).

The current inability to fully investigate and sanction potential judicial misconduct raises a whole host of questions,⁸⁴ but perhaps the most important one is whether a failure to investigate claims of misconduct by a judge harms people's acceptance of the rule of law and the role of judiciary within in it. It is important to note that judges are not magicians or all-powerful. The legitimacy of judicial decision-making comes from the populace's decision to accept judicial pronouncements and to act accordingly.⁸⁵

When a complainant and the public are aware of general information about potential judicial misconduct and an investigation into the alleged misconduct is initiated but then closed without a decision on the merits, it may create the perception that judges are above the law.⁸⁶ It may send a signal that everyday people will be required to undergo the indignities of having their actions interrogated and investigated, but the very individuals charged with overseeing those sorts of examinations can avoid similar intrusions into their own conduct. If the public begins to believe that judges are above the law in terms of their own personal conduct, it could have dramatic ramifications for the legitimacy of the judicial system and the respect for the rule of law, which tie together the very fabric of American society.⁸⁷

In some ways, the above observations regarding the need of the public to view judges and the court as legitimate sources of authority are unremarkable. Thus, one might question why judges do not more carefully ensure, or advocate for more authority to ensure, that full investigations

⁸⁴ While beyond the scope of this Essay, improper behavior of a judge that goes unchecked could put them on what behavioral ethicists call a "slippery slope," whereby they might begin with relatively innocuous misconduct that slowly becomes more significant and harmful to those around them. See David T. Welsh, Lisa D. Ordóñez, Deirdre G. Snyder & Michael S. Christian, *The Slippery Slope: How Small Ethical Transgressions Pave the Way for Larger Future Transgressions*, 100 J. APPLIED PSYCH. 114, 124 (2015); MAX H. BAZERMAN & ANN E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT 93 (2011).

⁸⁵ Gibson, *supra* note 82, at 487. Other work discussing legitimacy, although focused on the Supreme Court, has also been conducted. See Luis Fuentes-Rohwer, *Taking Judicial Legitimacy Seriously*, 93 CHIKENT L. REV. 505, 506–07 (2018); James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC'Y REV. 195, 213–16 (2011); James L. Gibson, *Institutional Legitimacy, Procedural Justice, and Compliance with Supreme Court Decisions: A Question of Causality*, 25 LAW & SOC'Y REV. 631 (1991).

⁸⁶ See Leah M. Litman & Deeva Shah, *On Sexual Harassment in the Judiciary*, 115 NW. U. L. REV. 599, 617 (2020) (noting that "some federal judges believe that the general rules of the workplace do not, in fact, apply to them").

⁸⁷ James L. Gibson & Michael J. Nelson, *The Least Accountable Branch?*, 55 CT. REV. 30, 30 (2019) (discussing the ways in which the public's disagreement with a judge's decision might impact its view of whether the judiciary is held accountable for its actions).

occur when allegations of misconduct are presented. In part, this is a result of the history and realities leading up to the passage of the Act.⁸⁸ Yet, it may also be a result of the way judges navigate their interactions with each other because of concerns regarding civility.

Some may believe that the harm to the judiciary is remedied, in part, by the judges leaving office. Once a judge has left the bench, some may wonder whether continuing to pursue an investigation that would serve primarily to further tarnish the judge's reputation would be hostile toward norms and notions of civility within the profession. Part of the answer to this concern depends on one's understanding of civility. If notions of civility are focused merely on "the enforcement of good manners amongst lawyers,"⁸⁹ then it may not seem necessary to continue investigating a judge who has left the bench. That judge's poor behavior has now been rectified, albeit without a full investigation with public resolution. But such a narrow view of civility—"weak civility"—fails to fully acknowledge the full role of a judge within a democracy.

Many understand the primary role of a judge to be to decide disputes between two parties, but the role and function of a judge within a democracy is arguably much broader.⁹⁰ While a fulsome exploration is beyond the scope of this Essay, some view a judge's role within a democracy as serving to bridge "the gap between law and society," which includes "maintain[ing] the coherence of the legal system as a whole."⁹¹ Additionally, the judge serves "to protect the constitution and democracy," which includes "safeguard[ing] both formal democracy, as expressed in legislative supremacy, and substantive democracy, as expressed in basic values and human rights."⁹² These understandings of the role of the judge, when paired with the importance of the public finding courts legitimate to ensure compliance⁹³ with judicial orders and pronouncements, suggest that concerns about civility based on appearances must not take priority over shoring up rule-of-law norms.

Fidelity to weak civility can be seen throughout the judiciary within the United States and its reluctance to levy sanctions against its own members.

⁸⁸ For a more fulsome discussion, see Geyh, *supra* note 35, at 243–46, and Dana A. Remus, *The Institutional Politics of Federal Judicial Conduct Regulation*, 31 YALE L. & POL'Y REV. 33, 34–37 (2012).

⁸⁹ Alice Woolley, Commentary, *Does Civility Matter?*, 46 OSGOODE HALL L.J. 175, 176 (2008).

⁹⁰ See Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 25–26 (2002).

