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**March 6, 2008**

**CRITIQUE**  
of  
**THE REPORT TO THE CHIEF JUSTICE**  
**ON THE IMPLEMENTATION OF THE JUDICIAL CONDUCT**  
**AND DISABILITY ACT OF 1980**

**IN SUPPORT OF CONGRESSIONAL HEARINGS  
& DISCIPLINARY AND CRIMINAL INVESTIGATIONS**



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“For it is a maxime in law, *aliquis non debet esse judex in propria causa.*”  
– “*No man shall be judge in his own cause*”

– Lord Edward Coke,  
Institutes of the Laws of England,  
Part I, Section 141a (1628)

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## INTRODUCTION

In September 2006, the Judicial Conduct and Disability Act Study Committee, chaired by Associate Justice Stephen Breyer, presented Chief Justice John G. Roberts, Jr. with a Report to the Chief Justice on the Implementation of the Judicial Conduct and Disability Act of 1980. [“Breyer Committee Report”], purporting that the federal judiciary has been “doing a very good overall job in handling complaints filed under the Act” (p. 107). Chief Justice Roberts and Justice Breyer then jointly presented the Report to the American People at a press conference held at the Supreme Court.<sup>1</sup>

As demonstrated by this Critique, the Breyer Committee Report is a knowing and deliberate fraud on the public and no less methodologically-flawed and dishonest than the 1993 Report of the National Commission on Judicial Discipline and Removal, on which it substantially draws, and the 2002 Federal Judicial Center’s follow-up study, on which it additionally relies. Like them, it is based on hiding the evidence – first and foremost, the thousands of judicial misconduct complaints filed under the Act, which the federal judiciary, not Congress, shrouded in confidentiality and made inaccessible to both Congress and the public, so as to conceal what it is doing.

The 1980 Act was predicated on assurances by the federal judiciary that it could and would “police itself”, as well as assurances by Congress that it would effect “vigorous oversight”<sup>2</sup>. Both premises of the Act are false and so-proven by the accompanying and referred-to documentary evidence. Based thereon, there must be congressional hearings, disciplinary and criminal investigations, and radical overhaul of the façade of federal judicial discipline that currently exists.

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<sup>1</sup> “*New Rules Mean Shift Toward Accountability for Judiciary*”, Legal Times (Tony Mauro) September 20, 2006; “*Glimmers of greater openness at secretive Court*”, First Amendment Center (Tony Mauro), October 10, 2006; “*Federal Judges Take Steps to Improve Accountability*”, New York Times (Linda Greenhouse), September 20, 2006. See also Supreme Court’s September 19, 2006 press release, quoting Chief Justice Roberts: ““The Committee has engaged in a thorough and comprehensive study of the judiciary’s implementation of the Judicial Conduct and Disability Act of 1980...””

<sup>2</sup> 126 Congressional Record 28617 (1980), quoting Congressman Robert W. Kastenmeier. Mr. Kastenmeier was chairman of the National Commission on Judicial Discipline and Removal and, according to its 1993 Report (p. 191), had been “the author of the Judicial Conduct and Disability Act of 1980”. Prior to becoming the National Commission’s chairman, he had been in the House of Representatives for 32 years, rising to ranking majority member of the House Judiciary Committee and chairman of its courts subcommittee.

See also, National Commission’s Report, p. 4: “Congress provided a charter of self-regulation that followed closely a model devised by the judiciary. The 1980 Act was, however, avowedly an experiment, and key Members of Congress promised that it would be the object of vigorous oversight.” (underlining added).

The Center for Judicial Accountability, Inc. (CJA) is uniquely qualified to render this Critique and spearhead action. We are a national, nonpartisan, nonprofit citizens' organization whose purpose is to ensure that the processes of judicial selection and discipline are effective and meaningful. We do this by interacting with these processes and gathering empirical evidence. Where the evidence shows dysfunction or corruption, we provide it to those in leadership positions so that they can independently verify it and take appropriate corrective steps.

Since 1993, we have been documenting the corruption of federal judicial discipline, including the federal judiciary's corruption of the Judicial Conduct and Disability Act of 1980 – of which we have direct, personal knowledge as we ourselves filed three judicial misconduct complaints under the Act. Each of these complaints was fashioned to empirically test the Act and each involved, directly, the judge who is now the federal judiciary's highest judicial officer charged with overseeing federal judicial discipline, the Chairman of the Judicial Conference's Committee on Judicial Conduct and Disability, Judge Ralph K. Winter.

We have given written statements and testimony before the National Commission on Judicial Discipline and Removal (July 1993: Exhibits A-4, A-6), the Long-Range Planning Committee of the Judicial Conference (December 1994: A-8), the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts (November 1995: Exhibits Q-2, Q-3), the Commission on Structural Alternatives for the Federal Courts of Appeals (April 1998: Exhibit I), the House Judiciary Committee's Courts Subcommittee (June 1998: Exhibit H), the Senate Judiciary Committee's Courts Subcommittee (July 2001: Exhibit L-7) and, most recently, to the Judicial Conference Committee on Judicial Conduct and Disability (October 2007: Exhibit T), which had solicited comment on draft rules for federal judicial discipline, developed in response to the Breyer Committee Report.

Additionally, we have a published article, "*Without Merit: The Empty Promise of Judicial Discipline*" (The Long Term View (Massachusetts School of Law), Vol. 4, No. 1 (summer 1997)), constituting a critique of the National Commission's Report (Exhibit A-1). Our article identified that we would be making a formal presentation to the House Judiciary Committee to remove federal judicial discipline from the federal judiciary, which we did by two memoranda, dated March 10 and March 23, 1998 (Exhibits B and C-1). These memoranda transmitted to the House Judiciary Committee our prior 2-½-year correspondence with the Administrative Office of the United States Courts concerning the federal judiciary's annihilation of all legal and ethical standards in the two cases from which our three judicial misconduct complaints emerged. These included Judge Winter's fraudulent appellate and disciplinary decisions, which ignored judicial disqualification and disclosure issues, including his own, falsified and omitted material facts, and disregarded controlling, black-letter law to financially crush and reputationally

injure judicial whistleblowing lawyers and their family members.

Due to the volume of our document-based advocacy, only the most immediately relevant documents are bound in an accompanying Compendium of Exhibits. Our three judicial misconduct complaints, filed under the Act, are provided in two free-standing file folders. A third folder contains the aforesaid 2-½-year correspondence with the Administrative Office, plus an additional ½-year of subsequent correspondence, as this correspondence provides “the clearest and most comprehensive picture of the mockery that the Administrative Office/Judicial Conference has been making of its responsibility to oversee federal judicial discipline” (Exhibit C-1, p. 7).

The further substantiating documentation is accessible from CJA’s website, [www.judgewatch.org](http://www.judgewatch.org), most conveniently *via* the sidebar panel “Judicial Discipline-Federal”.

### **THE BREYER COMMITTEE'S ESTABLISHMENT**

The deceit of the Breyer Committee Report begins with the explanation of its genesis – appearing both in its “Forward and Executive Summary” and its chapter 1. These directly quote the May 25, 2004 announcement of Chief Justice William H. Rehnquist’s establishment of the Committee, a copy of which the Report annexes as its Appendix A:

“[t]here has been some recent criticism from Congress about the way in which the Judicial Conduct and Disability Act of 1980 is being implemented, and I decided that the best way to see if there are any real problems is to have a committee look into it.” (pp. 11, 1, 122-123, 131).

The Report thereby represents that but for some unidentified “recent criticism from Congress”, Chief Justice Rehnquist was unaware of “any real problems”.

This is a flagrant and impeachable deceit. Chief Justice Rehnquist was personally aware of, and complicitous in, “real problems” with the federal judiciary’s implementation of the 1980 Act so serious as to have been the subject of an impeachment complaint against him and all eight Associate Justices – Justice Breyer among them – which was pending, uninvestigated before the House Judiciary Committee on May 25, 2004, as it still is today.

Investigation of the impeachment complaint – beginning with the particulars set forth by CJA’s March 10 and March 23, 1998 memoranda to the House Judiciary Committee, referred to therein – would suffice to discredit the Breyer Committee Report, totally.

The impeachment complaint, dated November 6, 1998, was filed with the House Judiciary Committee by CJA, with nine copies simultaneously sent to Chief Justice Rehnquist and the Associate Justices (Exhibits D-1, D-2) in conjunction with a petition for rehearing (Exhibit E) of a petition for a writ of certiorari they had denied the previous month (Exhibit F)<sup>3</sup>. The central issue presented by the cert petition was the federal judiciary's corruption of judicial, appellate, and disciplinary processes by fraudulent judicial decisions that had wiped out all adjudicative and ethical standards. These decisions, falsifying fact and law, had reduced to "empty shells" the statutes for ensuring the integrity of federal judges – 28 U.S.C. §§144 and 455, pertaining to judicial disqualification, and 28 U.S.C. §372(c), the codification of the 1980 Act, pertaining to judicial discipline. For this reason, the cert petition sought mandatory review by the Supreme Court under its "power of supervision" or, at minimum, referral of the case record of judicial corruption to disciplinary and criminal authorities for investigation and prosecution, as required by ethical rules of professional responsibility, applicable to every lawyer and judge.

The cert petition demonstrated that the federal judiciary's gutting of the federal disqualification and disciplinary statutes was not limited to the case presented, but applied generally. Such had been covered-up by the 1993 Report of the National Commission on Judicial Discipline and Removal and, thereafter, by the Administrative Office of the United States Courts and Judicial Conference, including by their knowingly false and deceitful advocacy to Congress. In substantiation, the petition annexed CJA's article "*Without Merit: The Empty Promise of Judicial Discipline*" (Exhibit A-1) and March 10 and March 23, 1998 memoranda (Exhibits B and C-1), which were part of the record in the case.

With respect to §372(c), the cert petition showed that the case provided the Supreme Court with a "rare opportunity" to give guidance to the circuits on summarily-dismissed §372(c) complaints – and stated:

"The Circuits are in dire need of guidance from this Court. In the 18 years since Congress enacted §372(c), they have not developed any case law on the interface between appellate and disciplinary remedies, or defined the 'merits-related' ground for dismissal under §372(c), or the discretion

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<sup>3</sup> Only the cert petition's "Questions Presented" and "Reasons for Granting the Writ" are annexed. A full copy of the May 18, 1998 cert petition, as likewise of the September 2, 1998 supplemental brief and October 30, 1998 petition for rehearing (containing the appendix documents), are enclosed in the file folder containing our second and third judicial misconduct complaint, as the record of those complaints was before the Supreme Court in the case (S.Ct #98-106).

CJA's website, [www.judgewatch.org](http://www.judgewatch.org), posts the Supreme Court submissions and underlying case record, including the complaints. It is most directly accessible *via* the sidebar panel "*Test Cases-Federal: Mangano*".



afforded by the statute to review even ‘merits-related’ complaints. The deliberateness with which they have not done so – leaving the ‘merits-related’ category vague so as to dump virtually all complaints on that ground and promulgating statutorily-violative implementing rules – is underscored by the Second Circuit’s disposition of the §372(c) complaints herein, where petitioner expressly challenged it to address these threshold issues.” (Exhibit F, p. 22).

The cert petition annexed the two §372(c) judicial misconduct complaints that had been filed against the district judge and three-judge appellate panel in the case. Also annexed were the dismissal order of the circuit’s chief judge, Ralph Winter, the petition to the circuit council for review of Judge Winter’s dismissal order, and the circuit council’s affirmance. As to these, the petition asserted:

“Based on the record herein, which is already before the House Judiciary Committee [], there can be no argument for reposing federal judicial discipline within the federal judicial branch, absent this Court’s decisive action. All available formal and informal checks on judicial misconduct, identified by the 1993 Report of the National Commission on Judicial Discipline and Removal as existing within the federal judicial branch, were utilized by petitioner and shown to be sham. Nor is there any check provided by the Judicial Conference, the very zenith of the federal judiciary. Its Administrative Office, to whom petitioner supplied the record of this case for presentment to the appropriate committees of the Judicial Conference for oversight intervention, has not only refused to make such presentment, but fails to respond to letters or return phone calls []. So much for the ‘self-policing’ of the federal judiciary.” (Exhibit F, p. 24).

The Supreme Court’s mandatory obligations were then reinforced by a supplemental brief (Exhibit G), chronicling the misfeasance of the House Judiciary Committee with respect to the March 10 and March 23, 1998 memoranda (Exhibits B, C-1) and appending, in substantiation, CJA’s written statement to the House Judiciary Committee for inclusion in the record of its June 11, 1998 “oversight hearing of the administration and operation of the federal judiciary” (Exhibit H). This and other appended and transmitted documents documentarily established that all three governmental branches were wilfully derelict in keeping the judiciary’s “house in order”. The result:

“the constitutional protection restricting federal judges’ tenure in office to ‘good behavior’ does not exist because all avenues by which their official misconduct and abuse of office might be determined and impeachment initiated (U.S. Constitution, Article II, §4, Article III, §1) are corrupted by political and personal self-interest. The consequence: federal judges who

pervert, with impunity, the constitutional pledge to ‘establish Justice’, (Constitution, Preamble) and who use their judicial office for ulterior purposes.” (Exhibit G, p. 2).

The Justices’ response to this catastrophic and unconstitutional state of affairs was described by the petition for rehearing (Exhibits E-1). They not only denied the cert petition without disciplinary or criminal referrals, but did so by ignoring, without adjudication, a September 23, 1998 letter-application for their disqualification and disclosure, made pursuant to 28 U.S.C. §455 – a statute applicable to them. Such letter-application (Exhibit E-2) was based, *inter alia*, on their personal and professional relationships with the lower federal judges whose corruption was the subject of the cert petition, as, for instance, Judge Winter. The Justices then compounded their *sub silentio* repudiation of the disqualification/disclosure statute by ignoring an improvised October 14, 1998 judicial misconduct complaint against them (Exhibit E-3), necessitated by their failure to create any procedure for complaints against themselves, in disregard of the National Commission’s 1993 Report recommending that they do so as they are not covered by the 1980 Act.

Based on the rehearing petition (Exhibit E-1), the impeachment complaint specified four grounds for the Justices’ impeachment, including:

“abuse of power by ‘lying to the American People’ as to the federal judiciary’s adherence to ethical codes and the adequacy of enforcing mechanisms to protect the public from judicial bias and corruption, among them, the federal judicial disqualification and disciplinary statutes” (Exhibit D-2, p. 2).

As to Chief Justice Rehnquist, who heads the Judicial Conference, the impeachment complaint set forth a further ground:

“his complicity in the Judicial Conference’s knowingly false and deceitful representations to the House Judiciary Committee as to the efficacy of the federal judicial disqualification and disciplinary statutes – 28 U.S.C §§144, 455, and 372(c) [] – most particularly by his wilful failure to ensure that the Judicial Conference retracted those representations when, by letter dated May 29, 1998 [], the true facts were brought to his *direct* attention.” (Exhibit D-2, p. 2, italics in the original).

This May 29, 1998 letter, which the impeachment complaint annexed as its Exhibit A, was identified in a footnote as having been hand-delivered to the Supreme Court for Chief Justice Rehnquist, together with copies of CJA’s March 10 and March 23, 1998 memoranda and other elaborating documents (Exhibit D-2, fn. 3). Among these: CJA’s

April 24, 1998 written statement to the Commission on Structural Alternatives for the Federal Courts of Appeals (Exhibit I), whose membership – all appointed by Chief Justice Rehnquist – included retired Supreme Court Associate Justice Byron White, who was its chair and also a recipient of the November 6, 1998 impeachment complaint (Exhibit D-2).

Chief Justice Rehnquist and the Associate Justices did not respond to the impeachment complaint, except by denying the rehearing petition on which it was based, again with no disciplinary or criminal referrals of the lower federal judges. Nor did the House Judiciary Committee respond.

Five and a half years later, Chief Justice Rehnquist was reminded of the November 6, 1998 impeachment complaint. In the wake of public controversy surrounding Associate Justice Scalia's duck-hunting trip with Vice-President Cheney and his failure to recuse himself from a case involving the Vice-President, Chief Justice Rehnquist sent letters to members of Congress making claims as to the Justices' own recusal practices. As the falsity of these claims was exposed by CJA's impeachment complaint, still pending, uninvestigated by the House Judiciary Committee, CJA stated this in a February 12, 2004 letter to Chief Justice Rehnquist (Exhibit J-1), with copies for each of the Associate Justices and to the pertinent members of Congress under coverletters addressed to them (Exhibits J-2, K-1, K-2)<sup>4</sup>.

3-1/2 months afterward, Chief Justice Rehnquist appointed the Breyer Committee.

Finally, although CJA's November 6, 1998 impeachment complaint and February 12, 2004 letter are decisive of Chief Justice Rehnquist's knowledge and cover-up of the "real problems" with the federal judiciary's implementation of the 1980 Act (Exhibits D-2, J-1), they are not exclusive. Chief Justice Rehnquist also received an abundance of communications from members of the public, alerting him either directly, or through the Administrative Office and Judicial Conference, to such "problems". As Chief Justice Rehnquist's successor, Chief Justice Roberts, should identify how the communications of

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<sup>4</sup> This included House Judiciary Committee Chairman F. James Sensenbrenner, Jr., who, on March 17, 2004, delivered sharp remarks to the Judicial Conference based solely on congressional experience with the 1980 Act, stating that it:

"raises profound questions with respect to whether the Judiciary should continue to enjoy delegated authority to investigate and discipline itself. If the Judiciary will not act, Congress will – consistent with its Constitutional responsibilities. Congress will begin assessing whether the disciplinary authority delegated to the Judiciary has been responsibly exercised and ought to continue."(Chairman Sensenbrenner's March 16/17, 2004 press release).

CJA's other prior correspondence with Chairman Sensenbrenner, alerting him to the public's experience in filing complaints under the Act, is appended as Exhibits L-2, M-2, N, O, P-1, P-2.

this nature that he receives, either directly or by the Administrative Office and the Judicial Conference, are handled, where, if at all, they are preserved, and what the practice was during the years of his predecessor's tenure.

### **THE COMMITTEE'S SELF-INTERESTED MEMBERSHIP & RESEARCH STAFF**

Chief Justice Rehnquist chose Associate Justice Breyer to chair the six-member Judicial Conduct and Disability Act Study Committee. Like Chief Justice Rehnquist, Justice Breyer was knowledgeable of, and colluded in, the corruption of the federal judiciary's implementation of the 1980 Act. This, by his participation as a Supreme Court Justice in the case that was the subject of the cert petition culminating in CJA's November 6, 1998 impeachment complaint against all the Justices. A copy of the impeachment complaint was sent to the Court for Justice Breyer (Exhibit D-1), as were CJA's February 12, 2004 letter and covermemo (Exhibits J-1, J-2). Such gave Justice Breyer a direct interest in the outcome of the Committee's "study". Quite simply, the Committee could not examine the true facts as to the federal judiciary's implementation of the Act, verifiable from the record of the cert petition, without validating CJA's still-pending impeachment complaint against him and Chief Justice Rehnquist.

The other five members of the Committee, all chosen by Chief Justice Rehnquist, were also interested in the outcome of the "study".

Chief Justice Rehnquist chose – as the Committee's only non-judge – his own administrative assistant, Sally M. Rider, Esq., who "serve[d] at the pleasure of the Chief Justice"<sup>5</sup> and whose loyalty to him was presumably beyond question. Indeed, as his administrative assistant from 2000, Ms. Rider would reasonably have received, or known of, CJA's February 12, 2004 letter to Chief Justice Rehnquist (Exhibit J-1). Similarly, she would have received, or known of, communications from other persons complaining about their experiences with the 1980 Act and lawless conduct by the federal judiciary, sent to Chief Justice Rehnquist at the Supreme Court.

