**Statement of**

**Arthur D. Hellman**
*Sally Ann Semenko Endowed Chair*
*University of Pittsburgh School of Law*

**House Committee on the Judiciary**
**Subcommittee on Courts, the Internet and Intellectual Property**

**Hearing on**

**H. Res. 916**

**Impeachment of Manuel L. Real**

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Arthur D. Hellman
University of Pittsburgh School of Law
Pittsburgh, PA 15260
Telephone: 412-648-1340
Fax: 412-648-2649
E-mail: hellman@law.pitt.edu

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Mr. Chairman, Ranking Member Berman, and Members of the Subcommittee:

Thank you for inviting me to express my views at this hearing on H. Res. 916, "Impeaching Manuel L. Real, judge of the United States District Court for the Central District of California, for high crimes and misdemeanors."

According to the public record, the essence of the alleged misconduct is that Judge Real received an ex parte communication from a litigant and, based on that communication, engaged in "a raw exercise of power" that caused serious harm to that litigant's adversary. In my view, the accusations against Judge Real, if substantiated, could provide an adequate basis for impeachment and removal from office. However, a Special Committee has been appointed – belatedly – under Chapter 16 of the Judicial Code to investigate the alleged misconduct. I believe that the preferable course of action for the House (and this Subcommittee as its agent) is to suspend proceedings on H. Res. 916 until the Special Committee has completed its work and the Judicial Council and/or the Judicial Conference of the United States have acted upon its report. If the investigation by the Special Committee substantiates the allegations of misconduct against Judge Real, but the Judicial Council and the Judicial Conference fail to impose suitable punishment, the House will be able to proceed with impeachment on a much stronger footing than it could do today.

Before elaborating on these points, I will say a few words by way of personal background. I am a professor of law at the University of Pittsburgh School of Law, where I was recently appointed as the inaugural holder of the Sally Ann Semenko Endowed Chair. I have been studying the operation of the federal courts for more than 30 years. During that period, I have written numerous articles, books, and

book chapters dealing with various aspects of the federal judicial system. Of particular relevance to the present resolution, I testified at a hearing of this Subcommittee in November 2001 on "Operation of the Judicial Misconduct Statutes." Subsequent to that hearing, Chairman Coble, joined by Ranking Member Berman, introduced the bipartisan Judicial Improvements Act of 2002, which became law as part of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273.

## I. The Alleged Misconduct

At the outset, I emphasize that I have no first-hand information about the alleged misconduct by Judge Real. Moreover, we have not yet heard from the Special Committee which, by Act of Congress, is the body designated to investigate such allegations. But this Subcommittee has an extensive public record to draw on, and based on that record, I believe that the nub of the allegations can be found in the order issued by the Judicial Council of the Ninth Circuit remanding the matter to the Chief Judge of the Circuit:

> [Judge Real] withdrew the reference in a bankruptcy case that was not previously assigned to him, and entered an order in that case based upon information he obtained ex parte from an individual who benefitted [sic] directly from that order.[1]

The individual who benefited from Judge Real's order was Deborah Canter. Ms. Canter was the debtor in the bankruptcy proceeding; she was also a federal criminal defendant whose case was pending before Judge Real. Judge Real had placed Ms. Canter on probation after she pled guilty to four counts of false

[1] In re Complaint of Judicial Misconduct, No. 03-89037 (Judicial Council of the Ninth Circuit, Dec. 18, 2003), reprinted in In re Complaint of Judicial Misconduct, 425 F.3d 1179, 1201 (Judicial Council of the Ninth Circuit, 2005) [hereinafter Judicial Council Order]. It is noteworthy that the Judicial Council's remand order was not itself published in the Federal Reporter.

statements and loan fraud. The order in question enjoined a judgment of the California state court that required Ms. Canter to vacate the house in which she and her husband had lived until they separated.

A somewhat more detailed – but still concise – account can be found in Judge Kozinski's opinion dissenting from the order of the Ninth Circuit Judicial Council affirming the dismissal of the complaint. Judge Kozinski provides, in essence, a bill of particulars with respect to the alleged misconduct. It is as follows:

> First, [in withdrawing the reference to the bankruptcy court and entering the order that stayed the eviction, Judge Real] acted based on information he obtained from the party [who benefited from] his orders, without disclosing this to the opposing parties or giving them an opportunity to correct any misstatements or exaggerations that may have been made to him in private. ...
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> Second, [Judge Real] withdrew the bankruptcy reference without any legal justification, for no reason other than to benefit the debtor by blocking her eviction [from the house that she had been ordered by the state court to vacate]. ...
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> Third, [Judge Real] acted without notice, in direct contravention of Fed.R.Civ.P. 65(a)(1) which states in categorical terms, "No preliminary injunction shall be issued without notice to the adverse party." ...
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> Fourth, [Judge Real] failed to heed the other explicit procedures applicable to the issuance of an injunction, such as the requirements of a bond and a clear statement of reasons, see Fed.R.Civ.P. 65(c), (d), all of which are designed to provide transparency for purposes of appellate review and otherwise protect the interests of the party against which an injunction is entered. This was twice pointed out to the judge by the creditors in their motions for reconsideration, with no effect whatsoever.
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> Fifth, [Judge Real] acted without even colorable legal authority. To this day, I am unaware of any conceivable legal basis the district judge might have had for enjoining the state court judgment and keeping the debtor in the Highland Avenue property at the expense of the Trust. Throughout these lengthy proceedings, the judge has offered nothing at all to justify his actions ... By his silence, [he] has implicitly acknowledged

> that his orders were a raw exercise of power, unsupported by any authority other than that of his commission. ...
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> Sixth, [Judge Real caused the Trust] serious harm ... through his improvident actions. Not only was it forced to host the debtor on its property rent-free for years--at a cost estimated by the court of appeals at $35,000--but it also had to spend money on lawyers to bring two motions for reconsideration and a mandamus petition in the court of appeals.[2]

In short, the allegation (and I emphasize that it is an allegation, not a statement of fact) is that Judge Real received an ex parte communication from a litigant and, based on that communication, engaged in "a raw exercise of power" that caused serious harm to that litigant's adversary.