⁹¹ *Id.* at 25.

⁹² *Id.* at 26.

⁹³ Gibson, *supra* note 82, at 487–89.

A recent study demonstrates the potential depths of the problem. In 2020, a special report, issued by *Reuters*, revealed the findings of a large study into judicial misconduct.⁹⁴ The upshot of the report is that “[m]ost states afford judges accused of misconduct a gentle kind of justice,” which demonstrates widespread reluctance to sanction judges for actions that were found to be inappropriate.⁹⁵ As a result, judges who were failing to follow legal guidelines in areas like the sentencing of criminal defendants were allowed to remain on the bench even as they had improperly deprived defendants of their liberty.⁹⁶

If the judiciary fails to police itself, and if Congress fails to police the judiciary, the principles and ideals that form the foundation of the judicial system within the United States will crumble and fall.⁹⁷ Civility norms, of course, matter, but the civility that is most important—“strong civility”—is focused on “respect and loyalty to clients, respectfulness to the general public, and ensuring the proper functioning of the legal system.”⁹⁸ It prioritizes the judiciary as an important branch within our government over the individual inconvenience of the judge. This notion of strong civility is eroded when judges are allowed to behave badly and, when caught, to save face and resign without investigation or sanction.

The upshot is, to ensure that rule-of-law norms and the legitimacy of the courts persist within a democratic system, judges must not be viewed as above the law. When judges are able to circumvent investigations into their own conduct, however, it has the potential to erode the public’s view of the courts as legitimate. For these reasons, it is imperative that mechanisms are adopted that will ensure investigations into judicial misconduct are completed, even in the event that the individual is no longer serving as a judge in the court where the complaint has been filed.

⁹⁴ Michael Berens & John Shiffman, *Special Report: Thousands of U.S. Judges Who Broke Laws, Oaths Remained on the Bench*, REUTERS (June 30, 2020, 7:06 AM), <https://www.reuters.com/article/us-usa-judges-misconduct-specialreport-idUSKBN2411WG> [<https://perma.cc/NN7C-UY9A>].

⁹⁵ *See id.*

⁹⁶ *Id.*

⁹⁷ This is not an idea unique to judges. Members of the legal profession, journalists, and a whole host of other groups must ensure they root out corruption to preserve the democratic ideals this country was founded on hold. *See, e.g., Leah Litman, Lawyers’ Democratic Dysfunction*, 68 DRAKE L. REV. 303, 306 (2020) (“When social or professional networks refuse to hold their members accountable for their actions, the networks lose the ability to function as meaningful safeguards against the breakdown of norms.”).

⁹⁸ Woolley, *supra* note 89, at 176.

B. Simultaneous Referral to Additional Authorities

When a complaint is received, the chief judge may undertake a variety of actions under the Act, including dismissing the complaint (i) for a lack of—or plainly untrue—information submitted by the complainant, (ii) for an inability to investigate, or (iii) if she finds that corrective actions have already been taken and a formal investigation may no longer seem required.⁹⁹ Indeed, under the current rules structure, not all allegations will result in “the formal procedures” or investigations, and the chief circuit judge may determine “whether informal corrective action will suffice and to initiate such steps as promptly as is reasonable under the circumstances.”¹⁰⁰ The chief judge may also dismiss the complaint if there has been an “intervening event[.]”¹⁰¹ These are the options explicitly granted to the chief judge under the Act, but there is nothing to stop the adoption of additional customs on how to respond when a complaint regarding the conduct of a judge is initiated.¹⁰²

In an effort to ensure that investigations into a judge’s conduct are fully investigated, each chief judge and each judicial council should adopt a custom of referral.¹⁰³ First, they should refer all nonfrivolous complaints to the state bars of which the judge at issue is a member for investigation and review to determine if a violation under that state’s rules of professional conduct occurred. Second, in the event that a retirement or other intervening cause prevents an investigation into the merits of a complaint against a judge, the chief judge should automatically refer the case for congressional inquiry and impeachment.

Customs, while generally not as robust as formal rules, can be quite powerful tools. Once a custom is entrenched, it can be difficult to walk away from and, if ignored, it can flag a lack of legitimacy surrounding the action

⁹⁹ 28 U.S.C. § 352(b).

¹⁰⁰ JCDA RULES, *supra* note 16, at 11.

¹⁰¹ 28 U.S.C. § 352(b)(2).

¹⁰² It is important to remember that the chief judge has a great deal of power within this framework. Indeed, the chief judge may look to “information *from any source*, other than a document [filed by or for a person], that gives a chief judge probable cause to believe that a covered judge . . . has engaged in misconduct . . . whether or not the information is framed as or is intended to be an allegation of misconduct” when deciding whether to initiate an investigation. JCDA RULES, *supra* note 16, at Rule 3(c)(2) (emphasis added).

