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ARTICLES

Secret Discipline in the Federal Courts—Democratic Values and Judicial Integrity at Stake

John P. Sahl

[S]urely, virtue is not the ruin of those who possess her, nor is justice destructive of a state . . . .1

INTRODUCTION

Americans, unlike citizens of other nations, are accustomed to a federal judiciary that plays an active governmental role.2 Since Marbury v. Madison,3 American courts have provided the ultimate

1 ARISTOTLE, POLITICS 145 (Benjamin Jowett trans., 1943).
2 See TWENTIETH CENTURY FUND TASK FORCE ON FEDERAL JUDICIAL RESPONSIBILITY, THE GOOD JUDGE 41-49 (1989) [hereinafter TWENTIETH CENTURY REPORT]. This report provides an excellent examination of a wide variety of public policy issues related to the federal judiciary. The ten-member Task Force consisted of distinguished judges, academics and political representatives and leaders.

Various writers have acknowledged the “centrality” of the act of judging in law. AARON BARAK, JUDICIAL DISCRETION 4 (Yadin Kaufmann trans., 1989); see, e.g., GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); ROBERT E. KEETON, VENTURING TO DO JUSTICE (1969); cf. PETER H. RUSSELL, THE JUDICIARY IN CANADA: THE THIRD BRANCH OF GOVERNMENT 3 (1987) (positing that “Canadians are not conditioned to think of [their] courts as part of the political system”); R.D. MULHOLLAND, INTRODUCTION TO THE NEW ZEALAND LEGAL SYSTEM 10-11 (1972) (“The legal system has been relegated to a subsidiary role. It is now left to solve these minor secondary problems which are, from either expediency or indolence, tossed to it from other quarters, or, on the other hand, to act as a final formal stamp for decisions which have been made elsewhere.”).

3 5 U.S. (1 Cranch) 137, 177 (1803) (asserting federal judiciary’s power to review
forum for the resolution of countless disputes, often making choices that Dean Guido Calabresi describes as tragic.\textsuperscript{4} Despite growing interest in alternative dispute resolution,\textsuperscript{5} the courts' political role is likely to become even more important in the future as paralysis grips the relationship between Congress and the Executive Branch.\textsuperscript{6} Moreover, the controversy concerning recent Supreme

the constitutionality of actions of Congress and the Executive; cf. Louis Fisher, \textit{One of the Guardians Some of the Time}, in \textit{IS THE SUPREME COURT THE GUARDIAN OF THE CONSTITUTION?} 85 (Robert A. Licht ed., 1993) (suggesting that \textit{Marbury v. Madison} is "more modest in scope. . . . It is just as accurate to say that it is emphatically the province and duty of the legislative department to say what the law is."). \textit{See generally} Bernard G. Segal, \textit{Federal Judicial Selection—Progress and the Promise of the Future}, 46 MASS. L.Q. 150-51 (1961) ("The final check on public acts, in our democratic system, is the vigorous expression of public opinion in behalf of worthy ideals. It is essential to our free society that the American people, lay and professional alike, hold the judgship in the highest esteem, that they regard it as the symbol of impartial, fair, and equal justice under [the] law." (emphasis added)).

4 GUIDO CALABRESI \& PHILIP BOBBIT, TRAGIC CHOICES 17-20, 75-76 (1978) (defining a tragic choice as the allocation of a scarce resource in society which inevitably denies some individual or segment of society the benefit of the same resource and noting that courts represent one method for such allocation); \textit{see also} TWENTIETH CENTURY REPORT, supra note 2, at 41-49.

5 \textit{See} ANTHONY T. KRONMAN, THE LOST LAWYER 317-18 (1993) (noting that even with the growth in alternative forms of resolution, the "judicial form . . . retain[s] the position of dominant importance . . . in our legal culture" because of the institutional prestige of the courts and the authority that judges exercise over decisionmakers in alternative dispute resolution).

6 This gridlock is poignantly reflected in the inability of the executive and legislative branches to resolve questions such as a woman's right to an abortion, the right to die, and national health care reform. \textit{See} Gwen Ifill, \textit{Clinton, Defending Health Plan, Attacks His Critics' Alternatives}, \textit{N.Y. TIMES}, Jan. 4, 1994, at A1 (casting opponents of his health bill as "obstructionists" with no real commitment to universal health coverage, President Clinton felt "his plan was in danger of being obscured by the rhetoric and the smoke and the process" (quoting President Clinton)). \textit{Compare} Charles Peters, \textit{Congress Is Back. Now, to Lay the Blame}, \textit{N.Y. TIMES}, Sept. 12, 1994, at A15 (criticizing Republican leaders for hypocritical obstructionism and causing governmental gridlock) \textit{with} Bob Dole, \textit{We'll Obstruct What Needs Obstructing}, \textit{N.Y. TIMES}, Sept. 12, 1994, at A15 (contending that principled opposition—and not partisan obstructionism—is basis for gridlock). \textit{See generally} Robert Pear, \textit{Gridlock, the Way It Used to Be}, \textit{N.Y. TIMES}, Oct. 9, 1994, at E4 (positing that the Founders of the Constitution invented the Senate, "in part, to slow things down and hold things back," and to act as a check on popular passions and the President—to promote gridlock).

Finding a solution to the current intergovernmental gridlock is further complicated by the fact that some experts believe that Congress is seemingly unwilling to address its own internal gridlock. Tape of Association of American Law Schools (AALS) Annual Meeting, Legislation Section Program, Unlocking Gridlock: Reform over Substance (Jan. 7, 1994) (discussing Congress' internal gridlock and suggesting that without real structural reform, for example, limiting the terms of committee chairpersons, there is little reason to believe Congress will become more responsive to public opinion) (on file with author); \textit{see also} TWENTIETH CENTURY REPORT, supra note 2, at 21, 41-46; \textit{id.} at 42 ("Today, citizens and institutions rely on the federal courts to decide matters primarily left to
Court nominations and the release of Justice Thurgood Marshall's papers suggests that the actions of the courts will be subjected to ever greater public scrutiny.

Most Americans, but by no means all, believe in the overall Congress or to the executive.

See, e.g., ALAN M. DERSHOWITZ, CONTRARY TO POPULAR OPINION 17-19 (1992) (noting the public "simply doesn't have a clue" about the process behind Judge David Souter's nomination and criticizing judicial selection processes as not sufficiently merit based); Adam Clymer, The High Court Is Not Everybody's Dream, N.Y. TIMES, Apr. 17, 1994, § 4, at E5 (United States Senator George J. Mitchell informs President that he is not interested in Supreme Court seat); Linda Greenhouse, A Choice That Few Are Likely to Oppose, N.Y. TIMES, May 14, 1994, § 1, at 10 (Judge Breyer had more bipartisan support on Capitol Hill than other potential nominees for the Supreme Court); see also Anita Hill, Thomas vs. Clinton, N.Y. TIMES, May 29, 1994, at E11 (discussing developments in public's understanding of sexual harassment in light of such charges against Judge Clarence Thomas following his nomination to the Supreme Court and those by Paula Corbin Jones pending against President Clinton). See generally TWENTIETH CENTURY REPORT, supra note 2, at 23 (stating that the issue of judicial conduct and the proper role of the federal judiciary as a whole "is unlikely to recede").

Public attention is focused regularly on all levels of our national judiciary. See, e.g., Neil A. Lewis, Unmaking the G.O.P. Court Legacy, N.Y. TIMES, Aug. 23, 1993, at A9 (noting that with nearly 130 vacancies, President Clinton has slowly started to change the makeup of the federal judiciary with the nomination of Judge Ruth Bader Ginsburg to Supreme Court); Anna Quindlen, Justice for Justice Barket, N.Y. TIMES, Feb. 16, 1994, at A19 (contending that conservative members of the Senate Judiciary Committee have "Thomased" or delayed for political reasons the confirmation of Florida Supreme Court Chief Justice Rosemary Barkett to the Court of Appeals for the Eleventh Circuit); see also Chicago Council of Lawyers, Evaluation of the United States Court of Appeals for the Seventh Circuit, 43 DePaul L. REV. 673, 675 (1994) [hereinafter Seventh Circuit Evaluation] (providing the public with the first detailed evaluation of the performance of a United States Court of Appeals by a bar association).


See, e.g., NATIONAL COMM'N ON JUDICIAL DISCIPLINE AND REMOVAL ("NCJDR"), REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 123 (1993) [hereinafter COMMISSION REPORT] ("The system of formal and informal approaches to problems of misconduct and disability within the federal judicial branch is working reasonably well. . . . The Commission is not aware of any [other system] that would . . . [accommodate the tension between the core constitutional values of judicial accountability and judicial independence] as well.").; Stephen B. Burbank, Politics and Progress in Imple-
integrity of the judiciary and the fundamental fairness of judicial adjudication.\textsuperscript{10} Many Americans perceive the courts not only as honorable and fair, but also as important guardians of property and person in an increasingly large, diverse, and often threatening society.\textsuperscript{11} When individual rights clash with majoritarian values or
governmental power, many Americans automatically respond by seeking redress in the courts. This basic trust is hardly based on intimate knowledge of the courts, whose workings are largely mysterious. The mystery no doubt reflects the complexity and subtlety of the law itself. Yet to some extent the mystery is the product of successful efforts by judges to shield their decision-making process from public view. Secrecy is arguably necessary in some parts of the process.

Consider, for example, the confidentiality of appellate deliberation, which facilitates frank and open discussion among the judges. Unless a judge writes a dissent or concurrence, the public is wholly unaware of the compromises that produced the "unanimous opinion."

This shroud of mystery surrounds not only the deliberative
process but also, in the main, the process that ensues when a federal judge is accused of misconduct. The investigation and the disposition of most cases are under the sole authority of the federal courts themselves, and the public is generally completely unaware of the proceeding's existence.  

Some courts and commentators contend that, because of the difficult nature of judging, confidentiality of judicial disciplinary proceedings is necessary to "shield[] judges from personal harassment and collateral attacks because of their rulings." Confidentiality thus safeguards the quality and independence of the judiciary.  

15 See Richard L. Marcus, Who Should Discipline Federal Judges, and How? 149 F.R.D. 375, 391 (1993) (reporting that the Act's process is shrouded in confidentiality and calling for a "careful assessment of issues of confidentiality," id. at 377); COMMISSION REPORT, supra note 8, at 103, 106 (1990 amendments to the Act left unresolved many disputed issues of confidentiality which have been broadly extended to cover initial stages of the process); infra Part III A; see also Geyh, supra note 8, at 309. Professor Geyh argues that the effectiveness of informal methods of judicial discipline, such as peer admonishment, depends largely on their confidential nature. Given the low number of formal complaints filed against judges, Professor Geyh notes that such confidentiality contributes to the public perception that the judiciary is exempt from discipline. Id. at 246. However, he further contends: "Nevertheless, evidence that informal discipline is administered regularly and effectively belies the assertion that the small number of complaints culminating in discipline under the Act translates into a significant volume of unaddressed incidents of judicial misconduct and disability." Id.  


This article, like Judge Edwards', uses the terms "secretive" and "confidential" interchangeably to describe a practice of concealing information from general knowledge. See American Heritage Dictionary of the English Language 151 (confidential), 663 (secretive) (1982).  

This article examines the arguments in favor of a confidential federal judicial discipline process and concludes that it threatens public trust in the judiciary. A more open process would be more conducive to accountability and would better serve the judiciary’s reputation and independence.

Part I briefly describes the decisions of the drafters of the United States Constitution on critical questions related to judicial discipline—questions of judicial independence and public accountability. The historical review informs the contemporary debate concerning the judiciary’s preference for confidentiality in disciplining its members.

Part II outlines the administration of the federal courts and the Judicial Councils Reform and Judicial Conduct and Disability Act ("Act") of 1980. The Act empowers the federal judiciary to engage in self-discipline.

Part III reviews several provisions of the Act that require confidentiality and the policy reasons traditionally advanced to support the provisions. The reasons are insufficient, especially in light of the experience of the United States Court of Appeals for the Fifth Circuit which, until recently, had a more open disciplinary process than that mandated by the Act.

Part IV proposes several amendments to the Act to open the disciplinary process to the public from the moment a complaint is filed. It also proposes that Congress amend the Act to permit the filing of complaints or the continuation of disciplinary proceedings against judges for a reasonable period of time after their resignation or retirement, and to permit amicus curiae participation.

The article concludes by briefly noting that although judges may prefer secrecy over openness and informality over formality on matters of internal discipline, the federal judiciary should nevertheless adopt Oregon’s approach to the lawyer disciplinary process. Oregon has opened that process to public review after the filing of a complaint. Oregon’s experience suggests by analogy that judicial independence and greater openness and public participation in the disciplinary process of federal judges are complimen-

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19 See Barr & Willging, supra note 7, at 131-33 (many circuits prefer informal resolution of allegations of misconduct); Geyh, supra note 8, at 246 (confidential and “informal disciplinary mechanisms are thriving”).
tary rather than mutually exclusive values. Congress should therefore adopt the amendments proposed in Part IV, thereby increasing judicial openness and accountability to the public.

I. JUDICIAL INDEPENDENCE, IMPEACHMENT AND THE CONSTITUTION

As many commentators have observed, the drafters of the Constitution sought to balance power among the executive, legislative, and judicial branches of the federal government. Specifically concerned about the potential for governmental abuse in the executive and legislative branches, they devoted most of their five months of deliberation during the Constitutional Convention to a discussion of those branches. However, Alexander Hamilton and other delegates were keenly aware of the importance of a strong and independent judiciary. The history of the judiciary in England as well as in the American colonies shaped their perception that the judicial branch was a necessary check on the broad powers granted to the executive and legislative branches.


21 See Burt, supra note 20, at 56.

22 Alexander Hamilton believed that an independent judiciary would be an "excellent barrier to the encroachments and oppression of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws." The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) [hereinafter Federalist No. 78]; see also Edward D. Re, Judicial Independence and Accountability: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 8 N. Ky. L. Rev. 221, 223 (1981) ("[I]t may be said that without judicial independence, no judge or justice, however well-prepared by qualities of heart, mind and personal training, can give full effect to the enduring values enshrined in our Bill of Rights."). See generally Burt, supra note 20, at 4 ("[Alexander] Hamilton's... conception of judicial supremacy has been [pre]dominant in our constitutional jurisprudence.").

23 See Raoul Berger, Impeachment: The Constitutional Problems 54 (1973) ("To understand what the Framers had in mind we must begin with English law, for nowhere did they more evidently take off from that law than in drafting the impeachment provisions."); see also John D. Feerick, Impeaching Federal Judges: A Study of the Constitutional Provisions, 39 Fordham L. Rev. 1, 15 (1970) ("The debates at the Constitutional Convention [in] 1787 clearly reveal that the delegates were familiar with colonial charters, early state constitutions, and common law traditions and precedents, and were knowledgeable in the various forms of government. This background particularly influenced them in formulating the impeachment provisions of the Constitution.").

24 Federalist No. 78, supra note 22.
Absent that check, "public happiness, personal liberty, and private property" would be at risk.25

The drafters viewed the judiciary as the weakest of the three branches of government.26 They sought to safeguard judicial independence in Article III by granting judges life tenure27 "during good behavior"28 and by prohibiting any reduction in their salaries.29

Additional protection for judicial independence is arguably found in Article II, Section 4 of the Constitution which contains the only express provision dealing with official misconduct: "The President, Vice President and all Civil Officers of the United States, shall be removed from office on Impeachment for, and Conviction of, Treason, Bribery or other high Crimes and Misde-

25 4 THE FOUNDERS' CONSTITUTION 139 (Philip B. Kurland & Ralph Lerner eds., 1987).

26 FEDERALIST No. 78, supra note 22, at 465-66 (asserting that the "judiciary is ... the weakest of the three departments [of government]"); see BURT, supra note 20, at 54. See generally MULHOLLAND, supra note 2, at 26 (presenting evidence that courts are weak in comparison to other governmental bodies in other countries). R.D. Mulholland writes:

[Courts] do not have the power base to rest upon which is available to many other bodies. In the ultimate[,] their position rests simply upon the respect that is accorded them by society in general . . . . It is not uncommon these days to find that immediately [after] a Court gives a decision somebody, possibly even the Government, will take action to negate the decision.

Id. at 27 FEDERALIST No. 78, at 487 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888)

Alexander Hamilton noted:

If, then, the courts of justice are to be considered as bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in judges which must be essential to the faithful performance of so arduous a duty.


29 "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1; see Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. REV. 205, 235 (1985) ("By virtue of their tenure and salary guarantees, Article III judges are constitutionally assured the structural independence to interpret and pronounce the law impartially."). See generally RUSSELL R. WHEELER & A. LEO LEVIN, FEDERAL JUDICIAL CENTER, JUDICIAL DISCIPLINE AND REMOVAL IN THE UNITED STATES (Vincenzo Vigorito ed., 1979) (providing an early and comprehensive discussion concerning judicial discipline and removal).
meanors." Judges are generally considered "Civil Officers" and thus subject to removal by impeachment. The House of Representatives has the "sole power of Impeachment" and proceeds like a grand jury. After receiving Articles of Impeachment from the House, the Senate has the "sole power to try all impeachments."

Scholars have, however, debated vigorously the issue of whether impeachment under Article II, Section 4 is the only constitutionally permissible method of judicial discipline. Participants in this debate fall generally into two camps. One group contends that the Framers intentionally established impeachment as the sole means of removing and disciplining judges. This contention finds a firm foundation in the discussion of the Constitutional

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32 See Catz, supra note 28, at 856.

33 Id.

34 Id.

35 For a sample of the publications favoring the Act's constitutionality, see Carol T. Rieger, The Judicial Councils Reform and Judicial Conduct and Disability Act: Will Judges Judge Judges?, 37 EMORY L.J. 45, 57 (1989); Shane, supra note 11, at 209-10; see also Patrick D. McCalla, Judicial Disciplining of Federal Judges is Constitutional, 62 S. CAL. L. REV. 1263, 1288-89 (1989) (the only unconstitutional provisions of the Act would be suspending a judge's calendar or removing a judge from office; the latter provision has been largely eliminated). Some works criticizing the constitutionality of the Act include: Abrams, supra note 20, at 100; Baker, supra note 30, at 1118; cf. Interview with Akhil Reed Amar, Professor of Law, Yale Law School (June 17, 1994) (judges have no vested constitutional right to their docket or calendar because the Constitution only protects a judge from having his salary or compensation reduced).

36 Abrams, supra note 20, at 95 ("The Framers [of the Constitution] mandated life tenure for judges, subject to impeachment for great offenses, precisely to reduce the potential of corruption inherent in extensive public accountability."); see Baker, supra note 30, at 1139-40. See generally Grimes, supra note 30, at 1254 ("Impeachment is an important safeguard for judicial independence because it involves the Congress in a removal process that may occasionally be inspired by vengeful or self-promoting prosecutors or the parochial politics of the judiciary.").
Convention delegates. Its proponents argue that the cumbersome impeachment process safeguards judicial independence by protecting judges from political and other external pressures. Realistically, lines of "neat distinction between political and disciplinary responsibility" cannot be drawn, and the consequences of error are not worth the risk of "chilling judicial independence."