Following Chief Justice Rehnquist's death in September 2005, Ms. Rider continued to have an interest in protecting him reputationally. This is reflected by her appointment, four months before the Report was issued, as "director of the William H. Rehnquist Center on the Constitutional Structures of Government, a nonpartisan national research center" being established at her alma mater, the University of Arizona, "to honor the Chief Justice's legacy" (underlining added) – an appointment she assumed four months

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<sup>5</sup> 28 U.S.C. §677(a); 22 Moore's Federal Practice - Civil §401.04[8], see also §401.07[2].

later, in September 2006.<sup>6</sup>

The other four Breyer Committee members who Chief Justice Rehnquist appointed are federal judges, each subject to the Act and against whom complaints thereunder may have been filed, were pending, or might be filed. Two are former chief circuit judges – Pasco M. Bowman of the Eighth Circuit and J. Harvie Wilkinson, III of the Fourth Circuit – in which capacity they had primary responsibility for implementing the Act, authoring orders dismissing virtually ALL the judicial misconduct complaints they received. The same is true of Justice Breyer, formerly chief judge of the First Circuit. The Committee’s other two judges, Sarah E. Barker, formerly chief judge of the Southern District of Indiana, and D. Brock Hornby, formerly chief judge of the District of Maine, would also have had experience with the Act, as members of their respective circuit councils, denying virtually ALL petitions for review. Surely these five seasoned judges understood that for the Committee to have found it necessary to formulate and refine “Standards for Assessing Compliance with the Act”, as the Report nonchalantly reports (at pp. 3, 17, 41), was in and of itself a cover-up, as it meant that in the quarter century since the Act’s passage, they and the federal judiciary’s other judges implementing the Act had not sufficiently or uniformly built caselaw interpreting the statutory standards for investigation of complaints.<sup>7</sup>

The Report emphasizes that the Committee utilized “experienced staff” (p. 2). The highest of this staff was Jeffrey Barr, Esq., who, from 1995 to 2004, was assistant general counsel at the Administrative Office and its “principal staff to the Judicial Conference’s Committee to Review Circuit Council Conduct and Disability Orders. Prior thereto,

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<sup>6</sup> See Ms. Rider’s biographic profile, appearing in Appendix B to the Breyer Committee Report (p. 134), and the Supreme Court’s May 9, 2006 press release, posted on its website, [www.supremecourtus.gov](http://www.supremecourtus.gov), accessible *via* the panel “Public Information”.

<sup>7</sup> The Breyer Committee Report was duty-bound to plainly state this, but did not. Indeed, a more candid admission was made in 2007 by the Judicial Conference Committee on Judicial Conduct and Disability in explaining why it had drafted new rules for federal judicial discipline in response to the Breyer Committee Report:

“The Breyer Committee found that it could not evaluate implementation of the Act without establishing interpretive standards...and that a major problem faced by chief circuit judges in implementing the Act was the lack of authoritative interpretive standards... The Breyer Committee then established standards to guide its evaluations, some of which were new formulations and some of which were taken from the ‘Illustrative Rules Governing Complaints of Judicial Misconduct and Disability’.” (Commentary to draft Rule 1, underlining added).

Such “major problem faced by chief circuit judges in implementing the Act” would have made it impossible for there to be only a 2-3% error rate in the federal judiciary’s handling of judicial misconduct complaints filed under the Act, as the Breyer Committee Report claims (pp. 5, 7, 107).

“[f]rom 1985-1995 he was a staff attorney for the U.S. Court of Appeals for the First Circuit, where judicial conduct matters was one of his principal responsibilities.” (p. 135). During that period, Mr. Barr would have worked closely with Justice Breyer – especially when Justice Breyer was chief judge, making the initial disposition of complaints filed under the Act.

Mr. Barr was a recipient of our November 6, 1998 impeachment complaint (Exhibit D-2). His misconduct as “principal staff to the Judicial Conference’s Committee to Review Circuit Council Conduct and Disability Orders”, covering up the corruption of federal judicial discipline, is chronicled by our 2-½-year correspondence with him, culminating in our March 10 and March 23, 1998 memoranda (Exhibits B and C-1), and by our ½ year of further correspondence with him, up to and including the November 6, 1998 impeachment complaint (Exhibit D-2). Such misfeasance by Mr. Barr gave him a direct interest in the outcome of the Breyer Committee’s “study”, lest it expose his key role in the federal judiciary’s subversion of the Act.

As identified by our March 23, 1998 memorandum (Exhibit C-1, p.6), Mr. Barr is the court-connected researcher referred to in our article “*Without Merit: The Empty Promise of Judicial Discipline*” as having reviewed confidential §372(c) complaints for the National Commission on Judicial Discipline and Removal – and to whom, in 1996, we gave a copy of the record of the first judicial misconduct complaint we filed under the Act. This record included our petition to the Supreme Court for a writ of certiorari, petition for rehearing, and supplemental petition for rehearing in the case underlying that judicial misconduct complaint<sup>8</sup>.

We gave the record of this first judicial misconduct complaint to Mr. Barr so that he could present it to the appropriate committees of the Judicial Conference so that they could address the federal judiciary’s subversion of the Act, documentarily established therein (Exhibit A-1, pp. 96-97). In 1997 and 1998, we gave Mr. Barr the record of our two further judicial misconduct complaints under the Act, again for presentment to the appropriate Judicial Conference committees for action on the federal judiciary’s subversion of the Act, once again documentarily established. Indeed, as to these latter two complaints, we provided Mr. Barr a full copy of the underlying case record, with a November 24, 1997 letter entitled “Remedies within the federal judiciary to restrain and punish on-the-bench misconduct by federal judges violative of recusal statutes and codes of judicial conduct”, expressly requesting that the Judicial Conference take steps to facilitate Supreme Court review of the prospective cert petition that would pivotally focus

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<sup>8</sup> The February 22, 1993 petition for a writ of certiorari, the May 14, 1993 petition for rehearing, and the June 1, 1993 supplemental petition for rehearing (S.Ct. #92-1405) are enclosed in the file folder containing our first judicial misconduct complaint. They are also posted on CJA’s website, [www.judgewatch.org](http://www.judgewatch.org).

on both the 1980 Act and the disqualification/disclosure statutes (Exhibit C-2, pp. 5-6).<sup>9</sup>

Since not a single one of the hundreds of judicial misconduct complaints that Mr. Barr purported to review for the National Commission and for the Breyer Committee are publicly available for independent examination, due solely to the federal judiciary's own confidentiality rules, the three complaints we gave him constitute the ONLY publicly-available frame of reference for assessing the honesty and integrity with which he evaluated complaints. What they establish, resoundingly, is his gross dishonesty and lack of integrity, thereafter ratified by his superiors at the Administrative Office and Judicial Conference and the nine Supreme Court Justices.

From the Breyer Committee Report (p. 3), it would seem that Mr. Barr is largely responsible for designing its research protocol, together with Thomas Willging of the Federal Judicial Center, also listed by the Report as "key staff" of the Breyer Committee

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<sup>9</sup> In pertinent part, our November 24, 1997 letter to Mr. Barr stated:

"What is here at issue is *not* the judicial independence of the Second Circuit judiciary – but willful abuse of that independence for the ulterior purposes particularized in the Petition for Rehearing with Suggestion for Rehearing *In Banc* and in the §372(c) complaints. If – notwithstanding the statutory grant of authority to the Judicial Conference under 28 U.S.C. §331, empowering it to 'prescribe and modify rules for the exercise of the authority provided in section 372(c)', with 'all judicial officers and employees of the United States' required to 'promptly carry into effect all [its] orders – the Conference believes itself 'powerless' to take action based on THIS RECORD, it should, pursuant to that statute, 'submit to Congress...its recommendations for [enabling] legislation'. If it believes that the only recourse within the federal judiciary is by appeal, e.g. appeal to the U.S. Supreme Court, we ask for a written statement to that effect – including its own endorsement of Supreme Court review so that the profound issues relating to judicial independence and accountability may be addressed by the judicial branch *before* they are addressed by Congress. In the event there is another route by which the Judicial Conference, headed by the Chief Justice of the Supreme Court, can alert the Supreme Court to the imperative to accept review of this important 'case in controversy', we ask that it do so. You indicated that there is no equivalent of the certification provision of 28 U.S.C. §1254(2), applicable to the Circuits. We, therefore, request that, pursuant to 28 U.S.C. §331, the Judicial Conference make a legislative recommendation to Congress for such statutory authority when confronted with a 'case in controversy' of this nature." (Exhibit C-2, pp. 5-6, italics and capitalization in the original).

The importance this November 24, 1997 letter was highlighted by our March 23, 1998 memorandum (Exhibit C-1, p. 7) and reflected, as well, by our November 6, 1998 impeachment complaint against the Justices (Exhibit D-2, fn. 3), identifying that a copy had been hand-delivered to the Supreme Court for Chief Justice Rehnquist. This, as part of our May 29, 1998 letter, itself addressed to Mr. Barr.

(p. 135). Such research protocol replicated the essential features of the methodologically-flawed and dishonest research study they did together for the National Commission.<sup>10</sup> The most important difference is the “Standards for Assessing Compliance with the Act” (pp. 143-151) – which may have been a response to “*Without Merit: The Empty Promise of Judicial Discipline*” (Exhibit A-1, pp. 94-95), as it had pointed out that the National Commission’s inability to enunciate standards with respect to “merits-relatedness” and the interplay between disciplinary and appellate remedies would have made it impossible for the Commission to have reached the “all’s well” conclusions it did, largely based on Messrs. Barr and Willging’s underlying research study.

Messrs. Barr and Willging also collaborated in producing the 2002 Federal Judicial Center’s follow-up study. Such follow-up study, requested by the chairman of the House Judiciary Committee’s courts subcommittee and its ranking member, reflects CJA’s resurgent advocacy in 2001 for hearings on the National Commission’s Report (Exhibits L, M, N), resulting in the subcommittee’s November 29, 2001 “hearing”, from which CJA was excluded (Exhibits O, P).

Finally, Russell R. Wheeler, formerly deputy director of the Federal Judicial Center, served as the Committee’s “overall staff coordinator” (p. 136), in which capacity he handled communications from members of the public seeking to provide the Committee with information for its “study”.<sup>11</sup> Mr. Wheeler may well have been familiar with CJA’s advocacy, as he had been a consultant to the Judicial Conference’s Long Range Planning Committee, before which we testified in December 1994 (Exhibit A-8). He had also provided research for the Commission on Structural Alternatives for the Federal Courts of Appeals, before which we testified on April 1998 (Exhibit I). Upon information and belief, in November 1998, he received a copy of CJA’s article “*Without Merit: The Empty Promise of Judicial Discipline*” (Exhibit A-1), following his presentation at a symposium on judicial independence and accountability at the University of Southern California Law School, at which Justice Kennedy also spoke.

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<sup>10</sup> “*Administration of the Federal Judicial Conduct and Disability Act of 1980*”, Research Papers of the National Commission, Vol. I, pp 477-711; also published as “*Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*”, 142 *University of Pennsylvania Law Review* 25 (1993).

<sup>11</sup> As illustrative, Mr. Wheeler’s correspondence with Joseph Norman, II, posted on CJA’s website, [www.judgewatch.org](http://www.judgewatch.org) – most conveniently accessible *via* the sidebar panel “Our Members’ Efforts”.



**THE COMMITTEE’S FLAWED METHODOLOGY,  
REFLECTIVE OF ITS SELF-INTEREST**

**A. Failing to Identify and Respond to Criticism of the 1993 Report of the National Commission on Judicial Discipline and Removal**

The Report’s chapter 1 contains a section entitled “Previous studies of the Act and its administration” (p. 13). It states:

“The Act’s administration has been the object of one major inquiry: that of the National Commission on Judicial Discipline and Removal, which Congress created in 1990 and which filed its report in 1993.” (p. 13)

It describes the National Commission as having found that the federal judiciary was properly implementing the Act – a finding the National Commission had based on

“its own analysis, informed by several research inquiries undertaken for the Commission, including Jeffrey Barr’s and Thomas Willging’s Federal Judicial Center study of chief judges’ disposition of complaints and their informal resolution of allegations...” (p. 13).

The Barr-Willging research study was the most important to the National Commission’s assessment of the Act since it alone was based on examination of filed complaints, which the federal judiciary, not Congress, had made confidential.

Conspicuously, the Breyer Committee Report does not discuss, or even mention, any scholarly literature or other critiquing of the National Commission’s Report or the underlying Barr-Willging research study. Neither does it identify any response thereto.

As reflected by CJA’s March 10 and March 23, 1998 memoranda (Exhibit B and C-1) and by our written statement for the House Judiciary Committee’s June 11, 1998 “oversight” hearing (Exhibit H), there was at least one very significant critique – CJA’s published article “*Without Merit: The Empty Promise of Judicial Discipline*” (Exhibit A-1) – and we explicitly and repeatedly called for the Judicial Conference’s response to its showing that the National Commission’s Report was methodologically-flawed and dishonest, specifically, with respect to the federal judiciary’s implementation of the 1980 Act. This includes by our May 29, 1998 letter, hand-delivered to Justice Rehnquist in his administrative capacity as head of the Judicial Conference (Exhibit D-2). Yet, the Judicial Conference would not respond.

**B. Concealing the Federal Judiciary’s Non-Compliance with Key Recommendations of the National Commission’s Report for Ensuring the Efficacy of the 1980 Act, which the Breyer Committee Now Advances as Its Recommendations**

The Breyer Committee Report asserts that the federal judiciary has implemented “most” of the National Commission’s recommendations “concerning the Act, its administration, and related matters” (p. 13) – with no specificity as to this alleged implementation. Among the unimplemented recommendations are those which had the potential to make federal judicial discipline more than the sham it is. These recommendations were succinctly summarized at the outset of CJA’s written statement for the record of the House Judiciary Committee’s June 11, 1998 “oversight hearing”:

“the federal judiciary has failed to follow through with key recommendations the [National] Commission made for enhancing the functioning of §372(c). This includes the Circuits’ failure to provide reasoned, non-conclusory explanations in their orders dismissing §372(c) complaints and to build a body of interpretive caselaw, as well as the Judicial Conference’s failure to modify and expand its committee structure to monitor and develop policy on judicial discipline and ethics issues...there is no one employed at the Administrative Office to handle §372(c) on a full-time basis, but only a single person, who gives it rock-bottom priority in comparison to his other duties. As to this person [Mr. Barr], our [March 10 and March 23, 1998] Memoranda provided the Committee with evidentiary proof of his wilful complicity in the federal judiciary’s subversion of §372(c).” (Exhibit H, p. 2).

The National Commission’s recommendation for caselaw development had been as follows:

“The Commission recommends that the Judicial Conference devise and monitor a system for the dissemination of information about complaint dispositions to judges and others, with the goals of developing a body of interpretive precedents and enhancing judicial and public education about judicial discipline and judicial ethics.” (National Commission’s Report, p. 109).

This was endorsed by the Judicial Conference in 1994, which:

“Agreed to urge all circuits and courts covered by the Act to submit to the West Publishing Company, for publication in Federal Reporter 3d, and to Lexis all orders issued pursuant to §372(c) that are deemed by the issuing

circuit or court to have significant precedential value or to offer significant guidance to other circuits and courts covered by the Act.”

The Breyer Committee Report quotes (at p. 118) both of these – as well as two subsequent invocations by the federal judiciary on the subject:

- the 2000 revision of the Illustrative Rules’ commentary, which stated that without access to other judges’ public orders, judges applying the Act would be “making decisions about issues under the statute quite unaware of how the same or similar issues have been treated in other circuits, and without the benefit that flows from scholarly critique” and
- the 2002 vote of the Judicial Conference to “[e]ncourage chief judges and judicial councils to submit non-routine public orders disposing of complaints of judicial misconduct and disability for publication by on-line and print services” – which the Report noted was a “suggestion of two members of Congress”.

Yet nowhere does the Report assess the federal judiciary’s compliance with these crystal-clear recommendations, endorsements, and invocations. Stunningly, the Report offers no information as to the volume of caselaw on the Act that has emerged, which, if the federal judiciary’s orders were truly reasoned and non-conclusory, should have been considerable. Based on the bar graph on page 22 of the Report, it appears that the federal judiciary “terminated” approximately 8,000 complaints in the 12 years from the National Commission’s 1993 Report to 2005. From these 8,000, there should be hundreds of orders from the 11 circuits and three national courts interpreting the Act’s statutory language. These would be the federal judiciary’s caselaw, whose uniformity and divergence in interpreting the Act over the past 25 years the Breyer Committee should have – but did not – assess. Tellingly, the Committee’s “Standards for Assessing Compliance with the Act” (pp. 145-151) do not contain a single citation to caselaw articulating the authoritative interpretations of the Act’s provisions with which the Committee agrees.

Had the Judicial Conference followed through with the National Commission’s proposals that it modify and expand its committee structure, the federal judiciary long ago and regularly would have been monitoring caselaw development – ready for the Breyer Committee to review and distill in its Report.

CJA’s March 23, 1998 memorandum detailed the Judicial Conference’s failure to upgrade its committee structure and monitoring capacity (Exhibit C-1, pp. 3-5). Because it so clearly exposes the indefensible belatedness of six of the twelve recommendations of the Breyer Committee Report (pp. 8-10, 109-119, 122-123), the pertinent excerpt is

reproduced in full:

“...the [House Judiciary] courts subcommittee did hold a hearing on the National Commission’s draft Report – on July 1, 1993. At that hearing, the Judicial Conference was represented by U.S. District Judge John F. Gerry, Chairman of its Executive Committee of the Judicial Conference. In his written statement, Chairman Gerry assured the subcommittee that the Judicial Conference would take ‘appropriate action’ on the National Commission’s recommendations and singled out that:

‘One initial step may well be for the Conference to look into recommendations made on page 128 of the [draft] report for a review of the Conference’s own committee structure in the disciplinary and ethics area...’ [Tr. at 44]

The recommendations to which Chairman [Gerry] was referring were preserved in the final Report with only grammatical changes:

‘...the Commission believes that the judiciary would be well served by a standing committee of the Judicial Conference to monitor and periodically evaluate experience under the 1980 Act and other formal and informal mechanisms for dealing with problems of judicial misconduct and disability. Although making no specific recommendation in that regard, the Commission did note the current dispersion of authority regarding judicial ethics and judicial misconduct and disability among a variety of Conference committees and the lack of any group responsible for coordinating the collection and analysis of relevant data and the development of policy proposals.

Since 1991 the Conference’s Committee to Review Circuit Council Conduct and Disability Orders, in addition to its statutory review functions under the 1980 Act, has been assigned the duty to monitor and report on judicial discipline legislation, to serve as liaison and clearinghouse for the circuits on their experience with the Illustrative Rules, and to make recommendations to the Conference on desirable legislative and rule changes. The Committee currently consists of two former circuit chief judges and two former district court judges. It is not clear whether the statutory responsibilities or the composition of that committee would make it the ideal vehicle for an even broader charge. In any event, any such group should include a substantial representation of

district judges as well as of (current or former) circuit chief judges and, as on some other Conference committees, lawyers who are not judges could make a useful contribution.’ [Final Report, at 126]

The next sentence in Chapter 5 of the National Commission’s Reports, both draft and final, goes on to mention a recommendation of the Twentieth Century Task Force on Federal Judicial Responsibility that ‘the Judicial Conference establish a representative oversight committee to review experience under the 1980 Act’. Without providing the details of the Task Force’s recommendation, the Reports concluded:

‘This [National] Commission’s studies and recommendations, if implemented, coupled with periodic reevaluations by the Judicial Conference and oversight by Congress, meet the needs to which the Task Force’s recommendation was addressed.’ [Final Report, at 127]

In fact, only the most scrupulous follow-through by the federal judiciary could have met such need – since the Task Force’s recommendation was *extraordinary*. The details were presented to the National Commission at its May 15, 1992 hearing by U.S. Circuit Judge Abner Mikva, a Task Force member who was a former member of the courts subcommittee<sup>fn.4</sup>:

‘...a committee appointed under the authority of the United States Judicial Conference which would include among its members judges, lawyers, and non-lawyers. And this committee would be empowered to examine all the records of the disciplinary complaints filed in the federal courts, the supporting materials, and the disposition of the complaint. And it would be charged with the responsibility of making an annual report to the appropriate congressional committees concerning the state of enforcement of the legislation, concerning judicial discipline within the federal system...’ [Hearings of the National Commission, at 252]

Such proposal had previously been presented by Judge Mikva, almost *verbatim*, to the [House Judiciary] courts subcommittee at its June 28, 1989 hearing on the bill that established the National Commission. In his written statement, offered jointly with the Task Force’s Chairman, Professor A. Leo

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<sup>fn.4</sup> The Twentieth Century Task Force also included a current member of the courts subcommittee, Congressman Barney Frank, among its eleven members.”

Levin<sup>fn.5</sup>, it had been emphasized that:

‘...such an oversight committee should be quite distinct from the committee of the Judicial Conference charged with reviewing judicial council orders. The latter has an operational function; it is charged with decisionmaking in the individual case. The former has an oversight function and the two are not compatible.’ [6/28/89 Tr. 392-395]

Thus, the Task Force’s proposal was for an independent mechanism to ‘audit’ on an unrestricted and on-going basis, the actual records of §372(c) complaints by a membership that included lay persons. This was far different from – and vastly superior to – the very restrictive, one-time examination done by the National Commission, where only court-connected consultants were permitted access for review of what was deemed a ‘cross-section of §372(c) records [See “*Without Merit: The Empty Promise of Judicial Discipline*”, pp. 93-94]. Moreover, the oversight commission was to have an important role in ‘creating a body of precedent that could prove useful in the administration of our system of judicial discipline’ [6/28/89 Tr. 394-395; Hearings of National Commission 5/15/92 Tr. 253].

