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JUDICIAL DISCIPLINE AND TENURE

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HEARINGS

BEFORE THE

SUBCOMMITTEES ON
JU L MACHINERY AND CONSTITUTION

OF THE

IITTEE ON THE JUDICIARY
NITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. 295, S. 522, S. 678

MAY 8 AND JUNE 25, 1979

Serial No. 96–25

Printed for the use of the Committee on the Judiciary

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CONTENTS

TUESDAY, MAY 8, 1979

STATEMENT

Page

Opening statement of Senator DeConcini 1

TESTIMONY

Panel of journalists:
Mollenhoff, Clark, professor of journalism, Washington and Lee University, and codirector of the Judicial Integrity Project, and Greg Rushford, journalist and codirector of the Judicial Integrity Project 3
Dubill, Robert, executive editor, Gannett News Service 18
Panel of judges:
Hunter, Judge Elmo B., U.S. District Judge, Western District of Missouri, and chairman, Committee on Court Administration, Judicial Conference of the United States; Chief Judge James R. Browning, U.S. Court of Appeals, Ninth Circuit; Judge J. Clifford Wallace, U.S. Court of Appeals, Ninth Circuit, and Judge J. Edward Lumbard, U.S. Court of Appeals, Second Circuit 22

PREPARED STATEMENTS

Hunter, Judge Elmo B 22
Lumbard, Judge J. Edward 46
Mollenhoff, Clark, and Greg Rushford 3
Wallace, Judge J. Clifford 35

MONDAY, JUNE 25, 1979

STATEMENTS

Opening statement of Senator DeConcini 69
Opening statement of Senator Mathias 81

TESTIMONY

Nunn, Senator Sam 70
Cameron, Chief Justice James Duke, Arizona Supreme Court 90
Gressman, Professor Eugene, School of Law, University of North Carolina 100
Bender, Professor Paul, School of Law, University of Pennsylvania 118

PREPARED STATEMENTS

Bender, Professor Paul 118
Cameron, Chief Justice James Duke 90
Gressman, Professor Eugene 100
Nunn, Senator Sam 71

APPENDIX

S. 295 127
S. 522 160
S. 678 168

ADDITIONAL PREPARED STATEMENTS

Page

Adams, Arlin M---- 251
Freedman, Monroe H---- 256
Gressman, Eugene---- 271

ARTICLES

"Chilling Judicial Independence," by Irving R. Kaufman, Yale Law Journal---- 286
"Chilling Judicial Independence: A Scarcrow," by Raoul Berger---- 323
"The Constitution and the Tenure of Federal Judges: Some Notes from History," by Philip B. Kurland, University of Chicago Law Review-- 385
"Judicial Rights and the Rise of State Misconduct Commissions," by Gerald Stern, National Law Journal, Feb. 26, 1979---- 420

MISCELLANEOUS

Code of Judicial Conduct for U.S. Judges, Judicial Conference of the United States---- 427
Exhibits of Judge J. Clifford Wallace---- 449
Letter to Senators Kennedy, Bayh, and Mathias from Judge Frank A. Kaufman, et al. re comments on judicial discipline and tenure hearings, June 20, 1979---- 513
Letter to Senator Kennedy from Robert D. Reischamer, Congressional Budget Office, re budgetary cost of establishing new courts mandated by passage of S. 1477, Aug. 3, 1979----
[Additional submissions are on file with the subcommittees.]

JUDICIAL DISCIPLINE AND TENURE

TUESDAY, MAY 8, 1979

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN
JUDICIAL MACHINERY,
AND SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittees met, pursuant to notice, at 9:10 a.m. in room 318, Russell Senate Office Building, Hon. Dennis DeConcini (chairman, Subcommittee on Improvements in Judicial Machinery) presiding.

Present: Senator DeConcini.

Subcommittee on Improvements in Judicial Machinery: Romano Romani, staff director; Michael J. Altier, counsel; Pamela Phillips, chief clerk; Sandra Walsh, secretary; and Cynthia McCormick, staff assistant. Subcommittee on the Constitution: Marcia Atcheson, counsel, and Linda Rogers-Kingsburg, chief clerk; also, Ken Feinberg, counsel, Senate Judiciary Committee, and Michael Hunter, legislative director to Senator Simpson.

Senator DECONCINI. The Committee on Judicial Machinery and Improvements will come to order.

OPENING STATEMENT OF SENATOR DeCONCINI

This is a joint hearing of the Subcommittee on Improvements in Judicial Machinery and the Subcommittee on the Constitution being held today, and we will hold hearings on three proposals relating to the discipline and tenure of the Federal judiciary. I, together with my colleague from Georgia, Senator Sam Nunn, have introduced S. 295, the proposed Judicial Tenure Act. Under this proposal, a procedure within the judicial branch would be created to deal with judges who, through their actions, have failed to meet the standard of "good behavior" required by article III of the U.S. Constitution, or who are unable to perform their judicial duties due to disabling mental or physical infirmities. S. 295 is identical to its predecessor, S. 1423, which was approved by the Senate in the 95th Congress on September 7, 1978, after extensive hearings and almost unanimous approval by the Judiciary Committee.

The second proposal, S. 522, the proposed Judicial Council Amendments and Discipline Act, has been introduced by my good friend from Indiana, Senator Bayh. This bill is similar to S. 295; however, the structure and the possible results are different than those found in the Judical Tenure Act. The third proposal, S. 678, the proposed Federal

Courts Improvement Act, has been introduced by the chairman of the Judiciary Committee, Senator Kennedy. A component part of S. 678, the proposed Federal Courts Improvement Act, relates to judicial discipline and will be compared to the other two bills. I have joined Senator Kennedy as a cosponsor of this proposal.

Today's witnesses will include a panel of two journalists who have investigated the subject of judicial conduct and disability. Mr. Clark Mollenhoff and his able asistant, Mr. Greg Rushford, have spent a considerable amount of time examining several of the problem judges who are unfit to sit on the bench.

We will then receive testimony from Mr. Robert Dubill, executive editor of the Gannett News Service. The Gannet News Service also has been making an in-depth analysis of the problem of judicial misconduct as is demonstrated by some of the recent articles that have been published throughout the Nation.

Following Mr. Dubill, we will receive extensive testimony from the Judicial Conference of the United States. We are fortunate to have three jurists who have been actively involved on this subject. Judge Elmo Hunter, a U.S. district court judge with the Western District of Missouri, is currently chairman of the Committee on Court Administration of the Judicial Conference of the United States. The committee and conference have had extensive discussion on this subject over the years. Accompanying Judge Hunter will be Chief Judge James R. Browning and Judge J. Clifford Wallace, both of the Ninth Circuit Court of Appeals. Chief Judge Browning has been active in leading his circuit in the establishment of procedures for the administrative disposition of complaints against judges, while Judge Wallace has lectured and written on the subject.

Legislation of this type is not new to the Senate. Similar bills to the proposed Judicial Tenure Act were introduced in the 90th and 91st Congresses by Senator Joseph Tydings, while Senator Nunn renewed these efforts in the 93d, 94th, and 95th Congresses. Since 1965, the Subcommittee on Improvements in Judicial Machinery has heard from 50 witnesses in 20 days of comprehensive hearings. Seldom has any proposal received such lengthy and focused attention. Unfortunately, the House of Representatives did not initiate any action of the Judicial Tenure Act after it was approved for the first time by the Senate last Congress. This year I am more optimistic that early Senate consideration and approval will provide ample opportunity for a full and comprehensive consideration by the House of Representatives.

Legislation on this subject is necessary. The public with its increased skepticism demands that all branches of Government account for their actions. It is especially critical that our Nation's courts be beyond any doubt. Although most Americans have a high regard for the overall integrity of the Federal judiciary, the past and recent publicity surrounding the acts of several U.S. judges has provided ample opportunity for questions to arise.

I welcome all of you and appreciate your being here today. Before we begin, S. 295, S. 522, and the relevant portion of S. 678 will be incorporated into the record at this point. I have to advise the witnesses that the full Judiciary meeting is due to meet at 10:30 a.m., and at that time

we will have to take a recess unless Senator Simpson can sit in for a while because of the *Illinois Brick* markup at that time.

[The bills referred to appear in the appendix.]

Senator DECONCINI. Our first witnesses, if you would come forward, please, Mr. Mollenhoff and Mr. Rushford.

Thank you very much for being here today. Let me compliment you again for your tenacity and fine work in this area. It has been extremely well done and, I believe, with a sense of improving the judicial machinery and the quality of judges.

If you would, please proceed. Your full statements will be printed in the record. If you would, highlight them for us.

PANEL OF JOURNALISTS:

STATEMENTS OF CLARK MOLLENHOFF, PROFESSOR OF JOURNALISM, WASHINGTON AND LEE UNIVERSITY, AND CODIRECTOR OF THE JUDICIAL INTEGRITY PROJECT, AND GREG RUSHFORD, JOURNALIST AND CODIRECTOR OF THE JUDICIAL INTEGRITY PROJECT

Mr. MOLLENHOFF. We must begin by commending this committee for trying, through these hearings, to come to grips with a difficult problem: How to deal with Federal judges who are unfit to sit on the Bench.

[The prepared joint statement of Messrs. Mollenhoff and Rushford follows:]

PREPARED JOINT STATEMENT OF CLARK MOLLENHOFF AND GREG RUSHFORD

We must begin by commending this committee for trying, through these hearings, to come to grips with a difficult problem: how to deal with Federal judges who are unfit to sit on the bench.

As journalists we have devoted considerable time in attempting to uncover the full extent of the problem. We think we have begun to understand it. We frankly don't know which piece of legislation this committee is considering is the most desirable. We see good points in each of the bills. None should be considered a panacea, or an excuse for the judiciary, Congress, the Justice Department, or the press, to continue what we believe is an ancient tradition of avoiding the agonies caused by the unfit Federal judge.

The first thing to say about the Federal bench is that there is no reason to doubt the ability or integrity of the vast majority of our nearly 700 Federal judges.

The second point always to keep in mind, particularly when discussing this legislation, is a proper respect for the independence of the Federal bench. Your problem, it seems to us, is to maintain the vital independence Federal judges must have from outside partisan pressures, and at the same time curb arrogant misconduct, corruption, and the other forms of judicial unfitness.

A WARNING

We too often hear suggestions that judge so-and-so should be investigated because he has a supposedly "left wing" bias, or that he has a "right wing" or some other perceived bias. It is important to resist such suggestions most strenuously. We recall vividly the "Impeach Earl Warren" sentiment plastered on billboards around this country, with their emotional pleas to move against a Federal judge simply because of his philosophy, not because of any wrongdoing. Such efforts, well-meaning or otherwise, are not only wrong but dangerous.

We are pleased that none of the bills before this committee were designed or could be used as vehicles to attack Federal judges for their "unpopular" decisions.

In these times when it is becoming more fashionable to criticize the "imperial" Federal judiciary, it should be pointed out that the Congress itself has created some of the popular resentment against the courts by passing legislation on "hot" political issues—say, abortion or busing—to the courts for resolution. We hear complaints often from Federal judges who are reluctant to voice in public their concerns about their roles as political arbiters; but it remains a valid point.

A MORBID LEGAL TRADITION

Within this framework of respect for the Federal bench, how serious and widespread are the problems of unfitness? Before it is necessary to reach this question, we point out that there is no mechanism to deal with even the known cases of judicial unfitness.

Seventeen years ago Washington attorney Joseph Borkin wrote "The Corrupt Judge," a well-documented study of Federal judicial corruption mainly during the depression era. It is noteworthy that Borkin's seminal study stands virtually alone. "The Corrupt Judge" is one volume among thousands in the modern law library. The primary lesson we have gleaned from Borkin's work, which has inspired our current efforts, is what he calls "the morbid legal tradition of reluctance to move against even a venal judge." His classic example is the late Albert Johnson of the Middle District of Pennsylvania. Judge Johnson served from 1925 to 1945 in an atmosphere of favoritism and outright venality in the sale of lucrative court offices. The FBI investigated Judge Johnson time after time; each inconclusive investigation seemed to strengthen the judge's determination to be even more venal, in the belief he was immune to a successful prosecution.

Finally, a combination of forces set in motion by a newsman, a Justice Department prosecutor, and then Congressman Estes Kefauver nailed down solid evidence of Judge Johnson's venality.

What happened? Judge Johnson escaped impeachment by Congress because he resigned his office. He was indicted but escaped conviction when witnesses refused to tell the trial jury what they had told the investigatory grand jury. Albert Johnson was never disciplined by any legal body. He returned to the private practice of law and was elected president of his local bar association.

HOW SERIOUS IS THE PROBLEM TODAY?

Our research (Mollenhoff's for over three decades as an investigative journalist, and Rushford's full-time investigation now in its second year) points us to this conclusion: The problems caused by unfit Federal judges, whether from outright corruption, political favoritism, or inability due to ill health or senility, amount to to a hidden national scandal. These problems are serious. They are deeprooted. They are difficult to investigate; more difficult to prosecute. But they are there. Each year several dozens of complaints against conduct by Federal judges, many of which seem to have at least surface merit, are simply dismissed or ignored because there is no mechanism to screen them, much less to adequately evaluate them.

As journalists our primary obligation is to report our specific findings in our series of articles, where they may be scrutinized by anyone. Several such efforts are underway. We would be happy, of course, to answer questions about articles we have already written. Perhaps you might wish to incorporate some of them in this hearing record.

Without going into yet unpublished material, the known problem cases—the Chandler affair in Oklahoma, the Ritter years in Utah, the Fogel matter in Philadelphia, the Tehan case in Wisconsin, the Ellis case in Louisiana—demonstrate the intractable nature of the problem. The consistent threat running through these cases is the years, even decades, during which the problems were allowed to fester.

Even a cursory review of the institutions which might be expected to cope with judicial unfitness reveals how problems tend to fall between the cracks.

THE SUPREME COURT

Joseph Borkin urged in "The Corrupt Judge" that the Supreme Court use its inherent constitutional authority to police the bench. No Chief Justice has ever seen such self-policing as his responsibility. The classic case involves the citizen who wrote to the court with his complaints of judicial corruption, and was told

by the clerk, "I regret to inform you that this court has no authority to institute or conduct investigations as mentioned in your letter. Neither can we suggest an investigative body."

We have spoken to the Federal judge who was accused in the above-mentioned case and he agrees with us that a judicial tenure mechanism or some such vehicle could be helpful in clearing up such festering complaints: either to clear the judge and restore public confidence in the integrity of the bench or to exonerate the citizen. Neither has been done.

When we called the Supreme Court recently for comment by the Chief Justice on an article we are preparing, we were told by the press officer, after he was supposed to check with the Chief Justice, "It's really not our responsibility here." We were referred to the Judicial Councils.

Last year we reported the following: "Judicial Councils in the regional Federal circuits have no investigative staffs and are not capable of dealing with complex cases. Although a review committee established by the policymaking Judicial Conference of the United States has been diligent and effective in resolving simpler conflict-of-interest and ethical questions, it too is not equipped to deal with difficult cases."

Our continuing investigation has reinforced that original view. On the whole Federal judges are reluctant to investigate their colleagues. We have seen precious little evidence of specific cases where Judicial Councils have curbed judicial unfitness. We have seen evidence, astonishingly enough, that some district chief judges are flat-out uninterested, even when cases of possible corruption are brought to their attention. And we have seen the agony that other Federal judges have gone through when judicial problems have surfaced, only to linger unresolved.

We believe that every single case where any action to curb judicial unfitness has been taken by the Judicial Councils should be reported in full to the Congress. We also believe this information should be made public. Frankly, this might embarrass a few judges who have done something embarrassing. But after all, Federal judges are public servants, more unaccountable than any others. Full disclosure of the problem cases, in our opinion, would help curb future excesses. We believe that citizens who are expected to give their trust to the Federal bench deserve an accurate accounting of the state of the Federal courts.

Another point: Judicial Councils, in the opinion of judges we have spoken with, probably should not have full investigative powers. This is for the simple reason that Judicial Councils are composed of Federal judges who might some day hear cases of misconduct or corruption. An investigative function should be located in an impartial investigative body; a court should not investigate and hear the same case. That seems to be one of the strongest arguments for independent judicial tenure and review commissions.

THE JUSTICE DEPARTMENT

The Justice Department has the responsibility to investigate and prosecute Federal judicial corruption. It has a poor track record.

Our investigation has uncovered a pattern going back for many years in Republican and Democratic administrations whenever a Federal judge, for one reason or another, has been the subject of a criminal investigation. This pattern is characterized by excessive Justice Department timidity and reluctance to move aggressively against judicial corruption. The case of Judge Stephen Chandler in Oklahoma is the best known example of this pattern we feel free to discuss at this time. Chandler accused two fellow judges of being involved in bribes from corporate interests. His charges meant that, if true, outright crooks served on the bench; if false, a liar and a slanderer did. But the Justice Department did not investigate. One of the accused Federal judges was appointed to head the prestigious Federal Judicial Center here in Washington. Another still sits on the bench.

The Justice Department's reluctance to investigate Federal judges seems to stem from the fact that, like all attorneys, it is a litigant in Federal court and fears retaliation from a vengeful judge should the investigative effort fail.

Another problem we have encountered is that a Federal judge might do something for which he is not criminally liable, or indictable, but there is some misconduct which strongly suggests he is in breach of the constitutional good behavior standard which all judges must observe. But the Justice Department files are presently unavailable to Congress. The Department does not refer such

cases to Congress, where impeachment authority (and oversight responsibility of Justice) rests. The result is that Congress lacks much information which it should have.

THE SENATE AND HOUSE JUDICIARY COMMITTEES

Until very recently nobody has pretended that this committee has been very thorough in screening its judicial nominees. What we have called an "ancient and dishonorable" tradition of laxness has worked roughly like this: If a prospective Federal judge was not vetoed secretly by his home-State Senator on a "blue slip" sent out by the chairman, he was a pure patronage shoo-in. Confirmation hearings have been routine, sparsely attended, devoid of searching questions, even when problems of a possibly criminal nature were suspected.

The surprising thing about this process is that it has worked so well. Most observers agree that about 90 percent of the nominees have gone on to become excellent Federal judges. But another way of putting that is to say about 10 percent, perhaps 70 of our 700-plus Federal judges, should not have been put on the bench. That's way too many.

We have been encouraged, and have pointed out in our writings, that thanks to the current membership of this committee, including the special efforts of Senators DeConcini, Mathias, Hatch, and, of course, Chairman Kennedy, definite improvements in the confirmation process have been made. There are encouraging signs that this committee is forging a new tradition. We refer to your current energetic and systematic efforts to scrutinize all nominees to the Federal bench. Litigants in Federal courts for the next generation should have reason to thank this committee for your careful work this year in confirming the 152 new judges.

We also hope this committee will devote some time to judicial oversight and investigatory efforts to improve the judicial machinery. After all, many of the problems which exist today on the Federal bench are the product of the formerly lax nomination process.

We are also encouraged at signs the House Judiciary Committee, conscious that it was able to rise to the impeachment challenge during Watergate, is also inclined toward a more vigorous oversight role of the Justice Department and the Federal bench. As more problems of the bench are brought to the public's attention we anticipate an ever-greater response by that body.

THE PRESS

We also must point out in fairness that our own institution, the press deserves its share of criticism. The true state of the Federal bench has been underreported. In fact, it virtually has been ignored. The resulting lack of press coverage even when problems on the bench are known to exist is itself a national problem. In city after city that we have visited in our investigation, local readers simply are not privy to the best information because nobody has gathered it. And in too many cases, information is known but not reported.

We have been working with the Gannett news organization, the Nation's largest newspaper chain. This year Gannett became the first news organization ever to embark on a major, systematic effort to report on the Federal bench. We believe this will have an important and beneficial impact on the Federal bench and on journalism. Already the Gannett newspapers have begun to report to their readers on sensitive judicial problems in a well-balanced and thorough manner. At the same time Gannett has paid tribute to the independence of the Federal bench.

JUDICIAL TENURE LEGISLATION

We don't know which legislative proposal would be the most effective. Even the strongest bill should not absolve the institutions which touch the courts from their continuing responsibilities for oversight and reporting.

Even the weakest proposal—a clearinghouse simply to process complaints brought against Federal judges and refer them to Congress or the Justice Department—is a step in the right direction.

We see no reason to fear a thorough investigative body with full removal powers would curb our cherished judicial independence. If we thought judicial tenure commissions would make Federal judges less free to make honest and impartial rulings, we would oppose them. We believe it is possible, as the California experience indicates at the State level, to police the bench and preserve its independence.

We are not lobbyists for any particular approach. As individuals we are inclined to favor a measure similar to but somewhat stronger than that which passed the Senate last year.

If you decide to place full responsibilties for the investigation and disposal of complaints against judges in the Judicial Councils, as some judges are urging, we would hope that at least you could build an oversight mechanism into the law: requiring the Councils to submit to Congress complete reports of their actions. Such congressional oversight would help eliminate charges of "whitewash" which are inevitable if judges control the investigative and disciplinary process. It would further provide a necessary check against the known judicial reluctance to move against judicial unfitness.

We also believe that the credibility of whatever measure you act upon would be enhanced by less secrecy and more public reporting than is in any of the proposals currently before the committee.

In conclusion we again commend the committee for this effort to come to grips with a most difficult issue. Whatever action you take will be important, and we are convinced your effort can strengthen the Federal courts.

Mr. MOLLENHOFF [continuing]. As journalists, we have devoted considerable time in attempting to uncover the full extent of the problem. We think we have begun to understand it. We frankly do not know which piece of legislation this committee is considering is the most desirable. We see good points in each of the bills. None should be considered a panacea or an excuse for the judiciary, Congress, the Justice Department, or the press, to continue what we believe is an ancient tradition of avoiding the agonies caused by the unfit Federal judge.

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We, too, often hear suggestions that Judge So-and-so should be investigated because he has a supposedly "left wing" bias, or that he has a "right wing" or some other perceived bias. It is important to resist such suggestions most strenuously. We recall vividly the "Impeach Earl Warren" sentiment plastered on billboards around this country, with their emotional pleas to move against a Federal judge simply because of his philosophy, not because of any wrongdoing. Such efforts, well-meaning or otherwise, are not only wrong but dangerous.

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When we called the Supreme Court recently for comment by the Chief Justice on an article we are preparing, we were told by the press officer, after he was supposed to check with the Chief Justice, "It's really not our responsibility here." We were referred to the Judicial Councils. I might say I have gone into many of these cases over the years and would be very happy to answer questions on my specific experience with the Judicial Councils and with Federal judges, the FBI and the courts.

Last year we reported the following:

> Judicial Councils in the regional Federal circuits have no investigative staffs and are not capable of dealing with complex cases. Although a review committee established by the policymaking Judicial Conference of the United States has been diligent and effective in resolving simpler conflict of interest and ethical questions, it too is not equipped to deal with difficult cases.

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We believe that every single case where any action to curb judicial unfitness has been taken by the judicial councils should be reported in full to the Congress. We also believe this information should be made public. Frankly, this might embarrass a few judges who have done something embarrassing. But after all, Federal judges are public servants, more unaccountable than any others. Full disclosure of the problem cases, in our opinion, would help curb future excesses. We believe that citizens who are expected to give their trust to the Federal bench deserve an accurate accounting of the State of the Federal courts.

Judicial councils, in the opinion of judges we have spoken with, probably should not have full investigative powers. This is for the simple reason that judicial councils are composed of Federal judges who might some day hear cases of misconduct or of corruption. An investigative function should be located in an impartial investigative body; a court should not investigate and hear the same case. That seems to be one of the strongest arguments for independent judicial tenure and review commissions.

The Department of Justice has the responsibility to investigate and prosecute Federal judicial corruption. It has a poor track record.

Our investigation has uncovered a pattern going back for many years in Republican and Democratic administrations whenever a Federal judge, for one reason or another, has been the subject of a criminal investigation. This pattern is characterized by excessive Justice Department timidity and reluctance to move aggressively against judicial corruption. The case of Judge Stephen Chandler in Oklahoma is the best-known example of this pattern we feel free to discuss at this time. Chandler accused two fellow judges of being involved in bribes from corporate interests. His charges meant that, if true, outright crooks served on the bench; if false, a liar and a slanderer did. But the Justice Department did not investigate. One of the accused Federal judges was appointed to head the prestigious Federal Judicial Center here in Washington. Another still sits on the bench.

The Justice Department's reluctance to investigate Federal judges seems to stem from the fact that, like all attorneys, it is a litigant in Federal court and fears retaliation from a vengeful judge should the investigative effort fail.

Another problem we have encountered is that a Federal judge might do something for which he is not criminally liable, or indictable, but there is some misconduct which strongly suggests he is in breach of the constitutional good behavior standard which all judges must observe. But the Justice Department files are presently unavailable to Congress. The Department does not refer such cases to Congress, where impeachment authority and oversight responsibility of Justice rests. The result is that Congress lacks much information which it should have.

Until very recently nobody has pretended that this committee has been very thorough in screening its judicial nominees. What we have called an "ancient and dishonorable" tradition of laxness has worked roughly like this: If a prospective Federal judge was not vetoed secretly by his home State Senator on a "blue slip" sent out by the chairman, he was a pure patronage shoo-in. Confirmation hearings have been routine, sparsely attended, devoid of searching questions, even when problems of a possibly criminal nature were suspected.

The surprising thing about this process is that it has worked so well. Most observers agree that about 90 percent of the nominees have gone on to become excellent Federal judges. But another way of putting that is to say about 10 percent—perhaps 70 of our 700-plus Federal judges—should not have been put on the bench. That is way too many.

We have been encouraged, and have pointed out in our writings, that thanks to the current membership of this committee, including the special efforts of Senators DeConcini, Mathias, Hatch, and, of course, Chairman Kennedy, definite improvements in the confirmation process have been made. There are encouraging signs that this committee is forging a new tradition. We refer to your current energetic and systematic efforts to scrutinize all nominees to the Federal bench. Litigants in Federal courts for the next generation should have reason to thank this committee for your careful work this year in confirming the 152 judges.

We also hope this committee will devote some time to judicial oversight and investigatory efforts to improve the judicial machinery. After all, many of the problems which exist today on the Federal bench are the product of the formerly lax nomination process.

We are also encouraged at signs the House Judiciary Committee, conscious that it was able to rise to the impeachment challenge during Watergate, is also inclined toward a more vigorous oversight role of the Justice Department and the Federal bench. As more problems of the bench are brought to the public's attention, we anticipate an ever greater response by that body.

We should also mention the press. We also must point out in fairness that our own institution, the press, deserves its share of criticism. The true state of the Federal bench has been underreported. In fact, it virtually has been ignored. The resulting lack of press coverage even when problems on the bench are known to exist is itself a national problem. In city after city that we have visited in our investigation local readers simply are not privy to the best information because nobody has gathered it. And in too many cases, information is known but not reported.

We have been working with the Gannett news organization, the Nation's largest newspaper chain. This year Gannett became the first news organization ever to embark on a major, systematic effort to report on the Federal bench. We believe this will have an important and beneficial impact on the Federal bench, and on journalism. Already the Gannett newspapers have begun to report to their readers on sensitive judicial problems in a well-balanced and thorough manner. At the same time Gannett has paid tribute to the independence of the Federal bench.

We don't know which legislative proposal would be the most effective. Even the strongest bill should not absolve the institutions which touch the courts from their continuing responsibilities for oversight and reporting.

Even the weakest proposal, a clearinghouse simply to process complaints brought against Federal judges and refer them to Congress or the Justice Department, is a step in the right direction.

We see no reason to fear a thorough investigative body with full removal powers would curb our cherished judicial independence. If we thought judicial tenure commissions would make Federal judges less free to make honest and impartial rulings, we would oppose them. We believe it is possible, as the California experience indicates at the State level, to police the bench and preserve its independence.

We are not lobbyists for any particular approach. As individuals we are inclined to favor a measure similiar to but somewhat stronger than that which passed the Senate last year.

If you decide to place full responsibilities for the investigation and disposal of complaints against judges in the judicial councils, as some judges are urging, we would hope that at least you could build an oversight mechanism into the law; requiring the councils to submit to Congress complete reports of their actions. Such congressional oversight would help eliminate charges of "whitewash" which are inevitable if judges control the investigative and disciplinary process. It would further provide a necessary check against the known judicial reluctance to move against judicial unfitness.

We also believe that the credibility of whatever measure you act upon would be enhanced by less secrecy and more public reporting than is in any of the proposals currently before the committee.

In conclusion, we again commend the committee for this effort to come to grips with a most difficult issue. Whatever action you take will be important, and we are convinced your effort can strengthen the Federal courts.

I might say that a major part of this problem has been the press. In most instances the press is only aware of the problem in its specific circulation area. In that situation, there is a natural reluctance by the reporters, editors, and the lawyers for the paper to want to come to grips with any fact situation that is critical of the Federal judiciary.

Senator DeConcini. Mr. Mollenhoff, thank you very much. If you have no objections, I would like to have in the record at this time the article written by you and Mr. Rushford in the Washington Post, April 23, 1978.

Mr. Mollenhoff. I think that would be good to put that in. I would suggest also, that the Gannett series will be placed in the record.

Senator DeConcini. We will also include those at the proper time.

Let me address a few questions to you, both of you.

Toward the end of your statement, you talk about potential whitewash, if this is left in the circuit councils. If there is an oversight mechanism which could help eliminate the whitewash charge, do you feel the Congress could find the time or would find the time for this additional task, when they have had very little time or made little effort in the matter of impeachments and oversight before?

Mr. Mollenhoff. I think the requirement for a report to the committee would have the effect of policing itself, whereas the press is reluctant to initiate these actions, the press in a specific area would then feel protected within the framework of the report itself. It is the same situation with regard to the various Inspector General offices that have been set up in recent years. The Congress certainly does not have time to do more policing of these agencies. However, making the Inspector General report available to the proper oversight committees of the House and Senate puts the committee in a position where it does not have to put too much time into this study. When those critical reports are made available, the press can then obtain the information and get an insight into the operations of the departments.

Senator DeConcini. Mr. Rushford, maybe you could answer this. Stephen Brill, contributing editor with Esquire magazine, recently wrote an article entitled "Benching Bad Judges." Are you familiar with that article?

Mr. Rushford. Yes, I am.

Senator DeConcini. He described the district court judges' judicial temperament. Are either of you familiar with this case, and if so, could you provide us with some additional background on the case for the record?

Mr. Rushford. We are familiar with the number of complaints which have been made involving several second circuit judges over the last few years. We have not looked specifically at the Cooper situation, except to note that it has been reported before, I believe in "The Bench Warmers." We have had a number of complaints handed to us by

citizens who ask that circuit for action. In most cases they have gotten a form letter back. In one case, a young man named David Shuffman is going to be disbarred for making his complaints. We have seen little evidence that the problems are addressed at all.

The point should be made in fairness that this is not to accuse any particular judges of wrong doing or to say citizens' complaints are going to be proven true, but simply that there does not seem to be a mechanism to cope with serious charges. Just this last weekend, for example, a man named Nick Spanos approached me. Spanos is a person who has had some reason to believe there have been improprieties in litigation he has had in the courts of New York and Chicago. I had never met him, but this is a typical case, and I can describe it just to illustrate how the process works. Mr. Spanos gave me a letter he had written to the chief judge of the circuit in 1974, accusing another judge of some improprieties, characterized roughly as backdating documents and mishandling of the case.

Mr. Spanos says, "All I got for my efforts is a form letter, and nothing has been done."

If the charges such as this citizen is making are false, they should be disproven. It casts discredit upon the Federal courts to allow these problems to fester. Perhaps, the judges should be cleared. They presently have no place to go to clear themselves if they should be cleared. In any event, the handling of these charges is important.

Senator DeConcini. Has it been either of your experiences that the general reaction from the circuits and from the chief judges of the districts are just a form letter in response to the citizens that you have talked to who have complained?

Mr. Mollenhoff. That is true. Let me explain another situation—the Fogel situation up in Philadelphia, where you had a Federal judge who had taken the fifth amendment before a Federal grand jury—on questions involving his criminal acts where there were admissions in the public record of the backdating of papers.

Senator DeConcini. Can you go into that case a little bit also? That was my next question.

Mr. Mollenhoff. This was a situation where a Federal judge prior to the time he was on the bench, had backdated some papers relative to some GSA leases. After he got on the bench, there were some complaints on this to the U.S. attorney. The U.S. attorney did not go into it. Civil litigation involving one of the competitors for the contract with GSA brought this material to light in depositions, and at that stage it became incumbent upon the local bar association and the prosecutors to move forward with it, which they did. It was only when it was put right on their backs, after the judge went before the grand jury and took the fifth amendment but remained on the Federal bench. It became quite an issue in the Philadelphia Bar Association. It was an amazing situation. The subcommittee of the Philadelphia Bar Association by a small margin recommended removal. The full committee, by a very small margin, said they would not recommend removal—rejected removal.

During this period I called Judge Seitz who is chief judge of that circuit. I wanted to talk to him and find out what they were doing about the Fogel matter and if he was concerned. Judge Seitz said he was

concerned about it, but he had no machinery to do anything about it, and did not think he would do anything about it unless it came officially before him.

I said, "How can it come officially before you?" Well, if the Philadelphia Bar Association would take some action and would formally present it to him.

But here is the kind of situation I think that Judge Seitz was deeply concerned, but he did not have the machinery. He explained he did not have the machinery to investigate or even a budget to investigate. This is what you people can do in providing them with the mechanism and the pressure. I think you have to put the pressure on for them to go into the matters, give them the mechanism and insist that they report. That does not interfere with their independence of the judiciary in any respect. I think that is the minimum that can be done. I tried to get some action on the Fogel case out of the Justice Department. Of course, they fumbled around with it, and the details on that we will be discussing in some articles at a later stage. They fumbled around with it inconclusively, and finally managed to get Judge Fogel to leave the bench.

Earlier in the Chandler case—I have dealt with that for years—and Judge Chandler came to me. He had been to the Justice Department and told them about corruption in the judiciary. He told two stories, and this is what established his credibility as far as I was concerned. He told one story about corruption in the State Supreme Court of Oklahoma, and the Justice Department went ahead with that and turned over parts of it to State prosecutors and in the end the State supreme court justices, I think it was three of them, were removed, and two of them were convicted on crimes. In the same conversations with the Justice Department, he told me about two of his colleagues involved in making efforts to bribe him, relative to litigation involving a large corporation. I talked to the Justice Department people about this, talked to the top people who were involved; they were attorneys. They did not want to go into this. They were concerned about it, but they did not want to go into it because they were going to have to litigate before those judges. They did not want to turn it over to the FBI. Chandler had gone to the FBI. He had gone to this committee. He had gone to the House committee. He had tried through the court system itself to get this matter resolved on petitions that involved one matter that went all the way to the Supreme Court; the Supreme Court would not touch it.

I think it is this reluctance that you have to deal with so that you put the court in a position where it feels a compulsion to solve these problems and to solve them publicly. If they solve them—and I think this is vital—if they solve them privately, some of them will be solved properly, but some of them will have a taint of fix. The public must be assured of these matters, that it is not a fix, that the issues are all there for public examination. You have to put the monkey on the court's back for a solution. I do not think that is an interference with their independence.

Mr. RUSHFORD. I could add a little bit to that. The difficulties in the Chandler mess out in Oklahoma seem to have contributed to the lack of resolution to the Willis Ritter problem which festered out in Utah for

almost 30 years. The Supreme Court's handling of the Chandler case, leaving inconclusive the question as to the powers of the judicial councils, frustrated the 10th circuit, as I understand it, when the Ritter problem came to the forefront. The judges who moved against Chandler had to pay their own legal expenses, as I understand it. They were deeply concerned.

Judge Lewis told me that he went over to Oklahoma City one time and Judge Chandler had been indicted in a State court for something or another, and he was so ashamed and frustrated with the spectacle of a sitting Federal judge in such a circumstance, he threw his shoe right out the window. And later when the Ritter problem came to notoriety, the 10th circuit felt itself unable to move diligently. It has been criticized for not moving more promptly, but I believe I can understand the reluctance, given the Chandler precedent.

Senator DECONCINI. It is our understanding that the fifth and ninth circuits have established administrative procedures to handle disability and misconduct problems. What has been your experience in those circuits?

Mr. RUSHFORD. Well, of course, the best evidence as to what specific actions have been taken should be provided by the ninth and fifth circuits.

Senator DECONCINI. Do you find those circuits any less prone to complaints or improprieties or questions in your judgment?

Mr. RUSHFORD. There have been some problems in the fifth circuit. What comes to my mind at the moment is the ninth circuit. I notice that Chief Judge Browning is here. He has an admirable record as far as I am able to determine. I can think of at least two decisions just off the top of my head where the ninth circuit has accused Federal district judges of abusing the code of conduct in their operations in the courtroom. This is certainly evidence of concern. However, there are more serious allegations out in the ninth circuit against one particular Federal judge. This man was named in national news articles and in a book of being overly sympathetic to mob leaders. The reports were deserving of some credibility because the sources were Federal prosecutors' documents. Someone could have obtained those to check them out. When I called the ninth circuit to ask if anything had been done about this, I found I was in a position of conveying information and that even the national publicity and the book apparently had not been brought to that council for action of some sort or another.

Senator DECONCINI. Currently the only way that a judge may be removed from office is by means of impeachment by the House of Representatives, and if successful, of course, a trial and conviction in the Senate.

Could you provide us with your understanding of what, if any, procedures exist in the House of Representatives to handle an impeachment matter?

Mr. MOLLENHOFF. I have gone to the House of Representatives over the last 25 years probably dozens of times on half a dozen cases. They have initiated no investigations except in one instance, and that involved the Chandler case. It was absolutely, totally, thoroughly superficial. Up to that point, and until recently, the chairman of that committee was Emanuel Celler and I did not really expect any great

kind of reform from Emanuel Celler who continued to practice law in New York and was in practice with a man who had been identified as the bagman in the Judge Manton scandal. I have written columns about Celler and his law partner. It is all very clear in the court record. I did not expect Chairman Celler to be any great progressive force as the policeman of the judiciary.

Senator DeConcini. Mr. Mollenhoff, to your knowledge are there funds authorized and appropriated or investigative staff available in the House?

Mr. Mollenhoff. There may be now. They have some staff members and some greater initiative over there. There were not in the past.

Senator DeConcini. You do not know of any specific——

Mr. Mollenhoff. There were none in the past. I know this is part of the reason that they said they only had their regular funds and there were no special funds and they would not go back to any extra funds. If there was something to be done quickly, they would make a couple telephone calls or make a trip or something, but that was about all they would do.

Senator DeConcini. In other words, to your knowledge there is no formal mechanism on complaint?

Mr. Mollenhoff. There is no formal mechanism.

Senator DeConcini. Let me ask you a question. From the Senators you interviewed—I know you talked to a number of them—what is your understanding what happens to complaints that come to Congress or Members of the Senate? What happens to complaints?

Mr. Mollenhoff. There was just a thorough lack of interest. Some of these matters at various stages in the past involved situations where some senior member of this committee was a figure involved. The general inclination has been around these committees for the chairman and the others to defer to the wishes of committee members. There were a number of situations up there.

Senator DeConcini. So you are really saying not only do we need the mechanism for the courts, so that in your judgment there is a procedure for them to act but also it would be very helpful for Congress to have some procedure to refer these complaints to where it would not get caught up in the potential politics of the committee or——

Mr. Mollenhoff. As I have gone to the various committees over the years with these complaints, invariably the staff people or the members of the committee would say, well, where is all the evidence? And I did not have all of the evidence; I had a broad range of incidents in the Chandler case indicating questionable conduct and believed somebody should damn well find out what the facts were. I could not resolve this. You would have difficulty resolving it even in a confrontation hearing. There has been too little stomach in the House or Senate for handling those problems.

Mr. Rushford. I might add something in fairness to the Congress. As you know, you have organized interest groups coming to you every day with some issue that they are vitally interested in which has received a great deal of publicity and has some urgency to it. No one until very recently has been talking about the problems on the Federal bench. Partly this is the fault of the press. I believe as the problems are brought more to the public's eye, you will see more

attention paid in the Congress. I can understand why problems have been somewhat neglected because you do not have time to cope with all the problems you know about now.

Mr. MOLLENHOFF. I think that is a very good point, that they were regarded as isolated incidents. Everyone hoped they would go away. But as time moved forward, I saw they were not isolated incidents; that whether it was in Wisconsin with Judge Tehan, who had been on the Federal bench, despite the fact that he had paid no Federal or State income taxes for 8 years prior to the time he was on the bench, to a wide range of other things involving conflicts of interest in a case in northern Indiana. These complaints were just not being resolved.

Even when this committee knew about the situation involving a U.S. district judge, that district judge was moved up to the circuit. I could go into that and would be very happy to go into it at any stage you want to go into it in detail.

Senator DECONCINI. I have a question from Senator Bayh. I would like to ask if you would be kind enough to answer it.

When S. 522 was introduced it was the concern of Senator Bayh and Senator Mathias that a genuine need exists for such legislation. You have told the subcommittee that about 10 percent of Federal judges may not be fit to sit on the bench. That seems to be very high to these two Senators. Have you specific instances to back that up, or are these generalizations?

Mr. RUSHFORD. We take that figure from a variety of sources. Numbers are always questionable. Who knows the true state? The most distinguished student of the judicial nominating process has been Prof. Harold Chase from the University of Minnesota. He sat in on the nominating processes as far back as the Kennedy administration. He is regarded by almost everyone I know as a very sober-minded observer. He has used that 10-percent estimate for years. It is a rough approximation.

Senator DECONCINI. It really does not make too much difference what the percentage is, if in fact there are abuses.

Mr. RUSHFORD. I might add that the problem involving Judge Tehan in Wisconsin was not just an isolated example. Judge Tehan came down and sat in cases in Indiana, cases which were notorious earlier in this decade. Once the bad Federal judge, just one, gets on the bench, he can have national, or at least regional impact.

Mr. MOLLENHOFF. There was a situation in northern Indiana where there was a highly questionable set of circumstances involving a Federal judge and conflicts of interest. That Federal judge stood aside with regard to the specific case. He had an outside judge come in to sit on that case, and the outside judge he had assigned was Judge Tehan from up in Milwaukee who was under fire on questionable activities involving an alleged fix of a tax case.

Judge Tehan at that time went down to this judge's district and sat on his hot case, and each of them ruled in favor of the other judge's friends.

It was one of those convenient swaps in the judiciary, musical chairs. I am afraid that happens a good many times. There should have been an outcry from others in the judiciary at that stage and there was not.

Senator DECONCINI. Thank you, gentlemen. Due to time, I am

going to ask if you would be kind enough to answer a couple of questions that we would submit to you in writing. Another one is from Senator Bayh, and perhaps Senator Kennedy's staff might have some.

Thank you very much.

Mr. MOLLENHOFF. Thank you.

Senator DECONCINI. Our next witness is Robert Dubill, executive editor of the Gannett News Service. Let me compliment you on the fine articles that some of your reporters have put together and the wide distribution of the articles. We appreciate that interest by the news service.

If you care to highlight your statement.

STATEMENT OF ROBERT DUBILL, EXECUTIVE EDITOR, GANNETT NEWS SERVICE

Mr. DUBILL. I am appearing before you at your invitation and the invitation of others associated with this committee, and we have expressed an interest in a series of articles entitled "Justice on Trial."

Gannett News Service is headquartered in Washington, D.C. We have bureaus in the capital cities of 10 States. We produce a daily report that includes hard news, features, investigative reporting, enterprise and special projects. Our service is received by 78 newspapers from the Virgin Islands to Guam.

As a news service, we do not take editorial positions on subjects we report and write about. Thus, we must decline respectfully to render opinions on the merits of bills before you relating to judicial tenure. Newspapers in the Gannett group establish their own editorial policies.

At your request, however, we feel it appropriate to share the published fruits of our continuing study of the judiciary. I am submitting reprints of two chapters. One of these has 16 pages; the other, 8 pages. Both focus on the highlights of investigations thus far.

[The "Justice on Trial" reprints can be found in the appendix.]

Five reporters and three editors have worked on this project. The reporters have conducted nearly 200 interviews—talking with lawyers, judges, legislators and scores of persons involved in the court system. They have visited more than a dozen States, studied countless court and research documents and picked the brains of constitutional scholars as well as those in and out of the media who have studied and/or reported on specific aspects of the Federal court system. We have picked the brains of Mr. Mollenhoff and Mr. Rushford. I might say, though, we have talked with them extensively we have pursued our studies and our investigations independently. In other words, when they would tip us to something or what have you, whether they would provide a lead of what have you, we have pursued our reporting independently.

We embarked on this project in the hope that we could shed light on the Federal judiciary, a branch of Government that has not been scrutinized by the general press on a sustained basis. We felt it would be especially important this year to focus on the Federal bench because of the 152 judgeships created by an act of Congress.

In summary, the articles show that the Federal courts in the United States are tainted by unfit judges and political patronage. While many judges have carried out their duties in a dignified and diligent manner, in accord with their oaths of office, others have become cantankerous eccentrics, enjoying lifetime tenure and an awesome, virtually unlimited scope of power. The Federal bench, the articles suggest, is answerable to no one, even itself.

The American Bar Association and the Senate Judiciary Committee are supposed to investigate judicial candidates, but the articles show that many appointments have slipped through without serious investigation. In the Nation's entire history, only nine Federal judges have been impeached by Congress, and only four convicted, the last in 1936.

The GNS investigations depict a pervasive feeling of uneasiness throughout the Federal court system; lawyers reluctant to complain on the record because they might be appearing before some of the very judges they criticize; judges themselves finding fault with disciplinary procedures; citizens feeling shut out in attempts to obtain redress.

The investigations revealed widespread agreement that the system for choosing, confirming and evaluating judges is unduly private; that the time may be at hand to develop a system of checks and balances aimed at not only restoring confidence in the legal community but the general public as well.

Senator DeConcini. Thank you, Mr. Dubill. In one of your articles, you provided some details on the Jack Nard case. Could you highlight that case for the record and the judicial misconduct that you believe has occurred there?

Mr. Dubill. As I mentioned at the outset, we would kind of like to stick with the articles as published. However, in this case we felt that this was reportable in terms of current investigations underway. We understand that a U.S. attorney in Iowa and a Senate subcommittee are probing a set of allegations that begin with a decision by a judge in Pennsylvania. As I say, since this case has been undergoing grand jury investigation, we would kind of like to stick with what we have published.

Senator DeConcini. Without your objection, we would like to include your articles in the record.

Mr. Dubill. Fine.

Senator DeConcini. What can you give us on the Ellis case?

Mr. Dubill. Yes. That was a case where Mr. Ellis was known as a political lackey. This was an article reported by Chris Collins of our news service. He was made a Federal judge. The research showed that in fact he was made a Federal judge because some in Government felt that he had no other place to go, and that was a good place to put this person. As it turned out, the ABA committee that rated all candidates for the judge has found Ellis qualified, the lowest of four ratings, the lowest rating possible without rejecting him outright.

There were many nuances to this whole thing. One of the things that was reported that was pertinent here is that those who were involved in the ABA study, those who were reviewing his record realized that, after he had been confirmed, there were problems. His becoming a drug addict became public. Mr. Segal of the ABA asked

what would have been achieved if the ABA took steps to get him out. "Once he is there," I am quoting Segal, "the prayer is that somehow he will be all right." This interview with Mr. Segal was conducted this year. I think the indication in these articles is that he had some reservations about not going public earlier on.

Senator DeConcini. The extensive investigations that Gannett News Service has done in Pennsylvania have shown some really traumatic problems and cases. Do you believe that similar findings could be substantiated in other parts of the country?

Mr. Dubill. I think the articles thus far have led to numerous visits. Lawyers have contacted us with instances where they had no recourse in the present system. We have received letters, briefs, and so forth, but again these are things that we are pursuing now.

Senator DeConcini. Do you have future plans to carry your investigations into other jurisdictions?

Dr. Dubill. Yes; we are. It is an ongoing investigation. We will be pursuing this at least to the rest of the year.

Senator DeConcini. Do you agree with Mr. Mollenhoff that part of this problem has been the press failure to want to address it for whatever reasons they may have? He laid some of the blame on the press as well as on the Congress and on the judges. I just wondered if you agreed with that?

Mr. Dubill. Without taking issue with my colleagues in the press, I think we felt that this investigation was long overdue. We felt that it was particularly appropriate this year because of 152 judgeship appointments at stake, and this, in effect, we felt would set the tone of justice for at least a generation in this country. We still feel that the subject requires much further exploration, investigation, amplification.

Senator DeConcini. Do you have any opinion, Mr. Dubill? Why do you think the press has been reluctant? Say 10 years ago there probably were some cases—I know of one in the ninth circuit, at least highly rumored at that time 10 years ago, and yet you never saw mention of it in the press. Do you think the press just looked the other way or were they too busy to really get into it?

Mr. Dubill. Well, probably everything you could say about any subject, you could come up with a variety of answers. I think in our situation we felt when we first decided to undertake this project, we read extensively, we read the commercial press, we read the legal periodicals, and it seemed to us that the subject was not covered extensively. That is why we had undertaken this project.

Senator DeConcini. That is why you moved into the area. I guess what I am trying to ask—and maybe you do not have an answer—is, what do you think the reductance was before Gannett moved into this area? Before Mollenhoff and Rushford moved into the area years ago? Do you think there was a reluctance or was there just an oversight on investigative ability of the news media?

Mr. Dubill. Well, sometimes maybe covering politics or legislative branches may be sexier. I was editor at Camden, N.J., 2 years ago, or 3 years ago. We did a rather extensive study of municial courts. Prior to that time, there was no hard look at municipal courts, yet these are

the courts people are most familiar with. Three million complaints a year in New Jersey, and yet the court system has been a stranger to many in the public.

I think at this point because of the overwhelming number of new judges, not that they are not needed, we felt it was time to take a look at this thing. If it has not been done in the past, let us do it now. If the system is fine, fine; if it is not, let us report on what we found. I hesitate to make opinions because we are really in a reportorial posture.

Senator DeConcini. I understand. I read your articles and I compliment the Gannett News Service for their in-depth study. But when I read those articles, I ache for the court system in this country because there is no reason that it ought to be that way. Those that have misbehaved bother me so much that I have lost some sleep over it. We do have fine judges and oftentimes there is a failure on the part of the press to report on the fine quality of those judges.

I would hope that the news media would consider doing—and maybe they have done—exposés and feature articles on the quality of judges as well. I urge you to continue the type of investigative reporting that you have done. I think it is something that has to be aired.

Mr. Dubill. In our series we have touched on some of the judges who have made contributions. I would add that even judges who are under a cloud, whether by the press, from the press, or from others in the ratings by bar associations and so forth and so on, even they have complaints that they have been hamstrung in getting a forum to hear their side of the story.

Senator DeConcini. Which only goes to the fact that we need some procedure in your observation to create the mechanism for complaints to be handled.

Mr. Dubill. Again I hesitate to make an opinion, but I think we will be continuing this series.

Senator DeConcini. Thank you very much for your testimony today.

Mr. Dubill. Thank you.

Senator DeConcini. At this time, we will have Judge Hunter, Chief Judge Browning, and Judge Wallace, and I would also ask Judge Lumbard to come forward.

We are going to have to recess around 10:40 or 10:45, so if we can hear your testimony, I regret only a half hour here, and if necessary, we will continue to another time. If you can summarize your statements, rather than reading them in full, it would help us so that everyone will have a chance to have their say. Your full statements with all attachments will be printed in the record.

Judge Hunter. Do I understand that you will not come back into session after your 10:30 recess?

Senator DeConcini. I am going to go over until 10:45 and then I am going to recess and probably will not come back in. We may hold other hearings on the bill at another time.

Judge Hunter. That leaves about 30 minutes for the four of us. I will do the best I can to follow your suggestion.

PANEL OF JUDGES:

STATEMENTS OF JUDGE ELMO B. HUNTER, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF MISSOURI, AND CHAIRMAN, COMMITTEE ON COURT ADMINISTRATION, JUDICIAL CONFERENCE OF THE UNITED STATES; CHIEF JUDGE JAMES R. BROWNING, U.S. COURT OF APPEALS, NINTH CIRCUIT; JUDGE J. CLIFFORD WALLACE, U.S. COURT OF APPEALS, NINTH CIRCUIT, AND JUDGE J. EDWARD LUMBARD, U.S. COURT OF APPEALS, SECOND CIRCUIT

Judge HUNTER. My name is Elmo B. Hunter. I am district court judge from the Western District of Missouri. I appear here today on behalf of the Judicial Conference of the United States in my capacity as chairman of the Conference's Committee on Court Administration.

[The prepared statement of Judge Hunter follows:]

PREPARED STATEMENT OF ELMO B. HUNTER

Mr. Chairman, in prior appearances before the Senate Judiciary Committee I have provided a brief summary of my personal background. Nevertheless, I believe it may be especially appropriate to provide that information again for the record which will be made of these proceedings; I hope you will therefore not mind a slight degree of repetition.

Although I am a judge of the United States District Court for the Western District of Missouri, I appear here today as chairman of the Judicial Conference's Committee on Court Administration. That committee consists of 15 Federal judges, currently 9 district court judges and 6 judges of the courts of appeals. The committee's work is usually initiated in one of its four subcommittees. An additional 18 judges who do not actually sit on the main committee serve on those subcommittees. Copies of a chart displaying the Conference's committee and subcommittee members, and a list displaying current members of the Conference itself, are included with this statement as appendices.

I have been a member of the Court Administrative Committee since 1969. Between 1976 and 1978, I served as chairman of its Subcommittee on Judicial Improvements, a position now held by Judge Bailey Brown, chief judge of the Western District of Tennessee. In January of 1978, I succeeded Judge Robert A. Ainsworth, Jr., of the Court of Appeals for the Fifth Circuit, as chairman of the committee. Judge Ainsworth, of course, appeared before the Senate Judiciary Committee on many occasions. On February 25, 1976, he testified on behalf of the Conference on a 94th Congress bill, S. 1110, an antecedent to one of the bills which is the subject of this hearing today.

During almost a full decade of service on the Court Administration Committee, I know of no legislative proposals which have been of as much concern to the committee and the Conference as bills designed to achieve purposes identical, or substantially similar, to those embodied in the bills which are the subject of this hearing. In my 10 years of committee service no other single issue has been as difficult as the fundamental issue posed by these bills now before you—an issue which is before you for the third Congress in a row: What processes or procedures should be legislatively instituted to supplement or complement, if not to effectively substitute for, impeachment of a Federal judge under article I of the Constitution? No single question has been more arduously weighed by the Court Administration Committee, and no other question has proven harder to resolve.

Quite naturally, every Federal judge first evaluates such proposals with an instinctive concern for the preservation of that concept of judicial independence which was embodied in our Constitution with deliberate care and has been staunchly defended since. Those judges serving on the Court Administration Committee and the Judicial Conference of the United States are especially sensitive to that concern. They are especially aware of their obligation to defend the independence of the Federal judiciary, not only because it is a funda-

mental element in our constitutional form of government, but also because, pragmatically, it is the most effective protection against conduct prejudicial to the administration of justice in our courts.

The members of the Court Administration Committee and the members of the Judicial Conference believe that is the key element: judicial conduct which is prejudicial to the administration of justice. Judges are only men and women. All men and women living in our free Nation "misbehave" from time to time in the eyes of other men and women who subscribe to many different social, political, and religious values. When we engage in a dialog about "judicial misbehavior" or "judicial misconduct" in the context of the proposed legislation now pending before the Senate, we cannot afford to lose sight of the fact that the kind of "judicial misbehavior" which is relevant is misbehavior which interferes with the effective and expeditious administration of the business of courts. Only a judiciary independent in terms of the separation of powers concepts of our Constitution is capable of administering justice in a manner which preserves confidence in our courts.

The history of the Judicial Conference's consideration of specific bills in this area evidences the difficulty encountered by the Conference. I believe a brief review of that history is a necessary part of my contribution to the record you are now making.

PRE-1979 CONFERENCE COMMENT

Congressional activity in this area first generated an official Judicial Conference comment on proposed legislation in October of 1940, when the Conference responded to a request from the House of Representatives for views upon a bill which would have authorized removal of a Federal judge from office by a method other than impeachment under article I. At that time, the conference responded with the following statement: "Assuming its constitutionality, as to which we express no opinion, we are in accord with the general purpose and approve, in principle, the provisions embodied in H.R. 9160, 76th Congress, 3d sess." (See Proceedings of the Judicial Conference, October 1940, at 24.)

When asked for views on a successor bill in the 77th Congress, the Conference reaffirmed the statement it had filed in October of the previous year.

Not until the mid-1960's did the issue again come before the Conference. It then arose as a result of a Court Administration Committee study, commencing in 1964, of "the adequacy of existing statutory and administrative procedures relating to" disabled judges, disability retirement, and "problems arising in the administration of justice * * * where a judicial officer is guilty of misbehavior in office." That study was conducted under the leadership of Committee Chairman John Biggs, Jr., then chief judge of the U.S. Court of Appeals for the Third Circuit, who was serving in his 11th year as chairman of the committee. Prior to completion of the committee's study, the Subcommittee on Improvements in Judicial Machinery, under the leadership of Senator Joseph Tydings, commenced a 4-year examination of this issue, and the Court Administration Committee study was suspended. (See Proceedings of the Judicial Conference, March 1964, at 9, March 1966, at 6, and September 1966, at 36–37.)

Because I was not a member of the Committee at that time, I cannot speak with personal knowledge, but I believe it accurate to ascribe the suspension of the Conference committee's endeavor to a general feeling that the Conference should appropriately await a request for comment upon congressional initiatives in this particular area which were then being developed.

In late 1969, one bill resulting from Senator Tydings' studies, title I of S. 1506, 91st Congress, came before the Conference for consideration, with a recommendation from the Court Administration Committee that the Conference express its approval of the proposal. In presenting his committee's findings to the Conference Judge Ainsworth stated that "* * * while there was considerable disagreement within [the] committee as to whether this subject matter can best be handled by a national commission [as provided by S. 1506] or by the grant of additional authority to the judicial councils of the circuits, the committee [has] resolved to recommend Conference approval * * *."

After discussing that recommendation, the Conference referred the matter back to the committee. See *Proceedings of the Judicial Conference*, October 1969, at 53. When successor legislation was not referred to the Conference during the 92d Congress, the matter was removed from the committee's agenda.

Following Senator Nunn's introduction of S. 4153, in the 93d Congress, that bill was referred to the Conference for comment. S. 4153, of course, was, in a sense, a successor bill to Senator Tydings' earlier efforts and a predecessor bill to one of the bills before you today, S. 295. In March of 1975 the Judicial Conference "agreed that * * * it would approve in principle * * * S. 1453, without approving the specific provisions of the bill." See *Proceedings of the Judicial Conference*, March 1975, at 4–5. Subsequently, Judge Ainsworth's appearance before the Subcommittee on Improvements in Judicial Machinery, which I mentioned earlier, occurred. During his testimony Judge Ainsworth expressed the Conference's approval of legislative efforts to create an approach which would serve as a supplement to impeachment for dealing with allegations of judicial misbehavior or maladministration, but emphasized the Conference's genuine concern that any legislation purporting to establish a method for removing a Federal judge from office other than by impeachment under article I might well be unconstitutional.

Three years later, when the immediate predecessor bill to S. 295 (S. 1423, 95th Congress) came before the Conference for comment, the Conference once again approved, in principle, the legislative objectives embodied in that bill, but also noted that:

"While fully cognizant of the constitutional powers vested in the Congress and the Conference's obligation to respect those powers, in responding to congressional requests for views on those bills, the Conference also believes it is obligated to express its genuine concern that enactment of any bill authorizing removal of a judge from office by a method other than impeachment will raise the fundamental question of the act's constitutionality.

"Aside from the reservation expressed on the constitutionality of the removal feature, the Conference concludes that legislation placing authority in the judicial branch itself is both compatible with longstanding concepts of separation of powers and desirable in terms of maintaining the ultimate objective of an independent judiciary worthy of public confidence." (See *Proceedings of the Judicial Conference*, March 1978, at 6–7.)

Beause that statement was soon deemed to be too ambiguous—by many Federal judges, as well as by congressional and academic commentators—the Conference approved a clarifying statement at its very next meeting:

"The action of the Judicial Conference concerning S. 1423, 95th Congress, has been widely misunderstood and the Conference hereby reaffirms 'its genuine concern that enactment of any bill authorizing removal of a judge from office by a method other than impeachment will raise the fundamental question of the act's constitutionality.'

"The Conference expresses its disapproval of any legislative provision which purports to delegate to any other tribunal or entity the constitutional power of Congress to remove a Federal judge from office." (See *Proceedings of the Judicial Conference*, September 1978, at 50.)

Simultaneously, the Conference directed the committee which I chair to conduct a study "to determine whether legislation is necessary to clarify the power of the judicial councils of the circuits to adopt procedures for the examination of judicial conduct in cases where it is warranted and to take appropriate action with respect to such instances."

MARCH 1979 CONFERENCE RESOLUTION

With assistance from many judges, especially Chief Judge James R. Browning and Judge J. Clifford Wallace of the ninth circuit, Judge Bailey Brown's Subcommittee on Judicial Improvements undertook a thorough study of circuit council powers. Their work resulted in a finding that, although procedures already in existence in two circuits appear to be satisfactorily resolving alleged judicial conduct problems which have arisen there, clarification of a council's authority to act under section 332 of title 28 would nevertheless be highly desirable.

The subcommittee then drafted proposed clarifying amendments to 28 U.S.C. 332 for consideration by the Court Administration Committee at its meeting on January 29 and 30 of this year. Devoting most of its meeting to that question, the Court Administration Committee modified those proposed amendments and formally recommended their adoption to the Judicial Conference in March.

The Conference, in turn, devoted a great deal of its time in March to consideration of those proposals. In fact, for the first time in its history, the Conference

found it necessary to extend its scheduled proceedings for an extra day, largely due to consideration of proposed amendments to section 332. I am sure it will come as no surprise to Members of the Senate that an arduous attempt by 25 "legal experts" to agree on precise proposed amendatory language during interrupted working sessions over a 3-day period did not lead to an agreement. As one who assisted the 25 members of the Conference, including Judge Browning, in those efforts, I can testify that the Conference's inability to reach agreement upon precise amendatory language did not derive from the lack of alternative proposals; proposed language was abundant. Eventually, however, members of the Conference realized the truth of what I understand is a longstanding congressional comment upon group-drafting efforts undertaken in a race against the clock: "A giraffe is a horse designed by a committee working in haste."

Although the Conference found final agreement upon precise proposed amendatory language for 28 U.S.C. § 332 impossible in the time available, it also found that, on many individual aspects of the question, there was unanimity of opinion. The Conference expressed that consensus in a four-part resolution.

RESOLUTION I

"1. The Judicial Conference of the United States expresses its approval of the following principles to be reflected in any legislation dealing with procedures for inquiries into the conduct of Federal judges:

"(a) Removal of an article III judge from office by any method other than impeachment as provided in article I of the Constitution would raise grave constitutional questions which should be avoided.

"(b) The primary responsibility for dealing with a complaint against a U.S. judge should rest initially with the chief judge of the circuit as presiding judge of the Judicial Council, who may dismiss the complaint if it is frivolous or relates to the merits of a decision or procedural ruling, or may close the complaint after assuring himself that appropriate corrective action has been taken.

"(c) Any complaint not dismissed or closed by the presiding judge should be referred to a committee appointed by the presiding judge, consisting of an equal number of circuit and district judges and the presiding judge.

"(d) The joint committee should report its findings and recommendations to the Judicial Council, which should take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit.

"(e) The Judicial Council may, in its discretion, refer a complaint and the Council's recommended action to the Judicial Conference of the United States.

"(f) If the Judicial Council concludes that grounds for impeachment may exist, it should transmit the record upon which its conclusion is based to the Judicial Conference of the United States; the Judicial Conference shall then determine whether, in all the circumstances, the matter should be referred to the House of Representatives.

"2. The Judicial Conference recommends that the Judicial Councils of the several circuits, at their earliest opportunity, consider the formulation and promulgation of rules of procedure for the receipt and processing of complaints against judges in accordance with the principles expressed in paragraph 1; such rules and regulations should be announced in such manner as to assure that the public and the bar will be informed.

"3. The Chairman of the Court Administration Committee and the members of the executive committee of the Conference are directed (1) to review and revise, in accordance with the principles stated in paragraph 1, the Court Administration Committee's proposed amendments to 28 U.S.C. § 332, and (2) to transmit the revised proposed amendments to all members of the Conference for their approval. Following approval by the Conference, the chairman of the Court Administration Committee, if called upon by the Congress to testify upon pending legislation, is authorized to inform the Congress that, if legislative action is to be taken, the Conference recommends amendments to 28 U.S.C. § 332 as approved by the Conference in accordance with this paragraph.

"4. All previous Judicial Conference resolutions or comments upon legislation dealing with the conduct of Federal judges are superseded by this resolution."

Mr. Chairman, I believe that resolution is a significantly constructive response to the very same concerns which have motivated introduction of the bills now before the Senate. I can personally assure you that part 4 of that resolution was

deliberately intended to avoid any suggestion of conflict with, or contradiction between, prior Conference comments on past bills and this resolution. While I believe that the Conference's comments from October 1940 to date evidence a consistent expression of an unchanging view, I also believe that, in approving part 4 of its resolution in March, the Conference's fundamental objective was that of focusing attention squarely upon the principles stated in part 1 of the resolution—principles which were very deliberately drawn to avoid any intimation of ambiguity.

I believe that part 2 of the resolution may well be as significant, and as important to your present inquiry, as is part 1. Part 2 of the resolution emphasizes the Conference's well-established commitment to the same fundamental objectives which have motivated many Members of Congress to sponsor or support legislation in this area in recent years, the provision of a responsive and responsible forum for legitimate complaints and the preservation of public trust and faith in the men and women who serve as Federal judges. The Conference has strongly urged every circuit council to act immediately, rather than to await formal amendments to title 28. Although such amendments are, as previously noted, desirable, they do not appear to be essential for the resolution of many, probably most of the allegations of "misconduct" which do arise.

In addition, the actual task of drafting such amendments, as the Conference learned in March, becomes more demanding and delicate than anticipated as one becomes more involved in the process. You will note that part 3 of the resolution confers that task upon this witness and the members of the Conference's executive committee, including Chief Judge Browning. Our efforts are appropriately subject to full review and approval by all members of the Conference. Although we have begun our task, we are far from finished. You will also notice, however, that the second sentence of part 3 of the resolution provides that, when amendments are approved, I am authorized to file them with Congress. For the present, however, I believe the principles set forth in part 1 of the Conference's March resolution are quite adequate for the purpose I am serving today in commenting upon the three bills now before you.

Application of the March resolution to S. 295, S. 522, and S. 678, title I, part E

Mr. Chairman, I have presented the preceding summary of the Conference's actions from 1940 through 1979 because I believe that there has been one consistent view which must be the first guideline I follow in commenting upon the three bills now before the Senate. The Judicial Conference does not recommend the enactment of any legislative proposal purportedly authorizing the removal of a Federal judge from office by any method other than impeachment under article I of the Constitution.

One of the bills before you—although acknowledged to have a fundamental purpose which the Conference can only approve—would authorize removal from office by a method other than impeachment under article I. That single feature clearly distinguishes S. 295 from S. 522 and the relevant provisions in S. 678. Given that feature alone, the Judicial Conference would not recommend enactment of S. 295. Given past Conference comment, however, I believe that statement deserves further explanation.

It is noteworthy that every bill commented upon by the Conference since 1940 would have authorized removal from office by a method other than impeachment under article I. There is no doubt that the Conference's comments on such bills were general in nature. I submit that they were necessarily general in nature. In every instance, from 1940 through 1978, the Conference was asked to evaluate a specific legislative proposal raising one of the most complex legal issues arising under our Constitution. Congress has periodically debated that issue, in one context or another, since 1804. Legal scholars have generated thousands of pages of academic comment. The unquestioned complexity and difficulty of the issue have bedeviled both Congress and the legal scholars. I think it is quite understandable that they have also bedeviled the Conference. Not wishing to actually disapprove bills designed to protect the integrity of the Federal bench, yet not wishing to expressly approve bills which would probably precipitate litigation of a fundamental constitutional question, the Conference repeatedly attempted to express support for the basic objective without endorsing the questionably valid means. Such expressions, perhaps inevitably, but certainly frequently, were misunderstood. I do not believe that paragraph (a) of part 1 of the Conference's March

resolution is ambivalent: provisions authorizing removal of a judge from office by a method other than impeachment "should be avoided."

When all else has been said concerning that issue, one fact remains: the only definitive answer to the question of the constitutionality of such a provision must come from the Supreme Court in a case decision. The Judicial Conference does not speak for the Supreme Court; nor does the Conference file "advisory opinions." It can only reiterate its frequently expressed view that "grave constitutional questions" should be avoided if possible. In this instance, avoidance is certainly possible.

While other aspects of S. 295 are also objectionable to the Conference, they nevertheless are designed to serve much the same purpose as are the provisions embodied in S. 522 and S. 678. In the context of disciplinary action other than removal from office, all three bills, as well as the Conference resolution of March 1979, have one basic objective. All seek to remedy a perceived problem of citizens' complaints having an inadequate forum. Given the experience I have had during the Court Administration Committee's consideration of the matter over the past decade, especially in the course of its work since September of 1978, I would like to suggest that one approach to assessing "remedies" for that problem is to begin by assessing the actual "scope" of the problem.

In introducing the proposals now before you, each sponsor commented upon the nature and extent of judicial misbehavior in both an historical and a current context. Historically, the 55 official congressional investigations into cases of alleged judicial misconduct, which resulted in only nine impeachments and four convictions in almost two centuries, may be interpreted to be evidence of a quantitatively small problem. They may also be seen to be evidence of a procedurally cumbersome process. The academicians have disputed that question to exhaustion. I do not believe further dispute will cast greater light; only greater heat. If the correct view is that the problem is not quantitatively large, then an elaborate institutional unit standing by only to resolve large numbers of cases is unnecessary. If, however, the correct interpretation is that more cases would be processed were impeachment not so "cumbersome," then an alternative "cumbersome" process wou'd accomplish little more than a shift of criticism for the "lack of responsiveness" to an entity other than Congress. What is needed is an approach which is responsive to the public without being an unnecessary cost to taxpayers. The Judicial Conference in March strongly reaffirmed its belief that the Judicial Councils of the circuits are the answer.

Even if we assume that only a small percentage of our judges "misbehave," with the total number of Federal judges escalating almost geometrically—albeit at irregular intervals—there is no question that some process is needed to serve as a supplement to impeachment. The Judicial Conference has long acknowledged that need, and acknowledged the fact that the Judicial Councils of the circuits might meet it. In his testimony in 1976 Judge Ainsworth suggested that approach. Since the Court Administration Committee study last winter, the Conference has become more convinced than ever of the value of that approach.

Our experience has indicated that most instances of alleged judicial misconduct or misbehavior can be resolved by means other than impeachment and removal from office. Certainly, if the alleged misconduct is serious enough, impeachment under article I should appropriately be utilized even if it is cumbersome. In those cases where that action is necessary, there is much to be said for Congress actually taking it, rather than passing the duty to the judicial branch or any other entity.

In reading Senator Nunn's introductory remarks accompanying S. 295, the one bill now before you which does authorize removal from office by a method other than impeachment, I was personally impressed by the Senator's observation that "common sense requires that a logical balance be struck between the gravity of the situation and the interruption of congressional activity." I think most Federal judges would agree with that statement. I believe they feel that if a judge's misbehavior is outrageous enough to require removal from office, the constitutionally authorized body that placed the judge in office ought to be the body to remove him.

Putting aside for one moment the academic pros and cons of that issue, I would like to suggest one other factor for your consideration. I note that this view is my personal opinion, rather than an authorized statement on behalf of the Court Administration Committee or the Judicial Conference. I believe it may, however, be of some value to Members of Congress. There is a potentially serious political problem related to the creation of a method for removal of a Federal judge from

office other than by impeachment under article I. If that ultimate power were to be recognized in a judicial body—be it a commission of judges, a special court, or even a circuit council—and if it were applied to a judge whom a majority of Members of Congress believed should not be removed, I think there would be extensive damage done to the public's faith in both the courts and the Congress. Again, I emphasize that that is my personal opinion.

In the course of the Court Administration Committee's work last winter, I was convinced that the majority of instances of alleged misbehavior are not "so grave as to warrant removal;" therefore, I believe the issue before you in relation to the three currently pending bills is really one of alternative methods of discipline. The "scope" of the problem, I believe, supports that conclusion.

In reading these three bills, I have concluded that, setting the removal issue aside, the search is focused upon clarifying (1) a range of disciplinary actions and (2) processes and procedures for their application. The Judicial Conference would welcome that clarification. Its March resolution is an effort to contribute to it.

Both S. 522 and S. 678, title I, part E approach the "processes and procedures" question in a manner which avoids several "liabilities" which are embodied in S. 295—"liabilities" which troubled the Court Administration Committee and the Conference in its review of S. 1423, 95th Congress. The processes and procedures provided in S. 522 and S. 678 are comparatively less "institutionalized" and more "flexible" than those provided in S. 295.

The Court Administration Committee devoted substantial time to assessing the "commission-special court" arrangement in S. 295. In truth, the dialog of 1969 which occurred under Judge Ainsworth's leadership, concerning the comparative merits of that arrangement and circuit council action, was renewed. As evidenced by the March resolution, the dialog in 1979 resulted in an overwhelming preference for circuit council action.

While there is no question that the establishment of a standing commission, with a permanent staff in Washington, would provide one central depository for all allegations of judicial misbehavior, that "asset" does carry with it certain "liabilities." A permanent staff in Washington, regardless of the capabilities of the executive director authorized by the bill, would realistically be far removed from activities in the majority of the Nation's Federal courts. On balance, the judges on my committee felt that the absence of personal knowledge of local conditions would be a far greater impediment to a "commonsense" evaluation of allegations than the "asset" of having a central depository is worth. During the past 2 years I have discussed that specific issue with many judges, and they have all expressed one concern which I share. An institutionalized office, any such office, be it a bureau in an executive agency, a subcommittee of Congress, or an administrative unit in the court system, has a natural tendency to perpetuate its own existence. If you create an office specifically designed only to investigate judicial misbehavior and authorize it to exercise extensive powers, how long will it be before that office feels compelled to demonstrate its worth by establishing impressive precedents? I do not want to overemphasize that concern, because it may be a peripheral one; I can, however, assure you that it is extensively shared by many judges.

The one other general aspect of S. 295's "commission-special court" arrangement was viewed as "cumbersome" by the committee. Under that arrangement much of the "disciplinary action" would probably have to be taken through tive remedy. If a judge has a drinking problem which impairs his performance in tions would be "drawn into" proceedings before the special court by the institutionalized aspect of the preceding stages in the arrangement. Our experience with judicial misbehavior incidents to date has suggested that overly formal proceedings are often not only not necessary, but actually may deter the most constructive remedy. If a Judge has a drinking problem which impairs his performance in the courtroom or impedes his work in chambers, the commission-special court framework may well aggravate his problem and impede his rehabilitation. Experience has shown us that such cases can often be satisfactorily handled informally and unofficially. To date, they certainly have been handled that way with a high measure of success. As a result, the individual judge's contributions to the system have been restored without raising widespread knowledge of the problem and casting serious doubt upon the particular judge's judicial abilities or the judiciary's reputation as a whole.

I believe it is obvious from the Conference's March resolution that the framework for disciplinary action contemplated in S. 295, even if authorization for removal from office were to be deleted, is not viewed by the Judicial Conference to be a desirable alternative.

Both S. 678 and S. 522, by vesting initial authority for both investigative and corrective action in the circuit councils, comply with one of the Conference's fundamental recommendations. Certainly the authority for the chief judge to the circuit to conduct the initial evaluation, as provided in subsection (g)(2) of proposed section 332 of S. 522, complies more fully with the Conference recommendation than does the provision in proposed subsection 372(c) in S. 678, which would require the entire circuit council to become involved from the commencement of consideration of a complaint. I would also note with approval S. 552's provision in the same subsection for the swearing of the complaint, a requirement not evident in S. 678.

We also view as very desirable S. 522's requirements, in proposed subsection (g)(4) of section 332, for judicial council oversight of any necessary further investigation in cases which the chief judge does not dismiss. I would like to bring to your attention the fact that the Conference resolution approved in March specifically recommends review in that context by a special panel of judges within the circuit rather than by the entire council. In part, that recommendation is founded upon the belief that district judges should participate in that evaluation, an objective which I believe both S. 678 and S. 522 seek to achieve through their proposed amendments to circuit council structure. In part, however, the Conference also felt that a smaller panel than the entire council might well conduct an investigation more expeditiously and efficiently. Certainly time is a vital factor in the process of responding to the public's concern. Arrangements for meetings, as Congress well knows, are always easier for smaller groups. The Conference's recommendation, of course, does contemplate an equal number of circuit court and district court judges on that panel.

One other feature of both S. 522 and S. 678 which should be noted is their delineation of a range of possible disciplinary actions. Under subsection (g)(8) of section 332, as proposed in S. 522, dismissal of the complaint is expressly provided. Under subsectioon (d)(1) of section 372, as proposed in S. 678, it is not expressly provided. S. 678's inclusion of "other appropriate actions" in paragraph (G) of subsection (d)(1) could certainly be interpreted to include that action. Let me point out that the Conference's March resolution (at paragraph (d) of part 1) recommends: "Such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit."

I believe the objective of paragraph (G) of subsection (d)(1) in S. 678 and the Conference's objective are identical: the necessary discretionary flexibility to take action which might not be included in a specific "list" of authorized actions, but which would provide the best remedy without encouraging doubts about the validity of that action. The addition of language similar to that in the Conference's resolution to S. 522 would achieve the same purpose in that proposal.

In relation to the "processes and procedures" matter, I should also point out (1) the Conference's decision to vest discretion in the circuit council to refer any case to the Judicial Conference (See paragraph (e) of part 1 of the resolution) and (2) its recommendation that any complaint which the council concludes may involve grounds for impeachment be transmitted to the Conference for review and a determination of the need to send the matter to the House of Representatives (See paragraph (f) of Part 1). Subsections (g) and (h) of proposed Section 372 in S. 678 provide for the same ultimate "judicial review" of final council actions. S. 522, however, expressly provides for Supreme Court review, by writ of certiorari. While an express provision for Supreme Court review may have great value, that really is an evaluation which only Congress can make. In recommending Conference review, and Conference determination of the question of referral to the House of Representatives, I believe the Judicial Conference's members were influenced by two fundamental concerns: (1) the ultimate responsibility which the Conference has within the judicial branch for the "effective and expeditious administration of the courts" nationwide, and (2) as I noted previously, a belief that if an instance of judicial "misconduct" is serious enough, the judicial conduct under review should be evaluated by the

48-202 O - 79 - 3

constitutionally mandated "ultimate authority," the Congress, exercising its powers under article I.

Circuit Council Membership

Finally, let me place before you for your consideration a separate resolution approved by the Conference in March, which is directly related to proposed amendments to 28 U.S.C. § 332(a) embodied in both S. 522 and S. 678.

RESOLUTION II

"The Judicial Conference of the United States expresses its approval of the following principles to be reflected in any legislation dealing with the membership of the Judicial Councils of the circuits:

"Any Judicial Council having less than six circuit judges as members shall have, as members, not less than two district judges in regular active service.

"Any Circuit Council having six or more circuit judges as members shall have as members, not less than three district judges in regular active service.

"The number of district judge members of a Judicial Council, fixed in accordance with the above principles, shall be fixed by majority vote of the active circuit judges of the Council.

"District judges shall serve as members of a Judicial Council in the order of their seniority, for terms of three years.

"No more than one district judge from any one district shall serve simultaneously on the Circuit Council, unless there is already a representative on the Council from each district in the circuit."

In the course of the Court Administration Committee's study of circuit council powers this past winter, the question of district judge membership on the councils quite naturally arose in conjunction with the question of the extent to which the councils should exercise "disciplinary" authority. A central concern was the provision of "an equal voice" for district court representation in the investigation and review of allegations of misconduct filed against district court judges. That concern reflected recognition of a basic reality: district court judges have a greater degree of personal experience in the daily conduct of district court business. Their insight and perspective are essential to a thorough evaluation of most allegations which may be filed against a district court judge.

After prolonged discussion, the Court Administration Committee decided to recommend that no more than seven circuit court judges, and an equal number of district court judges, serve on each circuit council, with the chief judge of each circuit serving as an additional, and the presiding, council member. The committee recommended that the number of circuit court judges serving be determined by majority vote of all courts of appeals judges in the circuit in regular active service, and that the chosen number of "circuit judge" positions be filled by seniority for rational 3-year terms. The committee recommended that "district court judge" positions be filled in the same manner, with a stipulation designed to insure that no one district would provide two members unless all other districts were already represented by at least one member.

As you can see, the Judicial Conference modified the committee recommendations. It did so in the belief that each circuit's active court of appeals judges should determine among themselves, by majority vote, the number of council members most appropriate for their circuit. The Conference further recommended that the determination of the number of "district court judge" members be similarly determined, but that a certain minimum number be required—not less than two for a council having less than six circuit judges, and not less than three for a circuit having six or more circuit judges. The Conference's modifications were deliberately intended to provide each circuit with an appropriate degree of "managerial flexibility." The Court Administration Committee's concern that district court judges be fully involved in disciplinary investigations was, of course, satisfied by the Conference's recommendation in paragraph (c) of part 1 of its other resolution, which provided that each "investigating committee" be composed of the chief judge of the circuit as a presiding member plus "an equal number of circuit and district judges."

Conclusion

Mr. Chairman, this presentation of testimony has been usually extensive. I believe, however, that the bills pending before you require such extensive comment. As I noted at the beginning of my testimony, no other matter has been

more difficult in my 10 years with the Court Administration Committee. The many questions raised in relation to the matters before you are sensitive. Their resolution is not easy nor should it be. While much has been done in the past, far greater consideration of these matters is warranted. The Judicial Conference will continue to work on the development of proposed amendatory language to title 28. As I noted previously, as soon as we are able to complete that undertaking, we will inform you of our actions.

While we are far from finished, I believe the resolutions approved by the Conference in March are evidence of substantial progress. Again, I would note that paragraph 2 of part 1 of the Conference's resolution on inquiries into the conduct of Federal judges has recommended that the circuit councils not await final legislative action but proceed, "at their earliest opportunity" to act in accordance with the principles expressed by the Judicial Conference.

At the beginning of these comments I stated that "the kind of 'judicial misbehavior which is relevant is misbehavior which interferes with the effective and expeditious administration of our courts," and noted the Judicial Conference's conclusion that: "legislation placing authority in the judicial branch itself is both compatible with longstanding concepts of separation of powers and desirable in terms of maintaining the ultimate objective of an independent judiciary worthy of public confidence." In March the Conference firmly expressed its belief that, if processes and procedures for the application of a range of disciplinary actions other than removal from office are legislatively authorized, responsibility for their implementation should be vested in the judicial councils of the circuits and the Judicial Conference. We believe that arrangement, reflecting those principles recommended by the Conference in March, will be least disruptive of our constitutional concept of an independent judiciary. There can be no better protection against conduct prejudicial to the administration of justice than the preservation of that constitutional concept.

APPENDIX TO PREPARED STATEMENT OF JUDGE HUNTER

MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Hon. Warren E. Burger, Chief Justice, presiding

Chief Judge Frank M. Coffin, First Circuit.
Chief Judge Andrew A. Caffrey, Massachusetts.
Chief Judge Irving R. Kaufman, Second Circuit.
Chief Judge T. Emmet Clarie, Connecticut.
Chief Judge Collins J. Seitz, Third Circuit.
Judge Alfred L. Luongo, Pennsylvania, Eastern.
Chief Judge Clement F. Haynsworth, Jr., Fourth Circuit.
Judge Charles E. Simons, Jr., South Carolina.
Chief Judge John R. Brown, Fifth Circuit.
Chief Judge William C. Keady, Mississippi, Northern.
Chief Judge George C. Edwards, Sixth Circuit.
Chief Judge Charles M. Allen, Kentucky, Western.
Chief Judge Thomas E. Fairchild, Seventh Circuit.
Judge S. Hugh Dillin, Indiana, Southern.
Chief Judge Floyd R. Gibson, Eighth Circuit.
Chief Judge James H. Meredith, Missouri, Eastern.
Chief Judge James R. Browning, Ninth Circuit.
Judge Morell E. Sharp, Washington, Western.
Chief Judge Oliver Seth, Tenth Circuit.
Judge Wesley Brown, Kansas.
Chief Judge J. Skelly Wright, Dist. of Columbia Circuit.
Chief Judge William B. Bryant, District of Columbia.
Chief Judge Daniel M. Friedman, Court of Claims.
Chief Judge Howard T. Markey, Court of Customs and Patent Appeals.

Judge HUNTER [continuing]. Also appearing with me here today is Chief Judge James R. Browning of the ninth circuit. Judge Brown-

ing is here to speak about his experience in his circuit for the program of handling complaints against Federal judges, a program which in our view has worked well.

Also appearing here with me is Judge Clifford Wallace of the ninth circuit. Judge Wallace is highly experienced in this particular field. He has made considerable study of it and can add much to the expertise that we have here at the table.

And lastly, appearing with us here today is Judge J. Edward Lumbard of the U.S. Court of Appeals with the Second Circuit, who will speak on matters within his personal knowledge.

We have attempted to divide our labors to some degree. Since we are so short on time, if I might be so bold as to suggest it, if there is time for questions, perhaps we can have them after we have all spoken, and then that one of us who may have some particular knowledge or expertise that applies to the question can answer it.

I have filed a prepared statement with this committee, and I do request that it be incorporated in full in your hearing record.

Senator DeConcinl. So ordered.

Judge Hunter. I will not go into any reading of that statement here. I do want to call to this committee's attention that at least in the last decade there simply has been no other issue before the Court Administration Committee or before the Judicial Conference of the United States that has proven as difficult or as important as the basic issue here today. That is what processes and procedures should be legislatively instituted to supplement or to complement, if not to effectively substitute for impeachment of a Federal judge under article I of the Constitution.

I simply cannot personally remember any other question receiving as careful scrutiny by these committees. I do not believe there is a single Federal judge who does not instinctively respond to legislative proposals in this area with extreme caution.

The first question in my mind, and I believe in every other judge's mind is what impact will this proposal have upon the concept of judicial independence so carefully embodied in our Constitution almost 200 years ago. Certainly the members of the Court Administration Committee, the members of the Judicial Conference have been especially sensitive to that concern. In attempting to formulate views on legislative proposals in this area, some judges more than others have had to squarely confront their special obligation to preserve that concept. They have done so of course because that concept is a fundamental element of our constitutional form of Government,

Now with regard to the bills that are before us today, I believe it is not the intended purpose of these three bills, S. 295, S. 522, and S. 678 to add to or to supplement criminal laws of the United States. The criminal laws of this Nation, both State and Federal, remain intact. Federal judges, like all citizens, remain subject to the criminal laws. If they violate the criminal law, they will be publicly prosecuted just as any other citizen.

All criminal trials are public trials. The purpose of these three bills, I believe, is to discipline judges for engaging in action or conduct which interferes with or prevents the proper administration of justice.

In other words, action or conduct which creates a roadblock in the path to justice. That roadblock needs to be removed by appropriate corrective action so that it no longer interferes with the effective and expeditious administration of justice.