The opposing camp argues that the Framers never intended impeachment to be the sole method of judicial discipline. Professor Raoul Berger, for example, writes that the "good behavior" clause was employed to guard against legislative and executive tampering with the judiciary, not to insulate judges from removal when they misbehaved. Similarly, Professor Akhil Amar reads the impeachment provisions as "providing a political mechanism for punishing judges that supplements, but does not supplant, the ordinary modes of criminal punishment." This view is supported

37 See Philip Kurland, The Constitution and the Tenure of Federal Judges: Some Notes from History, 36 U. CHI. L. REV. 665, 668 (1969); Martha A. Ziskind, Judicial Tenure in the American Constitution: English and American Precedents, 1969 SUP. CT., REV. 135, 152; see also Abrams, supra note 20, at 75 (debates at Constitutional Convention "strongly suggest that 'good Behavior' was intended to describe life tenure subject to impeachment, and was not intended as a separate standard of conduct authorizing removal or discipline by a means other than impeachment"); Edwards, supra note 16, at 774-77 (arguing impeachment is the only constitutional method to remove judge and that the "good behavior" clause permits discipline by nonimpeachment methods providing removal is not an option).

38 TWENTIETH CENTURY REPORT, supra note 2, at 65; see Abrams, supra note 20, at 83, 84 n.160 (The House has initiated over 50 impeachment investigations and has issued Articles of Impeachment against 15 officials. Thirteen of those officials have been judges and seven of them have been convicted and removed.); see also Grimes, supra note 30, at 1214 n.32; JOSEPH BORKIN, THE CORRUPT JUDGE 219-58 (1962).

39 See Irving R. Kaufman, Chilling Judicial Independence, 88 YALE L.J. 681, 715 (1979) (barring impeachment, judiciary's freedom from political accountability enhances democracy because it can check abuses by other branches); see also CAPPELLETTI, supra note 12, at 107. History supports the notion that political accountability for the courts is sometimes used as an instrument for judicial repression and oppression. Id. at 106 n.215 (citing a national report by Augusto M. Morello et al. submitted to the Eleventh International Congress of the Academy of Comparative Law, "concerning the recurrence since 1930 in Argentina . . . 'una depuraci6n des los quadros del Poder Judicial', with the removal of those judges who are not submissive to the regime").

40 See BERGER, supra note 23, at 165. Professor Berger further writes: "Judicial independence, in short, rises no higher than the 'good behavior' tenure in which it is expressed. And the separation of powers only guarantees, it does not alter, the tenure secured by 'good behavior'; much less does it exclude the judiciary from removing a judge who has misbehaved." Id.; see also Grimes, supra note 30, at 1255 (Act offers vehicle for disciplining judges, except in case of removal where impeachment process is preferable but requires reform).

41 Akhil Reed Amar, On Judicial Impeachment and Its Alternatives—Remarks Prepared for the National Commission on Judicial Discipline and Removal 4-5 (Dec. 18,
by considerable evidence from the founding and ante-bellum eras.\textsuperscript{42} Amar also notes that writs of mandamus and appellate review are traditional mechanisms for regulating judicial behavior, which further suggests that the Framers never intended impeachment to be the sole method of regulating judicial conduct.\textsuperscript{43}

Members of this camp also contend that impeachment is too cumbersome to be an effective mechanism for disciplining judges.\textsuperscript{44} They cite the decline in House impeachment investigations as strong evidence of this point.\textsuperscript{45} The recent Senate impeachments and removals of Federal District Court Judges Harry Claiborne,\textsuperscript{46} Alcee Hastings,\textsuperscript{47} and Walter Nixon\textsuperscript{48} support this

\begin{table}[h]
\begin{tabular}{|c|c|c|c|}
\hline
Periods & Impeachment Investigations & Judgeships (at 26th year) & Investigations to Judgeships \\
\hline
1790-1839 & 17 & 28 (1815) & .61 \\
1840-1889 & 12 & 63 (1865) & .19 \\
1890-1939 & 23 & 146 (1915) & .16 \\
1940-1989 & 7 & 407 (1965) & .02 \\
\hline
\end{tabular}
\end{table}

\textit{Id.}; see also Van Tassel, \textit{supra} note 30, at 336 n.14 (since 1789 Congress has impeached only 13 judges and removed only 7; in the 1930s Congress increasingly relied on Justice Department investigations or other pressure to remove misbehaving judges).
argument because they were expensive, time-consuming and politically unsettling for the legislative branch as well as for the judiciary. One commentator estimates that in Judge Hastings's case, the cost of the investigation by the Court of Appeals for the Eleventh Circuit and the House exceeded $2 million.

E. CLAIBORNE, S. Doc. No. 48, 99th Cong., 2d Sess. 289-97 (1986); see Claiborne v. Burger, 790 F.2d 1355 (9th Cir. 1986); United States v. Claiborne, 727 F.2d 842 (9th Cir.), cert. denied, 469 U.S. 829 (1984). See generally, Judge Aguilar Found Guilty on 2 Charges, L.A. TIMES, Aug. 23, 1990, at A1, A2 (suggesting that another impeachment may occur with U.S. District Judge Robert Aguilar's conviction and noting that impeachment by the House of Representatives and conviction by the Senate "could take months, even years.").


49 For a more detailed description of the time and cost involved in the impeachment proceedings of Judge Claiborne and Judge Hastings, see Grimes, supra note 30, at 1224-25. The Hastings impeachment was more complicated than the Claiborne impeachment and consisted of a two-year House investigation involving nine Judiciary Committee employees, five of whom were lawyers. The Hastings impeachment produced a House record of 4800 pages. Id. at 1225 n.91. After reassigning employees and making substantial additions to the staff for the Hastings trial, 55 witnesses testified over the course of 18 days before the 12 member Senate Trial Committee, producing a record of 6000 pages. The Trial Committee also devoted considerable time to pretrial matters, ruling on various discovery motions and issuing seven pretrial orders. Of course, substantial money was spent on all parties' legal fees.

The House investigation and impeachment process is lengthy compared to the average Senate trial, which takes between 16 days and 6 weeks. TWENTIETH CENTURY REPORT, supra note 2, at 65. The combined impeachment proceedings of both the House and Senate take anywhere from six months to as long as two and one-half years for completion as in the Hastings case. Grimes, supra note 30, at 1226.

50 Many Members of Congress and the public were troubled by the fact that Judges Nixon and Claiborne, who were convicted of felonies, continued to receive full salary and benefits until they were finally removed through the impeachment process. COMMISSION REPORT, supra note 8, at i; see also Dan Morain, Judge Sentenced for Aiding Mobster, L.A. TIMES, Nov. 2, 1990, at A3. This article reports that "until Congress impeaches [U.S. District Judge Robert Aguilar], which is the only way to oust him from what is otherwise a lifetime position" he will continue to draw his $97,570 salary. Judge Robert Aguilar "became only the third federal judge sentenced to a federal prison" and the first from California. He was sentenced to 6 months in prison plus a $2,100 fine and 1,000 hours of community service for obstructing justice. The other two judges are Walter Nixon of Mississippi, sentenced to five years imprisonment in 1986 for perjury and Harry Claiborne of Nevada, sentenced to 18 months imprisonment in 1984 for income tax evasion.

51 Grimes, supra note 30, at 1225 n.90.
The perceived costs and delays of recent impeachments perhaps explain why the impeachment process had not been used since 1936.\textsuperscript{52} Moreover, Congress believed that future judicial misconduct was likely, due to the ever-increasing number of judges.\textsuperscript{53} Thus, in the late 1970s Congress sought a legislative alternative to impeachment to ensure greater public accountability by judges and to ease the burdens on the House and the Senate by facilitating development of a record in impeachment cases.\textsuperscript{54} The legislation was likely to be evaluated in light of the ongoing debate about whether impeachment is the exclusive constitutional method to remove and discipline judges. This debate is symptomatic of a much more profound and fundamental tension: the need for a judiciary that is both independent and publicly accountable.\textsuperscript{55} Looming like a large cloud, this constitutional debate promises to cast a shadow over discussions about specific disciplinary provisions, such as the Act's requirement of confidentiality.\textsuperscript{56} Although a complete discussion of the Act's constitutional validity as a means of judicial self-regulation is beyond the scope of this article, it is important to note that several federal courts and scholars believe the Act is constitutional.\textsuperscript{57}

\textsuperscript{52} COMMISSION REPORT, supra note 8, at 4-5.

\textsuperscript{53} Id. at 4. To a limited extent, this belief is supported by the recent felony convictions of Judge Robert P. Aguilar of the Northern District of California in 1990 and of Robert F. Collins in the Eastern District of Louisiana in 1991. For a good discussion of these two cases and the three impeachments in the 1980s see Todd D. Peterson, The Role of the Executive Branch in the Discipline and Removal of Federal Judges, in I RESEARCH PAPERS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 243, 266-75 (1993) [hereinafter RESEARCH PAPERS].

\textsuperscript{54} COMMISSION REPORT, supra note 8, at 4.

\textsuperscript{55} BERGER, supra note 23; see also Kurland, supra note 37, where the author states: It should be kept in mind that the provisions for securing the independence of the judiciary were not created for the benefit of the judges, but for the benefit of the judged. It is not in the keeping of the judges to surrender this independence under pressure or voluntarily to give it away. Judicial independence is held in trust for the people and only they should determine whether they would like to exchange some judicial independence for more judicial efficiency.

\textsuperscript{56} Id. at 698 (emphasis added).

\textsuperscript{57} Hastings v. Judicial Conference of the United States, 829 F.2d 91 (D.C. Cir. 1987), cert. denied, 485 U.S. 1014 (1988); see COMMISSION REPORT, supra note 8, at 14-17; Shane, supra note 11, at 240-42. In addition, the recent amendment limiting the "removal" of judges to congressional impeachment has rendered the Act less vulnerable to the charge of unconstitutionality. See id. at 239; Judicial Misconduct, supra note 12, at 1088.
II. JUDICIAL ADMINISTRATION AND THE CONGRESSIONAL MANDATE FOR JUDICIAL SELF-REGULATION: THE JUDICIAL COUNCILS REFORM AND JUDICIAL CONDUCT AND DISABILITY ACT OF 1980 IN A NUTSHELL

A. Judicial Administration

The Judicial Conference of the United States and the judicial council in each of the twelve federal circuits have primary responsibility for the administration of the modern judicial bureaucracy. These administrative bodies will largely determine the success of any judicial self-regulatory regime established by Congress. The Judicial Conference, which meets annually, oversees the operation of the entire judiciary. The Chief Justice of the Supreme Court chairs the Conference, which consists of all of the chief circuit judges and one district judge from each circuit chosen by that circuit's district and circuit judges.

The judicial council is the central governing body within each circuit and is statutorily empowered to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." The chief circuit judge presides over the council, which meets at least twice a year and is comprised of an equal number of circuit and district judges. Council members serve for limited terms which are determined by the majority vote of all active judges in the circuit.

59 Baker, supra note 30, at 1118.
60 See generally TWENTIETH CENTURY REPORT, supra note 2, at 44 (In light of the courts' lack of administrative expertise, "[t]he capacity—and the right—of the judiciary to govern is open to debate." (citing Stanley C. Brubaker, From Incompetent Imperialism to Principled Prudence: The Role of the Courts in Restoring "the State," 10 HASTINGS CONST. L.Q. 81, 89-95 (1982))).
61 28 U.S.C. § 331 (the Chief Justice may call special sessions of the Conference); see Baker, supra note 30, at 1118-19.
62 28 U.S.C. § 331. The district judge is elected at the annual judicial conference of each circuit which meets to advise the chief judge of each circuit of "means of improving the administration of justice within such circuit." Id. § 333; see Baker, supra note 30, at 1118-19 nn.16-17.
63 28 U.S.C. § 332(d)(1); see Barr & Willging, supra note 7, at 33 n.17.
64 28 U.S.C. § 332(a)(1); see Barr & Willging, supra note 7, at 33 n.17.
65 28 U.S.C. § 332(a)(2); see Baker, supra note 30, at 1119.
B. Judicial Discipline and Administration Before the Act

Before Congress promulgated the Act in 1980, impeachment and removal was the only formal process for disciplining federal judges.\(^{66}\) Other constraints—individual and institutional, formal and informal—have traditionally operated as a check, short of discipline, on judicial misbehavior.\(^{67}\) For example, judges are subject to the criminal process and to the system of appellate review, which permits courts to address some forms of misconduct and correct some errors.\(^{68}\) Prior to the Act's passage, the chief judge of the circuit resolved most complaints about federal judges informally and secretly.\(^{69}\) In the absence of formal disciplinary mechanisms, peer influence played a key role in deterring misconduct or preventing its recurrence.\(^{70}\)

During the early 1900s, judges of each circuit began meeting annually and informally to facilitate communication among the various levels of an increasingly large judicial bureaucracy.\(^{71}\) In 1922, Congress established the Judicial Conference, which "added an in-house dimension to judicial administration."\(^{72}\) Yet both the Attorney General of the United States and the Department of Jus-

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\(^{66}\) See Geyh, supra note 8, at 243; see also TWENTIETH CENTURY REPORT, supra note 2, at 4 (prior to the Act, the "major mechanisms for monitoring and sanctioning federal judges" included impeachment and judicial socialization).

\(^{67}\) COMMISSION REPORT, supra note 8, at 1-3. For over 200 years, "various mechanisms have evolved to ensure the responsibility of individual judges and of the federal judiciary as a whole. These include the appointment process, judicial socialization, ethical restraint, recusal and disqualification, precedent, legal doctrines, individual liability, review of judicial decisions, and congressional oversight under the Constitution and by statute." TWENTIETH CENTURY REPORT, supra note 2, at 51; see also Beth Nolan, The Role of Judicial Ethics in the Discipline and Removal of Federal Judges, in I RESEARCH PAPERS, supra note 53, at 867-934 (discussing the role of judicial ethics in the regulation of judicial conduct).

\(^{68}\) COMMISSION REPORT, supra note 8, at 2 ("Although rarely invoked against sitting federal judges until recently, the criminal process has always been available, and its threat, sometimes in combination with an impeachment investigation, has induced a number of corrupt judges to resign.").

\(^{69}\) Abrams, supra note 20, at 94-95; see also Stephen B. Burbank, Alternative Career Resolution: An Essay on the Removal of Federal Judges, 76 Ky. L.J. 643, 656 (1988) (noting that before the Act probably "collegial or hierarchical suasion was the most common and effective supplement to the impeachment process").

\(^{70}\) COMMISSION REPORT, supra note 8, at 2; see also Geyh, supra note 8, at 243, 245, 258 (indicating that some private and informal disciplinary mechanisms, such as peer pressure, that existed before the Act are still "thriving").

\(^{71}\) See Baker, supra note 30, at 1120.

tice still primarily controlled the administration of the courts.\textsuperscript{75}

The Administrative Office Act of 1939 institutionalized the informal intercircuit meetings of judges and officially established judicial councils\textsuperscript{74} in each circuit to transfer the administration of federal courts from the Department of Justice to the judiciary.\textsuperscript{75} Only circuit judges are members of these administrative bodies.\textsuperscript{76} The Administrative Office Act of 1939 authorized the councils to take such "action . . . as may be necessary" to ensure "that the work of the district courts shall be effectively and expeditiously transacted."\textsuperscript{77} Congress amended this charge in 1948 to require the councils to "make all necessary orders for the effective and expeditious administration of the business of the courts."\textsuperscript{78} The councils broadly construed this language to empower them to take any action necessary to maintain public confidence in the federal courts, including regulating judges' behavior.\textsuperscript{79} Thus, the councils attempted to resolve complaints about judicial misconduct effi-

\textsuperscript{75} See Baker, supra note 30, at 1120 n.23.


\textsuperscript{75} See Marcus, supra note 15, at 375 (noting that except for impeachment, the discipline of federal judges was part of the general administrative responsibilities of the judicial councils under 28 U.S.C. § 332, adopted in 1939). See generally PETER G. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 40-165 (1979) (attributing the 1939 Act to: the 1936 impeachment trial of District Judge Halsted Ritter, a campaign by the Courts of Appeals for the Second and Fifth Circuits to separate appellate court funding from the Department of Justice; and Chief Justice Charles Evans Hughes's proposal to decentralize judicial administration by creating a supervisory council in each circuit, in part to improve the regulation of judicial misconduct, delay and disability).

\textsuperscript{76} See 28 U.S.C. § 332(a)(1). Given the hierarchial character of the federal judiciary, district judges and others have struggled to increase their representation on both the councils and the Judicial Conference. See Geyh, supra note 8, at 260 n.63. In 1980, the council membership of circuit judges was broadened to include a minimum of two or three district judges, depending on the size of the circuit's council. 28 U.S.C. § 332(a)(10)(C)(i)-(ii) (1988). Currently an equal number of circuit and district judges serve on each council with the total number of council members determined by a vote of all active judges in a circuit. See supra text accompanying notes 61-63.

\textsuperscript{77} See Baker, supra note 30, at 1120-21 (quoting Administrative Office Act ch. 501, § 306, 53 Stat. 1223, 1224 (codified as amended at 28 U.S.C. § 332 (1982))); see also Geyh, supra note 8, at 261 (noting that the broad powers of the council provide for an effective and efficient judicial administration under the 1939 Act).