This [House Judiciary] Committee should be aware that notwithstanding Judge Gerry recognized that the National Commission’s views on structural change within the Judicial Conference amounted to a recommendation, there has been *no* change in the Judicial Conference’s committee structure dealing with ethics and discipline issues<sup>fn.6</sup>. Moreover, *if* the Judicial Conference has given its Committee to Review Circuit Council Conduct and Disability Orders a ‘broader charge’ – the advisability of which was unclear to the National Commission – the recommended expansion of the Committee’s membership has *not* occurred<sup>fn.7</sup>. Nor are there any ‘lawyers who are not judges’ among its membership, yet another recommendation of the National Commission.

The fact that as of this date – almost five years after the National Commission’s recommendations (at 107-9) that the Circuits develop case

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<sup>fn.5</sup> Professor Levin teaches at the same law school as Professor Burbank: the Law School of the University of Pennsylvania.”

<sup>fn.6</sup> We have been unable to ascertain how much money, if any, of the federal judiciary’s \$3,000,000,000 budget is earmarked for oversight of §372(c).”

<sup>fn.7</sup> *If* it has been expanded, it is by a single judicial member.”

law precedent, interpreting the §372(c) statute – a recommendation endorsed by the Judicial Conference in 1994 – much as it had endorsed such case law development in 1986 – the Circuits have still not generated case law on §372(c) – only reinforces that the Judicial Conference has failed to exercise meaningful oversight over how §372(c) is being implemented. As pointed out by CJA’s article (p. 95), the federal judiciary is deliberately failing to create case law so as to keep the ‘merits-related’ category broad and undefined and thereby dump – in knee jerk fashion – virtually every §372(c) complaint as ‘merits-related’.” (Exhibit C, pp. 3-5).

The Breyer Committee’s recommendation’s #1, #2, #3, #4, #9, and #10 (pp. 8-10, 109-119, 122-123) – which are its most significant – and the federal judiciary’s proposed new rules of federal judicial discipline expanding the role of the Judicial Conference’s Committee on Judicial Conduct and Disability must be seen in the context of this March 23, 1998 memorandum (Exhibit C-1), pointing out, with specificity, what the Breyer Committee and Judicial Conference only now propose to rectify, but without the slightest acknowledgment of, or explanation for, the federal judiciary’s wilful and deliberate failure to do so previously upon CJA’s explicit notice to Mr. Barr, beginning in 1995, and from March 1998, to his superiors at the Administrative Office, Judicial Conference, to Chief Justice Rehnquist and the Associate Justices.<sup>12</sup> Certainly, too, the Breyer Committee’s recommendation for a more aggressive disciplinary review committee within the Judicial Conference and the federal judiciary’s rule changes based thereon fall short of the representative oversight committee proposed by the Twentieth Century’s Task Force on Federal Judicial Responsibility nearly 20 years ago.

Finally, with respect to the Breyer Committee’s recommendation #5 for “all courts in the circuit to encourage formation of committees of local lawyers” to aid members of the bar who fear retaliation for filing judicial misconduct complaints, the Report points out (pp. 103-104, 119-120) that this is not a new proposal. The National Commission had made a similar recommendation of a committee, potentially to include informed lay persons. The Judicial Conference responded by endorsing “a more general formulation of “structures or approaches...[that] might best serve the purpose of assuring that justified complaints are brought to the attention of the judiciary without fear of retaliation”. Yet, according to the Breyer Committee Report, nothing was created or presently exists, except possibly in one instance (pp. 104, 119-120).

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<sup>12</sup> Tellingly, much as CJA had been unable to obtain any information as to how much money the federal judiciary had budgeted for federal judicial discipline – and the number of staff members employed for such purpose – the Breyer Committee Report supplies no such information, including as to the budget and staffing of the Judicial Conference’s Committee to Review Judicial Conduct and Disability Orders.

Here, too, CJA had years ago brought the federal judiciary's non-compliance with this recommendation to Mr. Barr's attention. This includes by a December 1, 1995 letter (Exhibit Q-1) which sought information on the subject for the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts and transmitted to him a copy of our testimony at a November 28, 1995 hearing before that body, identifying the Second Circuit's apparent non-compliance (Exhibit Q-2, pp. 10-12). Such two-part testimony (Exhibits Q-2, Q-3) provided an overview of the worthlessness of remedies for federal judicial misconduct within the federal judiciary, foreshadowing what would be embodied in "*Without Merit: The Empty Promise of Judicial Discipline*" (Exhibit A-1), faxed and mailed to him two years later.

The legitimacy of lawyers' fears that federal judges' would retaliate against them for judicial whistleblowing was embodied again and again in our written statements and testimony (Exhibits A-4 (pp. 1-2); A-8 (p. 5); H (p. 9); Q-2 (p. 12)) and demonstrated by the two cases from which our three judicial misconduct complaints emerged. The complaints themselves particularized both the judges' retaliatory motive and the virulence of its manifestation. The response of the federal judiciary's upper echelons was to do nothing.

### **C. Concealing the Material Particulars of the Congressionally-Requested 2002 Federal Judicial Center Follow-Up Study**

After its paltry description of the National Commission's 1993 Report, the Breyer Committee's chapter 1 continues:

"In 2002, the chair and ranking member of the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property asked the Federal Judicial Center for some follow-up research on chief circuit judge orders dismissing complaints, which the study found were generally in compliance with a specific statutory requirement and another Judicial Conference recommendation." (pp. 13-14).

This is purposefully vague and deceitful.

The chairman and ranking member of the House Judiciary Committee's courts subcommittee had asked two questions, to be answered based on "the §372(c) dispositions that are already on file with [the Federal Judicial Center]":

"(1) whether the orders of the chief judges set forth factual allegations raised in complaints and the reason(s) for the subsequent disposition; and



(2) what percentage of dismissals are based on the grounds that the complaint is directly related to the merits of a decision or procedural ruling”?<sup>13</sup>

Messrs. Barr and Willging purported to answer these questions – but without clarifying that such requested “follow-up research to [their] earlier work” would be significantly different, as their “earlier work” for the National Commission involved reviewing the actual complaints, which are not on file with the Federal Judicial Center. Nor did they acknowledge that without comparing the complaints to chief judges’ orders they could not meaningfully answer the first question. This, because they could not determine whether the recited allegations in the chief judges’ orders were materially accurate and complete and whether the complaints’ actual allegations would justify the reasons stated by the orders for dismissing the complaints.

Mr. Willging’s research plan for the National Commission, set forth in a June 2, 1992 memo, had reflected this fact, stating:

“[A]s Judge Godbold indicated in his testimony to the Commission, the way to test the ‘directly related to the merits’ ground is to examine the complaint as stated and compare it to the dismissal order. Optimal research method would have the researcher examine the allegations as stated in the complaint and not accept a secondary restatement of those allegations. In my opinion, the most credible evaluation of the process should include an independent review of the logical relationship between the original allegations in the complaint and the reasons stated in support of the disposition of the complaint.”

Mr. Barr had quoted this excerpt from Mr. Willging’s memo in his own memo to the National Commission on “The Confidentiality Requirements of the 1980 Act and the Illustrative Rules” (at pp. 8-9). His endorsing comment was “Without some kind of access to uninvestigated complaints, meaningful research inquiry into the Act’s operation would appear difficult, if not impossible.” (at p. 18).

As proven by comparing the three judicial misconduct complaints we filed under the Act with the orders dismissing them, the orders are materially false and incomplete in their recitations of the complaints’ actual allegations. Likewise, the reasons for dismissal are both inapplicable and boilerplate when compared to the complaints’ actual allegations.

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<sup>13</sup> Letter from Subcommittee Chairman Howard Coble and Ranking Member Howard L. Berman to the Federal Judicial Center’s director, dated January 29, 2002, contained in the House Judiciary Committee’s Report on the “Judicial Improvements Act of 2002” (#107-459), pp. 19-20.

It appears that the standard used by Messrs. Barr and Willging for their 2002 study was that if a dismissal order restated “**an** allegation from the complaint”, they included it in the ultimate percentages of dismissal orders restating “allegations from the complaints”. Similarly, if it gave “**a** reason for the dismissal, beyond the recitation of a statutory conclusion” (2002 study, p. 3, underlining and bold added). Thus, the 2002 study stated as its “Results” to the first question:

“Overall, 89% of the orders stated **at least one** allegation of the complaint; 88% stated **a** reason for the dismissal, beyond the recitation of a statutory conclusion; and 86% met both of those standards.” (p. 3, underlining and bold added).

This was then obscured in their more prominent first-page “Introduction and Summary”:

“1. Chief Judges restated factual allegations of the complaint in 89% of the dismissal orders examined and restated a reason for dismissal beyond a recitation of the statutory grounds in 88% of the orders.<sup>[fn]</sup> Chief judges both restated allegations and provided reasons in 86% of their dismissal orders.” (p. 1, underlining and bold added, footnote omitted)<sup>14</sup>

Adding to this, the phrase “beyond the recitation of a statutory conclusion” was itself misleading. Not revealed was that the “beyond” could be as little as citing the circuit rules – this being as uninformative as reciting “a statutory conclusion”. Such appears to be the definition of “reasons” the Breyer Committee Report employs:

“The reasons offered in the 593-case sample usually involved citation to the council’s rules for processing complaints (65% of the orders) or to a previous order of the circuit council (24% of the orders). They rarely cited the Code of Conduct for United States Judges (4% of the orders) or advisory opinions issued by the Codes of Conduct Committee of the Judicial Conference of the United States (2% of the orders).” (p. 35).

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<sup>14</sup> Their “Conclusions” section comparably repeated:

“In general, the chief judges of the circuits have observed the Judicial Conference standards for chief judge orders responding to complaints of judicial misconduct or disability, that is, their orders set forth the allegations of the complaint and the reasons for the disposition. Chief judges restated the allegations of the complaint in 89% of their dismissal orders and stated a reason for dismissal other than a recitation of the statutory grounds in 88% of their orders. In 86% of the orders studied, chief judges complied with both standards.” (p. 10, underlining and bold added).

This sleight of hand – where, for a given complaint and dismissal order, the measure becomes “an allegation”, rather than the allegations that are material and complete, and “reasons” are reduced to bare citations – is what Messrs. Barr and Willging have done in the Breyer Committee Report:

“...the chief judge orders that terminated the complaints in the 593-case sample almost always restated an allegation from the complaint (92% of the orders) and offered reasons that supported the disposition (86% of the orders). These compliance levels are quite similar to those found in the 2002 study of the sample of complaints drawn completely at random, as shown in Table 9.” (p. 34, underlining and bold added).

The referenced 593-complaint sample were the complaints Messrs. Barr and Willging initially reviewed. There are no separate percentages for the 25 “problematic” complaints from this sample that the Breyer Committee later reviewed.<sup>15</sup> Nor are there percentages for the 100-complaint sample the Committee reviewed without preliminary analysis by Messrs. Barr and Willging or for the 16 filed “high-visibility” complaints that the Committee reviewed. In other words, although these further statistics – all involving Committee-reviewed complaints – would have complemented, if not potentially corroborated, what Mr. Barr and Willging purported to have found in the 593-complaint sample, they are absent. There is no explanation for this. Indeed, there is only one summarized complaint in the Report about which the Committee observes (at p. 74): “The order of the acting chief judge of the judge’s home circuit restated and responded to each allegation of the complaint”. That is C-4 (pp. 73-75) – and the acting chief judge’s thoroughness in responding to “each allegation” assuredly was because the complainants were “two members of Congress” concerning a case involving criminal investigation of President Clinton, widely reported by the press (p. 73).

As to the second question regarding the percentage of “merits-related” dismissals, Messrs. Barr and Willging’s 2002 study (at pp. 1, 11) placed the percentage at 80%. They noted that in their prior research study for the National Commission, “the single most common ground for dismissal [was] merits-relatedness” – and then added “The

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<sup>15</sup> The summaries of these 25 complaints in chapter 4 illustrate how disingenuous it is for the Report to make it appear that restating “an allegation from the complaint” means anything when material allegations are omitted. For example: A-3 (at p. 48): “The chief judge...didn’t mention the racial allegations. Neither did the judicial council’s conclusory affirmance, although complainant repeated those allegations in his petition for review”; A-4 (at p. 49): “...the judge’s response does not mention the allegation that...”; A-7 (at p. 51): “This disposition did not note the complaint’s assertion that...”; A-8 (at p. 52): “The chief judge did not address the potential issue of ex parte contacts...”; A-11 (at p. 54): “The chief judge did not discuss this factual inconsistency”; A-15 (at p. 59): “Also, at issue, however, but not mentioned in the order...”.

National Commission apparently did not find that conclusion problematic and did not make any recommendation in that regard.” (2002 study, at p. 2).

This was disingenuous. From CJA’s advocacy, including our three judicial misconduct complaints, dumped by the federal judiciary as “merits-related”, Mr. Barr well knew that such percentage was profoundly “problematic” – and that the National Commission’s failure to meaningfully confront the “merits-related” issue derived, in no small measure, from the flawed underlying research study he had done with Mr. Willging for the Commission. Indeed, the National Commission concealed the magnitude of the problem by omitting any percentage of “merits-related” dismissals from its Report – a percentage the Barr-Willging underlying research study for the National Commission had also concealed.<sup>16</sup>

Tellingly, the Breyer Committee Report also obscures the percentage of “merits-related” dismissals for the 3,670 complaints dismissed from 2001-2005. Its chapter 2 starts out by including, among its “Key findings”:

“Almost all complaints are dismissed by the chief judge; 88% of the reasons given for dismissal are that the complaint relates to the merits of a proceeding **or** is unsubstantiated.” (p. 19, bold and underlining added)

Obviously, dismissal of “unsubstantiated” complaints is unobjectionable. But, what is the percentage of complaints dismissed as “merits-related”? From the percentage in the 2002 Barr-Willging study, it should reasonably be about 80%.

The Report, however, gives no percentage for complaints dismissed as “merits-related”. Instead, it gives percentages from the total number of “reasons chief judges gave in their orders dismissing complaints or concluding proceedings” (p. 28). Since, as the Report notes (p. 28), “orders frequently give more than one reason”, the Committee thereby uses a larger denominator of total number of “reasons” – which it calculates as 5,141 – rather than the 3,670 complaints. The result is a significantly lower percentage: 52%, a figure the Report identifies as representing “2,668 of 5,141 reasons offered” (p. 28).

The real percentage, using the alleged 2,668 orders dismissed for “merits-relatedness” against a denominator of 3,670 complaints, would be 72.6%. This is nearly eight percent less than found by the 2002 Barr-Willging study – a statistically significant disparity unaccounted for by the Breyer Committee Report, which does not disclose the 80%

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<sup>16</sup> A separate underlying research study by Professor Charles Gardiner Geyh, entitled “*Judicial Discipline Other Than the 1980 Act*” identified an Administrative Office statistic that 83% of complaints dismissed in 1991 were for “merits-relatedness”. (Research Papers of the National Commission, Vol. I, p. 730). See Exhibit Q-2, p. 6.

statistic.<sup>17</sup>

#### **D. Concealing the Substantive Nature of Amendments to the 1980 Act to Avoid Examining Them and their Significance**

The Report's chapter 1 continues with a section entitled "The Act's major provisions" (p. 14), which states:

"The Act has been amended only twice. Congress enacted minor revisions in 1990,<sup>[fn]</sup> and in 2002 recodified the Act as a separate chapter in title 28.<sup>[fn]</sup> Appendix D reproduces the Act in codified form."

Here, too, the Report is inappropriately vague and deceitful.<sup>18</sup>

In 1990, the so-called "minor revisions", which the Breyer Committee does not identify, included giving chief circuit judges power to "identify a complaint" by "written order stating reasons therefor". The "high-visibility" circumstances of the 1980's that led to conferring on chief circuit judges a statutory power they did not previously have reflected Congress' commitment to ensuring that the federal judiciary would self-police and maintain public confidence, even when no complaint had been filed. This was plainly relevant to the single "high-visibility" case the Committee examined involving "a complaint [that] had not been filed but arguably should have been initiated and considered by the chief judge" (p. 3). That potential complaint, which "chief counsel to the House Judiciary Committee and to one of its subcommittees" had "suggested" to the director of the Administrative Office be initiated by the relevant chief judge, is summarized as C-8 (pp. 85-88) in the Report's chapter 4 under the heading "Problematic failure by a chief judge to identify and investigate a complaint against a district judge". It resulted in Breyer Committee recommendation #3 that chief judges and others responsible for administering the Act understand "the chief judge's authority in an appropriate instance to identify a complaint, particularly where alleged misconduct has come to the public's attention through press coverage or other means" (pp. 8, 115-116).

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<sup>17</sup> The Breyer Committee Report gives no qualitative assessment of the orders dismissing complaints as "merits-related". Such have been characterized as mostly "brief and formulaic" by Professor Arthur Hellman, a characterization he tucks into a footnote of his law review article, "*The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*", *University of Pittsburgh Law Review*, Volume 69, No. 2, fn. 125 (forthcoming 2008 – <http://ssrn.com/abstracts=1015858>) – an article that regards the Breyer Committee Report as "lengthy and detailed" and "thorough and well-documented" (pp. 27 and 37, respectively of web-version draft, subject to revision).

<sup>18</sup> According to the 1993 National Commission's Report (p. 85), it would appear that the Act was also amended in 1988.

Certainly, the frequency with which chief circuit judges had used their statutory authority to identify complaints since 1990 bore upon the question of the federal judiciary's implementation of the Act. Yet, the Report gives no statistics as to the numbers of complaints which chief circuit judges had identified and no explanation for the omission. To the extent that complaints by "court officials" is a euphemism for complaints identified by chief circuit judges, the Report describes them as "especially rare, averaging only one per year" (p. 22)<sup>19</sup>.

As for the Act being "recodified" in 2002, such recodification from 28 U.S.C §372(c) to 28 U.S.C. §351 *et seq.* was the least of what was done. The Act was also substantively amended – and such occurred within the very time frames being examined by the Breyer Committee. Those time frames were 2001-2003 for its samples of 593 and 100 complaints and 2001-2005 for its 17 "high-visibility" complaints. Yet the Report neither states this nor discusses how the 2002 amendment to the Act affected the federal judiciary's handling of complaints, before 2002 and after – and, if there was no effect, the reason why.

Among the substantive revisions to the Act in 2002 was the addition of extensive text, lifted *verbatim* from the federal judiciary's Illustrative Rule 4(b), giving chief circuit judges statutory powers they did not previously have to conduct a "limited inquiry" as part of their "initial review" of complaints. This was further significant as the Breyer Committee Report attributes 11 of the 20 "problematic" dispositions to "the chief judge's failure to undertake an adequate limited inquiry before dismissing the complaint, usually as 'frivolous'", with an additional four "'problematic' equally because of an 'inadequate limited inquiry'" and some other factor. (p. 45).<sup>20</sup>

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<sup>19</sup> Since the Report fails to mention the 1990 amendment to the Act as empowering chief circuit judges to initiate complaints, it also does not indicate whether "the Act's reporting mandate" (p. 19) – 28 U.S.C. §604(h)(2) – was correspondingly amended to require information as to the numbers of instances in which chief circuit judges identified complaints. It appears it was not but that the Administrative Office obtains such information from the circuits. Thus, at the September 27, 2007 "hearing" on the draft rules of federal judicial discipline (transcript, p. 39), Dr. Richard Cordero referred to the Administrative Office tables in questioning the spike of 88 complaints "filed by chief judges" for 2006 – as compared to the 0, 1, or 2 complaints they had filed in each of the previous nine years.

It may be noted that the Administrative Office forms were not revised after the 2002 amendment, as they are identified as AO-372 forms (Appendix F, p. 153) – presumably reflecting the Act's codification, until 2002, as 28 U.S.C. §372(c).

<sup>20</sup> The Report also might have noted – but did not – that the National Commission had likewise laid the blame for "troublesome dismissals" on "precipitous action, when further investigation was warranted". (National Commission's Report, p. 92).

The statutory expansion of power to chief circuit judges, which, in 2002, Congress embodied by §352(a) and §352(b)(1)(B), had been recommended by the National Commission's 1993 Report and rested on its conclusion, largely based on the underlying Barr-Willing study, that the federal judiciary was properly administering the 1980 Act. This included by the federal judiciary's commentary to its Illustrative Rule 4(b) interpreting such power as having been intended by Congress. According to the commentary, because Congress statutorily authorized a chief circuit judge to "conclude a proceeding" "if he finds that corrective action has been taken or that action on the complaint is no longer necessary because of intervening events", this implicitly meant he could go beyond the face of the complaint – and that he could additionally do so to "dismiss the complaint" on the three statutory grounds contained in a separate subsection. This represented a huge expansion of power, enabling the chief judge to dismiss not only for failure to state a cause of complaint, but by what amounted to summary judgment.

