Testimony of Charles G. Geyh on H.R. 916:
Impeaching Manuel Real, a Judge of the District Court for the Central District of California for High Crimes and Misdemeanors

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My name is Charles G. Geyh. I am the John F. Kimberling Chair in Law at the Indiana University School of Law at Bloomington. I am the author of *When Courts & Congress Collide: The Struggle for Control of America's Judicial System (University of Michigan Press 2006),* and coauthor, (with Professors James Alfini, Steven Lubet, and Jeffrey Shaman) of the forthcoming fourth edition of *Judicial Conduct and Ethics (Lexis Law Publishing 2007).* I am currently co-Reporter to the ABA Joint Commission to Revise the Model Code of Judicial Conduct, and previously served as consultant to the National Commission on Judicial Discipline and Removal.

As described in the order and dissenting opinions in Complaint of Judicial Misconduct, 425 F.3d 1179 (2005), Judge Manuel Real allegedly gave preferential treatment to a litigant with whom he engaged in an inappropriate *ex parte* communication. These allegations raise legitimate issues of judicial misconduct. The issue, then, is not whether such allegations should be thoroughly investigated, but by whom, and to what end.

This hearing has been convened for the purpose of considering a resolution to impeach Judge Real. A brief survey of the history and precedent of judicial impeachments and their investigation by the House Judiciary Committee leads me to conclude that if Judge Real were found to have engaged in a quid pro quo, in which he offered a litigant preferential treatment in exchange for sexual favors or something else of value to the judge, the Committee could fairly conclude that he committed an impeachable offense. If, on the other hand, the most that can be shown is that Judge Real exhibited simple favoritism in an isolated case, unaccompanied by any quid pro quo, precedent and history suggest that the likelihood of impeachment and removal is extremely low. It was precisely because of cases like this, where the underlying facts are complicated and uncertain, and the nature of the judge's conduct, once ascertained, may not amount to a "high crime or misdemeanor," that in 1939, Congress began to search for ways to husband its scarce resources and spare itself time-consuming and often fruitless inquiries into garden-variety cases of judicial misconduct. That search culminated in The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, now codified at 28 U.S.C. §351, et seq., which established a system of judicial self-discipline. Some members of the Committee have expressed frustration with the Act and the judiciary's failure to police judicial misconduct adequately—a frustration I share. The solution, however, is to amend the Act to make it more readily enforceable—and not to revert to the long-abandoned practice of Committee impeachment investigations, which will sap Committee resources and create a risk of haphazard and idiosyncratic application of impeachment standards.

Like Professor Hellman, I conclude that the Committee should not proceed with an impeachment investigation until the Judicial Council of the Ninth Circuit has completed its investigation. It is possible that the Judicial Council will resolve the complaint against Judge Real in a manner satisfactory to the Committee, thereby obviating the need for the Committee to undertake a time-consuming investigation of its own. Even if the Committee concludes, on the basis of the Judicial Council's investigation, that an impeachment inquiry is warranted it will have the benefit of the Judicial Council's fact-finding and conclusions to supplement its work.

The Original Understanding of the Impeachments Clauses

The framers of the U.S. Constitution did not focus much attention on the judiciary and its accountability to the political branches, but to the extent they thought about it at all, what they thought about was the impeachment process. As Alexander Hamilton explained in Federalist 79:

> The precautions for [the judges'] responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives, and tried by the Senate; and, if convicted, may be dismissed from office, and disqualified for holding any other. This is the only provision on the point which is consistent with the necessary independence of judicial character, and the only one which we find in our own Constitution with respect to judges.

When delegates to the Constitutional Convention debated the impeachment clauses, however, they were not concerned primarily with judges, but with the president, and whether subjecting him to impeachment and removal at the hands of Congress (they considered and rejected lodging the impeachment power with the Supreme Court and the state legislatures) was unnecessary, given that he was already subject to "removal" in periodic elections, or undesirable, insofar as it would create a dependency of the second branch on the first.

Apart from sporadic acknowledgment that judges would be subject to impeachment procedures,[1] Madison's notes of the Convention debates make meaningful reference to judicial impeachment only once—and even then, as a foil for distinguishing presidential impeachment. On July 20, 1787, Rufus King argued that judges but not presidents should be subject to removal by impeachment:

> It had been said that the Judiciary would be impeachable. But it should have been remembered at the same time that the Judiciary hold their places not for a limited time, but during good behaviour. It is necessary therefore that a forum should be established for trying misbehaviour. Was the Executive to hold his place during good behaviour? – The Executive was to hold his place for a limited term like the members of the

[1] *See, e.g.*, James Madison, Notes (August 20, 1787) in 2 FARRAND, *supra* note 29, at 344 (motion of Elbridge Gerry requesting that "the Committee be instructed to report . . . a mode of trying [the Supreme] Judges [in cases of] impeachment"); *id.* at 524 (statement of Gouverneur Morris alluding to the Senate's power to try the impeachment of judges in earlier and later drafts).