Seldom if ever will the questioned action or conduct be a crime. In the usual situation it will be such things as the judge's failure to administer his docket, his failure to show minimum consideration of the bar and litigants, his breach of some established and important rule of ethics for judges, that type of thing which results in a substantial impairment of the administration of justice. If the judge's conduct is so bad as to warrant serious consideration of impeachment to call that situation to the attention of the House of Representatives of our Congress, together with the forwarding of all possessed items of evidence.

Speaking of that kind of conduct such as to warrant disciplinary action, it usually can be corrected by nonpublic attention to it in the first instance by the chief judge of the circuit, and if that does not resolve the problem, then by the circuit council. The Judicial Conference is strong in its recommendation of this approach. Any approach other than a nonpublic one to this kind of conduct is counterproductive to correcting the problem, and may result in a chilling of necessary judicial independence.

In approaching this entire area of discipline of judges, we need a balanced perspective. We need to keep first things first and not destroy or impair the important, just to address the comparatively unimportant. Many judges and scholars see no need for any strengthening of section 332. They say it is not worth a candle to jeopardize judicial independence, just to address problem which in 192 years of Federal courts have remained comparatively small in relation to the number of judges who haved served in that period of time.

Certainly the seriousness of the subject demonstrates a need to act very carefully, and only then in the light of all pertinent data and considerations to the end that judicial independence provided by our forefathers, and which is essential to the third branch of the Government, if it is to continue to carry out its constitutional functions and our Nation not be destroyed.

Now, Mr. Chairman, I do not wish to endeavor to, in this short time, to take up the three bills in any detail. There simply is not that kind of time. I do want to turn, however, to that part of the report which is on file, commencing on page 10, to tell you what the Judicial Conference's position is. Although the Judicial Conference, following a great deal of study and work by its Subcommittee on Judicial Improvements and its Committee on Court Administration, was unable to agree on precise language concerning a proposed amendment to 280.S.C.332, it did agree on some very fundamental things. It is continuing its study of proposed language to get something concrete. It passed the following resolution. By "it," I mean the Judicial Conference.

(1) The Judicial Conference of the United States expresses its approval of the following principles to be reflected in any legislation dealing with procedures for inquiries into the conduct of Federal judges :

(a) Removal of an article III judge from office by any method other than impeachment as provided in article I of the Constitution would raise grave constitutional questions which should be avoided.

(b) The primary responsibility for dealing with a complaint against a United States judge should rest initially with the chief judge of the circuit as presiding judge of the Judicial Council, who may dismiss the complaint of it is frivolous or relates to the merits of a decision or procedural ruling, or may close the complaint after assuring himself that appropriate corrective action has been taken.

(c) Any complaint not dismissed or closed by the presiding judge should be referred to a committee appointed by the presiding judge, consisting of an equal number of circuit and district judges and the presiding judge.

(d) The joint committee should report its findings and recommendations to the Judicial Council, which should take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit.

(e) The Judicial Council may, in its discretion, refer a complaint and the Council's recommended action to the Judicial Conference of the United States.

(f) If the Judicial Council concludes that grounds for impeachment may exist, it should transmit the record upon which its conclusion is based to the Judicial Conference of the United States: the Judicial Conference shall then determine whether, in all the circumstances, the matter should be referred to the House of Representatives.

2. The Judicial Conference recommends that the Judicial Councils of the several circuits, at their earliest opportunity, consider the formulation and promulgation of rules of procedure for the receipt and processing of complaints against judges in accordance with the principles expressed in paragraph 1; such rules and regulations should be announced in such manner as to assure that the public and the bar will be informed.

(3) The Chairman of the Court Administration Committee and the members of the Executive Committee of the Conference are directed (*a*) to review and revise, in accordance with the principles stated in paragraph 1, the Court Administration Committee's proposed amendments to 28 U.S.C. 332, and (*b*) to transmit the revised proposed amendments to all members of the Conference for their approval. Following approval by the Conference, the Chairman of the Court Administration Committee, if called upon by the Congress to testify upon pending legislation, is authorized to inform the Congress that, if legislative action is to be taken, the Conference recommends amendments to 28 U.S.C. 332 as approved by the Conference in accordance with this paragraph.

(4) All previous Judicial Conference resolutions or comments upon legislation dealing with the conduct of Federal judges are superseded by this resolution.

Mr. Chairman, regrettably I have used all the time that I could possibly justify taking, in view of the time you must recess. So I simply at this time would like to turn the remainder of our time, nearly the remainder of all of our time over to Chief Judge Browning who can describe to you what the ninth circuit has already done, and also to Judge Wallace for his comments.

I would like to have the record show at this time that we are complying with the direction of the Judicial Conference and are proceeding to implement that resolution which I read.

Four circuits have already acted; namely, the second, seventh, ninth and tenth circuits. Three circuits' councils have scheduled action for later this month; namely, the first and third and ninth circuits and four circuit councils will act in June; namely, the fourth, fifth, sixth, and the District of Columbia.

With that brief indication of what the judiciary is doing, I expect, Judge Wallace, that you are next up.

Judge WALLACE. Mr. Chairman, my name is Clifford Wallace. I am a judge of the U.S. Court of Appeals for the Ninth Circuit. I am

speaking here only as an individual and not on behalf of the Ninth Circuit Court. I have prepared a written statement which I would like to file. It addresses not only the subject I was asked to comment upon today, but also my response to all of the bills which were introduced. Rather than take the time of the committee while I read the statement, I ask that it be filed.

Senator DECONCINI. It will be printed in the record.

[The prepared statement of Judge Wallace follows:]

PREPARED STATEMENT OF J. CLIFFORD WALLACE

I am grateful for your invitation to testify at this joint hearing on S. 295, S. 522, and title I, parts C and E of S. 678. The subject matter involved has been one of special interest to me over the last few years, and I hope I can be responsive in providing appropriate information to the subcommittees. I wish to emphasize that I do not speak on behalf of any other members of the Court of Appeals for the Ninth Circuit, but that I appear here only as an individual.

For convenience I will refer to S. 295, which was introduced by Mr. Nunn and Mr. DeConcini, as the Nunn bill; S. 522, which was introduced by Mr. Bayh, Mr. Mathias, Mr. Schmitt, and Mr. Bumpers, as the Bayh bill, and S. 678, which was introduced by Mr. Kennedy and Mr. DeConcini, as the Kennedy bill.

I. THE NUNN BILL

Senator Nunn of Georgia introduced S. 1110 on March 7, 1975. I have been opposed to that bill from the beginning, and my reasons are stated in a law review article I wrote entitled, "Must We Have the Nunn Bill? The Alternative of Judicial Councils of the Circuits," 51 Indiana Law Journal 297 (1976). Rather than restate my contentions, I attach a copy of that article and mark it exhibit A.

Last year the Senate passed S. 1423 which, I have been advised, is the same as S. 295 now being considered by these subcommittees. My opposition to S. 1423 (and, therefore, to the present S. 295) was outlined in an article I authored entitled, "The Nunn Bill: An Unneeded Compromise of Judicial Independence," 61 Judicature 476, No. 10, May 1978. A copy of that article is attached and marked exhibit B.

In both the Indiana Law Journal and the Judicature articles, I suggested the use of the Judicial Councils of the Circuits (also known as circuit councils) as an alternative to meet reasonably any perceived problem which the Nunn bill was designed to overcome. Because the Kennedy bill and the Bayh bill are more consistent with that thesis, I applaud their approach. I have heretofore outlined the benefits of reliance upon the Judicial Councils of the circuits as follows:

"The benefits of this proposed procedure over the Nunn bill are significant and, in my judgment, compelling. First, the Nunn bill does not allow for meeting local needs initially by a local machinery. Sending complaints to a bureaucrat on the Potomac whose salary and staff positions depend upon drumming up at least a minimal amount of business is fraught with dangers.

"Second, the bill does not provide the flexibility of informal resolution. Every complaint must be filed in Washington and start the complicated machinery. In contrast, under the present system, the chief judges of the circuits can quietly and effectively deal with almost all valid complaints.

"Third, my proposal provides a structure tailored to meet the perceived needs with only minimal intrusions upon the crucial independence of our Federal judiciary.

"Finally, my proposal does not supersede or eliminate the internal corrective machinery of the circuit council and thus leaves unimpaired an existing force which, in many instances, can be of immeasurable assistance in a variety of areas of judicial administration beyond the concerns to which the Nunn bill is addressed." 61 Judicature, supra, at 481.

II. WHAT IS NEEDED?

Before concentrating too much on a solution, it is always advisable, in my judgment, to investigate what the actual need is. Is there a need for additional

machinery, above and beyond that which is presently available, to control actions of judges which are perceived to be impediments to the administration of justice? In this regard, I commend to the committees' attention a document from the Federal Judicial Center, and authored by Steven Flanders and John T. McDermott, entitled, "Operation of the Federal Judicial Councils". After considerable investigation, they arrived at conclusions relevant to the issues before you. The following are excerpts which I believe are illuminating:

"Although the 'appellate model' may not be appropriate for docket supervision, it may be the best way for a council to handle malfeasance, nonfeasance, or other problems of individual judges' behavior." (Pp. 26–27.)

"As a result of our visits with circuit and district judges, supporting personnel, and a few lawyers, we have concluded that it is in the area of handling complaints about judge behavior that the councils have been most effective." (P. 28.)

"Despite considerable probing, we uncovered *no* clear instances in which councils had failed to act effectively (apart from previously known instances, such as those involving the late Judge Willis W. Ritter, and Judge Stephen S. Chandler)." (P. 29, italic in original.)

"On the basis of our visits to the circuits, we have concluded that the councils have done an effective job, as far as we can determine. We searched for complaints that had been 'swept under the rug,' and found none." (P. 30.)

These findings are not inconsistent with earlier reports on the effectiveness of the Judicial Councils of the Circuits. That more notoriety is not given when corrective measures are implemented against judges is not a blemish upon the machinery; indeed, it indicates, in my judgment, the best way of dealing with judge problems. Solving such problems informally is most consistent with the effective administration of justice. "The mere existence of the Judicial Council allows informal correction of unfortunate practices without the spotlight of more formal action. Without applause or publicity, the Chief Judges of the circuits have effectively used their persuasive powers to eradicate problems which might otherwise have caused serious difficulties in our judicial system." 51 Indiana Law Journal at 324–25.

The first question, therefore, that should be raised is whether there is a need for a change. As to correcting acts of judges, I have considerable doubt that the case has been made, at least for any substantial change. If such a need can be demonstrated, however, the second question should be: Does the proposed machinery meet the perceived need?

In the Judicature article (exhibit B), I suggested two minor modifications of 28 U.S.C. § 332, the statute which outlines the duties, responsibilities and powers of the Judicial Council of the Circuit. The first did not deal directly with judge discipline. It provided for a restructuring of the judicial council to include an equal number of circuit and district judges. The district judges would be chosen by a vote of all of the district judges in the circuit. I still believe this proposal is appropriate but have concluded, after further consideration, that it might be better to separate the restructuring of the judicial council from the issue of judicial discipline. A structure for consideration of complaints against judges has, in my judgment, a greater priority.

Section 332 presently requires only district judges to obey orders of the Judicial Council of the Circuit. The second minor change merely added judges from the courts of appeals who would be required to respond. I suggested the language: "The circuit and district judges shall promptly carry into effect all orders of the judicial council." See 61 Judicature at 480 (exhibit B). After further consideration, I believe the better language would be: "All courts and judges in the circuit shall promptly carry into effect all orders of the judicial council." This change would not only provide that all judges (including bankruptcy judges) would respond to the judicial council, but in addition would allow the council to order the courts to carry out various specified acts which would in effect allow the Judicial Council of the Circuit to have indirect control over people such as court reporters, and so forth, when they need to be directed for the effective and expeditious administration of the business of the courts.

With rare exception, the Judicial Councils of the Circuits have sufficient power to solve judge problems that require action. Thus, I am still of the opinion that no further amendments to section 332 are necessary, other than those which I proposed. I do not believe that a need of sufficient magnitude has been demonstrated to require additional structural changes. Without additional amendments to statutes, a method can be implemented by rule to formalize a complaint-

processing procedure. This has been done in the ninth circuit and attached is a copy of those procedures marked exhibit C. These procedures are completely consistent with the resolution adopted by the Judicial Conference of the United States at its latest meeting. That resolution is attached and marked exhibit D.

III. THE JUDICIAL COUNCILS OF THE CIRCUITS

Before making changes in the Judicial Council of the Circuit, it is important, in my judgment, to understand the nature of that council as it presently exists and its interrelationship to the total judicial administration structure.

The first part of the structure was originated in 1922 when the Conference of Chief Judges was created. This later became the Judicial Conference of the United States. Comprehensive changes to develop the judicial administration structure occurred with the passage of the Administrative Office Act of 1939. The basic structure was set by these two events.

There are three authoritative bodies in the Federal judicial structure. The Judicial Conference of the United States consists of the chief judge of each circuit, a district judge from each circuit elected by the judges of that circuit, and representatives of certain specialty courts. The conference is presided over by the Chief Justice of the United States. The primary duties of the Judicial Conference of the United States are: (1) to supervise the Administrative Office of the United States Courts; (2) to supervise the submission of the budget for the judiciary; (3) to initiate the rulemaking process; (4) to facilitate transfer of judges as needed due to heavy caseloads; (5) to provide a necessary means of communication; and (6) to respond to requests from Congress, when appropriate, for a position on proposed legislation. The Judicial Conference of the United States functions primarily as an advisory group concerned with the general policy for the Federal judiciary. It is without authority to issue orders. Its power comes from its membership, and that it is at the apex of the judicial administration structure.

The second body is the Judicial Council of the Circuit, also known as the circuit council. It consists of all circuit judges and is presided over by the chief judge of the circuit. The following are statutory duties given to the Judicial Council of the Circuit: (1) to approve plans of the district courts for jury selection, counsel appointed under the Criminal Justice Act, and speedy trial compliance; (2) to approve judge assignments to other circuits or senior judge assignments within the circuit; (3) certain housekeeping approvals, such as the place to keep records, court quarters, designation of residence of a district judge, pretermission of a regular session of court and staffs of senior judges; (4) to approve the selection of and salaries of public defenders; (5) to recommend numbers and salaries of magistrates and bankruptcy judges; (6) to issue a certification of physical or mental disability of a judge; (7) to make decisions when district judges cannot agree on rules, magistrates to be selected or recommendations on salary; and (8) other minor miscellaneous duties assigned by the Congress.

The Judicial Councils of the Circuits have also been given additional duties by the Judicial Conference of the United States: (1) to keep informed as to the conditions of the district courts in relationship to the conditions of the dockets, prisoners in jail awaiting trial, plans to expedite criminal trials, the operation of the Criminal Justice Act, the operation of the jury selection plan and the monitoring for the best utilization of jurors; and (2) where there is a large backlog before any judge, to take such steps as are necessary to relieve the situation.

The primary authority for the Judicial Council of the Circuit comes from 28 U.S.C. § 332(d), where it is authorized to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." The Supreme Court, in describing the Judicial Council of the Circuit, used the analogy of a "board of directors." *Chandler* v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74, 86, n. 7 (1970).

The third authoritative body is the Judicial Conference of the Circuit, sometimes also referred to as the circuit conference. In attendance at this annual meeting are all circuit and district judges plus representatives of the lawyers who practice before the Federal court. The ongoing statutory purpose of the conference is in "considering the business of the courts and advising means of improving the administration of justice within [the] circuit." 28 U.S.C. § 333.

The question would normally arise as to whom the Judicial Conference of the Circuit is to give its advice. It appears obvious to me that that advice is to be given to the Judicial Council of the Circuit, which body has the power to issue orders "for the effective and expeditious administration of the business of the courts within its circuit." 28 U.S.C. § 332(d). If the advice is national in scope, it would then be referred to the Judicial Conference of the United States.

These three units are to have staff assistance from the Administrative Office of the United States Courts and the Federal Judicial Center.

Based upon this review, it appears that there are four basic principles involved in the judicial administration structure. First, there is but one body which is given power to enter orders. The Judicial Conference of the Circuit is to give advice. The Judicial Conference of the United States is to develop overall policy. It is only the Judicial Council of the Circuit which has been given general powers to enter orders.

Second, the entire structure is built upon the principle of decentralization of authority. When a proposed bill giving all administrative authority to one national administrative office came to the attention of former Chief Justice Hughes, he responded:

"I think the difficulty in this present bill lies in an undue centralization. My thought is that there should be a greater attention to local authority and local responsibility * * *. My thought is that in each circuit there should be an organization which will have direct and immediate responsibility with regard to the judicial work in that circuit. My suggestion for your consideration is that there should be in each circuit a judicial council."

The third basic principle is that the key operative unit is to be the Judicial Council of the Circuit. In a decentralized climate, it was this body which was given the power to issue general orders.

The fourth and final principle is that the working and functioning of the entire structure will be based upon an administrative responsibility. Even when the Judicial Council of the Circuit enters orders, they will be "for the effective and expeditious administration of the business of the courts." That is, the judicial council will have a non-adjudicatory role; its orders will be nonaccusatory. In *Chandler* v *Judicial Council of the Tenth Circuit*, *supra*, 398 U.S. at 86, n.7, the Supreme Court stated:

"We find nothing in the legislative history to suggest that the Judicial Council was intended to be anything other than an administrative body functioning in a very limited area in a narrow sense as a 'board of directors' for the circuit. Whether that characterization is valid or not, we find no indication that Congress intended to or did vest traditional judicial powers in the Councils. We see no constitutional obstacle preventing Congress from vesting in the circuit Judicial Councils, *as administrative bodies*, authority to make "all necessary orders for the effective and expeditious administration of the business of the courts within [each] circuit." (Emphasis added.)

The Judicial Councils of the Circuits were designed to be and can best operate in an administrative, as distinguished from adjudicatory or accusatory, setting. This becomes very significant when considering what the function of the Judicial Council should be in reference to handling complaints against judges.

IV. PROPOSED RESTRUCTURING OF THE JUDICIAL COUNCILS OF THE CIRCUITS

With this background, it is easier to put into focus the various proposals for restructuring of the Judicial Councils of the Circuits to add district judges. In addition to the three bills offered in the Senate, I will also discuss a draft of a bill approved by the Court Administrative Committee of the Judicial Conference of the United States. (This draft does not have the approval of the Judicial Conference of the United States as of this date.) I will refer to this as the Court Administration Committee draft and a copy of it is attached and marked exhibit E.

The first question is, why should there be district judge membership on the Judicial Council of the Circuit? Some form of membership is included in the Kennedy bill, the Bayh bill and the Court Administration Committee draft. At present, some judicial councils have representation by district judges, but these proposals envisage voting membership.

Arguments in favor of district judge membership on the Judicial Council of the Circuit are as follows: (a.) Fairness—orders can affect district judges as well

as circuit judges; (b) District judges are as well equipped to administer as are circuit judges; (c) Many duties of the judicial council pertain only to the district court. District judges would bring practical and current information, resulting in better-informed decisions; (d) If the judicial council has power to correct district judges, district judges should be represented; (e) The judicial council does not need to be in the appellate model—it has an administrative functions; (f) a reconstituted council will not impinge on the business of the court of appeals. It will merely require separate agendas.

Arguments against membership of the district judges on the Judicial Council of the Circuit run as follows: (a) It will engender divisiveness in the Judicial Council of the Circuit; (b) It may cause district judges to become involved in the internal business of the circuit court; (c) If adding district judges is to meet a concern pertaining to judge corrections, the judicial council could be restructured only when that business is before the council. Alternatively, district judge involvement in judicial correction could be accomplished by having district judges represented on an investigating committee, which committee would then report to the judicial council as now composed; (d) The traditional structure and function of the judicial council would be altered, resulting in confusion and administrative difficulties; (e) It would result in a mixture of functions. The circuit judges, under the system, review the district judges' actions; (f) The district judge has great power. Adding district judges to the judicial council would dilute a needed check; (g) Adding power to selected district judges (and circuit judges in some circuits) by membership on the judicial council would decrease the collegiality of both courts; (h) It will adversely affect the dual role of the chief judge of the circuit who would need to act to preserve power in the judicial council; (i) An alternative to not diminishing the hierarchal model and yet allowing district judges to administer district courts would be the establishment of two councils: one for district courts and one for the circuit court, with a liaison committee between them.

In this regard Chief Justice Warren E. Burger stated in his "Annual Report on the State of the Judiciary" on February 11, 1979: "We should now consider providing some representation of the district judges on the judicial council of each circuit. Some circuits have regularly invited a district court representative to attend meetings of the council when considering broad problems affecting the district courts. It is appropriate now to formalize these practical working arrangements by restructuring the judicial councils to include some representatives of the district courts."

It is also significant that at its last meeting, the Judicial Conference of the United States passed a resolution expressing approval of principles providing for district court membership in any legislation to restructure the Judicial Councils of the Circuits. (That resolution is attached and marked exhibit F.)

[Exhibits A through F can be found in the appendix.]

The next question is, how many district judges should be added to the Judicial Council of the Circuit if such a provision is included in a bill? The Court Administration Committee draft and the Bayh bill provide for equal representation between the circuit and district court judges. In the Kennedy bill, the district judges would equal one-half of the circuit judges. The resolution of the Judicial Conference of the United States suggests a minimum number. (See exhibit F.)

Arguments in favor of equal membership are: less than equal membership is only tokenism toward district judges; both circuit and district judges are equally competent and should serve equally; and equal membership would assist in eliminating the concerns of district judges as the Judicial Councils of the Circuits assume their proper statutory authority.

Arguments against equal membership run as follows: unequal membership would be more palatable to circuit judges; with unequal membership there is less chance of divisiveness; and there would be less chance of a chief judge, with the tiebreaker vote, becoming a power broker.

The next question is, how should any district judges (and any circuit judges, when less than the total number of the circuit judges are members of the judicial council) be selected? The Bayh bill and the Court Administration Committee draft suggest that it be done on the basis of seniority. The Kennedy bill selects from the chief judges of the districts. None of these bills provide for election by the judges themselves. None of the bills provide for automatic ap-

pointment of the district judge who is the elected representative of that circuit to the Judicial Conference of the United States. (I believe the latter is unfortunate. It would add strength and communication in the administrative structure if the district judge who is a member of the Judicial Conference of the United States were also a member of the judicial council in his circuit.)

Arguments in favor of the seniority method are: that it is nonpolitical; it ensures experience; and, if the chief judges of the districts are used, it provides a structure so that the Judicial Council of the Circuit may function with the direct assistance of some of the chief administrative officers of the districts.

Arguments in favor of an elective process are: seniority does not ensure administrative ability or interest; it prevents the curmudgeon effect; if the Judicial Councils of the Circuits are to use the statutory power to correct judges, then each judge should have a vote as to who will exercise that power; at present the district judge representative on the Judicial Conference of the United States is elected, and it has not caused political problems (in fact, excellent judges have been selected); the elective process would give those on the judicial council more of a sense of responsibility and thus the council would be more functional operationally.

The next question pertains to the size of the judicial council. Should less than all of the circuit court judges serve? In the Kennedy and Bayh bills and in the Court Administration Committee draft, the number of circuit judges serving in the larger circuits is curtailed.

Arguments in favor of such a limitation are that the judicial council becomes too large and efficiency is impaired, the views of all of the court of appeals judges are not necessary for the proper deliberation of the judicial council and, therefore, limitation is appropriate.

Those opposed to the limitation state that the supervisory role of the court of appeals becomes disjointed when all of the members of the court of appeals are not members of the judicial council, and that such a procedure can become divisive on the level of the court of appeals.

V. MERITS OF THE VARIOUS PROPOSALS

For reasons already stated, I oppose the Nunn bill. I embrace the principle that all that reasonably needs to be done can be done by the Judicial Councils of the Circuits. If the Judicial Councils of the Circuits are to be restructured, I still adhere to my position stated in the Judicature article that there should be equal membership by election. However, I would not press adoption at this time, as I believe that issue can become too divisive, and it is more important to concentrate upon the use of the judicial councils in handling complaints against judges.

As to that function, I do not believe the Kennedy bill and the Bayh bill and the Court Administration Committee draft are necessary. I have concluded that all that is necessary is the minor modification to section 332 which I suggested earlier, so it is clear that the judicial council has power to issue orders which will affect all judicial personnel in the circuit. If additional changes are to be made, I offer the following comments.

As regards the Bayh bill, I am strongly in favor of the proposal of having the chief judge of the circuit involved with complaints prior to their presentation to the Judicial Council of the Circuit. My experience has been that a chief judge, functioning informally, can be very successful in correcting problems.

I disagree, however, with the approach of the Bayh bill of vesting each judicial council "with the judicial powers of a Federal court." As stated earlier, the judicial council functions best as, and was designed to be, an administrative body rather than a judicial body. I would strongly suggest that its powers be limited to those which are administrative in nature. Thus, for example, any appeal, if an appeal process is deemed to be appropriate, should be to the Judicial Conference of the United States, rather than to the United States Supreme Court.

The Bayh bill also provides for submitting a written report to the House of Representatives whenever action, other than dismissal of the complaint, is taken by the Judicial Council of the Circuit. I assume this is for consideration of impeachment. I think it would be more appropriate to forward matters to the House of Representatives only after the Judicial Council of the Circuit and the Judicial Conference of the United States have reviewed the cases and have concluded that there may be grounds for impeachment.

I could be in substantial agreement with the Kennedy bill, if it were made clear that it embraces the administrative, as distinguished from the judicial, approach to actions by the Judicial Council of the Circuit. It does provide for the judicial council to consider complaints and, if the particular problem of a particular judge is not susceptible to correction by the powers of the judicial council it allows for recommendation that impeachment is warranted to the Judicial Conference of the United States. The Judicial Conference of the United States then may recommend impeachment to the House of Representatives. This approach is basically sound. The judicial councils then could remain essentially administrative bodies, thus decreasing the possibility that the statute would be found unconstitutional. Removal remains with the Congress through the constitutional mandated methods of impeachment. However, the House would be benefitted by a full record and the recommendations of two judicial bodies. My only suggestion is that a lesser standard for calling this rare, extreme judicial problem to the attention of the House of Representatives might be in order. I propose that the language be changed to "may be warranted" rather than "are warranted."

The Kennedy bill also provides for orders by the judicial council that, on a temporary basis, no further cases be assigned to a judge. The Bayh bill goes further, also granting the power to relieve the judge of any duties with respect to cases he presently has assigned to him. This latter power is the one that was involved in the *Chandler* case. I lean toward the approach of the Kennedy bill.

The Kennedy bill also provides for problems that may occur in the court of claims, the court of customs and patent appeals and the customs court. This is a valuable addition.

I have two major suggestions and one minor suggestion to improve the Kennedy bill. First, the complaint for misbehavior is to allege "a violation of the good behavior standard required by article III, section 1, of the United States Constitution." I would prefer "alleging conduct which interferes with the effective and expeditious administration of the business of the courts." This would track the language of section 332, would be an administrative rather than an accusatory-judicial standard, and would be consistent with the judicial administrative structure. My second major suggestion in reference to the Kennedy bill would be to add a provision that the written complaint initially should go to the chief judge of the circuit and invest him with sufficient flexibility to solve the problem, if possible, before it goes to the Judicial Council of the Circuit. This approach, which is contained in the Bayh bill, has great merit.

My minor suggestion applies to both the Kennedy and Bayh bills. If seniority is to be the criterion for membership on the judicial council, I would recommend excluding those active judges eligible to retire.

I also believe that if there are to be major changes in the power of the judicial council, that the amending of section 373 as proposed in the Kennedy bill, is a better approach than including those amendments in section 332, as provided by the Bayh bill and the Court Administration Committee draft.

In this regard, if the Court Administration Committee draft were to be considered, I would recommend modifying it so that it would appear in section 372. Such a proposal is attached and marked exhibit G. This proposal also constitutes a compromise on the issue of restructuring of the Judicial Council of the Circuit. It provides for district court membership on the Judicial Councils of the Circuits only when they are considering complaints against judges and other court personnel. Some who are opposed to restructuring the judicial council generally state they would not be opposed to having the council restructured when considering complaints, especially when they are against district judges. It has also been stated that district judges would be more comfortable with a complaint procedure if some of their members were on the decisionmaking body. Exhibit G accommodates these positions. If it is concluded that such a compromise is necessary, similar amendments could be made to the Kennedy bill without much difficulty. The Bayh bill could also be similarly amended, but I suggest it would be much easier if it were accomplished by amendment to section 372, as was done in exhibit G.

Finally, although I have no pride of authorship, I have reduced to writing a proposed draft which might be considered if the Congress concludes added powers should be given to the judicial councils. This proposal is attached and marked exhibit H. As indicated earlier, I do not believe it is necessary. It does, however, include my thoughts as to how these additional powers could be

identified within the judicial council's administrative functions. However, I am persuaded by the Kennedy bill as to where such amendments should be structured when considering complaints, especially when they are against judges language to be included in section 372.

Comparing the language pertaining to judge correction in my proposal with that of the Kennedy bill demonstrates a closeness of approaches. With the changes I have suggested, I could, therefore, in large measure endorse that part of the Kennedy bill pertaining to correction of judges.

VI. FINAL CONSIDERATIONS

The Constitution of the United States wisely provided for separation of powers among the judicial, the legislative and the executive branches. A concommitant principle is that these separated powers should be balanced. That balance is an indispensable cornerstone to protect our country from tyranny. The system is roughly analogous to a three-legged stool. If the structure is to carry out its intended purpose, each of the legs must be equal and in balance. Each of the three Federal branches is responsible to maintain that delicate balance.

It is my judgment that an indispensable component of the separation of powers and the balance of powers is an independent judiciary. No rights can be guaranteed without an independent judiciary. As our judicial system has grown and the requirements placed upon it have been enlarged, there have been times when the need for efficient judicial administration has apparently come into conflict with judicial independence. See "Judicial Administration in a System of Independents: A Tribe With Only Chiefs," Brigham Young University Law Review Vol. 1, p. 39 (1978). Nevertheless, as consideration is given to whether additional legislative powers should be granted to any body which will in effect result in more control of the judiciary, the wise counsel of Prof. Philip Kurland should be considered:

"When dealing with so fundamental and fragile a notion as the independence of the judiciary, one ought to tread warily lest the ultimate cost far outweigh the immediate gain." (39 U. Chicago L. Rev. at 666 (1969).)

Judge WALLACE. Rather than discuss what I was prepared to say, let me just take a minute to summarize my comments, and then let Judge Browning use my time.

I think there are four basic principles that the Congress, in its wisdom, has established in relation to Judicial Councils of the circuits, known as circuit councils. I believe these four basic principles are important, not only because our national legislative body initially developed them, but because time has proven that they are correct and have set us on the right course. Given the added impetus of what is occurring now, referred to by Judge Hunter, we have an excellent opportunity to correct properly those judge practices which should be corrected.

The first basic principle, which I was prepared to discuss in some detail, is that there exists only one body in our judicial administrative structure which is given the power to issue orders. The Judicial Conference of the United States does not have specific authority to do so, and the Judicial Conferences of the circuits cannot; it is only the Judicial Council that has the power by statute to issue orders.

Second, the entire judicial administrative structure was set up to be decentralized. That is, it was the wisdom of Congress, and I applaud that wisdom, that problems with judges can best be handled on a local level, rather than in Washington, D.C. Problems can best

be solved locally where those problems are known best. That was the judgment of Congress, and I submit it was an accurate and proper assessment.

The third principle is that the key operative unit in this judicial administrative structure is the Circuit Council.

The fourth is that that structure envisages an administrative responsibility; that is, even when the Circuit Council enters orders, they are nonadjudicatory and nonaccusatory. They are for administrative purposes, and this principle will become critical when Judge Browning discusses judicial discipline.

Mr. Chairman, I would enjoy having a substantial amount of time to talk about the problems which were ventilated before this committee, especially by the gentleman who spoke, on behalf of newspapers, as to their perceptions of the problem. I think it unfortunate that the time is insufficient to provide you with a balanced inquiry as to the nature of the problem, but I think it more important that Judge Browning, with his practical knowledge, speak to you. It will give an insight to the committee as to what can be done with judge correction while not interfering substantially with judicial independence and still allowing a judicial system to function for the benefit of the citizenry.

And so with those brief comments I would defer to Judge Browning.

Judge BROWNING. Mr. Chairman, this generation in the Senate has been dealing with the problem now for almost a decade. I am sure you and I can agree that it is a happy thing that we are approaching a point of view that most in the judiciary and in the Congress can agree upon in dealing with this vexing problem.

The question, of course, is whether a legislative remedy in addition to the present statute is necessary to deal with problem judges. From the point of view of the judiciary alone, the answer might well be no. The administrative power already given by the Congress to the councils of the circuits under 28 U.S.C. section 332 has proven adequate to deal with the problem from the point of view of the judiciary. However, I am not going to argue for that position. I am willing to concede that the existing although under the 28 U.S.C. section 332 it may be an adequate remedy may not be adequate from the point of view of the Congress and the public. I say that for two reasons.

First, the remedy available under section 332 is not commonly known either to the Congress or to the public, and because it is not known, it is for practical purposes not totally effective.

Second, Congress may very well feel that the only remedy that is known, impeachment, is too burdensome to be effective.

I would like to make two points first. I would like to demonstrate that the section 332 remedy can be effective. Then I would like to indicate how we can solve the two problems I have mentioned through legislation that will make the existing remedy publicly known and that will reduce the burdens of impeachment.

I think virtually every person who has spoken or written on this subject, including most of the Senators who spoke in last year's debate, qualified their comments with a statement that the problem judges in the Federal system are very few. That is partly due to the high quality

of the people who have been nominated and confirmed, but I think it is also due to the effectiveness of the Councils and the chief judges in dealing with the occasional problems.

I would like to draw from experience in the last 18 years in our Circuit Council to illustrate the kind of approach I think has been effective.

All of the cases that I will refer to concern judges now deceased.

We had an alcoholic judge. The problem was investigated by a circuit judge assigned for that purpose. He was then confronted with the facts. He was eligible to retire under section 371(a), and did so. He went to an institution. He took the cure. Later after appearing before the Council and after frank and full discussion of his problem, he returned to the bench and continued to perform for over 10 years as a very productive judge. If instead we had filed charges, held a hearing and convicted him, the system would have lost a good judge and a good man would have been destroyed.

We had a judge incapable of sentencing. He also was an extremely able judge, but he simply could not impose a sentence commensurate with the crime. It was not arguable. He would put bank robbers on probation, while judges down the hall were giving them 15 to 20 years. Working with the chief judge of the district court, this judge was convinced that he ought to devote himself entirely to the civil docket. He continued to do that until his death, doing a superior job. If we had been compelled to proceed formally, the judge would have been compelled to defend himself. The man and system would have been hurt.

Another kind of problem we have dealt with is the judge who has cases under submission for too long. Several years ago a prominent trial judge in our circuit fell behind because of serious personal problems. He was visited by a circuit judge acting for the Judicial Council. He was told Council was considering entering an order barring further assignments, and he was invited to appear before Council. Before the date set for his appearance, he advised the clerk he did not wish any further assignments for the time being. He caught up—and he kept up thereafter.

In my 18 years, the same pattern has been repeated several times on the trial bench and on three occasions on the circuit bench.

Then there is the case of the foolish judge. This judge sentenced a highly successful "confidence" artist to prison. After a time the accused convinced the judge he was fully rehabilitated, and the judge interceded on his behalf with the parole board. The FBI later reported that fairly substantial payments of cash were moving from this convict to the judge's secretary. That of course raised serious questions. We undertook to inquire into it. We found that the secretary of the judge had become—"enamoured" is too strong a word—"bemused" by the accused. She had loaned him between $1,000 and $1,500. The payments to the secretary were repayments of that loan. The judge was not aware of the loan or its repayment. The Council issued a letter of reprimand to the judge, nevertheless, for failing to exercise proper control over his immediate staff. If that matter had been the subject of a public accusation, and the judge had been put to trial, his effectiveness as a judge in that community would have been destroyed.

The administrative handling of complaints against judges is a continuous process, going on every year, in every circuit. There is no record available because these matters are handled informally. We had not entered a formal order in such a matter in the ninth circuit in my 18 years on the court, until this year. That is quite generally the case in other circuits. It does not mean the procedures have not been effective. I do not know of a problem judge in the ninth circuit now who is out of hand. I have one caveat, and that is the irascible, overbearing judge. This is the most irritating of the problems we have, but also the most difficult to handle properly. When the bottom line is reached, it may be that an occasional problem of this kind is the price we have to pay for individualism—that you simply cannot legislate or regulate that problem away without meddling far too much.

The conclusion that the circuit councils, generally speaking, have been handling these complaints effectively is supported by a study conducted by the Federal Judicial Center.

I might say, having listened to testimony here again today, that incidents cited in support of the legislation deal primarily with criminal conduct by judges. If there are criminals on the bench, they ought to be indicted, convicted, and punished as any other criminal ought to be. We are not dealing with the punishment of criminals. We are dealing with the day-to-day administration of business in the Federal courts. If you create a system parallel to the criminal justice system to deal with criminals sitting on the Federal bench, you will create a system that is not effective for day-to-day administration of the Federal courts, and not appropriate for the trial and punishment of criminals either.

The second category of incidents dealt with, as I heard the testimony this morning, was conduct that occurred before the particular judge was appointed to the bench. I think if you will explore the cases referred to by the first three witnesses you will find there was a failure to heed a clear warning ahead of time that the proposed judge was not an appropriate candidate for a judgeship. The remedy there, of course, is in correcting the process of nomination and confirmation, rather than trying to deal with the problem thereafter.

Judge Lumbard, who will speak in a moment, has written on this subject in the American Judicature Society's journal. He has indicated there were some problems in the third and sixth circuits that were not dealt with by those councils. In both instances, however, they were dealt with by the Judicial Conference of the United States. Judge Lumbard was himself chief judge in the second circuit. He does not suggest there were any situations which the council of that circuit failed to deal with adequately. I do not think there were any.

It seems to me incorporating these basic procedures into legislation would be the most appropriate approach. I think they have operated effectively. If you put them in the statute, then when a congressman gets a complaint, the statute will tell him that the complaint should go to the chief judge and to the circuit council. They cannot evade their responsibility because it will be spelled out in the statute.

Dealing with the problem of "whitewash," it seems to me that if this obligation were fixed on the council by statute, and a Member of

the House of Representatives or Senator submitted a complaint to a council that was not appropriately responded to, the congressman would not have to stand for it.

Finally, I would like to deal with the legitimate contention that the Congress cannot take the time to deal with even a serious case by the impeachment process. I think for the first time the Judicial Conference resolution provides the basis for reducing the burden of impeachment. The resolution provides, and our published procedures now provide, that if the circuit council encounters grounds for possible impeachment, it has an obligation to refer those to the Judicial Conference, and the Judicial Conference in an appropriate case can refer them to the Congress.

If this procedure had existed in the past, the 17 resignations that occurred after the cases had reached the Congress and were under investigation by Congress would have occurred during the processing of the matter by the judiciary itself. Moreover, in those cases where resignations did not occur, the issues would have been clarified and the evidence would have been gathered before the matter reached the Congress.

I personally have great hope that this assumption of responsibility by the judiciary will reduce the burden on the Congress to the point where impeachment could also be a reasonably effective remedy where finally necessary. Thank you.

Senator DeConcini. Judge Lumbard, the executive committee does not have a quorum yet. I am going to stay here until they actually need me.

Judge Lumbard. I will be very brief, Mr. Chairman, and shall not repeat what has been said by my distinguished and well-informed colleagues.

[The prepared statement of Judge Lumbard follows:]

Prepared Statement of Judge J. Edward Lumbard

My name is J. Edward Lumbard. Since July 1955, I have been a U.S. circuit judge for the second circuit. I was chief judge of that circuit from December 1959 until May 1971. Thereafter, I took senior status and have continued to sit in the court of appeals and in some of the district courts of the second circuit. My chambers are in New York City and in Bridgeport, Conn., which is my official station.

From 1973 to 1975, I was a member of the Commission for Revision of the Federal Court Appellate System. Senator Hruska was chairman and I was vice chairman.

I am glad to respond to your invitation to comment on several bills which have been introduced to improve the operation of the Federal courts, particularly with respect to the discipline and tenure of Federal judges.

I think I can shorten my testimony by first stating what I believe to be the principles which should govern such legislation. Thereafter, I will comment specifically on the Nunn bill, S. 295; the Bayh bill, S. 522; and the Kennedy bill, S. 678.

For many years, it has become increasingly apparent that existing methods for disciplining and regulating the tenure of Federal judges are wholly inadequate to ensure adherence in all cases to the constitutional requirement of "good

behavior." During the past 20 years, the need for suitable mechanisms for investigating and prosecuting complaints regarding judges has considerably increased. In 1955, there were 360 article III judges below the Supreme Court, of which only 44 were senior judges. After the appointment of the 152 judges authorized by the Congress in October 1978, there will be 838 article III judges of whom 171 will be senior judges. Thus the potential for problems of good behavior has greatly increased since 1955. But at the same time, the Congress has become increasingly busy with important matters and less able to give any attention to judicial discipline. The last impeachment proceeding brought against a Federal judge was that against Halsted Ritter who was removed from office in 1936. Since then, the only involuntary removals of Federal judges have come about through criminal trials in Federal court: the conviction of Martin T. Manton of the second circuit in 1939 for receiving bribes, and of Otto Kerner of the seventh circuit in 1973 for bribery.

At present, the sole grant of powers to supervise judicial conduct is given to the circuit councils. It is to be found in 28 U.S. Code § 332, which provides that: "Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."

The councils, however, have no means of subpenaing witnesses or records and the lack of this power frequently frustrates any effective investigation. The only action which a circuit council may take in order to obtain the retirement of a Federal judge is to issue a certificate of disability when it finds that the judge is disabled. If the President concurs, he may appoint an additional judge to take the place of the disabled judge. While the circuit council could initiate an investigation into disability, in practice, the councils never do so. The only certificates of disability which I know of have been issued at the request of the disabled judges. However, in some cases the mere existence of the power to issue a certificate of disability has been a factor in persuading disabled judges to take senior status.

The circuit councils have always been very reluctant to use their powers. Most judges want nothing to do with disciplining their colleagues. There were several instances of judicial misconduct during the time I sat on the Judicial Conference which illustrate this great reluctance. In the sixth circuit, an Ohio district judge who handled important labor cases had as his secretary a labor union officer who performed no secretarial services. In the third circuit, several district judges in Philadelphia appointed their bailiffs to act as appraisers in bankruptcy cases. In both situations the circuit councils refused to act. The Judicial Conference solved the Ohio case by stopping the secretary's salary, and the Philadelphia case by a resolution disapproving such appointments, which the judges obeyed.

More recently, the tenth circuit encountered serious problems in dealing with the chief judge of the District of Utah, and in dealing with Judge Chandler of Oklahoma. *See Chandler* v. *Judicial Council*, 398 U.S. 74 (1970). Both of these investigations were severely hampered by the tenth circuit's lack of power to issue subpenas and to compel testimony, problems which the Nunn bill only partially addresses. The reluctance of each circuit council to confront abuses in its circuit, when contrasted with the readiness of the Judicial Conference to do so, points up the advantage of placing investigative and disciplinary powers in a national judicial agency, unhampered by local loyalties and embarrassments which may prevent action.

NUNN BILL S. 295

For these reasons, I urge the committee to approve the Nunn bill, S. 295, in principle and in most of its details. The Nunn bill would set up a Judicial Conduct and Disability Commission which would consist of one judge from each circuit, selected by the circuit council, and one judge selected by the Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court. The Commission, in addition to conducting its own investigation, could refer a complaint to a circuit council. Referral of complaints to the circuit councils is a necessary provision because most complaints, apart from those which are clearly frivolous, may best be resolved by the chief judge of the circuit. For example, one of the more frequent complaints against a judge is that he has failed to act in a matter. In most cases this can be handled by a telephone call or by a direc-

tion to the judge that he take on no new matters until this backlog of undecided matters has been resolved. I find one important omission in the Nunn bill—the failure to give the circuit councils the power to issue subpenas and to compel the attendance of witnesses.

The Nunn bill provides that where the Commission has found substance in the charges, a trial will follow before a Court on Judicial Conduct and Disability, of which the presiding officer shall be elected from the Judicial Conference. The presiding officer will then select six members of the Conference to serve with him and these seven will comprise the Court. I question the advisability of entrusting to any one judge the designation of six of the seven members of his court. In any event, five judges would be sufficient. In addition, I think it would be wise to provide that no one of the judges on the Court be from the circuit of the judge who is being charged and also that no more than one judge of the Court be from the same circuit.

Among other sanctions, the Court may direct the removal from office of any judge, except a Justice of the Supreme Court, as to whom it may only make a recommendation to the House of Representatives for possible impeachment or censure. Any adverse ruling by the Court on Judicial Conduct and Disability may be appealed to the Supreme Court.

I believe it would be constitutional for Congress to enact the legislation provided for in the Nunn bill. Federal judges assume office on the understanding that they may hold it only during "good behavior", the words in the Constitution. Although the Constitution refers to impeachment as one method of removing Federal judges, it does not prescribe impeachment as the only method. If a suitably constituted judicial board should find that a judge has failed to comply with the requirements of good behavior, there is no reason why he should remain in office. If Federal judges can decide the most important questions relating to the economy and business of the country there would seem to be no reason why they cannot determine whether one of their number has failed to measure up to the standard of "good behavior." If the Congress were to decide that a Court on Judicial Conduct and Disability, subject to review by the Supreme Court of the United States, should decide such questions, I see no reason to believe that this would violate the Constitution. However, whether such powers of removal should be given to any court is a political question for the Congress to determine.

If the circuit councils are to play a part in investigating complaints regarding judicial conduct and disability, whether under the Nunn bill or under any other proposals, it is of prime importance that the circuit council be manageable so that it can act effectively. In my experience, a circuit council of nine judges is the maximum number which can operate effectively. The judges are all very busy men and in most circuits they are separated from each other most of the time. Chief judges of the circuits must handle many matters informally after reassuring themselves that their colleagues on the council will support them. Every other member of the council has an equal vote. Consequently, the chief judge acts at his peril unless he is reasonably sure that what he does will be supported by the council. This means that in between sessions of the council, he must act in many matters after contacting sufficient members of the council to advise them of what he proposes to do. As a result of the creation in 1978 of additional circuit judges, seven of the eleven councils will soon have an excess of nine active judges. I therefore recommend that the circuit council be limited in size to consist of the nine most senior active circuit judges.

The circuit councils should consist only of circuit julges. To add district judges to the circuit councils will make the councils too large and unwieldy, and will dilute their authority. Moreover, the members of the circuit councils as presently constituted are always in a position adequately to advise themselves of the views of the district judges. Many of the circuit judges have served as district judges: in the second circuit, six out of nine have. Moreover, the councils may invite district judges to join their deliberations with respect to particular matters. For these reasons, I do not believe that district judges should be added to the membership of the circuit councils.

BAYH BILL S. 522

My first objection to Senator Bayh's proposal for investigating complaints against judges and processing any serious charges for report to the House of

Representatives is that it places too great a burden in the wrong place. It would make the circuit council the trial court for charges which may be contested. Second, Senator Bayh's proposal would have the circuit council consist of seven circuit judges and seven district judges. As I have already pointed out, such decisions should not be made by members of the local fraternity. Moreover, the council would be too large and unwieldy. In any event, district judges should not be members of the council.

I believe the public would have greater confidence in the Commission and the court procedure proposed in Senator Nunn's bill.

KENNEDY BILL S. 678

First, as to the proposal for limiting chief judges of circuits and districts to terms of 5 years, I see no gain from this. Judges are generally agreeable to having their seniors take precedence. So long as the chief judge is under 70, there will often be an advantage in having the chief judge serve more than 5 years because of his experience. A change every 5 years does not necessarily improve the leadership of the court or even ensure that the new chief judge is better qualified than his predecessor. I suppose one possible advantage would be that the title, and whatever distinction comes with it, would be shared by a greater number than is now the case.

In any event, it is of the utmost importance that no change be made in the provision of 28 U.S.C. § 45—that no judge shall serve as chief judge beyond the age of 70. For this reason, I am categorically opposed to Senator Moynihan's bill, S. 862. Congress took a great step forward to ensure better and more active administration of the Federal courts when it amended the law in 1958 so that chief judges of the courts of appeals and chief judges in districts of more than two judges could no longer serve as long as they pleased. In the eighth circuit, Archibald Gardner remained as chief judge until August 6, 1959, when the 1958 amendment took effect, at which time he was 92 years old. In the ninth circuit, William Denman stayed on as chief judge until 1957; he was then 85 years old. Before the 1958 statute we had three instances of chief judges of large district courts who were well into their eighties before they could be persuaded to retire: William Bondy in the Southern District of New York, and Robert Inch and Mortimer Byers in the Eastern District of New York. In each case, the senile condition of these chief judges had, for several years before their retirement, been well known to their colleagues, to members of the bar and to anyone appearing in their courtrooms.

While many Federal judges know when time has come for them to take senior status, the cases I have cited are demonstration of what frequently happens if the choice is left to the judge, instead of being fixed by law.

The 70-year limit not only provided younger and more vigorous chief judges, it also stimulated earlier retirements by other judges who no longer hung on in the hope that they might become chief judge. Thus, in 1955, only 12 percent of the Federal judges were in senior status; today, 25 percent are seniors.

Like the Bayh bill, the Kennedy bill also leaves to the circuit councils the processing of complaints and charges against judges, with councils consisting of seven circuit judges and four district judges.

The Kennedy bill would allow judges to retire as early as age 60 if they have served 20 years, or whenever their age plus years of service equals 80. I think the current provisions which permit retirement at 65 at the earliest is fair and ensures the government of the benefit of active service by judges during 5 of their most valuable years, from 60 to 65.

The proposal to amend § 1292 to allow the courts of appeals to take interlocutory appeals, even where the district court has refused certification, would be helpful; likewise with the amendment to § 1631 for transfer of certain cases. I urge their adoption.

Title IV would establish a new Court of Tax Appeals of 12 judges to be chosen by the Chief Justice from the circuit judges. The provision for the court to sit in "divisions of more than three judges," I suppose means at least four divisions.

I think the Chief Justice would encounter considerable difficulty in persuading 12 circuit judges to sit on tax cases for a year even if they were to continue to sit in their own circuits. I doubt whether enough is to be gained by creating such a court; it might increase the delay in hearing and deciding such cases. Some

day in the near future we must have some court such as the National Court of Appeals, proposed in 1975 by the Commission on Revision, to which the Supreme Court can refer cases. I think that would be a better way of arriving at nationally binding decisions, short of Supreme Court decisions. Until that day comes, I think it best to leave the tax appeals where they are.

Judge LUMBARD [continuing]. The problem of discipline and tenure, it seems to me, breaks itself into two main headings. The first is, what is it that the circuit councils should do? I agree with Judge Browning that most problems can be handled by the chief judge of the circuit or by action of the circuit council. If we have alert councils, this is the best guarantee against improper practices and questionable procedures. This makes it of paramount importance that the circuit councils be so organized and be so empowered that they can act effectively.

First, the size of the councils. When the current vacancies have been filled, there will be 7 of the 11 circuits which will have more than nine active judges. My first point is that there is a limit beyond which the circuit council is no longer as effective as it should be. The chief judge, while it is true he can act in many cases by himself, simply by a telephone call, persuading a judge that he ought to take a short vacation and persuading him not to sit for a while, there are many matters where he can act only if he has the backing of the circuit council. You cannot hold a council meeting every time to get authority. Therefore, the chief judge has to make contact, and assure himself that he has the support of the majority members of the circuit council.

Now in just a few months, Judge Browning is going to have to contact a majority of 23 judges, and Judge Brown in the fifth circuit is going to have to contact the majority of 25 judges. I say to you this is just impossible and means that many matters are simply not going to be handled the way they should be.

The second, of course, is the matter of leadership of the chief judge himself. I urge you very strongly not to pass the proposal made by Senator Moynihan that chief judges may again serve beyond the year of 70. What happened years ago in the eighth circuit when Archibald Gardner sat as chief judge until he was 92, and in the ninth circuit when Judge Denman sat until he was 85, as chief judge; and the situation in the third circuit where Judge Buffington sat until he was past 80, although he was both deaf and blind? Therefore the leadership should cease at 70 and give way to more vigorous younger leadership.

Most of all, the circuit councils should be given the power to get evidence. There were a number of occasions when I was chief judge where we could do nothing about investigating very serious complaints because we did not have the subpena power. The evidence would have to come from members of the bar who were always most reluctant to give you any information whatever about any possible misconduct of a judge.

Now although most complaints can be handled in this way through the chief judge or the circuit council, I submit to you that public opinion and the opinion of the bar feels that unless there is some mandate from the Congress, that complaints must be investigated, and unless there is some means of investigating beyond the local council of local judges, the public will not have the confidence it should that serious charges are being dealt with properly.

The last thing any Federal judge wants to do is to have anything to do with disciplinary proceedings against the man with whom he has lunch every day, with whom he goes to the circuit conference, with whom he sits on committees.

So when the situation gets beyond a certain point, there ought to be some central national agency with power of subpena, and even, I submit to you, power to grant immunity and get testimony in cases where necessary, which agency can then prosecute the matter further, either through a commission and then through a court and eventually to the Supreme Court, as one of the bills suggests.

And last, I see no constitutional difficulty in the Congress providing, in its wisdom, through the means such as those proposed in the Kennedy and DeConcini bill, a series of courts and reviews, and bear in mind very few cases will have to get that far. They will resolve themselves long before they get there. I see no reason why the Congress does not have the power, in view of its power to establish lesser Federal courts, in view of the constitutional provision that judges serve only during good behavior, Congress has the power to say who shall determine whether the judge is still observing the obligation of good behavior, and whether in return for a lifetime position at full salary, he is any longer fit to stay in that position.

Therefore I submit to you that the proposals made to give the courts the power of removal in the ultimate and most serious cases would be constitutional.

Senator DeConcini. Thank you very much. Let me address a question to Judge Hunter and Judge Browning.

The proposals before us vary. One of them, S. 295, would provide that complaints be filed with the Judicial Conduct and Disability Commission. Then they are referred back to the Committee of the Circuit Council which must make some determination within 30 days. Getting to the point that Judge Lumbard mentioned, and it has always troubled me about the image that I think the Judicial Conference fails to address itself to, is that the public feels that if the complaint only goes to the chief judge and is dismissed for very good reasons, is there not the Old Boy Club syndrome?

What would be wrong if the complaint is filed someplace else and then referred to the chief judge or his committee in the circuit and he has a period of time to resolve it before any other entity would have the right to do anything about it? Would you comment on that, Judge Hunter?

Judge Hunter. Yes; I expect Chief Judge Browning also would have a comment on it. Basically, what is wrong with that procedure is, you are centralizing in Washington, D.C., a matter which I would say in the 99 percent of the cases is going to be purely a local matter that should be resolved at the local level by the people there who are fully acquainted with the situation.

Senator DeConcini. If the resolution, if the complaint came to Washington, D.C., by law, was referred back to the circuit it came from, with either a committee or the chief judge having an ample period of time to solve it, why would that not work?

Judge Hunter. Simply because once you start that centralized procedure in Washington, D.C., you have set up the machinery which is not going to stop and you are going to be airing all of these minor-type

charges, erroneous-type charges, minimium-type charges. You are going to be building a large formal organization that very soon will be bringing everything on back to Washington, D.C.

Senator DECONCINI. Restricted by law, judge, that complaints filed here in Washington had to be referred to the ninth circuit to the chief judge and he had 60, 90, 120 days of whatever time to handle the matter before that Washington office could even look at it again. How would that strike you?

Judge HUNTER. Are you saying the chief judge would be empowered to dismiss the charge as frivolous and that that would be the end of it? There would be no publicity?

Senator DECONCINI. He would have to report back to the Washington office what he did and justify it, but, yes, he would have the right to dismiss it.

Judge HUNTER. Then you are going to require a recordkeeping and a potential publicity setup.

Senator DECONCINI. You would require recordkeeping?

Judge HUNTER. You are setting up something for the very serious case, not for the real meat and grind of what is going to come into the system.

Senator DECONCINI. You do not think that the public would feel more confident if the complaint was filed some place other than with the people whom the complaints are against?

Judge HUNTER. These very people are the ones who are given the most serious duties anyway. They are the ones who administer the entire justice system in their locale and administer it well. What would you do if you had a territory, for example, that included a State prison of some 3,000, several State mental institutions, that type of thing? What are you going to do with the incredible number of possible or potential complaints that would come out of institutions like that which are therapeutic to the one who is making the complaint, but they are in the main perhaps with rare, rare exception, totally without basis. Are you going to run those through that enormous federalism?

Senator DECONCINI. Under S. 295, a frivolous complaint could be dismissed at the Judicial Conduct and Disability Commission level or referred back to the Judicial Council which could recommend dismissal. That is how you would take care of the 3,000 frivolous complaints if you get that many, the point being, I think, Your Honor, what does the public conceive when the complaint does not go through any impartial hands other than the judges that are being complained against? That is what I think is the failure of the Judicial Conference to address the image of the courts. I do not say that it has to go through the Judicial Conduct and Disability Court. That is not important. What I am trying to get at is how can we get the point that Judge Lumbard has brought out so explicitly that we need to improve the image? Maybe you would like to comment, Judge Browning.

Judge BROWNING. Senator, you may have better information than I, but I doubt that there is great public clamor over whether these problems are adequately dealt with, by the judges or anybody else. I do not think there is a large constituency sitting out there concerned over whether they are being dealt with effectively.

Senator DeConcini. I would beg to differ with you. You gentlemen do not have to run for office. If you talk to constituents and take polls and you see how low the courts are rated today——

Judge Browning. That is a different proposition.

Senator DeConcini. Partly due to disagreement of decisions, but partly because nobody has any controls, and those are the kinds of answers.

Judge Browning. I agree with you, Senator, that we need public information as to the availability of a remedy. Members of Congress as well as the public should know that there is a remedy and that responsibility is fixed in the circuit council and the chief judge which they cannot evade. That is not now clear, though the remedy is there and some circuits have been effectively applying it and some have not. If it were in the statute, Senator, if you had a complaint and sent it to me and I did not deal with it properly, I do not think that you or your staff, Mr. Altier or Mr. Romani would let go without dealing with legitimate complaints from your constituents. You would pursue me and insist upon an appropriate response. I think the difficulty now is that responsibility is not clearly fixed.

We have in our circuit, as you know, Senator DeConcini, a committee in each of our districts made up of lawyer representatives to our circuit conference. We have a circuit group consisting of the chairmen of those committees. I went before that group and said, "I know it is hard for a lawyer to complain about a judge that he has matters pending before. If you have any problems with any judge get in touch with me, write me a letter or call me on the phone, and we will try to do something about it." Are you telling me we should not do that, but should have a system that is going to formalize all these matters, so that a complaint has to go first to Washington, it has to be registered there, and it has to come out to a committee for recommendation, and so forth.

Senator DeConcini. Judge, let me say this. As far as I can surmise, based on last year's hearings and this year's hearings, and information of the ninth circuit—I do not want to say you are the exception—but certainly you stand out as being one who has responded to what I think I am talking about, and that is public clamor that something has to be done. You were willing to apparently bite those bullets. We have example after example by the news media and court records of Ellis and Chandler and Ritter that no one can dispute that something should have been done more than just having a chief judge walk in and say, shape up, or whatever.

Judge Browning. One of the things this committee can take credit for is that there are now four circuits that have formally published their procedures for handling complaints and accept that responsibility; and before the year is out, there will be 11. Every one of them. That is a tremendous improvement.

Senator DeConcini. That is very good.

Judget Browning. They are published in Federal 2d, they are on file in every clerk's office. There is not going to be any argument about the circuit council's power. There have been arguments about it. I think you ought to give that system a chance to work. You pick cases, however, where you say that the difficulties are greater than can be

dealt with by such informal procedures. If there is criminal conduct afoot, I say again that there is no administrative procedure that will be appropriate for handling that kind of conduct. There is only one way a charge of criminal conduct by a judge can or should go—that is like all other criminal matters, by prosecution by the Department of Justice. No commission or judge outside that criminal justice system can deal appropriately with those cases.

Senator DECONCINI. From the testimony of the Justice Department it has been my observation they are reluctant to do that. They are reluctant to pursue a criminal investigation—though they will not say—they are reluctant, in fact, their lack of action will prove that they are reluctant.

Judge BROWNING. Sir, would you substitute the procedures in these bills, in the DeConcini bill for criminal prosecution?

Senator DECONCINI. No; it would augment them and provide some tool to go ahead and assume—obviously we can understand human beings in the Justice Department. They have to go before those courts. They are subject to contempt.

Judge BROWNING. Senator, my conception of the judges in our court is that they are more concerned with judges who act improperly than the general members of the public are.

Senator DECONCINI. Let the record show that I agree with Judge Browning that I am talking about a very isolated number of judges. I want to make that clear. This is not a blanket indictment.

Judge, you mentioned a number of cases that you did handle and I commend you for their resolution, but in the course of the court administrative work, were there any aggregate figures that you have utilized which would assist us in evaluating how severe the problem is?

Maybe there are not very many complaints filed. What worries me is that nobody seems to indicate there are any records kept.

Judge BROWNING. I would say the problem is minuscule, and it is blown all out of proportion by the approach we have taken to it. Last year we published our procedures. I do not mean it was a matter of front-page news in the ninth circuit, and most people are still not going to be aware of it; nonetheless, it is on file in every clerks office. I think we have had about four complaints since. That does not mean that is all we have done in connection with dealing with judges who are a little out of line.

Senator DECONCINI. How many complaints have you had in 17 years?

Judge BROWNING. I do not count them, but not a large number.

Senator DECONCINI. What would you estimate?

Judge BROWNING. Estimate?

Senator DECONCINI. Dozens, hundreds?

Judge BROWNING. I would say dozens would cover it. In any event, I would also say this, that the number of situations in which the Council responded because of an outside complaint is a very small part of the administrative work that the chief judge and the Council does. There are ways in which we become aware before anybody else is, of serious problems, and then move to deal with them. It does not depend upon receiving and handling complaints from the public. For example, I am alerted by filing of a petition mandamus in a particular case,

when a particular judge is falling behind in his work. We also get reports from the Administrative Office of the U.S. Courts. When a judge or a court starts to fall behind, we try to do something about it.

Senator DeConcini. Judge Hunter, let me submit some questions to you, if I could, from Senator Bayh, if you would answer them for the record.

Judge Hunter. I will do my best.

Senator DeConcini. Resolution 1 of the Judicial Conference is a four-part resolution and provides that the chief judge as presiding officer of the Circuit Judicial Council, may dismiss a complaint or close a complaint. If not dismissed, finding and recommendations of a joint committee of circuit and district judges are reported to the Circuit Judicial Council. The Circuit Judicial Council may take such actions as is appropriate.

First, would you describe what appropriate action would result; and second, how does the Circuit Council avoid the public response that dismissals or other actions by one's peers give the appearance of whitewash or not thorough consideration by independent nonpartial judges?

Judge Hunter. Well, first I would like to call your attention to the fact that the Judicial Conference also is on record for a restructuring of the Circuit Council membership, so that it would have on it a certain number of district court judges according to the size of the particular Circuit Council. Now, when the particular complaint comes in, if it goes past the stage of the chief justice handling it on its own, the chief justice appoints a committee which is evenly divided between circuit and district court judges. He is not going to appoint anybody to that committee who has any conflict of interest or any apparent buddy situation or any ax to grind. The chief judge is going to appoint the most objective committee that he can, and a committee that is composed equally of circuit and district court judges. I think that committee can be relied upon to make an appropriate factual investigation. I think that the public who live anywhere in that area and who know their district and circuit court of appeals judges, are going to have full confidence in the ability and the dedication of that committee to get at the real facts.

So I think that the very composition of the committee itself will carry the mark of integrity with the public, because after all these are men who are well known to the public in their locality. If by chance there should be something about it that needs further investigation, it goes on to the Judicial Council, and surely the Judicial Council can be depended upon to act with integrity. It would not be one or two people. It will be a composite action and an aggregate group, and there just is not any room in my mind to believe anybody is going to come up with a result that is of a whitewashing nature, or intensely wrong in any respect. If you cannot trust these men to act, the entire Federal judiciary is in trouble, because every judge bears enormous responsibility, and in the aggregate we do have an immense safeguard.

Senator DeConcini. Judge Hunter, thank you.

I am going to have to leave. I would respectfully ask if you would stay another 10 or 15 minutes. Mr. Feinberg of Senator Kennedy's

office does have some questions from the Senator that he would like to pose to you if you would remain, and also Marcia Atcheson might have a question or two from Senator Bayh. I will submit these for the record.

Let me thank you very much, judges, for your time. I realize how important this is to you and your colleagues. I can assure you that this committee is not going to move without great deliberation and considering very, very sincerely the objections and suggestions that you in the Judicial Conference have made.

I do apologize that we have only had 50 minutes here. I think we could spend another 4 or 5 hours discussing this issue. I wish I had time, Judge Wallace, to have some more discussion with you, and if you are inclined——

Judge WALLACE. Do not apologize at all. I know the time restraints that you are under.

Senator DECONCINI. If you care to submit anything else, the record will remain open for many days, at least 30 days; also, Mike Altier, of my subcommittee staff, will remain for the duration of the hearing.

Judge HUNTER. In view of the fact I am going to have a little additional time, may I say one more thing in answer to Senator DeConcini's last question. I think the cases that most concern you will inevitably go to the Judicial Conference. Of course, these are the chief judges of all of the circuits, plus special courts, plus district court judges elected by the district courts from all the circuits. A reporting provision at that level may be the answer to what you are saying, because what you are really interested in is that important, unusual, rare case where there is truly bad conduct that may be involved.

The system will carry those cases on up to the Judicial Conference, and if Congress wants a report on them, I am sure that can be worked out.

Mr. FEINBERG. Judge Lumbard, I have a few questions for the panel, but particularly for you because I am fascinated by your testimony. Usually you are in the majority in the second circuit, and on this panel it looks like you are one of the dissenters.

Judge LUMBARD. They are from a different circuit.

Mr. FEINBERG. I want to pose a question to you. If we give the Councils in each circuit the teeth that you talked about in your testimony, I take it that you still believe there should be some national body, either to review Council action or to be available if a complainant files a complaint with that national body; is that correct?

Judge LUMBARD. Yes; it is correct. First of all, let me say that I think it is important, and I believe it is provided for in the Kennedy-DeConcini bill, that matters be referred from the central agency to the circuit, and that there be a report back from the circuit as to what has happened regarding the complaint.

Mr. FEINBERG. Can that central agency be the Judicial Conference of the United States?

Judge LUMBARD. I see no reason why it could not be, yes, and I think that what the bill provides for is a director to be appointed by the Judicial Conference. It may be true that well over 95 percent of the

complaints will be completely frivolous. But the important thing is that the public be assured that if a complaint is made, somebody is going to do something about it, and this is the most important element in retaining the respect of the public for the judicial process.

Mr. FEINBERG. Here is one of the key points I think that has to be flushed out a little bit. Do you see the need for a national body along the lines of the Nunn-DeConcini bill or can the Judicial Conference perform that function of passing on complaints and communicating with the councils?

Judge LUMBARD. Well, I think a smaller group than the Judicial Conference is advisable. The Judicial Conference consists of 25 members, including the Chief Justice. I would favor something along the lines in the Kennedy bill of having a smaller Commission, and a Commissioner whose duties are limited to doing that. We have to remember that the members of the Judicial Conference for the most part are the busiest judges in the whole Federal system, among others, the chief judges of the various circuits, and they ought not to have this additional duty. Therefore, I think the Kennedy provisions are wise ones.

Mr. FEINBERG. Would you allow the councils to recommend that the House of Representatives consider impeachment or would you prefer that the national body, whatever it is, be the only body to actually make that recommendation?

Judge LUMBARD. I would have the national body do it. I think it comes more properly from the national body, and it is much more apt to be done there, and to be effective.

Mr. FEINBERG. Let me ask one totally unrelated question of you, and then I just have one other question for Judge Browning. You pass very briefly in your testimony on the provisions of the Kennedy bill that would allow interlocutory appeals to be taken despite the lack of a certification from the district court. I take it you think that is a salutary provision in the bill?

Judge LUMBARD. Very much so, because it so happens that many times in the most obvious cases or the cases which obviously require review, the district judge will refuse to grant the certificate. In fact, quite recently Judge Greisa refused to grant a certificate in the case where he held the Attorney General of the United States in contempt. In that case we proceeded by writ of mandamus.

Mr. FEINBERG. What about the argument, Judge, that is made against that provision, that the rule will result in just flooding the courts of appeals?

Judge LUMBARD. No; they will be on written papers, and the court can dispose of them very readily. And I think it will not take too much time to do it that way.

Mr. FEINBERG. My final question to you, you also passed very briefly on this provision in the Kennedy bill that would allow transfer of cases for want of jurisdiction, where a case is filed in the wrong Federal court. This is something that Judge Gignorex has been advocating for many years.

Judge LUMBARD. I think it obvious that would be a very desirable measure.

Mr. FEINBERG. For what reason?

Judge LUMBARD. Otherwise, you have a proliferation of litigation in different districts without always having all the parties in one place; the possibility, for that matter, of even different results in different places. Anything that can be done to concentrate the resolution of issues in one place saves a lot of judicial time, and I think on the whole, is much more satisfactory to all the parties concerned.

Mr. FEINBERG. Thank you, Judge.

My final question is for Judge Browning or Judge Wallace. Then Marcia may have a question or somebody else.

Judge Browning, the Bayh-Mathias bill would allow orders of the council to be article III orders, appealable to the Supreme Court. That is, I think a major distinction between the Bayh-Mathias bill and the Kennedy bill. I am wondering what your views are, both of you, on that particular aspect of the bills?

Judge BROWNING. Speaking for myself, I think that would be unfortunate. It seems to me that the effectiveness of the present procedure results from its lack of formality and its consequent flexibility—from the fact that it is purely administrative and not in any sense adjudicatory. We are not trying judges for offenses. We are simply trying to see that the courts function effectively. To convert from the model to one of adjudication, of formal court proceeding, in which you are trying a judge for misconduct, seems to me to miss the point, and make the system ineffective.

Judge WALLACE. I agree with Judge Browning.

Judge BROWNING. Speaking to the Kennedy bill, I do suggest to you there is one provision that ought to be modified. In the course of the bill it identifies the kinds of complaints that can be made. I suggest to you that there is no reason why a complaint should not be made any time the complainant wants to complain. I do not think we need a standard.

Mr. FEINBERG. You mean behavior?

Judge BROWNING. The Kennedy bill adopts a good behavior standard—that is article III standard. Since there is a substantial body of opinion, especially among judges that the article III standard of good behavior is no different from the impeachment standard, that would mean that in dealing with every complaint, we would have the threshold question of whether it is impeachable. It seems to me that imposes an unfortunate limitation on the kind of complaints that can be dealt with. This defect in the proposed statute can be very easily remedied by substituting a reference to the section 332 standard, which is any conduct which adversely affects the administration of business in the Federal courts.

Mr. ALTIER. That standard you are suggesting—it was in Judge Wallace's statement, too, the section 332 standard, is that broader or not as broad as the good behavior standard in your mind?

Judge BROWNING. I understand the section 332 standard, because we have been working with it so many years. In terms of the constitutional question of whether you can have removal other than by impeachment, my own feeling is that the better side of the argument is that impeachment is the exclusive means of removal and the Congress is the exclusive tribunal. In those terms, the good behavior standard of

article III does not set out lower standards that can be used by a different body to remove Federal judges.

Mr. ALTIER. There is a substantial argument that the case can be made on the other side, that the good behavior standard is broader than the impeachment clause?

Judge BROWNING. Yes. But the only position the Judicial Conference has taken, in the first paragraph of its resolution, is that because it is a very doubtful constitutional question, it ought to possibly be avoided. And I suggest to you that it can be avoided by making statutory the provisions that have now been drawn out that would provide for the chief judge and circuit council to handle these complaints plus the provision with respect to referencing cases that may involve grounds for impeachment by the Circuit Judicial Council to the Judicial Conference of the United States and then to the Congress.

Mr. ALTIER. Judge Wallace, do you have a comment?

Judge WALLACE. I think it really depends upon what model you are going to use. Assume for the sake of argument that you want to use the model of the Judicial Council of the circuit, which I suggest in my written testimony has great merit. In that situation, if the action of the judicial council is limited to violations of good behavior, we have a much narrower area where the Judicial Council is going to work. Let me give you an example. A judge sits on a case too long. That is not interference with good behavior, but it certainly is interference with administration of justice. That is where a council should be functioning and could do so working under the present section 332 standard.

In my judgment the Judicial Council of the circuit should have the broadest possible latitude to work as an administrative body in this decentralized system. On the other hand, if a judge is a crook, he should be indicted. If he is not indicted, I suggest the Congress should ask why the Justice Department is not seeking an indictment, rather than attempt to wire around the indictment process to put it into a judicial administration mechanism, where it does not really fit.

If a judge is unfit and should be impeached, then he should be impeached. Now I do not know what percent of Federal judges in the United States are unfit to serve. I would like to see some documentation on the figure that I have heard today, that 10 percent are unfit to serve. As far as I am concerned, I equate unfit with impeachable. But I suggest it is a rare case when a judge should be impeached. If, however, the Judicial Council has made a thorough investigation and has made a recommendation that grounds are sufficient that a judge should be impeached, and the Judicial Conference of the United States has made the same finding, I suggest the House of Representatives would not take long in voting for impeachment. This procedure allows the Judicial Council to do the work it can best do, and yet preserves removal for the constitutional process.

If you turn the present procedure around, centralize the machinery and provide for statutory removal, you will establish a massive organization to remove what a century of history suggests are very few judges. But the established bureaucracy will apply to the remaining 99-plus percent of judges.

To me it is just a wrong way to solve the perceived problem. I feel strongly that by working with the Judicial Councils and moving forward with them, they can solve the real problem more effectively.

Just as a postscript, if the Senate agrees and adopts the bill I suggest, and it is unsatisfactory, the Congress, can easily correct the situation by adding the centralized-removal approach. But if you go the full way, then the harm has already been done.

Could I go back to the question raised pertaining to this whitewash allegation? I do not perceive that as a real problem when using Judicial Councils. This is the reason why: I tried lawsuits for 15 years. Some judgments were not in favor of my client. There were times when I was antagonistic about things trial judges did, but I would have no hesitancy to appeal to an appelate court. I did not have any feeling at all that the appellate judges would protect the trial judges. I believed they would look at the law and make a proper determination. I did not think there would be a "good old boy" approach. I believe that the people generally will not have a dissimilar feeling about detached judges, in the sense that they are judges on the Judicial Council examining the complained-against judge to correct any abuse. I think as Circuit Councils have greater experience in judge correction, and as Circuit Councils are now beginning to be used, that procedure will be accepted.

I had the experience of being assigned by our Circuit Council to investigate the allegations of a litigant against one of the judges named in *The Bench Warmers*. I made an investigation, reported my findings, and, so far as I know, it was disposed of. Everybody was satisfied. I cannot change that judge's personality. I am not sure I want to change every judge's personality to have the same homogenized judge across the country. I think the Circuit Council can exercise control to the extent that it involves a nonimpeachable or noncriminal offense.

I have answered five or six questions. You see I have been very quiet thus far and storing this up. All of a sudden you gave me the microphone and it came out. I am sorry about that.

Mr. ALTIER. Under your proposed standard, the one that states that the conduct which interferes with the effective and expeditious administration of the business of the courts, under that standard, do you feel that such problems as habitual intemperance or mental or physical disability would come under that?

Judge WALLACE. Yes; to the extent it interferes with that judge's work. The good thing about the standard I propose is that is a broader gage. The Circuit Council does not have to accuse the judge of being a drunk. It needs only to demonstrate that he is interfering with the administration of justice. This allows the council to work much more effectively. If the Council is able to solve the problem, it really does not make much difference how it does it, as long as the problem is solved.

I think yes, to the extent that such conduct interferes with the administration of justice, it is covered by the standard.

Mr. ALTIER. How about other conduct which is not as severe as an impeachable offense, but other judicial misconduct, would that come under that standard also?

Judge WALLACE. Yes, to the extent it interferes with the administration of justice. There has been such conduct, and it has been dealt within nearly all cases.

One of the problems was ventilated by Senator DeConcini's question as to what our track record is. The record is good. The studies, such as the Johnson report which was submitted by the Judicial Conference of the United States, approved and put in the Congressional Record by Congressman Cellar some years ago, and the study of the Federal Judicial Center on Federal Judicial Councils, have a tendency to demonstrate that there is a tremendous amount being done to correct judges, but it is done in a way which does not bring publicity. There is no head count. But I suggest to you that if these studies are correct, and both of them appear to be documented, that the lack of publicity is a plus factor rather than a minus factor. If chief judges and councils correct the situations with judges without having it widely publicized, there is no public loss of confidence in the integrity of the judiciary. That is the best way.

There may be other Chandlers and Ritters with whom we will have to deal. I suggest those cases should have been dealt with more sternly than they were. No judge is pleased with what happened. All of us are trying to develop a better way to handle such a judge. But if we are correcting a large percentage of judge problems, and some say that is a very high percentage, without publicity, that is not bad.

Judge BROWNING. If I could add just one thought on that last point, it has occurred to me to the extent that you require publicity, you deny the chief judge and the Council leverage to solve these problems because surely one of the things that may bring a judge around, when he is a little off the track, is the knowledge that if he does not take corrective action, the next step may be more publicity than he is interested in being exposed to. You will sacrifice that leverage that the Council has to the extent that you require that everything be public.

Mr. ALTIER. That relates to me next series of questions, and then if Marcia has any questions she can proceed.

Has the public been aware through some sort of formal publication of what the ninth circuit is doing as far as their procedures for administratively handling these types of problems?

Judge BROWNING. When we issued the procedures in November, they were sent to all the legal publications in the circuit. I believe there is one in Seattle, one in San Francisco, one in Los Angeles, and maybe one in Arizona. They were filed in every clerk's office.

Also, two orders have been issued, and the procedures were fully reproduced as a footnote to one of them, so they would be printed in Federal 2d and presumably all lawyers would have access to them. The lawyers are going to be the most sensitive to the problems and most likely to take advantage of the procedures.

The other key group is the Members of Congress. They receive almost all serious complaints in one form or another. If the Congressmen and member of the Congressmen's staffs know that there is a place to send such complaints, and they can confidently anticipate that they are going to get an answer or have a right to demand to know why they have not, then I think such complaints are going to be sent to the chief judges and circuit councils and they are going to be handled.

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Mr. ALTIER. In your circuit, is there a mechanism set up where the person who originally brings the complaint to your attention is notified of the result and the reason for the result?

Judge BROWNING. Yes. If a complaint is dismissed, is handled, then the procedures provide that the complainant—both the judge and the complainant will be notified. Let me say that——

Mr. ALTIER. Notified of the result and the reason?

Judge BROWNING. And the reasons.

Mr. ALTIER. Is it not a form letter tapered to each individual case?

Judge BROWNING. That is correct. Even where the complaint is dismissed, as with the two cases that are reflected in these orders, I send a copy of the order dismissing the complaint to the complainant and the judge as required by our procedures. That means the judge's attention is called to the complaint even though we found that the complaint was not appropriate for processing administratively—the judge's attention was called to the fact that complaint had been made against him and exactly what it was.

If you go to a judge and say, I understand you have been acting inappropriately in your courtroom in some respect, his response can very well be, well, were you there? On the other hand, if you have a complainant, a complaining litigant, for example, and he recites the difficulties he had, I can send that complaint to the judge, even though it is dismissed because for some it is not appropriate for handling under the procedures, and this brings the problem to the judge's attention. I am confident that having received such a complaint, the judge who did not see himself as the litigant saw him, would take steps to correct his posture.

Mr. ALTIER. One last question. Under your procedure if the complainant is dissatisfied with your decision or the Council's decision in the case, is there any sort of appellate avenue or remedy available? Or is that decision final, no review?

Judge BROWNING. The council may in its discretion refer a complaint and its proposed disposition to the Judicial Conference.

Mr. ALTIER. But complainants cannot trigger that?

Judge BROWNING. I do not know if there is a provision for the complainant seeking review in the council or not. I would have to check the procedures myself.

Judge HUNTER. While you are looking, Judge Browning, I think it might be a good place to say that I am today reporting on what the Judicial Conference has approved. The work is still ongoing, and I am sure at some point that matter will be carefully resolved, and that you will then know fully about it.

Mr. ALTIER. Are you talking about an amendment to title 28?

Judge HUNTER. Yes, sir.

Mr. ALTIER. When do you think the Judicial Conference will make a determination on that?

Judge HUNTER. The work is ongoing now, and has been since the March Judicial Conference meeting. There is now a working draft, and it is difficult to give a definite date on its completion. The subject matter itself is very difficult. But certainly it is an ongoing matter, and it will come about just as soon as the Judicial Conference is able to finalize it. It should not be an overly long period of time at all.

Mr. ALTIER. Judge Browning.

Judge BROWNING. The procedures provide that if a complaint is rejected or closed by the chief judge, he should inform the judge complained against and the complainant of rejection or closing of the complaint, and the reasons therefor. There is no specific provision for review at the request of the complainant.

Ms. ATCHESON. I realize this area of review is very sticky and complicated. The Conference, as I read the resolution and its principles, did not resolved some of these questions. However, I would like to ask a couple of questions, if I may get your advice and thinking.

Judge Hunter, as I read your written statement, I have the understanding that the Conference at least in its resolution has not actually precluded Supreme Court review. Is that an accurate understanding or not?

Judge HUNTER. I do not think that the Conference has precluded it, but if I may speak personally, I rather read the temperature of those who have said anything on the subject to be that that is not the better way to do it, and I thought that Judge Wallace spoke very well to that point.

Ms. ATCHESON. Judge Wallace, again the resolution is not clear in this area, but is the current thinking in the Conference and the Court Administration Committee that there would not be review for a respondent judge? Is that correct? In other words, from the order or the action of the Council, would he have any review, as you see it?

Judge WALLACE. Well, it depends on which bill you are talking about. Under the proposal that was developed by the Court Administration Committee, which has not been approved yet by the Judicial Conference of the United States, an appellate type of procedure to the Judicial Conference of the United States is provided for, as I recall Judge Hunter's committee's bill. The reason for that, and not appellate review by the Supreme Court, is that the appropriate appellate track we are trying to convince the Senate to use is the administrative route. I feel very strongly about using judicial councils of the circuits, which are administrative bodies, so they do not get into the accusatory business. If that is a true principle then there are two decisions that need to be made; or three, really:

One, should there be an appeal from a chief judge's initial determination of dismissal? If so that could very easily be accomplished by appeal to the Judicial Council.

Second, should there be any appeal from the Judicial Council? Some say this is an administrative body, no appellate review is necessary, and, therefore, it should be finalized. That is the present ninth circuit procedure. Others say there should be an appeal from that Judicial Council. Third, if that is true, which track should it follow? Because we perceive the best method is to use the Judicial Council in its administrative capacity, the appeal would go forward in the administrative channel, which would be to the Judicial Conference of the United States and not to the Supreme Court, which would be the route of appeal in a judicial proceeding.

I think the climate that Judge Hunter refers to is that currently the Supreme Court is deluged with responsibility. The Judicial Confer-

ence is, too. But it is more of a problem in my judgment to provide appellate review on the judicial track to the Supreme Court than it would be to provide administrative-type review to the Judicial Conference of the United States.

Ms. ATCHESON. So in other words, the Judicial Conference again would be acting in an administrative, not an adjudicative role, if it did take review?

Judge WALLACE. In fact, and if they cannot solve it administratively, and it is a problem that deserves attention, then we are involved with the very few judges that should be impeached, and then the Judicial Conference of the United States could refer the matter to the House, indicating that there are grounds that may be considered for impeachment.

Ms. ATCHESON. One thing more on which I would ask all of you for your advice in your further deliberations. Judge Hunter, S. 522 has a provision which, rather than a recommendation to the House for impeachment, calls for a report of all cases which have come to a conclusion, as a matter of course, from the Council to the House of Representatives. I do not expect you to have any answers to that now. We would appreciate your thinking on that, and whether you think that there are any real drawbacks to this approach as contrasted to the specific recommendation to the House.

Judge HUNTER. I anticipate that the Judicial Conference will take a clear position on it. My reluctance simply is that in representing the Judicial Conference here today, I am careful to cover only those subjects that I am authorized to cover. I know the Conference is deeply into the subject and that it will be taking further action, which will be forwarded to this committee, to the House of Representatives, and the Senate. I simply have to say because of the difficult nature of the subject, I hope that you are patient.

Mr. FEINBERG. Fine. We appreciate that.

Judge WALLACE. As I am speaking for myself, I have no such constraints. I included in my written testimony a comment on that procedure.

Ms. ATCHESON. Thank you.

Mr. ALTIER. Mike Hunter from Senator Simpson's office has a few questions.

Mr. HUNTER. Judge Browning, are you familiar with the Public Integrity Section of the Justice Department Criminal Division?

Judge BROWNING. Just generally.

Mr. HUNTER. Have you ever been contacted by anyone in that section with respect to any judge in your circuit?

Judge BROWNING. No.

Mr. HUNTER. In your role as chief judge?

Judge BROWNING. No.

Mr. HUNTER. With respect to the second circuit, Judge Lumbard, I know that the section was not in existence at the time you were chief judge, but are you familiar with any situation that particular section of the Justice Department may have contacted the chief judge of the second circuit?

Judge LUMBARD. With respect to what?

Mr. HUNTER. Are you familiar with any situation in which the Public Integrity Section may have contacted the chief judge of the second circuit concerning judges within his circuit?

Judge LUMBARD. I am sorry; either I do not hear you clearly or I do not understand you.

Mr. HUNTER. There is a section in the Justice Department known as the Public Integrity Section that has a responsibility for public officials and their misconduct or alleged misconduct. That section was not in existence at the time you were chief judge?

Judge LUMBARD. I was just going to say that; yes.

Mr. HUNTER. Do you know if that section had contacted the present chief judge? You may not have any knowledge of that; and if so, simply state it.

Judge LUMBARD. I do not know that that is so.

Mr. HUNTER. Assuming that the goal of the Federal judicial system is to administer justice, and Judge Browning, I would direct this to you and Judge Wallace, particularly because of the effects you have achieved in the ninth circuit. Consider for the moment a situation in which a party may have been adversely affected in a lower court's decision and has appealed that decision, and the decision is affirmed.

Would you feel that it would be improper if any allegations with respect to conduct of that district judge were then made to the Council?

Judge BROWNING. I am not sure I understand the point of your question?

Mr. HUNTER. Would it be appropriate for an adversely affected party to approach the Council?

Judge BROWNING. Surely.

Mr. HUNTER. Would it be within your understanding of the Council's function, would it be within the authority of that Council to take some action, either dismissing the allegation or pursuing it?

Judge BROWNING. Of course, we would have to consider what the allegation might be. It would depend on this. If it simply had to do with the merits of the decision, that it was decided the wrong way, I would say no. The appellate process is available to correct erroneous decisions in particular cases. If it had to do with misconduct by the judge, charges of venality or whatever, or that his conduct in a particular case represented a pattern of conduct that was interfering with the administration of the business of the court, then surely it should be handled administratively.