## II. The Road to H. Res. 916

Judge Real's alleged misconduct took place six years ago. In August 2002, the Ninth Circuit Court of Appeals vacated the withdrawal of reference as well as the stay order.[3] That would probably have been the end of the matter – except that in the course of his lengthy career on the bench, Judge Real had made an implacable enemy, a Los Angeles attorney named Stephen Yagman.

In February 2003, Yagman filed a misconduct complaint against Judge Real under 28 USC § 351(a). The complaint alleged that Judge Real acted for inappropriate personal reasons in placing a "comely" female criminal defendant on probation "to himself, personally," and in withdrawing the reference in the bankruptcy proceeding of this probationer in order to "benefit an attractive female."[4] The Chief Judge of the Ninth Circuit, Mary M. Schroeder, conducted an inquiry into the accusations. On July 14, 2003, the Chief Judge filed an order

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[2] Judicial Council Order, 425 F.3d at 1194-95 (Kozinski, J., dissenting).

[3] In re Canter, 299 F.3d 1150 (9th Cir. 2002).

[4] See Judicial Council Order, 425 F.3d at 1180.

dismissing the complaint. In an accompanying memorandum, she stated that: (a) her inquiry "had not substantiated the conclusory charges of any inappropriate personal relationship between the judge and the defendant/debtor;" and (b) the withdrawal of bankruptcy jurisdiction was related to the merits of a judicial decision and thus was not cognizable under the misconduct statute.[5]

Yagman petitioned the Judicial Council of the Ninth Circuit for review of this order. The Judicial Council carried out its own inquiry.[6] Based on that inquiry, the Council issued an order vacating Chief Judge Schroeder's dismissal order and remanding the matter to the Chief Judge "for further proceedings consistent with our order." In response, Chief Judge Schroeder directed that a further inquiry be conducted. Based on that inquiry, she reached two conclusions:

> [Yagman's] factual allegations of an inappropriate personal relationship, and the Judicial Council's concerns about secret communications having occurred between [Judge Real and Ms. Canter] , are not reasonably in dispute within the meaning of 28 U.S.C. § 352(a).
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> [The] unlawful filing of and references to a confidential pre-sentence report in [Ms. Canter's] bankruptcy proceedings constituted a legitimate basis for [Judge Real's] initial assumption of jurisdiction in the bankruptcy case sufficient to preclude a finding of judicial misconduct.[7]

Thus, the complaint was again dismissed – and, once again, Yagman petitioned for review of the order of dismissal. This time the Council found that

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[5] See In re Charge of Judicial Misconduct, No. 03-89037 (Nov. 4, 2004) (Schroeder, Chief Judge) at 2-3 (summarizing memorandum of July 14, 2003) [hereinafter Supplemental Order].

[6] In my view, the Judicial Council should not have undertaken its own inquiry at that point in the proceedings. If the Council believed, as apparently it did, that there were factual issues that remained unresolved, it should have directed the Chief Judge to appoint a Special Committee. The statute authorizes the Council to "conduct ... additional investigation" after receiving a report from a Special Committee, but it does not authorize investigation as part of the process of reviewing a dismissal. See 28 USC § 354(a)(1)(A).

[7] Supplemental Order, supra note 5, at 6.

"appropriate corrective action has been taken in this case." It therefore affirmed the order of dismissal.[8] Three members of the Council dissented. The most extensive dissent was by Judge Kozinski. Judge Kozinski concluded that "serious misconduct has been clearly established and discipline must be imposed consisting of nothing less than a public reprimand and an order that the district judge compensate the Trust for the damage it suffered as a result of the judge's unlawful injunction."[9]

Although Chapter 16 appears to preclude further review of a Judicial Council decision ratifying an order of dismissal, Yagman nevertheless sought review by the Judicial Conference of the United States. The Conference referred the matter to its Committee to Review Circuit Council Conduct and Disability Orders.[10] By a divided vote, the Committee concluded that "under the scheme of the statute, this Committee has no jurisdiction to review a judicial council's order if the chief judge has not appointed a special committee under 28 U.S.C. § 353."[11]

Judge Ralph K. Winter, joined by Judge Carolyn R. Dimmick, filed a vigorous dissent. The dissenters argued that the jurisdiction of the Conference should be determined by "looking beyond the form of the proceedings to their

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[8] Judicial Council Order, 425 F.3d at 1181-82. Technically, Chapter 16 does not provide for "affirmance" of a Chief Judge's order dismissing a complaint. Section 352(c) of Title 28 authorizes "[a] complainant or judge aggrieved by a final order of the chief judge" under section 352 to "petition the judicial council of the circuit for review thereof." The statute goes on to say: "The *denial* of a petition for review of the chief judge's order shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." (Emphasis added.) The implication is that if the Judicial Council finds the appeal to be without merit, it should deny the petition for review, not affirm.