¹⁰³ One of the potential limitations, or perhaps flaws, with the Act is the amount of deference that the individual chief judges hold over what to do with a complaint or allegation of misconduct. The chief judges are instilled with the authority to act or not act when receiving complaints regarding the behavior of judges in their circuit, which means chief judges are provided power to handle a variety of potential concerns regarding judicial conduct and behavior outside a formal process. Geyh, *supra* note 35, at 248–49.

undertaken in violation of the established custom. Thus, the judicial councils and the circuit chief judges should act now to invoke customs that will bolster the processes and ability of a variety of actors to take a hard look at the conduct that led to complaints against an Article III judge in an effort to more fully and completely ensure that complaints against these individuals are investigated properly.

I. State Bar(s)

The benefit of sending a referral¹⁰⁴ to the relevant state bar(s) is that the scope of authority is actually much broader to regulate the conduct of lawyers under rules of professional conduct than what the judiciary utilizes under the Judicial Code of Conduct,¹⁰⁵ which sets forth principles and ethical standards by which judges are to conduct themselves, and the Judicial Conduct and Disability Act. As a result, it may be easier to obtain a more thorough review and sanction when the judge's actions are assessed under the rules of professional conduct governing lawyers than under the Act.

Take, for example, the allegations of sexual misconduct against Judge Kozinski. Regardless of what a full on-the-merits adjudication would or would not have determined under the Judicial Conduct and Disability Act, under Model Rule of Professional Conduct 8.4(g), Judge Kozinski, if a member of a state bar that had adopted provisions aligned with the Model Rules, might be subject to discipline if he, for example, “engage[d] in conduct that [he] kn[ew] or reasonably should [have] know[n] [wa]s harassment or discrimination on the basis of . . . sex.”¹⁰⁶ If a full investigation by the state bar determined that Judge Kozinski violated 8.4(g), it could then levy a range of sanctions against him, including a private or public reprimand, suspension of Kozinski's ability to practice for a limited period of time, or permanent disbarment.¹⁰⁷ For Kozinski, this additional possibility of discipline from the state bar would have real bite because he has chosen to pursue at least some measure of legal practice. If the bar were to suspend his license or disbar him altogether, it would send a strong signal to both the

¹⁰⁴ One might worry that this sort of intervention may result in the political weaponization of the state bar disciplinary system. Given the political realities of the day and the unprecedented attacks on rule-of-law norms, that is a valid concern. That said, a state bar investigation must be rooted in a violation of some sort of rule of professional conduct, and those systems are accustomed to dismissing unfounded complaints.

¹⁰⁵ 2A U.S. CTS., GUIDE TO JUDICIAL POLICY, ch. 2 (2019) [hereinafter JUDICIAL CODE OF CONDUCT].

¹⁰⁶ MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018).

¹⁰⁷ MODEL RULES FOR LAW. DISCIPLINARY ENF'T r. 10 (AM. BAR ASS'N 2020).

public and other members of the legal profession that the initial complaint was taken seriously. In other words, the judge was held to account.

There are, however, innate limitations with this proposal. First, it requires that the judge is a member of a state bar, because if she is not, there will be no jurisdiction to evaluate her under the state's rules of professional conduct.¹⁰⁸ Second, it requires that the judge not resign from the state bar upon learning of the referral to it, as a resignation from the bar may also cause a short-circuited investigation into the alleged judicial misconduct. That said, as evidenced by Judge Kozinski, a judge might agree to retire from being a member of the judiciary and still expect to be able to fall back on practicing law as an attorney. This can exacerbate the harms caused by lack of judicial sanction. If judges are able to sidestep inquiries into their conduct, yet are still able to practice law in the same community, their continued presence in legal proceedings and settings will further undermine the community's faith in and acceptance of the ability of the judiciary and the legal profession to ensure that their own members are adhering to rule of law principles.

Third, state bars often have very limited resources to expend on investigations.¹⁰⁹ They may question whether it is an efficient use of resources to levy an investigation into conduct that occurred while an individual was a judge when they have since left office. Fourth, state bars have a whole host of disciplinary options at their disposal, including the option of a private reprimand. As such, a state bar might decide to initiate an investigation, but determine that a public disclosure of the need to impose discipline is not needed. In these instances, the public will remain in the dark regarding the results of any investigation into the alleged misconduct. Finally, and perhaps most importantly, if the state bar is captured¹¹⁰ by the

¹⁰⁸ MODEL RULES OF PRO. CONDUCT r. 8.5(a) (AM. BAR ASS'N 2018) ("A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs.").

¹⁰⁹ See, e.g., Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805, 845 (2019) ("When members of the profession suggest that the ABA or state bar[s] . . . take on a new task or oversight responsibility, a 'resources' objection is quickly made."); Lisa H. Nicholson, *Access to Justice Requires Access to Attorneys: Restrictions on the Practice of Law Serve a Societal Purpose*, 82 FORDHAM L. REV. 2761, 2789 (2014) (noting budget constraints of many state bar committees); Beverly Storm, *Mandatory Reporting of Lawyer Misconduct: Can the Bench & Bar of the Commonwealth Discipline Itself Without It?*, 20 N. KY. L. REV. 809, 814 (1993) (noting that the lawyer discipline system is "over-taxed with complaints of fraud, conversion and substance abuse").

