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# YALE LAW & POLICY REVIEW

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## The Institutional Politics of Federal Judicial Conduct Regulation

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## INTRODUCTION

The conventional story of the federal judiciary's institutional growth begins with *Marbury v. Madison* and Chief Justice Marshall's establishment of judicial review.<sup>1</sup> From there, it proceeds through the history of landmark Supreme Court decisions that pushed back against the power of the political branches and advanced the judiciary's institutional position.<sup>2</sup> In this familiar story, the judiciary participates in the separation of powers through its case law.

Constitutional case law tells only part of the story, however.<sup>3</sup> In this Article, I examine an additional and significant way in which federal judicial leaders<sup>4</sup> influence the balance of governmental powers—through control over judicial conduct regulation. Historically, federal judicial conduct regulation was limited to the blunt constitutional tool of impeachment.<sup>5</sup> Today, after a half century of reform, a complex regulatory regime addresses a broad range of judicial behavior. This reform process facilitated judicial centralization, fostered a cohesive judicial identity, and bolstered judicial autonomy. I argue that it empowered the judiciary to play an increasingly influential role in the balance of governmental powers.

Currently, conduct regulation arrangements are governed by the Code of Conduct for United States Judges (the Federal Code of Conduct),<sup>6</sup> promulgated by the Judicial Conference of the United States, and the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the 1980 Act),<sup>7</sup> enacted by Congress. The Federal Code of Conduct prescribes appropriate conduct for all federal judges. The 1980 Act authorizes any individual to file a complaint alleging that a judge “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts,”<sup>8</sup> but leaves it to the ju-

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1. 5 U.S. (1 Cranch) 137 (1803).

2. See JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* 2-3 (2012) (describing this “textbook account”).

3. *Id.* at 4.

4. This includes Supreme Court Justices as well as appellate and district court judges who were active in the judiciary's internal organizational structure.

5. See *Report of the National Commission on Judicial Discipline and Removal*, 152 F.R.D. 265, 277 (1994). Appeal and mandamus were available to review judges' substantive decisions, but not their personal conduct. See Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 287 (1993) [hereinafter Geyh, *Informal Methods*]. And criminal proceedings were theoretically available, but had never been brought against a sitting federal judge.

6. CODE OF CONDUCT FOR U.S. JUDGES (2009).

7. Pub. L. No. 96-458, 94 Stat. 2035 (1980) (codified as amended at 28 U.S.C. § 372 (2012)).

diciary to interpret this language. The 1980 Act also authorizes the judiciary to create a system for reviewing and processing complaints and for determining appropriate sanctions.<sup>9</sup>

The judiciary has interpreted the statutory definition of misconduct<sup>10</sup> to encompass a broad range of problematic behaviors, spanning from gross misconduct, such as bribery and corruption, to less egregious but still troubling behaviors, such as failure to file financial disclosure forms, attendance at privately funded seminars, and membership in allegedly discriminatory organizations.<sup>11</sup> The judiciary has repeatedly clarified, however, that a violation of the Federal Code of Conduct does not necessarily meet the statutory standard warranting discipline.<sup>12</sup> Explicitly excluded from the scope of coverage are failures to disqualify or recuse, which are defined as merits-related and therefore outside of the scope of the 1980 Act.<sup>13</sup>

Legal ethics scholars have studied many aspects of this regime and offered many proposals to regulate judicial conduct more effectively.<sup>14</sup> Unfortunately,

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8. *Id.* § 3(a) (codified at 28 USC § 351(a) (2006)).

9. These sanctions include: censuring or reprimanding, either publicly or privately; ordering that no new cases be assigned to the subject judge for a limited, fixed period; requesting voluntary retirement; certifying disability of the judge; or, for the most extreme misconduct, a recommendation of impeachment by the House of Representatives. *See* RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS R. 28 (Judicial Conference of the United States 2008) [hereinafter RULES FOR JUDICIAL CONDUCT].

10. 28 USC § 351(a).

11. *See* David Pimentel, *The Reluctant Tattletale: Closing the Gap in Federal Judicial Discipline*, 76 TENN. L. REV. 909, 911 (2009). *See generally* Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 432-56 (2004) (describing the broad spectrum of judicial misconduct).

12. *See In re Charge of Judicial Misconduct or Disability*, 85 F.3d 701, 704 (D.C. Cir. 1996) (“[T]here is some indication that judicial councils should be guided in part by the Canons in determining whether a [statutory] violation occurred.”); RULES FOR JUDICIAL CONDUCT, *supra* note 9, R. 3 cmt. (suggesting that the Code “may be informative” on the meaning of § 351).

13. The judiciary’s system of conduct regulation addresses judicial behaviors that are not subject to appellate review because they fall outside the scope of substantive decisionmaking. Recusal and disqualification standards, which are defined as merits-related under the 1980 Act, address the related but distinct question of a judge’s ability to fairly engage in the substantive decisionmaking of a particular case. *See* RULES FOR JUDICIAL CONDUCT, *supra* note 9, R. 3(h)(3)(A). In this Article, I address only judicial behaviors that are governed by the conduct regulation system and therefore do not discuss questions of recusal and disqualification.

14. Ethics scholars have focused narrowly on the desirability of specific standards of conduct and modes of enforcement. *See, e.g.*, Lara Bazelon, *Putting the Mice in Charge of the Cheese: Why Federal Judges Cannot Always Be Trusted To Police Themselves and What Congress Can Do About It*, 97 KY. L.J. 439, 439-42 (2009); Ar-

thur D. Hellman, *Judges Judging Judges: The Federal Judicial Misconduct Statutes and the Breyer Committee Report*, 28 JUST. SYS. J. 426 (2007) [hereinafter Hellman, *Judges Judging Judges*]; Arthur D. Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*, 69 U. PITT. L. REV. 189, 210 (2007) [hereinafter Hellman, *The Regulation of Judicial Ethics*]; Ronald D. Rotunda, *Judicial Transparency, Judicial Ethics, and a Judicial Solution: An Inspector General for the Courts*, 41 LOY. U. CHI. L.J. 301, 309 (2010); Sambhav N. Sankar, *Disciplining the Professional Judge*, 88 CAL. L. REV. 1233 (2000). To the extent these scholars have addressed the broader significance of conduct regulation to the judiciary, it has been with reference to the effects of existing or proposed regulations on judicial legitimacy or on the decisional autonomy of individual judges. See, e.g., Bazelon, *supra*, at 442-44; Paul D. Carrington & Roger C. Cramton, *Original Sin and Judicial Independence: Providing Accountability for Justices*, 50 WM. & MARY L. REV. 1105, 1108-09 (2009); Rotunda, *supra*, at 325; Sankar, *supra*, at 1238-40. Charles Geyh has taken a broader view, analyzing how the balance of power between branches of government affects judicial discipline and removal. But he has not addressed the reverse relationship—how judicial discipline and removal affect the balance of powers. See Charles Gardner Geyh, *Highlighting a Low Point on a High Court: Some Thoughts on the Removal of Pennsylvania Supreme Court Justice Rolf Larsen and the Limits of Judicial Self-Regulation*, 68 TEMP. L. REV. 1041 (1995) [hereinafter Geyh, *Highlighting a Low Point*]. Federal courts scholars have noted the existence of disciplinary structures and their changes over time, but generally have not viewed conduct regulation as a development worthy of sustained attention. See PETER G. FISH, *POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* (1973); CHARLES G. GEYH, *WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM* (2008) [hereinafter GEYH, *COLLIDE*]; ROBERT A. KATZMANN, *COURTS AND CONGRESS* (1997); ROBERT A. KATZMANN, *JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY* (1988); Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677 (2004); Charles Gardner Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153 (2003) [hereinafter Geyh, *Constitutional Norms*]; Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165 (1996); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003) [hereinafter Resnik, *Constricting Remedies*]; Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269 (2000); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 933-34 (2000) [hereinafter Resnik, *Trial as Error*]; Judith Resnik, "Uncle Sam Modernizes His Justice": *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607 (2002); Russell R. Wheeler & Robert A. Katzmann, *A Primer on Interbranch Relations*, 95 GEO. L.J. 1155 (2007). In a notable exception, Stephen Burbank has addressed the history and early years of the 1980 Act, analyzing the implicated interactions between Congress and the judiciary. But his analysis is limited to this Act, and does not extend to the significance of conduct regulation or to the judiciary's institutional development over time. Stephen B. Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283 (1982) [hereinafter Burbank, *Procedural Rulemaking*].

they have largely neglected the broader political significance of federal judicial conduct regulation. In this Article, I address the resulting gap in the literature. I examine the rich historical record of interbranch negotiations regarding the reform of judicial conduct regulation and analyze how the judiciary's role in judicial conduct regulation has affected the separation of powers.

Two themes guide my analysis. First, regulating conduct is a much broader endeavor than addressing misconduct.<sup>15</sup> Judicial discipline historically sought to deter and punish misconduct, but twentieth-century reforms aspired to condition appropriate behavior as well as to sanction misbehavior. The resulting system of conduct regulation was highly influential in shaping the interactions and identity of individual federal judges and the judiciary as a whole.<sup>16</sup> Second, judicial independence is properly understood as an ideal balance of autonomy and accountability, along individual and institutional dimensions. On an individual level, autonomy ensures that judges can decide cases free from improper outside influence while accountability ensures that they decide them in accordance with law and their judicial role.<sup>17</sup> On an institutional level, autonomy insulates the judiciary against improper pressure from the political branches while accountability ensures that it is bound by our structure of government and the rule of law.<sup>18</sup>

These themes interact in important ways in the context of judicial conduct regulation. When conduct regulation is conceptualized narrowly as compelling some behaviors while deterring and punishing others, it mediates judicial independence on an individual level. When it is conceptualized more broadly as shaping judicial identity and power, it mediates independence on the institutional level. Ideally, conduct regulation strikes a desirable balance of autonomy and accountability on both levels. These themes provide an analytical framework for understanding the historical development and political significance of conduct regulation in the federal judiciary.

This Article proceeds in three Parts. In Part I, I address the early decades of reform. I show that through the 1960s and 1970s, with the support of the organized bar, judicial leaders used mounting public and congressional pressure for reform to the judiciary's institutional advantage. Judicial leaders centralized intrabranched authority within the Judicial Conference, began speaking on behalf

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15. Dana Ann Remus, *Just Conduct: Regulating Bench-Bar Relationships*, 30 YALE L. & POL'Y REV. 123, 140 (2011).

16. In a previous article, I demonstrated that the organized bar used the reform process in the states to encourage judicial involvement in the legal profession and to foster close ties between bench and bar. *Id.* In the federal system, the reform process proceeded along significantly different lines, with much less involvement by the organized bar. But the resulting arrangements were no less influential in conditioning judicial behavior.

17. Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 339 (1999).

18. *Id.*

of all federal judges with a unified voice, and persuaded Congress to delegate regulatory authority in the 1980 Act.

In Part II, I address the decades after the 1980 Act. With formal self-regulatory power consolidated within the Judicial Conference, judicial leaders began using the issue of conduct regulation to forge a cohesive professional identity. They decreased their reliance on the organized bar and fostered direct interactions with Congress. Members of Congress threatened to intervene when particular problems of judicial conduct provoked public scrutiny, but stepped aside when the judiciary addressed the problems itself.

This historical pattern changed in the early 2000s when the Judicial Conference began asserting its autonomy more aggressively by signaling that it would resist all congressional input regarding conduct regulation. Members of Congress responded in an equally aggressive manner. They proposed interventionist legislation to create an Office of the Inspector General for the judiciary with sweeping powers to investigate and discipline individual judges and the branch as a whole.

In Part III, I evaluate the resulting impasse between Congress and the judiciary. I argue that neither institution's approach is an adequate response to the current challenges of judicial conduct regulation. Congress's proposed legislation threatens to undermine judicial independence by holding the judiciary accountable to the political preferences of Congress. The judiciary's defense of the status quo threatens to undermine judicial legitimacy by failing to acknowledge and address increasing public concern with complete self-regulation. To move forward, I propose that the judiciary should reenlist the support of the organized bar and institute a more participatory and transparent conduct regulation process. Through compromise, the judiciary can mollify Congress, protect its independence, and preserve the separation of powers.

## I. CRISIS OF CONDUCT

Prior to the 1960s, the federal judiciary was a highly decentralized institution with no formal system of conduct regulation.<sup>19</sup> Throughout the following two decades, the Judicial Conference used the looming threat of congressional interference to coalesce intrabranch support for reform. Initially, it relied on the support of the organized bar. Subsequently, after convincing Congress to delegate regulatory power through the 1980 Act, it pushed the bar away. In this Part, I explain how the Judicial Conference used conduct regulation reform as a political opportunity to centralize judicial authority and to begin developing a professionalized judicial identity.

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19. See Resnik, *Trial as Error*, *supra* note 14, at 933-34.

### A. *The Decentralized Judiciary*

The early federal judiciary consisted of a loosely coordinated group of largely autonomous and isolated judges.<sup>20</sup> Federal judges were scattered throughout the country, had few interactions, and were subject to few constraints.<sup>21</sup> Several believed that any form of conduct regulation short of impeachment represented an impermissible intrusion on judicial independence.<sup>22</sup> They lacked binding, uniform procedures and generally followed the procedures of the states in which they sat.<sup>23</sup>

Initial efforts at judicial centralization began in the early twentieth century, but they did not reduce individual judges' nearly unlimited personal autonomy.<sup>24</sup> At the urging of Chief Justice Taft and in an effort to reduce delay and expense in litigation, Congress created the Conference of Senior Circuit Judges in 1922.<sup>25</sup> The Conference, which was to meet regularly to survey the business and condition of the courts, was later renamed the Judicial Conference of the United States and given the additional charge of reporting annually to Congress.<sup>26</sup>

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20. *Id.*

21. *Id.*

22. See Robert A. Ainsworth, Jr., *Impact of the Code of Judicial Conduct on Federal Judges*, 1972 UTAH L. REV. 369, 372 (1972); Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 697-99 (1980).

23. Resnik, *Trial as Error*, *supra* note 14, at 934.

24. FISH, *supra* note 14, at 38-39.

25. Act of Sept. 14, 1922, Pub. L. No. 67-298, § 2, 42 Stat. 837, 838-39 (codified as amended at 28 U.S.C. § 331 (2012)) (providing that the newly created Conference of Senior Circuit Judges was to meet regularly with the Chief Justice and “survey . . . the condition of business” of the federal courts and make suggestions “in the interest of uniformity and expedition of business”).

26. 28 U.S.C. § 331; see Reviser’s Notes, *reprinted in* LEGISLATIVE HISTORY OF TITLE 28, UNITED STATES CODE, “JUDICIARY AND JUDICIAL PROCEDURE” at A 1, A 45 (Roy M. Mersky & J. Myron Jacobstein eds. 1971) (explaining that intent “to authorize the communication to Congress of information which now reaches that body only because [it is] incorporated in the annual report of the Attorney General”).