[9] Judicial Council Order, 425 F.3d at 1199 (Kozinski, J., dissenting).

[10] This delegation is authorized by 28 USC § 331 (fourth paragraph).

[11] In re Opinion of Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, 449 F.3d 106, 109 (United States Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, 2006).

substance," and that under that approach the Conference (and its Committee) did have jurisdiction. They concluded that "the proceeding should be returned to the Judicial Council for the Ninth Circuit with directions to refer it to the Chief Circuit Judge for the appointment of a special committee under Section 353."[12]

The Judicial Conference Committee order was issued on April 28, 2006. On May 23, 2006, Chief Judge Schroeder appointed a Special Committee to investigate Judge Real's conduct.[13] According to newspaper accounts, the Special Committee held a hearing on August 21, 2006. I understand that another hearing has been scheduled for November.

Meanwhile, on July 17, 2006, Chairman Sensenbrenner introduced H. Res. 916, "Impeaching Manuel L. Real, judge of the United States District Court for the Central District of California, for high crimes and misdemeanors." Chairman Sensenbrenner cautioned his colleagues and others "not to jump to any conclusions in this matter." He added:

> Today's resolution merely allows the House Judiciary Committee to open an investigation to determine the facts. Only after the House Judiciary Committee has conducted a fair, thorough, and detailed investigation, will committee members be able to consider whether Articles of Impeachment might be warranted.

Thereafter, the resolution was referred to this Subcommittee. That referral is the subject of the hearing today.

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[12] Id. at 116-17.

[13] Technically, the order of May 23 did not direct the special committee to investigate the allegations contained in the original complaint against Judge Real; rather, it initiated an investigation of two later complaints. But Chief Judge Schroeder stated explicitly that the investigation "should cover all matters reasonably within the scope of the 'facts and allegations' of complaint No. 05-89097 including the nature and extent of any ex parte contact with [Judge Real], as well *as any related matters raised by the Judicial Council in its remand to me after my first dismissal of [the initial complaint against Judge Real*]." (Emphasis added.)

## III. The Constitutional Framework

The starting-point for consideration of H. Res. 916 is of course the Constitution of the United States. Four provisions of the Constitution are relevant.

The first is the judicial tenure provision of Article III. Section 1 of Article III provides:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.[14]

Implicitly, this language is supplemented by Article II section 4:

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

It has been accepted at least since the early 19th century that federal judges are included among the "civil Officers" who are subject to impeachment and removal under Article II.[15]

Finally, the process of impeachment is governed by Article I. Section 2 of Article I provides: "The House of Representatives ... shall have the sole power of impeachment." Section 3 adds:

> The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be convicted without the concurrence of two thirds of the members present.

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[14] In this statement I shall use the modern spelling of "behavior."

[15] See Joseph Story, Commentaries on the Constitution § 402 (1833) (1987 reprint, ed. Rotunda). Story wrote: "All officers of the United States ... who hold their appointments under the national government, whether their duties are executive or judicial, in the highest or in the lowest departments of the government, with the exception of officers in the army and navy, are properly civil officers within the meaning of the constitution, and liable to impeachment."

> Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

The interpretation and interaction of these constitutional provisions has generated a voluminous body of scholarship and commentary. For present purposes, I take four propositions as established.

First, the impeachment process delineated in Articles I and II is the sole means of removing a federal judge from office. This is the view of most commentators; it was also the conclusion of the National Commission on Judicial Discipline and Removal established by Congress and chaired by a former Chairman of this Subcommittee. After extensive study and discussion, the Commission wrote:

> The Commission believes that removal may be effected only through the impeachment process. By "removal," the Commission means anything that relieves the judge of the aspects of office provided for in the Constitution--namely, the judge's commission of office, with its accompanying eligibility to exercise the judicial power, and nonreducible compensation.[16]

I recognize that Professor Raoul Berger took a different view in his 1973 book on impeachment,[17] but later scholars have persuasively rejected his arguments (and in particular his reliance on the common law writ of *scire facias*).[18]

Second, when Congress acts under the impeachment powers of Article I, its actions are not subject to judicial review. In *Nixon v. United States*,[19] the Supreme

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[16] Report of the National Commission on Judicial Discipline and Removal, 152 F.R.D. 265, 289 (1993).

[17] Raoul Berger, Impeachment: The Constitutional Problems 135-65 (1973).

[18] See, e.g., David R. Stras & Ryan W. Scott, Retaining Life Tenure: The Case for a "Golden Parachute," 83 Wash. U. L. Q. 1397, 1406-08 (2005).

Court held that the meaning of the word "try" in the Impeachment Trial Clause is nonjusticiable. More broadly, the Court found that "the Judiciary, and the Supreme Court in particular, were not chosen [by the Framers] to have *any* role in impeachments."[20] This underscores the unique and solemn responsibility that devolves upon the House – and upon this Subcommittee as its agent – when a resolution of impeachment is under consideration.

Third, the Constitution does not preclude all exercise of disciplinary power by the institutional judiciary over individual judges. This was the conclusion that Congress itself reached when it enacted the Judicial Conduct and Disability Act of 1980, now codified in Chapter 16 of Title 28.[21] Recently the D.C. Circuit Court of Appeals agreed with this conclusion in a decision rejecting constitutional claims advanced by Judge John H. McBryde, who had been sanctioned under the Act by the Judicial Council of the Fifth Circuit.[22] Although the court found that the most serious sanctions imposed on Judge McBryde were moot, it reached the merits of some of his arguments. In doing so, it endorsed four propositions that are relevant to the present proceedings. They may be summarized as follows.