¹¹⁰ "Capture refers to an extremely close relationship between regulator[] and [the regulated]," in this case, the reality that members of the legal profession who make decisions within the state bar might have close relationships with members of the judiciary in that state. Veronica Root, *The Monitor-Client Relationship*, 100 VA. L. REV. 523, 579 (2014) (internal quotation marks omitted) (quoting Dorit

judiciary and its members, it may not be willing to initiate, or oversee, an investigation into a judge or former judge.¹¹¹

As for these latter three concerns, members of the legal profession are members of a self-regulated profession, and state bars are accustomed to investigating and levying sanctions against their own. That is not to suggest that it would be easy or trivial for a state bar to enter into an investigation into an Article III judge—it would be significant—but it is not an unprecedented role for leaders within the profession to undertake given the realities of regulation for members of the legal profession more generally. State bars are familiar with the need to prioritize the utilization of finite resources, and it is appropriate for them to use their best judgment regarding how to respond to cases referred to them by chief judges, just as it is appropriate to defer to them regarding whether results of any discipline should be made public or remain private. Importantly, state bars have chosen to sanction politicians and other powerful individuals in the past whose misconduct was well known and high-profile. For example, President Bill Clinton served a five-year suspension of his Arkansas law license in connection to false statements he made during the course of the Monica Lewinsky investigation.¹¹² Referring concerns regarding improper behavior of a judge to a state bar does not require the state bar to take a particular course of action, but it does prompt the state bar to consider whether action is appropriate given the allegations contained in the referral.

2. Congressional Impeachment

In the event that a retirement or other intervening cause prevents an investigation into the merits of a complaint against a judge, a chief judge should automatically refer the case for congressional inquiry and impeachment with an explicit request for a response regarding the status of the congressional inquiry to ensure a review does in fact occur.¹¹³

Rubinstein Reiss, *The Benefits of Capture*, 47 WAKE FOREST L. REV. 569, 570 (2012) (discussing the phenomenon of monitor capture)).

¹¹¹ While concerns about capture of local state bar members are certainly important, capture may be of even greater concern when a judicial council is making a determination about how to sanction one of its own—and this is true even when transferred to a different circuit’s judicial council. See, e.g., Geyh, *supra* note 35, at 244 (noting that some have argued that “judges cannot be trusted to judge judges”).

¹¹² Associated Press, *Bill Clinton Can Re-Apply for His Lawyer License*, NBC NEWS (Jan. 18, 2006, 8:28 AM), <http://www.nbcnews.com/id/10904831/ns/politics/t/bill-clinton-can-re-apply-his-lawyer-license/#.XyzUjShKhPY> [<https://perma.cc/XF4L-6JAP>]; Robert L. Jackson, *Ethics Panel Advises Clinton Be Disbarred*, L.A. TIMES (May 23, 2000, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2000-may-23-mn-33092-story.html> [<https://perma.cc/A5MS-MJ8V>].

¹¹³ Requesting a response may invoke separation-of-powers concerns. The goal here, however, is to encourage Congress to actually look at the matter, and asking for a response is meant to nudge them to do so. It is not meant to encourage them to make a particular decision or to take particular actions.

Referrals to Congress already occur on an ad hoc basis. For example, after Judge Kozinski resigned in 2018, the Second Circuit Judicial Council requested its opinion be forwarded to appropriate congressional committees, but this was based, in part, on the gravity of the accusations.¹¹⁴ In other words, the referral did not occur solely because Judge Kozinski's retirement eliminated the Judicial Council's jurisdiction to investigate; rather, it was referred because the investigation was circumvented *and* the allegations seemed serious. That makes intuitive sense, but a rule based on the perceived gravity of the offense would likely miss cases like those of Judge Barry, whose alleged misconduct had run well past any applicable statutes of limitations.¹¹⁵

The upshot is that the potential harm to the judiciary and rule-of-law norms from unadjudicated judicial complaints appear significant enough to warrant the adoption of customs by the judicial circuits that would require congressional oversight and inquiry into investigations that are stalled by intervening causes, like retirement. Again, if the arbiters of justice—judges—are perceived as being above the law, it has the potential to decrease the sense of legitimacy and fundamental fairness necessary for the populace to maintain high levels of trust in the judiciary.

Importantly, there are at least two potential benefits to a custom of automatic referrals. First, if a custom to automatically refer the matter to Congress becomes strong, then it might disincentivize judges from retiring from the court in an effort to thwart further investigation. Thus, it may decrease the need for congressional inquiry. And again, a custom of this nature can be implemented immediately by the chief judges of the various judicial councils.

Second, it may serve to normalize congressional oversight of instances of judicial misconduct. To date, relatively few impeachment proceedings have been pursued by Congress involving Article III judges. To the extent that there is not much misconduct within the federal judiciary, a low number of impeachment proceedings would likely be perceived as good. Yet, when a judge leaves the bench in response to an allegation that looks to contain a credible complaint, a lack of congressional response may send negative signals to the public.¹¹⁶ It might signal apathy regarding potential corruption

¹¹⁴ Kozinski Order, *supra* note 16, at 4.