Mr. HUNTER. Would it surprise you if a number of your brethren who are serving as chief justice in circuits did not share that same opinion?

Judge BROWNING. Nothing would surprise me. Judges disagree. But I am not so sure it is true. It may be the way the question is put to them or it is put to me. Would you explain a little further?

Mr. HUNTER. I think you answered it, that fact that there is a difference of opinion among judges, is there not?

Judge BROWNING. I do not know. You mean there are judges who would say that—I am not sure I understand what you view to be the relevance of that that there was a piece of litigation which was ter-

minated, and that then there is a complaint. I think a complaint of mis conduct on the part of a judge is appropriate whether there was prior litigation or not. I may just miss your point.

Mr. HUNTER. No; you have answered the question as I posed it.

Judge BROWNING. What is the opposite view?

Mr. HUNTER. That that Council does not have that role, and that has been expressed by at least one chief judge. That is why I was asking you that question.

Judge BROWNING. What role?

Mr. HUNTER. Should not accept that complaint, could not even consider it.

Judge BROWNING. What was the complaint?

Mr. HUNTER. Of misconduct on the part of a judge.

Judge BROWNING. I am surprised.

Mr. HUNTER. The reason I ask that is, it goes a little bit further on the line. You have indicated Councils are well prepared to handle that type of complaint. Mr. Mollenhoff earlier raised the question whether a Council should be investigating and then deciding the issue that is before it. Does that cause any concern for you, Judge?

Judge BROWNING. No; I think that we deal with these problems as an administrative matter. Our concern and focus is not whether the particular judge is a good or bad judge or anything of that sort. Our question is whether or not the administration of justice in the court in which he sits is being conducted efficiently and expeditiously. We approach it from that point of view. I do not view him as being on trial. We try to get to the bottom of that problem and find a solution to it, so that the case flow may be unimpeded and cases may be appropriately handled.

I wonder if your earlier question may have related to the exception that is in our procedures, that a complaint may be dismissed if it relates to the decision made in a particular case or on a particular procedural matter in a case. We would not handle that either, because an appropriate remedy for an allegedly erroneous decision of a case or a motion is appellate review. If a complainant came in and said, I had a lawsuit; it was decided against me; and that decision was inappropriate and unjust—in fact, the only possible explanation for the decision is that the judge must have been biased or prejudiced—we would say you have appellate review and that is an appropriate remedy for your problem. We would be in line with other circuits if that is what you referred to.

Mr. HUNTER. Let me pursue that for a second and then I will conclude. Going on that same reasoning that you have just brought up, Judge, if for one reason or another there was that adverse decision and it were affirmed at the appellate level, do you feel that it is appropriate or is there a need in the system of justice in the United States for any other avenue for that adversely affected party?

Judge BROWNING. There is a petition to the Supreme Court of the United States. Except for that remedy, the doctrine of finality of decision should apply. There is a necessity for repose. Litigation has to come to an end even though the case may, in the view of that litigant, have been wrongly decided. One side or the other is disappointed in

the outcome of every piece of litigation. It is appropriate that there be a finish.

Mr. HUNTER. In the attachment to your statement, Judge Wallace, as you go to the proposed amendment provisions approved by the Committee on Court Administration, those aspects which the Council may consider, you refer to a person claiming that a district or circuit judge or bankruptcy judge, is engaging in conduct prejudicial to the administration of justice by bringing the judicial office into disrepute, and in parentheses, other than conduct related to the merits of the decision or procedural ruling. That is what Judge Browning, I think, was just directing himself to. Would you support that position that there should be no other mechanism available or would you feel that perhaps a mechanism might be appropriate for some subsidiary review?

Judge WALLACE. That language is from the draft proposed by the court administration committee. I was adopting that to show how it could be applied under another section. I refer to the section 332 language test.

Let me say this, though, that in a case where a judge has been so far out of bounds, not just cantankerous, some of them are—maybe at times people think I am, I do not know, I try not to be—and where it gets to a place where a fair trial has been denied, then that is a judicial appellate problem. In our circuit, our court has reversed cases where we thought the judge through his actions, whether they were intentional or unintentional, deprived a person of a fair trial.

Your question is directed to the situation where the case is affirmed, but the litigant still has a complaint against that judge. The litigant still has another avenue. Now he is not appealing the ultimate decision. A court has said the trial judge may have been out of line, but it did not deprive the litigant of a fair trial, so there is no reason to reverse. But the question may still be open: What about the action of this judge? Even though the litigant got a fair trial and the appellate court said so, still the litigant is offended by the way that judge acted.

I think there is no doubt that the litigant has a second method of attacking, not the decision—because that should be overturned only if the trial was unfair—but the conduct of that judge. The conduct should be corrected if it is inappropriate. I do not think there is any doubt that the judicial council of the circuit has the power to do that.

As Judge Lumbard testified on one occasion, there is such broad power in what Congress has already given, it is hard to conceive of any greater power that could be given to the council. The only question I would have is whether the judges who sat on the direct appeal should recuse themselves from council action. There may be a question as to whether they would be biased in making a determination if there should be some sort of corrective action applied to that judge.

Mr. HUNTER. Assume that this district court judge was elevated to circuit court during the intervening time, would the Council be capable of handling that type of complaint?

Judge WALLACE. I have heard that question before. I do not have a problem with that at all. We dissent from time to time and sometimes in rather vitriolic language. But we try to have a court that works

with some unity. However, when push comes to shove, we have a sworn duty that comes before any other personal relationships. I think it would be unfortunate that the problem had not come up during the hearings before the U.S. Senate, so the Senate could take into consideration whether that person should be elevated. But if the judge has already been elevated, I think the Judicial Council should, and I think that we are moving toward a place where they would, look into any such conduct and act appropriately.

Mr. HUNTER. I would commend the efforts of the ninth circuit, too. I am impressed as many others indicated this morning. I anticipated asking a couple questions with respect to the illustrious Judge Ritter. I do not know that Judge Wallace is familiar with some of the aspects of that.

Judge WALLACE. Yes; I have studied the Ritter and Chandler cases and asked how they could have been handled better. I think they could have. That is like history, you know. You look back and say to yourself, that is a terrible thing that happened, and it was. We hopefully have learned how to handle the Chandlers and Ritters now. I would be happy to talk to you about it.

Mr. HUNTER. Thank you, Judge.

Mr. ALTIER. If there are no further questions, the hearing is adjourned.

[Whereupon, at 11:55 p.m., the hearing was adjourned.]

JUDICIAL DISCIPLINE AND TENURE, S. 295, S. 522, AND S. 678

MONDAY, JUNE 25, 1979

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN
JUDICIAL MACHINERY AND
SUBCOMMITTEE ON THE CONSTITUTION
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittees met at 9:30 a.m., pursuant to notice, in room 6226, Dirksen Senate Office Building, Senators Dennis DeConcini and Birch Bayh presiding.

Also present: Romano Romani, staff director, Michael J. Altier, counsel; Pam Phillips, chief clerk, and Cynthia McCormick, staff assistant, Subcommittee on Improvements in Judicial Machinery, and Marcia Atcheson, counsel, Subcommittee on the Constitution.

Senator DECONCINI. The hearing will come to order.

OPENING STATEMENT OF SENATOR DeCONCINI

This is the second day of our subcommittee's joint hearings with the Subcommittee on the Constitution. Today's hearing will consider three proposals relating to the judicial conduct and disability of members of the Federal judiciary.

The first, the Judicial Tenure Act introduced by Senator Sam Nunn, creates machinery within the judiciary to deal with the judges who through their actions have failed to meet the standard of good behavior required by article III of the Constitution.

There will also be testimony on S. 522, the proposed Judicial Council Amendments and Discipline Act that has been introduced by Senator Birch Bayh of Indiana; and S. 678, the proposed Federal Court Improvements Act which has been introduced by our chairman, Senator Kennedy. These bills also direct themselves to the issue of judicial discipline.

Public demand for accountability of public officials has extended into the judicial branch. The once accepted method of investigating the activities and behavior of public officials are no longer adequate. Growing public concern over the responsiveness and efficiency of our three branches of Government necessitate the development of machinery that can render the system more responsible and responsive to the public.

Today's witnesses include Senator Sam Nunn. Senator Nunn's interest in this matter has been long-standing. He has been the moving

force behind the Judicial Tenure Act for some time, and it is a pleasure to be a cosponsor of this measure with him.

Also testifying today will be our colleague from Maryland, Senator Charles McC. Mathias, whose interest in last year's bill culminated with his active participation in last year's floor debate and his subsequent cosponsoring of S. 522.

The Honorable James Duke Cameron, chief justice of the Arizona Supreme Court, will also testify. Chief Justice Cameron has been a leader in judicial reform for many years, and we are very pleased to have him with us today. The joint committee over which he chairs has invested a considerable effort on standards relating to judicial discipline and disability.

We will then receive testimony from Professor Gressman, professor of law of the University of North Carolina, who will present his view on review of the Supreme Court and other constitutional aspects.

Following Professor Gressman we will hear from Prof. Paul Bender of the University of Pennsylvania Law School. Professor Bender was involved in the *Chandler* case and will supply us with an analysis of the constitutionality of the proposal.

I welcome all of you and the participants here today. Before beginning, we will have S. 295 and S. 522, and the relevant portion of S. 678, appear in the record at this point.

Senator DeConcini. Senator Nunn, thank you for taking the time to be with us today.

STATEMENT OF SENATOR NUNN

Senator Nunn. Thank you very much. This is, I believe, my fourth appearance before the Judiciary Committee on this piece of legislation, as it is being considered now in the third or fourth Congress since I have personally been present in the Senate. I want to thank you at the outset for conducting these hearings. Without your attention in the last few years, this bill would never have moved as far as it has.

Of course, as you well know, having helped lead the fight on the floor of the Senate last year, it did pass the Senate by a vote of 43 to 31. Unfortunately, the Senate action was late in September of last year and there was no time for the House of Representatives to act. I am hopeful that, by starting early in this Congress, we will be able to conclude Senate action, whatever it may be, in time for the House to start earlier. I hope there is a parallel effort going on there now.

I am pleased to appear before this subcommittee to discuss this legislation. Serious congressional hearings have been conducted on the subject since the 1930's, and a principle similar to that embodied in S. 295 has been before the Senate for over 10 years.

While the Judicial Tenure Act does not represent an entirely new concept, it does represent a concept whose time has come. I am pleased to note that several of my colleagues in the Senate have now recognized the need for improvement in this area as evidenced by the introduction in this Congress of several bills regarding judicial disciplinary procedures.

S. 295 would establish a procedure within the Federal judiciary to investigate allegations that a Federal judge is not conforming to the

constitutional standard of "good behavior" or that a judge is suffering from a permanent mental or physical disability that seriously interferes with the performance of his official duties.

This legislation, which has become known as the Judicial Tenure Act, provides for the removal, censure, or involuntary retirement of a judge or justice in the event that allegations of that kind prove to be meritorious. I introduced the Judicial Tenure Act in the 94th Congress as S. 1110, and in the 95th Congress as S. 1423, and basically the legislation we are discussing here today, S. 295, is based on these two original acts with, I would say, a good many constructive alterations which, Mr. Chairman, you have personally had a very large role in, thanks to your detailed analysis of these bills.

Therefore, I believe that we have before us now a thoroughly studied bill that has been altered in a good many respects to take into account the constructive suggestions that have been made by jurists and other distinguished witnesses before this committee.

Mr. Chairman, I am going to ask that my entire statement, which is about 22 pages long, be put in the record. I will abbreviate it as much as possible, which may cause it to be somewhat disjointed, but I know you have heard it a good many times and I do not want to take unnecessary time of the committee. I will simply review the highlights.

[The prepared statement of Senator Nunn follows:]

PREPARED STATEMENT OF SAM NUNN

At the outset, Mr. Chairman, I would like to express my appreciation to you for conducting these hearings. As you know, this subcommittee held hearings on the Judicial Tenure Act during the 95th Congress and the full Judiciary Committee ultimately reported the legislation to the floor of the Senate where it was passed by a vote of 43 yeas to 31 nays. Unfortunately, this action was taken in September of 1978 and Congress adjourned before action on the bill could be completed in the House of Representatives.

I am extremely pleased to appear before the subcommittee today in order to discuss the merits of what I believe to be one of the most significant judicial reforms currently under consideration. The concept of judicial discipline is not a new one. Serious congressional hearings have been conducted on the subject since the 1930's and a principle similar to that embodied in S. 295 has been before the Senate for over 10 years. While the Judicial Tenure Act does not represent an entirely new concept, it does represent a concept whose time has come. I am pleased to note that several of my colleagues in the Senate have now recognized the need for improvement in this area as evidenced by the introduction in this Congress of several bills regarding judicial disciplinary procedures.

Senate bill 295 would establish a procedure, within the Federal judiciary, to investigate allegations that a Federal judge is not conforming to the constitutional standard of "good behavior" or that a judge is suffering from a permanent mental or physical disability that seriously interfers with the performance of his official duties. This legislation, which has become known as the Judicial Tenure Act, provides for the removal, censure or involuntary retirement of a judge or justice in the event that allegations of that kind prove to be meritorious. I introduced the Judicial Tenure Act in the 93d and 94th Congresses as S. 4153 and S. 1110 and in the 95th Congress as S. 1423 and the legislation which we are discussing now.

Many lessons should be learned from the recent experiences of the Watergate era. We were reminded that power can intoxicate its holders, and be abused by the highest governmental officials in this Nation. We all must recognize the unfortunate fact that public confidence in Government has been eroded over the past few years for many reasons, and it will continue to decline unless affirmative steps are taken, in each branch of Government, to stimulate renewed trust in public officials and institutions.

In recent years, new and substantial disclosure requirements have been imposed on Presidential appointees and we have implemented more extensive

ethical and disclosure standards for Members of Congress. It is imperative that all governmental officials act to restore and maintain the public trust. I believe very strongly that in no branch of Government is this public confidence and respect more vital than in the Federal judiciary.

It would be exceedingly shortsighted to focus reform efforts on ensuring that members of the executive and legislative branches of our Federal Government conform to legal, moral and ethical standards of the highest order and, at the same time, to ignore the conduct and capabilities of members of the branch of Government which possesses the authority to interpret, delay, and discontinue the actions of the other two. As now Attorney General Griffin Bell stated during hearings on S. 1110, "We are living in a time when our public institutions are under examination and the courts are not exempt. A citizen should be afforded a clear method for complaining against the courts."

Our appointed Federal judges enjoy a high degree of independence; they are not required to answer periodically to the electorate, as are the President and and Members of Congress. Although the need for a substantial degree of judicial independence is clear, experience has vividly demonstrated that no one person, or group of people, can be assumed perfect and therefore left completely unchecked. Despite the overall competence and integrity of members of the Federal judiciary, an occasional judge does misbehave or become physically or mentally disabled and yet continues to exercise the authority of his office. Recently, several Federal judges brought suit to establish the principle that the Federal judiciary is not even subject to the financial disclosure requirements with which Members of Congress and top level executive branch officials must comply. This problem has motivated my study of the subject of judicial tenure and discipline and my introduction of this legislation.

Historically, the sole procedure which has been employed to remove a Federal judge who has misbehaved (or is disabled), for one reason or another, has been the impeachment power which is housed in articles I and II and the Constitution. A few selected statutory provisions, which generally provide administrative authority with regard to the operation of the Federal judiciary, have also been suggested as potential sources of additional disciplinary authority.

When America's Founding Fathers, in addition to requiring impeachment for the President and Vice President, provided for the impeachment of "civil officers," a term which has been interpreted to include Federal judges, they envisioned a nation comprised of 13 States with a Federal judiciary and a Congress of commensurate size and responsibility. They would have been astonished to learn, for example, that during the second session of the 94th Congress, in excess of 870 measures were passed by the U.S. Congress and 700 rollcall votes were cast in the Senate. It is unreasonable, to say the least, to assume that the House and Senate could or should lay aside all legislative business for weeks or months in order to impeach and try an obscure, yet misbehaving judge. Present law authorizes 525 Federal judges with an additional 168 retired or senior judges, a number infinitely larger than originally authorized. Pursuant to the recently enacted Omnibus Judgeship Act, an additional 152 Federal district and circuit court judges will soon be assuming the Bench.

The analogy of impeachment to a heavy piece of artillery, which was made by Lord Bryce, is eminently appropriate. The impeachment procedure is cumbersome and ponderous and is only practical in the most serious and flagrant cases of abuse. As a result, indiscretions which should be addressed are regularly ignored. Commonsense requires that a balance be struck between the necessity for institution of impeachment proceedings and the resultant interruption in the important legislative process. There must be a logical relationship between the importance and power of the respondent and the time required by the House to impeach and the Senate to conduct the trial.

History has borne out Thomas Jefferson's characterization of impeachment as an "impractical thing" and a "mere scarecrow." Over the course of our 200 years as a nation, only 54 judges and 1 justice have been officially investigated. Of these, only eight judges and one justice have been successfully impeached by the House, resulting in the conviction and removal of a mere four judges in two centuries. The last impeachment and conviction occurred in 1936. While I am among the first to appreciate the overall quality of the Federal Bench, it seems unreasonable to assert that only four Federal judges in our history has misbehaved or been disabled. On the contrary, the record is filled with substantial allegations levied against judges who continued to serve on the Federal Bench.

I understand that the committee has already received testimony regarding potential current problems.

The facts clearly demonstrate that impeachment has not been utilized to insure compliance with the constitutional standard of "good behavior" imposed on the Federal judiciary by article III. Moreover, except in the most flagrant and publicized cases, it is questionable whether impeachment is an appropriate means through which to decide the merits of such serious allegations. Examination of the fifth amendment and its due process safeguards raises some interesting questions regarding the propriety, if not the constitutional sufficiency, of a trial where, as former Congressman Hatton Summers described the scene, "at one time only three Senators (jurors) were present and for 3 weeks we presented evidence to what was practically an empty chamber."

A point of view which is too often ignored is that of the accused judge. There is no question that society's rights must be protected, but is impeachment, with its attendant public humiliation and loss of pension a proper remedy to address the problem of a senile or disabled judge who has served well but fails to recognize that the time to step down has arrived?

I believe that a thorough analysis of the impeachment procedures leads one to the inevitable conclusion that, in practical as well as legal terms, impeachment has not insured and cannot effectively insure judicial compliance with the constitutional "good behavior" standard. Woodrow Wilson stated this premise most succinctly as follows, "judging by our past experiences, impeachment may be said to be little more than an empty menance."

The fact that repeated efforts have been made by scholars, jurists, and legislators to develop a reasonable alternative to impeachment can be viewed as substantial evidence, in and of itself, that a need for improved judicial accountability has existed throughout our history. The dissatisfaction of Congress with the efficacy of impeachment has been evidenced by legislative efforts originating as early as 1791 when the first constitutional amendment on the subject was proposed. Nine more such amendments were offered between 1807 and 1812 as a result of the impeachment of Justice Chase, and several bills were introduced in the period 1936–50 following the Ritter impeachment. A few statutory provisions have been enacted which have been credited with possessing varying amounts of disciplinary authority.

In particular, these statutory enactments involve the creation of the Judicial Conference of the United States in 1922 and the Administrative Office Act of 1939. Various responsibilities and duties were assigned to several entities by these statutes and the exact amount of disciplinary authority which is available under these laws has been the subject of considerable debate. It is clear that the judicial councils of each circuit, the Administrative Office of the Courts, and the Judicial Conference have been authorized to deal with the administrative details of the Federal court system. The question remains, however, whether or not any of the statutory language authorizes the discipline or removal, in fact or in effect, of a judge subject to the jurisdiction of the council or other entity. The courts have avoided directly addressing the question and the only concensus on the issue is that, at the least, whatever disciplinary authority may exist needs legislative clarification.

The logical and unavoidable conclusion at this point is that congressional inaction on the subject of judicial tenure and discipline has resulted in one of the three branches of our Federal Government being virtually unaccountable to anyone, even itself.

As I mentioned earlier during the early 1800's several constitutional amendments on the subject of judicial discipline and tenure were proposed. It is in the years subsequent to the last impeachment in 1936, however, that this subject has been most clearly and carefully scrutinized.

In the late 1930's two bills were introduced in Congress on the matter of providing an alternative disciplinary and removal procedure. S. 4527, introduced by Senator William McAdoo, proposed the establishment of a special court composed of Federal judges which would have jurisdiction over all Federal judiciary misbehavior cases, except those involving Justices of the Supreme Court. The prosecutorial role was filled by the Department of Justice and the decision could be appealed to the Supreme Court. H.R. 2271 was introduced by the chairman of the House Judiciary Committee, Hatton Summers, and provided that the House of Representatives, by way of resolution addressed to the Chief Justices of the United States, could initiate a hearing into the behavior

of an accused district judge. Prosecution was to be conducted by representatives from the House and appeal to the Supreme Court was provided. Both bills restricted the remedy to removal.

Serious legislative efforts in this regard were somewhat dormant from this period until formed Senator Joseph Tydings, of Maryland, introduced the Judicial Reform Act in 1969. S. 1506 represented a novel approach to the subject because its procedures were totally confined within the Federal judiciary. A Commission on Judicial Disabilities and Tenure, composed of five Federal judges, was to act as a fact finding body with regard to any allegations of misbehavior. The Commission had the authority to dismiss a spurious complaint, or, in the event the evidence so warranted, to recommend removal of the accused judge to the Judicial Conference of the United States where a triallike procedure would be conducted. A removal order from the Judicial Conference could be appealed to the Supreme Court. The Judicial Tenure Act which I first introduced as S. 4153 in October of 1974 is patterned after the Judicial Reform Act.

In the spring of 1976 and the fall of 1977, hearings on the Judicial Tenure Act were conducted before this Subcommittee on Improvements in Judicial Machinery. As a result of the testimony which was received during the course of those proceedings, several changes were made in the Judicial Tenure Act in an effort to incorporate several of the perfecting suggestions offered by the witnesses. This legislation is before you today as S. 295.

The purpose of the Judicial Tenure Act is to provide a mechanism within the judicial branch itself to enforce the "good behavior" standard which is imposed on the Federal judiciary by article III, section I of the Constitution. A procedure to investigate allegations that Federal judges have failed to exercise "good behavior", or charges that a judge is suffering from permanent physical or mental disability that seriously interferes with the performance of his duties is proposed to be established within the Federal judiciary.

Each portion of this proposal has been subjected to scrutiny, at least in theory, since the 1930's and language has been inncorporated to perfect each provision as any potential deficiency was identified. I believe that the Judicial Tenure Act represents comprehensive and reasoned approach which, if enacted, would address many of the insufficiencies in judicial discipline which I have described.

I have examined this issue in some depth and I am convinced, along with numerous bona fide constitutional scholars and prominent individuals in the legal community, that the approach adopted by this legislation is entirely consistent with the U.S. Constitution. It is important to keep in mind that the Judicial Tenure Act is proposed as a means in addition to, not in place of impeachment.

Constitutional questions have been continuously raised by those who oppose creation of a procedure which would allow meaningful implementation of the "good behavior" standard. My intention is certainly not to cut off constructive discourse on the subject; however, the time has come to recognize the practicalities of this issue and to examine it in a broad perspective with reason and logic. Opponents rely upon the assertion that impeachment is the solitary means of removal permissible under the Constitution. I believe that it is productive to examine exactly what the Constitution says on that issue—and, what is does not say.

The Constitution does say, in article I, that the Houses of Congress shall have the sole powers of impeachment and trial of all civil officers. It does not say, however, that Congress shall have the sole power of removal of these officers. As a matter of fact, it was determined early in our Nation's history, that lesser executive branch officials could be removed by order of the President. The Supreme Court ruled in 1897 that the President had the authority to remove a U.S. attorney despite the fact that the impeachment clause provides for the removal of civil officers. How can it reasonably be argued that impeachment is exclusive with regard to some "civil officers," such as judges, and not exclusive with regard to others? Moreover, if the Framers had intended impeachment to be the sole method of removal, it would have been a simple matter to employ specific language to that effect.

It is interesting to note that the extreme remedy of impeachment is provided for in article I, the legislative article, and article II, the executive article. No mention of this procedure is made in article III, the judicial article. In view of the fact that the debate by the Framers on the subject of impeachment

focused almost totally on the President and that the term "civil officers" was included almost as an afterthought, one could easily assume that the Framers intended to further address the subject of tenure of Federal judges in the appropriate place, article III.

Our federal system of government is predicated upon the doctrine of separation of powers. The interrelating system of checks and balances was devised by a group of men concerned by abuses produced through the dominance of one branch of government, the English Monarchy, over the remaining two branches. They took great care to provide elaborate safeguards to insure against history repeating itself in the American government by formalizing the separation of powers doctrine. I believe that impeachment of Federal judges was authorized, not as an exclusive means of disciplining the judiciary, but rather as one of the limited chceks by one branch of Government on another. Impeachment was not intended to preclude the judiciary from disciplining itself, rather it was intended as a carefully circumscribed exception to the doctrine of separation of powers to be used in extreme cases of abuse or as a safeguard against judicial branch inaction.

If we accept the principle that impeachment of Federal judges is a limited authority granted to the legislative branch as part of the system of checks and balances it seems logical that the Framers must have contemplated a disciplinary mechanism that would be available for less than extreme cases of abuse and in the normal course of maintaining the integrity and efficiency of the judicial branch. This mechanism was contemplated and it was logically placed in article III of the Constitution.

Prof. Raoul Berger, the noted constitutional scholar, who testified on behalf of this legislation during the 94th Congress has compiled a detailed analysis of the history and precedent on which the "good behavior" clause is based, and I would like to offer a copy of his testimony for inclusion in this record at an appropriate place. In his testimony before the Subcommittee on Improvement in Judicial Machinery, Professor Berger documented the technical legal distinction between impeachment and "good behavior" tenure. His analysis generates the unavoidable conclusion that the grounds for impeachment and the "good behavior" requirement are two distinct standards of conduct and that "good behavior" is a much more stringent standard than a prohibition against bribery, treason, or other high crimes and misdemeanors (i.e., not all forms of bad behavior constitute impeachable offenses).

Professor Berger pointed out that impeachment, at common law, was a criminal proceeding brought by the House of Commons in the House of Lords on charges of "treason bribery, high crimes and misdemeanors." Berger further documented the fact that the terms "high crimes and misdemeanors" had a limited technical meaning which referred to serious offenses and did not encompass all forms of misbehavior. As the House Judiciary Committee wrote in their report on the grounds for impeachment, during the Nixon impeachment deliberations, "High crimes and misdemeanors has traditionally been considered a term of art * * * The Supreme Court has held that such terms must be construed, not according to modern usage, but according to what the Framers meant when they adopted them". Although the Framers departed from the English model in separating the impeachment proceeding from a criminal proceeding, they intentionally retained the limited technical grounds of "high crimes and misdemeanors." Furthermore, there is no indication that the Framers intended the impeachment provisions to be a complete recitation of the causes justifying removal from office.

In contrast to impeachment, removal for breach of "good behavior" was a judicial, not legislative proceeding. Good behavior tenure was orig'nated in the Act of Settlement in 1700 in an effort to isolate the judiciary from the arbitrary whims of the monarch. Professor Berger points out that, "The words of 'good behavior' in all commissions and grants, public and private, imparted an office or estate for the life of the grantee terminable only by his death or breach of good behavior." This termination was declared by the judiciary in a civil proceeding for forfeiture of the office which was initiated by a writ of scire facias. Its sole objective was to remove the existing officer with no penalties or disqualifications involved. When the Framers employed "good behavior", a common law term of ascertainable meaning, with no indication that it was being used in a novel fashion, they must have assumed the inclusion of similar procedures for its implementation. Such an assumption is supported by Madison's

explanation to the Virginia Ratification Convention that "where a technical word was used all the incidents belonging to it necessarily attended."

A "gap" between the two standards "good behavior" and the grounds for impeachment, must therefore exist. To assume otherwise would be to claim that the grounds for impeachment and "good behavior" tenure are the same and thereby render the "good behavior" clause meaningless. The longstanding constitutional principle that no clause in the Constitution is intended to be without effect will not permit this result. Therefore an alternative method to impeachment to accomplish the removal of Federal judges must have been contemplated by the Framers to provide for the removal for misbehavior of disability less serious than an impeachable offense but in derogation of the "good behavior" standard. The substance of what constitutes "misbehavior" may be open to interpretation but it is completely clear that procedurally, "good behavior" was a term involving the judicial process.

In light of the evidence, it certainly cannot be logically maintained that the Framers would have rejected a process of judicial removal other than impeachment. It seems apparent that the term "good behavior" was employed with the eminently logical intention of providing a disciplinary means, within the judiciary branch itself, in addition to the power authorized to the legislative branch through impeachment. Simple logic indicates that if an office is conferred during "good behavior" it is relinquished upon bad behavior and some means of enforcing that end must be available.

A significant portion of the floor debate on the Judicial Tenure Act last fall focused on the erroneous impression that this legislation would dramatically dilute the independence of our Federal judiciary. Arguments of this kind are superficial and misleading. Judicial independence, a principle which we all agree is a precondition to an effective system of justice, has historically referred, not to the independence of judges from one another but rather to the independence of the judiciary as an institution from other branches of Government. The intention of the Framers was to avoid the experiences of the British which saw the judiciary totally dominated by the King. Professor Berger noted that, "all the remarks in the several conventions that bear on judicial independence, so far as I could find, referred to freedom from legislative and executive encroachments. No one suggested that judges must be immune from judicial control." The assertion that a disciplinary mechanism, totally restricted within the judiciary, infringes on judicial independence simply does not make sense.

The time has come to recognize the practicalities of the issue and to examine it in a broad perspective with reason and commonsense. It is clear that impeachment, in practical terms, is not an effective disciplinary mechanism.

It is clear that the existing statutory authority is ambigous and insufficient in this regard. It is clear that substantial authority exists indicating that the procedure proposed by the Judicial Tenure Act is constitutional. No less jurists than Justice Rhenquist, Justice Burger, and Justice Blackmun have expressed the opinion that the principle represented by the Judicial Tenure Act is constitutional. Attorney General Bell has stated, with regard to the Judicial Tenure Act, "I am not troubled over the constitutionality of the proposed legislation." The Judicial Tenure Act has been endorsed, in total or in principle, by the Judicial Conference of the United States, the American Bar Association, the American Judiciature Society, and the American Association of Attorneys General. It is clear that Congress possesses the authority to enact legislation in this regard. This authority was described in detail by Professor Berger as follows:

"Since the judicial power to declare a forfeiture on breach of a condition subsequent existed at the adoption of the Constitution, and since a dispute whether the condition was breached constitute a 'case or controversy,' it falls within the judicial power. Consequently, legislation that would set up a special court within the judiciary branch to adjudicate disputes whether a judge breached the 'good behavior' condition would merely entail a grant of fresh subject matter jurisdiction * * * such a grant would constitute action to supplement the 'judicial power' under the 'necessary and proper' clause or under the power of Congress to regulate the judisdiction of the inferior courts."

I understand that legislation on the subject of judicial discipline which has been introduced by Senator Kennedy and by Senator Bayh will also be considered during the course of these hearings. I am pleased that, as a result of the passage of S. 1423 last year, several of my colleagues have recognized that congressional action in this important area is necessary.

Without getting into the details of S. 678, as it applies to discipline, or S. 522, I would like to emphasize that the procedures embodied in S. 295 have been closely scrutinized and refined over a period of several years. Judges, lawyers, professors, laymen, and Senators have had an opportunity to review and shape the provisions of S. 295 following periods of study and reflection. I believe that this process has enabled us to develop a bill that is sound both substantively and procedurally.

Therefore, Mr. Chairman, I would caution the committee against adopting an alternative procedure which, although basically proposing the same steps and achieving a similar result, has been conceived in relative haste without any comparable period for comment and refinement.

I am not wedded to every period and comma in S. 295. If the committee feels that some constructive amendment is necessary, I am certainly willing to work with you in that regard. I do feel, however, that S. 295 is a thoroughly considered and well-documented foundation for dealing with the judicial discipline problem.

Mr. Chairman, as I pointed our earlier, the theory of providing a means to enforce the standards imposed upon our Federal judiciary has been discussed and debated throughout our history as a nation. Responsible legislation on the subject has been intermittently before the Congress for over 40 years. In recent years, we have recognized the need to shore up public confidence in our Federal Government and have therefor implemented stringent ethical and disciplinary mechanisms in the executive and legislative branches. S. 295 provides us with a reasonable and responsible mechanism to complete the job. It is my understanding that similar legislation is under consideration in the House of Representatives. With these facts in mind, Mr. Chairman, I am hopeful that the 96th Congress will recognize that the principle embodied in S. 295 is a significant and necessary judicial reform and therefore move expeditiously to its enactment.

Senator NUNN [continuing]. Our appointed Federal judges enjoy a high degree of independence; they are not required to answer periodically to the electorate, as are the President and Members of Congress. Although the need for a substantial degree of judicial independence is clear, experience has vividly demonstrated that no one person or group of people can be assumed perfect and, therefore, left completely unchecked.

Despite the overall competence and integrity of members of the Federal judiciary, an occasional judge does misbehave or become physically or mentally disabled and yet continues to exercise the authority of his office. This problem has motivated my study of the subject of judicial tenure and discipline, and my introduction of this legislation.

Historically, the sole procedure which has been employed to remove a Federal judge who has misbehaved or is disabled for one reason or another has been the impeachment power which is housed in articles I and II and the Constitution. A few selected statutory provisions, which generally provide administrative authority with regard to the operation of the Federal judiciary, have also been suggested as potential sources of additional disciplinary authority.

When America's Founding Fathers, in addition to requiring impeachment for the President and Vice President, provided for the impeachment of "civil officers," a term which has been interpreted to include Federal judges, they envisioned a nation comprised of 13 States with a Federal judiciary and a Congress of commensurate size and responsibility.

They would have been astonished to learn, for example, that during the second session of the 94th Congress, in excess of 870 measures were passed by the U.S. Congress and 700 rollcall votes were cast in the

Senate. It is unreasonable, to say the least, to assume that the House and Senate could or should lay aside all legislative business for weeks or months in order to impeach and try an obscure, yet misbehaving, judge.

Present law authorizes 525 Federal judges with an additional 168 retired or senior judges, a number infinitely larger than originally authorized. Pursuant to the recently enacted Omnibus Judgeship Act, an additional 152 Federal district and circuit court judges will soon be assuming the bench.

The analogy of impeachment to a heavy piece of artillery, which was made by Lord Bryce, is eminently appropriate. The impeachment procedure is cumbersome and ponderous and is only practical in the most serious and flagrant cases of abuse. As a result, indiscretions which should be addressed are regularly ignored.

Commonsense requires that a balance be struck between the necessity for institution of impeachment proceedings and the resultant interruption in the important legislative process. There must be a logical relationship between the importance and power of the respondent and the time required by the House to impeach and the Senate to conduct the trial.

I believe that a thorough analysis of the impeachment procedures leads one to the inevitable conclusion that, in practical as well as legal terms, impeachment has not insured and cannot effectively insure judicial compliance with the constitutional "good behavior" standard. Woodrow Wilson stated this premise most succinctly as follows: "Judging by our past experiences, impeachment may be said to be little more than an empty menace."

In the spring of 1976 and the fall of 1977, hearings on the Judicial Tenure Act were conducted before this Subcommittee on Improvements in Judicial Machinery. As a result of the testimony which was received during the course of those proceedings, several changes were made in the Judicial Tenure Act in an effort to incorporate several of the perfecting suggestions offered by the witnesses. This legislation is before you today as S. 295.

The purpose of the Judicial Tenure Act is to provide a mechanism within the judicial branch itself to enforce the "good behavior" standard which is imposed on the Federal judiciary by article III, section I of the Constitution. A procedure to investigate allegations that Federal judges have failed to exercise "good behavior" or charges that a judge is suffering from permanent physical or mental disability that seriously interferes with the performance of his duties is proposed to be established within the Federal judiciary.

Each portion of this proposal has been subjected to scrutiny, at least in theory, since the 1930's and language has been incorporated to perfect each provision as any potential deficiency was identified. I believe that the Judicial Tenure Act repesents a comprehensive and reasoned approach which, if enacted, would address many of the insufficiencies in judicial discipline which I have described.

I have examined this issue in some depth and I am convinced, along with numerous bona fide constituitional scholars and prominent individuals in the legal community, that the approach adopted by this legislation is entirely consistent with the U.S. Constitution.

I will not take time to go into the constitutional arguments which I know you have heard many times. Prof. Raoul Berger, the noted constitutional scholar who testified on behalf of this legislation during the 94th Congress, has compiled a detailed analysis of the history and precendent on which the good behavior clause is based. I would like to offer a copy of his testimony for inclusion in the record at this point.

Senator DeConcini. It will be included.

[The material referred to above appears in the appendix.]

Senator Nunn. Another significant portion of the floor debate on the Judicial Tenure Act last fall focused on the erroneous impression that this legislation would dramatically dilute the independence of our Federal judiciary. Arguments of this kind are superficial and misleading.

Judicial independence, a principle which we all agree is a precondition to an effective system of justice, has historically referred not to be independence of judges from one another but rather to the independence of the judiciary as an institution from other branches of government. The intention of the Framers was to avoid the experiences of the British which saw the judiciary totally dominated by the King.

Professor Berger noted that:

> All the remarks in the several conventions that bear on judicial independence, so far as I could find, referred to freedom from legislative and executive encroachments. No one suggested that judges must be immune from judicial control.

The assertion that a disciplinary mechanism, totally restricted within the judiciary, infringes on judicial independence simply does not make sense.

I understand that legislation on the subject of judicial discipline which has been introduced by Senator Kennedy and by Senator Bayh will also be considered during the course of these hearings. I am pleased that, as a result of the passage of S. 1423 last year, several of my colleagues have recognized that congressional action in this important area is necessary.

Without getting into the details of S. 678, as it applies to discipline, or S. 522, I would like to emphasize that the procedures embodied in S. 295 have been closely scrutinized and refined over a period of several years. Judges, lawyers, professors, laymen, and Senators have had an opportunity to review and shape the provisions of S. 295 following periods of study and reflection. I believe that this process has enabled us to develop a bill that is sound both substantively and procedurally.

It has been printed and discussed in numerious law journals throughout the country and I would hope, Mr. Chairman, while I know that in the course of any committee or subcommittee markup there will always be additional changes and usually they are constructive, that you would work on S. 295, which has been introduced by the two of us, because I believe it essential that we not lose some of the closely studied and scrutinized principles here in the formative stages.

If there need to be changes in those, then certainly I do not stand by every comma and period in this legislation. There can always be constructive changes. But I do believe it is much preferable to work on this as a model and then let whatever bill emerges from the committee be a committee bill.

Mr. Chairman, as pointed out earlier, the theory of providing a means to enforce the standards imposed upon our Federal judiciary has been discussed and debated throughout our history as a nation. Responsible legislation on the subject has been intermittently before Congress for over 40 years.

In recent years, we have recognized the need to shore up public confidence in our Federal Government and have, therefore, implemented stringent, ethical, and disciplinary mechanisms in the executive and legislative branches. S. 295 provides us with a reasonable and responsible mechanism to complete the job. It is my understanding that similar legislation is under consideration in the House of Representatives.

With these facts in mind, Mr. Chairman, I am hopeful that the 96th Congress will recognize that the principle embodied in S. 295 is a significant and necessary judicial reform and, therefore, move expeditiously to its enactment.

Senator DeConcini. Senator, your full statement is in the record and let me compliment you for your tenaciousness and willingness to stick with this. My understanding is that you got involved in this matter in the 93d Congress. Is that right?

Senator Nunn. That is right.

Senator DeConcini. That is when Senator Tydings was working on it.

Senator Nunn. Senator Tydings had left the Senate before I got here. I met with him and studied his legislation. The legislation I introduced was modeled and founded on the principles of his. So, there has been continuity. There have been many changes since the Tydings legislation, some of which were made before I introduced the bill and some of which were made by others since then.

Senator DeConcini. There were extensive hearings held by Senator Tydings when he was chairman of this committee. Are you familiar with any of those?

Senator Nunn. I was not here. I was back in Georgia practicing law before judges. At that time I did not testify on this measure although I did say publicly that I was for something along this line.

Senator DeConcini. It must be a little frustrating for you, as it is for me, only being here 2½ years and seeing the struggle we have gone through on this bill and the tremendous resistance we have had. I just want the record to note your willingness and commitment to the passage of this much needed legislation. I join you in that commitment.

I would also like to reiterate, as you have stated on numerous occasions, that this bill is not intended to discredit the members of the Federal judiciary. Most Americans have a high regard for the overall integrity of the Federal judiciary, however, the publicity surrounding the activities of a few U.S. judges has provided ample opportunity for questions to arise. We owe constituents an accessible means of protesting judicial conduct that is inconsistent with the behavior required by the Constitution. Conversely we owe Federal judges an alternative to the stigma attached to impeachment proceedings, in those cases where aberrant behavior is the innocent product of poor mental or physical condition.

Senator Nunn. Mr. Chairman, it has been 44 years since a judge has been impeached in this body. And I contend if we continue the way we

are now, it will be another 44 years before it is even considered. I do not say we ought to impeach judges but we have lost all the deterrent effect of an impeachment procedures. This is not an alternative to impeachment. There is nothing in the legislation that would prevent Congress from going forward with its powers of impeachment.

But it is an alternative, and I think a meaningful one and one that is long overdue. So, I hope you will continue your leadership because without it the bill never would have gotten to the floor last year.

Senator DeConcini. Well, I truly hope we can report a bill that has meaningful approaches toward this problem and one which can in fact create the mechanics for disciplinary action and hopefully removal of a misbehaving judge. I assure you that we will continue to work with you and your staff, and I want to express to you and to your staff at this time my thanks for the constant diligence and patience you have had in this very important area.

Senator Nunn. Thank you very much, Mr. Chairman. I look forward to continuing working with you.

Senator DeConcini. Perhaps Senator Bayh has a question to ask of Senator Nunn.

Senator Nunn. Senator Bayh asked me a good many questions on the floor last year.

Senator Bayh. I apologize, Mr. Chairman, for my tardiness. I picked up some sort of a foreign enemy over the weekend. It has lodged somewhere between my teeth and my head. And I apologize for being tardy. I appreciate the concern of our colleague from Georgia as well as our distinguished presiding officer to deal with this problem.

I would hope we can do so. I feel we can. I would hope we would resolve what differences we have. I understand the depth of the feeling of our colleague from Georgia. And I am looking forward to seeing if we cannot flesh this out. I think we can. I appreciate your longtime interest in this.

Senator Nunn. I thank Senator Bayh. You are one of our leading constitutional scholars and although we do not see eye to eye on every provision of this, I think we both see the need to have some alternative to the present procedure. I hope we can work something out.

Senator Bayh. No question. I have been concerned about that problem. I have been concerned that we do it in a framework that does not violate certain constitutional provisions. I do not suggest that I am any closer to the right answer than the Senator from Georgia. I thought maybe I was. We all look at these constitutional provisions a little differently.

But I think in this process we can go into it and hopefully find a resolution to the problem.

Senator DeConcini. Thank you, Senator Nunn.

Our next witness is Senator Mathias, a distinguished Senator from Maryland and member of the Judiciary Committee. Senator, we are pleased to have you here today.

OPENING STATEMENT OF SENATOR MATHIAS

Senator Mathias. Thank you, Mr. Chairman. I am pleased to be here today. And I will also submit several relevant letters and articles

which may be helpful to the committee in assessing this very difficult and complex problem. But I do welcome the opportunity to be here as we conclude the joint hearings on S. 295, S. 522, and S. 678.

Messrs. Chairmen, I welcome the opportunity to be here today as the Senate Judiciary Subcommittees on the Constitution and Improvements in Judicial Machinery conclude their joint hearings on three legislative proposals each designed to complement existing procedures governing the disciplining of Federal judges: S. 295, "The Judicial Tenure Act"—Nunn-DeConcini; S. 522, "The Judicial Council Amendments and Discipline Act of 1979"—Bayh-Mathias; and S. 678, "The Federal Courts Improvement Act of 1979"—Kennedy.

Senator Bayh and I introduced S. 522 on March 1, 1979. The primary purpose of this proposal is to classify the authority of the several judicial councils to deal with questions of alleged judicial misconduct.

S. 522 had it genesis last year in the opposition of Senator Bayh and myself to S. 1423, the Judicial Tenure Act, the predecessor to S. 295, both of which provide for the removal of Federal judges by means other than impeachment. Since our objections to S. 1423 are equally applicable to S. 295, I will review them briefly for the benefit of the subcommittees.

The overwhelming majority of legal scholars has concluded that the Founding Fathers intended that Federal judges be removed only by impeachment, and that any legislatively devised removal scheme must, therefore, fail to pass constitutional muster. We support this view. It certainly was the opinion of Alexander Hamilton, who, in Federalist 79, wrote:

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

Similar views were expressed by Thomas Jefferson and other of Hamilton's contemporaries; and, significantly during the course of the Constitutional Convention in 1787, the only other form of judicial removal proposed—"address" by the House of Congress—was overwhelmingly defeated.

In contrast, as the Committee on Federal Legislation of the Association of the Bar of the City of New York noted in its excellent report entitled "The Removal of Federal Judges Other Than by Impeachment," there is virtually no commentary by Hamilton's and Jefferson's contemporaries supporting the view that alternatives to impeachment are constitutionally permissible.

In fact, it appears that it was not until 1930 when Burke Shartel wrote in the "Michigan Law Review" that the possibility of constitutionally acceptable alternatives to impeachment was even suggested. This attempt to find new powers in the Constitution as such a late date reminds me of the forceful words of the late Justice Frankfurter. In rejecting the argument that Congress, in passing the 1875 act conferring Federal question jurisdiction on Federal courts, had made

maritime suits cognizable on the law side of the Federal courts, Justice Frankfurter wrote:

> The history of archeology is replete with the unearthing of riches buried for centuries. Our legal history does not, however, offer a single archeological discovery of new, revolutionary meaning in reading an old judiciary enactment. The presumption is powerful that such a far-reaching, dislocating construction as petitioner would now have us find in the Act of 1875 was not uncovered by judges, lawyers or scholars for 75 years because it is not there.

Similarly, I think there is a powerful presumption that this alternative to impeachment of Federal judges, however persuasively it might be argued in the abstract, was not discovered in the Constitution by the thousands of eminent scholars of our Constitution prior to this recent time simply because it was not there.

We also oppose the Judicial Tenure Act because it poses a direct and serious threat to the time-honored and constitutionally enshrined principle of judicial independence. This is a principle worth preserving. It is not a new principle. It is an ancient one. Its origins can be traced back long before the Constitution of the United States was written. It is more than 2,000 years old.

Herodotus, the Greek historian, in his "History of Ancient Persia," wrote:

> The Royal judges are men chosen from among Persians, who continue in office until they die or they are convicted of some injustice. They determine causes between the Persians and are the interpreters of the ancient constitutions and all questions referred to them.

Our Founding Fathers were worldly individuals. They were scholars. They knew Herodotus and they were aware that, by grafting judicial independence into the Constitution, they were embodying the wisdom of the ages into the organic law of our Nation; they were not creating a new experiment in government. The Judicial Tenure Act is a clear attempt to tamper with our organic law; S. 295 ignores the lessons gleaned from history. It must not be adopted.

As we consider the Judicial Tenure Act we would do well to keep in mind the eloquent advice of our former colleague, Sam Ervin, who noted:

> The Founding Fathers knew that the form of Government they established would not create a judiciary composed of judicial angels who could do no wrong. They knew the activities of a few judges might handicap the operation of the system. But at the same time, they realized that individual liberty is best protected by an independent judiciary composed of judges who were subject to the Constitution alone. They had learned the lesson of history, and attempted to build safeguards into our system which would prevent its repetition. We must not subvert their wisdom and destroy our own freedoms by regarding the Constitution they drafted as a piece of ancient parchment which can be folded and rearranged to suit the whims of individual men.

Finally, we object to the Judicial Tenure Act because it would work an unwarranted, radical, and violent alteration of our constitutional framework; and we believe that, if changes were needed in existing judicial disciplinary procedures, they should be achieved by means less drastic than those provided under the tenure bill. In fact, during the Senate debate last year, Senator Bayh suggested a number of possible alternatives to the Judicial Tenue Act, including legislation strengthening the powers of the judicial councils.

As the chairmen well know, despite these objections, on September 7, 1978, the Senate passed the Judicial Tenue Act by a vote of 43 to 31. Fortunately, the House of Representatives did not act on the bill before the close of the 95th Congress.

Following the adjournment of the 95th Congress, Senator Bayh and I reviewed the efficacy of existing judicial disciplinary procedures, with special emphasis on the need to clarify the authority of the judicial councils to deal with allegations of judicial misconduct. Similar reviews were undertaken by Senator Kennedy and by the Judicial Conference of the United States.

Our bill reflects the suggestion made last year by Senator Bayh regarding the possibility of granting greater authority to the judicial councils to deal with questions of judicial misconduct. In developing S. 522, Senator Bayh and I found the question of disciplining Federal judges to be complex, involving numerous constitutional and public policy issues. We became convinced that Congress should undertake a broad, thorough, and expeditious examination of the myriad issues raised by any legislative effort in this area.

No such examination on this subject had been undertaken since 1970, when the Senate Judiciary Subcommittee on Separation of Powers under the leadership of Senator Ervin, held 4 days of hearings on judicial independence. Instead, in the intervening years, Congress focused its examination almost entirely on the Judicial Tenue Act. Little, if any, attention was given to the possibility of alternative approaches. For this reason, I am pleased that your subcommittees have devoted so much time over the past few months to the entire area of judicial discipline. Such a comprehensive review was long overdue.

As your subcommittees begin the process of reviewing the hearing record you have compiled, I urge you to give careful consideration to a number of fundamental questions inherent in any judicial discipline proposal, be it S. 295, S. 522, or S. 678. Among these questions are:

The nature and extent of the problem of judicial misconduct;

What type of disciplinary mechanism would best remedy such problems as may exist;

The impact of such proposals on the independence of the Federal judiciary; and

Whether or not impeachment is the sole constitutional means of removing Federal judges.

Moreover, you must consider a number of more specific questions regarding any legislative effort to strengthen the powers of the Federal judicial councils, such as S. 522 or S. 678:

Under what circumstances should a Federal judge be subject to the disciplinary powers of the councils? Should the standard be, as provided under S. 522, when the judge's conduct interferes with or impairs the effective, expeditions, and fair administration of the business of the courts or the just determination of all litigation within the circuit in which the judge serves? Or, should the standard be conduct inconsistent with "good behavior," as set forth in S. 678?

Should the councils be constituted as Federal courts for purposes of dealing with allegations of judicial misbehavior?

Should appellate review of the orders of the judicial councils lie with the Supreme Court, or should review by placed in another body, such as the Judicial Conference?

Messrs. Chairmen, the task before your subcommittees, the full Judiciary Committee, the Senate, and ultimately the entire Congress is an enormous one. Any changes in the administration of our judicial system must be approached with very great care. We must be mindful that tampering with judges is as dangerous as tampering with the courts themselves. Above all, we must be certain that if we opt for greater judicial control, we will not sacrifice judicial independence.

[Additional material can be found in the appendix.]

Senator DeConcini. Senator, thank you very much. Your position is very clear. I recall the debate of last year and your position. And I appreciate your concern and interest.

Let me ask you this: In light of the fact that history shows us that there has been no impeachment for more than 40 years and yet it is indisputable that there have been a number of cases where judges have misbehaved and it has been very difficult to remove them and in a couple of instances they are still on the bench, do you believe that the Founding Fathers anticipated the magnitude, the growth, the complexity of our system when they designated that the procedure for removing a Federal judge would be by impeachment? Do you have any comments?

Senator Mathias. I think the Founding Fathers had a very clear vision of what this country would become. They knew they were founding a tremendous empire. They knew the growth of the country. There is a great story about the Supreme Court in the days when it rode the circuit. And as people will do when they are traveling, they found that they were tippling a little too much.

And they began to worry that their lack of temperance was interfering with the work of the Court. So, they took an oath of total abstinence while on the circuit. And they found that hard to live with. So, they modified the Court a little bit and they said, "Well, we will totally abstain from spirituous beverages except during inclement weather when it may protect our health if we drink a little." And they lived with that for a while and that was proving burdensome.

So, then they said, "Well, you know, considering the vast jurisdiction of this court from sea to sea, from Canada to Mexico, somewhere in this country it must be raining and, therefore, it must be all right to take a drink."

Well, people had an idea of what a huge country this was and what a huge system it was. And I think they would not be daunted by the fact that the Federal court system has grown tremendously since that time.

Senator DeConcini. Don't you think that some of the improprieties by Federal judges and the failure to have an effective removal process would be disturbing to the Founding Fathers?

Senator Mathias. Well, that is a human failure on the part of people who, if there were grounds for impeachment, did not set the impeachment proceedings in motion. I do not think that is a failure of the system. It is a failure of human will to make the system work. And I do not think any other system you propose is going to be immune from that defect.

Senator DeConcini. I agree with you that it is a human failure. However, it is difficult for legislators to digress from their legislative

activities to commence lengthly and cumbersome impeachment proceedings.

Senator MATHIAS. I do not think the problem is with the House of Representatives. The problem is the people do not bring the cases to the House. I think if people came in with a formal petition, for example, if the American Bar Association or if the judicial councils had come before the House of Representatives with a petition, which is the constitutional right of every citizen, alleging judicial misconduct and petitioning for a bill of impeachment, it would be very hard for the House Judiciary Committee not to grant an immediate hearing on that petition and to determine whether or not a bill of impeachment should be reported to the full house.

Senator DECONCINI. Well, the House Judiciary Committee reports to us that you have numerous complaints—I guess they are petitions—and I have to admit that there is no procedure for handling them. And maybe that is our failure as legislators and human beings.

But it really disturbs me that no one is willing to address their problem except to acknowledge that it is a failure on the part of the House and the Senate for not acting on the complaints.

Senator MATHIAS. I do not think it is a failure on the part of the House. I think if the American Bar Association, if the Arizona State Bar Association, if the Indiana State Bar Association or the Maryland State Bar Association came to the House of Representatives with a petition alleging judicial misconduct that that would get very early treatment.

Now, I am sure that there are a lot of disgruntled litigants who lost their cases who are going to be unhappy and who are going to complain about the treatment they got in court. But I think you have to sort out that kind of complaint, and maybe an accurate complaint, maybe just complaints about the treatment they got in some individual case, but I think you have to sort that out from the case of genuine judicial misconduct.

Senator DECONCINI. Do you think you can really expect members of the bar, composed of those who have to practice before judges, to bring a petition?

Senator MATHIAS. Well, that is what the American system of government is all about. That is what the Declaration of Independence said: We pledge our lives, our fortunes and our sacred honor. I mean, if you really want to make a republic work, people have to put it on the line. If you practice before a judge—well, it is no more unpleasant than it is around here.

I remember when I was a Member of the House of Representatives and we had some questions raised about the election of the Mississippi delegation to Congress. And it was a very unpleasant duty to pass a resolution for an investigation of the seating of the entire Mississippi delegation.

And I recall walking down the corridor the morning after we passed that and seeing Congressman Culmer, who was then chairman of the House Rules Committee, a very powerful man to antagonize, just as powerful for a Member of the House to antagonize as a judge to a practicing lawyer, and I remember Uncle Billy said: "How is my former friend today?"

And those are not pleasant experiences but you have to go through with them.

Senator DeConcini. Let me ask you another question. The average time for a trial in the Senate on impeachment is reported to be 16 days. Knowing how the Senate operates here and the inability of so many of us to be on the floor, do you think that a 16-day trial would really give a judge a fair trial before the Senate under impeachment today?

Senator Mathias. Oh, I think you could do it in less than 16 days.

Senator DeConcini. I am referring to the average. A lot have been 30 or 35 or 40 days.

Senator Mathias. Well, sure, but you are including in this average a lot of old trials.

There has not been one in 40 years. I mean, you are going to go back well into the late 19th century. You are including the trial of Samuel Chase, which was a political trial. That was not a trial on the misconduct of judges. That was a trial on the political views of Samuel Chase. So, that took a long, long time.

And if you refer to those kinds of trials, sure, you will get an average of 16 days. But if you are really dealing with a judge who is a drunk or a judge who is senile or that kind of problem, which is the modern problem, with which we have had to deal, you could handle that——

Senator DeConcini. Do you think you can get a fair trial in the Senate under the present procedures?

Senator Mathias. I have that much confidence in this institution, yes. This is the court of last resort in these matters.

Senator DeConcini. Thank you, Senator. Senator Bayh.

Senator Bayh. I am not certain I know the answer to that question, which is really the bottom line described by our colleague and distinguished presiding officer. However, without suggesting that there is infinite wisdom under the constitutional structure, you have to ask, but if you cannot get a fair trial in the Senate, where can you?

Senator Mathias. That is right. I think you are likely to have a more objective trial in the Senate. Our distinguished chairman here this morning raises a question that it is a burden for a practicing lawyer to complain about a judge. Well, it is equally a difficult burden for a brother judge or, in this day and age, a sister judge, to be passing judgment.

If you are going to create that kind of tribunal to have the last word, that could be a problem. And I think you are more likely to get an objective judgment here. You have people in the Senate who have some wisdom of the world, who have some perspective, who have some historical views and who can make a human judgment.

Not all the Members of the Senate are lawyers and maybe that is a good thing in this kind of circumstances. They can take those considerations into account. So, I think the Senate is a good place to have this trial.

Senator Bayh. I have no further questions, I think the gentleman from Maryland and I are either on the right track or in the same rut as the case may be.

Senator Mathias. We are on the right track or headed for the same precipice.

Senator BAYH. Right, and maybe both.

Senator MATHIAS. Well, unfortunately that is true.

Senator BAYH. I think what we have tried to do in our legislation is to structure a disciplinary vehicle that we feel meets the constraints of the Constitution and perhaps equally importantly, does so in a way that the offenses which may fall short of the discipline of impeachment can be handled without going the impeachment route. However, we hope to create a vehicle that can cause the House to move if there is an impeachable offense.

And I think our presiding officer here this morning is accurate. There has been at least one and maybe a couple of occasions where you wonder why something has not happened. Well, thank you, Senator.

Senator MATHIAS. I think the Senator from Indiana is exactly right. And I wish Sam Ervin were here to reiterate what he said several years ago because there is no question that you have some unfortunate situations. You have an occasional judge who becomes unfit to be a judge. But that has been a very rare circumstance.

And what has been such a tremendous success is this proud, successful structure of the Federal judiciary, which is built upon the independence of the judges.

Senator DECONCINI. But Senator, how do you answer the 22 postal employees who were put in jail because they used an elevator a judge told them not to use, out in Salt Lake City? That is the kind of abuse you have, and there is no action taken. In this particular case, the man passed away. But for years he just abused the power of that office. And neither the House of Representatives nor this great body would address it. And the judges were unable to address the problem.

I think it is important to note that generally the system has operated well. However, it is necessary that we develop some disciplinary procedures to deal with the unfit jurists. The situation shouldn't turn on the lifespan of the judge as was the situation in Utah.

Senator MATHIAS. Well, I of course share with the chairman a sense of the outrage over these kinds of petty tyrannies. And we all, I think, have to enlist with Thomas Jefferson in swearing eternal enmity to every form of tyranny over the mind of man, and this would be one of them.

But I would commend to the chairman a careful study of the bill which the Senator from Indiana and I have submitted for your consideration. I think S. 522 does provide a means of doing what you would like to do without doing what I am sure you do not want to do, specifically, to weaken the independence of the judiciary, to put even a hairline crack in the foundations of our Federal judicial system which has been such an important element in the success in American experiment in government.

Senator DECONCINI. Thank you, Senator. I would want the record to show that we have invited Senator Ervin to testify at the hearings this year. The reason Senator Ervin could not testify was not due to a lack of interest but rather a lack of time.

Senator BAYH. Mr. Chairman, if the Chair would yield a minute. I know how busy Senator Ervin is, and one of his reasons for leaving us was to get away from hearings and this kind of thing, but I know he

feels deeply about this matter. Would it be appropriate to ask him to give us a statement——

Senator DECONCINI. Indeed it would.

Senator BAYH [continuing]. A statement of his opinion on the matter which we can put in the record?

Senator DECONCINI. Indeed, it would. If I am not mistaken—and I will stand corrected—I believe we did get a letter of opinion from him in the 95th Congress. I will see the record is searched and invite him to submit any statement he cares to submit. That is an excellent idea.

Senator BAYH. Since I have interrupted, let me continue a minute by just offering a word of appreciation on the part of the Senator from Maryland and myself. I know as the chairman of this Subcommittee on Improvements in Judicial Machinery you have really looked at this problem very carefully. And we are appreciative of that fact.

And I think you have performed a service to the Judiciary Committee by jostling all of us who have probably two Senators' worth of work, as our chairman does, to perform every day. This is an issue that has just sort of lain dormant, but you have refused to let it remain so. And I think we are in your debt.

And, as I said earlier, I think that with these hearings and the past study you have conducted, and with perhaps some of the rest of us giving a little more attention at an earlier stage than was the case in the past, with all this I am confident we can find a way to resolve the constitutional problem, which is a resolvable problem, in a way most of us can rest easily with.

That we might have traveled different paths so far, I do not think should be construed in any way as a lack of cooperation.

Senator DECONCINI. I thank the Senator. I also join Senator Bayh in compliments to you, Senator Mathias, because I think it important that someone take the time to research and to think about the significance of altering the procedures for removing Federal judges.

Although you and I have a little disagreement on the techniques here, it is very encouraging that you and your staff would go into it in the depth you have and you have the strong feelings you have in preserving the constitutional provisions. I want to have the record show I am very pleased to have your participation.

Senator MATHIAS. Well, thank you very much, Mr. Chairman. I do not think there is a doubt that in this age in which everything is questioned that the judiciary can be immune from the questions which are asked by the Senate, by the House, by the Presidency, by every other institution in our society. And I think it is certainly appropriate, as you have done, to look at the situation and to see how it should be handled in the context of contemporary society.

I might also say that I am very pleased that Professor Kurland, who has been a long-time consultant to this committee, has agreed, although he could not be here today to testify personally, has agreed to submit material, which I believe will be of assistance. Thank you very much.

Senator DECONCINI. Yes, Senator Mathias, let me just advise you, we hope to close the hearing record about July 9, 2 weeks from today, barring Senator Ervin wanting more time. So, if you care to submit any more testimony or have any other documents, we would appreciate it if you would send them to us by that time.

Senator MATHIAS. Thank you very much. I think Professor Kurland's material, if not in the mail now, should be during the current week. And we will see that any other statements get into the record.

Senator DECONCINI. We also have some technical questions that I would like to submit to you that perhaps your staff could help to respond to if you do not mind.

Senator MATHIAS. We will be happy to wrestle with them.

[The material referred to above appears in the appendix.]

Senator DECONCINI. Thank you.

Our next witness is the Honorable James Duke Cameron, chief justice, Arizona Supreme Court. Chief Justice Cameron is cochairman of the Joint Committee on Professional Discipline of the Appellate Judges' Conference and the Standing Committee on Professional Discipline of the American Bar Association. Chief Justice Cameron has been a long-time friend of the judiciary and this member of the Judiciary Committee and has invested a great deal of time and effort on his part on disciplinary actions and standards for the judiciary.

That is why the Arizona judiciary is so outstanding. We are very pleased to have you here. Your full statement can be printed in the record. You may proceed as you please.

STATEMENT OF CHIEF JUSTICE JAMES DUKE CAMERON, ARIZONA SUPREME COURT

Chief Justice CAMERON. Thank you, Mr. Chairman, Senator DeConcini, Senator Bayh. It is a pleasure to be able to appear before this committee. I will try to keep my remarks brief, if anybody trained in the law is able to do that.

[The prepared statement of Chief Justice Cameron follows:]

PREPARED STATEMENT OF JAMES DUKE CAMERON

Mr. Chairman, Senator DeConcini, it is a pleasure to have the opportunity to add my comments regarding Senate bills 295, 522, and 678. I commend you for your interest in trying to create a mechanism whereby complaints and allegations against sitting judges can be properly evaluated and appropriate measures taken to insure the integrity of the judiciary. As Thomas Jefferson once stated, "Everybody in public life ought to be responsible to someone." I would submit that Federal judges can and should be responsible for their misconduct and that this can be done without violence to judicial independence. As stated in the Standards Relating to Judicial Discipline and Disability Retirement, "Federal judges should be subject to discipline" and "there should be a disciplinary structure for the Federal judiciary.[1]

Before I discuss the bills, however, I will make two comments. The first concerns the purposes judicial discipline and disability commissions actually serve. They act to protect the public, to preserve the integrity of the judicial process, to maintain public confidence in the judiciary, and to create a greater awareness of proper judicial behavior on the part of the judges themselves. While the commissions do discipline judges where such action is warranted, in actual practice their main function is to provide a place and a procedure wherein the public may file complaints and have them considered by a fair and impartial body. Actual discipline and removal of judges does not then become the major function of the commission. This does not mean the commission is not performing a valuable

[1] Standard 10, page 67, Standards Relating to Judicial Discipline and Disability Retirement, Joint Committee on Professional Discipline of the Appellate Judges' Conference and Standing Committee on Professional Discipline, approved by the House of Delegates of the American Bar Association, February 1978.

service to the judiciary and to the public. Indeed, this public confidence-building may be the commission's most important contribution to the cause of justice.

Second, I will comment on the volume of work a Federal commission is likely to have. With the exception of the problem of alcoholism which Federal judges would probably share equally with State judges, most of the complaint-generating cases heard by State judges are not part of a Federal judge's jurisdiction. For example, domestic relations and child custody matters make up a large proportion of the complaints filed against State judges. These are emotionally charged cases that frequently result in dissatisfied litigants. The Federal courts are not involved in these decisions. Another major source of complaints comes from traffic courts. These are functions that Federal judges do not perform.

As an example, in the State of California, according to Mr. John Sutro's remarks before this committee in 1977,[2] over a 15-year period, from 1961 to 1976, there were 2,427 complaints filed, that is, 162 a year. Of those, 1,768 or 117 a year, were unfound or frivolous; 669, or approximately 44½ cases a year, were investigated further. Of those, only 440, or 29 a year, were considered important enough that the judge had to be contacted and questioned about the allegation. In this same 15-year period, 67 judges, or 4½ a year, resigned or retired at the urging of the commission. I suspect that most of those resignations or retirements were due either to drinking problems or to mental disability. During this 15-year period, five judges were censured by the State supreme court, three were removed by the supreme court, and one was retired by order of the supreme court. So, the Supreme Court of California had to act in only nine cases during a 15-year period.

The State of Arizona is similar. We have had a Judicial Discipline and Disability Retirement Commission for approxmately 9 years. The supreme court has never had to consider any recommendations for judicial discipline. Only three judges have resigned or retired as a result of the actions of the commission and all three of those were for excessive use of alcohol. The commission is responsible for 177 judges including 84 justices of the peace.

The point that I wish to make is that the commission you create is not going to have a great deal of business and almost no serious disciplinary proceedings. The Federal judges are carefully screened before appointment and I doubt that there will be many valid complaints filed against them or considered by the commission. Most complaints, as in the State counterparts, will be frivolous and substitutes for appeal.

As to the three bills you now have under consideration, I would offer the following comments.

First, the machinery you are proposing is too large and cumbersome. There are too many people at too many levels getting into the process. This will result in unnecessary delay in the discipline process. A judge, if he is guilty of misconduct, should be disciplined quickly to protect the integrity of the judiciary and to protect the public. The proposed legislation, and particularly Senate bill 295, will, of necessity, be very slow to act.

Second, I note that the bills follow the circuit in the organization of the disciplinary structure. In Senate bill 678, the circuit judicial council is the one that receives and processes the complaints. In Senate bill 522, the complaint is filed with the chief circuit judge and there is a hearing by the circuit judicial council. In Senate bill 295, there is a Judicial Conduct and Disability Commission with circuit committees determining probable cause and then recommendations to a court of the judiciary. There will be as many different interpretations and applications as there are circuits, and I believe this is undesirable.

Next, Senate bill 295 requires that the complaint must be certified or subscribed to. I consider this unnecessary. Many of the important things that the commission will look into will be gleaned from newspapers or will be provided anonymously to the commission. Rule 4.1 of the Standards Relating to Judicial Discipline and Disability Retirement states:

"4.1 *Initiation of Procedure.*—An inquiry relating to conduct of a judge may be initiated upon any reasonable basis.

"*Commentary.*—Oral or written complaints may be made by judges, lawyers, litigants, court personnel, or members of the general public. They need not be

[2] Page 103, Hearing before the Subcommittee on Improvements in Judicial Machinery, Sept. 14, 1977.

made in any specifific form, nor need they be made under oath, but they must state facts that, if true, would be grounds for discipline. Upon good cause and upon its own motion, the commission may initiate an inquiry concerning any judge." [3]

As a practical matter, after investigation, if the matters are found to warrant further proceedings, members of the staff may sign the complaint.

I would suggest that all that is needed is a commission of seven to nine members to be appointed by the Chief Justice of the U.S. Supreme Court with a staff of competent people and the funds to do the job. The commission and its staff would have the power to accept complaints, screen, hear and determine allegations of misconduct or disability and make recommendations to the Supreme Court of the United States for the imposition of discipline where indicated. The commission would operate under rules of procedure as provided by the U.S. Supreme Court. The Supreme Court would be the final arbiter.

I would like to discuss two other items. One is the composition of the commission. I realize that most of the judges are requesting that the commission be composed of fellow judges. The Standards Relating to Judicial Discipline and Disability Retirement provide for public members on the commission, and ideally I would suggest a nine-man commission consisting of five judges, two lawyer members, and two public members. I realize that these bills are in their infancy and you may wish to start out with a commission composed of only judges, but eventually I think that public members would add a great deal to any commission of this type. In the States, we have found public membership to be most helpful. As to who appoints them, I feel that all members of the commission should be appointed, in the federal system at least, by the Chief Justice of the U.S. Supreme Court.

Regarding the scope of the discipline to be imposed, the proposed bills provide for the traditional forms of judicial discipline and disability. The question that is quite properly asked, however, is: May the Congress or Supreme Court permanently remove a judge from office and take away his salary and retirement rights? In other words, does the Congress or the Supeme Court have the power to ceate an alternative to impeachment? I had occasion to state in the Chicago-Kent Law Review the following:

"The separation of powers doctrine [however] has had the practical effect of limiting the common law power of the court to permanently remove a judge from office. The power of impeachment has been viewed as conferring the exclusive power of removal from office upon the legislature. For example, when the Supreme Judicial Court of Massachusetts adopted by court rule the Committee on Judicial Responsibility, it was quick to note:

" 'The Supreme Court's action does not confer on the committee or the court any power to remove a judge from office for either incapacity or misconduct. In the absence of an amendment to the Massachusetts Consitution, these powers are vigorously reserved to the legislature, the Governor, and the executive council. The court's action does, however, provide a systematic and consistent pocedure for the receipt and processing of complaints against judges.'

"This view of impeachment power has not been shared by some commentators. Both Professor Shartel and Stewart A. Block assert that the impeachment power granted to Congress does not necessarily negate judicial forms of removal.

"The American courts, however, have not interpreted impeachment power in the way suggested by commentators like Professor Shartel. While it appears there is a common law historical basis for removal of judges by a jurisdiction's highest court, no cases exist where a court has removed a judge from office based on the court's inherent power to discipline a judge. The New Hampshire Supreme Court expressed what appears to be the opinion of the American courts when it stated: 'Candor compels the recognition, at the very outset, that the judiciary has no power of impeachment * * *. The judiciary has not been granted the removal power by this method, either by the constitution or the common law.' " [4]

I would suggest to the commission that imperfect though it may seem, at least for the time being the power of the commission be limited to removing a sitting judge from any responsibility as a judge. He would continue to hold

[3] Standard 4.1, page 21, supra, Note 1.

[4] Cameron, "The Inherent Power of a State's Highest Court to Discipline the Judiciary," 54 Chicago-Kent L. Rev. 50–51 (1977).

the title and draw pay as a Federal judge. This is not the solution that is attractive, of course, but it may be the only solution you presently have consistent with the constitutional provisions which protect the independence of the judiciary. I would suggest this is more of a problem than those judges who are retired, because of physical disability, and continue to draw their full salaries while they are alive but no longer productive.

Again, may I thank you for allowing me to appear before this committee. The Joint Committee on Professional Discipline would be most happy to assist the committee in any way. The members of the committee are:

James Duke Cameron, cochairman, chief justice, Arizona Supreme Court, immediate past chairman, Appellate Judges' Conference, Phoenix, Ariz.

S. Shepard Tate, cochairman, president, American Bar Association, Memphis, Tenn.

John C. McNulty, vice chairman, chairman, Standing Committee on Professional Discipline, Minneapolis, Minn.

Ben F. Overton, Supreme Court of Florida, Tallahassee, Fla.

Robert Leflar, professor, University of Arkansas Law School, Fayetteville, Ark.

M. Roland Nachman, Jr., district 6 member, Standing Committee on Professional Discipline, Montgomery, Ala.

Florence Peskoe, deputy director, Administrative Office of the Courts, Trenton, N.J.

John Todd, associate justice, Supreme Court of Minnesota, St. Paul, Minn.

Michael Franck, district 7 member, Standing Committee on Professional Discipline, Lansing, Mich.

F. Jack Adams, district 5 member, Standing Committee on Professional Discipline, Cornelia, Ga.

Floyd R. Gibson, chief judge, U.S. Circuit Court of Appeals, 8th Circuit, Kansas City, Mo.

Mark I. Harrison, district 12 member, Standing Committee on Professional Discipline, Phoenix, Ariz.

Phil Peden, associate justice, Court of Civil Appeals, Austin, Tex.

Chief Justice CAMERON. We have spent 3 years working on this problem. We have looked in various commissions around the country, and we have come up with standards for the enforcement of judicial discipline and disability retirement, as well as model rules of procedure. Other members of the committee will submit some remarks to you, hopefully prior to the July 9 deadline.

I think that to begin with we should realize what these commissions are designed to do. There is a feeling they are designed only to discipline judges.

They perform many functions; they protect the public; they preserve the integrity of the judicial process, and retain public confidence in the judiciary. Also, they create a greater awareness of proper judicial behavior on the part of the judges themselves. While commissions do discipline judges where such action is warranted, in actual practice their main function is to provide a place and a procedure wherein the public may file complaints and have them considered by a fair and impartial body.

I note in the testimony given before me that there was some discussion about the complaints that are received by the Senate Judiciary Committee. I suspect most of those complaints are frivolous and unfounded, and substitutes for appeal. But if the Senate Judiciary Committee had a place where they could refer those complaints for proper investigation, where both sides could be looked into, I think the system would benefit from it.

I might also point out that with the exception of alcoholism and mental and physical disability, most of the complaints generating cases regarding State judges are not part of the Federal court's juris-

diction. Most of the cases we get in the States arise out of domestic relations problems. For example, and I get them across my desk as chief justice all the time—"Judge Y must be having an affair with my wife, how else could he have awarded her the children."

I suggest these are frivolous, unfounded complaints and are complaints that are really substitutes for an appeal. The Federal judiciary does not have jurisdiction in those types of cases.

Also, we have a tremendous amount of complaints arising out of the lower courts, the traffic courts. Accusations of ticket fixing, things like that, minor things, which again are not the concern of the Federal judiciary. Also, there is a stricter screening process in the selection of Federal judges.

I think some statistics are in order. There are 1,192 judges in California. And out of those they generate about 162 complaints a year. Of those, 117 are unfounded or frivolous on their face. Only 29 a year are considered important enough for a judge to be contacted and questioned about the allegation.

And I might point out this. That a judicial qualifications and discipline commission does not usually tell the judge of the complaints it receives. We would drive a trial judge up the wall if we did it because most are unfounded and frivolous. We handle them. We look at them. We respond to the complaint and tell the complainant what the problem is and it is dropped there. So it is a protection to the judge himself. It is an insulation. He can say, well, if you have a problem, go to the commission and the commission will look at it.

But it is interesting to note in California with 1,192 judges that only 5 judges were censured by the California Supreme Court in a 15-year period, 3 removed, and 1 ordered to retire. In the 10 years of the Arizona Commission, no recommendation has been made to the Arizona Supreme Court, and the Arizona Supreme Court has made no disciplinary decisions.

Three judges have resigned under pressure from the commission, and those three judges had a drinking problem. And we did not have any problem of actual misconduct there.

Also to the three bills, I think that the machinery you are proposing is too large and cumbersome. I think that you have become wedded to the circuit concept. I don't think you need that. In the first place, if you are going to have the circuit committees or councils deciding probable cause, you are going to have as many different interpretations of disciplinary matters as you have circuits. And I do think you want a consistency in this process.

One thing I would point out as to S. 295, you have adopted a proceeding which some of the judges complained we should adopt in our standards and that is the only complaint that would be considered would be a certified or subscribed complaint. As a practical matter, the really serious matters that commissions get are usually anonymous. The reason I think is apparent, because the people most likely to know of a serious complaint are part of the courthouse staff or they are attorneys. I would submit to you that no matter how brave a person may be or how supportive of our system he may be, he really is not going to rush out and put his name on a complaint, particularly when he may have some feeling that the complaint may not be acted upon promptly.

We hope it is, of course. So I think you have to give the commission the authority to consider anonymous complaints. Our commission in Arizona reads the newspaper, and if they see something in the newspaper that bothers them, they will look into it. And I think you should do that.

I think a simple commission would be nine members, or seven, or five, but anyway, a simple small commission is recommended; one that would have an efficient staff. You don't have to have a large staff for this field. But if you pay the people properly and have an executive director, a deputy, some investigators, some secretaries, I think you can do the job. And 95 percent of the complaints will be washed out prior to ever getting to the commission. They will be obviously frivolous. They will be substitutes for appeal. A simple letter to the complainant takes care of that. And then you only have the more serious matters which would go to the commission.

I don't think it is going to meet very often—maybe six times a year—and that will do the job.

I would like to touch on what I believe the most troublesome aspect of the bill from our point of view and that is whether or not this can be a substitute for the impeachment process. As I have stated in my printed remarks, the feeling is held by most of the courts who have considered it, that the judicial commissions, absent constitutional authority to do so, do not have the power to act as a substitute for the impeachment process.

I happen to think that there is inherent power in the U.S. Supreme Court to act as a substitute for the impeachment process. But it may well be that until such time as this law is developed and until the Supreme Court and judges get used to the proceedings, that you may have the imperfect remedy, admittedly imperfect, of saying, all right, if we recommend impeachment, we will have to have the impeachment process. But I would suggest the limit would be to recommend to a supreme court that the judge be removed from all of his duties.

This means that you will have a judge who will not be sitting but who will be paid his salary for the rest of his life. You do that in physical and mental disability. And I don't think you are going to have more than one or two doing it at any one time. It is not going to be a burden upon the system. But I think that is an initial first step. And down the road a ways maybe the U.S. Supreme Court will take the bull by the horns and say, yes; we do have this inherent power. The King's Bench had it when we became a nation.

Senator DeConcini. Excuse me, Judge, on that subject your committee was somewhat split on whether or not it was proper to have an actual removal; is that correct?

Chief Justice Cameron. We didn't have any problem because our recommendation was a constitutional amendment within the State to provide for this——

Senator DeConcini. For the actual removal?

Chief Justice Cameron. Yes; for the constitutional amendment. I might remind the chairman, however, that our procedure is that the commission hears everything and makes recommendations only to the supreme court, the State's highest court. And the constitutional amendment gives that power. Now, we have had some States—New Hampshire, Massachusetts—Maryland has on claim they have the right

to do it, but none have ever done it. They have set up commissions under their inherent power but the most they have done is up to and short of permanent removal.

Senator DeConcini. What is your opinion of the constitutional question of a commission or court having the right to actually remove a judge, that is, short of a constitutional amendment at the Federal level?

Chief Justice Cameron. I think the States or the Nation's highest court has that power. I don't think anything short of the U.S. Supreme Court has that right.

Senator DeConcini. In other words you are saying if you gave that authority to the highest court in the Federal system, short of a constitutional amendment, that you feel constitutionally that might be appropriate?

Chief Justice Cameron. Yes; I object a little bit to the words "give to the highest court" because I think they have it. I think you give them the machinery in which they can act.

Senator DeConcini. Was there discussion on this in the Joint Committee?

Chief Justice Cameron. Yes; violent discussions I might add. But I think you can give the U.S. Supreme Court the machinery to exercise their inherent power.

Senator DeConcini. I see your point.

Chief Justice Cameron. I think that the Founding Fathers were quite clear in this. They gave the Congress the right to impeach, but there were other forms of removal which were in existence at the time, legislative address, which they specifically considered and did not give to the Congress. Some of the States had in our history legislative address, and I think there may be some who still do. But you do not have the power of legislative address. You only have the power by impeachment.

So, I think you give the Supreme Court the machinery by which they can exercise it.

Senator DeConcini. Thank you for that distinction.

Chief Justice Cameron. I think these conclude my remarks. I will rest on the record and answer any questions you might have.

Senator DeConcini. Thank you.

You state "members should be appointed by the Chief Justice of the Supreme Court" and you prefer a nine-member commission, composed of five judges, two lawyers, and two public members. Currently the commission as drafted is composed of 12 members with a chairman, capable of authorizing a smaller number to act on behalf of the full commission. The idea behind 12 was to have representative judges from each of the 11 circuits. And one judge elected collectively from the three special national courts.

What are your thoughts on having a representative body of 12 members but authorizing a smaller number, such as 7, to act on behalf of the larger body?

Chief Justice Cameron. I have no problems with that. I think that you are tied in philosophically with the idea of the circuits and I am not sure that is necessary. But if you feel that is necessary to let seven

act—you are not going to have many cases with a split vote. Most of these cases are rather clearcut; either they are or they are not.

Senator DeConcini. None of the three bills before us today bring in the public or lawyers as members. The idea behind them was to keep the whole procedure entirely within the judicial branch. In your committee's debate over the composition of the commission, what arguments were put forth or developed against having the public and lawyer members, if any?

Chief Justice Cameron. Some of the judges that appeared before us were very strong in their opposition to nonjudge members. We were almost unanimous on the committee, in favoring public members as well as lawyer members, because of the purposes the commission serves. It is 50 percent a public relations operation, that is, someplace where members of the public can go and say, I think Judge Y is not a good judge and he should be removed, and feel they have a representative on that body.

Also the judges are performing a public function. There is no reason why they shouldn't have some public members. I think Thomas Jefferson said everybody in public life ought to be responsible to somebody. Well, not just a fellow judge. The big debate we had in the commission is who appoints the members. And I favor, at least for a start in this procedure that you are recommending, that they should be appointed by a member of the judiciary.

I am not really strong on insisting at this time that there be lawyer members and public members because I am convinced that after the committees are geared up and after they have been functioning a few years, that there will be a movement to provide public members and lawyer members. There will be an evolutionary process. I think they serve a good function. Sometimes lawyers and public members can see things that judges cannot. We have, as you know, Senator, in Arizona public members on our bar disciplinary board. And they have been very beneficial and helpful. Incidentally, experience has shown that public members tend to be softer than the lawyers. If you can imagine Dave Brinigen being soft. But he was one of the members and served very well.

Senator DeConcini. Yes; indeed. An outstanding citizen.

Your prepared statement talks about the machinery imposed in S. 295, the Nunn-DeConcini Act. And I agree that the disciplinary procedures should be prompt. Several critics of the bill agree with you that it is too cumbersome and encompasses too many levels of the procedure. What are your thoughts on merging the investigative and adjudicative functioning into a tribunal instead of a separate function being performed by each separate body?

Chief Justice Cameron. Well, I think, Mr. Chairman, the first thing that we should realize is that this is not a criminal proceeding and it is not a civil proceeding. It is something that is sui generis. The procedure that we are recommending has been approved in *Woodrow* v. *Larkin*, at 421, U.S. 35. It is tried-and-true procedure.

However, over and above that we think it provides the most efficient method of getting to the matter. After all, if you do have a rogue judge, you want to get him off the bench as soon as possible. If he is not a rogue judge and is being unjustly charged, he is entitled to have

that determined as soon as possible. And this type of procedure is the fastest procedure.

But I think there is something else. The two horrible examples that we looked at were the Illinois procedure and the old New York procedure. When you have a separating charging body, they tend to run away with their duties and their responsibility, with the result that there are a lot of unfounded charges being processed to the hearing stage, which do not need to be processed.

It seems that once they get into a separate charging body, they feel they have to justify their existence by filing a certain number of cases. And as I suggested to you, this is not a criminal procedure where we have a body already and we know somebody did it. We have sitting judges who are more than likely guilty of nothing more than deciding a case the wrong way in a particular lawsuit.

Senator DeConcini. Thank you, Judge.

One more comment. I know that the committee, the Joint Committee of Professional Discipline and Appellate Judges in the Conference, has done a great deal of work on standards relating to judicial discipline. We have in our possession a tentative draft of the standards dated December of 1977. Is there a more recent document? And if there is, would you have any objections if we incorporated it in the record at this point? If there is not, would you have objections that we put in the tentative draft?

Chief Justice Cameron. I have a marked copy of the approved draft, which was a limited edition—and you may have it, of course—and the reason why it was a limited edition is because we are publishing this August the report of the commission which will contain standards relating to judicial discipline and disability retirement as well as attorney standards and plus model rules of procedure for a judicial disability commission.

So I have this. It is marked. If you want it, you may have it.

We will have something more later.

Senator DeConcini. Do you have any objections if we include that in the record, or would you prefer us not to do that?

Chief Justice Cameron. No; I have no objection, we will have the full text sent to you some time in August.

If your staff will remind me, we will make sure you have sufficient copies for all.

Senator DeConcini. Thank you. I have no more questions.

[The supplementary material referred to will be furnished for the record and will appear in the appendix.]

Senator DeConcini. Senator?

Senator Bayh. Thank you, Mr. Chairman.

Judge, we appreciate your taking the time to be here with us. You may share the pride in your Senator that we all have because he has been bringing our attention to this very important matter. What does the Arizona constitution provide as far as impeachment or removal of judges?

Chief Justice Cameron. We have the standard impeachment procedure, and then we have a constitutional amendment, which was enacted in 1970 setting up a Judicial Discipline and Disability Commission. The constitutional provision is about a five-line general provision. Under our procedures in Arizona, all rules are promulgated by

the supreme court. So it provides for the membership of the commission, and then the Arizona Supreme Court provides rules for its operation. It was funded and off and running.

It also provides that the commission investigates and hears and makes recommendations to the Supreme Court of Arizona. This is something that is standard throughout most States in that commissions do not finally act but they make recommendations. Now as a practical matter because of the power to recommend, most matters of discipline are handled in the commission privately and confidentially. And I can think as an example, one of our judges, a very well-known judge, had a drinking problem. They called him in and said, "Bill, you are drinking too much. And if you don't stop it, we are going to recommend your removal."

He got on the wagon and he couldn't stand it for more than 4 months. He fell. And they said, "All right, you will resign by the 1st of April or we will make recommendations to the supreme court." He resigned quietly. The judiciary was protected and we got rid of a man who so far as we know had not made any bad decision but still we could not have an alcoholic on the bench.

Senator BAYH. It sound like a good way to resolve the problem. You said the constitution had a standard impeachment provision. And then in 1970 you amended the constitution to provide constitutional authority for the council procedure?

