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April 28, 2006

MEMORANDUM TO ALL CIRCUIT EXECUTIVES

SUBJECT: Opinion of Judicial Conference Committee to Review Circuit Council  
Conduct and Disability Orders

Attached for your information is an opinion of the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders. This opinion is issued in response to a petition for review filed by the complainant in a proceeding in the Ninth Circuit against a district judge under the Judicial Conduct and Disability Act, 28 U.S.C. § 351 et seq.

Judges Dolores K. Sloviter, Barefoot Sanders, and Pasco M. Bowman, II, have concurred in the opinion of the Committee. Judge Ralph K. Winter, Jr., issued a dissenting statement, also attached, in which Judge Carolyn R. Dimmick joins.

A handwritten signature in black ink, reading "William R. Burchill, Jr.".

William R. Burchill, Jr.

cc: Clerks, U.S. Courts of Appeals  
Clerk, U.S. Court of International Trade  
Clerk, U.S. Court of Federal Claims

OPINION OF THE COMMITTEE TO REVIEW  
CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS

April 28, 2006

Hon. Dolores K. Sloviter, with whom the Hon. Pasco M. Bowman II and the Hon. Barefoot Sanders join.

I.

Facts and Procedural Background

The Judicial Conference of the United States has delegated to the Committee to Review Circuit Council Conduct and Disability Orders the responsibility to consider petitions addressed to the Judicial Conference for review of circuit council actions on judicial conduct or disability complaints under 28 U.S.C. § 357(a).

A misconduct complaint was filed by an attorney against a district judge (“District Judge”) in the Ninth Circuit in February 2003, alleging that the District Judge withdrew the reference of a bankruptcy matter from the Bankruptcy Court and stayed enforcement of a state unlawful detainer judgment for improper reasons. The Debtor was serving probation after having been convicted of false statements and loan fraud. The Chief Judge of the Court of Appeals, Mary M. Schroeder, dismissed the misconduct complaint on July 14, 2003, stating that “upon inquiry the allegations of inappropriate conduct were not substantiated.”

The complainant then petitioned the Judicial Council of the Ninth Circuit for review of the chief judge's order dismissing the complaint. The petition for review was sent to ten members of the Judicial Council of the Ninth Circuit, a group consisting of five circuit judges and five district judges (hereafter referred to as "Judicial Council"), who were authorized to act as the Judicial Council. On September 10, 2003, the Judicial Council requested the District Judge to provide further details with respect to the District Judge's withdrawal of the reference to the Bankruptcy Court, his reinstatement of the automatic bankruptcy stay, and his placement of the Debtor on probation with a condition that she personally report to the District Judge every 120 days. The District Judge responded by letter dated October 9, 2003. The District Judge explained that he had transferred the Bankruptcy Court proceeding to another district judge to evaluate the propriety of the withdrawal of the reference. The second judge had referred the proceeding to the Bankruptcy Court once again, and ultimately that court granted the trustee's motion to abandon the estate's interest in the residence in question.<sup>1</sup>

At the request of the Judicial Council, during November, 2003 an Assistant

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<sup>1</sup> For further background factual information, see *In re Canter*, 299 F.3d 1150 (9<sup>th</sup> Cir. 2002) (holding that the District Judge abused his discretion in withdrawing the reference and in staying the eviction proceedings against the probationer).

Circuit Executive contacted several individuals regarding certain relevant facts.

The Judicial Council entered an order on December 18 vacating the chief judge's dismissal order and remanding the matter to her for further proceedings consistent with its order. Four members of the Judicial Council dissented, voting to affirm the order of Chief Judge Schroeder dismissing the complaint.

Upon remand, the District Judge filed a lengthy response to the Judicial Council's order challenging the complainant's allegation that an improper relationship existed between the District Judge and the Debtor, characterizing the allegations in the Judicial Council order as meritless, contending that the Council exceeded the scope of its authority under the Ninth Circuit's judicial misconduct rules, and requesting that the Council dismiss the complaint. By order dated November 4, 2004, Chief Judge Schroeder once again dismissed the complaint of judicial misconduct stating, *inter alia*, that "the complainant's factual allegations of an inappropriate personal relationship, and the Judicial Council's subsequent concern about secret communications having occurred between the District Judge and the defendant/debtor, are not reasonably in dispute within the meaning of 28 U.S.C. § 352(a)." The chief judge further stated that the unlawful filing of and references to a confidential pre-sentence investigation report in defendant/debtor's bankruptcy proceedings constituted a legitimate basis for the District Judge's

initial assumption of jurisdiction in the bankruptcy case, sufficient to preclude a finding of judicial misconduct.

The complainant then petitioned the Judicial Council for review of the chief judge's November 4, 2004 order. On May 18, 2005, the Judicial Council sent the District Judge a letter agreeing with the chief judge that the allegation that the District Judge acted inappropriately in supervising the probation of the Debtor was unfounded. Nonetheless, the Council sought additional information from the District Judge with respect to other allegations. The District Judge responded by his counsel by letter dated June 17, 2005.

On September 29, 2005, the Judicial Council issued an order concluding that "appropriate corrective action has been taken in this case" and affirmed the November 4, 2004 order of the chief judge dismissing the complaint. One judge filed a partial concurrence and partial dissent, another judge dissented, and a third judge separately dissented. On October 1, 2005 the complainant sent the Judicial Conference a request for review of the action of the Judicial Council, which was transmitted to this Committee.

## II.

### Discussion

Before proceeding to address the substance of the complaint, the Committee

must determine whether it has jurisdiction to do so.

The United States Code provides that any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts may file with the Clerk of the Court of Appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct. 28 U.S.C. § 351(a). The Clerk of the Court is required to promptly transmit any such complaint to the chief judge of the circuit as well as to the judge whose conduct is the subject of the complaint. 28 U.S.C. § 351(c). The chief judge is required to expeditiously review any such complaint received under section 351(a). Under the statute, the chief judge may conduct a limited inquiry for the purpose of determining “(1) whether appropriate corrective action has been or can be taken without the necessity for a formal investigation; and (2) whether the facts stated in the complaint are either plainly untrue or are incapable of being established through investigation.”

The chief judge may request the judge whose conduct is complained of to file a written response to the complaint and “may also communicate orally or in writing with the complainant, the judge whose conduct is complained of, and any other person who may have knowledge of the matter, and may review any transcripts or other relevant documents.” 28 U.S.C. § 352(a). However, that

section also provides that “[t]he chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute.” After the chief judge reviews the complaint, the chief judge may dismiss the complaint or appoint a special committee to investigate the facts and allegations. 28 U.S.C. §§ 352, 353.

In the case before us, the complainant has petitioned for review of the action of the Judicial Council. However, we are limited by § 357(a) to consider petitions for review by “a complainant or judge aggrieved by an action of the judicial council under section 354 . . .” 28 U.S.C. § 357(a). Section 354 gives the Judicial Council the authority to take certain actions “upon receipt of a report filed under section 353(c).” 28 U.S.C. § 354(a)(1). Section 353(c) in turn is limited to reports made by “[e]ach [special] committee appointed under subsection (a).”

In this case there was no special committee appointed by the chief judge. We must, therefore, determine whether we have any authority under the statute. The majority of this Committee concludes that the statute gives the Committee no explicit authority to review the Judicial Council’s order affirming the chief judge’s dismissal of the complaint. We believe it inappropriate to find that we have implicit authority. In cases that do not involve the appointment of a special investigating committee, it appears that Congress gave the Judicial Council final review authority by providing in § 352(c) that “[a] complainant or judge aggrieved

by a final order of the chief judge under this section may petition the judicial council of the circuit for review thereof.” Further, § 352(c) provides that “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.

Admittedly, under the statutory scheme as the majority reads it, a chief judge may avoid review by the Judicial Conference (and by definition our committee) by the simple expedient of failing to appoint a special committee under § 353 and instead dismissing a complaint under § 352(b). This may not be as serious a gap as appears in the first instance because the statute places the responsibility of reviewing orders of the chief judge squarely on the Judicial Council. If the chief judge (as happened in the matter before us) enters an order dismissing the complaint under § 352(b)(2) after concluding that there are no factual allegations reasonably in dispute and that there is a legitimate basis for the judge’s actions sufficient to preclude a finding of misconduct, then final review is left to the Judicial Council. The Judicial Council of the Ninth Circuit exercised its authority in a deliberative manner in the matter before us. It directed questions to the District Judge as to his explanation for his actions. It also directed the Assistant Circuit Executive to make further inquiry on its behalf.

The Judicial Council issued an order vacating the chief judge’s dismissal



order and remanded the matter to the chief judge for further proceedings consistent with its order. The chief judge directed that further inquiry be conducted and thereafter issued a supplemental order dismissing the complaint. The Judicial Council then entered an order affirming the order of the chief judge. Three members of the Judicial Council dissented.

We therefore conclude 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. Although we believe there is much to commend in the opinion of our dissenting member, we believe that additional legislation expanding the scope of the Conference's (and, by delegation, this Committee's) jurisdiction is necessary before we may review the Judicial Council's order affirming the chief judge's dismissal of the complaint. Therefore, we do not comment on the merits of the matter.

1                   United States Judicial Conference  
2       Committee to Review Circuit Council Conduct and Disability Orders  
3                   In re Complaint of Judicial Misconduct

4                               April 28, 2006

5       Dissenting Statement of the Honorable Ralph K. Winter, United  
6       States Circuit Judge, with whom the Hon. Carolyn R. Dimmick  
7       joins.