¹¹⁵ Judge Barry's case was not referred for review by appropriate congressional committees. Barry Order, *supra* note 15, at 2.

¹¹⁶ Impeachment may help assuage the concerns of the public regarding potential judicial misconduct more than if the judiciary is policing itself, given the different interests of each group. *See, e.g.,* Paula Abrams, *Spare the Rod and Spoil the Judge? Discipline of Federal Judges and the Separation of Powers*,

within the judiciary. It might also signal an unwillingness to sanction individuals who are perceived as having power, which could further entrench perceptions that judges are above the law. But if Congress is referred cases where the judge attempts to short-circuit the investigative process, it will provide an opportunity for Congress to restore norms of legitimacy surrounding the judiciary.

In reality, there are not likely to be very many of these investigations by referral, as these sorts of cases appear to be relatively rare when considering their frequency against the number of active Article III judges within the United States. Yet a decision to allow well-founded complaints of public concern regarding judicial misconduct to go uninvestigated has the potential to harm the rule of law and the democratic ideals upon which the United States is founded. It is Congress's constitutional duty to intervene.

There are, however, some legitimate objections to increased congressional oversight into complaints filed alleging judicial misconduct. First, impeachment involves significant costs in terms of both time and monetary resources.¹¹⁷ Second, because the House and Senate are given separate powers regarding impeachment, the process of impeaching an Article III judge may be inefficient and may devolve into political theater that fails to achieve a concrete and respected resolution. Third, and perhaps most importantly, Congress may be concerned that if it takes too active a role in policing the activities of members of the judiciary, it might be perceived as encroaching on the separation of powers between the three branches of government.¹¹⁸

These concerns, however, demonstrate the need for another proposal to realize this Essay's thesis, which is that it is imperative that mechanisms are adopted that will ensure investigations into judicial misconduct are completed, even in the event that the individual is no longer serving as a judge in the court where the complaint has been filed.

41 DEPAUL L. REV. 59, 60 (1991) (discussing the competing interests of the judiciary taking actions in ensuring fair judicial processes versus the interest of Congress in assuring public accountability by impeaching public officers for serious abuses and misconduct).

¹¹⁷ One impeachment inquiry lasted over two years. *The Impeachment Trial of Alcee L. Hastings (1989) U.S. District Judge, Florida*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Hastings.htm [<https://perma.cc/Z6HP-ZJ58>]. The estimated cost of the impeachment inquiry was over \$2 million. 135 CONG. REC. 5458 (1989) (statement of Terence J. Anderson, counsel to U.S. District Court Judge Alcee L. Hastings).

¹¹⁸ For a bit more history of the interplay between the judiciary and Congress regarding regulation of judicial conduct, see Remus, *supra* note 88, at 34–38.

C. *Amend the Act*

In 1980, Congress passed the Judicial Conduct and Disability Act, which empowered judges to, like the legal profession¹¹⁹ and Congress¹²⁰ itself, police themselves and each other.¹²¹ In doing so, Congress acted upon its own oversight authority to ensure that Article III judges were not violating the requirement to adhere to good behavior¹²² while serving as a judge, but did so in a way that allowed the Legislative Branch a certain hands-off approach, by deferring much of the oversight work to the judges themselves under the Judicial Conduct and Disability Act. Given how the Act has functioned over the past several years, and the awareness that jurisdictional limitations exist that allow judges to avoid a full investigation on the merits of their complaints by resigning, it seems time for the Act to be amended.

Reforming the Act is an ongoing debate among legal scholars¹²³ and policymakers.¹²⁴ This Essay supports that debate, as well as concrete actions to expand and strengthen judicial councils' authority to act. By broadening the scope of authority of judicial councils to permit investigations even in the event of the judge's retirement (or elevation) and addressing the impact of a judicial investigation into a judge's qualifications for their federal pension, Congress could improve the legitimacy and effectiveness of investigations brought under the Act. That said, it seems unlikely that much will be done on that front in the near term; thus, this Essay focuses its efforts on encouraging the creation and implementation of customs that might help to incentivize more robust investigations of complaints into alleged judicial misconduct.

This Essay makes two proposals. One focuses on creating a custom of referral to state bars and Congress. The other requires Congress to adopt significant revisions to the Judicial Conduct and Disability Act. While the

¹¹⁹ See Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J. LEGAL ETHICS 649, 657–58 (2016).

¹²⁰ *About*, HOUSE COMM. ON ETHICS, <https://ethics.house.gov/about> [<https://perma.cc/8L9G-4A65>]; U.S. SENATE SELECT COMM. ON ETHICS, *THE SENATE CODE OF OFFICIAL CONDUCT* 57 (2015).

¹²¹ See generally Tracey L. Adams, *Self-Regulating Professions: Past, Present, Future*, 4 J. PROS. & ORG. 70 (2017) (discussing international use of self-regulation).

¹²² I use “good behavior” here not in the conventional sense, but in the sense described by Professors Prakash and Smith. Prakash & Smith, *supra* note 4, at 88–105.