Naturally, by 2002, this statutory enhancement of power to chief circuit judges had to be supported by something more recent – and it was: the House Judiciary Committee's November 29, 2001 "hearing" on the "operations of federal judicial misconduct statutes", where four witnesses who had never filed any complaints under the Act<sup>21</sup> affirmed the good job the federal judiciary was doing. This included Professor Arthur Hellman, whose written statement proposed promulgation of this and other amendments<sup>22</sup> – which Congress thereafter did by the "Judicial Improvements Act of 2002".<sup>23</sup>

CJA was excluded from the November 29, 2001 "hearing", notwithstanding it was our evidence-based advocacy that had generated it (Exhibits L-P). Among the evidence we had provided to the House Judiciary Committee was the record of our first judicial misconduct complaint, filed under the Act in 1996, whose petition for review had raised the "limited inquiry" issue. The petition pointed out that "limited inquiry" was not part of the Act, that it derived from the federal judiciary's Illustrative Rule 4(b), and that this non-statutory power had been employed to dismiss our complaint on a bald claim that our charge of bias and prejudice was "unsupported" – a flagrant judicial lie, verifiable from both the face of the complaint and examination of its cited record references (pp. 4-8).

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<sup>21</sup> Our letters to two of these witnesses, Professor Hellman and Douglas Kendell, are annexed as Exhibits P-3 and P-4, respectively.

<sup>22</sup> Professor Hellman's written statement appears at pp. 40-53 of the record of the House Judiciary Committee's November 29, 2001 hearing on the "Operations of Federal Judicial Misconduct Statutes" (Series #45; 76-383 PDF). See, also, House Judiciary Committee Report (#107-459) "Judicial Improvements Act of 2002" (H.R. 3892).

<sup>23</sup> According to Professor Hellman, he "worked with" the House Judiciary's Courts Subcommittee in drafting the "Judicial Improvements Act of 2002" (p. 2 of his September 27, 2007 written statement to the Judicial Conference's Committee on Judicial Conduct and Disability, commenting on its draft rules for federal judicial discipline).

No matter. The circuit council denied the petition for review and adhered to the dismissal order, without addressing any of the facts, law, and legal argument our petition had presented.

The Breyer Committee Report conceals that both before and after the 2002 amendment chief judges' dismissal orders failed to adequately distinguish between dismissals of complaints as "frivolous" based on the face of the complaint and dismissals as "unsupported" based on "limited inquiry". Indeed, evident from its Table 7 of "Reasons Given in Chief Judge Dismissal Orders" (p. 28), from its Appendix F containing the blank Administrative Office form used by the circuits for reporting data about complaints (p. 153), and, especially from its Appendix G reprinting Table S-22 of the Administrative Office for "the 12-Month Period Ending September 30, 2005" (p. 156) is that there is no separate category for "unsupported". This is also evident from the Report's own definition of "frivolousness" in the context of describing its Table 7 (p. 28) which combines §352(b)(1)(A)(iii), pertaining to the face of the complaint ("lacked adequate factual specification"), with §352(b)(1)(B), pertaining to "limited inquiry" ("allegations could not be proven").

As data pertaining to "limited inquiry" is otherwise unrecorded, the Breyer Committee states it is able to discern "how often limited inquiries occur" from the casefiles of the 593-complaint sample since "they contain information beyond the complaint itself" (p. 36). Based thereon, it purports that in 51% of these 593 complaints there was "some form of limited inquiry", with this most often being "obtaining the record in the underlying case", as to which it qualifies that "several circuits...routinely include the underlying record in the information provided to the chief judge". Plainly, however, "obtaining the record in the underlying case" is not the same as the characterization in the Report's Table 10 (p. 37). There substituted is the phrase "examined underlying record in case", which is how it also appears in the Report's summarized "Findings" (pp. 6, 31). The Report does not identify what in the complaint files enabled Committee researchers – presumably Messrs. Barr and Willging – to conclude that chief circuit judges had "examined" the underlying record, rather than merely "obtain[ing]" it, as part of standard protocol. Nor does it qualitatively assess such purported "examin[ations]", including whether findings were made requisite for a summary judgment dismissal.

Here, too, the Report provides neither statistics nor other information about the "limited inquiries" for the 100-complaint sample, whose files the Breyer Committee members reviewed unaided by the researchers

Tellingly, although the statutory power of "limited inquiry" encompasses "communicat[ing] orally or in writing with the complainant" – language also taken *verbatim* from the federal judiciary's Illustrative Rule 4(b) – the Report fails to identify a single instance in which a chief circuit judge or his designee ever contacted a complainant



as part of “limited inquiry”. That the Breyer Committee did not even seriously consider that complainants would be contacted is evident from its forms for reviewing complaints (Appendix I, pp. 161-183). Thus, the forms start off with three choices as to the particulars of “limited factual inquiry”: “(a) Ask the judge for a written response”; (b) “Talk to the judge on the telephone; (c) Talk to the judge in person”. No subsequent choice specifies contacting the complainant (form 1, p. 163; form 2, p. 169).<sup>24</sup>

A further substantive revision to the Act in 2002 is no less significant, but likewise unmentioned by the Breyer Committee Report. That revision added text entitled “REFERRAL OF PETITIONS FOR REVIEW TO PANELS OF THE JUDICIAL COUNCIL”, expressly allowing judicial councils to refer petitions for review “to a panel of no fewer than 5 members of the council, at least 2 of whom shall be district judges”. This became 28 U.S.C. §352(d). Formerly, a complainant or judge aggrieved by a chief judge’s order “could petition the judicial council for review thereof”. According to the 1993 Barr-Willging research study for the National Commission, “the sizes of the twelve circuit councils ranged from nine to twenty-one judges, with a median size of thirteen and an average size of fourteen judges, including the chief judge.” (National Commission Research Papers, Vol. 1, p. 638). Thus, a petition for review could now statutorily be decided by five-judge panels, rather than councils of nine to 29 judges.

This statutory revision also rose from the House Judiciary Committee’s November 29, 2001 “hearing”, specifically Professor Hellman’s written statement. Noting that the Act did not authorize circuit councils to delegate petitions for review to panels, Professor Hellman asserted that at least one circuit – the Fifth – was doing so pursuant to its rulemaking authority, which might or might not be permissible. He endorsed using panels for petitions for review, asserting such would be less cumbersome and, “more important” that,

“...if the task is assigned to a group of 3 or 5 judges, those judges can concentrate on the tasks and are likely to put more time and effort into the review process.” (at p. 44).

Professor Hellman was thereby adopting the reasoning of Messrs. Barr and Willging in their 1993 underlying study for the National Commission. Indeed, his statement (at p. 44) cited the pertinent pages of their study. Yet, in so doing, Professor Hellman did not reveal two critical facts. First, that the Barr-Willging study had not empirically examined the process relating to petitions for review. Indeed, it had admitted as much:

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<sup>24</sup> See also pp. 31, 36, where the Report also omits the complainant as among those who might be contacted as part of the “limited inquiry”.

“We were unable to pin down definitive data about the petition for review process...” (National Commission Research Papers, Vol. 1, p. 487);

“The overwhelming record of affirmances may suggest to some, on its face, that judicial council consideration of a petition for review is largely a meaningless, pro forma exercise. Nothing in our study will permit us to confirm or reject that conclusion. Although we have been told that the amount of time spent by council members on these petitions is generally very small, we have no data to gauge the level of sophisticated attention actually paid to them.” (National Commission Research Papers, Vol. 1, p. 548).

Second, notwithstanding that the Barr-Willging study had proposed that “petitions for review...be determined by a three-judge panel of the judicial council, rather than the entire council” (p. 496), the National Commission had rejected it. Its 1993 Report stated:

“The Commission does not favor the use of panels of the council to consider petitions for review.” (p. 105).

These two critical facts were also missing from the House Judiciary Committee’s subsequent report to Congress in support of passage of the “Judicial Improvements Act of 2002”. Its rationale for an amendment statutorily authorizing panels for petitions for review was that it “creates flexibility and enhances the likelihood that the petition will receive greater scrutiny and process” (at p. 12). Yet, it cited no empirical evidence for the proposition that a petition for review would “receive greater scrutiny and process” if it went to a panel, rather than the full circuit council – and neither Professor Hellman’s 2001 written statement before the House Judiciary Committee nor the 1993 Barr-Willging study underlying the National Commission’s Report had offered any.

The Breyer Committee Report is silent as to whether petitions for review filed after the amendment’s effective date had received “greater scrutiny and process” by those circuits using panels. Indeed, it does not describe how petitions for review have been handled *at any point in time*. This may reflect the Committee’s knowledge that long before the 2002 amendment, circuits were already utilizing panels for petitions for review, although concealing this by circuit council orders which did not identify that they were by panels, whose members’ identities were also undisclosed. Here, too, the record of our three judicial misconduct complaints is dispositive. Our 1996 and 1998 petitions for review were denied by orders purporting to be from the circuit council, but which, in fact, were from four-judge panels. The utter mockery of their “scrutiny and process” is evident from the most cursory comparison of these orders with our petitions for review. Not only do both orders deny the petitions without identifying any of the facts, law, or legal argument presented, but they do so “for the reasons stated” by the orders which were the subject of

the petitions.<sup>25</sup>

As the Breyer Committee Report does not disclose that circuits were using panels for petitions for review, it also does not disclose when the practice first began – in the Fifth Circuit or any other.<sup>26</sup>

### **E. Covering up Violative & Misleading Illustrative and Circuit Rules**

The Report’s chapter 1 ends with a section entitled “Illustrative Rules and Committee Standards” (p. 17). As to the Illustrative Rules, it states:

“In 1986, a special committee of the chief judges of the courts of appeals formulated *Illustrative Rules Governing Complaints of Judicial Conduct and Disability* (AO 2000) for circuit councils to consider adopting; the Review Committee revised them in 2000. Most circuit councils have adopted the Illustrative Rules verbatim or with slight modifications.” (p. 17).

In other words, the Report purports that the federal judiciary made only a single revision to its Illustrative Rules, in 2000. No explanation as to why the revision was made, or of what it consisted.

In fact, the 2000 revision was not the first time the Illustrative Rules were revised. There was an earlier revision, in 1991 – and the reason for this, as stated by the National Commission in its 1993 Report (p. 85), was “to conform to the 1990 amendments to the Act” – amendments that gave chief circuit judges statutory authority to identify complaints.<sup>27</sup> By contrast, there was no revision of the Illustrative Rules following the

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<sup>25</sup> Nor is “scrutiny and process” discernible from a 1999 order of a Fifth Circuit judicial council panel which, upon the petition for review of Dr. Carl Bernofsky, affirmed the dismissal of his complaint. The panel’s order identified none of the facts, law or legal argument that Dr. Bernofsky’s petition for review had presented. Posted on CJA’s website, [www.judgewatch.org](http://www.judgewatch.org), accessible *via* the sidebar “Judicial Discipline-Federal” containing a link for CJA’s archive of posted complaints.

<sup>26</sup> Likewise, and notwithstanding the 1993 Barr-Willging recommendation that panels be used for petitions for review, their underlying study for the National Commission had not identified a single circuit as having deviated from review by the council’s full membership.

<sup>27</sup> That the 2000 revision was not the first is also reflected by the commentary to the 2007 draft rules for federal judicial discipline (both original and revised), which states:

“The Illustrative Rules were originally prepared in 1986 by the Special Committee of the Conference of Chief Judges of the United States Courts of Appeals, and were subsequently revised and amended, most recently in 2000...” (underlining added).

2002 amendment – but this is concealed by the Breyer Committee Report.

Obviously, answering the question as to whether the federal judiciary was implementing the Act “strictly as Congress intended” – which the Report stated to be the Committee’s assignment (p. 2) – required, in the first instance, comparing the federal judiciary’s implementing rules with the Act. Indeed, the Report repeats the word “strict” or “strictly” five times in its “Forward and Executive Summary” – including three times in the first page and a quarter:

- “...the Act...simultaneously insists upon consideration by the chief judge and members of the circuit judicial council, using careful procedure and applying strict statutory standards” (p. 1);
- “The basis question presented is whether the judiciary, in implementing the Act, has failed to apply the Act strictly as Congress intended” (p. 2);
- “The Committee sought, through...the use of strict objective standards” (p. 2);
- “the Committee Standards are strict and we applied them strictly” (p. 5).

Yet, despite all this talk of “strictness”, the Report does not compare the federal judiciary’s rules with the Act, or even claim that the rules are faithful to the Act. Indeed, although its chapter 3 states that each of the 13 courts of appeals’ websites had posted “the judicial council’s rules governing complaint filing and processing”, with a few websites including “a brief explanatory preface to the rules” (p. 32), the Report fails to state that they are accurate, let alone in “strict” conformity to the Act. Virtually all are not – and in a respect that is profoundly material.

Thus, although 28 U.S.C. §352(b) states:

“After expeditiously reviewing a complaint under subsection (a), the chief judge, by written order stating his or her reasons, may –

(1) dismiss the complaint –

(A) if the chief judge finds the complaint to be –

- (i) not in conformity with section 351(a);
- (ii) directly related to the merits of a decision or procedural ruling;  
or

- (iii) frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or containing allegations which are incapable of being established through investigation;

(B) when a limited inquiry conducted under subsection (a) demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence; or

(2) conclude the proceeding if the chief judge finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events”,

the federal judiciary’s Illustrative Rule 4(c), from its inception in 1986 to the present, instructs that a complaint “will” be dismissed and concluded under paragraphs (1) and (2) – a directive replicated in the rules of nine circuits: the Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth, District of Columbia, and Federal Circuits. In so doing, these judicially-adopted rules have removed the discretion that Congress conferred by using the word “may” to evaluate such facts and circumstances of a given complaint as would warrant that it not be dismissed even though it falls within a category for which it could be dismissed – as, for instance, “directly related to the merits of a decision or procedural ruling”. Among these facts and circumstances: the unavailability or ineffectiveness of appellate remedies, including with respect to litigants’ judicial disqualification motions. Such facts and circumstances were at the heart of the three judicial misconduct complaints we had filed.

The federal judiciary, including Justice Breyer, has long been on notice that Illustrative Rule 4(c) and circuit rules based thereon are nonconforming with the statute. Indeed, our November 24, 1997 letter to Mr. Barr – reprinted in the appendix of the supplemental brief in support of the 1998 cert petition<sup>28</sup> – could not have been clearer in stating:

“Pursuant to the Judicial Conference’s power under 28 U.S.C. §331 to ‘prescribe and modify rules for the exercise of the authority provided in section §372(c) of this title’, we request the Conference modify Illustrative Rule 4(c) since it is not in conformity with the statute – and, likewise, modify the Second Circuit’s essentially identical Rule 4(c) – because they mandate dismissal of “merits-related” complaints, whereas such dismissal is discretionary under the §372(c) statute...” (Exhibit C-2, p. 8).

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So-identified by the November 6, 1998 impeachment complaint (Exhibit D-2, fn. 3).

Moreover, had the Breyer Committee confronted the misinformation about the Act on the circuits' websites including by the prefatory warning:

“Congress has created a procedure that permits any person to file a complaint in the courts about the behavior of federal judges – but not about the decisions federal judges make in deciding cases...If you are a litigant in a case and believe the judge made a wrong decision – even a very wrong decision—you may not use this procedure to complain about the decision”<sup>29</sup>,

a warning which replicates language from Illustrative Rule 1(b) “What may be complained about” – and which the Breyer Committee recommends be extended to “every court covered by the Act” (pp. 120-121)<sup>30</sup> – it would have understood why “providing easy website access to information about filing complaints does not result in a higher rate of complaints filed” (pp. 33, 121). Indeed, the Committee failed to acknowledge a material discrepancy between its “Standards for Assessing Compliance with the Act” (pp. 145-146) and the Illustrative Rules and circuit modifications that would necessarily discourage would-be complainants. Unlike the Committee Standards, the Illustrative Rules and circuit-clones do not reveal that decisions which are the product of “an illicit or improper motive” are reviewable under the Act, with complaints based thereon not deemed “merits-related”.<sup>31</sup>

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<sup>29</sup> Such warning appears on the federal judiciary’s own website, [www.uscourts.gov](http://www.uscourts.gov) – on the page relating to “Judicial Misconduct and Disability”, with links for filing complaints to the judicial circuits and national courts. It is also featured in prefatory comments on the websites of the First, Second, Fifth, Seventh, Tenth, and District of Columbia Circuits.

<sup>30</sup> This Breyer Committee recommendation is prefaced as follows: “We suggest the website include a plain-language explanation of the Act, emphasizing that it is not available to challenge judicial decisions.” (p. 120).

<sup>31</sup> Also misleading is the commentary to Illustrative Rule 1, entitled “Advice to Prospective Complainants on Use of the Complaint Procedure”, which asserts:

“...Some complaints allege nothing more than that the decision was in violation of established legal principles. Many of them allege that the judges are members of conspiracies to deprive the complainants of their rights, and offer the substance of the judicial decisions as the only evidence of the conspiratorial behavior...”

A judge’s violations of “established legal principles” by his decision may certainly be “conduct prejudicial to the effective and expeditious administration of the business of the courts” and/or reflective of “mental...disability”. See “*Is Judicial Discipline in New York State a Threat to Judicial Discipline?*”, Gerald Stern, *Pace Law Review*, Vol. 1, No. 2, p. 291 (winter 1987):

“...a judge is not immune from being disciplined merely because the judge’s conduct also constitutes legal error. From earliest times it has been recognized that

This is not the only respect in which the Illustrative Rules and the circuit adoptions are not “strictly” in conformity with the Act. 28 U.S.C. §360, the only provision of the Act to deal with confidentiality, does not require the confidentiality of complaints that do not result in special committee investigative proceedings. Mr. Barr’s June 26, 1992 memo on confidentiality for the National Commission conceded this in the context of the identically-worded predecessor §372(c)(14), stating that it and §372(c)(15) pertaining to public availability of circuit council orders following special committee investigations:

“do not specifically address the confidentiality, or the public availability, of complaints, files, and orders in a §372(c) proceeding that does not result in appointment of a special committee, but instead is dismissed under §372(c)(3) as frivolous or merits-related or because corrective action was taken. The rest of the Act is silent on the matter.

The legislative history does not appear to be helpful either. Senate Report No. 362, 96<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1979), reprinted in 1980 U.S. Code Cong. & Admin. News 4315, does state, ‘The Committee believes that the establishment of a confidentiality provision will avoid premature injury to the reputation of a judge.’ S. Rep. No. 362 at 16; 1980 U.S. Code Cong. & Admin. New 4330. However, the language in §372(c)(14) does not come from the Senate bill, but instead was ultimately derived from the House bill. The relevant House report, H.R. Rep. No. 96-1313, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1980), contains no relevant comments.

The commentary to the Illustrative Rules reflects the uncertainty about the Act’s intended treatment of the files of uninvestigated complaints. The commentary to Rule 16, again, states that §372(c)(14)’s ‘reference to ‘investigations’ suggests that section 372(c) technically applies only in cases in which a special committee had been appointed.’ On the other hand, the commentary to Rule 17 asserts that ‘[t]he statute and its legislative history exhibit a strong policy goal of protecting judges from the damage

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‘errors’ are subject to discipline when the conduct reflects bias, malice or an intentional disregard of the law.<sup>[fn]</sup> These standards have been refined in recent years to remove from office or otherwise discipline judges who abuse their power and disregard fundamental rights.<sup>[fn]</sup> Clearly, no sound argument can be made that a judge should be immune from discipline for conduct demonstrating lack of fitness solely because the conduct also happens to constitute legal error.

..Judicial ‘independence’ encompasses making mistakes and committing ‘error,’ but was not intended to afford protection to judges who ignore the law or otherwise pose a threat to the administration of justice.” (at pp. 303-304, underlining added ).

Moreover, if “the substance of the judicial decisions” is otherwise inexplicable, such could suffice as evidence of “conspiratorial behavior” in given circumstances.

that could be done by publicizing unfounded allegations of misconduct.’ The commentary further notes that the Senate bill had specifically provided for confidentiality at all stages of the complaint process. The commentary concludes that, although the statutory language was ultimately derived from the House bill and is limited to ‘investigations, ‘there is no indication that nonconfidential treatment of other materials was contemplated.’