The Conference originally consisted of the Chief Justice as its presiding officer and the chief judges of each circuit, known at the time as senior circuit judges. ELMO HUNTER, *THE JUDICIAL CONFERENCE AND ITS COMMITTEE ON COURT ADMINISTRATION* 4 (1986). In 1948, the Conference’s name was changed to the Judicial Conference of the United States, and district judges were formally added to the Judicial Conference in 1957. Anthony J. Scirica, *The Judicial Conference of the United States: Where Federal Court Policy Is Made*, FED. LAW., Oct. 2009, at 28. From its beginning as a small, ten-member Conference, the current Judicial Conference has grown to include twenty-seven voting members: the Chief Justice, the chief judge from each judicial circuit, the Chief Judge of the Court of International Trade, and one district judge from each regional judicial circuit. Admin. Office

Prior to 1980, the Judicial Conference had no binding authority over judges and no formal role in judicial discipline.<sup>27</sup>

In 1930, Congress took additional steps toward judicial centralization by establishing the Administrative Office of the United States Courts and the circuit judicial councils, each composed of all of the judges in a single circuit.<sup>28</sup> The Administrative Office was created to assume responsibility for the judiciary's administrative and financial affairs, which had previously been administered by the Department of Justice.<sup>29</sup> The circuit judicial councils were created to ensure the work of their member courts was being "effectively and expeditiously transacted."<sup>30</sup> The Roosevelt Administration actively supported these steps, which it viewed as promoting intrabranched accountability while also enhancing judicial branch autonomy.<sup>31</sup> Attorney General Homer S. Cummings explained that the legislation was designed "so that [the judiciary] may not only be independent, but that there may be a concentration of responsibility, so that if the business of the judiciary gets behind . . . they won't have someone else to blame for it."<sup>32</sup>

The legislation did not specifically address judicial conduct regulation and, for most of the century, the judicial councils' authority to take corrective action remained unclear.<sup>33</sup> In 1965, the Tenth Circuit's judicial council responded to misconduct by District Judge Stephen Chandler by temporarily suspending him from all judicial duties.<sup>34</sup> Judge Chandler, refusing to acknowledge the authority

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of the U.S. Courts, *Judicial Conference of the United States: Membership*, <http://www.uscourts.gov/federalcourts/JudicialConference/Membership.aspx> (last visited Oct. 24, 2012). And in recent years, a magistrate judge and a bankruptcy judge have been invited by the Chief Justice to attend the Judicial Conference meetings in a nonvoting, observer capacity. Dennis Cavanaugh, *Magistrate Judges Are Effective, Flexible Judiciary Resource*, THIRD BRANCH, Oct. 2008, at 7.

27. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, § 3, 94 Stat. 2035, 2040 (codified at 28 U.S.C. § 372 (2012)); see Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 172 n.131 (1997).
28. Administrative Office Act of 1939, Pub. L. No. 76-299, §§ 302, 306, 53 Stat. 1223, 1224 (codified as amended at 28 U.S.C. § 601 (2012)).
29. FISH, *supra* note 14, at 125.
30. Administrative Office Act § 306. By investing appellate judges with responsibility for branch administration, the judicial councils emphasized appellate judges' status as distinct from, and superior to, district judges, promoting a hierarchical and centralized judicial structure.
31. Geyh, *Constitutional Norms*, *supra* note 14, at 207-08.
32. *Administrative Office of the United States Courts: Hearings on S. 3212 Before the S. Comm. on the Judiciary*, 75th Cong. 11 (1938) (statement of Homer S. Cummings, Att'y Gen. of the United States).
33. See *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970).
34. *Id.* at 78 ("[U]ntil the further order of the Judicial Council, the Honorable Stephen S. Chandler shall take no action whatsoever in any case or proceeding now



of the judicial council to impose such a sanction, filed a writ of mandamus and prohibition with the Supreme Court. He argued that the council's action represented an unconstitutional usurpation of Congress's power to impeach.<sup>35</sup> The Supreme Court sidestepped this core issue and concluded that because a direct appeal remained open, Judge Chandler had failed to state a case for extraordinary relief.<sup>36</sup> Nevertheless, sharply divided dicta drew heightened attention to the issue. Expressing a sentiment shared by many federal judges, Justice Douglas wrote: "It is time that an end be put to these efforts of federal judges to ride herd on other federal judges. This is a form of 'hazing' having no place under the Constitution."<sup>37</sup> Accordingly, even as some judges advocated administrative centralization to increase the efficiency of the courts, many others maintained a traditional view of judges' individual autonomy. Under this view, once judges ascended to the bench, they were free to espouse their views and to run their courtrooms as they saw fit, subject only to the constitutional constraint of impeachment.

The prevalence of this view impeded the development of more moderate and forward-looking means of conduct regulation. Prior to 1973, federal courts occasionally cited the 1924 Canons of Judicial Ethics—the American Bar Association's first official statement of standards of appropriate judicial conduct—as persuasive guidance regarding proper conduct.<sup>38</sup> But federal courts declined to adopt the Canons as definitive and binding standards.<sup>39</sup> Consequently, there

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or hereafter pending in the United States District Court for the Western District of Oklahoma; that all cases and proceedings now assigned to or pending before him shall be reassigned to and among the other judges of said court; and that until the further order of the Judicial Council no cases or proceedings filed or instituted in the United States District Court for the Western District of Oklahoma shall be assigned to him for any action whatsoever." The problematic conduct included conflicts of interest leading to multiple disqualifications, public accusations regarding the integrity of district and circuit judges, and personal involvement in a number of civil and criminal lawsuits. *Id.* at 77.

35. *Id.* at 75-76, 82.

36. *Id.* at 86, 89.

37. *Id.* at 140 (Douglas, J., dissenting). *Contra id.* at 85 (majority opinion) ("These are reasonable, proper, and necessary rules, and the need for enforcement cannot reasonably be doubted. . . . [I]f one judge in any system refuses to abide by such reasonable procedures it can hardly be that the extraordinary machinery of impeachment is the only recourse.").

38. Andrew J. Lievense & Avern Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of the Ways*, 28 JUST. SYST. J. 271, 274 (2007).

39. As the Supreme Court explained in 1965, a provision of the Canons "ha[d] of itself no binding effect on the courts but merely express[ed] the view of the [ABA]." *Estes v. Texas*, 381 U.S. 532 (1965); see, e.g., *Natural Res., Inc. v. Wineberg*, 349 F.2d 685, 691-92 & n.9 (9th Cir. 1965) (citing the Canons to underscore the importance of judges' avoiding appearance of wrongdoing); *United States v. Hintz*, 193 F. Supp. 325, 330 (D. Ill. 1961) (observing with approval that a judge's conduct con-

was no consensus regarding appropriate standards of conduct for federal judges. Combined with the strong and widespread belief that federal judges were not properly subject to each other's supervision, this meant that peer pressure, reputational concerns, and other informal channels of discipline were of limited utility.<sup>40</sup>

Judges' resistance to the relinquishment of personal autonomy, even within the branch, impeded administrative reform. The resulting decentralized model of the judiciary also impeded the judiciary's ability to participate with a single voice in interbranch discussions. The judiciary lacked shared notions of how judges should behave, much less what policy positions the judiciary should take before Congress. Consequently, although the Judicial Conference reported to Congress on administrative matters, it appeared reluctant to assert itself on legislative and policy matters.<sup>41</sup> Burdened by collective action problems, the judiciary possessed little institutional strength or political clout in interbranch relations.

### B. Centralization Through Alliance with the Bar

In the second half of the century, high-profile instances of misconduct gave rise to growing public and congressional criticism of the judiciary.<sup>42</sup> Some judges responded by defending the status quo,<sup>43</sup> but a group of prominent judicial leaders<sup>44</sup> approached the unrest from a different angle. They recognized

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formed to the Canons); *United States v. Food & Grocery Bureau of S. Cal.*, 43 F. Supp. 974, 976 (S.D. Cal. 1942) (citing with approval Canon 19 but declining to follow its requirement of informing litigants of the full grounds for decision); *Tolfree v. Wetzler*, 22 F.2d 214, 230 (D.N.J. 1927) (citing the Canons but explaining that their content needed elaboration).

40. Geyh, *Informal Methods*, *supra* note 5, at 244. *But see* Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 709 (1979) (noting that “[p]eer pressure is a potent tool”).
41. Resnik, *Trial as Error*, *supra* note 14, at 963-64.
42. See 111 CONG. REC. 27108 (1965) (statement of Sen. Joseph Tydings); Joseph Tydings, *The Congress and the Courts: Helping the Judiciary To Help Itself*, 52 A.B.A. J. 321 (1966); John H. Holloman III, *The Judicial Reform Act: History, Analysis, and Comment*, 35 LAW & CONTEMP. PROBS. 128, 131-33 (1970).
43. See generally Frank J. Battisti, *The Independence of the Federal Judiciary*, 13 B.C. INDUS. & COM. L. REV. 421 (1972) (describing past failed attempts at judicial oversight and discipline reform and current threats to judicial independence).
44. Throughout, I use “judicial leaders” to refer to members of the Judicial Conference and other federal judges who took an active and prominent role in the judiciary's institutional development.

that with support from the organized bar, they could turn calls for reform into useful political opportunities to bolster the judiciary's institutional strength.<sup>45</sup>

The threat of congressional action to increase judicial accountability loomed large in the 1960s.<sup>46</sup> In 1965, Senator Joseph D. Tydings announced that the Subcommittee on Improvements in Judicial Machinery would undertake a comprehensive study of the federal courts.<sup>47</sup> One of its objectives would be to evaluate alternatives to impeachment for removing a federal judge found "unfit by reason of physical or mental incapacity, inefficiency, or corruption."<sup>48</sup> For guidance, Senator Tydings and his committee looked to the spread of state judicial conduct commissions—independent organizations with the power to impose a range of sanctions on misbehaving judges, including the power to remove a judge in cases of extreme misconduct or lack of fitness.<sup>49</sup> Citing states'

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45. Cf. Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 LAW & SOC'Y REV. 87, 90 (1996) (contending that "political actors produce political institutions in the process of seeking advantage in the conflict over substantive political benefits").

46. Reform of judicial conduct arrangements in the states began much earlier than in the federal system due to the successful efforts of the organized bar. State bar associations, working centrally through the ABA, had been actively promoting adoption and enforcement of the 1924 Canons of Judicial Ethics since their promulgation. They had also been advocating for judicial conduct commissions. After California established the first modern judicial conduct commission in 1960, see *Ballot Proposals for November 1960*, THE COMMONWEALTH, OCT. 31, 1960, at 159-64, other states rapidly followed its lead. See, e.g., Robert W. Galvin, *Regulating Judicial Misconduct in Massachusetts*, 27 NEW ENG. L. REV. 189, 208-09 (1993). For histories of the processes in various states noting the role of the bar, see James Alfini, Shailey Gupta-Brietzke & James McMartin IV, *Dealing with Judicial Misconduct in the States: Judicial Independence, Accountability and Reform*, 48 S. TEX. L. REV. 889, 891-92, 908 (2007).

47. 111 CONG. REC. 27108 (1965) (statement of Sen. Joseph Tydings).

48. *Id.*

49. IRENE A. TESITOR & DWIGHT B. SINKS, JUDICIAL CONDUCT ORGANIZATIONS 19-27 (2d ed. 1980). Reform of judicial conduct arrangements in the states began much earlier than in the federal system due to the successful efforts of the organized bar. State bar associations, working centrally through the ABA, had been actively promoting adoption and enforcement of the 1924 Canons of Judicial Ethics since their promulgation. They had also been advocating for judicial conduct commissions. After California established the first modern judicial conduct commission in 1960, see *Ballot Proposals for November 1960*, COMMONWEALTH, OCT. 31, 1960, at 159-64, other states rapidly followed its lead. See, e.g., Robert W. Galvin, *Regulating Judicial Misconduct in Massachusetts*, 27 NEW ENG. L. REV. 189, 208-09 (1993). For histories of the processes in various states noting the role of the bar, see James Alfini, Shailey Gupta-Brietzke & James McMartin IV, *Dealing with Judicial Misconduct in the States: Judicial Independence, Accountability and Reform*, 48 S. TEX. L. REV. 889, 891-92, 908 (2007).

successful experiences with judicial conduct commissions, Senator Tydings proposed similar arrangements for the federal system.<sup>50</sup>

In 1969, calls for the impeachment of Justice Fortas<sup>51</sup> and growing dissatisfaction with the Warren Court moved the work of Senator Tydings's committee into the spotlight<sup>52</sup> and changed the tenor of its hearings. As was described at the time: "Gone were the expressions of confidence in and reverence for the federal judiciary which had always carefully preceded the remarks of Senators and testimony of witnesses in the past."<sup>53</sup> Replacing statements of respect for the value of judicial independence were criticisms of "the Judiciary's failure to keep its house in order," and observations regarding a "crisis of confidence, a crisis that threatens to gravely impair its strength and its effectiveness."<sup>54</sup> Senator Tydings explained his view that productive efforts at reform had been impeded by "[a]n exaggerated view of judicial independence."<sup>55</sup> He then introduced the Judicial Reform Act,<sup>56</sup> which would provide for non-impeachment removal and create a discipline review commission modeled on those in the states.<sup>57</sup> Illustrating a pattern that would repeat itself through the next thirty

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50. 111 CONG. REC. 27108 (1965) (statement of Sen. Joseph Tydings).

51. The Nixon Administration began calling for the impeachment of Justice Fortas in 1969, allegedly because of reports that he had received a \$20,000 consulting fee from the family foundation of a former client who, at the time, was being investigated for securities violations. Robert A. Ainsworth, Jr., *Judicial Ethics—The Federal Judiciary Seeks Modern Standards of Conduct*, 45 NOTRE DAME L. REV. 470, 470 (1970); see *Nominations of Abe Fortas and Homer Thornberry: Hearings Before the S. Comm. on the Judiciary*, 90th Cong. (1968). Even though he returned the initial payment and disclaimed the future payments, media reports sparked intense public outrage, leading to his resignation. *Justice Department Reported Studying Fortas-Wolfson Tie*, N.Y. TIMES, May 8, 1969; *Some in G.O.P. Ask Fortas to Resign; No Democrats in Congress Express Support for Him in Wolfson Fee Dispute*, N.Y. TIMES, May 6, 1969; see also Geyh, *Constitutional Norms*, *supra* note 14, at 216 (describing how "Fortas became a lightning rod for a backlash against the Warren Court"); Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914, 1926-28 (2010).

52. Holloman, *supra* note 42, at 135-36.

53. *Id.* at 137.

54. *The Judicial Reform Act: Hearings on S. 1506 and Related Bills Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 91st Cong. 16 (1969) (statement of Sen. Joseph Tydings).

55. *Id.* (blaming an "exaggerated view of judicial independence" as having deterred "meaningful attempts to codify standards of judicial conduct or to require the disclosure of extra-judicial activity and compensation").