> Legislature. Like them . . . he would periodically be tried for his behaviour by his electors, who would continue or discontinue him in trust according to the manner in which he had discharged it. Like them therefore, he ought to be subject to no intermediate trial, by impeachment. He ought not to be impeachable unless he hold his office during good behavior. . . .[2]

Implicit in King's observation is the hint of an underlying consensus on the need for judicial—as distinguished from presidential—impeachment. As to the behaviors for which a judge could be held accountable in the impeachment process, however, relevant discussion of impeachable offenses occurred almost exclusively in the context of debates on presidential impeachment. One somewhat elliptical exception occurred when Charles Pinckney proposed the creation of a Council of State to be comprised of specified officers, including the chief justice, each of whom, Pinckney asserted, "shall be liable to impeachment & removal from office for neglect of duty malversation, or corruption."[3] Otherwise, on July 20, the Convention approved a preliminary proposal subjecting the president to removal by impeachment for "mal-practice or neglect of duty."[4] Randolph argued that an impeachment mechanism was necessary to remedy the president's "great opportunitys of abusing his power."[5] Gouverneur Morris opined that "the Executive ought . . .to be impeachable for treachery; Corrupting his electors, and incapacity were other causes of impeachment."[6] Bedford, however, worried that "an impeachment would reach misfeasance only, not incapacity" and urged the inclusion of some means to remove a president for senility and insanity.[7]

Toward the end of the Convention, it was proposed that impeachable offenses be limited to treason and bribery.[8] On September 8, George Mason moved to add "maladministration" to the list, arguing: "Attempts to subvert the Constitution may not be Treason," yet should be impeachable.[9] James Madison opposed Mason's motion, arguing that so vague a standard for impeachment would "be equivalent to a tenure during pleasure of the Senate."[10] As a compromise, Mason amended his motion without further explanation, substituting language that subjected civil officers to impeachment for "other high crimes & misdemeanors."[11]

The implication would seem to be that the phrase "high crimes & misdemeanors" was understood to reach "attempts to subvert the constitution" but not reach so far as to establish "tenure during pleasure of the Senate." In a number of respects, the drafters of the Constitution put a "uniquely American stamp"[12] on the impeachment process they

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[2] James Madison, Notes (July 20, 1787) *in* 2 *id.*, at 66-67.

[3] James Madison, Notes (August 20, 1787) *in* 2 *id.*, at 344.

[4] James Madison, Notes (July 20, 1787) *in* 2 *id.*, at 64.

[5] James Madison, Notes (July 20, 1787) *in* 2 *id.*, at 67.

[6] James Madison, Notes (July 20, 1787) *in* 2 *id.*, at 69.

[7] James Madison, Notes (June 1, 1787) *in* 1 *id.*, at 69.

[8] *See* Journal (Sept. 4, 1787), *in* 2 *id.*, at 493, 493. This debate took place in the context of executive impeachment, but the clause the delegates were crafting was to apply to all civil officers of the United States.

[9] *See* James Madison, Notes (Sept. 8, 1787), *in* 2 *id.*, at 547, 550.

[10] *Id.*

[11] *Id.*

[12] MICHAEL GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 10 (2nd Ed. 2000).

devised, but "high crimes & misdemeanors" had English antecedents that imbued the phrase with a preexisting meaning, as Michael Gerhardt explains:

> [I]n the English experience prior to the drafting and ratification of the Constitution, impeachment was considered a political proceeding, and impeachable offenses were political crimes. For instance, Raoul Berger found that the English practice treated "[h]igh crimes and misdemeanors as *political* crimes against the state." . . . In England, the critical element of injury in an impeachable offense was injury to the state. The eminent legal historian, Blackstone, traced this peculiarity to the English law of treason, which distinguished "high" treason, which was disloyalty against some superior, from "petit" treason, which was disloyalty to an equal or inferior. According to Arthur Bestor, "[t]his element of injury to the commonwealth — that is, to the state and its constitution — was historically the criterion for distinguishing a 'high' crime or misdemeanor from an ordinary one."[13]