Chief Justice CAMERON. Yes; the constitutional provision creating the judicial qualifications commission, which is kind of a misnomer but that is our discipline commission, did not repeal the impeachment statute. We still have that on the books.

Senator BAYH. What does the original impeachment provision contain?

Chief Justice CAMERON. Well, it is a reflection of the U.S. provision that the House brings the charges and the Senate hears it and the two-thirds or three-fourths, I forget which. Incidentally, we on the committee felt that an impeachment should be retained, even though it is seldom used, as a check against the commission. Because if the commission was not going to do its job, we would have that.

I think we had one impeachment about 8 years ago, not of a judge. And the procedure is horrible, it is horrendous, but it is there on the books.

Senator BAYH. I guess that is sort of the position that some of us are concerned about. One can say the same thing about the impeachment process in the United States, but it is there to be dealt with. And we do not have that constitutional amendment that you have.

Chief Justice CAMERON. Well, Senator, may I say this. I doubt, knowing the process as I do, that you ever will. My suspicion is that if you have a judicial discipline and disability commission which has the power to recommend to the Supreme Court discipline, and if the Supreme Court decides it does not have the power to impeach but only the power to recommend, that would mean that they would send to the House a record that they had already been made requesting Judge Y's impeachment.

The House Judiciary could act on that record very quickly and send it to the Senate. I suspect that there are very few judges, unless he has

a severe mental problem, that would submit himself to that process. And I think you would have a resignation by that time.

Senator BAYH. So you feel that a process that does just about what your commission does—well, let me just read, "would give a judicial council the power to request that the judge voluntarily retire, on a temporary basis the judge be relieved of any duty with respect to cases presently assigned or that no further cases be assigned to a judge, or order the censure of a judge," or we could even go further, "or recommend his impeachment," and then have that forwarded to the House. The power to forward the report of the case to the House you feel would make that judge either shape up or resign, except in very, very unusual cases of mental abnormality where you would have no choice but to impeach?

Chief Justice CAMERON. It is a tremendous——

Senator BAYH. I concur.

Chief Justice CAMERON. I happen to think, if the matter goes to the U.S. Supreme Court and they make the recommendation, it is very simple for them to send that record to the House Judiciary Committee. If the legislative process can be swift, this would be as swift as I can think of.

Senator BAYH. Thank you very much.

I appreciate the time you have given to this whole problem.

Senator DECONCINI. Thank you immensely for your time. And we thank the supreme court members for letting you have the time to come here today. I know your calendars are long.

Chief Justice CAMERON. If our committee can be of further help, we stand ready to do so. I have given you a list of the members of the committee, and I know some will probably submit some written statements for the record.

Senator DECONCINI. Let me also for the record express our thanks for your effort on some of the decisions that the committee adopted for the selection of judges. The Conference of Chief Justices is extremely helpful in that area, and we want to thank you publicly for that.

Our next witness is Professor Gressman of the University of North Carolina Law School.

Professor Gressman, we are very pleased to have you here with us today. Thank you for your time. Your full statement will appear in the record. If you would highlight it and proceed as you please.

STATEMENT OF PROF. EUGENE GRESSMAN, SCHOOL OF LAW, UNIVERSITY OF NORTH CAROLINA

Professor GRESSMAN. I am again honored to appear before the subcommittee headed by Senator DeConcini. The Senator may recall my appearance last year before the subcommittee in support of the Supreme Court jurisdiction bill, which I would like to again endorse.

[The prepared statement of Professor Gressman follows:]

PREPARED STATEMENT OF EUGENE GRESSMAN

This statement addresses two questions raised by the somewhat varying provisions of these three proposals:

(1) Can Congress constitutionally provide for a system of judicial disciplining, including removal from office, of those Federal judges guilty of judicial mis-

conduct, by means other than impeachment? With certain qualifications, my answer to that question is "yes." Impeachment is not the exclusive constitutional method for disciplining or removing Federal judges. Congress has ample power under both the vertical and horizontal provisions of the necessary and proper clause, article I, section 8, clause 18, to direct and to implement the execution of judicial branch's power to discipline itself.

(2) Assuming a judicial disciplinary body is to be created by Congress, must that body be established as an article III court if some form of Supreme Court review is to be provided? My answer to that question is an emphatic and unqualified "yes." Under article III, the Supreme Court's appellate jurisdiction runs only to "cases and controversies" arising in some lower judicial tribunal; it does not run to any determination by an administrative agency or by an administrative arm of the Federal judicial system. The Court's decision in *Chandler* v. *Judicial Council*, 398 U.S. 74, 86 (1970), indicates that a disciplinary action of a judicial council could likely to be reviewed by the Court only if such action "was a judicial act or decision by a judicial tribunal."

Part (3) of this statement examines the three pending proposals in light of the analysis suggested in answering the questions above designated as (1) and (2).

(1) THE NECESSARY AND PROPER CLAUSE EMPOWERS CONGRESS TO PROVIDE FOR JUDICIAL DISCIPLINARY ACTION BY MEANS OTHER THAN IMPEACHMENT

A long and unresolved debate has attended the question whether the Constitution permits any form of discipline or removal of Federal judges other than through the difficult and cumbersome process of impeachment.[1] Not only eminent constitutional scholars [2] but highly respected Justices of the Supreme Court have voiced the argument that impeachment is the sole means recognized by the Constitution for disciplining or removing Federal judges for misconduct in office. In the words of Mr. Justice Black in his *Chandler* dissent, in which Mr. Justice Douglas joined, 398 U.S. at 141–142:

"While judges, like other people, can be tried, convicted, and punished for crimes, no word, phrase, clause, sentence, or even the Constitution taken as a whole, gives any indication that any judge was ever to be partly disqualified or wholly removed from office except by the admittedly difficult method of impeachment by the House of Representatives and conviction by two-thirds of the Senate. Such was the written guarantee in our Constitution of the independence of the judiciary, and such has always been the proud boast of our people."

Similar sentiments were expressed by these two Justices in dissenting from an earlier denial of a stay of the Judicial Council order in the *Chandler* proceeding, 382 U.S. 1003 (1966), where Mr. Justice Black wrote (pp. 1005–1006):

"One of the great advances made in the structure of government by our Constitution was its provision for an independent judiciary—for judges who could do their duty as they saw it without having to account to superior court judges or to anyone else except the Senate sitting as a court of impeachement.* * * To hold that judges can do what this Judicial Council has tried to do to Judge Chandler here would in my judgment violate the plan of our Constitution to preserve, as far as possible, the liberty of the people by guaranteeing that they have judges wholly independent of the Government or any of its agents with the exception of the U.S. Congress acting under its limited power of impeachment. We should stop in its infancy, before it has any growth at all, this idea that the United States district judges can be made accountable for their efficiency or lack of it to the judges just over them in the Federal judicial system."

This notion as to the exclusivity of impeachment as a disciplinary weapon has been questioned by various other constitutional analysts on historical, con-

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[1] The Impeachment Clause, article II, section 4 of the Constitution, provides: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors."

Justices of the Supreme Court and other Federal judges have always been deemed "civil Officers of the United States" for purposes of the Impeachment Clause. Since the adoption of the Constitution, nine Federal judges have been impeached, but only four of them were convicted and removed. (Berger, "Impeachment," 166 (1973).)

[2] See, e.g., Kurland. "The Constitution and Tenure of Federal Judges; Some Notes from History," 36 U. Chi. L. Rev. 665 (1969); Ziskind, "Judicial Tenure in the American Constitution; English and American Precedents," 1969 Sup. Ct. Rev. 135.

stitutional, and policy grounds.[3] It is not the purpose of this statement to review or repeat all the facets of this great debate, much of which has been aired in previous hearings before various subcommittees.[4] Suffice it to say, and with all due respect to Mr. Justice Black and other esteemed proponents of the exclusivity notion, that my own reading of the Constitution as a whole, including all provisions dealing with impeachment, convinces me that there are other "words, phrases, clauses and sentences" in the Constitution that authenticate disciplining and even removing Federal judges other than via the impeachment route. In short, the oft-forgotten provisions of the necessary and proper clause in article I, section 8, if properly understood and applied, can give constitutional sanction to nonimpeachment methods of judicial discipline and removal.

Prof. Raoul Berger, in his noted treatise on the impeachment process, has rightly noted that the constitutional footing of alternative methods of judicial discipline derives from the necessary and proper clause. Berger, "Impeachment," 135, 176 (1973). Many of the proponents of the exclusivity of impeachment, including Mr. Justice Black, have failed even to mention or acknowledge the existence of this rich lode of congressional power, a power which underlies and implements the execution of virtually every other power vested in the three branches of government, save those which are inherently self-executing. It is a power that must be reckoned with by all who would assert that Congress lacks the constitutional authority to implement the effective functioning and execution of the powers and duties assigned by the Constitution to the Congress, the Executive or the judiciary. The contention that Congress lacks any power to provide for the disciplining and removal of Federal judges and lacks that power simply because of the supposed exclusivity of the impeachment clause reflects a misunderstanding of the critical role played by the necessary and proper clause in the execution and implementation of the judicial power of the United States.

The majestic sweep of this congressional power to provide whatever is deemed necessary or proper to make effective—or more effective—the powers dispersed among the three branches was constitutionally immortalized by Chief Justice Marshall's opinion in *McCulloch* v. *Maryland*, 4 Wheat, 316, 420–421 (1819). The necessary and proper clause, said Marshall, lodges in the Congress the power to exercise "its best judgment in the selection of measures to carry into execution the constitutional powers of the government" It was in that context that Marshall then uttered the famous methodology for testing the validity of any given measure selected by Congress to carry into execution one of the given powers of government:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

It bears repeating and emphasizing that this power to select necessary and appropriate means to execute the powers of government applies not only to the powers vested in Congress under article I but also to those powers vested in the Executive under article II and in the judiciary under article III. The necessary and proper clause, in other words, operates both vertically and horizontally with respect to the three great articles of government. In its vertical aspect, this clause empowers Congress to select appropriate means for executing all of its own "foregoing powers" specified in article I, especially in section 8 thereof. In its horizontal aspect, this clause empowers Congress to select appropriate means for executing "all other powers vested by this Constitution in the Government of the United States, or in any department or

[3] Preeminent among those who hold that impeachment was never intended by the Framers to be the sole means of disciplining Federal judges is Prof. Raoul Berger, a frequent witness at hearings on previous proposals like those now under consideration. See particularly his treatment of this matter in Berger, "Impeachment," 122–180 (1973).

[4] In hearings held on September 14, 1977, before the Subcommittee on Improvements in Judicial Machinery on S. 1423 (95th Cong., 1st sess.). Attorney General Bell presented a Department of Justice memorandum stating (p. 84) that impeachment "is not the only constitutionally permissible method for removal of Federal judges" and that "Judicial procedures for removal of the type provided for in S. 1423 are permissible." In 1970 hearings before the Subcommittee on Separation of Powers on the Independence of Federal Judges (91st Cong., 2d sess., p. 330), Assistant Attorney General (now Justice) Rehnquist presented his own and the Department's position that judicial removal of judges in cases of failure to conform with the good behavior standard of article III is "constitutionally permissible."

officer thereof." [5] The immediate importance of this horizontal characteristic of the necessary and proper clause is that Congress can have and does have a constitutional role to play in determining how the judiciary can most effectively execute its powers vested under article III. Chief Justice Marshall's methodology for testing the constitutional validity of any effort by Congress to exercise its "necessary and proper" powers has been followed literally hundreds of times by the Supreme Court. It consists of three questions:

1. Is the end sought legitimate, i.e., is the governmental power sought to be implemented actually and legitimately vested in one of the three branches of government?

2. Are the means selected by Congress "appropriate" and "plainly adapted" to the execution of the designated governmental power?

3. Are such means "not prohibited" by some other provision of the Constitution, and are they "consistent with the letter and spirit of the Constitution"?

These, then, are the questions that must be put in assessing the constitutionality of any proposal that Congress provide for disciplining and removing Federal judges for misconduct outside the parameters of the impeachment clause. The answers, I suggest, compel the conclusion that such an exercise of congressional power is entirely consistent with the letter and spirit of the necessary and proper clause and of all other provisions and clauses of the Constitution—at least as respects all Federal judges other than the Justices of the Supreme Court. Let me make these answers more precise.

1. There are two kinds of ends sought by any proposal that Congress authorize the disciplining and removal of lower Federal court judges found guilty of misconduct. In the first place, article I, section 8, clause 9 vests in the Congress the power "To constitute Tribunals inferior to the Supreme Court." That is one of "the foregoing Powers" that activates the vertical thrust of the necessary and proper clause. To carry that power into execution, and to insure that the inferior courts it creates are not corrupted by their members, Congress may take all steps that it deems necessary, proper or appropriate.

In the second place, the proposal in question may also be directed horizontally in aid of the judiciary's article III powers to conduct and administer a fair and uncorrupted Federal court system. Federal courts must and do have the power, the inherent power, to administer themselves free of dishonesty, malfeasance and corruption. Congress may accordingly provide whatever aid it deems necessary and proper to that end.

But the Supreme Court obviously stands apart from the lower Federal judiciary. It is a court established by article III, not by Congress. It derives its original jurisdiction directly from article III, not from Congress. And while most of its appellate jurisdiction is dependent on legislative decree, the very fact that the Court is at the head of a coordinate branch of government and is the responsible administrator of the entire Federal judiciary suggests the inappropriateness of providing for the disciplining or removal of Supreme Court Justices other than by impeachment. As between the heads of two coordinate branches, the concept of separation of powers might be invoked to render inoperative any legitimate end that Congress might have in mind in disciplining the Justices.

2. By any token, the second question posed by Marshall's "necessary and proper" methodology must be answered in the affirmative. There is obvious power in the Congress to establish a fair system of justice; and there is obvious power in the judiciary to administer and maintain a fair system of justice. To implement and execute those powers, Congress may in its discretion deem it proper and appropriate to eliminate an unfair element in the system—the corrupt and the incompetent judge. If Congress so provides, it becomes a proper means "adapted to that end" of establishing and maintaining such a system.

Congress has had a long history of providing necessary and proper means for executing the judiciary powers under article III. From the first Judiciary Act

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[5] For a modern "rediscovery" and analysis of this horizontal aspect of the necessary and proper clause, see Van Alstyne, "The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of 'The Sweeping Clause'," 36 Ohio St. L. J. 788 (1975).

of 1789 to the present, Congress has spelled out a host of supplemental aids for the lower Federal courts in their administration of the Federal judicial system.[6] Congress has provided the means for establishing uniform rules of evidence, civil procedure and criminal procedure for these courts. And it has set the standards by which a Federal judge must decline to participate in a given case for reasions of bias and prejudice or substantial personal interest or involvement. See 28 U.S.C. §§ 144, 455. It is but a matter of degree for Congress to provide even stronger sanctions for a judge whose judicial actions are marked by corruption or incompetence. All such enactments may be deemed appropriate means for executing judicial functions in an expeditious and fair manner.

3. The third and last inquiry under the "necessary and proper" methodology is whether the proposed judicial disciplinary statute would be prohibited by any other provision of the Constitution, and whether it would be "consistent with the letter and spirit of the Constitution." The immediate answer is that there is not a word, phrase or sentence in the Constitution that proscribes such a statute. Nor can the statute be thought of as inconsistent with the letter or spirit of the Constitution, unless we assume that the Framers meant to endorse and promote a corrupt and incompetent Federal judicial system.

It is at this last point in the "necessary and proper" methodology that the meaning and impact of the impeachment clause must be assessed. Several observations are in order in that respect.

a. The impeachment clause by its terms is not a restriction on the powers of Congress. Rather it is a grant to Congress of a specific but rather limited power of impeachment. As Chief Justice Marshall said in the *McCulloch* case, 4 Wheat. at 420, an unqualified grant of a specific power to Congress should not be read as "concealing an intention to narrow the discretion of the national legislature [stemming from the necessary and proper clause] under words which purport to enlarge it."

b. Not one word is said in the impeachment clause as to the purported exclusivity of impeachment as a means of removing a civil officer from office. It neither affirms nor denies that other forms of discipline or removal may be constitutionally possible. Indeed, the only kind of exclusivity that can be ascribed to the impeachment clause comes from entirely separate constitutional provisions, i.e., the provision in article I, section 2 that gives the House "the sole Power of Impeachment," and the provision in Article I, section 3 that gives the Senate "the sole power to try all impeachments."

c. The impeachment clause does not reflect any brooding spirit in the Constitution that impeachment is the only process by which civil officers in the various branches of government, other than the President and Vice President, can be disciplined or removed from office. Impeachment has long been deemed totally inapplicable to the legislative branch. There is no mention whatever in article III of impeachment of judicial officers. Judges have been subjected to the impeachment process only by the historic tour de force of applying to them an impeachment provision that was placed by the framers in article II, which deals exclusively with executive branch officers.

Yet many officers in the executive branch can be removed by ways other than impeachment. The President has the power to remove certain inferior executive officials on the common law notion that the power of appointment carries with it the power of removal, unless a statute otherwise provides. And when a statute does set a tenure for a particular executive office, Congress is exercising its "necessary and proper" power to determine how and when the executive officer may lose his office.

d. The fact that article III sets the tenure of article III judges as continuing throughout "good behavior" does not operate to immunize such judges from discipline or removal by means other than impeachment where they are guilty of so-called "bad behavior." On the contrary, the "good behavior" language of article III was borrowed from the English common law, which used those words to describe the duration of judicial tenure in a way that would preclude termination of tenure at the will of the sovereign. The notion that "good behavior" tenure can be terminated only on proof of "bad behavior" is as applicable to termination by a judicial process as it is to termination by the impeachment process.

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[6] In *Wayman* v. *Southard*, 10 Wheat. 1, 21–22 (1825), the Supreme Court, speaking through Chief Justice Marshall, used the necessary and proper clause to validate a section of the Judiciary Act of 1789 that provided the means for carrying into effect a judgment rendered by a Federal court.

e. The repeated assertions that the constitutional guarantees of an independent judiciary would be violated by judicial disciplinary proceedings are without foundation. As the majority opinion in the *Chandler* case noted, 398 U.S. at 84, there is an "imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function," but there is no need to carry that independence to the point where each judge becomes "the absolute rule of his manner of conducting judicial business." Reasonable standards and procedures for the conduct of judicial business must be established. As the Court added in *Chandler*, 398 U.S. at 85, "if one judge in any system refuses to abide by such reasonable procedures it can hardly be that the extraordinary machinery of impeachment is the only recourse."

f. The constitutional guarantee of an independent judiciary is often said to be violated by placing in the hands of one's judicial peers and superiors the power to discipline or remove from judicial office. But judges, perhaps even more than the legislators involved in the impeachment process, are likely to be the most concerned, the most protective, about the judicial independence concept. If the judges themselves cannot be trusted to preserve that independence, then the asserted guarantee of independence becomes a hollow one indeed.

The short of it is that neither the letter nor the spirit of the Constitution forbids Congress from directing and authorizing the judicial branch to clean its own house. In exercise of its vast discretionary powers under the necessary and proper clause, Congress can legitimately provide for judicial procedures leading to the discipline and possible removal from office of judges of the lower Federal courts—all of which were the creation of Congress in the first place.

But Congress should hesitate long before attempting to impose such disciplinary procedures upon the Justices of the Supreme Court. The special place that the Court occupies in our governmental system and the embarrassment that lower Federal judges would likely suffer in passing upon the asserted "bad behavior" of a Supreme Court Justice combine to make reasonable the continuation of the present practice of dealing with such matters informally, where impeachment proceedings are not warranted.

(2) IF SUPREME COURT REVIEW OF JUDICIAL DISCIPLINARY ACTION IS TO BE HAD, THE BODY IMPOSING THE DISCIPLINARY SANCTION MUST BE CONSTITUTED AS AN ARTICLE III JUDICIAL TRIBUNAL

The Supreme Court in its *Chandler* decision virtually dictated the answer to the second question posed in this statement. The Court stated, 398 U.S. at 86, that it "would be no mean feat" to assume appellate jurisdiction over a disciplinary order issued by a Judicial Council. The Court there conceived the Judicial Council, as established by Congress, as nothing more than "an administrative body functioning in a very limited area in a narrow sense as a 'board of directors' for the circuit." (Ibid., 86 n. 7.) Review of the challenged disciplinary action of the Judicial Council perhaps could be had, said the Court, only if such action of the Judicial Council "was a judicial act or decision by a judicial tribunal." Ibid., 86.

The message of the *Chandler* opinion is unmistakable and unexceptionable. If Congress desires to make the disciplinary actions of a Judicial Council or the Judicial Conference reviewable by the Supreme Court, it must constitute such an administrative body as an article III tribunal, exercising a judicial function by rendering a judicial decision in a disciplinary "case or controversy." The Supreme Court simply has no appellate jurisdiction over any decision by an administrative body, even though that body happens to be composed of article III judges. Article III so dictates.

The "case or controversy" requirement of article III is readily satisfied. Historically, under the common law, the forfeiture of an office held during good behavior was determined in judicial proceedings, by way of a writ of scire facias. In more modern times, the Court has consistently accepted jurisdiction over petitions for certiorari that have challenged judicial disciplinary and removal actions directed at State court judges where the actions were finally resolved by the highest court of the State.

But the "case or controversy" requirement of article III extends not only to Supreme Court proceedings but to the proceedings in some lower Federal court. And it must be a "case or controversy" resolved by a body established as a judicial tribunal and acting as a judicial tribunal.

The need for establishing a judicial council or the Judicial Conference as an article III judicial tribunal is easily satisfied. Those administrative bodies are

already composed of article III judges serving during good behavior. Congress need only provide a method for staffing a new special disciplinary tribunal with some or all of these article III judges now constituting the Judicial Council or Judicial Conference, establish that tribunal as one created under article III, give the new court either ad hoc or continuing life, and pin a distinctive name on the tribunal.

Precedents abound for creating a special court under article III staffed with judges of other Federal courts. All three-judge district courts, happily now declining in number, are created in that fashion. The most recent precedent is found in the Foreign Intelligence Surveillance Act of 1978, Public Law 95–911, where special courts composed of article III judges were created to hear applications and to review denials of applications for orders to approve certain electronic surveillances.

But unless this procedure for establishing a disciplinary tribunal under article III is followed, the Supreme Court will doubtless consider itself without jurisdiction to review any disciplinary or removal order of a Judicial Council or the Judicial Conference.

(3) APPLICATION OF THE FOREGOING COMMENTS TO THE THREE PENDING PROPOSALS

The foregoing discussion renders it unnecessary to make prolonged comments about the three pending proposals. With respect to the two issues or questions discussed in this statement, those comments are:

S. 295.—This proposal would establish a Court on Judicial Conduct and Disability, staffed with article III judges, to review disciplinary recommendations of a Judicial Conduct and Disability Commission. The court is authorized to order involuntary retirement, removal from office or censure of the affected judge. Such action would clearly involve a case or controversy, making it possible for the Supreme Court to review it by writ of certiorari, as the bill provides.

But I would seriously question the advisability of subjecting the Justices of the Supreme Court to the procedures of the aforesaid commission and court. With respect to the Justices, S. 295 limits possible sanctions to (1) recommendation to the House that a justice be impeached if his conduct is found to be an impeachable offense; (2) recommendation to the House that a justice be censured if his conduct is found not to be impeachable but to be inconsistent with "the good behavior required by article III, section 1 of the Constitution;" or (3) dismissal of the case. No provision is made for review by the Supreme Court.

Apart from my reservations previously expressed as to the advisability of including the Justices within the reach of proposals of this type, I fear that a serious separation of powers problem is raised by the proposal that the Court on Judicial Conduct and Disability make formal recommendations to the House concerning impeachment and censure. Impeachment in particular is the sole prerogative of the House, and the judicial branch would seem to exceed its legitimate functions if it renders advisory opinions and recommendations as to the impeachability of a Justice. If the House is adequately informed as to the allegations and facts respecting an impeachable offense, and it normally would be in a matter of that magnitude, it is well enough to leave to the House the decision whether to proceed with impeachment. The judiciary has no role to play in that matter.

S. 522.—This bill deals only with judges of the United States, which appears to exclude Justices of the Supreme Court. But the bill falters in its attempt to provide Supreme Court review under 28 U.S.C. § 1254 of the disciplinary rulings of a judicial council, which is not designated as a special disciplinary court under article III.

Section 1254, of course, refers only to Supreme Court review of the decisions of the Federal courts of appeals. As presently written, § 1254 would provide no jurisdiction base for reviewing the decisions of a judicial council of a circuit, even if it were to be designated as an article III court for these disciplinary purposes. In short, if S. 522 is to provide for Supreme Court review, the Judicial Council must first be reconstituted as an article III tribunal and then some special jurisdictional provision for Supreme Court review must be established.

S. 522 does have one meritorious feature lacking in S. 295 and S. 678. It makes no attempt to include among the sanctions that the Judicial Councils can impose a recommendation to the House that impeachment is warranted. Instead, it provides that full written reports of all disciplinary actions taken by the

councils be routinely sent to the House, without any comment or recommendation as to the impeachment possibilities. The House is thus left free to arrive at its own determinations as to impeachment, which is consistent with the article I, section 2 provision that the House shall have "the sole power of impeachment."

S. 678.—Title I, part E of this bill addresses the disciplinary problems only in terms of Federal district judges and Federal circuit judges, thus avoiding any problems with respect to covering Supreme Court Justices within its disciplinary ambit.

The bill provides for disciplinary matters to be heard and considered in the first instance by the respective judicial councils, with review of council actions being had before the Judicial Conference of the United States. No attempt is made to reconstitute the Councils or the Conference as article III tribunals, and no provision is made for Supreme Court review of the actions of these administrative bodies.

S. 678 does raise one problem, however. It permits all the Councils to recommend to the Conference that the Conference recommend impeachment to the House of Representatives pursuant to article I, section 3 and article II, section 4 of the Constitution. As with respect to a similar provision in S. 295, this authorization to make a formal recommendation to the House that impeachment proceedings are warranted may raise a serious problem as to separation of powers. In addition, while no court has ever tried to review an impeachment, it is possible that an impeached and convicted judge might some day protest in court the propriety or the procedures employed in the impeachment proceeding. In that event, the judicial branch, having recommended impeachment in the first place, would find itself in an unfortunate conflict of interests. However remote the possibility of such a conflict, it serves to augment the inappropriateness of a judicial tribunal recommending to the House the impeachment of a member of the judicial branch.

CONCLUSION

The major purpose of these proposals is to provide a less cumbersome alternative to the use of the impeachment process to discipline and remove Federal judges guilty of misconduct or "bad behavior" in their official duties. That purpose, I submit, can be achieved in a manner fully consistent with the powers vested in Congress by the necessary and proper clause. It is a purpose, moreover, that is equally consistent with the language and the purpose of the impeachment clause.

Professor GRESSMAN [continuing]. I was invited to appear at these proceedings with particular reference to two aspects of the proposals that are before the subcommittee, to wit, the constitutionality of the proposals to impose some sort of judicial discipline and/or removal short of impeachment, and second, to address the problem that is implicit or expressed in some of these proposals to permit some kind of Supreme Court review of the action taken by a lower disciplinary body.

I am not, of course, going to repeat my written statement, which the Senator has indicated will become part of my record. I will simply address myself very briefly to my position with respect to these two matters. And I guess I would like to reverse the order in which I presented them in my written statement by addressing first of all the problems of allowing or authorizing the Supreme Court to review any possible disciplinary action that might be taken. That of course is a matter of policy to be determined in the first instance by Congress, whether any Supreme Court review is to be permitted.

There is no requirement that there be any Supreme Court review. The action of the judicial or administrative body that is dealing with judicial discipline can be made final if the Congress so desires. Therefore, assuming that there is a desire by the Congress to permit Supreme

Court review, as I believe two of the bills before you this day—S. 678 and S. 522—provide, the problem with respect to allowing Supreme Court review has really been answered definitively by the Supreme Court's decision in *Chandler* v. *The Judicial Council*. The Senators will recall that that involved action by a judicial council, I believe in the 10th circuit, which directed that Judge Chandler be relieved of further assignments. And he sought, by writ of mandamus in the Supreme Court, to secure judicial review of that action.

The Supreme Court did not find it necessary to resolve that judicial review question precisely, but the dictum was very definite and precise. The Court said that it would be no mean feat for the Court to even try to assume jurisdiction, appellate jurisdiction, over a judicial council disciplinary order of that nature, because they viewed the judicial council, as then constituted and as now constituted under law, as merely an administrative arm of the judicial branch of the Government. And review could be possible, said the Court, only if such action was a judicial act or a decision by a judicial tribunal.

I repeat they did not view the judicial council as a judicial tribunal. It was and it is an administrative arm of the judiciary. That being true, we have to rely upon the basic proposition that the appellate jurisdiction of the Supreme Court can only go to the review of judicial acts of judicial tribunals. And therefore, if the Congress determines to provide some kind of judicial review, it is going to have to designate the agency that is finally imposing some kind of disciplinary or removal order, Mr. Chairman, as an article III tribunal. Such has been done as to the proposed Court on Judicial Conduct and Disability in S. 295.

It is perfectly permissible, and indeed I would suggest required on the assumption that the desired purpose is to achieve Supreme Court review, that the Congress designate this disciplinary body as an article III court. There are plenty of precedents for that. You already have judicial councils composed of article III judges, and of course they are attached to their respective circuit and district courts. But you can superimpose upon those article III judges another assignment to another court simply by the stroke of the legislative pen, designating them as an ad hoc or some sort of a continuing tribunal, perhaps with tenure of a year or two, or rotating membership, or whatever.

Many courts have been superimposed in that fashion. And it simply solves all the problems, which the *Chandler* case revealed as to Supreme Court review.

I would like to add just one minor addendum with respect to S. 522, which does not quite propose in my judgment to establish an article III tribunal. It does give the judicial powers of a Federal court to the judicial councils when acting in a disciplinary capacity. I would suggest that this ought to be made a little more express and eliminate all possible doubt that you are doing something more than giving them judicial powers.

You are really constituting each council as an article III tribunal. It only needs a phrase or a clause to perfect that. And that it seems to me would completely eliminate any conceivable problem for the Supreme Court. And I might say this has been the modern history with respect to creating or superimposing these article III tribunals composed of article III judges already in existence.

We have had three-judge Federal courts for many years. eW have had a number of temporary or emergency courts of appeals. We had one situation last year involving foreign surveillance matters in which a group of existing or sitting article III judges were designated to sit or to participate on a completely different article III tribunal. And that kind of designation, it seems to me, is the basic requirement if Supreme Court review is determined to be desirable.

Now with respect to the constitutionality of all of these proposals, I include both disciplinary and removal sanctions within my general remarks about constitutionality. I might say preliminarily that I approach this question of the constitutionality of judicial discipline and removal short of impeachment fresh from the battlefields of an ongoing controversy, a constitutional controversy in which I have been privileged to represent the U.S. House of Representatives. I refer to the litigation involving the constitutionality of the one-House veto. You may be aware of the fact that Mr. Cornelius Kennedy is acting as counsel to the Senate with respect to this litigation. That litigation respecting the one-House veto has led us to a modern rediscovery, if you will, of a very great and important source of congressional power. That source is the necessary and proper clause of article I, section 8, clause 18, of the Constitution.

That has been called the sweeping clause, but I prefer to call it the sleeping clause. While the clause has very deep roots in constitutional law, going back to the famous decision by Chief Justice Marshall in *McCulloch* v. *Maryland*, and while it has been applied literally hundreds of times by the Supreme Court to sustain congressional actions of all varieties, it has apparently fallen into disuse or disfavor, at least by many of the constitutional analysts who have addressed various aspects of congressional power in modern times.

Let me say briefly that we have achieved a substantial degree of success in utilizing "the necessary and proper" clause to sustain the one-House veto. In *Atkins* v. *the United States*, in 556 F. 2d 1028, where the Supreme Court denied certiorari, 434 U.S. 1009, the Court of Claims held that the necessary and proper clause authorized the Congress to utilize the one-House veto technique as an alternative to the normal legislative process of having a bill enacted by the two Houses of Congress and signed by the President.

It is somewhat amazing to me to see that many of the arguments that were put forth to contest the constitutionality of that device are mirrored in part by the arguments that are now put forth to protest the constitutionality of some form of judicial discipline or removal, short of impeachment.

Without attempting to analyze this power in great depth, I will say simply that the clause itself has both a vertical and a horizontal effect. The clause, which follows the detailing of all of the basic powers of the Congress in article I, section 8, says that the Congress shall have the power to execute all of those foregoing powers by any means that it deems necessary and proper.

The clause thus refers to virtually all the powers vested in Congress under section 8 and other portions of article I. That is what we call the vertical thrust of the necessary and proper clause.

The necessary and proper clause also has another dimension that is vital to understanding the affirmative power that this Congress has to

48-202 O - 79 - 8

make judicial discipline work short of impeachment. The necessary and proper clause says, horizontally, that the Congress may adopt whatever it deems necessary and proper "to execute all other powers vested in the Government of the United States or any officer or department thereof." That means—and there are Supreme Court decisions to sustain this—that this Congress can take appropriate steps to help execute the non-self-executing powers of the President under article II or the judiciary under article III.

If you use the simple test devised by Chief Justice Marshall in the *McCulloch* case, I submit that these proposals for judicial discipline short of impeachment can be fully sustained under the Constitution. It is for you to decide how far you want to go. If you only want to provide simple forms of discipline short of removal or if you want to go the entire length and permit removal of judges, either is sustainable under the "necessary and proper" analysis.

My one reservation on that score is largely a matter of policy. I think it would be a mistake to permit any form of discipline or removal of Supreme Court Justices. I believe the Supreme Court is something apart from the run of lower Federal tribunals. It is the only court established by article III and it is the head of a coordinate branch of government. I think serious thought ought to be given as to whether Congress at this point wants to create a vehicle for disciplining or removing the Supreme Court Justices short of impeachment.

But let me get back very briefly to the constitutional analysis. And I might say that the only person that I know who has testified in this committee's past proceedings and who has even mentioned the necessary and proper clause is of course Prof. Raoul Berger. You will note in his testimony in the past and in his leading treaties on impeachment that he refers rather briefly to the fact that the constitutional basis for judicial removal and discipline is the necessary and proper clause. What he does not do is to develop that thesis, which I have tried to do a little bit in my written statement. But the situation is essentially this.

If we take the analysis that Marshall has given us and that the Supreme Court has followed ever since when this matter is brought to its attention, the first problem is to identify the power of the Government which Congress seeks to implement or to execute. If there be a power vested in the Congress or in the President or in the judiciary, that is the first problem of identification.

I submit that there are a number of powers that are existent and to which these proposals may be attached as a necessary and proper means. To wit, the Congress has the power to establish all inferior tribunals, an article I power of the Congress. Another power that is very obvious is the power of the Senate of the United States to confirm all appointments to the Federal courts for a term of good behavior. There is another and perhaps implicit power in article III, vested in the first instance in the Federal judiciary, that permits the judges to administer themselves and their courts. Overlaying that power is the power of Congress to create the Federal judicial system and to implement and help execute the necessary administrative and disciplinary powers within the judiciary. That power is necessarily resident in article III as it is written, and the power to implement it is necesarily resident in the necessary and proper clause.

Now, the second question that Marshall asks is: Are the means selected by Congress appropriate to execute one of those identified powers of government? Well, it seems to me that requiring some kind of judicial discipline and/or removal may well be considered appropriate in the eyes and in the discretion of the Congress, Mr. Chairman, to implement the power to create the lower Federal tribunals in the first place or to condition the appointment of judges to the Federal Bench or indeed to direct the judiciary to administer its judicial system fairly. In short, to clean house if necessary.

The final question that one puts under this Marshall analysis is whether the means selected by Congress are consistent with the letter and spirit of the Constitution. With respect to that I suggest that these proposals are fully consistent with the letter and spirit. In the first place, there is nothing in the Constitution that prohibits Congress from seeking to provide the judiciary with its own weapon to execute and to clean its own judicial house and put it in order.

The most frequent clause that is raised, of course, is the impeachment clause. Arguments are constantly made that the impeachment clause constitutes the exclusive way in which judges can be removed. And I might say that that argument is also made with respect to judicial discipline short of removal.

You will recall that the *Chandler* case did not involve removing Judge Chandler. The judicial council simply ordered that no further cases be assigned to the judge. And yet, the dissent of Justices Black and Douglas said that even that was prohibited by the impeachment clause.

And why? Because the impeachment clause is the exclusive provision in the Constitution. Well, I suggest that needs some rethinking. There is not one word in the impeachment clause that says it is exclusive. It does not prohibit Congress from adopting some alternative methods of disciplining or removing judges. Indeed, it is a grant of power not a limitation on congressional power. It says that the Congress shall have the power of impeachment in designated cases involving high crimes and misdemeanors and treason and bribery. It says nothing else. Apparently there is no power to impeach for some less offense than a high crime or a misdemeanor, but neither is there any prohibition against Congress providing some other means of removal. And you get back to the *McCulloch* decision of Chief Justice Marshall, where he said that an affirmative grant of power, which I submit the impeachment clause is, is not to be construed as an intention by the framers to narrow the discretion implicit in Congress in the necessary and proper clause.

So I submit that those who challenge the constitutionality of this procedure must first address this very significant proposition that the impeachment clause is not really a limitation on the powers, on the vast discretionary powers vested in Congress under the necessary and proper clause.

Now another argument is made, as you well know, that there is somewhere in the Constitution an all-enveloping concept of independence of the judges, that judges must be independent of Congress, of the President, and I assume from themselves. Well, I yield to no one in

my sympathy and my support of the idea of judicial independence. Again turn to the *Chandler* case, which contains the answer, really, to Justices Black and Douglas' raising of this independence claim. The majority of the Court, speaking through the Chief Justice, said that, yes, there is a judicial independence concept in the Constitution, if you will, and there is an imperative need for total and absolute independence of judges in deciding cases and/or in any phase of the judicial function. But, said the Chief Justice, it is quite another matter to say that each judge in a complex system should be the absolute ruler of his manner of conducting judicial business.

And when you have a judge who is abusing his office, he is not abusing that in the name of independence. Independence has absolutely nothing to do with a judge who commits a crime or is incapable of administering a court fairly and in accordance with the way a court should be conducted.

And I might also add there that the Chief Justice went on to make a very significant and I think compelling remark that is very relevant to the very proposition before the Congress today:

> If any one judge in any system refuses to abide by reasonable procedures that have been established for the conduct of his office, it can hardly be that the extraordinary machinery of impeachment is the only recourse.

Now that is practically an invitation, if not a ruling, that the Congress could well adopt some measure other than impeachment to insure that the judicial branch is conducted properly. And certainly that would involve no problem with respect to judicial independence.

Well, I think in short that the debate about the constitutionality of these proposals has been too much convoluted. It starts and it often ends with a discussion of the impeachment clause and whether or not that is an exclusive method of removing judges. I suggest that the first question is: Is there an affirmative power in Congress to provide this? And then, if you find there is an affirmative power, then is it limited by the impeachment clause? And that is the whole technique and analysis in the use of the necessary and proper clause. If you approach the problem by starting with the necessary and proper clause and can legitimately say, as I think you can, that these proposals are being used to implement the various powers vested in the Congress and in the judiciary, and then if you agree, as I think we must, that these proposals are appropriate to that end, it leaves you with a different approach to the problem of the impeachment clause.

And simply stated, the final question is: Is judicial discipline inconsistent with the theory of independence of judges? And I suggest any fair analysis of those propositions will lead one to conclude that there is full constitutional power to provide for discipline and even removal, short of impeachment.

Senator DeConcini. Professor, thank you very much for your very explicit testimony. And indeed you answered a number of the questions that I had intended to ask. I have posed here. I have additional questions, but due to time constraints. I ask if I could just submit them to you at a later date and request a written response.

Professor Gressman. Surely.

Senator DeConcini. Let me ask you one about the Court on Judicial Conduct and Disability. Under S. 295 it has an option to make a recom-

mendation and submit it to the House of Representatives regarding action. Do you find any problem with that procedure?

Professor GRESSMAN. A recommendation of impeachment?

Senator DECONCINI. Yes.

Professor GRESSMAN. I do have a slight problem with that. It seems to me that the judiciary, whatever form it takes, should not be in the position of recommending an impeachment of one of its own Members to the Congress. I think a separation of powers problem might be raised about that. It is probably unnecessary to have any kind of formal recommendation. I think it would carry an undue weight, for example, with respect to a fair trial being accorded the judge. Here his peers have recommended to the House of Representatives that he be impeached. It seems to me quite adequate, as I believe S. 522 does, to simply send all the records of all disciplinary proceedings to the House of Representatives and allow the House Members or the Judiciary Committee to make its own judgment free of any recommendation about impeachment. And I believe that if a situation is all that bad, that impeachability will be fully known and will be appreciated by the House to begin with; and particularly if they get all of these reports from the judicial body, they can be expected to take appropriate impeachment action where it is called for.

Senator DECONCINI. Thank you, Professor. That is a very good point.

Senator Bayh.

Senator BAYH. Professor Gressman, I appreciate the degree of thought that you have given this issue. I appreciate getting your opinion and examining it carefully. You seem to rely rather heavily on *Chandler*. What exactly did *Chandler* decide?

Professor GRESSMAN. Well, they found eventually in the opinion that there were some alternative remedies that Judge Chandler could pursue. I think they were anxious not to decide that case on its merits. They sidestepped the ultimate question as to whether the judicial council order was proper. They found that there were some other things that Judge Chandler might pursue that would make it inappropriate for the Court to resolve that question.

But in doing that they made very strong statements in the majority opinion about both the reviewability of the judicial council's action as well as the appropriateness of some sort of removal or disciplinary action short of impeachment. And they were perhaps compelled to make some of those remarks by the vigor of the dissenting opinions in that case, which they raised directly the constitutional impropriety of doing anything less than impeachment.

Senator BAYH. Well, I guess, and I don't want to put words in your mouth, but I think probably that to say the Court was trying to avoid having to decide the case, the ultimate consequence was they didn't decide much of anything because a reconciliation of that problem was made moot.

I don't recall the majority opinion in *Chandler* using the word "removal." They talked about discipline, but I don't think they talked about removal.

Professor GRESSMAN. No, that is true. There was no attempt to remove Judge Chandler. They simply said he was not to complete his assignments and was not to have any more cases assigned to him.

Senator BAYH. The Court's discussion dealt, as I recall, with the opportunity of establishing alternative ways to mete out discipline. I don't think the Court used the word "removal," did they? You know, it is different if we are talking about disciplining, censuring, limiting cases, this kind of thing. If we are talking about outright removal, then we get into the concern that I have.

Professor GRESSMAN. Well, the only thing that comes close to that thought, it seems to me, is this one sentence I quoted, which refers to impeachment, which must refer to some kind of removal. It simply says if any one judge gets out of line, it can hardly be that the extraordinary machinery of impeachment is the only recourse. Now, I don't think that that necessarily means that the Chief Justice was talking about removal short of impeachment. I agree.

Senator BAYH. That could mean any kind of discipline short of removal, couldn't it?

Professor GRESSMAN. That is right. All I think I meant to say, Senator, is that the constitutional theory that I have proposed does not distinguish between discipline and removal. I think both can be sustained under that theory. Now, it is a matter of congressional judgment as to whether you want to go as far as to provide removal, as some of these other bills do, of course. And it may be a matter of policy. But I think that the constitutional analysis that I suggest will permit removal of judges. Now, this, of course, is documented historically and analytically by Professor Barger's statements and writing on this subject. And I don't think he has made any meaningful demarcation between removal and lesser disciplines.

Senator BAYH. No; he hasn't, and you have not; and you have made your case very clear and very eloquently. I for one am glad to have it and want to study it over very carefully. And although you feel that the "necessary and proper" clause can be used as constitutional support, it is not really fair to rely on *Chandler* to support that conclusion, is it?

Professor GRESSMAN. That is probably true; yes. But I think *Chandler* is a significant acknowledgment by the Supreme Court that there is some kind of power, short of impeachment, to discipline judges.

Senator BAYH. Those of us who find ourselves on the other side of this argument, as far as the finality and exclusiveness of the impeachment clause, at least speaking for myself, think it is important to have some sort of disciplinary procedure; and we are trying to work that out in a way that is consistent with the impeachment clause, which is the only discipline which we are concerned about.

Professor GRESSMAN. I agree. I am well aware of that concern. I would say only that I don't think the impeachment clause is one of limitation to begin with. I think, as I said before, it is an affirmative grant, a limited grant, but not a limitation on any other power in Congress to provide alternatives.

But remember also that the dissents in *Chandler* went to a low-level type of discipline, and even as to that, Justices Black and Douglas brought the full force of the argument with respect to the impeachment clause. In other words, they were making no distinction as to the effect of the impeachment clause, whether on the kind of discipline that *Chandler* was given, or, obviously, with respect to any

kind of removal, short of impeachment. That is the basic argument, as I understand it, that goes to your proposals and to those that would permit removal.

Senator BAYH. Well, I suspect I don't think that is our argument, and I don't think that one can, first of all, take what the minority opinion and dissents say in *Chandler* as necessarily being relevant to what the majority held, particularly when the majority did not deal specifically with removal. And it is the feeling of many of us—I can't speak for everybody on the other side of this argument—that we ought to have, and we can have completely constitutionally, a disciplinary system short of outright removal, and indeed have that system structured in such a way that we can sort of prod the House to awaken to the problem.

I find it rather ironic that you are concerned about any recommendations for impeachment that may be structured into a bill. We reworked our bill so that there would not be a recommendation for impeachment.

But I find it rather ironic that in your opinion we can't have a judicial panel recommendation to the House that there are grounds for impeachment without prejudicing the case, but we can remove the judge outright. That panel that can't recommend for fear of prejudicing the trial in the House and the Senate nevertheless could jerk the fellow out of there.

Professor GRESSMAN. Well, I think there are two different concepts involved there. One of the other things, of course, is that if you have a judicial body recommending impeachment, it is conceivable that the judicial system may someday be asked to review the constitutionality of a particular impeachment that might result from its recommendation, and you would get sort of a conflict of interest within the judiciary in that respect.

But let me say—without prolonging my response any more than necessary—I think the analysis I suggest, the constitutional analysis, will fully support and indeed may be the only full constitutional support for precisely the kind of discipline, short of removal, that you are concerned about; in other words, I think my arguments will fully sustain your position, as well as one that would allow removal.

But I say that it is a matter of judgment for the Congress to make as to how far you want to go along those lines.

Senator BAYH. Could I ask one other question? I know our chairman is anxious to move us on here. I just ask this one because I think it is a rather basic one.

You believe that we can use the necessary and proper clause. Maybe it ought to be a two-headed question about the necessary and proper clause because I want to get to your interpretation and see if we have any common ground.

You mentioned you feel a policy reason for not permitting the necessary and proper clause to give the Congress power to structure the removal of a Supreme Court judge by means other than impeachment, but I assume from what you said before that you believe the necessary and proper clause would give us the power to do so.

Professor GRESSMAN. I think the theory of it would so permit, but I just hesitate to say that Congress should immediately jump in with the full extent of this theory——

Senator BAYH. Well, Professor, let me suggest to you that this is the dangerous ground we are on. Once you breach this—and maybe I will just go back to the basic question. My concern is that you cannot very well say that the necessary and proper clause gives us the power, but for policy reasons it should not be used, without opening the door for some circumstance in the future in which it would be taken advantage of by us. And as I read the necessary and proper clause and the way it has been construed by past courts, you must first get to the availability of this power.

Am I fair in saying that the necessary and proper clause can be utilized in this particular instance the impeachment clause must be interpreted in such a way that it is not a limitation, an absolute prohibition? If that is our argument, if impeachment says this is the only way to remove, then the necessary and proper clause really does not come into play, does it?

Professor GRESSMAN. Well, that is the third step in the analysis. The first step is to identify the power that is vested in some department of Government. I think one of the critical powers to which the means might be connected is the power in article I, section 8, in the Congress, to establish inferior judicial tribunals. Now, that excludes the Supreme Court and it may be that if you were to tie in this kind of a proposal as an execution of the power to establish these article III tribunals in the first place, that that would give you a clean constitutional analysis which would not embarrass you in any way by not having it extended to the Supreme Court.

In other words, I think a constitutional argument can be grounded under the necessary and proper clause that this kind of discipline, if not removal, is necessary and proper to execute and implement the congressional power to establish inferior tribunals.

Senator BAYH. Yes, but aren't we talking about giving article I tribunals the power to remove article III judges?

Professor GRESSMAN. No; we are talking about giving article III judges, I assume——

Senator BAYH. Aren't you saying that this is an article I tribunal that is being established?

Professor GRESSMAN. No; I think I misspoke. It is a power vested in Congress under article I, which permits the Congress to establish any kind of lower tribunal, be it an article I court or an article III court. All of the lower Federal courts in existence today are in existence pursuant to that article I power that the Congress has to establish them. Congress started doing that in 1789 and has continued it ever since.

Senator BAYH. Yes, I understand.

Professor GRESSMAN. The final question, however, is whether or not, if you assume that that power is being executed by this means, it is consistent with the letter and the spirit of the impeachment clause.

I say, for reasons I have given already, that it is consistent. That is because the impeachment clause fairly read—and this, of course, I understand, is debatable—is not a limitation. It seems to me if you go back to Marshall's opinion in *McCulloch* where he says that when you are dealing with a clause in the Constitution that does not expressly intend to limit but really is a grant of power that would not otherwise exist—and that, I submit, is what the impeachment clause is all about: It is a grant to the Congress to impeach—and he says that if that is

all there is to that kind of clause, then it is not to be read as a limitation or a restriction on the means by which you may execute a vested power.

Senator BAYH. I appreciate your opinion. I find it very stimulating and provocative.

Professor GRESSMAN. I think it is a rich lode of congressional power that has been lost sight of in recent years; it was well articulated by Marshall and by literally hundreds of the earlier Supreme Court decisions. But the recent Court has also recognized it as recently as, I think, in the *Buckley* v. *Valeo* case a few years ago, 424 U.S. 1, 90, 132.

Senator BAYH. Well, I understand that the clause has been well developed here more recently, but it has not been developed in regard to removing judges.

Professor GRESSMAN. Well, of course——

Senator BAYH. And unfortunately, if the power were there originally, then we can use it today; but, interestingly enough, we have gone decade after decade without it being developed. We do not have any of our Founding Fathers who are closer to the intent that we are in suggesting this; in fact, you are familiar with what Hamilton and some of the rest of them wrote in the Federalist papers; and even Jefferson, who came to be opposed to the impeachment process, never intimated there was ever any other way of doing it other than impeachment.

Profesor GRESSMAN. But at that same time those same framers gave us the necessary and proper clause, and it is one of the glories of the Constitution, as you well know, that it can be utilized and developed centuries later to meet problems that were not in existence in 1787, and they gave us the source of power for dealing with modern problems.

Now, they didn't have a problem of a vast judicial machinery in 1787; they didn't have the problems of discipline that have now been created by this vast judicial system in the Federal Government.

Senator BAYH. Well, you have been very kind. I don't want to delay our chairmen. I think, really, our disagreement comes before you get to the development of the necessary and proper clause. In other words, is impeachment an absolute prohibition, or is it a grant of power that can be expanded?

And then the necessary and proper clause comes in. That we agree on, don't we?

Professor GRESSMAN. I think it is the reverse, but then we get the same result. I prefer to start with identifying the power and then determining if you are executing it properly, by a necessary and proper means; and then asking is that power, an affirmative power that you have, consistent with the letter and spirit of the impeachment clause or any other clause in the Constitution.

Senator BAYH. Well, I guess we are talking about the cart or the horse here, but I appreciate your opinion.

Senator DECONCINI. Professor Gressman, thank you very much.

I also would give my thanks for your testimony previously on the Supreme Court Jurisdiction Act. We are grateful for your time and expertise.

Senator DECONCINI. Our next witness is Prof. Paul Bender of the School of Law of the University of Pennsylvania.

Professor, we are pleased to have you here. You have a prepared statement. That will be inserted in the record in full.

If you would like to highlight that for us.

STATEMENT OF PROF. PAUL BENDER, SCHOOL OF LAW, UNIVERSITY OF PENNSYLVANIA

Professor BENDER. Thank you, Senator. It is an honor to be here this morning.

[The prepared statement of Professor Bender follows:]

PREPARED STATEMENT OF PAUL BENDER

My name is Paul Bender. I am a professor of law at the University of Pennsylvania Law School, where my principal subjects are constitutional law and constitutional litigation. I first became involved with some of the questions now before you in 1966, when I was a lawyer in the Solicitor General's Office of the U.S. Department of Justice and was assigned to help present the 10th Circuit Judicial Council in the *Chandler* case (*Chandler* v. *Judicial Council of the Tenth Circuit*, 382 U.S. 1003 (1966), 398 U.S. 74 (1970)). That case, as you know, raised, but did not decide, issues relating to the legality and constitutionality of efforts by a circuit judicial council to use its powers under 28 U.S. § 332 to restrict the docket of a Federal district judge who, the council believed, was not properly discharging his judicial responsibilities.

One of the three bills before you today (S. 295 (Nunn-DeConcini)) provides for the removal of Federal judges by a Court on Judicial Conduct and Disability, which would be established as an article III Federal court. In my view, this removal provision is very probably unconstitutional. Article III Federal judges, who are to hold office "during good behavior," can, I think, only be involuntarily removed from office pursuant to the impeachment provision of article III, section 4 of the Constitution, which states that "all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." I think, that is, that article III judges have constitutionally guaranteed life tenure, subject only to removal by impeachment, the essential procedures for which are spelled out in several places in the Constitution.

To my mind this conclusion that judges have life tenure subject only to impeachment is the most natural and sensible reading of all of the constitutional language. It is the meaning that was completely accepted by virtually all of those who wrote about or studied the Constitution and the judiciary from the time of Hamilton and Jefferson until about 1930, and it is still the meaning accepted by the very large majority of scholars and commentators.

It is clear that the Framers of the Constitution cared deeply about establishing and preserving judicial independence, both in order to ensure fairness for litigants and in order to remove political and other improper pressures that might otherwise harmfully influence judicial decisions important to the welfare of the entire nation. The tenure-during-good-behavior provision of article III was a primary means of securing the necessary judicial independence. It is difficult for me to accept that, being thus concerned with establishing judicial tenure in order to preserve needed judicial independence, the Framers would nevertheless have meant to permit Federal judges to be removed from office for failing to live up to an enormously vague and subjective standard of "good behavior." It is even more difficult for me to accept that the Framers, concerned as they were with establishing and maintaining judicial tenure, would have permitted Federal judges thus to be removed for lack of good behavior without specifying even the most essential aspects of that removal procedure, such as who was to have the power of removal. Yet both of those consequences would follow if the impeachment process were not the sole constitutional means for removal of Federal judges. On the other hand, judicial independence is meaningfully secured if "good behavior" is read—as I would read it—to mean life tenure subject to impeachment.

Although I believe that the removal provision in S. 295 is very likely unconstitutional, there is certainly another side to the argument. It does not, however,

seem to me to be necessary for Congress to resolve this constitutional question in order to reject any proposal for nonimpeachment removal of Federal judges at the present time. For, at the very least, I think everyone would agree that substantial doubts exist about the constitutional validity of nonimpeachment removal. Congress should not, I submit, enact a statute as to which there are such substantial doubts (especially, I would add, when the doubts concern matters as fundamental as the independence of the Federal judiciary) unless it finds a compelling necessity to act because of a serious problem that cannot satisfactorily be handled in any other way.

I am not aware of any pervasive problem of unfit Federal judges today that cannot potentially adequately be met by careful Senate confirmation procedures, by informal interest and action by fellow judges, and by use of the existing power of the circuit judicial councils under present 28 U.S.C. § 332 (d) to "make all necessary orders for the effective and expeditious administration of the business of the courts within [the] circuit." If some additional legislation is needed, I would favor the approach of S. 522 (Bayh-Mathias) and S. 678 (Kennedy-DeConcini), which do not provide for nonimpeachment removal, but generally confine their coercive sanctions to temporary suspension or withdrawal of a judge's caseload. Although these temporary docket-control provisions to some extent affect a judge's ability to function independently, and therefore raise some constitutional doubts, these doubts are not nearly as serious as those created by an outright provision for nonimpeachment removal. I would suggest that the doubts might be eased even further by providing not only for "temporary" suspension of case assignments to Federal judges, but by also setting out affirmatively the conditions and procedures for the lifting of such a temporary suspension.

Finally, I would favor a substantive standard for temporary docket suspension similar to that contained in S. 522, which permits action to deal with conditions affecting "the effective, expeditious, and fair administraton of the business of the courts or the just determination of litigation." Fewer constitutional doubts are raised, I think, by a standard that thus looks overtly to considerations of judicial administration, than by a standard that turns on a judge's "good behavior." A good behavior or similar standard for restricting an individual judge's docket treads very close to—and may indeed actually impinge upon—those matters of judicial misconduct that, in my view, can only constitutionally be dealt with through the formal impeachment process.

In summary then, given the substantial and fundamental constitutional doubts in this area, it would seem to me to be most appropriate for Congress to go slowly—to attempt initially to use techniques that raise the fewest doubts of constitutional validity, and to employ stronger and more constitutionally doubtful medicine only if it should become clear that milder measures will not work. Judicial tenure is one of the most important ingredients of a constitutional system that by and large has served us very well. The judicial independence safeguarded by that tenure should not be tampered with unless a demonstration is made that such a course is absolutely essential to the proper functioning of the Federal courts.

Professor BENDER [continuing]. I am going to restrict my remarks primarily to the constitutional question, and I will try to be quite brief, but I would also be glad to try to answer questions on other aspects of the legislation.

Let me say at the outset that I first came into contact with the problems involved in this legislation when I was in the U.S. Solicitor General's Office in 1965 and 1966, and I was assigned to work on the *Chandler* case, which has been mentioned frequently this morning. I thought the problems were very hard then, and as Senator Bayh pointed out, the Court did not resolve anything. I still think the problems are hard.

One of the bills before you today—S. 295—provides for the removal of Federal judges. In my view, unlike Professor Gressman, I think that provision is unconstitutional.

The Constitution says explicitly that article III judges are to hold office during good behavior, and that, it seems to me, is the critical constitutional provision: What is the meaning of the provision that article III judges are to hold office during good behavior?

I think the meaning is that they can be involuntarily removed from office only through the impeachment mechanisms of the Constitution. That is, the good behavior clause means that article III judges have life tenure subject only to removal by impeachment.

The Constitution then goes on to spell out in some detail the essential procedures for impeachment removal.

This reading of all the constitutional language seems to me to be the most natural reading, the most sensible, the one most consistent with what I think was the intention of the framers of the Constitution.

I would also point out that it was also the meaning that was virtually unanimously accepted by all scholars, by people who commented on the Constitution and the judiciary from the time of Hamilton and Jefferson—and it was not all that common for Hamilton and Jefferson to agree, but they agreed on this—up until about 1930. It has only been since then that there have been some people—Professor Gressman being one—who have taken the opposite view.

I think, however, that even today the vast majority of people who have studied on these provisions continue to believe that the good behavior provision does, in fact, confer life tenure subject only to removal by impeachment.

Let me state, quite briefly, why I think this is the most natural and sensible reading of the language.

It seems to be very clear that one thing the framers of the Constitution cared about very deeply was securing judicial independence; they did not want judges to be elected; they did not want judges to serve at the whim of the Executive or the legislature. The good behavior provision in article III was the principal means by which the framers thought they were conferring this judicial independence.

It is difficult for me—in light of that evident purpose of the framers—it is very difficult for me to believe that being thus concerned with conferring tenure—meaningful, substantial tenure—they would in the first place, have made that tenure subject to termination for lack of "good behavior." That phrase, "good behavior," is enormously subjective and vague. It had no firmly developed meaning in the law up until that time. It is therefore very difficult for me to believe that the framers really contemplated that these judges, upon whom they wanted to confer substantial tenure, would be removable because of some interpretation of this very vague and subjective phrase of "good behavior."

It is even harder for me to believe that they would have wanted to permit this removal without at all specifying who was going to do the removing. That, it seems to me, is an even more telling point than the lack of meaning of the phrase, "good behavior." Even assuming that somebody could work out what "good behavior" meant, still, if you are going to accept that judges are removable for lack of good behavior, you have a Constitution that does not tell you who is going to have the removal power; and we know the framers were very conscious of expressly dividing up those responsibilities.

In the impeachment clause, for example, where they clearly provide for removal, they very carefully say the House shall do the indicting

and the Senate shall do the judging. It is quite hard for me to believe that they would have wanted—as we know they did—to confer substantial tenure and then leave entirely up in the air, open to question, open to—under Professor Gressman's view, Congress discretion—who will be doing the removing: the judges; the Supreme Court; the House; the Senate; some combination of the above; citizens; lawyers? Maintaining judicial independence is an extremely important structural aspect of the Constitution and I find it very difficult to read the constitutional language to provide for the possibility of removal of judges so as potentially to destroy that independence without the framers ever saying who was going to be responsible for the removing.

So, in short, that is why I find it more natural to read "good behavior" as really the opposite side of impeachment; "good behavior" means the commission of no impeachable offenses.

I would agree with Professor Gressman, if there were no "good behavior" tenure provision in the Constitution, that Congress would, under the necessary and proper clause have the power to devise procedures for removal of Federal judges. But, as I think he agrees, if there is a provision in the Constitution that denies the power to Congress, then, obviously, the necessary and proper clause can't give the Congress the power.

For example, Congress can certainly not, under the necessary and proper clause, provide for lengthening or shortening the term of the President or the Vice President, since the Constitution specifically states what the tenure of those officers is to be.

So, since I think the Constitution specifically states that the tenure of judges is to be life tenure subject only to removal by impeachment, I don't reach the application of the necessary and proper clause.

Although I believe removal of Federal judges other than by impeachment is unconstitutional, there is obviously another side to the question; and, as Professor Gressman has argued it, it is not by any means a trivial argument; other people take that position as well.

However, my main point to you this morning is that I don't think it is necessary for you to resolve that constitutional question in deciding whether or not to enact legislation providing for removal, because at the least I think everyone would agree that the constitutional questions created by a removal provision are substantial ones. There are, at the least, extremely serious constitutional doubts about removal of Federal judges by means other than impeachment. We have, for example, Justices Black and Douglas strongly taking the position in the *Chandler* case that even procedures quite short of removal are unconstitutional. In that situation, where removal would at the very least raise serious constitutional doubts, it seems to me that the Congress should not act to create such a mechanism, a removal mechanism, unless it finds a compelling necessity to do so because there is no other way to meet the problem.

I am not aware of any basis for Congress concluding now that there is, in fact, no other way to meet the problem of judicial misconduct or malfeasance or nonfeasance other than by removal.

It would seem to me that means short of removal include careful Senate confirmation procedures, informal actions by other Federal judges, and the use of existing powers of the circuit judicial councils

under 28 U.S.C. 332—the same powers that were used in the *Chandler* case—"to make all necessary orders for the effective and expeditious administration of the business of the courts within the circuit."

For example, as in the *Chandler* case, limiting the docket of a Federal judge is probably adequate to deal with many situations. I would not think it wise to move beyond that unless it were clear that those powers could not deal with the problem.

As I say, I am not aware of any great number of judges who continue to sit on the bench despite attempts to use those more limited and more clearly constitutional powers. Therefore, I don't think it would be appropriate for you to reach out and create a removal mechanism that at the very least creates extremely serious constitutional problems.

I might say that the development of the senior judge system—that is, the ability of any sitting judge, once he reaches a certain age or has a certain number of years of service—the two are blended together in the legislation—to take on senior status, to continue to draw his full salary, to continue to sit insofar as he is needed to sit, has, I think, relieved a substantial part of the problem. Obviously, it does not relieve it entirely, but I think the number of instances where you will get judges persisting to sit even when they are unqualified to do so has dropped to a very low number because of the ability of any judge with substantial years of service to go on senior status.

Just a couple of comments about some of the details of the pending legislation:

If some additional legislation beyond existing section (d) of 28 U.S.C. is needed, I would favor the kind of provisions in S. 522 and S. 678 that provide, not for removal, but for a sanction such as docket control, the kind of response that was used in the *Chandler* case. I think there are some constitutional problems even with these sanctions, as Justices Black and Douglas said in *Chandler*, but these constitutional doubts are not nearly as serious as those created by outright removal. I think you could help remove some of the doubts about the docket control provisions if, in addition to providing, as I think S. 522 does, for temporary removal, the bill also provided for how that temporary removal could be lifted—that is, if it is indeed to be temporary, as it should be, then there ought to be an express provision about what the judge has to do, what he has to show, and to whom he has to show it, in order to have that temporary removal ended.

And, finally, insofar as the standard for whatever sanctions short of removal are going to be proposed, I would favor the kind of standard is S. 522, which refers to the "efficient, expeditious, and fair administration of the business of the courts"—I favor a standard like that over a standard that refers to good behavior, for many of the same reasons that I have constitutional doubts about the removal legislation itself.

If the standard talks about "good behavior," I think that what you are doing, or what you are authorizing the judicial councils or whatever body you authorize to do it, what you are authorizing them to do sounds very much like impeachment; that it, we are getting rid of judges because of lack of a good behavior.

I think the argument there is, if you are getting rid of a judge because of lack of good behavior, you can only do that through impeachment. So I think your standard should be directed not to the badness of the judge's behavior, but to the needs of the court system for fair and expeditious adjudication of the cases before them, the kind of standard that presently exists in section 332.

In summary then, because of the substantial doubts about removal—I believe that removal is unconstitutional, but in any event there are serious doubts—it should be Congress responsibility to go slowly in this area.

We are dealing with a fundamental constitutional provision, fundamental in two respects: One, in terms of structure, in terms of separation of powers, an independent judiciary is necessary for the welfare of the whole country; second, we are also dealing with a fundamental provision in terms of the individual rights to a fair tribunal. Before you tamper with that fundamental provision, important in both of those ways, it seems to me you ought to make sure you have exhausted every remedy short of that. And I don't think that under the present circumstances you can fairly say that the power to limit dockets and similar powers of the judicial councils have been entirely exhausted, and that there nevertheless remains a very, very serious problem of unfit judges. Thank you.

Senator DECONCINI. Thank you very much. You make a sound argument based on 28 U.S.C. 332, where the action or disciplinary function take place. Yet, looking at Judge Singleton in Texas, Judge Fogel in eastern Pennsylvania, and at other judges in western Pennyslvania, and, of course, the *Ritter* case, and the *Chandler* case, it is very difficult to feel very confident about the disciplinary provisions in section 332 given that historically those provisions have been seldom used, though we have numerous examples where failure to do so has brought outrage by the public. Given the fact that there have been occasions where section 331 could have been properly enforced, why has there been a failure to do so?

Professor BENDER. Well, in some cases, for example, that of Judge Fogel from the Eastern District of Pennsylvania, where I live, Judge Fogel did resign, and he resigned within a fairly short period of time after serious problems were raised about his fitness to sit.

I think that is generally what happens. Judge Chandler was a fairly rare, more than fairly, extremely rare, case of a judge who refused to resign after his fellow judges made it very clear to him that they thought he should; and that was one of the very few cases where the circuit council did use its power; and it seems to me that those powers ultimately worked in that situation.

Senator DECONCINI. What about the 10th circuit, with Judge Ritter, what about that case?

Professor BENDER. I am not familiar with the details of that case. I don't mean to say every council has used its powers fully. I think they are hesitant to do so; perhaps it would be wise for Congress to amend section 332 and make it clear that they wanted those powers to be used more expeditiously and effectively than they have been, and perhaps put in a section, as I think essentially S. 522 does, directing the atten-

tion of the councils to the use of those powers with regard to judges who are not properly disposing of their workload.

The statutory language now is very general. It might be wise to suggest that those powers can be used specifically with reference to certain judicial conduct.

Senator DECONCINI. Now, you mentioned in your statement that you believe the overwhelming numbers of people of professional opinion and background would come to the same conclusion that you have come to, that it is unconstitutional to remove.

Have you done any studies or have any statistics, or is that your general impression?

Professor BENDER. No; that is simply a general impression gained from reading published commentary. It seems to me that the weight of scholarly comment is against the position of Professors Burger and Gressman, although there is a minority that take that position.

Senator DECONCINI. In the Senate, of course, the majority took the other position last year.

Professor BENDER. Yes; I understand that.

Senator DECONCINI. That it was indeed constitutional. Perhaps we are not all scholars, but I think there was a great deal of debate and consideration.

Let me ask you one further question, because time is moving along and I know Senator Bayh has further questions.

How do you address the procedure if the removal was taken away, sir? Do you think there would be any constitutional problems with taking all cases away from a judge or censuring him, but not fully removing him?

Professor BENDER. I think some people would raise constitutional questions, obviously—and we have the opinions of two Justices no longer on the Court—that some of those mechanisms, of taking cases away, would be unconstitutional. I think that docket control would be constitutional if it is temporary. If it is clear that it is a temporary device, to last as long as the judge remains unable or unwilling to dispose of his or her workload, and it is done in order to make sure the cases get disposed of, then I think it would be constitutional.

I agree with what Justice Burger said in the *Chandler* case: You can't believe it has to be impeachment or nothing. I think there are administrative devices to deal with dockets and workload that could properly be implemented.

For example, you could say to a judge, "You have to dispose of cases in a certain amount of time; if you don't, you will not get any further cases." I don't think there are serious constitutional problems with that.

Senator DECONCINI. Thank you.

Senator Bayh?

Senator BAYH. Mr. Bender, I appreciate your thoughts and your statement.

I might just point out that Mr. Bender has been of significant help to the Judiciary Committee prior to his present testimony. I know our Subcommittee on the Constitution has benefited by his analysis.

Professor BENDER. Thank you.

Senator BAYH. The *Stanford Daily* decision, and other matters, besides the matter it is now considering.

Just to summarize, your assessment is that the impeachment clause is so definite in its limitation of the use of impeachment as the only vehicle for removal, that the construction of the necessary and proper clause as a vehicle for us having constitutional authority to remove does not really enter into the picture. Is that an accurate reassessment?

Professor BENDER. Yes; except for one detail. I don't think it is the impeachment clause; it is the good behavior clause. I don't think the impeachment clause is exclusive.

For example, the Secretary of State can be removed by the President. Even though he is a civil officer of the United States, he doesn't have to be impeached to be removed. The impeachment clause is an omnibus clause that applies to all Federal officers.

With regard to officers who are not, in some other part of the Constitution, given tenure in office, I do not think the impeachment clause is exclusive. With regard to those officers, like the Secretary of State, the impeachment clause is one method of removal, which permits the House and the Senate to remove even if nobody else wants to, but it would permit other organs of the Government—in that case the President—to remove.

So it is not the impeachment clause that is the source of exclusivity; it is the conferral of tenure by the good behavior clause.

The good behavior clause, to me clearly confers tenure on judges; it says they shall hold tenure during good behavior; and the question is, what does that mean? And as I tried to say during my statement, the most natural reading of that is that they hold tenure for life unless removed by impeachment.

Senator BAYH. In other words, that was the alternative to appointment by the King, which was the way judges were appointed prior to that time?

Professor BENDER. That is right, or as an alternative to election, with a terminable period of service, and then reelection. As an alternative, the Constitution said, not election, not at the will of the electorate; judges hold office during good behavior; the question is, what does that mean? The most natural reading, and as I said the reading was virtually unanimously accepted until about 1930, is that that means life tenure, with removal only through impeachment.

So it is the good behavior clause in which I find the source of exclusivity of impeachment; just as with the President, who holds office for 4 years, and who can only be removed by impeachment during that time. Similarly, judges hold office for good behavior, which means they hold office for life, and I think they can only be removed by impeachment during their lives.

Senator BAYH. Thank you very much.

Senator DECONCINI. We appreciate your testimony very much.

This will conclude the hearings of the subcommittees and the record will remain open until July 9, unless Senator Bayh has anything further today?

Senator BAYH. Thank you very much.

We appreciate your courtesy in holding these joint hearings.

Senator DECONCINI. Thank you.

[Whereupon, at 12:20 p.m., the hearing was concluded.]

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APPENDIX

96TH CONGRESS
1ST SESSION

S. 295

To establish a procedure in addition to impeachment for the retirement of disabled members of the Judiciary of the United States and the removal of those whose conduct is or has been inconsistent with the good behavior required by article III, section 1 of the Constitution, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 31 (legislative day, JANUARY 15), 1979

Mr. NUNN (for himself and Mr. DECONCINI) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To establish a procedure in addition to impeachment for the retirement of disabled members of the Judiciary of the United States and the removal of those whose conduct is or has been inconsistent with the good behavior required by article III, section 1 of the Constitution, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Judicial Tenure Act".

PROCEDURES FOR INVOLUNTARY RETIREMENT, REMOVAL, OR CENSURE

SEC. 2. (a) Title 28, United States Code, is amended by adding immediately after chapter 17 the following new chapter:

"CHAPTER 18.—PROCEDURES FOR INVOLUNTARY RETIREMENT, REMOVAL, OR CENSURE

"Sec.
"381. Judicial Conduct and Disability Commission; establishment.
"382. Committees; selection of members; receipt of complaints.
"383. Complaint concerning the condition or conduct of judges; filing and processing.
"384. Procedure before the Judicial Conduct and Disability Commission.
"385. Court on Judicial Conduct and Disability; duties of the Judicial Conference of the United States relating to proceedings with respect to involuntary retirement, removal, and censure.
"386. Disqualification of judges.
"387. Confidentiality of proceedings.
"388. Removal or censure of judges.
"389. Justices of the Supreme Court; report of impeachment or censure.
"390. Claims of involuntarily retired judges relating to judicial duties.
"391. Rules of procedure; Court on Judicial Conduct and Disability, Judicial Conduct and Disability Commission, and committees; attorneys' fees.
"392. Intervention; amicus curiae; mandamus.

"§ 381. Judicial Conduct and Disability Commission; establishment

"(a) There is established in the judicial branch of the Government a body which shall be known as the Judicial Conduct and Disability Commission. The mandate of the commission shall be to further the honest, impartial, and efficient administration of justice in the courts of the United States in accordance with the duties imposed upon it by law. The Judicial Conference of the United States is authorized and directed to appoint an executive director, whom it may

remove for cause shown. The Judicial Conference shall fix the compensation of the executive director at a rate not to exceed the lowest annual rate of pay payable for grade 16 of the General Schedule (GS–16) prescribed under section 5332 of title 5. The executive director shall be eligible for increases in pay corresponding with those provided for by section 5335 of title 5. The executive director, with the approval of the commission, may appoint necessary employees of the commission in such number as may be approved by the Director of the Administrative Office of the United States Courts.

"(b)(1) The commission shall be composed of one member from each judicial curcuit, and one member selected collectively by the judges of the Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court. Each member shall be a judge of the United States in regular active service or senior status. Each member from a circuit shall be elected by the circuit and district judges of the circuit who are in regular active service or senior status, at a judicial conference of the circuit held pursuant to section 333 of this title. The one member representing the Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court shall be elected by the judges of those courts who are in regular active service or senior status. A judge of any court created by an Act of Congress in a territory which is

invested with jurisdiction of a district court of the United States may not take part in any election or be elected as a member of the commission. A judge who is a member of the Judicial Conference may not serve simultaneously as a member of the commission. The members of the commission shall elect one of its members as chairman of the commission.

"(2) The chairman may appoint, pursuant to rules promulgated under section 391 of this title, a panel of seven members of the commission to carry out the duties of the commission under this chapter and to consider any complaint not dismissed under section 383(a) of this title. The panel is authorized to act on behalf of the commission upon the concurrence of four of the members of the panel.

"(c)(1) The term of each member of the commission shall be three years except that when the commission is initially selected four of the members shall serve two-year terms and four of the members shall serve one-year terms. The chairman shall decide who shall serve each of the initial terms. The term of any member shall automatically be extended until his successor has qualified. A member selected to fill a vacancy shall commence a full three-year term. A judge may serve on the commission any number of terms but may not serve consecutive terms.

"(2) The term of a member of the commission shall automatically expire when that member resigns as a judicial

officer, is involuntarily retired under section 372(c) of this title, or is removed or censured under section 388 of this title.

"(d) For the purposes of section 456 of this title, the performance of duties as a member of the commission shall constitute the transaction of official business.

"§ 382. Committees; selection of members; receipt of complaints

"Each circuit, the Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court shall have a committee of judges who are in regular active service or senior status to receive, process, and review any complaints against judges of their respective circuits or courts transmitted from the Judicial Conduct and Disability Commission under section 383(a) of this title. The chief judge of each of the circuits, the Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court, shall sit as the presiding officer of the respective committee. The other members shall be selected in accordance with the rules promulgated under section 391 of this title. Judges of the district court and court of appeals must be represented in the case of a circuit committee. During consideration of a complaint filed by or against a chief judge, the next most senior member of the circuit, or of the Court of Claims, the Court of Customs and Patent Appeals, or the Customs Court, shall sit as pre-

siding officer of the committee and select the other members of the committee. Upon receipt of a complaint transmitted from the commission, the committee shall convene and conduct its proceedings in accordance with the rules promulgated under section 391 of this title.

"§ 383. **Complaint concerning condition or conduct of judges; filing and processing**

"(a) Any person may file a complaint with the Judicial Conduct and Disability Commission setting forth the condition or conduct of a judge of the United States, alleging that such condition or conduct violates the good behavior standard required by article III, section 1 of the Constitution. All complaints shall be in writing and certified or subscribed in the manner set forth in section 1746 of this title. The commission, acting through its executive director, shall dismiss by written order, without prejudice, any complaint found to be improperly verified or subscribed, or, after preliminary inquiry, with prejudice, any complaint which is frivolous or outside the jurisdiction of the commission. Complaints which are outside the jurisdiction of the commission include, but are not limited to, complaints relating to the merits of any decision or procedural ruling of a judge, and complaints relating to the condition or conduct of a judge which is not connected with his judicial office or which does not prejudice the administration of justice by bringing the judicial office into disre-

pute. Any complaint not initially dismissed by the commission, acting through its executive director, shall be transmitted within seven days of the filing of the complaint to the presiding officer of the committee of the respective circuit or court. A judge whose condition or conduct is the subject of a complaint transmitted to a committee shall receive a copy of such complaint and shall be notified in writing by the commission of his right to submit to the committee within ten days a written statement in his own behalf and of other rights under rules promulgated under section 391 of this title.

"(b) Upon receipt of the complaint from the commission, the committee shall conduct a preliminary investigation to determine the nature and existence of any of the grounds specified in section 372(c) of this title for the involuntary retirement of a judge, or in section 388 of this title for the removal or censure of a judge.

"(c)(1) Each committee, after completion of its investigation and on the basis of the grounds specified in section 372(c) or 388 of this title, shall, by majority vote, recommend to the commission—

"(A) dismissal of any complaint which it finds to be frivolous, insufficient in law or fact, or outside the jurisdiction of the commission; or

"(B) further investigation by the commission of any complaint for which the committee finds sufficient

cause to believe that the condition or conduct of the judge may be inconsistent with the good behavior required by article III, section 1 of the Constitution; or

"(C) that there be a reasonable period of time in which the committee be authorized to attempt to address the specified matter raised in such complaint.

"(2) A copy of the recommendation of the committee under this subsection, accompanied by a written explanation, shall be forwarded to the commission and the judge under inquiry.

"(d) The committee shall have no longer than thirty days from the receipt of the complaint from the commission in which to make a recommendation under subsection (c) of this section, except that the commission, in the interest of justice and for cause shown, may grant a reasonable extension upon application made by the committee.

"(e) The committee may utilize existing staff employed by the circuit or court, or employees of other circuits or courts, or may request the Director of the Administrative Office of the United States Courts to procure personal services of experts and consultants, as authorized by section 3109 of title 5, as may be necessary to carry out the duties of the committee in any particular case under this chapter.

"§ 384. Procedure before the Judicial Conduct and Disability Commission

"(a) Upon receipt of the recommendation of a committee as provided in section 383 of this title, the Judicial Conduct and Disability Commission, pursuant to rules promulgated under section 391 of this title, shall either dismiss the complaint, initiate an investigation of its own to determine the nature and existence of any of the grounds specified in section 372(c) of this title for the involuntary retirement of a judge or in section 388 of this title for the removal or censure of a judge, or if necessary, authorize a reasonable period of time for the committee to attempt to address the specified matter raised in such complaint. Upon the conclusion of the time period, the committee shall either recommend that the case be dismissed or that the commission conduct a further investigation. Any judge whose condition or conduct is the subject of an investigation under this subsection shall be notified in writing of the pending investigation, and of his right to submit a written statement in his own behalf and of other rights under rules promulgated under section 391 of this title.

"(b)(1) The commission is authorized to administer oaths, order and otherwise provide for the inspection of books and records, and issue subpenas for the attendance of witnesses and the production of papers, books, accounts, documents, and testimony relevant to the conduct of any investi-

gation under this chapter. Such attendance of witnesses and the production of such evidence may be required from any place within the United States and its territories at any designated place of hearing within the United States upon payment of fees and expenses as prescribed by law.

"(2) If a person who is the subject of a subpena issued under paragraph (1) of this subsection refuses to obey such subpena, the commission may invoke the aid of the district court of the district in which the subpenaed party either resides or may be found. The district court may issue an order requiring such person to produce evidence or to give testimony relating to the matter under investigation. Any failure to obey such order of the district court may be punished by such court as contempt thereof.

"(c) The commission, or a panel acting on behalf of the commission, after completion of its investigation and on the basis of the grounds specified in section 372(c) or 388 of this title, shall, by majority vote—

"(1) dismiss any complaint which it finds to be frivolous, insufficient in law or fact, or outside the jurisdiction of the commission; or

"(2) recommend to the Court on Judicial Conduct and Disability that it hold a hearing on any complaint for which the commission finds sufficient cause to believe that the condition or conduct of the judge may be

inconsistent with the good behavior required by article III, section 1 of the Constitution.

"(d) Whenever the commission dismisses a complaint under subsection (c)(1) of this section, section 383(a), or 384(a), the judge against whom the complaint was filed and the complainant shall be notified in writing of the action taken and the reason for the order of dismissal. Within ten days after such notification, the complainant may petition, the Court on Judicial Conduct and Disability to issue a writ of certiorari to review an order of dismissal. If certiorari is granted, the court may summarily affirm, or, if it determines that the dismissal was arbitrary or capricious, reverse with directions for further investigation by the commission.

"(e) Whenever the commission recommends under subsection (c)(2) of this section that a hearing be held in the court, it shall make and file a report with the court which includes the complaint made against the judge, the recommendation of the committee, the recommendation of the commission, and a summary of the factual evidence which its investigation has disclosed. Such report shall be entered on the records of the court. A copy of the report shall be forwarded to the judge under inquiry and to the complainant.

"(f) The commission shall have no longer than ninety days from receipt of the recommendation of a committee in which to prepare and forward any report to the court, except

that the court, in the interest of justice and for cause shown, may grant a reasonable extension upon application made by the commission.

"(g) The commission may utilize its own staff or other employees of a circuit or court, or the executive director, with the approval of the commission, may request the Director of the Administrative Office of the United States Courts to procure personal services of experts and consultants, as authorized by section 3109 of title 5, as may be necessary to carry out the duties of the commission in any particular case under this chapter.

"(h) The commission shall prepare an annual report to the Congress showing the number of complaints and the action taken on each complaint.

"**§ 385. Court on Judicial Conduct and Disability; duties of the Judicial Conference of the United States relating to proceedings with respect to involuntary retirement, removal, and censure**

"(a)(1) The Judicial Conference of the United States shall elect annually one member of the conference to be presiding officer of the Court on Judicial Conduct and Disability to hear matters concerning the involuntary retirement, removal, or censure of a judge of the United States. A member of any committee established under section 382 of this title who was a member of the committee which conducted the

preliminary investigation relating to the condition or conduct of a judge shall not sit as a member of the court in a matter concerning the same judge. The chief justice shall neither participate in the election of the presiding officer nor be the presiding officer of the court.

"(2) The presiding officer shall select six members of the conference to serve on the court with the presiding officer each for a one-year term pursuant to rules promulgated under section 391 of this title. Any temporary or permanent vacancy in a term of a member of the court shall be filled by the presiding officer. The court is established under article III of the Constitution of the United States as a court of record and may exercise all appropriate judicial powers incident or necessary to the jurisdiction conferred upon it by this title. Appropriate judicial powers include, but are not limited to, administering oaths, ordering and otherwise providing for the inspection of books and records, and issuing subpenas for the attendance of witnesses and the production of papers, books, accounts, documents, and testimony relevant to the conduct of a proceeding of the court. Such attendance of witnesses and the production of such evidence may be required from any place in the United States and its territories at any place designated for holding court within the United States. The clerk and marshal of the district court of the District of Columbia shall be the clerk and marshal of the court and

shall be responsible for the maintenance of all records of the court and the service of process and execution of all orders of the court. When the court is sitting outside the District of Columbia, the clerk and marshal of another district court, with the approval of the court, may act as the clerk and marshal of the court. The court may hold court at the District of Columbia and at such other places within the United States and at such times as the court may designate by rule or order.

"(b) Upon receipt of a report from the commission under section 384(e) of this title, the presiding officer shall convene the court at the earliest practical date to hear and decide the merits of the written complaint made against the judge. The commission, or its representative, shall appear, offer evidence in support of the report of the commission, and shall have the burden of proving its report before the court by clear and convincing evidence. Any judge whose condition or conduct is the subject of a hearing shall be given no less than ten days' notice of such hearing, shall be admitted to the hearing, may be represented by counsel, offer evidence in his own behalf, confront and cross-examine any witness against him, and have the right to compulsory process to obtain evidence or witnesses.

"(c)(1) The commission shall on its own motion or upon the filing of a complaint pursuant to section 383 of this title

compile information and maintain current records of all cases in which a judge has pleaded guilty, nolo contendere or has been found guilty in a court of competent jurisdiction of a crime punishable as a felony under State or Federal law or of any crime under State or Federal law which involved moral turpitude.

"(2) The commission shall file a report directly with the court whenever it has determined pursuant to rules promulgated under section 391 of this title that a judge has pleaded guilty, nolo contendere, or has been found guilty in a court of competent jurisdiction of a crime punishable as a felony under State or Federal law or of any crime under State or Federal law which involved moral turpitude. The court may suspend such judge of the United States from the exercise of any judicial powers or prerogatives pending final disposition of the complaint against him. If the conviction of the judge is reversed, the suspension shall automatically terminate. If such reversal is subsequently overturned, the suspension shall be automatically reinstated. In either case the clerk shall confirm the automatic termination or reinstatement by entering the appropriate order. Whenever the conviction of the judge becomes final, the court may, pursuant to rules promulgated under section 391 of this title, order his removal or censure from office under section 388 of this title.

48-202 O - 79 - 10

"(3) In all other cases, the court may suspend a judge who is the subject of an inquiry from the exercise of any judicial powers or prerogatives only upon the holding of the hearing as specified in subsection (b) of this section. The entry of an order specified in subsection (d)(1) (A) or (B) of this section may include an order of suspension.

"(4) An order of suspension shall be issued upon a majority vote of the members of the court. During the period of suspension, the judge shall continue to receive the salary of his office. The court shall send a copy of the suspension order to the suspended judge, to the commission, and to the authority responsible for the assignment of business to judges within the court of the judge affected by the order. Upon receiving notification of a suspension order, the authority responsible for the assignment of business shall refer the assignment of business pending before the suspended judge to other judges as it may deem appropriate.