> 1. The guarantees of judicial independence in the Constitution are designed primarily, if not exclusively, to safeguard the Judicial branch from "encroachment or aggrandizement" by the Executive and Legislative

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[19] 506 U.S. 224 (1993).

[20] Id. at 234 (emphasis added).

[21] The full name of the statute was the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. Minor changes were made in later years, notably in the Judicial Improvements Act of 1990. More substantial revisions were made in 2002 when Congress enacted the bipartisan Judicial Improvements Act of 2002, cosponsored by Chairman Coble and Ranking Member Berman of this Subcommittee. It was the 2002 law that gave the judicial misconduct provisions their own chapter in the United States Code.

[22] McBryde v. Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States, 264 F.3d 52 (D.C. Cir. 2001), rehearing en banc denied, 278 F.3d 29 (D.C. Cir. 2002), cert. denied, 537 U.S. 821 (2002).

branches. They are not designed "to insulate individual judges" from influence or control by the "the judicial branch itself."

2. Under the Constitution, Congress may authorize the institutional judiciary to impose some sanctions, short of removal or disqualification, on individual judges for acts of "[a]rrogance" or "bullying" or other misconduct.

3. The internal disciplinary powers of the judiciary include the power to impose sanctions for a judge's conduct in the course of adjudication – that is, actions that the judge takes in deciding cases or otherwise performing the judicial function.

4. The internal disciplinary powers of the judiciary extend at least to the sanction of reprimand.

Fourth, although the precise relationship between the "good behavior" clause of Article III and the impeachment provision of Article II will never be settled definitively, it is generally accepted that the power of Congress to impeach and remove a federal judge can be exercised only for the "gravest cause"[23] or for "*very serious* abuses."[24] This follows from the Framers' concern for protecting judicial independence. It can be seen in the emphatic rejection by the Constitutional Convention of John Dickinson's proposal to add, after the "good behavior" provision in what is now Article III, the following qualification: "provided that [the Judges] may be removed by the Executive on the application [of] the Senate and House of Representatives." One delegate after another objected to Dickinson's motion. Said James Wilson: "The Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our [Government]." Edmund Randolph "opposed the motion as weakening too much

[23] John D. Feerick, Impeaching Federal Judges: A Study of the Constitutional Provisions, 39 Fordham L. Rev. 1, 30 (1970) (footnote omitted).

[24] Harry T. Edwards, Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges, 87 Mich. L. Rev. 765, 777 (1989) (emphasis in original).

the independence of the Judges." Only one state voted for the motion; seven voted against it.[25]

We are thus brought back to the constitutional framework as it exists. Under that framework, do the accusations against Judge Real fall within the category of "very serious abuses" that may be the subject of impeachment proceedings? Or do they point to a lesser form of misconduct that should be dealt with by the judiciary itself under the system of self-discipline authorized by Congress? To that question I now turn.

## IV. Narrowing the Issues

In order to focus more precisely on the issue raised by H. Res. 916, it is useful to catalogue some potential issues that are not raised by the resolution.

First, there can be no suggestion that H. Res. 916 is an effort to punish Judge Real for an unpopular decision. As Chief Justice William H. Rehnquist commented in his book on impeachment, the acquittal of Justice Samuel Chase by the Senate in 1803 "has come to stand for the proposition that impeachment is not a proper weapon for Congress ... to employ" against judges whose decisions are viewed as "unwise or out of keeping with the times."[26] If I thought that H. Res. 916 had targeted Judge Real based on displeasure with the substance of his decisions, I would strongly oppose any effort to proceed with impeachment. But Judge Real has not decided any cases on the Pledge of Allegiance or same-sex marriage or the various other subjects that arouse public passions today. There is absolutely no reason to think that H. Res. 916 is anything other than what it

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[25] The account in this paragraph is based on 2 Max Farrand, The Records of the Federal Convention of 1787 at 428-29 (1911); and Feerick, supra note 23, at 21.

[26] William H. Rehnquist, Grand Inquests 134 (1992). I elaborated briefly on this point in my statement at the hearing held by this Subcommittee on the Constitution Restoration Act of 2004.

purports to be: an effort to assure punishment for apparent misconduct that already been condemned by respected federal judges.

Second, there can be no doubt that the allegations relate to Judge Real's performance of his duties as an Article III judge. This Subcommittee need not confront the difficult issue of whether impeachment is constitutionally permissible for off-the-bench activities or misbehavior unrelated to a judge's exercise of authority under Article III.

On the other side of the ledger, it does not appear that Judge Real has committed a felony or has violated a federal criminal statute. This is not a case like that of Judge Harry Claiborne, who was impeached after he was convicted by a jury of evading federal income taxes.[27] Nor is it a case like that of Judge Alcee Hastings. Although Judge Hastings was acquitted of criminal charges, the Judicial Council of the Eleventh Circuit found, after an extensive investigation, that Judge Hastings had engaged in a corrupt conspiracy to solicit a bribe and had "presented fabricated documents and false testimony in a United States District Court" in an attempt to conceal his participation in the conspiracy.[28] Nothing remotely comparable is found in the allegations against Judge Real. There is a federal statute that makes it a "high misdemeanor" for a federal judge to "engage[] in the practice of law,"[29] but no one has asserted that Judge Real violated that statute.

Finally, and of particular significance, I will assume that Judge Real has not committed any acts that could be deemed "corrupt" even if not criminal.