\textsuperscript{79} See Baker, supra note 30, at 1121; Geyh, supra note 8, at 260, 262.
ciently and fairly.\textsuperscript{80}

Although the councils were confronted with a full "gamut of problematic behavior" during the period between the Administrative Office Act of 1939 and the Act's adoption in 1980,\textsuperscript{81} they rarely issued orders dealing with misconduct.\textsuperscript{82} Instead, council orders addressed judicial behavior involving judicial inaction or delay.\textsuperscript{83} This paucity of orders regarding misconduct resulted from the perception that those orders threatened judicial independence, that the legislation creating the councils provided insufficient guidance regarding the scope of the orders, and that some chief judges were insufficiently interested in administration to encourage orders.\textsuperscript{84}

In addition, the Supreme Court's decision in \textit{Chandler v. Judicial Council of the Tenth Circuit} left in doubt the councils' power to discipline Article III judges and raised concerns about the independence of individual judges.\textsuperscript{85} In \textit{Chandler}, the Tenth Circuit's council disciplined a circuit judge by eliminating his docket, an action which effectively removed him from office.\textsuperscript{86} The Supreme Court declined to rule on the constitutionality of the Administrative Office Act of 1939 and the Tenth Circuit's disciplinary actions, holding that Judge Chandler had waived any constitutional claims when he voluntarily acquiesced in his sanction.\textsuperscript{87} Moreover, although the Court "recognized the validity of limited judicial management authority,"\textsuperscript{88} it cautioned that such authority to intervene in a judge's affairs is circumscribed by "the constitutional requirement of judicial independence."\textsuperscript{89} The \textit{Chandler} ruling provided little inspiration for councils to issue orders disciplining judges.\textsuperscript{90}

\textsuperscript{80} See Geyh, \textit{supra} note 8, at 263-64.
\textsuperscript{81} Id. at 264.
\textsuperscript{82} For a good discussion of judicial misconduct and the councils' activities during this period, see \textit{id}. at 263-71; \textit{see also} Fish, \textit{supra} note 75, at 418 (noting that "[f]ormal orders from the council to a . . . judge are, however, very much the exception").
\textsuperscript{83} See Geyh, \textit{supra} note 8, at 263-71.
\textsuperscript{84} Id. at 265-67.
\textsuperscript{85} 398 U.S. 74 (1970); \textit{see Commission Report, supra} note 8, at 2-3; Burbank, \textit{supra} note 69, at 655. For a discussion of \textit{Chandler}, see Gerhardt, \textit{supra} note 30, at 70-73.
\textsuperscript{86} See Baker, \textit{supra} note 30, at 1121.
\textsuperscript{87} Chandler, 398 U.S. at 80-81; \textit{see} Baker, \textit{supra} note 30, at 1121-22.
\textsuperscript{88} Abrams, \textit{supra} note 20, at 93.
\textsuperscript{89} Id. (quoting Chandler, 398 U.S. at 85).
\textsuperscript{90} In his dissent, Justice Douglas wrote, "there is no power under our Constitution for one group of federal judges to censor or discipline any federal judge and no power to declare him inefficient and strip him of his power to act as a judge." \textit{Chandler}, 398 U.S. 74, 137 (1970) (Douglas, J., dissenting); see Geyh, \textit{supra} note 8, at 270 (noting that \textit{Chandler} did not resolve the still open question of whether an aggrieved judge can obtain
After *Chandler*, and in the wake of Watergate, members of Congress again sought to enact formal disciplinary mechanisms for the federal judiciary similar to those that some states had adopted.\(^9\) Attempting to respond to changing societal expectations and to avert legislation, the judiciary adopted the Code of Conduct for the United States Judges in 1973. Additionally, the judiciary followed the Judicial Conference's recommendation that circuit councils adopt rules to provide a disciplinary mechanism within the judiciary.\(^9\) Nevertheless, Congress determined that legislation was necessary because *Chandler* left in doubt the power of the councils to engage in effective self-regulation and raised concerns regarding the independence of individual judges.\(^9\) Legislators were aware of dissatisfaction with the constitutional provisions for the removal of judges.\(^9\) They were also cognizant of the concern that a significant amount of judicial misconduct and disability was being ignored and of the inadequacies in some of the councils' procedural rules.\(^9\)

**C. The Act in a Nutshell**

The Act was the result of compromises both within Congress and between Congress and the federal judiciary.\(^9\) Congress adopted the Act principally to assure public accountability but also to provide a formal and effective supplement to the impeachment process for resolving complaints of misconduct or disability.\(^9\) The judiciary expressed its concern that any such supplement "not prove to be a cure worse than the disease."\(^9\) "[B]elieving that judicial review of a council's order or whether the councils can petition the courts for a writ of mandamus to compel judges to comply with its orders)."

\(^{91}\) COMMISSION REPORT, *supra* note 8, at 3; *see* Marcus, *supra* note 15, at 375.

\(^{92}\) COMMISSION REPORT, *supra* note 8, at 3.

\(^{93}\) Id.

\(^{94}\) *See* Burbank, *supra* note 69, at 644-45.

\(^{95}\) COMMISSION REPORT, *supra* note 8, at 3; Geyh, *supra* note 8, at 243.


\(^{98}\) COMMISSION REPORT, *supra* note 8, at 4.
misconduct was not widespread, and sensitive to [the need for] both institutional and individual judicial independence," Congress passed the Act—"a charter for [judicial] self-regulation" modeled on one that judges had devised. Thus, the Act reflects an administrative rather than punitive orientation towards judicial discipline and leaves the judicial circuit councils with primary responsibility for judicial discipline. Nevertheless, Congress and others regarded the Act as an experiment that would require vigorous congressional oversight.

For the first time, the Act provides the judiciary with a formal process for internally handling complaints about judicial behavior. It establishes specific procedures for circuit judicial councils and the Judicial Conference to follow when disciplining Article III judges. Although Congress enacted the measure in 1980, both the Act's constitutionality and the efficacy of some of its provisions remain fertile ground for commentary. Congress amended the Act in 1988 and 1990, and two major studies have evaluated it.

The Act's goal and substantive conduct standard is simple and far reaching: promoting the "effective and expeditious administration of the business of the courts." In Hastings v. Judicial Conference of the United States, the Court of Appeals for the Eleventh Circuit rejected a claim by Federal District Judge Alcee Hastings that the Act's goal created a standard of judicial conduct that was unconstitutionally overbroad. The court concluded that the Act was directed primarily against judicial misconduct and decided that

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99 Id.
100 See Marcus, supra note 15, at 375.
101 COMMISSION REPORT, supra note 8, at 4.
102 28 U.S.C. § 372(c); see Marcus, supra note 15, at 375.
103 See, e.g., Anthony D'Amato, Self-Regulation of Judicial Misconduct Could Be Mis-Regulation, 89 MICH. L. REV. 609 (1990); Edwards, supra note 16; see Marcus, supra note 15, at 376 (There are "various assertions about whether the judiciary has taken a serious approach to . . . self-discipline imposed by the Act.").
104 In 1989, the Twentieth Century Fund Task Force prepared the first study, entitled The Good Judge. The Twentieth Century Fund is a not-for-profit and nonpartisan research foundation providing analysis of economic, political and social issues. See TWENTIETH CENTURY REPORT, supra note 2. Congress authorized the second study in 1990 to "study problems and issues involved in the tenure (including discipline and removal) of our Article III judges." Pub. L. No. 101-650, § 410, 104 Stat. 5122 (1990) (requiring a report that would identify problems regarding discipline and removal and that would "evaluate the advisability of proposing alternatives to current arrangements"). See COMMISSION REPORT, supra note 8, at 115 (discussing amendments).
105 28 U.S.C. § 372(c)(1); see COMMISSION REPORT, supra note 8, at 94.
106 829 F.2d 91, 105 (D.C. Cir. 1987) (recommending impeachment after combining investigatory and adjudicatory functions under Act is constitutional).
it was closely enough tailored to the end of preventing misconduct to avoid a violation of the First Amendment. In 1986, a special committee of the Conference of Chief Judges indicated that “misconduct” under the Act included the “use of the judge’s office to obtain special treatment for friends and relatives, acceptance of bribes, improperly engaging in discussions with lawyers or parties to cases in the absence of representatives of opposing parties, and other abuses of judicial office.”

The Act prescribes in general terms the process for the filing and initial processing of a complaint. The Act expressly required that the rules of each circuit judicial council provide procedural protection for judges and complainants, and that the rules be a matter of public record. In addition, it was clear from the Act’s background and legislative history that Congress expected the judicial councils in each circuit to revise their existing codes of conduct.


108 SPECIAL COMM. OF THE CONFERENCE OF CHIEF JUDGES OF THE U.S. COURTS OF APPEALS, ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY WITH COMMENTARY Rule 1(b) (Federal Judicial Center 1986) [hereinafter ILLUSTRATIVE RULES]; see infra notes 108-12 and accompanying text (discussing the Illustrative Rules); see also Burbank, *supra* note 8, at 23; D’Amato, *supra* note 103, at 618. See generally Abrams, *supra* note 20, at 80-100 (arguing that for purposes of holding federal judges publicly accountable, misconduct covered by Act is too broad because it includes impeachable offenses under U.S. CONST. art. II § 4 which requires Congressional action under separation of powers doctrine).

The Code of Conduct for United States Judges provides judges with insight about what kind of behavior may constitute misconduct under the Act. See, e.g., CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 5(c) (1992) [hereinafter CODE] (directing judges to “refrain from financial and business dealings that tend to reflect adversely on the judge’s impartiality, interfere with the proper performance of judicial duties, exploit the judicial position, or involve the judge in frequent transactions with lawyers or other persons likely to come before the court on which the judge serves”).

Judges tend to be disciplined only for willful violations under the Code and such willful violations arguably constitute misconduct under the Act. See generally WHEELER & LEVIN, *supra* note 29, at 63 (discussing “willful misconduct in office” or “habitual intemperance” as common behavioral standards for judges).


110 28 U.S.C. §§ 372(c)(11)(B)-(C). This section also authorizes the Judicial Conference to prescribe rules or to modify any council’s rules. See COMMISSION REPORT, *supra* note 8, at 84-85.
operational rules to implement its provisions. All councils revised their rules when the Act became effective. Some early criticism focused on rules that lacked uniformity among the circuits. In response, a special committee of the Conference of Chief Judges of the United States Courts of Appeals, working with the Federal Judicial Center, prepared Illustrative Rules Governing Complaints of Judicial Misconduct and Disability with Commentary in 1986. Although the Illustrative Rules are strictly advisory and do not fill all the gaps in the Act, most circuits followed the Judicial Conference’s recommendation to adopt them on an experimental basis. They were amended in 1991 to conform to the Act’s 1990 amendments. As a result, there is considerable uniformity among circuit council rules, which, according to the National Commission on Judicial Discipline and Removal (NCJDR), “seriously and sensitively implement the Act.”

The Act permits “any person” to file with the clerk of the court of appeals for a circuit a complaint alleging that “a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.” Any person can also allege that a judge or magistrate is “unable to discharge all the duties of office by reason of mental or physical disability.” “Any person” includes the chief judge of the court of appeals. Unlike all other complainants, however, the chief judge need not file a written complaint with the clerk of the court.

When the clerk receives a complaint, it must be promptly transmitted to the chief judge, unless it concerns the chief judge, in which case the complaint is transmitted to the active judge who

112 See COMMISSION REPORT, supra note 8, at 85.
113 ILLUSTRATIVE RULES, supra note 108; see COMMISSION REPORT, supra note 8, at 85; see also TWENTIETH CENTURY REPORT, supra note 2, at 103-12 (containing some illustrative rules concerning the confidentiality of complaints). The Special Committee was chaired by Chief Judge James R. Browning (9th Cir.) and included Chief Judge Emeritus Collins J. Seitz (3d Cir.) and Chief Judge Charles Clark (5th Cir.). Anthony Partridge of the Federal Judicial Center was the Committee’s Reporter. ILLUSTRATIVE RULES, supra note 108, at i.
114 See COMMISSION REPORT, supra note 8, at 85.
115 Id.
116 Id.
118 Id.
119 Id.
120 Id.
is next in seniority. The clerk also transmits a copy of the complaint to the judge who stands accused.

The Act vests wide discretion in each chief judge, at least until the chief judge appoints an investigative committee. After an expeditious review, the chief judge may dismiss the complaint if (1) it fails to state facts showing misconduct prejudicial to the effective and expeditious administration of the business of the courts; (2) it relates directly to the merits of a case; or (3) it is frivolous. Furthermore, the chief judge may "conclude the proceeding if [the chief judge] finds that appropriate corrective action has been taken or that . . . intervening events" make additional action unnecessary.

During the chief judge's review, only the chief judge, the

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122 Id.
123 28 U.S.C. §§ 372(c)(3)(A)(i)-(iii) & 372(c)(1)(B); see COMMISSION REPORT, supra note 8, at 84-86.
124 28 U.S.C. § 372(c)(3) (requiring the chief judge to "expeditiously review[] a complaint"). Apparently "some doubt exists about the power of a chief judge to conduct a limited inquiry into the factual support for a complainant's allegations" prior to disposing of the complaint. COMMISSION REPORT, supra note 8, at 102. The NCJDR recommends that the 1980 Act be amended to provide for such a "limited inquiry" and the chief judge "not make findings of fact about any matter that is reasonably in dispute." Id. A better approach suggested by some commentators requires the chief judge or the chief judge's staff to examine the record in the underlying case to determine whether the facts are plainly untrue or incapable of being investigated. See Barr & Willging, supra note 7, at 34-39; see also ILLUSTRATIVE RULES, supra note 108, Rule 4(b) (authorizing the chief judge to "conduct a limited inquiry for the purpose of determining" veracity or verifiability of facts in the complaint, "whether appropriate corrective action has been or can be taken without the necessity for a formal investigation, and whether the facts stated in the complaint are either plainly untrue or incapable of being established through investigation").
126 28 U.S.C. § 372(c)(3)(B). One example of a chief judge dismissing a complaint because corrective action was taken involved a prison inmate who complained that a district judge had unreasonably delayed in deciding motions in a case that would harm the recollection of witnesses. See COMMISSION REPORT, supra note 8, at 90. Pursuant to the chief judge's request for a response, the trial judge responded that his clerk had accidently marked the case closed and that he would order the case reopened and promptly decide all pending matters. Id.
127 The 1990 amendments to the Act added the "intervening events" provision to reflect the practice of dismissing complaints as "moot" when a judge has resigned, died, retired, or, in the case of bankruptcy judges or magistrates, was not reappointed. See Barr & Willging, supra note 7, at 78-79. "The only interesting matter" to arise under the rubric of mootness or intervening events concerned whether articles of impeachment against a judge rendered a complaint moot. Id. at 78. The special investigative committee considering this matter declined to act on the complaint.
complainant, the clerk of the court, and the accused judge are supposed to be aware of the complaint. If the chief judge dismisses or concludes the proceedings, the chief judge must state in writing the reasons for the action and transmit copies of the order to the complainant and to the accused judge or magistrate. If the chief judge does not dismiss or conclude the proceedings, "a special committee to investigate the facts and allegations contained in the complaint" must be appointed, composed of district and appellate court judges from the same circuit. The chief judge must certify the complaint and any other documents necessary for the special investigative committee and also must notify the complainant and the accused judge. The Act grants the special committee full subpoena powers and authorizes it to investigate all the facts and allegations contained in the complaint. After conducting "an investigation as extensive as it considers necessary," the committee must "expeditiously file a comprehensive report" about the investigation with "the judicial council of the circuit." The report outlines the committee's findings and its recommendations for "necessary and appropriate action by the judicial council of the circuit." The Act does not require that either the complainant or the accused receive a copy of the report.

Upon receipt of the special committee's report, the judicial

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128 As a practical matter, persons other than this small group often know about the complaint. See infra notes 201-04 and accompanying text (discussing complainants' freedom to ignore the Act's confidentiality provisions and publicize their complaints, often to the consternation of aggrieved judges who feel less free to respond publicly); see also Doe v. Judicial Qualification Comm'n, 748 F. Supp. 1520 (S.D. Fla. 1990) (complainant has First Amendment right to publicize his testimony about judge); Baugh v. Judicial Inquiry and Review Comm'n, 907 F.2d 440 (4th Cir. 1990) (First Amendment permits individuals to publicly report their testimony about judicial misconduct); Barr & Willing, supra note 7, at 179 (a chief judge reporting that "if there's a serious allegation [of misconduct], the reality is that confidentiality is unlikely.").


130 Id. § 372(c)(4)(A).

131 Id. § 372(c)(4)(B), (C).

132 Id. § 372(c)(4)(A), (9)(A). The Act also grants subpoena power to the judicial council, the Judicial Conference, and any standing committee appointed by the Chief Justice under 28 U.S.C. § 332(d). 28 U.S.C. § 372(c)(9)(A), (B); see Williams v. Mercer, 783 F.2d 1488 (11th Cir. 1986) (challenges to subpoena issued by court of appeals must be to that court and not the district court).


134 Id.

135 Id. But see infra note 154 and accompanying text (noting that while release is not required, the judicial council has the discretion to release the report).
council may institute any of several types of actions to "assure the effective and expeditious administration of the business of the courts." The council may conduct further investigation, dismiss the complaint, certify the disability of the judge, request the judge's voluntary retirement, order a temporary halt in the assignment of cases to the judge, issue a private or public censure or reprimand, and mandate "such other action as . . . [the council] considers appropriate," except for the removal of an Article III judge from office. The judicial council may also direct the chief judge to take any "appropriate" action, including removal, against a magistrate whose conduct is the subject of a complaint. Whatever action the council chooses, it must "immediately provide written notice to the complainant and to . . . [the accused] judge or magistrate." If grounds for impeachment exist, the judicial council may recommend impeachment of an Article III judge to the Judicial Conference. The judicial council is also authorized to certify a matter for resolution by the Judicial Conference if, in the "interest of justice," the council is unable to resolve the matter itself. With or without referral by the judicial council, the Judicial Conference by a majority vote can recommend impeachment to the House of Representatives.

137 Id. § 372(c)(6)(A).
138 Id. § 372(c)(6)(C).
139 Id. § 372(c)(6)(B)(ii).
140 Id. § 372(c)(6)(B)(iii).
141 Id. § 372(c)(6)(B)(iv). This provision requires that the interruption of case assignments to a judge be for a "time certain" and not for an unlimited or open period. Some commentators contend that a long or unlimited suspension in case assignments is tantamount to removal. See McCalla, supra note 35, at 1289-90. Such de facto removal of Article III judges contravenes the Article II, § 4 prohibition on the removal of judges except by impeachment.
143 Id. § 372(c)(6)(B)(vii). See generally supra text accompanying notes 20-39 (discussing impeachment generally and arguments favoring impeachment as the sole method for removing Article III judges).
144 28 U.S.C. § 372(c)(6)(B)(i). Magistrates are not considered judges for purposes of Article III of the Constitution and, therefore, are subject to removal by methods other than impeachment under Article II. See id. § 372(c)(6)(B)(vii) (prescribing that removal of magistrates be according to 28 U.S.C. § 631 and bankruptcy judges according to 28 U.S.C. § 152); see also COMMISSION REPORT, supra note 8, at 89.
146 Id. § 372(c)(7)(B)(i).
147 Id. § 372(c)(7)(B)(ii).
148 Id. § 372(c)(8)(B). The Judicial Conference by a majority vote can recommend to
The Act prohibits the filing of amicus curiae briefs or third-party interventions of any kind in disciplinary proceedings before the judicial council or the Judicial Conference. Although the prohibition expressly applies to matters before the judicial council and the Judicial Conference, there is little reason to believe that it is limited only to these proceedings; it probably also applies to review by the chief judge or the investigative committee.

Intervention and amicus curiae participation may occur more commonly in formal adjudicative proceedings, such as those before the judicial council or the conference. Yet it is conceivable that a third party might wish to intervene or file an amicus curiae brief while a complaint proceeding is still in its infancy—under investigation by the chief judge and before the appointment of a special investigative committee. After all, for an accused judge, the optimal time for supportive third-party intervention is probably at this early stage in the proceedings while the chief judge can still take unilateral and relatively discreet action in dismissing the complaint.

Section 372(c)(14) of the Act establishes a general rule of confidentiality: “All papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceeding . . . .” Although this section by its terms applies only the House of Representatives the impeachment of a judge or magistrate convicted of a felony, providing the felon-judge “has exhausted all means of obtaining direct review of the conviction, or the time for seeking further direct review of the conviction has passed and no such review has been sought.” Id. In other words, the Judicial Conference does not have to wait for a referral from the judicial council recommending impeachment pursuant to § 372(7)(B)(i); the Conference can act unilaterally in the case of a judge convicted of a felony.