8               This petition for review of the dismissal of a judicial  
9       misconduct complaint has been considered twice by the Chief  
10      Circuit Judge of the Ninth Circuit Court of Appeals and twice by  
11      the Ninth Circuit Judicial Council. In its final decision, the  
12      Judicial Council affirmed the Chief Circuit Judge's dismissal of  
13      the complaint, In re Complaint of Judicial Misconduct, 425 F.3d  
14      1179, 1182 (9th Cir. 2005), although several members of the  
15      Council dissented, e.g., id. at 1183 (Kozinski, J., dissenting);  
16      id. at 1202 (Winmill, J., dissenting). My colleagues conclude  
17      that the Judicial Conference -- and by delegation this Committee,  
18      see In re Complaint of Judicial Misconduct, 37 F.3d 1511, 1511-12  
19      (Jud. Conf. 1994) -- has no statutory jurisdiction to entertain  
20      the petition. Respectfully, I cannot agree.

21              Two key aspects of this proceeding are effectively  
22      indisputable. First, the record would support a finding of  
23      misconduct in the form of an ex parte contact resulting in a  
24      judicial ruling. Second, the mandatory statutory procedures  
25      regarding judicial misconduct petitions were not followed by

1 either the Chief Circuit Judge or the Judicial Council of the  
2 Ninth Circuit.

3 As it comes before us and briefly stated, a debtor in  
4 bankruptcy was on probation as a result of a criminal proceeding  
5 against her. The District Judge who had sentenced the debtor was  
6 personally supervising her probation -- as is his practice with  
7 all probationers. Without notice to any of the other parties to  
8 the bankruptcy proceeding, the District Judge withdrew the  
9 reference of that proceeding (not previously assigned to the  
10 District Judge) and entered an order staying a state court  
11 eviction proceeding brought by the debtor's landlord.

12 The debtor's own lawyer has stated that his secretary wrote  
13 a letter to the District Judge in the debtor's name, that the  
14 debtor personally delivered it to the District Judge and had a  
15 brief discussion with him, and that the debtor later reported  
16 that the letter had "worked."

17 More importantly, the District Judge told the Judicial  
18 Council only a slightly different story. He stated that he had a  
19 conversation with the debtor and learned of a state court  
20 eviction proceeding in which she was involved, and as to which  
21 the automatic bankruptcy stay had been lifted by the bankruptcy  
22 court. On the basis of that conversation, he concluded that her  
23 legal representation in the state proceeding had been inadequate  
24 and withdrew the reference and reimposed the stay. None of the

1 parties to the bankruptcy proceeding or their counsel had any  
2 notice of, or participated in, the conversation. The District  
3 Judge's best recollection was that this conversation occurred at  
4 a scheduled meeting with the debtor involving her probation.

5 The statutory scheme clearly requires that, in all  
6 misconduct proceedings that are non-frivolous and involve  
7 uncorrected conduct, the chief circuit judge shall appoint a  
8 special committee to investigate and report to the Judicial  
9 Council on the matter. 28 U.S.C. § 353(a). The Judicial Council  
10 may then take action as it sees fit, id. § 354, and aggrieved  
11 parties may seek review in the Judicial Conference, id. § 357(a),  
12 which has delegated its power in that regard to this Committee,  
13 see In re Complaint of Judicial Misconduct, 37 F.3d at 1511-12.

14 No special committee was ever appointed to investigate the  
15 present complaint. Instead, the Chief Circuit Judge used a  
16 summary procedure limited by statute to cases where the complaint  
17 is frivolous on its face, no material facts are in dispute, or  
18 corrective action has been taken. See 28 U.S.C. § 352. When  
19 following this procedural route, the Chief Circuit Judge is  
20 expressly forbidden by the statute from making "findings of fact  
21 about any matter that is reasonably in dispute." Id. § 352(a)(2).  
22 Nevertheless, she concluded that no letter was received by the  
23 District Judge from the debtor, and, without mentioning the  
24 District Judge's own admissions, that no ex parte conduct had

1 occurred. The Judicial Council stated that it would not "upset  
2 that factual finding." In re Complaint of Judicial Misconduct,  
3 425 F.3d at 1181. The Council also found that corrective action  
4 had been taken because the District Judge, who denied that any  
5 conversation with the probationer constituted an ex parte  
6 contact, acknowledged that he would explain his actions better in  
7 the future. Id. at 1181-82.

8 Unlike misconduct complaints subject to the special  
9 committee procedure, the statute contains no provision for review  
10 by the Conference involving complaints that are subject to the  
11 summary procedure. My colleagues conclude that because the Chief  
12 Circuit Judge never appointed a special committee, the Conference  
13 has no jurisdiction to entertain the petition for review.

14 In my view, we have authority to review whether a misconduct  
15 complaint requires appointment of a special committee or whether  
16 it may be disposed of by what was intended as a summary  
17 procedure. I therefore believe that we have jurisdiction to  
18 review whether this matter was of a kind that Congress intended  
19 to be subject to review by the Conference.

20 First, the jurisdiction of appellate tribunals is not  
21 determined by the whim of the subordinate tribunals whose  
22 decisions are to be reviewed. Yet that is the result here:  
23 because the Chief Circuit Judge did not appoint a special  
24 committee, the Committee concludes that the Conference has no

1 jurisdiction. In short, because the statutorily required  
2 procedures were not followed, there is no review. Second, if a  
3 non-frivolous misconduct proceeding may be disposed of through  
4 the summary procedure, then all assurance that uniform rules of  
5 procedure or conduct will be followed in such proceedings will be  
6 lost because review at the national level will be random. Third,  
7 there cannot be public confidence in a self-regulatory misconduct  
8 procedure that allows those closest to an accused colleague to  
9 dismiss a complaint by actions that ignore statutory procedures  
10 and simultaneously render the tribunal of final review impotent.

11 The details of my reasoning follow.

#### 12 I. The Statutory Scheme

13 Under the governing statute, any person may file a written  
14 complaint with the clerk of the relevant court of appeals  
15 claiming that a judge has engaged in "conduct prejudicial to the  
16 effective and expeditious administration of the business of the  
17 courts." 28 U.S.C. § 351(a). The clerk transmits the complaint  
18 to the chief circuit judge. Id. § 351(c).

19 The statute then distinguishes between complaints that may  
20 be dismissed summarily and those that raise genuine issues. As  
21 to the former, after "expeditiously reviewing a complaint," the  
22 chief circuit judge may dismiss the complaint if it fails to  
23 conform with the requirements for submitting a complaint, is  
24 directly related to the merits of a decision or procedural

1 ruling, or is frivolous. Id. § 352(b)(1). A frivolous claim is  
2 one that lacks sufficient evidence to raise an inference that  
3 misconduct had occurred or contains allegations that are  
4 incapable of being established through investigation. Id. §  
5 352(b)(1)(A)(iii). The chief circuit judge may also dismiss the  
6 complaint without further action "when a limited inquiry . . .  
7 demonstrates that the allegations in the complaint lack any  
8 factual foundation or are conclusively refuted by objective  
9 evidence." Id. § 352(b)(1)(B). In that "limited inquiry," the  
10 chief circuit judge "shall not undertake to make findings of fact  
11 about any matter that is reasonably in dispute." Id. § 352(a).  
12 The chief circuit judge may also "conclude" the proceeding if  
13 "appropriate corrective action has been taken" or if intervening  
14 events have rendered action on the complaint unnecessary. Id. §  
15 352(b)(2).

16 Any person aggrieved by a Section 352 order of the chief  
17 circuit judge may petition the circuit judicial council, or a  
18 panel thereof, for review of the order. Id. § 352(c). If the  
19 petition for review is unsuccessful, no further review is  
20 available. "[D]enial of a petition for review of the chief  
21 judge's order shall be final and conclusive and shall not be  
22 judicially reviewable on appeal or otherwise." Id. § 352(c).

23 The statute provides a different procedure for complaints  
24 that raise a genuine dispute about whether misconduct occurred.

1 If the chief circuit judge may not validly dismiss the complaint  
2 or conclude the proceeding under Section 352, "the chief judge  
3 shall promptly . . . appoint himself or herself and equal numbers  
4 of circuit and district judges of the circuit to a special  
5 committee to investigate the facts and allegations contained in  
6 the complaint" and certify the complaint to that committee. Id.  
7 § 353(a)(1)-(2). The chief circuit judge must also notify the  
8 judge whose conduct is the subject of the complaint. Id. §  
9 353(a)(3). The special committee "shall conduct an investigation  
10 as extensive as it considers necessary, and shall expeditiously  
11 file a comprehensive written report thereon with the judicial  
12 council of the circuit." Id. § 353(c).

13 Upon receiving the special committee's report, the judicial  
14 council may conduct additional investigation as necessary. Id. §  
15 354(a)(1)(A). The council may dismiss the complaint, but, if it  
16 does not, "shall take such action as is appropriate to ensure the  
17 effective and expeditious administration of the business of the  
18 courts within the circuit." Id. § 354(a)(1)(B)-(C). Any  
19 complainant or judge aggrieved by an action of the judicial  
20 council under Section 354 may petition the Judicial Conference of  
21 the United States for review. Id. § 357(a). As noted, "[t]he  
22 Judicial Conference has established this committee to be the  
23 standing committee authorized to act for the Judicial Conference  
24 under § 331 in proceedings of this kind." In re Complaint of



1     Judicial Misconduct, 37 F.3d at 1511-12.

2             Other than review of Section 352 orders by the judicial  
3     council and review of Section 354 proceedings by the Judicial  
4     Conference, "all orders and determinations, including denials of  
5     petitions for review, shall be final and conclusive and shall not  
6     be judicially reviewable on appeal or otherwise." 28 U.S.C. §  
7     357(c). Therefore, this Committee has jurisdiction to hear a  
8     petition for review in a complaint arising out of a proceeding  
9     under Sections 353 and 354, but not a complaint arising out of a  
10    proceeding under Section 352.