"(d)(1) The court shall, in each case brought before it, order one of the following:

"(A) involuntary retirement of the judge under section 372(c) of this title;

"(B) removal from office of the judge under section 388 of this title;

"(C) censure of the judge under section 388 of this title; or

"(D) dismissal of the case.

"(2) Each order under paragraph (1) of this subsection shall be made by a majority of the members of the court and shall be supported by clear and convincing evidence on the record.

"(3) Each order of the court shall be in writing and the commission, the complainant, and any judge affected by such order shall receive a copy. Within ten days after such notification of an order under subsection (d), only the commission or the judge may file a petition for writ of certiorari to the Supreme Court under section 1259 of this title.

"(e)(1) An order of the court directing involuntary retirement, removal, or censure of a judge shall become final upon either the denial of a petition for writ of certiorari to the Supreme Court under section 1259 of this title, affirmance of the order by the Supreme Court, or expiration of the time for filing the petition. Upon filing the petition with the Supreme Court the order of involuntary retirement, removal, or censure shall be automatically stayed and the clerk of the court shall prepare an order to confirm the stay.

"(2) In any case in which a judge is involuntarily retired or removed under this chapter, the court shall, at the time its order becomes final, certify to the President that a vacancy exists in the office from which the judge has been involuntarily retired or removed. The President shall appoint, by and

with the advice and consent of the Senate, a successor to fill any vacancy caused by the involuntary retirement or removal of a judge under this section.

"(f) Whenever a person, other than the judge who is the subject of an inquiry, refuses to give or produce evidence on the basis of his privilege against self-incrimination, the court may issue an order requiring that person to testify or produce evidence. The testimony given or evidence produced in compliance with that order, and any information directly or indirectly derived from that testimony or evidence, may not be used against the person so ordered in any criminal case, except a prosecution for perjury, giving a false statement, or for otherwise failing to comply with that order. The court shall not issue an order compelling a person to testify or produce evidence under this subsection until thirty days after notification of the Attorney General of the United States of its intention to do so.

"(g) All proceedings had in open court shall be recorded verbatim by shorthand, by mechanical means, or by electronic sound recording by an official court reporter. The court reporter shall transcribe and certify the record of proceedings and shall deliver the original records and transcript to the clerk of court. Notwithstanding the provisions of section 753 of this title, if the proceedings are reported and transcribed by the reporter appointed by the district court under that

section, the Director of the Administrative Office of the United States Courts shall pay the court reporter a fee for the transcript at the rates established under section 753(f) of this title.

"(h) The court may utilize existing staff employed by a circuit or court or may request the Director of the Administrative Office of the United States Courts to procure personal services of experts or consultants as authorized by section 3109 of title 5, as may be necessary to carry out the duties of the court in any particular case under this chapter. The court may arrange for the attendance of witnesses, including witnesses not subject to subpena. Each witness, other than an officer or employee of the United States, shall receive the same attendance fees and other amounts allowed by law to a witness in a civil case as provided in section 1821 of this title. The amount shall be paid by the United States marshal for all witnesses for the court upon certification of the clerk of court.

"(i) The Federal Rules of Evidence shall apply to all proceedings before the court.

"(j) The court shall act upon the concurrence of any four of its members.

"§ 386. Disqualification of judges

"A judge who is a member of a committee established under section 382 of this title, of the Judicial Conduct and

Disability Commission, or of the Court on Judicial Conduct and Disability shall not sit in any proceeding of that body when it inquires into his own condition or conduct, or when it inquires into a complaint filed by him against another judge.

"§ 387. **Confidentiality of proceedings**

"Unless authorized in writing by the judge whose condition or conduct is the subject of an inquiry under this chapter or otherwise authorized by this section, all matters filed with, all testimony or evidence given before, and all deliberations of a committee or the Judicial Conduct and Disabling Commission in connection with the involuntary retirement of a judge under section 372(c) of this title or the removal or censure of a judge under section 388 of this title shall be confidential. Upon the filing of a report under section 384(e) of this title with the Court on Judicial Conduct and Disability, the contents of the written complaint, the recommendation of the committee, the report of the commission, and all documents and proceedings before the court shall be made public. Any participant in the proceedings who violates the provisions of this section shall be in contempt of court and may be fined not more than $5,000 or imprisoned not more than one year, or both.

"§ 388. **Removal of censure of judges**

"(a) A judge of the United States may be removed from office or censured in accordance with the procedures estab-

lished in this title only upon a finding by the Court on Judicial Conduct and Disability that the conduct of such judge is or has been inconsistent with the good behavior required by article III, section 1 of the Constitution.

"(b) Conduct which shall be deemed to be inconsistent with good behavior includes, but is not limited to, willful misconduct in office, willful and persistent failure to perform duties of the office, habitual intemperance, or other conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

"(c) Upon a final order of removal, the office of the judge shall become vacant and the entitlement to the salary of the office shall terminate. For the purposes of section 376(g) of this title, a judge removed from office shall be deemed to be a judge who resigned from office without entitlement to retirement salary.

"§ 389. Justices of the Supreme Court; report of impeachment or censure

"(a) Any person may file a complaint with the Judicial Conduct and Disability Commission setting forth the conduct of a Justice of the United States, alleging that such conduct violates the good behavior standard required by article III, section 1 of the Constitution. All complaints shall be in writing and verified or subscribed in the manner set forth in section 1746 of this title. The commission, acting through its

executive director, shall dismiss by written order, without prejudice, any complaint found to be improperly verified or subscribed, or, after preliminary inquiry, with prejudice, any complaint which is frivolous, or outside the jurisdiction of the commission. Complaints which are outside the jurisdiction of the commission include, but are not limited to, complaints relating to the merits of any decision or procedural ruling of a Justice and complaints relating to the conduct of a Justice which is not connected with his judicial office or which does not prejudice the administration of justice by bringing the judicial office into disrepute.

"(b)(1) Any complaint not dismissed by the commission, acting through its executive director, pursuant to subsection (a) of this section, shall be investigated by the commission, or a panel acting on behalf of the commission under section 381(b)(2) of this title, to determine whether there is sufficient cause to believe that the conduct of the Justice may be inconsistent with the good behavior required by article III, section 1 of the Constitution. A Justice whose conduct is the subject of an investigation under this section shall receive a copy of the complaint and shall be notified in writing of the pending investigation, of his right to submit a written statement in his own behalf, and of other rights under rules promulgated under section 391 of this title.

"(2) The commission, or a panel acting on behalf of the commission, after completion of its investigation, shall by majority vote—

"(A) dismiss any complaint which it finds frivolous, insufficient in law or fact, or outside the jurisdiction of the commission; or

"(B) recommend to the Court on Judicial Conduct and Disability that it hold a hearing on any complaint for which the commission finds sufficient cause to believe that the conduct of the Justice may be inconsistent with the good behavior required by article III, section 1 of the Constitution.

"(3) Whenever the commission dismisses a complaint under subsection (a) of this section or under paragraph (2)(A) of this subsection, the Justice against whom the complaint was filed and the complainant shall be notified of the action taken and the reason for the dismissal. Within ten days after such notification the complainant may petition the Court on Judicial Conduct and Disability to issue a writ of certiorari to review an order of dismissal. If certiorari is granted, the court may summarily affirm, or if it determines that the dismissal was arbitrary or capricious, reverse with directions for further investigation by the commission.

"(4) Whenever the commission recommends under paragraph (2)(B) of this subsection that a hearing be held in the

court, it shall make and file a written report with the court which includes the complaint made against the Justice, the recommendation of the commission, and a summary of the factual evidence which its investigation has disclosed. Such report shall be entered on the records of the court. A copy of the report shall be forwarded to the Justice under inquiry and to the complainant.

"(5) The commission shall have no longer than one hundred and twenty days from the initial filing of a complaint in which to prepare and forward a report to the court, except that the court, in the interest of justice and for cause shown, may grant a reasonable extension upon application made by the commission.

"(c)(1) Upon receipt of a report from the commission under subsection (b)(4) of this section, the presiding officer of the court shall convene the court at the earliest practical date to hear and decide the merits of the written complaint made against the Justice. The hearing shall be conducted under subsections (a), (b), (f), (g), (h), (i), and (j) of section 385 of this title.

"(2) The court shall, in each case brought before it—

"(A) recommend to the House of Representatives the impeachment of any Justice whose conduct is found to be an impeachable offense as defined in article II, section 4 of the Constitution; or

"(B) recommend to the House of Representatives the censure of any Justice whose conduct is found to be inconsistent with the good behavior required by article III, section 1 of the Constitution and whose conduct is not found to be an impeachable offense as defined in article II, section 4 of the Constitution; or

"(C) order the dismissal of the case.

"(3) Each determination of the court under paragraph 2 of this subsection shall be made by a majority of the members of the court and shall be supported by clear and convincing evidence on the record.

"(4) Conduct which shall be deemed to be inconsistent with good behavior includes, but is not limited to, willful misconduct in office, willful and persistent failure to perform duties of the office, habitual intemperance, or other conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

"(5) Whenever the court recommends to the House of Representatives the impeachment or censure of any Justice under paragraph (2) (A) or (B) of this subsection, it shall prepare a written report which includes the complaint made against the Justice, the recommendation of the court, the recommendation of the commission, a copy of the transcript of the hearing, and specific findings made by the court. Such report shall be submitted to the House of Representatives for

appropriate action. A copy of the report shall be forwarded to the Justice under inquiry and to the complainant. There shall be no judicial review of a recommendation for the impeachment or censure of a Justice.

"(6) Whenever the court orders a complaint dismissed under paragraph (2)(C) of this subsection, the Justice against whom the complaint was filed and the complainant shall be notified in writing of the action taken and the reason for the dismissal. There shall be no judicial review of an order of dismissal.

"(d) Unless authorized in writing by the Justice whose conduct is the subject of inquiry under this chapter or otherwise authorized by this subsection, all matters filed with, all testimony or evidence given before, and the deliberations of the commission in connection with a recommendation for the impeachment or censure of a Justice under this section, shall be confidential. Upon the filing of a report under section 389(b)(4) of this title, the contents of the written complaint, the report of the commission, and all documents and proceedings before the court shall be made public. Any participant in the proceedings who violates the provisions of this section shall be in contempt of court and may be fined not more than $5,000 or imprisoned not more than one year, or both.

"§ 390. **Claims of involuntary retired judges relating to judicial duties**

"(a) The Court on Judicial Conduct and Disability shall hear and determine any claim for assignment as authorized under section 294 of this title by a judge retired under section 372(c) of this title who alleges that his mental or physical disability has improved to the extent that he is able to efficiently perform the duties of the judicial office from which he was retired.

"(b) The court may prescribe by rule such procedures as may be appropriate to the consideration and disposition of these claims. The court shall, by majority vote, issue an appropriate order with respect to such claim and shall transmit such order to the authority responsible for the assignment of judicial duties to retired judges within the circuit or court of the judge affected by such order.

"§ 391. **Rules of procedures; Court on Judicial Conduct and Disability, Judicial Conduct and Disability Commission, and committees; attorneys' fees**

"(a) The judicial Conference of the United States shall promulgate rules of procedure for the Court on Judicial Conduct and Disability and the Judicial Conduct and Disability Commission.

"(b) The Judicial Conference of the United States shall promulgate rules of procedure for the committees established under section 382 of this title, or authorize the judicial council of each circuit, the Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court to promulgate rules of procedure for their respective committees. Such rules shall be consistent with the rules promulgated for the court and the commission under subsection (a).

"(c) All rules promulgated under this section may be modified at any time by the Judicial Conference of the United States and shall be a matter of public record.

"(d) A judge or Justice whose condition or conduct is the subject of a complaint shall be reimbursed for a reasonable attorney's fee and for other costs reasonably incurred in proceedings before the commission, the Court on Judicial Conduct and Disability, and the Supreme Court from funds appropriated to the Judicial Conference of the United States if such complaint is finally dismissed.

"**§ 392. Intervention; amicus curiae; mandamus**

"(a) No person shall be granted the right to intervene or appear as amicus curiae in any proceeding before a committee established under section 382 of this title, the Judicial Conduct and Disability Commission, or the Court on Judicial Conduct and Disability.

"(b) Notwithstanding any other provision of law, the Court on Judicial Conduct and Disability shall have exclusive original jurisdiction to hear any action in the nature of mandamus directed against a committee established under section 382 of this title or the commission.".

(b) The table of chapters for title 28, United States Code and for part I of title 28, United States Code, are each amended by inserting immediately after the item relating to chapter 17 the following:

"18. Procedures for involuntary retirement, removal, or censure ..... 381".

INVOLUNTARY RETIREMENT

SEC. 3. Section 372 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(c)(1) Whenever any judge of the United States appointed to hold office during good behavior is eligible to retire and does not so retire, and a majority of the Court on Judicial Conduct and Disability finds, pursuant to a complaint filed under section 383 of this title, that the judge is unable to discharge efficiently the duties of his office by reason of a permanent mental or physical disability, the court shall order the involuntary retirement of the judge. Habitual intemperance shall constitute a disability for the purposes of this subsection. Such judge shall be entitled to salary as specified in subsection (a) of this section. An involuntarily retired judge shall be deprived of all powers of the office except that an

involuntarily retired judge who has been determined again able to undertake judicial duties under section 390 of this title may be designated and assigned under section 294 of this title.

"(2) The President shall, by and with the advice and consent of the Senate, appoint a successor to any judge retired involuntarily under the provisions of this subsection. After the successor has been appointed, the vacancy subsequently caused by the death or resignation of the judge involuntarily retired shall not be filled.".

SUPREME COURT REVIEW

SEC. 4. (a) Chapter 81 of title 28, United States Code, is amended by adding at the end the following new section:

"**§ 1259. Court on Judicial Conduct and Disability; appeal of order**

"(a) Upon the petition of an aggrieved judge, the Supreme Court may review by writ of certiorari an order of the Court on Judicial Conduct and Disability under chapter 18 of this title that such judge be involuntarily retired, removed, or censured for a condition or conduct inconsistent with the good behavior required by article III, section 1 of the Constitution.

"(b) Upon the petition of the Judicial Conduct and Disability Commission, the Supreme Court may review by writ

of certiorari, an order of the court under chapter 18 of this title that a complaint against a judge be dismissed.

"(c) Each petition shall be filed within ten days after receipt of the written notice of the order of the Court on Judicial Conduct and Disability.".

(b) The analysis of chapter 81 of title 28, United States Code, is amended by adding at the end the following new item:

"1259. Court on Judicial Conduct and Disability; appeal of order.".

ASSIGNMENT OF RETIRED JUDGES

SEC. 5. (a) Section 294(c) of title 28, United States Code, is amended to read as follows:

"(c) Any voluntarily retired circuit, district, or any other judge of the United States, or any involuntarily retired judge who is determined again able under section 390 of this title to undertake judicial duties, may be designated and assigned by the chief judge or judicial council of his circuit, or the chief judge of his court, to perform such judicial duties within the circuit or in such court as he is willing and able to undertake.".

(b) Section 294(e) of title 28, United States Code is amended to read as follows:

"(e) Neither a Justice or judge who has voluntarily retired nor a judge who was involuntarily retired but has been determined again able under section 390 of this title to un-

48-202 O - 79 - 11

dertake judicial duties shall perform judicial duties except when designated and assigned.".

MISCELLANEOUS

SEC. 6. (a) Section 569(b) of title 28, United States Code, is amended by inserting "and of the Court on Judicial Conduct and Disability and the Judicial Conduct and Disability Commission under chapter 18 of this title" immediately after "Canal Zone,".

(b) Section 604 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(f) The Director shall provide facilities and pay necessary expenses incurred by the Judicial Conduct and Disability Commission under chapter 18 of this title, including mileage allowance and witness fees, at the same rate as provided in section 1821 of this title, and fix the compensation not otherwise fixed by law of employees, experts, and consultants of the commission.".

(c) Section 610 of title 28, United States Code, is amended by striking "the Customs Court." and inserting "the Customs Court, and the Court on Judicial Conduct and Disability.".

SEPARABILITY

SEC. 7. If any provision of this Act or any amendment made by this Act, or the application of such provision or amendment to any person or circumstances, shall be held in-

valid, the remainder of this Act or such amendment or the application of such provision or amendment to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

AUTHORIZATION OF APPROPRIATIONS

SEC. 8. There are authorized to be appropriated such sums as may be necessary to carry out this Act.

96TH CONGRESS
1ST SESSION

S. 522

To amend title 28 of the United States Code to change the composition of the judicial councils, and to provide procedures within the judicial councils of each circuit for the processing of complaints and for the administration of disciplinary action, if necessary, with respect to the conduct of the Federal judiciary within that circuit.

IN THE SENATE OF THE UNITED STATES

MARCH 1 (legislative day, FEBRUARY 22), 1979

Mr. BAYH (for himself, Mr. MATHIAS, Mr. SCHMITT, and Mr. BUMPERS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend title 28 of the United States Code to change the composition of the judicial councils, and to provide procedures within the judicial councils of each circuit for the processing of complaints and for the administration of disciplinary action, if necessary, with respect to the conduct of the Federal judiciary within that circuit.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Judicial Council Amendments and Discipline Act of 1979".

SEC. 2. Section 332 of title 28, United States Code, is amended—

(1) by amending subsection (a) to read as follows:

"(a)(1) The chief judge of each court of appeals of a circuit shall call at least twice in each year and at such places as he may designate, a council of the circuit, consisting of the following members:

"(A) the chief judge of the court of appeals for the circuit, who shall preside;

"(B) such number, not to exceed seven, of courts of appeals judges of the circuit in regular active service as is fixed by vote of a majority of all such judges, to be chosen by seniority; and

"(C) the number of district court judges of the circuit in regular active service equal to the number of courts of appeals judges fixed in paragraph (B), to be chosen by seniority, except that no more than one district court judge from any one district shall serve on the council unless such service is necessary to attain the number of district court judges required by this subparagraph.

"(2) Each member shall serve for a term of three years, and shall be succeeded by judges in regular active service next in seniority, unless there are no judges in regular active service who have not yet served on the council. In the event

of the death, resignation, retirement, or disability of a member, a replacement shall be chosen by seniority, to hold office for the remainder of the term.

"(3) Each member, unless excused by the chief judge of the circuit, shall attend all sessions of the council.";

(2) by amending subsection (d) to read as follows:

"(d) Each judicial council is authorized to make all necessary and appropriate orders for the effective, expeditious, and fair administration of the business of the courts and the just determination of litigation within its circuit. Matters relating to routine administration and management of any court within the circuit, including the circuit court, are not required to be considered by the council unless such matters involve an impediment of justice. Each council is authorized to hold hearings, to require by subpena the attendance of witnesses and the production of books, papers, documents, records, and other tangible things specified in the subpena, and to administer oaths. Each subpena shall be issued by the clerk of the circuit court under the direction of the chief judge or his designee in accordance with the provisions of rule 45 of the Federal Rules of Civil Procedure. Each court and judge of the circuit shall promptly carry into effect all orders of the judicial council."; and

(3) by adding at the end thereof the following new subsection:

"(g)(1) Any person claiming that the conduct of a judge of the United States is conduct which interferes with or impairs the effective, expeditious, and fair administration of the business of the courts or the just determination of litigation within the circuit in which that judge serves, may file a complaint with the chief judge of the circuit. In any case in which the chief judge is the subject of the complaint, the next senior circuit judge of that circuit shall perform the duties of the chief judge under this subsection. Each complaint shall be in writing and shall be accompanied by supporting affidavits.

"(2) The chief judge of that circuit shall, within thirty days of receipt of such a complaint, review the complaint and shall dismiss by written order any complaint which is frivolous, which relates to the merits of any decisional or procedural ruling of a judge and would have the effect of a collateral attack upon such ruling, or which alleges conduct which does not interfere with or impair the effective, expeditious, and fair administration of the business of the courts or the just determination of litigation within that circuit.

"(3) In any case in which the chief judge does not initially dismiss a complaint under paragraph (2), the chief judge shall transmit a copy of the complaint to the judge whose conduct is the subject of the complaint and notify that judge of his right to submit, within fourteen days from the time of such notification, affidavits in his own behalf. Upon a

request made by the judge who is the subject of the complaint and for good cause shown, the chief judge may grant a reasonable extension of the fourteen-day period. Within fourteen days after receipt of any affidavits filed by the judge, the chief judge shall review the judge's affidavits together with the complaint and the complainant's supporting affidavits and shall—

"(A) dismiss the complaint for any of the reasons set forth in paragraph (2);

"(B) attempt to redress the matter specified in the complaint through any informal means available; or

"(C) upon a finding that the alleged conduct warrants further investigation or after a determination that the matter cannot be redressed through informal means, refer the complaint to the full judicial council for a hearing on the matter.

"(4) In any case in which the chief judge dismisses a complaint under paragraph (3)(A), the chief judge shall notify the complainant of that action and the reasons for the dismissal. The complainant may, within thirty days after notification of the decision to dismiss the complaint, request that the judicial council review such decision. The decision of the judicial council shall be final and shall not be subject to review or appeal. In any case in which the chief judge refers the complaint to the judicial council for a hearing under para-

graph (3)(C), the chief judge shall transmit a copy of the complaint with a written explanation of his findings which justify that referral to the council.

"(5) Unless the judge who is the subject of the complaint gives his written consent, all papers, documents, records, deliberations, and investigations under paragraphs (1) through (4) are confidential and may not be disclosed by any person. Upon the referral of a complaint by the chief judge under paragraph (3)(C) to the judicial council for a hearing, the contents of the complaint, the findings of the chief judge, and all proceedings before the council shall be public.

"(6) For the purposes of all proceedings conducted under this paragraph and paragraphs (7) through (10), each judicial council is vested with the judicial powers of a Federal court. The judicial council shall hold a hearing on each complaint that is referred under paragraph (3)(C) by the chief judge, and shall prescribe by rule such procedures as are necessary to conduct such hearings and dispose of such claims. In prescribing those procedures, the council shall guarantee that the judge who is the subject of the complaint be given adequate notice of the hearing and an opportunity, with or without the assistance of counsel, to be present and to present testimony and witnesses on his own behalf.

"(7) Each hearing shall be recorded verbatim by shorthand, by mechanical means, or by electronic sound recording

by an official court reporter. The court reporter shall transcribe and certify the record of the proceedings.

"(8) After a hearing in accordance with the procedures established under paragraphs (6) and (7), the judicial council may proceed in accordance with any one or more of the following:

"(A) order that the complaint be dismissed;

"(B) request that the judge voluntarily retire;

"(C) order that, on a temporary basis, the judge be relieved of any duties with respect to cases presently assigned or that no further cases be assigned to the judge; or

"(D) order the censure of the judge.

"(9) Any action taken by the judicial council under paragraph (8) of this subsection shall be made by a majority of the members of the council and shall be supported by clear and convincing evidence on the record. Each order and recommendation shall be in writing and the complainant and any judge affected by such order or recommendation shall receive a copy. Within ten days after notification of an order under paragraph (8), the judge may file a petition for writ of certiorari to the Supreme Court under section 1254 of this title.

"(10) Whenever a judicial council takes any action under paragraph (8), with the exception of dismissal under (8)(A), it shall prepare and submit a written report to the

House of Representatives which includes the complaint made against the judge, the action taken by the council, a copy of the transcript of the hearing, and specific findings made by the council. A copy of the report shall be forwarded to the judge under inquiry and to the complainant.

"(11)(A) The judicial councils may utilize existing staff employed by the circuit or may request the Director of the Administrative Office of the United States Courts to procure personal services of experts and consultants, as authorized by section 3109 of title 5, as may be necessary to carry out the duties of the council in any particular case under this subsection.

"(B) Each judicial council shall prepare an annual report to the Congress showing the number of complaints and the action taken on each complaint.".

96TH CONGRESS
1ST SESSION

S. 678

To provide for improvements in the structure and administration of the Federal courts, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 15 (legislative day, FEBRUARY 22), 1979

Mr. KENNEDY (for himself and Mr. DECONCINI) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To provide for improvements in the structure and administration of the Federal courts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Courts Improvement Act of 1979".

TABLE OF CONTENTS

TITLE I—GOVERNANCE AND ADMINISTRATION OF THE FEDERAL COURTS

PART A—CHIEF JUDGE TENURE

Sec. 101. Appointment and terms of chief judges of the courts of appeals.
Sec. 102. Appointment and terms of chief judges of the district courts.
Sec. 103. Effective date; applicability.

PART B—PRECEDENCE AND COMPOSITION OF PANEL

Sec. 111. Precedence on panel.
Sec. 112. Composition of panel; requirements and size.

PART C—JUDICIAL COUNCILS

Sec. 121. Circuit councils.

PART D—RETIREMENT AND PENSIONS

Sec. 131. Judicial resignation and retirement.
Sec. 132. Pensions of judges who resign to accept executive positions.

PART E—JUDICIAL DISCIPLINE

Sec. 141. Procedures within judicial councils.

PART F—TEMPORARY ASSIGNMENT OF JUSTICES AND JUDGES

Sec. 151. Assignment to other offices within the Judicial Branch.

TITLE II—JURISDICTION AND PROCEDURE

PART A—INTERLOCUTORY APPEALS

Sec. 201. Court of appeals certifications.

PART B—TRANSFER OF CASES

Sec. 211. Transfer to cure want of jurisdiction.

PART C—INTEREST

Sec. 221. Interest on judgments and prejudgment interest.

TITLE III—APPELLATE STRUCTURE FOR PATENT, TRADEMARK, CUSTOMS, AND TRADE APPEALS

PART A—COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Sec. 301. Composition and placement of circuit.
Sec. 302. Assignment and appointment of judges.

PART B—ESTABLISHMENT OF UNITED STATES CLAIMS COURT

Sec. 311. Organization of court.
Sec. 312. Abolishment of Court of Customs and Patent Appeals.
Sec. 313. Technical and conforming amendments relating to organization.
Sec. 314. Technical and conforming amendments relating to the Department of Justice.

Sec. 315. Technical and conforming amendments relating to court officers and employees.

PART C—COURT OFFICERS AND EMPLOYEES OF THE UNITED STATES CLAIMS COURT

Sec. 321. Appointment, removal, and contract authority.
Sec. 322. Abolishment of United States Court of Customs and Patent Appeals.
Sec. 323. Technical and conforming amendments relating to repeal of Court of Customs and Patent Appeals.
Sec. 324. Jurisdiction of the United States Court of Appeals for the Federal Circuit.

PART D—UNITED STATES AS DEFENDANT

Sec. 331. Jurisdiction of the district courts.
Sec. 332. Related technical and conforming amendments.

PART E—UNITED STATES CLAIMS COURT; JURISDICTION AND VENUE

Sec. 341. Jurisdiction and Venue.
Sec. 342. Repeal of Court of Customs and Patent Appeals jurisdiction and related technical amendments.

PART F—UNITED STATES CLAIMS COURT PROCEDURE

Sec. 351. Amendment to title 28.
Sec. 352. Repeal of Court of Customs and Patent Appeals procedure and related technical and conforming amendments.

TITLE IV—TAX APPELLATE STRUCTURE

Sec. 401. Creation of Court of Tax Appeals; composition and placement of circuit.
Sec. 402. Appointment of chief judge and assignment of judges.
Sec. 403. Conforming amendments relating to appeal to the Supreme Court.
Sec. 404. Jurisdiction of the United States Court of Tax Appeals.
Sec. 405. Conforming amendments relating to review of orders of Federal agencies.

TITLE V—TECHNICAL AND CONFORMING AMENDMENTS OUTSIDE OF TITLE 28 RELATING TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT AND THE UNITED STATES COURT OF TAX APPEALS

Sec. 501. Title 2.
Sec. 502. Title 5.
Sec. 503. Plant Variety Protection Act.
Sec. 504. Trademark Act of 1946.
Sec. 505. Federal Fire Prevention and Control Act of 1974.
Sec. 506. Title 18.
Sec. 507. Indian Claims Commission.
Sec. 508. Indian lands.
Sec. 509. Internal Revenue Code of 1954.
Sec. 510. Title 44.

Sec. 511. Transportation.
Sec. 512. Miscellaneous amendments.

TITLE VI—EFFECTIVE DATE

Sec. 601. Effective date; applicability to actions filed before the effective date.

TITLE I—GOVERNANCE AND ADMINISTRATION OF THE FEDERAL COURTS

PART A—CHIEF JUDGE TENURE

APPOINTMENT AND TERMS OF CHIEF JUDGES OF THE COURTS OF APPEALS

SEC. 101. (a) Section 45(a) of title 28, United States Code, is amended to read as follows:

"(a)(1) The chief judge of the circuit shall be the circuit judge in regular active service who is senior in commission of those judges who—

"(A) are sixty-four years of age or under; and

"(B) have served for one year or more as circuit judge.

"(2)(A) In any case in which no circuit judge meets the qualifications of paragraph (1), the youngest circuit judge in regular active service who is sixty-five years of age or over and who has served as circuit judge for one year shall act as the chief judge.

"(B) In any case under subparagraph (A) in which there is no circuit judge in regular active service who has served as a circuit judge for more than one year, the circuit judge in

regular active service who is senior in commission shall act as the chief judge.

"(3)(A) Except as provided in subparagraph (C), the chief judge of the circuit appointed under paragraph (1) shall serve for a term of five years or, if longer, until another judge is eligible under paragraph (1) to serve as chief judge of the circuit.

"(B) Except as provided in subparagraph (C), a circuit judge acting as chief judge under subparagraph (A) or (B) of paragraph (2) shall serve until a judge has been appointed who meets the qualifications under paragraph (1).

"(C) No circuit judge may serve or act as chief judge of the circuit after attaining the age of seventy years unless no other circuit judge is qualified to serve as chief judge of the circuit under paragraph (1) or is qualified to act as chief judge under paragraph (2).".

(b) Section 45(c) of title 28, United States Code, is amended to read as follows:

"(c)(1) If the chief judge desires to be relieved of his duties as chief judge while retaining his active status as circuit judge, he may so certify to the Chief Justice of the United States, and thereafter the chief judge of the circuit shall be the circuit judge in regular active service who is senior in commission of those judges who—

"(A) are sixty-four years of age or under; and

"(B) have served for one year or more as circuit judge.

"(2)(A) In any case in which no circuit judge meets the qualifications of paragraph (1), the youngest circuit judge in regular active service who is sixty-five years of age or over and who has served as circuit judge for one year shall act as the chief judge.

"(B) In any case under subparagraph (A) in which there is no circuit judge in regular active service who has served as a circuit judge for more than one year, the circuit judge in regular active service who is senior in commission shall act as the chief judge.

"(3)(A) Except as provided in subparagraph (C), the chief judge of the circuit appointed under paragraph (1) shall serve for a term of five years or, if longer, until another judge is eligible under paragraph (1) to serve as chief judge of the circuit.

"(B) Except as provided in subparagraph (C), a circuit judge acting as chief judge under subparagraph (A) or (B) of paragraph (2) shall serve until a judge has been appointed who meets the qualifications under paragraph (1).

"(C) No circuit judge may serve or act as chief judge of the circuit after attaining the age of seventy years unless no other circuit judge is qualified to serve as chief judge of the

48-202 O - 79 - 12

circuit under paragraph (1) or is qualified to act as chief judge under paragraph (2).".

APPOINTMENT AND TERMS OF CHIEF JUDGES OF THE DISTRICT COURTS

SEC. 102. (a) Section 136(a) of title 28, United States Code, is amended to read as follows:

"(a)(1) In any district having more than one district judge, the chief judge of the district shall be the district judge in regular active service who is senior in commission of those judges who—

"(A) are sixty-four years of age or under; and

"(B) have served for one year or more as district judge.

"(2)(A) In any case in which no district judge meets the qualifications of paragraph (1), the youngest district judge in regular active service who is sixty-five years of age or over and who has served as district judge for one year shall act as the chief judge.

"(B) In any case under subparagraph (A) in which there is no district judge in regular active service who has served as a district judge for more than one year, the district judge in regular active service who is senior in commission shall act as the chief judge.

"(3)(A) Except as provided in subparagraph (C), the chief judge of the district appointed under paragraph (1) shall

serve for a term of five years or, if longer, until another judge is eligible under paragraph (1) to serve as chief judge of the district.

"(B) Except as provided in subparagraph (C), a district judge acting as chief judge under subparagraph (A) or (B) of paragraph (2) shall serve until a judge has been appointed who meets the qualifications under paragraph (1).

"(C) No district judge may serve or act as chief judge of the district after attaining the age of seventy years unless no other district judge is qualified to serve as chief judge of the district under paragraph (1) or is qualified to act as chief judge under paragraph (2).".

(b) Section 136(d) of title 28, United States Code, is amended to read as follows:

"(d)(1) If the chief judge desires to be relieved of his duties as chief judge while retaining his active status as district judge, he may so certify to the Chief Justice of the United States, and thereafter, the chief judge of the district shall be the district judge in regular active service who is senior in commission of those judges who—

"(A) are sixty-four years of age or under; and

"(B) have served for one year or more as district judge.

"(2)(A) In any case in which no district judge meets the qualifications of paragraph (1), the youngest district judge in

regular active service who is sixty-five years of age or over and who has served as district judge for one year shall act as the chief judge.

"(B) In any case under subparagraph (A) in which there is no district judge in regular active service who has served as a district judge for more than one year, the district judge in regular active service who is senior in commission shall act as the chief judge.

"(3)(A) Except as provided in subparagraph (C), the chief judge of the district appointed under paragraph (1) shall serve for a term of five years or, if longer, until another judge is eligible under paragraph (1) to serve as chief judge of the district.

"(B) Except as provided in subparagraph (C), a district judge acting as chief judge under subparagraph (A) or (B) of paragraph (2) shall serve until a judge has been appointed who meets the qualifications under paragraph (1).

"(C) No district judge may serve or act as chief judge of the district after attaining the age of seventy years unless no other district judge is qualified to serve as chief judge of the district under paragraph (1) or is qualified to act as chief judge under paragraph (2).".

EFFECTIVE DATE; APPLICABILITY

SEC. 103. (a) The amendments to section 45 of title 28, United States Code, and to section 136 of such title, made by

sections 101 and 102 of this part, shall take effect three years from the date of enactment of this Act and shall not apply to or affect any person serving as chief judge on that effective date.

(b) The provisions of section 45(a) of title 28, United States Code, in effect on the day before the effective date of this part shall apply to the chief judge of a circuit serving on the effective date. The provisions of section 136(a) of title 28, United States Code, in effect on the day before the effective date of this part shall apply to the chief judge of a district court serving on the effective date.

PART B—PRECEDENCE AND COMPOSITION OF PANEL

PRECEDENCE ON PANEL

SEC. 111. Section 45(b) of title 28, United States Code, is amended by inserting "of the court in regular active service" immediately after "circuit judges" in the second sentence.

COMPOSITION OF PANEL; REQUIREMENTS AND SIZE

SEC. 112. (a) Section 46(b) of title 28, United States Code, is amended by striking the period at the end of the first sentence and inserting at the end thereof a comma and the following: "at least two of whom shall be judges of that court".

(b) Section 46(c) of title 28, United States Code, is amended by striking out "not more than" in the first sentence.

PART C—JUDICIAL COUNCILS

CIRCUIT COUNCILS

SEC. 121. Section 332 of title 28, United States Code, is amended—

(1) by amending subsection (a) to read as follows:

"(a)(1) The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the judges of that circuit as specified in paragraph (2) of this subsection.

"(2)(A) Such council shall consist of not more than seven circuit judges in regular active service, including the chief judge, unless there are fewer than seven circuit judges in regular active service in which case every circuit judge in regular active service shall serve as a member of the council. The judges shall be summoned to serve on the council in order of the seniority of their circuit court commissions and shall serve for a period not to exceed five years. No circuit judge shall serve on the council who has not been a circuit judge for at least three years, unless there are no other circuit judges in regular active service who are senior in commission.

"(B) In addition to the circuit judges under subparagraph (A), such council shall consist of not more than four district judges in regular active service. If there are fewer than seven circuit judges in regular active service on the council, the number of district judges on the council shall be reduced by the number by which the number of circuit judges is less than seven, except that there shall be at least two district judges on the council. The judges of the district courts shall be represented on the council by the chief judges of the districts within the circuit, summoned to serve on the council in order of the seniority of their commissions, each to serve for a period not to exceed five years. If judges other than chief judges are needed to complete the district court membership on the council, judges in regular active service shall be summoned to serve on the council in order of the seniority of their commissions, each to serve for a period not to exceed five years. No district judge shall serve on the council who has not been a district judge for at least three years, unless there are no other district judges in regular active service who are senior in commission. The chief judge of the circuit may invite additional judges of the district courts to attend particular meetings of the council and participate in the discussion.

"(C) The terms for initial appointments to the council may be staggered by rule adopted by the judicial council of

the circuit to assure that such terms do not expire during the same year. The chief judge of each circuit shall preside at the council. The judges of the council shall attend all sessions of the council unless excused by the chief judge."; and

(2) by adding the following new subsections at the end thereof:

"(g) In performing the duties prescribed in this section, the council may hold such hearings and issue such orders or subpoenas as are necessary to compel the appearance of witnesses and the production of documents. Such orders may issue to any part of or person within the circuit and may require the appearance of witnesses and the production of documents at any place designated for holding court within the circuit. The circuit court and district courts shall promptly implement all orders of the judicial council.

"(h) Each court of appeals shall appoint an advisory committee for the study of the rules of practice and internal operating procedures of the court of appeals. The advisory committee shall serve as a means for the making of recommendations to the court concerning such rules and procedures.

"(i) Each court of appeals shall publish the rules of practice and the operating procedures of the court of appeals.".

PART D—RETIREMENT AND PENSIONS

JUDICIAL RESIGNATION AND RETIREMENT

SEC. 131. Section 371(b) of title 28, United States Code, is amended to read as follows:

"(b) Any justice or judge of the United States appointed to hold office during good behavior may retain his office but retire from regular active service after attaining an age which, when added to his years of judicial service, is equal to or greater than eighty years, except that no justice or judge shall so retire if such justice or judge has not served at least ten years continuously or otherwise. Upon such retirement, such justice or judge shall, during the remainder of his lifetime, continue to receive the salary of the office. The President shall appoint, by and with the advice and consent of the Senate, a successor to a justice or judge who retires.".

PENSIONS OF JUDGES WHO RESIGN TO ACCEPT EXECUTIVE POSITIONS

SEC. 132. Section 8332 of title 5, United States Code, is amended by inserting the following new subsection at the end of the section:

"(l) For the purposes of section 8339 of this title, an employee shall be allowed credit for any period of service as a justice or judge of the United States as defined by section 451 of title 28.".

PART E—JUDICIAL DISCIPLINE

PROCEDURES WITHIN JUDICIAL COUNCILS

SEC. 141. (a) Section 372 of title 28, United States Code, is amended by—

(1) amending the section heading to read as follows:

"§ 372. Retirement for disability; substitute judge on failure to retire; judicial discipline"; and

(2) adding the following new subsections at the end of the section:

"(c) Any person may file a written complaint against a district judge or circuit judge with the judicial council of the circuit in which the judge serves, requesting that a certificate of disability be issued under subsection (b) of this section or alleging a violation of the good behavior standard required by article III, section 1 of the United States Constitution. The Council shall receive, process, and investigate all such complaints relating to the judges of the circuit and may also investigate any other allegation on its own motion. After review of the allegations, the Council may dismiss the complaint as frivolous or after appropriate corrective action has been taken. In any such case, the chief judge shall transmit copies of the order to the complainant and the judge who is the subject of the complaint.

"(d)(1) In any case in which the complaint is not dismissed, the Council shall notify the complainant and the judge who is the subject of the complaint, and shall give that judge an opportunity to appear before the Council with the assistance of counsel, if desired. Whenever the Council finds that the conduct proved warrants further action, it may—

"(A) request that the judge voluntarily retire with the provision that the length of service requirements under section 371 of this title shall not apply;

"(B) certify disability pursuant to subsection (b) of this section;

"(C) recommend that, on a temporary basis, no further cases be assigned to the judge;

"(D) censure or reprimand the judge by means of private communication;

"(E) censure or reprimand the judge by means of public announcement;

"(F) recommend to the Judicial Conference of the United States that it advise the House of Representatives that impeachment proceedings pursuant to Article I, section 3 and article II, section 4 of the United States Constitution are warranted; or

"(G) take such other action as it considers appropriate under the circumstances.

"(2) Whenever any council acts pursuant to this subsection it shall promptly notify the Judicial Conference of the United States.

"(e) Each council may establish by its own rules procedures for considering allegations made pursuant to subsections (c) and (d), including procedures to assure confidentiality.

"(f) In discharging its duties pursuant to subsection (d), each council may request administrative, professional, and financial assistance and support from the Administrative Office of the United States Courts or the Federal Judicial Center. The Administrative Office and the Federal Judicial Center are authorized to provide such assistance and support and to expend funds in order to assure such assistance and support within the limits of its available resources.

"(g)(1) The Judicial Conference of the United States shall, at the request of the judge who is the subject of the action, review any decision taken pursuant to subsection (d). The Conference may prescribe such rules for the conduct of its proceedings as it considers appropriate. The Judicial Conference shall have the power to administer oaths, provide for the inspection of books and records, and issue subpoenas for the attendance of witnesses and the production of relevant material. Attendance of witnesses and the production of relevant material may be required from any place in the United

States and its territories at any place designated for holding court within the United States. The judge who is the subject of the action shall be given adequate prior notice in writing of any investigation by the Conference under this subsection and shall be given an opportunity to appear before the Conference with the assistance of counsel, if desired, and to present testimony and relevant material in his behalf. For purposes of this subsection, the Judicial Conference may appoint one or more of its members to receive such testimony and relevant material, and thereafter report to the Judicial Conference.

"(2) In each case brought before it the Judicial Conference shall—

"(A) order dismissal of the action;

"(B) recommend impeachment to the House of Representatives pursuant to Article I, section 3 and article II, section 4 of the United States Constitution;

"(C) affirm the recommendations and orders issued pursuant to subsection (d) of this section;

"(D) modify the recommendations and orders issued pursuant to subsection (d) of this section without increasing the severity of the sanction recommended or ordered; or

"(E) remand the action to the Council for further consideration.

"(h) Whenever, upon complaint and after a hearing, the Chief Justice of the United States finds that the chief judge of the Court of Claims, the Court of Customs and Patent Appeals, or the Customs Court has violated the good behavior standard required by article III, section 1 of the United States Constitution or is the subject of another serious allegation, or in the case of any judge of the Court of Claims, the Court of Customs and Patent Appeals, or the Customs Court, such judge is found by the chief judge of his court to be subject to a certificate of disability pursuant to subsection (b) of this section, the Chief Justice or chief judge shall promptly notify the Judicial Conference. The Judicial Conference shall thereupon review the facts and circumstances concerning the action taken and make such recommendations as are deemed necessary, in accordance with subsection (g) of this section.".

(b) The table of sections for chapter 17 of title 28, United States Code, is amended by amending the item relating to section 372 to read as follows:

"372. Retirement for disability; substitute judge or failure to retire; judicial discipline.".

PART F—TEMPORARY ASSIGNMENT OF JUSTICES AND JUDGES

ASSIGNMENT TO OTHER OFFICES WITHIN THE JUDICIAL BRANCH

SEC. 151. (a) Title 28, United States Code, is amended by inserting the following new chapter after chapter 13:

"CHAPTER 14—TEMPORARY ASSIGNMENT OF JUSTICES AND JUDGES TO OTHER OFFICES WITHIN THE JUDICIAL BRANCH

"Sec.
"301. Temporary assignment.
"302. Appointment of successor.
"303. Official station.
"304. Return to active service; seniority and precedence.

"§ 301. Temporary assignment

"Any retired justice of the United States, or any judge of the United States in active, senior, or retired status may be temporarily assigned to the position of Administrative Assistant to the Chief Justice, Director of the Administrative Office of the United States Courts, or Director of the Federal Judicial Center. Such service shall be without additional compensation.

"§ 302. Appointment of successor

"Upon the appointment of any judge in active status pursuant to section 301 of this title, the President shall, by and with the advice and consent of the Senate, appoint a successor to fill the vacancy resulting from the temporary assignment. Whenever such a successor is appointed, any va-

cancy created by the death, resignation, retirement, or assumption of senior status of the judge who is temporarily assigned pursuant to section 301 shall not be filled. If the judge temporarily assigned resumes active service pursuant to section 304(a)(1) of this title, the first vacancy created on that court shall not be filled.

"§ 303. Official station

"Notwithstanding the provisions of sections 44, 134, and 374 of this title, the official station of the Administrative Assistant to the Chief Justice, the Director of the Administrative Office of the United States Court, and the Director of the Federal Judicial Center is the District of Columbia.

"§ 304. Return to active service; seniority and precedence

"(a) Any judge who was in active service at the time of his temporary assignment made pursuant to section 301 of this title may—

"(1) resume such active service upon vacating his office; or

"(2) assume active service as a judge in the circuit of the District of Columbia.

"(b) For the purposes of seniority and precedence, a judge who resumes active service under paragraph (1) of subsection (a) shall be considered to have been in continuous active service as a judge of that court.".

(b) The table of chapters for part I of title 28, United States Code, is amended by inserting the following new item immediately after the item relating to chapter 13:

"14. Temporary Assignment of Justices and Judges to Other Offices within the Judicial Branch ..... 301".

TITLE II—JURISDICTION AND PROCEDURE

PART A—INTERLOCUTORY APPEALS

COURT OF APPEALS CERTIFICATIONS

SEC. 201. Section 1292(b) of title 28, United States Code, is amended by deleting ": *Provided, however,* That application" and inserting in lieu thereof a period and the following: "The Court of Appeals may permit an appeal from a decision of a district court, not otherwise appealable under this section, after a refusal by a district court judge to make such a statement in writing, if the Court of Appeals determines in its discretion that an appeal is required in the interests of justice and because of the extraordinary importance of the case. Application".

PART B—TRANSFER OF CASES

TRANSFER TO CURE WANT OF JURISDICTION

SEC. 211. (a) Title 28, United States Code, is amended by adding the following new chapter after chapter 97:

"CHAPTER 99.—GENERAL PROVISIONS

"Sec.
"1631. Transfer to cure want of jurisdiction.

48-202 O - 79 - 13

"**§ 1631. Transfer to cure want of jurisdiction**

"Whenever an action is filed in a court of the United States, and that court finds that there is a want of jurisdiction, the court shall, if it is in the interests of justice, transfer such action to any court of the United States in which the action could have been brought at the time such action was filed, and the action shall proceed as if it had been filed in the transferee court on the date upon which it was actually filed in the transferor court.".

(b) The table of chapters for title 28, United States Code, and for Part IV of such title, are each amended by adding at the end thereof the following:

"99. General Provisions ..... 1631".

PART C—INTEREST

INTEREST ON JUDGMENTS AND PREJUDGMENT INTEREST

SEC. 221. Section 1961 of title 28, United States Code, is amended—

(1) by striking out "at the rate allowed by State law" in the last sentence and inserting in lieu thereof the following: "at the rate established pursuant to section 6621 of the Internal Revenue Code of 1954 (26 U.S.C. 6621) as of that date. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges."; and

(2) by inserting "(a)" at the beginning of the section and by adding the following new subsection at the end:

"(b)(1) Except as provided in paragraph (2) or unless otherwise required by law, in awarding damages to a party the court may add to the sum of actual damages awarded a sum of interest computed at the rate fixed under subsection (a) at the time of judgment and compounded annually and measured from the time that the party against whom damages have been awarded became aware of his potential liability or from the time which, but for the actions of that party, he should have become aware of such liability, or for a period of five years, whichever is earlier.

"(2) Interest under paragraph (1) shall not be awarded on losses which will not be incurred until after judgment, nor shall such interest be awarded where such an award would be duplicative of some other sum awarded.".

TITLE III—APPELLATE STRUCTURE FOR PATENT, TRADEMARK, CUSTOMS, AND TRADE APPEALS

PART A—COURT OF APPEALS FOR THE FEDERAL CIRCUIT

COMPOSITION AND PLACEMENT OF CIRCUIT

SEC. 301. (a) Section 41 of title 28, United States Code, is amended by striking "eleven" from the first sentence and by adding at the end of the section the following:

"Federal	All Federal judicial districts.".

(b)(1) Section 44(a) of title 28, United States Code, is amended by adding at the end of the subsection the following:

"Federal	12.".

(2) Section 44(c) of such title is amended by striking out "Except in the District of Columbia" and inserting in lieu thereof "Except in the District of Columbia, the Court of Appeals for the Federal Circuit, and the Court of Tax Appeals".

(c) Section 48 of title 28, United States Code, is amended by inserting at the end of the table of circuits and places the following:

"Federal	In such of the above listed places as the court may by order select.".

ASSIGNMENT AND APPOINTMENT OF JUDGES

SEC. 302. (a) Notwithstanding the provisions of section 44 of title 28, United States Code, the judges of the United States Court of Claims and the United States Court of Customs and Patent Appeals shall, on the effective date of this Act, be assigned to the United States Court of Appeals for the Federal Circuit. Thereafter, a vacancy on the court shall be filled in accordance with the provisions of section 44 of title 28, United States Code.

(b) Notwithstanding the provisions of section 45(a) and (b) of title 28, United States Code, the first chief judge of the United States Court of Appeals for the Federal Circuit shall be appointed by the President, by and with the consent of the Senate. When the person who first serves as chief judge of the United States Court of Appeals for the Federal Circuit vacates that position, the position shall be filled in accordance with the provisions of section 45 of title 28, United States Code.

(c) Section 46(b) of title 28, United States Code, is amended by striking the period at the end of the first sentence and inserting in lieu thereof the following: "except that in the United States Court of Appeals for the Federal Circuit and the Court of Tax Appeals the size of the division shall be a number determined by the court but not less than three.".

(d) Section 46(c) of title 28, United States Code, is amended by inserting the following new sentence after the first sentence: "The United States Court of Appeals for the Federal Circuit may sit in divisions of more than three judges.".

PART B—ESTABLISHMENT OF UNITED STATES CLAIMS COURT

ORGANIZATION OF COURT

SEC. 311. Chapter 7 of title 28, United States Code, is amended to read as follows:

"CHAPTER 7—UNITED STATES CLAIMS COURT

"Sec.
"171. Appointment and number of judges; character of court; designation of chief judge.
"172. Tenure and salaries of judges.
"173. Terms.
"174. Assignment of judges; decisions.
"175. Expenses for travel and subsistence.
"176. Removal from office.
"177. Disbarment of removed judges.

"§ 171. Appointment and number of judges; character of court; designation of chief judge

"(a) Except as provided in subsection (b), the President shall appoint by and with the advice and consent of the Senate, sixteen judges who shall constitute a court of record known as the United States Claims Court (hereinafter in this chapter referred to as the 'Claims Court'). The Court is declared to be a court established under article I of the Constitution of the United States.

"(b) Those persons who on the effective date of this chapter are serving as commissioners of the United States Court of Claims shall be judges of the Claims Court for a term of fifteen years measured from the date they took office as commissioners of the United States Court of Claims. Those commissioners who have served for more than fifteen years and are more than sixty years old, or who are more than sixty-five when they complete fifteen years of service, may continue to serve until age seventy. At the time the commissioners become judges of the Claims Court they may elect between the retirement program set forth in section 7447 of the Internal Revenue Code of 1954 (26 U.S.C. 7447) and the pension plan in which they were enrolled before becoming a judge of the Claims Court.

"(c) The Claims Court shall designate, at least biennially, a judge to act as chief judge.

§ 172. Tenure and salaries of judges

"The term of office of any judge of the Claims Court shall expire fifteen years after the judge takes office. Each judge shall receive a salary at the same annual rate as judges of the district courts of the United States, pursuant to section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351–361), as adjusted by section 461 of this title.

"§ 173. Terms

"The Claims Court may hold court at such times and in such places as it may fix by rule of court. The times and places of the sessions of the Claims Court shall be prescribed with a view to securing reasonable opportunity for citizens to appear before the Claims Court, with as little inconvenience and expense to citizens as is practicable.

"§ 174. Assignment of judges; decisions

"(a) The judicial power of the Claims Court with respect to any action or proceeding, except congressional reference cases, shall be exercised by a single judge, who may preside alone and hold a regular or special session of court at the same time other sessions are held by other judges.

"(b) All decisions of the Claims Court shall be preserved and open to inspection.

"§ 175. Expenses for travel and subsistence

"Judges of the Claims Court shall receive necessary traveling expenses, and a per diem allowance as provided in the Travel Expense Act of 1949, while traveling on duty and away from their designated stations, subject to the same limitations in amount as are applicable to the United States Customs Court.

"§ 176. Removal from office

Judges of the Claims Court may be removed by the President, after notice and opportunity for public hearing, for

inefficiency, neglect of duty, or malfeasance in office, but for no other cause.

"**§ 177. Disbarment of removed judges**

A judge of the Claims Court removed from office in accordance with section 176 of this title shall not be permitted at any time to practice before the Claims Court.".

ABOLISHMENT OF COURT OF CUSTOMS AND PATENT APPEALS

SEC. 312. Chapter 9 of title 28, United States Code, is repealed.

TECHNICAL AND CONFORMING AMENDMENTS RELATING TO ORGANIZATION

SEC. 313. (a) Section 256(b) of title 28, United States Code, is amended by striking out all that appears after "*Provided, however,*" and inserting in lieu thereof the following: "That an interlocutory appeal may be taken from such an order pursuant to the provisions of section 1295(a)(7) of this title, and that the United States Court of Appeals for the Federal Circuit may, in its discretion, consider the appeal.".

(b) The table of chapters for title 28, United States Code, and for part I of such title, are each amended—

(1) in the item relating to chapter 7, by striking "Court of Claims" and inserting in lieu thereof "United States Claims Court"; and

(2) in the item relating to chapter 9, by striking "Court of Customs and Patent Appeals" and inserting in lieu thereof "Repealed".

(c) Section 291 of title 28, United States Code, is amended by repealing subsection (b).

(d) Section 292(e) of title 28, United States Code, is amended by striking out "the Court of Claims, the Court of Customs and Patent Appeals or" and by striking out "in which the need arises".

(e) Section 293 of title 28, United States Code, is amended by striking out the subsection designation "(b)" and by repealing subsections (a), (c), and (d).

(f) Section 331 of title 28, United States Code, is amended—

(1) in the first paragraph, by striking out ", the Chief Judge of the Court of Claims, the Chief Judge of the Court of Customs and Patent Appeals,"; and

(2) in the third paragraph by striking out the second sentence.

(g) Section 372 of title 28, United States Code, is amended—

(1) in the third paragraph of subsection (a), by striking out "Court of Claims, Court of Customs and Patent Appeals, or";

(2) in the fifth paragraph of subsection (a), by striking out "Court of Claims, Court of Customs and Patent Appeals, or"; and

(3) in subsection (b), by striking out "Court of Claims, Court of Customs and Patent Appeals," each time it appears.

(h)(1) Section 415 of title 28, United States Code, is repealed.

(2) The table of sections at the beginning of chapter 19 of title 28, United States Code, is amended in the item relating to section 415 by striking out "Court of Claims decisions" and inserting in lieu thereof "Repealed".

(i) Section 451 of title 28, United States Code, is amended by striking out "the Court of Claims, the Court of Customs and Patent Appeals," in the first paragraph and "Court of Claims, Court of Customs and Patent Appeals;" in the third paragraph.

(j) Section 456 of title 28, United States Code, is amended by striking out "the Court of Claims, the Court of Customs and Patent Appeals," in the second paragraph.

(k)(1) Chapter 21 of title 28, United States Code, is amended by adding the following at the end thereof:

"**§ 462. Application to the United States Claims Court**

"Sections 452, 453, 454, 455, 457, 458, 459, and section 461 of this chapter shall also apply to the United States Claims Court.".

(2) The table of sections at the beginning of chapter 21 of title 28, United States Code, is amended by adding at the end thereof:

"462. Application to the United States Claims Court.".

TECHNICAL AND CONFORMING AMENDMENTS RELATING TO THE DEPARTMENT OF JUSTICE

SEC. 314. (a) Section 518(a) of title 28, United States Code, is amended by striking out "in the Court of Claims in which the United States is interested" and inserting in lieu thereof "against the United States brought originally in the United States Court of Appeals for the Federal Circuit or in the United States Claims Court".

(b)(1) Section 520 of title 28, United States Code, is amended—

(A) in subsection (a) by striking out "Court of Claims" and inserting in lieu thereof "United States Claims Courts or actions against the United States brought originally in the United States Court of Appeals for the Federal Circuit"; and

(B) by striking out "Court of Claims" in the section heading and inserting in lieu thereof "United

States Claims Court or actions against the United States brought originally in the United States Court of Appeals for the Federal Circuit".

(2) The table of sections at the beginning of chapter 31 of title 28, United States Code, is amended in the item relating to section 520 by striking "Court of Claims" and inserting in lieu thereof "United States Claims Court or in actions against the United States brought originally in the United States Court of Appeals for the Federal Circuit".

TECHNICAL AND CONFORMING AMENDMENTS RELATING TO COURT OFFICERS AND EMPLOYEES

SEC. 315. (a) Section 610 of title 28, United States Code, is amended by striking out "the Court of Claims, the Court of Customs and Patent Appeals," and inserting in lieu thereof "the United States Claims Court".

(b)(1) Chapter 47 of title 28 is amended by adding at the end thereof the following new section:

"§ 714. Staff attorneys and technical assistants

"Each court of appeals may appoint such central staff attorneys and technical assistants as may be necessary, all of whom shall be subject to removal by the court.".

(2) The table of sections for such chapter is amended by adding at the end thereof the following new item:

"714. Staff attorneys and technical assistants.".

PART C—COURT OFFICERS AND EMPLOYEES OF THE UNITED STATES CLAIMS COURT

APPOINTMENT, REMOVAL, AND CONTRACT AUTHORITY

SEC. 321. Chapter 51 of title 28, United States Code, is amended to read as follows:

"CHAPTER 51—UNITED STATES CLAIMS COURT

"Sec.
"791. Clerk and other employees.
"792. Law clerks and secretaries.
"793. Bailiff and messenger.
"794. Reporting of court proceedings.

"§ 791. Clerk and other employees

"(a) The United States Claims Court may appoint a clerk, a chief deputy clerk, and other employees as may be necessary, each of whom shall be subject to removal by the court.

"(b) The clerk shall pay into the Treasury all fees, costs, and other moneys collected by him. He shall make such returns to the Director of the Administrative Office of the United States Courts under regulations prescribed by him.

"(c) On the first day of each regular session of Congress, the clerk shall transmit to the Congress a complete statement of all the judgments rendered by the court during the previous year, showing the dates and amounts of such judgments and the parties in whose favor they were rendered, together with a brief synopsis of the nature of the

claims upon which they were rendered, and a statement of the costs taxed in each case.

"§ 792. Law clerks and secretaries

"The judges of the United States Claims Court may appoint necessary law clerks and secretaries subject to any limitation of the aggregate salaries of such employees which may be imposed by law.

"§ 793. Bailiff and messenger

"The Claims Court may appoint a bailiff and a messenger who shall be subject to removal by the court.

"§ 794. Reporting of court proceedings

"The Claims Court is authorized to contract for the reporting of all proceedings had in open court, and in such contract to fix the terms and conditions under which such reporting services shall be performed, including the terms and conditions under which transcripts shall be supplied by the contractor to the court and to other persons, departments, and agencies.".

ABOLISHMENT OF UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

SEC. 322. (a) Chapter 53 of title 28, United States Code, is repealed.

(b) The table of chapters for title 28, United States Code, and at the beginning of part III of such title are each amended—

(1) in the item relating to chapter 51, by striking "Court of Claims" and inserting in lieu thereof "United States Claims Court"; and

(2) in the item relating to chapter 53, by striking "Court of Customs and Patent Appeals" and inserting in lieu thereof "Repealed".

(c) Section 957 of title 28, United States Code, is amended by striking the subsection designation "(a)" and repealing subsection (b).

TECHNICAL AND CONFORMING AMENDMENTS RELATING TO REPEAL OF COURT OF CUSTOMS AND PATENT APPEALS

SEC. 323. (a) Sections 1255 and 1256 of title 28, United States Code, are repealed.

(b) The table of sections at the beginning of chapter 81 of title 28, United States Code, is amended—

(1) in the item relating to section 1255, by striking "Court of Claims; certiorari; certified questions" and inserting in lieu thereof "Repealed."; and

(2) in the item relating to section 1256, by striking "Court of Customs and Patent Appeals; certiorari." and inserting in lieu thereof "Repealed".

(c) Subsection (b) of section 1336 of title 28, United States Code, is amended by striking out "Court of Claims" and inserting in lieu thereof "United States Claims Court".

JURISDICTION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SEC. 324. (a) Section 1291 of title 28, United States Code, is amended by striking out "The courts of appeals" and inserting in lieu thereof "Except as specifically provided in sections 1295 and 1296, the courts of appeals".

(b) Section 1294 of title 28, United States Code, is amended by striking out "Appeals" and inserting in lieu thereof: "Except as specifically provided in sections 1295 and 1296, appeals".

(c) Chapter 83 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 1295. Jurisdiction of the United States Court of Appeals for the Federal Circuit

"(a) The Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

"(1) in any appeal from a district court in which the jurisdiction of the district court was based, in whole or in part, on section 1338 of this title, except cases involving copyrights which shall be governed by section 1294 of this title;

"(2) in any appeal from a district court in which the jurisdiction of the district court was based, in whole or in part, on section 1346(b), except for any

48-202 O - 79 - 14

claim founded upon an Act of Congress or a regulation of an executive department providing for internal revenue, or on section 1346(g) of this title;

"(3) in any appeal from the United States Claims Court;

"(4) in any petition for review brought under section 1006 of the Federal Aviation Act of 1958 (72 Stat. 795, 49 U.S.C. 1486);

"(5) in any appeal from a decision of—

"(A) the Board of Appeals and the Board of Patent Interferences of the Patent and Trademark Offices as to patent applications and interferences, at the request of an applicant for a patent or any party to a patent interference;

"(B) the Commissioner of Patents and Trademarks or Trademark Trial and Appeals Board as to trademark applications and proceedings as provided in section 21 of the Act entitled 'An Act to provide for the registration and protection of trademarks used in commerce to carry out the provisions of certain international conventions, and for other purposes', approved July 5, 1946 (60 Stat. 427; 15 U.S.C. 1071); and

"(C) the district courts to which cases were directed pursuant to sections 145 and 146 of title 35, United States Code;

"(6) in any appeal from a final judgment or order of the United States Customs Court;

"(7) in any interlocutory appeal from an interlocutory order of the United States Customs Court in accordance with the provisions of subsection (b);

"(8) to review, by appeal on questions of law only, the findings of the United States International Trade Commission as to unfair practices in import trade made under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337);

"(9) to review, by appeal on questions of law only, findings of the Secretary of Commerce under headnote 6 to schedule 8, part 4 of the Tariff Schedules of the United States, relating to importation of instruments or apparatus (19 U.S.C. 1202);

"(10) in any appeal under section 71 of the Plant Variety Protection Act; and

"(11) in any appeal from a final order or final decision of the Merit Systems Protection Board under section 7703(b)(1) of title 5, United States Code.

"(b)(1) The Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an interlocutory appeal under subsection (a)(7) if—

"(A) the chief judge of the Customs Court issues an order under the provisions of section 256(b) of this title; or

"(B) when any judge in the Customs Court, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved as to which there is substantial ground for difference of opinion and that an immediate appeal from its order may materially advance the ultimate termination of the litigation.

"(2) An appeal under paragraph (1)(B) is in the discretion of the Customs Court and application for such an appeal shall be made within ten days after the entry of the order. The application for and the granting of such an appeal shall not stay the proceedings in the Customs Court unless a stay is ordered by a judge of the Customs Court or by the United States Court of Appeals for the Federal Circuit or a judge of that court.".

(d) The table of sections at the beginning of chapter 83 of such title is amended by adding at the end thereof the following new item:

"1295. Jurisdiction of the United States Court of Appeals for the Federal Circuit.".

PART D—UNITED STATES AS DEFENDANT

JURISDICTION OF THE DISTRICT COURTS

SEC. 331. Section 1346 of title 28, United States Code, is amended to read as follows:

"**§ 1346. United States as defendant**

"(a) The district courts shall have original jurisdiction of any civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws.

"(b)(1) Except as provided in paragraph (2), the district courts shall have original jurisdiction, concurrent with the United States Claims Court, of any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Con-

tract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

"(2) The Claims Court shall not have jurisdiction of any civil action or claim against the United States founded upon any Act of Congress or regulation of an executive department providing for internal revenue.

"(c) Subject to the provisions of chapter 171 of this title, the district court, together with the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

"(d) The jurisdiction conferred by this section includes jurisdiction of any setoff, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

"(e) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

"(f) The district courts shall have original jurisdiction of any civil action against the United States provided in section 7426 or section 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954.

"(g) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a of this title to quiet title to an estate or interest in real property in which an interest is claimed by the United States.".

RELATED TECHNICAL AND CONFORMING AMENDMENTS

SEC. 332. (a) Section 1398 of title 28, United States Code, is amended by striking out "Court of Claims" and inserting in lieu thereof "Claims Court".

(b) Subsection (c) of section 1406 of title 28, United States Code, is amended by striking out "Court of Claims" wherever it appears and inserting in lieu thereof "Claims Court".

PART E—UNITED STATES CLAIMS COURT; JURISDICTION AND VENUE

JURISDICTION AND VENUE

SEC. 341. Chapter 91 of title 28, United States Code, is amended to read as follows:

"CHAPTER 91—UNITED STATES CLAIMS COURT

"Sec.
"1491. Claims against United States generally; actions involving Tennessee Valley Authority.
"1492. Congressional reference cases.
"1494. Accounts of officers, agents, or contractors.
"1495. Damages for unjust conviction and imprisonment; claims against United States.
"1496. Disbursing officers' claims.
"1497. Oyster growers' damages from dredging operations.
"1498. Patent and copyright cases.
"1499. Liquidated damages withheld from contractors under Contract Work Hours Standards Act.
"1500. Pendency of claims in other courts.
"1501. Pensions.
"1502. Treaty cases.
"1503. Set-offs.
"1505. Indian claims.
"1506. Transfer to cure defect of jurisdiction.

"§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

"(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, except an Act of Congress or a regulation of an executive department providing for internal revenue, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied con-

tract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

"(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

"(b) Nothing in this section shall be construed to give the United States Claims Court jurisdiction in actions against, or founded on conduct of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

"§ 1492. Congressional reference cases

"Any bill, except a bill for a pension, may be referred by either House of Congress to the United States Claims Court for a report in conformity with section 2506 of this title.

"§ 1494. **Accounts of officers, agents or contractors**

"The United States Claims Court shall have jurisdiction to determine the amount, if any, due to or from the United States by reason of any unsettled account of any officer or agent of, or contractor with, the United States, or a guarantor, surety or personal representative of any such officer, agent, or contractor, and to render judgment thereon, if—

"(1) the claimant or the person he represents has applied to the proper department of the Government for settlement of the account;

"(2) three years have elapsed from the date of such application without settlement; and

"(3) no action upon the unsettled account has been brought by the United States.

"§ 1495. **Damages for unjust conviction and imprisonment; claim against the United States**

"The United States Claims Court shall have jurisdiction to render judgment upon any claim for damages by any person unjustly convicted of an offense against the United States and imprisoned.

"§ 1496. **Disbursing officers' claims**

"The United States Claims Court shall have jurisdiction to render judgment upon any claim by a disbursing officer of the United States or by his administrator or executor for

relief from responsibility for loss, in line of duty, of Government funds, vouchers, records or other papers in his charge.

"§ 1497. Oyster growers', damages from dredging operations

"The United States Claims Court shall have jurisdiction to render judgment upon any claim for damages to oyster growers on private or leased lands or bottoms arising from dredging operations or use of other machinery and equipment in making river and harbor improvements authorized by Act of Congress.

"§ 1498. Patent and copyright cases

"(a)(1) Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner of the invention or lawful right to use or manufacture the invention, the owner's remedy is an action against the United States in the Claims Court for the recovery of his reasonable and entire compensation for such use and manufacture.

"(2) For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

"(3) The court shall not award compensation under this section if the claim is based on the use or manufacture by or for the United States of any article owned, leased, used by, or in the possession of the United States prior to July 1, 1918.

"(b) A Government employee shall have the right to bring suit against the Government under this section except where he was in a position to order, influence, or induce use of the invention by the Government. This section shall not confer a right of action on any patentee or any assignee of such patentee with respect to any invention discovered or invented by a person while in the employment or service of the United States, where the invention was related to the official functions of the employee, in cases in which such functions included research and development, or in the making of which Government time, materials, or facilities were used.

"(c)(1) Whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization or consent of the Government, the exclusive remedy of the owner of such copyright is an action against the United States in the Claims Court for

the recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages as set forth in section 504(c) of title 17, United States Code.

"(2) A Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the copyrighted work by the Government.

"(3) This subsection shall not confer a right of action on any copyright owner or any assignee of such owner with respect to any copyrighted work prepared by a person while in the employment or service of the United States, where the copyrighted work was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used.

"(4) Before such an action against the United States has been instituted the appropriate corporation owned or controlled by the United States or the head of the appropriate department or agency of the Government, as the case may be, is authorized to enter into an agreement with the copyright owner in full settlement and compromise for the damages accruing to him by reason of such infringement and to settle the claim administratively out of available appropriations.

"(5) Except as otherwise provided by law, no recovery shall be had for any infringement of a copyright covered by this subsection committed more than three years prior to the filing of the complaint or counterclaim for infringement in the action, except that the period between the date of receipt of a written claim for compensation by the department or agency of the Government or corporation owned or controlled by the United States, as the case may be, having authority to settle such claim and date of mailing by the Government of a notice to the claimant that this claim has been denied shall not be counted as part of the three years, unless the action is brought before the date of mailing by the Government of such a notice to the claimant.

"(d) The provisions of this section shall not apply to any claim arising in a foreign country.

"(e)(1) Whenever a plant variety protected by a certificate of plant variety protection under the laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm or corporation acting for the Government and with the authorization and consent of the Government, the exclusive remedy of the owner of such certificate shall be by action against the United States in the Claims Court for the recovery of his

reasonable and entire compensation as damages for such infringement.

"(2) A Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the protected plant variety by the Government.

"(3) This subsection shall not confer a right of action on any certificate owner or any assignee of such owner with respect to any protected plant variety made by a person while in the employment or service of the United States, where such variety was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used.

"(4) Before such action against the United States has been instituted, the appropriate corporation owned or controlled by the United States or the head of the appropriate agency of the Government, as the case may be, is authorized to enter into an agreement with the certificate owner in full settlement and compromise, for the damages accrued to him by reason of such infringement and to settle the claim administratively out of available appropriations.

"§ 1499. Liquidated damages withheld from contractors under Contract Work Hours Standards Act

"The United States Claims Court shall have jurisdiction to render judgment upon any claim for liquidated damages

withheld from a contractor or subcontractor under section 104 of the Contract Work Hours Standards Act.

"§ 1500. Pendency of claims in other courts

"The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or the plaintiff's assignee has pending in any other court any action or process against the United States or any person who, at the time when the cause of action alleged in such action or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

"§ 1501. Pensions

"The United States Claims Court shall not have jurisdiction of any claim for a pension.

"§ 1502. Treaty cases

"Except as otherwise provided by Act of Congress, the United States Claims Court shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations.

"§ 1503. Setoffs

"The United States Claims Court shall have jurisdiction to render judgment upon any setoff or demand by the United States against any plaintiff in such court.

"§ 1505. Indian claims

"The United States Claims Court shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Claims Court if the claimant were not an Indian tribe, band, or group.

"§ 1506. Transfer to cure defect of jurisdiction

"If a case within the exclusive jurisdiction of the district courts is filed in the United States Claims Court, the court shall, if it is in the interest of justice, transfer such case to any district court in which it could have been brought at the time such case was filed, where the case shall proceed as if it had been filed in the district court on the date it was filed in the Claims Court.".

REPEAL OF COURT OF CUSTOMS AND PATENT APPEALS JURISDICTION AND RELATED TECHNICAL AMENDMENTS

SEC. 342. (a) Chapter 93 of title 28, United States Code, is repealed, and the table of chapters for title 28, United States Code, and at the beginning of part IV of such title are each amended—

48-202 O - 79 - 15

(1) in the item relating to chapter 91, by striking out "Court of Claims" and inserting in lieu thereof "United States Claims Court"; and

(2) in the item relating to chapter 93, by striking "Court of Customs and Patent Appeals" and inserting in lieu thereof "Repealed".

(b) Section 1926 of title 28, United States Code, is repealed, and the table of sections at the beginning of chapter 123 of title 28, United States Code, is amended in the item relating to section 1926 by striking "Court of Customs and Patent Appeals" and inserting in lieu thereof "Repealed".

(c) Section 2110 of title 28, United States Code, is repealed, and the table of sections at the beginning of chapter 133 of title 28, United States Code, is amended in the item relating to section 2110 by striking "time for appeal to Court of Claims in torts claims cases" and inserting in lieu thereof "Repealed".

(d)(1) Section 2353 of such title is repealed.

(2) The table of sections for chapter 158 of such title is amended in the item relating to section 2353 by striking out "Decision of the Plant Variety Protection Office" and inserting in lieu thereof "Repealed".

PART F—UNITED STATES CLAIMS COURT PROCEDURE

AMENDMENT TO TITLE 28

SEC. 351. Chapter 165 of title 28, United States Code, is amended to read as follows:

"CHAPTER 165—UNITED STATES CLAIMS COURT PROCEDURE

"Sec.
"2501. Time for filing suit.
"2502. Aliens' privilege to sue.
"2503. Interest of witness.
"2504. Calls and discovery.
"2505. Counterclaim or set-off; registration of judgment.
"2506. Congressional reference cases.
"2507. Referral of cases by Comptroller General or the head of an executive department or agency.
"2508. Accounts of officers, agents, or contractors.
"2509. Disbursing officers; relief.
"2510. Unjust conviction and imprisonment.
"2511. Forfeiture of fraudulent claims.
"2512. New trial, stay of judgment.
"2513. Interest on claims and judgments.
"2514. Payment of judgments.
"2515. Conclusiveness of judgment.
"2516. Fees; cost of printing record.
"2517. Subpenas.
"2518. Rules of practice, procedure, and evidence.

"§ 2501. Time for filing suit

"(a) Each claim for which the United States Claims Court has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

"(b) Each claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

"(c) A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

"(d) An action for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the General Accounting Office fails to act within six months after receiving the account.

"§ 2502. Aliens' privilege to sue

"Citizens or subject of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the Claims Court if the subject matter of the suit is otherwise within such court's jurisdiction.

"§ 2503. Interest of witness

"A witness in an action in the United States Claims Court shall not be exempt or disqualified because he is a party to or interested in such action.

"§ 2504. Calls and discovery

"(a) The Claims Court may call upon any department or agency of the United States or upon any party for any information or papers, not privileged, for purposes of discovery or for use as evidence. The head of any department or agency may refuse to comply with a call issued pursuant to this subsection when, in his opinion, compliance will be injurious to the public interest.

"(b) Without limitation on the provisions of subsection (a) of this section, the court may, in accordance with its rules, provide additional means for the discovery of any relevant facts, books, papers, documents or tangible things, not privileged.

"(c) The Claims Court may use all recorded and printed reports made by the committees of the Senate or House of Representatives.

"§ 2505. Counterclaim or setoff; registration of judgment

"(a) Upon the trial of any action in the Claims Court in which any setoff, counterclaim, claim for damages, or other demand is set up on the part of the United States against any plaintiff making claim against the United States in that court, the court shall hear and determine such claim or demand both for and against the United States and plaintiff.

"(b) If upon the whole case it finds that the plaintiff is indebted to the United States it shall render judgment to that effect, and such judgment shall be final and reviewable.

"(c) The transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records and shall be enforceable as other judgments.

"§ 2506. Congressional reference cases

"(a) Whenever a bill, except a bill for a pension, is referred by either House of Congress to the chief judge of the Claims Court pursuant to section 1492 of this title, the chief

judge shall designate a trial judge for the case and a panel of three judges of the court to serve as a reviewing body. One member of the review panel shall be designated as presiding judge of the panel.

"(b) Proceedings in a congressional reference case shall be under rules and regulations prescribed for the purpose by the chief judge who is authorized and directed to require the application of the pertinent rules of practice of the Claims Court insofar as feasible. Each trial judge and each review panel shall have authority to do and perform any acts which may be necessary or proper for the efficient performance of their duties, including the power to administer oaths and affirmations. None of the rules, regulations, findings, or conclusions authorized by this section shall be subject to further judicial review.

"(c) The trial judge to whom a congressional reference case is assigned by the chief judge shall proceed in accordance with the applicable rules to determine the facts, including facts relating to delay or laches, facts bearing upon the question whether the bar of any statute of limitation should be removed, or facts claimed to excuse the claimant for not having resorted to any established legal remedy. He shall append to his findings of fact conclusions sufficient to inform Congress whether the demand is a legal or equitable claim or

a gratuity, and the amount, if any, legally or equitably due from the United States to the claimant.

"(d) The findings and conclusions of the trial judge shall be submitted by him, together with the record in the case, to the review panel for review by it pursuant to such rules as may be provided for the purpose, which shall include provision for submitting the report of the trial judge to the parties for consideration, exception, and argument before the panel. The panel, by majority vote, shall adopt or modify the findings or the conclusions of the trial judge.

"(e) The panel shall submit its report to the chief judge for transmission to the appropriate House of Congress.

"(f) Any act or failure to act or other conduct by a party, a witness, or an attorney which would call for the imposition of sanctions under the rules of practice of the United States Claims Court shall be noted by the panel or the trial judge at the time of occurrence thereof and upon failure of the delinquent or offending party, witness, or attorney to make prompt compliance with the order of the panel or the trial judge a full statement of the circumstances shall be incorporated in the report of the panel.

"(g) The Claims Court is authorized and directed, under such regulations as it may prescribe, to provide the facilities and services of the office of the clerk of the court for the filing, processing, hearing, and dispatch of congressional ref-

erence cases and to include within its annual appropriations the costs thereof and other costs of administration, including but not limited to the salaries and traveling expenses of the judges serving as trial judges and panel members, mailing and service of process, necessary physical facilities, equipment, and supplies, and personnel (including secretaries and law clerks).

"§ 2507. Referral of cases by Comptroller General or the head of an executive department or agency

"(a)(1) The Comptroller General may transmit to the Claims Court for trial and adjudication any claim or matter of which the Claims Court might take jurisdiction on the voluntary action of the claimant, together with all vouchers, papers, documents, and proofs pertaining thereto.

"(2) The Claims Court shall proceed with the claims or matters so referred as in other cases pending in such court and shall render judgment thereon.

"(b)(1) The head of any executive department or agency may, with the approval of the Attorney General, refer to the Claims Court for judicial review any final decision rendered by a board of contract appeals pursuant to the terms of any contract with the United States awarded by that department or agency which such head of such department or agency has concluded is not entitled to finality pursuant to the review standards specified in section 10(b) of the Contract Disputes

Act of 1978. The head of each executive department or agency shall make any referral under this section within one hundred and twenty days of the receipt of a copy of the final appeal decision.

"(2) The Claims Court shall review the matter referred in accordance with the standards specified in section 10(b) of the Contract Disputes Act of 1978. The Court shall proceed with judicial review on the administrative record made before the board of contract appeals on matters so referred as in other cases pending in such court, shall determine the issue of finality of the appeal decision, and shall, if appropriate, render judgment thereon, take additional evidence, or remand the matter pursuant to the authority specified in section of this title.

"§ 2508. Accounts of officers, agents or contractors

"(a) Notice of an action under section 1494 of this title shall be given to the Attorney General, to the Comptroller General, and to the head of the department requested to settle the account in question.

"(b) The judgment of the Claims Court in such an action, after completion of appellate review, shall be conclusive upon the parties, and payment of the amount found due shall discharge the obligation.

"(c) The transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records, and shall be enforceable as other judgments.

"§ 2509. Disbursing officers; relief

"Whenever the Claims Court finds that any loss of a disbursing officer of the United States was without his fault or negligence, it shall render a judgment setting forth the amount thereof, and the General Accounting Office shall allow the officer such amount as a credit in the settlement of his accounts.

"§ 2510. Unjust conviction and imprisonment

"(a) Any person suing under section 1495 of this title must allege and prove that—

"(1) his conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction, and

"(2) he did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, territory, or the District of Co-

lumbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

"(b) Proof of the requisite facts shall be by a certificate of the court or pardon wherein such facts are alleged to appear, and other evidence thereof shall not be received.

"(c) No pardon or certified copy of a pardon shall be considered by the Claims Court unless it contains recitals that the pardon was granted after applicant had exhausted all recourse to the courts and that the time for any court to exercise its jurisdiction had expired.

"(d) The Court may permit the plaintiff to prosecute such action in forma pauperis.

"(e) The amount of damages awarded shall not exceed the sum of $5,000.

"§ 2511. Forfeiture of fraudulent claims

"(a) A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.

"(b) In such cases the Claims Court shall specifically find such fraud or attempt and render judgment of forfeiture.

"§ 2512. New trial; stay of judgment

"(a) The Claims Court may grant a plaintiff a new trial on any ground established by rules of common law or equity applicable as between private parties.

"(b) Such court, at any time while any action is pending before it, or after proceedings for review have been instituted, or within two years after the final disposition of the suit, may grant the United States a new trial and stay the payment of any judgment upon satisfactory evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done the United States.

"**§ 2513. Interest on claims and judgments**

"(a) Interest on a claim against the United States shall be allowed in a judgment of the Claims Court only under a contract or Act of Congress expressly providing for payment thereof.

"(b) Interest on judgments against the United States affirmed by the Supreme Court after review on petition of the United States shall be paid at the rate established in section 1961 of this title from the date of the filing of the transcript of the judgment in the Treasury Department to the date of the mandate of affirmance. Such interest shall not be allowed by any period after the term of the Supreme Court at which the judgment was affirmed.

"**§ 2514. Payment of judgments**

"(a) Except as provided by the Contract Disputes Act of 1978, every final judgment rendered by the Claims Court against the United States shall be paid out of any general appropriation thereof, on presentation to the General Ac-

counting Office of a certification of the judgment by the clerk and chief judge of the court.

"(b) Payment of any such judgment and of interest thereon shall be a full discharge to the United States of all claims and demands arising out of the matters involved in the case or controversy, unless the judgment is designated a partial judgment, in which event only the matters described therein shall be discharged.

"§ 2515. Conclusiveness of judgment

"A final judgment of the United States Claims Court against any plaintiff shall forever bar any further claim, suit, or demand against the United States arising out of the matters involved in the case or controversy.

"§ 2516. Fees; cost of printing record

"(a) The United States Claims Court shall by rule impose a fee not exceeding $10, for the filing of any petition.

"(b) The clerk shall collect a fee of 10 cents a folio for preparing and certifying a transcript of the record for the purpose of appeal to the Court of Appeals for the Federal Circuit, and for furnishing certified copies of judgments or other documents. Not less than $5 shall be charged for each certified copy of findings of fact and opinion of the court to be filed in the United States Court of Appeals for the Federal Circuit.

"(c) The clerk shall also collect for each certified copy of the court's findings of fact and opinion a fee of 25 cents for five pages or less, 35 cents for those over five and not more than ten pages, 45 cents for those over ten and not more than twenty pages, and 50 cents for those of more than twenty pages.

"§ 2517. Subpenas

"Subpenas requiring the attendance of parties or witnesses and subpenas requiring the production of books, papers, documents, or tangible things by any party or witness having custody or control thereof, may be issued for purposes of discovery or for use of the things produced as evidence in accordance with the rules and orders of the court. Such subpenas shall be issued and served and compliance therewith shall be compelled as provided in the rules, and order of the court.

"§ 2518. Rules of practice, procedure, and evidence

"The proceedings of the United States Claims Court and its divisions shall be in accordance with such rules of practice and procedure (other than the rules of evidence) as the Claims Court may prescribe and in accordance with the rules of evidence applicable to trials without a jury in the United States District Court of the District of Columbia.".

REPEAL OF COURT OF CUSTOMS AND PATENT APPEALS PROCEDURE AND RELATED TECHNICAL AND CONFORMING AMENDMENTS

SEC. 352. (a) Chapter 167 of title 28, United States Code, is repealed.

(b) The table of chapters for title 28, United States Code, and at the beginning of part VI of such title are each amended—

(1) in the item relating to chapter 165, by striking out "Court of Claims Procedure" and inserting in lieu thereof "United States Claims Court Procedure"; and

(2) in the item relating to chapter 167, by striking out "Court of Customs and Patent Appeals Procedure" and inserting in lieu thereof "Repealed".

(c) Section 2638(b) of title 28, United States Code, is amended to read as follows:

"(b) The decision of the judge is final and conclusive, unless a retrial or rehearing is granted pursuant to section 2639 of this title or an appeal is made to the United States Court of Appeals for the Federal Circuit within sixty days after entry of judgment or order.".

TITLE IV—TAX APPELLATE STRUCTURE

CREATION OF COURT OF TAX APPEALS; COMPOSITION AND PLACEMENT OF CIRCUIT

SEC. 401. (a) Section 41 of title 28, United States Code, is amended—

(1) by inserting "(a)" immediately before the introductory sentence; and

(2) by adding at the end of the section the following new subsection:

"(b) The United States Court of Tax Appeals is composed of all the Federal judicial circuits.".

(b) Section 44(a) of title 28, United States Code, is amended—

(1) by striking out "(a) The President" and inserting in lieu thereof "(a)(1) The President"; and

(2) by adding at the end thereof the following new paragraph:

"(2) The Chief Justice of the United States shall designate twelve judges of the United States circuit courts of appeals to serve on the Court of Tax Appeals. The first twelve judges designated by the Chief Justice shall serve on the court as follows: four for a term of two years from the date of designation, four for a term of four years from the date of designation, and four for a term of six years from the date of designation. Thereafter, the Chief Justice of the United

States shall, whenever a vacancy occurs on such court, designate an additional judge of the United States circuit courts of appeals to serve on the court for a term of three years from the date of designation.".

(c) Section 48 of title 28, United States Code, is amended—

(1) by inserting "(a)" before the first paragraph;

(2) by inserting at the end of the table of circuits and places the following new subsection:

"(b) Terms or sessions of the United States Court of Tax Appeals shall be held at least once per year in each of the circuits, and at such other times and places as the court may by order select."; and

(3) by inserting "(c)" before the second paragraph.

APPOINTMENT OF CHIEF JUDGE AND ASSIGNMENT OF JUDGES

SEC. 402. (a) Notwithstanding the provisions of section 45 (a) and (b) of title 28, United States Code, the first chief judge of the United States Court of Tax Appeals shall be appointed by the Chief Justice of the United States from those judges appointed under section 44(a)(2) of title 28, United States Code, as added by section 401(b) of this title. When the person who first serves as chief judge of the United States Court of Tax Appeals vacates that position, the posi-

48-202 O - 79 - 16

tion shall be filled in accordance with the provisions of section 45 of title 28, United States Code.

(b) Section 46(c) of title 28, United States Code, is amended by inserting the following new sentence after the first sentence: "The United States Court of Tax Appeals may sit in divisions of more than three judges. Whenever six of the judges of the court determine that it is in the interests of justice and the case is of extraordinary importance, no less than nine judges shall hear the case in banc.".