149 Id. § 372(c)(13).
150 Congress’ failure to extend the prohibition clearly to other stages of the Act may permit chief judges to allow third-party participation either before or during the special investigative committee stage of the Act. See id. § 372 (c)(13).
151 For example, the chief judge may order a dismissal of a frivolous complaint or conclude the complaint proceedings if “appropriate corrective action” has already occurred or if “intervening events” make further disciplinary action unnecessary. See supra text accompanying notes 125-127.
152 28 U.S.C. § 372(c)(14); see Barr & Willging, supra note 7, at 36; see also Edwards, supra note 16, at 789 (Act requires judiciary to follow intricate procedures including “nearly absolute confidentiality” (citing 28 U.S.C. § 372(c)(14))); TWENTIETH CENTURY REPORT, supra note 2, at 7 (“[M]ost details of current disciplinary procedures are confidential. Thus, the public, public interest groups, and scholars are at a disadvantage in evaluating these procedures. As a result, there is no comprehensive record of the decisions of the chief judges and the judicial councils in response to the 1980 reforms.”); COMMISSION REPORT, supra note 8, at 103 (The Act’s confidentiality provision leaves
to special committee investigations, "most chief judges have interpreted it to apply to all stages of the process, including chief judge review of complaints." Yet the Act also clearly establishes four exceptions to the general rule of blanket confidentiality. The first is discretionary; the judicial council of the circuit may release a copy of the report of a special investigative committee to the complainant and the judge who is the target of the impeachment investigation.

The second exception directs the judicial council or the Judicial Conference, or the Senate or the House of Representatives by resolution, to release any material it considers necessary to an impeachment investigation or trial under Article I of the Constitution. Unlike the first exception, this exception is not expressly

"open the question whether and to what degree confidentiality should be required if a special committee is not appointed. [Nevertheless, t]he Illustrative Rules extend confidentiality to earlier points in the process.").

153 Barr & Willging, supra note 7, at 36; see also TWENTIETH CENTURY REPORT, supra note 2, at 106 (Although "the reference to 'investigation' suggests that section 372(c)(14) technically applies only in cases in which a special committee has been appointed[,] ... [Illustrative Rule 16] applies the rule of confidentiality more broadly, covering consideration of a complaint at any stage."). Illustrative Rule 16, which addresses confidentiality, provides:

(a) General Rule. Consideration of a complaint by the chief judge, a special committee, or the judicial council will be treated as confidential business, and information about such consideration will not be disclosed by any judge, magistrate, or employee of the judicial branch or any person who records or transcribes testimony except in accordance with these rules.

(b) Files. All files related to complaints of misconduct or disability ... will be maintained separate and apart from all other files and records, with appropriate security precautions to ensure confidentiality.

ILLUSTRATIVE RULES, supra note 108, at 49. See generally COMMISSION REPORT, supra note 8, at 104-10 (reporting "uncertainty and controversy have surrounded the issue of confidentiality under the Act", id. at 106, and noting that the Illustrative Rules which support a broader interpretation of § 372(c)(14) have generally achieved "an appropriate balance", id. at 107, between the conflicting policies of confidentiality and public accountability).

154 Section 372(c)(14)(A) of the Act provides:

[T]he judicial council of the circuit in its discretion [may] release[ ] a copy of a report of a special investigative committee ... to the complainant whose complaint initiated the investigation by that special committee and to the judge or magistrate whose conduct is the subject of the complaint ... .


155 Section 372(c)(14)(B) of the Act authorizes that all information related to investigations ... shall be confidential ... except to the extent that—the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution ... .
made discretionary. Yet the body considering whether to release information has discretion in deciding whether the information is necessary to the investigation. Thus, the decision about the release is at least in some measure discretionary.

Third, disclosure to the public will occur at the request of the judge or magistrate who is the subject of the investigation and with the concurrence of the chief judge, the Chief Justice, or the chair of the Judicial Conference's standing committee established to review such matters. Again, disclosure is not certain to occur because it requires the written permission of the accused judge or magistrate and of another party, such as the chief judge.

Fourth, the Act permits disclosure of disciplinary proceedings when a majority of the Judicial Conference votes to recommend that the House of Representatives consider impeachment or other "necessary" action against a judge. Disclosure of the record of the proceedings of the judicial council or of the Judicial Conference is discretionary in the sense that it depends upon a finding that impeachment may be warranted. Thus, the Act expressly makes two of its four exceptions to confidentiality discretionary and the other two become applicable only after a determination that impeachment may be warranted.


Section 372(c)(14)(C) of the Act permits such disclosure [when it] is authorized in writing by the judge or magistrate who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee [created pursuant to section 331 of title 28 which establishes the Judicial Conference] . . . .


156 Id. § 372(c)(8)(A). In addressing a recommendation of impeachment by the Judicial Conference, this section states, in part: "Upon receipt of the determination and record of proceedings in the House of Representatives, the Clerk of the House of Representatives shall make available to the public the determination and any reasons for the determination." Unlike subsection (A), subsection 372(c)(8)(B) does not expressly call for similar disclosure. It provides for a recommendation of impeachment by a majority vote of the Judicial Conference when a judge or magistrate has been convicted of a felony and has exhausted all means of obtaining direct review of the conviction or the time for seeking such review has passed or the party has no intention of seeking review. Id. § 372(c)(8)(B). Presumably the Clerk of the House, as in subsection (A), can also "make available to the public the determination [by the Judicial Conference] and any reasons for the determination," especially since a felony conviction is a matter of public record. Id. § 372(c)(8)(A).
III. THE JUDICIARY AND CONFIDENTIALITY

A. The Act's Confidentiality Provisions

Three provisions of the Act work together to “mandate[] confidentiality with respect to most proceedings.” The first provision, 28 U.S.C. § 372(c)(3), vests in the chief judge of the circuit broad discretion to “dismiss a complaint” for inadequacy. A complaint is inadequate if it is not in conformity with the Act, is directly related to the merits of a decision or procedural ruling, or is frivolous. The chief judge can also “conclude the proceeding if... appropriate corrective action has been taken or... action on the complaint is no longer necessary because of intervening events.” An intervening event could be the with-
drawal of a judge or magistrate from a case because of an alleged conflict of interest or due to resignation or retirement.\textsuperscript{162}

The chief judge's decision to dismiss or conclude the complaint proceedings must be in writing.\textsuperscript{163} Until recently, these written orders were unavailable to the public or, if available, so brief as to provide the public with little meaningful information about the alleged misconduct. Indeed, the published order might omit the names of the complainant and the accused judge, containing only the cryptic message that the complaint had been dismissed, that appropriate corrective action had been taken, or that the process had been concluded due to intervening events.\textsuperscript{164} This prompted the NCJDR to recommend that Congress amend the Act to make Illustrative Rule 17 mandatory in all circuits if it was not adopted as uniform policy by the courts.\textsuperscript{165} Rule 17 requires the public availability of a chief judge's or judicial council's order dismissing a complaint that is no longer subject to review.\textsuperscript{166} The Rule also states that a chief judge's order concluding a complaint proceeding shall be publicly available.\textsuperscript{167} Supporting memoranda outlining the reasons for such orders, as well as any dissenting opinions or separate statements by

\begin{itemize}
\item \textsuperscript{162} 28 U.S.C. § 372(c)(3)(B); see supra note 127.
\item \textsuperscript{163} 28 U.S.C. § 372(c)(3).
\item \textsuperscript{164} Jud. Conf. Comm. to Review Circuit Council Conduct and Disability Orders, Report to the Judicial Conference of the U.S. 23-24 (Mar. 1994) (noting that boiler-plate dismissal orders are "not uncommon") (on file with the FJC); ILLUSTRATIVE RULES, supra note 108, Rule 17 commentary at 54-55 ("With regard to dispositions by the chief judge, the more general practice is apparently not to permit public access" to the order of disposition and the name of the judge or magistrate.).
\item \textsuperscript{165} See COMMISSION REPORT, supra note 8, at 106, 153 (indicating that "most [judicial] councils have adopted [Illustrative Rule 17] and report no difficulties under it" and recommending that all councils or the Judicial Conference adopt Rule 17 within a reasonable period of time otherwise Congress should amend the Act to impose Rule 17). Rule 17 provides, in part:
\begin{quote}
A docket-sheet record of orders of the chief judge and the judicial council and the texts of any memoranda supporting such orders and any dissenting opinions or separate statements by members of the judicial council will be made public when final action on the complaint has been taken and is no longer subject to review.
\end{quote}
ILLUSTRATIVE RULES, supra note 108, at 52.
\item \textsuperscript{166} Id. at 52-53.
\item \textsuperscript{167} \textit{Id.} Rule 17 provides that when a chief judge's order dismisses a complaint or concludes a proceeding which is no longer subject to review, then such order and any supporting memoranda should be made public. See COMMISSION REPORT, supra note 8, at 106; \textit{see also} supra notes 108-13 and accompanying text (providing a background discussion of the Illustrative Rules).
council members, shall also be publicly available.\textsuperscript{168} However, the Rule provides that these orders and memoranda will exclude the name of the complainant and the accused judge.\textsuperscript{169}

Although many circuit councils had already adopted Illustrative Rule 17, the Judicial Conference recently adopted it as uniform policy in all circuits.\textsuperscript{170} While Rule 17 compliance enhances accountability in most circuits,\textsuperscript{171} especially for chief judges, the judiciary still retains virtually complete discretion concerning what and how much information to provide in support of orders dismissing a complaint or concluding proceedings.

The second provision of the Act that insulates disciplinary proceedings from public disclosure is 28 U.S.C. § 372(c)(13). This section expressly prohibits both third-party intervention and amicus curiae participation in proceedings before the judicial council or the Judicial Conference, and probably at all stages of the Act.\textsuperscript{172} This limits the number of parties involved in the judicial complaint process to the complainant and the accused judge. Section 372(c)(13)'s broad prohibition may hinder the ability of the accused judge and the complainant to present their strongest cases by enlisting the assistance of third parties. It also effectively denies the judicial council, the Conference, and arguably, the

\textsuperscript{168} Illustrative Rules, supra note 108, Rule 17 and commentary at 52, 54.

\textsuperscript{169} Id. at 55. The Act expressly requires confidentiality only with the appointment of a special committee. The drafters of the Illustrative Rules started off with the "dubious assumption that '[(]the [Act] and its legislative history exhibit a strong policy goal of protecting judges and magistrates from the damage that could be done by publicizing unfounded allegations of misconduct.'" Marcus, supra note 15, at 425.

\textsuperscript{170} See L. Ralph Mecham, Director, Admin. Off. of the U.S. Courts, Memorandum to All Judges [and other Staff], Preliminary Report of Actions Taken by the Judicial Conference of the U.S., in session, Mar. 15, 1994, at 10 (Mar. 23, 1994) (on file at the FJC) (endorsing, "in principle, the recommendations of the [NCJDR] a) that Illustrative Rule 17(a), providing for the public availability of sanitized chief judges' orders dismissing or concluding complaints, be uniformly adopted and adhered to by all circuits and courts covered by the Act; b) that the provisions of the Illustrative Rules regarding confidentiality be adopted and adhered to by all circuits and courts covered by the Act; c) that chief judges' orders dismissing or concluding complaints set forth the allegations of the complaint and the reasons for the disposition as required by Illustrative Rule 4(f); . . . "); see also Interview, Judge Levin H. Campbell: Preserving a Fair System of Judicial Conduct, 26, No. 6 THE THIRD BRANCH, June, 1994 at 10 (as chair of the Jud. Conf. Comm. to Review Circuit Council Conduct and Disability Orders, reporting that the Jud. Conf. adopted the NCJDR's recommendation that all circuits should adopt Rule 17(a)—publicizing sanitized dismissal orders of chief judges).

\textsuperscript{171} See infra note 318 and accompanying text (contending that Rule 17 represents a retreat from the level of accountability in the United States Court of Appeals for the Fifth Circuit).

\textsuperscript{172} 28 U.S.C. § 372(c)(13); see supra text accompanying notes 149-51.
chief judges, the benefits of such assistance.

The third and most important provision, \( \text{§} \) 372(c)(14), expressly mandates confidentiality for special committee investigations except in four situations. It prohibits "any person in any proceeding" from disclosing any "papers, documents, and records of proceedings related to investigations." However, \( \text{§} \) 372(c)(14) has been broadly construed by the judiciary as implicitly mandating total confidentiality for the complaint process subject to the Act’s four exceptions.

### B. Justifications for Confidential Self-Discipline

Traditional arguments in favor of confidentiality focus primarily on two different, but related, values: judicial independence and efficiency. The argument based upon judicial independence reflects the belief that an independent judiciary is necessary to provide a check on the other two branches of government and to ensure the impartial administration of justice. Protecting the privacy and reputation of individual judges is considered a prerequisite to preserving the independence and integrity of the entire judicial system. Proponents of secrecy also focus on the notion of efficiency, arguing that a more open discipline process will inevitably be more complex and expensive.

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173 See supra notes 152-53 and accompanying text.
176 See supra notes 152-53 and accompanying text.
177 For an excellent and critical discussion of the arguments typically advanced in favor of confidentiality, see SHAMAN ET AL., supra note 17, at 416-38; Shaman & Bégüé, supra note 17, at 760-66; see also CAPPELLETTI, supra note 12, at 84 (an international comparative study of judges and judicial disciplinary systems); Marcus, supra note 15, at 424-32 (identifying various confidentiality interests under the Act).
178 See Sparks v. Duval County Ranch Co., 604 F.2d 976, 985 (5th Cir. 1979) (en banc) (dissenting opinion) (commenting on a judge’s role in a conspiracy to violate the 1871 Civil Rights Act, the court noted that “[i]f there is anything a judge ought to prize and that the public demands, it is his judicial integrity. . . . [A] judge must not only avoid evil but he must also avoid even the appearance of it.”), aff’d, 449 U.S. 24 (1980). See generally In re Lauer, 788 F.2d 135, 138 (8th Cir. 1985) (“Although federal judges enjoy the independence accorded them under the Constitution, every judge should at the same time be keenly aware that the independence of the federal judicial branch depend[s] in large part on public confidence in the integrity and impartiality of the judiciary.” (quoting Justice Frankfurter in Rochin v. California, 342 U.S. 165, 171-72 (1952) (“[J]udges [must establish a] habit of self-discipline and self-criticism . . . .”))).
179 See PROPOSED MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT, Preamble (1994) [hereinafter ABA PROPOSED JUDICIAL ENFORCEMENT] (Although expressly not applicable to federal judges, the preamble emphasizes that both judges and the public share
1. Judicial Independence

Voluminous literature and legions of speakers have stressed the importance of an independent and impartial judiciary. Proponents of the Act's confidentiality provisions begin by arguing that the vast majority of complaints against judges are not meritorious. One recent study, which supports this contention, indicated that chief judges dismissed ninety-five percent of the complaints filed and not withdrawn through 1991 on the basis that they were frivolous, directly related to the merits of a decision or procedural ruling, or not in conformity with the Act.

Proponents of confidentiality then argue that nonmeritorious complaints pose a serious threat to the privacy and reputations of individual judges. Complaints are said to attract front-page coverage while their retractions often receive little attention. One
chief judge stated that "the threat of newspaper coverage is a big deterrent. Every judge worries about something coming out in the newspaper." Another circuit council executive reported that sometimes the press is informed about complaints before the judiciary is and that publicized complaints "bring[] a lot of unwanted attention on the courts." Prominent coverage of complaints may effectively deny judges an adequate opportunity to protect their reputations, especially given the judiciary's "strong tradition" of not responding to complaints. This tradition and the

184 See Marcus, supra note 15, at 428 (quoting Federal Judicial Center (FJC) Study interviews with circuit chief judges; owing to the confidential nature of the study, no identifying information was provided).

185 See id. at 431 (quoting FJC Study); see also David Johnston, Appointment in Whitewater Turns into a Partisan Battle, N.Y. TIMES, Aug. 13, 1994, at 1. A poignant and recent example of widespread press coverage before the filing of a complaint involved Judge David B. Sentelle who headed a three-judge appellate panel that appointed Kenneth W. Starr as the new Whitewater independent prosecutor. Democratic senators claimed that Judge Sentelle's meeting with Senators Lauch Faircloth and Jesse Helms, conservative Republicans and presumably supporters of Starr, was improper because the panel was still considering its choice for prosecutor. Id. at 1, 7. Several "senior Democrats, frustrated that the independent counsel law contains no route for appealing the panel's choice, discussed seeking a disciplinary review of Judge Sentelle's conduct" under the Act. Id. at 1.

186 See COMMISSION REPORT, supra note 8, at 106 (noting that at least one circuit council refused to adopt Illustrative Rule 17's approach to making dismissal orders and supporting memoranda public out of concern that the media will highlight only the fact that charges were made and not that they were also dropped); see also Johnston, supra note 185, at 1 (reporting that some fellow judges "questioned" the propriety of Judge Sentelle's contact with "a leading critic" of the previous Whitewater prosecutor while considering his replacement and, although Judge Sentelle denied any impropriety, the reports of possible misconduct arguably overshadowed his denial). For recent examples of highly publicized nonfrivolous complaints against prominent state judges, see, e.g., Michael deCourcy Hinds, Pennsylvania House Votes to Impeach a State Justice, N.Y. TIMES, May 25, 1994, at A14 (Pennsylvania House of Representatives voted unanimously to impeach Justice Rolf Larsen charging numerous offenses, including improperly assisting friends and contributors with their cases before his court and lying under oath); Diana J. Schemo, A Prison Term of 15 Months for Wachtler, N.Y. TIMES, Sept. 10, 1993, at B1 (Chief Justice Sol Wachtler of the New York Court of Appeals resigned and pled guilty to sexual harassment); Rhode Island Ex-Judge Accused of Felony, N.Y. TIMES, Dec. 3, 1993, at A8; Top Rhode Island Justice Quits Amid Accusations, N.Y. TIMES, Oct. 9, 1993, at 11 (Chief Justice Thomas F. Fay of the Rhode Island Supreme Court resigned from office in face of an impeachment inquiry and was later indicted by a grand jury and convicted on felony charges of obstructing justice regarding possible misuse of special court fund; second resignation of Rhode Island justice in recent years); see also William Carlsen, Judicial Panel Agrees to Probe Top State Judge, S.F. CHRON., Nov. 25, 1993, at A1, 21 (Chief Justice Malcolm Lucas of the California Supreme Court investigated by state Commission on Judicial Performance about acceptance of travel expenses from groups with petitions before his court and his frequent absences from court).

Act's confidentiality provisions lead many judges to conclude that they must "grin and bear" all "unfounded but facially credible allegation[s]" of misconduct that are "leak[ed] . . . to the press."188

Proponents of confidentiality fear that judges will be intimidated by the threat of complaints and will compromise their impartiality or independence by currying favor with litigants and other parties who might seek retribution.189 Accordingly, proponents believe that compromises will undermine the integrity of individual judges as well as of the entire judiciary.190

The United States Court of Appeals for the Second Circuit discussed the harm that frivolous complaints can produce in In re Martin-Trigona.191 Mr. Martin-Trigona filed numerous lawsuits against a variety of parties, including federal and state judges. The federal district court granted an injunction prohibiting him from filing an action in any district court in the circuit without first seeking court permission. On appeal, Judge Winter wrote that a federal court has the power to take whatever "means necessary to carry out [its] constitutional function" of administering the federal legal system efficiently.192 Unless the court protected its person-

192, 215 (E.D. Pa. 1984), aff'd, 784 F.2d 467 (3d Cir. 1986) (en banc); see also CHARLES WOLFRAM, MODERN LEGAL ETHICS 601 (1986) ("judicial tradition leaves judges unable to defend themselves against groundless public charges" for fear of appearing less than impartial or becoming embroiled in public controversy); Marcus, supra note 15, at 493 (a question exists about the right of judges to publicly respond to complaints; some judges publicly respond whereas others feel that such responses are prohibited).