¹²³ See, e.g., Arthur D. Hellman, *An Unfinished Dialogue: Congress, the Judiciary, and the Rules for Federal Judicial Misconduct Proceedings*, 32 GEO. J. LEGAL ETHICS 341, 346 (2019); Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25, 29, 180–95 (1993).

¹²⁴ See, e.g., Robert H. Tembeckjian, *Toward a Judiciary Both Independent and Accountable*, 55 CT. REV. 62, 66 (2019); Press Release, *supra* note 83; Budryk, *supra* note 83; THE JUD. CONDUCT & DISABILITY ACT STUDY COMM., *IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE* (2006).

second proposal would be more difficult to enact, it is likely the superior form of intervention.

III. ADDITIONAL CONSIDERATIONS

This Essay contributes to conversations about the complex task of how to best design a system of oversight for Article III judges. It argues that it is imperative that mechanisms are adopted that will ensure investigations into judicial misconduct are completed, even in the event that the individual is no longer serving as a judge in the circuit where the complaint has been filed. However, this argument raises several additional considerations.

This Part addresses three such concerns: (i) the impact of unsanctioned misconduct on the judiciary's members, (ii) what to do regarding the pension of a judge who has retired to avoid investigations of misconduct, and (iii) how best to address the expectations and conduct of Supreme Court Justices. But there are many others that should be considered and addressed in future work by both scholars and policymakers.

A. *Impact on Members of the Judiciary*

In addition to potential harms to the public's belief in and adherence to rule-of-law norms, unchecked misconduct within the judiciary may also impact the judges themselves in a myriad of undesirable ways. In particular, it may make the misconduct become more entrenched.

Within behavioral ethics literature, there is a concept known as "slippery slope," whereby when people engage in "small indiscretions over time," it "may gradually lead people to commit larger unethical acts that they otherwise would have judged to be impermissible."¹²⁵ Research suggests that "past behavior serves as a guide for future ethical choices," so that "gradual changes across a series of ethical decisions, as opposed to abrupt changes, may facilitate moral disengagement through an induction mechanism in which unethical conduct becomes routinized over time and is deemed acceptable" without the person ever fully thinking through why they have determined the behavior is acceptable.¹²⁶

The chambers of an Article III judge is, in many ways, her own little kingdom. As discussed above, there is very little oversight into the judge's conduct. And as recent scandals sparked by a #MeToo movement within the judiciary have revealed, the avenues for reporting judicial misconduct have traditionally been, at best, limited, although actions to address these

¹²⁵ Welsh et al., *supra* note 84, at 114.

¹²⁶ *Id.* at 116.

limitations are ongoing.¹²⁷ For individual judges, the lack of reporting structures may have created situations where behavior that could have been complained about and rectified when it first appeared instead was either (i) not identified, or (ii) tolerated in a manner that resulted in an increase in the improper behavior. Each little step—whether an inappropriate joke or seemingly eccentric behavior—left unchecked¹²⁸ is an opportunity to slide further and further down a slippery slope, which can have devastating results for those residing in that judge’s kingdom.

Additionally, the slippery slope effect can impact others within an organization—in this case other members of the court and the legal community. Research demonstrates “that people also commonly fail to notice the slippery slope of *others’* unethical behavior,” which can cause them to ignore “clear warning signals” that something is amiss.¹²⁹ In particular, behavioral ethics research has “found that people are less likely to perceive changes in others’ unethical behavior if the changes occur slowly over time rather than abruptly.”¹³⁰ Applying this to the members of the court and legal community, there might be some level of awareness of improper conduct by a judge, but if it starts off small and grows more significant over time, it is less likely to be perceived or recognized as problematic, and is more likely to just be understood as how that judge operates. In other words, that conduct might become normalized and accepted.

Without strong mechanisms for signaling intolerance for judicial misconduct, the judiciary makes itself vulnerable to a whole host of potential risks. Members of the judiciary, Congress, and the public should continue to consider what strategies might be adopted to ensure that the judges appointed to fulfill crucial functions within the United States’ democracy actually remain above reproach and, if and when they stumble, are held to account. While there are several reforms currently under consideration and in implementation stages regarding particular areas of concern,¹³¹ this Essay focuses on investigations into allegations of judicial misconduct and argues in favor of finding mechanisms for allowing investigations to continue even in the event that the judge in question leaves the court.

¹²⁷ Litman & Shah, *supra* note 86, at 615–20; U.S. CTS., STATUS REPORT FROM THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 8–11 (2019).

¹²⁸ Importantly, behavioral ethics research suggests that there are prevention mechanisms that can help curb the slippery-slope-effect. Welsh et al., *supra* note 84, at 125.

¹²⁹ BAZERMAN & TENBRUNSEL, *supra* note 84, at 92 (emphasis added).

¹³⁰ *Id.* at 93.

¹³¹ See U.S. CTS., *supra* note 127 (summarizing the progress on various proposals).

