INFORMAL METHODS OF JUDICIAL DISCIPLINE

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INTRODUCTION

Prior to passage of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980¹ (the "Act"), when no formal, explicitly disciplinary process for remedying judicial misconduct (short of impeachment and removal) existed, many commentators expressed the concern that a significant volume of judicial misbehavior and disability was being ignored.² In the minds of some, the Act and the

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¹ Pub. L. No. 96-458, 94 Stat. 2035 (1980) (codified at 28 U.S.C. § 1 (1988)).

² See, e.g., *Judicial Tenure and Discipline-1979-80: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 118 (1979) (statement of Clark Mollenhoff, Professor of Journalism, Washington and Lee University) ("[T]he problems caused by unfit federal judges, whether from outright corruption, political favoritism, or inability due to ill-health or senility, amount to a hidden national scandal."); HAROLD W. CHASE, *FEDERAL JUDGES: THE APPOINTING PROCESS* 189 (1972) (estimating that "roughly 10 percent of the federal judges are incapable of doing a first-rate job due to disabilities of illness (including failing eyesight and defective hearing) and old age"); JOSEPH C. GOULDEN, *THE BENCHWARMERS* 11 (1974) ("The federal judiciary is . . . peculiarly exempt from outside scrutiny, insofar as its personalities and politics are concerned. This is bad, because godawful things happen regularly in the federal courts. Lawyers know about them, and talk about them at lunch and trade meetings . . ."); DAVID STEIN, *JUDGING THE JUDGES* 4 (1974) ("The suggestion is not made that all judges are crooked or inept or lazy or arrogant or overly ambitious for political, commercial, financial or professional advancement. But enough judges are in one or more of those categories to make the entire calling properly suspect."); Larry C. Berkson & Irene A. Tesitor, *Holding Federal Judges Accountable*, 61 *JUDICATURE* 443, 445-46 (1978) ("This paucity of impeachment proceedings, it is argued, is a clear indication that the procedure is ineffective. Surely, claim proponents of this view, more than nine federal judges have failed to comport with the high standards of judicial office. Their case is strongly supported by existing evidence."); Sam Nunn, *Judicial Tenure*, 54 *CHI.-KENT L. REV.* 29, 31-32 (1977) ("[I]t seems unreasonable to assert that only four federal judges in our history have misbehaved or have been disabled. On the contrary, the record is filled with cases of judges against whom substantial allegations

self-regulatory scheme it codified have dispelled that concern to a significant extent; for those subscribing to such a view, the paucity of disciplinary actions taken under the Act is simply a tribute to the quality of the federal bench.³ Others are less sanguine: judges cannot be trusted to judge judges, they have argued.⁴ For these skeptics, the small number of complaints culminating in discipline under the Act is evidence of judges' unwillingness to regulate themselves.⁵

were levied and who continued to serve on the federal bench."); Comment, *Removal of Federal Judges—Alternatives to Impeachment*, 20 VAND. L. REV. 723, 723 (1967) ("[T]here is considerable feeling that, in a system as large and as overburdened as the federal judiciary, a need exists for other procedures to deal with judges who are unfit for office through some fault of their own or through physical or mental disability.").

³ See, e.g., THOMAS E. BAKER, THE GOOD JUDGE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON FEDERAL JUDICIAL RESPONSIBILITY 77 (1989) ("More complaints against judges have been processed in the eight years under the 1980 act than in all the years under the impeachment clause. Has the experiment been a success? The somewhat speculative answer is a qualified yes."); Stephen B. Burbank, *Politics and Progress in Implementing the Federal Judicial Discipline Act*, 71 JUDICATURE 13, 22 (1987) ("[The] small number of complaints that have survived to the investigative stage and the much smaller number that have resulted in sanctions are proof, not of the councils' inactivity, but rather of the high caliber of the federal judiciary. . . . The present system is working.").

⁴ See, e.g., Anthony D'Amato, *Self-Regulation of Judicial Misconduct Could Be Mis-Regulation*, 89 MICH. L. REV. 609, 615 (1990) ("[T]he very procedures set up by the judiciary betray a distinctly unfavorable disposition toward complaints about misbehavior of their fellows. These procedures provide no reassurance that judges can or should self-regulate cases of judicial misconduct."); Carol T. Rieger, *The Judicial Councils Reform and Judicial Conduct and Disability Act: Will Judges Judge Judges?*, 37 EMORY L.J. 45, 77 (1988) (questioning the "willingness of judges to 'keep their own houses in order'" under the Act); R.C. Wynn, *Calling for Impeachment*, TEX. LAW., Sept. 30, 1991, at 2 ("[I]t is obvious that the judiciary is not capable of policing itself. . . . If even a few good men and women lawyers, officers of the courts, are afraid to stand up, the judiciary will continue to make a mockery of the Judicial Conduct and Disability Act."); David Margolick, *A Glimpse at the Secret System of Penalizing Judges*, N.Y. TIMES, July 14, 1989, at A1, B8 ("This is not a system to sanction judges, but to protect judges against complaints, and one that only the blind or foolhardy would use," said Professor Dershowitz, who called the procedure a 'Kafkaesque charade.') (quoting Alan Dershowitz, Professor of Law, Harvard Law School).

⁵ See 132 CONG. REC. S8746 (daily ed. June 26, 1986) (statement of Sen. DeConcini) ("This act has been largely ignored by the Federal judiciary. . . . The record of the past 5 years—a record of inactivity—speaks for itself."); D'Amato, *supra* note 4, at 614-15 (arguing that judges have made "the path to complaining about judicial misbehavior rocky, narrow, incoherent, and fraught with peril," and pointing to the dearth of corrective actions taken in response to complaints filed under the Act, as evidence that "[t]he judges' efforts appear to have worked"); Rieger, *supra* note 4, at 94 ("Rather than enhancing respect for the judiciary by allowing judges to deal with misconduct which may not warrant full impeachment proceedings, the Act has precipitated a growing number of complaints, most of which have been summarily dismissed, causing frustration and resentment about the judiciary's handling of the

With all eyes focused on the Act, one is left with the impression that it is, if not the only means of judicial discipline besides impeachment, the only means worth talking about. Yet there have been and continue to be a number of less visible, less explicitly disciplinary mechanisms for regulating judicial misconduct and disability. Before passage of the Act, some of those mechanisms were the subject of study.⁶ After the Act became law, however, what little attention informal methods of judicial discipline received was drowned in a sea of scholarship analyzing the constitutionality, desirability, and effectiveness of the formal process the Act established for disciplining judges.⁷ Notwithstanding the lack of attention informal methods have

matters." (footnote omitted)); Alan Dershowitz, *Judicial Ethics is in Wrong Hands*, ST. PETERSBURG TIMES, May 27, 1989, at 18A ("[T]he disciplinary process has become a paper tiger under Haynsworth's chairmanship. . . . Congress must look into the scandal of judicial discipline. . . . But with an unrepentant fox guarding the chicken coop, it is naive to assume that the ethics of the fox will not persist."); Raoul L. Felder, *Who Judges the Judges?*, NEWSDAY, Dec. 4, 1992, at 62 ("The present system does not discipline judges; rather, it protects and covers up for judges. Since 1980, 1,300 complaints against federal judges have been lodged nationwide, but only three federal judges have been publicly reprimanded.").

⁶ See generally PETER G. FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* (1973) (providing a political history of federal court administration); STEVEN FLANDERS & JOHN T. MCDERMOTT, *OPERATION OF THE FEDERAL JUDICIAL COUNCILS* (1978) (appraising the effectiveness of judicial councils); RUSSELL R. WHEELER & A. LEO LEVIN, *Judicial Discipline and Removal in the United States* (1979) (discussing the formal mechanisms used to regulate judicial conduct); Peter G. Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration*, 37 U. CHI. L. REV. 203 (1970) [hereinafter Fish, *Rusty Hinges*] (discussing the Administrative Office Act); Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681 (1979) (arguing that informal process should be preferred to a stringent process of judicial regulation); John W. Oliver, *Reflections on the History of Circuit Judicial Councils and Circuit Judicial Conferences*, 64 F.R.D. 201 (1975) (making several proposals for increased judicial efficiency); J. Clifford Wallace, *Judicial Administration in a System of Independents: A Tribe with Only Chiefs*, 1978 B.Y.U. L. REV. 39 (attempting to reconcile the conflict between judicial independence and effective and efficient judicial administration); Brent D. Ward, *Can the Federal Courts Keep Order in Their Own House? Appellate Supervision Through Mandamus and Orders of Judicial Councils*, 1980 B.Y.U. L. REV. 233 (examining the supervision of lower courts by appellate courts through advisory and supervisory writs of mandamus and orders of judicial councils).

⁷ Articles analyzing the Act include: Stephen B. Burbank, *The Federal Judicial Discipline Act: Is Decentralized Self-Regulation Working?*, 67 JUDICATURE 183 (1983) (arguing that the Act is deficient because of vagueness and inconsistency within the policies formulated by the judicial councils); Stephen B. Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283 (1982) (same); Harry T. Edwards, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges*, 87 MICH. L. REV. 765 (1989) (arguing for the desirability of judicial self-regulation in matters where

received in the thirteen years that the Act has been in place, a significant body of evidence points to the conclusion that some of these preexisting, informal disciplinary mechanisms are thriving, and are doing so not despite, but because of the formal disciplinary process.

The limited visibility of informal judicial discipline ordinarily places it beyond public scrutiny and renders it subject to criticism on that ground. 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.

For purposes of discussion here, informal disciplinary or quasi-disciplinary mechanisms are divided into two groups. The first group consists of "tools of judicial administration," which include two disciplinary or quasi-disciplinary mechanisms worthy of note: (1) orders and actions of the circuit judicial councils, and (2) actions and communications of chief circuit and district judges.⁸ The second

impeachment and criminal action are not at issue); C. Randolph Fishburn, *Constitutional Judicial Tenure Legislation?—The Words May Be New, but the Song Sounds the Same*, 8 HAST. CONST. L.Q. 843 (1981) (arguing that the framers of the Constitution correctly limited judicial regulation to impeachment); Collins T. Fitzpatrick, *Misconduct and Disability of Federal Judges: The Unreported Informal Responses*, 71 JUDICATURE 282 (1988) (arguing that the Act bolsters the informal methods of regulating judicial misconduct and disability); Robert W. Kastenmeier & Michael J. Remington, *Judicial Discipline: A Legislative Perspective*, 76 KY. L.J. 763 (1988) (advocating reliance on the Act as a starting point for judicial reform); Eric Neisser, *The New Federal Judicial Discipline Act: Some Questions Congress Didn't Answer*, 65 JUDICATURE 143 (1981) (exploring aspects of the Act and offering possible interpretations); Michael J. Remington, *Circuit Council Reform: A Boat Hook for Judges and Court Administrators*, 1981 B.Y.U. L. REV. 695 (discussing the Act as it applied to the circuit judicial councils); Comment, *Judicial Misconduct and Politics in the Federal System: A Proposal for Revising the Judicial Councils Act*, 75 CAL. L. REV. 1071 (1987) (criticizing the Act for internal inconsistencies and proposing revisions); see also *supra* notes 2-4.

⁸ Other mechanisms could be added. The Civil Justice Reform Act, 28 U.S.C. § 476 (1988 & Supp. IV 1992), for example, requires each judicial district to publish semi-annually, a list of district judges and the motions, bench trials, and cases each judge has had pending over a specified period of time. To the extent that inexcusable delay is a form of judicial misconduct, § 476 would properly qualify as a quasi-disciplinary mechanism calculated to embarrass judges into keeping abreast of their dockets. See Katherine J. Henry, *Judicial Discipline Through the Civil Justice Reform Act's Data Collection and Dissemination Requirements*, in 1 RESEARCH PAPERS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE & REMOVAL 859, 860-61 (1993) [hereinafter RESEARCH PAPERS] (article appears as Appendix C to Charles G. Geyh, *Means of Judicial Discipline Other Than Those Prescribed by the Judicial Discipline Statute*, 28 U.S.C. Section 372(c), in RESEARCH PAPERS, *supra*, at 713); R. Lawrence Dessem, *Judicial Reporting Under the Civil Reform Act: Look, Mom, No Cases!*, 54 U. PITT. L. REV.

group, "methods of judicial socialization," includes two additional devices that can be quasi-disciplinary in nature: (1) judicial review, including mandamus, and (2) "peer pressure" among judges.

This Article explores the circumstances in which the above mechanisms are used, assesses how well they work, and discusses a number of proposals to improve or modify their operation. Such an undertaking is complicated by two factors: (1) most primary research and secondary literature on the subject predates the 1980 Act, and so is not necessarily descriptive of current practice, and (2) most of the disciplinary measures at issue here are informal, and thus "off the record," making it difficult to assess the frequency and effectiveness with which such measures are used. In an effort to gather more information about the disciplinary methods under investigation, questionnaires were distributed to all present and former chief circuit judges, forty-five in all, of whom thirty-six responded, thirty-one by completing the questionnaire. Copies of the questionnaires and summaries of the responses are included as the Appendix to this Article. In a related effort, interviews of several present and former chief circuit judges were conducted by Jeffrey Barr, of the National Commission on Judicial Discipline and Removal, and Thomas Willging, of the Federal Judicial Center. Segments of their interview transcripts are quoted throughout this Article. Those interviews were conducted with the understanding that no material would be published that could reveal the identity of either the chief judge being interviewed, or other judges whose disciplinary problems the chief judge discussed. I have taken care to honor that understanding here.⁹

687 (1993); Charles G. 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. (forthcoming 1993). The Code of Conduct for U.S. Judges is likewise relevant to the control of judicial misconduct. See generally Beth Nolan, *The Role of Judicial Ethics in the Discipline and Removal of Federal Judges*, in RESEARCH PAPERS, *supra*, at 867 (discussing the interplay of the Code's ethical principles and misconduct). So too, are judicial education programs conducted by the Federal Judicial Center, to say nothing of the individual judge's sense of right and wrong.

This Article examines the *general*, informal disciplinary mechanisms that address judicial misconduct and disability *after they have occurred*. Mechanisms narrowly targeted to address specific problems such as decision-making delay have thus been excluded. Mechanisms that may prevent misconduct and disability problems from arising in the first place, such as the Code of Conduct and educational programs, are likewise beyond the scope of this Article.

⁹ See Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25, 31-32 (1993).

I. WHEN INFORMAL METHODS OF JUDICIAL DISCIPLINE ARE USED

Initially, it is helpful to identify the processes through which judicial misconduct or disability is likely to be addressed, if at all, by means other than disciplinary action pursuant to the Act. There are two such circumstances: (1) a complaint is filed but the Act is deemed inapplicable; and (2) a complaint is not filed.

A. *A Complaint Is Filed, but the Act Is Deemed Inapplicable*

The Act does not necessarily apply to all episodes of judicial misbehavior.¹⁰ By its terms, the statute's application is limited to situations in which (1) the judge or judicial officer has "engaged in conduct,"¹¹ (2) the conduct is serious enough to be "prejudicial to the effective and expeditious administration of the business of the courts,"¹² and (3) the misbehavior is not "directly related to the merits of a decision or procedural ruling."¹³

It is, of course, impossible to ascertain precisely how often episodes of judicial misbehavior are made the subject of informal disciplinary or quasi-disciplinary action after it has already been dismissed as outside

¹⁰ In delineating the range of less than "good" behavior arguably outside the reach of the Act, discussion will be largely confined to misconduct. The statutory language at issue in Parts I.A.1. and I.A.2., *infra*, applies only to misconduct complaints. The language at issue in Part I.A.3., *infra*, on the other hand, permitting dismissal of complaints if they relate to the merits of a decision or ruling, applies to disability complaints too. For example, a *bona fide* complaint of disability might be dismissed pursuant to § 332(c)(3)(A)(ii), as relating to the merits of a decision, should the disability be manifested in the judge's opinions or rulings. In such a situation, recourse to other remedies, including judicial council orders certifying disability under § 372(b) might be necessary. A review of complaints filed under § 372(c), however, suggests that this issue has yet to arise. For an excellent discussion of the complaints filed, see Richard L. Marcus, *Who Should Discipline Federal Judges, and How?*, 149 F.R.D. 375 (1993); see also 28 U.S.C. §§ 332(c)(3)(A)(ii), 372(b)-(c) (1988 & Supp. IV 1992). Thus, while the discussion in Part I.A.3., *infra*, may be as applicable to disability as misconduct, discussion is confined to the latter.

¹¹ 28 U.S.C. § 372(c)(1) (Supp. IV 1992).

¹² *Id.*

¹³ § 372(c)(3)(A)(ii). Two other qualifications specified in the statute need be mentioned only in passing. One is that frivolous complaints of misconduct may be dismissed. See § 372(c)(3)(A)(iii). If a complaint is frivolous, however, the reasons for refusing to apply the discipline statute would apply equally to any of the other disciplinary or quasi-disciplinary measures at issue in this article. Another is that the chief judge may "conclude the proceeding" if she finds that "corrective action has been taken." § 372(c)(3)(B). In such instances, the Act applies to the conduct at issue, and any "corrective action" taken is taken pursuant to the Act. Given that this Article addresses disciplinary measures outside of the Act, the operation of § 372(c)(3)(B) will not be discussed here.

the scope of the statute. That this occurs, however, is confirmed by former Chief Judge Paul Roney of the Eleventh Circuit, who stated that "[t]he act produces substantial indirect benefits. It brings to the attention of the chief judge matters that may not fall within the statute but nevertheless deserve attention. The procedure gives the chief judge the opportunity to correct these matters."¹⁴ Of twenty-nine present and former chief circuit judges expressing an opinion in the questionnaire, twenty-seven agreed with Judge Roney.¹⁵

1. The Judge or Judicial Officer Must Have
"Engaged in Conduct"

The Act permits persons alleging that a judge has "engaged in conduct" sanctionable under the statute to file a complaint. Complaints "not in conformity" with this requirement may be dismissed. Read literally, the statute suggests to some that a complaint should be dismissed if it alleges that a judge *failed* to engage in conduct in which she should have engaged. Thus, for example, complaints alleging that a judge has unjustifiably delayed decision-making or has neglected her cases, arguably fall outside the scope of conduct regulated by the Act. The same might be said of complaints alleging that a judge did not intercede where intercession was warranted, in response to events of one sort or another transpiring in the court room.

Senior Judge and former Chief Judge John Godbold testified before the National Commission on Judicial Discipline and Removal that the question, "Does the statute include failures to act?" is a matter generating great differences of opinion among the chief judges.¹⁶ It was Judge Godbold's sense that "most chief circuit judges think it is not within the statute," although he held "the opposite view."¹⁷

Judge Godbold's opposing view can be defended without doing violence to the text of the Act. The dictionary definition of "conduct" refers to the synonym "behavior,"¹⁸ which in turn is defined as the

¹⁴ Letter from Paul H. Roney, Chief Judge of the Eleventh Circuit Court of Appeals, to Judge Elmo B. Hunter, Chairman, Committee on Court Administration, Judicial Conference of the United States (Sept. 30, 1987) (on file with authors).

¹⁵ See *infra* app., question 4.

¹⁶ Transcript of Hearings Before the National Commission on Judicial Discipline and Removal 62 (May 1, 1992) [hereinafter NCJDR Hearings] (testimony of John C. Godbold, Senior Circuit Judge, Eleventh Circuit Court of Appeals) (on file with author).

¹⁷ *Id.*

¹⁸ See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 393 (3d ed. 1992).

manner in which one "act(s), react(s), function(s) or perform(s)."¹⁹ One manner in which a person can react, function, or perform in response to a given situation is not to act at all. Accordingly, inaction, at least in common parlance, qualifies as a form of behavior or "conduct."

However, even to the extent that the phrase "engaged in conduct" is read literally to exclude failures to act, one could still argue that a judge who fails to act, if under a duty to act, has "engaged in conduct" within the meaning of the Act. Criminal law provides a logical parallel: Crimes such as homicide are usually defined to require affirmative acts, such as the killing of another person, and are generally inapplicable to persons who, through inaction, permit another to die.²⁰ An exception exists, however, in cases where a person has an affirmative duty to act. Thus, for example, a parent who neglects an affirmative duty to protect his child, which results in the child's death, may be found guilty of homicide.

By the same token, federal judges take an oath in which each assumes an affirmative duty to "administer justice" and to "faithfully and impartially discharge and perform all the duties incumbent upon [her] . . . according to the best of [her] abilities."²¹ One might fairly conclude that a judge's failure to act, if "prejudicial to the effective and expeditious administration of justice," is a dereliction of the duty spelled out in that oath. If so, the fact that the Act may be read literally to exclude failures to act should not render it inapplicable to judicial inaction.

The argument that the Act is inapplicable to failures to act does not actually appear to have support within the federal judiciary. No chief judge responding to the question of whether they ordinarily dismiss complaints of excessive decision-making delay said "yes" on the grounds that the statute does not reach failure to act.²²

2. The Conduct Must Be "Prejudicial to the Effective and Expeditious Administration of the Business of the Courts"

Records of disciplinary proceedings reflect that complaints are occasionally dismissed because the behavior complained of, even if

¹⁹ *Id.* at 167.

²⁰ For a general discussion of omissions to act in criminal law, see WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 3.2, at 282-96 (1986).

²¹ 28 U.S.C. § 453 (Supp. IV 1992).

²² See *infra* app., question 12.

troublesome to some degree, is insufficiently significant to be "prejudicial to the effective and expeditious administration of the business of the courts."²³ The Ninth Circuit has dismissed complaints of delayed decision-making on such grounds. Characterizing the purpose of the formal disciplinary process as being "to promote 'the effective and expeditious administration of the business of the courts . . . ' by providing a means for dealing with systematic inability or unwillingness to perform the duties of the judicial office," the court has declined to discipline isolated instances of decision-making delay in the absence of a "broader pattern of conduct."²⁴

The Second Circuit has taken a similar tack. In a 1987 status report to the Judicial Conference Committee on Court Administration, the chief judge explained that "if a complainant asserts that a matter has been pending before a judicial officer for a lengthy period of time, copies of the filings in question are requested so that a determination may be made on whether there is a *pattern* of lengthy delay."²⁵ Likewise, in the Fourth Circuit, prospective complainants are given an informational notice advising them of what conduct is subject to the Act. The notice states that the phrase "engaged in conduct prejudicial to the effective and expeditious administration of the courts' . . . could include *habitual* failure to decide matters in a timely fashion."²⁶

²³ § 372(c)(1).

²⁴ *In re Charge of Judicial Misconduct*, 593 F.2d 879, 881 (9th Cir. 1979) (citation omitted) (quoting the Ninth Circuit Judicial Council's procedures for processing complaints of judicial misconduct). Although this case arose prior to passage of the Act, it was decided pursuant to procedures established by the Ninth Circuit Judicial Council, which were substantially similar to those later codified in the Act. The language quoted from the opinion has since been applied to proceedings under the Act. See *In re Charge of Judicial Misconduct*, 782 F.2d 181 (9th Cir. 1986). Moreover, Chief Judge Browning, who authored both of these decisions, also chaired the Special Committee of the Conference of Chief Judges that developed the Illustrative Rules, which adopted a similar position. See SPECIAL COMM. OF THE CONFERENCE OF CHIEF JUDGES OF THE U.S. COURTS OF APPEALS, ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY, Rule 1(e) (1986) (original version of the rules). The Illustrative Rules were recently revised in response to the passage of the Judicial Improvement Act of 1990 and were circulated to the courts covered by the Act to provide a guide for the modification of local court rules. See Memorandum from the Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States to the Chief Judges of the United States Courts of Appeals, the United States Court of International Trade, and the United States Claims Court 1 (Aug. 15, 1991) [hereinafter ILLUSTRATIVE RULES] (on file with author).