188 See Marcus, supra note 15, at 427 n.175 (quoting the FJC Study).

189 See Bryan E. Keyt, Reconciling the Need for Confidentiality in Judicial Disciplinary Proceedings with the First Amendment: A Justification Based Analysis, 7 GEO. J. LEGAL ETHICS 959, 966-70 (1994); see also R. Wheeler & A. Levin, Judicial Discipline and Removal in the United States I-2 (July 1979) (unpublished Federal Judicial Center staff paper, on file at the American Judicature Society) (suggesting that judicial discipline process "should protect against unwarranted release of unfounded charges and adverse information"). See generally Marcus, supra note 15, at 394 (Although the Act has not threatened judicial independence, "[a]ll are agreed that . . . in the abstract, judicial discipline could pose a risk to [judicial] independence.").

190 See Fiss, supra note 180, at 58-9; see also Edwards, supra note 16, at 772 ("But if a judge can be made to answer outside of the criminal and impeachment processes for judicially related activities, pursuant to a loosely constructed congressional act regulating judicial "misconduct," one wonders about the sanctity of separation of powers and the inviolability of judicial independence.").

191 In re Martin-Trigona, 737 F.2d 1254, 1263 (2d Cir. 1984).

192 Id. at 1262. Later, the injunction would be broadened to prohibit the plaintiff from filing any suit in any federal court without first seeking leave from the court. See also Martin-Trigona v. Shaw, 986 F.2d 1384, 1386-88 (11th Cir. 1993) (discussing the Eleventh Circuit Court of Appeal's application of the Second Circuit's injunction against
nel and their families from frivolous attacks like Mr. Martin-Trigona's, the courts would find it increasingly difficult to recruit talented people "for all positions in the judicial branch."¹⁹³

Judicial independence is, of course, of critical importance to the proper functioning of the judiciary. Yet courts have not always concluded that it must prevail over openness. In *Landmark Communications, Inc. v. Virginia*,¹⁹⁴ the Supreme Court assumed, without deciding, that judicial independence and the protection of judges' privacy and reputations were valid and important state interests. In *Landmark Communications*, a Virginia state statute prohibited the publication of information concerning complaint proceedings before the Virginia Judicial Inquiry and Review Commission.¹⁹⁵ A newspaper challenged the statute, and the state argued that the public's interest was not served by the disclosure of frivolous or nonmeritorious complaints. The Court rejected the state's argument, noting that the public discussion of governmental affairs is one of the basic principles protected by the First Amendment and that publication by the press and the open discussion of judicial processes work to prevent miscarriages of justice and abuses of power.¹⁹⁶ Complaints of judicial misconduct provide the public with an important opportunity to consider the effectiveness of its courts.

There are other reasons, consistent with the Court's ruling in *Landmark Communications*, for preferring full disclosure of judicial complaints over the Act's current regime of secrecy. First, using judicial independence to justify shielding an important part of the disciplinary process from public scrutiny carries overtones of "professional paternalism."¹⁹⁷ It assumes that the public is unable or unwilling to consider responsibly allegations in a complaint.¹⁹⁸ At

Martin-Trigona).

¹⁹³ In re Martin-Trigona, 737 F.2d at 1261-62; see also Nolan, supra note 67, at 871 (imposing "unnecessary but burdensome or intrusive regulations . . . [has the] potential to discourage service in the judiciary.").


¹⁹⁵ *Landmark Communications*, 435 U.S. at 830.

¹⁹⁶ Id. at 839 (quoting Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)); see Keyt, supra note 189, at 972.

¹⁹⁷ Paternalism is "a policy or practice of treating or governing people in a fatherly manner, especially by providing for their needs without giving them responsibility." Robert S. Redmount, *Paternalism and the Attorney-Client Relationship*, 14 J. LEGAL PROF. 127, 127 (1989) (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 909 (2d ed. 1985)); see also id. (examining professional paternalism in traditional lawyer-client relationships and urging lawyers to be more egalitarian when dealing with clients).

¹⁹⁸ Cf. Doe v. Florida Judicial Qualification Comm'n, 748 F. Supp. 1520, 1527 (S.D.
least one federal court recently rejected this justification for prohibiting a Florida complainant from publicly disclosing the contents of his complaint against a state judge in confidential proceedings. The same court also rejected the state's argument that the publication of nonmeritorious complaints "would invest [the complaints] with an undeserved legitimacy in the public eye."

Second, complainants are generally free under the First Amendment to make public their complaints and other information about the accused judge before and even after the filing of a complaint. Several chief judges indicated that the accused judge is at a disadvantage when a complaint is made public because judges feel bound to remain silent as a result of judicial tradition and the Act's confidentiality provisions. Thus, the confidentiality provisions, which are designed in part to protect judicial morale, may actually harm morale since judges are inhibited in responding to allegations of misconduct. The potential for judicial demoralization is minimized by the Act and the Due Process Clause of the Fifth Amendment, both of which guarantee judges sufficient opportunity to defend their actions. Nevertheless, a completely open process clearly would free judges to defend themselves against nonmeritorious complaints, thereby possibly bolstering morale.

Fla. 1990) (public is capable of evaluating the legitimacy of judicial complaints).

199 Doe, 748 F. Supp. at 1527-29.

200 SHAMAN ET AL., supra note 17, at 67-68; see Doe, 748 F. Supp. at 1527-28; see also Marcus, supra note 15, at 399 (suggesting that the burden of disposing of "flagrant examples of abuse of the Act," like the repeated complaints of Mr. Martin-Trigona, is "not too great").

201 See Doe, 748 F. Supp. at 1529. Bryan Keyt, supra note 189, enumerates the First Amendment rights available to complainants in this area:

[C]ourts have generally established that several explicit First Amendment rights exist: (1) Third parties and nonparticipants in the proceedings cannot be punished for publishing lawfully acquired, truthful information; (2) A witness cannot be prevented from discussing the substance of their testimony (although it is not yet clear whether a state can temporarily delay disclosure for part of the proceedings); (3) A witness has a right to disclose the end result of the proceedings; and (4) A complainant has a right to disclose the fact that a complaint has been filed.

Id. at 984-85 (emphasis added).

202 Barr & Willging, supra note 7, at 179.

203 See Marcus, supra note 15, at 428. Some circuit chief judges expressed this concern in an FJC Study. Id. at 427 n.175. For example, one judge stated: "It's harder now to get good lawyers to come on the bench; a lack of confidentiality would make it worse . . . . Confidentiality is necessary to protect judges." Id.

204 The risk of demoralization is further limited in the case of frivolous complaints.
Third, traditional and public mechanisms designed to promote judicial accountability, such as appellate review, writs of mandamus, and impeachment, have not undermined judicial independence or prestige.® This remains true despite the recent spate of impeachments and criminal convictions of judges.®

Fourth, judges are highly trained professionals who should be able to execute their responsibilities even in the face of nonmeritorious complaints.® Moreover, unlike other public officials, they have life tenure, which furnishes substantial protection against attacks on their independence and impartiality. The removal of a judge is an extremely difficult and costly process.® This may be, in part, because “some of the constitutional protections of independence have been reinforced by the evolution of broad cultural understandings that . . . insulate the judiciary from political control.”®

Judicial independence is not an absolute value,® and given

or those that involve the merits of a decision or a procedural ruling since the Act vests the power of dismissal in the chief judge. Cf. id. at 427 n.175 (quoting at least one circuit chief judge who felt differently: “If every complaint is in the newspaper every time, that would undermine public confidence in the judiciary. Chief judges would then have to spend enormous time refuting frivolous allegations.”).

205 Fiss, supra note 180, at 59 (suggesting that judicial independence is “fully respected when higher court judges supervise other judges through the ordinary, appellate procedures”).

206 Barr & Willging, supra note 7, at 156 (chief judges found that recent criminal prosecutions and impeachments had no effect on their judicial independence); see also William K. Slate, II, Analysis and Report Surveys of Knowledge and Satisfaction of Federal Judicial Discipline and Removal Mechanisms and Processes, in II RESEARCH PAPERS, supra note 53, at 959, 998 (noting that 294 of 301 (98%) federal appellate, district, bankruptcy, and magistrate judges reported that disciplinary proceedings never interfered with their judicial independence).

207 See Shaman & Bégue, supra note 17, at 765 (in reviewing complaints, judges are probably not easily influenced in assessing a colleague’s conduct since they are accustomed to avoiding ex parte contacts of any nature that might influence their decision-making).

208 See supra notes 43-51 and accompanying text (discussing constitutional protections of judicial independence). Most states have procedures for removing judges other than by impeachment. Letter from Professor Geoffrey C. Hazard, Jr., Director of The American Law Institute, to author (Aug. 30, 1994) (on file with author) (“[Most states] have term elections or appointments that must be renewed by reelection or reappointment.”). Such procedures provide opportunities for public review of performance and possible censure by nonrenewal. The absence of these procedures or “democratic controls” make the secrecy in the federal system especially stark. Id.

209 Fiss, supra note 180, at 61 (reporting also that no judge has been removed because of the nation’s strong disagreement with his decision).

210 See id. (noting that “[u]nlimited judicial independence without any political control may interfere with democratic values. What is needed is a limited measure of [political insularity]”—limited independence).
the Supreme Court's preference in Landmark Communications for the open discussion of governmental processes, proponents of confidentiality should bear the burden of clearly demonstrating that judicial independence and an open disciplinary process cannot coexist. In First Amendment parlance, the proponents should show that no less-restrictive alternative to the Act's broad rule of confidentiality is available.

2. The Notion of Efficiency

Proponents of confidentiality maintain that the Act not only safeguards judicial independence but also facilitates a more efficient disciplinary process. They contend that a confidential process minimizes costs often associated with more open investigations and adjudications. These costs may include the increased expense and delay involved in especially detailed investigations to establish clear evidence of misconduct, in additional procedural protections, and in adverse publicity resulting from a more

211 See Shaman & Bégué, supra note 17, at 760, 765; see also COMMISSION REPORT, supra note 8, at 86 (noting that there was general agreement in Congress that judicial independence necessitated a statutory mechanism for the speedy dismissal of frivolous complaints). See generally BAILEY KUKLIN & JEFFREY W. STEMPFL, FOUNDATIONS OF THE LAW 42-43 (1994).

Like any organization charged with self-regulation, the federal judiciary faces the difficult question of how much resources to allocate for self-discipline. There is always the risk that in its quest for organizational efficiency, the judiciary may neglect the legitimate needs or rights of the accused judges and their victims—individual citizens directly harmed by the accused's actions and arguably the public at large. For a somewhat analogous discussion concerning a self-regulatory organization and the tension between organizational efficiency and the due process needs of alleged miscreant members, see John P. Sahl, College Athletes and Due Process Protection: What's Left After NCAA v. Tarkanian?, 21 ARIZ. ST. U.J. 621 (1989).

212 See Geyh, supra note 8, at 246, 268; see also Gerhardt, supra note 30, at 103 (cautioning that even if judicial self-regulation is constitutionally permissible, cumbersome procedures might strain limited judicial resources and outweigh any intended benefit); Edwards, supra note 16, at 791-93 (suggesting that old informal disciplinary measures protected judicial independence and facilitated the efficient resolution of complaints, albeit criticized as "secretive' proceedings"). But see Abrams, supra note 20, at 95 (stating that "the Act effectively undermines one of its intended purposes, . . . by imposing significant investigative and administrative responsibilities on the judiciary to process meritless complaints"). See generally CALABRESE & BOBBIT, supra note 4, at 55, 131-34 (discussing process costs associated with various decisionmaking mechanisms involved in the allocation of scarce resources).

213 See KUKLIN & STEMPFL, supra note 211, at 42. For a somewhat analogous discussion of the reasons for the ever-increasing delays and costs of civil litigation, see generally, Robert Banks, The Need for Reform, 74 JUDICATURE 113, 115 (1990) (Harris poll of 400 litigators reporting that "overdiscovery" is most important cause of litigation cost and delay).

214 For example, the accused judge might seek the right to cross-examine the com-
public and probably more contentious adjudicatory process.\textsuperscript{215} Because even the initial stages of reviewing a complaint consume valuable judicial resources, speedy disposition is consistent with the Act's goals.\textsuperscript{216}

Perhaps the most compelling efficiency rationale for confidentiality is the belief that miscreant judges are more likely to resign or retire voluntarily if a veil of secrecy preserves their reputations\textsuperscript{217}—for many, their most important professional asset.\textsuperscript{218} Testimony before the NCJDR and interviews with chief judges indicate that a "central feature of the Act" is the opportunity for chief

plainant and others prior to the chief judge's appointment of a special investigative committee. At some point, the accused might also demand a full blown adjudicatory proceeding according to the Federal Rules of Evidence, seek to exclude tainted evidence (grounded on the Fourth Amendment), and engage in traditional adversarial tactics, such as delay. The belief is that once judicial disciplining goes public, the accused judge has no choice but to fight for exoneration, irrespective of personal and judicial costs. See KUKNL \& STEMPFL, \textit{supra} note 211, at 127 (proponents of alternative dispute resolution contend lower costs and faster processing time is appropriate tradeoff for fewer procedural safeguards).

\textsuperscript{215} See \textit{supra} notes 44-50 and accompanying text; see also Tom Montgomery, Note, \textit{Towards Greater Openness in Judicial Conduct Commission Proceedings: Temporary Confidentiality As an Alternative to Inviolable Confidentiality—Garner v. Cherberg}, 111 Wash.2d 811, 765 P.2d 1284 (1988), 64 WASH. L. REV. 955, 970-71 (1989) (open investigations and fact-finding hearings can be exploited by the media, citing a California Commission on Judicial Performance proceeding involving then Associate Supreme Court Justice Mosk which turned into a "media circus"). See \textit{generally} KUKNL \& STEMPFL, \textit{supra} note 211, at 103-27 (discussing benefits and detriments of resolving disputes through the adversary system with alternative dispute resolution models).

\textsuperscript{216} A complaint not clearly frivolous on its face nor related to the merits of a decision or procedural ruling will consume valuable judicial resources. In addition to the time devoted by the chief circuit judge to reviewing a complaint, he will require the assistance of others, notably the circuit court clerk and possibly staff in his own chambers. If the matter involves a district or bankruptcy court judge or a magistrate, the chief district court judge may also be consulted. They may assist the chief circuit judge in investigating, marshalling, and assessing evidence of conduct "prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 372(c)(1).

\textsuperscript{217} See Shaman \& Bégqué, \textit{supra} note 17, at 765 ("[V]oluntary retirement may be an efficient and economical alternative to formal proceedings . . . ."); WILLIAM BRAITHWAITE, \textit{WHO JUDGES THE JUDGES?} 89, 94 (1971); \textit{COMMISSION REPORT, supra} note 8, at 6, 113; \textit{see also} Kamasinski v. Judicial Review Council, 797 F. Supp. 1083, 1093 (D. Conn. 1992) (emphasizing that miscreant judges would "prefer to end [their] career[s] with dignity" by resigning from the bench \textit{if} they could leave "quietly"). See \textit{generally} \textit{COMMISSION REPORT, supra} note 8, at 124 ("[P]erhaps the greatest benefit of the 1980 Act has been the support . . . and the impetus it has given, to informal approaches to problems of federal judicial misconduct and disability."). These considerations convinced the NCJDR that an alternative disciplinary scheme, like one of the state's, "is neither necessary nor desirable." \textit{Id.} at 124.

\textsuperscript{218} See Landmark Communications, Inc. v. Virginia, 495 U.S. 829, 893 (1978); \textit{see also} \textit{Judicial Misconduct, supra} note 12, at 1081; Montgomery, \textit{supra} note 215, at 968-69.
judges to intervene early in the complaint process and expeditiously conclude the proceedings on the basis of corrective action.\textsuperscript{219} Individual judges are aware that their fellow judges will evaluate their actions and decide whether they have engaged in "conduct prejudicial to the effective and expeditious administration of the business of the courts."\textsuperscript{220} They are probably also aware that chief judges dismiss most complaints\textsuperscript{221} or conclude most proceedings; the disposition order does not identify the accused judge in either situation.\textsuperscript{222} Indeed, chief judges are specifically cautioned to protect the anonymity of the judge and the complainant.\textsuperscript{223}

It is not surprising, therefore, that in 1988 one circuit executive for the Seventh Circuit reported that "[o]ver the last several years, there have been at least nine federal judicial officers who retired after a judicial misconduct complaint was looming in the background. In most of those cases, resolution would have been unlikely if the statutory judicial misconduct complaint procedure and remedies were not available."\textsuperscript{224} Two recent studies of for-
mer and present chief judges confirm the Seventh Circuit’s experience:225 between 1981 and 1991 at least twenty-five judges resigned or retired while facing formal or informal complaints of misconduct.226 The total number is probably greater since some judges serving fixed terms declined to seek reappointment while disciplinary charges were pending.227

The number of resignations or early retirements taken while a complaint is pending does not suggest that the judiciary is “disregarding its responsibilities under the Act.”228 Yet this practice raises several problems, and the efficiency it produces ultimately fails to justify the Act’s secrecy. First, a judge’s resignation or retirement does not entail an express admission of official wrongdoing; indeed, it suggests that the departure is for reasons other than cause. The public is particularly likely to have this impression in an environment in which some judges have resigned or retired to pursue lucrative opportunities in private practice or to seek other challenging work.229 When considered from the perspective

overall performance of the U.S. Court of Appeals for the Seventh Circuit, see Seventh Circuit Evaluation, supra note 7.

225 See Marcus, supra note 15, at 384; Barr & Willing, supra note 7, at 200-06 (illustrating information obtained from § 372(c) forms filed with the administrative office); see also Geyh, supra note 8, at 247, 322-23 (eight out of 29 chief judges indicated that the filing of a § 372(c) complaint caused a judge to resign, retire, or be certified disabled).

226 See Marcus, supra note 15, at 384. See generally Dan M. McGill, Disincentives to Resignation of Disciplined Federal Judges in the Benefits Package of the Federal Judiciary, in II RESEARCH PAPERS, supra note 53, at 1221 (suggesting that judges accused or convicted of misconduct are more likely to retire—if eligible—rather than resign in order to retain generous job benefits and proposing to neutralize the financial disincentive to resignation by providing resignees with some benefits, id. at 1239, 1248; disagreeing with the Judicial Conference Committee on the Judicial Branch which contends that judges’ decisions concerning resignation and early retirement are unlikely to be affected by loss of job benefits, id. at 1239). See COMMISSION REPORT, supra note 8, at 114-18.