B. Lifetime Pension

One of the more troubling concerns associated with a judge’s decision to leave the bench prior to an investigation into alleged misconduct is that it often ensures that the judge will be able to collect his or her pension—which is essentially his or her salary—for life. For example, when Judge Barry retired in response to the complaint being filed against her with the Judicial Council, she continued to collect her pension, which is estimated to be between \$184,500 to \$217,600 a year.¹³²

To qualify for a retirement pension, an Article III judge must satisfy the “Rule of 80,”¹³³ which is a combination of the listed years-of-service and age requirements to receive a pension equal to the salary earned just prior to leaving office.¹³⁴

Attained Age	Length of Service Required for Pension
65	15
66	14
67	13
68	12
69	11
70	10

Today, no provision under the Judicial Conduct and Disability Act or other federal statute prohibits a judge from receiving his pension if he is subject to an investigation by the circuit’s judicial council regarding allegations of misconduct.¹³⁵

¹³² Buettner & Craig, *supra* note 54; Debra Cassens Weiss, *Trump’s Sister, a Federal Appeals Judge, Resigns amid Ethics Inquiry*, ABA J. (Apr. 11, 2019, 9:15 AM), <https://www.abajournal.com/news/article/trumps-sister-a-federal-appeals-judge-resigns-amid-ethics-inquiry> [https://perma.cc/CM4N-U8PY].

¹³³ Under the “Rule of 80,” a judge whose age and years of experience on the bench equal eighty is entitled to receive a full pension equal to his or her salary. 28 U.S.C. § 371(a)–(c). See Marin K. Levy, *The Promise of Senior Judges*, 115 NW. U.L. REV. (forthcoming 2021), for further discussion of the Rule of 80.

¹³⁴ 28 U.S.C. § 371(c).

¹³⁵ Unlike Article III judges, who can receive their pensions regardless of a criminal conviction, members of Congress found guilty of espionage, treason, or several other national security offenses against the United States must forfeit their federal retirement pension. 5 U.S.C. § 8312. Indeed, Judge Kent actually requested that he be able to retire in a manner that would enable him to keep drawing his salary after being found guilty of making false statements during the judicial council inquiry into his conduct. McKinley, *supra* note 12.

Under current law, a court today would likely find that a judicial pension is a protected right under the Constitution through one of the following arguments: one based on contract law or one based on Article III's Compensation Clause.

Applying the contract rationale, a U.S. Court of Federal Claims case, *Johnson v. United States*, found that a federal statute regarding judicial pensions created a contractual agreement between the retiring judge and the government when the judge met the statute's requirements to receive lifetime pension payments equal to his salary upon leaving office.¹³⁶ The majority reasoned that a judge, upon satisfying the statute's specific retirement terms, abdicates his office in consideration of the lifetime pension payments.¹³⁷ As one congressman noted at the time the statute was passed, judicial pensions were "not so much for the purpose of paying them for the service they have rendered as judges[, but rather so] . . . that [Congress] m[ight] have a mode of inducing them to leave the bench when they become too old to perform good service upon it."¹³⁸

Accordingly, under *Johnson*, if Congress chooses not to impeach a federal judge but still attempts to prevent him from receiving his lifetime pension, a court may find the government in breach of the contract and force the government to pay the pension that was in effect at the time the judge took office. However, *Johnson* also explained that if a judge voluntarily renounces a federal pension provided for by law in exchange for Congress not initiating impeachment proceedings, then the judge would no longer be entitled to that compensation. The court justified this loss of entitlement by stating that Congress would not be forced to pay the judge his pension due to the theory of promissory estoppel "and good conscience."¹³⁹

A judge's right to a judicial pension, even if she retires to avoid misconduct investigations, can also be justified by using Article III's Compensation Clause. Under this analysis, a court may find that because Congress has already provided judges currently holding office an expected pension compensation under 28 U.S.C. § 371, Congress cannot diminish or prevent a judge from collecting this pension. The court in *Beer v. United States* used this reasoning to reject Congress's effort to modify cost-of-living

¹³⁶ 79 F. Supp. 208, 211 (Ct. Cl. 1948).

¹³⁷ Consideration requires that the promisor "manifest an intent to induce the performance or return promise." RESTATEMENT (SECOND) OF CONTRACTS § 81 cmt. a (AM. L. INST. 1981). *But see id.* § 81 (noting that even if "what is bargained for does not of itself induce the making of a promise," that "does not prevent it from being consideration for the promise").

¹³⁸ CONG. GLOBE, 41st Cong., 1st Sess. 647 (1869).

¹³⁹ *Johnson*, 79 F. Supp. at 213.

increases for judges. The majority found that “all sitting federal judges are entitled to expect that their real salary will not diminish due to . . . the action or inaction of the other branches of Government.”¹⁴⁰ The Court also noted that “when Congress promise[s] protection against diminishment in real pay in a definite manner . . . that Act trigger[s] the expectation-related protections of the Compensation Clause for all sitting judges. A later Congress c[annot] renege on that commitment without diminishing judicial compensation.”¹⁴¹ Similarly, in *United States v. Will*, the Supreme Court found that Congress could not eliminate cost-of-living adjustments for judges when such adjustments were provided for in a statute that had already taken effect.¹⁴²

If a court were to apply the reasoning used in *Beer* and *Will* to judicial pensions, it may find that these pensions are likely covered under Article III’s Compensation Clause. Given that a judge, under 28 U.S.C. § 371, can receive an annual pension after satisfying the “Rule of 80” requirement, a court may find that such pensions are a guaranteed component of judicial salaries for all judges currently on the bench.