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[27] See Emily Field Van Tassel & Paul Finkelman, Impeachable Offenses: A Documentary History from 1787 to the Present 168-72 (1999).

[28] See Alan I. Baron, The Curious Case of Alcee Hastings, 19 Nova L. Rev. 873, 874 (1995) (quoting Report of the Investigating Committee to the Judicial Council of the Eleventh Circuit).

[29] 28 USC § 454.

"Corruption" entails some kind of quid pro quo, actual or contemplated. A "corrupt judge" is a judge who "sells his honor and his decision"[30] or who "abuse[s] his power for his own personal aggrandizement."[31] On the basis of the public record, there is no evidence that Judge Real used his position as a federal judge for personal financial gain or other pecuniary or personal advantage.

Having said that, I recognize that the original complaint against Judge Real can be read as implying – without actually saying so – that Judge Real used his official position to benefit Ms. Canter in the hope or expectation of receiving sexual favors from her.[32] If the Subcommittee were to find evidence of "judicial action in exchange for sexual favors" (actual or requested), that would be a very different case. It would not be difficult to conclude that a judge who "sells his honor and his decision" for sexual favors is no less "corrupt" than a judge who does so for financial gain. But in the absence of evidence that that is what occurred here, I will assume that it did not.

Based on this analysis, I believe that the question raised by H. Res. 916 is this: Does the Constitution authorize impeachment of a federal judge for a misuse of judicial power that is not criminal and not corrupt, but that does cause harm to a litigant?[33] To answer that question, I look first at the evidence from the period of

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[30] Joseph Borkin, The Corrupt Judge: An Inquiry into Bribery and Other High Crimes and Misdemeanors in the Federal Courts 11 (1962).

[31] Edward H. Surrency, Book Review, 7 Am J. Leg. Hist. 184, 184 (1963) (review of Borkin book).

[32] Compare Judicial Council Order, supra note 1, at 1182 (majority opinion) (referring to "the specific allegation raised by the complainant of judicial action in exchange for sexual favors") with id. at 1188 n. 5 (Kozinski, J., dissenting) ("there is no reference [in the complaint] to sexual favors, nor to any quid pro quo").

[33] Some may argue that I have defined "corruption" too narrowly. But I believe that it is preferable to adhere to the generally accepted definition and to frankly confront the question whether abuse of power without any quid pro quo can constitute an impeachable offense. At the

the Framing and then at the impeachment precedents that I believe are most closely on point.

## V. The Meaning of "Other High Crimes and Misdemeanors"

Under the Constitution, Judge Real may be impeached and removed from office only for "Treason, Bribery, or other High Crimes and Misdemeanors." Does this phrase encompass a judge's misuse of judicial power to benefit one litigant at the expense of another, when his actions are neither criminal nor corrupt? I believe that it does, at least where the abuse of power is serious and the injury is substantial.

I base this conclusion, in part, on the history of the impeachments clause. Initially the clause provided for impeachment only on the basis of treason or bribery. George Mason argued that this was too limited: "Attempts to subvert the Constitution may not be Treason as above defined." He therefore moved to add after "bribery": "or maladministration." James Madison objected that "maladministration" was too "vague." Mason thereupon withdrew "maladministration" and substituted "other high crimes & misdemeanors." With that alteration, his motion passed by a vote of 8 states to 3.[34]

What is striking here is that the phrase "other high crimes and misdemeanors" was added on the floor of the Convention without discussion, or at least without discussion that Madison thought it necessary to record. While we must be wary of putting too much weight on negative evidence, the most natural inference is that the delegates did not think that they were using a narrow and

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same time, there is no need to consider whether abuse of power without injury to a litigant falls under Article II, because the allegations undoubtedly include financial damage to the Trust.

[34] The account in this paragraph is based on 2 Farrand, supra note 25, at 550.

technical term. Rather, they were broadening the grounds for impeachment while avoiding (they hoped) the vagueness of the term "maladministration."

In any event, the debates at the Convention are of only limited utility in the present context. When the delegates were considering the grounds for impeachment, the impeachment clause applied only to the President.[35] The President would serve for a specified term of years, so there was no need to consider the relationship between impeachment and tenure during "good behavior."

For an analysis of the impeachment provisions that does focus on judges, we must look at the ratification debates, and in particular at the Federalist Papers. Alexander Hamilton addressed the point directly in Federalist No. 79. In an oft-quoted paragraph, he wrote:

> The precautions for [federal judges'] responsibility are comprised in the article respecting impeachments. They are liable to be impeached for mal-conduct 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 the judicial character, and is the only one which we find in our own constitution in respect to our own judges.[36]

Two points about this analysis deserve emphasis. First, in describing the behavior that will justify impeachment of a judge and removal from office, Hamilton does not use either of the phrases that are part of the constitutional text. He does not say that judges may be removed if they fail to meet the Article III standard of "good behavior," nor does he quote the language of Article II referring

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[35] The decision to make the Vice President "and other civil Officers" subject to impeachment was made later on the same day that the words "other high Crimes and Misdemeanors" were added to the impeachments clause. See id. at 552.

[36] The Federalist at 532-33 (No. 79) (Jacob E. Cooke ed. 1961).

to "Treason, Bribery, or other high Crimes and Misdemeanors." Rather, he states that federal judges "are liable to be impeached for *malconduct*."