(c) Section 292 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(e) The Chief Justice of the United States may, whenever the need arises and in the interests of justice, designate and assign temporarily any district judge or any judge of the United States Tax Court to serve as a judge of the United States Court of Tax Appeals for the consideration of any matter before such court.".

CONFORMING AMENDMENTS RELATING TO APPEAL TO THE SUPREME COURT

SEC. 403. Section 1254 of title 28, United States Code, is amended—

(1) by striking out "Cases in the courts of appeals" and inserting in lieu thereof "(a) Except as pro-

vided in subsection (b), cases in the courts of appeals"; and

(2) by adding at the end thereof the following new subsection:

"(b) Cases in the Court of Tax Appeals may be reviewed by the Supreme Court by writ of certiorari.".

JURISDICTION OF THE UNITED STATES COURT OF TAX APPEALS

SEC. 404. (a) Chapter 83 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 1296. Jurisdiction of the United States Court of Tax Appeals

"The Court of Tax Appeals shall have exclusive jurisdiction—

"(1) in any appeal from a district court in which the jurisdiction of the district court was based, in whole or in part, on section 1340 of this title;

"(2) in any appeal from a district court in which the jurisdiction of the district court was based, in whole or in part, on section 1346(a), on 1346(b) in any claim founded upon an Act of Congress or a regulation of an executive department providing for internal revenue, or on 1346(f); and

"(3) in any appeal from the United States Tax Court.".

(b) The table of sections for chapter 83 of such title is amended by adding at the end thereof the following new item:

"1296. Jurisdiction of the United States Court of Tax Appeals.".

CONFORMING AMENDMENTS RELATING TO REVIEW OF ORDERS OF FEDERAL AGENCIES

SEC. 405. Section 2342 of title 28, United States Code, is amended by striking out "The court of appeals" and inserting in lieu thereof "Except for the Court of Appeals for the Federal Circuit and the Court of Tax Appeals, the courts of appeals".

TITLE V—TECHNICAL AND CONFORMING AMENDMENTS OUTSIDE OF TITLE 28 RELATING TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT AND THE UNITED STATES COURT OF TAX APPEALS

TITLE 2

SEC. 501. Section 356(c) of title 2, United States Code, is amended by adding immediately before the period at the end of the subsection the following: "and the judges of the United States Claims Court".

TITLE 5

SEC. 502. Section 7703 of title 5, United States Code, is amended—

(1) in subsection (b)(1) by striking out "Court of Claims or a United States court of appeals as provided in chapter 91 and 158, respectively, of title 28" and inserting in lieu thereof "United States Court of Appeals for the Federal Circuit"; and

(2) in subsection (c) by striking out "Court of Claims or a United States court of appeals" and inserting in lieu thereof "Court of Appeals for the Federal Circuit".

PLANT VARIETY PROTECTION ACT

SEC. 503. Section 71 of the Plant Variety Protection Act (7 U.S.C. 2461) is amended by striking out the second sentence and inserting in lieu thereof "The United States Court of Appeals for the Federal Circuit shall have jurisdiction.".

TRADEMARK ACT OF 1946

SEC. 504. The headnote of subsection (a) of section 21 of the Trademark Act of 1946 (15 U.S.C. 1071(a)), is amended by striking out "COURT OF CUSTOMS AND PATENT APPEALS;".

FEDERAL FIRE PREVENTION AND CONTROL ACT OF 1974

SEC. 505. Section 11(d) of the Federal Fire Prevention and Control Act of 1974 (15 U.S.C. 2210(d)) is amended by striking out "Court of Claims of the United States" and inserting in lieu thereof "United States Claims Court".

TITLE 18

SEC. 506. Section 204 of title 18, United States Code, is amended by striking out "Court of Claims" and inserting in lieu thereof "United States Claims Court, the United States Court of Appeals for the Federal Circuit, or the United States Court of Tax Appeals".

INDIAN CLAIMS COMMISSION

SEC. 507. Section 129 of the Act entitled "An Act to create an Indian Claims Commission, to provide for the powers, duties, and functions thereof, and for other purposes," approved August 13, 1946 (60 Stat. 1049) is amended—

(1) in subsection (2) by striking out "Court of Claims" wherever it appears and inserting in lieu thereof "Claims Court"; and

(2) by repealing subsection (3).

INDIAN LANDS

SEC. 508. Section 2 of the Act entitled "An Act authorizing the attorney general of the State of California to bring suit in the Court of Claims on behalf of the Indians in Cali-

fornia, approved May 18, 1928 (45 Stat. 602; 25 U.S.C. 652), is amended by striking out "Court of Claims" and "Court of Claims of the United States" and inserting in lieu thereof "United States Claims Court".

INTERNAL REVENUE CODE OF 1954

SEC. 509. (a) Section 7422(e) of the Internal Revenue Code of 1954 (26 U.S.C. 7422(e)), is amended by striking out "or the Court of Claims" wherever it appears.

(b) Section 7428 of the Internal Revenue Code of 1954 (26 U.S.C. 7428), is amended—

(1) by striking out ", the United States Court of Claims," and "or the Court of Claims" in subsection (a);

(2) by striking out ", the Court of Claims," in subsection (b)(2);

(3) by striking out "or" at the end of subsection (c)(1)(C)(ii) and inserting in lieu thereof a period; and

(4) by repealing subsection (c)(1)(C)(iii).

(c) Section 7447 of the Internal Revenue Code of 1954 (26 U.S.C. 7447) is amended by adding at the end thereof the following new subsection:

"(j) The provisions of this section shall also apply to the United States Claims Court. For purposes of this section, service as a trial commissioner of the Court of Claims is to be

treated as service of a judge of the United States Claims Court.".

(d) Section 7448 of the Internal Revenue Code of 1954 (26 U.S.C. 7448) is amended by adding at the end thereof the following new subsection:

"(t) The provisions of this section shall also apply to the United States Claims Court.".

(e) Section 7456(c) of the Internal Revenue Code of 1954 (26 U.S.C. 7456(c)) is amended by striking out the second sentence and inserting in lieu thereof "Each commissioner shall receive pay at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351–361), as adjusted by section 461 of title 28, United States Code, and also necessary traveling expenses and per diem allowance as provided in the Travel Expense Act of 1949, while traveling on official business and away from Washington, District of Columbia.".

(f) Section 6110(i)(1) of the Internal Revenue Code of 1954 is amended by striking out "Court of Claims" and inserting in lieu thereof "United States Tax Court".

(g) Section 7481 of the Internal Revenue Code of 1954 (26 U.S.C. 7481) is amended by inserting "Tax" after "United States Court of" each time it appears.

(h) Section 7482 of the Internal Revenue Code of 1954 (26 U.S.C. 7482), is amended—

(1) in subsection (a) by striking out "Courts of Appeals" and inserting in lieu thereof "Court of Tax Appeals" and by striking out "any such court" and inserting in lieu thereof "the Court of Tax Appeals";

(2) by repealing subsection (b);

(3) in subsection (c)(1) by striking out "such courts" and inserting in lieu thereof "the United States Court of Tax Appeals"; and

(4) in subsection (c)(4) by inserting "Tax" after "United States Court of".

TITLE 44

SEC. 510. (a) Section 713 of title 44, United States Code, is amended—

(1) by striking out "eight hundred and twenty-two" and inserting in lieu thereof "eight hundred and twenty"; and

(2) by striking out "to the Court of Claims, two copies;".

(b) Section 1103 of title 44, United States Code, is amended by striking out ", the Court of Claims," and ", chief judge of the Court of Claims,".

TRANSPORTATION

SEC. 511. Section 1006 of the Act of August 23, 1958 (49 U.S.C. 1486), is amended—

(1) in subsection (a) by striking out "courts of appeals of the United States or the United States Court of Appeals for the District of Columbia" and inserting in lieu thereof "Court of Appeals for the Federal Circuit"; and

(2) by striking out subsection (b).

MISCELLANEOUS AMENDMENTS

SEC. 512. (a) The following laws of the United States are amended by striking out "Court of Claims" wherever it appears and inserting in lieu thereof "United States Claims Court":

(1) sections 1 and 2 of the Act of October 19, 1973 (87 Stat. 466);

(2) section 8715 of title 5, United States Code;

(3) section 8912 of title 5, United States Code;

(4) section 2273(b) of title 10, United States Code;

(5) section 337(i) of the Tariff Act of 1930 (19 U.S.C. 1337(i));

(6) section 606(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2356(a));

(7) section 1 of the Act entitled "An Act providing for the allotment and distribution of Indian tribal funds", approved March 2, 1907 (25 U.S.C. 119);

(8) section 2 of the Act of August 12, 1935 (25 U.S.C. 475a);

(9) section 2 of the Act of May 28, 1908 (30 U.S.C. 193a);

(10) section 7 of the Act of July 31, 1894 (31 U.S.C. 72);

(11) section 1302 of the Act of July 27, 1956 (31 U.S.C. 724a);

(12) section 183 of title 35, United States Code;

(13) section 104(c) of the Contract Work Hours and Safety Standards Act (40 U.S.C. 330(c));

(14) sections 13(b)(2) and 14 of the Contract Settlement Act of 1944 (41 U.S.C. 113(b), 114);

(15) sections 171 and 173 of the Atomic Energy Act of 1954 (42 U.S.C. 2221, 2223);

(16) section 10(i) of the Trading with the Enemy Act (50 U.S.C. App. 10(i));

(17) section 105 of the Renegotiation Act of 1951 (50 U.S.C. App. 1215);

(18) sections 106(a)(6), 108, and 108A of the Renegotiation Act of 1951 (50 U.S.C. App. 1216(a)(6), 1218, 1218a);

(19) section 114(5) of the Renegotiation Act of 1951 (50 U.S.C. App. 1224(5)); and

(20) section 4 of the Act of July 2, 1948 (50 U.S.C. App. 1984).

(b) The following laws of the United States are amended by striking out "Court of Claims" wherever it appears and inserting in lieu thereof "Claims Court":

(1) section 4(c) of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b(c));

(2) section 20 of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831s);

(3) section 403 of the International Claims Settlement Act of 1949 (22 U.S.C. 1642b);

(4) section 2(a) of the Act of May 15, 1978 (92 Stat. 244);

(5) section 4 of the Act of August 2, 1956 (25 U.S.C. 824);

(6) section 311 of the Act of June 30, 1948 (33 U.S.C. 1321(j));

(7) section 10(b) of the Act of February 5, 1974 (33 U.S.C. 1479(b));

(8) section 282 of title 35, United States Code;

(9) section 5261 of the Revised Statutes (45 U.S.C. 87);

(10) section 41(a) of the Trading with the Enemy Act (50 U.S.C. App. 41(a)); and

(11) subsection (a) of rule 1101 of the Federal Rules of Evidence.

(c) The following laws of the United States are amended by striking out "United States Court of Customs and Patent Appeals" and "Court of Customs and Patent Appeals" wherever each appear and inserting in lieu thereof "United States Court of Appeals for the Federal Circuit":

(1) section 21 of the Trademark Act of 1946 (15 U.S.C. 1071);

(2) the headnote of subsection (g) of section 516 of the Tariff Act of 1930 (19 U.S.C. 1516(g));

(3) section 152 of the Act of August 1, 1946 (42 U.S.C. 2182); and

(4) section 305(d) of the National Aeronautics and Space Act of 1958 (42 U.S.C. 2457(d)).

(d) The following laws of the United States are amended by striking out "Court of Customs and Patent Appeals" wherever it appears and inserting in lieu thereof "Court of Appeals for the Federal Circuit":

(1) subsections (d) and (f) of section 516 of the Tariff Act of 1930 (19 U.S.C. 1516(e), (g));

(2) subsection 528 of the Tariff Act of 1930 (19 U.S.C. 1528);

(3) section 337(c) of the Tariff Act of 1930 (19 U.S.C. 1337(c)); and

(4) sections 141 through 146 of title 35, United States Code.

(e) The following laws of the United States are amended by striking out "the United States Court of Claims, the United States Court of Customs and Patent Appeals" wherever it appears and inserting in lieu thereof "the United States Claims Court":

(1) section 6001(4) of title 18, United States Code; and

(2) section 906 of title 44, United States Code.

TITLE VI—EFFECTIVE DATE

EFFECTIVE DATE; APPLICABILITY TO ACTIONS FILED BEFORE THE EFFECTIVE DATE

SEC. 601. Except as otherwise specifically provided in this Act, the provisions of this Act shall take effect ninety days after the date of enactment of this Act and shall apply to cases commenced on or after the effective date of this Act.

ADDITIONAL PREPARED STATEMENTS

Prepared Statement of Arlin M. Adams

I appreciate the opportunity you have afforded me to make a statement regarding the various proposals for establishing a mechanism, short of impeachment, by which federal judges may be disciplined and relieved of their responsibilities in appropriate circumstances.

At the outset, I should like to commend you for your gallant and persistent efforts over the past few years to enact needed legislation in this area, notwithstanding the pressing demands of other congressional business. That legislation is needed is evident to me from my dual vantage points as a federal judge and as past president of the American Judicature Society. It is not that I believe that the federal judiciary is less equipped or less qualified than in the past. Quite to the contrary. I have only the highest regard for the professional competence of my colleagues on the bench. But though the quality of the judiciary has not, at least as far as I can ascertain, materially declined in recent years, other changes have occurred that make essential the introduction of new procedures for handling reports of judicial misconduct and unfitness.

In the last number of years, the public has become more aware of the way in which the judiciary functions and more concerned that justice be dispensed fairly. In large

measure this development is an outgrowth of the increasingly litigious nature of our society. The judiciary is being asked with greater frequency to mediate the political, economic, and social disputes that beset our nation and its communities, to resolve traditional private controversies, and to deal effectively, yet justly, with various aspects of the crime problem. Because the judiciary has assumed a more central role in resolving societal as well as private law issues, many more individuals are coming into contact with the court system, are being affected by it, and are scrutinizing its processes both on their own and with the assistance of a watchful and conscientious news media.

Given this trend, it seems imperative that individual persons as well as the public at large be afforded an effective means of airing their grievances against the judiciary. A citizen who believes that an elected official is unqualified can seek to rectify the situation at the ballot box; but he has no similar avenue for redress against a judge whom he has reason to believe is unsuited for that position, or if suited originally has been rendered unqualified by subsequent developments. The impeachment process, cumbersome and inaccessible, has been proved by history not to be a satisfactory solution. Only four judges have been removed by the impeachment process in the past two centuries, and the time available to the Congress to devote to such matters is now becoming less, rather than more, plentiful. Without some impartial mechanism for promptly receiving and investigating complaints regarding judicial conduct and fitness, I fear that the public may well become disenchanted

with its judges and frustrated with its inability to do anything about shortcomings that it perceives in the judiciary, thereby creating an unhealthy environment for governance.

The proposals now being considered by your subcommittee are responsive to this need. For under each proposal, the corrective apparatus may be initiated by an individual citizen, and the complainant must be informed of the outcome of the investigation.

In my view, none of the proposals runs afoul of the Constitution. I shall not summarize the arguments on both sides of the constitutionality question; they have been fully explored by others who are more knowledgeable than I am on this matter. Moreover, the question will be resolved, favorably, only when an appropriate "case or controversy" makes its way to the Supreme Court of the United States. I should like to point out, however, that whatever lingering doubts may exist regarding the constitutionality of other possible proposals for reform, S. 522 and S. 678 would appear to be constitutional. They do not appear to grant the judicial councils any powers that they do not already have, and, in addition, they leave impeachment as the sole method for the actual removal of a judge.

A contention that is somewhat related to the constitutionality question and that is frequently voiced by opponents of these legislative proposals is that the introduction of any change will have a chilling effect on judicial

48-202 O - 79 - 17

independence. This argument, however, appears either to misconstrue the meaning of judicial independence or to overlook the manner in which each of the proposals assiduously ensures such independence.

Clearly, if the judiciary is to continue to operate objectively and fairly, not every grievance can or should be actionable. Federal judges are not elected officials, and students of government would agree that there ought not to exist a power to remove or otherwise discipline a judge on the basis of a disagreement with his rulings or his philosophy. Judicial independence from such intermeddling is, of course, guaranteed by the constitutional provision that judges "shall hold their offices during good behavior." Each of the proposals now under consideration would appear to preserve this independence by vesting the newly-created supervisory authority in other judges, who themselves would be sensitive to any intrusion upon their independence to decide cases; by advertently delimiting the circumstances under which corrective action may be taken; and by surrounding the proceedings with ample safeguards to assure adequate confidentiality. At the same time, the proposals would facilitate corrective action against judicial misbehavior or unfitness that brings the judiciary into disrepute. I do not understand the opponents of these proposals to contend that such misbehavior or unfitness are, or should be, beyond scrutiny, but only that the supervision contemplated by the

legislative proposals would intimidate judges from deciding cases and making rulings as they see fit. However, given the carefully planned arrangement chosen by the drafters of the proposed legislation, I cannot but conclude that the opponents' concern about a chilling effect is speculative, and that they have not substantiated their concerns.

Furthermore, rather than chill judicial activity, I am persuaded that any of the proposals, if enacted, would to a considerable extent enhance the judiciary's independence. The establishment of an accessible and workable scheme for reviewing judicial conduct and fitness would afford a judge whose integrity or physical or mental fitness has been called into question a means of clearing his or her name in an honorable manner. At present, no such avenue exists, and, on those few occasions when others act irresponsibly, judges have no respectable alternative but to bear with public silence what they know to be unfounded and even vindictive charges. Certainly the new proposals are to be welcomed on this score.

I have chosen to focus my statement on two of the less conventional reasons for pursuing congressional action in this area -- providing the public a meaningful mechanism for registering its grievances against the judiciary and affording judges a modicum of self-protection -- not out of disaffection with the primary justifications for these proposals, but mainly to encourage additional perspectives on the need for legislation.

Your efforts are to be applauded by all who cherish the federal judiciary and the important function it occupies in a democratic society.

ADDITIONAL PREPARED STATEMENT OF MONROE H. FREEDMAN

REMOVAL AND DISCIPLINE OF FEDERAL JUDGES

Thank you for inviting me to testify on behalf of the American Civil Liberties Union regarding proposals affecting judicial tenure.

The American Civil Liberties Union opposes the pending legislation that would provide for removal or other discipline of federal judges by any means other than impeachment. ACLU shares the view of those who founded our system of government, that the independence of the judges is essential to ensure "inflexible and uniform adherence to the

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*I have been asked to state for the record my background and qualifications. I am a member of the National Board of the ACLU, a Professor of Law at Hofstra University (where I was Dean of the Law School from 1973-1977), and counsel to the New York law firm of Orenstein, Snitow, Sutak & Pollack. In practice, my work is principally litigation before federal courts and agencies. As a law professor, my relevant areas of specialization are Constitutional Law and Lawyers' Ethics. I also served as Legislative Consultant to Senator John L. McClellan in 1959, and have testified on several occasions before this Committee and the Senate Judiciary Committee.

In preparing this testimony, I have received valuable research assistance from Guido Gabriele, a third-year student at Hofstra Law School.

rights of the Constitution, and of individuals."[1] Toward that end, the framers of the Constitution sought to establish virtual "permanency in office" and "permanent tenure" for the federal judges.[2]

As Alexander Hamilton explained, there was a single constitutional provision for dealing with a lack of "responsibility" on the part of individual judges:

> The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives, and tried by the Senate; and, if convicted, may be dismissed from office, and disqualified for holding any other. This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges.[3]

The same proposition has been stated unequivocally by eminent authorities from that time forward.[4] James Madison said:

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[1]The Federalist No. 78 (Hamilton) 502, 508-510 (Mod.Lib.).

[2]The Federalist No. 79 (Hamilton) 512, 513 (Mod.Lib.).

[3]Id. at 513-514 (emphasis added).

[4]I do not want to burden the record with multiple quotations. Numerous other authorities are cited in Kaufman, "Chilling Judicial Independence" (Thirty-Fourth Annual Cardozo Lecture of the Association of the Bar of the City of New York, 1978); Ervin, "Separation of Powers: Judicial Independence," 35 L.& Contemp.Prob. 108 (1970); Ziskind, "Judicial Tenure in the American Constitution: English and American Precedents," 1969 Sup.Ct.Rev. 135; Kurland, "The Constitution and the Tenure of Federal Judges: Some Notes from History," 36 Ll. of Chi. L. Rev. 665 (1969); Kramer & Barron, "The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary," Selected Readings, Judicial Discipline and Removal (Winters, ed.; Amer. Jud. Soc.,1973); W.S. Carpenter, Judicial Tenure in the United States (Yale, 1918); B. Bailyn, Pamphlets of the American Revolution 1750-1776 (Belknap, 1965).

"The judges are to be removed only on impeachment, and conviction before Congress."[5] Thomas Jefferson first supported life tenure for judges so that they "should not be dependent upon any man or body of men," but he then sponsored the impeachment attacks against Federalist judges and sought constitutional amendment to eliminate life tenure--thereby reaffirming in the most emphatic way his understanding of the relevant constitutional provisions.[6] After a century of experience with the Constitution, Lord Bryce concluded that, "The Fathers of the Constitution studied nothing more than to secure the complete independence of the judiciary,"[7] and accordingly, "impeachment is the only means by which a Federal judge can be got rid of."[8] More recently, the Supreme Court has described Article III courts as "presided over by judges appointed for life, subject only to removal by impeachment."[9]

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[5]Quoted by Rep. Rutledge in 11 Annals of Congress 738 (1802); Kaufman, supra, p. 32 and n. 111.

[6]Kurland, supra, pp. 694-695.

[7]Bryce, The American Commonwealth, vol. I, p. 268.

[8]Id., p. 107; see also p. 226.

[9]United States ex rel. Toth v. Quarles, 350 U.S. 11, 16, (1955); see also Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

In the face of those authorities, and numerous others,[10] how could it be supposed that federal judges can be removed from office by means other than impeachment? As Congressman Celler observed, "It scarcely can be believed that the framers intended vesting Congress with an important power [to provide for removal other than by impeachment] and then so skillfully concealed it it could not be discovered save after 150 years."[11] Professor Raoul Berger (the principal academic opponent of judicial life tenure) has retorted that the framers' true intention was concealed "only from those who did not pause to turn the pages of history" and ask the right questions[12] --a category that includes, as we have seen, Hamilton, Madison, Jefferson and others who participated in drafting and explaining the Constitution before "the accumulated dust of generations"[13] had settled upon it to confound understanding.

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[10] See n. 4. supra.

[11] 81 Cong. Rec. 6171 (1937); Kurland, supra, p. 691, n. 63. The reference is to Shartel, "Federal Judges--Appointment, Supervision, and Removal--Some Possibilities under the Constitution," 28 Mich. L. Rev. 870 (1930).

[12] Berger, Impeachment: The Constitutional Problems 179 (Harvard, 1973).

[13] The quoted phrase (on this occasion) is Professor Berger's. Id., p. 178

Like other critics of judicial life tenure,[14] Professor Berger begins his arguments by pointing to the awkwardness of impeachment as a method of removal.[15] In short, he argues that impeachment is not the exclusive removal procedure because it is so clumsy that (in his view) it should not be the only means of ousting a venal judge. But that, of course, is precisely the point. The framers quite consciously and explicitly sought to assure an independent judiciary by making judges removable only by the extremely difficult process of impeachment. As Hamilton expressed it, the purpose was thus to provide "permanency in office" and "permanent tenure" for federal judges.[16] To protest as Professor Berger does, therefore, that impeachment is not a very efficient means for removing a judge from office, is simply to confirm that the framers' purpose has been achieved.

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[14] E.g., Shartel, supra.

[15] Berger, supra, p. 122-123. Illustrative of Professor Berger's misleading selectivity in the use of authorities, he quotes Bryce on the clumsiness of impeachment, but fails to note Bryce's approval of life tenure as an essential safeguard of judicial independence, and Bryce's conclusion that impeachment is the exclusive constitutional procedure for removal. See n. 7 and 8, supra.

[16] See n. 2, supra.

Professor Berger's principal contention, however, derives from the fact that there are two relevant clauses in the Constitution, and that they use different phrases to express the standard for judicial tenure. Article II, section 4, provides for impeachment of all civil officers of the United States for treason, bribery, or other "high crimes and misdemeanors." Article III, section 1, provides that the judges shall hold their offices "during good behavior." Thus, Professor Berger argues that the "good behavior" standard is broader than the "high crimes and misdemeanor" standard,[17] and that, therefore, impeachment is not the exclusive procedure for removal.

As Professor Austin Scott used to say, I understand everything except the therefore. That is, even if there be two standards for removal, it does not follow that there cannot be an exclusive procedure for removal. Put otherwise, assuming that Professor Berger is correct in his inference of a double standard of judicial removal, the Constitution appears to say simply that all civil officers can be impeached for high crimes and misdemeanors, and that judges can also be impeached for lack of good behavior. It is therefore a non sequitur when Professor Berger says:

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[17]Berger, supra, p. 125.

> When the Framers employed "good behavior," a common law term of ascertainable meaning, with no indication that they were employing it in a new and different sense, it might be presumed that they implicitly adopted the judicial enforcement machinery that traditionally went with it.[18]

Professor Berger's conclusion, therefore, is a mere presumption dangling from a "might" and tied tenuously to an "implicitly."

More importantly, there is solid historical evidence that the framers used the phrase "good behavior" in a special sense, without intending to broaden the standard of high crimes and misdemeanors, and without intending to carry with it any "judicial enforcement machinery" other than impeachment. First, the framers never said that they had adopted any other procedure. Second, on the contrary, they expressly provided for only one procedure, and they expressly explained repeatedly that only one was intended.

In addition to the previously quoted statements, consider the observation of Gouverneur Morris, the most important member of the Committee of Style and

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[18] Berger, supra, p. 131 (emphasis added).

Revision of the Constitutional Convention:[19]

> Misbehavior is not a term known in our law; the idea is expressed by the word misdemeanor; which word is in the clause respecting impeachments. Taking, therefore, the two together, and speaking plain old English, the Constitution says,
>
> "The judges shall hold their offices so long as they demean themselves well; but if they shall misdemean, if they shall on impeachment be convicted of misdemeanor, they shall be removed."[20]

Similarly, Bryce defined good behavior as synonymous with impeachment: "[The justices] hold office during good behavior, i.e., they are removable only by impeachment."[21]

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[19] He is so characterized by Ziskind, supra, p. 150.

[20] Annals of Cong. 90 (1801). Professor Berger replies that Morris was wrong, because "misbehavior" was used in two colonial constitutions. Surely, however, Morris' understanding--or even misunderstanding--of the words he used is more significant than Professor Berger's emendation. And again, apart from the standard to be applied, Morris is clear that the sole procedure intended by the framers is impeachment.

[21] Bryce, supra, p. 226.

Finally, Professor Berger suggests that Hamilton conceded the propriety of removal by means other than impeachment in cases of insanity.[22] Again, Professor Berger is demonstrably wrong. This is what Hamilton said:

> The want of a provision for removing the judges on account of inability has been a subject of complaint. But all considerate men will be sensible that such a provision would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose. The mensuration of the faculties of the mind has, I believe, no place in the catalogue of known arts. An attempt to fix the boundary between the regions of ability and inability, would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good. The result, except in the case of insanity, must for the most part be arbitrary; and insanity, without any formal or express provision, may be safely pronounced to be a virtual disqualification.[23]

A careful reading of that important passage shows

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[22]Berger, supra, p. 139. Once again, the contention rests upon an unfounded "presumably." In this instance, Dr. Ziskind shares Professor Berger's misreading. See Ziskind, supra, p. 152.

[23]The Federalist No. 79, supra, p. 514.

that the Constitution had been attacked in 1788 by those who believed, as Professor Berger does, that there should be provision for removing judges for "inability" as distinguished from impeachment for malconduct. Significantly, Hamilton did not respond as Professor Berger would have wanted, by saying that Congress has the power to provide for judicial removal of judges for disability under the necessary and proper clause.[24] On the contrary, Hamilton met the criticism head-on by defending the want of an alternate procedure in cases of disability. He gave two reasons: (1) the line between ability and inability cannot be drawn, and (2) the opportunity to draw such a line would more frequently give scope to partisanship than would it advance the interests of justice or the public good.

Accordingly, Hamilton explained, the result of a decision based upon disability would, for the most part, be arbitrary. Concededly, he added, such a decision would not be arbitrary in the case of insanity--the extreme form of disability--but such cases are simply not going to arise often enough to justify an alternative to impeachment for malconduct as the exclusive removal procedure. Insanity, after all, is a "virtual disqualification," that is, literally, it is not in fact a ground for disqualification, but for practical purposes it is not going to happen with any significant frequency.

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[24] Art. I, sec. 8. See Berger, supra, pp. 180, 178.

That is not my reading alone. Explaining in his Commentaries why judges are not constitutionally removable other than by impeachment for malconduct, Justice Story repeated almost verbatim Hamilton's argument quoted above. However, Story paraphrased the last clause of Hamilton's argument to read: "and instances of absolute imbecility would be too rare to justify the introduction of so dangerous a provision."[25]

Thus, even the problem of insanity on the part of a judge (even though such a determination could be made without arbitrariness) is not sufficiently serious to have justified alternative constitutional standards or procedures for judicial removal. The threat to judicial independence was deemed to be too great.

One might well conclude that the text of the Constitution and the explanations of the framers are so clear that any argument based upon policy is superfluous. Indeed, a major concern of the American Civil Liberties Union is that the integrity of the Constitutional language and structure be respected. That policy, in itself, is sufficient ground to oppose the proposed legislation. The policy of judicial independence, however, and its inevitable relationship to civil

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[25]Story, Commentaries, sec. 1619.

rights and liberties, cannot be overstressed. It was the expressly reiterated purpose of the framers, and it is of paramount concern to the ACLU. As Professor Kurland has observed, "When dealing with so fundamental and so fragile a notion as the independence of the judiciary, one ought to tread warily lest the ultimate cost far outweigh the immediate gains."[26]

Moreover, there is good reason to believe that any novel and looser removal power would be directed against

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[26] Kurland, supra, p. 666.

those judges who are most zealous in safeguarding the rights and liberties of unpopular minorities and individuals. Judges in New York who regularly violate the constitutional rights of citizens accused of crimes are reappointed without difficulty, but one who takes that constitutional right seriously has been threatened by the mayor with non-reappointment. As Justice Douglas has testified from personal experience, retaliation against the more libertarian judge is not "a rare instance; it has happened to other federal judges who have had perhaps a more libertarian approach to the Bill of Rights than their brethren." As a result, "the nonconformist has suffered greatly at the hands of his fellow judges."[27] On the other hand, judges who have joined in hysterical anti-radicalism, or who have fought against civil rights and liberties, have been rewarded with judicial appointments and promotions to higher office.

Finally, Chief Judge Irving Kaufman of the Second Circuit has given two additional policy reasons against looser removal standards and procedures: first, judges would be exposed through complaints to harassment by disgruntled litigants;[28] second, disciplinary schemes "pitting judge

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[27] Chandler v. Judicial Council (II), 398 U.S. 74, 129, 137 (1970) (Douglas, J., dissenting).

[28] Kaufman, supra, p. 48.

against judge...would also disrupt the sense of community so essential to a functioning court."[29]

Is there, then no judicial accountability? Are there no checks on the insane judge, the corrupt judge, or the incompetent one? Of course, there are. One, obviously, is impeachment. Another check is even closer to home, that is, more care and conscientiousness in the appointment process. Ironically, the members of the Senate who support looser removal procedures have themselves helped to create the problem they now decry--either by their own selections or by their tolerance, through "senatorial courtesy," of the irresponsible selections of their colleagues. Another check, within the judiciary, is appellate review.

Yet another check on the judiciary is the right of freedom of speech and press. Only yesterday, for example, the New York Times gave prominent front-page coverage to the severe appellate criticism of two trial court judges who had abused the powers of their office. Such public condemnation cannot be ineffective.[30]

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[29]Id., p. 55.

[30]The attitude of the established bar to criticism of judges is illustrated by the ABA Code of Professional Responsibility in which lawyers are required to volunteer unprivileged knowledge of another lawyer's misconduct, but must reveal knowledge of judicial misconduct only upon request of an official body. DR 1-103.

48-202 O - 79 - 18

For those reasons, Mr. Chairman, the American Civil Liberties Union opposes the proposals before this Committee to remove or to discipline federal judges by procedures other than impeachment.

ADDITIONAL STATEMENT OF EUGENE GRESSMAN

These additional remarks are submitted to the Senate Judiciary Subcommittees on Improvements in Judicial Machinery and on the Constitution as an addendum to the testimony and written Statement that I submitted on June 25, 1979. The Subcommittees are concerned with the judicial discipline and removal provisions, short of impeachment, contained in S. 295, S. 522 and S. 678.

The following remarks have particular reference to various supplemental questions that Senator DeConcini addressed to me following the June 25 hearing. I have also added a final section herein, summarizing my view of the constitutional basis upon which any and all of these proposals must rest.

I

The concept of judicial independence is unaffected by the power of the judiciary to discipline its own members

The first question put by Senator DeConcini is whether legislation "which creates a mechanism whereby the judiciary is empowered to discipline its own members threatens the concept of judicial independence."

That question I must answer in the negative. The concept of judicial independence is a part of the doctrine of separation of powers, the doctrine that separates the three great branches of governmental power from each other. That doctrine, in addition to being most general in nature and subject to hosts of exceptions, relates primarily to the independence that each branch must have in executing the basic function assigned to it by the Constitution.

Thus it is that Article III assigns to the Supreme Court and such inferior courts as Congress shall establish the function of executing "the judicial Power of the United States." That means that the Judicial Branch

must be separate and independent from the Legislative and Executive Branches in the execution of the judicial power -- i.e., in the making of judicial decisions in the context of cases and controversies. As the Supreme Court said in the Chandler case, 398 U.S. at 84, the imperative need for total and absolute independence of judges relates only to their function "in deciding cases or in any phase of the decisional function." Neither Congress nor the President can invade or perform that judicial function of deciding cases. To that extent, judges are independent of Congress and the Executive. And to that extent, judges are independent of each other.

It follows that such judicial independence is not threatened when legislation empowers the judiciary to discipline its own members for cause shown. The notion of independence has nothing whatever to do with protecting the judiciary from the sins of its own misconduct or ineptness. To discipline a malfunctioning judge is not to impinge upon his independence in reaching a judicial decision in a particular case or controversy. No more is it an impingement on the independence of a Senator or Representative in making his own legislative judgments for either House to impose proper discipline upon its member guilty of some form of misconduct in office.

It is sometimes said that a judge's independence may be destroyed under threats of discipline by those who disagree with the thrust or tenor of his judicial opinions. But the possibility that discipline may be threatened for ignoble reasons cannot mask the legitimacy of discipline when properly imposed in cases of judicial misconduct. Indeed, when the judiciary is itself empowered to discipline its own members, the risk of invading judicial independence under the guise of disciplinary threats

is reduced to an absolute minimum.

The concept of judicial independence is no more threatened by legislation empowering the judiciary to discipline itself than by legislation directing where and when a court must sit, or determining the standards by which a judge must recuse himself. The separation of powers doctrine and its judicial independence offspring are quite unrelated to the affirmative power of Congress to constitute inferior courts and to take all necessary and proper steps to preserve the integrity of those courts. A miscreant judge's cry of "independence" cannot outweigh that constitutional power of Congress.

The independence of federal judges, so highly prized, finds its constitutional roots in the Article III provision that the judiciary shall have tenure measured only by "good behavior." That provision is what guards against legislative and executive tampering with the judiciary. Neither Congress nor the Executive can challenge the freedom of judges to render their own independent judgments by arbitrarily terminating their tenure. But that judicial insulation from outside decisional interference was not meant to perpetuate in office those judges who misconduct their office. As Professor Raoul Berger has written in his notable treatise, Impeachment 165 (1973),

> "Judicial independence, in short, rises no higher than the 'good behavior' tenure in which it is expressed. And the separation of powers only guarantees, it does not alter, the tenure secured by 'good behavior'; much less does it exclude the judiciary from removing a judge who has misbehaved."

II

A standard for disciplining or removing a judge should be more precise than the "good behavior" concept of Article III

Judge J. Clifford Wallace of the Ninth Circuit has suggested that a legislative directive that the judiciary discipline its own members might utilize, as the standard for imposing disciplinary sanctions, the notion that the challenged judicial conduct "interferes with the effective and expeditious administration of the business of the courts." Senator DeConcini has asked for comments on this suggested standard, particularly in connection with any advantages or disadvantages it might have over the "good behavior" standard referred to in Article III, Section 1 of the Constitution.

It must be emphasized at the outset that the "good behavior" reference in Article III, Section 1 concerns the length of tenure that federal judges enjoy. Tenure for "good behavior" is to be distinguished from tenure for the "good pleasure" of the sovereign appointing power. At common law, the notion of life tenure was itself conditioned on "good behavior," and indeed good behavior was always considered to be an implied if not an express ingredient or limitation on any grant of office for life. Berger, Impeachment 126 (1973). Life tenure, in other words, has always been considered terminable on the condition subsequent of a breach of "good behavior."

But providing tenure for "good behavior" does not provide much of a meaningful standard for determining when a judge has breached the "good behavior" concept. Such a breach brings to mind the opposing concept of "bad behavior," but even that does not offer much guidance in assessing what is bad about a judge's behavior on the bench. The paucity of content

in the notions of good and bad behavior suggests that any legislative directive concerning judicial discipline or removal should contain more precise and meaningful standards. Constitutional due process requires that all persons, and presumably all federal judges, "be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). We must guard against providing so broad a standard of removal or discipline as to permit judicial misconduct problems to be resolved "on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application" of such a standard. See Grayned v. City of Rockford, 408 U.S. 104, 109 (1972).

In short, from the due process standpoint, any disciplinary standard adopted by Congress should be precise enough both (1) to give the federal judiciary adequate and fair notice of what constitutes bad conduct in office, and (2) to provide the judicial or administrative body imposing discipline a workable means for assessing alleged misconduct. It is true that on occasion the Supreme Court has approved some broad standards of administrative action. And in the judicial misconduct area, it has dismissed for want of a substantial federal question two claims that state judicial misconduct standards that spoke only in terms of removal "for cause" were unconstitutionally vague. Friedman v. New York, 397 U.S. 317 (1970); In re Napolitano, 401 U.S. 951 (1971).

But I see no advantage in trying to exploit whatever broad or even vague standards the Supreme Court might be expected to tolerate. Congress has its own obligation to respect due process requirements when it writes legislation. In this instance, the due process requirements run both to the judges accused of bad behavior and to the agency that resolves such matters. Both the judges and the decisional body need more guidance

from Congress than a general admonition to follow and apply the vague dictate of "good behavior."

Some idea of the more precise standards that might be adopted can be gleaned from the various judicial misconduct standards now in use in the States. A valuable catalogue of all state judicial disciplinary and removal provisions can be found in Hall, Judicial Removal for Off-Bench Behavior: Why? 21 J. Pub. L. 127, 129-131 (1972). The standards so far erected by the States run the gamut from the most nebulous to the most precise. At the one extreme are eleven States that rely upon some formulation of the "reasonable cause" prescription as a basis for discipline. More than one-third of the States authorize removal for corruption or "wilful misconduct in office."

A slightly larger number of States permit the removal of judges for a "misdemeanor in office," which is less restrictive than the provision in several States prescribing discipline or ouster for engaging in conduct or committing an offense that involves moral turpitude. Greater specificity is sometimes found in State standards defining the criminal or anti-social nature of the activity that can lead to ouster, such as conviction of a felony, habitual drunkenness, intemperance, gambling and illegal use of drugs.

At the other end of the State disciplinary spectrum are the various standards couched in such broad terms as "gross immorality," "during good behavior," and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." Of similar caliber are such standards as "conduct unbecoming a member of the judiciary" and "conduct evidencing unfitness for judicial office." Other States have also made

violations of the canons of professional or judicial ethics a ground for sanctions against a judicial violator.

It may be instructive to note the judicial disciplinary standards set forth in California's Constitution, Article VI, Section 18(c), standards which seem to combine the specific with the more general:

> "On recommendation of the Commission on Judicial Qualifications the Supreme Court may (1) retire a judge for disability that seriously interferes with the performance of his duties and is or is likely to become permanent, and (2) censure or remove a judge for action occurring not more than 6 years prior to the commencement of his current term that constitutes wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

One cannot hope to specify all the situations that might constitute judicial misbehavior or misconduct. Not even the 25th Amendment attempts to specify the circumstances in which it can be determined that the President "is unable to discharge the powers and duties of his office." Thus I do not believe that due process concepts necessarily prohibit the adoption of some of the more generalized standards designed to encompass the unforeseeable kinds of judicial misconduct. For that reason it is probably permissible to utilize such standards as "wilful misconduct in office" or, as suggested by Judge Wallace, conduct that "interferes with the effective and expeditious administration of the business of the courts."

I conclude that any legislative direction respecting judicial discipline should be couched in more specfic terms than "good behavior" or "bad behavior." The more specific the directive can be the more fair and meaningful will be the result. Such specifics as inability to perform the powers and duties of the judicial office, habitual drunkenness, conviction of a felony, and immoral conduct readily come to mind. They should be

combined with some of the more general judicial misconduct concepts, such as the one suggested by Judge Wallace, to take care of situations that cannot reasonably be anticipated and therefore specified.

III

If Supreme Court review is desired, any disciplinary adjudicative body must be constituted as an Article III judicial tribunal

In answer to several questions in this area posed by Senator DeConcini, let me say the following:

1. It has been suggested that the investigative and adjudicative functions respecting judicial discipline could be merged into one body, perhaps into an Article III tribunal. I see several problems emerging from that suggestion.

First, as a practical matter, Article III judges do not have the time, the inclination or the facilities to engage in investigating charges and complaints against their fellow judges. To do so, they would necessarily have to employ a staff of non-judges, call it a commission or an administrative office or arm, to engage in the investigative functions of sifting charges, developing and exploring facts, and making appropriate charges. Those are simply not judicial functions; they are functions that should be performed by those trained in the investigative arts. And how simple it is to establish non-judicial investigative bodies, as has been done in most States, with power not only to investigate but to bring and to prosecute charges before an adjudicative body of Article III judges.

Second, if Supreme Court review of disciplinary action is to authorized, Congress must establish the disciplinary order that is subject to review as a judicial decision of a judicial tribunal. But where that disciplinary tribunal is also charged with the duty of investigation and prosecution, does it not lose its purely judicial characteristics for purposes of Supreme Court review? Does it not become primarily an administrative or investigative arm of the judiciary, such as the Judicial Councils were conceived to be in the Chandler case? The Court has been known to reject jurisdiction over a judicial tribunal's order that was deemed to be primarily administrative in nature. Federal Radio Commission v. General Electric Co., 281 U.S. 464 (1930). While these jurisdictional waters remain troubled and muddy, I would not advise an undue stirring of those waters if it can be avoided. I believe it is asking for jurisdictional trouble to combine these investigative and adjudicative functions into an Article III tribunal and then to expect the Supreme Court to review the disciplinary order on certiorari. The danger signals that flew in the Chandler opinion should be a sufficient warning that it is not advisable to combine investigatory and adjudicative functions in any Article III tribunal dealing with judicial discipline.

2. Senator DeConcini has also asked whether there are any problems with respect to establishing under S. 295 a Court on Judicial Conduct and Discipline, designating it as an Article III tribunal and authorizing Supreme Court review on petition of designated persons.

My reading of S. 295 convinces me that this disciplinary court, which would be composed of Article III judges, is designed solely for adjudicatory purposes. I perceive no investigatory or prosecutorial

functions assigned to this court. On that reading, any disciplinary order issued by the Court on Judicial Conduct and Discipline can be made reviewable by the Supreme Court on certiorari. It would be a judicial act by a judicial tribunal.

IV

It is inappropriate to authorize the Judicial Branch to recommend to the House of Representatives the impeachment or censure of any member of the Judicial Branch

S. 295 provides, as the most serious sanction that can be imposed against a Justice of the Supreme Court, that the Court on Judicial Conduct and Disability may recommend to the House of Representatives (a) the impeachment of any Justice whose conduct is found to be an impeachable offense as defined in Article II, Section 4 of the Constitution, or (b) the censure of any Justice whose conduct is found to be inconsistent with the good behavior required by Article III, Section 1 of the Constitution, and whose conduct is not found to be an impeachable offense.

I find several reasons why such a provision is inadvisable, if not unconstitutional. And I would make essentially the same response if this provision were changed or extended to cover lower court judges, in addition to Supreme Court Justices. These are my reasons:

1. For the reasons expressed in Part II of this additional Statement, the provision grounding censure upon a finding of conduct "inconsistent with the good behavior required by Article III" is too vague and unmanageable. No one can say what Article III requires in

the way of good behavior, if indeed it requires anything at all. "Good behavior," it must be emphasized, is a measure of tenure, not a measure of conduct.

2. I suggest that the spirit of the separation of powers doctrine makes it inappropriate for the Legislative Branch to engage in disciplining or censuring any member of the Judicial Branch or of the Executive Branch, short of impeachment. It would be equally inappropriate for the President or the Supreme Court to discipline or censure any Member of Congress. Indeed, the inappropriateness of such inter-Branch discipline may be so great as to warrant the label of unconstitutionality.

3. It virtually follows that any recommendation from the Judicial Branch that the Congress censure a member of the Judicial Branch is equally inappropriate. Congress simply has no authority, in my judgment, to censure any Supreme Court Justice or any federal court judge. What Congress cannot do should not be recommended by the Judiciary.

4. Insofar as a judicial recommendation of an impeachment of a Justice or judge is concerned, I would suggest that such a recommendation does violence to the constitutional scheme that places the "sole" power respecting impeachment and conviction in the hands of Congress. Just as the Judiciary has the sole power to adjudicate a case or controversy without benefit of any recommendation from Congress, so too the Congress has the sole power to initiate and pursue the impeachment processes without benefit of any recommendation from the Judiciary or the Executive.

5. Any such recommendation of impeachment or censure would also constitute an advisory opinion on the part of the Article III tribunal making the recommendation. The question of whether Congress should impeach or censure a Justice or judge is obviously not a case or controversy before the Article III court. The very fact that this recommendation is labelled just that, a recommendation, demonstrates that it is not a judicial decision. An Article III tribunal is simply not empowered under Article III to make recommendations, which are the very essence of advisory opinions.

6. Such recommendations, moreover, would serve to predetermine the ultimate guilt of the accused Justice or judge. The recommendation of an Article III court, under this proposal, would be premised on a judicial finding that the Justice or judge had in fact committed an impeachable offense or had engaged in conduct inconsistent with the so-called good behavior standard. Such findings and recommendations would tend to be given prejudicial weight, an undue weight, by the Congress. And should the accused Justice or judge somehow seek judicial review of the Congressional judgment, basing his complaint upon the validity of the very procedures here in question, the Judicial Branch would find itself in an intolerable conflict of interest. It would be placed in the unenviable position of having found the judge guilty of conduct which led the Judiciary to recommend Congressional sanctions in the first place. The impeached or censured judge could find no fair judicial review proceedings under these circumstances.

7. Finally, and solely with respect to the Justices of the Supreme Court, I reiterate my position that any and all suggestions about disciplining or removing Supreme Court Justices short of impeachment

would create a situation that is at least inapporpriate and unnecessary if not unconstitutional. The Congress should not allow itself to be in the position of censuring or removing, or authorizing some other agency to censure or remove, the collective or individual heads of a co-ordinate branch of government. Respect for the separation of powers doctrine should be enough to discourage adoption of such suggestions. The impeachment process contemplated by the Constitution is a sufficient weapon for Congress to use with respect to misconduct in office by the heads of either of the other two branches of government.

In response to Senator DeConcini's last question, I would indeed prefer and support the provision in S. 522 that contemplates that all disciplinary actions taken by the judicial tribunal be routinely reported to the House of Representatives, without comment or recommendation as to impeachment or censure possibilities. There is nothing constitutionally wrong with two branches of government cooperating with each other, as long as each is free to arrive at its own determinations. Here, such reporting would leave the House completely free to make its own judgments as to the impeachability of any judge about whom a report has been made.

It has also been suggested that, under S. 522, the House might be required to act, or at least make its best efforts to respond to a report, within a finite number of days. There is certainly no constitutional or separation of powers problem if Congress wishes to impose such an obligation on the House. But I fail to see what purpose would be served by such a requirement. Many of the reports would probably not engender any response or need for action on the part of the House. And on impeachment matters,

which are the sole concern of the House, the House bears sole responsibility and is obligated to report to no one but itself. Most certainly, the House Judiciary Committee can be expected to make its own independent judgments with respect to impeachable matters appearing in these reports, and to do so in such time as the Committee sees fit.

V

The Necessary and Proper Clause provides an adequate constitutional base for enacting a judicial discipline statute

By way of a short summary of the constitutional analysis that I have suggested as a justification for enacting a judicial discipline statute, let me reiterate the John Marshall analysis of the Necessary and Proper Clause:

1. What is the governmental power sought to be implemented or executed by the proposed legislation? With respect to judicial discipline, the answer is at least twofold. First, Congress has power under Section 8, Clause 9, of Article I to constitute tribunals inferior to the Supreme Court. Second, the Judiciary has the power and the obligation under Article III to operate the federal judicial system fairly and efficiently.

2. Are the means selected by Congress, evidenced in the proposed legislation, appropriate and plainly adapted to the execution of those designated governmental powers? Using the vertical thrust of the Necessary and Proper Clause, imposing judicial discipline on the members of the inferior tribunals that Congress has created seems plainly adapted and appropriate to the execution of this power of creation. And under the horizontal thrust of the Necessary and Proper Clause, it seems quite appropriate for Congress to give the Judiciary the power to discipline its

own members to the end that the federal judicial system may operate more efficiently and with greater integrity.

3. Are the means selected in the proposed legislation consistent with the letter and spirit of the Constitution? Are they prohibited by any other provision of the Constitution? Disciplining federal judges, other than the Justices of the Supreme Court, is certainly consistent with the spirit of the separation of powers principle, as well as with the spirit of the judicial independence doctrine. The only two constitutional provisions that are said to be inconsistent with legislation prescribing the means for judicial discipline are the Impeachment Clause and the Good Behavior provision of Article III. But the Impeachment Clause, as I have previously demonstrated, is an affirmative grant of power to Congress, not a limitation on its power to implement other authority vested by the Constitution. As for the Good Behavior provision, that is but a measure of the tenure of Article III judges. It does not purport to limit or proscribe the means by which that tenure may be terminated upon a showing of something less than "good behavior."

This analysis, of course, deserves and needs far greater contemplation than I have been able to give in making these few remarks. But I am convinced that the analysis is sound and that it provides a sure constitutional footing for the judicial disciplinary proposals now under consideration.

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ARTICLES

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CONGRESSIONAL RESEARCH SERVICE
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Cont Copy

In Memory of Harold Dwight Lasswell

Harold Dwight Lasswell 1902-1978
Myres S. McDougal

Chilling Judicial Independence
Irving R. Kaufman

Multicriteria Choice Processes: An Application of Public Choice Theory to *Bakke*, the FCC, and the Courts
Matthew L. Spitzer

Suing the Police in Federal Court

Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights

Procedural Safeguards for Periodic Review: A New Commitment to Mental Patients' Rights

Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2)

Reviews: *Patrick Devlin, Philip B. Kurland*

AMERICAN LAW DIVISION

Chilling Judicial Independence

Irving R. Kaufman†

If there is any lesson to be drawn from the political turmoil of recent years, it is the indispensable need for a judiciary able to serve, in the words of Edmund Burke, as a "safe asylum" during times of crisis.[1] Federal judges have been increasingly entrusted with basic and vital questions regarding the structure of our society and its allocation of wealth and power, ranging from the admissions policy of a California medical school[2] and the landing rights of the Concorde,[3] to governmental funding for abortions[4] and possession of subpoenaed White House tape recordings.[5]

No institution, of course—and least of all one composed of unelected officials who serve for life—can hope to resolve issues of such significance without frequently incurring the wrath of many members of the society. Displeasure with the outcome or trend of decisions provokes cries for replacing objectionable judges with others less irritating and more pliable. It is hardly surprising that the increased prominence of our courts in nearly every aspect of human endeavor coincides with a period of renewed agitation to place constraints on federal judges.

Two distinct lines of thought account for the renewed interest in the character of the bench. There is, first, the idea that because courts are part of our political structure and become involved in issues with profound political repercussions, they should be held politically accountable. This view is rarely stated, and indeed is more often disclaimed,[6] but I believe that it lurks dangerously beneath the surface.[7] Although the premise underlying this view may be partially correct, its

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1. E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 242 (T. Mahoney ed. 1955).
2. Regents of Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978).
3. British Airways Bd. v. Port Auth., 564 F.2d 1002 (2d Cir. 1977).
4. Beal v. Doe, 432 U.S. 438 (1977).
5. United States v. Nixon, 418 U.S. 683 (1974).
6. *See, e.g.*, 116 CONG. REC. 11,912 (1970) (Rep. Ford).
7. Only occasionally does this concern break through into the open, as it did in 1937 when President Roosevelt defended his Court-packing plan in these striking words: "We have reached the point as a nation where we must take action to save the Constitution from the court and the court from itself." N.Y. Times, Mar. 10, 1937, at 1, cols. 6-7 & 15, col. 3. Note also Roosevelt's famous "NOW" speech. *Id.*, Mar. 5, 1937, at 1, cols. 6-7 (only with favorable Court can New Deal confront national problems "now").

conclusion is wrong, and dangerously so. Courts may be deciding more issues of political consequence, but they are still, at the core, exactingly judicial. Independence becomes more—not less—critical as the issues faced by the courts expand.

The second threat to the independence of the federal judge stems from an impulse to streamline the complex procedure for ridding the bench of what some captious critics seem to think is a plethora of drunks and other misfits.[8] Congress has considered alternatives to impeachment with increasing frequency ever since Senator William McAdoo sponsored one such proposal in 1936.[9] On September 7, 1978, the Senate, acting on a nearly unanimous report of its Judiciary Committee,[10] passed by a 43-32 vote[11] the proposed Judicial Tenure Act.

This latest proposal would establish a complex, multitiered structure, operating in Washington and featuring a twelve-judge Judicial Conduct and Disability Commission, assisted by an Executive Director and an extensive staff, and a special seven-judge Court on Judicial Conduct and Disability empowered to remove any miscreant federal judge below the Supreme Court.[12]

Neither the specific flaws in this arrangement, nor the provisions authorizing the newly created court to impose disciplinary measures short of removal will be discussed here.[13] Rather, this article seeks to demonstrate that the premises underlying the principle of a judicial removal power are rooted in a series of grave misconceptions. Proposals

8. *See, e.g.*, H. CHASE, FEDERAL JUDGES: THE APPOINTING PROCESS 189 (1972); J. GOULDEN, THE BENCHWARMERS 3-20, 291-347 (1974).

9. A useful review of the legislative history, from the McAdoo bill to the Nunn bill, the immediate predecessor of the currently pending proposal, is given in Battisti, *An Independent Judiciary or an Evanescent Dream?* 25 CASE W. RES. L. REV. 711, 728-31 (1975).

10. S. REP. No. 1035, 95th Cong., 2d Sess. (1978). Senators Bayh and Mathias filed dissenting reports. *See id.* at 63, 73.

11. 124 CONG. REC. S14,782 (daily ed. Sept. 7, 1978). The Record has since been corrected to include the negative vote of Senator McGovern, originally counted as not voting. *See id.* at S14,918 (daily ed. Sept. 11, 1978).

12. S. 1423, 95th Cong., 2d Sess., S. REP. No. 1035, 95th Cong., 2d Sess. 47-61 (1978). The proposed Commission would be composed of one judge "in regular active service or senior status" from each judicial circuit and one "selected collectively by the judges of the Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court." *See id.* § 381(b)(1). The major substantive provision of the Senate bill is that "[a]ny person may file a complaint with the Judicial Conduct and Disability Commission setting forth the condition or conduct of a judge of the United States, alleging that such condition or conduct violates the good behavior standard required by article III, section 1 of the Constitution." *Id.* § 383(a). Conduct violating this standard is further defined to include, "but [not be] limited to, willful misconduct in office, willful and persistent failure to perform duties of the office, habitual intemperance, or other conduct prejudicial to the administration of justice that brings the judicial office into disrepute." *Id.* § 388(b).

13. Besides removal or dismissal of the complaint, involuntary retirement or censure could be ordered. *See id.* § 385(d)(1).

like the Senate bill are fatally misguided and pose an ominous threat to the judicial independence so necessary to our form of government. The bill is unconstitutional, unnecessary, and, indeed, counterproductive. Impeachment was the only procedure the Framers allowed for judicial removal, and they deliberately made it unwieldy. Manifold protections against judicial aberrance, including informal peer influence, have already been molded into our system and make change unnecessary. Moreover, to allow any simpler process for judicial removal, even one under the control of judges themselves, would eviscerate the independence of the individuals on the bench and undermine the sense of collegiality so necessary to the work of federal judges.[14]

I. Judicial Independence and Its Critics

A. *The Traditional View*

When the American Bar Association's Special Committee on Standards of Judicial Conduct drafted the *Code of Judicial Conduct*, we decided, after careful consideration, to declare at the outset that "[a]n independent and honorable judiciary is indispensable to justice in our society."[15] Before examining the constitutional and policy arguments about judicial tenure, it is important to recall why the independence

14. This article will focus only on the role of federal judges. The concept behind the state judiciary differs dramatically from that which demanded the creation of the federal courts. This was apparent as early as 1789, when the First Congress decided to establish a federal judiciary beneath the Supreme Court mandated by the Constitution. *See* Act of Sept. 24, 1789, ch. 20, 1 Stat. 73. Madison argued that in many states the courts were "so dependent on State Legislatures," for their salaries and otherwise, that it would be unwise to leave the application of federal law exclusively to them. 1 ANNALS OF CONG. 844 (Gales & Seaton eds. 1789). For a survey of state practice in selection and tenure of judges at the time of the Constitutional Convention, see Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 138-47.

Even today the state courts are more dependent than the federal judiciary on the good will of legislatures and political parties. Many state judges are popularly elected for limited terms. *See, e.g.*, N.Y. CONST. art. 6, §§ 2, 6, 10, but all federal judges are appointed to serve during good behavior. It stands to reason, therefore, that one cannot profitably compare the state and federal practices for removal of judges from office.

The case of California Superior Court Judge Alfred Gitelson, defeated in his bid for reelection shortly after he ordered busing to desegregate the Los Angeles public school system, is a striking example of how the state system of judicial selection entails an unavoidable loss of independence. Note Gitelson's own comments on the dangers to a judiciary able "'to preserve for all people their human rights,'" L.A. Times, Nov. 5, 1970, at 1, col. 3 & 32, col. 5 and the editorial comment, *Judicial Independence and Politics*, in *id.*, Nov. 10, 1970, § 2, at 6, cols. 1-2. For a survey of state practice for disciplining judges, see Comment, *The Procedures of Judicial Discipline*, 59 MARQ. L. REV. 190 (1976), and, more particularly, Comment, *Selection and Discipline of State Judges in Texas*, 14 HOUS. L. REV. 672 (1977).

15. ABA CODE OF JUDICIAL CONDUCT Canon 1 (1976). This recollection is confirmed by E. THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 45 (1973).

of federal judges is such a fundamental postulate of our political system. Adjudication based on the noble precept "equal justice under law" requires impartiality, and impartiality demands freedom from political pressure. This is especially true under a written constitution, guaranteeing for the ages certain individual rights even against the democratically determined actions of the majority, and in our federal system of government, in which the federal courts are the ultimate guarantor of state observance of federal rights.[16] As Justice Frankfurter explained, "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society."[17]

Our legal tradition emphasizes that an independent judiciary is most essential to the protection of democracy and of individual liberty "in dangerous times" when, as Judge William Cranch wrote, it "becomes the duty of the Judiciary calmly to poise the scales of justice, unmoved by the armed power, undisturbed by the clamor of the multitude."[18] Yet our history has demonstrated the fragility of this independence; the "least dangerous branch"[19] has often been the most vulnerable. The low standing of the Supreme Court during the Reconstruction era, when ideological opposition drove it into "ineffable contempt,"[20] is but one example of how even the profound American reverence for the judiciary can be shaken by the pressures of convulsive times.

The independence of our judiciary has survived the popular outcry against its most famous—as well as its most infamous—decisions. But today we must ask whether the role of the courts in our society has so changed that the traditional notion of judicial independence has become outmoded.

B. *The Contemporary Reconsideration*

The courts have always adjudicated thorny issues in America, but until modern times the most well-known and controversial exercises

16. *See* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 510 (1963); Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1045-46 (1977).

17. Dennis v. United States, 341 U.S. 494, 525 (1951) (concurring opinion). Frankfurter continued: "Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence." *Id.*

18. *See* 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 303 (1926) (quoting dissenting opinion of Cranch, J., in unnamed case).

19. The original phrase came from Alexander Hamilton in THE FEDERALIST No. 78, at 522 (J. Cooke ed. 1961) ("the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution"), and was built into a theory of judicial restraint by the late Professor Bickel. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

20. C. BOWERS, THE TRAGIC ERA v (1929). "[N]ever," records Bowers, "has that tribunal so often cringed before the clamor of the mob." *Id.*

of judicial power were negative actions limiting the scope of government.[21] In recent years, the judiciary has often been an accelerator of governmental activity rather than a brake. In the last few decades the courts have given broad construction to affirmative personal rights and manifested an increasing willingness to articulate and implement new ones. The roll call of causes dealt with by the judiciary sounds like a litany of the most vexing questions in current American political history: racial discrimination and segregation,[22] school admissions and affirmative action,[23] busing,[24] free speech and political protest,[25] internal and foreign security,[26] the rights of criminal defendants,[27] church-state relations from prayers in public schools[28] to public funding for parochial schools,[29] legislative reapportionment,[30] obscenity,[31] the draft,[32] abortion,[33] the death penalty,[34] women's rights,[35] and ecology.[36] Moreover, the complex subject matter of modern statutes and Congress's tendency to legislate by exhortatory generality[37] have

21. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case), 343 U.S. 579 (1952) (restricting President's inherent executive power); Hammer v. Dagenhart, 247 U.S. 251 (1918), *overruled*, United States v. Darby, 312 U.S. 100 (1941) (child labor case) (restricting Congress's commerce power); Lochner v. New York, 198 U.S. 45 (1905) (striking down state regulation of maximum hours of work).

22. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160 (1976) (prohibiting commercially operated, nonsectarian schools from denying admission to black students).

23. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978).

24. *See, e.g.*, Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971).

25. *See, e.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) (ordinance prohibiting picketing near school invalid); New York Times Co. v. United States, 403 U.S. 713 (1971) (Pentagon Papers case).

26. *See, e.g.*, United States v. United States Dist. Court, 407 U.S. 297 (1972) (surveillance for domestic security); New York Times Co. v. United States, 403 U.S. 713 (1971) (foreign security).

27. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury trial in state criminal prosecutions); Mapp v. Ohio, 367 U.S. 643 (1961) (inadmissibility of illegally obtained evidence).

28. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962).

29. *See, e.g.*, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973).

30. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).

31. Perhaps no area of the law has witnessed greater changes in the governing rules than has obscenity. *Compare* Roth v. United States, 354 U.S. 476 (1957) (early standards) *with* Miller v. California, 413 U.S. 15 (1973) (current standards).

32. Some of these were among the many vexing cases brought to the federal courts because of the divisions engendered by the Vietnam War. *See, e.g.*, Welsh v. United States, 398 U.S. 333 (1970).

33. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

34. *See, e.g.*, Jurek v. Texas, 428 U.S. 262 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

35. *See, e.g.*, General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Reed v. Reed, 404 U.S. 71 (1971).

36. *See, e.g.*, Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) (snail darter case).

37. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1314 (1976); Rosenblatt, *Health Care Reform and Administrative Law: A Structural Approach*, 88 YALE L.J. 243, 247-52 (1978) (noting this congressional tendency in health care legislation).

propelled the courts into what may appear to be an unaccustomed regulatory and quasi-legislative role.[38] Both the pettiest details and the broadest concepts of government have come within the judicial ambit. Ideally, the modern judge should be, in the phrase describing Justice Brandeis, a master of both microscope and telescope.[39]

Moreover, the judge of today cannot retain his earlier passive judicial role. The extraordinary complexity of modern litigation requires him, if his cases are not to linger for years, to exercise a crucial management function. And when the judge decides that relief is warranted, he must often command rather than merely prohibit.[40] The lawsuit does not simply clarify the law and allow the parties to order their affairs in accord with it; often the suit establishes "a complex, on-going regime" subjecting the parties—and even absentees—to continuing judicial oversight.[41] It is not enough for justice to be declared. The judge must assure that justice is done.

Together, these developments—the judge's more comprehensive role in defining the substance of the law, and his more intensive procedural role in implementing it—have confronted judges with novel bureaucratic and administrative functions, such as overseeing schools,[42] men-

38. *But see* p. 687 & note 48 *infra* (courts in past became involved at times in regulating and administering institutions).

39. The metaphor is that of Chief Justice Hughes. *See* A. MASON, BRANDEIS: A FREE MAN'S LIFE 629 (1946).

40. *See* O. FISS, THE CIVIL RIGHTS INJUNCTION 9 (1978) (civil rights injunctions no longer simply preventive, but often command restructuring of institutions); Chayes, *supra* note 37, at 1284 (judge as "creator and manager of complex forms of ongoing relief" in public law litigation also evident in other fields of law, *e.g.*, antitrust, securities fraud, union governance, and environmental management); Schmitt & Pasterczyk, *Specific Performance Under the Uniform Commercial Code—Will Liberalism Prevail?* 26 DE PAUL L. REV. 54, 63-66 (1976) (citing cases under UCC in which specific performance commanded, rather than money damages).

41. Chayes, *supra* note 37, at 1298. Professor Chayes is concerned about the new functions assumed by judges, but he concludes that the judiciary is well suited to its new role in public law litigation and that the assumption of that role is necessary to accomplish justice in an increasingly regulated society. *Id.* at 1307-16.

Senator Moynihan, in his recent Herbert H. Lehman Memorial Lecture, is not so sanguine:

> But if the federal courts are going to make law (a legislative function) and enforce law (an executive function)—which is what Chayes's term "the public-law litigation model" implies—they are inevitably going to find themselves in conflict with the legislative and executive branches. In that conflict they will just as ineluctably be led to adopt the techniques of the other two branches in order to prevail in the ensuing conflict . . . . They will thus develop a "rigid, multilayered hierarchy of numerous officials" of their own.

D. Moynihan, An Imperial Presidency Leads to an Imperial Congress Leads to an Imperial Judiciary: The Iron Law of Emulation 11 (Mar. 28, 1978) (Lehman College Publications No. 13).

42. *See, e.g.*, Hart v. Community School Bd., 383 F. Supp. 699 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975) (Coney Island schools); Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass.), *aff'd sub nom.* Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (Boston schools).

tal hospitals,[43] and prisons.[44] In the Second Circuit last term, *Wolfish v. Levi*[45] presented a challenge by inmates of the new Manhattan Correctional Center to almost all of the facility's policies and practices down to the clothing requirement for inmates.[46] The opinion I wrote for a panel of the court touched on a dozen distinct issues—and many more contentions had already been resolved below.

These developments, of course, do not represent a completely new phenomenon. The evolution of substantive rules and rights is not surprising; since the end of the eighteenth century, judges have explicitly taken account of the social and economic ramifications of common law rules.[47] The principal procedural novelty is not the quality of a court's involvement in particular cases, but the vast increase in the quantity of cases demanding an active judicial role.[48] Formerly they were considered exceptional, but now they seem routine.

Yet, as the judiciary more frequently assumes functions ordinarily associated with the representative branches and bases its decisions on the same criteria used by those divisions, it is a natural tendency to treat and think of judges as political officials. Solicitor General Wade McCree has acutely observed: "[W]hen courts begin to make law wholesale, or if you will, act like legislatures, they quickly come under attack from many sources for their alleged usurpation of power as they appear to exceed the proper role perceived for them in our scheme of

43. *See, e.g.*, Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974), *discussed in* Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975).

44. *See, e.g.*, Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part and rev'd in part sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977); Holt v. Hutto, 363 F. Supp. 194 (E.D. Ark. 1973), *aff'd in part and rev'd in part sub nom.* Finney v. Board of Correction, 505 F.2d 194 (8th Cir. 1974), *on remand sub nom.* Finney v. Hutto, 410 F. Supp. 251 (E.D. Ark. 1976), *aff'd*, 548 F.2d 740 (8th Cir. 1977), *aff'd*, 98 S. Ct. 2565 (1978).

45. 573 F.2d 118 (2d Cir.), *cert. granted sub nom.* Bell v. Wolfish, 99 S. Ct. 76 (1978) (No. 77-1829).

46. *Id.* at 124.

47. *See* Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917 (1974).

48. The increasing use of what Professor Fiss terms the "structural injunction" reflects a modern reemphasis and development of the courts' equity jurisdiction. O. FISS, *supra* note 40, at 9-10. A structural injunction is one that "[seeks] to effectuate the reform of a social institution." *Id.* at 9. It is not without historical antecedents. In the late nineteenth century, equity courts were involved in reorganizing and running the railroads. *Id.* at 9-10; *see* Cover & Aleinikoff, *supra* note 16, at 1038. *See generally* Comment, *Equitable Remedies: An Analysis of Judicial Utilization of Neoreceiverships to Implement Large Scale Institutional Change*, 1976 WIS. L. REV. 1161, 1167-72. Fiss also points to the more recent antitrust divestiture cases as historical antecedents of the structural injunction developed in civil rights cases. *See* O. FISS, *supra* note 40, at 10 & n.3 (citing United States v. E.I. Du Pont De Nemours & Co., 366 U.S. 316, 326-35 (1961)); O. FISS, INJUNCTIONS 325-414 (1972) (citing history of meat packers decree, beginning with Swift & Co. v. United States, 276 U.S. 311 (1928)).

government."[49] But despite the profound evolution in the role of the judiciary, its independence remains both essential and proper because that role continues to be a judicial one. In each important aspect of the litigation, traditional constraints continue to apply, even if in somewhat evolved form.

First, judges are not free to search out issues for resolution. If the rules of standing have lost much of their rigidity, courts are no less bound by the constitutional limitation of their jurisdiction to "cases or controversies."[50] Access to the federal courts has been made easier for those aggrieved—and access has been created by statute as well as by case law—but an issue is adjudicated only if and when presented by a litigant in a live controversy.

Second, judges are not free in deciding issues to give untrammelled effect to their personal preferences. Even on the most novel issues of law, the decision does not result from intuition or judicial idiosyncrasy. "We do not sit like a kadi under a tree," declared Justice Frankfurter, "dispensing justice according to considerations of individual expediency."[51]

That the process of judicial decisionmaking is not idiosyncratic, of course, does not imply that it is mechanical. Assuming that "conscientious, able and independent men" are chosen for the bench, one must, in the words of Charles Evans Hughes, examine a judge's "bedrock of conviction as to what are conceived to be fundamental principles of government and social relations" to predict how he will decide.[52] There are variations in judges' points of departure and processes of reasoning, but they are variations on a common theme. They arise in the fixed context of interpreting and implementing the commands of the Constitution, statutes, and precedents.

These first two limitations were eloquently captured by Benjamin Cardozo: "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at

49. W. McCree, Address to the Annual Dinner Meeting of the Judicial Administration Division of the American Bar Association 2 (typescript of speech given Aug. 7, 1978); *see* note 41 *supra* (quoting Sen. Moynihan).

50. U.S. CONST. art. III, § 2, cl. 1; *see* Muskrat v. United States, 219 U.S. 346 (1911).

51. Terminiello v. Chicago, 337 U.S. 1, 11 (1949) (concurring opinion).

It is interesting that Justice Holmes, one of the foremost "legal realists," *see, e.g.*, O.W. HOLMES, THE COMMON LAW xii, xix, 5 (M. Howe ed. 1963), was also one of the leading proponents of judicial self-restraint, *see, e.g.*, Baldwin v. Missouri, 281 U.S. 586, 595-96 (1930) (dissenting opinion); Lochner v. New York, 198 U.S. 45, 74-76 (1905) (dissenting opinion). In *Lochner*, Holmes declared, "If it were a question whether I agreed with [the economic theory upon which the case was decided], I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty . . . ." *Id.* at 75.

52. C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 49 (1928).

will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles."[53]

Third, although a decree issued by a judge may substantially affect persons not party to the litigation,[54] it is nevertheless formulated to remedy what has been adjudicated to be specific legal injury. When we grant relief to a party—even the most far-reaching and detailed injunctive relief—we do so because we are compelled to. To deny that relief would be to turn our backs on what our learning, our consideration, and our deepest convictions persuade us is a right under the law and the Constitution. In a real sense, we do what we must.

In this connection, it is important to remember the rationale of the most important case in American judicial history, *Marbury v. Madison*.[55] There Chief Justice Marshall asserted the power of judicial review as a natural consequence of the judicial function—to relieve parties aggrieved under the law. Because a court must determine the application of the law to the particular case before it, he declared, "It is emphatically the province and duty of the judicial department to say what the law is."[56] And, when a practice of the executive or a statute of the legislature is in conflict with the command of the Constitution, it is clearly the latter that must be heeded. Unless the question of constitutionality has been committed to another branch, the judiciary must decide it, and it must then give full effect to that decision.[57]

Only the "considered judgment"[58] of the courts can guarantee our constitutional liberties, and only in an atmosphere of judicial independence can that judgment thrive. As we perceive an increasing breadth to our fundamental, affirmative rights, and so rely increasingly on the courts for their development and protection, the process does not become less judicial. And it is thus more crucial than ever that judicial independence be preserved. The commitment to the rule of law transcends the diversity in style and substance evident in judicial opinions; it is the principal justification for according judges their independence.

The decisions of such contemporary judges as Frank Johnson of Alabama, upholding against vitriolic opposition the rights of disad-

53. B. Cardozo, The Nature of the Judicial Process 141 (1921).

54. *See* O. Fiss, *supra* note 40, at 14, 17 (beneficiaries of injunction may not be identifiable individuals, but social group; addressees may be anyone with actual notice of decree); Chayes, *supra* note 37, at 1284 (relief granted by judge in typical public law litigation has "widespread effects on persons not before the court").

55. 5 U.S. (1 Cranch) 137 (1803).

56. *Id.* at 177.

57. *Id.* at 177-78.

58. The phrase is from United States v. Butler, 297 U.S. 1, 62-63 (1936).

vantaged minorities,[59] provide illustrations as impressive as any in history of the importance of independence. And the billboards that demanded the impeachment of Chief Justice Warren, together with the efforts to impeach Justice Douglas, warn us that the stature of the judiciary remains in constant danger. Nor have the onslaughts against the entire Supreme Court waned. The attempts during Reconstruction by Northern radicals to limit the Court's appellate jurisdiction[60] were echoed after the *Brown* case by the efforts of Southern conservatives to achieve the same goal.[61]

Criticism is not only inevitable but healthy; we would not eliminate it even if we could. But the modern judge, no less than his predecessors, must act independently if he is to perform the function we demand of him, and he must feel secure that such action will not lead to his own downfall.

II. Protecting Judicial Independence: Security of Tenure

The question, then, is how the judge's independence may be protected. In principle, the answer is clear: the judge must be assured unequivocally that his legal decisions, no matter how unpopular, will not threaten his term of office and that the only indignity he may suffer for error is reversal. In short, he must be certain that disagreeable views will not lead to personal punishment. Judges should be removable only for the most serious offenses, and then only by an especially cautious procedure. It is essential to remember that provisions protecting judicial tenure were "not created for the benefit of the judges, but for the benefit of the judged."[62]

A. *The Constitutional Guarantees*

The Framers of the Constitution were well aware of the encroachments on judicial independence that would surely follow if secure tenure were not fixed for the federal judiciary. Indeed, one of the

59. *E.g.*, Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974); Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd in part*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975).

60. The notorious Reconstruction episode, which culminated in the celebrated case of *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869), is related in 2 C. WARREN, *supra* note 18, at 464-88, and 1 C. FAIRMAN, RECONSTRUCTION AND REUNION 1864-88, at 433-514 (1971) (6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES (Oliver Wendell Holmes Devise, P. Freund ed. 1971)). Perhaps the greatest threat to the Court's independence came in 1937, when Franklin D. Roosevelt very nearly succeeded in his attempt to pack the bench of "The Nine Old Men." *See generally* L. BAKER, BACK TO BACK (1967) (describing FDR's battle with Supreme Court).

61. *See* N.Y. Times, May 14, 1956, at 25, col. 1; *id.*, May 15, 1956, at 1, col. 3 & 26, col. 8.

62. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 698 (1969).

grievances against George III listed in the Declaration of Independence was: "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." Our Founding Fathers were determined that the judiciary of the new Republic would not be so feeble. In Article III of the new Constitution, therefore, they provided that the salaries of federal judges must not be diminished during their tenure and that they should continue in office "during good Behaviour."[63]

The difficulty is that neither "good Behaviour" nor the procedure for determining its breach is anywhere explicitly defined in Article III—or, in fact, anywhere else in the Constitution. Article II, section 4, however, provides that "all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[64] It has long been settled that federal judges are "Civil Officers" within the meaning of this clause.[65] Indeed, judges have been removed by impeachment ever since the first decade of the nineteenth century.[66]

And yet it has often been argued, and with mounting vehemence in recent years, that impeachment is not the exclusive method for judicial removal.[67] The currency of this theory is surprising, to say the least, in view of the Supreme Court's statement in *United States ex rel. Toth v. Quarles*[68] in 1955 that Article III courts are "presided over by judges appointed for life, subject only to removal by impeachment."[69] But those who lack faith in the impeachment process argue that, since Article III does not explicitly refer to Article II's impeachment clause, there might be transgressions of the good behavior standard that do not rise to the level of impeachable offenses.[70] Thus, scholars such as

63. U.S. CONST. art. III, § 1.

64. *Id.* art. II, § 4.

65. *See, e.g.*, Shurtleff v. United States, 189 U.S. 311, 316 (1903) (dictum); United States v. Isaacs, 493 F.2d 1124, 1142 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (dictum).

66. *See* Thompson & Pollitt, *Impeachment of Federal Judges: An Historical Overview*, 49 N.C.L. REV. 87 (1970) (describing impeachment episodes).

67. *See* note 70 *infra*.

68. 350 U.S. 11 (1955).

69. *Id.* at 16. In *Toth*, the Court held that a civilian ex-soldier was entitled to be tried by an Article III court (rather than a military court created under Article I powers) for crimes allegedly committed during his military service. Part of the underlying rationale of the decision was the difference in independence between Article III courts and military tribunals, as exemplified by the difference in the judges' tenure. *See id.* at 17.

70. The argument was made on the floor of the House of Representatives as early as 1801, *see* Kurland, *supra* note 62, at 674, but the first modern scholarly presentation of it was by Professor Shartel in his article, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution* (pts. 1-3), 28 MICH. L. REV. 485, 723, 870 (1930). Shartel's position has been supported by, among others, Raoul Berger, *see* R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 122-80 (1973), and the Senate Judiciary Committee, *see* S. REP. No. 1035, *supra* note 10, at 5-11.

Raoul Berger contend, it is constitutionally permissible to establish a removal procedure other than impeachment for judges whose conduct falls in the substantive gap between "high Crimes and Misdemeanors" and violations of "good Behaviour."[71]

The durability of this argument cannot be ascribed to any logical merit. The very absence of a removal provision in Article III indicates that the Framers must have implied a reference to the impeachment clauses and thereby intended that bad behavior be dealt with exclusively by impeachment. Otherwise, the silence of Article III would leave no restrictions whatsoever on the identity of the persons to whom Congress might delegate the power of removal. Even the President—or a lesser officer—under this interpretation might be authorized to remove a judge on a finding of malconduct.[72] Of course, it is perfectly fitting for the President to remove his own executive subordinates without invoking the impeachment process—indeed, as the *Myers*[73] case shows, his removal power over certain officials cannot be expunged.[74] A simplified process may even be applied against the "legislative" judges whose very offices are created by Congress in the exercise of its general authority under Article I.[75] But if such procedures for removal

71. *See* note 70 *supra* (citing sources).

72. The danger of legislative control over the judicial branch is not necessarily diminished by a congressional delegation of its removal power to judges, since the latter might be handpicked. *See* Otis, *A Proposed Tribunal: Is it Constitutional?* 7 U. KAN. CITY L. REV. 3, 29 (1938). Judge Otis also effectively anticipated and rebutted Berger's argument, *see* R. BERGER, *supra* note 70, at 174, that Congress has power under the "necessary and proper" clause to devise appropriate means for judges to enforce the good behavior standard. *See* Otis, *supra*, at 34-35.

73. Myers v. United States, 272 U.S. 52 (1926).

74. *Id.* at 176. *Myers* held that an Act of Congress requiring the President to procure the advice and consent of the Senate before dismissing a postmaster unconstitutionally interfered with the executive power. The *Myers* Court relied heavily on the debate in the First Congress recognizing that the power to remove executive subordinates is vested in the President alone. *See id.* at 174-76; *cf.* Parsons v. United States, 167 U.S. 324 (1897) (presidential discretion to remove district attorney when removal is in public good). James Madison, the leader in the congressional debate as well as in the Constitutional Convention, stated that impeachment could not be the exclusive means for removing subordinate officers, but added that this "might be the case" "as applied to Judges," 1 ANNALS OF CONG. 389 (Gales & Seaton eds. 1789), as did his colleague Elias Boudinot, *id.* at 390-91. *See* Note, *Judicial Disability and the Good Behavior Clause*, 85 YALE L.J. 706, 716 (1976). "Throughout the debate the speakers contrasted executive officials with judges who held office during good behavior . . . ."

75. The distinction between Article I "legislative" judges and Article III "constitutional" judges, drawn by Chief Justice Marshall in American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828), clarifies the argument often cited by advocates of alternatives to impeachment that "courts can exercise jurisdiction to declare judicial conduct and other offices forfeit for misconduct or neglect of duty," Shartel, *supra* note 70, at 885. Professor Shartel's assertion was based on the fact that Attorney General Charles Lee advised the House of Representatives in 1796 that action against Judge George Turner might be taken by indictment or "information" as well as by impeachment. But Turner's judgeship was created by Congress's assertion of its Article I powers in the Organic Law of

are appropriate for the judges in whom Article III vests the judicial power of the United States, then the independence of this entirely different class of officers is a snare and a delusion.

The logical flaws in Berger's gap theory run deeper. Article II allows the cumbersome tool of impeachment to be wielded against judges, but only as to those who have committed the most serious treachery or corruption. Moreover, Article I limits the procedures and consequences of impeachment; only the House may impeach, only the Senate by a two-thirds vote may convict,[76] and the sole penalties are removal and disqualification from office. How, then, can one reasonably contend that those precise penalties may be imposed for a lesser offense, and by a lesser tribunal acting under a less stringent procedure?

Confronted by the possibility of this anomaly, the proponents of easy judicial removal are forced to contend that Article III contemplated the development of alternatives to impeachment not only for actions falling in the perceived gap between "good Behaviour" and "high Crimes and Misdemeanors," but for *all* transgressions against the "good Behaviour" standard—including impeachable offenses. In thus attempting to rescue their hypothesis, however, the gap theorists only compound their troublesome dilemma.[77] They are driven to the proposition that the impeachment process may be ignored altogether in removing federal judges. But how, one wonders, can they ignore two hundred years of history? They will have difficulty explaining Alexander Hamilton's statement that trial for removal from office on the grave charges specified by the impeachment clauses must be held before

the Northwest Territory. *See* 3 A. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTIVES 981-83 (1907). He was therefore a legislative rather than a constitutional judge. The two classes of judges must be treated differently with regard to their tenure. *See* Myers v. United States, 272 U.S. 52, 154-58 (1926). The crucial factor is whether the tenure of an officer is determined by the Constitution. *See* Shurtleff v. United States, 189 U.S. 311, 316 (1903) (dictum) (life tenure provided for federal judicial officers, but not for territorial judges); McAllister v. United States, 141 U.S. 174, 187-88 (1891) (tenure of Article III judges distinguished from that of territorial judges). Thus, in Burton v. United States, 202 U.S. 344 (1906), the Court carefully construed a statute purporting to render any senator convicted of taking a bribe "forever hereafter incapable" of holding any office under the United States. The statute, the Court said, did not of its own force remove Burton from office, for that remained the sole prerogative of the Senate under Article I, § 5. *Id.* at 369-70.

76. The fact that Article I gave the Houses of Congress the sole powers to impeach and to try impeachments, when other options such as trial by the Supreme Court were considered and rejected, *see* Otis, *supra* note 72, at 29-30 & nn.12-13, vitiates the argument sometimes made that the impeachment clauses were meant as limitations only on Congress, *see* R. BERGER, *supra* note 70, at 153-54; Otis, *supra* note 72, at 21-32; Shartel, *supra* note 70, at 894 (Congress has "a concurrent, not an exclusive, power of removal"). Rather, the power of removal was deliberately granted to the legislature in its historic role as the great and solemn public tribunal of the nation. *See* THE FEDERALIST No. 65, *supra* note 19, at 440-41.

77. Otis, *supra* note 72, at 33-34.

the Senate, because of "[t]he awful discretion, which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community."[78] And they will have problems in accounting for the nine impeachments of judges that have already occurred. The Jeffersonian Congress, so eager to remove Federalists from the bench, wasted much effort in the cases of John Pickering and Samuel Chase[79] if, instead of twice running the gantlet of impeachment, it might have utilized a more streamlined and far simpler procedure to accomplish the same result.

Led by Berger, the gap theorists have reached across the ocean in an attempt to bolster their position. Judicial offices were granted in England by royal letters patent, Berger points out, and good behavior was a condition of the tenure.[80] Breach of such a condition resulted in forfeiture of the office, and the judicial writ of *scire facias* was then available to repeal the patent.[81] English judges were therefore subject to judicial removal. Since the constitutional draftsmen chose the same substantive term—"good Behaviour"—in limiting the tenure of Article III judges, and since they employed "a common law term of ascertainable meaning, with no indication that they were employing it in a new and different sense," Berger concludes that they implicitly adopted the judicial enforcement machinery that traditionally went along with it.[82]

The most daring aspect of this argument is Berger's hypothesis that by adopting the substantive standard of good behavior the Framers implied the availability of a particular procedural device, *scire facias*. But the Framers never felt the need to mention *scire facias* in their debates or to refer to it in the Constitution itself. Berger thus bears the burden of proving that they believed the writ was so inextricably intertwined with judicial tenure during good behavior that its use was implicit in all they did. It is a burden he cannot carry.

Indeed, Berger himself recognizes the first gaping hole in his armor: the fact that "there is no English case wherein a judge comparable to a federal judge was removed in a judicial proceeding."[83] But, he responds, the *scire facias* procedure was clearly used to oust other of-

78. THE FEDERALIST No. 65, *supra* note 19, at 441-42.

79. *See* p. 705 *infra*.

80. R. BERGER, *supra* note 70, at 125-26.

81. *Scire facias* was a prerogative judicial writ issued to revoke or repeal grants or charters of the Crown. 2 A. KEITH, ANSON'S LAW AND CUSTOM OF THE CONSTITUTION (pt. 1) 235-36 (4th ed. 1935).

