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### Judges Behaving Badly . . . Then Slinking Away

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## Judges Behaving Badly... Then Slinking Away

**Author :** Maureen Carroll

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Veronica Root Martinez, [Avoiding Judicial Discipline](#), 115 *Nw. U. L. Rev.* 953 (2020).

A federal judge is accused of misconduct and an investigation begins. Before the investigation has concluded, though, the judge leaves her post. What happens next? Does it create an accountability gap, and if so, how much should that concern us? These are the questions that Veronica Root Martinez takes up in *Avoiding Judicial Discipline*.

This topic is timely and important in light of the crisis of accountability in the modern federal judiciary. Federal judges' work is high in status and low in transparency, in the sense that social and professional norms give them a great deal of power but allow them to operate mostly out of public view. Those conditions [create fertile ground for sexual harassment](#) and other forms of misconduct, yet the federal judiciary has largely been left to police itself. Federal judges are exempt from workplace misconduct laws such as Title VII. Congress has the authority to impeach and remove them, but in 230 years, the House of Representatives has impeached fifteen judges and the Senate has removed eight.

Martinez focuses on the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, which offers one of the few mechanisms through which allegations of judicial misconduct can be addressed. The statute gives the judicial council of each federal circuit authority to investigate allegations and impose discipline when appropriate. But that authority extends only to judges serving within the circuit. If a judge leaves the circuit's bench before the investigation is complete, the statute's grant of jurisdiction evaporates and the matter ends.

Martinez uses three recent examples to demonstrate that short-circuited investigations are not merely theoretical. Maryanne Trump Barry was serving on the Third Circuit when it initiated an investigation into allegations that she had engaged in tax evasion. Shortly after receiving formal notice of the investigation, she retired, ending the investigation. Alexander Kozinski was serving on the Ninth Circuit when it initiated an investigation into allegations that he had sexually harassed several of his law clerks. He retired days later, so the investigation never even got off the ground. Brett Kavanaugh was serving on the D.C. Circuit when allegations became public that he had committed sexual assault while he was in high school. The circuit received several complaints connected to those allegations, but because he left the circuit to become an associate justice of the Supreme Court, all were dismissed.

These examples are well-chosen, and Martinez draws on them to make concrete various flaws in the status quo. A judge with unadjudicated allegations of misconduct can continue to draw a pension equal to her full salary; since her retirement, Barry has continued to receive a judicial pension in the neighborhood of \$200,000 per year. Retirement from a judicial post does not equate to retirement from the profession; it might be followed by the practice of law (as with Kozinski) or another judicial position (as with Kavanaugh). Any misconduct that goes unaddressed in one forum might appear again in another.

Systemically failing to address misconduct creates systemic problems, and even as she draws on the lessons of individual instances, Martinez remains focused on that broader view. The failure to complete investigations into judicial misconduct allegations can contribute to a public perception that judges are above the law. The judiciary's only real authority comes from the public's faith in it; as Martinez puts it, "who will obey a judiciary that fails to police itself?" That failure of self-policing can also put judges on an ethical slippery slope, under which a judge might not notice his behavior worsening over time. As that deterioration occurs, it might become normalized among the judge's peers as his standard operating procedure—an open secret perhaps, but not one that other judges feel compelled to do anything

about.

Systemic problems require systemic responses, and Martinez offers several. She proposes modifying the Judicial Conduct and Disability Act, to confer authority to complete an investigation after a judge leaves the circuit and to make clear that the inquiry could address whether the judge should remain eligible to receive a pension.

Failing legislative reform—and Martinez is not optimistic on that front—each circuit’s chief judge and judicial council should adopt a “custom of referral” for every non-frivolous complaint they receive. Under this custom of referral, a circuit would simultaneously forward a complaint to Congress and to any state bar to which the accused judge belongs. The congressional referral would be designed to prompt an inquiry into the appropriateness of impeachment proceedings. Although a judge who has retired cannot be removed from the bench, Congress could evaluate whether the former judge should be eligible to receive a pension or serve in a similar federal office in the future. The state bar referral would be designed to prompt an investigation into potential violations of the rules governing attorneys’ professional conduct. Although some judges do not belong to any state bar, some intend to practice law after leaving the bench, so those proceedings could have real teeth.

Martinez covers a lot of ground in this essay, but she does not purport to address all of the situations that might leave allegations against a federal judge unadjudicated. For example, how should the death of a judge affect an investigation into allegations of misconduct? That situation looms large in my mind, because I clerked for Stephen Reinhardt. He [sexually harassed Olivia Warren](#), who was clerking for him at the time of his death in March 2018. Warren tried to report the misconduct through formal and informal avenues, from former Reinhardt clerks to the federal judiciary’s Office of Judicial Integrity, but they (and we) failed her at every turn.

When the allegations became public, some objected that they risked damaging the judge’s reputation for no real benefit. Martinez discusses similar objections. She sees them as consistent with what she refers to as “weak civility”—the idea that judges and lawyers should be mannerly with each other and that allegations such as these are somehow unmannerly. But as Martinez powerfully argues, we should be more concerned with “strong civility,” which prioritizes interpersonal respect and the proper functioning of the judicial branch. That version of civility counsels in favor of a full accounting of any misconduct that has occurred.

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