227 Id. at 385 n.25.

228 Id. at 385.

229 See Glen Elsasser, Rehnquist: Drug Cases Strain Courts, CHIC. TRIB., Jan. 2, 1989, at C3 (Chief Justice Rhenquist stated that “dozens of federal judges have resigned from the bench during the past 15 years, far more than ever before, due in large measure to financial reasons.”); Rehnquist Backs Proposal on Pay Hikes for Judges, ST. LOUIS POST DISPATCH, Jan. 2, 1989, at 10A (citing an American Bar Foundation survey which found that 30% of federal judges who responded said they planned to resign before retirement unless “a significant increase in compensation” was provided). Compare Lee May, Federal Judges Complain Pay Is Too Low, Seek Raises, L.A. TIMES, July 28, 1985, part 1, at 8, which suggests that judges are public servants and know what they will earn when they take the job. The article adds that judges “have perquisites, prestige and power that make their careers satisfying beyond what dollars can buy.” Moreover, David Keating, the executive vice-president of the National Taxpayers Union, stated that judges have a “liberal pension system, which allows many to draw their full salaries after retiring.” Id. See generally
of the public's interest in information about its governmental officials, the Act's veil of secrecy at best obfuscates the real reasons underlying a judge's decision to leave the bench and at worst conceals judicial misconduct from the public.

A judge's voluntary resignation or retirement in the face of allegations of misconduct poses an additional danger. Without a clear finding of misconduct or some other official acknowledgment of possible misconduct, the public is forced to bear the risk that a departing judge who engaged in misconduct, but has an untainted record, may assume another position of public trust either on the federal or the state level. This concern, among others, prompted the drafters of the recent ABA Proposed Model Rules for Judicial Disciplinary Enforcement to grant "continuing jurisdiction over former judges regarding allegations that misconduct occurred before or during service as a judge." The drafters also sought to "ensure that judges [could] not avoid judicial discipline by resigning before information regarding their conduct is made known." Although an accused judge may deserve a second chance at public service, the second chance should be premised on full disclosure of prior allegations of judicial mis-

KRONMAN, supra note 5, at 319 (reporting that although the lawyer-statesman ideal is jeopardized in the private bar by the rise of commercialism, the ideal is not similarly jeopardized in the judiciary because "judging is not a vehicle for making money").

A related criticism that recently raised the ire of citizens was the ability of judges who were convicted of crimes to continue to collect their salaries during the impeachment process. COMMISSION REPORT, supra note 8, at i.

230 Judith Resnik, Due Process: A Public Dimension, 39 U. FLA. L. REV. 405, 407 (1987). In understanding due process, Judith Resnik suggests that it is important to consider the public dimension (or its absence) in adjudication and dispute resolution. Id. at 431. She analyzes the "dominant themes" favoring public participation—that there is an Anglo-American jurisprudential tradition of public participation, that such participation educates the public and provides catharsis, and that the public serves as a check on decision makers and enhances accuracy. Id. at 408. She explains further: "the interaction between process and the public is important and assists in the development of legal norms about the merits of disputes and about how disputes should be handled." Id. For Resnik, the term "public" "denote[s] a political community, the citizenry of the United States," but in no way suggests "that this citizenry is a unified group." Indeed, "[t]here are many 'publics.'" Id. at 407. See generally Robert M. Cover, Violence and the Word, 95 YALE L.J. 1601, 1626-29 (1986). In the context of capital punishment, the article notes that "[i]n the United States—with only trivial exceptions—no judge sitting alone on a significant legal issue is immune from appellate review." Id. at 1625.

231 See Van Tassel, supra note 30, at 387 (noting that although the motivations for the retirement or resignation of federal judges are often serendipitous because no records are kept, some judges resign or retire to avoid sanctions or public discredit).

232 ABA PROPOSED JUDICIAL ENFORCEMENT, supra note 179, Rule 2B(2).

233 Id.
conduct and of any evidence uncovered by the judiciary pursuant to the Act.\footnote{234} As presently written, the Act does not expressly provide the judiciary with jurisdiction to discipline a judge who has resigned or retired in the face of pending complaints.\footnote{235} Moreover, no federal court has addressed the propriety of disciplining a judge or magistrate after withdrawal from office.\footnote{236}

The Act's failure to extend disciplinary jurisdiction to cover former judges and its broad confidentiality provisions create a powerful tool for chief judges and others to encourage corrupt or senile judges to resign or retire before the appointment of a spe-

\footnote{234} One well-known case where the public was willing to permit a miscreant judge to serve again in a position of public trust involves Alcee Hastings. A special five-judge committee and investigator John Doar, who had worked in the Civil Rights Division of the Justice Department in the 1960s, conducted a three and a half year investigation of Judge Hastings. The committee found "clear and convincing evidence that Judge Hastings sought to conceal his participation . . . with the sale of justice." \textit{See} Jack Bass, \textit{Impeached, Then Elected}, \textit{N.Y. Times}, Mar. 18, 1993, at A21. The Committee also found that Judge Hastings committed perjury 14 times at the trial where he was acquitted of bribery charges. In 1989, the Senate impeached then Florida Federal District Court Judge Hastings for various acts of misconduct. In response, he argued that his prosecution was racially motivated. In the fall of 1992, Florida voters elected him to the United States House of Representatives. \textit{Id.} Although controversy still abounds regarding his suitability to serve in the House of Representatives, the Florida electorate at least knew of his prior misconduct at the time they elected him.

\footnote{235} Possible sanctions against a judge who has already left the bench could include: reprimand, public censure, loss of benefits, and disqualification from ever holding public office again. \textit{See} SHAMAN ET AL., \emph{supra} note 17, at 17.

\footnote{236} Most of the published decisions concerning claims of judicial misconduct by federal judges fall into two general categories. The first involves unsuccessful challenges to the Act's constitutionality based on the separation of powers doctrine. Such challenges usually involve claims of denial of due process as well. \textit{See, e.g.}, \textit{In re Matter of Certain Complaints}, 783 F.2d 1488 (11th Cir. 1986), \textit{aff'd} Williams v. Mercer, 610 F. Supp. 169 (S.D. Fla. 1985); \textit{United States v. Claiborne}, 727 F.2d 842 (9th Cir. 1984). The second category involves the unsuccessful use of the \textsection 372(c) complaint process to challenge collaterally the merits of a decision. \textit{See, e.g.}, \textit{In re Charge of Judicial Misconduct}, 691 F.2d 923 (9th Cir. 1982); \textit{In re Charge of Judicial Misconduct}, 685 F.2d 1226 (9th Cir. 1982).

State courts are divided on the question of whether authority exists to discipline a judge who has resigned or retired. \textit{See} SHAMAN ET AL., \emph{supra} note 17, at 15-18. \textit{Compare In re Probert}, 308 N.W.2d 773, 776 (Mich. 1981) (discipline of former judge warranted in order to preserve judicial integrity and to prevent the public from construing a failure to discipline "as an act of condonation" (citing \textit{In re Hammond}, 585 P.2d 1066 (Kan. 1978) (public censure of judge who had resigned because of physical disabilities))) \textit{with In re DeLucia}, 387 A.2d 362 (N.J. 1978) (resigning judge still subject to discipline, but as member of the bar, not as a judge). For the most recent decision regarding a court's jurisdiction to discipline judges who are no longer on the bench, see \textit{In re Steady}, 641 A.2d 117 (Vt. 1994) (holding that judicial conduct rules did not intend to enable judges to avoid discipline by resigning).
cial investigative committee. Aggrieved judges who retire are guaranteed their valuable pension benefits, which are subject to forfeiture upon impeachment or resignation. Moreover, judges who resign or retire at this stage of the process can do so without fear of additional post-departure disciplinary proceedings under the Act. Resignation or retirement is an "intervening event" under § 372(c)(3)(B), permitting the chief judge to conclude the complaint proceedings, eliminating the need for further action on the complaint. While a finding under § 372(c)(3)(B) that "appropriate corrective action has been taken" may vaguely suggest some official condemnation and action against a judge, the "intervening events" language in that section suggests neither condem-

237 See McGill, supra note 226, at 1225-26 (judicial resignees forfeit all benefits and prestige of office). Unless independently wealthy, a judge's pension may be his or her most valuable financial asset. Some judges facing serious charges may retire quietly, foregoing efforts of vindication, rather than risk forfeiture. See Hazard, supra note 208. See generally HEARINGS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 670-74 (1993). Although discussed in the context of a criminal conviction and couched in terms of resignation rather than retirement, Professor Ronald Rotunda suggested that a judge who is convicted of a crime might prefer resignation to impeachment because the miscreant judge retains his pension. Id. at 672. In response to this suggestion, Judge Levin Campbell of the NCJDR stated that "it would be outrageous for [the convicted judge] to be paid off by the taxpayers." Professor Rotunda agreed, saying he was also "troubled [by] finding some way to pay him off so he just resigns." Id. But cf. COMMISSION REPORT, supra note 8, at 115 (noting one situation where "a corrupt federal judge avoided impeachment after retiring only by forewearing retirement benefits").

238 There is a valid concern that subjecting judges to potential discipline after their departure may cause some judges to engage in long and costly litigation to safeguard the future of their pensions. See Hazard, supra note 208. Greater openness in the Act and the long-term preservation of an accused judge's pension, however, are not inextricably connected. For example, Congress or the judiciary could establish a policy that permitted judicial resignees to retain some or all of their pension, provided that the resignation and its underlying reasons are available to the public. The public may conclude that permitting accused judicial resignees to retain their pensions is an acceptable cost in return for their voluntary and expeditious removal. However, the public has an important interest in knowing about the performance of its governmental officials. The public, not a selfinterested judiciary, should decide whether resignees may retain their pensions. See McGill, supra note 226, at 1248.

239 Section 372(c)(3)(B) provides: "After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may . . . conclude the proceeding if he finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events." Id. (emphasis added).

240 See Marcus, supra note 15, at 412. Although the Act does not define the phrase "corrective action," it encompasses a variety of events that usually involves "acknowledgment by the judge that there is some problem and/or an undertaking to avoid the problem in the future." Given the administrative orientation of the Act, Professor Marcus contends that chief judges should enjoy wide discretion in defining corrective action. He notes that there are problems with the use of this standard. For example, chief judges frequently treat the dismissal of the complaint itself as corrective action. Id.
nation nor action. Instead, conclusion of a proceeding due to an intervening event suggests that the complaint is moot.

A second argument made by proponents of confidentiality is that it fosters a more efficient disciplinary process because complainants, accused judges, and others will feel free to participate in the process without fear of unwanted publicity or of retaliation from judges and others. 241 This argument is flawed, however, because the Act does not expressly require the concealment of the complainant's identity from the judge who is the subject of the complaint. 242 Indeed, the Act directs the clerk of the circuit court to forward the complaint to the chief judge and "to simultaneously transmit a copy" to the judge or magistrate who is the subject of the complaint. 243 Additionally, the Illustrative Rules require that all complaints be signed by the complainant and reviewed by the chief judge. 244 The chief judge usually talks to the

241 See Marcus, supra note 15, at 428 (noting that potential witnesses may "be more willing to cooperate if confidentiality could be assured"); see also Shaman & Bégué, supra note 17, at 760 (On the state level, confidentiality also protects "a commission's sources of information from subornation of perjury by the accused judges or their colleagues." (citing Stern v. Morgenthau, 465 N.E.2d 349, 353 (N.Y. 1984) (commission's rule of confidentiality superior to grand jury subpoena power))). But see Vanessa Merton, What Should We Do About Bad Lawyers?, NEWSDAY, Sept. 25, 1994, at A51 (commenting on the New York lawyer disciplinary process, Professor Merton stated: "I don't buy the rationale . . . that secrecy 'promotes voluntary giving of evidence and minimizes outside interference'"; New York Bar committee called for a change that would open disciplinary hearings to the public).

242 See 28 U.S.C. § 372(c)(1) (written complaint must contain a "brief statement of the facts constituting such conduct"). Any argument that the Act implicitly prohibits the disclosure of the complainant's identity raises serious questions of fairness for the accused judge. The inability to readily identify the source of the complaint may hinder the accused's ability to respond quickly, precisely, and fully to the complainant's allegations. See also Wheeler & Levin, supra note 29, at 62 (including as elements of procedural fairness to the accused judge: notice, the opportunity to confront evidence and argue inferences, and "protection against unwarranted release of unfounded charges and adverse information"). See generally Baker, supra note 30, at 1193-98 (arguing that the Act denies the accused judge fair and proper judicial process by merging prosecutorial and adjudicative functions in violation of the Fifth Amendment's Due Process Clause).


244 Illustrative Rules, supra note 108, Rules 2(f), 4(a); see D'Amato, supra note 103, at 613 ("The insistence that a complainant disclose his identity and assume the risk of an indictment for perjury seems sharply at variance with . . . the Act's purpose of 'promot[ing] and expedit[ing] legitimate complaints against errant judges.'" (citing Harry T. Edwards, Regulating Judicial Misconduct and Divining "Good Behavior" for Federal judges, 87 MICH. L. REV. 765, 789 (1989))); see also id. at 611 (two lawyers publicly reprimanded and fined $500 each for filing disciplinary charges against judge (referring to In re Complaint of Judicial Misconduct, 2 Cl. Ct. 255, 262 (1983))); Geyh, supra note 8, at 258-59 (citing confidentiality as a reason why more complaints are not filed and noting, nevertheless, that chief judges often take informal disciplinary action after notification of an
aggrieved judge about the complaint informally, and this discussion is bound to involve the disclosure of the complainant's identity. Even if the chief judge redacts the complainant's name from the complaint, the filing date or the nature of the complaint may reveal the complainant's identity. Thus, the judge who is the subject of the complaint and presumably the person most likely to retaliate against the complainant is one of the first to learn the complainant's identity.

Another threat to the privacy of the complainant and others involves the broad investigative authority of the chief judge in the first instance and, possibly later, of a special investigatory committee, a judicial council, or the Judicial Conference. The complainant has no guarantee under the Act that what may begin as an unsigned complaint.

245 See Geyh, supra note 8, at 318-19; see also Charles Gardner Geyh, Adverse Publicity as a Means of Reducing Judicial Decision-Making Delay; Periodic Disclosure of Pending Motions, Bench Trials and Cases Under the Civil Justice Reform Act, 41 CLEV. ST. L. REV. 511, 525-27 (1994) (disclosing that circuit chief judges frequently communicate informally with judges to resolve misconduct); Seventh Circuit Evaluation, supra note 7, at 702 (revealing that Chief Judge Bauer called other judges to request issuance of overdue opinions).

246 See Shaman & Bégue, supra note 17, at 760-61 (noting similar problems with confidentiality in the context of state disciplinary processes); SHAMAN ET AL., supra note 17, at 418-19 (indicating that the effectiveness of secrecy to protect complainants and witnesses is more theoretical than real and that claims that secrecy fosters complainant/witness participation are exaggerated in state judicial discipline processes); Seventh Circuit Evaluation, supra note 7, at 718 n.131 (indicating that although the Chicago Council of Lawyers is willing to act as intermediary to protect lawyers who file complaints, most lawyers are unwilling to identify the date and times of misconduct due to fear of retaliation).

247 Nevertheless, basic fairness suggests that the accused judge have a fair and early occasion to respond quickly and fully to any allegation of wrongdoing. Section 372(c)(2) provides for such prompt notice even if it fails to protect the identity of the complainant.

248 See Illustrative Rule 3(a)(2) (carving out an exception to the Act's general rule of confidentiality at an early stage of the proceedings). The rule directs the chief judge to forward a copy of the complaint to the chief district court judge for assistance in resolving a complaint. But see Marcus, supra note 15, at 429 n.178 (illustrating, with one chief judge's remarks, that this practice is probably infrequent: "I have never communicated with a chief judge of a district court about a formal complaint. What are they going to do about it? It's just another place for a leak.").

The federal judiciary is not the only self-regulatory entity to raise concerns about making internal investigations public. See Berst v. Chipman, 653 P.2d 107 (Kan. 1982). The National Collegiate Athletic Association (NCAA) is a self-policing body that regulates most intercollegiate athletics. In Berst, the NCAA refused to turn over its investigative files to the Birmingham Post, which was sued for libel after it reported on the NCAA's investigation into the recruitment of a player. Id. at 110. The NCAA contended that its 30-year-old self-policing system depended on the confidentiality of such files and that disclosure would harm intercollegiate athletics.
very narrow and discreet investigation will remain so, especially if the investigating authority finds it necessary to issue subpoenas or broaden the investigation.249 Once the accused judge is confronted with information about the investigation, he can probably identify the participants even without official disclosure.250

The Act also calls for disclosure of the complainant's identity to additional judges at other stages of the disciplinary process: when the chief judge appoints a special investigative committee,251 when the committee forwards a complete record of its investigation to the judicial council of the circuit,252 and when the judicial council in its discretion refers a complaint together with the record of the ensuing proceedings to the Judicial Conference.253 The number of judges and court personnel who have access to confidential information increases with the seriousness of the complaint. Although the absolute number of those who have access remains small, the chance for disclosure of the complainant's identity necessarily increases. The "widespread reluctance" of lawyers to file complaints suggests that practitioners do not see the Act's confidentiality provisions as effective in practice.254 Lawyers are more likely to file meritorious complaints

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249 The special investigatory committees, judicial councils, and the Judicial Conference possess full subpoena power. 28 U.S.C. § 372(c)(9)(A)-(B); see Marcus, supra note 15, at 430 (complaint filed against a chief judge for violating confidentiality provisions by revealing complainant's identity).

250 See COMMISSION REPORT, supra note 8, at 101.

251 28 U.S.C. § 372(c)(4)(B) (The chief judge shall "certify the complaint and any other documents pertaining thereto to each member of the committee.").

252 28 U.S.C. § 372(c)(5) states that:

Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit.

Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

253 [T]he judicial council may, in its discretion, refer any complaint under this subsection, together with the record of any associated proceedings and its recommendation for appropriate action, to the Judicial Conference of the United States." 28 U.S.C. § 372(c)(7)(A).

254 See COMMISSION REPORT, supra note 8, at 100-01 ("This type of risk aversion is common among those who appear frequently in federal court, notably government lawyers."); see also Geyh, supra note 8, at 257-58 (suggesting that lawyers, as well as litigants, jurors, witnesses, the press, court personnel, and fellow judges fear alienating miscreant judges); Barr & Willging, supra note 7, at 148 ("Several chief judges indicated that lawyers . . . are afraid to use [the complaint process] for fear of antagonizing the judiciary.").
than nonmeritorious complaints, and to the extent that knowledgeable persons with meritorious complaints are unwilling to file them, the Act fails to serve its purpose.

The Judicial Conference may also refer the record of the disciplinary proceedings to the Clerk of the House of Representatives for consideration of impeachment. Upon receipt of the determination that impeachment may be warranted, the Clerk of the House of Representatives must make public the determination and the record of the associated proceedings.

Thus, the notion that the Act's confidentiality provisions protect complainants and other participants from possible retaliation or unwanted publicity is unsound. More importantly, it is not entirely clear that participation in the complaint process depends upon confidentiality, especially for nonlawyers and others not subject to retaliation. Furthermore, dropping the Act's broad shield of confidentiality does not threaten the judiciary's ability to conduct investigations because it has the authority to subpoena important evidence. In the final analysis, the notion of efficiency fails to justify the Act's regime of confidentiality.