11    II.   The Judicial Misconduct Proceeding

12            On February 21, 2003, Stephen Yagman, a California lawyer,  
13    filed a judicial misconduct complaint against the District Judge.  
14    The complaint alleged a series of unusual, even extraordinary,  
15    events. A criminal defendant (hereafter "debtor") sentenced to  
16    probation had been ordered to report, with her probation officer,  
17    directly to the District Judge. This is the ordinary course  
18    followed by this District Judge in probation cases. The debtor  
19    had been facing eviction and filed a bankruptcy petition that  
20    stayed the eviction proceedings. When the stay was lifted by the  
21    bankruptcy court, the debtor agreed to vacate the premises in  
22    question. Ten days after this agreement, the District Judge, who  
23    had no assignment regarding the bankruptcy action, withdrew the  
24    debtor's case from the bankruptcy court and shortly thereafter

1 reimposed the stay, allowing the debtor to live rent-free in the  
2 apartment for about twenty-two months. Those actions were taken  
3 without notice -- other than entry of the orders themselves -- to  
4 the other parties to the bankruptcy proceeding. The District  
5 Judge entered no findings of fact or explanation of his orders  
6 withdrawing the case and staying the eviction proceedings.  
7 Later, the Court of Appeals issued a writ of mandamus in a  
8 strongly worded opinion and remanded the matter directly to the  
9 bankruptcy court. In re Canter, 299 F.3d 1150 (9th Cir. 2002).

10 The record of the bankruptcy proceeding was bereft of any  
11 hint of how the District Judge learned of its existence, the  
12 existence of the eviction proceedings, or the lifting of the stay  
13 on those proceedings. Yagman's judicial misconduct complaint  
14 stated that these facts on their face suggested that "something  
15 inappropriate" had happened and asked for an investigation into  
16 the relationship between the debtor and the District Judge.

17 The Chief Circuit Judge dismissed the complaint on the  
18 grounds that it (i) was frivolous because it lacked a verifiable  
19 factual foundation and (ii) was directly related to the merits of  
20 the underlying judicial decision. In re Charge of Judicial  
21 Misconduct, No. 03-89037, Order of the Chief Judge at 2-3 (9th  
22 Cir. Jud. Council July 14, 2003).

23 The Chief Circuit Judge's inquiry appears to have been  
24 limited to whether the District Judge did order some, if not all,

1 probationers to report directly to him. Id. at 1-2. No inquiry  
2 appears to have been made into how or why the District Judge,  
3 without any record contact with, or knowledge of, a garden-  
4 variety bankruptcy case, ordered its withdrawal and immediately  
5 imposed a stay on state court eviction proceedings without notice  
6 to or hearing from the lawyers in the bankruptcy case. Id.

7 Yagman then petitioned the Ninth Circuit Judicial Council  
8 for review. The Council proceeded to conduct its own  
9 investigation into the circumstances surrounding the complaint.

10 Circuit staff spoke to the debtor's bankruptcy attorney who  
11 said that his secretary "'ghostwr[o]te' a letter for [the  
12 debtor]" to the District Judge. As summarized by the circuit  
13 staff, "[the debtor] delivered the letter to [the district judge]  
14 personally and had some brief discussion with him." The  
15 secretary said that the letter was delivered "a day or two"  
16 before the withdrawal of the bankruptcy reference and that the  
17 debtor reported that the letter had "worked."

18 The Judicial Council also inquired of the District Judge as  
19 to the circumstances surrounding his withdrawal of the bankruptcy  
20 reference and imposition of the stay. He answered:

21           There is no wheel for the purpose of  
22           withdrawing the reference in a bankruptcy  
23           matter. I felt it was related to my program  
24           of working with probationers to help their  
25           rehabilitation. I have been doing this for  
26           more than 25 years and have been told by the  
27           Probation Officer that it is a successful  
28           program. In this case a person who was a

1 probationer in a criminal case informed me  
2 that the home in which she and her husband  
3 were living at the time of their divorce had  
4 been given to them by her husband's parents.  
5 She was still living in the house with her 8  
6 year old daughter and was in divorce  
7 proceedings. She was contesting her right to  
8 occupancy in the divorce court and I felt it  
9 should be finalized there so I re-imposed the  
10 stay to allow the state matrimonial court to  
11 deal with her claim. From her explanation of  
12 the proceedings in the state court it  
13 appeared to me that her counsel had abandoned  
14 her interest so it could not be adequately  
15 presented to the state court. Counsel for  
16 her husband had asked the Probation Officer  
17 to release [the debtor's] probation report so  
18 it would be used in the divorce proceedings.  
19 I denied that request upon the recommendation  
20 of the Probation Officer.

21  
22  
23 This statement was, of course, a flat-out admission of  
24 having taken judicial action in a case based entirely on a  
25 contact with one party to the case and no notice to other  
26 parties.

27 The Judicial Council, based on this evidence, concluded  
28 "that the Chief Judge erred in dismissing the complaint as  
29 frivolous or unsubstantiated; it is plainly neither." In re  
30 Complaint of Judicial Misconduct, No. 03-89037, Order at 6 (9th  
31 Cir. Jud. Council Dec. 18, 2003). In doing so, the Council  
32 explicitly noted that the District Judge himself "confirm[ed]  
33 what [the] complainant alleges and the evidence suggests: The  
34 district judge withdrew the reference in a bankruptcy case that  
35 was not previously assigned to him, and entered an order in that

1 case based upon information he obtained ex parte from an  
2 individual who benefitted directly from that order." Id. at 4-5.

3 Upon the return of the case to the Chief Circuit Judge, a  
4 lawyer filed a brief on behalf of the District Judge. It  
5 criticized the Judicial Council for having conducted its own  
6 investigation that led to the evidence of an ex parte contact,  
7 i.e., the statement of the debtor's lawyer and the statement of  
8 the District Judge himself. Interestingly, the brief noted that  
9 investigations -- and the expansion of investigations -- are the  
10 province of special committees appointed pursuant to Section 353.  
11 It also argued that there was no evidence before the Council of  
12 an ex parte contact.

13 The District Judge's brief did not mention his own statement  
14 to the Council that he had a conversation with the debtor about  
15 her housing arrangements, withdrew the bankruptcy reference, and  
16 stayed the state eviction proceeding because he deemed her legal  
17 representation in that proceeding to be deficient. Rather, the  
18 brief asserted that the reason for withdrawing the reference was  
19 to prevent disclosure of the debtor's confidential pre-sentence  
20 report.

21 A new statement by the District Judge was included. It said  
22 that his recollection of conversations at probation meetings with  
23 the debtor was consistent with that of the probation officer who  
24 recalled the debtor complaining that her confidential pre-

1 sentence report had been entered in the probation hearing. The  
2 District Judge's statement also denied receipt of a letter. The  
3 District Judge made no mention of his earlier detailed statement  
4 regarding his reasons for imposing the stay on the eviction  
5 proceedings. The debtor also gave a statement that denied the  
6 existence or delivery of a letter to the District Judge.

7 The brief further argued that a scheduled probation meeting  
8 between a judge and a probationer with a probation officer  
9 present is never an ex parte contact.

10 The Chief Circuit Judge again dismissed the complaint. In  
11 re Charge of Judicial Misconduct, No. 03-89037, Supplemental  
12 Order of the Chief Judge (9th Cir. Jud. Council Nov. 4, 2004).  
13 She found that the Council's concerns about an ex parte contact  
14 were unjustified in light of the District Judge's and debtor's  
15 denials about the letter. Id. at 5. The Chief Circuit Judge  
16 concluded that the withdrawal of the bankruptcy reference was due  
17 to concerns over the distribution of the pre-sentence report.  
18 Id. at 5-6. No explanation of the lifting of the stay on the  
19 state court eviction proceeding was offered. No mention of the  
20 District Judge's own earlier explanation for the stay was given.

21 A majority of the Ninth Circuit Judicial Council agreed and  
22 dismissed the petition for review. In re Complaint of Judicial  
23 Misconduct, 425 F.3d 1179 (9th Cir. 2005). They stated that they  
24 would "not upset [the Chief Circuit Judge's] factual finding"

1 that there was no ex parte contact. Id. at 1181. Again, the  
2 District Judge's own account of a conversation with the debtor  
3 was not mentioned. The majority of the Council also found that  
4 the corrective action had been taken in that the District Judge  
5 had stated that he saw the error he had made in not explaining  
6 his actions more carefully. Id. at 1181-82.

### 7 III. The Conference's Jurisdiction

8 There can be no question that the Chief Circuit Judge -- and  
9 the Council in not correcting her error -- did not follow the  
10 statute when the Chief Circuit Judge failed to appoint a special  
11 committee under Section 353. When issues are reasonably in  
12 dispute, such an appointment is mandatory, see 28 U.S.C. §§ 352-  
13 353, and there are at least two such issues in this case.

14 The first disputed issue relates to the circumstances of the  
15 contacts between the debtor and the District Judge. This  
16 involves not only the letter described by the debtor's lawyer but  
17 also the District Judge's own statement to the Council. In that,  
18 the District Judge himself stated that, based on a conversation  
19 that was not shared with other parties to the bankruptcy  
20 proceeding, he withdrew the bankruptcy reference and stayed the  
21 state court eviction because he deemed the debtor's  
22 representation in the state court to be deficient. On the second  
23 go-around, both the Chief Circuit Judge and the Council majority  
24 avoided the issues raised by this statement by not mentioning it.

1           The second disputed issue arises from the brief filed on the  
2 District Judge's behalf. It argued that a regularly scheduled  
3 meeting between a judge and a probationer is not an improper ex  
4 parte contact even though a separate legal action is discussed in  
5 the absence of other parties to that action. As to this issue,  
6 neither the Chief Circuit Judge nor the Council expressed an  
7 opinion, a result consistent with not mentioning the District  
8 Judge's own statement. In doing so, however, they implied that  
9 the District Judge's statement was irrelevant because such  
10 contact is not improper.