56. Judicial Reform Act, S. 1506, 91st Cong. (1969).

57. *Removal of Federal Judges*, 56 A.B.A. J. 373, 374 (1970); see Holloman, *supra* note 42, at 135 (quoting Senator Tydings regarding the constitutionality of non-impeachment removal).

years of reform, Senator Tydings used the threat of legislation to pressure the judiciary to act for itself, ensuring institutional accountability. He focused the content of the proposed legislation on the conduct and misconduct of individual judges, prompting the judiciary to respond by increasing the individual accountability of its judges.

Sensitive to political dissatisfaction with the Warren Court and wary of measures that could give Congress a heightened role in conduct regulation, judicial leaders took the threat of legislation seriously. They recognized that their best strategy for preventing congressional interference would be to persuade Congress and the public that the judiciary could handle matters itself; the vast majority of judges were behaving well and the judiciary was already holding accountable the few who were not. The problem was that taking such action would require centralized and consolidated leadership that the judiciary lacked. Judicial leaders had long been working to promote centralization<sup>58</sup> and had persuaded Congress to establish the Federal Judicial Center in 1967 to “engage[] in the business of planning and thinking about the future and the overall plans and problems in the judiciary.”<sup>59</sup> They had met with much less success within the branch, however, as many judges clung to the traditional notion of absolute autonomy.<sup>60</sup>

Judicial leaders were not to be dissuaded. In 1969, Chief Justice Warren<sup>61</sup> convened a special session of the Judicial Conference to respond to both the Fortas affair and Senator Tydings’s proposed Judicial Reform Act.<sup>62</sup> The meeting produced four resolutions addressing judicial conduct, which were intended to signal judicial leaders’ willingness and ability to address problems from with-

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58. James A. Gazell, *Chief Justice Warren’s Neglected Accomplishments in Federal Judicial Administration*, 5 PEPP. L. REV. 437, 440-41 (1978); Russell Wheeler, *Empirical Research and the Politics of Judicial Administration: Creating the Federal Judicial Center*, 51 LAW & CONTEMP. PROBS. 31, 44-45 (1988) (including an explanation by Chief Justice Warren “that the ‘time has urgently come when the Judicial Conference needs to get its aims and goals before the Congress, the Executive, and the general public and let them know what it is trying to accomplish to improve the administration of justice in the country’” (quoting Minutes of Reed Committee Meeting, Jan. 27, 1967, at 4)).
59. Wheeler, *supra* note 58, at 45 (quoting Interview with Chief Judge James Browning, U.S. Court of Appeals for the Ninth Circuit, in San Francisco (Oct. 5, 1977)).
60. At the end of the decade, historian Peter Fish described the Judicial Conference’s “pervasive absence of power throughout the decade.” FISH, *supra* note 14, at 283.
61. The Chief Justice serves as the presiding officer of the Judicial Conference. 28 U.S.C. § 331 (2012).
62. Joint Committee on the Code of Judicial Conduct of the Judicial Conference of the United States, *A Review of the Activities of Judicial Conference Committees Concerned with Ethical Standards in the Federal Judiciary, 1969-1976*, 73 F.R.D. 247, 248 (1977).

in the branch.<sup>63</sup> If passed and acted upon, the resolutions would have: (1) restricted extrajudicial compensation; (2) required regular financial disclosures; and (3) established a committee to formulate an official code of conduct for the federal judiciary.<sup>64</sup> The proposed resolutions were popular with the media and members of Congress<sup>65</sup> but distinctly unpopular with a majority of judges, who continued to view new forms of conduct regulation as intrusions on their personal autonomy.<sup>66</sup>

The strong opposition of many judges posed a serious problem for Chief Justice Warren and other leaders within the Judicial Conference. Having no formal binding authority over members of the judiciary, the Judicial Conference relied on voluntary compliance by judges.<sup>67</sup> If the Conference abandoned the resolutions and took no action in the face of internal opposition, it would invite immediate congressional interference. But if it forged ahead with the resolutions and judges failed to comply, it would publicly reveal its lack of intra-branch authority. Either way, the judiciary would lose legitimacy and credibility with both Congress and the public.

The American Bar Association (ABA) provided a route out of this predicament. It, too, had acted quickly in response to the Fortas affair, appointing a committee to review and update the 1924 Canons of Judicial Ethics. As the committee's chair, the ABA had named former California Chief Justice Roger Traynor, a highly respected court reformer.<sup>68</sup> When the Judicial Conference reconvened in September 1969, newly appointed Chief Justice Burger reported that Chief Justice Traynor had requested that the Judicial Conference suspend action on its resolutions pending the ABA committee's completion of a revised and updated code of conduct. Chief Justice Traynor suggested that "it w[ould]

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63. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 42-43 (June 10, 1969).

64. *Id.*

65. See, e.g., *Buttressing Judicial Integrity*, WASH. POST, June 13, 1969, at A26; John P. MacKenzie, *Federal Judges' Panel Bars Paid Outside Work*, WASH. POST, June 11, 1969, at A8; see also Robert A. Ainsworth, Jr., *Judicial Ethics: A Crisis Abates*, 47 TUL. L. REV. 245, 247-48 (1971) (describing "mostly favorable" responses by the press to the June Resolutions).

66. Ainsworth, *supra* note 51, at 474.

67. The Senate Subcommittee on Separation of Powers and the Committee on the Judiciary held hearings a month later that considered, among other things, "the question of the authority of the Judicial Conference and judicial councils to adopt and enforce rules and regulations governing the conduct and activities of federal judges." *Nonjudicial Activities of Supreme Court Justices and Other Federal Judges: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 91st Cong. 5 (1969).

68. Ainsworth, *supra* note 51, at 474.

be fortunate if both the federal and state judiciaries [could] eventually abide by the same set of basic canons.”<sup>69</sup>

Judicial leaders had long been trying to increase the federal judiciary’s prestige through distance from the practicing bar.<sup>70</sup> Accepting Chief Justice Traynor’s suggestion would empower the ABA and run counter to these efforts.<sup>71</sup> But given its predicament, the Judicial Conference had little choice but to acquiesce. By citing respect for the ABA’s drafting process as the reason for tabling its 1969 resolutions, the Judicial Conference could save face and preserve its credibility. By demonstrating that it had the formal support of the organized bar, the Judicial Conference could bolster its legitimacy. And by participating in the ABA’s drafting process, the Conference could, in a nonthreatening way, break from its traditional approach of commenting on legislation only when asked to do so and assume a more proactive stance in its interactions with Congress.<sup>72</sup> Accordingly, the Judicial Conference voted to suspend its June 1969 resolutions and to participate in the ABA’s process of drafting a new code of judicial conduct.<sup>73</sup>

The Judicial Conference did not, however, surrender control over the determination of appropriate standards of judicial conduct. Three federal judges

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69. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 50-51 (June 10, 1969).

70. An ongoing theme of federal court reform had been strengthening judges’ control over the litigation process while reducing lawyers’ control. See Peter G. Fish, *Guarding the Judicial Ramparts: John J. Parker and the Administration of Federal Justice*, 3 JUST. SYS. J. 105, 108 (1977). The sentiment that distance was needed was expressed early in the court-reform process. See Charles E. Hughes, *Some Needs of the Bar*, 30 COM. L. LEAGUE J. 206, 206 (1925) (blaming widespread criticism of the courts on the behavior of lawyers who “constantly foul our reputation by their utterances and their acts”).

71. For example, when the Federal Judicial Center was created, the Judicial Conference insisted that the governing board consist exclusively of judges, excluding members of the legal profession because “professors . . . and lawyers . . . each have their specific and particular interest.” *Crisis in the Federal Courts: Hearings on the Administration of Justice in the Federal Court System and on S. 915 and H.R. 6111 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 90th Cong. 309 (1967) (statement of C.J. Roszel C. Thomsen).

72. GEYH, COLLIDE, *supra* note 14, at 240-41.

73. Resolution II required judges to file a financial report with the Judicial Conference of “investments and other assets held by him at any time during the year as well as a statement of income, including fits and bequests, from any source, identifying the source, and a statement of liabilities.” REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 42-43 (June 10, 1969). While suspending this resolution, the Conference did approve the drafting and transmittal of a reporting form for comments and also requested that federal judges report back on “their views on the desirability of any financial reporting by federal judges.” *Id.*

were members of the thirteen-member drafting committee,<sup>74</sup> and the committee seriously considered the Judicial Conference's proposals.<sup>75</sup> The committee's final draft was reviewed by the Judicial Conference's Joint Committee on the Code of Judicial Conduct,<sup>76</sup> composed exclusively of federal judges.<sup>77</sup> Accordingly, when the Judicial Conference adopted the ABA's Model Code with only minor changes in April 1973,<sup>78</sup> it was adopting a written statement of standards that aligned in most material respects with its preferences.<sup>79</sup> The Conference was also taking an important first step in demonstrating to the public that the judiciary was willing and able to address judicial misconduct.

Ensuring enforcement of the new Code would mark the Conference's second critical step in proving its ability to address problems from within. Critics claimed that standards of conduct meant little without a means of enforcing them.<sup>80</sup> Finding themselves in a familiar predicament, judicial leaders recognized the need for judicial action to avoid congressional interference but were too weak to act in light of internal dissent and opposition. Again, they turned to the ABA for political cover and support.

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74. Ainsworth, *supra* note 22, at 375.

75. E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 42-43 (1973) (noting that in formulating the code, the ABA drafting committee had accounted for proposed legislation in Congress and recent proposals and activity by the Judicial Conference).

76. The 1969 resolution to establish a committee to formulate an official code of conduct for the federal judiciary had been tabled along with the other resolutions, in light of Chief Justice Traynor's letter and the agreement to defer to the ABA drafting process. However, anticipating the ABA's draft code, the Judicial Conference established a joint committee, consisting of the members of the committee that reviewed judges' disclosure forms and the committee that offered advisory opinions, to review the ABA's code and "report[] back to the Judicial Conference on the feasibility of adopting this report as applying to all federal judges and to determine whether any additional standards may be needed in the federal system." *A Review of the Activities of Judicial Conference Committees Concerned with Ethical Standards in the Federal Judiciary, 1969-1976*, 73 F.R.D. 247, 252 (1977). This committee later became the Judicial Conference's Committee on Codes of Conduct.

77. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 9-10 (Apr. 5-6, 1973).

78. *Id.* at 52-53. As adopted by the federal judiciary, the code became the "Code of Conduct for United States Judges."

79. Ainsworth, *supra* note 65, at 257-58. The one principal change was a heightened disqualification standard. While the governing federal statute required disqualification when a judge had a "substantial" financial interest in a case, the relevant code provision required disqualification when a judge had "any legal or equitable interest, no matter how small." INTERIM REPORT OF THE SPECIAL COMMITTEE ON STANDARDS OF JUDICIAL CONDUCT 6 (1970).

80. Holloman, *supra* note 42, at 137.



The ABA had long been working in the states to create judicial conduct commissions—independent committees authorized to investigate complaints, file and prosecute charges, and recommend or impose sanctions, including removal.<sup>81</sup> The ABA had begun advocating similar arrangements in the federal system, with the important caveat that all investigative and sanctioning power would be invested exclusively in the federal judiciary rather than in an independent body.<sup>82</sup> The ABA was undeterred by constitutional challenges from members of Congress<sup>83</sup> and by strong opposition from many individual judges.<sup>84</sup>

Even as some judges opposed any form of nonimpeachment removal power,<sup>85</sup> the Judicial Conference recognized the advantages of aligning with the ABA and the risks of defending the status quo. Most notably, the ABA could lobby Congress with resources and political capital that the Judicial Conference lacked. A new removal power invested in the judiciary was also far preferable to new intrusive powers invested in Congress. Consequently, in 1969, the Judicial Conference expressed support “in principle” for the ABA’s removal legislation.<sup>86</sup> The Judicial Conference maintained this position for the next decade, voting tentative approval of a Senate bill that provided for a judicial conduct commission and nonimpeachment removal in March 1978.<sup>87</sup>

### C. Authority To Self-Regulate

As Congress continued to agitate for increased accountability in the late 1970s, the Judicial Conference continued to use the unrest strategically. The

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81. TESITOR & SINKS, *supra* note 49, at 19-27.
82. *See Report of the Standing Committee on Judicial Selection, Tenure, and Compensation: Recommendations*, 95 ANN. REP. A.B.A. 212, 213 (1970) [hereinafter *1970 ABA Report*].
83. *See The Independence of Federal Judges: Hearings on S. 1506 Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 91st Cong. (1970); Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROBS. 108, 121-27 (1970).
84. *1970 ABA Report*, *supra* note 82, at 213.
85. Battisti, *supra* note 43, at 455 (criticizing the 1969 Judicial Reform Act and similar attempts of congressional regulation as the “harassment of federal judges” that infringes on judicial independence); *see Association’s House of Delegates Meets in Atlanta, February 23-24*, 56 A.B.A. J. 370, 374 (1970) (noting that the “Judicial Conference of the Ninth Circuit had considered” proposals for judicial removal and “had overwhelmingly disapproved [of them]”).
86. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 53 (Oct. 31 - Nov. 1 1969); *see also 1970 ABA Report*, *supra* note 82, at 147-48 (1970) (reporting longstanding Judicial Conference approval); Burbank, *Procedural Rulemaking*, *supra* note 14, at 293 nn.32, 33.
87. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 6-7 (Mar. 9-10, 1978) (voting approval of S. 1423, 95th Cong. (1977)).

Conference increased the judiciary's autonomy and, with the help of Congress, decreased its reliance on the organized bar. Eventually, the Judicial Conference gained sufficient confidence and authority to part ways with the bar, to change its stated position, and to oppose all forms of nonimpeachment removal. In doing so, the Judicial Conference revealed that its early alliance with the ABA, while fruitful, had been a relationship of convenience.

Throughout this period, the threat of legislation continued to check the institutional autonomy of the judiciary, while proposed and actual legislation continued to focus on increasing the individual accountability of judges. In 1978, responding to post-Watergate public mistrust in government,<sup>88</sup> Congress passed the Ethics in Government Act of 1978,<sup>89</sup> which required all federal officials to file annual personal financial reports of assets, income, gifts, and liabilities.<sup>90</sup>

Initially, the Judicial Conference opposed application of the Act to the judiciary on the grounds that it duplicated existing judicial disclosure guidelines and was therefore unnecessary.<sup>91</sup> Judicial leaders may have realized, however, that the Act would prove useful in increasing intrabranched authority and interbranch autonomy. By granting the Judicial Conference formal authority to implement and compel compliance with the Act's requirements,<sup>92</sup> the Act could remedy the Judicial Conference's previous powerlessness to require judges to follow disclosure procedures.<sup>93</sup> By enabling the Judicial Conference to require

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88. The Senate passed the Watergate Reorganization and Reform Act, but the House failed to act on it. See *Watergate Reorganization and Reform Act of 1975: Hearings on S. 495 and S. 2036 Before the S. Comm. on Gov't Operations*, 94th Cong. (1975) (noting that the Act would require federal judges along with other federal officials to report publicly earned and unearned income together with gifts). In the next Congress, the Public Officials Integrity Act, the precursor to the Ethics in Government Act, was introduced. See *Public Officials Integrity Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings Before the S. Comm. on Governmental Affairs*, 95th Cong. (1977).