*Looking at the language of the Act, however, there is in truth also no express indication that nonconfidential treatment of other materials was not contemplated. Obviously, Congress could have specifically included in §372(c)(14) a reference to materials relating to uninvestigated complaints, and did not do so. The legislative clues on this question are so spotty as to make any firm conclusion dubious.*

*The statutory intent is so ambiguous...” (pp. 3-4, italics added, underlining in the original).*

It is in the absence of any express language in the Act and, in face of a legislative history that is “so spotty as to make any firm conclusion dubious” that Illustrative Rule 16(a) states:

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

The commentary to Illustrative Rule 16 itself admits that this is not a “strict” interpretation of 372(c)(14):

“rule 16(a) applies the rule of confidentiality more broadly, covering consideration of a complaint at any stage.” (underlining added).

As for the circuits, they all replicate Illustrative Rule 16(a), *verbatim*, or close to it, except for the Ninth Circuit, whose modification is certainly not “minor”. Rather, the Ninth Circuit brings complainants within its edict of confidentiality by replacing court personnel in Rule 16(a) with “any person”:

**(a) General rule.** Consideration of a complaint by the chief judge, a special committee, or the judicial council will be treated as confidential business, and information about such consideration shall not be disclosed by any person in any proceeding except in accordance with these rules.” (underlining added).



The Ninth Circuit’s commentary then buries – literally – the qualification that “it is not contemplated that a complainant should be barred from disclosing the fact that a complaint was filed or the nature of his or her complaint.” Yet, does this mean that the complainant can disclose the actual complaint itself? The next sentence is also ambiguous:

“Any official action on the complaint, however, including the appointment of a special committee or actions taken by judges or judiciary employees to investigate the charges are ‘proceedings’ within the meaning of this rule and must not be disclosed.”

Since a chief circuit judge’s order dismissing a complaint is an “official action”, as likewise a circuit council’s denial of a petition for review, is a complainant precluded from disclosing these? The concluding notice entitled “Violations of Confidentiality”, also ambiguous, further intimidates the complainant into silence. It states:

“Disclosure violating §360 and these rules may result in contempt proceedings. The law explicitly contemplates contempt proceedings against judiciary employees who compromise the confidentiality of the proceedings, 28 U.S.C. §332(d)(2), but the legislative history of the Misconduct Statute says that anyone involved in the investigation could be held in contempt for such conduct.<sup>fn7</sup> It would frustrate the entire confidential investigatory scheme if a complainant...were permitted to hold press conferences, revealing the existence and nature of pending proceedings. Disclosure by the complainant may also result in termination of the complainant’s rights as provided in these rules. See Rule 13(f).”

In marked contrast is the District of Columbia Circuit. While preserving the language of Illustrative Rule 16(a), it adds a subsection that appears in rules of no other circuit. Entitled “Disclosure by complainant”, it highlights the ambiguity of the Ninth Circuit’s Rule 16 by its clarity:

**(i) Disclosure by complainant.** A complainant may disclose the fact that the complaint has been filed, and any additional information about the complainant or complaint process in the complainant’s possession. A complainant may not disclose information conveyed to the complainant by the chief judge, a special committee, or the council, if such information was conveyed on an express condition that the information would be kept confidential. No conveyance of information shall be made on condition of

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<sup>fn7</sup> S.Rep.No. 362, 96<sup>th</sup> Cong., 1<sup>st</sup> Sess. 4315, 4330 (1980).”

confidentiality unless the complainant is notified of the condition prior to the conveyance, and provided an opportunity to object, or to decline the information. Such information conveyed to a complainant on condition of confidentiality may be disclosed by the complainant with the authorization of the council obtained pursuant to subsection (h) of this rule. A complainant's communication with counsel is not considered a 'disclosure' subject to this rule."

Yet, none of this significant "implementation of the 1980 Act is identified by the Breyer Committee Report. To the contrary, the Report falsely makes it appear (at p. 40) that the federal judiciary's rules have expanded public access, when the opposite is the case.

The Breyer Committee Report is also affirmatively misleading as to "merits-relatedness". It states "The Act tells chief judges to dismiss complaints that are 'directly related to the merits of a decision or procedural ruling'" (p. 54)<sup>32</sup> – although this is not correct. The language of the 1980 Act is discretionary and does not automatically require dismissal of "merits-related" complaints.

Finally, and pervading the federal judiciary's implementation of the Act – including with respect to "merits-relatedness" – is the self-serving claim, by its Illustrative Rule 1(a), embraced by all the circuits:

"The law's purpose is essentially forward-looking and not punitive. The emphasis is on correction of conditions that interfere with the proper administration of justice in the courts".

But is it? According to Professor Hellman, "This is not necessarily the impression one would get from the legislative history of the Act". He elaborates as follows:

"To be sure, there was support for the Illustrative Rules' approach. For example, key players in both the House and Senate quoted an American Bar Association report stating that '[t]he major purpose of judicial discipline is not to punish judges...' See 126 Cong. Rec. 28091 (Sen. DeConcini); id. at 25370 (Rep. Railsback). But at least in the Senate, much attention focused on devising an alternative to impeachment as a means of disciplining judges who engage in misconduct. This may be forward-looking, but it is also punitive."<sup>33</sup>

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<sup>32</sup> Also, p. 14: "review of judicial behavior apart from decisions in cases"; p. 32: "what it...does not cover (e.g., the merits of judicial decisions)"; and p. 31: "not available to challenge judicial decisions" (p. 120).

<sup>33</sup> It is unknown whether this important observation in Professor Hellman's *The Regulation of*

The Breyer Committee Report does not reveal that its assessment of the federal judiciary's compliance with the Act is predicated on the assumption that Congress intended a "forwarding-looking", not "punitive", approach to federal judicial discipline.<sup>34</sup> In Professor Hellman's words "...the Illustrative Rules' rejection of a 'punitive' purpose has been widely influential in the administration of the misconduct statutes".<sup>35</sup>

#### **F. Steering Clear of the Federal Judiciary's Own Store of Complaints & Communications from Members of the Public**

The Report purports that "the only way it could answer"

"whether the judiciary, in implementing the Act, has failed to apply the Act strictly as Congress intended, thereby engaging in institutional favoritism",

was by reviewing "the complaints themselves" (p. 2) – which, of course, is untrue because comparing the federal judiciary's rules with the Act would also have permitted an "answer" to the question.

However, if the Breyer Committee wanted to honestly confront "institutional favoritism" by examining complaints, Mr. Barr had the full record of the three complaints CJA had

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*Judicial Ethics in the Federal System: A Peek Behind Closed Doors*", University of Pittsburgh Law Review, Volume 69, No. 2, fn. 93 (forthcoming 2008 – <http://ssrn.com/abstracts=1015858>), originated in CJA's August 13, 2002 letter to him, which stated,

"Certainly, topping the list of 'Research materials for Congressional oversight' should be the legislative history of the §372(c) statute. This is additionally so because the Illustrative Rules and Circuit Rules each purport that §372(c) is 'essentially forward-looking and not punitive' – a premise accepted by the Federal Judicial Center study, on which the Report of the National Commission relies. That Congress ever intended that misbehaving federal judges be allowed to 'get off the hook' when made the subject of legitimate complaint – as the federal judiciary uniformly permits them to do – is a matter that not only needs to be verified from the legislative history, but revisited." (Exhibit P-3, pp. 4-5).

<sup>34</sup> The Report's only mention of this interpretive issue is in the Committee's Standard 7 "Appropriate Corrective Action" (pp. 149-150). It there states "Terminating a complaint based on corrective action is premised on the implicit understanding that voluntary self-correction of misconduct is preferable to sanctions imposed from without" – without saying that such "implicit understanding" is from Congress and, followed, thereafter, by the bald assertion "the Act is generally forward-looking".

<sup>35</sup> "*The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*", web-version draft, *supra*, p. 27.

sent him precisely because they established “institutional favoritism” so extreme as to mandate action by the Judicial Conference, if federal judicial discipline was to continue to be reposed in the federal judiciary. He also knew – including because it was stated in “*Without Merit: The Empty Promise of Judicial Discipline*” (Exhibit A-1, p. 97) – that CJA was a source for other judicial misconduct complaints, additionally demonstrative of “institutional favoritism”.

Moreover, since the Administrative Office and Judicial Conference regularly receive complaints and other communications from members of the public protesting the federal judiciary’s handling of their complaints, the Breyer Committee could also have readily obtained these.

Nonetheless, the Breyer Committee did not see fit to review any complaints that members of the public brought forward – either in the past or in the present. Indeed, the Report identifies that upon the Committee’s receipt of what it terms “unsolicited submissions” from “48 individuals” – nine of whom are described as having “protested the disposition of a misconduct complaint under the Act” (pp. 12-13) – the Committee did not contact any of these persons about their complaints. Rather:

“We sent a postcard acknowledging receipt of each submission and giving the citation of the Act as the proper vehicle for filing misconduct and disability complaints; because we had no authority to act on individual complaints, we took no other action.” (p. 13).<sup>36</sup>

For the Committee to justify itself by the pretense “we had no authority to act on individual complaints” is a deceit. The Committee had authority to examine complaints for purposes of assessing how they had been handled – and the fact that nine complainants came forward protesting what had been done offered the Committee the opportunity to gain valuable evidence and insight as to their perceptions of “institutional favoritism”.

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<sup>36</sup> The postcards, sent to individuals protesting the disposition of their complaints under the Act, printed the following two sentences:

“The Judicial Conduct and Disability Act Study Committee has received the information you submitted dated \_\_\_\_\_. If you have not filed a formal complaint and want to do so, please refer to section 351(a) of title 28 of the United States Code.”

The relevant date was then hand-written in. One such postcard was sent to Gary Wall, who had, by then, filed five judicial misconduct complaints, dismissed by chief circuit judges. Two postcards were sent to Joseph Norman, II, who had, by then, filed four judicial misconduct complaints, also dismissed. Three postcards were sent to Dr. Richard Cordero, who had, by then, filed two judicial misconduct complaints under the Act, likewise dismissed.

The need for such evidence and insight is underscored by the Report's parenthetical comment that

“(for example, one individual sent us six separate packets over several months objecting to a chief judge’s dismissal, of his complaint, which we later realized was case C-9, discussed in Chapter 4)” (pp. 12-13).

Turning to that case entry in chapter 4 relating to “Dispositions of high-visibility complaints” (p. 88), it is presented in six sentences under a category heading “*Dispositions in which the primary point of interest is the chief judge's merits-related dismissal*” (p. 88). The complaint came within the Committee’s study apparently because “The local press covered the lawsuit and some Internet postings discussed the complaint” (p. 88) – and, according to the Report, it had the “weakest claim” to being one of the Committee’s 17 “high-visibility complaints” and was the only one of the 17 where the complainant was not “an attorney, a public official, or a court employee” (p. 68).

Evident from the entry is that the reason the Committee found it to be properly dismissed is because it substituted speculation adverse to the complainant over evidence it might have been obtained from him. Thus, the Report finds the dismissal of the complaint proper, stating:

“The chief judge’s dismissal is consistent with Committee Standard 2 on merits-relatedness. This appears to be a typical complaint that assumes bias because the judge ruled against the complainant...” (p. 88, underlining added)

Conspicuously, this Committee “assessment” at page 88 fails to identify anything about what the complainant had sent to the Committee by his “six separate packets” “objecting to the chief judge's dismissal” – referred to 76 pages earlier, at page 12. Presumably the particulars of his objections were also set forth in his petition for review of the dismissal. However, the Report also fails to identify anything about what his petition for review had presented. Indeed, the Report’s only mention of the petition for review is in the summarizing heading for C-9: “Complaint against a district judge properly dismissed, review petition dismissed” (p. 88) – which is also the only mention of its dismissal, unaccompanied by any particulars. This is methodologically indefensible.<sup>37</sup>

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<sup>37</sup> Certainly, too, C-9 rebuts Professor Hellman’s claim that for “each complaint” in the “high-visibility” category, “the report provides a detailed account of the allegations and the procedures followed by chief judges and circuit councils in considering them.”, “*The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*”, *supra*, web-version draft, p. 57.

## **G. Obscuring the Number of Congress-Originating Complaints – & the Outcome of the Committee’s Review of their Disposition**

The Report describes the Committee as having:

“initially examined individual instances in which members of Congress had complained (to the Judicial Conference and the public) about the handling of allegations of judicial misconduct.” (p. 2).

In other words, the Committee reviewed Congress member’s own complaints. The Report does not identify the number of these complaints. It would appear that because review of these relatively few congress-originating complaints “suggested that, in some of those instances, the judiciary’s own handling of the complaints may have been problematic” (pp. 2-3),<sup>38</sup> the Committee decided to bury the percentage (which it does not supply) within a research study that would purport to evaluate “the vast bulk of complaints that receive little or no public notice” (p. 3) – as to which, because the federal judiciary has made complaints confidential, the Committee could then trumpet an unverifiable claim of only a 2-3% “problematic” dismissal rate (pp. 5, 7, 39, 107) – and then discount this further by purporting the “problems” to be “procedural”, not necessarily substantive (pp. 44, 107).

The Report also obscures and dilutes the percentage of “problematic dismissals” of congress-originating complaints by lumping them into a bogus category of “high-visibility complaints” – where the measure of “high visibility” is absurdly low.<sup>39</sup> The Committee managed to cull 16 complaints from 2001-2005 for such category, plus an additional complaint which a chief circuit judge should have initiated (p. 3). Of these 17, the Report admits to “problematic dismissals” for five, of which C-9 is not one. These five represent “an error rate of close to 30%” (pp. 3-5), but the Report provides no percentage for the complaints Congress had filed, or inquired about.

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<sup>38</sup> House Judiciary Committee Chairman Sensenbrenner characterized the Report as having found that the federal judiciary “bungled all of the matters in which the House Judiciary Committee conducted extensive oversight” (September 19, 2006 press release: Exhibit R-1). The four “matters” cited are those summarized by the Report as C-4 (pp. 73-75: Judge Cudahy); C-5 (pp. 75-78, Sixth Circuit shenanigans); C-7 (pp. 80-85: Judge Real); and C-8 (pp. 85-88: Judge Rosenbaum).

<sup>39</sup> The Committee’s definition of a “high-visibility” complaint is one where “the Westlaw or Lexis database yielded at least one article about it and if the article indicated that a complaint had been filed...”. It then conceded “Most of the complaints have had some national visibility, at least within judicial circles; a few received only regional or local attention, and qualified as ‘high visibility’ only because of the ‘at least one article’ rule.” (p. 68).

## **H. Failing to Interview Any Complainants, Yet Interviewing All Current Chief Circuit Judges and their Staff, which the Committee Selectively Uses to Buttress Self-Serving Conclusions**

The Committee's failure to interview the C-9 complainant about his complaint and the basis for his contention that it was wrongfully dismissed (pp. 12-13, 88) is replicated hundreds of times by the Committee's failure to interview any of the complainants whose approximately 700 complaints it was reviewing – complaints which constituted “the vast bulk of complaints filed that receive little or no public notice” (p. 3) – and whose authors' contact information was readily available from their complaints, in the federal judiciary's possession.

By contrast:

“the judges on the Committee interviewed all current chief judges and one judge who had just stepped down as chief judge. Committee staff interviewed current and former chief circuit judges and circuit staff at length, and the Committee reviewed detailed reports of those interviews.” (p. 4, also, p. 12).

Yet, it appears that the most important and obvious questions were NOT asked in these interviews. Such should have included – but plainly did not – questions asking them:

(1) to identify which of their circuit's orders they considered as interpreting the statutory language of the Act and to which their other, more routine, orders were presumably citing as precedent to support their dispositions;

(2) to confirm that all their interpretive, precedential, and significant orders had been submitted “to the West Publishing Company, for publication in Federal Reporter 3d, and to Lexis”;

(3) to explain the reason for any interpretive, precedential, and significant orders they failed to submit for publication;

(4) to explain/justify orders they had rendered or participated in, which the Committee's review had found “problematic”.

There is no explanation as to why the Report does not append a list of questions asked or topics discussed when, by comparison, it annexes the blank Administrative Office forms used to gather data from the circuits about complaints filed under the Act (Appendix F, p. 153) and the blank Committee forms for reviewing termination of complaints (Appendix

I, pp. 161-183). This is additionally noteworthy as the National Commission's 1993 Report had reprinted the interview questions as part of an appendix to the underlying Barr-Willging research study (National Commission Research Papers, Vol. I, pp. 679-689). Among the questions asked of chief judges in 1993:

“2. What, if any, sources do you consult to finding meaning for statutory terms like ‘directly related to the merits,’ ‘frivolous,’ or ‘appropriate corrective action?’

[Follow-ups: (a) Has a common law developed in your circuit to guide you and other judges as to the meaning of the statute?...]”

(National Commission Research Papers, Vol. I, p. 679).

The Committee's failure to append to its Report a list of the questions asked or topics discussed warrants an inference that such would have exposed the superficial, self-serving nature of the interviews and/or their selective use by the Committee to buttress conclusions the Report seeks to advance. Thus, after making its disingenuous presentation as to the percentage of chief judge orders that restate complaint allegations and include reasons for dismissal (pp. 20-23, *supra*), the Report adds:

“In Committee interviews, chief judges emphasized the importance of both these elements (restatement of allegations and the reason for the disposition) of their orders. For example, ‘[t]he complainant has a reasonable expectation of a reasoned resolution, so we don't do boilerplate.’ ‘The complainant should know from our public order that I did read the complaint, even if complainant doesn't like my disposition.’ Another said, ‘I try to be careful and forthcoming in the dismissal orders. Not just ‘You lose,’ but to explain politely, even to a complainant who is using the wrong procedure, why the complaint doesn't work. This is necessary to accord the process some dignity.’” (p. 35).

Claims that the dismissal orders are “careful and forthcoming” and not “boilerplate” are not characterizations with which complainants would typically agree. In substantiation, they would offer dismissal orders that are often no more than a few sentences. As for longer, seemingly more detailed orders, complainants would have no trouble demonstrating, by comparison to their complaints, that such are “window-dressing”. We, too, could easily show this – by our petitions for review, particularizing that the dismissal orders falsified, distorted, and omitted the complaints' material allegations, and gave reasons for dismissal that were not just boilerplate, but outrightly false, when compared to both the complaints' actual allegations and the cited authorities.

Suffice to say that the National Commission's 1993 Report reached its “all's well” conclusions in precisely the same methodologically-flawed way. As pointed out by



*“Without Merit: The Empty Promise of Judicial Discipline” –*

“How did the Commission reach its conclusions? ...the Commission's researchers never interviewed anyone who had filed a judicial misconduct complaint with the federal judiciary under the 1980 Act or with Congress to initiate its impeachment procedures. How can you make any assessment about how these mechanisms are working unless you reach out to the victims of judicial misconduct who have used them? Yet the researchers who reviewed §372(c) complaints were not ashamed to admit, ‘We know little about complainants and what they seek. We did not design this research to address those issues.’<sup>fn.2</sup> This admission is buried deep within their underlying research study.

Instead, the Commission’s researchers interviewed Chief Circuit Judges and Circuit Executives about their experience in administering the 1980 Act. And how did the Chief Judges explain the value of the 1980 Act when 95% of the complaints filed were dismissed, mostly on the statutory ground that they were ‘merits-related’? They made claims about how the Act served as a deterrent to misconduct, and that ‘informal’ discipline was taking place behind the scenes, using phrases like ‘still water runs deep.’ The judges insisted on absolute immunity and that their comments be camouflaged to prevent them from being traced back to their Circuit. The Commission gave scant recognition that judges’ responses might be tainted by self-interest.” (Exhibit A-1, p. 93).

**I. Failing to Disclose the Committee’s Initial Protocol and Deviation Therefrom**

Undisclosed by the Breyer Committee Report is that its initial protocol was quite different. This may be seen from the Supreme Court’s June 10, 2004 press release announcing the Committee’s organizational meeting, at the Supreme Court, at which it had determined to

“initially examine as many non-frivolous Act-related complaints as can be identified, along with a statistical sample of all complaints, filed in the last several years. The Committee will use this information to help shape a further course of examination and analysis...

The Committee will use staff drawn from the Administrative Office of the United States Courts and the Federal Judicial Center. The staff will

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<sup>fn.2</sup> Research Papers of the National Commission on Judicial Discipline and Removal, Vol. I, 635.”

develop a research plan based both on statistical sampling and interviews, including interviews of judges, administrators, and practicing lawyers, such as prosecutors and defense attorneys. It will examine complaints submitted by members of the public to other institutions, including Congress, and will develop methods for obtaining information from members of the public. Although, the Committee will proceed publicly where useful and appropriate, it recognizes the statutory requirement to maintain confidentiality of records and complaints (See 28 U.S.C. §360)...” (Exhibit R-2, underlining added).<sup>40</sup>

Yet the Report reveals (p. 2) that the complaints the Committee “initially examine[d]” were those initiated by members of Congress. No mention is made of any review of complaints submitted by members of the public “to other institutions, including Congress”. Moreover, the Report’s admission that the Committee rejected submissions received from 48 individuals makes evident that it developed no “methods of obtaining information from members of the public”.