255 See COMMISSION REPORT, supra note 8, at 100; see also Geyh, supra note 8, at 258 (chief judges granted authority in 1990 to identify and initiate complaint proceedings based on information received informally, yet very few complaints were initiated).

256 28 U.S.C. § 372(c)(8)(A) states that:

If the Judicial Conference . . . makes its own determination that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary. Upon receipt of the determination and record of the proceedings in the House of Representatives, the Clerk of the House of Representatives shall make available to the public the determination and any reasons for the determination.

(emphasis added).

257 Id. The Act does not make clear whether the Judicial Conference's determination and associated record of proceedings contains information from earlier stages of the complaint process—stages in which participants may have conveyed such information with an expectation that their identities would remain secret.

258 See COMMISSION REPORT, supra note 8, at 101 (implying that confidentiality is unnecessary if a culture is created and nourished by the bar and the citizenry for "defending lawyers against retaliation from vindictive judges"); see also Marcus, supra note 15, at 429-30 (noting that generally the complainant's interest in remaining anonymous "is fairly weak" and that "some complainants have no desire to maintain confidentiality" as evidenced by those who "call press conferences to trumpet their accusations").

C. Experiences of the Fifth Circuit and the Oregon Bar

Proponents of confidentiality have not cited evidence of more open systems in support of their pessimistic forecasts concerning judicial independence and efficiency. And indeed, there is evidence that a more open disciplinary system can function well. From the time when the Act became effective on October 1, 1981 until recently, the United States Court of Appeals for the Fifth Circuit permitted the public direct access to all complaints against judges as well as to the chief judge's dismissal orders. Chief Judge Charles Clark and his successor, Chief Judge Henry A. Politz, routinely asked accused judges for their responses to complaints. These responses, along with other evidence, were placed in a file with the initial complaint and the chief judge's dismissal order. The entire file was available for public examination. The circuit followed this practice because its judges thought that a policy of "non-access would cause the public to be suspicious" and because the circuit wanted to show the public that it was "not hiding anything." From 1982, the first year for

260 See id. § 331. The Fifth Circuit no longer provides the public with full access to judicial complaints and orders as a result of its decision to adopt Illustrative Rule 17. The circuit was motivated by the Judicial Conference's desire to have one uniform, national policy regarding dismissal orders by chief judges. Telephone Interview with Henry A. Politz, Chief Judge of the United States Court of Appeals for the Fifth Circuit (Apr. 25, 1994) [hereinafter Politz Interview].

261 Telephone interview with Charles Clark, former Chief Judge of the United States Court of Appeals for the Fifth Circuit (May 4, 1994) [hereinafter Clark Interview]. However, in accordance with the Act, the Fifth Circuit did not open for public review the chief judge's orders referring complaints to special investigative committees, the committees' activities, nor the committees' reports to the judicial council. Nevertheless, the type of complaints that concern many advocates of confidentiality (the frivolous and merits-related complaints) were resolved in a nonconfidential manner in the initial stages of the Act by the chief judges. Both Chief Judge Politz and Clark reported there were no problems with their circuit's policy of having judicial complaints and their files completely available to the public in cases where they dismissed the complaints. See also Politz Interview, supra note 260.

262 Politz Interview, supra note 260; Clark Interview, supra note 261.

263 Politz Interview, supra note 260; Clark Interview, supra note 261.

264 Politz Interview, supra note 260; Clark Interview, supra note 261.

265 See Politz Interview, supra note 260; Clark Interview, supra note 261. Former Chief Judge Clark served on the three-member Special Committee of the Conference of Chief Judges of the United States Court of Appeals that prepared the Illustrative Rules. See supra notes 110-16 (providing a background discussion of the Illustrative Rules). Rule 17 called for the publication of dismissal orders and for the limited disclosure of the reasons for such orders. Although former Chief Judge Clark and the Fifth Circuit played a key role in the formulation of Rule 17, they eventually rejected it because it denied the
which the circuit has statistics, through the end of March 1994, a total of 279 complaints were filed. The chief judges dismissed approximately ninety percent of these complaints because they were merits-related, frivolous, not in conformity with the Act, or because corrective action had occurred. Very little publicity resulted.

The open disciplinary process produced neither major controversies regarding individual judges or complainants nor serious damage to the judiciary's integrity or morale; indeed, citizens only occasionally requested copies of complaints and orders under the policy of open access. Public unfamiliarity with the complaint process in the circuit, especially the right to review complaints and related materials, may have contributed to this low level of interest.

The Oregon Bar disciplinary process furnishes additional evidence that professional self-regulation can be open without destroying the profession. Unlike the Fifth Circuit's lawyer disciplinary process, which opened only part of the judicial complaint process to the public, Oregon's process is open to the public from the initial filing of a complaint to its resolution. In the

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public direct access to complaints, the evidence concerning them, and the original dismissal orders. Both Chief Judges Politz and Clark were concerned that Rule 17 precluded the public from deciding for itself that the circuit had nothing to hide; see Politz Interview, supra note 260; Clark Interview, supra note 261.

266 Telephone Interview with Charles Fulbruge, III, Clerk of the United States Court of Appeals for the Fifth Circuit (May 3, 1994).

267 Id.

268 See supra note 260. A Nexis search in the ARCNWS library using the search terms “fifth circuit w/40 (judicial misconduct or judicial complaints)” supports the chief judges' conclusions. The search uncovered only four articles regarding judicial misconduct in the Fifth Circuit. Two of the articles were in national law newspapers, and two were in local general newspapers. Two of the articles concerned the same judge.

269 Clark Interview, supra note 261.

270 Telephone Interviews with George Riemer, Associate Executive Director and General Counsel, Oregon State Bar (May 20 & June 29, 1994) [hereinafter Riemer Interviews]. Executive Director Riemer reports that since 1976, Oregon has been the only state with a policy of total openness regarding its lawyer disciplinary process. See Sadler v. Oregon State Bar, 550 P.2d 1218 (Or. 1976).

271 The Fifth Circuit has always kept investigations by special committees confidential pursuant to § 372(c)(14) of the Act. See supra note 261.

272 Public Records and Public Meetings Law, OR. REV. STAT. § 9.010 (1993) (expressly subjecting the state bar to the state Public Records and Public Meetings Law as a public body); OR. REV. STAT. § 192.420 (1993) (“Every person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505.” (listing exemptions)); OR. BAR R. CIV. P. 1.7(b) (records related to bar disciplinary proceedings open for public inspection); see Riemer Interviews,
recent Tonya Harding controversy, numerous complaints were filed with the Oregon Bar's Disciplinary Committee against the lawyer who represented Harding's husband. The complaints followed the lawyer's public comments concerning Harding's involvement in the assault on fellow skater Nancy Kerrigan. The openness of the disciplinary process did not produce a wave of frivolous complaints by the public or by the bar. On the contrary, complaints from both sources expressed sensible concern about the propriety of the attorney's remarks.

The McKay Commission, which the ABA established in 1989 to study lawyer disciplinary systems, provides additional evidence that Oregon's open disciplinary system is effective. Based in

supra note 270 (indicating that the public occasionally learns about complaints even before the accused attorney). See generally Open the Process, NAT'L LJ., Apr. 25, 1994, at A16 (noting that secret disciplinary processes for lawyers have harmed the profession's reputation and that recapturing the public's trust requires that disciplinary systems should be open from the filing of a complaint, as in Oregon and Florida).

Recognizing a strong public interest in obtaining knowledge about its judges, a federal court recently struck down a Florida law prohibiting complainants from publicly discussing their testimony in state judicial disciplinary proceedings. Doe v. Florida Judicial Qualifications Comm'n, 748 F. Supp. 1520, 1525 (S.D. Fla. 1990); see also Baugh v. Judicial Inquiry and Review Comm'n, 907 F.2d 440, 444-45 (4th Cir. 1990) (deciding that only a compelling state interest could justify Virginia's confidentiality regulation which prohibited complainants from publicly reporting that they had filed judicial complaints). See generally Lind v. Grimm, 30 F.3d 1115, 1120-21 (9th Cir. 1994) (holding that individual has First Amendment right to disclose that he filed a complaint with Hawaii's Campaign Spending Commission and rejecting the Commission's justifications for confidentiality; the Commission's justifications were similar to those advanced by proponents of the Act's confidentiality).

Randall Sullivan, Tonya Harding, ROLLING STONE, July 14-28, 1994, at 80 (providing a detailed account of the incident).

Id. at 113.

See Riemer Interviews, supra note 270. Executive Director Riemer reports that while no disciplinary system is completely problem-free, the benefits of Oregon's open disciplinary system clearly outweigh its detractors. The openness has promoted public confidence in the lawyer self-disciplinary process. See also Telephone Interview with James Mass, Legal Counsel for the Oregon Supreme Court and the Oregon Court of Appeals (May 20, 1994) (indicating that Oregon's open disciplinary process has been beneficial in promoting public confidence in the bar's self-regulation). See generally Merton, supra note 241.

See David Margolick, Of Tonya, Jeff and the Price Demanded for a Lawyer's Finger-Pointing, N.Y. TIMES, Feb. 11, 1994, at B18; see also Russell Sadler, MEDFORD [OR.] MAIL TRIB., Apr. 10, 1994, at A11 (noting as incorrect the prevailing wisdom in Oregon approximately 20 years ago that the public disciplining of lawyers would produce media trials and "election-year dirty tricks and besmirched reputations"; noting also that in 1990 the state bar president recommended Oregon's public disciplinary process to ABA). See generally Open the Process, NAT'L LJ., Apr. 25, 1994, at A16 (urging states to make their lawyer disciplinary processes more public).

COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS'N, LAWYER
part on the Oregon experience, the McKay Commission proposed an open disciplinary system in its 1992 report to the ABA House of Delegates. The commission recommended that disciplinary matters be made public from the time of the complainant's initial contact with a disciplinary body. Although the commission ultimately withdrew the proposal because of opposition, it nevertheless underscores the commission's appreciation of and preference for an open disciplinary process.

Opening the Act's complaint process will not produce a result any different from that witnessed in the analogous context of the Oregon Bar. Indeed, the Fifth Circuit's experience indicates that the result will be the same. And there is some reason to be concerned with the risk that the Act's broad shroud of secrecy may be perceived as just another coverup by a profession at the public's expense.

D. Accountability, Public Perception and Openness

Even if the Act's confidentiality offers some protection for
judicial independence, this is not the only value at stake in the judicial discipline process. Public accountability of judges, a countervailing value, must also be weighed when assessing the Act’s effectiveness. Indeed, Congress was principally concerned with assuring public accountability in the Act, which has its roots in the 1970s—a time of heightened concern over accountability of government officials in general.

Questions persist about the extent of misconduct in the federal judiciary and the effectiveness of the available regulatory mechanisms. The Act’s broad shroud of secrecy denies the public important information about the internal disciplinary workings of the judiciary and prevents the public from making its own assessment about the state of judicial affairs. Even the NCJDR noted its “apprehension that the notion of confidentiality can assume a life of its own, at great cost to public accountability.”

One expert on judicial discipline recently wrote, “[T]he perception persists that judges cannot be trusted to judge themselves [because] the public sees lots of judges and little formal disciplinary action.” This perception is particularly troublesome because the public is precluded from evaluating the dismissals of ninety-

283 Barr & Willging, supra note 7, at 173-78.
284 See Barr & Willging, supra note 7, at 128-28 (noting that “[t]he Act does not address most of the tension between the [competing] goals ‘oversight and confidentiality’”).
285 COMMISSION REPORT, supra note 8, at 4; see Marcus, supra note 15, at 375.
286 See COMMISSION REPORT, supra note 8, at 123-27; see also Seventh Circuit Evaluation, supra note 7, at 716-19 (criticizing the chief judge and the circuit judicial council for not fulfilling their responsibilities under the Act to investigate and discipline judges, even after the Chicago Council of Lawyers identified judges who may have engaged in misconduct). See generally Grimes, supra note 30, at 1220-23. Although “the Act has yet to prove itself as a reliable tool for dealing with the more serious judicial misconduct traditionally addressed through a House impeachment investigation,” id. at 1223, its “mechanism offers hope of addressing the vast majority of disciplinary problems that do not warrant removal,” id. at 1222.
287 The confluence of three sections shields information—frivolous as well as nonfrivolous—from public purview: § 372(c)(3) vests the chief judge with broad discretion to dismiss a complaint, § 372(c)(13) prohibits third party intervention in disciplinary proceedings, and § 372(c)(14) mandates total confidentiality during the Act’s complaint process. See supra text accompanying notes 158-76.
289 COMMISSION REPORT, supra note 8, at 106.
290 See Geyh, supra note 8, at 309 (contending that the judiciary engages in significant informal and less visible disciplinary activity); see also Abrams, supra note 20, at 95 (noting that most complaints are privately resolved by chief judges and that the confidentiality of these resolutions does “not really satisfy the goals of public accountability”). See generally DERSHOWITZ, supra note 7, at 17-19 (contending the quality of the judiciary is inferior to many other democratic nations because of the political appointment process).
five percent of the complaints filed against judges. Instead, it is forced to rely on the assessment of the NCJDR and others regarding the effectiveness of the Act. In addition to these third-party assessments, the public may soon be able to rely on a sanitized summary of the reasons for complaint dismissals from all circuits—with the chief judge excising the names of the accused judge and complainant. Nevertheless, the public is still prevented from directly reviewing the complaint file and thereby drawing its own conclusions.

This problematic perception may be exacerbated by any decline in the quality of justice dispensed by the federal courts. One veteran circuit judge recently cautioned Congress that "time is of the essence" for finding a "radical" way to expand the federal judiciary to cope with its ever-increasing docket. The judge reported that cases all too often get "second-class treatment" and that other judges share his dire view that there is a continuing...
decline in the quality of the work of the federal judiciary. 295 A 1993 report by the Justice Research Institute (JRI Report) for the NCJDR found that even judges acknowledged that "valid complaints are not filed," although the number of unfiled complaints cannot be known. 296

The anticipated growth of the federal judiciary and the appetite of Americans for litigation are likely to ensure a steady stream of judicial complaints. 297 Limiting the public’s knowledge about judicial performance prevents the public from being certain that justice is being administered fairly and efficiently. In a perverse way, if the complainant and the accused judge follow the Act, it effectively serves as a prior restraint by broadly denying the public information that is critical of public servants. 298 By largely insulating judges from public scrutiny, Congress may undermine the very purpose of the Act—to provide for the fair and efficient administration of justice and, according to some, to provide the public with access to avenues of judicial discipline. 299

A disciplinary process more open to public review would improve the public’s perception of judicial self-regulation and, in the long term, prevent the courts from becoming less accountable to or separate from the public. 300 Evidence of this separateness is

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295 Reinhardt, supra note 294, at 52. See generally Richard A. Posner, The Federal Courts: Crisis and Reform 7, 77-93 (1985) (describing the caseload crisis in economic terms and noting that the demand for judicial services has outstripped the supply).

296 See Slate, supra note 206, at 1021-22 (stating that a representative sample of 306 judges of the United States Court of Appeals, U.S. District Courts, Bankruptcy and Magistrate Courts participated in the survey).

297 See COMMISSION REPORT, supra note 8, at ii, 4; supra notes 294-96 and accompanying text.

298 See Edwards, supra note 16, at 792-93. Complainants and witnesses often ignore the Act’s mandate of confidentiality and publicize their testimony. See Marcus, supra note 15, at 427 n.175. One chief judge stated:

As I now read the statute and rules, either party is free to breach confidentiality. Certainly [the] complainant is; probably the judge is equally free . . . . I'd like to make it clear in the Rules that either [the] complainant or the judge has the right to respond publicly once confidentiality is breached by the other side.

Id.; see also Doe v. Florida Judicial Qualifications Comm’n, 748 F. Supp. 1520, 1529 (S.D. Fla. 1990) (holding that complainants have a constitutional right to publicly communicate the fact that a complaint has been filed).

299 See COMMISSION REPORT, supra note 8, at 4 ("Congress was principally concerned with assuring public accountability in the 1980 Act . . . ."); see also Edwards, supra note 16, at 793 (criticizing the Act as an "ill-conceived" Congressional statutory procedure "to cure a perceived need for public access to avenues of judicial discipline" (citing Judge Browning, Report on the Implementation of the Judicial Conduct and Disability Act of 1980 in the Ninth Judicial Circuit 4 n.3 (Oct. 21, 1987))).

300 See COMMISSION REPORT, supra note 8, at 109-10; see also Cappelletti, supra note
reflected in the recent JRI Report which found that "[t]he public virtually has no knowledge or easy access to information about the judicial complaint process." A judiciary that is too separate from the "democratic order" may interfere with "democratic commitments to majority rule."

If the disciplinary process is open from the time a complaint is filed, some individual judges, like other public servants, may suffer from frivolous and mean-spirited claims of misconduct. Yet the Supreme Court recognizes that the public's criticism of an official's conduct does not become unworthy of constitutional protection just because it diminishes the official's reputation. Indeed, the Supreme Court has noted the strong public interest in obtaining knowledge about judges and has stated that judges "are not anointed priests" deserving special protection from public...
criticism. Yet proponents of confidentiality have not demonstrated that judicial independence is possible only if the Act's disciplinary process remains largely confidential and closed to public participation. Nor have they demonstrated that the risks of a more open process clearly outweigh the public's competing interest in having direct access to information about judicial conduct upon the initial filing of a complaint alleging judicial misconduct. Even assuming that some individual judges will be harmed by the public airing of nonmeritorious complaints, a fundamental policy choice concerning secrecy and openness has to be made, and it ought to favor disclosure.

IV. OPENING THE ACT: PROPOSED AMENDMENTS

Congress should consider several changes to the Act to bolster the public's perception of judicial self-regulation and to enhance public accountability. First, it should amend the Act to make the entire complaint process open to public review. The amendment should clearly express Congress' intent to promote public accountability by providing the public with full access to complaints, pertinent evidence, and final orders except under extraordinary circumstances. Extraordinary circumstances might include

440 (4th Cir. 1990).
306 See SHAMAN ET AL., supra note 17, at 419.
307 The FJC Study suggests that providing the public with full access to judicial complaint files may be more of a risk in certain regions of the country where the media allegedly has a more voracious appetite for judicial complaints. See Marcus, supra note 15, at 427. Even if the media in certain regions did report nonmeritorious complaints, this is an insufficient reason to impose a blanket rule of confidentiality on all circuit councils.
308 See Keyt, supra note 189, at 985 (suggesting that an "independent and honorable judiciary" is best served by openness and accountability).
309 But see Marcus, supra note 15, at 430 (describing as "overblown" the notion that the public has an interest in "making all aspects of the discipline process public").