²⁵ Letter from Wilfred Feinberg, Chief Judge, Second Circuit Court of Appeals, to Judge Elmo B. Hunter, Chairman Committee on Court Administration, Administrative Office of the U.S. Courts 4 (Sept. 23, 1987) (emphasis added) (on file with author).

²⁶ Letter from Harrison L. Winter, Chief Judge of the Fourth Circuit Court of

In the Ninth Circuit, the chief judge has dismissed complaints of concededly extreme delay. In one case, a complaint was dismissed on the grounds that there was no showing of a habitual problem, notwithstanding that a panel of the Court of Appeals had been "appalled" by the extent of the delay.²⁷ The questionnaire to chief circuit judges revealed that of sixteen judges indicating that they *did* ordinarily dismiss complaints of decision-making delay, ten did so at least in part because delay in isolated cases did not constitute conduct prejudicial to the administration of justice. Moreover, of the nine judges who said they did *not* ordinarily dismiss such complaints, four indicated that complaints were dismissed if the delay proved not to be habitual.²⁸

A look at the background of the phrase "prejudicial to the effective and expeditious administration of the business of the courts" reveals that exclusion of decision-making delay from its scope is a recent phenomenon. The phrase did not make its debut in the Act. Prior to 1980, the Administrative Office Act²⁹ authorized the circuit judicial councils to make "all necessary orders for the effective and expeditious administration of the business of the courts."³⁰ Fish notes that under that Act, the judicial councils issued orders responding to isolated complaints of delay "from the beginning."³¹ Similarly, a 1978 study of the federal judicial councils by Flanders and McDermott refers to "several instances in which a council took action when a judge's docket became backlogged because of a particular case."³² That the judicial

Appeals to Judge Elmo B. Hunter, Chairman, Committee on Court Administration, Judicial Conference of the United States (Sept. 30, 1987) (emphasis added) (quoting a notice from the clerk of the court to persons considering filing complaints of judicial misconduct or disability) (on file with author).

²⁷ See *In re Charge of Judicial Misconduct*, Nos. 89-80366, 89-80367 (9th Cir. Jud. Council filed June 12, 1990) (rejecting a charge that the judge unduly delayed deciding a case because no showing was made that "the judge delays in a substantial number of cases or that the judge's failure is persistent"); see also Marcus, *supra* note 10, at 414 (noting that chief judges "almost always dismiss complaints for delay").

²⁸ See *infra* app., question 12.

²⁹ Act of June 25, 1948, ch. 646, § 1, 62 Stat. 902 (codified as amended at 28 U.S.C. § 1 (1988)).

³⁰ *Id.* § 332 (codified as amended at 28 U.S.C. § 332(d) (1988)). In 1980, the word "justice" was substituted for the phrase "business of the courts," in order to clarify and enlarge the judicial council's authority. See Pub. L. No. 96-458, § 2(a)-(d)(1), 94 Stat. 2035 (1988) (codified as amended at 28 U.S.C. § 332(d)(1) (1988)); see also Remington, *supra* note 7, at 725-26 (suggesting that the new wording was intended to include "the institutional appearance of justice" under the scope of the Act).

³¹ FISH, *supra* note 6, at 401; see also *infra* part II.A.1.

³² FLANDERS & MCDERMOTT, *supra* note 6, at 32. For a more thorough analysis of the judicial councils' general powers as they relate to decision-making delay, see

councils have historically tackled complaints of decision-making delay in individual cases, under their authority to issue orders necessary for the "effective and expeditious administration of the business of the courts," suggests, at least, that in appropriate cases, such delays should likewise be treated as prejudicial to judicial administration under the Act.

Delay is not, however, the only instance in which a complaint may be dismissed on the grounds that problematic conduct is not problematic enough. In the Ninth Circuit, for example, a complaint was filed with respect to a district judge's handling of a status conference. The chief circuit judge dismissed the complaint. While the chief judge alluded to problems significant enough to merit corrective action, he concluded that the judge's handling of the conference did not rise to the level of prejudice to judicial administration.³³

In short, misconduct complained of may have to reach a certain magnitude before it will be deemed prejudicial to judicial administration. Misconduct falling short of that level must be handled, if at all, by other means.

3. The Conduct Must Not Be Directly Related to the Merits of a Decision or Procedural Ruling

An operating assumption of the Act, expressed in § 372(c)(3)(A)(ii), is that if judicial misconduct relates to the merits of a judge's decision or ruling, the problem is better addressed by the appellate process than by the disciplinary process. Complaints relating to the merits of decisions and rulings are therefore routinely dismissed. The Administrative Office of U.S. Courts reports that of the 195 proceedings terminated by chief judges in 1991, 162 (eighty-three percent) were dismissed on the grounds that they related directly to the merits of a judicial proceeding.³⁴

At least two distinct questions of scope are presented by that provision of the Act authorizing the chief judge to dismiss complaints relating to the merits of a decision. The first arises in situations that present an extant, though remote, opportunity for appeal: "Is anything that arose in the course of a proceeding out of bounds for a complaint," asked former Chief Judge Patricia Wald of the District of

infra part II.A.

³³ See *In re* Charge of Judicial Misconduct, No. 87-8135 (9th Cir. Judicial Council Aug. 3, 1988).

³⁴ See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 117-18 (1991).

Columbia Circuit, "or is behavior that might have been appealed as a fundamental deprivation of due process (i.e., the lack of an unbiased judge) still a permissible subject of a complaint?"³⁵ The District of Columbia Circuit, Chief Judge Wald explained, "operated on the assumption that if a complainant had requested and been denied recusal of a judge, that decision could have been appealed in the regular judicial process and so could not form the basis of a complaint."³⁶ On the other hand, she added, "I gather by reading some decisions in other Circuits, there may indeed be conduct by a judge in the course of proceedings, that while possibly appealable, is still considered a legitimate subject of complaint."³⁷

The other problem of scope relates, once again, to the issue of delay. Isolated instances of excessive decision-making delay might conceivably be dismissed on two grounds: (1) the statute does not reach failures to act; and (2) absent a pattern of delay, tardy decisions in individual cases are not prejudicial to judicial administration. To these two rationales may be added a third: mandamus, and not disciplinary proceedings, may be the proper remedy for decisional delay.

In dismissing a complaint that "the judge has not rendered judgment in a pending matter quickly enough," the Ninth Circuit opined that the disciplinary procedures were "not intended to provide a tactical option to counsel in litigation If a judge fails or refuses to enter judgment in a particular case when the circumstances require that judgment be entered, a petition for mandamus . . . provides an adequate remedy."³⁸ A subsequent report on the implementation of the Act in the Ninth Circuit explained that "[m]ost judicial misconduct complaints dismissed by the chief judge concern the merits of a judge's ruling or decision."³⁹ The Report describes one class of such complaints as those involving allegations that "the judge unduly delayed taking action in a case (22% of the 1985 complaints)."⁴⁰

³⁵ Memorandum from Patricia Wald, Chief Judge, D.C. Circuit, to Judge Elmo Hunter, Chairman, Committee on Court Administration, Judicial Conference of the United States 7 (Sept. 25, 1987) [hereinafter Wald Memorandum] (on file with author).

³⁶ *Id.* at 6.

³⁷ *Id.*

³⁸ *In re Charge of Judicial Misconduct*, 593 F.2d 879, 880-81 (9th Cir. 1979).

³⁹ JUDICIAL COUNCIL OF THE NINTH CIRCUIT, REPORT ON THE IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980 IN THE NINTH JUDICIAL CIRCUIT 11 (1987).

⁴⁰ *Id.* at 11-12.

Similarly, in the Eighth Circuit, then Chief Judge Donald Lay explained that "[i]n cases where the complaints relate to the failure of the trial judge to make a timely ruling, I have referred these matters to the court to be filed as petitions for mandamus."⁴¹ The Second Circuit, in contrast, appears to have dismissed complaints of delay on the grounds that they are related to the merits only if the complainant had actually filed a petition for a writ of mandamus.⁴² Responses to the chief circuit judge questionnaire lend additional support to the conclusion that complaints of decision-making delay are sometimes dismissed as related to the merits of the case. Of sixteen judges responding that they ordinarily dismissed such complaints, eleven indicated that they did so at least partly because delays are properly remedied by petitions for mandamus and therefore relate to the merits of a decision or ruling.⁴³

The propriety of dismissing complaints of decision-making delay on the grounds that the matter can be resolved in a mandamus petition turns upon a construction of § 372 (c)(3)(A)(ii). A literal reading of that section does not easily accommodate an interpretation that delay complaints are to be summarily dismissed as relating to the merits of a decision or ruling. While one could argue that neglect or failure to decide is, in effect, a "decision" to do nothing, the merits of which may be challenged in a mandamus petition, a more reasonable interpretation is that the conduct complained of in such cases is *not* a decision or ruling, but the complete absence of a decision or ruling. Dismissal in such instances appears to turn less on a strict construction of the statutory text than on an interpretation of its spirit and purpose: disciplinary action under the statute was not intended as a substitute for judicial review. If mandamus or appeal is or would have been available to remedy the conduct complained of, the complaint should be dismissed.

The operating assumption of this approach is that the Act serves a gap-filling function, in which its availability is limited to situations in which appeal or mandamus is unavailable. Given that appeal or mandamus is available when delays turn outrageous and when courtroom misconduct becomes so extreme as to deprive litigants of

⁴¹ Letter from Donald Lay, Chief Judge, Eighth Circuit Court of Appeals, to Judge Elmo Hunter, Chairman, Court Administration Committee, Judicial Conference of the United States 1 (Sept. 21, 1987) (on file with author).

⁴² See JUDICIAL COUNCIL OF THE SECOND CIRCUIT, COMPLAINTS FILED PURSUANT TO THE JUDICIAL COUNCILS REFORM AND JUDICIAL CONDUCT AND DISABILITY ACT OF 1980 4-5 (1987).

⁴³ See *infra* app., question 12.

fundamental due process, the paradox of this approach is that the severity of judicial misconduct becomes inversely related to the applicability of the Act. That is, the more outrageous the delay or the more extreme the courtroom misconduct, the more available becomes appeal or mandamus, and the less available becomes discipline. The alternative to such a paradoxical approach is to read § 372(c)(3)(A)(ii) more literally, to permit dismissal only in cases of complaints questioning the correctness of judges' rulings or decisions. Under this interpretation, the fact that misconduct could be challenged on appeal or in a petition for mandamus would not render the complaint dismissible, as long as the misconduct complained of did not pertain to the merits of an actual ruling or decision.⁴⁴

How § 372(c)(3)(A)(ii) is interpreted has an obvious effect on the role played by other disciplinary mechanisms. Particularly where no appeal or mandamus petition is filed, and the opportunity to file has passed, legitimate complaints of judicial misconduct that have been dismissed because the litigant could have appealed or filed for mandamus may be among the strongest candidates for other remedial action.

B. *The Act May Apply, but No Complaint Is Filed*

As indicated in the preceding section, methods of judicial discipline independent of those specified in the Act may be brought to bear in a variety of circumstances in which the conduct in question is deemed to fall outside the scope of the statute. A second situation in which other methods of judicial discipline may come into play is where a formal complaint is never filed, regardless of whether the conduct at issue would be sanctionable under the Act. One chief judge stated to Barr and Willging: "In my experience here, the most serious allegations of misconduct never hit the complaint process."⁴⁵ Most judges responding to the questionnaire agreed.⁴⁶

Incidents of alleged misconduct can come to the attention of those in a position to administer discipline in a variety of ways other than through a formal complaint. Under the Illustrative Rules, a complaint

⁴⁴ Even under this narrower interpretation, complaints challenging a judge's refusal to recuse him or herself might properly be dismissed. Such complaints were the focus of Judge Wald's concern. See Wald Memorandum, *supra* note 35, at 6-7; *supra* text accompanying note 35.

⁴⁵ Unpublished interview with federal judge (transcript on file with Barr & Willging).

⁴⁶ See *infra* app., question 3.

is not recognized as such for purposes of the Act unless it is signed and verified.⁴⁷ Anonymous complaints, informal complaints or reports, press reports of judicial misconduct or disability, and rumors of misconduct or disability circulated via the office grapevine therefore do not qualify as "complaints" triggering the § 372(c) process.

To better understand why legitimate complaints of judicial misconduct may never be formalized, it is helpful to group prospective complainants into one of two categories: court "outsiders," such as lawyers, litigants, jurors, witnesses, and observers, including the press; and court "insiders," such as fellow judges, clerks, and other court personnel.

Court outsiders may not file a complaint for a variety of reasons. They may be unaware that a problem exists, as in the case of a drinking problem known only to the judge's colleagues.⁴⁸ Or they may be aware of the problem, but feel it is insufficiently significant to justify a formal complaint. Victims of judicial misconduct who happen to win their lawsuits, for example, may no longer have the impetus to pursue a complaint through the administrative process.⁴⁹ Or they may regard the problem as significant, but do not wish to alienate the judge by filing a complaint. This is particularly true of the "repeat players" in the process—lawyers—who are reluctant to file complaints against judges before whom they routinely appear.⁵⁰

⁴⁷ See ILLUSTRATIVE RULES, *supra* note 24, Rules 2(f), 3(d).

⁴⁸ One chief judge responding to the questionnaire noted that while complaints under the Act captured 81% to 90% of courtroom misconduct, they captured only 11% to 20% of all other misconduct. See Individual Judges' Responses to Questionnaire (on file with author). Flanders and McDermott note that "excessive drinking" was "the most common" problem reported to them. FLANDERS & MCDERMOTT, *supra* note 6, at 31.

⁴⁹ The net effect is that the vast majority of complaints are filed by litigants who have lost their cases. See Wald Memorandum, *supra* note 35, at 9. ("[c]andidly, our experience has almost universally been with disappointed litigants or national organizations"); see also Edwards, *supra* note 7, at 793 (characterizing the Act as burdening the judiciary with "the needless work generated by disaffected litigants").

⁵⁰ Asked if he had ever used the Act to file a complaint about the delay in disposition of a motion or case, Alan Morrison, Director of the Public Citizen Litigation Group, responded:

No. I guess I never thought of actually using it at all.

... [I]f I'm reluctant to file mandamus petitions . . . this would be even more of a problem for me because it suggests that something ought to happen to the judge. And as a regular litigator in the federal courts, it's hard enough to file a mandamus petition. But this would be awfully difficult to do.

Judicial Discipline and Removal Hearings, *supra* note 16, at 224-25 (testimony of Alan Morrison, Esq.); see also Fitzpatrick, *supra* note 7, at 282 (noting that attorneys' reluctance to file judicial misconduct complaints often stems from "fear the judge

As one chief judge said in an interview with Barr and Willging: "Lawyers are reluctant to file complaints and will do it only in a serious case."⁵¹ Echoed another judge, "It's very difficult for a practicing lawyer to file a complaint, they're in constant practice before the judge. Yet, those are the complaints that tend to require some action or caution on my part."⁵² Even if the court outsider ultimately steels herself to file a written, verified complaint, the complaint may, at least in some jurisdictions, be rejected by the clerk's office if it is not submitted on the circuit's preprinted complaint form.⁵³

Court insiders may be even less likely to resort to filing formal complaints.⁵⁴ Employees who work alongside the judge on a daily basis cannot be expected, except in the most unusual of circumstances, to step forward and complain about that judge's conduct. For the judges themselves, the disincentives to filing formal complaints against their colleagues are at least as great. The judiciary has historically handled its disciplinary problems quietly, privately, and in its view, effectively.⁵⁵ As discussed in Part II.A., the mechanisms for administering discipline in this manner remain in place. From the judge's perspective the only purpose served by filing a formal complaint may be the disruption of collegiality among the judges in the circuit. Since 1990, chief circuit judges have had the authority to "identify" complaints and initiate § 372(c) proceedings on the basis of information coming to their attention informally.⁵⁶ To date, however, it is a

might be prejudiced against their current or future clients").

⁵¹ See *supra* note 45.

⁵² Barr & Willging, *supra* note 9, at 134.

⁵³ See *Judicial Independence-Discipline and Conduct: Hearings on H.R. 1620, 1930, and 2181 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 365 (1989) (testimony of Janice Kamenir-Reznik, President of California Women Lawyers).

⁵⁴ In the Ninth Circuit, over 95% of the complaints received as of 1987 were filed by individuals concerning lawsuits with respect to which they had an interest. See JUDICIAL COUNCIL OF THE NINTH CIRCUIT, *supra* note 39, at 9. This suggests that less than five percent of the complaints received by the Ninth Circuit could have been filed by court insiders.

⁵⁵ As one former chief judge has said of the circuit judicial council, which historically has been the primary administrator of discipline within the federal judiciary (see *infra* part II.A.): "[W]e believe its success may be measured by its lack of visibility. We suspect that some who have criticized councils for inactivity are unmindful of the saw that still waters run deep, and that the most effective actions are often the most inconspicuous." *Nolan v. Judicial Council of the Third Circuit (In re Imperial "400" Nat'l, Inc.)*, 481 F.2d 41, 47 (3d Cir.), *cert. denied*, 414 U.S. 880 (1973).

⁵⁶ See *Judicial Discipline and Removal Act of 1990*, Pub. L. No. 101-650, § 402(a),

power that has rarely been exercised.⁵⁷ Barr and Willging's interviews with chief circuit judges suggest that identification of complaints is reserved for truly serious cases: "There was a case where I identified a complaint. I thought it would have been improper to call the judge informally in that case. It was a serious allegation, it required on the record, formal treatment."⁵⁸

It is clear that judicial misconduct often comes to the attention of chief circuit judges by means other than a formal complaint. Twenty-three of thirty chief circuit judges reported that they had investigated allegations of misconduct coming to their attention informally.⁵⁹ A majority of judges indicated that less than forty percent of the true misconduct coming to their attention was ever the subject of a complaint, and only three of twenty-five judges put the figure as high as ninety-one to one hundred percent.⁶⁰

To the extent that formal complaints are neither filed by complainants nor identified by chief judges, the § 372(c) process is not triggered, and the conduct at issue must be addressed, if at all, by some other means. Having outlined the circumstances in which disciplinary methods other than those specified in the Act may come into play, a closer look will be taken in Parts II and III at what those disciplinary methods are and the processes they entail.

II. INFORMAL DISCIPLINE AND JUDICIAL ADMINISTRATION

As noted in the introduction, a number of disciplinary or quasi-disciplinary measures may be characterized as tools of judicial administration. Judicial administration has been defined to encompass the development and implementation of policies "designed to enable courts to dispose—justly, expeditiously, and economically—of the disputes brought to them for resolution."⁶¹ Such a definition is quite

104 Stat. 5122, 5122 (1990) (codified as amended at 28 U.S.C. § 372 (c)(1) (Supp. IV 1992)).

⁵⁷ Only three chief judges responding to the questionnaire reported that they have identified complaints pursuant to 28 U.S.C. § 372. See *infra* app., question 6.c.2. Barr and Willging may have identified one additional chief judge who has resorted to the procedure. See Barr & Willging, *supra* note 9, at 138.

⁵⁸ See *supra* note 45.

⁵⁹ See *infra* app., question 5.a.

⁶⁰ See *infra* app., question 3.

⁶¹ Russell Wheeler, *Judicial Reform: Basic Issues and References*, 8 POL'Y STUD. J. 134, 135 (1979); see also RUSSELL WHEELER & H. WHITCOMB, JUDICIAL ADMINISTRATION: TEXT AND READINGS 1-12 (1977); A. Leo Levin, *Research in Judicial Administration: The Federal Experience*, 26 N.Y.L. SCH. L. REV. 237, 238 (1981) (quoting Wheeler's definition of judicial administration).

broad, reaching issues ranging from the "mechanics of budget administration, and the determination of how many deputy clerks are needed in a particular court" to "the scope of the rulemaking power, the use of staff attorneys to process appeals, the structure of a judicial system and the processes of insuring stability in the law of a circuit."⁶²

The means taken to discipline misconduct, discourage decision-making delays, and address disabilities, insofar as they facilitate the just and expeditious disposition of disputes, are fairly characterized as judicial administration policies. Two such means are elaborated upon in this section: (1) orders and actions of the circuit judicial councils; and (2) actions and communications of the chief circuit and district judges.

A. Orders and Actions of the Circuit Judicial Councils

The circuit judicial councils are administrative bodies established in each of the judicial circuits. They are comprised of the chief circuit judge and an equal number of circuit and district judges.⁶³ The many and varied duties of the circuit judicial councils are spelled out in thirty-three different sections of the U.S. Code.⁶⁴ Two of those sections are of special interest here: (1) § 332(d)(1), which authorizes each council to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit"; and (2) § 372(b), which authorizes the councils to certify a judge as disabled by majority vote.

⁶² *Id.* at 239.

⁶³ See 28 U.S.C. § 332(a)(1) (Supp. IV 1992). The total number of judges serving on the council is determined by a vote of all active judges in the circuit. Prior to 1990, the composition of the council was limited to circuit judges, together with a minimum of two or three district judges. See 28 U.S.C. § 332(a)(1)(C)(i)-(ii) (1988). Prior to 1980, the councils were comprised entirely of circuit judges. See Administrative Office Act of 1939, Pub. L. No. 76-299, § 305, 53 Stat. 1223, 1224. The composition of the councils has long been a contentious issue, with district judges historically desirous of greater representation than the circuit judges were willing to cede. See FISH, *supra* note 6, at 252-53, 310-11, 380-82. The composition of the councils may be relevant to their effectiveness as disciplinary bodies. Participation by district judges may improve the councils' sensitivity to problems confronting the trial courts, and enhance the legitimacy of the councils in the minds of district judges, who are, after all, the councils' primary regulatees. See *infra* text accompanying note 101.

⁶⁴ For a list of those sections and a summary of what they provide, see Geyh, *Means of Judicial Discipline*, *supra* note 8, app. B.