11           The absence of a special committee has left the record in  
12 this matter something of a black box. My colleagues determine  
13 that the Conference lacks jurisdiction because a special  
14 committee was never appointed. However, there can hardly be a  
15 dispute regarding whether such a committee was required. The  
16 claim of impropriety in the District Judge's withdrawal of the  
17 bankruptcy reference and stay of the state court action based on  
18 a conversation with one party to the bankruptcy proceeding  
19 (witnessed at best only by a probation officer) clearly cannot be  
20 described as lacking "any factual foundation or . . . conclusively  
21 refuted by objective evidence." 28 U.S.C. § 352(b)(1)(B).  
22 Indeed, when the Judicial Council first remanded this to the  
23 Chief Circuit Judge, it stated explicitly that the complaint was  
24 non-frivolous and substantiated by the District Judge's own



1 version of events. In re Complaint of Judicial Misconduct, No.  
2 03-89037, Order at 6 (9th Cir. Jud. Council Dec. 18, 2003). This  
3 alone was more than sufficient to call for a special committee  
4 under Section 353.

5 Upon the Council's review of the Chief Circuit Judge's  
6 second dismissal, it declined to "upset [the] factual  
7 finding[s]," In re Complaint of Judicial Misconduct, 425 F.3d at  
8 1181, of the Chief Circuit Judge even though she was explicitly  
9 barred by statute from making findings of disputed fact, 28  
10 U.S.C. § 352(a)(2). And a claim that judicial action was taken  
11 as a result of an ex parte contact is not corrected by a promise  
12 to provide better explanations of such actions in the future. I  
13 cannot agree that these very errors deprive the Conference of all  
14 power to review this proceeding.

15 First, the labels used by subordinate tribunals do not  
16 conclusively determine the jurisdiction of appellate tribunals.  
17 In such circumstances, appellate tribunals determine their  
18 jurisdiction by looking beyond the form of the proceedings to  
19 their substance. See, e.g., Dodge v. Cotter Corp., 328 F.3d  
20 1212, 1221 (10th Cir. 2003) ("[I]n considering whether a judgment  
21 is 'final' under § 1291, the label used to describe the judicial  
22 demand is not controlling, meaning we analyze the substance of  
23 the district court's decision, not its label or form.") (citation  
24 and quotation marks omitted); Birmingham Fire Fighters Ass'n 117

1 v. Jefferson County, 280 F.3d 1289, 1292 (11th Cir. 2002) ("[W]e  
2 are not governed by the district court's own characterization of  
3 the order as an 'interpretation' or 'clarification,' as  
4 distinguished from a 'modification.'"); LeBoeuf, Lamb, Greene &  
5 MacRae, L.L.P. v. Worsham, 185 F.3d 61, 64 (2d Cir. 1999) ("[A]  
6 district court cannot render a non-final judgment final simply by  
7 so stating."); Gautreaux v. Chicago Hous. Auth., 178 F.3d 951,  
8 958 (7th Cir. 1999) ("[T]his court must look beyond the  
9 'injunction' label of the order to see if jurisdiction is proper  
10 [under 28 U.S.C. § 1292(a)]."); Sierra Club v. Marsh, 907 F.2d  
11 210, 213 (1st Cir. 1990) ("In appraising whether appellate  
12 jurisdiction was triggered pursuant to section 1292(a)(1), we  
13 believe we should take a functional approach, looking not to the  
14 form of the district court's order but to its actual effect.");  
15 Spath v. Nat'l Collegiate Athletic Ass'n, 728 F.2d 25, 27 (1st  
16 Cir. 1984) ("substance must prevail over nomenclature" in  
17 determining appealability); see also 11A Charles Alan Wright,  
18 Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure  
19 § 2962 (2d ed. 1995) ("[A] district court may not avoid immediate  
20 review of its determination [under 28 U.S.C. 1292(a)(1)] simply  
21 by failing to characterize or label its decision as one denying  
22 or granting injunctive relief."). That mode of analysis is  
23 applicable here.

24 Second, there is good reason to understand the statute to

1 vest the Conference with jurisdiction to determine whether use of  
2 the summary procedure was proper or a special committee was  
3 required. Conference review has two purposes, neither of which  
4 is needed in frivolous or truly corrected cases. The first  
5 purpose is to ensure procedural and substantive regularity in  
6 judicial misconduct cases. The second is to ensure that uniform  
7 national standards are applied. Denial of review in the present  
8 matter thwarts both purposes.

9 With regard to ensuring procedural and substantive  
10 regularity, denial of review means that chief circuit judges and  
11 circuit judicial councils are free to disregard statutory  
12 requirements. In fact, by disregarding those requirements, they  
13 may escape review of their decisions. Were this a case in which  
14 a judge had been publicly admonished by a chief circuit judge,  
15 upheld by the relevant council, in a Section 352 proceeding, the  
16 admonishment under Section 352 would be a clear violation of the  
17 statute, and surely the Conference would reasonably believe that  
18 it had the power to force resort to the proper statutory  
19 procedures. Nevertheless, the Committee's rationale would  
20 preclude review.

21 With regard to uniform national standards, the majority's  
22 position is seriously flawed at two levels. First, there can now  
23 be very different uses of Sections 352 and 353, not only between  
24 circuits but also within circuits from one chief circuit judge to

1 the next. Second, denial of review can lead to inconsistent  
2 treatment of similar conduct depending on the circuit involved  
3 and the procedural course followed by various chief judges and  
4 judicial councils. In the present matter, the District Judge has  
5 admitted to a conversation with one party to a bankruptcy  
6 proceeding in the absence of other parties and to taking actions  
7 in the proceedings beneficial to the party to the conversation  
8 and detrimental to another. He claims that the conversation was  
9 not an improper ex parte contact because it was in the course of  
10 a probation supervision. The Chief Circuit Judge and Judicial  
11 Council have implicitly agreed. Whether such conduct is improper  
12 should be the subject of a national rule, rather than determined  
13 circuit by circuit. Again, if a judge had been admonished in a  
14 Section 352 proceeding on the basis of conduct found blameless in  
15 other circuits, the judge ought to have a right to have his or  
16 her conduct reviewed on the basis of consistent national  
17 standards. If so, then complainants should have the same right.

18 Third, review by the Conference adds an important measure of  
19 public confidence. The judicial misconduct procedure is a self-  
20 regulatory one. It is self-regulatory at the request of the  
21 judiciary in a legitimate effort to preserve judicial  
22 independence. A self-regulatory procedure suffers from the  
23 weakness that many observers will be suspicious that complainants  
24 against judges will be disfavored. The Committee's decision in

1     this case can only fuel such suspicions.

2             The present matter involves a complaint with factual support  
3     including an admission of facts by the District Judge but with a  
4     claim of no impropriety. The required statutory procedure was  
5     not followed. The complaint was dismissed without any discussion  
6     by the Chief Circuit Judge or the Council majority of the facts  
7     admitted by the District Judge accused of an improper ex parte  
8     contact. The admitted facts would be regarded by some, if not  
9     most, professional observers as establishing just such a contact.  
10    The Committee rules that it has no power to review the Council's  
11    decision because the statutory procedures were not followed by  
12    the Chief Circuit Judge and Council. The disposition of the  
13    present matter is therefore not a confidence builder.

14    IV. Conclusion

15            I would hold that: (i) the Conference has the power,  
16    delegated to this Committee, to determine whether this proceeding  
17    was properly a matter to be disposed of under Section 353 rather  
18    than Section 352; (ii) the complaint was improperly disposed of  
19    under Section 352; and (iii) the proceeding should be returned to  
20    the Judicial Council for the Ninth Circuit with directions to  
21    refer it to the Chief Circuit Judge for the appointment of a  
22    special committee under Section 353.



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January 14, 2008

**NOTICE**

Attached are two opinions of the Judicial Conference Committee on Judicial Conduct and Disability, issued today, regarding petitions for review filed in proceedings in the Ninth Circuit under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364.

COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY

Memorandum of Decision

INTRODUCTION

1        This Memorandum of Decision addresses a petition for review  
2        of an order of the Judicial Council of the Ninth Circuit. The  
3        Committee's review is based on the delegation to it by the  
4        Judicial Conference of the United States of the responsibility to  
5        consider petitions addressed to the Judicial Conference for  
6        review of circuit council actions under 28 U.S.C. § 357(a).  
7        Jurisdictional Statement of the Committee on Judicial Conduct and  
8        Disability (As approved by the Executive Committee, effective  
9        March 12, 2007), *available at*  
10       [http://www.uscourts.gov/judconf\\_jurisdictions.htm#Disability](http://www.uscourts.gov/judconf_jurisdictions.htm#Disability).  
11       See also 28 U.S.C. §§ 331 (authorizing the Judicial Conference to  
12       establish a standing committee to review petitions), 357(b) ("The  
13       Judicial Conference, or the standing committee established under  
14       section 331, may grant a petition filed by a complainant or judge  
15       under subsection (a).").

16       In the order in question, dated March 21, 2007, the Judicial  
17       Council adopted the findings and recommendations of a special  
18       committee. Based on its investigation and an acknowledgment of  
19       the district judge, the committee found that the judge had  
20       engaged in a pattern and practice of not providing reasons for  
21       his decisions when required to do so and that this pattern and  
22       practice was misconduct. It recommended a private reprimand.

23       In a letter dated March 26, 2007, the original complainant  
24       sought review by the Judicial Conference of the Judicial

1 Council's Order, arguing that the sanction of a private reprimand  
2 was insufficient. For the reasons stated below, we grant the  
3 petition, vacate the Judicial Council's Order, and remand for  
4 further consideration.