89. Ethics in Government Act, Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified as amended at 5 U.S.C. App. 4 §§ 101-111 (2006)).

90. *Id.*

91. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 8-9 (Apr. 7, 1976) (disapproving of legislative proposals requiring financial disclosure by federal judges due to overlap with the existing reporting and disclosure procedures of the Judicial Conference).

92. Ethics in Government Act; see also REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 19-23 (Mar. 7-9, 1979) ("We are required by the statute to develop the necessary forms and promulgate such rules and regulations as may be necessary and . . . monitor and investigate compliance with the requirements of the judicial ethics statute.")

93. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 67-68 (Oct. 28-29, 1971). After suspending the June 1969 resolutions, the Judicial Conference ultimately adopted a modified reporting resolution, requiring

certain behaviors from federal judges, the Act could lay the groundwork for a more cohesive institutional culture.<sup>94</sup> The Act also provided a useful precedent of direct interactions with Congress in place of intermediation by the organized bar, lobbying on the judiciary's behalf.

After the Act passed the Senate, and concurrently with its passage in the House, the Judicial Conference rebuked the ABA's position and reversed its position on removal legislation. With an imminent increase in authority bolstering its confidence, the Conference apparently saw little need to continue its alliance with the organized bar. With little discussion, the Judicial Conference announced that its previous support had been "widely misunderstood" and clarified its "disapproval of any legislative provision which purports to delegate to any other tribunal or entity the constitutional power of Congress to remove a federal judge from office."<sup>95</sup>

Six months later, the Judicial Conference passed a series of resolutions that demonstrated new resolve to speak with a single voice on behalf of the judiciary.<sup>96</sup> Whereas the Judicial Conference had previously played a relatively passive and reactive role in its relations with Congress,<sup>97</sup> it now took a more proactive stance. It approved "principles to be reflected in any [judicial conduct] legislation," which included a commitment to impeachment as the only means

judges to report outside compensation exceeding \$100 per quarter and organizational positions held. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 51 (Oct. 31-Nov. 1, 1969). This was then included in the Federal Code of Conduct. *Code of Judicial Conduct for United States Judges*, 69 F.R.D. 273, 284-85 (1975) (reprinting the Code of Judicial Conduct for United States Judges as approved by the Judicial Conference). But the Conference had no authority to compel compliance and, prior the passage of the statute, faced the problem of noncompliant judges. See *Judge Edward A. Tamm: The Role of the Committee on Judicial Ethics*, THIRD BRANCH, July 1984, at 1, 5.

94. Even with the new delegation of authority, the Conference continued to struggle with certain judges who refused to file on principle. The chairman of the committee that received the reports later described receiving "thirty to fifty vitriolic letters a year" from objecting judges. *Judge Edward A. Tamm: The Role of the Committee on Judicial Ethics*, *supra* note 93, at 5.
95. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 50 (Sept. 21-22, 1978); see also Patrick Donald McCalla, *Judicial Disciplining of Federal Judges Is Constitutional*, 62 S. CAL. L. REV. 1263, 1271 (1989) (explaining that the Judicial Conference reversed its earlier approval and definitively expressed opposition to the removal legislation).
96. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 5, 6-8 (Mar. 7-9, 1979); Burbank, *Procedural Rulemaking*, *supra* note 14, at 296-97.
97. Resnik, *Constricting Remedies*, *supra* note 14, at 282 (revealing that, historically, the Judicial Conference self-consciously refrained from asserting itself on policy matters).

of removal.<sup>98</sup> It resolved that “all previous Judicial Conference resolutions or comments upon legislation dealing with the conduct of federal judges [shall be] superseded.”<sup>99</sup> Finally, it drafted a bill to implement new forms of conduct regulation within the existing structures of the judiciary.<sup>100</sup> The bill gave chief circuit judges and circuit judicial councils primary responsibility for reviewing misconduct complaints and ordering sanctions, while granting the Judicial Conference a limited appellate role and reserving for Congress a loose oversight role.<sup>101</sup>

Many Members of Congress recognized advantages to supporting the Judicial Conference’s bill and delegating the day-to-day work of conduct regulation to the Judicial Conference.<sup>102</sup> By doing so, Congress could quiet internal critics who had been protesting removal legislation as an unconstitutional encroachment on judicial authority.<sup>103</sup> Congress could preserve resources for other priorities while demonstrating seriousness about conduct reform.<sup>104</sup> And it could demonstrate respect for the expertise of the Judicial Conference and the values of judicial independence and accountability. Based on the Judicial Conference’s proposal, Congress enacted the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the 1980 Act).<sup>105</sup> Through the 1980 Act, Congress loosely defined misconduct as “conduct prejudicial to the effective and expeditious administration of the business of the courts.”<sup>106</sup> Congress delegated to the judiciary authority to determine what conduct violates this standard, as well as to formulate and implement procedures to process complaints and impose sanctions.<sup>107</sup>

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98. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 5 (Mar. 7-9, 1979).

99. *Id.* at 6.

100. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. § 372 (2012)); see Burbank, *Procedural Rulemaking*, *supra* note 14, at 284-85.

101. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.

102. Ervin, *supra* note 83, at 121-27.

103. FISH, *supra* note 14, at 301-05.

104. See DEBORAH J. BARROW & THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM 252-54 (1988).

105. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.

106. *Id.* § 3(a)(c)(1).

107. See 28 USC § 358 (2012). The Rules for Judicial-Conduct and Judicial-Disability Proceedings (the Rules) establish the standards and procedures for addressing complaints brought under the Act of 1980. These Rules provide that once a complaint has been filed or identified, the chief judge of the circuit must review the complaint and determine whether it should be: (1) dismissed, (2) referred to a special committee for investigation, or (3) concluded due to voluntary corrective

In persuading Congress to accept its proposal for formal self-regulatory power, the Judicial Conference took a significant step towards its goal of consolidating intrabranch authority. In subsequently implementing the Act's provisions, the Judicial Conference began working towards the additional goal of fostering a unifying judicial culture. To this end, the Conference began developing a complaint processing system that promoted discretion as the hallmark of conduct regulation as well as of the judiciary's professional identity. For example, shortly after enactment, the Judicial Conference addressed the question of whether an individual could file a misconduct complaint under the 1980 Act alleging a judge's failure to file financial disclosure forms.<sup>108</sup> Emphasizing the critical importance of judicial discretion, the Judicial Conference decided a formal complaint was an inappropriate means of addressing the problem and that chief

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action or intervening events that make action on the complaint unnecessary. RULES FOR JUDICIAL CONDUCT, *supra* note 9, R. 11. The chief judge may conduct a limited inquiry at this stage but must not make determinations on any reasonably disputed issue. *Id.* at 13. For complaints that are dismissed or concluded, the chief judge must provide a memorandum in support of the disposition. *Id.* at 14. If the complaint is not concluded or dismissed, the chief judge must appoint a special committee, consisting of the chief judge and an equal number of circuit and district judges, to investigate the allegations. *Id.* at 19. The special committee must submit a comprehensive report of its investigation to the judicial council of the circuit, including findings and recommendations for council action. *Id.* at 24. After considering the special committee's report, the judicial council may, at its discretion and by majority vote: (1) dismiss or conclude the complaint; (2) refer the complaint to the Judicial Conference; (3) request the special committee to conduct further investigation or investigate the matter itself; or, (4) take remedial action to ensure the effective and expeditious administration of the business of the courts. *Id.* at 27-29. Both the complainant and the subject judge may petition the judicial council to review the chief judge's disposition. *Id.* at 26. The judicial council may affirm the chief judge's disposition by denying the petition; return the matter to the chief judge for further investigation or with directions to appoint a special committee; or, in exceptional circumstances, take other appropriate action. *Id.* at 30. Upon petition by the complainant or subject judge, or by its own initiative, the Judicial Conference's Committee on Judicial Conduct and Disability may review certain judicial council orders. *Id.* at 31. The Committee's dispositions of petitions for review are ordinarily final, unless the Judicial Conference, at its discretion, exercises its power of review. *Id.* Lastly, if the Judicial Conference determines impeachment may be warranted, it must transmit to the Speaker of the House of Representatives the record of all relevant proceedings. *Id.* at 33.

108. The Judicial Conference's Committee on Judicial Ethics had learned of two judges and one magistrate judge who were continuing to refuse to comply with disclosure requirements. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 78 (Sept. 24-25, 1981).

judges should address failures to file financial disclosures within their respective circuits as they saw fit.<sup>109</sup>

The Judicial Conference's ability to make this decision, which balanced autonomy from outside interference with limited accountability within, demonstrated that the judiciary had entered a new phase of institutional growth. It had pushed aside the traditional model of the judiciary as a decentralized institution comprising autonomous judges. It had increased the accountability of individual judges and, in doing so, had convinced Congress to acquiesce in limited institutional accountability. And it had begun formulating its own positions rather than following those of the organized bar. Initially, the ABA had helped the Judicial Conference emerge as a serious political actor in the eyes of Congress and the public, but the Judicial Conference was now ready for increased distance from the organized bar.

## II. JUDICIAL IDENTITY AND GROWING AUTONOMY

After the passage of the 1980 Act, judicial leaders continued to use conduct regulation to the judiciary's institutional advantage: to establish distance from the organized bar, to develop a distinct and cohesive judicial identity, and to speak with a unified voice in interbranch relations. Congress remained content to acquiesce in self-regulation as long as the Judicial Conference was attentive to congressional and public concerns. This pattern continued until the early 2000s, when the Judicial Conference began rejecting all outside suggestions for conduct regulation. Congress responded by seeking a more direct and intrusive role in conduct regulation. In this Part, I detail the process through which the Judicial Conference reached an apex of confidence in its institutional position and triggered a fundamental change in approach by Congress.

### A. *Fracture with the Bar*

Historically, the federal judiciary viewed distance from the practicing bar as a desirable means of bolstering judicial efficacy and prestige.<sup>110</sup> In the years fol-

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109. *Id.* ("It was the view of the Conference that it would be inappropriate for the Committee to make use of the formal procedures of the Judicial Conduct and Disability Act. The Committee, however, was authorized, as one of its enforcement procedures, to make reports concerning judges who may appear to the Committee to be acting in violation of the Ethics in Government Act to the appropriate chief circuit judges.").

110. See Issachar Rosen-Zvi, *Constructing Professionalism: The Professional Project of the Israeli Judiciary*, 31 SETON HALL L. REV. 760, 783 (2001) ("With the peaking of its moral authority and social reputation, the judiciary began to perceive a close relationship with the Bar as not only in vain but even harmful."); cf. Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 93 (1988) (noting that William H. Taft "ardently favored the professionalization of the judiciary").

lowing passage of the 1980 Act, the judiciary worked to increase that distance by establishing itself as a distinct profession, separate from the legal profession.<sup>111</sup> The judiciary's stance presented a contrast to the situation in many states, where the organized bar was using the reform of judicial conduct regulation to increase the number and closeness of ties between bench and bar.<sup>112</sup>

One of the principal mechanisms through which the federal judiciary sought to distance itself from the bar was code drafting. In 1969, to review the code proposed by the Traynor Commission, the Judicial Conference had created the Joint Committee on Code of Conduct (now the Committee on Codes of Conduct).<sup>113</sup> After the Judicial Conference adopted the first Federal Code of Conduct in 1972, this committee was tasked with periodically reviewing and amending the Code, which it began doing in a way that gradually distinguished its process and code from the ABA's process and code.<sup>114</sup> In 1981, for example, the Joint Committee proposed and the Judicial Conference adopted new commentary that disapproved of judicial membership in discriminatory organizations.<sup>115</sup> At the time, the ABA was considering amendments to the ABA Model Code's analogous provisions, but the Judicial Conference did not wait for ABA comments before adopting the new canon. The substance of the new provision likely also reflected the Judicial Conference's quest for independence. The canon vested discretion in individual judges to determine which organizations qualified as discriminatory, reinforcing discretion as a central and distinguishing feature of the judiciary's identity. Whereas the ABA's provision mandated that a judge "shall" not hold membership in a discriminatory organization, the Federal Code provided that a judge "should" not, explaining in commentary that individual judges must "determine[] by [] conscience . . .

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111. The judiciary faced significant obstacles in doing so. Typically, professionalization entails an occupational group seeking economic and social benefits by "clos[ing] access to the occupation, to its knowledge, to its education, training and credentials and to its markets in services." KEITH M. MACDONALD, *THE SOCIOLOGY OF THE PROFESSIONS* 29 (1995). Here, although the Judiciary was no longer reliant on the bar's support for authority in conduct regulation, it continued to share many close ties with the bar. Cf. Rosen-Zvi, *supra* note 110, at 784 ("The professional project of the judiciary . . . is the project of a sub-profession struggling to dissociate itself from the rest of the profession. . . . The problem for the judiciary is not so much gaining an image of professionals in the public, but distinguishing itself from a very similar group from which, to a large extent, it originated, and with whom it shares the same formal training and a similar body of knowledge."). Among other things, being a lawyer had long been a prerequisite to becoming a federal judge. DORIS MARIE PROVINE, *JUDGING CREDENTIALS: NONLAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM* 1 (1986).

112. See generally Remus, *supra* note 15 (describing the reform process in the states).

113. Lievens & Cohn, *supra* note 38, at 278.

114. *Id.*

115. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 27 (Mar. 12-13, 1981).

whether membership in a particular organization is compatible with the duties of judicial office.”<sup>116</sup>

The Judicial Conference’s efforts to distinguish itself from the bar received indirect but critical support when Congress preempted certain provisions of the ABA Model Code through the Ethics Reform Act of 1989 (1989 Ethics Act).<sup>117</sup> The 1989 Ethics Act, which amended the 1978 Ethics Act, restricted outside earned income, honoraria, and gifts for all federal officials.<sup>118</sup> The Act invested in each branch the authority to adopt binding regulations to implement the new restrictions,<sup>119</sup> granting the Judicial Conference implementing authority not only over all lower court judges, but also over Justices of the Supreme Court and members of the Federal Judicial Center—two entities over which the Conference had previously lacked jurisdiction.<sup>120</sup> Soon after the Act’s passage, the Judicial Conference amended the Federal Code to conform to the new statutory disclosure and gift provisions.<sup>121</sup>

Through the 1990s, the Judicial Conference’s drafting process continued to diverge from the ABA’s. After the ABA revised the Model Code in 1990, the Judicial Conference announced that its Committee on Codes of Conduct would review the new Model Code “to determine whether the Judicial Conference should adopt the substantive changes and, if so, how to do so appropriately for the federal judicial system.”<sup>122</sup> The ABA’s central changes were to state most standards in mandatory rather than advisory terms<sup>123</sup> and to relegate additional aspirational guidance to the commentary.<sup>124</sup> The ABA advocated that the federal as well as state judiciaries adopt this approach to signal a commitment to—and

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116. *Id.* (quoting *Model Codes of Conduct for Various Judicial Employees* Canon 2 cmt.).

117. Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (codified as amended at 5 U.S.C.A § 7353 (2012)); see PRESIDENT’S COMMISSION ON FEDERAL ETHICS LAW REFORM, TO SERVE WITH HONOR: REPORT AND RECOMMENDATIONS TO THE PRESIDENT (1989) (recommending a wide array of ethical regulations for all three branches of government).

118. Ethics Reform Act.

119. *Id.*

120. *Id.*

121. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 14, 15 (Mar. 13, 1990).

122. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 68 (Sept. 12, 1990).

123. See MODEL RULES OF PROF’L CONDUCT (1983); see also Don J. DeBenedictis, *House Approves Judicial Code*, 76 A.B.A. J. 130 (Oct. 1990) (describing the replacement of “should” in the old code with “shall” as one of the changes to the 1990 Code).

124. 1151 ANN. REP. A.B.A. 759 (1990) (distinguishing mandatory standards from aspirational guidelines in the newly adopted 1990 ABA Model Code of Judicial Conduct).



in practice to compel—enforcement of the standards of judicial conduct.<sup>125</sup> Likely because this change would run counter to the Judicial Conference's efforts to cultivate discretion as the mark of judicial professionalism, it declined to adopt the change for the Federal Code without comment.<sup>126</sup>

The ABA's declining influence in the federal system was evident elsewhere as well—namely, in its implementation and enforcement efforts. In the wake of three time-consuming impeachments between 1986 and 1989,<sup>127</sup> Congress expressed renewed interest in the implementation and functioning of the 1980 Act.<sup>128</sup> In 1990, Congress created the National Commission on Judicial Discipline and Removal to review complaint-processing procedures and to reconsider non-impeachment removal as an additional sanction.<sup>129</sup> The ABA's president requested a formal role, but when he was invited to testify before the congressional commission, he appeared disorganized and unprepared to offer meaningful federal proposals.<sup>130</sup> His testimony sparked significant internal disagreement within the ABA over the desirability of federal removal legislation and other new enforcement mechanisms.<sup>131</sup> The ABA's focus on the states had ap-

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125. M. Peter Moser, *The 1990 ABA Code of Judicial Conduct: A Model for the Future*, 4 GEO. J. LEGAL ETHICS 731, 731-32, 734 (explaining the changes and advocating adoption by federal and state judiciaries).
126. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 62 (Sept. 22, 1992).
127. Between 1986 and 1989, three federal judges were impeached: Judge Claiborne, Judge Hastings, and Judge Nixon. Hellman, *The Regulation of Judicial Ethics*, *supra* note 14, at 209.
128. In 1989, several bills and constitutional amendments relating to judicial removal were pending, including H.R. 1620, H.R. 1930, H.R. 2181, and S.J. Res. 11, 232, and 233.
129. The National Commission on Judicial Discipline and Removal was established by the Judicial Improvement Act of 1990, Pub. L. No. 101-650, §§ 409, 410, 104 Stat. 5089, 5124-27.
130. When ABA president Talbot D'Alemberte testified before the Commission that the ABA continued to support removal legislation, he conceded that the ABA would need more time to develop a formal proposal for implementation within the federal judiciary. Report of the National Commission on Judicial Discipline and Removal, 6, 147-48 (1993) [hereinafter 1993 National Commission Report]; see also 118 ANN. REP. A.B.A. 618, 622 (1993) (reporting ABA President D'Alemberte's testimony to the National Commission on Judicial Discipline and Removal on the ABA's policy favoring "non-impeachment judicial removal . . . to which . . . the Association saw no constitutional impediment"). When pushed, D'Alemberte suggested that the Commission simply examine the ABA Standards Relating to Judicial Discipline, Disability and Retirement, even though they had been drafted chiefly with a view to the states. 1993 National Commission Report, *supra*.
131. *Report of the Task Force on Judicial Removal et al.: Recommendation*, 118 ANN. REP. A.B.A. 618, 623 (1993) (formally reversing position and explaining that "prior reso-

parently left it unprepared to participate with a unified voice in the federal system.

By the close of the commission's proceedings, the Judicial Conference had satisfied Congress that it was adequately addressing judicial conduct matters. The commission reported favorably on implementation of the 1980 Act and reaffirmed impeachment as the sole constitutional method of removal.<sup>132</sup> The commission also supported an amendment to the 1980 Act that would further empower the Judicial Conference by authorizing it to certify conduct warranting impeachment to the House, independent of any certification from a circuit judicial council.<sup>133</sup> In approving this amendment,<sup>134</sup> Congress reaffirmed broad-based judicial self-regulation while also reinforcing the Judicial Conference's success in using conduct reform strategically—first to acquire authority over the conduct of individual judges, and then to strengthen interbranch institutional autonomy by increasing intrabranched individual accountability.

### B. *Extreme Autonomy*

In the early 2000s, the Judicial Conference expressed new confidence in its authority and autonomy. Having successfully distanced itself from the organized bar in matters of judicial conduct regulation, it began resisting congressional involvement as well. One issue in particular—judicial attendance at privately funded educational seminars—revealed the Judicial Conference's increasingly insular and assertive approach, and introduced new and significant tension in interactions between the Judicial Conference and Congress.<sup>135</sup>

In a 1980 advisory opinion, the Judicial Conference had condoned attendance at private seminars subject to the overriding requirement that judges avoid the appearance of impropriety.<sup>136</sup> Judges viewed the opinion as approving

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lutions of the ABA House of Delegates do not fairly reflect the delicate balance of the arguments on this obviously difficult and important constitutional question”).

132. The Commission's "report basically endorsed existing constitutional arrangements in all respects and concluded that the judiciary had, on the whole, utilized the 1980 Act properly and policed itself fairly." REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 56 (Sept. 20, 1993).

133. *Report of the National Commission on Judicial Discipline and Removal*, 152 F.R.D. 265, 397 (1994).

134. In 2002, as part of an appropriations act, Congress passed a revised version of the 1980 Act, which made only minor changes in procedural details and codified the Act in its own chapter of the U.S. Code. 21st Century Department of Justice Appropriations Act, Pub. L. No. 107-273, 116 Stat. 1758, 1848-56 (2002).

135. Fred Barbash, *Big Corporations Bankroll Seminars for U.S. Judges*, WASH. POST, Jan. 20, 1980, at A1.

136. Advisory Comm. on Codes of Conduct, Attendance at Educational Seminars, Advisory Op. No. 67 (1980) (stating that seminar participation was allowable so long as it was consistent with canons relating to avoiding appearances of impropriety); see *United States Judicial Conference, Administrative Office and Federal Judicial*

attendance at virtually any seminar, including seminars that entailed all-expenses-paid trips to attractive destinations, funded by corporate sponsors or ideological interest groups.<sup>137</sup> Problematic appearances fueled public and congressional criticism throughout the 1990s,<sup>138</sup> leading to calls for legislative action.<sup>139</sup>

In 2000, Senators John Kerry and Russell Feingold introduced a bill to require the Federal Judicial Center to vet seminars in advance to determine whether attendance would undermine “the public’s confidence in an unbiased and fair-minded judiciary.”<sup>140</sup> Given that the vetting was to occur within the judiciary, the legislation would have neither intruded on judicial autonomy nor shifted the interbranch balance of powers. It would only have increased the individual accountability of judges for their decisions to attend private seminars. Nevertheless, the Judicial Conference and the Federal Judicial Center strongly opposed the bill.<sup>141</sup> Judicial leaders predicted that limiting the education of judges would have “unintended consequences.”<sup>142</sup> They expressed concerns with Congress’s proposed interference in the judiciary’s affairs and argued that

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*Center and the “Protecting American Small Business Trade Act of 1998”*: Hearing Before the Subcomm. on Courts of the H. Comm. on the Judiciary, 105th Cong. 78 (1998) (statement of J. Terrell Hodges, Chairman, Executive Commission of the Judicial Conference of the United States) (“It is a very difficult problem or issue that each judge has to decide ultimately for himself or herself when invited to attend a seminar that is being sponsored by someone other than a governmental entity. . . . [I]t has been dealt with, at least to some extent, by opinions of the Conduct Committee . . . .”)

137. Cf. *Congress Looks at Creating Judicial Watchdog*, National Public Radio, July 24, 2006, <http://www.npr.org/templates/story/story.php?storyId=5577532> (interviewing Professor Stephen Gillers on the differences between how judges view attendance at seminars and how the public views such attendance).
138. Ruth Marcus, *Issues Groups Fund Seminars for Judges*, WASH. POST, Apr. 9, 1998, <http://www.washingtonpost.com/wp-srv/politics/daily/april98/judges9.htm>; *Let Judges Spurn Bogus Seminars and Pay for Their Own Vacations*, FT. LAUDERDALE SUN-SENTINEL, Apr. 18, 1998, [http://articles.sun-sentinel.com/1998-04-18/news/9804170454\\_1\\_seminars-federal-judges-judicial-advisory-committee](http://articles.sun-sentinel.com/1998-04-18/news/9804170454_1_seminars-federal-judges-judicial-advisory-committee).
139. The Senate passed a nonbinding resolution urging the judiciary to “review and reevaluate” its rules regarding gifts, travel, and travel-related expenses. S. Res. 158, 104th Cong. § 3 (1995) (enacted) (“It is the sense of the Senate that the Judicial Conference of the United States should review and reevaluate its regulations pertaining to the acceptance of gifts and the acceptance of travel and travel-related expenses and that such regulations should cover all judicial branch employees, including members and employees of the Supreme Court of the United States.”).
140. Judicial Education Reform Act, S. 2990, 106th Cong. (2000).
141. *Judicial Conference Opposes Sweeping Restrictions on Educational Programs*, THIRD BRANCH, Oct./Nov. 2000, at 1. Judicial leaders did not specify the nature of these consequences.
142. *Id.*

judges deserved an opportunity to address the issue themselves.<sup>143</sup> Apparently willing to give the judiciary a second chance, Senators Kerry and Feingold dropped the bill.

The ABA, meanwhile, saw an opportunity to reassert itself on the federal scene. In contrast to the more relaxed seminar policies it was advancing in the states,<sup>144</sup> the ABA drafted an ethics opinion that would prohibit attendance by federal judges at virtually all private seminars.<sup>145</sup> The opinion drew the judiciary's ire. In a harshly worded letter, the director of the Administrative Office accused the ABA drafting committee of acting under the inappropriate influence of ideological interest groups.<sup>146</sup> Other judicial leaders chimed in with additional criticisms of the ABA's approach, noting the absence of judges on the ABA's drafting committee, the committee's reluctance to release its draft for federal judicial review and commentary,<sup>147</sup> and the allegedly insufficient weight accorded to the value of continuing judicial education.<sup>148</sup> Chastened, the ABA retreated from the debate without issuing the opinion.

The seminar controversy demonstrated a worrying decline in the quality of the judiciary's institutional relations with both Congress and the legal profession. The Judicial Conference appeared unresponsive to calls for the introduction of relatively moderate accountability measures, which were aimed at increasing judicial legitimacy and improving the quality of judicial conduct regulation. Apart from their genesis in Congress and the ABA, the proposals did not threaten to erode judicial autonomy from Congress or from the bar. To the contrary, they had the potential to improve public confidence while preempting further threats from the political branches. But instead of studying and carefully considering the proposals, the Judicial Conference quickly rejected them.

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143. See REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 38 (Sept. 2000) (opposing pending legislation limiting seminar attendance and requesting an opportunity to "study and comment upon those issues and to take such action as is necessary and appropriate").

144. LISA MILFORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 30-44 (1992) (describing the drafting and adoption of Canon 4).

145. Tony Mauro, *Judges Assail ABA Study on Paid Trips*, LEGAL TIMES, June 24, 2002, [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=900005372812&Judges\\_Assail\\_ABA\\_Study\\_on\\_Paid\\_Trips](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=900005372812&Judges_Assail_ABA_Study_on_Paid_Trips).

146. *Tainted Justice: How Private Judicial Trips Undermine Public Trust in the Federal Judiciary*, COMMUNITY RIGHTS COUNSEL ch. 2, at 8 (Mar. 2004), <http://communityrights.org/TaintedJustice/Introduction.pdf>.

147. Mauro, *supra* note 145.

148. Judicial Education Reform Act, S. 2990, 106th Cong. § 1 (2000); see also *Chief Justice Supports Judges' Education*, THIRD BRANCH, June 2001, at 1, 6 (reporting Chief Justice Rehnquist's remarks to the American Law Institute regarding private seminar attendance).

### C. Congress's Response

After passing the 1980 Act into law, Congress proved willing to acquiesce in judicial self-regulation. But four years after the seminar controversy, in light of the Judicial Conference's continued failure to adopt a new seminar policy, members of Congress adopted a new approach that would fundamentally undermine judicial self-regulation.<sup>149</sup> No longer focusing narrowly on the accountability of judges as individuals, they sought to hold the judiciary accountable as an institution.

Signaling this new approach, House Judiciary Committee Chairman James Sensenbrenner told the Judicial Conference at its March 2004 meeting that Congress "will begin assessing whether the disciplinary authority delegated to the judiciary has been responsibly exercised and ought to continue."<sup>150</sup> Members of the Senate introduced new bills to set standards regarding private seminars and conflicts of interest without input from the Judicial Conference.<sup>151</sup>

The judiciary's institutional position, which recently appeared strong and fortified, was now on more tenuous ground. Recognizing this, the Judicial Conference retreated from its aggressive stance. Chief Justice Rehnquist appointed a committee in May 2004, chaired by Justice Breyer (the Breyer Commission), to study the judiciary's implementation of the 1980 Act.<sup>152</sup> It was too late, however, to mollify Judiciary Committee leaders and other members of Congress. Senator Charles Grassley introduced the Judicial Transparency and Ethics Enhancement Act of 2006, which sought to establish an Office of Inspector General of the judiciary.<sup>153</sup> He argued that the Act would be "just the right medicine

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149. See 152 CONG. REC. S229 (daily ed. Jan. 26, 2006) (statement of Sen. Patrick Leahy) ("For the past 4 years, editorial boards across the country have called our attention to the appearance of impropriety that occurs when federal judges accept gifts and attend lavish private seminars sponsored by well-heeled corporations . . . . I had hoped that the federal judiciary would engage in self-regulation on these timely and substantive ethical issues. Unfortunately, press reports show continued appearances of impropriety . . . .").

150. *Remarks of House Judiciary Committee Chairman Sensenbrenner Before the U.S. Judicial Conference*, 16 FED. SENT'G REP. 280, 281 (2004).

151. Fair and Independent Federal Judiciary Act of 2003, S. 787, 108th Cong. § 7 (2003); Federal Judicial Salary Restoration Act of 2008, S. 1638, 110th Cong. § 10(c) (2008).

152. *Implementation of the Judicial Conduct and Disability Act of 1980*, THE JUDICIAL CONDUCT AND DISABILITY ACT STUDY COMMITTEE, at 1 (Sept. 2006), [http://www.fjc.gov/public/pdf.nsf/lookup/breyero6.pdf/\\$file/breyero6.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/breyero6.pdf/$file/breyero6.pdf) [hereinafter BREYER REPORT]; Hellman, *The Regulation of Judicial Ethics*, *supra* note 14, at 210.