1. The Judicial Councils' General Authority to Make Orders
Pursuant to 28 U.S.C. § 332(d)(1)

a. *The Administrative Office Act of 1939*

The Administrative Office Act of 1939 created the circuit judicial councils and authorized them to act in furtherance of effective and expeditious judicial administration.⁶⁵ Professor Peter Fish's outstanding political history of judicial administration is an appropriate starting point for an analysis of the judicial councils and their operation.⁶⁶ Fish attributes the creation of the judicial councils to three disparate events. The first was the 1936 impeachment trial of District Judge Halsted Ritter, which left many members of Congress exhausted, irritated, and eager to explore alternative means of judicial discipline and removal.⁶⁷ The second was a campaign by Second Circuit Judge Martin Manton and Fifth Circuit Judge Nathan Bryan in the mid-1930s to separate appellate court funding from that of the Department of Justice.⁶⁸ The third and most immediate motivation for creating the judicial councils was Chief Justice Charles Evans Hughes's proposal to decentralize judicial administration by creating a supervisory council in each judicial circuit.⁶⁹

Chief Justice Hughes was especially concerned with improving the regulation of judicial misconduct, delay, and disability.⁷⁰ The administrative structure of the Judicial Conference in place until 1939 had been criticized in congressional debates as inadequate to the task.⁷¹ Instituted in 1922 as the Conference of Senior Circuit Judges, the Judicial Conference drew criticism for its lack of explicit disciplinary authority.⁷² Moreover, many saw the Conference as too centralized to respond sensitively and expeditiously to local problems involving individual judges.⁷³ The individual circuit judicial conferences,

⁶⁵ See Administrative Office Act, § 305, 53 Stat. at 1223.

⁶⁶ See FISH, *supra* note 6, at 3.

⁶⁷ See *id.* at 153-54.

⁶⁸ See *id.* at 110-11, 155. Until 1939, the Department of Justice oversaw the budget and administration of the lower federal courts.

⁶⁹ See *id.* at 152.

⁷⁰ See *id.* at 154-55.

⁷¹ See *id.* at 37.

⁷² See *id.* at 36, 235-36. This did not, however, prevent the conference from discussing episodes of judicial misconduct and delay that came to its attention. See *id.* at 56-57.

⁷³ See *id.* at 36-37.

informally assembled in some circuits as early as 1924,⁷⁴ were obviously decentralized, but had no statutory authority whatsoever, let alone the authority to administer discipline.⁷⁵ With no individual or entity in possession of explicit disciplinary authority, the chief justice and chief circuit judges were reduced to "wheedling," and the judicial conference to making only suggestions and recommendations. Targeted judges could and occasionally would ignore these mild injunctions, apparently without fear of reprisal.⁷⁶

"To the end that the work of the district courts shall be effectively and expeditiously transacted," declared the 1939 Act, "it shall be the duty of the senior circuit judge of each circuit to call . . . a council composed of the circuit judges for such circuit."⁷⁷ That section further provided that "[i]t shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts."⁷⁸

Although the cumulative effect of these provisions, said Chief Judge Kimbrough Stone, was to create in the Judicial Council the "only . . . agency with any disciplinary powers,"⁷⁹ the nature and extent of those powers were not specified in the statute.⁸⁰ Judges who participated in drafting the legislation and who later testified in support of it identified consultation, reasoned arguments, persuasion, and publicity as the disciplinary tools available to the councils.⁸¹ These

⁷⁴ See *id.* at 146-47.

⁷⁵ See *id.* at 145-46, 151. The Administrative Office Act, in addition to creating the judicial councils, authorized circuit judicial conferences.

⁷⁶ Chief Justice Taft admitted as much:

"The fate of a Chief Justice in attempting to make District and Circuit Judges do what they are not disposed to do is a difficult one," . . . His suggestions . . . might go utterly unheeded which, thought the Chief Justice, was "a pretty good indication that I have no function to perform in the matter of disciplining judges."

Id. at 88-89 (footnote omitted).

Similarly, Fish quotes Chief Judge Kimbrough Stone as saying "[n]ot even the Judicial Conference itself . . . can do more than make recommendations and suggestions which may or may not be followed, as the judges affected may elect." *Id.* at 152. As discussed further in Part II.A.2., *infra*, however, these informal methods of regulating judicial behavior were nevertheless quite effective overall.

⁷⁷ Administrative Office Act of 1939, Pub. L. No. 76-299 § 306, 53 Stat. 1223, 1224 (codified as amended in scattered sections of 28 U.S.C. (1988 & Supp. IV 1991)).

⁷⁸ *Id.*

⁷⁹ FISH, *supra* note 6, at 152.

⁸⁰ The terms of the judicial councils' authority were so general that the Eighth Circuit Judicial Council initially concluded that the statute had not empowered it to act in a disciplinary capacity. See *id.* at 400.

⁸¹ See *id.* at 162-63. The testimony of interested witnesses is generally recognized

judges explicitly excluded penal sanctions from the proposed councils' arsenal as unnecessary and counterproductive. "You don't have to threaten judges to get them to carry out the directions of the councils," stated Chief Judge John Parker, who argued that judges would follow the suggestions of the judicial councils by virtue of the existence rather than the exercise of disciplinary authority.⁸² As Chief Judge Evans added, more could be accomplished "by a diplomatic handling of a bad situation where cooperation of the district judges is necessary than by coercion under authority of law."⁸³

b. *Judicial Discipline Under the Councils' General Order-Making Authority*

In 1948, the Judicial Councils section of the Administrative Office Act was amended to read that the councils "shall make all necessary orders for the effective and expeditious administration of the business of the courts," and that "the district judges shall promptly carry into effect all orders of the judicial council."⁸⁴ The House Report characterized this amendment as effecting a change in "phraseology," without altering the original understanding of the councils' powers.⁸⁵ This language remained unchanged until 1980, when the Act became effective.

Between 1939 and 1980, misbehavior and inaction of all shapes and sizes came to the attention of the judicial councils. Instances of judicial

as a weak source of legislative history. See George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates and Other Sources of Legislative History*, 1990 DUKE L. J. 39, 41-42, 59. "The section relating to the circuit councils," however, "was enacted precisely as it was proposed by the Judicial Conference." Remington, *supra* note 7, at 713. Moreover, the section was "deliberately worded in broad terms in order to confer broad responsibility and authority on the judicial councils." Emanuel Celler, *Foreword to REPORT ON THE POWERS AND RESPONSIBILITIES OF THE JUDICIAL COUNCILS*, H.R. MISC. DOC. NO. 201, 87th Cong., 1st Sess., pt. 2, at v (1961). By speaking in such broad terms, Congress effectively delegated to the councils themselves the task of enumerating their powers. It was, then, the chief judges who, acting collectively as the judicial conference, drafted the legislation, and who, acting as chairs of their respective judicial councils, took the lead in interpreting the legislation. Accordingly, in this instance, the testimony of chief judges may constitute the best extratextual evidence of the legislation's reach.

⁸² FISH, *supra* note 6, at 161-62.

⁸³ *Id.* at 162 (footnote omitted).

⁸⁴ Act of June 25, 1948, Pub. L. No. 80-773, § 332, 62 Stat. 869, 902 (1948) (codified as amended at 28 U.S.C. § 332 (1988)).

⁸⁵ H.R. REP. NO. 308, 80th Cong., 1st Sess. A46 (1947); see also *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 98-99 (1970) (affirming that the amendment did not change the original meaning of § 332 of the Act of June 25, 1948).

misconduct included judges who appointed relatives as court officers or who heard cases litigated by relatives;⁸⁶ judges who improperly refused to disqualify themselves;⁸⁷ judges who were suspected of corruption;⁸⁸ judges who billed the government for questionable expenses;⁸⁹ and judges who were accused of being excessively aggressive in moving cases on their dockets.⁹⁰ Instances of judicial inaction included both judges who delayed decision-making⁹¹ and judges who took extended vacations.⁹² Extrajudicial misconduct likewise appears to have been a subject of judicial council review.⁹³

While the nature of the judicial misconduct and inaction confronting the councils ran the gamut of problematic behavior, the circumstances in which the councils issued orders pursuant to § 332 were exceedingly limited. With the notable exception of the *Chandler* case,⁹⁴ the judicial councils' order-making authority was exercised

⁸⁶ See FISH, *supra* note 6, at 401.

⁸⁷ In one well known case, the court of appeals questioned District Judge Willis Ritter's impartiality and suggested that further proceedings be heard by a different judge. See *United States v. Hatahley*, 257 F.2d 920, 925-26 (10th Cir.), *cert. denied*, 358 U.S. 899 (1958). Judge Ritter refused to comply, prompting the court of appeals to order that the case be reassigned by the circuit's chief judge. See *United States v. Ritter*, 273 F.2d 30, 32 (10th Cir. 1959), *cert. denied*, 362 U.S. 950 (1960). Problems persisted, and the matter was pending with the judicial council when Judge Ritter died. See FLANDERS & MCDERMOTT, *supra* note 6, at 29, n.44. *Chandler* concerned a circuit council order prompted in part by Judge Chandler's refusal to disqualify himself in two cases. See *Chandler*, 398 U.S. at 77-82. Other alleged misconduct was also at issue. For an account of the judge's alleged misconduct and the judicial council's response, see *infra* notes 121-33 and accompanying text.

⁸⁸ See FISH, *supra* note 6, at 401-02.

⁸⁹ See *id.* at 407.

⁹⁰ See FLANDERS & MCDERMOTT, *supra* note 6, at 32-33.

⁹¹ See, e.g., *Chandler*, 398 U.S. at 74 (enforcing order of Judicial Council of the Tenth Circuit finding Judge Chandler unable or unwilling to discharge his duties efficiently); *In re Charge of Judicial Misconduct*, 593 F.2d 879, 881 (9th Cir. 1979) (denying complaint that district court judge did not render judgments with sufficient speed); *Hilbert v. Dooling*, 476 F.2d 355, 357 (2d Cir. 1973) (granting petition of mandamus for Judge Dooling to dismiss criminal indictment on grounds that Rule 4 of the Second Circuit's Rules Regarding Prompt Disposition of Criminal Cases precludes a second indictment); FISH, *supra* note 6, at 401 (discussing the Fourth Circuit Council's criticism of Judge John Paul for delay in two cases); FLANDERS & MCDERMOTT, *supra* note 6, at 32 (discussing one circuit that removed a district court judge from the case assignment list until he resolved a case causing serious delay).

⁹² See, e.g., FISH, *supra* note 6, at 409 (citing an instance in which a district judge in New York City took a world tour that lasted for three months).

⁹³ In 1969, the Judicial Conference authorized the judicial councils to review extrajudicial activities of judges where remuneration was received. See *id.* at 402; DIRECTOR OF THE ADMIN. OFFICE OF THE U.S. COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE 42, 50-52 (1969).

⁹⁴ See *infra* text accompanying notes 121-35.

almost exclusively in response to episodes of judicial inaction or delay, not misconduct.⁹⁵ The only instance of formal council action (other than *Chandler*) reported by Flanders and McDermott in their investigation, was an order removing a judge from the case assignment list until a long delayed case was decided.⁹⁶ Fish likewise reports that:

Formal orders from the council to a district court or judge are, however, very much the exception. . . .

When such formal orders are issued, they often relate to the more mundane aspects of administration. Freezing a district judge's regular docket assignments until he has decided cases already under advisement is not uncommon. . . .⁹⁷

The questionnaire completed by chief circuit judges corroborates these conclusions. Of eight disciplinary and quasi-disciplinary mechanisms evaluated, circuit council orders were among the least frequently used, ranking ahead of only impeachment and criminal prosecution.⁹⁸ Furthermore, of eighty-five to ninety-two reported instances of remedial action taken outside of the formal disciplinary process specified in § 372(c), only seven culminated in circuit council orders.⁹⁹ Each of the five judges reporting that circuit council orders had been issued described the conduct causing remedial action as including delay or disability.¹⁰⁰

The infrequency of orders issued by the judicial councils may be attributable to a variety of factors:

Councils may view formal orders as a potential threat to judicial independence. "It is vital," declared the 1974 Report of the Judicial Conference, "that the independence of individual members of the judiciary to decide cases before them and to articulate their views freely be not infringed by action of a judicial council."¹⁰¹ As discussed below, the *Chandler* decision did little to reduce uncertainty surround-

⁹⁵ Two qualifications are in order. First, the councils have occasionally issued orders in response to the conduct of court personnel. See, e.g., *Nolan v. Judicial Council of the Third Circuit (In re Imperial "400" Nat'l, Inc.)*, 481 F.2d 41, 46-47 (3d Cir.) (upholding council order prohibiting a lawyer from serving as bankruptcy trustee when a client of his firm had submitted a reorganization plan in the proceeding), cert. denied, 414 U.S. 880 (1973). Second, judicial disability has occasionally been the subject of judicial council orders under § 332.

⁹⁶ See FLANDERS & MCDERMOTT, *supra* note 6, at 32.

⁹⁷ FISH, *supra* note 6, at 418-19.

⁹⁸ See *infra* app., question 1.

⁹⁹ See *infra* app., question 6.

¹⁰⁰ See *infra* app., question 6.

¹⁰¹ Oliver, *supra* note 6, at 213 (quoting DIRECTOR OF THE ADMIN. OFFICE OF THE U.S. COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE 8 (1974)).

ing the constitutional limits of the council's power to issue orders regulating judicial conduct.¹⁰² To avoid the problem altogether, the councils may have preferred less action to more. As one chief judge put it: "[W]e think nothing would furnish potential critics of the circuit council with ammunition more than would overaction."¹⁰³

The statute may offer insufficient guidance as to the permissible scope of council orders. "Standing alone," wrote the court in *Chandler*, "§ 332 is not a model of clarity in terms of the scope of the judicial councils' powers Legislative clarification of enforcement provisions of this statute . . . [is] called for."¹⁰⁴ With § 332, Congress created an empty vessel that it directed the judicial councils to fill. In the wake of *Chandler* and the continued uncertainty surrounding the constitutional scope of their powers, the councils may be reluctant to do so, absent more explicit congressional guidance. The net effect is a statute perceived as lacking real substance. "[T]he Councils," observed Chief Judge Lumbard, "by their many failures to act have themselves contributed to a feeling on the part of many judges that Section 332 gave the councils no real power."¹⁰⁵

Some councils may be headed by chief circuit judges who are insufficiently interested in judicial administration to encourage council orders. How active or passive a council is turns in no small part upon its leader, the chief circuit judge. As District Judge John Oliver observed of circuit judicial conferences: "If a particular Chief Judge was blessed with that exceedingly rare quality of administrative talent, excellent conferences were held during his time. If not, the conferences were . . . a waste of judicial time so far as making any contribution to the improvement of administration of justice"¹⁰⁶ The same is true of the judicial councils. Fish writes: "Much depends on the chief judge of the circuit. Without his leadership, council effectiveness wanes, and his outright disinterest assures impotence."¹⁰⁷

Councils may deem it unnecessary to issue orders pursuant to § 332, given the availability of the Act. The Act was intended to complement, not

¹⁰² See *infra* text accompanying notes 121-35.

¹⁰³ *Nolan v. Judicial Council of the Third Circuit (In re Imperial "400" Nat'l, Inc.)*, 481 F.2d 41, 47 (3d Cir.), cert. denied, 414 U.S. 880 (1973).

¹⁰⁴ *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 85 n.6 (1970).

¹⁰⁵ J. Edward Lumbard, *The Place of the Federal Judicial Councils in the Administration of the Courts*, 47 A.B.A. J. 169, 170 (1961).

¹⁰⁶ Oliver, *supra* note 6, at 215.

¹⁰⁷ FISH, *supra* note 6, at 405 (footnote omitted). A December 30, 1964, interview with J. Edward Lumbard, Chief Judge of the Second Circuit Court of Appeals, is noted in support of Fish's statement. See *id.* at 405 n.152.

replace the councils' general order-making authority as a remedy for judicial misconduct and inaction,¹⁰⁸ and the Illustrative Rules recognize as much.¹⁰⁹ Nevertheless, the infrequency of § 332 orders since 1980 suggests that such orders may have an increasingly insignificant role to play in the disciplinary process.

Council members do not like to order their colleagues about. In 1959, the Ninth Circuit Judicial Council formally resolved not "to take any action which might be construed by the district judges as an effort to crack the whip over them," so as to ensure that the judge did not think herself "just another employee taking orders from a judicial council acting as a quasi board of directors."¹¹⁰ Fish argues that this resolution articulated a shared philosophy of the judicial councils, that "provides the background against which councils have failed to act, especially on problems involving judicial behavior."¹¹¹ Moreover, prior to 1980, the councils were composed entirely of circuit judges, whose lack of familiarity with district court practice may have contributed to their reluctance to take formal action against district judges.¹¹² Even with district judges present on the councils, concerns may linger. As one chief judge explained to Barr and Willging:

¹⁰⁸ The Act was designed to strengthen the councils' power to remedy judicial misconduct and inaction pursuant to their § 332 authority to issue orders. See Remington, *supra* note 7, at 725. Section 332 was amended by substituting the phrase "administration of justice" for "administration of the business of the courts." *Id.* (quoting 28 U.S.C. § 332(d) (1976)). One purpose of this change was to expand the councils' authority to reach judicial discipline and disability. See Remington, *supra* note 7, at 726 n.162.

¹⁰⁹ See ILLUSTRATIVE RULES, *supra* note 24, Rules 2, 20. In justifying the Rule 2 requirement that § 372(c) complaints be signed and verified, the accompanying commentary explains:

[C]hief judges, as chairmen of the circuit judicial councils, can, just as they always have, consider information from any source, anonymous or otherwise. This solution is consistent with congressional expressions of intention that informal methods of resolving problems, traditionally used under section 332, should continue to be used in many cases.

Id. Rule 2 commentary at 11.

¹¹⁰ FISH, *supra* note 6, at 406-07 (quoting a 1959 resolution of the Ninth Circuit Judicial Council).

¹¹¹ FISH, *supra* note 6, at 407.

¹¹² See John Biggs, Jr., *Some Observations on Judicial Administration*, 29 F.R.D. 464, 469 (1961) ("It was the opinion of some members of the Committee on Court Administration that one of the reasons why the Judicial Councils of the Circuits had not functioned more adequately in the past was because there were no district judges on the Councils."); Oliver, *supra* note 6, at 210 ("[I]t is extremely difficult to expect an appellate judge to make directions about the conduct of the business of a trial court with which he is generally unfamiliar . . .").

I never took it to the judicial council, that's self-defeating. If the Chief Judge invokes the judicial council, none of the district judges likes it. You create more problems than you solve, the hostility of the district court, and the Chief Judge of the district court, against the court of appeals.¹¹³

Councils may find informal persuasion to be more effective than formal orders. As Chief Judge Charles Clark put it: judges cannot "be bossed around—they respond to more delicate handling."¹¹⁴ "[F]ormal orders issuing as lofty commands from Olympus" are therefore seen as a remedy of last resort.¹¹⁵ In contrast, a simple visit from the chief judge may prove highly effective in persuading a miscreant judge to change his or her behavior.¹¹⁶ As one chief judge told Barr and Willing: "Informal processes sometimes take a while, but work better. You could never get the judicial council to go in one direction to solve such a problem unless the Chief Judge had already done all he could informally."¹¹⁷ The chief circuit judge questionnaire arguably supports a different conclusion. Asked to appraise the value of eight disciplinary mechanisms in terms of their general deterrent value, chief circuit judges viewed judicial council actions under § 332 and informal actions of peer judges as equally significant.¹¹⁸ The question, though, asked for an assessment of *deterrent* effect, not *remedial* effectiveness.

Formal orders are unlikely to succeed where informal methods of persuasion fail. Despite the chief circuit judge's best informal efforts to wheedle, shame, or threaten a judge into amending her ways, occasionally such efforts will prove unavailing. Judges unmoved by informal overtures (which can include threats of formal

¹¹³ See *supra* note 45.

¹¹⁴ FISH, *supra* note 6, at 413 (quoting a letter from Charles E. Clark, Chief Judge of the Second Circuit Court of Appeals, to Richard A. Merrill (Apr. 5, 1963)).

¹¹⁵ *Federal Judges and Courts: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 411 (1969) (statement of Clement F. Haynsworth, Jr., Chief Judge of the Fourth Circuit); see also Lumbard, *supra* note 105, at 169 ("Those who comprise the councils must do the work by example, leadership, and persuasion. The making of orders and their publication should be the last resort, rather than the first.").

¹¹⁶ See FLANDERS & McDERMOTT, *supra* note 6, at 28-29 ("[I]t is in the area of handling complaints about judge behavior that the councils have been most effective The action taken was almost always informal. Despite considerable probing, we uncovered no clear instances in which councils had failed to act effectively"); see also *infra* part II.A.2.

¹¹⁷ See *supra* note 45.

¹¹⁸ See *infra* app., question 2.

council action¹¹⁹) may not be stirred by a council order, either. As District Judge Mell G. Underwood remarked in reaction to a judicial council resolution urging his retirement: "They have no authority to remove me, and they've found that out. I told them to go to hell" ¹²⁰

*Chandler v. Judicial Council of the Tenth Circuit*¹²¹ illustrates, if not contributes to, the thicket of factors impeding the judicial councils' exercise of their general order-making authority.¹²² Judge Stephen Chandler was the Chief Judge of the Western District of Oklahoma from 1956 to 1969. By 1965, Judge Chandler's docket was backlogged, he had been named as a defendant in civil and criminal cases, and he had been issued writs of mandamus twice for failing to disqualify himself from hearing cases where he had an alleged bias toward one of the parties.¹²³

In December 1965, the judicial council ordered that Judge Chandler be given no new cases and that his pending cases be reassigned.¹²⁴ In light of a subsequent agreement among all judges in the district, including Judge Chandler, the council modified its order in February 1966, to permit him to retain his pending cases.¹²⁵ Judge Chandler then retracted his acquiescence and filed a motion with the Supreme Court for leave to file a writ of mandamus or prohibition challenging the judicial council's constitutional authority to issue the order.¹²⁶

A threshold question before the Supreme Court was whether the Court had jurisdiction to hear Chandler's petition.¹²⁷ The answer turned on whether the council order constituted judicial or administrative action: if judicial action, hearing the petition would be a proper exercise of the Court's appellate jurisdiction; if administrative action, hearing the petition would require the Court to exercise original jurisdiction, which it lacked.

Chief Justice Burger, writing for a four-member majority, hinted that the council's action might well be administrative in character,¹²⁸

¹¹⁹ See FISH, *supra* note 6, at 419-20.

¹²⁰ Jack E. Frankel, *The Case for Judicial Disciplinary Measures*, 49 J. AM. JUDICATURE Soc'y 218, 223 (1966).

¹²¹ 398 U.S. 74 (1970).

¹²² See *id.* at 84-89.

¹²³ See *id.*; see also WHEELER & LEVIN, *supra* note 6, at 39 (describing Chandler's history as a judge).

¹²⁴ See *Chandler*, 398 U.S. at 78.

¹²⁵ See *id.* at 79-80.

¹²⁶ See *id.* at 86-89.

¹²⁷ See *id.* at 86.