#### 5 BACKGROUND

6 On July 18, 2006, the special committee wrote to the  
7 district judge complained against and informed him of the scope  
8 of the investigations. The committee interpreted the complaint  
9 as alleging that the district judge had engaged in a pattern and  
10 practice of abusing his judicial power by (i) refusing to follow,  
11 or demonstrating recalcitrance in following, court of appeals  
12 orders; (ii) improperly taking jurisdiction of cases; and (iii)  
13 failing to follow the law. In addition to four cases cited in  
14 the original 2004 Complaint, the committee identified twenty-  
15 three additional cases -- cases that had been remanded to the  
16 district judge multiple times, or reassigned to a different judge  
17 on remand -- that it felt might bear on the complaint. On July  
18 25, 2006, the committee advised the district judge that it had  
19 identified two additional cases for consideration.

20 On September 21, 2006, the committee notified the district  
21 judge that it had analyzed the twenty-nine cases more thoroughly  
22 and refined the issues, reducing the number of cases to be  
23 considered to seventeen. The committee informed the district  
24 judge that the cases presented the following issues: (i) refusal  
25 to follow, or demonstrating recalcitrance in following, court of  
26 appeals orders or directives; (ii) improper taking of



1 jurisdiction over cases, or improper treatment of jurisdiction;  
2 (iii) failure to provide reasons when required; (iv) improper  
3 reliance on ex parte contact; and (v) abuse of authority.

4 The special committee held a hearing on November 8 and 9,  
5 2006, at which testimony -- including testimony by the district  
6 judge -- was heard, and exhibits were introduced. At the  
7 conclusion of the hearing, the committee advised the district  
8 judge that it was persuaded that there was no basis for finding  
9 judicial misconduct with respect to many aspects of the  
10 complaint. The committee, however, also stated that it intended  
11 to investigate further whether the district judge had a pattern  
12 or practice of "failing to state reasons" when either prevailing  
13 law or a direction from the court of appeals in specific cases  
14 required him to do so, and whether -- if established -- such a  
15 pattern or practice would constitute judicial misconduct. **[Tr.**  
16 **11/9/06, pp. 92-93.]**

17 Following the hearing, the committee decided to expand the  
18 scope of its investigation of the "reasons" issue and identified  
19 seventy-two additional cases that appeared to be relevant to the  
20 investigations. In a December 18, 2006 letter to the district  
21 judge, the committee described the expanded investigation and the  
22 additional cases it would be considering.

23 After sending this letter, the committee entered discussions  
24 with the district judge's counsel about "expediting" the  
25 investigation. The discussions resulted in the following  
26 acknowledgment from the district judge:

1 I realize that my failure in some cases to adequately  
2 state my reasons for my decisions when this is required  
3 by either prevailing law or direction from the Court of  
4 Appeals causes additional expense and delay to the  
5 litigants, and, therefore, is a pattern and practice that  
6 the Committee has determined is misconduct because it is  
7 prejudicial to the effective and expeditious  
8 administration of the business of the courts. I hereby  
9 commit to use my best efforts to adequately state reasons  
10 when required in the future.<sup>1</sup>

11  
12 Following this acknowledgment, the committee determined that  
13 it was appropriate to treat the expanded investigation as a  
14 separate complaint and to address it in a separate report. In  
15 that February 14, 2007 report, the committee "decided to accept  
16 the district judge's acknowledgment [of misconduct]. Based on  
17 that acknowledgment and on its own investigation, the Committee  
18 unanimously [found] that the district judge had a pattern and  
19 practice of not providing reasons when he was required to do so  
20 and that this pattern and practice constitutes misconduct."  
21 **[Special Committee Report at 7.]** The committee unanimously  
22 recommended a private reprimand as an appropriate sanction. **[Id.**  
23 **at 9.]** The committee found that a sanction short of a private  
24 reprimand was "not sufficient," because the conduct of the  
25 district judge was "manifestly prejudicial to the effective and  
26 expeditious administration of the business of the courts, was  
27 repeated and continued over a substantial period of time, caused  
28 significant harm to litigants, and wasted judicial resources."

---

<sup>1</sup> The judge's acknowledgment is not a model of clarity. In particular, it appears to acknowledge only that the special committee has found his pattern and practice of not giving reasons to be misconduct.

1    **[Id. at 9-10.]** The committee found that a more severe sanction  
2    was not warranted "based on the [Judicial Conduct and Disability  
3    Act's] non-punitive, corrective purpose, on the Committee's  
4    determination that most of the allegations of the 2004 Complaint  
5    did not have merit, and on the district judge's acknowledgment of  
6    his misconduct . . . and his commitment to correcting that  
7    behavior in the future." **[Id. at 10.]** The Judicial Council's  
8    Order adopted the findings and recommendations of the special  
9    committee in toto.

#### 10                                   DISCUSSION

11           In a March 26, 2007 letter, the original complainant sought  
12    review of the Judicial Council's Order, arguing that the sanction  
13    of a private reprimand was insufficient. Because we find that  
14    two issues raised by the complaint -- explained more fully below  
15    -- require the Judicial Council's Order to be vacated, and the  
16    case remanded for further consideration, we grant the petition.

17           First, we believe that the type of misconduct alleged in the  
18    complaint may not be cognizable under the Act and, therefore,  
19    requires further examination by the Judicial Council. A  
20    complaint alleging only conduct "directly related to the merits  
21    of a decision or procedural ruling" does not allege misconduct  
22    within the meaning of the Act. 28 U.S.C. § 352(b)(1)(A)(ii).  
23    The misconduct procedure is not designed as a substitute for, or  
24    supplement to, appeals or motions for reconsideration. Nor is it  
25    designed to provide an avenue for collateral attacks or other  
26    challenges to judges' rulings. Id.; Implementation of the

1 Judicial Conduct & Disability Act of 1980, A Report to the Chief  
2 Justice, 239 F.R.D. 116, 239-40 (Sept. 2006) ("Breyer Committee  
3 Report").

4 This principle is of critical importance.<sup>2</sup> The Act is  
5 intended to further "the effective and expeditious administration  
6 of the business of the courts." It would be entirely contrary to  
7 that purpose to use a misconduct proceeding to obtain redress for  
8 -- or even criticism of -- the merits of a decision with which a  
9 litigant or misconduct complainant disagrees. Adjudication is a  
10 self-contained process governed by extensive statutory provisions  
11 and rules of procedure. Inserting misconduct proceedings into  
12 this process would cause these provisions and rules to be far  
13 less "effective" and "expeditious." Moreover, allowing judicial  
14 decisions to be questioned in misconduct proceedings would  
15 inevitably begin to affect the nature of those decisions and  
16 would raise serious constitutional issues regarding judicial  
17 independence under Article III of the Constitution. Judges  
18 should render decisions according to their conscientiously held  
19 views of prevailing law without fear of provoking a misconduct  
20 investigation. Indeed, for these very reasons, judges have  
21 absolute immunity from civil liability for their decisions,  
22 Pierson v. Ray, 386 U.S. 547, 553-54 (1967), a principle fully  
23 applicable to misconduct proceedings.

---

<sup>2</sup> This district judge has not petitioned for review and thus has not argued to the Committee the issues discussed. However, given that the misconduct procedure is largely administrative and inquisitorial, the Committee has discretion to follow the mandates of the Act rather than apply ordinary waiver principles.

1       The present matter involves a reprimand for decisions  
2 rendered without giving a statement of reasons. The failure of a  
3 judge to give reasons for a decision is, in our view, a merits  
4 issue regarding that decision. The merits of a decision and the  
5 reasons given or not given for it are often inseparable. For  
6 example, litigants seeking to overturn a decision often argue  
7 that the decision violates existing law because inadequate  
8 reasons have been given. United States v. Hirlliman, 503 F.3d  
9 212, 213 (2d Cir. 2007). If an appellate court finds that claim  
10 to be correct, the decision will generally be vacated and the  
11 case remanded for further proceedings that may result in a  
12 different outcome. Id. at 215. However, it is often the case  
13 that even when a statement of reasons is generally required, the  
14 reasons for a particular decision are entirely obvious on the  
15 record and would not benefit from an explicit recitation by the  
16 judge. United States v. Travis, 294 F.3d 837, 841 (7th Cir.  
17 2002) ("[W]e shall uphold a sentence imposed with an incomplete  
18 statement, provided that a more than adequate foundation in the  
19 record supports the district court's findings.") (internal  
20 citation and quotation marks omitted). Given this context, the  
21 giving or not giving of reasons for a particular decision, like  
22 the reasons themselves, should not be the subject of a misconduct  
23 proceeding. We have concluded that misconduct complaints  
24 regarding the failure to give adequate reasons for a particular  
25 decision are, absent more, not cognizable under the Act.

26       The Judicial Council appears to have recognized this issue

1 by restricting its consideration to whether the district judge  
2 had engaged in, and had acknowledged, a "pattern and practice" of  
3 not giving reasons for his decisions when required to do so by  
4 prevailing law or by the direction of the court of appeals in  
5 particular cases.

6 We agree that a judge's pattern and practice of arbitrarily  
7 and deliberately disregarding prevailing legal standards and  
8 thereby causing expense and delay to litigants may be misconduct.  
9 However, the characterization of such behavior as misconduct is  
10 fraught with dangers to judicial independence. Therefore, a  
11 cognizable misconduct complaint based on allegations of a judge  
12 not following prevailing law or the directions of a court of  
13 appeals in particular cases must identify clear and convincing  
14 evidence of willfulness, that is, clear and convincing evidence  
15 of a judge's arbitrary and intentional departure from prevailing  
16 law based on his or her disagreement with, or willful  
17 indifference to, that law.