Hamilton was a careful lawyer. He was also as familiar as any man then alive with the language of the proposed Constitution. The fact that he used the word "malconduct" strongly suggests that he did not interpret "Treason, Bribery, or other high Crimes and Misdemeanors" as embracing only violations of criminal statutes; rather, he read the language of Article II – at least when applied to judges – as including a broader category of misbehavior.

This interpretation is reinforced by the final sentence of the quoted passage. After summarizing "the article respecting impeachments," Hamilton adds: "This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find *in our own Constitution in respect to our own judges*." This last phrase is often cited as describing the United States Constitution.[37] However, I believe that the final clause is much more plausibly read to refer to the New York State Constitution. Hamilton speaks of "our own Constitution" and "our own judges," and of course, the Federalist Papers are addressed to "the People of the State of New York."

What then do we find in the New York Constitution as it stood at the time of the debates over ratification of the United States Constitution? The State of New York had adopted its Constitution in 1777. The tenure of judges was governed by Article XXIV. That Article provided:

> ... that the chancellor, the judges of the supreme court, and first judge of the county court in every county, [shall] hold their offices during

[37] For example, in Nixon v. United States, 506 U.S. 224, 235 (1993), the Court, speaking through Chief Justice Rehnquist, said, "In our constitutional system, impeachment was designed to be the *only* check on the Judicial Branch by the Legislature." The Court then quoted the passage set forth in the text above, emphasizing the entire last sentence.

> good behavior or until they shall have respectively attained the age of sixty years.[38]

The standard for impeachment was set forth in Article XXXIII. That article provided:

> That the power of impeaching all officers of the State, for *mal and corrupt conduct* in their respective offices, [shall] be vested in the representatives of the people in assembly ...[39]

It thus appears that Hamilton thought that "Treason, Bribery, or other high Crimes and Misdemeanors" was not all that different from "mal and corrupt conduct."

I do not suggest that this history provides a definitive answer to the question whether a federal judge may be impeached and removed from office for a serious misuse of power which, though neither criminal nor corrupt, benefits one party in a case before him and injures another party. But it does seem to me that, based on the history as well as the text, an affirmative answer is easier to defend than a negative one.

The point can be made in another way. As far as I am aware, there was not a word in the debates in Philadelphia that even hinted at the possibility that the judiciary would have some sort of internal mechanism for disciplining errant judges. But the text of the Constitution makes clear that judges serve only during "good behavior." Which is more likely to represent the intent of the Framers: that a judge who misused power in the way I have described could be impeached and removed from office, or that he would remain on the bench as though nothing had happened?

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[38] 5 Francis Newton Thorpe, The Federal and State Constitutions 2634 (1909).

[39] Id. at 2635 (emphasis added).

I believe that the conclusion suggested here is consistent with the careful and thorough analysis of the impeachment provisions published by Professor (later Dean) John D. Feerick more than 35 year ago. Professor Feerick wrote:

> In framing the impeachment provisions, the concern of the framers was not limited to crimes of which private citizens and public officials could be equally guilty. ... What the framers seemed greatly concerned about during their discussion of impeachment was the abuse or betrayal of a public trust, offenses peculiar to public officials. ... The debates reveal that the framers were heavily motivated in fashioning the impeachment provisions by the possibility of tyrannical, oppressive, corrupt and willful use of the power connected with a public office.[40]

It is no stretch at all to say that this description encompasses the allegations against Judge Real.[41]

## VI. The Impeachment Precedents

In the history of the United States, only 13 federal judges have been impeached by the House.[42] Four (Chase, Peck, Swayne, and Louderback) were acquitted by the Senate. Two (Delahay and English) resigned before the Senate held an impeachment trial.[43] Seven judges were convicted and removed from office (Pickering, Humphries, Archbald, Ritter, Claiborne, Hastings, and Nixon).

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[40] Feerick, supra note 23, at 53.

[41] Professor Feerick quotes at length from the lectures of Richard Woodeson, an English historian who was a contemporary of the Framers. See id. at 54 & n. 284. Woodeson indicated that a "magistrate [who] introduce[s] arbitrary power" would be subject to impeachment. Recently the Supreme Court relied heavily on Woodeson in ascertaining the meaning of the Ex Post Facto clause. See Carmell v. Texas, 529 U.S. 513, 522-24 (2000); see also Stogner v. California, 539 U.S. 607, 613 (2003). The Court noted that Woodeson's treatise "was repeatedly cited in the years following the ratification by lawyers appearing before this Court and by the Court itself." Carmell, 529 U.S. at 523 n.10.

[42] For a comprehensive account of the various impeachment proceedings, see Van Tassel & Finkelman, supra note 27.

[43] In fact, Judge Delahay resigned after the House had agreed to a resolution of impeachment but before articles of impeachment were actually drafted. See id. at 119-20.

Most of the convictions have little relevance in the present context. This is particularly true of the three most recent convictions (Claiborne, Hastings, and Nixon), all of which involved criminality or corruption or both. However, one of the earlier convictions does have some bearing on the accusations against Judge Real, and that is the conviction of Judge Robert W. Archbald in 1913.