¹²⁸ See *id.* at 86 n.7. Chief Justice Burger wrote:

but declined to reach the issue. Instead, the Court denied Chandler's motion because his petition was premature. Even if it had jurisdiction, the Court reasoned, the petition should be denied because a less extreme remedy remained available: Chandler could still request the council to modify its order in light of his retracted acquiescence.¹²⁹

The three remaining justices who heard the case concluded that the council order was judicial action susceptible to Supreme Court review in a mandamus proceeding. The three disagreed, however, as to how the petition should be decided. Justice Harlan, concurring in the denial of the writ, argued that the council had acted lawfully and that the petition should be denied.¹³⁰ Justices Douglas and Black dissented, arguing that the Council's order unconstitutionally encroached upon judicial independence and that the petition should be granted.¹³¹

In the end, *Chandler* provides little guidance as to the permissible scope of judicial council orders. Whether judges aggrieved by such orders may obtain judicial review remains an open question,¹³² as does whether the councils may petition for a writ of mandamus to compel unwilling judges to comply with council orders.¹³³

Chandler may, however, help to explain why the judicial councils might not resort to formal orders, even after informal efforts to resolve problems fail: a recalcitrant judge who is unresponsive to private chiding and informal threats may be no more responsive to a formal order, and five years and two trips to the Supreme Court later, the council may be back where it started. The lesson from the council's

We find nothing in the legislative history to suggest that the Judicial Council was intended to be anything other than an administrative body functioning in a very limited area in a narrow sense as a 'board of directors' for the circuit. Whether that characterization is valid or not, we find no indication that Congress intended to or did vest traditional judicial powers in the Councils.

Id.

¹²⁹ See *id.* at 87-89.

¹³⁰ See *id.* at 89 (Harlan, J., concurring in denial of the writ).

¹³¹ See *id.* at 129 (Douglas, J., dissenting); *id.* at 141 (Black, J., dissenting).

¹³² If, however, a district court issues an order that draws its substance from a judicial council directive, the judicial council's action may be reviewable by the circuit court in the context of an appeal from the district judge's order. Thus, in *Nolan v. Judicial Council of the Third Circuit* (*In re Imperial "400" Nat'l, Inc.*), 481 F.2d 41 (3d Cir. 1973), cert. denied, 414 U.S. 880 (1973), a district court order removing a bankruptcy trustee, as required by the judicial council, was remanded for reconsideration by the court of appeals on the grounds that the judicial council's action was invalid. See *id.* at 49.

¹³³ FISH, *supra* note 6, at 425.

perspective may be that orders are rarely worth the headache. Indeed, Flanders and McDermott report that Judge Ritter¹³⁴ escaped council action because he was in the same circuit as Judge Chandler, and that the council "was hesitant to take another forceful action after a perceived failure in the Chandler case."¹³⁵

In short, the judicial councils' general authority to issue necessary and appropriate orders is rarely exercised as a means to regulate judicial misconduct and inaction. The possible explanations for this inaction are many and varied. The fact that orders are infrequently issued under § 332, however, does not necessarily mean that the statute serves no purpose. As explained in Part II.A.2, the very existence of the statute may give chief judges additional leverage needed to remedy misbehavior informally.

2. The Judicial Council's Authority to Certify a Judge as Disabled

Under 28 U.S.C. § 372(a), a judge or justice who becomes permanently disabled may retire and receive the salary of the office if she has served at least ten years, or half the salary of the office if she has served less than ten years. Should a permanently disabled district or circuit judge not retire pursuant to § 372(a), 28 U.S.C. § 372(b) provides that the judge may be certified as disabled by a majority of the circuit judicial council. If the President agrees with the council, he or she may appoint an additional judge (with Senate confirmation) to the affected district or circuit. The disabled judge is not removed upon the appointment of the new judge, but is treated as junior in commission. The vacancy later created by the death, retirement, or resignation of the disabled judge is not filled.

This procedure for addressing the problem of the disabled judge has been in place since 1957, but the problem itself has been the subject of numerous pieces of legislation dating back to 1801.¹³⁶ What to do with an allegedly senile, mentally ill, or otherwise disabled judge is an understandably difficult issue that requires Congress to balance the conflicting interests of protecting the judicial system from

¹³⁴ See *infra* text accompanying notes 256-71.

¹³⁵ FLANDERS & MCDERMOTT, *supra* note 6, at 29 n.44.

¹³⁶ The chronological summary of judicial disability and retirement legislation that follows owes much to the research talents of Eric Laumann, who compiled many of the citations referenced here. See Memorandum from Eric Laumann to Professor Stephen Burbank (Aug. 4, 1989) (describing research done while Laumann was a student at the University of Pennsylvania Law School) (on file with author).

the disabled judge, insulating the nondisabled judge from politically motivated efforts at neutralization, and preserving the dignity of the now-disabled judge who may have served the judiciary long and well. The history of judicial disability and retirement legislation reflects the struggle between these competing concerns.

In 1801, judicial reform legislation included this provision:

That in the case of the inability of the district judge . . . to perform the duties of his office, and satisfactory evidence thereof being shown to the circuit court, in and for such district, it shall be the duty of such circuit court . . . to direct one of the judges of said circuit court, to perform the duties of such district judge . . . for and during the period the inability of the district judge shall continue.¹³⁷

Professor Raoul Berger argues that this legislation is precedent for legislative authority to provide for the removal of disabled judges by means other than impeachment.¹³⁸ Berger notes that the 1801 Act was employed to "relieve" Judge John Pickering, and that his impeachment became necessary only after repeal of the Act in 1802.¹³⁹

In 1809, a new disability statute was enacted. Like the 1801 Act, it relieved disabled judges of all judicial duties for the duration of their disability.¹⁴⁰ It also elaborated upon the procedure to be followed: first, evidence of disability was submitted in an application of the U.S. Marshal or District Attorney to the Supreme Court justice with supervisory responsibility over the affected district; then, if a determination of disability was made, it was to be announced in local newspapers at least thirty days before the new court held session.

Another disability statute was enacted in 1850.¹⁴¹ This variation on prior practice shifted responsibility for initiating the process from the U.S. Marshal or District Attorney to the clerk of court, who would certify the existence of the disability to the circuit judge. The circuit

¹³⁷ Act of Feb. 13, 1801, ch. 4, § 25, 2 Stat. 89, 97.

¹³⁸ See RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 189 (1973).

¹³⁹ *Id.* at 183 n.11 (quoting 3 J.B. MCMASTER, *HISTORY OF THE PEOPLE OF THE UNITED STATES* 166 (1892)).

¹⁴⁰ See Act of Mar. 2, 1809, ch. 27, 2 Stat. 534. The Act provided that a substitute judge hear "all actions, suits, causes, pleas, or processes, civil or criminal, of what nature or kind soever, that may be depending in said district court and undetermined," as well as "all suits of what nature or kind soever, which may thereafter be brought . . ." *Id.* at 535.

¹⁴¹ See Act of July 29, 1850, ch. 30, 9 Stat. 442.

judge was then authorized—but not required, as in predecessor statutes—to designate any district judge within the circuit to “discharge all the judicial duties”¹⁴² of the disabled judge for the duration of the disability. The same procedure was made applicable to disabled circuit judges, whose disability was to be certified to the Chief Justice.

The 1850 legislation, as introduced in the Senate, also included a provision giving the President the authority to appoint substitute judges—an approach similar to that ultimately enacted in 1919 and retained in current law. The 1850 bill providing for presidential appointment of substitute judges was effectively deleted on the Senate floor.¹⁴³ A comparable provision in a bill introduced in the House in 1869 was again rejected.¹⁴⁴

Congress made no significant changes in the judicial disability procedure for the next seventy years.¹⁴⁵ In 1919, the precursor to the current disability and retirement statute was enacted.¹⁴⁶ Like § 372(b), it gave the President the power to appoint a new judge when a sitting judge became disabled, and provided that the vacancy later created by the death, resignation, or retirement of the disabled judge would go unfilled. And like § 372(b), but unlike the 1801, 1809, and 1850 Acts, the 1919 legislation did not relieve the disabled judge of all judicial duties. Instead, the disabled judge was to be “treated as if junior in commission to the remaining judges of said court.”¹⁴⁷ To go further, argued the sponsors of the legislation, would be unconstitutional:

It is not within the power of the Congress or of the President to displace a judge if once appointed. He is there for good behavior, or life, practically, and he can not be removed from office; and all

¹⁴² *Id.*

¹⁴³ See CONG. GLOBE, 31st Cong., 1st Sess. 898 (1850).

¹⁴⁴ See CONG. GLOBE, 41st Cong., 1st Sess. 219 (1869).

¹⁴⁵ Congress did, however, adopt a few minor changes to judicial disability procedure. In 1863, “the judge of the supreme court for any circuit” was authorized to name a substitute judge for himself for purposes of conducting circuit court proceedings, should the supreme court judge be disabled, absent, have a conflict of interest or otherwise need additional assistance. Act of Mar. 3, 1863, ch. 93, 12 Stat. 768, 768. In 1876, private legislation was passed authorizing a disabled judge to “resign,” notwithstanding that he had not reached the minimum retirement age of 70. Act of June 2, 1876, ch. 119, 19 Stat. 57, 57. And in 1907, the chief justice was authorized to designate a district judge from another circuit to perform the duties of a disabled district judge (the 1850 law had limited the designations to district judges within the circuit of the disabled judge). See Act of Mar. 4, 1907, ch. 2940, 34 Stat. 1417, 1417.

¹⁴⁶ Act of Feb. 25, 1919, ch. 29, sec. 6, § 260, 40 Stat. 1157, 1158.

¹⁴⁷ *Id.* at 1158.

that this bill attempts to do is simply to change his status as a member of that court. Instead of his being senior in commission, as he may possibly be, he simply becomes the junior in commission¹⁴⁸

It appears that Congress did not regard neutralization of a disabled judge by the judiciary itself (as provided for in the 1801, 1809, and 1850 Acts) as creating a constitutional controversy, but did see potential constitutional problems if other branches of government had a significant role to play.

Unlike § 372(b), the 1809, or the 1850 statutes, the Act of 1919 required no certification of disability from within the ranks of the judicial system—the decision was the President's alone to make. Supporters argued that this posed no problem: if the President moved to replace an able judge, the Senate would simply refuse to confirm the replacement.¹⁴⁹ Also, unlike § 372(b) and predecessor disability statutes, the 1919 law targeted the aging, senile judge specifically and not disabled judges generally. By its terms, the disability procedure stated in the 1919 statute applied only to a judge "having so held a commission or commissions at least ten years continuously and having attained the age of seventy years," who did not resign or retire and who was "unable to discharge efficiently all the duties of his office by reason of mental or physical disability of permanent character."¹⁵⁰

In 1939, the predecessor to § 372(a) was enacted, permitting disabled judges to retire voluntarily by certifying their disability in writing to the chief circuit judge.¹⁵¹ As under current law, minimum age requirements otherwise a prerequisite to receiving retirement pay were inapplicable: a disabled judge serving ten years or more was entitled to receive the salary she was paid at the date of retirement.

The last significant amendment to the disability retirement system was made in 1957.¹⁵² In that year, the involuntary "retirement"

¹⁴⁸ 57 CONG. REC. 369 (1918) (statement of Rep. Steele).

¹⁴⁹ *Id.* at 368-69 (statement of Rep. Steele).

¹⁵⁰ 40 Stat. at 1158. The scope of the 1919 statute is understandable, given that its focus was upon judicial retirement, resignation, and the creation of a senior judge system.

¹⁵¹ Act of Aug. 5, 1939, ch. 433, 53 Stat. 1204, 1204. In the case of a disabled Supreme Court justice or chief circuit judge, the disability was to be certified by the Chief Justice.

¹⁵² Act of Sept. 2, 1957, Pub. L. No. 85-261, 71 Stat. 586 (codified at 28 U.S.C. § 372 (1957)). In 1944, however, the 1939 Act was amended to authorize chief circuit judges to call upon district and circuit judges who had voluntarily retired for disability to perform whatever judicial duties the retired judges were willing to undertake. *See* Act of May 11, 1944, ch. 192, sec. 1, § 260, 58 Stat. 218 (amending 53 Stat. 1204).

procedure for disability was extended to disabled judges, regardless of age, and the signatures of a majority of the circuit judicial council certifying the disability were required before the President could appoint a new judge.¹⁵³

As the sheer number of attempts at legislation imply, judicial disability has posed a chronic problem for Congress. That the problem is chronic, however, does not necessarily mean that its magnitude is great. Reform efforts have frequently been initiated with a particular judge in mind, whose refusal to retire or resign has become a source of embarrassment. These isolated instances, though visible enough to prompt legislative action, reveal little about the true extent of the problem.

A lengthy review of personnel records by the Administrative Office indicates that since 1957, only six judges have been involuntarily certified as disabled by the circuit judicial councils under § 372(b).¹⁵⁴ Chief circuit judges, on the other hand, reported that twelve to thirteen judges have been involuntarily certified as disabled since 1981. While the discrepancy may be attributable to overcounting by survey respondents, the inaccessibility of the relevant information suggests a need for more systematic record keeping of judicial council orders. The Administrative Office also reports that since 1939, only fifty-seven judges—roughly one per year—have retired voluntarily due to disability.¹⁵⁵ This figure, coupled with that of only six certifications of disability since 1957, can be read in any of three ways: judicial disability problems are being ignored, judicial disability rarely occurs, or judicial disability is being addressed by means other than § 372. As with misconduct, there is evidence to suggest that formal council action is a remedy of last resort to address disability. Respect for the disabled judge, sympathy for her situation, and a general preference for persuasion rather than force have made informal efforts to convince a judge to resign or retire the favored approach.¹⁵⁶

In 1948, the judicial retirement and disability provisions were recodified under Title 28. *See* Act of June 25, 1948, ch. 17, 62 Stat. 869, 903-04 (codified at 28 U.S.C. §§ 371-372 (1948)). Other minor revisions were made and oversights corrected in 1949, 1951, and 1954. *See* Act of May 24, 1949, ch. 139, sec. 67, § 372, 63 Stat. 89, 99; Act of Oct. 31, 1951, ch. 655, sec. 39, § 371, 65 Stat. 710, 724; Act of Feb. 10, 1954, ch. 6, sec. 4, §§ 371-372, 68 Stat. 8, 12-13.

¹⁵³ § 372, 71 Stat. at 586.

¹⁵⁴ Telephone Interview with William Burchill, General Counsel to the Administrative Office of the United States Courts (Aug. 31, 1992).

¹⁵⁵ *See id.*

¹⁵⁶ *See* FISH, *supra* note 6, at 412-17; Kaufman, *supra* note 6, at 708-09; *see also supra* text accompanying notes 114-18.

The councils' reluctance to resort to the certification process, however, does not mean that disabled judges remain on the bench in significant numbers. As discussed in the next section, informal efforts to coax disabled judges into resignation have been quite successful. Certification thus becomes necessary in only two situations: when a disabled judge refuses to retire voluntarily, or when she is willing to retire voluntarily but has not been on the bench long enough to do so with full benefits. One chief judge described the latter scenario in an interview with Barr and Willging: "Once I was on a special committee investigating a complaint of disability against a judge. That was a prearranged case. The judge lacked the length of service requirements to voluntarily retire, but if he retired by order of the judicial council, those requirements wouldn't apply."¹⁵⁷

The fact that only fifty-seven judges have retired voluntarily due to disability does not necessarily belie the success of informal efforts. It almost goes without saying that mental and physical disabilities afflict the old to a greater extent than the young. The elderly, disabled judge who has served fifteen or more years is eligible for conventional retirement under § 371, and may understandably prefer that option to publicizing his or her disability by retiring under § 372(a). That only four of 359 complaints filed in 1991 accused a judge of disability—with three of those four filed in a single circuit¹⁵⁸—offers at least some confirmation that the infrequency with which judges step down voluntarily due to disability, or are certified as disabled, does not translate into an excessive number of disabled judges active in the judiciary.

B. Informal Actions of the Chief Circuit Judge and the Chief District Judge

Of all the disciplinary and quasi-disciplinary mechanisms evaluated in this report, informal actions by the chief circuit and district judges appear to be used with the most frequency and to the greatest effect. In the survey of chief circuit judges, respondents identified informal actions by the chief circuit and district judges as the first and second most frequently used of the eight disciplinary mechanisms evaluated. Of the eighty-five to ninety-two remedial actions collectively taken by chief circuit judges in response to informal allegations of misconduct

¹⁵⁷ See *supra* note 45.

¹⁵⁸ ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *supra* note 34, at 117.

or disability, seventy-seven to eighty included or were limited to chief circuit judge communications. An additional fourteen remedial actions included or were limited to communications from other judges (often chief district judges) made at the behest of the chief circuit judge.¹⁵⁹

1. The Chief Circuit Judge

The role of the chief circuit judge in addressing problems of misconduct and disability informally has been alluded to previously in the context of discussing the circuit judicial councils. Some commentators, such as Flanders and McDermott, made no attempt to separate council orders from informal actions of the chief circuit judge, choosing instead to lump the two together under the general rubric of circuit judicial council functions authorized by § 332. Others, such as Fish, have to some extent treated them separately.

Whether informal disciplinary actions of the chief judge are characterized as a subset of judicial council operations can profoundly affect the overall evaluation of the councils' performance. For Flanders and McDermott, the chief judge was the alter ego of the council—if the chief judge acted informally on a disciplinary matter, it was the council acting also. Taking into account the "almost always informal" actions of the chief judge in response to episodes of disability and misconduct, they "uncovered *no* clear instances in which councils had failed to act effectively,"¹⁶⁰ and concluded that the councils had been "most effective."¹⁶¹ In contrast, Professor Fish, who looked at formal council responses to judicial misbehavior independently of informal responses of the chief judge, characterized the councils as "pillars of passivity,"¹⁶² and "rusty hinges of federal judicial administration."¹⁶³ Before reviewing the nature and extent of chief judges' informal efforts to respond to judicial misbehavior, then, it may be helpful to ascertain the source or sources of power or authority for such efforts, in order to determine if they are properly characterized as a subset of judicial council action pursuant to § 332.

¹⁵⁹ See *infra* app., question 6.

¹⁶⁰ FLANDERS & McDERMOTT, *supra* note 6, at 29.

¹⁶¹ *Id.* at 28.

¹⁶² FISH, *supra* note 6, at 404.

¹⁶³ Fish, *Rusty Hinges*, *supra* note 6, at 203.

a. *Sources of Power or Authority for Informal Disciplinary Actions of Chief Circuit Judges*

i. Section 332: The Judicial Council

The Illustrative Rules Governing Complaints of Judicial Misconduct and Disability (the "Illustrative Rules") express the generally accepted view that § 332 authorizes the council, through the chief judge, to employ "informal methods of resolving problems."¹⁶⁴ Such a view is, however, without explicit textual foundation. Section 332 includes six provisions relating to the chief judge, which authorize or direct the judge to: (1) call council meetings;¹⁶⁵ (2) preside at such meetings;¹⁶⁶ (3) designate replacements for council members who retire or resign;¹⁶⁷ (4) excuse council members from attending meetings;¹⁶⁸ (5) submit Administrative Office reports to the council;¹⁶⁹ and (6) direct the issuance of subpoenas for council hearings.¹⁷⁰ Nowhere is the chief judge authorized to investigate or resolve matters of judicial conduct on behalf of the council.

Under § 332(d)(1), the council could presumably direct the chief judge to seek informal resolution of a particular matter, but there is ample evidence that the chief judge investigates and acts upon reports of misconduct or disability before, or without ever, consulting the council. Thirty chief circuit judges reported collectively undertaking a total of 141 to 152 investigations in response to informal allegations of judicial misconduct, and taking remedial action in eighty-five to ninety-two cases, while consulting the councils in only fifty-three to fifty-six cases.¹⁷¹

Alternatively, the council could issue a standing order authorizing the chief judge to investigate and respond to reports of misconduct and disability. There is, however, no indication that such orders are in fact given. In the absence of an empowering order, the most that can be said is that the authority of the chief judge may be implied by the council's statutory structure: the statute makes the chief judge responsible for calling and presiding at council meetings, and setting

¹⁶⁴ ILLUSTRATIVE RULES, *supra* note 24, Rule 2 commentary at 11, Rule 20 commentary at 62.

¹⁶⁵ See § 332(a)(1).

¹⁶⁶ See § 332(a)(1)(A).

¹⁶⁷ See § 332(a)(5).

¹⁶⁸ See § 332(a)(6).

¹⁶⁹ See § 332(c).

¹⁷⁰ See § 332(d)(1).

¹⁷¹ See *infra* app., questions 5, 6.

council agenda falls naturally within the ambit of those duties. Investigating reports of judicial misconduct and disability for the purpose of determining if council attention is warranted is arguably part of the agenda-setting process; unsubstantiated reports, and substantiated reports in which the judge in question has voluntarily taken corrective action at the behest of the chief judge, are insufficiently significant to merit a spot on the council agenda. The chief judge is thus able to regulate the investigation of allegations of judicial misconduct or disability.

ii. Custom

The derivation of informal action by chief circuit judges in response to episodes of judicial misbehavior may be more firmly rooted in tradition than a formal grant of statutory authority. Since the inception of the union, the Chief Justice, and other Supreme Court justices supervising the individual circuits, shouldered the burden of responding privately to individual cases of judicial misconduct and disability.¹⁷² Senior circuit judges, later renamed chief circuit judges, did likewise, well before the judicial councils were created in 1939.¹⁷³ This fact suggests that the power to monitor judicial conduct may be inherent in the position of chief judge. The Illustrative Rules, while citing § 332, also allude to "the historic functions of the chief judge" in support of the chief judge's role in resolving disciplinary problems informally.¹⁷⁴

iii. Section 372(c): The Authority of the Chief Judge to Identify Complaints

In 1990, the formal disciplinary process spelled out in § 372(c) was amended to provide that the chief judge "may, by written order stating reasons therefor, identify a complaint" *sua sponte*, and thereby trigger the formal disciplinary process.¹⁷⁵ This could be done "on the basis of information available to the chief judge," and without a formal complaint being filed.¹⁷⁶ Thus, the Act authorizes the chief judge to act upon reports of misbehavior coming to his or her attention informally. By permitting, but not requiring, the chief judge to identify

¹⁷² See FISH, *supra* note 6, at 8-10.

¹⁷³ See *id.* at 87-90.

¹⁷⁴ ILLUSTRATIVE RULES, *supra* note 24, Rule 20 commentary at 62.

¹⁷⁵ § 372(c).

¹⁷⁶ § 372(c)(1).

a complaint upon substantiating such reports, the statute effectively authorizes the judge to pursue less formal alternatives.¹⁷⁷

On the basis of the foregoing analysis, informal actions of the chief circuit judge will be treated here as related to, but distinct from, circuit judicial council operations. On one hand, charges of passivity made against the councils must be tempered by the recognition that the chief judge is head of the council, and that informal actions on her part may obviate the need for formal council action.¹⁷⁸ On the other hand, the chief circuit judge is more than just the head of the council; she is also head of the circuit, and decision-maker of first resort in the formal disciplinary process. Insofar as the chief judge may investigate and remedy judicial misconduct and disability independently of the council, such action should also be examined and evaluated independently of the council.

b. *The Nature and Extent of Informal Chief Circuit Judge Action*

i. Misconduct

There is a general consensus among judges, legislators, and academics that informal action has been and remains the judiciary's most common response to episodes of judicial misconduct.¹⁷⁹ The

¹⁷⁷ See *NCJDR Hearings*, *supra* note 16, at 57-58 (testimony of Judge John C. Godbold, Senior Circuit Judge, Eleventh Circuit Court of Appeals).

¹⁷⁸ See *supra* note 156 and accompanying text.