18 We have concluded that this standard is necessary to ensure  
19 that misconduct proceedings do not intrude upon judicial  
20 independence by becoming a method of second-guessing judicial  
21 decisions. For example, every experienced judge knows of cases  
22 where the circumstances justifiably called for a decision that  
23 was superficially at odds with precedent. This is because  
24 although prevailing legal standards have large areas of clarity,  
25 litigation often involves the borders of those areas. Breathing  
26 room -- something more than a comparison of a judge's ruling with

1 a special committee's or judicial council's view of prevailing  
2 legal standards -- must therefore be afforded. This standard,  
3 requiring clear and convincing evidence of an arbitrary and  
4 intentional departure from, or willful indifference to prevailing  
5 law, provides that breathing room.

6 In the present case, the Judicial Council made no express  
7 finding of willfulness, and the district judge's letter also  
8 fails to admit willfulness expressly. Therefore, we conclude  
9 that we must return this matter to the Judicial Council of the  
10 Ninth Circuit for further consideration of the facts of this case  
11 under the above-articulated standard. Great care must be taken  
12 in finding clear and convincing evidence of willfulness. To the  
13 extent that such a finding is based simply on a large number of  
14 cases in which reasons were not given when seemingly required by  
15 prevailing law, the conduct must be virtually habitual to support  
16 the required finding. However, if the judge has failed to give  
17 reasons in particular cases after an appellate remand directing  
18 that such reasons be given, a substantial number of such cases  
19 may well be sufficient to support such a finding. Hirlihan, 503  
20 F.3d at 216-17.

21 The second issue with which we are concerned is the sanction  
22 imposed in this matter. The judge in question has very recently  
23 been publicly sanctioned by the same Judicial Council in a  
24 decision affirmed by this Committee. In affirming that decision,  
25 we noted that the judge had persistently denied an impropriety in  
26 the face of overwhelming evidence of an ex parte contact. We

1 find that history to be relevant to the determination of an  
2 appropriate sanction. Moreover, the conduct alleged here, if  
3 found willful, is very serious indeed. A private reprimand for  
4 such conduct in the wake of a previous public reprimand for other  
5 misconduct is not a sanction commensurate with the totality of  
6 recent misconduct by this judge. Therefore, if the Council finds  
7 willfulness, it should consider a more severe sanction, such as a  
8 public censure or reprimand and an order that no further cases be  
9 assigned to the judge for a particular period of time.

10 CONCLUSION

11 For the reasons discussed above, we grant the petition for  
12 review.

13 Respectfully Submitted,

14 Hon. Ralph K. Winter, Chair  
15 Hon. Pasco M. Bowman II  
16 Hon. Carolyn R. Dimmick\*  
17 Hon. Dolores K. Sloviter  
18 Hon. Joseph A. DiClerico, Jr.  
19  
20  
21  
22  
23  
24

25 \* Judge Dimmick has not participated in this proceeding, having  
26 concluded, in her discretion, that the circumstances warranted  
27 her disqualification. See Rule 25(a) of the Draft Rules  
28 Governing Judicial Conduct and Disability Proceedings Undertaken  
29 Pursuant to 28 U.S.C. §§ 351-364, current working draft available  
30 at  
31 [http://www.uscourts.gov/library/judicialmisconduct/commentonrules](http://www.uscourts.gov/library/judicialmisconduct/commentonrules.html)  
32 [.html](http://www.uscourts.gov/library/judicialmisconduct/commentonrules.html).  
33



COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY

Memorandum of Decision

1        This Memorandum of Decision addresses two petitions for  
2 review of an order of the Judicial Council of the Ninth Circuit.  
3 The Committee's review is based on the delegation to it by the  
4 Judicial Conference of the United States of the responsibility to  
5 consider petitions addressed to the Judicial Conference for  
6 review of circuit council actions under 28 U.S.C. § 357(a).  
7 Jurisdictional Statement of the Committee on Judicial Conduct and  
8 Disability (As approved by the Executive Committee, effective  
9 March 12, 2007), *available at*  
10 [http://www.uscourts.gov/judconf\\_jurisdictions.htm#Disability](http://www.uscourts.gov/judconf_jurisdictions.htm#Disability).  
11 See also 28 U.S.C. §§ 331 (authorizing the Judicial Conference to  
12 establish a standing committee to review petitions), 357(b) ("The  
13 Judicial Conference, or the standing committee established under  
14 section 331, may grant a petition filed by a complainant or judge  
15 under subsection (a).").

16        In the order in question, dated November 16, 2006, the  
17 Judicial Council of the Ninth Circuit adopted -- with minor  
18 revisions -- the findings of a special investigatory committee  
19 and ordered that District Judge Manuel L. Real be publicly  
20 reprimanded for his misconduct. The district judge filed a  
21 petition for review of the Judicial Council's Order. The  
22 complainant also filed a petition for review, arguing that the  
23 sanction of a public reprimand was insufficient. For the reasons  
24 given below, we approve the Judicial Council's Order, and deny

1 both petitions.

2  
3 BACKGROUND

4 We briefly summarize the history of this matter. In  
5 February 2003, a misconduct complaint was filed against a United  
6 States district judge, alleging, inter alia, that the judge had,  
7 based on an ex parte contact, withdrawn the reference of a  
8 bankruptcy matter from the bankruptcy court and stayed  
9 enforcement of a state unlawful detainer judgment. [**Complaint No.**  
10 **03-89037**] The Chief Judge of the Ninth Circuit dismissed the  
11 complaint without convening a special committee under Section 353  
12 of the Judicial Conduct and Disability Act to investigate the  
13 allegations. The complainant petitioned the Judicial Council for  
14 review of this order. On September 10, 2003, the Judicial  
15 Council asked the district judge to provide a further explanation  
16 of his actions in the matter. The judge responded by letter  
17 dated October 9, 2003. Following a limited investigation, a  
18 divided Judicial Council vacated the Chief Judge's dismissal and  
19 remanded for further specified proceedings.

20 Upon remand, the district judge filed a lengthy response to  
21 the allegations of the complaint and to the order of the Judicial  
22 Council. On November 4, 2004, the Chief Judge once again  
23 dismissed the misconduct complaint without appointing a special  
24 committee. The complainant petitioned the Judicial Council for  
25 review, and again the Judicial Council requested additional  
26 information from the district judge. The judge responded in a

1 letter dated June 17, 2005. Thereafter, on September 29, 2005, a  
2 divided Judicial Council affirmed the Chief Judge's dismissal of  
3 the misconduct complaint, holding that a subsequent appellate  
4 court ruling -- which held that the judge had abused his  
5 discretion by withdrawing the reference in the bankruptcy case --  
6 coupled with the judge's prediction that such conduct would not  
7 recur constituted "appropriate corrective action" in the matter.  
8 The complainant petitioned the Judicial Conference for review of  
9 this matter, which was referred to this Committee under the  
10 delegation described above. A majority of this Committee found  
11 that we had no jurisdiction to consider a petition for review of  
12 a Chief Judge's dismissal of a complaint when no special  
13 investigatory committee had been appointed under Section 353. In  
14 re Opinion of Judicial Conference Comm. to Review Circuit Council  
15 Conduct & Disability Orders, 449 F.3d 106, 109 (U.S. Jud. Conf.  
16 2006). A minority of this committee believed that we had  
17 jurisdiction to review whether a special committee should have  
18 been appointed and that a committee was required under the  
19 circumstances. Id. at 109-17.

20 In 2005, the complainant filed a new complaint. He alleged  
21 that the district judge had committed misconduct by being  
22 disingenuous and misleading in his responses regarding the 2003  
23 Complaint. This time, the Chief Judge of the Ninth Circuit  
24 appointed a special committee to investigate the allegations.  
25 The special committee subsequently conducted a four-month  
26 investigation that necessarily covered much of the alleged

1 misconduct that led to the initial 2003 Complaint. The special  
2 committee reported its findings and recommendations to the  
3 Judicial Council, which accepted them with minor revisions.

4 The Judicial Council's Order found that the district judge  
5 had committed misconduct by making misleading statements to the  
6 Judicial Council itself in his 2003 letter, and by making further  
7 misleading statements to the special committee during its  
8 investigation. The Judicial Council further found that the judge  
9 had committed misconduct by withdrawing the bankruptcy reference  
10 and ordering a stay of judgment based on an ex parte contact.  
11 The Judicial Council ordered that the judge be publicly  
12 reprimanded for this misconduct.

13 As noted, both the district judge and the complainant have  
14 petitioned for review of the Judicial Council's Order. The  
15 judge's petition advances the following four arguments: (i) that  
16 the 2005 Complaint was effectively an "appeal" of an earlier  
17 complaint and was thus barred by 28 U.S.C. § 352(c); (ii) that  
18 Judge Kozinski should have been recused by the Judicial Council  
19 because of his bias against the subject judge; (iii) that the  
20 findings of the special committee, as adopted in the Judicial  
21 Council's Order, are overstated and unsupported by the evidence;  
22 and (iv) that a public reprimand is too harsh a punishment in  
23 light of the humiliation the judge already suffered as a result  
24 of the investigation. The complainant's petition argues that a  
25 public reprimand is an inadequate sanction.

26 For reasons discussed below, we find none of these arguments

1 convincing.

2  
3 DISCUSSION

4 We assume familiarity with the following orders and reports  
5 in this matter: Order and Memorandum of the Judicial Council of  
6 the Ninth Circuit, No. 05-89097 (Nov. 16, 2006); and Report to  
7 the Judicial Council of the Ninth Circuit from the Committee  
8 Convened Pursuant to 28 U.S.C. § 353(a) to Investigate the  
9 Allegations of Judicial Misconduct in the Complaints Docketed  
10 Under 05-89097 and 04-89039, Pertaining to Complaint 05-89097  
11 (Oct. 10, 2006) (As modified by order of the Judicial Council of  
12 the Ninth Circuit for adoption by the Judicial Council).