Judge Archbald was a member of the short-lived Commerce Court. Thirteen articles of impeachment were voted against him by the House. Overall, the articles did accuse Archbald of corrupt behavior. The House Committee Report recommending impeachment said:

> [Judge Archbald] has prostituted his high office for personal profit. He has attempted by various transactions to commercialize his potentiality as judge. He has shown an overweening desire to make gainful bargains with parties having cases before him or likely to have cases before him. To accomplish this purpose he has not hesitated to use his official power and influence.[44]

Judge Archbald was convicted on five of the thirteen articles. Four of these (including the thirteenth, a catchall article) alleged specific acts of corruption. However, Article 4 did not. Article 4 involved a case that was decided by the Commerce Court in 1912. In that case, the Louisville & Nashville Railroad Co. challenged a ruling by the Interstate Commerce Commission.[45] Here are the allegations in Article 4:

- While the suit was pending before the Commerce Court, Archbald "secretly, wrongfully, and unlawfully [wrote] a letter to the attorney for [the railroad] requesting said attorney to see one of the witnesses who had testified in said suit on behalf of said company and to get his

[44] House Report No. 946, 62d Cong. 2nd Sess., at 23.

[45] See Louisville & Nashville R. Co. v. ICC, 195 Fed. 541 (Com. Ct. 1912). The Commerce Court's decision was reversed by the United States Supreme Court. See ICC v. Louisville & Nashville Ro. Co., 227 U.S. 88 (1913).

explanation and interpretation of certain testimony that the said witness had given in said suit, and communicate the same to ... Archbald, which request was complied with by said attorney[.]"

- Later, while the suit was still pending, Archbald "secretly, wrongfully, and unlawfully again did write to the [attorney saying] that other members of [the court] had discovered evidence on file in said suit detrimental to the said railroad company and contrary to the statements and contentions made by the [attorney]." Archbald requested the attorney "to make to him ... an explanation and an answer thereto[.] "
- "[Archbald] did then and there request and solicit [the attorney] to make and deliver to ... Archbald a further argument in support of the contentions of the said attorney so representing the railroad company, which request was complied with by said attorney, all of which on the part of said Robert W. Archbald was done secretly, wrongfully, and unlawfully, and which was without the knowledge or consent of the said Interstate Commerce Commission or its attorneys."[46]

Note what is and what is not in this article. The article alleges that Judge Archbald sought and received ex parte communications from the railroad's lawyer about a case pending before Judge Archbald's court. It does not say that Judge Archbald sought or received any quid pro quo for helping the railroad to support its position. It does not even say what happened in the case.

Some of that information is provided earlier in the Committee Report, in the narrative account. The Report explains that the Commerce Court decided the case in favor of the railroad, with Judge Archbald writing for the majority (which included three other judges) and Judge Mack dissenting. The Report adds: "In the opinion of your committee, this conduct on the part of Judge Archbald was a misbehavior in office [sic], and unfair and unjust to the parties defendant in this case."[47]

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[46] House Report No. 946, supra note 44, at 26-27.

[47] Id. at 8.

The Senate convicted Archbald on Article 4 by a vote of 52 to 20. It did so even though the Article asserted, at most, an abuse of power that benefited one side in the case and injured the opposing parties.[48] The conviction on Article 4 thus stands as a strong precedent for the proposition that the alleged misconduct by Judge Real constitutes a high crime or misdemeanor within the meaning of Article II of the Constitution.

There is also a precedent that may be viewed as pointing in the other direction, although not with much force. In 1830, the House impeached Judge James H. Peck on a single article. The allegation was that Judge Peck "unjustly, oppressively, and arbitrarily" punished a lawyer for contempt of court.[49] In the Senate, there was not even a majority for conviction; the vote was 21 to 22.

The impeachment article describes what sounds like an abuse of power that was neither criminal nor corrupt. In that respect it resembles the accusations against Judge Real. But we have no way of knowing why the Senators voted to acquit. Judge Peck's counsel, William Wirt, acknowledged that "if [Judge Peck] knew that [the lawyer's behavior] was not a contempt, and still punished it as one, it would have been an intentional violation of the law, which would have been an impeachable offense."[50] But Wirt also argued that "a mere mistake of law is no crime or misdemeanor in a judge." Senators may have voted for acquittal on the ground that the House managers had not shown more than "a mere mistake of

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[48] In fact, it is by no means clear that Judge Archbald's actions caused any harm to the defendants. Four judges joined the opinion of the Commerce Court, and nothing in the House Committee report indicates that the other three judges saw or were influenced by the material that Judge Archbald obtained through his ex parte communications with the railroad counsel.

[49] See Van Tassel & Finkelman, supra note 27, at 113.

[50] See id. at 109.

law" without bad intent. The acquittal thus does not tell us much about whether the alleged misconduct by Judge Real constitutes an impeachable offense.

Looking at the precedents as a whole, I conclude that the allegations against Judge Real could provide an adequate basis for impeachment – but that the alleged misconduct is marginal when measured against the offenses committed by the judges who have previously been impeached and convicted.

## VII. The Next Steps

Based on what I have said thus far, it would appear that the allegations against Judge Real, if substantiated, could provide a sufficient basis for impeachment and removal from office. However, I think it would be a mistake for the House to consider at this time whether Articles of Impeachment might be warranted. Rather, I believe that the House (and this Subcommittee as its agent) should suspend proceedings on H. Res. 916 until the Special Committee appointed by Chief Judge Schroeder has completed its work and the Judicial Council and/or the Judicial Conference of the United States have acted upon that report.

In saying this, I fully acknowledge three considerations that might suggest a different conclusion. First, the House of Representatives, and this Subcommittee as its agent, have the constitutional authority to initiate impeachment proceedings without waiting for action by any other agency or institution, including institutions created by Congress. Under Article I, the House of Representatives has "the sole power of impeachment." By enacting Chapter 16, Congress has established a mechanism that may assist the House in the performance of its constitutional responsibility, but nothing in that chapter diminishes the authority of the House to act on its own.