But, in theory, because Congress would not be reducing any current Article III judge’s salary but rather placing new conditions for new judges to receive a pension, a court may find that this sort of targeted legislation would not violate the Compensation Clause.¹⁴³

C. *The Supreme Court*

This Essay is focused on ensuring that investigations into complaints filed against Article III judges are not circumvented by the jurisdictional limitations within the Judicial Conduct and Disability Act, but the Act has yet another relatively big omission. It does not apply to one class of Article III judges: Supreme Court Justices.¹⁴⁴ A perhaps obvious question raised by the arguments in this Essay regarding the need to investigate claims of judicial misconduct so as not to diminish rule-of-law norms is whether Supreme Court Justices should be exempt from the Judicial Conduct and Disability Act.

¹⁴⁰ *Beer v. United States*, 696 F.3d 1174, 1184 (Fed. Cir. 2012).

¹⁴¹ *Id.* at 1184–85.

¹⁴² 449 U.S. 200, 224–26 (1980).

¹⁴³ Congress is, of course, free to pass legislation that changes judicial salary as long as the new conditions apply to newly appointed Article III judges while grandfathering previously appointed judges in to the prior compensation system. Further discussion of the modifications to judicial compensation is beyond the scope of this Essay.

¹⁴⁴ Judges covered under the Judicial Conduct and Disability Act include circuit judges, district judges, bankruptcy judges, and magistrate judges. 28 U.S.C. § 351(d)(1).

The lack of oversight of the Justices, paired with their nonexistent ethics rules,¹⁴⁵ has been the subject of a long-standing public debate.¹⁴⁶ How to best incorporate oversight of Supreme Court Justices is generally beyond the scope of this Essay. It is, however, worth acknowledging two points. First, the separation-of-powers concerns, discussed above, about the interplay between congressional oversight of judges and the importance of an independent judiciary are likely exacerbated when considering Supreme Court Justices, as they are the utmost authority of one of the three branches of the United States government.¹⁴⁷ Second, if we want to defer to an organization's ability to self-police, which is what the Supreme Court currently does, it seems reasonable to expect the organization to adopt a set of clear and impartial expectations for itself. Without an *ex ante* set of expectations and standards, the legitimacy of decisions made by the Justices when there is an appearance of impropriety will always remain suspect.¹⁴⁸

CONCLUSION

The importance of the courts to ensuring faith in and compliance with democratic norms and ideals within the United States cannot be overstated. Since the time of America's birth, a strong judiciary has been recognized as imperative for the success of its democracy. Yet, when judges are perceived as functioning above the law—as impervious to discipline—it may delegitimize the courts within the view of the public. This Essay contributes to conversations regarding the need to ensure that the judiciary remains perceived as a legitimate source of authority within American society. In particular, it argues in favor of taking concrete steps that will ensure

¹⁴⁵ The Judicial Code of Conduct also does not apply to Supreme Court Justices. JUDICIAL CODE OF CONDUCT, *supra* note 105, at 2. Justice Samuel Alito has noted that the Supreme Court “follow[s] the [judicial] code of conduct that applies to the lower courts, but [the Court does not] regard [itself] as being legally bound by it.” *Financial Services and General Government Appropriations for 2020: Hearing Before the Subcomm. on Fin. Servs. & Gen. Gov't of the H. Comm. on Appropriations*, 116th Cong. 96 (2019) (statement of Samuel A. Alito, Jr., Associate Justice, U.S. Supreme Court). He also stated that he believes “it is inconsistent with the constitutional structure for lower court judges to be reviewing things done by Supreme Court Justices for compliance with ethical rules.” *Id.*

¹⁴⁶ Compare JOHANNA KALB & ALICIA BANNON, BRENNAN CTR. FOR JUST., SUPREME COURT ETHICS REFORM: THE NEED FOR AN ETHICS CODE AND ADDITIONAL TRANSPARENCY 2, 4–5 (2019), <https://www.brennancenter.org/our-work/research-reports/supreme-court-ethics-reform> [<https://perma.cc/QZAC-Z7K6>] (noting “long-standing debate” over why the Supreme Court is not bound by an ethical code and suggesting reforms), with JOHN J. ROBERTS, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4–7 (2011) (explaining that Supreme Court Justices “do in fact consult the Code of Conduct in assessing their ethical obligations” and detailing other ways that Justices “seek[] to follow high ethical standards”).

¹⁴⁷ See KEVIN M. LEWIS, CONG. RSCH. SERV., LSB10255, A CODE OF CONDUCT FOR THE SUPREME COURT? LEGAL QUESTIONS AND CONSIDERATIONS 2–3 (2019).

¹⁴⁸ See, e.g., Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 662 (2005).

investigations into judicial misconduct are completed, even in the event that the individual is no longer serving as a judge in the circuit where the complaint has been filed.