¹⁷⁹ See *Nolan v. Judicial Council of the Third Circuit (In re Imperial "400" Nat'l Inc.)*, 481 F.2d 41, 52 (3d Cir.) (Lumbard, J., dissenting) ("In almost every case the fact that the circuit council had the power to make orders has rendered it unnecessary to do so in a formal way. A suggestion from the chief judge or one of the circuit judges almost always has gained ready compliance."), *cert. denied*, 414 U.S. 880 (1973); 126 CONG. REC. 28,092 (1980) (statement of Sen. DeConcini) ("[T]he informal, collegial resolution of the great majority of meritorious disability or disciplinary matters is to be the rule rather than the exception. Only in the rare case will it be deemed necessary to invoke the formal statutory procedures and sanctions . . ."); FLANDERS & McDERMOTT, *supra* note 6, at 29 ("[C]ouncils have taken effective action after identifying a problem with a district or circuit judge's behavior. The action taken was almost always informal."); U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, REPORT ON THE IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980 IN THE NINTH JUDICIAL CIRCUIT (1987) ("[E]fforts by the judiciary to police itself have a genesis much older than . . . § 372(c), which was adopted in 1980. Chief circuit judges dealt with problem judges through an informal mechanism, backed up by the circuit council's power to enter orders if necessary under . . . §332. This mechanism was generally effective."); Fish, *Rusty Hinges*, *supra* note 6, at 227 ("Persuasion affords councils their initial and often sole strategy in implementing administrative policies. As one practitioner . . . put it, lifetime judges cannot 'be bossed around—they respond to more delicate handling.' And more often than not

chief circuit judge questionnaire corroborates this conclusion, identifying informal actions by chief circuit judges as the most frequently used of the eight mechanisms studied.¹⁸⁰ Explanations for the popularity of this mechanism vary. One chief judge explained the virtues of informal action in an interview with Barr and Willing: "The advantage of proceeding informally is that you deal with the problem without compromising the Article III status of the judges. You deal with the problem while keeping the judge insulated from outside pressures. You deal with it informally without headlines and newspaper stories." Said another chief judge: "It's always better to do it informally. You get the right result without unnecessarily humiliating or degrading anyone." Yet another judge explained:

The informal process is a teaching mode, not a disciplinary mode. I can talk to a judge without the judge getting defensive. I can get real corrective action, not mere grudging changes. I see the formal process as what I must use where I have failed in the informal process.¹⁸¹

The chief judges investigate and address a wide range of misconduct, but responses to the questionnaire identify decision-making delay most frequently.¹⁸² Also mentioned is a range of questionable behavior taking place in the courtroom: sleeping or appearing drunk on the bench; excessively abusing lawyers, parties, or witnesses; making inappropriate remarks, including but not limited to comments reflecting racism or gender bias. Extrajudicial misconduct is also addressed informally: sexually harassing staff or others; dating a juror; consorting with a defendant; living outside the judicial district; drinking excessively at lunch; being arrested for driving under the influence; and allegedly receiving an excessive teaching salary.

"Informal action" embraces a broad array of approaches available to the chief judge in her efforts to rein in recalcitrant colleagues, ranging from the subtle to the blunt. The chief judge may simply forward a copy of the report that the chief received to the errant judge.¹⁸³ She may tell the judge in question that a given report is

this 'delicate handling' must come from the presiding judge of the court of appeals" (footnote omitted); Fitzpatrick, *supra* note 7, at 283 ("[T]he most serious judicial problems have not been initiated with a formal complaint. Often, problems are resolved without a complaint ever being filed.").

¹⁸⁰ See *infra* app., question 1.

¹⁸¹ Barr & Willing, *supra* note 9, at 137-38.

¹⁸² See *infra* app., question 6.

¹⁸³ See Fitzpatrick, *supra* note 7, at 283:

being taken seriously by the chief judge or the judicial council.¹⁸⁴ The chief may threaten to publicize the matter if cooperation is not forthcoming.¹⁸⁵ Or she may:

appeal to flattery and to institutional loyalty in the face of congressional and judicial criticism and of threats, real and imaginary, of remedial legislation or budgetary retaliation. And to bolster their case, chief judges may note the deep concern of that august body expressed at its most recent session, or urge, as did Senior Circuit Judge Learned Hand, that a district judge behind in his work "act on this case, because when I go to Washington on the conference, this very matter will be mentioned, and they will say, 'What happened here?'"¹⁸⁶

Judges and other observers report that these efforts are almost always successful.¹⁸⁷ The success of informal disciplinary action is attributable to at least three factors. First, judges who are dedicated to their work and to the judiciary as an institution, are likely to need no more than a gentle suggestion from the chief judge to modify their behavior. As Chief Judge Groner observed shortly after creation of the circuit judicial councils in 1939: "You don't have to threaten judges

Without accepting the veracity of the allegations, the chief judge passed the letter on to the judge. A few days later, the judge called and was thankful for the information. He had discussed it at home with his family. They agreed he had been harsh, as he had also been harsh with them.

Id.

¹⁸⁴ See FLANDERS & McDERMOTT, *supra* note 6, at 32-33:

Another council took informal action to moderate the approach of a judge who was severely criticized by the bar for his alleged excessive aggressiveness in moving cases on his docket. Reportedly, no further action was required after the circuit chief judge conveyed to the judge in question the seriousness of the bar complaints, and the concern these caused the circuit council.

Id.

¹⁸⁵ See FISH, *supra* note 6, at 162.

"Just turning the light of day on the judges probably in most instances would be all that is required." Peer-group ostracism would do the rest. So thought Arthur Vanderbilt, who told the Senate Judiciary Committee that "no judge likes to have the fact that he is not abreast of his work held up to public notice."

Id. (footnotes omitted).

¹⁸⁶ *Id.* at 413-14 (footnotes omitted).

¹⁸⁷ Informal methods of correcting misconduct are used so frequently, in large part because they work well. See *supra* notes 114-18. On the other hand, as Professor Fish emphasizes repeatedly, little could be done about the occasional, ornery judge who refused the advice of the chief judge or judicial council. See FISH, *supra* note 6, at 412; Fish, *Rusty Hinges*, *supra* note 6, at 228.

to get them to carry out the directions of the councils' asserted Judge Parker, 'they carry them out because the judges are good men, they want to do what is right.'¹⁸⁸ Second, as alluded to in a previous section, judges may react more cooperatively to criticism couched as a friendly suggestion from the chief judge, than to an imperious directive of the judicial council.¹⁸⁹

Third, the mere presence of more formal means for remedying judicial misconduct provides an incentive for judges to take seriously the informal suggestions of the chief circuit judge. When the judicial councils were created, it was widely assumed that their formal powers would not need to be used frequently because the very existence of such powers would encourage the necessary compliance.¹⁹⁰ With enactment of the formal disciplinary process in 1980, and a 1990 amendment authorizing the chief judge to identify complaints, the incentives for recalcitrant judges to take advantage of informal opportunities to modify their behavior became even greater. As former Chief Judge Godbold testified before the National Commission on Judicial Discipline and Removal:

[The complaint procedure] changed the relationship of the chief judge to the other judges within his circuit. Until 372C came along, a judge who said to a judge within his circuit, "Look, let me talk to you candidly. Are you having a little problem with the bottle?" The reply probably would have been, "Mind your own business."

But, you see, the procedure, particularly with the 1990 Amendment, gives the chief judge an opportunity to be in communication, to investigate, and to act

This gives the chief judge an opportunity for informal relationships about a whole host of matters. And any sensitive and able chief judge, I think, will avail himself of this.¹⁹¹

As another chief judge responding to the questionnaire put it, the Act serves as a "shotgun behind the door." Twenty-two of twenty-six judges expressing an opinion said that the Act has created more incentives than disincentives for judges to respond constructively to informal efforts by the chief circuit judge to remedy misconduct or disabili-

¹⁸⁸ FISH, *supra* note 6, at 161.

¹⁸⁹ See *supra* text accompanying notes 114-18.

¹⁹⁰ See FISH, *supra* note 6, at 162.

¹⁹¹ NCJDR Hearings, *supra* note 16, at 57-58 (testimony of Judge John C. Godbold).

ty.¹⁹² On a related note, Circuit Executive Collins Fitzpatrick reports that

[o]ver the last several years, there have been at least nine federal judicial officers who retired after a judicial misconduct complaint was filed or was looming in the background. In most of these cases, resolution would have been unlikely if the statutory judicial misconduct complaint procedure and remedies were not available.¹⁹³

Chief judges responding to the survey reported a total of three instances in which judges retired in response to informed allegations of misconduct, and twelve to thirteen instances in which judges retired in response to informal allegations of disability.¹⁹⁴

ii. Disability

The preceding discussion of misconduct applies equally to disability. Professor Fish summarizes some of the informal techniques employed to persuade disabled judges to retire or resign:

Chief Judge Charles Clark used an assortment of techniques to induce three chief district judges then in their mid-80s to step down from their administrative posts. He applied pressure on one judge's secretary, while in another case he made "use of a sort of high-grade blackmail," by threatening "that the Bar Association was going to take the matter to the newspapers." The entire proceeding is tortuous. One chief judge recalled it as being "rather unpleasant, both for the person who goes to see the aged judge and . . . for the aged judge himself." So the Sixth Circuit Council had discovered in the Underwood affair. But, the chief judge declared: "We kept after him, and the largest newspaper in Ohio with statewide circulation published some accounts concerning the way he was handling his work, and he finally called me up and said his name had been 'dragged down in the mud far enough,' and that he would retire, and he did retire."¹⁹⁵

Informal efforts to persuade disabled judges to resign, retire, or seek help, have also been quite successful.¹⁹⁶ One chief judge

¹⁹² See *infra* app., question 7.

¹⁹³ Fitzpatrick, *supra* note 7, at 283.

¹⁹⁴ See *infra* app., question 11.

¹⁹⁵ FISH, *supra* note 6, at 416 (footnotes omitted).

¹⁹⁶ See *supra* text accompanying notes 114-18, 183-88. Flanders and McDermott note:

In one case, a highly respected judge was pressured into what has been described as a very effective cure following a council threat to take action

described the process to Barr and Willging:

[A] certain judge was losing his memory. We could not in conscience allow the judge to take cases. There was no complaint, no one on the outside knew of it. But we could see it in conference and at lunch. First we took the judge off everything except *pro se* cases, and gave the judge strong panels on those. Then it got worse. It took a lot of persuasion to get the judge to retire.¹⁹⁷

Other chief judges also told Barr and Willging of occasions where they refused to certify senior judges for office support or salary increases as a means of encouraging their retirement.

Again, as with the success in informal handling of misconduct, the ability of chief judges to cope informally with disability problems has been attributed to the availability of more formal procedures:

Even if a council never actually employed its formal powers, the mere threat to cancel a judicial assignment or to certify disability "has resulted in definite consequences in the form of action by the intended subjects of the orders." Either order, if issued, would have reflected on the incumbent judge's physical and/or mental capacity. It constitutes a public vote of no confidence in him, and is aimed directly at his pride and vanity.¹⁹⁸

2. Chief District Judge

Chief district judges play no formal disciplinary role. That they do, however, have at least an informal disciplinary role is evidenced by the fact that chief circuit judges identified chief district judge action as the second most frequently used of eight disciplinary mechanisms.¹⁹⁹

under 28 U.S.C. § 372(b). In at least two other cases, judges with alcohol problems took senior status early following an informal expression of concern from the council or chief judge.

In at least three other cases, judges took senior status because of an expression of council concern regarding senility or quasi-senility. In addition, Judge Mell G. Underwood took senior status in 1966 following a threat that the council would invoke section 372(b).

FLANDERS & McDERMOTT, *supra* note 6, at 31-32 (footnotes omitted); *see also* Fitzpatrick, *supra* note 7, at 283 (describing cases in which judges "whose deteriorating mental or physical health diminished their judicial abilities" were persuaded to take senior status).

¹⁹⁷ *See supra* note 45.

¹⁹⁸ FISH, *supra* note 6, at 419 (quoting Richard H. Chambers, Chief Judge of the Ninth Circuit Court of Appeals) (footnote omitted).

¹⁹⁹ *See infra* app., question 1.

Moreover, chief circuit judges reported a collective total of fourteen occasions where they called upon chief district judges to address particular problems.²⁰⁰ In their interviews with Barr and Willging, several chief circuit judges explained that they would refer matters to the chief district judge for informal resolution where greater knowledge of and sensitivity to events within the district would be helpful.²⁰¹

III. INFORMAL DISCIPLINE AND JUDICIAL SOCIALIZATION

Judicial council orders and chief judge actions clearly encompass actions undertaken in support of judicial administration, insofar as they are designed to implement policies enabling the judiciary to dispose of disputes justly, expeditiously and economically. Two additional devices with disciplinary implications do not fit easily within the definition of judicial administration: (1) appeal and mandamus, and (2) peer influence.

Appellate court decisions are not means of judicial administration per se, but are forms of judicial action; the just, expeditious and economical operation of which is furthered by judicial administration. Although designed to rectify erroneous judicial decision-making in individual cases, circuit court opinions can also serve to encourage the judge who does her job well, and to chasten the judge who does not. Peer influence, on the other hand, is largely a social and cultural phenomenon that is not necessarily "designed" to do anything at all, but which may nevertheless serve as a regulator of judicial conduct. The relevance of these two devices is that both of them regulate judicial behavior through a subtle process of judicial socialization.

A. *Mandamus and Appeal*

Mandamus or appeal, when used simply as a means to correct a lower court's decision on the merits, is not used for disciplinary purposes. On occasion, however, appellate courts address conduct in mandamus or appellate proceedings that, while possibly related to the merits, might otherwise be subject to discipline under § 372(c). This Section explores the situations in which mandamus and appeal have been used in a disciplinary or quasi-disciplinary manner.²⁰²

²⁰⁰ See *infra* app., question 6.

²⁰¹ Barr & Willging, *supra* note 9, at 135.

²⁰² To convey the disciplinary tone of the opinions discussed in this Section, passages from the cases will be quoted at length. This survey does not purport to be

1. Limitations on Mandamus and Reversal as Disciplinary Tools

There are several reasons why mandamus and appeal constitute relatively weak means of addressing judicial misbehavior. First, most errors corrected in mandamus and appellate proceedings have nothing to do with judicial misconduct in the traditional sense of the phrase. Judge Harry Edwards observed:

[I]t has never been assumed that mandamus or reversal are useful tools to deal with the ongoing problems of judicial misconduct. Mandamus and reversal are used mainly to counter the types of "honest error" that, unless intentional or belligerent, do not call for punishment so much as correction, or "setting straight." The areas of "honest disagreement" that result in reversal are hardly appropriate for sanction²⁰³

Second, Judge Edwards's point remains well-taken even in cases where a judge's error is less than honest. Mandamus and reversal are designed to correct error, not to call the judge to task for misbehavior. A court of appeals reluctant to chastise a colleague in a published opinion can usually avoid the problem by focusing exclusively upon the merits of the judge's decision or ruling. The disinclination of the courts of appeals to criticize the judge personally is nowhere more evident than in mandamus proceedings. Courts often express regret that the mandamus proceeding obliges the district judge to become a named party.²⁰⁴ Even when mandamus is granted, courts of appeals

exhaustive of relevant cases on the subject; in most instances, I have selectively identified those cases that best illustrate the issues raised.

²⁰³ Edwards, *supra* note 7, at 794. Even though petitions for writs of mandamus are granted only in extreme cases deemed to constitute a usurpation of judicial power, or its equivalent, such petitions usually concern erroneous actions or inactions of the district court that are closely tied to the merits of an underlying litigation. See *infra* notes 204-12 and accompanying text. Thus, district courts have been ordered to issue bench warrants, *see, e.g., Ex parte United States*, 287 U.S. 241 (1932); to surrender a vessel in an in rem admiralty proceeding, *see, e.g., Ex parte Republic of Peru*, 318 U.S. 578 (1943) (superseded by 28 U.S.C. §§ 1605-1607 (1988)), as stated in *In re Air Crash Disaster*, 716 F. Supp. 84 (E.D.N.Y. 1989), *rev'd on other grounds*, 907 F.2d 1328 (2d Cir. 1990)); to remand a case to state court, *see, e.g., Maryland v. Soper*, 270 U.S. 9 (1926); to retain a case improperly remanded to state court, *see, e.g., In re Southwestern Bell Tel. Co.*, 535 F.2d 859 (5th Cir. 1976); to modify pretrial procedures, *see, e.g., International Business Machs. Corp. v. Edelstein*, 526 F.2d 37 (2d Cir. 1975); to reinstate a jury verdict, *see, e.g., Kanatser v. Chrysler Corp.*, 199 F.2d 610 (10th Cir. 1952), *cert. denied*, 344 U.S. 921 (1953); to refrain from referring a case to a master, *see, e.g., La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); to refrain from ordering production of a film, *see, e.g., Goldblum v. National Broadcasting Co.*, 584 F.2d 904 (9th Cir. 1978); and to hear motions on an indictment, *see, e.g., Frankel v. Woodrough*, 7 F.2d 796 (8th Cir. 1925).

²⁰⁴ *See, e.g., Kerr v. United States*, 426 U.S. 394, 402 (1976) (stating that writs of

occasionally go to great lengths to anesthetize the sting of their orders by praising the district court and avoiding language that could be construed as disciplinary in tone.²⁰⁵

Third, mandamus standards are exacting. Traditionally, "only exceptional circumstances amounting to a judicial 'usurpation of power'" would justify the use of mandamus.²⁰⁶ Under this standard, mandamus was available only when a judge took action that she was not empowered to take, or failed to take action that she was required to take.²⁰⁷ In recent years, that standard has been relaxed. Mandamus has been used to discourage erroneous practices and prevent their recurrence, on the grounds that "supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system"²⁰⁸—even though the judicial action at issue is technically within the district judge's power ("supervisory" mandamus).²⁰⁹ Similarly, mandamus may be used in an advisory capacity to resolve important questions of first impression that would likely recur if left unresolved ("advisory" mandamus).²¹⁰ Although the advent of supervisory and advisory mandamus increased the authority of the courts of appeals to address judicial misconduct in

mandamus have "the unfortunate consequence of making the [district court] judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him" (quoting *Ex parte Fahey*, 332 U.S. 258, 260 (1947)); *Nelson v. Grooms*, 307 F.2d 76, 79 (5th Cir. 1962) (Brown, J., concurring) ("A mandamus proceeding is an unfortunate technique. It puts a Judge in an adversary position. . . . [This case] ought not to be encumbered by the embarrassing predicament of attacking a conscientious, vigorous, energetic Judge . . . for non-performance of duty.").

²⁰⁵ See, e.g., *Edelstein*, 526 F.2d at 42, 47 (granting mandamus petition, but underscoring that "the trial judge did not intend adverse results to flow from his rulings," that the practices at issue were merely "indicative of the high standards" which the judge had set for the trial, and that "[t]his court has the greatest respect for Judge Edelstein's efforts").

²⁰⁶ *Will v. United States*, 389 U.S. 90, 95 (1967) (quoting *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945)).

²⁰⁷ See Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595, 599 (1973).

²⁰⁸ *La Buy v. Howes Leather Co.*, 352 U.S. at 259-60; see also *Ward*, *supra* note 6, at 241 ("*La Buy* is viewed by both courts and commentators as a precedent for expanded appellate court supervision of lower courts.").

²⁰⁹ Even though the *La Buy* decision used the conventional "abuse of power" language, see 352 U.S. at 256, the judicial action at issue—referring cases to a master—was explicitly authorized by Rule 53 of the Federal Rules of Civil Procedure. The issue, therefore, was not whether the judge exceeded his power in making the references, but whether a decision he was empowered to make had been made erroneously. See *Ward*, *supra* note 6, at 241.

²¹⁰ See *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964).

mandamus proceedings, it did not make mandamus proceedings readily available for that purpose. As the Supreme Court observed in *Allied Chemical Corp. v. Daiflon, Inc.*²¹¹: "In short, our cases have answered the question as to the availability of mandamus . . . with the refrain: 'What, never? Well, *hardly* ever!'"²¹²

2. When Mandamus and Reversal Are Used as Disciplinary Tools

Notwithstanding the foregoing limitations upon mandamus as a vehicle for judicial discipline, there are instances in which it has been so used. Chief judges responding to the questionnaire rated mandamus as among the more frequently used mechanisms for judicial discipline, placing it ahead of impeachment, criminal prosecution, judicial council orders, and discipline under § 372(c).²¹³ In addition, nineteen of twenty-eight judges responding rated the deterrent effect of mandamus significant or very significant.²¹⁴ Even when mandamus is denied or a lower court ruling is affirmed, a comment in the appellate opinion critical of the lower court may have the desired admonitory effect.²¹⁵ The questionnaire results offer some support for this proposition, with seventeen of twenty-seven judges rating the deterrent effect of "adverse comments in appellate court opinions" as significant or very significant.²¹⁶

a. *Decision-making Delay*

Whether mandamus is an effective means to rectify unjustified decision-making delay is an issue of particular importance, given that the formal disciplinary process has generally been deemed unavailable to remedy delay.²¹⁷ The first and perhaps foremost problem with

²¹¹ 449 U.S. 33 (1980)

²¹² *Id.* at 36. Less colorful expressions of the same sentiment litter recent Supreme Court opinions in mandamus proceedings. *See, e.g.,* *Kerr v. United States*, 426 U.S. 394, 402 (1976) (considering mandamus a drastic remedy, for use only in extraordinary situations); *Ex parte Fahey*, 332 U.S. 258, 260 (1947) (stating that writs of mandamus are extraordinary remedies "reserved for really extraordinary causes").

²¹³ *See infra* app., question 1.

²¹⁴ *See infra* app., question 2.

²¹⁵ *See, e.g.,* *Hester v. NCNB Texas Nat'l Bank*, 899 F.2d 361, 367 (5th Cir. 1990) (denying mandamus, but adding that "the district court may have been wrong . . . not to stay the appointment of the trustee"); *Stans v. Gagliardi*, 485 F.2d 1290, 1291-92 (2d Cir. 1973) (denying mandamus, but adding "we cannot agree with the judge's view that [this] 'is a very simple case'" and that "Judge Gagliardi may again consider the matter as we hope he will").

²¹⁶ *See infra* app., question 2.

²¹⁷ *See supra* part I. Note that appeal is not available as a remedy for delay,

mandamus petitions as the principal remedy for delay is that lawyers are understandably reluctant to use them, for one of the same reasons courts of appeals are reluctant to grant them: they are directed at the judge personally, and the judge may take them personally. Alan Morrison describes the no-win situation confronting a lawyer in such cases:

The case is sitting there not for days or weeks but for months, and in some cases years.

For the lawyer, the[re are] nothing but bad choices. . . . You can call chambers. You can write letters. You can contact the chief judge. You can write a letter to the administrative office. Now, fortunately, with the Civil Justice Reform Act, there are reports twice a year that show who the judges are who are behind, and you can call the local newspaper and tell them to go look at it.