Consistent with Gerhardt's summary, Alexander Hamilton, writing in The Federalist, declared that impeachment was an appropriate remedy for "the misconduct of public men" taking the form of an "abuse or violation of some public trust" that "may with peculiar propriety be denominated *political.*"

On September 14, the Convention fended off one final attempt to expand Congress's impeachment power over the president. Rutlidge and Gouverneur Morris moved "that persons impeached be suspended from their office until they be tried and acquitted." Madison's objection, however, won the day and the motion was defeated:

> The President is made too dependent already on the Legislature, by the power of one branch to try him in consequence of an impeachment by the other. This intermediate suspension, will put him in the power of one branch only. They can at any moment, in order to make way for the functions of another who will be more favorable to their views, vote a temporary removal of the existing magistrate.[14]

Although the Convention fixated on presidential not judicial impeachment, the provisions they devised were unitary and applicable to each. The Convention's efforts to limit the impeachment power so as to protect the president from becoming overly dependent on Congress thus served equally (if serendipitously) to benefit the judiciary's independence.

The founders' fixation on Presidential impeachment complicates attempts to divine the scope of impeachable crimes and misdemeanors as they apply to judges. Clearly, their concerns ran to something more than indictable crimes; their focus was on misconduct, such as subversion of the Constitution, treachery and corruption that violated

[13] *Id.* at 103-04.

[14] *See* James Madison, Notes (Sept.14, 1787), *in* 2 Farrand, *supra* note 29, at 612, 612.

the public's trust in some important way, regardless of whether it was separately indictable.

Against that backdrop, it would seem that a judge who gave preferential treatment to litigants in exchange for anything of value to the judge (such as sexual favors) would be engaging in a form of "corruption" that the founders would characterize as an abuse of the public trust and an impeachable crime. There is, however, no clear evidence to indicate that anything so extreme occurred in Judge Real's case, and whether lesser forms of bias or favoritism would qualify as impeachable offenses in the framers' minds is difficult to determine.

The Impeachment Precedents

With impeachment as the primary means by which to curb judicial misconduct, the question arose early and often as to the kinds of misbehavior for which judges could be impeached. The founding generation left a limited number of clues. Most obvious is the text of the impeachment clause itself: Judges, as a subset of "civil officers," are subject to impeachment for "treason, bribery, and other high crimes and misdemeanors." The meaning of treason and bribery seems clear enough as long as we don't get down to close cases, but what of "high crimes and misdemeanors"? As just noted, from the perspective of those who drafted the Constitution, "high crimes and misdemeanors" was a more precise impeachment standard than "maladministration," which they considered and rejected as overly broad and susceptible to excessive manipulation by the Senate. Although "high crimes and misdemeanors" might not appear to possess an intrinsic meaning any more narrow or plain than "maladministration," the drafters were not writing on a clean slate with only a dictionary to guide them. Impeachment was a process they imported from England, where impeachable conduct had been confined to political offenses against the state and characterized as "high crimes."[15]

Separate and distinct from the forms of misbehavior that are subject to impeachment is the question of severity: How serious must a "political" offense be to qualify as a "high . . . misdemeanor"? Since Article III limited judicial tenure to service during "good behaviour," one possibility would be to set the threshold for an impeachable misdemeanor at any behavior that is less than "good." There are, however, some behaviors — such as senility — that may be less than good but cannot easily be characterized as "misdemeanors," a term which implies bad motives or blameworthiness. That, in turn, suggests that there may be a gap between the floor of "good behavior" and the ceiling of an impeachable "misdemeanor." The same may be said of venial misbehavior, which may not be "good" but would not necessarily constitute "high . . . misdemeanors." The breadth of that gap, if one existed, was another aspect of the scope of impeachable offenses that experience would need to fill.

For the summary of judicial impeachment proceedings described below, I rely heavily on Emily Field Van Tassel & Paul Finkleman, *Impeachable Offenses: A Documentary History From 1787 to the Present* (1999).

Judges Removed: The House has impeached and the Senate convicted a total of seven judges:

[15] MICHAEL GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 109-10 (2nd ed. 2000).

• In 1804, District Judge John Pickering was impeached and removed for insanity (notwithstanding that the articles of impeachment ostensibly focused on the arbitrariness of his decisions in an isolated case)[16].

• In 1862, District Judge West Humphreys was impeached and removed for desertion.