13 a) Finality

14 In his petition, the district judge argues that the 2005  
15 Complaint "encompasses *the identical factual allegations* that  
16 were raised in the [2003 Complaint]." **[Real Petition at 6**  
17 **(emphasis in original).]** He therefore suggests that the 2005  
18 Complaint constitutes an "appeal" for "review" of the dismissal  
19 of the 2003 Complaint, which is barred by 28 U.S.C. § 352(c)  
20 ("The denial of a petition for review of the chief judge's order  
21 shall be final and conclusive and shall not be judicially  
22 reviewable on appeal or otherwise."). The judge argues that  
23 Section 352(c) provides "finality" for the proceedings and bars  
24 any "court or reviewing body" from further considering the  
25 matters involved in the 2003 Complaint. **[Real Petition at 12.]**

26 The 2005 Complaint, however, was not an appeal of the

1 earlier dismissal. Rather, the 2005 Complaint was a new  
2 proceeding with new factual allegations, and was thus not barred  
3 by Section 352(c).

4 However, the Judicial Council's Order concluded that the  
5 judge had engaged in some of the misconduct alleged in the  
6 original 2003 Complaint. The Order did, therefore, involve a re-  
7 examination of some factual issues involved in the earlier  
8 proceedings. This overlap raises the question of whether  
9 reconsideration of these issues triggers a claim preclusion  
10 principle analogous to res judicata requiring dismissal of the  
11 present proceeding.

12 If this proceeding was litigation in an adversarial setting  
13 in which the need for finality was of great importance, further  
14 consideration of the matter might be barred. We cannot, however,  
15 ignore the profound differences between this type of proceeding  
16 and litigation. This Committee has recognized that, although  
17 misconduct proceedings "have an adjudicatory aspect, they also  
18 have an administrative and managerial character not present in  
19 traditional adjudication by courts." In re Complaints of  
20 Judicial Misconduct, 9 F.3d 1562, 1566 (U.S. Jud. Conf. 1993).  
21 Consequently, before applying the legal doctrine of claim  
22 preclusion, we must examine the reasons underlying that doctrine  
23 and consider their applicability and relevance to misconduct  
24 proceedings.

25 The doctrine of claim preclusion serves three basic  
26 purposes: (i) the need for finality in the settlement of

1 disputes; (ii) the need to conserve judicial resources by  
2 avoiding duplicative proceedings; and (iii) the prevention of  
3 harassment. See Allan D. Vestal, Res Judicata/Preclusion V-8 to  
4 V-12 (1969). These purposes are not served by an application of  
5 the doctrine in the present matter.

6 First, the need for finality has less relevance to the  
7 present circumstances than it does to litigation generally. In  
8 ordinary litigation, there is not only a strong interest in  
9 reaching a correct conclusion, but also an interest in achieving  
10 finality so that the parties may obtain repose and their dispute  
11 be finally settled. The need for finality arises both from the  
12 nature of an adversary system, which requires parties to pursue  
13 their own claims as they see fit, and from the negative  
14 consequences of allowing a dispute to continue after a decision  
15 has been rendered in an initial, full adjudication. Parties to  
16 litigation are thus generally not allowed to revive fully  
17 adjudicated claims by serially advancing new legal theories not  
18 raised in earlier proceedings but involving the same underlying  
19 transactions.

20 By contrast, misconduct proceedings under the Judicial  
21 Conduct and Disability Act are adversarial only to the extent  
22 that they may be initiated by complaint and usually allow  
23 interested parties some opportunity to present their respective  
24 view of the events in question. Fundamentally, however,  
25 misconduct proceedings are inquisitorial and administrative.  
26 Chief circuit judges need not passively await the filing of

1 complaints and then referee a contest between a complainant and a  
2 judge, bounded by the four corners of the complaint. Instead,  
3 chief circuit judges may "identify" and review complaints  
4 themselves. See 28 U.S.C. §§ 351(a)-(b), 352(a). In addition, a  
5 complainant who has initiated a complaint does not have the full  
6 rights accorded a party to litigation. See 28 U.S.C. § 358(b).  
7 Indeed, the Act provides no mechanism for a complainant to  
8 withdraw a complaint. Thus, the Illustrative Rules "treat[] the  
9 complaint proceeding, once begun, as a matter of public business  
10 rather than as the property of the complainant. The complainant  
11 is denied the unrestricted power to terminate the proceeding by  
12 withdrawing the complaint." Commentary to Illustrative Rule 19.  
13 Furthermore, Illustrative Rule 10(a) allows special committees,  
14 on which chief judges sit ex officio, the right to "expand the  
15 scope of the investigation to encompass" misconduct that is  
16 "beyond the scope of the complaint."

17 The inquisitorial nature of a misconduct proceeding is the  
18 direct result of the Act's adoption of a self-regulatory system  
19 in recognition of the need to maintain judicial independence, as  
20 opposed to a system in which misconduct complaints are  
21 adjudicated by an external tribunal. Under this self-regulatory  
22 regime, the responsibility of chief judges, special committees,  
23 judicial councils, and the Judicial Conference, must be to  
24 vindicate the process rather than adjudicate the rights of  
25 parties. Moreover, there cannot be public confidence in a  
26 self-regulatory misconduct procedure that, after the discovery of



1 new evidence or a failure to investigate properly or completely  
2 serious allegations of misconduct, allows misconduct to go  
3 unremedied in the name of preserving the "finality" of an  
4 earlier, perhaps misfired, proceeding.

5 Therefore, any argument that the instant proceeding is  
6 barred because it is duplicative of the prior one is  
7 unpersuasive, particularly because no special committee  
8 investigation was undertaken in the earlier proceedings. We now  
9 have what the previous proceeding lacked -- a defined record and  
10 factual findings based on that record. We thus conclude that  
11 neither the letter nor the intent of the Judicial Conduct and  
12 Disability Act prevents us from rendering a decision on the  
13 merits based upon that record and those findings because of  
14 considerations of finality.

15 As to the second purpose served by the doctrine of claim  
16 preclusion, concerns about wasting judicial resources on  
17 duplicative proceedings are not weighty in these circumstances.  
18 Misuse of the misconduct procedure can be easily prevented. See  
19 Illustrative Rule 1(f) ("A complainant who has filed vexatious,  
20 repetitive, harassing, or frivolous complaints, or has otherwise  
21 abused the complaint procedure, may be restricted from filing  
22 further complaints."). There is, therefore, no danger of opening  
23 the floodgates to duplicative misconduct proceedings by allowing  
24 the present proceeding to continue.

25 Finally, the risk of harassment is a serious concern in the  
26 context of judicial misconduct complaints, but it is not an issue

1 in this case. A judge should not be forced to respond repeatedly  
2 to the same charges, with a new special committee appointed each  
3 time to review the same evidence. Harassment, however, is not  
4 implicated where, as here, no full proceeding by a special  
5 committee occurred in the first instance, and some new  
6 allegations of cognizable misconduct, supported by new evidence,  
7 are presented. When there is a reason for continuing or  
8 reinstating a proceeding that is legitimate and not intended to  
9 harass or punish, the nature of the administrative,  
10 self-regulatory process requires that the new proceeding be  
11 completed. This is particularly important where, as here,  
12 credible evidence is presented that the subject judge hindered  
13 the original proceeding.

14 We thus proceed to the district judge's substantive  
15 arguments.

16 b) Recusal of Judge Kozinski

17 There is no merit in the district judge's argument that  
18 Judge Kozinski should have been recused. The district judge has  
19 presented no evidence whatsoever of an actual bias or the  
20 appearance of bias on Judge Kozinski's part. The fact that Judge  
21 Kozinski, as a member of the Judicial Council, took actions in  
22 the earlier proceeding with which the district judge disagrees,  
23 particularly in concluding in the earlier proceeding that the  
24 district judge had entered orders in the bankruptcy case based on  
25 ex parte contacts with the debtor, in no way constitutes  
26 recusable bias.

1 c) The Judicial Council's Findings

2 The Judicial Council, acting on the report of the special  
3 committee, made two principal findings: First, that the district  
4 judge committed misconduct by making inaccurate and misleading  
5 responses to the Judicial Council and special committee; and  
6 second, that the judge committed misconduct by withdrawing the  
7 bankruptcy reference and staying a judgment in that matter based  
8 on personal knowledge and information received ex parte. The  
9 district judge challenges both findings as well as the  
10 alterations the Judicial Council made to the special committee's  
11 report.

12 Ordinarily, we will defer to the findings of the Judicial  
13 Council and the special committee, and will overturn those  
14 findings only if, upon examination of the record, they are  
15 clearly erroneous. Based on the record before us, we cannot  
16 conclude that the factual findings of the special committee as  
17 adopted by the Judicial Council, or the committee's  
18 interpretation of the evidence before it as adopted by the  
19 Council, were clearly erroneous. First, the district judge's  
20 versions of relevant events have been incomplete and involved  
21 serious, material variations. Second, there is overwhelming  
22 evidence that the judge's withdrawal of the reference of the  
23 bankruptcy proceeding and stay of a state court proceeding was  
24 based on a contact with the debtor, who was a probationer in a  
25 separate criminal matter before the judge, and occurred without  
26 any notice to other parties to the bankruptcy proceeding. This

1 was judicial action based on an improper ex parte contact,  
2 whether or not a probation officer witnessed the contact.

3 Nor are the minor alterations to the committee report made  
4 by the Judicial Council problematic. The alterations are largely  
5 semantic, leaving the substantive conclusions of the special  
6 committee undisturbed and the recommended sanction unchanged.

7 d) Public Reprimand

8 While the Judicial Conference has an obvious interest in  
9 avoiding major disparities in sanctions among the various  
10 circuits, we will generally defer to a judicial council's  
11 judgment with respect to an appropriate sanction so long as the  
12 council has fully considered all the relevant options. In this  
13 case, the district judge's misconduct was arbitrary and caused  
14 significant harm to the bankruptcy litigants. His response to  
15 well-founded concerns over judicial actions based on improper ex  
16 parte contact has been a persistent denial of any impropriety.  
17 The judge's claim that he has been punished enough is not  
18 compelling because the lack of any sanction would appear to  
19 ratify the judge's view that no serious misconduct occurred. Nor  
20 do we agree with the complainant that the gravity of the  
21 misconduct requires a harsher sanction. A public reprimand is  
22 within the discretion of the Council, was arrived at through a  
23 full consideration of the available alternatives, and should not  
24 be overturned.