153. Judicial Transparency and Ethics Enhancement Act of 2006, H.R. 5219, 109th Cong. (2006). This Act, sponsored by Representative James Sensenbrenner in 2006, 2007, 2009, and 2011, would have established an Office of Inspector General for the judicial branch.

the federal judiciary needs to ensure it is complying with its own ethical guidelines and to root out potential waste, fraud and abuse in the system.”<sup>154</sup>

The bill would grant Congress extensive influence over many aspects of the judiciary’s functioning and system of self-regulation. Its provisions granted Congress a role in appointing the Inspector General and required the Inspector General to report back to Congress annually.<sup>155</sup> The provisions required the Inspector General to conduct investigations of alleged judicial misconduct, to recommend oversight or other action by Congress, to conduct and supervise audits, and to recommend new or amended legislation governing the judicial branch.<sup>156</sup> Additional provisions authorized the Inspector General to subpoena judicial testimony and records including “all information kept in the course of business by the Judicial Conference of the United States, the judicial councils of circuits, the Administrative Office of the United States Courts, and the United States Sentencing Commission.”<sup>157</sup>

If enacted, the legislation would grant Congress significant influence over judicial conduct regulation. It would also empower members of Congress to target individual judges for their substantive decisions. The bill’s supporters denied this charge, noting that the bill prohibited the Inspector General from investigating or reviewing the merits of a judicial decision.<sup>158</sup> But nothing would prevent members of Congress from using their influence over the Inspector General’s far-reaching investigatory powers to retaliate against judges for particular decisions.

The potential dangers of the legislation are underlined by the activities of its sponsors, including its principal sponsor, Representative Sensenbrenner. In response to substantive judicial decisions,<sup>159</sup> Sensenbrenner has threatened impeachment proceedings, held oversight hearings, and subpoenaed judges’ records.<sup>160</sup> In the past, others in Congress have similarly used threats of impeachment to retaliate against judges for particular substantive rulings.<sup>161</sup> These

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154. *House Bill Would Impose Inspector General on Judiciary*, THIRD BRANCH, July 2006, at 2.

155. H.R. 5219 § 1025.

156. *Id.* § 1023.

157. *Id.* § 1024.

158. See *The Judicial Transparency and Ethics Enhancement Act of 2006: Hearing on H.R. 5219 Before the H. Comm. on the Judiciary*, 109th Cong. 40 (2006) (statement of Arthur D. Hellman, quoting Rep. James Sensenbrenner).

159. Todd David Peterson, *Congressional Investigations of Federal Judges*, 90 IOWA L. REV. 1, 13-19 (2004) (describing the investigation of Judge Rosenbaum by the House Judiciary Committee, of which Rep. Sensenbrenner was a member and then the chair).

160. *Id.*

161. High profile examples include calls for the impeachment of Justices Fortas, Warren, Douglas, and, most recently, Kennedy (in the wake of *Romer v. Evans*, 513

partisan efforts remained squarely outside the formal system of judicial conduct regulation, however, and never posed credible threats.<sup>162</sup> That could change under the proposed legislation, which effectively authorizes the Inspector General to define “conduct” broadly enough to include the substantive work of judging.

The Judicial Conference acted quickly to prove that the intrusive legislation was unnecessary and unwarranted. The appointment of the Breyer Commission had not stopped the push for new legislation, but judicial leaders sought to prove in other ways that new arrangements were unnecessary—that all concerns could be addressed by improving existing arrangements.<sup>163</sup> In September 2006, the Judicial Conference adopted its previously promised policy on privately-funded seminars<sup>164</sup> and a new policy on recusal for conflicts of interest.<sup>165</sup> The same month, the Breyer Commission released its report, concluding that chief circuit judges and judicial councils were competently handling the vast majority of complaints filed under the 1980 Act, but that the “error rate” among “high visibility cases” was “far too high.”<sup>166</sup> The Commission made a series of

U.S. 1146 (1995)). See Geyh, *Constitutional Norms*, *supra* note 14, at 209-10; Richard K. Neumann, Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 256-72 (2007); Tuan Samahon, *Impeachment as Judicial Selection?*, 18 WM. & MARY BILL RTS. J. 595, 605-12 (2010).

162. Since the Senate’s refusal to remove Justice Chase after the House’s impeachment, the use of impeachment to retaliate against judges for particular decisions has been viewed as improper. GEYH, *COLLIDE*, *supra* note 14, at 54, 142. Geyh concludes that no judge need fear the threat of impeachment for a substantive decision. *Id.* at 170.
163. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 7, 19-20 (Mar. 13, 2007).
164. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 5, 11, 24 (Sept. 19, 2006); *Policy on Judges’ Attendance at Privately Funded Educational Programs*, JUDICIAL CONFERENCE OF THE UNITED STATES (Jan. 1, 2007), <http://www.uscourts.gov/uscourts/RulesAndPolicies/SeminarDisclosure/judbrappc906c.pdf>. The seminars policy details factors that judges should consider in determining whether it is proper to attend a seminar. These factors include the identity of the sponsor, the nature and source of the funding, the likelihood of a sponsor or donor appearing before the judge, the subject matter of the program, and the nature of the reimbursed expenses. The policy also requires advance disclosure by judges of attendance and by educational program providers regarding topics, speakers, sponsors, and funding. See Comm. on Codes of Conduct, *Advisory Opinion No. 67: Attendance at Independent Educational Seminars*, 2B GUIDE TO JUDICIARY POLICY 67-1 to 67-4 (2012), <http://www.uscourts.gov/RulesAndPolicies/conduct/Volo2B-Ch02.pdf>.
165. JUDICIAL CONFERENCE POLICY ON JUDGES’ ATTENDANCE AT PRIVATELY FUNDED EDUCATIONAL PROGRAMS 1-2 (2006), <http://www.uscourts.gov/uscourts/RulesAndPolicies/SeminarDisclosure/judbrappc906c.pdf>.
166. BREYER REPORT, *supra* note 152, at 5. The report found that five out of the seventeen high-profile cases it studied had been mishandled, generally because a chief judge had failed to appoint a special committee to investigate a complaint, even

recommendations, including that the Judicial Conference take on a “vigorous consultative role” in reviewing circuit council orders to help chief judges deal with difficult complaints.<sup>167</sup> To implement the Commission’s recommendations, the Judicial Conference directed its Committee on Judicial Conduct and Disability to develop uniform mandatory procedural rules for the processing of judicial misconduct complaints.<sup>168</sup> One of the new rules authorized the Judicial Conference to appoint a special committee to investigate a complaint even where a chief judge and circuit council had declined to do so.<sup>169</sup> This rule further centralized judicial authority and bolstered the Judicial Conference’s authority.

Also in response to congressional criticism, the Judicial Conference directed its Committee on Codes of Conduct to begin another full review and revision of the Federal Code of Conduct.<sup>170</sup> It publicly explained that it was doing so independent of the ABA’s 2007 Model Code redrafting process—once again distancing itself from the organized bar.<sup>171</sup> For the first time, the drafting com-

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though the facts were “reasonably in dispute”—the statutory standard for appointing a special committee. *Id.* at 107-08. Under the 1980 Act, a chief judge is required to appoint a special committee unless the chief judge has determined either that the complaint is frivolous, merit-based, or lacking any factual basis, or that appropriate corrective action has been taken. 28 U.S.C. §§ 352, 353 (2012). See also Hellman, *Judges Judging Judges*, *supra* note 14, at 431 (“A recurring theme in the Breyer Committee’s account of ‘problematic’ cases is the failure of a chief judge ‘to submit clear factual discrepancies to special committees for investigation.’” (citation omitted)); Hellman, *The Regulation of Judicial Ethics*, *supra* note 14, at 241-42 (“If there is a single thread that runs through the various lapses chronicled by the Committee and other observers, it is this: at each stage of the process, the chief judge or circuit council opts for the action that is less structured and less public.”).

167. BREYER REPORT, *supra* note 152, at 107.

168. The intent was to eliminate procedural variation among circuits and to carve out an expanded oversight function for the Conference. Press Release, Judicial Conference, National Rules Adopted for Judicial Conduct and Disability Proceedings (Mar. 11, 2008) (announcing the first set of nationally binding rules adopted by the Judicial Conference dealing with accusations of misconduct by federal judges).

169. This rule was a response to a high-profile incident of misconduct by U.S. District Judge Manuel Real that had revealed a problematic loophole in the existing rules. See Arthur D. Hellman, *When Judges Are Accused: An Initial Look at the New Federal Judicial Misconduct Rules*, 22 NOTRE DAME J. L. ETHICS & PUB. POL’Y 325, 331-32, 337, 339 (2008).

170. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 9 (Sept., 16 2008); *Request for Public Comment on Proposed Revisions to Code of Conduct for United States Judges*, THIRD BRANCH, March 2008, at 9. The revised code was adopted by the Judicial Conference in 2008. *Judiciary Updates Code of Conduct, Seeks New Judgeships*, THIRD BRANCH, March 2009, at 1.

171. See Lievense & Cohn, *supra* note 38, at 271 (emphasizing the independence of the federal judiciary’s drafting process).



mittee requested public comment on a draft version of proposed changes.<sup>172</sup> In one of only a handful of submitted comments, the ABA repeated its suggestions that the federal judiciary phrase its Code in mandatory terms and define misconduct under the 1980 Act to include a violation of the Federal Code.<sup>173</sup> If it did so, judicial councils and the Judicial Conference would retain significant discretion in identifying violations of the Code and determining whether and what sanctions were appropriate, but they would clarify to judges, lawyers, and the public at large the meaning of the 1980 Act's vague description of sanctionable misconduct—"conduct prejudicial to the effective and expeditious administration of the business of the courts."<sup>174</sup>

The drafting committee did not formally respond to the ABA's comments (or to any of the submitted comments),<sup>175</sup> and the Judicial Conference adopted a revised Code that was stated in advisory terms. But the committee's chairman later explained why the ABA's suggestions had been rejected: while the ABA's approach turned the Model Code into a collection of "black and white" rules, the Federal Code provided "guiding principles by which judges should abide."<sup>176</sup>

The rejection of the ABA's comments without formal explanation was revealing. Although the Judicial Conference was willing to improve a number of aspects of its judicial conduct arrangements to placate Congress, it was not will-

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172. *Public Comments Aid Study of Proposed Changes to Code of Conduct for Judges*, THIRD BRANCH, May 2008, at 7 [hereinafter *Public Comments Aid Study*].

173. The ABA had restructured its 1990 Code to follow the example of the attorney conduct rules. See Terry Carter, *Keeping Up with the Times: New Conduct Code May Require Judges To Report Impaired Colleagues, Lawyers*, 90 A.B.A. J. 67 (Apr. 2004) ("The Commission conducting the first sweeping review of the ABA Model Code of Judicial Conduct since 1990 is considering a new format that would help judges understand more easily what conduct is prohibited. That structural change would make the judicial canons more like the Model Rules . . . . 'That way there would be a more obvious and clear distinction between the rules and comments, with more of the aspirational content in the comments . . . . Then judges would have a better idea about what would be the subject of enforcement.'" (citation omitted)).

174. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, § 3(c)(1) 94 Stat. 2035 (1980) (codified as amended at 28 U.S.C. § 372 (2012)).

175. *Public Comments Aid Study*, *supra* note 172, at 7 (reporting receipt of comments from the ABA, the American Judicature Society, the National Conference of Bankruptcy Judges, Chief Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit, and Carl Bernofsky, a lawyer from Louisiana).

176. Gordon J. Quist, *Giving Advice on Ethics: Seldom Simple*, THIRD BRANCH, June 2008, at 10 (elaborating that individual judges need sufficient discretion to tailor their conduct to particular contexts, and disciplinary authorities need sufficient discretion to consider the full range of relevant circumstances in reviewing complaints).

ing to sacrifice the discretion that had long been at the core of those arrangements, nor did it appear interested in cultivating an ongoing dialogue with the ABA.

### III. THE PATH AHEAD

Through the last three decades of the twentieth century, Congress and the judiciary established a loose pattern of cooperation regarding matters of judicial conduct regulation. When particular issues or problems of judicial conduct provoked public attention, members of Congress threatened to intervene. When the judiciary took action to address the problem itself—in the early years, with help from the bar—Congress stepped aside.

Events in the early 2000s marked a shift in this traditional pattern and the disappearance of any signs of cooperation. With the bar formally excluded from the process, both Congress and the Judicial Conference assumed increasingly polarized positions. Congress pushed ahead with unconstitutional legislation while the judiciary defended the status quo. The inadequacy of both positions provides a window into the inability of any one of these institutions, acting alone, to address judicial conduct regulation effectively. All three institutions—bench, bar, and Congress—need to participate in a system of tripartite checks and balances.

#### A. *Turning Point*

When congressional leaders introduced the 2006 inspector general legislation, they faced a judiciary that was staking out an extreme position on judicial autonomy and that had failed to act on the controversial issue of judicial attendance at privately funded seminars. After promising to act promptly, the Judicial Conference had delayed action for six years. Congress responded by doing what it had always done when it identified important problems in the conduct system: it threatened legislation. Previously, however, Congress had threatened legislation that would have increased the individual accountability of judges. In 2006, facing a judiciary that was unwilling to act, Congress threatened legislation that would have increased the institutional accountability of the judiciary as a whole. Taking a more adversarial stance, Congress threatened inspector general legislation that would have fundamentally undermined judicial self-regulation and re-shaped interbranch relations.

Members of Congress have frequently used conduct regulation in a political, and often partisan, manner. As noted, they have periodically advocated the impeachment of particular judges and justices because of particular substantive rulings. But in the past, these calls served primarily as a signaling device for the benefit of constituents.<sup>177</sup> They did not pose credible threats to judges' or justices' tenure or to the judiciary's self-regulatory authority.

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177. See, e.g., Mike Allen, *DeLay Apologizes for Comments: Leader Wouldn't Say Whether He Wants Schiavo Judges Impeached*, WASH. POST, Apr. 14, 2005, at A5; Robert

Against this background, the inspector general bill marks a significant and troubling turning point in Congress's approach to conduct regulation. The bill proposes to strip the judiciary of a measure of institutional autonomy and to make judicial administration and decisionmaking susceptible to Congress's political preferences.<sup>178</sup> The bill brings institutional politics to the forefront of the debate and threatens to bring partisan politics into the structure of conduct regulation.

When the Judicial Conference recognized a new intensity in congressional calls for action in 2005 and 2006, it retreated from its stance of extreme autonomy and did what it had successfully done in the past. It responded to congressional criticism with concerted efforts to improve its existing scheme of self-regulation.<sup>179</sup> But its efforts were inapposite to the shift in Congress's approach and came too late to reestablish good faith interbranch relations. These efforts failed to appease congressional leaders, who continued to advocate inspector general legislation. Between 2006 and 2011, the bill was introduced four times in both houses.<sup>180</sup> The bill has failed to garner significant political support thus far, but may become politically viable if the Judicial Conference fails to respond with significant changes to the current system. Moreover, it is symbolically significant in marking a turn away from the historical pattern of interactions between Congress and the judiciary and toward increasing hostility.