But in the end, there's nothing you can do save file a petition for a writ of mandamus. And then what does that do? It may get you a decision, but not the one that you and your client want.²¹⁸

While the lawyer who files a petition in such cases may succeed in antagonizing the district court, the lawyer who does not file a petition may succeed in antagonizing the court of appeals. In *United States v. Boyce*,²¹⁹ for example, the district court took almost three years to deny a criminal defendant's motions for a new trial and a judgment of acquittal.²²⁰ During the time that the motions were pending, defense counsel called the matter to the attention of the district judge in at least six telephone calls to the judge's chambers, and in one letter.²²¹ Nevertheless, in reversing the district court, the court took the opportunity to chide the defendant's lawyer:

Defense counsel's acceptance of a court appointment to represent Boyce, who was an indigent criminal defendant, included a serious commitment to zealously represent the best interests of his client. In light of this extraordinary delay, we are surprised that Boyce's counsel failed to file a petition for a writ of mandamus on behalf of his client.²²²

inasmuch as appeals seek review of a lower court decision or ruling, not the absence of such a decision or ruling.

²¹⁸ NCJDR Hearings, *supra* note 16, at 207-08 (May 1, 1992) (testimony of Alan Morrison, Director of the Public Citizen Litigation Group).

²¹⁹ 849 F.2d 833 (3d Cir. 1988).

²²⁰ *See id.* at 838.

²²¹ *See id.*

²²² *Id.* (citations omitted).

Of the cases in which a mandamus petition has been filed to remedy decision-making delay, most of the delays at issue do not appear to have arisen as a result of judicial incompetence, neglect, or malice. Many petitions have been denied on grounds that the delay was insufficiently extreme.²²³ Others—some granted, some not—have concerned delays that were simply the result of well-intentioned efforts by the district court to postpone decision-making pending resolution of related proceedings,²²⁴ or to permit extrajudicial resolution of the litigation.²²⁵ Still other petitions—some granted, some not—concerned delays occasioned by excessive workload.²²⁶

²²³ See, e.g., *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666 (1978) (denying mandamus because delay in adjudicating claim was "a product of the normal excessive load in the District Court"). A series of recent cases in the Fourth Circuit denied petitions for mandamus on the grounds that the delay complained of—generally six months or less—had not been undue. See, e.g., *In re Artis*, 1992 U.S. App. LEXIS 11851, at *1 (4th Cir. May 22, 1992) (denying mandamus because three-month lapse since "recent significant action" does not constitute undue delay); *In re Silvers*, No. 91-8066, 1991 U.S. App. LEXIS 24710, at *1 (4th Cir. Oct. 17, 1991) (stating that four months of inaction is insufficient basis for granting mandamus on grounds of undue delay); *In re Wilcox*, No. 91-8019, 1991 U.S. App. LEXIS 10424, at *1 (4th Cir. May 23, 1991) (stating that there is no undue delay where complaints were last acted on within six months); *In re Reeves-Bey*, No. 90-8047, 1991 U.S. App. LEXIS 1161, at *1 (4th Cir. Jan. 29, 1991) (stating that there is no undue delay where judicial attention has been paid to a motion within the last six months).

²²⁴ See, e.g., *In re Blodgett*, 112 S. Ct. 674, 676 (1992) (holding that the court of appeals improperly delayed decision in habeas case, pending resolution of related petition in district court and denying mandamus on other grounds); *Will*, 437 U.S. at 655 (denying mandamus petition where federal court proceedings were delayed pending outcome of related state proceedings); *Mach-Tronics, Inc. v. Zirpoli*, 316 F.2d 820, 834-35 (9th Cir. 1963) (granting mandamus to lift stay pending outcome of related state proceedings); *Nelson v. Grooms*, 307 F.2d 76, 79 (5th Cir. 1962) (denying mandamus petition where proceedings in school desegregation case were stayed pending resolution of a related suit).

²²⁵ See, e.g., *Cheyney State College Faculty v. Hufstедler*, 703 F.2d 732, 738 (3d Cir. 1983) (denying mandamus petition where stay of proceedings in school desegregation case was justified in order to permit administrative resolution); *In re United States*, 140 F.2d 19, 20 (5th Cir. 1943) (holding that delay in proceeding for purpose of enabling claimant to rectify alleged statutory violation unjustified and denying mandamus on other grounds).

²²⁶ In the words of one court granting mandamus:

The unfortunately high volume of prisoner cases pending in the District of Kansas is insufficient to justify the delay occasioned here.

Certainly we sympathize with the district court's efforts to keep abreast of its burgeoning case load. And, "[i]t is indeed unfortunate if the judicial manpower provided by Congress in any district is insufficient to try with reasonable promptness the cases properly filed in or removed to that court"

Even to the extent a delay is attributable to spite, neglect or incompetence, the previously discussed stringency of mandamus standards may result in denial. As one chief judge told Barr and Willing in the context of a discussion of complaints relating to delay under the Act: "Complaints occasionally raised delay, which I found difficult. In an individual case, the rules are clear it's a no go, you file a mandamus, even though the number of mandamuses granted is so minuscule you're not sure how practical an alternative that is."²²⁷

There are, however, a relatively small number of cases in which the courts of appeals have granted petitions for writs of mandamus on the grounds of delay attributable to inappropriate judicial behavior. Eighteen of twenty-five chief judges expressing a view stated that mandamus petitions were a somewhat effective or very effective means of remedying judicial neglect and unjustified delay.²²⁸ "There can be no doubt," opined the Court in *Will v. Calvert Fire Insurance Co.*,²²⁹ "that, where a district court persistently and without reason refuses to adjudicate a case properly before it, the court of appeals may issue the writ 'in order that [it] may exercise the jurisdiction of review given by law.'"²³⁰ Thus, for example, in *Hall v. West*,²³¹ the United States Court of Appeals for the Fifth Circuit granted the plaintiffs' mandamus petition in a school desegregation case whose motions had been pending with the district court for over two years.²³² The district court defended the action as within the discretionary authority of a district judge to control his schedule, and as necessary to facilitate an amiable solution to the litigation.²³³ The court of appeals was unpersuaded:

[T]his Court feels that the response does not merit the serious attention of the Court. It shows startling, if not shocking, lack of

Johnson v. Rogers, 917 F.2d 1283, 1285 (10th Cir. 1990) (citations omitted) (quoting *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 344 (1976)); see also *In re Maxwell*, 100 F.2d 749, 751 (5th Cir. 1938) (denying mandamus but admonishing that "pressure of other business is not an excuse for further delay" and warning that an order in the nature of mandamus would issue "[s]hould entry of final judgment be delayed more than thirty days").

²²⁷ See *supra* note 45.

²²⁸ See *infra* app., question 13.

²²⁹ 437 U.S. 655 (1978).

²³⁰ *Id.* at 661-62 (quoting *Insurance Co. v. Comstock*, 83 U.S. (16 Wall.) 258, 270 (1873)).

²³¹ 335 F.2d 481 (5th Cir. 1964).

²³² See *id.* at 483.

²³³ See *id.* at 483-84.

appreciation of the clear pronouncements of the Supreme Court and this Court during the past year which make it perfectly plain that *time has run out* for a district court to temporize. . . .

. . . .

. . . In this case neither the school authority nor the district court has accepted its responsibility. . . .

. . . .

. . . The respondent has had ample admonishment, both from the Supreme Court and this Court, as to what is required of him in the premises. His failure to respect these admonishments makes it reasonably clear that an order from us directing merely that he enter a judgment in the case would mean simply that the case would be back here again. . . . Such further delay and such further consumption of judicial time is not only unnecessary but it would tend to destroy the confidence of litigants in our judicial system.

The mandamus absolutely will, therefore, [be granted].²³⁴

In a number of cases, the courts of appeals have pointedly rejected claims of crowded dockets in defense of delayed decision-making. In *Jones v. Shell*,²³⁵ the Eighth Circuit granted a mandamus petition with the following explanation:

We find a flagrant violation of our mandate of January 13, 1977, by the district court in failing to act within a reasonable time upon this court's order of [reversal]. The writ of habeas corpus, challenging illegality of detention, is reduced to a sham if the trial courts do not act within a reasonable time. . . . Busy court dockets cannot justify a 14-month delay in processing this claim from the date of remand. Petitioner has been seeking relief since March of 1976. We find this delay has denied petitioner constitutional due process.²³⁶

Similarly, in *McClellan v. Young*,²³⁷ the Sixth Circuit granted a mandamus petition, rejecting the district court's explanation that the delay was attributable to "an unusually crowded docket," and stating: "We are fully appreciative of the problems of the District Judge but in much less time than we believe was consumed in the preparation and filing of his motion to dismiss . . . he could have ruled on petitioner's habeas

²³⁴ *Id.* at 484-85.

²³⁵ 572 F.2d 1278 (8th Cir. 1978).

²³⁶ *Id.* at 1280 (footnote omitted).

²³⁷ 421 F.2d 690 (6th Cir. 1970).

corpus petition"²³⁸ In *United States v. Boyce*,²³⁹ a mandamus petition was never filed, but a delayed order denying motions for a new trial and an acquittal was reversed by the Third Circuit. The court stated:

[I]t is with extreme consternation that we observe that the district court took almost *three full years* to deny Boyce's post-trial motions

. . . .

Nothing in the record before us even hints at a reasonable explanation for this unconscionable delay. Conceivably, this matter might have slipped through the cracks of the district court's docket which is unquestionably burdened by the weight of a heavy case load. . . .

. . . .

Regrettably, we cannot ignore that the ultimate responsibility for this unjust delay rests on the shoulders of the district judge The injustice inflicted by judicial delay of this magnitude is intolerable.²⁴⁰

And in *In re Funkhouser*,²⁴¹ the Eighth Circuit "deem[ed] it extraordinary" that a magistrate delayed almost seventeen months in ruling on a motion for leave to proceed in forma pauperis, and granted the writ, rejecting the magistrate's explanation that there had been numerous filings by state prisoners in the district.²⁴²

The overall effectiveness of mandamus as a remedy for decision-making delay is debatable. It does, of course, end delays in cases where mandamus petitions are filed and granted; on the other hand, it does nothing in cases where litigants are unwilling to file petitions. And to the extent mandamus petitions are granted carefully to avoid the impression that they have a disciplinary purpose, delays which deserve to be characterized as the product of inappropriate judicial behavior may be ended without "discipline." The net effect may be, as one chief judge described it to Barr and Willging: "You issue the usual order, say mandamus is an extraordinary remedy, you are confident the judge will take care of the matter in the immediate future. Invariably the judge will take care of that case, but not the other 999 cases."²⁴³

²³⁸ *Id.* at 691.

²³⁹ 849 F.2d 833 (3d Cir. 1988).

²⁴⁰ *Id.* at 838-39.

²⁴¹ 873 F.2d 1076 (8th Cir. 1989).

²⁴² *Id.* at 1077-78.

²⁴³ See *supra* note 45.

b. *Bias and Conflict of Interest*

A litigant's right to have her case heard before an impartial judge is protected by the Due Process Clause of the Fifth Amendment and sections 144 and 455 of title 28 of the U.S. Code. These constitutional and statutory provisions enable litigants to request that a judge recuse herself on grounds of bias or conflict of interest. District court orders denying such requests may be reviewed on appeal or in mandamus proceedings. Because remedies are in place to address bias and conflicts of interest, chief judges have dismissed complaints of such conduct filed under the Act on the grounds that they are related to the merits of a matter that was or should have been raised and resolved in the underlying litigation.²⁴⁴

By its terms, § 144 empowers a litigant to disqualify a judge by filing a "timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party."²⁴⁵ Section 455(a), in contrast, directs a judge to disqualify herself from "any proceeding in which his impartiality might reasonably be questioned,"²⁴⁶ while § 455(b) requires disqualification in certain specific circumstances.²⁴⁷

Although the text of sections 144 and 455 appears to create a relaxed standard for disqualification that would be relatively easy to satisfy, judicial construction has limited the statutes' application, so that recusal is rare, and reversal of a district court's refusal to recuse is even rarer. First, the courts have counterbalanced the need to preserve the appearance of impartiality, with the judges' obligation not to recuse themselves except where absolutely necessary.²⁴⁸ Second, the courts have limited the scope of evidence demonstrative of bias: this evidence may not be based on attitudes formed by the judge in light of her experience with the litigants in present or past proceedings;²⁴⁹ on

²⁴⁴ See *supra* notes 35-37 and accompanying text.

²⁴⁵ 28 U.S.C. § 144 (1988).

²⁴⁶ 28 U.S.C. § 455(a) (1988).

²⁴⁷ Such circumstances include: where the judge has a personal bias; where the judge or his former firm served as counsel in the matter when the judge was in practice; where the judge has a financial interest in the matter; and where the judge is related to a party, lawyer, witness or someone with a financial interest in the matter. See § 455(b)(1)-(5).

²⁴⁸ Many courts have spoken in terms of the judge's duty to sit when disqualification is not warranted as being as great as the duty not to sit when disqualification is warranted. See *United States v. Bray*, 546 F.2d 851, 857 (10th Cir. 1976); *Rosen v. Sugarman*, 357 F.2d 794, 797 (2d Cir. 1966); *In re Union Leader Corp.*, 292 F.2d 381, 391 (1st Cir. 1961); *Tucker v. Kerner*, 186 F.2d 79, 85 (7th Cir. 1950); *Grand Entertainment Group, Ltd. v. Arazy*, 676 F. Supp. 616, 619 (E.D. Pa. 1987).

²⁴⁹ See, e.g., *Easley v. University of Mich. Bd. of Regents*, 906 F.2d 1143, 1146-47

attitudes expressed in the judge's prior opinions or rulings;²⁵⁰ or on the judge's activities or views expressed prior to ascending the bench.²⁵¹ Evidence of bias against a lawyer, rather than a party, may likewise be insufficient.²⁵² Third, some circuits have denied petitions for mandamus challenging a judge's refusal to disqualify herself, on the grounds that the issue is properly resolved only on appeal.²⁵³ At the same time, at least one circuit has rejected appeals challenging the judge's refusal to disqualify herself, on the grounds that the issue is properly resolved only in a petition for mandamus.²⁵⁴

Notwithstanding the gauntlet of impediments to recusal under sections 144 and 455, courts of appeals have occasionally ordered the disqualification of judges with biases or conflicts of interest too obvious to ignore.²⁵⁵ Two of the best known series of cases have concerned

(6th Cir. 1990) (upholding judge's refusal to recuse despite the fact that the judge graduated from the law school that was a party in the action); *United States v. Pritchard*, 875 F.2d 789, 791 (10th Cir. 1989) (upholding judge's refusal to recuse despite the judge's prior judicial contacts with defendant); *Securities Exch. Comm'n v. Drexel Burnham, Inc. (In re Drexel Burnham Lambert, Inc.)*, 861 F.2d 1307, 1316 (2d Cir. 1988) (upholding judge's refusal to recuse despite criticism of defense counsel and the judge's wife's interest in the sale of the business in which the defendant is litigating the action).

²⁵⁰ See, e.g., *United States v. Haldeman*, 559 F.2d 131, 133 (D.C. Cir. 1976) (upholding a judge's refusal to recuse despite the defendant's claim that the opinions expressed by the judge while the judge presided over the defendant's criminal proceedings created bias); *Wounded Knee Legal Defense/Offense Comm. v. FBI*, 507 F.2d 1281, 1285 (8th Cir. 1974) (upholding a judge's refusal to recuse despite the defendant's claim that the judge had personal bias against the defendant from dealing with the defendant in other criminal cases).

²⁵¹ See, e.g., *Laird v. Tatum*, 409 U.S. 824, 839 (1972) (denying a motion for a justice to recuse himself on grounds that his past decisions as an employee of the executive branch created no bias).

²⁵² See, e.g., *Gilbert v. City of Little Rock*, 722 F.2d 1390, 1398-99 (8th Cir. 1983) (upholding a judge's refusal to recuse despite claims of extrajudicial bias against the attorney of one of the parties); *Davis v. Board of Sch. Comm'rs*, 517 F.2d 1044, 1052 (5th Cir. 1975) (upholding judge's refusal to recuse despite claims of extrajudicial bias against the attorney of one of the parties).

²⁵³ See *In re City of Detroit*, 828 F.2d 1160, 1166 (6th Cir. 1987); *City of Cleveland v. Krupansky*, 619 F.2d 576, 578-79 (6th Cir.), cert. denied, 449 U.S. 834 (1980); *Green v. Murphy*, 259 F.2d 591, 594 (3d Cir. 1958).

²⁵⁴ See *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991); *Taylor v. O'Grady*, 888 F.2d 1189, 1201 (7th Cir. 1989).

²⁵⁵ Cases ordering disqualification because of bias include: *Johnson v. Mississippi*, 403 U.S. 212, 215-16 (1971) (disqualifying judge because of revealed bias against civil rights workers); *Berger v. United States*, 255 U.S. 22, 28-36 (1921) (disqualifying judge because of bias against American citizens of German ancestry); *United States v. Holland*, 655 F.2d 44, 47 (5th Cir. 1981) (disqualifying judge because of revealed bias against the defendant); *Roberts v. Bailar*, 625 F.2d 125, 128-30 (6th Cir. 1980) (disqualifying judge because of the judge's friendship with the plaintiff); *Nicodemus*

judges whose biases were not necessarily extrajudicial in origin, but were sufficiently extreme to cause the appellate courts to ignore the general rule excluding such evidence from consideration.

One series of cases, involving Chief Judge Willis Ritter, in the District of Utah, spanned nearly two decades.²⁵⁶ In the 1955 decision of *United States v. Hatahley*,²⁵⁷ the court of appeals reversed Judge Ritter's judgment charging the United States with unauthorized destruction of the plaintiffs' horses and burros and observed that the case "was tried in an atmosphere of maximum emotion and a minimum of judicial impartiality."²⁵⁸ The Supreme Court reversed and remanded for new proceedings consistent with the Court's opinion.²⁵⁹ Following retrial, the court of appeals reversed Judge Ritter again:

A casual reading of the two records leaves no room for doubt that the District Judge was incensed and embittered, perhaps understandably so, by the general treatment over a period of years of the plaintiffs and other [Native Americans] in southeastern Utah by the government agents From his obvious interest in the case . . . we are certain that the feeling of the presiding Judge is such that, upon retrial, he cannot give the calm, impartial consideration which is necessary for a fair disposition of this unfortunate matter, and he should step aside.

. . . .

v. Chrysler Corp., 596 F.2d 152, 156-57 (6th Cir. 1979) (disqualifying judge because of statements made against the defendant); *United States v. Thompson*, 483 F.2d 527, 527 (3d Cir. 1973) (disqualifying judge for statement that it was his policy to sentence selective service violators to 30 months if they were "good people"); *Occidental Petroleum Corp. v. Chandler*, 303 F.2d 55, 57 (10th Cir. 1962) (disqualifying judge because of actions taken in court against defendant that demonstrated bias); *Connelly v. United States Dist. Court*, 191 F.2d 692, 696-97 (9th Cir. 1951) (disqualifying judge because judge's remarks during trial demonstrated hostility toward the plaintiff); *Whitaker v. McLean*, 118 F.2d 596, 596 (D.C. Cir. 1941) (disqualifying judge because of admitted bias against Communists).

Cases ordering disqualification because of conflict of interest include: *Moody v. Simmons*, 858 F.2d 137, 139-43 (3d Cir. 1988) (disqualifying a judge because his daughter was employed by one of the parties in the action that he was presiding over and because he was represented by the defendant's law firm in a personal injury action); *Texaco, Inc., v. Chandler*, 354 F.2d 655, 657 (10th Cir. 1965) (disqualifying judge because the plaintiff's attorney was representing him in another action); *Rapp v. Van Dusen*, 350 F.2d 806, 813-14 (3d Cir. 1965) (disqualifying judge because he had previously employed the defendants' counsel).

²⁵⁶ Judge Ritter is the focus of an article by attorney Brent Ward, analyzing the effectiveness of mandamus as a means of judicial administration. See Ward, *supra* note 6, at 233-36.

²⁵⁷ 220 F.2d 666 (10th Cir. 1955).

²⁵⁸ *Id.* at 670.

²⁵⁹ See *Hatahley v. United States*, 351 U.S. 173, 180-82 (1956).

[W]e suggest that when the case is remanded to the District Court, the Judge who entered the judgment take appropriate preliminary steps to the end that further proceedings in the case be had before another Judge.²⁶⁰

Upon remand, Judge Ritter announced that he did not "intend to follow" the court of appeals' suggestion that he step aside,²⁶¹ whereupon the United States petitioned the Tenth Circuit for a writ of mandamus.²⁶² The writ was granted.²⁶³

In 1976, the court of appeals granted another mandamus petition seeking the disqualification of Judge Ritter.²⁶⁴ The judge had become noticeably warmer to defense counsel and colder to government counsel midway through an antitrust proceeding, beginning at the point the judge first became aware that defense counsel, in the counsel's capacity as president of the state bar, had opposed six bar resolutions objecting to Judge Ritter's behavior in other cases.²⁶⁵ The court of appeals wrote:

The final question, and that which disturbs us most, is whether in the light of the total facts and viewing the future of this case in the light of Section 455(a), there exists a reasonable likelihood that the cause will be tried with the impartiality that litigants have a right to expect in a United States district court. Unfortunately, we cannot predict that it will be.²⁶⁶

The following year the Tenth Circuit reversed a directed verdict by Judge Ritter for the plaintiff in a contract dispute in which a basketball team sued its former coach.²⁶⁷ Although the basis for reversal was that the facts as adduced at trial did not support the directed verdict, the court felt compelled to comment on Judge Ritter's demeanor:

In the circumstances, it is not necessary for us to discuss the defendants' claims of many errors based on admission and rejection of evidence and on restriction of cross-examination. It is enough to say that the trial was not conducted in an impartial

²⁶⁰ *United States v. Hatahley*, 257 F.2d 920, 925-26 (10th Cir.), *cert. denied*, 358 U.S. 899 (1958).

²⁶¹ *United States v. Ritter*, 273 F.2d 30, 32 (10th Cir. 1959), *cert. denied*, 362 U.S. 950 (1960).

²⁶² *See id.*

²⁶³ *See id.*

²⁶⁴ *United States v. Ritter*, 540 F.2d 459, 464 (10th Cir.), *cert. denied*, 429 U.S. 951 (1976).

²⁶⁵ *See id.* at 460-61.

²⁶⁶ *Id.*

²⁶⁷ *See Eckles v. Sharman*, 548 F.2d 905, 909 (10th Cir. 1977).

manner. In a new trial, judicial conduct similar to that appearing in the record before us, hopefully, will not be repeated.

....