• In 1913, Commerce Court and District Judge Robert Archbald was impeached and removed for abusing his position by entering into business relationships with prospective litigants, under circumstances that implied a quid pro quo.

• In 1936, District Judge Halsted Ritter was impeached and convicted on an omniubus charge of bringing the court into "scandal and disrepute," in light of other specific charges (for which he was acquitted) that he received kickbacks for appointing a former law partner as a receiver, and continued to practice law as a sitting judge.

• In 1886, District Judge Harry Claiborne was impeached and removed for tax evasion

• In 1989, District Judge Alcee Hastings was impeached and removed for soliciting a bribe.

• In 1989, District Judge Walter Nixon was impeached and removed for perjury.

Judges Impeached but not Removed: In addition to those removed upon conviction in the Senate, the House has impeached six other judges, whom the Senate acquitted or who resigned before their Senate trial:

• In 1805, the House impeached but the Senate acquitted Supreme Court Justice Samuel Chase for abusing his power in several cases.

• In 1830, the House impeached but the Senate acquitted District Judge James Peck for abusing his contempt power

• In 1873, District Judge Mark Delahay resigned after his impeachment in the House for drunkenness.

• In 1905, the House impeached but the Senate acquitted District Judge Charles Swayne, for a range of alleged misconduct, from overstating his travel expenses and accepting gifts from litigants to living outside his judicial district and abusing his contempt power.

• In 1926, District Judge George English resigned after his impeachment for misbehavior that ranged from misusing bankruptcy funds for private gain, abusing administrative powers over admission to practice before the court, to exhibiting favoritism in appointing bankruptcy receivers to obtain personal advantage, and being generally tyrannical.

[16] CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 125-31 (2006).

• In 1933, District Judge Harold Louderback was impeached and acquitted of charges that he exhibited favoritism in the appointment of incompetent bankruptcy in an effort to enrich his friends.

Judges Investigated, but Neither Impeached Nor Removed: The House has investigated at least 78 judges over time (including the thirteen that the House ultimately impeached). A total of 148 known charges have been leveled against those 78 judges, and it may be useful for the Committee to see the range of conduct that has provoked impeachment inquiries over the years:[17]

• thirty two charges concerned abuse of judicial power (judges who allegedly made outrageous judicial rulings that disregarded the law);

• nineteen charges concerned abuse of administrative power

• fifteen charges concerned favoritism or bias

• fourteen charges concerned misuse of office for financial advantage

• thirteen charges concerned demeanor on the bench

• thirteen charges concerned solicitation of bribes or favors

• eleven charges related to nonperformance or incompetent performance

• ten charges concerned non-judicial misconduct

• eight charges related to the misuse of government funds

• thirteen charges related to other, miscellaneous misconduct, ranging from disloyalty, moonlighting and insanity, to failure to reside within the judicial district and omnibus claims of unfitness.

Surveying applicable precedent, no judge has been removed for an isolated act of simple favoritism (as distinguished from bribery or other more extreme acts of favoritism featuring quid pro quo, at issue in the cases of Alcee Hastings and Robert Archbald). Favoritism in the appointment of bankruptcy receivers featured prominently in the impeachment of Judge Harold Louderback and to a lesser extent in the impeachment of George English, but in each case a quid pro quo for the benefit of preexisting friends was at issue; moreover, in Louderback's case he was ultimately acquitted, and for George English, favoritism was but one of many charges that led him to resign. The charges against James Peck included an element of bias (the alter-ego of favoritism): The judge was accused of abusing his judicial power by holding a lawyer in contempt for criticizing the judge in the press, but the primary question there was whether a judge who made a high-handed judicial ruling committed an impeachable offense, and Peck's acquittal, coupled with prior and subsequent precedent suggests that the answer is no.[18] A total of fifteen judges have been investigated over the years for favoritism and bias. In every one

[17] For a tabulated summary of these investigations, see Charles Gardner Geyh, When Courts & Congress Collide: The Struggle for Control of America's Judicial System 120-25 (2006).

[18] Charles Gardner Geyh, When Courts & Congress Collide: The Struggle for Control of America's Judicial System 113-70 (2006).

of those cases, however, charges of favoritism have been accompanied by other accusations.