Although complete openness would be the ideal, there are alternatives to opening fully the Act's process overnight. For example, one alternative would be to apply the openness provisions only to judges who are appointed after the provisions are adopted. This alternative would respond to concerns that a completely open regime should not apply to judges appointed under a regime of confidentiality. Moreover, the approach would gradually introduce the new "openness" to the judiciary and the public, provide a transitional period to fine-tune the provisions, and reduce the likelihood that the courts would confront a sudden surge of frivolous complaints.
those instances in which disclosure of information in a complaint threatens national security, endangers someone’s life, or involves juveniles.\footnote{See, e.g., Daniel B. Silver, \textit{The Uses and Misuses of Intelligence Oversight}, 11 \textit{Hous. J. INT'L L.} 7, 9 (1988) (noting that “[d]espite the vigor with which public debate and political action are pursued in some areas of government activity, there seems to be a widespread enduring consensus in our society that functions necessary to the security of the United States can, and should be, conducted in secret whenever it is necessary to their success”).}

In such extraordinary circumstances, the chief judge or the judicial council should have discretion to impose the kind of confidentiality the Act now mandates. The extraordinary circumstances exception to the Act’s policy of openness should be construed narrowly and should require a showing of clear and convincing evidence.\footnote{This intermediate standard of persuasion should limit the availability of the extraordinary circumstances exception and is thus commensurate with the importance of having an open process to ensure public accountability. \textit{See} Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967) (as a safeguard against chilling First Amendment expression, clear and convincing evidence of actual malice required before granting public figure recovery in defamation action against a media defendant).}

Opening the entire process would promote judicial morale because it would significantly undermine any allegations of a coverup of judicial misconduct. In addition, judges would no longer be disadvantaged by the fact that complainants are free to disseminate information publicly while the judges feel duty bound by both their Code of Conduct and the Act to remain silent.\footnote{See \textit{supra} notes 186-90 and accompanying text. \textit{But see} Marcus, \textit{supra} note 15, at 427 n.175 (quoting one chief judge: “the sense of the statutory scheme is that it’s all confidential . . . . I think that’s clear now; complainants know that leaks are improper.”).}

Surely, an open disciplinary process would provide judges with a more level playing field for vindicating their interests before the public.\footnote{\textit{See Marcus, supra} note 15, at 427 n.175 (quoting one chief judge: “I’d like to make it clear in the Rules that either [the] complainant or the judge has the right to respond publicly once confidentiality is breached by the other side.”).}

Second, if Congress rejects opening the entire complaint process, it should nevertheless amend § 372(c)(14) of the Act to open special committee investigations to public review unless extraordinary circumstances warrant confidentiality.\footnote{\textit{See supra} notes 173-76, 309-310 and accompanying text.}

Once a complaint has reached this stage, the chief judge has determined that further investigation is necessary because the complaint is not merits-related or frivolous and that neither corrective action nor intervening events permit the chief judge to conclude the pro-
ceeding. The public's interest in accountability outweighs the competing confidentiality concerns of the accused judge that his reputation is being unjustifiably placed at risk. If Congress refuses to open the special committee investigations, then at the very least Congress should make clear that § 372(c)(14)'s confidentiality provision applies only to the investigations of the special committee and does not function as a general rule of confidentiality for the entire Act. 315

Third, the Judicial Conference recently adopted Illustrative Rule 17 as national policy. 316 It is therefore no longer acceptable for chief judges to write only brief conclusory statements in support of their dismissal orders in hopes of complying with the Act's goal of public accountability. 317 This is an important positive step, yet Rule 17 requires chief judges to redact the name of both the accused judge and the complainant 318—in effect, providing a sanitized version of the record. Not all judges are enthusiastic about the Rule's adoption, and it is uncertain how effective this policy will be in informing the public, especially given the omission of the names of the accused judge and the complainant. 319 The success of the Rule depends largely on the willingness of chief judges to provide sufficient information in support of their dismissal orders. Congress should amend § 372(c) to require that all chief judges' disciplinary orders be public and be accompanied by sufficient information for meaningful public evaluation. To ensure full implementation of Rule 17, the amendment should

315 This would be consistent with the NCJDR's position that the Act's confidentiality provisions be construed narrowly. See Commission Report, supra note 8, at 107.
316 See supra note 170.
317 See supra notes 163-68 and accompanying text; see also Commission Report, supra note 8, at 108 ("Seven of the twelve complaint dismissals identified as troublesome by the Commission's consultants... relied on form dismissals that [did] not articulate reasons for the stated conclusions.").
318 Commission Report, supra note 8, at 107; see also Twentieth Century Report, supra note 2, at 104-12 (discussing Illustrative Rules 16 and 17 and the Act's confidentiality); supra note 169 and accompanying text. For the Fifth Circuit, the adoption of Illustrative Rule 17 for resolving judicial complaints represents an additional efficiency cost because the chief judge must prepare a sanitized version of the complaint, the record, and the order. Before Rule 17's adoption, all matters associated with a complaint, such as papers and other evidence, were directly available to the public in unedited form in the Fifth Circuit. See supra notes 260-67 and accompanying text.
319 For a sample of chief judges' views concerning the need for a confidential complaint process, see Marcus, supra note 15, at 427 n.175. One chief judge remarked, "[I]f the complaints were public, that could do a lot of damage, it could undermine public respect for the judiciary. As for issuing public, but sanitized, chief judge orders of dismissals, I don't know what purpose that would serve." Id.
require that the Judicial Conference establish a committee with both lawyers and lay persons to evaluate annually circuit compliance with Rule 17 in light of the Act’s goal of public accountability.\textsuperscript{320}

Fourth, Congress should amend § 372(c)(13) of the Act to permit amicus curiae participation,\textsuperscript{321} which would provide the judiciary with valuable information for resolving individual cases of misconduct and for addressing more systemic matters.\textsuperscript{322} Amicus curiae intervention will be easier and more effective if Congress also amends § 372(c) or § 372(c)(14) to provide the public with greater access to information about alleged misconduct. Even if it does not amend these sections, however, amicus curiae participation is appropriate. Although it may entail some costs, such as the time judges spend considering additional briefs, the potential benefits of additional insight concerning judicial discipline out-

\textsuperscript{320} Some have suggested that the responsibilities of an oversight committee be extended beyond overseeing Rule 17 compliance to cover all judicial implementation of the Act. Although this may seem like an attractive compromise between complete openness and the Act’s current regime of secrecy, it should not be viewed as a substitute for a truly open disciplinary process. See \textit{Commission Report}, supra note 8, at 61 ("Oversight is not without problems. . . . [I]t can be too intrusive [and] it may not be sufficiently comprehensive."). Furthermore, some judges are concerned about creating a separate and central oversight organization because it might threaten judicial independence. See \textit{Commission Report}, supra note 8, at 61, 123. It may also undermine judicial morale and discourage judicial candidates. Furthermore, in an "age of fiscal restraint," the creation of another governmental organization may be politically unpopular, especially since there is no guarantee that such a commission will necessarily satisfy the need for accountability. See \textit{id}. at 66 (reporting that no new governmental bodies are necessary to conduct additional study and oversight of judicial self-regulation because existing institutions—such as congressional committees and the Judicial Conference—are adequate). Moreover, there is a substantial risk that instead of building public confidence in the judiciary, the oversight committee may be perceived as just an extension of the judiciary—judges "watching" fellow judges. As an interim measure, however, an oversight committee might provide some reassurance that judges are engaging in self-discipline and constitute a logical step toward a fully open disciplinary process.

\textsuperscript{321} See supra notes 149-51, 172 and accompanying text; see also United States v. Michigan, 940 F.2d 143, 163-64 (6th Cir. 1991) (opining that amicus curiae interposition in a judicial proceeding serves the public interest by providing the courts with "impartial information" on matters of law about which there is doubt"); Michael K. Lowman, \textit{The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?}, 41 AM. U. L. REV. 1243, 1244-46 (1992) (reporting that the amicus curiae can provide the judiciary with impartial and valuable information and advice, especially given the ever-increasing complexity of cases).

\textsuperscript{322} For a recent example of when amicus curiae intervention in judicial disciplinary matters might be beneficial, see \textit{FBI Investigates a Nev. Judge Inquiry}, NAT’L L.J., April 18, 1994, at A6, A13 (judicial disciplinary hearing stayed by Nevada state justice prompts "request from director of Association of Judicial Disciplinary Counsel in New York to intervene in the case by filing an amicus curiae brief").
weigh any competing efficiency concerns.\textsuperscript{323} The Act's absolute ban on amicus curiae participation is too broad and arguably inconsistent with the goal of increased public accountability.\textsuperscript{324} At a minimum, Congress should amend the Act to provide the chief judge or judicial council with discretion to permit amicus curiae participation.

Fifth, Congress should amend the Act to give the courts jurisdiction to discipline judges who have resigned or retired before or after the filing of a complaint. Such an amendment, already the practice in several states and recommended by the drafters of the new ABA Proposed Model Rules of Judicial Disciplinary Enforcement,\textsuperscript{325} will reassure the public that miscreant judges will neither escape sanction nor receive generous job-related benefits merely because they leave office quickly and quietly.\textsuperscript{326} Extending the Act's reach to cover departed judges will also promote full compliance by active judges with the Code of Judicial Ethics and the Act.

Sixth, if Congress refuses to extend the Act's disciplinary jurisdiction to cover departed judges, it should nevertheless amend the Act to require disclosure of any complaint pending at the time a judge resigns or retires. The official designation of "retirement (or resignation) while complaint pending" may cause some judges to challenge allegations of misconduct rather than leave office voluntarily. Nevertheless, the public's interest in knowing about judicial departures under these circumstances warrants the designation and outweighs competing efficiency concerns.\textsuperscript{327}

Finally, Congress should amend the Act to involve citizens in

\textsuperscript{323} The benefits of amicus curiae participation in dispute resolution have been long acknowledged by the Supreme Court. See Karen O'Connor & Lee Epstein, Reforming Amicus Curiae Rules, 8 JUST. SYS. J. 35 (1983) (Supreme Court finds the benefits of amicus curiae briefs outweigh their impact on an already crowded docket). Both "public interest" and "judicial administration" would be similarly benefitted by amending the Act to permit amicus participation. Id. at 45.

\textsuperscript{324} See generally Lee v. United States, 343 U.S. 924 (1952). Justice Felix Frankfurter condemned the solicitor general's blanket denial of motions to file amicus curiae briefs when the government was a party as "not conducive to the wise disposition of the Court's business." Id. at 942.

\textsuperscript{325} See supra notes 232-36 and accompanying text. Rule 2B(2) of the ABA Proposed Rules requires that complaints against former judges be filed "within one year following the last day of the judge's service." ABA PROPOSED JUDICIAL ENFORCEMENT, supra note 179, Rule 2B(2) commentary. A similar statute of limitations should be adopted for filing complaints against former federal judges. The period for filing federal complaints, however, should be longer given the public interest at stake.

\textsuperscript{326} See supra notes 231-34, 237-39 and accompanying text.

\textsuperscript{327} See supra notes 231-34 and accompanying text.
the disciplinary process.\textsuperscript{328} Citizen participation should not be viewed as an unnecessary interference in an elite profession, but rather as a potential source of public assistance and support.\textsuperscript{329} The recent JRI Report indicates significant support for the involvement of lawyers and lay persons in the judicial disciplinary process.\textsuperscript{330} Even seventeen percent of the judges surveyed in this report favored establishing an independent national commission for judicial discipline which would include both lawyers and lay persons as members.\textsuperscript{331}

The Act presents several opportunities for public participation. For example, the chief judge could appoint a representative of the bar and a member of the public to serve as a standing committee to assist him in screening complaints before either dismissing them or appointing a special investigative committee. Another alternative is for the chief judge to appoint citizens to special investigative committees. Both alternatives still provide the local circuits with primary authority for disciplining fellow judges—a structure that some judges regard as preferable to the creation of a national tribunal.\textsuperscript{332} Citizen participation at some stage in the judicial discipline process is consistent with the goals of judicial independence and integrity because it promotes public appreciation of and respect for judicial decisionmaking.\textsuperscript{333} Ideally, any

\textsuperscript{328} See COMMISSION REPORT, supra note 8, at 152 (recommending “that each circuit council charge a committee or committees, broadly representative of the bar but that may also include lay persons . . . to assist in the presentation to the chief judge of serious complaints against federal judges” (emphasis added)). Although this recommendation is permissive, a standing committee of the American Judicature Society has wisely suggested that it is in the self-interest of the judiciary to “insist” on including lay participation because it reduces the risk of public alienation and mistrust of the judicial system. See American Judicature Soc’y Comm’n, supra note 294; see also The Effects of Gender, supra note 301, at 991 (recommending that the Ninth Circuit create a standing committee on fairness to fight gender bias in the courts and that the committee be composed of individuals of sufficient diversity, including “non-lawyer representatives”).

\textsuperscript{329} See generally SHAMAN ET AL., supra note 17, at 6 (citing I. TESITOR & D. SINKS, JUDICIAL CONDUCT ORGANIZATIONS 28-39 (2d ed. 1980) (suggesting that nonjudges already sit on many state judicial conduct commissions)).

\textsuperscript{330} See Slate, supra note 206, at 1023-24.

\textsuperscript{331} See id.; cf. Barr & Willging, supra note 7, at 174-75 (noting that several chief judges thought that a national court or citizen tribunal “might impinge on judicial independence” if selected as an alternative to the Act which focuses disciplinary control in local circuits).

\textsuperscript{332} See Barr & Willging, supra note 7, at 174-75 (reporting that several chief judges perceived a threat to judicial independence if disciplinary power “goes outside the circuit to some national body” causing the administration of complaints to “become formal, literal, and bureaucratic”).

\textsuperscript{333} All states and the District of Columbia have judicial conduct commissions, six
congressional effort to increase openness under the Act by providing for limited citizen participation should be combined with a campaign to educate the public about judicial activities. The judicial councils should follow the NCJDR’s suggestion of undertaking a campaign to educate the public about the Act and to publicize its existence. Members of the public should have direct input and representation on any judicial committee charged with informing the public about the Act.

CONCLUSION

The goal of the proposed amendments is to open the Act’s disciplinary process to the public—to democratize the process by providing for public involvement and review in the formulation and implementation of judicial discipline. By opening the process, Congress may prevent what Judge Abner Mikva recently noted as

states have a majority of public members, and only three have no nonlawyer public members. SHAMAN ET AL., supra note 17, at 382-83. These commissions function as investigatory bodies with broad authority. Id. at 384; see, e.g., CAL. CONST. amend. XXX, § 1 (defining the California Commission on Judicial Performance as an independent body overseeing the conduct of all state judges, composed of five judges selected by the supreme court, two lawyers chosen by the state bar, and two members of the public appointed by the governor and confirmed by the senate); cf. American Judicature Soc’y Comm’n, supra note 294 (reporting that the ABA recommends lay person participation on judicial conduct commissions and that every state commission include nonlawyers, sometimes constituting a majority).

See COMMISSION REPORT, supra note 8, at 126 (recommending that the membership of the Judicial Conference’s Committee to Review Council Conduct and Disability Orders, which monitors judicial discipline legislation and serves as a clearing house among circuits, be expanded to include lawyers as well as former circuit and district chief judges).

See COMMISSION REPORT, supra note 8, at 99-100 (noting “widespread ignorance about the Act in virtually every respondent group and a widely shared perception that some meritorious complaints are never filed”); see also supra notes 268-69 and accompanying text (suggesting that the Fifth Circuit’s legacy of openness shows that even an open complaint process requires educating the public about the Act if public interest is to occur). One possible method for bridging the informational gap between the public and the courts is to have court personnel, perhaps the clerk, distribute press releases about the activities of the court. Like other institutions that depend on public trust, the courts should cultivate channels for the distribution of information. Any information campaign should begin by reaching back to primary and secondary schools.

See COMMISSION REPORT, supra note 8, at 152 (recommending that the “bar and the federal judiciary increase awareness of and education about the 1980 Act among [various groups, including the] public”); see also TWENTIETH CENTURY REPORT, supra note 2, at 87-88 (citing public awareness as the linchpin of the 1980 Act, the Task Force suggested more education for “consumers” of judicial services: for example, giving each litigant a brief written summary of the Act or circulating the Act and other proposed rules to the bar and other interested groups for comments).
the tendency "of some of my colleagues on the bench [to] forget that the courts are a public institution. The public interest has to predominate over any private interest."³³⁷

The NCJDR notes in its recent and excellent report that judicial self-discipline under the Act appears to be functioning "reasonably well [but also that] it is by no means a perfect system."³³⁸ The NCJDR also notes that it does not regard the conclusions and recommendations in the report as the final word on judicial self-regulation.³³⁹

In the spirit of the NCJDR Report, this article has attempted to further the dialogue about accountability and independence in the federal judiciary by suggesting that Congress lift the Act’s veil of secrecy. The public benefit from full and open access to the disciplinary process outweighs any independence or efficiency concerns that seem to militate in favor of a confidential process. Indeed, an open process promises to serve both the judiciary’s long-term interest in maintaining its independence and integrity and the public’s interest in preserving governmental accountability and democratic rule.³⁴⁰

More importantly, without complete information about the filing of complaints and the reasons for their disposition, the public is denied the opportunity to evaluate judges fully. Indeed, the

³³⁷ Marianne Lavelle, Hearings Reveal Deep Divisions over the Issue of Court Secrecy, NAT’L L.J., May 2, 1994, at A12. Judge Mikva’s remark was part of his testimony before the United States Senate Subcommittee on Courts which examined the risks associated with the practice of settling complaints secretly. He urged Congress to establish guidelines for judicial approval of secret settlements in order to safeguard the public’s interest. For example, it was suggested that the Food and Drug Administration (FDA) would have kept silicone breast implants on the market in 1991 but for a doctor presenting the FDA Commissioner with copies of protected court documents that showed evidence of “scientific fraud” and other problems associated with the implants. Id. For a possibly ominous sign concerning the judiciary’s general disposition toward openness, see generally Henry J. Reske, No More Camera in Federal Courts, A.B.A. J., Nov. 1994, 28 (reporting that after a twenty minute debate the Judicial Conference reinstated its ban on television cameras in the courtroom, despite considerable support by judges, lawyers and others for expanding broadcast access).

³³⁸ See COMMISSION REPORT, supra note 8, at 123.

³³⁹ See id. at 129. In concluding its fine efforts, the NCJDR stated: “[T]he Commission realizes that the last pages in these particular chapters of constitutional history and judicial administration may not have been written. Others, either in the near or the distant future, may feel differently than we. This is as it should be; the Constitution is, after all, a living document.” Id.

³⁴⁰ See Hazard, supra note 208. See generally Fiss, supra note 180, at 60 (“Although some degree of political independence is necessary, removing the judiciary from popular control might well interfere with democratic values.”).
public is unable to make an informed assessment of the Act itself, including Congress' decision in the first instance to grant the judiciary almost absolute self-regulatory authority.\(^{341}\)

341 See Marcus, supra note 15, at 390-91, 431 (arguing that the shroud of confidentiality surrounding the Act's complaint process prevents the public from crediting the judiciary for its disciplinary efforts and makes it difficult to assess whether the public's perception of the judiciary has improved). See generally SHAMAN ET AL., supra note 17, at 417-18. No state judicial disciplinary system permits public access to complaints before they are evaluated for probable cause, and complaints dismissed for a lack of probable cause remain unavailable to the public. Currently, 22 states permit the public to review complaints and other information in files after an investigation results in formal charges. Id. at 417. Nineteen states permit public disclosure after a formal hearing and when discipline is recommended to the supreme court, and nine states permit public disclosure only if the supreme court issues sanctions. Id.