... The conduct of the trial by Judge Ritter indicates that he has a strong personal bias and prejudice incompatible "with the impartiality that litigants have a right to expect in a United States district court."²⁶⁸

In the same year that *Eckles* was decided, the court of appeals reversed Judge Ritter again in *Webbe v. McGhie Land Title Co.*²⁶⁹

Here, the trial judge, without reading the depositions, and based on the oral argument of counsel for Webbe and Kitt, announced that the insurance company was "stuck" before even permitting counsel for the insurance company to address the court. To us there is not a reasonable likelihood that the trial judge in the instant case, having now been reversed for granting summary judgment, could later preside over the trial of this matter in a fair and impartial manner²⁷⁰

In the fall of 1977, the United States took the unprecedented step of petitioning the Tenth Circuit for a writ of mandamus barring Judge Ritter from hearing any case in which the United States was a party. By way of explanation, the petition alleged that:

[Judge Ritter] invents and follows his own rules, is swayed by his own preconceptions of legal procedure, and is determined that no outside force—not the arguments of counsel, not the holdings of this Court—shall interfere with the conduct of his court. He feels no responsibility to the litigants to explain or justify his decisions. He brooks no argument and does not tolerate even well-mannered opposition to his views. He attempts to make his decisions in such a way that this Court will be unable to correct his errors.²⁷¹

Judge Ritter died before the petition was decided.

A second series of cases involved Judge Miles Lord of the District

²⁶⁸ *Id.* at 910-11 (quoting *United States v. Ritter*, 540 F.2d 459, 464 (10th Cir. 1976)).

²⁶⁹ 549 F.2d 1358 (10th Cir. 1977).

²⁷⁰ *Id.* at 1361.

²⁷¹ Ward, *supra* note 6, at 234 (quoting *Petition of the United States for Writ of Mandamus or Prohibition* at 2-3, *United States v. Ritter* (10th Cir.) (No. 77-1829), *dismissed as moot*, Aug. 11, 1978).

of Minnesota.²⁷² In the 1972 decision of *Pfizer, Inc. v. Lord*,²⁷³ the court of appeals denied a mandamus petition seeking Judge Lord's recusal on grounds of bias, but also admonished the judge:

This record adversely reflects upon Judge Lord's conduct during the pretrial proceedings. Reluctantly, we have pointed out his shortcomings in this case. We demand of Judge Lord, as we do of every trial judge in this circuit, a high standard of judicial performance with particular emphasis upon conducting litigation with scrupulous fairness and impartiality.²⁷⁴

Four years later, in *Reserve Mining Co. v. Lord*,²⁷⁵ the Eighth Circuit granted a petition seeking Judge Lord's recusal:

Ordinarily, when unfair judicial procedures result in a denial of due process, this court could simply find error, reverse and remand the matter. Recusal would be altogether inappropriate. However, the record in this case demonstrates more serious problems. The denial of fair procedures here was due not to good faith mistakes of judgment or misapplication of the proper rules of law by the district court. The record demonstrates overt acts by the district judge reflecting great bias against Reserve Mining Company and substantial disregard for the mandate of this court.²⁷⁶

In 1983, the court of appeals reversed the convictions of five defendants in *United States v. Singer*,²⁷⁷ due to apparent bias on the part of Judge Lord:

While he undoubtedly thought that by aiding and correcting the government attorney, he was merely redressing the balance between several reputable defense lawyers and one "overwhelmed" government attorney, the obvious effects were 1) to place the defense at a disadvantage in the eyes of the jury by casting the prosecutor in the role of an underdog . . . and 2) to suggest to the jury that he favored the government's position.²⁷⁸

²⁷² An article by former Professor Carol Rieger evaluates the effectiveness of the discipline statute, with particular reference to Judge Lord. See generally Rieger, *supra* note 4.

²⁷³ 456 F.2d 532 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972).

²⁷⁴ *Id.* at 544.

²⁷⁵ 529 F.2d 181 (8th Cir. 1976).

²⁷⁶ *Id.* at 185.

²⁷⁷ 710 F.2d 431 (8th Cir. 1983).

²⁷⁸ *Id.* at 436 (citations omitted).

Chief Judge Donald Lay was bolder in his concurrence: "Once the judge assumes the mantle of an advocate the balance of fair process becomes imbalanced and the proceeding becomes inquisitorial in kind. The fair and respected judge is one who becomes detached from the outcome and allows the chips to fall where they may."²⁷⁹

The following year, in *Gardiner v. A.H. Robins Co.*,²⁸⁰ a Dalkon Shield case, the Eighth Circuit ordered stricken from the record Judge Lord's condemnation and reprimand of the defendant corporation's officers.²⁸¹ The officers, who were not parties to the litigation, were chastised by Judge Lord for their role in bringing the Dalkon Shield to market.²⁸² The court of appeals did not approve: "Here, the judge made his comments without a trial and thus without hearing both sides of the case. Those comments in such a context exhibit a pervasive bias and prejudice as to deprive Robins of its due process right to a hearing before an impartial judge."²⁸³

Interestingly, the defendant first raised the reprimand issue not in its appeal, but in a separate complaint filed under the Act. The appeal was from an "order" entered by Judge Lord converting the parties' private settlement into an order of the court.²⁸⁴ The net effect of that "order" would have been to make violation of the settlement a contempt of court rather than a simple breach of contract.²⁸⁵ While the court of appeals directed that the order be stricken, it took the opportunity to address the reprimand as well, on the grounds that "[i]t is far more desirable for this issue to be addressed in the normal appellate process than in the extraordinary context of a disciplinary proceeding."²⁸⁶ Subsequent to the court of appeals' decision in *Gardiner*, the Eighth Circuit Judicial Council dismissed as moot the disciplinary complaint against Judge Lord.²⁸⁷

It is open to debate whether Judge Lord's conduct in *Gardiner* was, as the court of appeals concluded, better addressed in an appellate forum than a disciplinary proceeding. Professor Rieger argues that formal disciplinary action should have been taken against Judge Lord, given that repeated efforts by the court of appeals to chastise the judge

²⁷⁹ *Id.* at 438 (Lay, C.J., concurring).

²⁸⁰ 747 F.2d 1180 (8th Cir. 1984).

²⁸¹ *See id.* at 1194.

²⁸² *See id.* at 1186.

²⁸³ *Id.* at 1192.

²⁸⁴ *See id.* at 1186.

²⁸⁵ *See id.*

²⁸⁶ *Id.* at 1190.

²⁸⁷ *See Rieger, supra* note 4, at 75-77.

in appellate and mandamus proceedings had failed to deter his chronic misbehavior.²⁸⁸

c. *Disregard for Authority*

A final category of judicial misbehavior concerns instances in which lower courts have consciously flouted the dictates of a higher authority, be it an appellate court, a judicial council, or an act of Congress. In a limited number of cases, mandamus petitions have been granted to enforce compliance with orders of the circuit judicial councils. In *Utah-Idaho Sugar Co. v. Ritter*,²⁸⁹ and *Kerr-McGee Corp. v. Ritter*,²⁹⁰ petitions for writs of mandamus were granted against Chief Judge Ritter for assigning cases in contravention of a judicial council order issued pursuant to 28 U.S.C. § 137. In *Hilbert v. Dooling*,²⁹¹ the district court declined to dismiss an indictment and the defendant petitioned the court of appeals for a writ of mandamus ordering dismissal.²⁹² The petition was granted on the grounds that the indictment had been filed late, in violation of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases adopted by the judicial council.²⁹³

In some cases, district courts are called to task for flouting orders of higher courts. The remarkable Judge Ritter was again the issue in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*²⁹⁴ Ritter approved a plan for the division of markets between two related gas pipeline companies in an antitrust case. The Supreme Court reversed and remanded, directing Judge Ritter to order divestiture.²⁹⁵ Judge Ritter's new order upheld the earlier plan, on the grounds that it "seems to me to make a lot of sense."²⁹⁶ Once again, Judge Ritter was reversed by the Supreme Court:

[Judge Ritter's proposed decree] does the opposite of what our prior opinion and mandate commanded. Once more, and nearly three years after we first spoke, we reverse and remand, with directions that there be divestiture without delay and that the

²⁸⁸ See *id.* at 92.

²⁸⁹ 461 F.2d 1100 (10th Cir. 1972).

²⁹⁰ 461 F.2d 1104 (10th Cir. 1972).

²⁹¹ 476 F.2d 355 (2d Cir.), *cert. denied*, 414 U.S. 878 (1973).

²⁹² See *id.* at 357.

²⁹³ See *id.* at 356-57, 362.

²⁹⁴ 386 U.S. 129 (1967).

²⁹⁵ See *id.* at 142.

²⁹⁶ *Id.*

Chief Judge of the Circuit or the Judicial Council of the Circuit assign a different District Judge to hear the case.²⁹⁷

A similar problem was confronted in *Federal Home Loan Bank v. Hall*.²⁹⁸ In that case, the district court permitted the parties to relitigate issues previously resolved by the court of appeals. A mandamus petition seeking an order of dismissal was granted by the Ninth Circuit, with the following explanation: "It is clear that Respondent District Judge and Respondent litigants herein have at all times erroneously and wrongfully construed and interpreted the meaning and intent of this Court as expressed in its three opinions and decisions, and mandates issued pursuant thereto."²⁹⁹

Finally, some courts have been subject to mandamus for disregarding congressional enactments. In *Ex parte United States*,³⁰⁰ the United States petitioned for a writ of mandamus to prevent the district court from suspending the sentence of a defendant convicted of embezzling from a national bank, a crime which carried a minimum statutory sentence of five years. The Supreme Court, concluding that the "authority to define and fix the punishment for crime is legislative," and that the "right to relieve from punishment . . . belongs to the executive department,"³⁰¹ held that mandamus was warranted, but stayed issuance of the writ long enough to permit the executive branch to consider a pardon.³⁰² In *Maloney v. Plunkett*,³⁰³ the district judge discharged the jury on the grounds that the peremptory challenges exercised by the parties in jury selection had been racially motivated, and ordered that the new jury be selected without the use of peremptory challenges.³⁰⁴ A writ of mandamus was sought and granted.³⁰⁵ In ordering the district judge to proceed to trial with the original jury, the Seventh Circuit explained:

[The district judge] deliberately refused to enforce a peremptory (pun intended) statutory command. Section 1870 of the Judiciary Code provides, in words that could not be clearer, that, "In civil cases, each party shall be entitled to three peremptory challenges." . . . [A]nd there is no argument—there can be no argument—

²⁹⁷ *Id.* at 142-43 (citation omitted).

²⁹⁸ 225 F.2d 349 (9th Cir. 1955), *cert. denied*, 350 U.S. 968 (1956).

²⁹⁹ *Id.* at 384-85.

³⁰⁰ 242 U.S. 27 (1916).

³⁰¹ *Id.* at 42.

³⁰² *See id.* at 52-53.

³⁰³ 854 F.2d 152 (7th Cir. 1988).

³⁰⁴ *See id.* at 153.

³⁰⁵ *See id.* at 156.

that section 1870 is inapplicable to the present case. Nevertheless Judge Plunkett forbade either side to exercise any peremptory challenges in selecting a new jury.³⁰⁶

B. *Peer Influence*

Comparatively little has been written about the impact of peer influence upon judicial conduct. It is probably safe to assume that judges desire the respect of their colleagues to an extent no less than anyone else. Professor Fish notes at several points in his book that the success of the judicial conference, the judicial councils, and the chief judge in the exercise of their disciplinary or quasi-disciplinary authority hinges upon whether the misbehaving judge will be deterred by the prospect of having his conduct held up for his colleagues to see.³⁰⁷

Judge Irving Kaufman has argued that informal peer pressure constitutes a critical protection against judicial aberrance.³⁰⁸ In cases of delay:

A judge who falls significantly behind in his work is coaxed—and usually effectively—to keep up. If he is . . . not lazy but simply overworked, a brief respite can be arranged by his colleagues and may prove sufficient. The Circuit Judicial Councils . . . may reassign recalcitrant judges and may order them to eliminate their backlogs before taking on any new cases. But such open activism is rarely necessary. Few judges are willing to risk public attention by persistently rejecting their colleagues' overtures.³⁰⁹

In cases of judicial disability:

The problem can almost always be managed effectively in a personal and informal manner. . . . If necessary, other judges, attorneys, and even family members may approach the ailing jurist. Almost invariably he will acquiesce. At least four Supreme Court justices—Grier, Field, McKenna, and the great Holmes—retired at the suggestion of their brothers. There is no record that any has ever refused. . . . Even if the judge is slow to accept the suggestion of his brethren, this method is sure to accomplish his ouster faster than a formal procedure. Peer pressure is a potent tool. It should not be underestimated because it is neither exposed to public view nor enshrined in law.³¹⁰

³⁰⁶ *Id.* at 154.

³⁰⁷ See FISH, *supra* note 6, at 154, 412.

³⁰⁸ See Kaufman, *supra* note 6, at 709.

³⁰⁹ *Id.* at 708 (footnote omitted).

³¹⁰ *Id.* at 709 (footnotes omitted).

In the relatively rare case that peer pressure alone is not enough to deter misconduct, Judge Kaufman argues, reversal and mandamus almost always do the trick. "The case of the late Judge Willis Ritter," Judge Kaufman concluded, "is not, as some have suggested, an egregious example of a common phenomenon. It is simply an aberration."³¹¹

Of all the disciplinary and quasi-disciplinary measures considered in this report, peer influence is the most difficult to quantify or assess. Its existence is difficult to deny, and all available evidence suggests that its impact is salutary. Chief circuit judges identified peer influence as the third most frequently used disciplinary mechanism of eight under consideration.³¹² Fifteen of twenty-six judges identified the deterrent effect of peer pressure as significant or very significant (which is comparable to other disciplinary mechanisms).³¹³ Beyond that, little can be added, except this: Judge Kaufman argues that "[t]he effectiveness of informal peer pressure in ridding the judiciary of disabled members is based substantially on the prevalence within the judiciary of an atmosphere of good faith and collegiality."³¹⁴

The rapidly increasing size of the federal judiciary in recent years has, in the minds of many judges, precipitated a decline in collegiality.³¹⁵ Twenty-five of twenty-nine chief judges responding to the survey agreed.³¹⁶ The possibility thus exists that a decline in collegiality may precipitate a decline in the significance of peer influence as a disciplinary mechanism. A plurality of eleven chief circuit judges believed that the decline in collegiality has reduced the impact of peer influence on judicial behavior, while nine saw no effect, and two correlated the decline in collegiality to an increase in the influence of peer pressure.³¹⁷ While hardly dispositive, these results suggest that routine increases in the number of Article III judgeships may be accompanied by certain hidden costs to the judiciary that ought to be seriously considered when future increases are contemplated.

³¹¹ *Id.* at 710.

³¹² See *infra* app., question 1.

³¹³ See *infra* app., question 2.

³¹⁴ Kaufman, *supra* note 6, at 711.

³¹⁵ In a questionnaire prepared by the Federal Courts Study Committee for circuit judges, "lack of collegiality" was identified most frequently as "among the chief disadvantages of a large circuit." 2 FEDERAL COURTS STUDY COMM., *Survey of the United States Circuit Judges*, in WORKING PAPERS AND SUBCOMMITTEE REPORTS (1990) (quoting question five of the survey).

³¹⁶ See *infra* app., question 8.

³¹⁷ See *infra* app., question 8.

IV. IMPROVING THE EFFECTIVENESS OF INFORMAL JUDICIAL DISCIPLINE

As the preceding sections reflect, the strands of informal judicial discipline are many and varied. Woven together, they form a net that serves both as a screen that filters out and addresses misconduct before it reaches the formal disciplinary process, and as a backstop that captures misconduct that has bypassed or passed through the formal disciplinary process. The strength of the informal disciplinary net and the fineness of its weave are not entirely clear. While interview, survey, and other data suggest that the informal process addresses a range of judicial misbehavior and discourages its recurrence, the data also reveal a number of weaknesses associated with the various disciplinary strands.

In evaluating the significance of those weaknesses and the need for reform, two caveats are in order. First, the informal disciplinary strands comprising the net are interwoven; a weakness in one strand will not cause misconduct to break through the net as long as one or more other strands hold firm. Thus, where a petition for mandamus may fail, an informal communication from the chief circuit judge may succeed. The informal net as a whole may therefore be stronger than the sum of its parts. Second, it is important to view the informal disciplinary process in tandem with the formal disciplinary process. After all, to the extent that misconduct is addressed and remedied by the formal disciplinary process, informal processes are superfluous and their weaknesses irrelevant. Thus, for example, every case of inexcusable delay addressed and remedied by the Act is a case that the informal process need not resolve. Moreover, the formal process serves as a "shotgun behind the door" that encourages responsiveness to the informal disciplinary process, whatever its weaknesses may be.

Keeping these caveats in mind, we must now consider *which* strands of the informal disciplinary net are frayed and where their weaknesses can be found. Which strands are reparable, and which are not?

A. *Circuit Judicial Councils*

The circuit judicial councils are burdened by statutory ambiguity, constitutional uncertainty, and a history of inaction. The councils' statutory mandate has never expressly afforded them disciplinary powers, and the Supreme Court shied from its one opportunity to

explicate the constitutional limits of the councils' disciplinary authority.³¹⁸ In the absence of meaningful guidance from Congress or the Court, the councils have, with few exceptions, avoided assuming an explicitly disciplinary role throughout their fifty-year history.

Given that the councils' exercise of their § 332 general order-making authority to remedy misconduct has largely been a portrait of impotence and inertia, it is tempting to recommend that their enabling statute be amended to reinvigorate their disciplinary mission. There are at least three reasons to question such a recommendation. First, Congress has attempted to breathe new life into § 332, as recently as 1980,³¹⁹ to no apparent effect. Second, the Act gave the councils a role to play in the formal disciplinary process. While the councils' formal disciplinary role under the Act was not intended to supersede their disciplinary mission under § 332, the fact remains that the councils are administering judicial discipline, albeit pursuant to a different statutory section, as illustrated by the well-publicized case of Judge Alcee Hastings.³²⁰ Third, a primary reason for the councils' apparent inertia is that informal action by chief circuit judges—who chair the councils—has often made formal council action unnecessary.³²¹ That is not to say that the councils are superfluous, however, for the specter of formal council action has improved the ability of chief circuit judges to handle matters privately.

B. *Mandamus and Appeal*

The processes of mandamus, reversal, and recusal require the victims of judicial misconduct to complain formally and on the record. Victims unwilling to risk alienating the judge before whom their case is pending or before whom they may appear in future cases will not employ such quasi-disciplinary mechanisms.³²² Moreover, the victim of judicial misconduct who steels herself to petition for mandamus or to move for recusal will prevail only if she is able to meet stringent

³¹⁸ See *supra* notes 126-33 and accompanying text.

³¹⁹ See Kastenmeier & Remington, *supra* note 7, at 723.

³²⁰ Judge Hastings was prosecuted and acquitted for bribery. The Judicial Council for the Eleventh Circuit, however, undertook to investigate the matter pursuant to its authority under the Act. The Council ultimately recommended that Congress institute impeachment proceedings. See generally *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983); see also Todd D. Peterson, *The Role of the Executive Branch in the Discipline and Removal of Federal Judges*, in 1 RESEARCH PAPERS, *supra* note 8, at 243, 266-69.

³²¹ See *supra* notes 160-98 and accompanying text.

³²² See *supra* notes 50-53, 217-22 and accompanying text.

legal standards, meaning that relief is available only for the most egregious misbehavior or nonfeasance.³²³ Even then, the appellate court that grants relief often characterizes the misbehavior in question as a mistake to be corrected, rather than as misconduct to be avoided, making its action nondisciplinary in tone and effect.

While requiring the victims of courtroom misconduct to file motions, petitions, and appeals undeniably limits the role that mandamus and recusal play in judicial discipline, the attending problems are mostly unavoidable. Motions, petitions, and appeals are not designed to achieve disciplinary ends, even though their resolution may sometimes serve a disciplinary purpose. Rather, they are procedural tools designed for use in an adversarial system of justice. By definition, the adversarial process is one in which adversaries actively and aggressively do battle in open court; there is no place in such a system for hearing anonymous, informal complaints about judicial conduct.

The stringency of the legal standards associated with mandamus and recusal could, of course, be relaxed by statute. But again, disciplining judicial misconduct is not the only concern here; the stability and integrity of the judicial process are also at issue. Relaxed mandamus standards translate into more petitions being filed, more frequent disruptions of district court proceedings, and more work for circuit courts. Relaxed recusal standards translate into more motions, more recusals, and fewer judges available to hear pending cases.

C. Informal Action by Chief Circuit Judges, Chief District Judges, and Peer Judges

Judicial council orders and orders issued in mandamus and appellate proceedings are "informal" methods of judicial discipline only in the limited sense that their "formal" purpose is nondisciplinary. They are nevertheless "formal" to the extent that their scope and structure are dictated by statute, and, in the case of mandamus, reversal, and recusal, by judicial precedent as well. Informal action by chief circuit judges, chief district judges, and peer judges, in contrast, is truly informal. It is unencumbered by the structural impediments that limit the flexibility and scope of other "informal," quasi-disciplinary devices. With greater flexibility and scope comes an improved ability to respond to misconduct in ways that meet the unique needs of the particular situation: a friendly, off-the-record chat in one case, a

³²³ See *supra* notes 48-50, 206-07 and accompanying text.

stern dressing-down in another, raising the specter of formal disciplinary action in a third, and a threatened disclosure to the press in a fourth.

Consequently, it is understandable that the chief circuit judges who responded to the questionnaire and spoke with Barr and Willging expressed a high level of satisfaction with informal action by chief and peer judges as a means to address misconduct and disability.³²⁴ But the flexibility to address these problems as the chief judge sees fit, with a range of private, unofficial approaches—the informal mechanisms' greatest virtue—may also be their greatest vice.

With unstructured informality comes a lack of visibility. The problem is illustrated by a relatively frequent occurrence: a chief circuit judge is alerted to misconduct after it occurs and responds promptly, privately, and in a manner that discourages recurrence. While the chief may consider the problem solved, the public may not have been aware that a problem existed, and if aware that a problem existed, would probably not have been aware that it was rectified. For its part, the public sees lots of judges and little formal disciplinary action. Thus, the perception persists that judges cannot be trusted to judge themselves and that a significant volume of misconduct goes unremedied.

Congress or the Judicial Conference could address the visibility problem by requiring each circuit to file an annual report with the Administrative Office of the United States Courts. Such a report should indicate the number of, nature of, and grounds for informal disciplinary actions taken by the chief circuit judge in the absence of a § 372(c) complaint. By furnishing a more complete picture of disciplinary and quasi-disciplinary activity, annual reports could serve to dispel the perception that the judiciary is not policing itself. In taking steps to make the informal disciplinary process more visible, however, care must be taken not to sacrifice the flexibility and confidentiality that enable the process to work. The annual report requirement should not, for example, insist upon the inclusion of identifying information about the judges in question. In such a case, the ability of the chief judge to seek the target judge's cooperation in a collegial, confidential atmosphere would be lost.

More troubling than lack of visibility, perhaps, is that with unstructured informality comes a lack of formal guidance to instruct the chief judge. Suppose that a lawyer or court employee approaches

³²⁴ See *supra* notes 55, 114-16, 159, 179-94 and accompanying text.

the chief judge and complains privately about a particular judge's behavior. Whether and how the chief circuit judge responds must, in the absence of more formal guidance from a statute, rule, or court decision, depend on her private perception of the judge's conduct. Was it misconduct at all? If so, was it serious enough to worry about? Did it require anything more than a friendly word over the phone to rectify? To the extent that a formal complaint is never filed, which the survey data suggest occurs a significant majority of the time, the chief judge's unguided and unreviewable interpretation of the conduct in question will dictate if and how discipline is administered.