In short, the impeachment precedents reveal that favoritism exhibited in the context of quid pro quo arrangements, in which a judge gives preferential treatment to litigants or others for the benefit of the judge, smacks of impeachable corruption. Making decisions—administrative or judicial—as a means to improve the lot of relatives or friends would fall into this category. On the other hand, an isolated act of bias or favoritism that is neither part of a pattern nor the product of a corrupt quid pro quo has not been insufficient by itself to trigger serious impeachment efforts. The judge who, over the course of a matter, loses his impartiality, fails to disqualify himself, and renders decisions for or against a party out of favoritism or animus, would seem to fall into this category. To date, none of the facts adduced in Judge Real's case indicate a quid pro quo, although further investigation could conceivably reveal otherwise. It is precisely because Congress has been loath to bring the cumbersome impeachment machinery to bear in such cases that, beginning in 1939, it has depended increasingly on the judiciary to regulate itself.

Judicial Self-Regulation

In the Administrative Office Act of 1939, Congress established circuit judicial councils and empowered them to act in furtherance of effective and expeditious judicial administration, and in 1948 it amended the Act to state that the councils "shall make all necessary orders for the effective and expeditious administration of the business of the courts," and that " the district courts shall promptly carry into effect all orders of the judicial council."[19] During that time, Congress discontinued the 150 year old practice of independently investigating allegations of judicial misconduct, effectively ceding the task of initial investigation to the judicial councils and (in cases of criminal misconduct) the Department of Justice. By 1980, however, there was widespread concern that a significant volume of judicial misconduct was going unaddressed;[20]the limits of circuit council authority to impose discipline remained unclear, and a consensus emerged that some mechanism for judicial discipline short of impeachment needed to be devised. And so, Congress passed the Judicial Councils Reform, Judicial Conduct and Disability Act of 1980, which established the disciplinary mechanism in place today.[21]

During the 1980s, Congress impeached and removed three district judges. The process was cumbersome and time-consuming, and led to agitation for further reform. In 1990, Congress created the National Commission on Judicial Discipline & Removal, and in 1993 the Commission issued its report, which concluded that: "The Commission's analysis of experience under the 1980 Act and other formal mechanisms of discipline within the judicial branch reveals that existing arrangements are working reasonably well."[22]

Our current disciplinary regime contemplates that rank and file allegations of judicial misconduct will be initially investigated by the chief judge and the judicial council of the circuit courts. In this case, the Ninth Circuit Judicial Council's investigation into the Real matter is ongoing. It is entirely possible that after a thorough

[19] 28 U.S.C. 332.
[20] Charles Gardner Geyh, *Informal Methods of Judicial Discipline,* 142 U. Pa. L. Rev. 243, 243 (1993).
[21] 28 U.S.C. 351 et seq.
[22] Report of the National Commission on Judicial Discipline & Removal 6 (1993)

investigation, the Judicial Council will resolve the complaint against Judge Real in a manner satisfactory to the Committee. If the Judicial Council's resolution of the matter is, in the Committee's view, inadequate, the Committee may initiate its impeachment investigation then—an investigation that will be better informed by the results of the judicial council's inquiry. The judiciary is far larger today than it was a century ago; it is unrealistic to hope that the Committee can police judicial misconduct as it once did. To return to the practice of investigating garden-variety episodes of judicial misconduct will over-tax the Committee and inevitably lead to unsystematic and ultimately inadequate enforcement. Like Professor Hellman, I urge the Committee to stay its investigation pending the outcome of the Ninth Circuit's inquiry.

Judicial Discipline Reform

Explanations offered for H.R. 916 suggest that the resolution is strategically designed to send a message to the judiciary that if it does not police itself, Congress will reassert its authority to regulate judicial misconduct. This message is born of an understandable frustration with the Ninth Circuit Judicial Council's reluctance to investigate the complaint against Judge Real.

When the National Commission on Judicial Discipline and Removal issued its Report in 1993, its conclusion that the disciplinary system was working "reasonably well" was justified. That same year, I applauded the judiciary's informal resolution of disciplinary matters as an effective means to address misconduct that rendered frequent formal enforcement unnecessary.[23] In the intervening decade, however, circumstances have changed. Judges have come under attack from both sides of the political aisle and public confidence in the courts is in a state of flux.[24] The infrequency of formal judicial self-discipline has aroused suspicion among members of the House Judiciary Committee and the general public, and informal enforcement, almost by definition, occurs outside of public view.[25] In 1993, It has become increasingly clear that there is a value served by making policy-makers, the press and public better aware of the disciplinary activities that the federal judiciary undertakes. Vigilant and visible self-enforcement of the judicial discipline statute is one way for the judiciary to promote public confidence in the courts—and forestall resort by Congress to more draconian methods of court control that could undermine the judiciary's independence.