The resulting interbranch impasse demonstrates deep structural imbalances in judicial conduct regulation. Although the judiciary has long used conduct regulation to solidify its institutional position, it has always acted in the shadow of potential congressional interference, which functions as an institutional accountability mechanism. By either threatening or enacting legislation, Congress has always been able to check self-interested behavior by the judiciary. Except for judicial review, there is no corresponding mechanism for the judiciary to check self-interested behavior by Congress.

In 2006, the judiciary was able to take steps to reduce congressional pressure and preempt congressional action. Now, in contrast, the judiciary has far less ground to give in terms of meaningful concessions and no means of resist-

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Barnes, *In Emotionally Charged Times, Calls Arise for Impeachment of a Justice or Two*, WASH. POST, Nov. 1, 2010, at A19; Amy Gardner & Matt DeLong, *Newt Gingrich's Assault on 'Activist Judges' Draws Criticism, Even from Right*, WASH. POST, Dec. 17, 2011, [http://www.washingtonpost.com/politics/newt-gingrichs-assault-on-activist-judges-draws-criticism-even-from-right/2011/12/17/gIQAoYa8oO\\_story.html](http://www.washingtonpost.com/politics/newt-gingrichs-assault-on-activist-judges-draws-criticism-even-from-right/2011/12/17/gIQAoYa8oO_story.html).

178. Cf. Stephen B. Burbank, *Judicial Independence, Judicial Accountability and Interbranch Relations*, 95 GEO. L.J. 909, 909, 910, 913-14 (2006) (noting efforts by Congress in other contexts "to persuade the public that courts are part of ordinary politics and thus that judges are policy agents to be held accountable as such").
179. See *supra* notes 163-172 and accompanying text.
180. H.R. 727, 112th Cong. (2011); S. 348, 112th Cong. (2011); H.R. 486, 111th Cong. (2009); S. 220, 111th Cong. (2009); H.R. 785, 110th Cong. (2007); S. 461, 110th Cong. (2007); H.R. 5219, 109th Cong. (2006); S. 2678, 109th Cong. (2006).

ing congressional self-interest. But there is no less pressure from Congress, and its options for action are limited. It could simply not act or it could actively disobey Congress, but both paths would undermine the judiciary's legitimacy while making congressional interference more likely. If Congress enacts the inspector general legislation, courts could invalidate it as an impermissible usurpation of judicial independence. But doing so could undermine the judiciary's legitimacy by revealing the lengths to which federal judges would go to avoid outside scrutiny and regulation. This, in turn, could risk a true constitutional crisis.

Consequently, the current impasse between Congress and the judiciary differs in significant respects from previous phases of reform. Until recent years, Congress used the threat of legislation to ensure that the Judicial Conference acted to address conduct problems. But as long as the Judicial Conference did so, Congress deferred to the judiciary's choices regarding how it would do so. Members of Congress are no longer satisfied with this arrangement. They have started using conduct regulation as a powerful tool to increase the institutional accountability of the judiciary to their political preferences, and as a means through which to intervene in judicial self-regulation. The judiciary, meanwhile, has limited options for quieting congressional criticism.

### B. *Evaluating the Inspector General Legislation*

Institutional accountability is an important part of the judicial independence balance.<sup>181</sup> The inspector general legislation, however, imposes a problematic form of accountability.<sup>182</sup> As discussed above, inspector general investigations could be used to retaliate against particular judges for their substantive decisions and could undermine the branch's ability to safeguard judges' independence.<sup>183</sup> As drafted, the inspector general legislation may even be unconsti-

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181. Burbank, *supra* note 17, at 339.

182. See, e.g., RECOMMENDATION ADOPTED BY THE ABA HOUSE OF DELEGATES NO. 308, at 11-12 (Aug. 7-8, 2006), <http://www.aba.org/leadership/2006/annual/dailyjournal/threehunderedeight.doc> [hereinafter ABA RECOMMENDATION NO. 308] (“[O]ur opposition is not premised on the assertion that enactment of this legislation would in fact constitute a violation of the separation-of-powers doctrine if it were challenged in court. Even if it were constitutionally permissible for Congress to establish an IG under this bill, we still would object to it on policy grounds and because it threatens separation of powers by altering the well-balanced calibration in our system of checks and balances.” (internal quotation marks omitted)).

183. *Judicial Transparency and Ethics Enhancement Act of 2006: Hearing on H.R. 5219 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 39 (2006) (statement of Charles G. Geyh, Professor of Law, Indiana University).

tutional.<sup>184</sup> However, the text of the Constitution almost certainly creates space for increased congressional involvement in judicial conduct regulation. Accordingly, even if the current bills go too far, Congress could enact more moderate but still intrusive legislation to hold the judiciary institutionally accountable. For example, Congress could codify particular standards of conduct and particular procedures for processing complaints.<sup>185</sup>

As many commentators have noted, the text of Article III provides limited safeguards of judicial independence.<sup>186</sup> Vesting the judicial power in the Supreme Court and such lower courts as Congress creates, Article III grants judges life tenure during “good Behaviour” and ensures them compensation that cannot be diminished.<sup>187</sup> Significantly, Article III’s standard of “good Behaviour” differs from Article II’s standard for impeachment: “Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>188</sup> For this reason, commentators have argued that the standard for impeachment of Article III judges is lower than that for impeachment of other “civil Officials of the United States.”<sup>189</sup> Certainly, the different standards suggest that Congress could regulate judicial conduct in the gap between good behavior and impeachable conduct.<sup>190</sup>

Over time and as a product of custom, Congress has developed heightened protections of judicial independence.<sup>191</sup> In exploring customs of judicial inde-

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184. See, e.g., Donald E. Campbell, *Should the Rooster Guard the Henhouse: Evaluating the Judicial Conduct and Disability Act of 1980*, 28 MISS. C. L. REV. 381, 404 (2009).

185. For example, members of Congress recently introduced bills that would have imposed a code of conduct on Supreme Court Justices. H.R. 862, 112th Cong. (2011). A group of over one hundred law professors wrote a letter to the Senate Judiciary Committee advocating the constitutionality and desirability of such legislation. Letter from Mark N. Aaronson, Professor of Law, Univ. of California Hastings College of Law, et al., to Chairmen and Ranking Minority Members of Senate Judiciary Comm. and House Judiciary Comm. (Mar. 17, 2011), [http://www.afj.org/judicial\\_ethics\\_sign\\_on\\_letter.pdf](http://www.afj.org/judicial_ethics_sign_on_letter.pdf); see R. Jeffrey Smith, *Professors Ask Congress for an Ethics Code for Supreme Court*, WASH. POST, Feb. 24, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/23/AR2011022304975.html>. Because the Judicial Conference lacks jurisdiction over the Supreme Court, these proposals are outside the scope of this Article. However, they provide a window onto the types of legislation that Congress could pursue.

186. Geyh, *Constitutional Norms*, *supra* note 14, at 161.

187. U.S. CONST. art. III, § 1.

188. *Id.* art. II, § 4.

189. See, e.g., Neumann, *supra* note 161, at 173-74; Samahon, *supra* note 161, at 625-26.

190. See Neumann, *supra* note 161, at 173.

191. Congress has rejected, for example, the use of impeachment, jurisdiction-stripping, and court-packing for the purposes of holding judges accountable for their decisions. These congressional practices express “customary judicial independence,” which is rooted not in the text of the Constitution but rather in the

pendence, Charles Geyh has noted that any decisions by Congress to “overlook or override its customs or precedents . . . must first overcome the presumption that such action is contrary to the Constitution as Congress has traditionally construed it.”<sup>192</sup> In recent years, however, many members of Congress have appeared ready to reject long-standing customs of judicial independence. For example, members of Congress have politicized the appointments process even though that politicization undermines constitutional norms of judicial independence.<sup>193</sup>

Against this backdrop, judicial conduct regulation provides fertile ground for increased congressional involvement in judicial affairs. By virtue of its authority to constitute the lower federal courts and to make laws necessary and proper for empowering the judiciary to decide cases and controversies,<sup>194</sup> Congress has long played a significant role in designing and regulating matters of judicial administration and procedure, including those relating to judicial conduct.<sup>195</sup> Indeed, court administration has long been viewed as a power shared between Congress and the judiciary.<sup>196</sup> Having long acquiesced in this arrangement with respect to rulemaking under the Rules Enabling Act and with respect to conduct regulation under the 1980 Act, the judiciary would be hard pressed to claim now that judicial administration generally or conduct regulation specifically is part of the Judicial Power, invested exclusively in the federal judiciary.

The inspector general legislation may go too far, but Congress could likely play a much more intrusive role in judicial conduct regulation than it currently plays without exceeding the bounds of its constitutional role. That an increased role is constitutionally permissible does not mean that it is normatively desirable, however. To the contrary, judicial legitimacy and independence would be bolstered if the judiciary acted for itself so that pressure for an increased congressional role dissipated.

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historical practices of Congress. Geyh, *Constitutional Norms*, *supra* note 14, at 158, 221.

192. *Id.* at 166.

193. *Id.* at 159, 220 (“The appointments process, by virtue of its unique interbranch dynamic, and the relative ease with which ideologically motivated rejections can be accomplished, has evolved separately, unencumbered by the same judicial independence norms, and has thus become the last best hope for legislators seeking to preserve some measure of extrajudicial accountability.”).

194. U.S. CONST. art. III, §§ 1-2.

195. *See, e.g., Judge Patrick E. Higginbotham: Rules Changes Under Review*, THIRD BRANCH, Feb. 1995, at 10, 11.

196. Geyh, *Highlighting a Low Point*, *supra* note 14, at 1052.

### C. *Assessing Judicial Legitimacy*

Adding to the judiciary's current predicament, its conduct regulation arrangements are currently attracting significant public criticism and distrust. Part of the problem stems from the self-regulatory nature of these arrangements. Any self-regulatory system is vulnerable to pathologies of self-interest. The dangers may be exacerbated in the context of the federal judiciary.<sup>197</sup> Federal judges are undoubtedly committed to the integrity and legitimacy of the federal courts, but the judiciary is an exceptionally insular institution. Appointed for life and protected against reductions in salary, federal judges are prone to view the world from a different perspective than members of the public—a perspective that may be far more forgiving of colleagues' questionable conduct than would appear appropriate to a member of the public. In addition, judges have been socialized to place a high value on judicial collegiality, expertise, and discretion.<sup>198</sup> Both judges and other commentators have noted judges' tendencies to trust their colleagues and to want to protect judges and courts from undue criticism or publicity.<sup>199</sup> For example, the Breyer Commission observed that a common theme among cases of mishandled complaints was the chief judge's failure to appoint a special committee to conduct the investigation.<sup>200</sup> This failure may be explained by an effort to avoid problematic publicity for the judge in question, the judge's home circuit, or the judiciary.

In one particularly problematic case that the Breyer Commission analyzed, a chief judge improperly dismissed a complaint twice, and the dismissal was affirmed by the circuit council on the basis that "adequate corrective action ha[d] been taken."<sup>201</sup> A divided panel of the Judicial Conference's Committee on Conduct and Disability then dismissed an appeal for lack of jurisdiction to review a case for which the complaint had been dismissed by the chief judge.<sup>202</sup> Dissenting, Judge Winter recognized the ramifications of this decision for public confidence in judicial self-regulation:

The judicial misconduct procedure is a self-regulatory one. It is self-regulatory at the request of the judiciary in a legitimate effort to preserve judicial independence. A self-regulatory procedure suffers from

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197. See, e.g., Bazelon, *supra* note 14, at 443 n.20.

198. Robert Carp & Russell Wheeler, *Sink or Swim: The Socialization of a Federal District Judge*, 21 J. PUB. L. 359, 389-90 (1972).

199. See, e.g., Bazelon, *supra* note 14, at 442.

200. BREYER REPORT, *supra* note 152, at 200 (noting that a recurring theme among problematic cases was the failure of a chief judge "to submit clear factual discrepancies to special committees for investigation").

201. *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1181-82 (9th Cir. Jud. Council 2005).

202. *In re Opinion of Judicial Conference Comm. To Review Circuit Council Conduct and Disability Orders*, 449 F.3d 106, 109 (U.S. Jud. Conf. 2006).

the weakness that many observers will be suspicious that complainants against judges will be disfavored. The Committee's decision in this case can only fuel such suspicions.<sup>203</sup>

Notwithstanding the Judicial Conference's efforts to respond to problems identified by the Breyer Report, public perceptions have worsened in recent years. Between 2008 and 2010, egregious misconduct led to the impeachment or resignation of three federal judges.<sup>204</sup> Congressional leaders have cited these incidents in building support for inspector general legislation. In each case, the judiciary's discipline system, functioning properly, brought the problems to light and laid the groundwork for removal. There is no evidence that these incidents are representative of wider patterns of misconduct. However, the public has few points of contact with, or sources of information regarding, the inner workings of the federal judiciary. Because of widespread media coverage and congressional attention, these high-profile incidents have eroded public trust in the judiciary as an institution.

#### D. *Proposals for Reform*

The judiciary and Congress are both responsible for the current impasse regarding judicial conduct regulation, but the judiciary has far more to lose. Structural imbalances in interbranch relations limit the judiciary's ability to check self-interested congressional action while declining public confidence is undermining its independence. If the judiciary fails to take action and pushes the current standoff too far, Congress may withdraw the judiciary's power to self-regulate, fundamentally undermining judicial independence and triggering

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203. *Id.* at 117 (Winter, J., dissenting).

204. In October 2008, Chief Judge Nottingham of the District of Colorado resigned in the face of multiple complaints that, among other things, he lied under investigation, hired prostitutes, was frequently intoxicated in public, and violated court policy by viewing pornography on his court computer. *District Judge Nottingham Resigns, Apologizes*, DENV. POST, Dec. 2, 2008, [http://www.denverpost.com/news/ci\\_10777031](http://www.denverpost.com/news/ci_10777031); see *In re Nottingham*, Complaint Nos. 2007-10-372-36, 2007-10-372-45, 10-08-90089, 10-08-90090 (order dismissing complaints at 1-2) (10th Cir. Oct. 30, 2008), [http://howappealing.law.com/EWN\\_final\\_order.pdf](http://howappealing.law.com/EWN_final_order.pdf). In May 2009, District Judge Samuel Kent pled guilty to obstruction of justice for lying in an investigation regarding sexual abuse and misconduct. He was sentenced to thirty-three months in prison. After the House Judiciary Committee voted to impeach him, he resigned. See Brenda Sapino Jefferys, *Former Judge Samuel B. Kent Sentenced to 33 Months in Prison*, TEX. LAW., May 11, 2009; see also Martha Neil, *Federal Judge Samuel Kent Resigns, as Senate Impeachment Trial Looms*, A.B.A. J. (June 25, 2009), [http://www.abajournal.com/news/article/federal\\_judge\\_samuel\\_kent\\_resigns\\_as\\_senate\\_impeachment\\_trial\\_looms](http://www.abajournal.com/news/article/federal_judge_samuel_kent_resigns_as_senate_impeachment_trial_looms). In October 2010, District Judge Thomas Porteous was impeached and convicted by the Senate for lying under oath, filing a bankruptcy petition under a false name, hiding assets and gambling debts, and soliciting and accepting cash and other gifts from litigants and lawyers. See H.R. Rep. No. 111-427 (2009).



a constitutional crisis between branches. Fortunately, the history of judicial conduct regulation offers guidance for the path ahead. The judiciary can preserve its independence by eliminating its existing vulnerability to criticism and by weakening congressional momentum for reform. To do so, it should reenlist the support of the organized bar and institute a more participatory and transparent conduct regulation process.