Neither does the Report identify any subsequently-developed “research plan” to interview “practicing lawyers”. That the Committee conducted no such interviews is evident from the Report. Thus, it states that “at least one district has created the position of ombudsman” – “a lawyer in private practice appointed by the court” to act as “intermediary” between the judges and the bar (p. 104), but its description is entirely from the district website. The lawyer was not contacted for purposes of obtaining verifying information and other particulars.

Finally, there is nothing in the Report to indicate that the Committee proceeded “publicly” at any point. Certainly, its ability to do so was not limited by the “statutory requirement to maintain confidentiality of records and complaints” under 28 U.S.C. §360, whose relevance is only for the minuscule number of complaints that have resulted in special committee investigations (*see pp. 35-38, supra*).

## **J. Concealing the Content of the House Judiciary Committee’s Files**

Even in identifying that the Committee’s staff reviewed “the files of the House Committee on the Judiciary” (p. 4), the Report does not acknowledge “complaints” from the public as contained within those files. Rather, it euphemistically speaks of

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<sup>40</sup> This press release may have been a response to such editorials as The New York Times’ May 27, 2004 editorial “*Judicial Ethics Under Review*”, which, referring to the Breyer Committee, stated, “If the Committee held public hearings and invited testimony from lawyers and other private citizens, it could educate people on an important matter and inform its recommendations.”

“allegations of judicial misconduct sent to Congress” (p. 4). The Report provides no information as to the nature or volume of these “allegations”. Nor does it identify how the House Judiciary Committee had addressed them, if at all. This information should have been readily-available to the Committee if the depiction of the House Judiciary Committee in the National Commission’s Report were accurate – if the House Judiciary Committee and Congress had appropriately followed through with the National Commission’s recommendations addressed to it.

According to the National Commission’s Report:

“Since 1983, the Committee has kept a record of the number and nature of judicial discipline complaints it has received and has reported this data in the Summary of Activities published each Congress. Every Congress these complaints are archived and may be made available upon request. Today the Committee responds to every complaint with a letter acknowledging receipt of the complaint and directing the complainant’s attention to the 1980 Act...

With a few changes, the Committee’s responses to judicial complaints could be even more informative. The acknowledgment letter should tell complainants that the 1980 Act does not contemplate sanctions for judge’s decisions or issues relating to the merits of litigation. In appropriate cases, the Committee may request to be kept apprised of the complaint’s disposition. Finally, because Members of Congress sometimes receive complaints from constituents, Members might be encouraged by the House Judiciary Committee Chairman – perhaps once a Congress – to forward the complaints to the Committee.” (pp. 35-36).

Its recommendations based thereon were as follows:

“The Commission recommends that the House Committee on the Judiciary continue to acknowledge every judicial discipline complaint. In serious cases involving potentially impeachable conduct, the Committee should conduct a follow-up inquiry or solicit the aid of the Justice Department in such an inquiry. The Committee should continue to keep a record of the number and nature of these complaints, and report these data each Congress.” (p. 36)

“The Commission recommends that the House ensure that its Committee on the Judiciary has the resources to deal with judicial discipline matters, and the resources and institutional memory necessary to deal with impeachment cases as they arise.” (p. 37)

According to the House Judiciary Committee’s “Summary of Activities” for the 101<sup>st</sup> and 102<sup>nd</sup> Congresses, it received 141 and 120 complaints. It is reasonable to surmise that the Committee has received similar numbers in the subsequent Congresses – now up to the 110<sup>th</sup>. However, immediately following the National Commission’s Report, the House Judiciary Committee’s “Summary of Activities” for each Congress stopped listing the number of complaints received, a fact we first brought to the House Judiciary Committee’s attention by a July 10, 1995 letter – and repeatedly thereafter, to no avail. This includes by our June 11, 1998 written statement for the record of the Committee’s “oversight hearing” of the federal judiciary (Exhibit H, pp. 5-6).

It may be noted that only on page 68 does the Breyer Committee Report state “The staff of the House Judiciary Committee made its complaint files available to our researchers. (Those files include cases forwarded to it by its counterpart Senate Committee.)”. Yet, there is no information about the numbers of complaints those files contained – or anything about their nature except that “The files contained no high-visibility complaints not already identified.”

Other than that, the Report is entirely silent about what should have been a wealth of information in the House Judiciary Committee files about what the public was telling Congress about the state of federal judicial discipline, including their experience under the 1980 Act – and what, if anything, the House Judiciary Committee was saying in response. Such files should have contained CJA’s voluminous correspondence to the House Judiciary Committee, spanning from 1993 to 2004. Among this correspondence: our letters requesting to review the complaints of judicial misconduct that the House Judiciary Committee had received and, which, according to the National Commission’s Report, are “available upon request” (Exhibit A-1, p. 94). The House Judiciary Committee’s files should also have contained our two impeachment complaints against the federal district and circuit judges in the two cases from which our advocacy emerged, filed in 1993 and 1998 (Exhibits A-2, C-1 (at pp. 10-11)), as well as our 1998 impeachment complaint against the Supreme Court Justices (Exhibit D-2) – duplicates of which we provided to the House Judiciary Committee in July 2001 (Exhibit N).

#### **K. Concealing Other Means for Readily-Ascertaining the Federal Judiciary’s Handling of Complaints under the Act**

Among the easiest ways for the Breyer Committee to have explored what complainants were saying about the federal judiciary’s implementation of the 1980 Act – if its five judicial members did not already know it from their own prior (and current) participation in the process – was by examining complainants’ petitions to circuit councils for review of chief circuit judges’ dismissal orders. To a greater or lesser degree, each petition for review provided the complainant’s analysis of the chief judge’s dismissal order, comparing it to his complaint. Exemplifying this, spectacularly, are our two petitions for

review of the two orders dismissing our three judicial misconduct complaints. The hoax of this appellate phase of the complaint process is then established by the failure of the circuit council orders to even identify, let alone address, any of the facts, law, or legal argument the petitions presented. That they deny the petitions “for the reasons stated” by the chief judge orders only adds insult to injury.

Based on data submitted to the Administrative Office, the Report identifies, at page 29, the substantial numbers of petitions for review and their outcomes during the three years examined by the Breyer Committee:

“The complainants petitioned the judicial council to review the chief judge’s order in 44% (1,592 of 3,627) of the dismissed or concluded complaints. ...the councils in each instance either denied the petition or, pursuant to a few circuits’ practice, granted the petition and then dismissed it on the merits.”<sup>41</sup>

Yet, the Report devotes only a single paragraph to this frequently resorted-to petition for review process – eight pages later, at page 37, under a title heading “Monitoring petitions for review”<sup>42</sup>:

“Finally, most circuits provide for monitoring of the complaints through the judicial council petition process. In eight circuits, that task falls to the same office that prepares the initial write-up of the complaint. (One chief judge said in a Committee interview, ‘I always read the petitions for review of my dismissal orders. I want to make sure I didn’t blow the facts [when] I’m writing detailed orders.’)”.

Putting aside the Report’s failure to comment upon whether the same office that drafts the chief judge’s dismissal orders should also be handling the “task” of the petitions for review – since the review is supposed to be before the judicial council, not the chief judge<sup>43</sup> – the Report provides no information as to what these petitions for review are

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<sup>41</sup> The Report notes (p. 30) an error in this 100% rate – there being one instance where a complaint was reinstated – C-3. Doubtless this was because while the petition for review of a complaint arising from cases involving President Clinton was pending before the circuit council, “a House Judiciary Committee member submitted a letter to the clerk of the court of appeals...” with supplemental information (pp. 71-72).

<sup>42</sup> The title “Monitoring petitions for review” (p. 37) creates an initial ambiguity as to whether the adjective “monitoring” is meant to describe the function played by “petitions for review” or the function of the circuit councils with respect thereto. From the first sentence of the paragraph it appears that the Report is applying it to the circuit councils – which is the opposite of the reality of the situation.

<sup>43</sup> Illustrative Rule 18(c), entitled “Disqualification of chief judge on consideration of a petition for

saying about the dismissal orders, including as to whether they “bl[e]w the facts”. The two-sentence parenthesized quote from the chief judge, consuming half of the four-sentence section, is not responsive. It does not answer how many times petitions for review had shown that the chief judge “bl[e]w the facts” – with the circuit council’s orders properly reinstating the complaint by reason thereof.

One has to turn back those eight pages to page 29 to see that the petitions for review are all being rejected, without specificity as to how this is being accomplished. The Report does not, for example, offer any assessment as to how often circuit council orders recite the allegations of the petitions for review as to the deficiencies of chief judges’ dismissal orders and give reasons for their denials of the petitions that confront these deficiencies. Yet, this could have easily been done, just as the Committee purported to do by its statistics for chief judges’ orders dismissing complaints (pp. 20-23, *supra*).

The Report’s concealment of the significance of petitions for review<sup>44</sup> as a measure of the federal judiciary’s implementation of the 1980 Act is further reflected by its chapter 4. Its summaries of complaints drawn from the 593-complaint sample contain section headings: “Facts and complaint”, “Chief judge order”, and “Assessment”, but no sections headings “Petition for review” and “Circuit council order”, although applicable to three complaints: A-1 (pp. 47-9); A-3 (p. 48); and A-5 (pp. 49-50).<sup>45</sup>

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review of a chief judge’s order”, states

“...the chief judge will not participate in the council’s consideration of the petition. In such a case, the chief judge may address a written communication to all of the members of the judicial council, with copies provided to the complainant and to the judge complained about. The chief judge may not communicate with individual council members about the matter, either orally or in writing.”

This proscription, going back to 1986, was continued by the identically-entitled Rule 25(c) of the draft rules for judicial discipline, released for public comment on July 16, 2007 by the Judicial Conference Committee on Judicial Conduct and Disability. Such was gone from the Committee’s December 13, 2007 “latest working draft” and, thereafter, from its January 23, 2008 final draft, which it had approved for submission to the Judicial Conference, and then the further draft posted on or about February 25, 2008, reflecting “comments recently received from members of the Judicial Conference”. The proposed superseding Rule 25(c) is entitled: “Chief Judge Not Disqualified from Considering a Petition for Review of a Chief Judge’s Order” – and its accompanying commentary neither notes nor explains this 180-degree change, one plainly rejecting Professor Hellman’s observation in his September 27, 2007 written statement to the Committee that “Non-participation by the circuit chief judge is an important element of circuit council review of chief judge orders.”

<sup>44</sup> The Report’s “Flowchart of Major Steps to Complaint Process” (p. 15) barely includes petitions for review – and nothing about their processing.

<sup>45</sup> By contrast, the summaries of six “high-visibility” complaints signal the existence of petitions for review either by section headings or in the descriptive titles given to the complaints: C-1 (p. 69), C-3

From the minimal descriptions of these three petitions for review from the 593-complaint sample, as well as from the descriptions from the three “high-visibility” complaints where petition for review were filed, C-5 (pp. 75-78); C-7 (pp. 80-85); C-10 (pp. 88-89),<sup>46</sup> it seems clear that the petitions are pointing out deficiencies in, and responding to, the chief judges’ orders – deficiencies and responses the Report articulates as if they were the Committee’s own, without identifying that they derive from the petitions for review and without necessarily identifying that the circuit councils rejected these petitions for review without addressing their content.

There is another reason the Committee should have examined the efficacy of petitioning for review, namely, the Committee’s reliance on the availability of such appeal process as the reason why complaints against chief circuit judges for dismissing complaints were dismissible as “merits-related”. This reason is explicit in the Committee’s “Standards for Assessing Compliance with the Act”:

“Thus, a complaint challenging the correctness of a judge’s determination to dismiss a prior misconduct complaint would be properly dismissed as merits- related – i.e., as challenging the substance of the judge’s administrative determination to dismiss the complaint – even though it does not concern the judge’s rulings in any case. A petition for review can be filed with the circuit council.” (p. 145).

In so stating, the Committee well knew that circuit councils had reduced such petitioning process to worthlessness: denying or dismissing the petitions nearly 100% of the time – and mostly doing so without addressing the facts, law, and legal argument presented by these petitions.

Examining complaints filed against chief circuit judges for dismissing complaints would have been a further means for the Committee to have gained insight into what complainants were saying about the complaint process. And locating such complaints against chief circuit judges and acting chief circuit judges, past and present, would have been easy.

Additionally, circuit councils have issued orders barring some complainants from filing further judicial misconduct complaints without permission. Our 1996 petition for review

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(pp. 71-72), C-5 (pp. 75-78), C-7 (pp. 80-85), C-9 (p. 88), C-10 (pp. 88-89). Indeed, the titles for three additional “high-visibility” complaints, C-11 (pp. 90-91), C-12-13-14 (pp. 91-92), and C-15 (p. 92), actually identify, in their titles, “no petition for review” and do so notwithstanding the Committee’s assessment that the chief judge’s disposition was proper.

<sup>46</sup> Petitions for review were also filed in three other “high-visibility” cases: C-1 (p. 69), C-3 (pp. 71-72), and, C-9 (p. 88). However, the Report gives no description of their content.

had annexed one such order, from 1993. As there stated (at pp. 1, 5), this barring order appeared to be the Second Circuit’s “only ‘precedential’ published decision...relating to §372(c) complaints in the 16 years since the statute was enacted by Congress” – with the circuit thereafter using it as precedent to bar another complainant.

**L. The Committee’s “Standards for Assessing Compliance with the Act” are Materially Incomplete, Superficial, and Misleading**

The Breyer Committee’s “Standards for Assessing Compliance with the Act”, annexed as Appendix E to its Report (pp. 145-151), interpret nine specific phrases of the Act, eight from 28 U.S.C. §352, plus an additional phrase from 28 U.S.C. §351(b). None of these nine phrases are the “may” of §352(b). The Committee thereby avoided acknowledging, let alone examining, any of the facts and circumstances that would properly trigger the statutory discretion not to dismiss complaints governed by its Standards 2, 3, 4, 5, 6, 7, and 8. This alone vitiates the Standards as a tool for assessing “compliance with the Act”.

The Standards begin (p. 145, #1) by endorsing the federal judiciary’s commentary to its Illustrative Rule 4 interpreting the statutory language of §352(a) for “expeditious review” as 60 days from the filing of the complaint to the chief judge’s disposition. This, however, is a doubling of the 30 days which was the definition for “expeditious review” in the originally-promulgated Illustrative Rules from 1986. Such fact is neither identified here nor elsewhere in the Report.

The Standards then jump to the subsections of §352(b), skipping over the introductory language where Congress, by using the word “may”, rather than “shall”, conferred upon the federal judiciary discretion not to dismiss or conclude complaints, even where the statutory grounds for doing so are met. This introductory language of §352(b) is also where Congress required that the chief judge provide a “written order stating his or her reasons” for dismissing or concluding a complaint. As pointed out by our 1996 petition for review of the dismissal of our first complaint (at p. 2), the chief judge’s order, if not conclusory, must necessarily explain why the discretion to dismiss or conclude a complaint is being exercised.

It is the second subsection of §352(b) – (1)(A)(ii) – “directly related to the merits of a decision or procedural ruling”, that the Standards discuss first.

The Committee’s discussion is best compared with our 1996 petition for review, which provides a frame of reference for how the Committee might have laid out its interpretation of “merits-relatedness” in its Standard 2, had it wished its presentation to be clear and precedent-based. As stated by our petition for review based on “what little caselaw there is for §372(c)”:



“The earliest caselaw for §372(c) – and the model upon which the congressional statute was drawn – derives from the administrative complaint procedures established in November 1978 by the Judicial Council of the Ninth Circuit.

The emerging succession of Ninth Circuit cases, beginning with *In re Judicial Misconduct*, 593 F.2d 881 (1979), all stand for the same proposition: administrative disciplinary review is not properly invoked where there is an available appellate remedy ‘absent any suggestion of corruption or other impropriety or any indication of a broader pattern of conduct evidencing incapacity, arbitrariness, or neglect of office’ (Id., 881). See also *In re Judicial Misconduct*, 595 F.2d 517 (9<sup>th</sup> Cir. 1979); *In re Judicial Misconduct*, 613 F.2d 768 (9<sup>th</sup> Cir. 1980), *In re Judicial Misconduct*, 685 F.2d 1227 (9<sup>th</sup> Cir. 1982).

In other words, there are two circumstances under which disciplinary review under §372(c) is proper: (1) where there is no appellate remedy; and (2) where a complaint involves allegations such as bad-faith conduct and corruption – in which case it does not matter whether an appellate remedy exists.”

This is infinitely more straight-forward than the Committee’s articulation, which rejects “where there is no appellate remedy” and garbles in ambiguity situations of corruption, bias, and “illicit or improper motive”.

Standard 2 purports that a complaint is not “merits-related” if it alleges corruption and bias “— however unsupported — ” (p. 145), thereby making it appear that a complaint presenting these allegations would not be dismissed as “merits-related” even if “unsupported”. However, it then announces “Most such complaints are more properly dismissed as frivolous – i.e., lacking in factual substantiation” (p. 146).

Apart from the gratuitousness of this addition, its deceit would have been evident had Standard 2 revealed that the federal judiciary rejects, as constituting evidence of corruption, bias, and illicit motive, a judge’s decisions and rulings – with the result that complaints alleging that a judge has demonstrated his corruption, bias, and illicit motive by decisions and rulings which *knowingly* falsify and omit material facts and which *knowingly* disregard controlling, black-letter law – as verifiable from the record of pleadings, motions, and trial proceedings – are deemed “frivolous” and “unsupported” The closest the Committee comes to revealing this is in its gobbledygook final paragraph of Standard 2 which purports:

“Thus, a chief judge may properly dismiss an allegation that a judge's language that is relevant to a ruling was inserted out of an illicit motive, absent evidence aside from the ruling itself to suggest improper motive.” (p. 146, underlining added).

In other words, the ruling is excluded as evidence of the improper motive, notwithstanding the ruling may be indefensible in fact and law and so-alleged and demonstrated by the complaint. This is yet a further reason why the Report (p. 19) lumps together “merits-related” complaints with “unsubstantiated” ones – as complaints supported by record-evidence of the illegality and illegitimacy of decisions and rulings are deemed supported by no evidence (*see* p. 24, *supra*). It also explains the meaning of the Report's recommendation (p. 121) that court websites advise: “The law says that complaints about judges’ decisions and complaints with no evidence must be dismissed.”. In practice, these two separate grounds for dismissal have been merged into one by the federal judiciary.

The deceit, superficiality, and practical worthlessness of the Committee’s Standard 2 for “merits-relatedness”, especially with respect to “a judge’s failure to recuse”, and the existence of appellate remedies (pp. 145-146), is established, overwhelmingly, by the record of our three judicial misconduct complaints. These complaints, which identified their suitability for making long-overdue clarifying caselaw, were specifically fashioned to empirically test the “merits-related”, recusal, and appellate remedy issues dodged by the National Commission – as they are by the Breyer Committee.

As for Standard 3 relating to the statutory ground for dismissal: “not in conformity with section 351(a)” (p. 146), the Committee asserts:

“This standard does not appear susceptible to precise definition outside the context of particular fact-situations. Presumably, that was the intent of the Act’s drafters.

The standard is given such coherence as it has by the Code of Conduct for U.S. Judges and the accumulated precedent of the circuits under the Act, insofar as those precedents have been revealed...” (p. 147)<sup>47</sup>

What does that mean “insofar as those precedents have been revealed?” when the circuits have had a quarter century to develop and publish their precedential, interpretive orders at to this statutory ground. Where are they? If they exist, why does the Committee not cite

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<sup>47</sup> Similarly, page 56: “This language does not appear susceptible to precise definition outside the context of particular fact situations. Accordingly, our Standard suggests reference to the Code of Conduct for U.S. Judges and prior interpretations of the provision in chief judge public orders...”

them?<sup>48</sup>

As for Standard 4 relating to the statutory ground for dismissal: “frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred” (pp. 147-148), this is the only place in the Report where the Committee reveals that the 1980 Act was more than recodified in 2002 – and that the phrase “lacking sufficient evidence to raise an inference that misconduct has occurred” was added to define “frivolous”.