In this case, the Judicial Council's approach to the investigation of Judge Real has been less vigilant and visible than grudging, which gives the Committee understandable cause for concern, and renders the Committee's proposed inquiry into the conduct of Judge Real understandable. As discussed above, I think that an impeachment inquiry at this juncture is premature and ill-advised. If the problem lies with the disciplinary process, the Committee should explore further reform of the disciplinary process.

A core failure of the existing disciplinary regime in the federal courts is the hopelessly vague standard that it brings to bear in disciplinary actions. Under the statute, judicial conduct is assessed with reference to whether it is prejudicial to the

[23] Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243 (1993).
[24] Charles Gardner Geyh, When Courts & Congress Collide: The Struggle for Control of America's Judicial System 3-4 (2006).
[25] *Id.* at 254.

administration of justice. So general a standard offers no clear guidance as to what does or does not constitute misconduct, and contributes to non-enforcement, because judicial councils are understandably reluctant to impose sanctions on judges for conduct that the judges may not know violates the statute.

There is an easy and obvious solution. The American Bar Association has a Model Code of Judicial Conduct, some variation of which has been adopted by virtually every judicial system in the United States, including the federal judiciary n its Code of Conduct for United States Judges. In almost every state, the disciplinary process is tethered to the Code of Conduct, which provides judges with detailed and explicit guidance as to conduct that is permitted, required and forbidden: When a judge is disciplined, the disciplinary authority will cite the specific provision of the Code that the judge violated.

Unfortunately, the federal judiciary has resisted linking its Code to the disciplinary process. One study found that the Code was referenced in only 3% or federal disciplinary actions, and the Code of Conduct for U.S. Judges explicitly divorces the Code from discipline. It is laudable that the federal judiciary encourages ethical conduct among its judges by inviting them to inquire into the appropriateness of their conduct under the Code without the specter of discipline hanging over their heads. But nothing forecloses the judicial conference from continuing to employ a committee that provides such advice on a confidential basis at the same time as the judicial councils utilize the Code for disciplinary purposes. Indeed, this bifurcation of responsibility—with one judicial entity offering advice about the Code on request, and another using the Code in disciplinary actions—is common practice among the state systems, and works quite well.

Judge Real's case exemplifies the problem. It is virtually stipulated that Judge Real engaged in an ex parte contact with a probationer. And yet the circuit council concluded that this aspect of the judge's conduct had been remedied by judicial review, thus obviating the need for disciplinary action. Such a conclusion ought to be unacceptable. The appellate court's order corrected the legal error the judge committed as a consequence of his inappropriate ex parte communication but did nothing to address the ethical impropriety of the communication itself. A simple application of the Code yields a clear answer: Canon 3A(4) declares that "a judge should . . . neither initiate nor consider ex parte communications on the merits, or procedure affecting the merits, of a pending or impending proceeding." Insofar as Judge Real engaged in an ex parte communication concerning a procedure affecting the merits of a proceeding, the communication ran afoul of the Code. The only question is what the sanction should be. The Code likewise includes guidance relevant to favoritism: Canon 2B states that a judge "should not allow family, social, or other relationships to influence judicial conduct or judgment." More generally, Canon 1 provides that a judge "should uphold the integrity and independence of the judiciary," the accompanying commentary to which explains that "The integrity and independence of judges depend . . . upon their acting without fear or favor." Whether Judge Real exhibited favoritism is a question of fact that a thorough investigation needs to explore, but if favoritism is found, the issue of whether such conduct is improper is once again easily answered by the Code.

The Judicial Conference could make its Code of Conduct for U.S. Judges applicable to disciplinary proceedings without enabling legislation by Congress. Alternatively, Congress could revise the disciplinary statute to link conduct prejudicial to

the administration of justice to the specific provisions of the Code. I see no separation of powers impediment to such a move, insofar as the judiciary retains control over the terms of the Code itself. If this change is made by the Conference or Congress, some hortatory language in the Code would need to be changed to mandatory. And some provisions would need to be revised: for example, the discipline statute properly exempts from its scope matters related to the merits of a dispute, and some provisions of the existing Code (such as Canon 3A(1), which instructs judges to "be faithful to . . . the law") may be closely intertwined with the merits of disputes. Such an effort, however, is well worth the time it takes, because it will ensure a more meaningful framework for disciplining judicial misconduct. Frivolous complaints can be dismissed as quickly as before, while more serious complaints can be investigated and resolved more systematically, fairly, and efficiently.