### 1. Renewed Alliance with the Bar

In the early years of reform, alliance with the organized legal profession was politically convenient for the judiciary and provided resources for improving conduct regulation reform.<sup>205</sup> Since the 1980s, however, the Judicial Conference has taken the profession for granted—openly dismissing a role for bar input<sup>206</sup> while continuing to rely on bar support when Congress threatens to erode judicial independence.

Elsewhere I have described the dangers of excessive ABA influence in the states.<sup>207</sup> As the Judicial Conference's exclusion of the bar from conduct regula-

205. See *supra* Section I.B.

206. The chair of the Codes of Conduct Committee, in describing the recent Federal Code revision, described the Model Code as having limited relevance to the federal drafting process. See Lievens & Cohn, *supra* note 38, at 271. The truth of this statement was illustrated by the continuing divergence of the Federal Code and the ABA's Model Code. Compare CODE OF CONDUCT FOR U.S. JUDGES Canon (D)(5) & cmt. (encouraging judges to participate in all types of nonprofit organizations, prohibiting direct fundraising for any of them, and treating them all similarly for purposes of compensation, reimbursement, and financial reporting), with ABA Model Code Reporter's Explanation, R. 3.7, 3.13, at 42-43, 50 (2007) (explaining that "[t]his distinction between events and organizations that are or are not law-related is another theme that occurs throughout Canon 3"); compare ADMIN. OFFICE OF THE U.S. COURTS, 2 GUIDE TO JUDICIARY POLICY, pt C. § 620.35(b)(3) (prohibiting any judicial officer or employee from accepting gifts from anyone appearing before the court, including all lawyers), with Reporter's Explanation, R. 3.13(C)(3), 50 (2007) (viewing a previous ban on gifts and substantial invitations from lawyers appearing before a judge as "more stringent than necessary" and therefore allowing such gifts and invitations if reported), and MODEL CODE OF JUDICIAL CONDUCT, R. 3.13(B) (2007), and MODEL CODE OF JUDICIAL CONDUCT Canon 4D(5)(h) (1990) (granting a judge virtually unrestricted discretion to receive gifts and invitations from lawyers who do not appear before the judge). These and other differences may appear minor, but they reflect the diminished influence of the ABA and they allow for significantly less informal access by lawyers to judges. See Remus, *supra* note 15, at 139-42.

207. Remus, *supra* note 15, at 143-55. The ABA's self-interest in state judicial conduct regulation remains largely unchecked by state legislatures or judiciaries. This is not a problem in the federal system, where the ABA's interests have been checked by the existing engagement of the Judicial Conference and Congress, and by greater visibility. The ABA has therefore taken more responsible and publicly oriented positions in the federal system than in the states. For example, it advo-

tion arrangements shows, however, complete exclusion of the ABA can be equally problematic. The ABA's inclusion is important because the ABA can effectively check the interests of both Congress and the judiciary and can diffuse the current impasse between the two.

The bar is well-positioned to advocate limits on both the judiciary's exercise of its self-regulatory powers and Congress's attempts to encroach on judicial independence.<sup>208</sup> The bar is well versed in the court system. It is familiar with the interests of key stakeholders in the court system—litigants and lawyers—whose input is critical to the efficacy and legitimacy of judicial conduct regulation.<sup>209</sup> And notwithstanding its formal exclusion from the federal conduct regulation process, the ABA has continued to devote significant material resources to the study of existing arrangements and the formulation of proposals for change.

In other contexts, the ABA has been appropriately criticized for being insufficiently representative of the profession and for acting in a partisan manner.<sup>210</sup> In the context of judicial conduct regulation, however, the profession's interests are remarkably unified. The ABA has refrained from taking partisan positions and through fifty years of change in the composition of the federal

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cated a strict seminar attendance policy in the federal system, which would have prohibited attendance at virtually all privately funded seminars. In the states, it advocated a far more permissive policy, which left the decision to the discretion of judges and required limited disclosure. *Id.* While the drafters of the Model Code enabled state judiciaries and the bar to draw closer together through provisions encouraging frequent and informal bench-bar interactions, the federal drafters introduced new restrictions on interactions between judges and lawyers, building increased distance into the relationship between the federal judiciary and the bar. *Id.* Accordingly, in some respects, the Federal Code's divergence from the ABA Model Code is desirable. For example, the Federal Code's prohibition on judicial participation in any form of fundraising activities is far preferable to the Model Code's exceptions for bar-related activities, which appear self-interested. *Id.* at 142-43.

208. *Cf.* Carrington & Cramton, *supra* note 14, at 1108 (seeking to define a role for "citizen lawyers" in ensuring effective judicial accountability and independence).
209. *See* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 380 (2004); Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 421-22 (2000).
210. The practice of law is subject to great variation by practice area and location, and the ABA has been widely criticized for failing to capture that variation. *See* JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 3 (1982). The ABA has also been widely criticized for taking partisan positions on issues such as abortion, the death penalty, gay marriage, and even in its evaluation of judicial nominees. *See, e.g.*, Richard L. Vining, Amy Steigerwalt & Susan Navarro Smeicer, *Bias and the Bar: Evaluating the ABA Ratings of Federal Judicial Nominees* (SSRN Elec. Library, Working Paper No. 1,368,891, 2009), <http://ssrn.com/abstract=1368891>.

courts, the ABA has consistently demonstrated sensitivity to the distinction between measures that would improve judicial accountability and measures that would harm judicial independence.<sup>211</sup>

Moreover, the ABA has appeared to prioritize its civic interests over its private interests when addressing conduct regulation in the federal system. The ABA has engaged in sustained efforts to support and bolster judicial independence in the federal system, even in the absence of formal recognition by the federal judiciary and with little potential gain for itself or its members. This suggests that the ABA would not leverage a role in federal judicial conduct arrangements to promote problematic ties between the legal profession and the federal judiciary, as it has done in the states. Bar interests would be checked by the interests of Congress and the judiciary, and by the greater visibility of the federal system. The bar, in turn, could check the interests of both Congress and the judiciary.

## 2. Increased Participation and Transparency

As several commentators have observed, the insularity and secrecy of the judiciary's current conduct regulation system have given rise to problematic appearances. A significant step in bolstering the judiciary's current position would therefore be to implement a more participatory and transparent conduct regulation process. Doing so would increase judicial accountability in a way that increases public confidence and bolsters judicial independence.

Currently, the Judicial Conference's Committee on Codes of Conduct is comprised exclusively of federal judges, and its proceedings are largely closed

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211. The ABA has consistently proposed and supported judicial accountability and legitimacy measures that would increase efficacy in conduct regulation without infringing upon decisional independence, while consistently opposing measures that would erode the judiciary's institutional independence from Congress. For example, the ABA partnered with the Judicial Conference in the late 1960s to draft what would become the first Federal Code of Conduct, improving conduct regulation arrangements while preempting congressional interference. Although the ABA split with the judiciary in forwarding removal legislation through the 1970s, the ABA's proposals would have vested control over removal with the judiciary itself, arguably bolstering judicial autonomy. More recently, the ABA has been outspoken in opposing inspector general legislation, which it characterizes as an infringement on judicial decisional independence. ABA RECOMMENDATION NO. 308, *supra* note 182 (opposing any such legislation that requires the Chief Justice to consult with congressional leaders over the appointment of an Inspector General, confers on the Inspector General broad subpoena powers, or requires the Inspector General to report to Congress). The ABA has publicly applauded actions by the Judicial Conference to address particular problems by implementing automated conflicts checking software and a new policy on private seminar attendance. *See id.* (applauding the Judicial Conference's actions in response to congressional concerns and advocating increased informal interbranch communications and exchanges).

from view.<sup>212</sup> To increase participation and transparency, membership of the Committee should be broadened to include representatives from the public, the organized bar, and the academy. To ensure their independence and ability to counter judicial perspectives, these individuals should be designated by the groups they represent rather than being chosen by judicial leaders. Even if the views of nonjudicial members are ultimately rejected, deliberation and discussion would serve as an important check on abuses of judicial discretion.<sup>213</sup> In addition, the Committee should solicit feedback through public meetings and formal notice and comment periods, and it should offer reasoned public responses.

For many of these changes, the Judicial Conference's Committee on Rules of Practice and Procedure and advisory rulemaking committees offer useful guidance. The rulemaking committees include representatives from a variety of groups—federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice.<sup>214</sup> Their processes entail sustained deliberations and multiple efforts at transparency, including public meetings, detailed public committee records, public notice-and-comment periods, and reasoned responses.<sup>215</sup> Though not analogous in all respects, they offer useful examples of ways in which the Judicial Conference could implement a more collaborative process.

The Judicial Conference should also address the appearance of impropriety by limiting the extent of judicial discretion built into the current system, both in the definition of misconduct and in the imposition of sanctions.<sup>216</sup> The potential for abuse has been noted by commentators and by the ABA,<sup>217</sup> but lead-

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212. Although the committee invited public comments on a draft for the first time in 2007, it provided no public responses. See *Request for Public Comment on Proposed Revisions to Code of Conduct for United States Judges*, *supra* note 170, at 9.

213. Cf. Lobel, *supra* note 209, at 380.

214. ADMIN. OFFICE OF THE U.S. COURTS, *The Federal Rules of Practice and Procedure, A Summary for Bench and Bar* (Oct. 2011), <http://www.uscourts.gov/RulesAndPolicies/federalRulemaking/RulemakingProcess/SummaryBenchBar.aspx>.

215. See Cary Coliganese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process*, 77 GEO. WASH. L. REV. 924, 927-28 (2009) (discussing the instrumental value of transparency in government processes for facilitating meaningful public participation). One consistent criticism of the rulemaking process, of which designers of the conduct drafting process should remain aware, is that it favors some segments of the profession by excluding participation by other segments. This risk could be addressed through efforts to solicit comments from a variety of specialty bar associations and diverse segments of the profession.

216. See, e.g., Carrington & Cramton, *supra* note 14, at 1137-40; Rotunda, *supra* note 14, at 309.

217. See generally Bazelon, *supra* note 14 (detailing the amount of discretion afforded to judges in the judiciary's disciplinary system).

ers within the judiciary have been unresponsive to calls for change. When asked if the Federal Code is “simply advisory in nature for federal judges,” the chair of the Judicial Conference Committee on Codes of Conduct replied: “I wish you hadn’t used the word ‘simply.’ Essentially, yes.”<sup>218</sup>

To signal a commitment to enforceable standards of conduct, the Judicial Conference should accept the ABA’s repeated suggestions to articulate code provisions in mandatory rather than advisory terms and to define misconduct under the 1980 Act by reference to the Federal Code.<sup>219</sup> Given that the enforcement power will remain within the judiciary, this change will not sacrifice autonomy to Congress. It will, however, bolster legitimacy and improve institutional accountability. It will also constitute an important concession to the bar, signaling a willingness to work together on issues of conduct regulation.

Finally, the Judicial Conference could also reduce the extreme discretion inherent in current arrangements by defining misconduct to include a knowing failure to follow the procedures of the 1980 Act and the Judicial Conference’s implementing regulations. Based on the findings of the Breyer Commission and in an effort to address observed failures of chief judges and circuit councils to follow complaint procedures,<sup>220</sup> the Judicial Conference issued uniform implementing guidelines to be adopted in all circuits.<sup>221</sup> The frequency of these failures would be reduced, and institutional accountability increased, if intentional failure to follow the procedural rules were a form of misconduct subject to discipline. Already, the Judicial Conference has created a mechanism for review of a chief judge’s failure to appoint a special committee. But the need for review would be lessened if the consequences of a mistaken dismissal were not only reversal of the decision but a potential misconduct complaint.

The Judicial Conference can increase the efficacy and legitimacy of its conduct regulation arrangements by including and transparently balancing the interests of Congress, the judiciary, and the organized legal profession. By lessening the discretion at the core of these arrangements, the Conference can bolster

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218. Gordon J. Quist, *Giving Advice on Ethics is Seldom Simple*, THIRD BRANCH, June 2008, at 10.

219. *Impeaching Manuel L. Real, A Judge of the United States District Court for the Central District of California, for High Crimes and Misdemeanors: Hearing on H.R. 916 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Charles G. Geyh, Professor of Law, Indiana University).

220. BREYER REPORT, *supra* note 152, at 107. One of the most frequent problems was failure by a chief judge to appoint a special committee.

221. RULES FOR JUDICIAL CONDUCT, *supra* note 9, R. 1 cmt. (“Based on the findings of the Breyer Committee, the Judicial Conference Committee on Judicial Conduct and Disability concluded that there was a need for the Judicial Conference to exercise its power under Section 358 of the Act to fashion standards guiding the various officers and bodies who must exercise responsibility under the Act. To that end, the Judicial Conference Committee proposed rules that were based largely on Appendix E of the Breyer Committee Report and the Illustrative Rules.”).

public trust and confidence. These changes could reduce the incentives for members of Congress to pursue interventionist legislation. These changes could also draw attention away from institutional politics and back towards the efficacy of conduct regulation arrangements.

## CONCLUSION

Federal judicial conduct regulation has been, and is, about much more than simply ensuring that judges conduct themselves appropriately. The conduct reform movement began as a political crisis for the judiciary, threatening its autonomy from both Congress and the legal profession. The Judicial Conference then used conduct regulation strategically to expand the judiciary's institutional autonomy and to develop its institutional identity. When understood in context, judicial conduct regulation has lain at the heart of the institutional development of the judiciary. In less than fifty years, conduct regulation permitted the Judicial Conference to solidify its authority over individual federal judges, quieting internal dissent, to speak to Congress with a unified voice, and to develop as a profession separate from the legal profession.

Recently, high-profile misconduct has eroded judicial legitimacy and fueled new calls for reform, just as it did at previous points in the reform process. Now, however, Congress is attempting to use the political moment to bring the judiciary in line with the political preferences of Congress, bringing institutional politics to the forefront and further eroding judicial legitimacy in the process.

To counter this new and potentially dangerous approach by Congress, the judiciary should bolster its legitimacy by improving aspects of the conduct regulation system. Through a more transparent and participatory process, judicial conduct regulation can move from a point of conflict to a site of collaboration.