The Committee states “there can be no hard and fast rule” as to when an otherwise cognizable complaint alleges enough to warrant a chief judge’s “initial inquiry”, rather than dismissal as “frivolous”, again, citing no caselaw articulating such rules as have evolved over the course of the federal judiciary’s experience. It then continues:

“generally all a complaint (i.e., a complaint that is not inherently incredible and is not subject to dismissal on other grounds) need do is assert that the complaint’s allegation is supported by the transcript or by a named witness....Indeed, a complaint need not itself identify a particular transcript or witness, if the complaint sets forth allegations that are capable of being verified by looking at identifiable transcripts or questioning identifiable witnesses...”

Such is relevant to a complaint alleging misconduct arising from in-court appearances and other live contact with the judge. It is not necessarily germane to a complaint alleging that a judge’s bias, corruption, and other improper motive are manifested by knowingly false and lawless decisions and rulings – for which the evidence would be the casefile with its pleading and motions papers. Conspicuously, Standard 4 does not state that a complaint’s citation to these documents would remove it from the category of “frivolous”.

Standard 4 also seems to indicate that “frivolous” complaints include those that are “inherently incredible”. It defines an allegation as “inherently incredible” where “no reasonable person would believe that the allegation, either on its face or in the light of

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<sup>48</sup> Such unanswered questions are all the more startling as Standard 3 goes on to note:

“More common are complaints alleging conduct that occurred before the judge went on the federal bench. Whether such an allegation can constitute misconduct under the statutory standard is a question that the judiciary does not appear to have resolved conclusively. It would seem that at least some chief judges believe that the Act simply does not extend to pre-judicial conduct. A contrary view is that pre-judicial conduct can be prejudicial to the current administration of the business of the courts....

Rather than have the researchers try to resolve such an important question that the circuit councils themselves have not settled, the researchers will place any such cases (probably two to five) in a separate category and identify them for Committee review.” (p. 147).

other available evidence, could be true.” Undisclosed is that the federal judiciary considers allegations of conspiratorial conduct by judges, including their collusion in fraudulent judicial decisions – even where substantiated by the casefile record – to be within that category and thereby dismissible.

As for Standard 5 pertaining to “limited inquiry” (pp. 148-149), the Committee states:

“Dismissal following a limited inquiry typically occurs where the complaint refers to transcripts or to witnesses, and when the chief judge consults the transcripts and questions the witnesses, and they all support the judge.”

Omitted is any mention of “limited inquiry” involving review of the casefile with its pleading and motion papers, as necessary for complaints alleging fraudulent and lawless judicial decisions.

#### **M. The Committee’s Application of its “Standards for Assessing Compliance with the Act” Reveals their Superficiality and Deceit**

The Report’s summaries of “problematic” and “high-visibility” complaints in its chapter 4 underscore the superficiality and deceit of the Committee’s “Standards”, particularly with respect to “merits-relatedness”. The following is illustrative:

The A-3 summary states (p. 48): “A litigant complained that a bankruptcy judge conspired to defraud him. Among the complaint’s nearly 50 allegations were two involving race...” It then asserts “The chief judge properly dismissed the conspiracy allegations...”

The summary offers no explanation as to why the complainant’s non-race-based conspiracy allegations were “properly dismissed” – and they could not be unless the “nearly 50 allegations” gave no substantiating particulars – which the summary does not claim in noting that both the chief judge’s dismissal order and the “conclusory” judicial council affirmance had omitted the racial allegations.

The A-6 summary states (p. 50): “The chief judge dismissed the complaint, in part on the proper ground that its objections to the judge’s rulings were merits-related”.

Yet, a “merits-related” dismissal does not seem “the proper ground”. The summary does not explain why it is. Indeed, the referred-to “rulings” seem demonstrative of the subject judge’s “improper animus” against the complainant, making the complaint non-“merits-related”. Moreover, even if “merits-related”, the complaint would appear to warrant investigation pursuant to the discretion conferred by the Act not to dismiss “merits-related” complaints. Especially is this so if the context is a “long-closed criminal case”.

As to the judge's alleged comments about the complainant, the summary concedes that they should not have been dismissed as "frivolous" without inquiry of complainant's attorney.

The A-7 summary states (pp. 50-51), without disapproval, "The chief judge dismissed parts of the complaint on merits-related and non-conformity grounds". However, the summarized allegations appear non-"merits-related", demonstrative of the complainant's contention that the judge had shown "bias toward the state and against complainant". As to the bias allegations, the summary concedes that the chief judge should not have dismissed them as "frivolous" without inquiry of witnesses and transcripts.

The A-12 summary intimates (p. 55) that the complaint is not "merits-related", but does not say so directly. Nor does it explore whether, even if "merits-related", it presents a situation where the discretionary dismissal language of the Act would warrant investigation of the complaint.

The A-24 summary and A-25 summary (pp. 64, 65) involve two separate complaints where chief judges had dismissed as "merits-related" allegations that judicial decisions contained false and maligning facts and characterizations. Although the Committee originally believed that the chief judge should have conducted an initial inquiry concerning illicit or improper motive, it not only changed its view, but amended the "merits-related" standard so as to hold:

"the need to protect judges' independence in deciding what to say in an opinion means that if a judge's language was relevant to the case at issue, as it was here, the chief judge may presume the judge's choice of language was 'merits-related'." (underlining added, pp. 64, 65).

In so doing, the summaries fail to explain how a judge's insertion of knowingly false and manipulated facts for an illegitimate purpose can ever be "relevant".

The C-6 summary states (p. 79) "The chief judge dismissed the complaint based on nonconformity with the statute; he could also have dismissed it as merits-related." Such suggested disposition is inconsistent with the Committee's recognition that it is the allegations of misconduct, not the relief sought, which are determinative, as well as its acknowledgment that:

"The chief judge did not confront the allegation's facts and documentary support that suggested the subject judge's conduct arguably violated the Code of Conduct for United States Judges concerning ex parte contacts and public comment about pending litigation."

Even if “merits-related”, the complaint would appear to have warranted the discretion conferred by the Act not to dismiss it.

The C-7 summary states (p. 81) “the chief judge dismissed the complaint as directly related to the judge’s ruling or decision in the underlying case and also as frivolous and unsupported.” Although the summary states that “Both grounds for dismissal seem problematic”, it does not elaborate upon the “problematic” nature of the “merits-related” dismissal.

The C-8 summary states (pp. 85-88) that House Judiciary Committee counsel had brought to a chief judge’s attention that a district judge had “illegally departed downward from the sentencing guidelines in drug cases, implying that he had done so in bad-faith disregard of the applicable law” (p.85). The summary then states: “if raised in a formal complaint, [such] could be dismissed as merits-related and as unsupported.”(p. 87). Likewise, with respect to allegations that a district judge had “improperly closed a sentencing proceeding and sealed transcripts of other sentencing proceedings, perhaps to hide his allegedly illegal acts” (p. 86). The summary states that such “would properly have been dismissed as merits-related and unsupported” (p. 87). However, illegal and bad-faith conduct, as here alleged, is not “merits-related”.

The C-9 summary describes (p. 88) the complaint (from the litigant who had sent six packets of information to the Committee (pp. 12-13)) as follows:

“A litigant complained that, in his lawsuit against local prosecutors, the judge showed bias, ‘acted as counsel for defendants,’ and improperly dismissed portions of the lawsuit. The complaint said that the defendants were ‘high ranking [local] officials that [the judge] has had prior affiliation with,’ and that the judge’s misconduct occurred while complainant’s recusal motion was pending. The local press covered the lawsuit and some Internet postings discussed the complaint.”

The summary then describes the chief judge’s order as having “dismissed the complaint as merits-related, and also as frivolous for lack of any factual substantiation for the allegations of bias and improper demeanor.” As to this, the Committee’s assessment is:

“The chief judge’s dismissal is consistent with Committee Standard 2 on merits-relatedness. This appears to be a typical complaint that assumes bias because the judge ruled against the complainant. The file shows that the chief judge’s staff reviewed the transcript of the hearing mentioned in the complaint and advised the chief judge that the transcript contained no indication of any bias, irregularity, or improper demeanor.”

A judicial bias complaint is not “merits-related”. However, even were it so-deemed, the evidence of bias was presumably not limited to hearing transcripts. Surely it included documents on which the rulings were based, including the referenced recusal motion. The title of C-9 reveals that the complainant had filed a petition for review of the chief judge’s dismissal order. Undoubtedly, it challenged the order’s assertion that the complaint was “frivolous for lack of any factual substantiation for the allegations of bias and improper demeanor”. However, the summary contains none of this. Why is that?

Examination of the summaries of these and other complaints in the Report’s chapter 4 reveal that the Committee did not have legitimate, consistent “Standards for Assessing Compliance with the Act” and, certainly, not for “merits-relatedness”, whose sticky issues pertaining to recusal, appellate remedies, and evidentiary proof it avoided. That the Committee does not append the orders of the chief judges and judicial councils for any of these complaints – although publicly available by the federal judiciary’s own rules – serves to conceal these sticky issues, palpable to anyone with experience in the courts. Nor does the Committee offer the complaints and petitions for review, which are not confidential under the Act. Apparently, even redacted to remove identifying details, the Committee will not allow verification and scrutiny of its work.

**N. The Committee’s Sham Justification for the Divergent Percentages of “Problematic Dispositions” for “High-Visibility” Complaints & Other Complaints**

The Report contends that although there was a 29.4% “problematic disposition” rate for the 17 “high-visibility” complaints, there was only a 3.4% “problematic disposition” rate for the 593-complaint sample (pp. 96-97)<sup>49</sup>. It justifies this huge discrepancy in percentages as follows:

“The explanation for this sizable difference lies in differences in the two types of complaints. The overwhelming majority of the 593 cases were obvious candidates for dismissal, even given the overselection of cases more likely to be meritorious. Were we able to identify and remove those unexceptional cases from the sample, the denominator of 593 would shrink considerably and the 20 problematic cases would constitute a much higher percentage, closer to the 29.4% observed in the 17 high-visibility terminations.

Each of the 17 high-visibility cases, by contrast, is in our study because members of Congress took a serious interest in it or because journalists paid attention to it, or both. These cases aroused interest and

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<sup>49</sup> The Report contends there was a 2% “problematic disposition” rate for the 100-complaint sample (p. 67).

attention because they presented the plausible possibility of some misconduct – not necessarily an obvious possibility, but simply a more plausible possibility. Complaints that are more plausible than most are infrequent, and moreover are likely to confront the chief judge or circuit council with more decisions than the typical case: identify a complaint? undertake a limited inquiry? Seek a response from the judge? Appoint a special committee? Regard an appellate reversal in the underlying litigation as corrective action? With the greater number of decision points and less familiarity in dealing with these types of complaints comes a greater possibility of a mistake.

Whatever the reasons, the fact remains that chief judges and councils made a greater number of mistakes, proportionately, among these more complex complaints.” (p. 97).

The claim that “the overwhelming majority” of complaints from its 593-complaint sample were “obvious candidate[s] for dismissal” is unverifiable so long as the federal judiciary does not release these complaints for independent examination – and such release is not precluded by the statute (*see pp. 35-38, supra*). Certainly, the summaries of “problematic dispositions” in the Report’s chapter 4 give ample reason to question the Breyer Committee’s assessment of both its 593-complaint sample and its 100-complaint sample.

Conspicuously, the Report does not identify how the Committee arrived at the sample size of 593 or how many of that sample constituted “*all* of those complaints most likely to have merit (those filed by attorneys, for example)” (p. 3, italics in original). Nor does it identify how the balance of the 593-complaint sample was randomly-selected – or how the 100-complaint sample was randomly-selected – including who was involved, and whether it was independently supervised (pp. 41, 66). In view of the myriad of verifiable material deceptions in the Report and the demonstrated official misconduct of Mr. Barr and Justice Breyer when presented with “hard evidence” of the federal judiciary’s corruption of the 1980 Act (Exhibits B, C, D, E, F, G, J, Q), the possibility that the samples were rigged cannot be discounted.

As for the suggestion that the reason Congress and the press took an interest in the complaints they did was because they “presented the plausible possibility of some misconduct” – by contrast to other complaints which did not – this is false. Members of Congress “took an interest” in complaints because such advanced their thinly-disguised political agendas. Established by CJA’s three impeachment complaints, including against the Supreme Court Justices (Exhibits A-2, C-1 (pp. 10-11), D-2, J), is that Congress ignores fully-documented complaints of systemic judicial corruption having no partisan tinge. The fact that the House Judiciary Committee has ceased to publish the number of judicial misconduct complaints it receives – and denies the public access to them – only underscores its misfeasance with respect to complaints, whose merit it thereby conceals.



As for the journalists, they are essentially parasitic, feeding off press releases of Congress and operating according to their own fixed prejudices, as well as institutional and personal conveniences and interests, to the detriment of the public. CJA's press releases and communications with the press from 1998-2004 for coverage of the House Judiciary Committee's misfeasance with respect to the hundreds of complaints it receives against federal judges from private citizens and as to our own impeachment complaints against federal judges and against the Justices demonstrate this, royally.<sup>50</sup>

Also false is that the greater percentage of "problematic dispositions" among "highly-visible" complaints is because plausibly meritorious complaints are so infrequent that the federal judiciary is unfamiliar with how they should be handled and that they are "more complex" than unworthy complaints, presenting more decision-points at which to err. This is nonsense. Federal judges know how to handle dismissal motions and summary judgment motions – and the procedures laid down by the Act for a chief judge's initial review and "limited inquiry" are roughly parallel.<sup>51</sup> As the Report itself states (p. 97), virtually all the "problematic dispositions" were deemed to have arisen at the initial review stage, where the chief judge had not undertaken adequate "limited inquiry" or had improperly made findings as to disputed facts. Such stage and its standards for "limited inquiry" and proscription against resolving factual disputes is straightforward and basic.

Indeed, it may be surmised that the reason the Committee did not question the chief judges (and in some cases the judicial councils) as to how they made the errors they did in the handling of these complaints is because it knew, from the complaints and petitions for review, that their errors were NOT innocent and in good-faith, but deliberate acts of "institutional favoritism" that cannot be explained away. Also obvious is that the federal judiciary is more careful, rather than less, with respect to "high-visibility" complaints – such as those filed or inquired about by members of Congress or the press. The Report elsewhere discloses as much:

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<sup>50</sup> Our press releases and communications with the press on the subject are accessible *via* the "Press Suppression" sidebar panel of CJA's website – with a "SPECIAL TOPIC" entitled:

"TESTING THE PROPOSITION: that 'any publicly made (non-frivolous) allegation of serious misconduct...against a Supreme Court Justice would receive intense scrutiny in the press...' (1993 Report of the National Commission on Judicial Discipline and Removal, at p. 122)".

<sup>51</sup> This parallel is explicitly made in the commentary of the latest drafts of the new rules for federal judicial discipline. The commentary to Rule 11 states: "Essentially, the standard articulated in subsection (b) ["Inquiry by Chief Judge"] is that used to decide motions for summary judgment pursuant to Fed. R. Civ. P. 56....".

“Chief judges told us that the staff typically alerts them to unusual complaints. One said in an interview, for example, that the chief deputy ‘might alert me that there’s something tricky,’ giving as an example one of the high-visibility complaints...” (p. 34)

Finally, it is a comparable deceit for the Report to pretend, as it does, that “The Act creates a complex system” (p. 1) and that there are “complexities in processing a complaint” (p. 14). There is nothing “complex” about the Act – and, surely, not in the initial phase handled by the chief judge. Moreover, any “complexity” should long ago have been addressed by caselaw, settling any uncertainty as to the meaning of the statutory terms.

### **O. Covering Up the Worthlessness of “Activity Outside the Formal Complaint Process”**

Chapter 6 of the Breyer Committee Report asserts that the 1980 Act is “not the only mechanism that seeks to remedy judicial misconduct or disability or prevent its occurrence” (p. 99). It then lists nine “principal mechanisms”, prefaced by the statement “The operation of these procedures was not part of our charge and we have not analyzed them.” It then repeats, after listing them, “Examining the use of these other formal mechanisms was not in our charter and we did not do so.” (p. 100). Such is a further respect in which the Breyer Committee Report is methodologically-flawed and dishonest.

No proper examination of the 1980 Act could have failed to include as part of its “charge” and “charter” evaluation of at least some of the listed “other formal mechanisms”, most importantly: (1) “recusals sua sponte or on motion under 28 U.S.C. §§144 & 455”; (2) “appellate reversals aimed at improper judicial conduct”; and (3) “writs of mandamus” (p. 100). This, because their efficacy underlies the Act’s “merits-related” ground for dismissal of complaints.

For instance, the Report states:

“Although recusal decisions are almost always merits-related and thus not covered by the Act, litigants (and sometimes others) nevertheless file complaints alleging improper failure to recuse, and chief judges must act on the complaints even if only to dismiss them.” (p. 9).

This is then elaborated upon by Standard 2. Without explaining why “recusal decisions are almost always merits-related”<sup>52</sup> and, in fact, removing the “almost always”, Standard

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<sup>52</sup> The essence of recusal is that a judge is biased or interested in the outcome, in other words that he had the “illicit or improper motive” that the Standard recognizes removes such allegation from the

2 states:

“A mere allegation that a judge should have recused is indeed merits related; the proper recourse is for a party to file a motion to recuse. The very different allegation that the judge failed to recuse for illicit reasons – i.e., not that the judge erred in not recusing, but that the judge knew he should recuse but deliberately failed to do so for illicit purposes – is not merits related. Such allegations are almost always dismissed for lack of factual substantiation.” (p. 146)

By asserting that “the proper recourse is for a party to file a motion to recuse”, the Committee implies that such will produce results, responsive to evidence that the judge has been biased or has an interest in the case before him. This is false – and so-proven by the very case that was the subject of the 1998 cert petition, containing eight recusal motions and applications – apart from the final application to recuse the Justices (Exhibit E-2). Indeed, the cert petition quoted the general view of scholars as to the worthlessness of the recusal statutes:

“‘There is general agreement that §144 has not worked well.’ Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d §3542, at 555, citing law review articles and quoting from *Statutory Disqualification of Federal Judges*, David C. Hjelmfelt, Kansas Law Review, Vol. 30: 255-263 (1982): ‘Section 144 has been construed strictly in favor of the judge...Strict construction of a remedial statute is a departure from the normal tenets of statutory construction.’; Because of this strict construction, ‘disqualification under this statute has seldom been accomplished’, initially and upon review, Flamm, [Judicial Disqualification: Recusal and Disqualification of Judges (1996)], at 737, ‘...§144’s disqualification mechanism has proven to be essentially ineffectual.’ Flamm, *ibid*, at 738; ‘While the text of sections 144 and 455 appear 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 refusal to recuse, is rarer still.’, Charles Gardner Geyh, ‘*Means of Judicial Discipline Other Than Those Prescribed by the Judicial Discipline Statute, 28 U.S.C. Section 372(c)*’, Research Papers of the National Commission on Judicial Discipline and Removal, Vol. I, at 771 (1993).” (Exhibit F, p. 30).<sup>53</sup>

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“merits-related” category.

<sup>53</sup> The Breyer Committee Report references Professor’s Geyh’s research study for the National Commission as an “analysis of methods of judicial discipline other than those provided in the Act.”(p. 13). In so doing, it does not reveal his above-quoted assessment of what the federal judiciary had done

Judicial interpretation of the disqualification statutes, 28 U.S.C. §§455 and 144, has essentially removed the judge's conduct and rulings in the case as grounds for disqualification. As a result, the same conduct and rulings that are deemed "merits-related", if alleged in a complaint filed under the Act, are also off-limits if set forth in a disqualification motion. This leaves no forum for their adjudication, except appeal – whose corruption is resoundingly established by the two cases underlying the three judicial misconduct complaints we filed under the Act.

The corruption of the appellate process in the second case was particularized by the 1998 cert petition. The corruption of the appellate process in the first case – the case described by "*Without Merit: The Empty Promise of Judicial Discipline*" (Exhibit A-1, p. 95) – was particularized by a 1993 cert petition. Each of these cases had to be reversed on appeal, *as a matter of law*, with disciplinary and criminal referrals of the district judges for their demonstrably fraudulent, retaliatory judicial decisions. Instead, three-judge appellate panels upheld each, without confronting, or even mentioning, any of the appellate issues raised, including those of judicial bias and disqualification. The circuit court of appeals then put its imprimatur to these fraudulent and retaliatory appellate panel decisions by failing grant the petitions for rehearing and rehearing *in banc*. Such is summarized by our March 23, 1998 memorandum (Exhibit C-1, pp. 7-10), and, with more devastating particularity, by our April 24, 1998 statement to the Commission on Structural Alternatives for the Federal Courts of Appeals (Exhibit I, pp. 6-11).

As for the Breyer Committee's listing of "writs of mandamus", such is another illusory remedy. Here, too, as with judicial disqualification, treatises recognize the general unavailability of the extraordinary remedy of mandamus as a means for removing biased judges, the vast preponderance of cases denying the writ. This fact was pointed out by our November 28, 1995 testimony before the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts, citing Moore's Federal Practice (Exhibit Q-3, p. 10).