82. R. BERGER, *supra* note 70, at 131 (footnote omitted).

83. *Id.* at 127 (footnote omitted). The *scire facias* cases are analyzed in Otis, *supra* note 72, at 49 app. and Ziskind, *supra* note 14, at 153-54 app.

ficers who enjoyed good behavior tenure, and the fact "that there is no precise precedent for application of that procedure to judges" should be held of little account, for the keystone of the common law is the extension of consistent principles when analogous circumstances arise.[84] "Impeccable conduct, not atrophy of process," he suggests, may explain the absence of any attempts to remove an English judge by *scire facias* in over two and a half centuries.[85]

The suggestion is rather surprising in light of the assertion by Thomas Denman, later a well-known Lord Justice and one of the barristers quoted by Berger to prove the availability of *scire facias* for judicial removal,[86] that "[t]he misconduct of Judges had frequently come under the consideration of Parliament."[87] Moreover, judges cannot, as Berger posits,[88] be easily analogized to inferior officers. A simple removal procedure is appropriate for such officers because it is not necessary that they have the independence expected of judges; indeed, it is more often essential that such inferior officers be accountable to their superiors and to the public.[89] Furthermore, all conceptions of judicial hierarchy would be toppled if the tenure of any judge could be ended by any other judge issuing a writ, an unavoidable result if a judge's tenure were terminable by a finding of bad behavior in a *scire facias* proceeding.

It is not surprising, then, that Berger's evidence does not prove his assertion that *scire facias*, though never used for the purpose, was available to remove English judges. He cites three cases of judges who claimed that their offices could be forfeited by *scire facias* proceedings.[90] But all three made the argument only because they were then fending off removal by another procedure that, they attempted to demonstrate, was improper. It is weak evidence indeed that a judge endangered in one forum pleads that another one is appropriate.[91]

Berger then cites us to an opinion rendered in 1753 by Attorney General Ryder and Solicitor General Murray, later Lord Mansfield,

84. R. BERGER, *supra* note 70, at 128.

85. *Id.* at 130 n.42; *see* Note, *The Exclusiveness of the Impeachment Power Under the Constitution*, 51 HARV. L. REV. 330, 335 & n.38 (1937) (no attempt to use *scire facias* since 1700).

86. R. BERGER, *supra* note 70, at 130 n.40.

87. 24 PARL. DEB. (2d ser.) 965 (1830).

88. R. BERGER, *supra* note 70, at 127-28.

89. *See* Myers v. United States, 272 U.S. 52, 121-22 (1926).

90. The three judges were Sir John Walter, Sir John Archer, and Sir Jonah Barrington. R. BERGER, *supra* note 70, at 128-29, 130 n.40.

91. Particularly in Barrington's case it was clear that the judge, through his counsel, Denman, was attempting, in the words of the Solicitor General, "to throw every obstacle in the way of a speedy decision." 24 PARL. DEB. (2d ser.) 966 (1830).

48-202 O - 79 - 20

that the commission of a colonial judge mistakenly appointed during good behavior "cannot be revoked without misbehaviour." That Ryder and Murray said "revoked" rather than "impeached" is significant, Berger argues, and "it is highly improbable that they confused 'misbehavior,' the classic scire facias formula, with impeachment, which proceeds for 'high crimes and misdemeanors.' "[92] This argument assumes the very point Berger is trying to prove: that the substantive standard of good behavior carried with it the procedural implication of *scire facias*. And the argument is mystifying as well. No one contends that impeachment was the only method for ousting a miscreant judge in England, for in 1700 the Act of Settlement[93] had explicitly provided for removal by the Crown upon the address of both Houses of Parliament.[94]

92. R. BERGER, *supra* note 70, at 129.

93. Act of Settlement, 1700, 12 & 13 Will. 3, c. 2.

94. The statute provided that "Judges Commissions be made *Quandiu se bene gesserint* [during good behavior], and their Salaries ascertained and established; but upon the Address of both Houses of Parliament it may be lawful to remove them." *Id.* § 3. According to Maitland, the statute attempted to prevent the servility to the Crown that had characterized the judiciary serving at the pleasure of the Stuart kings. *See* F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 312 (1908). Under the Act, the monarch was no longer empowered to remove judges at will, but only upon conviction or address of Parliament. *Id.* at 313. Thus, the address procedure, as a limitation on the power of the monarch to remove disfavored judges, stands in contrast to impeachment, which allowed Parliament to remove the King's favorites. *See* R. BERGER, *supra* note 70, at 26. Unlike impeachment, which required a trial and bore potentially heavy penalties, address was merely a petition to the Crown for the removal of an objectionable judge. *See* note 115 *infra* (quoting Edmund Burke); A. BRADLEY, WADE & PHILLIPS'S CONSTITUTIONAL AND ADMINISTRATIVE LAW 316-17 (9th ed. 1977).

Impeachment, as Berger shows, could only be predicated on a claim of a serious offense. *See* R. BERGER, *supra* note 70, at 53-78. Berger argues that removal upon address, by contrast, was not conditioned on misbehavior; the provision for address was thus a qualification, rather than a consequence of the good behavior tenure. *See id.* at 151 n.131.

If Berger were correct it would follow that the good behavior standard was implicitly understood to relate to a common law removal procedure, presumably that of *scire facias*. But this does not seem to be the most persuasive interpretation of the statute, at least not that which prevailed by the middle of the eighteenth century. In 1760 Parliament repeated the provisions of the Act of Settlement in a new statute, 1 Geo. 3, c. 23 (1760), designed to ensure the continuance of judicial tenure despite the demise of the monarch. The elaborate preamble to that statute enumerated the benefits incident upon "the Independency and Uprightness of Judges" with the consequent desirability of making "further Provision for continuing Judges in the Enjoyment of their Offices during their good Behaviour." Neither judicial "independency" nor good behavior tenure could be regarded as more than hollow and pious hopes if a judge could be removed at any time at the whim of Crown and Parliament. Berger's attempt to invoke the 1760 statute in aid of his construction of the Act of Settlement, *see* R. BERGER, *supra* note 70, at 151 n.131, thus backfires. His argument is based on the clause of the later statute that read "Provided always . . . That it may be lawful for his Majesty . . . to remove any Judge or Judges upon the Address of both Houses of Parliament." 1 Geo. 3, c. 23, § 2 (1760). But "provided always" was standard language in that period for statutory provisos and indicated not an exception but a further elucidation, *see, e.g., id.* c. 7, §§ 8, 17, 25, 26, 34,

The most Berger can demonstrate is that there was total confusion in England as to the practices available for judicial removal. One example is Lord Chancellor Erskine's statement in the House of Lords in 1806 opposing the use of address to remove an Irish judge. Would it not be wiser, he asked, "to let the guilt or innocence of the honourable judge be decided by a jury upon a scire facias to repeal the patent by which he held his office?"[95] Berger excises the words "by a jury" in reporting this statement[96] because they indicate Erskine's confusion about the nature of *scire facias*. The writ was issuable in a civil proceeding, but, as Erskine's complete speech makes clear, he was discussing the procedures employed in a criminal trial under the "penal law."[97] Indeed, the entire debate demonstrates that their Lordships were uncertain about the most basic mechanics of removing a judge.[98]

Even the most eminent students of English constitutional law have not been able to avoid this uncertainty. Berger relies heavily on his reading of the great constitutional historian W.S. Holdsworth.[99] Not surprisingly, though, he does not quote Holdsworth, for that would undermine his case. Holdsworth merely wrote that judges "may, it is said," be removed by several procedures other than address: "either by *scire facias* . . . , criminal information, or impeachment, or by the exercise of the inquisitorial and judicial jurisdiction vested in the House of Lords."[100] Holdsworth's qualified statement of this view indicates that he was not vouching for its truth—and with good reason.

and the phrase "any Judge" indicates only that any judge was subject to removal by address, not that judges could be removed by address for any reason.

Later codifications, too, indicate that, whatever had been the intention of the 1701 Parliament, its successors did not believe that it had intended to allow a common law removal procedure. Thus, the Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. 5, c. 49, § 12(1), provided that judges of the High Court "shall hold their offices during good behaviour subject to a power of removal . . . on an address presented to His Majesty by both Houses of Parliament." Two English authorities (one an Attorney General) have interpreted this clause as providing that a High Court judge "is only removable on an address to the Crown." Inskip & Bridgman, *Courts*, in 8 HAILSHAM, HALSBURY'S LAWS OF ENGLAND ¶ 1299, at 590 (2d ed. 1930); *see* Lawson & Davies, *Constitutional Law*, in 8 HAILSHAM, HALSBURY'S LAWS OF ENGLAND ¶ 813, at 537 n.7 (4th ed. 1974) (calling address "the only practical way of removing judges of the Supreme Court").

95. 7 PARL. DEB. (1st ser.) 769 (1806).

96. R. BERGER, *supra* note 70, at 130.

97. 7 PARL. DEB. (1st ser.) 768 (1806).

98. Indeed, almost the entire debate in the House of Lords centered on the question whether the Lords could make an address before the Commons. And their Lordships displayed a marked lack of certainty as to the consequences of their refusal to vote an address. *Id.* at 755-71.

99. R. BERGER, *supra* note 70, at 130 & n.42, 142, 151.

100. Holdsworth, *Constitutional Law*, in 6 HAILSHAM, HALSBURY'S LAW OF ENGLAND ¶ 783, at 609 (2d ed. 1932). It is significant that in the latest edition, revised by new authors, the sentence otherwise repeating Holdsworth's words omits the reference to *scire facias*. *See* Lawson & Davies, *supra* note 94, ¶ 1107, at 680.

Except for the mention of address, it was lifted almost verbatim from his only source on the point: Denman's petition in the House of Lords for an accused judge, Sir Jonah Barrington.[101] Holdsworth even adopted Denman's apparently unprecedented language on the removal power of the House of Lords.[102]

Holdsworth's caution is well founded, for other eminent scholars appear to differ on the point.[103] Most, however, seem to believe that the Act of Settlement did not allow judicial removal by *scire facias*. Berger's assertion to the contrary is based on a highly selective reading of the texts.[104]

It seems unlikely, then, that at the time of our Constitutional Convention an English judge comparable to a federal judge could have been removed by *scire facias* proceedings. That English judges themselves, as well as modern scholars, have been confounded by the entire subject of judicial removal is convincing evidence that the Framers did not silently imply the availability of that unused, unmentioned procedure when they adopted the simple words "good Behaviour."

Berger's fallback position is that, whatever procedural remedies the good behavior standard implied in England, the standard clearly did not draw the same demarcation as the "high Crimes and Misdemeanors" test that had long been used for impeachment. Thus, he contends, by use of two terms of art the Framers indicated that judges could be removed in certain cases in which impeachment would not lie; it must therefore be possible to create an alternative removal procedure.[105]

Once more, however, Berger is forced to concede the weakness in his own position, for he admits that "[t]he early law does not define 'misbehavior' in so many words."[106] Indeed, he presents weighty evidence

101. 62 H.L. JOUR. 602 (1830).

102. *See* Holdsworth, *supra* note 100. It appears evident that Denman used this unusual verbiage in a vain attempt to persuade the Lords not to employ the simple address procedure to remove his client. *See* note 91 *supra*.

103. *Compare* F. MAITLAND, *supra* note 94, at 312-13 (criminal conviction and address are exclusive procedures for removing English judges; *scire facias* is not available) *with* McIlwain, *The Tenure of English Judges*, 7 AM. POLITICAL SCI. REV. 217, 225 (1913) (English judges may be removed by *scire facias*, address, or impeachment).

104. In addition to Holdsworth, Berger also erroneously relies on H. BROOM, CONSTITUTIONAL LAW VIEWED IN RELATION TO THE COMMON LAW (London 1866). *See* R. BERGER, *supra* note 70, at 130 n.42. Broom simply stated that the "judges of our inferior courts," who had been placed "under the general supervision of the Queen's Bench," might be removed at common law or by statute for misbehavior. H. BROOM, *supra*, at 790-91. Broom said of judges generally, however, that they "are only removable on the address of Parliament." *Id.* at 789. This distinction in tenure between the superior judges (those of the High Court and the Court of Appeal) and the lower ranks of the judiciary is also emphasized in H. WADE, ADMINISTRATIVE LAW 71-72 (4th ed. 1977), and in Terrell v. Secretary of State for the Colonies, [1953] 2 All E.R. 490, 494-95 (Q.B.).

105. R. BERGER, *supra* note 70, at 131-33.

106. *Id.* at 160.

that " '[m]isdemean' and 'misbehave' were sometimes interchangeable terms."[107] Nevertheless, he argues, the fact that the terms might have been interchangeable "for purposes of forfeiture" does not indicate that they were equivalents "for purposes of impeachment."[108] English impeachments, he points out, were never grounded on breaches of good behavior but only on "high treason" or "high crimes and misdemeanors."[109]

But since "misbehavior" and "misdemeanor" were often used synonymously, Berger bears the onus of proving that the Framers regarded it as clear that the substantive "good Behaviour" standard must refer to a removal procedure other than impeachment. Not only does he fail once more to carry his burden, but the evidence points unmistakably in the opposite direction. The Framers believed that the tenure of judges should be established in terms of good behavior and the remedy for a breach should be impeachment. In an essay published in 1776 and distributed widely in the South,[110] John Adams, a prominent lawyer, declared: "The judges . . . should hold estates for life in their offices; or, in other words, their commissions should be during good behavior. . . . For misbehavior, the grand inquest of the colony, the house of representatives, should impeach them before the governor and council . . . ."[111]

Similarly, the constitution drafted for Massachusetts two years later would have vested in the state house of representatives "the power of impeaching all officers of the State for malconduct in their respective offices."[112] When the citizens of Essex County met to consider the proposed constitution, they declared, in rejecting it and in formulating the principles properly governing the judicial power, that all judicial officers should "be removable only for misbehaviour. Let the senate be the judge of that misbehaviour, on impeachment of the house."[113] The constitutions of other states also indicate that the lawyers of the

107. *Id.* at 161.

108. *Id.* (emphasis deleted).

109. *Id.* at 162.

110. Ziskind, *supra* note 14, at 143.

111. J. Adams, *Thoughts on Government*, in 4 The Works of John Adams 189, 198 (C. Adams ed. 1851). These words were quoted verbatim, and apparently without attribution, in a letter by Thomas Jefferson the same year. *See* Letter from Thomas Jefferson to George Wythe (July 1776), *reprinted in* 2 The Writings of Thomas Jefferson 59-60 (P. Ford ed. 1893). The letter was revealed with great delight by Federalists, 2 The Balance, and Columbian Repository (Hudson, N.Y.) 146, at col. 1 (1803), when, as President, Jefferson's regard for an independent judiciary deteriorated.

112. Massachusetts Draft Constitution of 1778 art. 20, *reprinted in* The Popular Sources of Political Authority 198 (O. Handlin & M. Handlin eds. 1966) (later rejected in popular referendum).

113. The Essex Result (1778), *reprinted in* The Popular Sources of Political Authority, *supra* note 112, at 364.

new republic regarded impeachment as an appropriate remedy against judges enjoying tenure during "good Behaviour."[114] Therefore, it is clearly incorrect to argue that in adopting that substantive standard, the Framers must have had in mind a removal procedure other than impeachment.

The American draftsmen were not concerned with whether tenure during good behavior had taken on a technical meaning in England, where an offense could be sufficient for simple removal by address and yet not sufficiently grave to invoke the severe additional penalties of impeachment.[115] Judicial tenure during good behavior was widely adopted in America not because it indicated the possibilities of unspoken methods of removal but, as the Adams statement[116] demonstrates, because it was this formulation that had guaranteed English judges life tenure since the beginning of the century. Denial to the colonies of the benefits of an independent judiciary enjoyed in England was one of the grievances that led to the Revolution.[117] It was thus only natural that the constitutions of the new republic borrowed the description of tenure from the mother country.

Nor is it surprising that, from the beginning of their deliberations, the delegates to the federal Constitutional Convention assumed that federal judges should sit during good behavior. Indeed, in its only substantial debate on the question of judicial tenure, the Convention manifested an unmistakable intention to make judicial removal even more difficult than in England.[118] The Framers never explicitly dis-

114. *See* THE FEDERALIST No. 79 (A. Hamilton) (discussing impeachment procedure in New York constitution); Ziskind, *supra* note 14, at 139-44 (discussing early Delaware, New York, North Carolina, and Virginia constitutions).

115. The English distinction is demonstrated by Burke, who is partially quoted in R. BERGER, *supra* note 70, at 151 n.132:

> We may, when we see cause of complaint, administer a remedy; it is in our choice by an address to remove an improper judge, by impeachment before the peers to pursue to destruction a corrupt judge, or by bill to assert, to explain, to enforce, or to reform the law, just as the occasion and necessity of the case shall guide us.

1 SPEECHES OF EDMUND BURKE 80-81 (London 1816) (from speech in House of Commons on powers of juries in prosecutions for libels).

116. *See* p. 699 *supra*. Similarly, Hamilton wrote: "The standard of good behaviour for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government." THE FEDERALIST No. 78, *supra* note 19, at 522; *see* Note, *supra* note 74, at 718.

117. *See* pp. 690-91 *supra*.

118. John Dickinson of Pennsylvania moved to amend the judiciary article to provide for removal of federal judges, in effect, by joint address, but he encountered vigorous opposition. That such a procedure would be more dangerous in the United States than in England was asserted by John Rutledge and James Wilson, the former because the Supreme Court would be called on to judge between the United States and the particular states, the latter because the House of Lords and the House of Commons would be less

cussed how breaches of good behavior were to be determined, but the explanation by Gouverneur Morris erases doubt that impeachment was the intended remedy:

> Misbehaviour is not a term known in our law; the idea is expressed by the word misdemeanor; which word is in the clause respecting impeachments. Taking, therefore, the two together, and speaking plain old English, the Constitution says: "The judges shall hold their offices so long as they demean themselves well; but if they shall misdemean, if they shall, on impeachment, be convicted of misdemeanor, they shall be removed."[119]

Berger's answer to this striking quotation is that Morris was incorrect in claiming that the term misbehavior was unknown to the American law, because two of the early state constitutions expressly made misbehavior triable.[120] The response is inadequate for two reasons. Whether Morris was correct in describing the prior status of American law is irrelevant. Morris's statement is highly significant because, as the most important member of the Committee on Style and Revision,[121] he is generally regarded as having had the last word on the choice of language in the Constitution. No one else was as qualified to define precisely the meaning and interrelation of its clauses.

Moreover, the Morris statement confirms Berger's mistake in assuming that the Framers ascribed a well-defined technical meaning to the standard "good behavior," under which it was clearly possible for an offense to be cause for removal even without crossing into the narrow region of impeachable transgressions. Good behavior was chosen simply to give judges secure tenure;[122] elaboration of proper causes for removal was left to the impeachment clause of Article II.[123]

likely to concur on such issues than would the Houses of Congress. The proposal was rejected by a vote of one state for, seven against, and three absent. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 428-29 (M. Farrand rev. ed. 1937), *discussed in* Ziskind, *supra* note 14, at 150-51.

119. 11 ANNALS OF CONG. 90 (1802).

120. R. BERGER, *supra* note 70, at 148 n.120.

121. Ziskind, *supra* note 14, at 150.

122. *See* p. 700 & note 116 *supra*.

123. Berger points out that the Framers decided to specify the causes for impeachment with a narrow and technical phrase, "high crimes and Misdemeanors," rather than with a more general term resembling "misbehavior," because they feared the latter would be too vague. Thus, he contends, it is clear that they believed the "good behavior" language to allow removal of judges on grounds broader than the strict classification of impeachable offenses. R. BERGER, *supra* note 70, at 163-65. But this reasoning backfires against Berger. It seems clear that the use of "good behavior" in Article III was meant to protect tenure, not to categorize grounds for removal. When the Framers did confront the removal question, they insisted on using a phrase of well-defined scope because, as Madison argued, a

Certainly this was understood when ratification of the new charter was debated. Indeed, opponents of the Constitution argued as a reason for rejection that it allowed no alternative to impeachment for the removal of federal judges.[124] Alexander Hamilton offered a different assessment of the value of the impeachment and conviction clauses, but not a different reading. "[Judges] are liable to be impeached for malconduct by the house of representatives, and tried by the senate," he wrote in *The Federalist*. "This is the only provision on the point, which is consistent with the necessary independence of the judicial character . . . ."[125]

It is enlightening, moreover, to scrutinize the proceedings of the First Congress on removal of executive officers and on the first Judiciary Act.[126] That great statute, which gave flesh to the skeletal structure of our nation's courts as established by the Constitution, was discussed in depth by Congress.[127] The common assumptions under-

"vague . . . term will be equivalent to a tenure during pleasure of the Senate." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 118, at 550, *quoted in* R. BERGER, *supra* note 70, at 163. Clearly the Framers did not contemplate giving federal judges so tenuous a hold on their offices; the very generality of the good behavior standard thus indicates that the Framers implied a connection to the impeachment clause.

124. "Brutus," *The Power of the Judiciary* (pt. 1), in THE ANTIFEDERALIST PAPERS NOS. 78-79, at 222, 224 (M. Borden ed. 1965).

125. THE FEDERALIST No. 79, *supra* note 19, at 533.

126. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73 (establishing lower federal courts). Berger quotes several statements from congressional debate to the effect that impeachment is the exclusive means to remove judges. He dismisses them as "broad dicta," however, since they were made in a debate over presidential power to remove executive officers and in refutation of the argument that the power to appoint is the power to remove. *See* R. BERGER, *supra* note 70, at 147-50. Even if somewhat tangential to the issue debated, however, such unambiguous statements as that of Abraham Baldwin, who had been a delegate to the Constitutional Convention, cannot be so easily dismissed: "The judges are appointed by the President, by and with the advice and consent of the Senate; but they are only removable by impeachment." 1 ANNALS OF CONG. 579 (Gales & Seaton eds. 1789).

127. *See* 1 ANNALS OF CONG. 47-51 (Gale & Seaton eds. 1789). This is in marked contrast to the Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112, cited by Berger to show that the First Congress believed judges could be removed without impeachment, *see* R. BERGER, *supra* note 70, at 150. That statute prescribed punishment for a judge who accepts a bribe, as well as for the person offering it, and also declared that persons convicted "shall forever be disqualified to hold any office of honour, trust or profit under the United States." But it appears from the congressional debates on the act that there was no mention in either House of the bribery penalties, constituting a brief portion of a long statute aimed at punishing crimes against the United States. Discussion focused rather on a section allowing dissection of the bodies of malefactors. *See* 1 & 2 ANNALS OF CONG. 976-77, 1572-74 (Gales & Seaton eds. 1790). Moreover, the statute has never been invoked against a federal judge; indeed, the constitutional considerations have led scholars to the conclusion that the disqualification provision was not intended to operate before impeachment and conviction. *See* Shipley, *Legislative Control of Judicial Behavior*, 35 LAW & CONTEMP. PROB. 178, 200 n.104 (1970); Clark, Book Review, 34 OHIO ST. L.J. 94, 97-98 (1974). This is comparable to the reading that the Supreme Court has given a similar statute, applicable to members of Congress, that has since been consolidated with the 1790 Act. *See* Burton v. United States, 202 U.S. 344 (1906), *discussed in* note 75 *supra*.

lying the debates of 1789, in which many of the Framers participated, are persuasive evidence of the intentions of the Convention of 1789.[128] Not surprisingly, we find that the congressmen "agreed that judges with good behavior tenure could only be removed by impeachment."[129]

B. *Secure Tenure Evaluated*

Both logic and history, then, compel the conclusion that the Constitution intended impeachment to be the only permissible procedure for judicial removal. Furthermore, the architects of the Constitution stood on solid ground as a matter of policy. Neither the standards nor the procedure for removing judges may be cut too fine. We must tolerate some judges without whom the system would be better off, because the dangers are greater on the side of an overly potent removal power. The possibility of judicial removal for vague grounds of dissatisfaction would create a dragnet that would inevitably sweep into its grasp the maverick, the dissenter, the innovator, the reformer—in a word, the unpopular. Even apparently innocent attempts to rid the bench of its disabled members—those suffering from senility, drunkenness, mental instability, or other unfortunate "status" defects—may mask something more sinister. A provision allowing removal on grounds of disability, wrote Hamilton, "would be more liable to abuse

Another early statute often cited to show that impeachment was not intended as the exclusive means of removing judges was passed during the Jefferson Administration. In the closing days of the Adams Administration, Congress created a set of circuit courts to be presided over by newly appointed judges. *See* Act of Feb. 13, 1801, ch. 4, § 7, 2 Stat. 89. The following year, the Jeffersonian Congress removed the thorn of these Federalist "midnight judges," *see* 2 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 561-62 (1916), by the simple expedient of eliminating their offices and providing instead that the circuit courts would consist of one Supreme Court justice and the district judge of the district in which the circuit court was sitting, *see* Act of Apr. 29, 1802, ch. 31, § 4, 2 Stat. 156. The constitutionality of the statute was never judicially tested. Moreover, from Professor Kurland's account of the incident, it is clear that the bill's proponents made no attempt to link the removal of an entire category of judges to the good behavior standard. *See* Kurland, *supra* note 62, at 670-78. The statute, therefore, does not demonstrate objective constitutional interpretation, but merely the Jeffersonian hostility to the federal judiciary that marked the first decade of the nineteenth century.

128. Myers v. United States, 272 U.S. 52, 136 (1926).

129. Note, *supra* note 74, at 712 n.31. A few examples will suffice to prove the point. Mr. Smith of South Carolina stated: "The judges are to hold their commissions during good behavior, and after they are appointed, they are only removable by impeachment." 1 ANNALS OF CONG. 828 (Gales & Seaton eds. 1789). No less an authority than Madison is reported to have said: "The judges are to be removed only on impeachment, and conviction before Congress." *See* 11 ANNALS OF CONG. 738 (1802) (Rep. Rutledge quoting unattributed statement by Madison). Elbridge Gerry echoed Madison's words, *see* 1 ANNALS OF CONG. 860 (Gales & Seaton eds. 1789), and others agreed, *see* R. BERGER, *supra* note 70, at 149-50.

than calculated to answer any good purpose."[130] Half a century later, Justice Story added:

> An attempt to fix the boundary between the region of ability and inability would much oftener give rise to personal, or party attachments and hostilities, than advance the interests of justice, or the public good. And instances of absolute imbecility would be too rare to justify the introduction of so dangerous a provision.[131]

These words are a striking reminder that judgments of inability involve a crucial subjective element.

Despite this caution, many have argued from the Jeffersonian era to this day that judicial removal should be made easier, because of the frustrations encountered in impeachment procedures.[132] Jefferson himself, thwarted in an attempt to secure the removal of Justice Chase, called impeachment "a bungling way of removing judges,"[133] and "not even a scare-crow"[134]—even as he conceded that the Constitution forbade other measures.[135] Lord Bryce, one of our most acute observers from overseas, commented that impeachment

> is the heaviest piece of artillery in the congressional arsenal, but because it is so heavy it is unfit for ordinary use. It is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at.[136]

130. THE FEDERALIST No. 79, *supra* note 19, at 533. Antifederalists, too, believed that the Constitution did not allow judicial removal for incapacity. *See* "Brutus," *supra* note 124, at 224.

131. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 486 (Boston 1833) (footnote omitted). It is interesting to note that at the 1804 impeachment trial of the Federalist Judge John Pickering, Republicans "made the most strenuous efforts . . . to deny even the admission of evidence as to Pickering's insanity," which was raised as a defense, "and attempted only to show him guilty of crime." Turner, *The Impeachment of John Pickering*, 54 AM. HIST. REV. 485, 493 (1949). Thus, it was early assumed that the Constitution did not allow removal for disability, a principle well documented in Note, *supra* note 74, at 713.

132. *See* pp. 691-92 & note 70 *supra*.

133. *See* W. PLUMER, JR., LIFE OF WILLIAM PLUMER 325 (Boston 1856) (quoting conversation between Thomas Jefferson and author's father, Sen. Plumer, during trial of Judge Pickering).

134. Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), *reprinted in* 10 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 111, at 141; *accord*, Letter from Thomas Jefferson to James Pleasants (Dec. 26, 1821), *reprinted in* 10 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 111, at 199 (impeachment "is a bugbear which . . . [the judges] fear not").

135. *See* Letter from Thomas Jefferson to James Pleasants, *supra* note 134 (comparing English practice of joint address with American requirement of impeachment).

136. 1 J. BRYCE, THE AMERICAN COMMONWEALTH 212 (rev. ed. 1913). Bryce nevertheless regarded it as clear that impeachment was the only means for removing federal judges. *See id.* at 111.

The simple response to these complaints is that they prove that the constitutional draftsmen performed their task well, for they intended that the removal process not be easily invoked. Impeachment was meant to be a drastic remedy, essential but dangerous, to be used only in imperative cases.

Even the clearest words, however, do not provide impregnable protection. The Framers may have anticipated that resourceful legislators would seek to evade the constitutional standard. Indeed, Congress has at times distorted the "high Crimes and Misdemeanors" language in judicial impeachments. Such incidents, though, are not examples of legitimate constitutional interpretation, but of the dangers inherent in a legal process in which any indictment or conviction is decided by a political body. Thus, in 1804, the Jeffersonians, encouraged by their success in removing District Judge John Pickering on charges that included his " 'being a man of loose morals and intemperate habits,' "[137] sought bigger quarry and impeached the irascible Justice Samuel Chase. Impeachment, proclaimed William Giles of Virginia, the Jeffersonian leader in the Senate, " 'is nothing more than an enquiry, by the two Houses of Congress, whether the office of any public man might not be better filled by another.' "[138] A majority in the Senate voted to remove Chase, but not the two-thirds necessary for conviction. "For the first time since Jefferson's election," Albert Beveridge wrote in his distinguished biography of Marshall, "the National Judiciary was, for a period, rendered independent."[139]

But attempts to gloss over the "high Crimes and Misdemeanors" standard did not end there. In 1830, District Judge James H. Peck of Missouri was impeached because the House found one of his contempt orders "unjust, oppressive and arbitrary."[140] In this decade a prominent member of Congress claimed, in proposing action against Justice Douglas, that "an impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment

137. Turner, *supra* note 131, at 496 (quoting fourth article of impeachment).

138. *See* 3 A. BEVERIDGE, *supra* note 127, at 173 (quoting speech of Sen. Giles).

139. *Id.* at 220. Marshall was fearful of the Chase impeachment because it was thought that the Republican plans would soon spread to the entire Federalist Supreme Court. *See* L. BAKER, JOHN MARSHALL 421-22 (1978). Indeed, he suggested in a letter to Chase the idea of trading the congressional impeachment power for a surrender of the independence of the judiciary. He wrote: "I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than a removal of the judge . . . ." Letter from John Marshall to Samuel Chase (Jan. 23, 1804), *quoted in* L. BAKER, *supra*, at 422. Of the end of the ordeal, Baker states: "John Marshall's reactions to the votes [at the Senate trial] are unrecorded but he was obviously relieved." *Id.* at 438.

140. Thompson & Pollitt, *supra* note 66, at 101-02.

in history."[141] The threat to judicial independence created by such a position more than answers the argument that the Framers chose an overly rigid impeachment mechanism. Impeachment, moreover, has not been an idle threat. Fifty-five judges have been charged on the floor of the House with impeachable offenses, nine have been impeached, and four convicted; more than a score have resigned rather than risk trial and exposure.[142] And yet, it is reassuring to note that Congress has found such action justified with increasing rarity. No judges have been impeached since 1936.

III. Protection Against Judicial Aberrance—Formal and Informal

If impeachment is designed for occasional use only, there must be some other means of ensuring that judges do not abuse their trust. The judge who has committed a crime, whether before or after he dons the judicial ermine, is not the problem; he, like other criminals, may be indicted and convicted, in our courts, and thereafter removed from the bench. The cases of Judges Kerner and Manton show that judges, as well as other criminals, may be incarcerated.[143] "Protection of tenure," the Seventh Circuit Court of Appeals said in the Kerner case, "is not a license to commit crime . . . ."[144]

Because a judge is not a criminal does not, of course, qualify him for the bench. There are ample protections, however, in our system against the unfit judge, and they accomplish their purpose without transcursing the independence of the judiciary.

The first operates before the judge ever assumes the federal bench. For decades federal judges have been required to pass the extraordinarily thorough clearance procedures of the Justice Department, its investigating arm the FBI, and the organized bar, as well as the close scrutiny of the Senate.[145] The chances of a venal person becoming a

141. 116 CONG. REC. 11,913 (1970) (remarks of Rep. Ford). Similar sentiments were put forth in the trial following the impeachment of Justice Chase. Senator Giles, leader of the Jeffersonian faction, told Senator Plumer: " 'We have authority to remove a judge, if he is disagreeable in his office, or wrongheaded, and opposed to the administration though not corrupt in conduct.' " *See* L. BAKER, *supra* note 139, at 424 (quoting Sen. Giles). Interestingly enough, when Senator Giles became annoyed at how time-consuming impeachment was, he came to favor the idea of amending the Constitution to have judges removable by the President "on the application of Congress." WILLIAM PLUMER'S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, 1803-1807, at 239 (E. Brown ed. 1923).

142. R. BERGER, *supra* note 70, at 166; Thompson & Pollitt, *supra* note 66, at 118.

143. For a detailed narrative of the Manton episode, see J. BORKIN, THE CORRUPT JUDGE 23-93 (1962). Manton resigned his judgeship before his trial. *Id.* at 27.

144. United States v. Isaacs, 493 F.2d 1124, 1142 (7th Cir. 1974).

145. As a measure of how the confirmation process has become more intensive, it is interesting to note the statement read by Felix Frankfurter when he appeared before the

federal judge are slim indeed. After all, the ability, the habits, and the honesty of those selected are generally well known to their peers, whose views the bar committees and the FBI always seek.

If a prospect for the federal bench passes the "strict scrutiny" to which he is subjected, he does not, of course, become free from restraints. The most important of these is one to which I have already referred:[146] the responsibility to decide cases according to the law by adhering to the principles laid down by Constitution, statutes, and precedent. Among the limitations the judge discovers are those he must place on his own role: he must act impartially—indeed, he must disqualify himself if even the appearance of justice would suffer by his sitting on a case[147]—and he cannot reach out like a legislator to resolve pressing social issues.[148] These restraints are, in the first instance, self-imposed, but they are powerful nonetheless for the overwhelming majority of judges who have no desire to abuse their power or make unprincipled decisions.

To ensure that the individual judge has heeded those restraints in good faith and has fully considered the "consecrated principles"[149] of law, appellate review is available as a corrective process. Those who call for a regime of judicial discipline, however, argue that appellate review is not adequate to the task because of the powerful strategic position occupied by trial judges. The appellate process, though, is hardly a toothless animal; it is able to excise not only error but also bias, impropriety, irrationality, and abuse of discretion.[150] The celebrated *Reserve Mining*[151] case is but one illustration of this fact. The

Senate Judiciary Committee after his nomination for the Supreme Court in 1939:

> I, of course, do not wish to testify in support of my nomination. Except only in one instance, involving a charge concerning an official act of an Attorney General, the entire history of this committee and of the court does not disclose that a nominee to the Supreme Court has appeared and testified before the Judiciary Committee.
>
> While I believe that a nominee's record should be thoroughly scrutinized by this committee, I hope you will not think it presumptuous on my part to suggest that neither such examination nor the best interests of the Supreme Court will be helped by the personal participation of the nominee himself.

N.Y. Times, Jan. 13, 1939, at 1, col. 4 & 7, col. 4. Today, of course, it would probably be considered presumptuous if a nominee did not participate in the Judiciary Committee's investigation.

146. *See* p. 688 *supra*.

147. *See* 28 U.S.C. § 455(a) (1976) (judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned"); *id.* § 455(b) (setting out specific, additional circumstances requiring disqualification).

148. *See* p. 688 *supra*.

149. B. Cardozo, *supra* note 53, at 141.

150. Of course, appellate review is not always an infallible safeguard against a trial court's occasional abuse of its power. *See* Kuhns, *The Summary Contempt Power: A Critique and a New Perspective*, 88 Yale L.J. 39, 69-70 (1978).

151. Reserve Mining Co. v. Lord, 529 F.2d 181 (8th Cir. 1976).

Eighth Circuit found that the district judge had "shed the robe of the judge and . . . assumed the mantle of the advocate," thereby demonstrating "great bias" and "substantial disregard for the mandate of this court."[152] The appellate court remanded the case to the district court and ordered that it be retried before a different judge. And this, significantly, occurred in a complex environmental case—precisely the kind that has engendered particular anxiety on the part of Congress and the public over the sweep of judicial decisionmaking.

But what if the perverse or inadequate judge is himself an appellate judge? Who will guard the guardians? It is because of this concern, of course, that appellate decisions are made collectively. No opinion, whether idiosyncratic or exquisitely sculpted from crystalline premises, can become law without the agreement of at least half the author's colleagues.

The federal legislature, it is important to note, is not hierarchical, and the executive is not collective at the top. Only the judiciary, which because of its independence provides its own corrective mechanism, protects against its own errors by both hierarchical structures and collective decisionmaking. These are effective mechanisms, designed only to correct, not to punish: they act only against judge's opinions and decisions, and not against him personally.

But what if the judge's inadequate performance is more than occasional? A judge who falls significantly behind in his work is coaxed—and usually effectively—to keep up. If he is not incompetent but merely exhausted, not lazy but simply overworked, a brief respite can be arranged by his colleagues and may prove sufficient. The Circuit Judicial Councils are not without powers. They may reassign recalcitrant judges and may order them to eliminate their backlogs before taking on any new cases.[153] But such open activism is rarely necessary. Few judges are willing to risk public attention by persistently rejecting their colleagues' overtures.

If the disability is permanent, the judge will often recognize it and retire. If he does not, his fellow judges may—unless he is a Supreme Court justice—invoke 28 U.S.C. § 372(b) by certifying the judge's disability to the President and authorizing him to appoint an extra

152. *Id.* at 185.

153. *See* 28 U.S.C. § 332(d) (1976) ("Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit.") In a talk to the Conference of Chief Judges of the United States Circuit Courts on September 20, 1978, Steven Flanders, Esq., of the Federal Judicial Center indicated that he expected a report he is preparing for the Center to show that the Circuit Councils are able to handle disciplinary problems informally and effectively. Whether the Councils have on occasion exercised too much power was left unsettled in Chandler v. Judicial Council, 382 U.S. 1003 (1966), and *id.*, 398 U.S. 74 (1970).

judge.[154] This statute, it should be noted, was framed with sedulous regard for constitutional limitations. It does not act against the judge; it does not attempt to remove or discipline him. It fulfills one entirely proper purpose: to ensure that the bench has its full complement of able members so that it may administer justice properly.

Invocation of section 372(b) is rarely needed, however.[155] The problem can almost always be managed effectively in a personal and informal manner. On occasion, close colleagues of an afflicted judge suggest that he retire. If necessary, other judges, attorneys, and even family members may approach the ailing jurist. Almost invariably he will acquiesce. At least four Supreme Court justices—Grier, Field, McKenna,[156] and the great Holmes—retired at the suggestion of their brothers. There is no record that any has ever refused. Field, reminded in his senescence of his own part in securing the retirement of Grier, said he had never done "a dirtier day's work,"[157] and Hughes shed tears as he left the still-gallant Holmes.[158] Distasteful it is, but highly effective. Few judges would long withstand the united importunings of their peers. Even if the judge is slow to accept the suggestion of his brethren, this method is sure to accomplish his ouster faster than a formal procedure.[159] Peer pressure is a potent tool. It should not be underestimated because it is neither exposed to public view nor enshrined in law.[160]

154. *See* 28 U.S.C. § 372(b) (1976).

155. I have been able to find only two instances in which it has been employed.

156. A. MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 215 (1964).

157. C. HUGHES, *supra* note 52, at 75-76.

158. Freund, *Charles Evans Hughes as Chief Justice*, 81 HARV. L. REV. 4, 29 (1967).

159. Such confrontations are rarely needed. In my 29 years on the district and circuit benches, I can recall very few occasions on which it became necessary for us to approach a disabled colleague. Not one of these involved a judge thought to be senile. In these few instances, after the judge was advised that his disability hampered his effectiveness, he promptly restored himself to sound condition. A formal disciplinary proceeding would not only have been cruel; it would have been less effective than a more personal approach. Sometimes, of course, an informal approach "takes a great deal of effort and quite a long time," but it usually succeeds. *Hearings Before the Subcomm. of Improvements in Judicial Machinery of the Senate Comm. on the Judiciary on Procedures for the Removal, Retirement, and Disciplining of Unfit Federal Judges*, 89th Cong., 2d Sess. 15-16 (1966) (testimony of Judge John Biggs, Jr., former chief judge of Third Circuit) (recalling having had "a rather considerable experience in getting old and sick judges to retire") [hereinafter cited as *1966 Senate Hearings*].

160. Judge Joseph T. Sneed of the Ninth Circuit Court of Appeals also expressed this view in a recent speech:

> Numerous others sitting at the district and circuit level have been cajoled, despite serious doubts concerning the legitimacy of such efforts, *Chandler v. Judicial Council*, 398 U.S. 74 (1970), into taking senior status or retiring. Serious drinking problems have been confronted and the individual judge either rehabilitated or eased into retirement by quiet, but seriously intended, threats to remove all, or almost all, cases from his court.

J. Sneed, Not Good Behavior 12-13 (address to Chit Chat Club, San Francisco, Cal., Sept. 11, 1978).

IV. Judge Against Judge: The Trojan Horse

It is fallacious, then, to claim that there is no adequate method of dealing with the disabled or incompetent judge, and it is therefore all the more difficult to understand the recent outbreak of anxiety over removing judges. It is certainly not attributable to any groundswell of federal judicial misbehavior. On the contrary, it is less of a problem than ever. The case of the late Judge Willis Ritter, so often cited, is not, as some have suggested, an egregious example of a common phenomenon. It is simply an aberration.[161]

Recognition of the constitutional infirmities that would attend any procedure dissolving the lines between the branches of government has dissuaded Congress from attempting to design a legislative removal procedure simpler than the extraordinary one of impeachment. But the proponents of facile removal believe that at last they have found the solution to their frustrations. They have embraced the notion that all constitutional impediments might be avoided by establishing the disciplinary power within the judiciary itself. This has been the conception behind the series of judicial tenure bills introduced over the last decade—including the one recently passed by the Senate.[162]

I have argued that the scheme as a whole is unconstitutional, since judges created under Article III may only be removed by impeachment, and that it is unnecessary to create formal mechanisms to remove disabled judges with greater ease, since the informal pressure of a judge's peers is both more humane and more efficient. An additional harmful aspect of the scheme remains to be considered: the fact that it would disrupt the delicate balance of collegiality and individualism that is so necessary to the work of the federal bench. Indeed, the Senate bill would tend in large measure to obstruct the very goals it was designed to attain.

Collegiality and individualism, it must be understood, are complementary, not conflicting qualities. If the judicial fraternity is tightly knit, its members will find suitable scope for a personal approach to their task, in much the same way that scholars draw both inspiration and confidence from the sustaining atmosphere of a healthy academic environment. The judicial community could not long maintain respect if it were merely a collection of fungible judges; nor could judicial

161. Senator Tydings, sponsor of one of the previous bills that would have limited judicial tenure, conceded that only a "tiny handful of judges . . . harm . . . the efficient administration of justice," *1966 Senate Hearings*, *supra* note 159, at 1, and that "an exposé on the Federal judiciary . . . would undoubtedly find little to expose," *id.* at 4.

162. *See* p. 682 & notes 11-12 *supra* (describing plan passed by Senate).

individualism long be tolerated if it were not rooted in a firm communal base.

A. *Judicial Community*

The effectiveness of informal peer pressure in ridding the judiciary of disabled members is based substantially on the prevalence within the judiciary of an atmosphere of good faith and collegiality. This sense of judicial community, itself so vital to the proper functioning of our courts, would be gravely endangered if judges were compelled to accept the formal power to discipline their colleagues and thus bypass impeachment.

Judicial community is formed in the main in the conference room, and it is important that it be so. Judges remain acutely aware that too much dissension creates gnawing uncertainty in the law. Apart from the interests of legal uniformity and coherence, judges usually realize that continual dissent and refusal to accept settled doctrine undercut the weight their views carry with their brethren, the bar, and the public. In sum, judges must be willing to engage in a dialogue with their colleagues. Whether they employ legal argument, hard-nosed negotiation and compromise, or a combination of these techniques, that dialogue will not be productive in the absence of personal respect and confidence.

Sometimes, of course, ideological disagreements combine with personal incompatibilities to disrupt the working relationship. These rifts are unfortunate but tolerable. The other judges muffle the flames, and the consequences are rarely more severe than a few heated dissents and a mild increase in the number of cases heard en banc. But add a judicial mechanism for investigating judges and the problem would be magnified. A judge might see across the table not merely a working partner but a potential adversary. The dialogue would continue, of course. In most cases no change would be detectable. But there would be an inevitable loss of frankness if each participant feared that candor might one day build a case against him.

The sense of judicial community spreads beyond the conference rooms of our appellate courts. Judges at every level of the system interact frequently and in many ways. In every circuit, for example, district judges sit by designation on the Court of Appeals,[163] and circuit judges may try cases.[164] Judges of both courts often have chambers in the same building. In addition, they deal with one another on a

163. 28 U.S.C. § 292(a) (1976).
164. *Id.* § 291(c).

48-202 O - 79 - 21

multitude of matters, such as the formulation and evaluation of Speedy Trial Plans,[165] necessary for the expeditious administration of justice. But we are not satisfied with the contacts that are required by statute. We make certain that there are numerous opportunities, such as our Circuit Conferences, for informal association and discussion. This contact is cherished, for it fosters the cross-pollination of ideas that is the genius of coherent growth in the law. Nearly all federal judges, I am sure, would be wary of driving the wedge of judicial discipline into this creative community.

The effect would be minimal, claim the proponents of disciplinary schemes, because a bureaucratic filter can obviate the necessity of judges hearing all but the most substantial of charges. It seems unwise to allow bureaucrats, whether lawyers or not, to determine, even in part, the fate of judges.[166] The sheer magnitude of the disciplinary engine, moreover, would be a major nuisance. Judges frequently receive hostile or threatening correspondence from disappointed litigants. Creation of a new disciplinary scheme would transform a minor annoyance into a constant threat of official action. At the very least, it would require time-consuming responses by the judge. Even if the judge were not eventually condemned, the mere invocation of the statutory provisions might taint him with a devastating stigma. The vestments of authority might remain but the aura of respect and confidence so essential to the judicial function would be forever dissipated. It is not at all surprising that three quarters of all federal judges responding to a recent questionnaire expressed "extreme concern" about the intrusion of this Trojan Horse.[167] And it was only natural that the United States Judicial Conference, in its latest pronouncement on September 22, 1978, expressed not only its concern over the constitutionality of, but also its flat opposition to, any attempts to short-circuit impeachment by delegating the removal power.[168]

B. *Individualism on the Bench*

But, of course, the primary reason for opposing the idea of judicially enforced discipline is not that it would be bothersome, nor that it

165. These plans, required by the Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1976), are reviewed by circuit and district judges under the provisions of § 3165(c).

166. This point was made forcefully by Judge Anthony M. Kennedy of the Ninth Circuit Court of Appeals at the Circuit Conference on May 19, 1978 (page 30 of the transcript on file in the Office of the Circuit Executive for the Ninth Circuit).

167. 124 CONG. REC. S14,758 (daily ed. Sept. 7, 1978) (Sen. Bayh).

168. The resolution expressed the Conference's "disapproval of any legislative provision which purports to delegate to any other tribunal or entity the constitutional power of Congress to remove a federal judge from office."

would tear at the vital sense of judicial community, nor even that it is totally unnecessary to ensure proper judicial behavior. The fundamental flaw in judicially enforced discipline is that it would vitiate the independence of the judiciary.

This is not understood by the proponents of such projects. Thus, in its report on the currently pending bill, the Senate Judiciary Committee declared: "Judicial independence, a principle which is a precondition to an effective system of justice, [has] historically referred, not to the independence of judges from one another, but rather to the independence of the judiciary as an institution from other branches of government."[169]

The Committee based this assertion on the theory propounded by Raoul Berger that the common law writ of *scire facias* allowed one judge to remove another on breach of good behavior. I have already explained why I find this theory totally unconvincing.[170] Berger's historical misconceptions are less significant, however, than the Judiciary Committee's grievous conceptual error. The separation of powers is not the exclusive cause and guarantee of judicial independence. Of course, it is vital to protect the entire third branch from the others. What may be less apparent, but is no less true, is that it is equally essential to protect the independence of the individual judge, even from incursions by other judges. The heart of judicial independence, it must be understood, is judicial individualism. The judiciary, after all, is not a disembodied abstraction. It is composed of individual men and women who work primarily on their own. This is true of trial courts, and it is no less true on the appellate level. The Supreme Court, Justice Powell commented, "is perhaps one of the last citadels of jealously preserved individualism. . . . [F]or the most part, . . . we function as nine small, independent law firms."[171] The mental processes of the judges, then, are those of individuals and not of cogs in a vast machine.

Perhaps that is why those Presidents who expect their appointees to hew to the party line have so often been surprised to learn that judges are independent-minded men. Justice Clark's vote in the *Steel Seizure Case*[172] was just one of many that displeased Truman and prompted him unfairly to call the appointment the worst mistake he ever made.[173] Earl Warren's record on the bench drew a similar assessment from

169. S. Rep. No. 1035, *supra* note 10, at 8.

170. *See* pp. 694-98 *supra*.

171. L. Powell, Report on the Court 1-2 (address to ABA Labor Law Section, Aug. 11, 1976).

172. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 660 (1952) (Clark, J., concurring).

173. M. Miller, Plain Speaking: An Oral Biography of Harry S. Truman 225 (1974).

Eisenhower.[174] Theodore Roosevelt was even more pungent than his successors. " 'I could carve out of a banana a judge with more backbone than that,' " he exclaimed after the dissent in the *Northern Securities Case*[175] of his first Supreme Court appointee, Oliver Wendell Holmes, Jr.[176]

No matter how strong an individual judge's spine, the threat of punishment—the greatest peril to judicial independence—would project as dark a shadow whether cast by political strangers or by judicial colleagues. A federal judge, wrote Justice Douglas, must be "independent of every other judge . . . . [N]either one alone nor any number banded together can act as censor and place sanctions on him."[177]

It is vital to preserve the opportunities for judicial individualism. Cardozo realized that judicial decisions are not crystalline in nature. "What is it that I do when I decide a case?" he asked:

> To what sources . . . do I appeal for guidance? . . . If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? . . . At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions.[178]

Not only are personal standards an element in the mixture, but finding the proper proportion of all the ingredients is itself a matter of personal judgment.

That personal element—that individual sense of justice—is not only inextinguishable, but essential for the orderly development of the law. For the law to progress it must occasionally adopt views that were previously in disfavor, and the intellectual foundations are often laid by the opinions of dissenting judges. A dissent, said Hughes, "is an appeal to the brooding spirit of the law, to the intelligence of a future day."[179] How often has that appeal been accepted! There are many familiar examples—the first Justice Harlan's dissent in *Plessy v. Fergu-*

174. Eisenhower's precise words were " 'the biggest damned-fool mistake I ever made.' " Whitman, *For 16 Years, Warren Saw the Constitution as Protector of Rights and Equality*, N.Y. Times, July 10, 1974, at 24, col. 1.

175. Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

176. W. HARBAUGH, POWER AND RESPONSIBILITY 162 (1961).

177. Chandler v. Judicial Council, 398 U.S. 74, 136 (1970) (dissenting opinion); *see* Wallace, *Judicial Administration in a System of Independents: A Tribe With Only Chiefs*, 1978 B.Y.U. L. REV. 39, 43-44.

178. B. CARDOZO, *supra* note 53, at 10.

179. C. HUGHES, *supra* note 52, at 68.

son,[180] the minority opinions in the child labor[181] and minimum wage cases,[182] the noble writings of Holmes and Brandeis on freedom of speech.[183]

The First Amendment dissents are particularly significant. Individualism in expression and in judicial decisionmaking are important for the same reason. Holmes stated it well when he declared in *Abrams v. United States*[184] that "time has upset many fighting faiths."[185] The wisdom of today may not be that of tomorrow. Recently, in *Herbert v. Lando*,[186] I wrote that "the lifeblood of the editorial process is human judgment. The journalist must constantly probe and investigate; he must formulate his views and, at every step, question his conclusions, tentative or otherwise."[187] Those words are as true of judges as they are of journalists. We should not tamper with the working processes of either.

Judicial independence, like free expression, is most crucial and most vulnerable in periods of intolerance, when the only hope of protection lies in clear rules setting forth the bright lines that cannot be traversed. The press and the judiciary are two very different institutions, but they share one significant characteristic: both contribute to our democracy not because they are responsible to any branch of government, but precisely because, except in the most extreme cases, they are not politically accountable at all and so are able to check the irresponsibility of those in power. Even in the most robust of health, the judiciary lives vulnerably. It must have "breathing space."[188] We must shelter it against the dangers of a fatal chill.[189]

Conclusion

Our judicial system can better survive the much discussed but rarely existent senile or inebriate judge than it can withstand the loss of

180. 163 U.S. 537, 552 (1896).

181. Hammer v. Dagenhart, 247 U.S. 251, 277 (1918), *overruled*, United States v. Darby, 312 U.S. 100 (1941) (Holmes, J., dissenting).

182. Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 618 (1936) (Hughes, C.J., dissenting); *id.* at 631 (Stone, J., dissenting); Adkins v. Children's Hosp., 261 U.S. 525, 562 (1923) (Taft, C.J., dissenting); *id.* at 567 (Holmes, J., dissenting).

183. *See, e.g.*, Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

184. 250 U.S. 616 (1919).

185. *Id.* at 630 (Holmes, J., dissenting).

186. 568 F.2d 974 (2d Cir. 1977), *cert. granted*, 98 S. Ct. 1483 (1978) (No. 77-1105).

187. *Id.* at 983-84.

188. Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973).

189. The term "chilling effect," most often used in relation to the First Amendment, has found appropriate application in other areas as well. *See* Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 808 & n.2 (1969).

judicial independence that would ensue if removal of judges could be effected by a procedure too facile or a standard too malleable.

Independence, I have argued, has always been crucial for judges to perform their function properly. It is more important as that function has expanded while retaining its fundamentally judicial character. The only way to protect judicial independence is to provide judges secure tenure. This the draftsmen of the Constitution did, allowing removal only for the most serious causes and by the strictest procedures. Their design has operated with great success and is supplemented by potent, yet informal and generally invisible restraints against aberrant behavior. Disciplinary schemes pitting judge against judge are not only unnecessary and of dubious constitutionality, but they would also disrupt the sense of community so essential to the functioning of the courts and would weaken the quality of judicial individualism that has been responsible for the bench's most creative advances and its noblest defenses of liberty.

Even in the post-Watergate age, I can think of no better words than those used by John Rutledge, Jr. in 1802 on the floor of the House of Representatives to describe the "shield" of the judiciary:

> As long as this buckler remains to the people, they cannot be liable to much or permanent oppression. The Government may be administered with indiscretion and with violence; offices may be bestowed exclusively upon those who have no other merit than that of carrying votes at elections; the commerce of our country may be depressed by nonsensical theories, and public credit may suffer from bad intentions; but, so long as we may have an independent Judiciary, the great interests of the people will be safe. . . . Leave to the people an independent Judiciary, and they will prove that man is capable of governing himself; they will be saved from what has been the fate of all other Republics, and they will disprove the position that Governments of a Republican form cannot endure.[190]

190. 11 ANNALS OF CONG. 739-40 (1802).

"Chilling Judicial Independence": A Scarecrow

Raoul Berger *

In an article entitled "Chilling Judicial Independence," Chief Judge Irving R. Kaufman sounds the alarm against a pending proposal to facilitate judicial removal of federal judges. This, he trumpets, is "fatally misguided"; it "pose[s] an ominous threat to the judicial independence";[2] it is a "Trojan Horse," "pitting judge against judge";[3] it "may mask something more sinister"--"a dragnet that would inevitably sweep into its grasp the maverick, the dissenter, the innovator;[4] "the threat of punishment," that is, of removal, "would project a dark shadow" over the vital potential of dissent.[5] Apparently the impeachment process to which he clings does not "project a dark shadow," presumably because it is quite unlikely to be invoked. What is the proposal that conjures up such a spectral parade?

It is proposed[6] to establish "a twelve-judge Judicial Conduct and Disability Commission" drawn from each circuit and the special courts, each member from a circuit to be elected by its circuit and district judges.[7] Each circuit shall have a committee of judges to review complaints forwarded by the Commission, and shall make recommendations to the Commission which thereupon shall initiate its own investigation, and make its recommendations to a seven-man Court on Judicial Conduct and Disability. The Commission shall have the burden

of proving its report "by clear and convincing evidence"; and an adverse judgment may be reviewed by the Supreme Court.[8] At each stage the complained-of judge is entitled to notice and hearing.[9] The bill, Judge Kaufman maintains, is "unconstitutional. . . . Impeachment was the only procedure the Framers allowed for judicial removal, and they deliberately made it unwieldy."[9a]

Why does Judge Kaufman, who chants the praises of "collegiality," of "collective decision making" on appeal, of the "tightly knit fraternity"[10] which, as an appellate court can repeatedly rule against a dissenter below without stifling dissent, suspect that Dr. Jekyll would become Mr. Hyde when sitting as a court drawn from the entire nation, a "sinister" "dragnet for dissenters?" The implication that the summoned judge will suspect that such a court would remove him for deciding for (or against) desegregation is unworthy both of the judge and of the court which would sit on the removal hearing.[11] To object to the trial of a judge for misconduct by his judicial peers drawn from the entire United States is to cast doubt on the fairness of the judicial process. If such a panel cannot be trusted fairly to try a "dissenter" for alleged judicial misconduct, no more can a district judge be trusted to try social rebels. If the process is good enough for the common man in matters of life or death, it is good enough for the trial of a judge's fitness to try others. As to the "chill" factor, Justice Jackson

rejected the argument that summary contempts by the offended judge posed a threat to the independence of counsel, because "It is to be doubted whether the profession will be greatly terrorized by punishment of some of its members after . . . extended and detached consideration" by appellate courts.[12] Judges do not possess less fortitude. The proposed bill is altogether without summary elements; all is based on hearing and trial by dispassionate judges.

Judge Kaufman notices the "dangers inherent" in trial by a "political body" such as Congress, the sweeping claims that have been made by its leaders, as when Congressman Gerald Ford maintained with respect to Justice Douglas, that "an impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment in history."[13] He recognizes that "Congress has at times distorted the 'high Crimes and Misdemeanors' language in judicial impeachments."[14] Yet he strangely prefers an impeachment by Congress, often riven by political passions, often inattentive to the evidence,[15] to a hearing by judges who sit and listen and are schooled to evaluate evidence and to strive for its dispassionate appraisal. It is true that adjudication "demands freedom from political pressure," but it does not follow that a nation-wide panel of judges hearing charges of misconduct will become political pawns.

Judge Kaufman recognizes that the cumbersome impeachment process was structured for the "imperative," exceptional case.[16] Activists--Judge Kaufman sings the praises of the relatively

recent expansion of judicial activism[17]--explain that judicial alteration of the Constitution (which is without textual warrant) is compelled by the cumbersomeness of the amendment process.[18] One might therefore expect an activist to seize upon the textual common law term "good behavior" for avoidance of the "cumbersome" impeachment procedure. But more influential considerations are at play. It is no secret that Congress is loath to tear itself away from urgent national problems to undertake judicial housecleaning. The veteran Hatton Sumners, chairman of the House Judiciary Committee and participant in two out of the nine impeachments, observed that they take "the time of the entire Senate . . . away from all other business of a great nation, and make them sit there for days and days . . ." "For this reason," remarked Senator William McAdoo, after one such impeachment, it is always resorted to with great reluctance, even in cases of flagrant misconduct." As a result, he said, "the practical certainty that in a large percentage of cases misconduct will never be visited with impeachment is a standing invitation for judges to abuse their authority with impunity and without fear of removal."[19]

Judge Kaufman, to borrow from him, has "shed the robe of the judge . . . and assumed the mantle of the advocate."[20] A more judicious attitude might have prompted him to acknowledge that his peers, Chief Justice Burger, Justice Blackmun, Tom Clark, Rehnquist, Circuit Judge Bailey Aldrich and former Circuit Judge Griffin Bell see no threat to judicial independence

in proposals for judicial removal of judges and regard them as constitutional. 3.0a His deep-grained commitment to judicial "independence" has led him to level a barrage of pejoratives at the contrary views I expressed in 1970, in a study that was the product of scholarly curiosity, without commitments to one side or the other.[21] If I failed to bring the study into focus, it was not because of bias or a desire to tailor the facts to a particular result. Consequently Judge Kaufman's charges that my presentation was "highly selective," that I "excised," i.e. suppressed language, relied on incomplete quotations,[22] comports better with over-heated advocacy than with the detachment befitting a judge. One thing needs at once to be made clear: neither Professor Burke Shartel, who in 1930 pioneered the view opposed to that of Judge Kaufman,[23] nor I, were prompted by "displeasure with the outcome or trend of decisions."[24] My 1970 study followed on the heels of my defense of the legitimacy of judicial review.[25] Not until 1974, when I began my study of the Fourteenth Amendment, did I begin to perceive the judicial takeover of functions that the Framers had withheld.[26]

Common Law Terms

"Led by Berger," states Judge Kaufman, the "theorists have reached across the ocean in an attempt to bolster their position" respecting the meaning of "good behavior" and the machinery for its effectuation.[27] Where but to England are

we to look for the meaning of common law terms? Both "good behavior" tenure and "impeachment for 'high crimes and misdemeanors'" Hamilton said, were "copied" from the English institutions.[28] It has long been a canon of construction that when the Framers employed common-law terms, the common law "definitions," as Justice Story held, "are necessarily included, as much as if they stood in the text" of the Constitution.[29] Earlier Chief Justice Marshall, considering the meaning of "levying war," held that treason "is a technical term . . . It is scarcely conceivable that the term was not employed by the framers of our Constitution in the sense which had been affixed to it by those from whom we borrowed it."[30] They looked to the common law for the meaning of such common law terms as "felony," "ex post facto," and the like.[91] But, Judge Kaufman urges, the "difficulty is that neither 'good behaviour' nor the procedure for determining its breach is anywhere explicitly defined in Article III--or, in fact, anywhere else in the Constitution."[32] That same "difficulty" exists with respect to "high crimes and misdemeanors" to which he would confine removals; for its definition we must look to English practice.[33]

"Good behavior" tenure reaches back across the centuries. In 1803 Judge St. George Tucker, a pioneer commentator on the Constitution, noted that "these words (by a long train of decisions in England . . .) . . . imported an office or estate . . . determinable only by [the grantee's] death, or

breach of good behavior."[34] Bacon's Abridgment explained that under "a grant to a man for so long as he shall behave himself well . . . his misbehavior in each case determines [i.e. terminates] his interest," as was held by Coke, and in 1693 by Chief Justice Holt.[35] A grant during "good behavior" is simply an estate on condition subsequent which is forfeited by non-performance of the condition. Blackstone refers to "all forfeitures which are given by law of life estates . . . for any acts done by the tenant himself, that are incompatible with the estate. . . ."[36] Given termination upon misbehavior there must be a power to remove the officer, Lord Mansfield held, lest "offices might be forfeited for offenses; and yet there would be no means to carry the law into execution."[37] Without such a remedy the limitation of tenure to so long as the grantee "doth behave himself well" would be an impotent formula. "[W]here the patentee hath done an act that amounts to a forfeiture of the grant," Blackstone stated, "the remedy to repeal the patent is by writ of scire facias."[38]

"The most daring aspect of this argument," Judge Kaufman writes, "is Berger's hypothesis that by adopting the substantive standard of good behavior, the Framers implied the availability of a particular device, scire facias. But the Framers never felt the need to mention scire facias in their debates or to refer to it in the Constitution itself."[39] Had the Framers sought to describe the remedy appropriate to every constitutional right they would have emerged with a swollen,

inflexible code. Instead their approach is illustrated by the response in the Virginia Ratification Convention to anxious inquiries whether the words "trial by jury" included the right to challenge jurors. Madison assured the Ratifiers that "where a technical word was used all the incidents belonging to it necessarily attended it," an explanation in which John Marshall, Judge Edmund Pendleton and Edmund Randolph joined.[40]

Of course, I did not insist on the "particular" remedy of scire facias, described by Blackstone as appropriate not long before the Convention. It was cited only to show that the common law afforded a remedy to effectuate the forfeiture. When the Framers limited judicial tenure to "during good behavior" (many weeks before impeachment of the Supreme Court Justices was "mentioned"), they self-evidently did not intend that a judge who violated the condition should continue in office. Remedies, I showed, were not frozen by the Constitution to those extant in 1787; if scire facias had become obsolete (not if Blackstone be credited), it is open to Congress to provide another remedy. Marshall laid claim in Marbury v. Madison to the common law power to fashion a remedy for every right.[41]

Judge Kaufman finds a "gaping hole in [my] armor" in that "there is no English case where a judge comparable to a federal judge was removed in a judicial proceeding."[42] But for the fact that this falls from the lips of a veteran judge

this might be dismissed as the veriest ribbon-matching. He emphasizes, however, that the simple scire facias proceeding was appropriate for "inferior officers" because "it is not necessary that they have the independence expected of judges."[43] He rides his hobby too hard. The "independence" of judges was late aflowering. Since they were appointed "at pleasure" they could be unceremoniously removed, as when James I dumped Coke.[44] Historically the common law has grown by application of a principle to analogous circumstances. Once judges were given "good behavior" tenure it was natural to follow the removal procedure traditionally associated with it. Consequently, when several rare "good behavior" high court appointees were threatened by arbitrary royal removal, they insisted on the protection of a scire facias proceeding. One such was Sir John Walter, Chief Baron of the Exchequer, who refused in 1628 to surrender his patent of appointment on the ground "that he ought not to be removed without a proceeding on scire facias. . . ."[45] In 1672, Sir John Archer, a Justice of Common Pleas which ranked with King's Bench, "refused to surrender his patent without a scire facias."[46] These cases are dismissed by Judge Kaufman: the judges "made the argument only because they were then fending off removal by another procedure . . .,"[47] in fact without any procedure whatever. To attribute dissimulation to High Court justices in order to hang on to office is to reduce his demigods to common clay. And why did they not, instead of insisting on scire facias,

invoke impeachment, so dear to Judge Kaufman's heart, for that would have been an even more plausible way (in his eyes) of "fending off removal by another procedure." The fact that Archer and Walter turned rather to scire facias testifies both that scire facias was the familiar remedy and that judges justly preferred trial by judges rather than by Parliament. When the Archer-Walter cases were cited in 1692 before Chief Justice Holt and his associate Justices by Sergeant Levinz, himself a former Justice, Holt made the significant remark that "our place as Judges are so settled, only determinable upon misbehavior."[48]

In another case, that of Sir Jonah Barrington, a judge of the court of admiralty in Ireland, Lord Justice Denman, then a noted advocate, arguing against removal by Address (without trial) stated, "a scire facias could have been sued out to abrogate the patent of office."[49] Denman, Judge Kaufman tells us, was attempting "to throw every obstacle in the way of speedy decision."[50] Nevertheless, one who is familiar with the relation of barristers to the high tribunals of England will not readily conclude that a noted advocate would put a frivolous alternative to the tribunal or fail to be reprimanded if he did. Dilatory tactic or not, it cannot be gainsaid that Denman once more preferred scire facias to removal without trial.

This view of the law was later summarized by Lord

Chancellor Erskine when, in the course of a debate in the House of Lords in 1806 upon whether to employ an Address for the removal of Justice Luke Fox of Common Pleas in Ireland, he asked, "Were their Lordships afraid to trust the ordinary tribunals upon this occasion, to let the guilt or innocence of the honorable judge be decided . . . upon a scire facias to repeal the patent by which he held his office?"[51] Once more, Judge Kaufman resorts to a hollow distinction: "Berger excises the words 'by a jury' in reporting this statement because they indicate Erskine's confusion about the nature of a scire facias. The writ was issuable in a civil proceeding, but, as Erskine's complete speech makes clear, he was discussing the procedures employed in a criminal trial. . . ."[52] I "excised" the words "by a jury" because they did not bear upon the distinction between trial by a court (be it civil or criminal) and removal by Parliament. To attribute to one of the greatest English judges "confusion" about whether scire facias, a familiar writ noted by Blackstone, was civil or criminal borders on the laughable. What matters is that Erskine once more preferred judicial removal to removal by Parliament.[53] English judges thus regarded removal by judges as a privilege, not an invasion of their "independence," to be preferred to trial by Parliament on impeachment or removal without trial by Address.

Another unfounded charge of suppression is contained in Judge Kaufman's treatment of my remark, "Eminent scholars,

among them Holdsworth, consider that removal of judges by scire facias remains available in England."[54] He states

> Not surprisingly, though [Berger] does not quote Holdsworth for that would undermine his case. Holdsworth merely wrote that judges 'may, it is said,' be removed by several procedures other than address, 'either by scire facias . . . criminal information, or impeachment, or by the exercise of the inquisitorial and judicial jurisdiction vested in the House of Lords.' Holdsworth's qualified statement of this view indicates that he was not vouching for its truth--and with good reason. Except for the mention of address, it was lifted almost verbatim from his only source on the point: Denman's petition in the House of Lords for an accused judge, Sir Jonah Barrington.[55]

Mark that one of the greatest English legal historians attaches more weight to Denman than does Judge Kaufman. Nor did Holdsworth have to "vouch for the truth" of the fact that judges were removable by "impeachment." Plainly Judge Kaufman grasps at straws. Worse, he again accuses me of "excising," that is suppressing, allegedly unfavorable facts so that my "case" should not be "undermined." What motivation would a long-time student of legal history have for such suppression? Judge Kaufman's zeal for "independence" has carried him too far.

Against Holdsworth Judge Kaufman summons one of the bright

stars of legal history, Maitland, citing from his lectures on Constitutional Law that "scire facias is not available."[56] But as H.A.L. Fisher's preface states, this early work "does not claim to be based upon original research; for much of his information [Maitland] was confessedly content to draw upon classical textbooks."[57] Compare with this the later, studied conclusion of Charles McIlwain, in his essay on "The Tenure of English Judges" that "English judges may be removed by scire facias, address or impeachment."[58] Whatever the state of English law in the late 19th century, Blackstone, to whom the colonists looked for a statement of the common law, had not long before the Revolution declared that scire facias was the "remedy" for forfeiture upon misbehavior.

Act of Settlement

In 1700 the Act of Settlement gave judges good behavior tenure. Entitled "An Act for further limitation of the Crown," it provided that "Judges Commissions be made Quandiu se bene gesserint [as long as he shall behave himself well] . . . but upon the Address of both Houses of Parliament it may be lawful to remove them."[59] By this time "good behaviour" had an accepted connotation, associated with a judicial proceeding to declare the forfeiture for misbehavior. Bacon's Abridgment states that "If a statute make use of a Word the Meaning of which is well known at the Common Law, the Word shall be understood in the same sense it was understood at the Common Law."[60] Consequently it needed no Address procedure to effectuate a

forfeiture for breach of "good behaviour. Judge Kaufman argues, however, that "removal upon address" was "conditioned on misbehavior."[61] "But" is defined as "except that," "with the exception of," so that notwithstanding the tenure for good behavior judges could be removed by Address.[62] An English authority, Alpheus Todd, remarked that removal by Address, "is, in fact, a qualification or exception from, the words creating a tenure during good behavior, and not an incident or legal consequence thereof."[63]

To counter this analysis, Judge Kaufman invokes the Act of 1760 for "the most persuasive interpretation" of the Act of Settlement. After alluding to the benefits of "independency," the Act made "further provision for continuing Judges in the Enjoyment of their Offices during their good Behaviour . . . Provided always . . . That it may be lawful for his majesty . . . to remove any judge or judges upon the Address of both Houses of Parliament."[64] The "but" of 1700 was thus replaced by "Provided always," read by Judge Kaufman as "standard Language" to indicate "not an exception but a further elucidation."[65] A proviso, however, carves out an exception from what precedes.[66] Against this Judge Kaufman argues that "Neither judicial 'independence' nor good behaviour tenure could be regarded as more than hollow and pious hopes if a judge could be removed at any time at the whim of Crown and Parliament."[67] Yet he states that "Unlike impeachment, which required a trial and bore potentially heavy penalties, address was merely a petition to the Crown for the removal of an

objectionable judge,"[68] inferably without trial. He would therefore substitute for removal upon a judicial proceeding for misbehavior removal without any trial at all, a sorry contribution to judicial "independence." Moreover, he would impose upon the past his own attachment to "absolute independence," a product of the very recent present.[69] But a Parliament that enjoyed supremacy--so Blackstone declared--not subject to judicial review,[70] was hardly minded so to exalt the judges. As Justice Story observed, "the object of the act of Parliament was to secure the judges from removal at the mere pleasure of the crown; but not to render them independent of the action of Parliament,"[71] as the title of the Act of 1700 confirms. And since removal by Address required no trial, it did leave judges "at the whim of Crown and Parliament." For this reason a motion to incorporate the 1760 proviso in the Constitution was rejected by the Framers. Gouverneur Morris "thought it a contradiction in terms to say that the Judges should hold their office during good behavior, and yet, be removable without a trial . . . it was fundmentally wrong to subject Judges to so arbitrary an authority."[72]

Another analytical flaw is exhibited by Judge Kaufman's reliance on a non-judicial interpretation in 1974 of the Consolidation Act of 1925--judges of the High Court "shall hold their offices during good behaviour <u>subject</u> to a power of removal . . . on address"--to the effect that such a judge

"is only removable on an address to the Crown."[73] This interpretation would attribute to Parliament renunciation of its power of impeachment, a renunciation which would leave it powerless to remove objectionable judges, because as McIlwain points out, no Act "forces the king to remove. . ."[74] Thus this reading converts an Act designed to shelter judges from royal removal into royal authority to continue objectionable judges in office against the will of Parliament. It was precisely this power to remove those whom the king sought to shelter for which Parliament had fought.[75] Edmund Burke,[76] Lord Chancellor Erskine, Holdsworth and McIlwain consider that the other means of removal--impeachment, scire facias--remain, and such authorities are not to be laughed out of court.

A reading more respectful of the syntax of the Act and the history of its terms is that of R.H. Jackson: "the power to remove judges after an address is additional to the common law. It is a principle of construction that judicial process is not abolished except by clear words."[77] Our own Supreme Court declined to construe the all-inclusive "every person" to strike down an established judicial immunity in the absence of specific language indicating such an intention.[78] The view that the Act of Settlement provided both for judicial trial for misbehavior and unqualified removal on Address (implicit in Gouverneur Morris' statement) is spelled out in the Maryland Constitution of 1776, patently modelled on the Act: "Judges shall be removed for misbehavior, on conviction

in a court of law, and may be removed by the Governor [without reference to misbehavior] upon the address of the General Assembly." If the argument that removal by address excluded removal for misbehavior by judges fails, and this though both provisions are contained in the same section of the Act, the case for the exclusivity of impeachment is even weaker, for the "good behavior" and impeachment provisions were in quite different Articles and temporally separated.

American Materials

The starting point for analysis is that the Constitution employed long-established technical terms of widely disparate provenance and located them in two separate Articles. Article III conditioned judicial tenure "on good behavior"; there it appeared almost from the beginning of the Convention, May 29th, long before impeachment of the Justices was mentioned.[79] The provision for impeachment for "high crimes and misdemeanors, chosen precisely because those words had a "technical," "limited" meaning,[80] was placed in Article II, the Executive Article, for the simple reason that almost all of the impeachment debate centered on the President. As said by Hamilton, both the English and several State constitutions "seem to have regarded the practice of impeachments as a bridle in the hands of the legislative body upon the executive servants of the government. Is not this the true light in which it ought to be regarded?"[81] When at last, on August 20th, the Committee of Five was

directed to report "a mode of trying Supreme Judges in cases of impeachment," no mention was made of impeachment of "inferior" judges.[82] Judge Kaufman himself notes English authority held that "the 'judges of our inferior courts' who had been placed 'under the general supervision of the Queen's Bench' might be removed at common law or by statute for misbehavior."[83] The distinction between the "superior judges" and "the lower ranks of the judiciary," stressed by Judge Kaufman,[84] was thus implicitly drawn by the Convention. And the absence of "mention" (of the "lower courts") upon which Judge Kaufman often relies for proof,[85] justifies the inference that they at least were to be removed in the traditional way by judges for breach of good behavior under Article III.

Only at the last minute were the words "Vice President and all civil officers" added to Article II, an afterthought as it were.[86] So far as the text goes--Judge Kaufman's fellow activists have consigned the "legislative intention" to deepest limbo,[87] and one of them insists that "the most important datum bearing on what is intended is the constitutional language itself"--[86] the association of "President, Vice President and other civil officers" in the Executive article permits the inference, under the maxim noscitur a sociis ("a word is known by the company it keeps"),[89] that those words referred to officers of the Executive Department. A commentator often quoted by Judge Kaufman, observed that "There is a legitimate textual question whether judges were

included in the impeachment provision of Article II."[90] Moreover, impeachment, as the Founders knew, proceeded against great offenders for "great and dangerous offenses"[91]; in the words of Judge Kaufman, it is "a drastic remedy, essential but dangerous, to be used only in imperative cases,"[92] a category that ill fits the removal of a sordid district judge for misconduct. In the North Carolina Ratification Convention, Archibald Maclaine rejected the notion "that petty officers might be impeached . . . impeachment cannot extend to inferior officers of the United States."[93] To be sure, Judge Kaufman entertains a more exalted view of the "inferior" courts, but when that is balanced against the tremendous problems from which impeachment would divert the Congress, it is difficult to conclude that the Framers meant the wheels of Congress to grind to a halt in order to oust a judge soiled by corruption or incapacitated by senility.

Judge Kaufman recognizes that "If impeachment is designed for occasional use only, there must be some other means of ensuring that judges do not abuse their trust."[94] But he dismisses removal of judges for criminal offenses because of the availability of indictment, e.g. Judges Kerner and Manton were indicted and convicted.[95] On the other hand, the noisome practices of district judge Albert W. Johnson of Pennsylvania extended over a twenty-year period; complaints about his conduct began almost immediately; he was under continuous investigation; a judge of his own Circuit Court went to Washington

to obtain relief. At last he was indicted but acquitted. Two of the witnesses who had themselves been convicted refused to repeat the testimony they had given before the grand jury, though his co-conspirator son, the object of his corrupt favors, was convicted.[96] Who has not witnessed jury acquittals that leave a large area of doubt as to the innocence of the defendant?[97] What too of the cases which just fall short of "beyond a reasonable doubt" but nevertheless besmirch the court? Then there are the cases altogether devoid of criminality but yet discredit the judicial process.

Judge Kaufman would solve the problem of the senile judge by "peer pressure."[98] At times that is effective; but it has also been sadly wanting, as in the long-drawn-out effort to procure the retirement of the aged Judge Buffington, an unwitting tool of his corrupt associate, Judge Davis. Their associate, Circuit Judge Biggs, finally "persuaded these elderly gentlemen to retire," but it took "a good deal of effort and quite a long time," adding that there is not the slightest doubt "that the machinery for the removal of unfit judges is inadequate,"[99] a view earlier expressed by Justice Samuel Miller.[100]

Since in contrast to the activists my respect for the "original intention" remains a constant,[101] I shall follow in the path of Judge Kaufman's citations, almost all of which I anticipated. The weightiest evidence of that intention must be sought in the records of the Convention. There, but for

the last-minute reference to the impeachment of the "Supreme judges," there was no reference to the removal of the inferior judges nor to exclusion of the traditional removal by judges for breaches of good behavior. The remarks before and after the Convention need to be weighed against the Framers' awareness that the technical common law terms they employed carried with them their common law connotations. Thus, when they employed "treason" they carefully redefined it to avoid the excesses of English history.[102] Noting that so defined treason would not include subversion of the State--the cardinal impeachable offense--the words "high crimes and misdemeanors" were added, after canvassing a number of alternatives, because they had a "technical", "limited" meaning.[103] John Dickinson sought for the meaning of ex post facto in Blackstone and concluded that to expand it beyond criminal cases would require "some further provision."[104] By the same token, to curtail the traditional judicial remedy for breach of good behavior would therefore require some redefinition. The test, articulated by Chief Justice Marshall, is a showing that had "this particular case" been suggested, the "language would have been so varied, as to exclude it."[105] No evidence remotely suggesting that the Framers would have rejected judicial removal of the "inferior" judges is to be found in the records of the Convention; their respect for the common law meaning of the terms they used argues against it. One other fact needs to be noted: the Framers did not share Judge Kaufman's devotion

to "absolute independence." So, James Wilson, next to Madison the chief architect of the Constitution, declared, "The independency of each power consists in this, that its proceedings . . . should be free from the remotest influence . . . of either of the other powers. But further than this, the independency of each power ought not to extend."[106] Hamilton wrote, the "standard of good behavior . . . is an excellent barrier to the despotism of the prince" and "to the encroachments and oppressions of the representative body,"[107] not, be it noted, to removal of judges by judges. One of the earliest commentators on the Constitution, Judge St. George Tucker of the Virginia Court of Appeals, wrote that the "absolute independence of the judiciary for which we contend is . . . an independence of the other coordinate branches of the government . . . who have custody of the purse and sword."[108] Judge Kaufman cites no English or American constitutional source for the proposition that "it is equally essential to protect the independence of the individual judge, even from incursions by other judges."[109] The English practice, as we have seen, was to the contrary. Hamilton himself considered that "all impeachments" should be tried by "a Court."[110] And at one stage the Convention referred to the Committee on Detail a resolution that "impeachments shall be . . . before the Senate and the judges of the federal judicial Courts,"[111] thereby indicating that impairment of "collegiality" played no part in their thinking.

The evidence most favorable to the Kaufman view is Rufus King's statement that "the judiciary hold their places not for a limited time, but during good behavior. It is therefore necessary that a forum should be established for trying misbehavior. Was the Executive to hold his place during good behavior? He ought not to be impeachable unless he held his office during good behavior."[112] But King's attempt to link impeachment to good behavior tenure met with no favor. In the upshot the "forum" was not to "try misbehavior" but "high crimes and misdemeanors," a quite different standard. The pitfalls of reliance on such desultory remarks are illustrated by statements on the same day by Gouverneur Morris and George Mason that impeachment was designed to punish "crimes."[113] Yet the final structure of the impeachment provisions separated removal for impeachable offenses from indictment for the crime.[114] Then too Madison urged on the same day that impeachment should comprehend "incapacity . . . of the Chief Magistrate," and Morris added that "incapacity" was among the "causes of impeachment,"[115] a view that finds no warrant in the impeachment trials for "high crimes and misdemeanors," adopted by the Framers because of its "limited" nature. And in The Federalist, Hamilton rejected "incapacity" because the task of fixing the bounds of inability "would much oftener give rise to personal and petty attachments and animosities than advance the interest of justice or the public good."[116] Who is to be given greater credence--Madison and Morris or

Hamilton? In electing "high crimes and misdemeanors" because of its "technical" meaning, I suggest, the Framers chose to rely on the English practice rather than the views earlier expressed by this or the other Framer.[117] And since the Framers singled out the "Supreme Judges" for impeachment it is reasonable to infer that removal of "inferior" judges was left to forfeiture under Article III. If impeachment was available it was when their breaches rose to the level of "great offenses" and Congress chose to employ impeachment as a "supplementary remedy" because the Judiciary neglected to cleanse its own house.

Let us now consider the American materials mustered by Judge Kaufman. "The Framers," he writes, "believed that the tenure of judges should be established in terms of good behavior and the remedy for a breach should be impeachment," referring to "an essay published in 1776" by John Adams, and "quoted verbatim . . . in a letter by Thomas Jefferson the same year."[118] Jefferson came to take a broader view, writing in 1816 (after the abortive Chase impeachment) that judges "are irremovable, but by their own body, for any depravities of conduct," being confirmed in this in 1825 by a renowned commentator on constitutional law, William Rawle.[119] Adams, of course, was not a "Framer," being, like Jefferson, absent on a diplomatic mission during the sessions of the Convention.[120] Had Adams consulted Blackstone he would have learned that a forfeiture for breach of "good behavior" was declared on a writ of scire facias. The State Trials which he invoked for impeachment of

judges were for "high crimes and misdemeanors," not breaches of "good behavior." A cue to the potential influence of such remarks is furnished by the fact that the Convention turned to English practice rather than to existing State constitutions for light.[121]

Next Judge Kaufman relies on Hamilton's statement in The Federalist, No. 79: judges "are liable to be impeached for malconduct by the House of Representatives, and tried by the Senate . . . This is the only provision on the point which is consistent with the necessary independence of the judicial character."[122] Having in mind that the Convention had rejected removal by Address, this remark may be construed to refer to and rule out such removal. For Hamilton sought to make judges independent of the other branches, not of judges.[123] Moreover, he immediately made his "only" subject to an exception: "insanity, without any formal or express provision, may be safely pronounced to be a virtual disqualification."[124] Why should an exception for the unmentioned "insanity" rise higher than an exception, to use his own words, for the explicit "standard of good behavior,"[125] a standard different from that of "high crimes and misdemeanors." The House speedily approved another exception, removal by the President of his subordinates, of which Judge Kaufman says, "Of course, it is perfectly fitting for the President to remove his own executive subordinates without invoking the impeachment process . . . ."[126] Why "of course"? Executive subordinates squarely fit within

the all inclusive "all civil officers" of Article II, whereas there is at least a doubt whether the Article III judges, covered by the "standard of good behavior" were meant to fit within the terms of Article II. Such exceptions as those of Judge Kaufman are dictated by taste rather than irrefragable logic. It is easier to recognize an "exception" for the established forfeiture proceeding that was a time-honored concomitant of the technical term "good behavior."

Judge Kaufman also draws on the "removal" debate in the First Congress, where a sharply divided House gratuitously expressing its views as to the President's power vis-a-vis the Senate, considered whether his power of appointment carried with it the power of removal, leading to the argument that since the Senate shared the one it should participate in the other.[127] The remarks upon which Judge Kaufman relies are admittedly "somewhat tangential to the issue debated"--removal of a subordinate by the President--but he defends them because they are "unambiguous."[128] A dictum is not the less a dictum because stated "unambiguously"; and as Chief Justice Marshall held, dicta "ought not to control judgment in a subsequent suit when the very point is presented for decision . . . [because] their possible bearing on all other cases is seldom completely investigated."[129] Speaking on behalf of the President's removal power, Madison stated that "impeachment could not be the exclusive means of removing subordinate officers, but added that this 'might be the case' as applied to judges."[130] Opponents were asking whether the President could also remove judges, and

the thrust of the debate is disclosed by the reply of Roger Sherman, a Framer: the power which appoints can also remove, unless there are exceptions made. Now the power which appoints judges cannot displace them, because there is a constitutional restriction [good behavior tenure] in their favor." Michael Stone chimed in that "good behavior limited the exercise of the power which appoints. It is thus in the case of judges."[131] It is in this context that one must read the remark by Abraham Baldwin: "The judges are appointed by the President but they are removable only by impeachment. The President has no agency in the removal."[132] The focus of the debate was on removal by the President of his subordinates not on the exclusivity of impeachment of judges. Elias Boudinot, the erstwhile President of the Continental Congress, was closer to the mark in the First Congress: "it is nowhere said that officers shall never be removed but by impeachment; but it says they shall be removed on impeachment."[133] It is not a little remarkable that Judge Kaufman, who dismisses the pertinent demands of Justices Archer, Walter and of Denman on behalf of Justice Barrington for judicial trial because they sought to avoid a legislative proceeding, should here pitch his case on the sheerest dicta.