Second, it is understandable that Members of Congress feel some frustration at the fact that the Special Committee was not appointed until May 2006, more than three years after the filing of the original complaint against Judge Real.

Third, I am aware of the constraints of the Congressional calendar. It appears that the Special Committee will not file its report until November 2006 at the very earliest. By the time the processes within the Judiciary have been completed, the 109th Congress will have adjourned. And experience tells us that new committees will not be organized in the new Congress until February 2007.

Nevertheless, I believe that the prudent course of action is to suspend proceedings on H. Res. 916 until the proceedings within the Judiciary have been completed. Here is why.

First, in analyzing the constitutional issues raised by H. Res. 916, I have assumed the correctness of the factual recital in Judge Kozinski's opinion dissenting from the Circuit Council decision of Sept. 29, 2005. But Judge Kozinski did not carry out the full-scale investigation that Chapter 16 contemplates when the facts relevant to a complaint are "reasonably in dispute." Under Chapter 16, that responsibility is to be carried out by a Special Committee appointed under 28 USC § 353. A Special Committee investigation is now under way. The Special Committee may determine that the facts are not as Judge Kozinski believed them to be. We may discover, for example, that Judge Real is guilty of nothing worse than poor judgment and a failure to adequately explain his actions. If so, impeachment would certainly not be warranted.

Second, even if the "bill of particulars" laid out by Judge Kozinski is substantiated by the Special Committee investigation, the conduct it depicts is at the margin of impeachable conduct. There is no allegation that Judge Real violated

any criminal statutes, nor does Judge Kozinski suggest that Judge Real's behavior was corrupt. This is significant because an abuse of power that is at the margin of impeachable conduct can, in all likelihood, be dealt with adequately through the disciplinary process under Chapter 16. For example, Judge Kozinski suggested that sanctions should be imposed including "a public reprimand and an order that the district judge compensate the Trust for the damage it suffered as a result of the judge's unlawful injunction." The Subcommittee, and ultimately the House, might well conclude that those sanctions – or some equivalent – constitute an adequate penalty for the misconduct established.[51]

Finally, there is the possibility that the investigation by the Special Committee will substantiate the allegations of misconduct against Judge Real, but the Judicial Council and the Judicial Conference will fail to impose suitable punishment. In that event, the House will be able to proceed with impeachment on a much stronger footing than it could do today. It will have a full record, compiled through the process that Congress itself has ordained. And it will have the enhanced credibility that comes from having given the Judicial Branch the opportunity to deal appropriately with a possible transgressor in its ranks.

## VIII. Conclusion

I conclude on a forward-looking note. In April 2006, Chairman Sensenbrenner and Chairman Smith introduced H.R. 5219, the Judicial Transparency and Ethics Enhancement Act of 2006. In June, the Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on the bill. Three

[51] I recognize, of course, that Judge Real might well argue that Chapter 16 does not authorize the Judicial Council or the Judicial Conference to enter an order requiring him to compensate a litigant. If the Judiciary is unable to impose a suitable punishment, that might be a reason for proceeding with impeachment.

academic witnesses – Professor Ronald Rotunda, Professor Charles Geyh, and I – offered suggestions for improving the bill. My own suggestions focused primarily on three objectives: reinforcing the preservation of judicial independence; integrating the proposed new mechanisms into the existing statutory structure; and enhancing the transparency of the processes within the judiciary.

I hope that the Subcommittee on Crime will continue its work on H.R. 5219. In addition, this Subcommittee may wish to consider whether the troubling history of the accusations against Judge Real has revealed gaps in Chapter 16 that warrant legislative attention. For example, perhaps section 352 should be amended to clarify the narrow realm of the "limited inquiry" that the chief judge may undertake, in contrast to the "formal investigation" that requires the appointment of a Special Committee.[52] Perhaps the statute should draw a sharper line between the circumstances under which a chief judge may "dismiss the complaint" and those under which the chief judge may "conclude the proceeding."[53] Perhaps provision should be made for review by the Judicial Conference of the United States even when no Special Committee has been appointed. Perhaps the legislation should authorize a compensatory remedy for victims of judicial misconduct in appropriate circumstances.[54]

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[52] It is worth emphasizing that the Special Committee serves a dual function. It helps the public to ascertain whether allegations of misconduct are well founded. But its elaborate procedures also serve to protect the judge who is the subject of the complaint.

[53] In the present case, the chief judge dismissed the complaint, but the Circuit Council affirmed the dismissal on the ground that "appropriate corrective action has been taken." See Judicial Council Order, 425 F.3d at 1180, 1182. However, under 28 USC § 352(b), "corrective action" is a basis for concluding the proceeding, not for dismissing the complaint.

[54] As already noted, Judge Kozinski suggested that Judge Real should be required to "compensate the Trust for the damage it suffered as a result of the judge's unlawful injunction." But it is not clear that current law would authorize such a remedy.

This is not the occasion to develop these or other possibilities.[55] But if the Judiciary Committee of the House of Representatives seizes the opportunity afforded by this unfortunate episode to strengthen the ability of the Judicial Branch to deal with misconduct by judges, it will have performed a valuable service whatever the outcome of the proceedings involving Judge Real.

[55] In May 2004, Chief Justice Rehnquist established a committee, chaired by Justice Stephen Breyer, "to evaluate how the federal judicial system has implemented the Judicial Conduct and Disability Act of 1980." The Breyer Committee is expected to issue its report later this month. That report may provide additional suggestions for improving the operation of the 1980 Act.