25  
26 CONCLUSION

**REPORT OF THE PROCEEDINGS  
OF THE JUDICIAL CONFERENCE  
OF THE UNITED STATES**

**Special Session  
June 17, 2008**

The Judicial Conference of the United States convened in special session by telephone conference call on June 17, 2008, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference participated:

First Circuit:

Chief Judge Sandra L. Lynch  
Judge Ernest C. Torres,  
District of Rhode Island

Second Circuit:

Chief Judge Dennis Jacobs  
Chief Judge William K. Sessions III,  
District of Vermont

Third Circuit:

Chief Judge Anthony J. Scirica  
Chief Judge Garrett E. Brown, Jr.,  
District of New Jersey

Fourth Circuit:

Chief Judge Karen J. Williams  
Chief Judge James P. Jones,  
Western District of Virginia

Fifth Circuit:

Chief Judge Edith Hollan Jones  
Judge Sim Lake,  
Southern District of Texas

Sixth Circuit:

Chief Judge Danny J. Boggs  
Judge Thomas M. Rose,  
Southern District of Ohio

Seventh Circuit:

Chief Judge Frank H. Easterbrook  
Judge Wayne R. Andersen,  
Northern District of Illinois

Eighth Circuit:

Chief Judge James B. Loken  
Judge Lawrence L. Piersol,  
District of South Dakota

Ninth Circuit:

Judge Charles R. Breyer,  
Northern District of California

Tenth Circuit:

Chief Judge Robert H. Henry  
Judge Alan B. Johnson,  
District of Wyoming

Eleventh Circuit:

Chief Judge J. L. Edmondson

District of Columbia Circuit:

Chief Judge David Bryan Sentelle  
Chief Judge Royce C. Lamberth,  
District of Columbia

Federal Circuit:

Chief Judge Paul R. Michel

Court of International Trade:

Chief Judge Jane A. Restani

Also present for this session of the Conference were Judge Ralph K. Winter, Jr., Chair of the Committee on Judicial Conduct and Disability, and from the Administrative Office of the United States Courts (AO), James C. Duff, Director; William R. Burchill, Jr., Associate Director and General Counsel; Bret G. Saxe, Assistant General Counsel; Laura C. Minor, Assistant Director, and Wendy Jennis, Deputy Assistant Director, Judicial Conference Executive Secretariat; and David A. Sellers, Assistant Director, Office of Public Affairs. Jeffrey P. Minear, Administrative Assistant to the Chief Justice, attended as well.

## **PROCEEDINGS UNDER THE JUDICIAL CONDUCT AND DISABILITY ACT**

The Chief Justice called this special teleconference session of the Judicial Conference to consider a certificate issued on December 20, 2007, by the Judicial Council of the Fifth Circuit pursuant to 28 U.S.C. § 354(b)(2)(A), conveying a determination that Judge G. Thomas Porteous, Jr., of the United States District Court for the Eastern District of Louisiana had engaged in conduct that might constitute one or more grounds for impeachment under Article II of the United States Constitution. On February 13, 2008, this matter, *In re: Complaint of Judicial Misconduct against United States District Judge G. Thomas Porteous, Jr. under the Judicial Conduct and Disability Act of 1980*, was referred to the Committee on Judicial Conduct and Disability, which in June 2008 issued a report with recommendations to the Judicial

Conference, as required by the rules adopted by the Judicial Conference for processing such complaints.

In advance of the teleconference, the members of the Judicial Conference were given copies of the Judicial Conduct and Disability Committee's report and recommendations, as well as documents from the record of the proceedings before the Fifth Circuit Judicial Council. The report and recommendations included a proposed certification to the House of Representatives that consideration of impeachment may be warranted.

At the teleconference, the Chief Justice afforded each member of the Conference the opportunity to comment upon the proposed certification. After discussion and on recommendation of the Committee, the Conference agreed to certify to the House of Representatives, pursuant to 28 U.S.C. § 355(b)(1), the Conference's determination that consideration of impeachment may be warranted, to transmit to the House of Representatives records of the proceedings, and to adopt and include the following certificate:

Pursuant to 28 U.S.C. § 355(b)(1), the Judicial Conference of the United States certifies to the House of Representatives its determination that consideration of impeachment of United States District Judge G. Thomas Porteous (E.D. La.) may be warranted. This determination is based on evidence provided in the Report by the Special Investigative Committee to the Judicial Council of the United States Court of Appeals for the Fifth Circuit and the Report and Recommendations of the Committee on Judicial Conduct and Disability. Said certification is transmitted with the entire record of the proceeding in the Judicial Council of the Fifth Circuit and in the Judicial Conference of the United States.

The determination is based on substantial evidence that:

- a. Judge Porteous repeatedly committed perjury by signing false financial disclosure forms under oath in violation of 18 U.S.C. § 1621. This perjury concealed the cash and things of value that he solicited and received from lawyers appearing in litigation before him. Parts F(1)(a), (2)(a), and G of Report of the Committee are incorporated by reference.



- b. Judge Porteous repeatedly committed perjury by signing false statements under oath in a personal bankruptcy proceeding in violation of 18 U.S.C. §§ 152(1)-(3), 1621, as well as Canons 1 and 2A of the Code of Conduct for United States Judges. This perjury allowed him to obtain a discharge of his debts while continuing his lifestyle at the expense of his creditors. His systematic disregard of the bankruptcy court's orders also implicates 11 U.S.C. § 521(a)(3) and 18 U.S.C. § 401(1). Parts F(1)(c), (2)(c), and G of the Report of the Committee are incorporated by reference.
- c. Judge Porteous wilfully and systematically concealed from litigants and the public financial transactions, including but not limited to those designated in (d), by filing false financial disclosure forms in violation of 18 U.S.C. § 1001, 5 U.S.C. App. 4 § 104, and Canon 5C(6) of the Code of Conduct for United States Judges, which require the disclosure of income, gifts, loans, and liabilities. This conduct made it impossible for litigants to seek recusal or to challenge his failure to recuse himself in cases in which lawyers who appeared before him had given him cash and other things of value and for the Fifth Circuit Judicial Council and the Judicial Conference to determine the full extent of his solicitation and receipt of such cash and things of value. Parts F(1)(a), (b), (2)(a), (b), and G of the Report of the Committee are incorporated by reference.
- d. Judge Porteous violated several criminal statutes and ethical canons by presiding over *In re: Liljeberg Enters. Inc. v. Lifemark Hosps. Inc.*, No. 2:93-cv-01784, rev'd in part by 304 F.3d 410 (5th Cir. 2002). In that matter, which was tried without a jury, he denied a motion to recuse based on his relationship with lawyers in the case, in violation of 28 U.S.C. § 455 and Canons 3C(1) and 3D of the Code of Conduct for United States Judges. In denying the motion, he failed to disclose that the lawyers in question had often provided him with cash. Thereafter, while a bench verdict was pending, he solicited and received from the lawyers appearing before him illegal gratuities in the form of cash and

other things of value in violation of 18 U.S.C. § 201(c)(1)(B). This conduct, undertaken in a concealed manner, deprived the public of its right to his honest services in violation of 18 U.S.C. §§ 1341, 1343, and 1346, and constituted an abuse of his judicial office in violation of Canons 5C(1) and 5C(4) of the Code of Conduct for United States Judges. Parts F(1)(b), (2)(b), and G of the Report of the Committee are incorporated by reference.

- e. Judge Porteous made false representations to gain the extension of a bank loan with the intent to defraud the bank and causing the bank to incur losses in violation of 18 U.S.C. §§ 1014 and 1344. Parts F(1)(d), (2)(d), and G of the Report of the Committee are incorporated by reference.
- f. The conduct described in (a) through (e) has individually and collectively brought disrepute to the federal judiciary.

Executed this 17<sup>th</sup> day of June, 2008.

Since a certificate under 28 U.S.C. § 354(b)(2)(A) does not automatically conclude or suspend an ongoing misconduct proceeding before a judicial council, on recommendation of the Committee, the Conference also agreed to authorize the Committee to invite the Judicial Council of the Fifth Circuit to make an express decision on whether (a) to continue at this time or suspend proceedings pursuant to 28 U.S.C. § 354 regarding sanctions for misconduct by Judge Porteous under the Judicial Conduct and Disability Act; and (b) to direct that, under section 354(a)(2)(A)(i), no further cases be assigned to Judge Porteous for two years or until final action regarding impeachment and removal from office by the Congress, if earlier than two years.

Chief Justice of the United States  
Presiding

1           For the above reasons, we deny both petitions for review.

2  
3                               Respectfully Submitted,

4  
5                               Hon. Ralph K. Winter, Chair  
6                               Hon. Pasco M. Bowman II  
7                               Hon. Carolyn R. Dimmick\*  
8                               Hon. Dolores K. Sloviter  
9                               Hon. Joseph A. DiClerico, Jr.

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17       \* Judge Dimmick has not participated in this proceeding, having  
18       concluded, in her discretion, that the circumstances warranted  
19       her disqualification. See Rule 25(a) of the Draft Rules  
20       Governing Judicial Conduct and Disability Proceedings Undertaken  
21       Pursuant to 28 U.S.C. §§ 351-364, current working draft *available*  
22       at  
23       [http://www.uscourts.gov/library/judicialmisconduct/commentonrules](http://www.uscourts.gov/library/judicialmisconduct/commentonrules.html)  
24       .html.