How, for example, is a chief circuit judge to handle an informal complaint implicating gender bias by a male judge? Comments by chief judges in both the questionnaire and interviews with Barr and Willging reflect the view that gender bias is a form of misconduct deserving corrective action.³²⁵ But can chief judges be counted on to "know it when they see it" and to respond appropriately?

Of the forty-five present and former chief circuit judges who received the questionnaire in the Appendix, forty-two (93.3%) were men. The Ninth Circuit Gender Bias Task Force found that female judges and judicial officers perceive that gender bias occurs more frequently and see its impact as more deleterious than do their male counterparts.³²⁶ To the extent that this reflects a less than complete appreciation for gender bias problems by male judges, it suggests that chief circuit judges, the vast preponderance of whom are male, may be insufficiently sensitized to gender bias issues called to their attention informally. The net effect may be that episodes of gender bias are too often not recognized as such, or not taken seriously, and so are not addressed or remedied by the informal disciplinary process.

Addressing the guidance problem requires that greater emphasis be placed on identifying issues about which judges may be unacquainted, and acquainting them. That means commissioning studies on such

³²⁵ See *infra* app., question 6.

³²⁶ See NINTH CIRCUIT GENDER BIAS TASK FORCE, THE EFFECTS OF GENDER IN THE FEDERAL COURTS 63 (1992) ("Although most male and female judges believe that cutting off female counsel's argument evidences gender bias, only half of male judges, compared to almost three-quarters of female judges, believe that this style of interaction imposes special burdens on female counsel."); *id.* at 73 ("[S]mall percentages of male judges and larger percentages of female judges said they have heard judicial colleagues disparage female judges' competence . . ."); *id.* at 104 ("[T]he male ALJs surveyed virtually unanimously concluded that they had not heard any disparaging gender-based remarks In contrast, four of the seven women ALJs who responded reported such remarks occurring 'frequently' to 'somewhat frequently'").

issues as gender bias.³²⁷ It means integrating the results of those studies into programs developed by the Federal Judicial Center for the purpose of sensitizing federal judges to problems about which they may be unaware.³²⁸ It means amending formal mechanisms, such as the Act and the Judicial Code of Conduct, from which chief judges take their cues in making informal assessments about judicial behavior.³²⁹ It means, in effect, taking pains to ensure that the shared assumptions of the judges who administer informal discipline are as informed as possible.

CONCLUSION

This Article has examined a number of informal methods of judicial discipline: circuit judicial council orders, informal communications from chief circuit and district judges, appellate court orders of reversal and mandamus, and peer judge influence. None of these so-called "disciplinary" mechanisms is solely or even primarily disciplinary by design. Still, all are occasionally, and in some cases commonly, used to address judicial misbehavior and disability. Of all the disciplinary mechanisms evaluated here, the least formal—communications from chief and peer judges—appear to be utilized the most frequently and successfully. The vitality of several of these informal disciplinary mechanisms should provide some comfort to those concerned that the infrequency with which formal discipline is imposed may mean that a significant volume of misconduct is being overlooked or ignored. This is not to suggest that discipline under the Act is unimportant. Indeed, it is in part because a formal disciplinary mechanism is in place that informal means of discipline are so successful. Nor is it true that informal methods of judicial discipline are trouble free. To the

³²⁷ Although the Report of the Federal Courts Study Committee, issued in 1990, expressly declined to recommend further study of gender bias, *see* FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169 (1990), the National Commission on Judicial Discipline and Removal recommended that each circuit conduct studies of racial, religious, ethnic, and gender bias. *See* NATIONAL COMM'N ON JUDICIAL DISCIPLINE & REMOVAL, REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 126 (1993).

³²⁸ The Report of the Federal Court Study Committee made just such a recommendation with respect to gender bias. *See* FEDERAL COURTS STUDY COMM., *supra* note 327, at 169. The Federal Judicial Center is in the process of developing gender bias materials for use in judicial education.

³²⁹ The National Commission on Judicial Discipline and Removal recommended changes in the Code of Conduct for United States Judges to prohibit racial, religious, ethnic, and gender bias. *See* NATIONAL COMM'N ON JUDICIAL DISCIPLINE & REMOVAL, *supra* note 327, at 99.

contrary, I have argued that informal judicial discipline has been insufficiently publicized, and that efforts should be made to better inform the public as to its existence and scope—particularly with regard to the critical role of the chief circuit judge in regulating misconduct and disability. Moreover, because informal processes depend for their success upon the conscientiousness and responsiveness of the chief judges who administer those processes, it is imperative that chief judges be sensitized to disciplinary problems they might not otherwise define as such. In the final analysis, the essential point is simply that informal processes serve a critical role in addressing judicial misconduct and disability, and that understanding those processes and their operation is essential to a fuller appreciation of judicial discipline.

APPENDIX

Questionnaire and Summary of Responses

A. DISCIPLINARY MECHANISMS COMPARED

1. In light of your experience as chief judge, rank the following eight disciplinary and quasi-disciplinary mechanisms as to the *frequency* with which they are used to remedy judicial misconduct in your circuit from 1 (least) to 8 (most):
 - a. impeachment
 - b. criminal prosecution
 - c. discipline pursuant to 28 U.S.C. § 372(c)
 - d. circuit council orders under 28 U.S.C. § 332(d)(1)
 - e. informal actions of the chief circuit judge
 - f. informal actions of chief district judge
 - g. judicial action, e.g., mandamus, appellate review
 - h. informal actions of peer judges

TABLE A-1
Summary of Responses to Question 1

<i>Disciplinary Action</i>	<i>Estimated Frequency</i>								<i>Average</i>
	1	2	3	4	5	6	7	8	
a. Impeachment	18	3	0	0	0	0	0	0	1.14
b. Criminal Prosecution	9	12	0	0	0	0	0	0	1.57
c. § 372(c)	1	2	8	3	5	1	1	3	4.29
d. § 332(d)(1)	2	3	7	10	1	1	0	0	3.33
e. Chief Circuit Judge	0	2	0	2	3	4	4	9	6.29
f. Chief District Judge	1	2	1	0	2	6	9	3	5.87
g. Judicial Action	1	2	2	4	4	4	1	6	5.25
h. Peer Pressure	1	1	2	3	3	4	6	2	5.36

2. Assess the extent to which the threat or availability of each of the following disciplinary or quasi-disciplinary measures serves as a general deterrent to judicial misconduct. Please circle the appropriate number for each measure.

	<i>Don't Know</i>	<i>Not a Deterrent</i>	<i>Mild Deterrent</i>	<i>Significant Deterrent</i>	<i>Very Significant Deterrent</i>
a. impeachment	1	2	3	4	5
b. criminal prosecution	1	2	3	4	5
c. discipline pursuant to 28 U.S.C. § 372(c)	1	2	3	4	5
d. judicial council actions under 28 U.S.C. § 332(d)(1)	1	2	3	4	5
e. informal actions of the chief circuit judge	1	2	3	4	5

	<i>Don't Know</i>	<i>Not a Deterrent</i>	<i>Mild Deterrent</i>	<i>Significant Deterrent</i>	<i>Very Significant Deterrent</i>
f. informal actions of peer judges	1	2	3	4	5
g. mandamus/ reversal	1	2	3	4	5
h. adverse comments in appellate court opinion	1	2	3	4	5
i. other	1	2	3	4	5

TABLE A-2
Summary of Responses to Question 2

<i>Disciplinary Action</i>	<i>Estimated Deterrent Effect</i>					<i>Average</i>
	1	2	3	4	5	
a. Impeachment	3	6	3	8	7	2.80
b. Criminal Prosecution	4	6	0	10	8	2.80
c. § 372(c)	1	9	7	9	1	2.92
d. § 332(d)(1)	1	11	8	6	1	2.73
e. Chief Circuit Judge	0	7	15.5	5.5	2	2.94
f. Peer Pressure	1	10	10	5	2	2.73
g. Mandamus	2	7	11	8	0	2.89
h. Adverse Comments	2	8	13	4	0	2.70
i. Other	0	0	0	0	0	0

3. Of the instances that you have considered to be "true" judicial misconduct in your circuit coming to your attention while chief judge, approximately what percentage were ever the subject of a complaint filed under 28 U.S.C. § 372(c)? Please circle the letter corresponding to the range that best represents the best estimate of your experience.

a. 0-10%

b. 11-20%

c. 21-30%

- d. 31-40% e. 41-50% f. 51-60%
 g. 61-70% h. 71-80% i. 81-90%
 j. 91-100%

TABLE A-3
Summary of Responses to Question 3

<i>Estimate</i>	<i>Responses</i>
a. 0-10%	10
b. 11-20%	3
c. 21-30%	0
d. 31-40%	2
e. 41-50%	0
f. 51-60%	2
g. 61-70%	1
h. 71-80%	2
i. 81-90%	3
j. 91-100%	3

4. A former chief circuit judge has stated that 28 U.S.C. § 372(c) "produces substantial indirect benefits. It brings to the attention of the chief judge matters that may not fall within the statute but nevertheless deserve attention. The procedure gives the chief judge the opportunity to correct these measures." Do you agree or disagree? Please circle one.

- a. agree
 b. disagree
 c. no opinion

Why or why not?

TABLE A-4
Summary of Responses to Question 4

<i>Answer</i>	<i>Responses</i>
a. Agree	27
b. Disagree	2
c. No Opinion	1

B. JUDICIAL COUNCIL ACTION

5. a. During your tenure as chief judge, did you and/or the circuit judicial council investigate or consider reports of judicial misconduct or decision-making delay coming to your attention by means other than a formal complaint filed pursuant to § 372(c)? Please circle the appropriate number.
- 1) yes (please answer 5.b.)
- 2) no (please skip to section C)
- b. Please indicate the total number of instances in which you and/or the circuit judicial council investigated or considered such reports.
- c. In how many of these instances did you consult with the judicial council about the matter?

TABLE A-5
Summary of Responses to Question 5

<i>Answer</i>	<i>Responses</i>
a. Yes	23
No	7
b. Total Investigations	141-52
c. Referred to Judicial Council	53-56

6. a. If your answer to question 5.a. was “yes,” did your investigation or consideration of a report of judicial misconduct or decision-making delay, that came to your attention by means other than a formal complaint filed pursuant to § 372(c), ever lead you and/or the judicial council to take any remedial action, either formal or informal? Please circle the appropriate number.

- 1) yes (please answer 6.b.)
- 2) no (please skip to section C)

b. Please indicate in how many instances remedial action was taken, and the nature of the conduct addressed. Place a number in the blank.

On ____ occasions, remedial action was taken.

The conduct addressed was

c. If your answer to subpart a. of this question was “yes,” what remedial action or actions have you and/or the judicial council taken? Please circle as many numbers as apply, and indicate in the blank spaces how many times each type of remedial action was taken.

- 1) In ____ instances, the judicial council issued a formal remedial order.
- 2) In ____ instances, I identified a complaint under § 372(c).

- 3) In ___ instances, I communicated with the judge in question.
- 4) In ___ instances, one or more of the judicial council, other than myself, communicated with the judge in question.
- 5) In ___ instances, I and/or the judicial council requested another judicial officer not on the judicial council (e.g., a chief district judge or a friend of the judge in question) to communicate with the judge in question.
- 6) In ___ instances, I and/or the judicial council took remedial action not enumerated in (1)-(5) above. Please specify.

TABLE A-6
Summary of Responses to Question 6

<i>Answer</i>	<i>Responses</i>
a. Yes	21
No	1
b. Actions Taken	85-92
c. 1) J.C. Order	7
2) § 372(c) Complaint	11
3) C.J. Communication	77-80
4) Other J.C. Communication	10
5) Other Judge Communication	14
6) Other	11

C. OTHER MEANS OF REGULATING JUDICIAL BEHAVIOR

7. Does the existence of the 28 U.S.C. § 372(c) complaint procedure create any incentives or disincentives for judges to respond constructively to informal efforts by you as chief judge to remedy judicial misconduct or disability where no formal complaint is filed? Circle the appropriate letter.

- a. It has created more incentives than disincentives for judges to respond constructively to informal efforts by the chief judge to remedy misconduct or disability.
- b. It has created more disincentives than incentives for judges to respond constructively to informal efforts by the chief judge to remedy misconduct or disability.
- c. It has created about an equal level of incentives and disincentives for judges to respond constructively to informal efforts by the chief judge to remedy misconduct or disability.
- d. It has not created any incentives or disincentives for judges to respond constructively to informal efforts by the chief judge to remedy misconduct or disability.
- e. Other (specify):

TABLE A-7
Summary of Responses to Question 7

<i>Answer</i>	<i>Responses</i>
a. More Incentives	22
b. More Disincentives	8
c. Equal	1
d. Neither	3
e. Other	1

8. a. It has been argued that the increased size of the federal judiciary has had an adverse affect upon "collegiality" among judges, in that it has resulted in a dilution of professional and social relationships, and a decline in esprit de corps. Do you agree? Circle the number corresponding to your response.

1) strongly agree

2) mildly agree

3) mildly disagree

- 4) strongly disagree
- 5) no opinion
- b. If you strongly or mildly agree that the increased size of the judiciary has resulted in a decline in collegiality, has the decline had any effect upon the potency of judicial "peer pressure"—what fellow judges may think or say to each other about particular conduct—as a vehicle for encouraging ethical and responsible behavior? Circle the number corresponding to your response.
- 1) The influence of "peer pressure" is reduced by the decline in collegiality.
 - 2) The influence of "peer pressure" is increased by the decline in collegiality.
 - 3) The influence of "peer pressure" has not been affected by the decline in collegiality.
 - 4) No opinion.

TABLE A-8
Summary of Responses to Question 8

	<i>Answer</i>	<i>Responses</i>
a.	1) Strongly Agree	7.5
	2) Mildly Agree	17.5
	3) Mildly Disagree	3
	4) Strongly Disagree	1
	5) No Opinion	0
b.	1) Reduced	11
	2) Increased	2
	3) Unaffected	9
	4) No Opinion	3

D. THE IMPACT OF JUDICIAL DISCIPLINE ON RETIREMENT
AND RESIGNATION PURSUANT TO
28 U.S.C. § 372(A) & (B)

9. a. Since 28 U.S.C. § 372(c) became effective in 1981, has the filing or processing of a complaint pursuant to that section culminated in a judge in your circuit resigning, retiring, or being certified as disabled? Circle the number that corresponds to your response.

1) yes (please answer 9.b.)

2) no (please skip to question 10)

- b. How many judges have resigned, retired or been certified as disabled? Place a number in the appropriate blanks.

___ judges retired or resigned following complaints of conduct prejudicial to the effective administration of the business of the courts, pursuant to 28 U.S.C. § 372(c)(1).

___ judges were retired or resigned following complaints of disability, pursuant to 28 U.S.C. § 372(c)(1).

___ judges certified as disabled by the judicial council following complaints of disability, pursuant to 28 U.S.C. §§ 372(b) and (c)(6)(B)(ii).

TABLE A-9
Summary of Responses to Question 9

<i>Answer</i>	<i>Responses</i>
a. Yes	8
No	21
b. Resigned after § 372 misconduct complaint	5(4)*
Resigned after § 372 disability complaint	2
Certified disabled after § 372 complaint	7 (3 or 4)*

10. a. Since 1981, has any judge in your circuit been certified as disabled by order of the judicial council under 28 U.S.C. § 372(b), where no complaint was filed pursuant to 28 U.S.C. § 372(c)? Circle the number that corresponds to your response.

1) yes (please answer 10.b.)

2) no (please skip to question 11)

b. How many judges have been the subject of such an order?

TABLE A-10
Summary of Responses to Question 10

<i>Answer</i>	<i>Responses</i>
a. Yes	10
No	19
b. Total	15 (12-13)*

11. a. Since 1981, has any judge resigned or retired following informal action by you or a prior chief judge of the circuit (or

* Numbers in parentheses take into account the possibility of double counting by respondents within the same circuit.

an agent of the chief judge), in response to evidence of misconduct or disability, where no complaint was filed pursuant to 28 U.S.C. § 372(c)? Circle the appropriate number.

1) yes (please answer 11.b.)

2) no (please skip to section E)

- b. How many judges have resigned or retired following such informal action? Place a number in the appropriate blanks.

___ judges retired or resigned following allegations of misconduct.

___ judges retired or resigned following allegations of disability.

TABLE A-11
Summary of Responses to Question 11

<i>Answer</i>	<i>Responses</i>
a. Yes	11
No	19
b. Misconduct	4(3)*
Disability	14-15 (12-13)*

E. JUDICIAL DISCIPLINE AS A MEANS OF REGULATING INACTION AND DELAY

12. a. Do you ordinarily dismiss complaints that a judge has delayed excessively in deciding a particular case? Please circle the appropriate number.

1) yes

* Numbers in parentheses take into account the possibility of double counting by respondents within the same circuit.

2) no

3) I don't know

b. If your answer to subpart a. was "yes," which statement best characterizes your reasons for ordinarily dismissing such complaints? Please circle as many numbers as apply.

1) A judge who *fails* to act has not "engaged in conduct" prejudicial to the effective and expeditious administration of the courts' business, within the meaning of 28 U.S.C. § 372(c)(1).

2) Delays are properly remedied by petitions for mandamus and therefore relate to the merits of a decision or ruling.

3) Delay in an isolated case does not constitute conduct prejudicial to the administration of the courts' business; the delay must be habitual or otherwise involve corrupt behavior.

4) The complaint procedure is not ordinarily an effective way to deal with delay in an isolated case.

5) Other (please specify):

c. If your answer to subpart a. was "no," which statement best characterizes your reasons for not routinely dismissing such complaints? Please circle as many as apply.

1) Excessive delay in isolated cases may be subject to discipline under § 372(c).

2) Complaints of excessive delay in isolated cases are investigated to determine if delay is an habitual problem, and are later dismissed if it is not found to be habitual.

3) Other (please specify):

TABLE A-12
Summary of Responses to Question 12

<i>Answer</i>	<i>Responses</i>
a. Yes	16
No	9
Don't Know	2
b. 1) Not Conduct	0
2) Merits Related	11
3) Not Prejudicial	10
4) Not Effective	8
5) Other	1
c. 1) Delay within § 372	5
2) Delay within § 372 if habitual	5
3) Other	0

13. Assess the overall effectiveness of the following measures for *remedying judicial neglect and unjustified delay* by circling the appropriate number.

	<i>Very In- effective</i>	<i>Somewhat Ineffective</i>	<i>Somewhat Effective</i>	<i>Very Effective</i>	<i>I Don't Know</i>
a. public disclosure of matters pend- ing—Civil Justice Reform Act	1	2	3	4	5
b. discipline pursu- ant to 28 U.S.C. § 372(c)	1	2	3	4	5
c. judicial council actions under 28 U.S.C. § 332(d)(1)	1	2	3	4	5
d. informal actions of the chief judge	1	2	3	4	5
e. informal actions of peer judges	1	2	3	4	5
f. mandamus	1	2	3	4	5
g. other	1	2	3	4	5

TABLE A-13
Summary of Responses to Question 13

<i>Disciplinary Action</i>	<i>Estimated Effectiveness</i>					<i>Average</i>
	1	2	3	4	5	
	<i>Number of Judges per Response</i>					
a. CJRA	0	1	7	12	7	3.55
b. § 372(c)	4	5	8	4	4	2.71
c. § 332(d)(1)	3	5	6	5	6	2.68
d. Informal Chief Judge Action	1	1	10.5	15.5	1	3.44
e. Peer Pressure	3	2	15.5	3.5	3	2.79
f. Mandamus	1.5	5.5	3	15	1	3.26
j. Other	0	0	0	0	0	0

F. BURDENS ON THE CHIEF JUDGE

The final questions are designed to provide information about the burdens that administering the discipline act place on you as chief judge.

14. *Hours spent:* Excluding time you spent as a member of any special committee, how many hours of your time do or did you spend in an average month administering § 372(c)? Please circle one.

- a. less than five hours per month
- b. six to ten hours per month
- c. eleven to fifteen hours per month
- d. sixteen to twenty hours per month
- e. more than twenty hours per month

TABLE A-14
Summary of Responses to Question 14

<i>Answer</i>	<i>Responses</i>	<i>Percentage of All Responses</i>
a. Under 5 Hours	10	34%
b. 6-10 Hours	9	31%
c. 11-15 Hours	5	17%
d. 16-20 Hours	4	14%
e. Over 20 Hours	1	3%

15. *Information consulted in making decision to dismiss:* Regarding § 372(c) complaints that you dismissed, we would like your best estimate (without researching your dismissal orders) of the percentage in which you could make your decision on the basis of the complaint alone, and of the percentage of complaints as to which you needed to use other types of information. Please fill in blanks.

- a. Approximate percentage of dismissed complaints in which you made decision to dismiss on basis of complaint (including attachments) alone: _____%
- b. Approximate percentage of dismissed complaints in which the following types of information beyond the complaint were considered (note that these percentages may add up to more than 100 because several sorts of information may be considered in a given case):
 - 1) Additional materials from the record or clerk's files in any related litigation (such as transcripts of hearings, docket sheets, filings in court, etc.): _____%
 - 2) Response (written or oral) from judge complained against: _____%
 - 3) Other information (please specify): _____%

<i>Estimate</i>	<i>Responses</i>
a. 0-25%	3
26-50%	1
51-75%	2
76-100%	20
b. 1) 0-25%	21
26-50%	1
51-75%	0
76-100%	2
2) 0-25%	24
26-50%	0
51-75%	0
76-100%	1
3) 0-25%	13
All Others	0

16. *Delegation:* A former chief judge has expressed the opinion that the confidentiality provisions of the Act restrict a chief judge's ability to delegate tasks involved in handling § 372(c) complaints. Other chief judges seem to rely on staff for assistance with a number of tasks. We are interested in your opinion about whether 28 U.S.C. § 372(c) permits the chief judge to delegate the following activities to a staff member for purposes of advising or making a recommendation to the chief judge, and whether in your handling of § 372(c) complaints you have in fact delegated any of them. Please indicate your responses by circling the appropriate response (Y for yes and N for no) in each column.

<i>Activity</i>	<i>Act allows dele-</i>		<i>I have</i>	
	<i>gation</i>		<i>delegated</i>	
a. Reviewing complaint and any attachments	Y	N	Y	N
b. Obtaining and reviewing the record or court files in related litigation	Y	N	Y	N
c. Investigating the facts	Y	N	Y	N
d. Research applicable precedents (e.g., Code of Judicial Conduct, Illustrative Rules, prior § 372(c) cases)	Y	N	Y	N
e. Preparing a draft memorandum or order of dismissal	Y	N	Y	N

TABLE A-16
Summary of Responses to Question 16

<i>Activity</i>	<i>Act allows delegation: Responses</i>		<i>I have delegated: Responses</i>	
	Y	N	Y	N
a. Reviewing complaint	21	3	16	8
b. Obtaining and reviewing related litigation	23	2	15	7
c. Investigating the facts	22	3	18	6
d. Research applicable precedent	25	0	18	7
e. Preparing a draft memorandum/order	24	1	19	6