The other "principal mechanisms" listed in chapter 6 are also worthless when invoked by litigants victimized by the corruption and abuse of power of federal judges. Consider, for instance, "criminal and civil actions (absent judicial immunity)" (p. 100). Apart from the unavailability of criminal prosecutions against federal judges by reason of the nonfeasance of the U.S. Justice Department – as highlighted by the supplemental brief in support of the 1998 cert petition (Exhibit G, p. 10) – the federal judiciary has both conferred upon itself and secured legislatively, by self-serving and false advocacy to Congress, sweeping immunities. Such has not only made civil actions against judges a

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with the judicial disqualification statutes. The National Commission's Report had also not revealed this quote of Professor Geyh – a fact pointed out by CJA's March 10, 1998 memorandum (Exhibit B, p. 3).

virtual impossibility, but, by the federal judiciary’s power to author fraudulent decisions falsifying the facts of any case, as well as the law, actually impossible in those few cases where judicial immunity is absent. The case presented by the 1998 cert petition – which was a suit against state judges – showcases the federal judiciary’s ability to fabricate immunity where none exists.

As for the first listed “principal mechanism”, *to wit*, “Constitutional provisions for impeachment and removal” (p. 99), this is the only mechanism among the nine listed for which the Breyer Committee supplies editorial comment. It describes this mechanism as “rarely used” – a description it amplifies by the parenthesized addition “(13 judicial impeachments and seven convictions)” – and then justifies as being in accord with a “guiding principle”, articulated by Chief Justice Rehnquist, that “rulings from the bench ...would not be the basis for removal from office” (p. 99). This is an on-going, flagrant deceit by the federal judiciary.

Firstly, impeachment is ‘rarely used’ because the House Judiciary Committee ignores, without investigation or referral, the hundreds of impeachment complaints against federal judges it receives – a fact CJA first brought to the federal judiciary’s attention by testimony before the Judicial Conference’s Long Range Planning Committee in 1994 (Exhibit A-8, pp. 6-7) and repeatedly, thereafter, including by the supplemental brief and petition for rehearing in support of the 1998 petition for a writ of certiorari (Exhibit G, pp. 1-2, 8, Exhibit E, pp. 4, 6).

Secondly, despite the federal judiciary’s self-serving pretenses, rulings are a proper basis for a judge’s removal from office – much as they are for a judicial misconduct complaint under the 1980 Act – when they are not good-faith adjudications, but, rather, motivated by bias or interest. In other words, when they are corrupt.<sup>54</sup> This simple truth, highlighted by “*Without Merit: The Empty Promise of Judicial Discipline*” (Exhibit A-1), is the pivot of much of CJA’s advocacy, repeated again and again, without dispute because it is indisputable. As stated by our March 23, 1998 memorandum – thereafter repeatedly quoted:

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<sup>54</sup> See *Matter of Bolte*, 97 A.D. 551 (NY, 1904):

“A judicial officer may not be removed for merely making an erroneous decision or ruling, but he may be removed for *willfully* making a wrong decision or an erroneous ruling, or for a reckless exercise of his judicial functions without regard to the rights of litigants, or for manifesting friendship or favoritism toward one party or his attorney to the prejudice of another...” (at 568, emphasis in original).

“Favoritism in the performance of judicial duties constitutes corruption as disastrous in its consequence as if the judicial officer received and was moved by a bribe.” (at 574).

**“Judges who, for ulterior purposes, render dishonest decisions – which they *know* to be devoid of factual or legal basis – are engaging in impeachable conduct.”** (Exhibit C-1, pp. 10-11, bold and italics in the original; see also Exhibit H (p. 9); Exhibit I (p. 6); Exhibit N (p. 9)).

This includes *knowingly* dishonest decisions on the trial level, on appeal, and in the disciplinary process, as, for instance, chief judges’ orders dismissing complaints where the allegations of corrupt and retaliatory judicial conduct are not only facially-sufficient, as a matter of law, *by any cognizable standard*, but documentarily-established by the underlying case records.

As succinctly stated by CJA’s first impeachment complaint against lower federal judges that included Judge Winter – still pending, uninvestigated by the House Judiciary Committee nearly 15 years after it was filed – “fabrication of fact and perversion of law is not part of the judicial function.” (Exhibit A-2, p. 2, underlining in the original)<sup>55</sup>.

Had the Breyer Committee interviewed complainants, their comments would have been graphic not only as to their experiences in filing complaints under the Act, but as to the federal judiciary’s corrupting of such “other mechanisms” as judicial disqualification motions, appeals, writs of mandamus, and lawsuits against judges. They would have described how the federal judiciary has destroyed all remedies of redress by decisions that are not, as the federal judiciary spins it, “wrong” or “erroneous”, but demonstrably fraudulent.

This is yet another reason why the Committee did not reach out to complainants and held no public hearings for their testimony.

**THE FEDERAL JUDICIARY’S CHARADE OF PUBLIC COMMENT  
& ITS CONTINUED SUBVERSION OF FEDERAL JUDICIAL DISCIPLINE  
BY ITS NEW RULES**

Following release of the Breyer Committee Report, the federal judiciary continued to disregard, and make a mockery of, public input by its proposal of new implementing rules for the 1980 Act to replace the federal judiciary’s Illustrative Rules and the circuits’ modifications thereof. Such new rules were expressly based on the Breyer Committee Report, including its “Standards for Assessing Compliance with the Act”, much of which it replicated *verbatim* in its commentary

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<sup>55</sup> This first impeachment complaint, dated June 9, 1993 (Exhibit A-2), was also an exhibit to our second impeachment complaint – this being our March 23, 1998 memorandum, encompassing Judge Winter’s further impeachable conduct, now as the Second Circuit’s chief judge corrupting the 1980 Act (Exhibit C-1, p. 11).

On July 16, 2007, the Judicial Conference's Committee on Judicial Conduct and Disability announced a 90-day comment period for its new implementing rules. Such comment-period was to end on October 15, 2007, with a single public hearing, to be held on September 27, 2007 in Brooklyn, New York.

Requests to testify at the hearing were required to be e-mailed to the Office of the General Counsel of the Administrative Office, with a "written indication" of the intended testimony. For no apparent reason, these were required by August 27, 2007.

CJA's request to testify, made by phone and e-mail, was a week later, on September 4, 2007 – in other words 3-1/2 weeks before the hearing date. We stated that our testimony would address:

"the 'lack of authoritative interpretive standards' pertaining, in particular, to the 'merits-related' grounds for dismissal of judicial misconduct complaints – Draft Rule 11(c)(2) – the most frequently invoked ground for dismissal." (Exhibit S-1).

In further support of our request to testify, we pointed to our prior extensive correspondence with the Administrative Office. Noting that such should have been retained in its files "for responsive action", we identified that it was conveniently accessible from CJA's website, [www.judgewatch.org](http://www.judgewatch.org), and highlighted our article "*Without Merit: The Empty Promise of Judicial Discipline*" (Exhibit A-1) as discussing "the federal judiciary's dismissal of judicial misconduct complaints for 'merits-relatedness' and its wilful and deliberate disregard of a 1986 Judicial Conference recommendation to develop interpretive standards."

By an unsigned e-mail, the federal judiciary informed us that our request to testify was "too late" (Exhibit S-4). To this we responded with two questions.

“(1) Whether the August 27<sup>th</sup> deadline for requesting to testify is inexorable for everyone whose request is made after that date;” (underlining in the original) and

(2) [Whether]...there are no available time slots for testimony.” (Exhibit S-5).

We received no answer to either of these straight-forward questions.

The September 27, 2007 "hearing" was conducted by only a single-member of the

Committee on Judicial Conduct and Disability, its chairman, Judge Winter, who announced that three witnesses were “scheduled” and that a fourth witness, Professor Monroe Friedman had been “originally scheduled”, but “unable to make it” (Exhibit S-8). The testifying witnesses were Professor Hellman, who identified that he had been “invited”. Of the two other witnesses, only Dr. Richard Cordero had requested to testify prior to August 27, 2007. Francis Knize, who was filming the “hearing”, had not.

It was clear, from the leisurely course of the “hearing”, that there were ample potential time slots for others wishing to be heard with respect to the rules. However, at the conclusion of the “hearing”, lasting a mere two hours, Judge Winter denied our reiterated request to testify concerning, “specifically the violations of the statute reflected in the rules with respect to merits related[ness]”, remarking that the comment period was open until October 15, 2007 (Exhibit S-8).

On October 15, 2007, we furnished our comments by a written statement (Exhibit T) – largely replicating the draft statement we had e-mailed on September 27, 2007, shortly before the hearing began, in further support our request to testify (Exhibits S-7, S-9). The most noteworthy difference in our October 15, 2007 statement was its assertion that “the highest echelons of the federal judiciary, including Judge Winter” were long knowledgeable of our advocacy and its focus (Exhibit T, p. 1). Nearly two pages of substantiating detail followed, identifying that CJA’s three judicial misconduct complaints documented Judge Winter’s flagrant disregard of disqualification/disclosure issues, his corruption of appellate and disciplinary processes, and that these three complaints – which we had long ago transmitted to the Administrative Office for presentment and action by the Judicial Conference – were “decisive guideposts in evaluating the Draft Rules” (Exhibit T, pp. 7-8).

Nine weeks later, on December 21, 2007, the federal judiciary’s website posted the “latest working draft” of the new rules implementing the 1980 Act, ostensibly for further “public comment”, but not in actuality.<sup>56</sup> Although this “working draft” was purported to reflect “the Committee’s efforts to respond to the comments received”, it corrected none of the fatal defects and other deficiencies pointed out by our October 15, 2007 statement (Exhibit T).

These fatal defects and deficiencies were continued in the Committee’s further draft, posted on the federal judiciary’s website on January 23, 2008, with a notice that the Committee had recommended its adoption by the Judicial Conference and did “not contemplate making any further changes” prior to the Judicial Conference considering it

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<sup>56</sup> Dr. Cordero has highlighted this and other deficiencies in a masterful submission to the federal judiciary on January 9, 2008, which we herein incorporate by reference.



on March 11, 2008”. A subsequent draft was nevertheless posted on or about February 25, 2008, reflecting “comments recently received from members of the Judicial Conference”. It, too, maintained the same fatal defects and deficiencies particularized by our October 15, 2007 statement.<sup>57</sup>

Thus, this final draft of the proposed rules affirmatively misrepresents that a complaint “must” be dismissed if it “is directly related to the merits of a decision or procedural ruling” (Rule 11(c)(1)(B), p. 24), and that its exclusion as “cognizable misconduct” [Rule 3(h)(3)(A), p. 11] “tracks the Act” [commentary to Rule 3(h)(3)(A), p. 14, Ins. 1-4]. This is untrue (pp. 22-25, 32-34, 52-54, 56-69, *supra*).

Further, as to non-“merits-relatedness”, proposed Rule 3(h)(3)(A) retains and even exacerbates language that can only confuse and discourage a would-be complainant – language repeating, largely *verbatim*, the Breyer Committee’s Standard 2 (p. 145) that we

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<sup>57</sup> None of the superseding posted drafts flagged any of the substantive changes made to earlier drafts. This has required interested parties to be burdened with the tedious and time-consuming task of comparing the successive drafts, line-by-line, to detect them. This has stymied further “public comment”. Indeed, Professor Hellman, the most prominent scholar and commentator on the proposed rules, himself missed a key change: the 180-degree reversal of the disqualification provision of the proposed Rule 25 relating to petitions for review. Thus, proposed Rule 25(c), entitled “Disqualification of Chief Circuit Judge on Consideration of a Petition for Review of a Chief Circuit Judge’s Order”, which was circulated in the 90-day public comment period and essentially replicated the 22 year-old Illustrative Rule 18(c) – as to which Professor Hellman’s September 27, 2007 written statement to the Committee had commented “Non-participation by the circuit chief judge is an important element of circuit council review of chief judge orders” – emerged from the Committee two months after the “public comment” period, as “Chief Judge Not Disqualified from Considering a Petition for Review of a Chief Judge’s Order”. No commentary explained this complete turn-around. [*See* fn. 43, *supra*]

The Committee could not have been unaware of the consequences of its failure to publicly identify this and other fundamental modifications of the originally circulated draft rules, as it could easily have done. Such failure certainly is not in keeping with the spirit of 28 U.S.C. §360, requiring that promulgated rules be the subject of “appropriate proper notice and an opportunity for comment”.

It would seem logical that the source for the dramatic reversal in Rule 25(c) is the federal judiciary itself. Likewise, the federal judiciary may be presumed to be the source of the backpedaling from the original draft rules’ potential for aggressive Committee monitoring, noted by Professor Hellman’s September 27, 2007 statement. As illustrative, Professor Hellman had noted (at p. 5) that: “Under Rule 8, copies of each complaint will be sent to the Conduct Committee upon filing”. This is now gone -- excised in the most recent and unexpected draft, as likewise the commentary that had explained the necessity of such transmittal. Professor Hellman had also noted that “Under Rule 18(c), when a complainant or subject judge petitions the circuit judicial council for review of a chief judge order dismissing the complaint or concluding the proceeding, the petition must be sent to the Conduct Committee, along with ‘*all materials obtained by the chief circuit judge in connection with the chief circuit judge’s inquiry.*’ (Emphasis added.)”. This has also been changed. Now only the petition for review is to be sent, unless a request is made by the Conduct Committee.

The federal judiciary is also presumably the source of many of the undercutting changes noted by Dr. Richard Cordero in his correspondence to the Chief Justice and the Judicial Conference.

had shown could be easily clarified simply by replacing the vague phrase “without more” for the specific phrase “absent an allegation of improper motive”. Indeed, all our suggestions as to how the rules might be clarified to provide meaningful guidance to both complainants and judges with respect to “merits-relatedness” and non-“merits-relatedness” were ignored.

Additionally, the final draft affirmatively misrepresents that “The Act makes clear that there is a barrier of confidentiality between the judicial branch and the legislative. It provides that material may be disclosed to Congress only if it is believed necessary to an impeachment investigation or trial of a judge.” (commentary to Rule 23, at p. 55, lns. 10-14). This is also untrue (see pp. 35-38, *supra*) – and our October 15, 2007 statement had not only pointed out that “the Commentary to Illustrative Rule 16 had acknowledged that the statutorily-required confidentiality ‘technically applies only in cases in which an investigatory committee has been appointed’”, but that this “candid admission...is gone from the Commentary to the Draft Rules.” (Exhibit T, p. 6).

Finally, proposed Rule 25 remains deficient in failing to require a chief circuit judge or his substitute to confront disqualification/disclosure issues. The necessity for such requirement was described at the close of our October 15, 2007 statement as follows:

“That a chief circuit judge can – and did – knowingly and deliberately disregard threshold disqualification/disclosure issues, as likewise a circuit judicial council – is established by what Committee Chairman Winter did, as Chief Judge of the Second Circuit, when [two] judicial misconduct complaints...came before him asserting his absolute disqualification for interest and the necessity that the complaints be transferred to a different circuit.<sup>[fn]</sup>

Nothing in Draft Rule 25 or in Draft Rule 26 ‘Transfer to Another Judicial Council’ (p. 45), as currently written, would prevent a repeat of the travesty and corruption of the Judicial Conduct and Disability Act that is manifested by the record of these judicial misconduct complaints, where Judge Winter, ignoring the disqualification/transfer issues, dumped the complaints by a knowingly false and conclusory February 9, 1998 order purporting they were ‘merits-related’ and, therefore, not cognizable under the Act – a deceit all the more egregious as he had just participated in the Second Circuit’s denial of a petition for *in banc* rehearing of the underlying ‘merits’ decision.<sup>[fn]</sup> The Second Circuit Judicial Council then put its imprimatur to Judge Winter’s brazen misconduct. In face of a petition for review that demonstrated, *inter alia*, that Judge Winter’s February 9, 1998 dismissal order had:

‘(1) failed to disclose facts bearing upon his lack of impartiality, as [was] his statutory *sua sponte* obligation under 28 U.S.C. §455(e) and his ethical obligation under Canon 3D of the Code of Conduct for U.S. Judges and Canon 3F of the ABA Code of Judicial Conduct;

(2) ignored, *without* any adjudication, the threshold issue of his disqualification for bias and self-interest, as *explicitly* presented by [the] complaints;

(3) ignored, *without* any adjudication, the threshold issue of the Circuit’s disqualification for bias and self-interest, also *explicitly* presented by [the] complaints; and

(4) flouted the directives of the Judicial Conference and National Commission on Judicial Discipline and Removal, as *explicitly* highlighted by [the] complaints, calling upon Chief Judges who dismiss §372(c) complaints to do so by non-conclusory orders which address ‘the substantive ambiguity’ of the 1980 Act and which build interpretive precedent.’ (April 3, 1998 petition for rehearing, pp. 1-2, italics in original),

the Second Circuit Judicial Council not only denied the petition for review, but did so ‘for the reasons stated in the order dated February 9, 1998.’” (Exhibit T, pp. 6-7).

## CONCLUSION

The thousands of judicial misconduct complaints filed under the Act by ordinary citizens – virtually 100% dismissed by chief circuit judges, without appointment of special committees to investigate – are the best evidence of how the federal judiciary has corrupted federal judicial discipline. This is why the federal judiciary, to impede oversight by Congress and the American Public, made them confidential. It is also why the Breyer Committee fashioned a “study” where citizens would not be interviewed or have the opportunity to testify about their complaints.

The Breyer Committee Report has not put forward a single complaint to support its claim that “chief judges and judicial councils are doing a very good overall job in handling complaints filed under the Act” (p. 107) and, by its own admission, has not evaluated the efficacy of “other formal mechanisms”, such as “recusals sua sponte or on motion under 28 U.S.C. §§144 & 455” and “appellate reversals aimed at improper judicial conduct” (p. 100). By contrast, this critique is substantiated by the three complaints CJA’s founders filed under the Act – in other words, by three more than the Breyer Committee has supplied – with each complaint arising from and showcasing the federal judiciary’s corrupting of the recusal and appellate “mechanisms” that the Breyer Committee has not examined.

Much as the Breyer Committee Report began by looking at “high-visibility” complaints, so too these three complaints are “high-visibility”, having been the focus of CJA’s vigorous public advocacy spanning a decade and a half. This includes our published article “*Without Merit: The Empty Promise of Judicial Discipline*” (Exhibit A-1, pp. 95-97), summarizing the historic origin and odyssey of the first complaint, going back to the National Commission on Judicial Discipline and Removal, in 1993.

The National Commission said that “absent a convincing demonstration of the inadequacy of the 1980 Act,” it would not recommend change (Exhibit A-1, pp. 95-96, Exhibit A-5, pp. 1-2). Our three complaints and the two cases from which they arise are more than a “convincing demonstration of the inadequacy of the Act”. They resoundingly prove the federal judiciary’s subversion of the Act, including the predicates for excluding “merits-related” complaints, *to wit*, recusal motions and appellate review.

Faced with this evidentiary proof, the federal judiciary’s highest echelons not only failed to meet their constitutional, statutory, and ethical responsibilities to take corrective action, but rewarded the judges whose corruption was evidentially proven. Among these, Judge Winter, who Chief Justice Rehnquist was obligated to have referred for disciplinary and criminal investigation and prosecution in 1998, if not in 1993, but who he instead appointed to chair the Executive Committee of the Judicial Conference in 1999 and to chair the Judicial Conference’s Committee on Judicial Conduct and Disability in 2004.

Talk about “putting the fox in charge of the hen-house”!

Judge Winter’s rise, in the face of CJA’s advocacy and three judicial misconduct complaints involving him, is itself a casestudy of the “institutional favoritism” the Breyer Committee Report purported to examine (p. 2). Such casestudy is all the more significant as the Justices’ personal and professional relationships with Judge Winter were encompassed by the September 23, 1998 application for their disqualification and disclosure (Exhibit E-2), which they ignored without adjudication, and by the October 14, 1998 improvised judicial misconduct complaint (Exhibit E-3), both underlying CJA’s November 6, 1998 complaint to the House Judiciary Committee for their impeachment (Exhibit D-2).

CJA’s website, [www.judgewatch.org](http://www.judgewatch.org), posts an archive of judicial misconduct complaints filed under the 1980 Act by CJA members and others, together with their correspondence to the federal judiciary, including to the Breyer Committee, seeking investigation and redress from the federal judicial corruption of which they have direct, first-hand experience and substantiating proof. Such posted documents further reinforce “the inadequacy of the 1980 Act” and the fraud on the public perpetrated by the Breyer Committee Report.