Such dicta were ignored by the First Congress when it was confronted by an actual case, and by its action repudiated the several suggestions that impeachment was exclusive. In the Act of 1790 the First Congress provided that upon conviction in court for bribery a judge shall be "forever disqualified to

48-202 O - 79 - 23

hold any office."[134] Since the impeachment clause provides for removal and disqualification upon impeachment and conviction, as Judge Kaufman recognizes,[135] the Act is unconstitutional if the clause indeed provides the "exclusive" method of disqualification. The First Congress, in which sat many Framers and Ratifiers, is scarcely to be charged with misconstruing the Constitution. Hence the 1790 statute must be recognized as a weighty construction that the impeachment clause does not provide the "only" means for the disqualification of judges. As with "disqualification" so with "removal," for the two stand on a par in the impeachment clause. What the First Congress did when it had to deal with the "disqualification" of judges thus speaks against reliance upon some earlier utterances by its members when the removal of judges was not involved. To dispose of the 1790 Act Judge Kaufman resorts to a truly marvelous argument: the bribery provision was "a brief portion of a long statute" and "there was no mention in either House of the bribery penalties."[136] Nonmention of an express statutory provision in the debates deprives it of effect, an original contribution to the uses of legislative history!

For Judge Kaufman "the explanation [in 1802] by Gouverneur Morris erases doubt that impeachment was the intended remedy:

> 'Misbehaviour is not a term known in our law; the idea is expressed by the word misdemeanour; which word is in the clause respecting impeachments.

> Taking, therefore, the two together, and speaking plain old English, the Constitution says: The judges shall hold their offices so long as they demean themselves well; but if they shall misdemean, if they shall, on impeachment be convicted of misdemeanor, they shall be removed.' [137]

To my comment that "Morris was incorrect in claiming that the term misbehavior was unknown to the American law, because two of the early state constitutions expressly made misbehavior triable"--let alone that Article III refers not to "misbehaviour" but to "good behavior," a common law term of established meaning--Judge Kaufman responds that this is irrelevant.[138] Yet those state constitutions were before the Convention; Morris' remark 15 years later was not. Judge Kaufman maintains, however, that Morris was "the most important member of the Committee on Style and Revision," that he was therefore best "qualified to define precisely the meaning" of the constitutional terms."[139] But he was not entitled to "define" the "meaning" of those terms long after the Convention completed its labors, when his "revision" could no longer be submitted for its approval.

The "Committee of Style," as its name suggests, was appointed "to revise the style of an arrangement the article agreed to by the House,"[140] not by "defining" to make changes of substance. Can Morris' mistaken and after-the-fact "revision," for instance, alter the meaning of "high crimes and misdemeanors" as he purports to do. "High crimes and

misdemeanors," I have shown, meant "and High Misdemeanors," a term peculiar to impeachment,[141] meaning political crimes against the State as distinguished from "misdemeanors" which appeared long after in criminal law to identify private wrongs.[142] "High misdemeanors" were never confused with "misdemeanors" in English law, and but for a few statutes directed at political crimes, the term found no place in American criminal law.[143] The terms were chosen by the Framers precisely because they were not "so vague" as "maladministration" and had a limited, technical meaning.[144] Judge Kaufman would make impeachment turn on commission of a crime, exactly as Richard Nixon sought to do. True it is that the Framers did not ascribe "a well-defined technical meaning to the standard 'good behavior,'"[145] but neither did they do so with habeas corpus and other common law terms. But they recognized that "treason," "ex post facto" had a technical meaning; in another context the Convention struck out the word "high misdemeanor", "it being doubtful whether 'high misdemeanor had not a technical meaning too limited."[146] No occasion arose similarly to underscore the technical meaning of "good behavior." Now, through the medium of Morris' muddled remarks, Judge Kaufman would empty the Framers' reliance on technical terms.

A far better understanding of textual differentiation was exhibited in the same year, 1802, by Congressman David Stone: Judges, he declared,

doubtless shall, (as against the President's power to retain them in office,) . . . be removed from office by impeachment and conviction; but it does not follow that they may not be removed by other means. They shall hold their offices during good behavior, and they shall be removed from office upon impeachment and conviction of treason, bribery, and other high crimes and misdemeanors. If the words impeachment of high crimes and misdemeanors, be understood according to any construction of them hitherto received as established, it will be found, that although a judge guilty of high crimes and misdemeanors, is always guilty of misbehavior in office, yet that of the various species of misbehavior in office, which may render it exceedingly improper that a judge should continue in office, many of them are neither treason nor bribery nor can they be properly dignified by the appellation of high crimes and misdemeanors and for the impeachment of which no precedent can be found; nor would the words of the Constitution justify such impeachment. To what source, then, shall we resort for a knowledge of what constitutes this thing called misbehavior in office? The Constitution, surely, did not intend that a circumstance, as a tenure by which judges hold their offices, should be incapable of being ascertained. Their misbehavior certainly is not an impeachable offense; still it is

> ground by which the judges are to be removed from office. The process of impeachment, therefore, cannot be the only one by which the judges are to be removed from office, under, and according to the Constitution. I take it, therefore, to be a thing undeniable, that there resides somewhere in the government a power to declare what amounts to misbehavior in office by judges, and to remove them from office for the same without impeachment."[147]

My regard for the intention of the Framers is much greater than that of the activists, with whom Judge Kaufman apparently identifies himself. But it is a regard for the clearly discernible, unmistakable original intention, not for a history that is inconclusive, tangential and muddled. Inconclusive history, in my judgment, cannot overcome the Framers' choice of common law terms of settled attributes.

Judicial Rule by Divine Right

"Independence," states Judge Kaufman, "becomes more--not less--critical as the issues faced by the courts expand."[147a] But it is the courts that have "expanded" their governance. Apparently oblivious to the ongoing debate whether the powers exercised by the courts under the Fourteenth Amendment exceed its grants,[148] Judge Kaufman repeatedly assumes the answer. Thus, "Federal judges have been increasingly entrusted with basic and vital questions regarding the structure of our

society and its allocations of wealth and power, ranging from the admissions policy of a California medical school . . . to governmental funding for abortions. . . ."[149] He acknowledges that "until modern times the most . . . controversial exercises of judicial power were negative actions limiting the scope of government . . . In the last few decades the courts have given broad construction to affirmative personal rights and manifested an increased willingness to articulate and implement new ones. The roll call of causes dealt with by the judiciary sounds like a litany of the most vexing questions in current American political history; racial discrimination and segregation, school admissions and affirmative action, busing [etc. etc.]."[150] This, he notes, represents a "profound evolution in the role of the judiciary."[151] Others have called it a "revolution."[152] Let a fellow activist, Professor Louis Lusky, who defends the change, describe it: "the Court's new and grander conception of its own place in the governmental scheme" rests on "two basic shifts in its approach to constitutional adjudication"--"assertion of power to revise the Constitution, bypassing the cumbersome amendment procedure prescribed by Article V," and "repudiation of the limits on judicial review that are implicit in the orthodox doctrine of Marbury v. Madison (1803),"[153] and it may be added are explicit in the constitutional history. In less enthusiastic terms, Professor Philip Kurland wrote that this presents "the most immediate constitutional crisis of our present time, the usurpation by the judiciary of general

governmental powers on the pretext that its authority derives from the Fourteenth Amendment."[154]

Notwithstanding, Judge Kaufman refers to the judiciary as "the least dangerous branch," quoting Hamilton,[155] and overlooking his assurance to the Ratifiers that of the three branches "the judiciary is next to nothing."[156] For Hamilton's view of the judicial role was far removed from the "new and grand" activist vision, as can speedily be made plain by his own words. (1) "The judiciary . . . can take no active resolution whatever. It may be truly said to have neither FORCE nor WILL, but merely judgment," that is, it cannot initiate policy. (2) There "is no liberty, if the power of judging be not separated from the legislative and executive powers," which speaks against the assumption of such powers by the judiciary.[157] (3) The courts may not "on the pretense of a repugnancy . . . substitute their own pleasure to the constitutional intentions of the legislature,"[158] much less substitute their own "pleasure" for the policy choices of the Framers, as the Supreme Court has done with respect to desegregation and reapportionment. (4) "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents."[159] (5) And to make his meaning clear, Hamilton assured the Ratifiers that the judges could be impeached for "deliberate usurpations on the authority of the legislature."[160] So confined, the judiciary was indeed "the least dangerous branch," but that is poles apart from the judiciary of today as portrayed by Judge Kaufman. He tells us that the judiciary

has been "increasingly entrusted" with essentially political questions, but not who "entrusted" them with those decisions. In truth these "new" powers have been self-conferred.

Judge Kaufman observes that "as the judiciary more frequently assumes functions ordinarily associated with the representative branches and bases its decisions on the same [legislative] criteria used by those divisions, it is a natural tendency to treat and think of judges as political officials."[161] That "natural tendency" is not a whit diminished because in judicial eyes the "role continues to be a judicial one."[162] Judges must be judged by what they do, not by what they conceive their role to be. Inevitably, to borrow from him, as courts "become involved in issues with profound political repercussions, [people consider] they should be politically accountable."[163] This he views as "dangerous," but his distinguished predecessor, Judge Learned Hand, impliedly held to the contrary: "If we need a third [legislative] chamber it should appear for what it is, and not as the interpreter of inscrutable principles."[164] Increasing assumption of legislative-political functions calls for greater, not less, accountability.

"Implicit in the system of government [the Framers] designed," Alpheus T. Mason wrote, "is the basic premise that unchecked power in any hands whatsoever is intolerable."[165] With Charles McIlwain, I would urge that the "two fundamental correlative elements of constitutionalism for which all lovers

of liberty must yet fight are the legal limits to arbitrary [ungranted] power and a complete political responsibility of government to the governed."[166] If judges are to govern, as they are increasingly doing, they must be politically responsible.[166a] Judge Kaufman, however, is outraged because a California judge was "defeated in his bid for reelection shortly after he ordered busing to desegregate the Los Angeles public system . . ."[167] Busing has encountered widespread, stubborn resistance, and since it is designed to reduce segregation it is in violation of the Fourteenth Amendment which excluded federal interference with segregation.[167a] The people are entitled to insist on self-government except in so far as it is limited by the Constitution; and the defeat of the California judge by the people manifested the will of the voters to govern themselves. That busing may seem desirable to a judge is not dispositive if the power to command it was withheld.

A last word about the alleged threat removal by judges poses to judicial independence: where Judge Kaufman regards it as an irrefutable postulate, practical experience has shown that such removal proceedings have little or no impact on judicial independence. Thirty-five - forty States have such removal procedures, and there is no evidence that the administration of justice has thereby been impaired. To the contrary, a pioneer State, California, considers that such procedures have raised "the caliber of the judiciary, while concomitantly increasing the confidence of the public in the whole judicial

structure."[168] A past president of the American Bar Association, Robert W. Meserve, who studied the State practice, reminds us of Justice Brandeis' words that the States are the laboratories of experimentation, and that "with substantial unanimity" they have reached the conclusion that this is "a desirable way to approach the rare problem of the judge who needs to be removed or retired. . . ."[169] That practice rebuts Judge Kaufman's assumption that "all conceptions of judicial hierarchy would be toppled if the tenure of any judge could be ended by any other judge issuing a writ,"[170] a distorted version of the country-wide panel of judges proposed by the Bill he assaults. No reports of "toppling" State hierarchies have come from the forty States. Since the "delicate balance of collegiality and individualism" is no more "necessary to the work of the federal bench"[171] than to that of the States, "absolute" independence is patently not a sine qua non of impartial adjudication.

FOOTNOTES

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The following is a manuscript version of an Article that will appear in a future issue of the Cornell Law Review, Volume 64.

1. 88 Yale L.J. 681 (1979), hereinafter cited as Kaufman.

2. Id. 683.

3. Id. 710.

4. Id. 703. He borrowed this from Justice Douglas. Berger, Impeachment: The Constitutional Problems 157-158 (1973), hereafter cited as IMPEACHMENT. In the interest of conserving space and of directing attention to confirmatory materials, I shall cite thereto rather than to the sources.

5. Kaufman 714.

6. Judge Kaufman directs his criticism to S.1423 (95th Cong., 2d Sess.,) which passed the Senate on September 7, 1978. Kaufman 682. The bill was introduced as S.295 in the 96th Cong., 1st Sess., and I draw thereon for details.

7. S.295, §381.

8. Sec. 382, 384. The Judicial Conference shall annually elect one member of the Conference to be presiding officer of the Court, and he shall select six members of the Conference to serve with him. Id. §385.

9. The complained of judge is entitled to submit a written statement to the circuit panel. §383.

9a. Kaufman 683.

10. Id. 708-10.

11. Hatton Sumners, the veteran chairman of the House Judiciary Committee, stated in 1937, "I never heard it said until today . . . that three judges of the circuit court of

appeals trying a judge might stultify themselves in order to convict an honest man and remove him from office." 81 Cong. Rec. 6184.

12. Sacher v. United States, 343 U.S. 1, 13 (1954)

13. Kaufman 705-706. Because impeachable offenses, Hamilton said, are of a nature "denominated POLITICAL," they "seldom fail to agitate the passions of the whole community," exposing officials "to the persecution of an intemperate or designing majority in the House of Representatives." The Federalist, No. 65 at 423-24, 428 (Mod. Lib. Ed. 1937).

14. Kaufman 705.

15. Hatton Sumners, who had participated in the impeachment of Judge Harold Louderback, said it was "the greatest force ever presented. At one time only three senators were present, and for ten days we presented evidence to what was practically an empty chamber," IMPEACHMENT 167 n.199.

16. Kaufman 704-05.

17. Infra at notes 149-151.

18. Because "the process of amendment is politically difficult, other modes of change have emerged." McDougal & Lans, Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy, 54 Yale L.J. 181,293 (1945); Kutler, Raoul Berger's Fourteenth: A History or Ahistorical, 6 Hastings Const. L. Q. (1979): "the path for amendment is often blocked by inertia or irresponsibility," hence judicial alteration.

19. IMPEACHMENT 167. After the trial of district judge Halsted Ritter, Congressman Chauncey W. Reed said that Senators should not thus "be required to set aside their legislative duties, paralyzing for weeks the lawmaking function." Id. n. 9.

20. Kaufman 708.

21. Hearings before the Subcommittee on Improvements in Judicial Machinery, Senate Committee on the Judiciary, on S.1110, Judicial Tenure Act, 101,141 (94th Cong., 2d Sess., February 1976); IMPEACHMENT 158, n.166a.

22. Berger, Impeachment of Judges and "Good Behavior" Tenure, 79 Yale L.J. 1475 (1970); this article formed the basis of Chapter 4 of my IMPEACHMENT, against which Judge Kaufman directs his fire.

23. Kaufman 698, 697.

24. IMPEACHMENT 178, 127 n.26; Kaufman 691 n.70.

25. Kaufman 681.

26. R.Berger, Congress v. The Supreme Court (1969).

27. R.Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977).

28. Kaufman 694.

28. The Federalist, No. 65 at 425, No. 78 at 511 (Mod. Lib. Ed. 1937). "'The provisions of the Constitution,' wrote Holmes, 'are organic legal institutions transplanted from English soil.'" Jones, Introduction, in Political Separation and Legal Continuity xiv (1976). Professor Harry W. Jones comments that "American continuity with the English past . . . was something natural, inevitable and predetermined by the circumstances and culture of the time." Jones, The Common Law in the United States, id. 91, 92; and see id. 97. When Hamilton laid down in No. 78 of The Federalist the judges "should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case," Jones asks, "where were the American courts to look to find them, other than in the corpus of English common law doctrine?" Id. 101-02.

29. United States v. Smith, 18 U.S. (5 Wheat.) 153, 160 (1820), per Justice Story. Ex parte Grossman, 267 U.S. 87, 109 (1925): "The statesmen and lawyers of the Convention were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. . . . [W]hen they came to

put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood."

30. United States v. Burr, 25 F. Cas. 55, 159 (C.C.D.Va. 1807) (No. 14,693). That was earlier held by Justice Iredell in Fries' Case, 9 F.Cas. 826, 911-12 (C.C.D.Pa. 1799) (No. 5, 126).

31. For "felony" see Madison in the Virginia Ratification Convention, 3 J.Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 531 (2d ed. 1836). For "ex post facto" see John Dickinson, 2 M.Farrand, Records of the Federal Convention of 1787 at 448 (1911). So too, Chief Justice Marshall consulted English practice for the effect of a pardon. IMPEACHMENT 131 n.43.

32. Kaufman 691; see also id. 698.

33. IMPEACHMENT 67-71. Since "high crimes and misdemeanors," are not defined by any statute, Justice Story stated, "Resort, then, must be had either to parliamentary practice and the common law, in order to ascertain what are high crimes and misdemeanors, or the whole subject must be left to the arbitrary discretion of the Senate. . . ." IMPEACHMENT 88 n.161. So too, the judicial "contempt" power was not "explicitly" provided for but was derived from English practice. Berger, Constructive Contempt: A Post-Mortem, 9 U.Chi.L. Rev. 602, 618 (1942). Nor is there an "explicit" provision for the separation of powers, a basic tenet of our democratic system. Judicial review itself was not "explicitly"

provided for; in fact it ran counter to British practice at the time of the Revolution. 1 W. Blackstone, Commentaries on the Law of England 91 (1765-1769); whereas there were a number of common law definitions of "misbehavior." IMPEACHMENT 160-61.

Professor Jones observes;

> Manifestly the standard for removal of a judge should be violation of 'good behavior' rather than guilt of 'high Crimes and Misdemeanors,' and a judicial commission would seem to be better qualified than the two Houses of Congress for the disciplinary task involved. The demands of an impeachment and impeachment trial make on an already overcrowded Congressional schedule have made the impeachment process almost a dead letter in all but great matters like the Nixon impeachment. . . .

Jones, supra note 28, at 114.

34. IMPEACHMENT 125-26.

35. Id. 126.

36. Id. 133 n.55.

37. Id. 127 n.25. In 1862, the English crown law officers rendered an opinion with reference to judicial "good behavior" tenure that "when a public office is held during good behavior, a power [for removal for misbehavior] must exist somewhere." IMPEACHMENT 127 n.25. Congressman Michael Stone drew the same conclusion in 1803, infra at n.147.

38. Id. 133 n.53.

39. Kaufman 694, emphasis added. Chief Justice Marshall required a showing that "had this particular case been suggested, the language would have been so varied, as to exclude it." Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518,644 (1819).

40. IMPEACHMENT 131, emphasis added.

41. 5 U.S. (1 Cranch) 137, 163 (1803). Professor Jones referred to the "ingrained common law idea that there is no meaningful right if there is no effective remedy to vindicate it." Jones, supra note 28, at 126. That we are merely dealing with the "remedy" is confirmed by Blackstone: "where the patentee hath done an act that amounts to a forfeiture of the grant . . . the remedy to repeal the patent is by writ of scire facias." 3 Blackstone, supra n. 33, at 260-61 (emphasis added).

42. Kaufman 694.

43. Id. 695.

44. IMPEACHMENT 3.

45. Id. 128-29 n.37.

46. Id. 128-129.

47. Kaufman 695.

48. IMPEACHMENT 129.

49. Id. 130 n.40.

50. Kaufman 695 n.91. Despite Denman's appeal to scire facias, Judge Kaufman argues that the extension of scire facias for removal of judges is rebutted by Denman's assertion that the "misconduct of judges had frequently come under the consideration of Parliament." Id. 695. Notwithstanding, Denman preferred scire facias.

51. IMPEACHMENT 130.

52. Kaufman 697, emphasis added.

53. Lord Campbell, himself a Lord Chancellor, and one who did not shrink from pointing out errors in the views of his predecessors, quoted the Erskine passage without comment, thus giving it credit. 6 J.Campbell, Lives of the Chancellors 559-60 (1848-50).

54. IMPEACHMENT 130.

55. Kaufman 697-98, emphasis added.

56. Id. 699 n.103.

57. IMPEACHMENT 130 n.42.

58. Kaufman 699 n.103.

59. IMPEACHMENT 151 n.131, emphasis added.

60. 4 M.Bacon, A New Abridgment of the Law 647 ("Statute"(I)(4)). For an early American case to the same effect, see Mayo v. Wilson, 1 N.H. 53,55 (1817).

61. Kaufman 696 n.94.

62. "But" indicates "that what follows is an exception to that which has gone before. . . ." In re Naftzger's Estate, 24 Cal.(2d) 595, 150 P.(2d) 873,875 (1944); E.H.Rollins v. Board of Comm'rs, 199 Fed. 71,78 (8th Cir. 1912); In re Sullivan County, 76 N.H. 185, 81 A. 473,474 (1911).

63. IMPEACHMENT 88 n.162.

64. Kaufman 696 n.94.

65. Id. For this he merely cites other "provided always" in other sections of the Act, each of which requires individual analysis.

66. With an air of stating settled law, Chief Justice Marshall held in 1825 that "The proviso is generally intended to restrain the enacting clause, to except something which would otherwise have been within it." Wyman v. Southard, 23 U.S. (10 Wheat.) 1,30. See also Cox v. Hart, 260 U.S. 427,435 (1922). In England it was held, "the proviso, of which, according to the ordinary rules of construction, the effect must be to except out of the earliest part of the section something which, but for the proviso, would be within it." Duncan v. Dixon, 62 L.T. 319-320 (Ch.Div. 1890). This rule of construction is confirmed by the facts hereinafter set forth.

67. Kaufman 696 n.94.

68. Id.

69. IMPEACHMENT 153-54.

70. 1 Blackstone, supra n.33 at 91.

71. IMPEACHMENT 151 n.133.

72. 2 Farrand, supra n.31 at 428. The separation between judicial removal of breach of "good behavior" and removal by address is clearly marked in the Maryland Constitution of 1776: "Judges shall be removed for misbehavior, on conviction in a court of law, and may be removed by the Governor upon the Address of the General Assembly." IMPEACHMENT 152 n.137. So too, the Massachusetts Constitution of 1780 provided, "All judicial . . . officers shall hold their offices during good behavior . . . Provided, nevertheless, The governor . . . may remove them upon the address of both houses of the legislature," i.e. regardless of good behavior. IMPEACHMENT 152 n.137. These statutes constitute a colonial gloss upon the Acts of 1700 and 1760.

73. Kaufman 697 n.94. Mark the progression from "but" through "provided that" to "subject to."

74. IMPEACHMENT 151.

75. Id. 71-72. The fear of "favorites" was vigorously expressed in the Convention, id.140. Judge Kaufman notices that "the address procedure, as a limitation upon the power of the monarch to remove disfavored judges, stands in contrast to impeachment, which allowed Parliament to remove the King's favorites." Kaufman 696 n.94.

76. Id. 151 n.132.

77. Id.

78. Pierson v. Ray, 386 U.S. 547,554-55 (1967).

79. IMPEACHMENT 146-47.

80. Id. 74.

81. The Federalist, No. 65 at 425 (Mod. Lib. Ed. 1937).

82. IMPEACHMENT 146.

83. Kaufman 698 n.103. King's Bench, said Bacon's Abridgment, "exercises a superindency over all inferior courts, and may grant an attachment against the Judges of such courts for oppressive, unjust or irregular practice. . . ." IMPEACHMENT 66.

84. Kaufman 698 n.104. Judge Kaufman argues that an "English judge comparable to a federal judge could [not] have been removed by scire facias proceedings," that "judges cannot be easily analogized to inferior officers." Kaufman 698,695. (1) Judges of the English high courts thought otherwise, supra at notes 45-53. (2) The Framers labelled the lower courts the "inferior" courts and left their creation and jurisdiction in the hands of Congress, testimony that the Framers did not share Judge Kaufman's awed regard for the "inferior" federal judges. Indeed Hamilton assured them that of the three departments "the judiciary is next to nothing." The Federalist, No. 78 at 504 (Mod. Lib. Ed. 1937).

85. Thus Judge Kaufman argues, "The very absence of a removal provision in Article III indicates that the Framers must have implied a reference to the impeachment clause and thereby intended that bad behavior be dealt with exclusively by impeachment." "The very absence" of a reference to impeachment

of "inferior" judges when impeachment of the "Supreme judges" was mentioned even more forcibly indicates that the removal of "inferior" judges was to "be dealt with" under Article III for breach of "good behavior." His reliance on non-mention is pointed up by his dismissal of an express statutory provision for penalties on the ground that "there was no mention in either House of the bribery penalties, constituting a brief portion of a long statute aimed at punishing crimes against the United States"!

86. IMPEACHMENT 147.

87. Alfange, On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation, 5 Hastings Constl.L.Q. 603 (1978); Murphy, Book Review, 87 Yale L.J. 1752 (1978).

88. Ely, Constitutional Interpretivism: Its Allure and Impossibility, 53 Ind. L.J. 399,418 (1978), italics in the original.

89. Jarecki v. Searle & Co., 367 U.S. 303, 307 (1961). For reliance on such a maxim by a perfervid activist, see C.Black, Impeachment: A Handbook 36 (1974).

90. IMPEACHMENT 147. Against this Judge Kaufman argues, "It has long been settled that federal judges are 'Civil Officers' within the meaning of this clause," Kaufman 691, citing a "dictum" in Shurtleff v. United States, 189 U.S. 311, 316 (1903). Since when do dicta "settle" issues? See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264,399 (1821), quoted infra at n.129.

91. IMPEACHMENT 86,88, 172.

92. Kaufman 705. When Judge Kaufman asks how can his opponents "ignore two hundred years of history," Kaufman 693, he overlooks that the history of impeachment is tied to "high crimes and misdemeanors," not to breaches of "good behavior," a quite different category, that impeachment was the medium for removal of the highest officials, e.g. the Earl of Stafford, the Earl of Suffolk, the Duke of Buckingham, IMPEACHMENT 30-40,67-69, not lower tier corruptionists. That is why we experience no "difficulty in explaining Alexander Hamilton's statement that trial for removal from office on the grave charges specified by the impeachment clauses must be held before the Senate because of 'The awful discretion, which a court of impeachment must necessarily have, to do honor or infamy to the most confidential and the most distinguished characters of the community." Kaufman 693-94, emphasis added. "Awful discretion" is involved in removing a President Andrew Johnson or Richard Nixon, but it is absurd to insist that it is likewise involved in removing obscure corruptionists.

93. IMPEACHMENT 162-63.

94. Kaufman 706.

95. Id.

96. IMPEACHMENT 168.

97. See id. 168 n.204.

98. Kaufman 709.

99. IMPEACHMENT 168 n.204.

100. In 1878 Justice Smauel Miller wrote, it "must be confessed that the means provided . . . for removing a judge, who for any reason is found to be unfit for his office, is very unsatisfactory . . . [and] after the experience of nearly a century . . . must be pronounced inadequate." IMPEACHMENT 169 n.205. See also C.E.Hughes, The Supreme Court 76 (1928). One expects that a judge will take account of such weighty opinion opposed to his own.

101. IMPEACHMENT 74-75. R.Berger, Executive Privilege: A Constitutional Myth, 52-68, 124-29 (1974).

102. Article III, §3(1).

103. IMPEACHMENT 86-87; see also supra at notes 30-31.

104. 2 Farrand, supra n.31 at 448-49; see also supra at notes 77-78.

105. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 644 (1819).

106. 1 Works of James Wilson 299 (R.McCloskey ed. 1967).

107. The Federalist, No. 78 at 503 (Mod. Lib. ed. 1937).

108. IMPEACHMENT 155 n.149.

109. Kaufman 713.

110. 1 Farrand, supra n.31 at 292.

111. 2 id. at 136.

112. 2 id. at 66-67.

113. 2 id. at 64.

114. IMPEACHMENT 79.

115. 2 Farrand, supra n.31 at 65,69.

116. Supra, n.107 at No. 79, p. 514.

117. The Framers' respect for these technical terms, supra at notes 30-31, undermines Judge Kaufman's statement that "The American draftsmen were not concerned with whether tenure during good behavior had taken on a technical meaning in England. . . ." Kaufman 700. So too, it vitiates his statement that "Judicial tenure during good behavior was widely adopted in America not because it indicated the possibilities of unspoken methods of removal but, as the Adams statement demonstrates, because it was this formulation that had guaranteed English judges life tenure since the beginning of the century." Id. And he states, "the use of 'good behavior' in Article III was meant to protect tenure, not to categorize grounds for removal." Id. 701 n.123. The divorce between tenure and its forfeiture is a discovery of Judge Kaufman's, without roots in English law. In 1862 the English Crown law officers confirmed the appeals of Justices Archer and Walter to scire facias, holding "with reference to judicial 'good behavior' tenure that when a public office is held during good behavior, a power [of removal for misbehavior] must exist somewhere [as Lord Mansfield had held]; and when it is put in force, the tenure of the office is not thereby abridged, but it is forfeited and declared vacant for nonperformance of the condition on which it was originally conferred." IMPEACHMENT 127 n.25. Never was impeachment the "method" of forfeiture. For the "categories" of "misbehavior" resort must be had, as in the case of "high crimes and misdemeanors," to English

practice. In 1768 Josiah Quincy, Sr. had directed attention to the scope of impeachment in England. IMPEACHMENT 143 n.97.

118. Adams, who had just discovered the State Trials, IMPEACHMENT 142-143, but had not noticed that they proceeded for "high crimes and misdemeanors," wrote: "The judges . . . should hold their estate for life . . . their commission should be during good behavior . . . For misbehavior, the grand inquest of the colony . . . should impeach them. . . ." Kaufman 699.

119. IMPEACHMENT 155 n.150, emphasis added. Rawle wrote in 1825 that in England "Judges are held liable to trial for every offense before their brethren." Id.

120. A similar slipshod remark is Judge Kaufman's statement that "The Jeffersonian Congress, so eager to remove Federalists from the bench, wasted much effort in the cases of John Pickering and Samuel Chase, if, instead of twice running the gauntlet of impeachment, it might have utilized a more streamlined and far simpler procedure to accomplish the same result." Kaufman 694. "When Jefferson became President," his biographer, Dumas Malone, observed, "the national judiciary, one hundred per cent Federalist, amounted to an arm of the party," and in fact often made intemperate attacks on the Jeffersonians, IMPEACHMENT 155-56, so they were little likely to remove one of their own on complaints from the Jeffersonians.

Another such slip is Judge Kaufman's statement that "The

logical flaws in Berger's gap theory" is illustrated by the fact that "the sole penalties" on impeachment "are removal and disqualification from office. How, then can one reasonably contend that those precise penalties may be imposed for a lesser offense. . . ." Kaufman 693. Who has ever contended that removal for breach of "good behavior" can be accompanied by "disqualification from office"? His indictment was too hastily drawn.

121. IMPEACHMENT 144 n.101.

122. Kaufman 702.

123. Supra at notes 81 and 107. Judge Kaufman reminds us that "one of the grievances against George III listed in the Declaration of Independence was: 'He has made the judges dependent on his Will alone. . . . therefore, they provided . . . they should continue in office 'during good Behaviour.'" Kaufman 690-91.

The view that "the impeachment clauses were meant as limitations only on Congress," Judge Kaufman argues, is vitiated by the fact that the power to try impeachment was vested in the Senate rather than the Court." Kaufman 693 n.76. But, as Hamilton explained, it was doubted whether the Supreme Court would "be endowed with so eminent a portion of fortitude" as to "bridle" the "executive branch." The Federalist, No. 65 at 425 (Mod. Lib. ed. 1937) Parenthetically, it required no "fortitude" in the Supreme Court to impeach an "inferior" judge. Then too, the impeachment clause constituted an exception from the separation of powers. IMPEACHMENT 118 n.73.

124. The Federalist, i.e. No. 79 at 514.

125. Id. No. 78 at 503.

126. Kaufman 692.

127. The "removal" debate is discussed in R.Berger, Congress v. The Supreme Court 146-49 (1969).

128. Kaufman 792 n.126.

129. Cohens v. Virginia, 19 U.S. (6 Wheat.) 294,399-400 (1821).

130. Kaufman 692 n.74.

131. IMPEACHMENT 149, emphasis added.

132. Id.; Kaufman 702 n.126.

133. IMPEACHMENT 138 n.73.

134. Id. 150.

135. Kaufman 693.

136. Id. 702 n.127, emphasis added. Judge Kaufman also relies on Burton v. United States, 202 U.S. 344, 369-70 (1906), which considered a statute rendering a senator convicted of taking a bribe "forever hereafter incapable" of holding any office under the United States. "The statute, the Court said, did not of its own force remove Burton from office, for that remained the sole prerogative of the Senate under Article I, §5." Kaufman 693 n.75. This had no reference to impeachment under Article II, §4, but to the powers of each House to judge the "qualifications of its own members"; only the Senate could "expel its members." Moreover, the Court held, Senators are "chosen by state legislature, and cannot properly be said to

hold their places 'under the Government of the United States," which cannot be said of federal judges.

137. Kaufman 701. "Misdemeanor" and "misbehave" were sometimes interchangeable terms--identified for purposes of "good behavior"--but it does not follow that "misbehavior" was equated with "misdemeanor"; rather "misbehave" and "misdemean" illustrate the familiar fact that the same word may have different meanings in different contexts. IMPEACHMENT 161. And see infra at notes 141-143.

138. Kaufman 701.

139. Id.

140. 2 Farrand, supra n.31 at 547, emphasis added. In April 1831, Madison wrote that "the finish given to the style and arrangement of the Constitution fairly belongs to the pen of Mr. Morris." C.Van Doren, The Great Rehearsal 160 (1948). Cf. Berger, supra n.127 at 220-221.

141. IMPEACHMENT 74 n. 108.

142. Id. 61-63.

143. Id. 74 n.109, 75 n.110.

144. Id. 74.

145. Kaufman 701

146. IMPEACHMENT 74.

147. 11 Ann.Cong. 72 (7th Cong.). Stone mistakenly concluded that "the Constitution does not prohibit their removal by the legislature," which is true enough if one seeks for an express prohibition. But impeachment is an exception from the

separation of powers, IMPEACHMENT 118 n.73; otherwise his analysis responds to the historical facts.

147a. Kaufman 682.

148. Justice Harlan, Oregon v. Mitchell, 400 U.S. 112, 202-203 (1970) dissenting opinion; Bork, Neutral Principles and Some First Amendment Problems, 47 Ind.L.J. 1 (1971); Grey, Do We Have an Unwritten Constitution?, 27 Stan.L.Rev. 703 (1975); R.Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977). A number of reviewers state that the book raises serious questions that call for answer: Perry, 78 Colum. L.Rev. 685 (1978); Kommers, Review of Politics 407 (July 1978); Beloff, The Times (London), Higher Education Supp. April 7, 1978, II; Kay, 10 U.Conn.L.Rev. 801 (1978).

149. Kaufman 681, emphasis added.

150. Id. 684-85. Judge Kaufman recognizes that a judge "cannot reach out like a legislator to resolve pressing social issues." Id. 707.

151. Id. 688.

152. Alfred Kelly, an admirer of the Warren Court, wrote that it was "determined to carry through a constitutional revolution. . ." Kelly, Clio and the Constitution: An Illicit Love Affair, Sup.Ct.Rev. (1965) 119, 158. Former Justice Abe Fortas wrote, "It is fascinating, although disconcerting to some, that the first and fundamental breakthrough in various categories of revolutionary progress have been made by the

Courts. . ." Miller, Brown's 25th: A Silver Lining Tarnished With Time, 3 Dist. Lawyer 21,26 (1979). Where is the warrant for a "revolution" by judges?

153. Lusky, "Government by Judiciary": What Price Legitimacy, 6 Hastings Constl.L.Q. (1979) emphasis added.

154. Letter to Harvard University Press, August 15, 1977.

155. Kaufman 684.

156. The Federalist, No. 78 at 504 (Mod.Lib. ed. 1937).

157. Id. 504.

158. Id. 507.

159. Id. 510.

160. Id. No. 81 at 526-27.

161. Kaufman 687.

162. Id. 688.

163. Id. 681.

164. L.Hand, The Bill of Rights 70 (1962). Hand rejected rule by nine Platonic Guardians, id. 73. J.H.Ely observes that "our society did not make the constitutional decision to move to near universal suffrage and have superimposed on popular decision the values of first rate lawyers," i.e. judges. Hart, Foreword: On Discovering Fundamental Values, 92 Harv.L.Rev. 5, 38 (1979).

165. Mason, Myth and Reality in Supreme Court Drama, 48 V.L.Rev. 1385, 1405 (1962).

166. C. McIlwain, Constitutionalism: Ancient and Modern 146 (rev.ed. 1947).

166a. "[J]udicial review of legislation inevitably involves the courts in issues heavily freighted with policy and political considerations and so makes the idea that judges should be politically responsible more plausible than it would otherwise be." Jones, supra n.28, at 116.

167. Kaufman, 683 n.14.

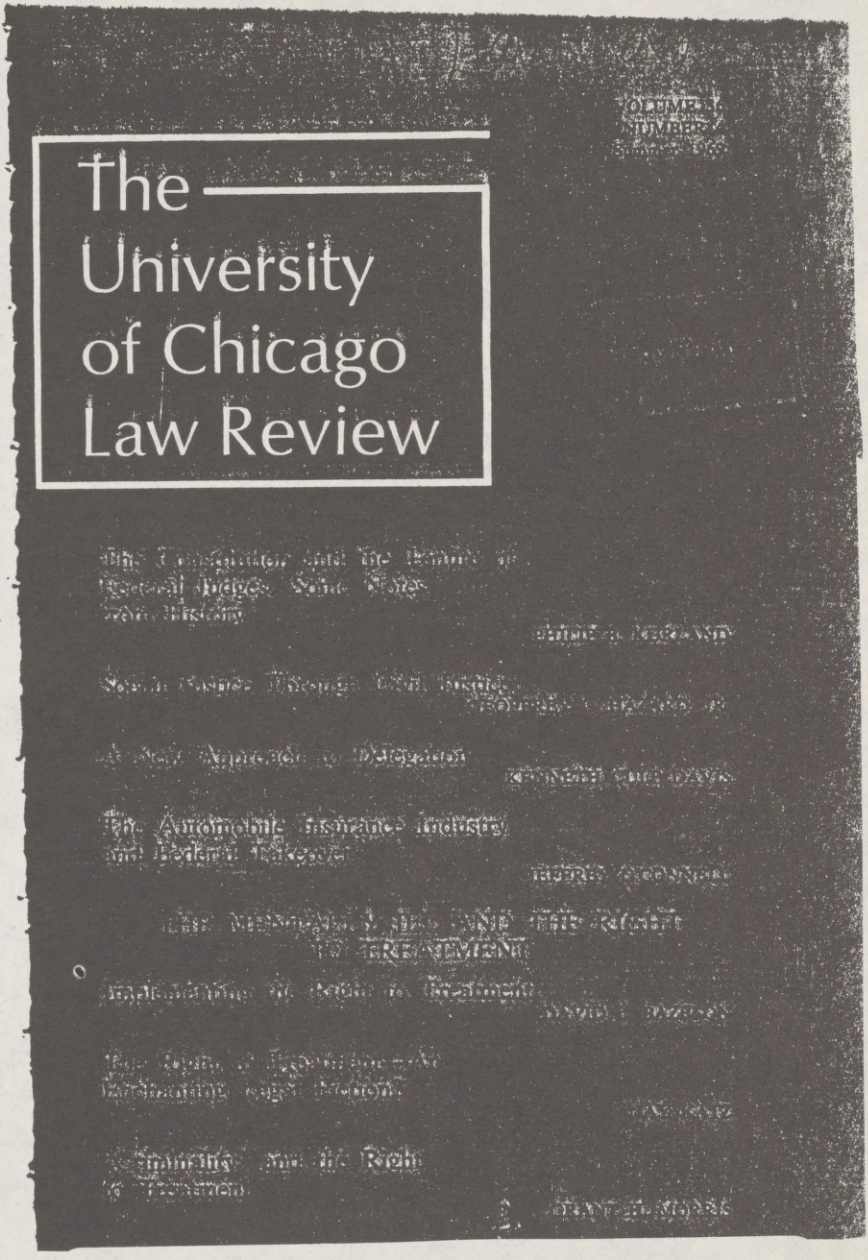
167a. Nathanson, Book Review, 56 Tex.L.Rev. 579,580-81 (1978). Brown v. Board of Education, an activist tells us, was decided by "a badly splintered Court. Discontent lurked behind the facade of unanimity, symbolizing a nation that outwardly was all for racial decency but inwardly was not." Since then, he writes, "the principle of racial equality has simply not been fully accepted by the American people. The formal law of the Constitution [what the Justices say it is] says one thing, the 'living' law of the zeitgeist another. In the final analysis it is the zeitgeist that controls. . . ." Miller, supra n.152 at 25,26.

168. Hearings, supra n.20 at 119,123.

169. Id. 156.

170. Kaufman 695.

171. Id. 710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The Constitution and the Tenure of Federal Judges: Some Notes from History

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Almost every generation since the founding of this nation has raised the question, in one form or another, for good reasons and bad, whether federal judges are removable from their offices by means other than impeachment and for causes other than the commission of "high crimes or misdemeanors." The issue has never been successfully framed for a definitive resolution by the Supreme Court. Those who would bestow a monopoly of constitutional construction on the Court have, therefore, to face the problem without adequate judicial authority on which to rest argument. Nor have the other branches of the national government, equally sworn to uphold the Constitution, afforded a clear answer to the problem.

The materials collected in this article, largely from non-judicial sources, are offered with the thought that a few pages of history may be worth a Supreme Court dictum. For the issue has once again been raised in the Senate. This time the objective of the legislators appears to be benign. It does not derive from the conflicts engendered by an unpopular judiciary. The bill introduced in the first session of the 91st Congress[1] had its origins in a bill offered in the 90th Congress and

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1 S. 1506, 91st Cong., 1st Sess. (1969), may be taken as typical of several bills directed toward the same end. It was introduced on March 12, 1969. Its provisions relevant to the immediate inquiry are summarized by the Legislative Reference Service in this way:

> Judicial Reform Act—*Title I: Commission on Judicial Disabilities and Tenure*—Establishes within the judicial branch of the Government a Commission on Judicial Disabilities and Tenure composed of five members. Requires each member be a judge of the United States who is in regular active service. Requires the Commission, at all times, to include at least two district judges, and two circuit judges. Provides that all members be assigned to the Commission by the Chief Justice of the Supreme Court. Makes the term of the Commission four years.
>
> Provides that the Commission shall promote the honorable and efficient administration of justice in the courts of the United States. Permits it to act to retire or remove a judge only after an investigation and formal hearing in accordance with the requirements of due process. Provides that a decision to remove a judge for misconduct shall be subject to review by the Judicial Conference and ultimately by the Supreme Court by certiorari. Makes such proceedings confidential.
>
> Enables the Commission to undertake an investigation of a judges [*sic*] physical or mental fitness upon a report of any person. Gives the Commission necessary powers such as the subpoena power, depositions, etc. Authorizes the payment of fees and mileage of witnesses and provides that U.S. marshals shall serve

in no way is it attributable to the successful foray against Mr. Justice Fortas. Nevertheless the infamous Fortas affair may well contribute to its enactment, despite the fact that the bill does not affect Supreme Court Justices. Senator Tydings, the prime sponsor of the bill, has been patently concerned only with the worthy objective of improvement of the machinery for the administration of justice. His concern is with the process not the substance of judicial litigation. His concern is about the senile, the inebriate, and the corrupt judge rather than those who have simply rendered decisions that have offended the sensitivities of executive and legislative officials. But it should be kept in mind that tools created by the well-intentioned for beneficent uses may fall into less worthy hands to be used for less appropriate ends. If the Supreme Court is not directly touched by this proposed legislation, use and legitimation of this legislation will afford ample precedent for similar treatment of Supreme Court Justices. When dealing with so fundamental and so fragile a notion as the independence of the judiciary, one ought to tread warily lest the ultimate cost far outweigh the immediate gains.

In any event, the defects of our national judiciary are not, to my mind, attributable primarily to the faults of the removal process. For every inebriate, senile, and malfeasant judge on the federal bench, there are several dullards and sluggards immune from removal whatever new standards and machinery are offered. The essential problem is to be found in the process that has made federal judicial appointments prime patronage plums to be awarded by Senators in acknowledgement of party or personal loyalty. (At the highest level, the patronage is the personal prerogative of the President.) As Mr. Justice Frankfurter once noted in another context:[2] "Fit legislation and fair adjudication are attainable. The ultimate reliance of society for the proper fulfillment of both these august functions is to entrust them only to those who are equal to their demands."

This is not to suggest that legislative alternatives to the appointment process should be sought. It should be clear by now that differences in the machinery for judicial selection have made little or no difference in the quality of the judiciary. Certainly the politics of the bar associations offer no advantages over the politics of our elected officials. A combination of the two is likely to provide only exacerba-

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process and execute orders for the Commission.
Digest of Public General Bills and Resolutions, 91st Cong., 1st Sess., LEGIS. REF. SERV. A-97 (1969).

There are obvious constitutional problems in addition to the one treated in the text, including the problem of a case or controversy, right to jury trial, etc.

2 F. FRANKFURTER, SOME REFLECTIONS ON THE READING OF STATUTES 29 (1947).

tion of the faults of each. The basic difficulty is to secure recognition of the necessity for merit appointments. How this sense of responsibility is to be secured is a question that has not yet been answered. Nor is it realistic to expect such improvement at a time when equality rather than quality is the watchword of government; when mediocrity rather than talent recommends men for appointment to high posts. But certainly there is no point in tinkering with the independence of federal judges by subjecting their tenure to control of other federal judges appointed by the same defective process. Without their independence, the federal judges will have lost all that separates them from total subordination to the political processes from which they ought to be aloof.

In the event that my bias is not yet clear, I would say that I am in wholehearted agreement with Mr. Justice Black's opinion in *Chandler v. Judicial Council of the Tenth Circuit of the United States*,[3] where he dealt with the problem that neither the Court nor the Congress has been prepared to face squarely:

> One of the great advances made in the structure of government by our Constitution was its provision for an independent judiciary—for judges who could do their duty as they saw it without having to account to superior court judges or to anyone else except the Senate sitting as a court of impeachment. Article II, § 4, of the Constitution provides that "Officers of the United States," which includes judges, "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors," and Art. I, §§ 2 and 3, state that impeachment can be instituted only on recommendation of the House of Representatives and that trial can be held only by the Senate. To hold that judges can do what this Judicial Council has tried to do to Judge Chandler here would in my judgment violate the plan of our Constitution to preserve, as far as possible, the liberty of the people by guaranteeing that they have judges wholly independent of the Government or any of its agents with the exception of the United States Congress acting under its limited power of impeachment. We should stop in its infancy, before it has any growth at all, this idea that United States district judges can be made accountable for their efficiency or lack of it to judges just over them in the federal system. . . .

Nor am I impressed by the recent vogue among the States to provide

[3] 382 U.S. 1003, 1005 (1966). The case, after a mysterious disappearance, has now reappeared on the Court's docket for the 1969 Term.

means for chastising judges who get out of line. Admittedly, the worse the quality the more external restraint that is required, provided that the rein is in proper hands. But the various devices that the States have recently adopted for policing their judiciaries are little more than polite blackmail, suggestions that the bar is unhappy with the judge's behavior and he'd better shape up or else. I shudder to think how early the federal courts might have been deprived of the services of Judge Learned Hand under such a system as California's. For politeness to counsel and a willingness to tolerate fools gladly were not among his virtues, and it is only such virtues and that of regular attendance at the court house that the policing systems seem capable of evoking from timid judges.

On the question of judicial removal, much has been written. There is more literature than learning. If the issue is deemed to be resoluble by the intention of the Founding Fathers, I think that it has been made pellucidly clear by Martha Ziskind that the intention was to make impeachment the sole means of removal of federal judicial officers.[4] I do not, therefore, propose to reexamine the problem of original intention here. I propose, here, to look at post-adoption history to see how the three branches of the national government have dealt with the problem in the past. I have not exhausted these materials but only sampled them. But, as with most social scientists, my sample is adequate to reveal support for my hypothesis, that legislation providing alternative means of removal is not the appropriate response to such problems of judicial tenure as may exist.

I. Judicial Attitude

The absence of a definitive answer from the Court on the question whether a federal judge of a constitutional court might be removed by some process other than impeachment is due to the failure to present the issue for judicial resolution. It could come to the Court only after the executive, the legislature, or the judiciary attempted to effect such removal. With two exceptions, none of these branches of the government has seen fit to force the question. The first exception relates to the repeal of the Judiciary Act of 1801, which destroyed several judgeships created by the previous administration.[5] The repealing statute was never the subject of challenge in the courts. The second exception might be found in the case of removal—*de facto* if not *de jure*—of District Judge Chandler by the Tenth Judicial Cir-

[4] Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*. This article will appear in 1969 Sup. Ct. Rev. —.

[5] *See* text at notes 12-26 *infra*.

cuit.[6] Aside from the Black opinion quoted above, the Court said nothing about the issues raised by this action.

As is often the case, however, on many occasions when the issue was not the subject of Supreme Court resolution, it was the subject of Supreme Court dictum. These dicta are consistent in their construction of the Constitution as requiring life tenure not subject to abbreviation except by the terms of the Constitution. Starting with Marshall's proposition in *American Insurance Co. v. Canter*,[7] through the extensive discussion in a multitude of opinions in *Glidden Co. v. Zdanok*,[8] the line has been consistent with the authority cited by Mr. Justice Douglas in the latter case: Alexander Hamilton. The quotation from Hamilton included the following:[9]

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

Indeed, as *Glidden* makes clear, whichever of the opinions is read, the essential hallmark of a constitutional court is life tenure guaranteed by the Constitution.

It should be pointed out, however, that just as several members of the judiciary have in the past recommended a retirement age for federal judges, so too have some commended the notion of a removal process short of impeachment. In each case, however, the judicial commentator made it clear that his recommendation did not include an opinion that such removal process would satisfy the demands of the Constitution. Mr. Justice Jackson appeared before a Senate Committee in 1941, shortly after his appointment to the Court, to endorse the need for a more sophisticated and less cumbersome process for removal than by impeachment. He was careful to preface his position

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6 *See* note 3 *supra*.

7 26 U.S. (1 Pet.) 511, 546 (1828).

8 370 U.S. 530 (1962). Additional cases in this line include: *Ex parte* Bakelite, 279 U.S. 438, 449 (1928); Downes v. Bidwell, 182 U.S. 244, 266 (1900); United States v. Guthrie, 58 U.S. (17 How.) 284, 309 (1854) (dissenting opinion); *see also* argument by Attorney General Cushing in that case, 58 U.S. (17 How.) at 285-6; *Ex parte* Hennen, 38 U.S. (13 Pet.) 225, 258-9 (1839).

9 THE FEDERALIST No. 79, at 491-3 (H. Lodge ed. 1908) (A. Hamilton), quoted in 370 U.S. at 595.

thus: "There are two aspects of the matter that I do not want to discuss. One is the issue of constitutionality, as to which I take the position that the judicial conference under Chief Justice Hughes and under Chief Justice Stone has taken in discussing the policy of the matter without expressing any opinion on constitutionality."[10]

The position of the Judicial Conference, which Jackson referred to, was also one of support for the plan, if it were constitutional.[11] The fate of the legislation which evoked these statements from judicial officers was defeat in Congress, with extensive arguments made as to the unconstitutional nature of the legislation, the question on which the judges had abstained.

II. Congressional Views

The problem of judicial tenure and removal has been the subject of congressional concern far more often than it has been the object of judicial scrutiny. Appropriate analysis of the constitutional conventions as understood by Congress would require an exhaustion of the debates and bills and committee reports. (As I already indicated, except for the repeal of the Judiciary Act of 1801, there has been no legislation directly on the subject.) I have attempted here to extract a few samples chosen on a very unscientific basis. I have looked only to a few of the critical periods when judicial-legislative conflict was most aggravated. A study of calmer times may reveal more considered understanding. But it is in times of stress that constitutional conditions are likely to be reshaped to meet new needs.

A. *Repeal of the Judiciary Act of 1801*

To begin at the beginning requires a look at the famous debates over the repeal of the Judiciary Act of 1801.[12] Certainly this was one of the most hotly contested political controversies that wracked the young Republic. The background of the 1801 statute makes the controversy more easily understood:[13]

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10 *Hearings Before a Subcomm. of the Comm. on the Judiciary of the United States Senate on H.R. 146*, 77th Cong., 1st Sess. 25 (1941).

11 The attitude of the Judicial Conference was reported this way:

> A committee consisting of Judges Biggs, Phillips, and Learned Hand considered the advisibility of legislation with respect to an alternative for impeachment proceedings in the case of circuit and district judges charged with derelictions. On the report of the committee the Conference adopted the following resolution: "Assuming its constitutionality, as to which we express no opinion, we are in accord with the general purpose and approve in principle the provisions embodied in H.R. 9160, Seventy-sixth Congress, third session."

1940 Att'y Gen. Ann. Rep. 32.

12 Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (1801).

13 F. Frankfurter & J. Landis, Business of the Supreme Court 20-21, 23-25 (1927) (footnotes in original omitted).

> In fact, the Justices carried out the hopes that were entertained for them as inculcators of national patriotism. They utilized charges to the grand juries as opportunities for popular education.[14] Jay, Cushing, Wilson, Iredell, all indulged in the practice. These "elegant" and "eloquent" speeches received wide publicity. Having a Federalist flavor with more or less pungency, they promptly aroused political opposition. That the Circuit Justices helped to further the Federalist cause there can hardly be doubt. That they helped to consolidate the opposition is no less clear. Criticism against the Judiciary was accumulating from friends, as well as enemies, of a strong federal bench. Ardent Federalists with increasing vigor urged Randolph's proposal for separate circuit judges; the emerging Jeffersonian Party came to regard the federal courts as a political adjunct of the hated Federalists. The judicial system was drawn into the vortex of politics.
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> . . . .
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> Dissatisfaction with the existing system was also fed by the desire of influential opinion to extend the scope of federal jurisdiction. The interference of local prejudices with the enforcement of federal law stimulated the proponents of a more comprehensive federal judiciary. But no serious attempt looking towards drastic reform appears until John Adams, in 1799, brought the matter before Congress. His recommendation culminated in the notorious Act of February 13, 1801. This measure combined a thoughtful concern for the federal judiciary with selfish concern for the Federalist party.

With the election of the Jeffersonians, the 1801 Act was doomed. But the question remained as to the proper means for reducing the statute that the Federalists had enacted from such partisan motives. The battle included not only the contest over the Judiciary Act, but the question of the propriety of judicial review as fostered by *Marbury v. Madison*,[15] and the failure of the impeachment proceedings against Mr. Justice Chase.

For our purposes, the interesting parts of the debates were concerned not with the power of judicial review which was also subject to attack, but with the propriety of abolishing the newly created judgeships, thus ending the tenure of the newly appointed judges. When the First Judiciary Act was being considered, Mr. Smith of South Carolina had admonished care in its preparation. For, he said, "The judges are

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[14] *See* Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127.

[15] 5 U.S. (1 Cranch) 137 (1803).

to hold their commissions during good behaviour, and after they are appointed, they are only removable by impeachment; consequently this system must be a permanent one."[16] He obviously underestimated the imaginative capacities of his successors.

Senator Breckenridge of Kentucky had sought the advice of John Taylor of Caroline in order to mount an attack on the Judiciary Act of 1801. The statute had, among other things, abolished two district courts in Kentucky and Tennessee, although retaining the judges in office by assigning them to the newly created circuit courts. Taylor's advice was found among the Breckenridge manuscripts and provided the basis for the action taken by Congress in abolishing the 1801 judgeships:[17]

> Congress are empowered *from time to time* to ordain and establish inferior courts.
>
> The law for establishing the present inferior courts is a legislative instruction affirming that, under this clause, Congress may abolish as well as create these judicial offices, because it does expressly abolish the then existing courts for the purpose of making way for the present.
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> It is probable that this construction is correct, but it is equally pertinent to our object whether it is or not. If it is, then the present inferior courts may be abolished as constitutionally as the last; if it is not, then the law for abolishing the former and establishing the present was unconstitutional, and being so, is undoubtedly repealable.
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> Thus the only ground which the present inferior courts can take is that Congress may from time to time create, regulate, or abolish such courts as the public interest may dictate, because such is the very tenure under which they exist.
>
> . . . The Constitution declares that the judge shall hold his office during good behavior. Could it mean that he should hold this office after it was abolished? Could it mean that his tenure should be limited by behaving well in an office which did not exist? It must either have intended these absurdities or admit of a construction which will avoid them. This construction obviously is that an officer should hold that which he might hold, namely an existing office, so long as he did that which he might do, namely his duty in that office; and not that he should hold an office which did not exist or perform duties not sanctioned by law. If, therefore,

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16 1 ANNALS OF CONG. 828 (1789).

17 Breckenridge MSS., Nov. 21, 1801, quoted in Carpenter, *Repeal of the Judiciary Act of 1801*, 9 AM. POL. SCI. REV. 519, 523-6 (1915).

> Congress can abolish the courts, as they did by the last law, the officer dies with the office, unless you allow the Constitution to admit impossibilities as well as absurdities.
>
> . . . .
>
> Nor is it incompatible with the "good behavior" tenure when its origin is considered. It was invented in England to counteract the influence of the crown over the judges. And we have rushed into the principle with such precipitancy, in imitation of this our general prototype, as to have outstript monarchists in our efforts to establish a judicial oligarchy; their judges being removable by a joint vote of Lords and Commons, and ours by no similar or easy process.
>
> The tenure, however, is evidently bottomed on the idea of securing the honesty of judges while exercising the office, and not upon that of sustaining useless or pernicious offices for the sake of the judges. The regulation of offices in England, and indeed of inferior offices in most or all countries, depends upon the legislature; it is a part of the detail of government which necessarily devolves upon it, and is beyond the foresight of a constitution because it depends upon variable circumstances. And in England a regulation of the courts of justice was never supposed to be a violation of the good behavior tenure. If this principle should disable Congress from erecting tribunals which temporary circumstances might require, without entailing them upon the society after these circumstances by ceasing had converted them into grievances, it would be used in a mode contemplated neither in its original or duplicate.
>
> Whether courts are erected by a regard to the administration of justice or with the purpose of rewarding a meritorious faction, the legislature may certainly abolish them without infringing the Constitution whenever they are not required by the administration of justice, or the merit of the faction is exploded and their claim to reward disallowed.

This was the exact line taken by Senator Breckenridge in the Senate debates, but not without argument.

It is, perhaps, not irrelevant to point out a distinction that was sought to be drawn between legislation affecting the lower federal courts and legislation concerning the Supreme Court, the former alleged to be creatures of Congress and the latter to be ordained by the Constitution. In the words of one of the Republicans, Stevens Thomson Mason:[18]

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18 11 ANNALS OF CONG. 59 (1801).

> . . . I observe . . . a clear distinction between the Supreme Court and the other courts. With regard to the institution of the Supreme Court the words of the Constitution are imperative; while with regard to the inferior courts they are discretionary. . . . [T]he Legislature should have power, from time to time, to create, to annul, or to modify the courts as the public good might require, whenever a change of circumstances may suggest the propriety of a different organization.

Senator Stone spoke directly to the issue presented here:[19]

> . . . They doubtless shall, (as against the President's power to retain them in office) in common with other office[r]s of his appointment, be removed from office by impeachment and conviction; but it does not follow that they might not be removed by other means. They shall hold their offices during good behaviour, and they shall be removed from office upon impeachment and conviction of treason, bribery, and other high crimes and misdemeanors. If the words, impeachment of high crimes and misdemeanors, be understood according to any construction of them hitherto received and established, it will be found, that although a judge, guilty of high crimes and misdemeanors, is always guilty of misbehaviour in office, yet that of the various species of misbehaviour in office, which may render it exceedingly improper that a judge shall continue in office, many of them are neither treason, nor bribery, nor can they be properly dignified by the appellation of high crimes and misdeameanors; and for the impeachment of which no precedent can be found; nor would the words of the Constitution justify such impeachment.
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> To what source, then, shall we resort for a knowledge of what constitutes this thing called misbehaviour in office? . . . Their misbehaviour certainly is not an impeachable offence; still it is the ground upon which judges are to be removed from office. The process of impeachment, therefore, cannot be the only one by which the judges may be removed from office under, and according to the Constitution.

The additional removal power is in the legislature. Only the President is restricted on "removal." The powers given the legislature—to have the courts meet only every six or ten years, to pack the court, etc. —show that no significant barrier was intended as against the legislature's control of judges.

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19 *Id.* at 72.

Senator Bradley also followed the Taylor line. The words "good behavior" have been given assorted meanings in assorted states, but the most appropriate meaning is that used at their source, England. In England, the putting down of courts and justices is considered consistent with holding office during good behavior.

In the House, Representative Giles, on behalf of repeal, asserted that the term independence of judges or of the judiciary department was not to be found in the Constituion but was a mere inference from some of the specified powers. The Constitution only declared that there should be such a department formed by the other two departments who owe a responsibility to the people. The only limitation upon the power of Congress consists in the number of supreme courts to be established, and the spirit, as well as the words of the Constitution, are completely satisfied provided one Supreme Court be established. He therefore felt the firmest conviction that there was no constitutional impediment in the way of repealing the act in question.

John Randolph sought a more sophisticated line and one that might be impossible to draw:[20]

> I am free to declare that if the intent of this bill is to get rid of the judges, it is a perversion of your power to a base purpose; it is an unconstitutional act. If, on the contrary, it aims not at the displacing one set of men, from whom you differ in political opinion, with a view to introducing others, but at the general good by abolishing useless offices, it is a Constitutional act.

Representative Williams asserted that power to decide what grounds are constitutionally adequate for impeachment must be in the legislature. Otherwise the judge can rule any attempt to oust him to be unconstitutional. Courts were created in the interest of the people, not of the judges, and the representatives of the people must, therefore, have final control. It is enough that judges are free from diminution of salary. The characterization of a life contract is inapt.

The opponents of Breckenridge's propositions were not silent. Senator Tracy attempted to dispose of the distinction between the Supreme Court and lower federal courts:[21] "No person will say that the judges of the Supreme Court can be removed, unless by impeachment and conviction of misbehaviour; but the judges of the inferior courts, as soon as ordained and established, are placed on precisely the same grounds of independence with the judges of the Supreme Court."

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[20] *Id.* at 652.

[21] *Id.* at 57.

Governeur Morris claimed that there was no power of removal except on impeachment:[22] "Misbehaviour is not a term known in our law; the idea is expressed by the word misdemeanor; which word is in the clause respecting impeachments. Taking, therefore, the two together . . . the Constitution says: 'The judges shall hold their offices so long as they demean themselves well; but if they shall misdemean, if they shall on impeachment be convicted of misdemeanor, they shall be removed.' "

Senator Mason also denied any way of removing a judge from office or the office from the judge except by way of impeachment.

Senator White proposed that on accepting their appointments judges entered into a contract with the government that guaranteed life tenure during good behavior, so that any law diminishing their tenure would be an unconstitutional impairment of contract and *ex post facto* law. Senator Chipman also asserted that continuance of office during good behavior was solely at the option of the judge. He relied in part on the proposition that the Constitution, having provided an exception to life tenure by way of the misbehavior clause, excluded all other bases for limiting tenure.

Senator Calhoun asserted that once a judge received his commission, he was "completely beyond the reach of Legislative power. . . . We all fully and at once understand what is good behaviour in a judge, the oath he takes and the very nature of the office show it; to act with justice, integrity, ability, and honor, and to administer justice speedily and impartially, is good behaviour; if he acts contrary, it would be misbehaviour, and the Constitution, in that case, has given a remedy by impeachment."[23]

Senator Ross rejected the notion that the standard was the same here as in Great Britain where the Crown on the address of both houses could limit tenure. He relied on the need for independence of the judiciary as described by Judge Pendleton of the high court of Virginia.

The judiciary had its defenders in the House of Representatives as well. Hemphill argued that the power to interfere with the judiciary was reserved to the people by the ninth and tenth amendments, in order to assure the people an independent judiciary. Bayard argued that if the judges had shown undue partisanship, the proper remedy was by way of impeachment: "What is meant by tenure of 'good behavior'?" It meant a tenure for life, unless the judge committed a misdemeanor. This was the understanding in England. The only ex-

22 *Id.* at 90.
23 *Id.* at 139-40.

48-202 O - 79 - 26

press condition was the requirement of good behavior. The provision for such basis for removal precluded any other bases. The framers of the Constitution had been offered the opportunity to provide for removal of judges by other means and had rejected it.

Representative Smith asserted that while the legislature had the power to remove the jurisdiction of the lower courts it had no authority to limit the tenure of the judges except by impeachment. And Representative Rutledge turned to *The Federalist* for support of a similar conclusion. He quoted from No. 78:[24]

> . . . good behaviour for the continuance in office of the judicial magistracy, is the most valuable of the modern improvements in the practice of government. . . . And it is the best expedient that can be devised in any Government to secure a steady, upright, and impartial administration of the laws. . . . The complete independence of the courts of justice is essential in a limited Constitution; one containing specific exceptions to the legislative authority. . . . Such limitations can be preserved in practice no other way than through the courts of justice . . . . The Convention acted wisely in establishing good behaviour as the tenure of judicial offices. This plan would have been inexcusably defective had it wanted this important feature of good government.

He concluded from this that judges were removable only by impeachment. He then quoted from Madison's debates on the first judiciary bill: "The judges are to be removed only on impeachment, and conviction before Congress."[25] And from Mr. Gerry:[26] "The judges will be independent, and no power can remove them: they will be beyond the reach of the other powers of the Government; they will be unassailable, and cannot be affected but by the united voice of America, and that only by a change of Government . . . ," *i.e.*, by constitutional amendment or revolution.

A most eloquent defense of judicial independence was made by Mr. Griswold. It was clear to him that judges could lose their office only on conviction for misbehavior after impeachment. He found that the failure to provide for the inclusion of the power of removal that was existent in England, *i.e.*, on motion of both houses of Parliament and action taken pursuant thereto by the Crown, was deliberate.

Mr. Dana was even more persuasive. He, too, showed that the

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24 *Id.* at 736.
25 *Id.* at 738.
26 *Id.*

proposal for removal by joint motion of both houses was laid before the convention and rejected. Jefferson's Virginia constitution specifically provided that judges of the higher court should hold tenure during good behavior but judges of the lower courts should have tenure during good behavior and the existence of the courts. The absence of such qualification on the tenure of the lower courts in the national constitution indicated the lack of intention to incorporate this difference. Mr. Dana added that the power to remove judges was not different from the power to remove the President, *i.e.*, only by impeachment processes as specified in the Constitution.

Despite this eloquent defense of the judiciary, the Jeffersonians prevailed, although by but a single vote in the Senate. The courts created by the 1801 Act were abolished. No judicial test of this action was made. Following this success, the Jeffersonians sought to eliminate the Federalist judges who were holding office under the original judiciary act by bringing impeachment proceedings. They were successful in the removal of Judge Pickering of New Hampshire, but this movement foundered when the impeachment of Mr. Justice Chase failed of conviction.

B. *Judicial Reconstruction after the Civil War*

In the Reconstruction Congress, there was an interesting forerunner of President Franklin D. Roosevelt's court-packing plan. Of the antipathy of the Radicals to the Court, nothing need be added here. One of the attacks on the Court in the House of Representatives came under the leadership of Representative Bingham. He sought to secure an addition to the Senate Judiciary bill that would "permit" voluntary retirement of judges on pension, and would provide further:[27]

> That if any judge who shall have attained the aforesaid age shall be incompetent, by reason of disease or infirmity, to make and file such certificate, the facts of his age and incompetency may be proved by satisfactory evidence before any judge of the Supreme Court; and upon such justice filing his certificate of such facts with the President the said judge shall thereupon be excused and retired with like effect as upon his own certificate.
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> Sec. 6. *And be it further enacted*, That within six months after the filing with the President of either of the certificates mentioned in section five of this act, or if any judge of any of the courts of the United States whose age now exceeds seventy years, or who shall hereafter arrive at the age of

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27 CONG. GLOBE, 41st Cong., 1st Sess. 337 (1869).

> seventy years, shall for one year after the passage of this act, or after arriving at the age of seventy years, continue to hold his office without filing such certificate, it shall in either of such cases be the duty of the President to nominate and appoint, by and with the advice and consent of the Senate, an additional judge for the said court, who shall have the same power and perform the same duties and receive the same compensation as the judge then acting in such court, or who shall be retired and excused from so acting, and shall, in connection with or in the absence of his senior associate, hold the courts prescribed by law for said senior or retired judge; and upon the decease of said senior, associate, or retired judge, or upon his ceasing for any cause to hold said office, the said additional judge appointed under the provisions of this act shall be and become the judge of such court.

On the constitutional issue, Bingham asserted:[28]

> . . . I think I am justified in saying that the committee are of the opinion that it is not competent for the Congress of the United States under the Constitution to pass any law requiring a judge of the United States to resign. . . .
> Mr. Speaker, there is another provision of the amendment which may become very important, the provision which provides for retiring incompetent judges and supplying their places. Suppose a judge upon your Supreme bench is struck by paralysis. He is unable to tender his resignation or to take any action in the premises. How can you supply his place except by some such provision as this, which provides for evidence being taken and for the appointment of a judge to take his place as an acting member of the court? It must occur to members of the House that there is no room for the impeachment of a United States judge on account of the visitation of God. His commission runs for life, or during good behavior; and he cannot be removed by reason of having been overtaken by disease, and thereby rendered incapable of taking his place upon the bench. . . .

When Bingham was challenged on the constitutional question, a rather unenlightening dialogue followed between Bingham and Lawrence.[29] Mr. Jenckes, like Bingham, had little difficulty with the constitutional issue. And like Bingham, he conceded:[30]

> We cannot, under the Constitution, compel the judges to

28 *Id.*
29 *Id.* at 338.
30 *Id.* at 340.

> resign when they are seventy years of age and accept a pension. The law gives them the office for life or during good behavior. We cannot pass a law excluding them from the court after a certain age and allowing them to draw their present salary, or five times their present salary, if you please. They are created judges by the Constitution, and they hold their offices by a title greater than that which we can create, and their salary by a firmer tenure than that which any law can give. . . .

Mr. Kerr, however, saw the problem differently:[31]

> But, Mr. Speaker, it is proposed by this bill to retire by congressional legislation certain judges after they shall have passed the age of seventy years. The honorable gentleman from Ohio, [Mr. Bingham,] my colleague on the committee, will doubtless say that such is not the precise proposition contained in this bill. But I insist that the logical effect, the legal effect, the practical effect, of this proposition will be to retire those judges, willing or unwilling. The bill provides that the Supreme Court shall consist of nine judges; and then it is declared that whenever a judge shall have attained the age of seventy years and shall have rendered service for ten years in any judicial department of the Federal Government he may retire from active service and receive a pension equal to his salary. . . .
>
> The court is to consist primarily of nine judges. The gentleman from Ohio undertakes to correct me by saying that it shall ultimately consist of nine judges, together with the retired judges. The retired judges and the judges who shall be appointed to take their places are theoretically to perform precisely the same duties and to have precisely the same jurisdiction. If one holds a circuit court anywhere in the country, the other in theory of law is supposed to sit with him. If the new judge takes his seat upon the bench, the old judge may do the same. If it is competent for Congress to do thus by indirection what it cannot do directly, if it is competent for Congress to enact such a provision as this, then it is equally competent for Congress to say that after a judge shall have attained the age of sixty years or fifty years or forty years, he may in like manner be retired or superseded or may be aided by the appointment of another judge who shall sit with him, dividing with him his jurisdiction—dividing with him every one of the functions of his office until, if this process be continued, the court, so far as this

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31 *Id.* at 341-2.

new organization is concerned, will become a mockery of a judicial tribunal.

The man who is thus superseded by the appointment of another judge is practically retired from office, and he, if not we, will so understand it. He and the country will understand when his successor is thus appointed by the President and confirmed by the Senate that he himself is notified that his services are no longer needed on the bench . . . .

It seems to me that this provision will introduce into our judicial system and into the control of Congress over it a most dangerous principle of interference, one that will go to the very fundamental idea upon which that court was organized, upon which its great service as a coordinate department of the Government must always rest. It will go directly, most logically and most dangerously, to disturb the independence of that department of the Government, and to place it, as well as all others, under the power of the legislative department, and I submit that it was that very fear, an apprehension of that very danger, a prescience of what is this day being done, that led the framers of our Constitution to incorporate the provision organizing that court precisely as it is. In this opinion I am not unsustained by the history of this provision in our Constitution. During its consideration in the Convention there was a proposition made concerning which I will read from the Commentaries of Justice Story, section sixteen hundred and nineteen:

"A proposition of a more imposing nature was to authorize a removal of the judges for inability to discharge the duties of their office. But all considerate persons will readily perceive that such a provision would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose. The mensuration of the faculties of the mind has no place in the catalogue of any known art or science. An attempt to fix the boundary between the region of ability and inability would much oftener give rise to personal or party attachments and hostilities than advance the interest of justice or the public welfare, and instances of absolute imbecility would be too rare to justify the introduction of so dangerous a provision." . . .

For the very highest of reasons the constitutional Convention refused to confer upon the legislative department of the Government any right at all under any circumstances to sit in judgment upon the ability or inability of the judges of the Supreme Court. It is not permitted to Congress at all to say what shall be the exact measure of ability for a judge of that court, or what shall constitute disability for the dis-

> charge of its duties, or what age in life or service shall limit the judicial capacity. If it were, with what dangers would we be instantly surrounded! If Congress could declare that at the age of seventy years a man was incompetent to perform judicial service in that court, could not Congress, its own discretion being its supreme law, declare that a man at the age of sixty should be held thereafter to be incompetent for the discharge of such duties, or that at forty, or even at thirty-five, he should be held to be incompetent? Whenever you leave the power at all to the legislative department you make the discretion of that body its rule of action, unless you prescribe qualifications and limitations upon that power, which it would be very difficult indeed to do. . . .

The issue was fought, not in Kerr's realistic terms, but on the issue whether Congress could provide annuities for superannuated judges. Thus, Mr. Butler spoke to the constitutional issues on the assumption that all that was involved was voluntary retirement:[32]

> What is the exact thing we propose? That these men shall remain as judges because we cannot under the Constitution prevent that, but that they may be retired from active duty if they choose. Is there anything against the Constitution in that? My friend says we are doing that indirectly which we cannot do directly. No, sir; let me correct his phrase, with due consideration. We are allowing them to do that for themselves which we cannot do to them . . . . Is there anything in the Constitution which prevents that? Does it militate against the *dicta* of Hamilton upon this question? Hamilton feared—and it was the fear of men of his cast of thought in that day—lest there should be an attempt to remove judges by the Legislature and to overrule the judiciary, for he looked upon, and all the men of that day who thought with him looked upon the judiciary as the great arbiter between the other branches of the Government, the great protector of the rights of the people; and it was thought necessary, even at the risk of all the inconvenience that I have been speaking of, to make the judges independent of every power beyond the very power of removal. In that they but followed the great reform which had not very long before that taken place in England, by which the judges were made independent of the will of the king and held their offices during good behavior.
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> But, mark the difference of circumstances. We were then but just starting as a nation. John Marshall and the justices

[32] *Id.* at app. 2.

> of that day were young men. Our fathers saw no evil or trouble arising from old age or incompetency of the judges. They were dealing with a small people. Sir, I agree it is necessary to have an independent judiciary, but it is equally necessary to have an effective judiciary. . . . And I think there is no man in the country who will not say that it is the best way for us to allow the men who from age and infirmity cannot carry on judicial work to remove themselves, and to give them this poor privilege of retiring from active service on the bench with a support for their declining years. . . .

Although the Bingham amendments passed the House, the bill that was ultimately approved provided only for voluntary retirement and omitted the court-packing provisions. Reading these debates, one wonders why it took so long for Franklin Roosevelt to come up with his version of court-packing.[33] Certainly Bingham had anticipated the Roosevelt plan.

C. *The Abolition of the Commerce Court*

The next set of congressional debates to which I refer centered, as did the 1802 contest, on the power of Congress to abolish judicial posts along with the abolition of a federal court, this time the Commerce Court of the United States. Once again political feelings ran high over the issue. The court was established in 1910, after bitter debate, to centralize review of the Interstate Commerce Commission in a single court. That the court was intended to serve and did serve as a tight rein on the Commission is clear from its antecedents and its judgments. By 1911, the court was already on its death bed.

In the background of the debates over the Commerce Court was the populist demand for a power of recall over the members of the judiciary and its opinions, led by former President Theodore Roosevelt and desperately fought by President Taft. The temper of the times may be derived from a series of Senate Documents, all of which are concerned, in whole or part, with the need to control the judiciary.[34] The presence of this conflict is reflected throughout the debates. Senator Bailey's remarks are not untypical:[35]

> But, Mr. President, if there were no other reasons I could not vote for this proposition, because it is a sort of legislative

[33] See Leuchtenburg, *The Origin of Franklin D. Roosevelt's "Court-packing" Plan*, 1966 SUP. CT. REV. 347.

[34] *See, e.g.*, S. Doc. Nos. 292, 302, 348, 406, 408, 451, 452, 472, 473, 892, 941, 62d Cong., 2d Sess. (1912); S. Doc. Nos. 1075, 1106, 1108, 62d Cong., 3d Sess. (1913).

[35] 48 CONG. REC. 7843 (1912).

> recall of this court. That is precisely what it is, and that is precisely what it is intended to be. Some Senators, and others who have not taken the trouble to examine these decisions, are not satisfied with them, and they proceed to recall the court. If, when the court does not please the Senate, we can repeal the law which created it, we shall have precious little right to complain of those gospelers of riot and disorder who now are proposing not only to recall the courts, but to overrule the decisions of courts by plebiscite. We shall make the proposition of an ex-President eminently respectable and conservative if we go to the extent of repealing the law which created this court, because, forsooth, we do not happen to like some of its decisions.

Senator Bailey also had some interesting remarks to make about the scope of "good behavior":[36]

> I do not agree that a judge holds his office for life. He holds it merely during his good behavior. I have never believed that in order to remove a judge it is necessary to prove against him the same things it would be necessary to prove against an officer holding for a fixed term, who can not be impeached except for high crimes or misdemeanors.

What language of the Constitution he was relying on for this distinction is not revealed.

The House bill did not propose to abolish the judgeships along with the court. The judges of the Commerce Court had been appointed as "additional circuit judges" to sit for a period of five years on the Commerce Court but to serve by assignment on the circuit courts. At the end of five years different judges from other federal courts were to be assigned to replace these judges on the Commerce Court while these judges continued their duties on the circuit courts.

It was Senator Overman who proposed the elimination of the judgeships as well as the court.[37] Thus was revived the debate of 1802, with little more contribution made to the arguments of that time, but with a few sidelights thrown on the issues more immediately relevant to the Tydings Committee's inquiries.

There is a lengthy exegesis on the question by Senator (later Mr. Justice) Sutherland. The Senate was sharply divided on the question whether existing judicial offices could be abolished thus ending the tenure of the incumbents. The 1802 precedent being thrown in his face, Sutherland quoted extensively from Story and St. George Tucker

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[36] *Id.* at 7844.

[37] *Id.* at 7969.

and their opinions that the 1802 action by Congress was unconstitutional.[38] Backed to the wall by the argument that Congress had power to remove all the jurisdiction of all federal courts, except for the original jurisdiction conferred on the Supreme Court by the Constitution, Sutherland at one point agreed that the judges would have to be kept "in office" although they had no functions to perform, but ultimately fell back to Story's position that all of the jurisdiction provided in article III had to be conferred on some federal court.[39]

Senator Cummins, himself no mean constitutional lawyer, returned to the question of the meaning of "good behavior" and secured Sutherland's agreement in a proposal of more interest to the issues now under consideration. But he aroused the opposition of Senator Lodge:[40]

> It would be most interesting and instructive if we were to enter for a little while, and I do intend to do it, upon the consideration of the term "good behavior"; there is a prevalent notion throughout the country that judges of the Federal courts are appointed for life. That is not true. They are appointed during good behavior. I recognize that I am not now speaking directly to the point at issue, but we so often hear the expression that Federal judges are appointed for life that I want to give some publicity to the real language of the Constitution, which is "during good behavior." I am not one of the persons who believes that the determination of what is good behavior can be had only in an impeachment trial. My friend from Utah says that unless a Federal judge is removed from his office by the process of impeachment for high crimes and misdemeanors he must remain there during his natural life. I can not agree to that statement. I do not intend to pause to even discuss what procedure could be established by Congress in order to determine what good behavior is and what it is not; but I believe that there is misbehavior on the part of a judge for which he can be removed from office that does not arise to the dignity or the severity of either a crime or a misdemeanor. . . .
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> Mr. Sutherland. Either I did not express myself as I intended to do so or the Senator from Iowa did not quite understand me. I did not mean to say that a judge could hold his office until he had been impeached. . . . I am not at all certain but that there may be such behavior upon the part of a judge

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38 *Id.* at 7995-6.

39 *Id.* at 7998.

40 *Id.* at 7999-8000.

> short of an impeachable offense that would enable us to get rid of him. I did not mean to antagonize that position.
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> Mr. Cummins. I am very glad indeed that I misunderstood the Senator from Utah, because in these days when clouds are rolling around the judiciary, when various remedies are proposed for their recall, I think it is well to remember that we have somewhere, somehow, the power to determine the good behavior of the judges of the United States, and that therefore we do not need, at this time at any rate, those severer changes that are suggested in the recall by a popular vote.
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> I think that Congress has the power to provide for the removal of judges of the United States whenever they violate the rule which is established in the Constitution, namely, the rule of good behavior; and that means that these judges must obey, and as I am very glad to say that they generally have obeyed, the fundamental principles of propriety and of ethics.

The Senate voted to abolish the offices along with the court, but in conference, the House prevailed and the judgeships were retained.[41] But this wasn't enough to save the bill from presidential veto, with language by President Taft reminiscent of the manner in which Senator Bailey started the debate in the Senate:[42]

> . . . I am utterly opposed to the abolition of a court because its decisions may not always meet the approval of a majority in the Legislature. It is introducing a recall of the judiciary, which, in its way, is quite as objectionable as the ordinary popular method proposed. . . .

Congress could not override the veto.[43] But this was not the end of the matter.

During the third session of the 62nd Congress, the Senate found Judge Archibald of the Commerce Court guilty of the impeachment charges brought against him.[44] For our purposes the most interesting materials consisted of a separate opinion by Senators Elihu Root and Henry Cabot Lodge indicating a diametrically opposed view of the concept of "good behavior" to that agreed upon by Senators Cummins and Sutherland above:[45]

OPINIONS OF SENATOR ROOT AND SENATOR LODGE

> In the impeachment of Robert W. Archibald, January 13, 1913: I have voted that the respondent is guilty under articles

41 *Id.* at 8001; 10057.
42 *Id.* at 11027.
43 *Id.* at 11034-5.
44 49 CONG. REC. 1448 (1913).
45 *Id.*

1, 2, 3, 5, 6, and 13, because I find that he used the power and influence of his office as judge of the Court of Commerce to secure favors of money value for himself and his friends from railroad companies, some of which were litigants in his court and all of which were under the regulation of the Interstate Commerce Commission, subject to the review of the Court of Commerce.

I consider this course of conduct, and each instance of it, to be a high crime and misdemeanor.

I have voted "not guilty" upon the other articles, because while most of them involve improper conduct, I do not consider that the acts proved are high crimes and misdemeanors. . . .

Elihu Root.

I concur in the foregoing, except as to article 4, upon which I voted the respondent guilty.

H. C. Lodge.

By the next session of Congress, Wilson had succeeded to the Presidency. The Commerce Court was doomed. But the question remained whether the judges were to be deprived of their tenure. This time the House demanded the elimination of the judges,[46] but the Senate proved recalcitrant. The debate on the issue took place on the Senate floor. It was essentially a reprise of the arguments already examined and concerned only the issue of the power of the legislature to abolish judicial posts and thereby terminate the tenure of the holders thereof. Senators Borah and Walsh carried the burden of demonstrating constitutional doubts about the proposed abolition of the judgeships and Senators Bacon and Smith of Georgia were the advocates in defense of the proposition.[47] The Senate version, preserving the judgeships, ultimately prevailed, so that the precedent of 1802 was not repeated.

D. Hatton Sumners' Judicial Good Behavior Bill

The last of my expeditions into extensive congressional debates is concerned with the proposal to provide an alternative system to that of impeachment for removal of judges. These proceedings in the 75th and 76th Congresses were not unrelated to the general problem that gave rise to the Roosevelt court-packing plan. Again, then, we have a situation in which strong political feelings against the judiciary are not irrelevant to the debate.

House Resolution No. 227 to bring this issue before the Commit-

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46 50 Cong. Rec. 4543 (1913).

47 *Id.* at 5409-18; 5426-9.

tee of the whole House was called up by Representative Smith in the first session of the 75th Congress:[48]

> Mr. Smith. . . . As you know, our customary way for the trial of Federal judges is through impeachment. I think we have all, over a period of years, come to feel that the only way to get rid of a Federal judge is through impeachment. Under the Sumners bill a method is provided which will relieve the Senate of the burden of the trial of impeachment cases of the inferior judges of the Federal courts. The bill only applies to district judges of Federal courts. [Later versions expanded the applicability to other Federal courts but not the Supreme Court.]
>
> First, I will call your attention to the constitutional provision, which provides that Federal judges shall hold office not for life but during good behavior. We have rather come to assume that they hold office for life. They do not. They hold office, under the Constitution, only during good behavior. The purpose of this bill is to set up a court to judicially try the question of the good behavior of a Federal judge against whom impeachment charges have been preferred. Under the procedure set up in this bill we would proceed just exactly as we do today up to the point where an impeachment is voted by the House of Representatives. In other words, impeachment charges would be filed against a district judge. They would go to the Committee on the Judiciary, and that committee would consider the matter thoroughly and investigate it, and it would come into the House and be debated, and we would vote upon an impeachment resolution just as we have always done. After the House has voted the impeachment resolution, then under this bill the procedure changes. Under this bill a court is set up, consisting of three judges of the circuit courts of appeals, to be selected by the Supreme Court of the United States. Those judges would then proceed to try the question of the good behavior of the judge whose good behavior has been questioned, and if upon trial of that case they determine that his behavior was other than good behavior, he would then be removed from office; but no other penalty would attach.
>
> There will be an amendment offered by the committee which will provide in case of those trials that after trial by the court in the first instance either side shall have the right of appeal to the Supreme Court of the United States. . . . Whenever there is an impeachment trial it is necessary to consume the time of the entire Senate of the United States some-

48 81 CONG. REC. 6157-8 (1937).

> times for a period of weeks on the trial of a question of whether a minor Federal judge shall continue to hold his office. . . . Necessarily, with the manifold duties of Members of the Senate, that is an unsatisfactory trial. . . .
>
> This bill will protect the judges in every way, because it will give them as fair and impartial a tribunal as they now have, but one which will give its undivided attention to the trial of the issue. There will be no danger that a judge may be hauled up and tried for some trivial charge, because, first, it has to come under the present procedure, and there has to be an impeachment resolution offered on the floor. It must be considered by the Committee on the Judiciary and voted out, and then it must come back to the floor of this House and be debated before an impeachment resolution is voted. Only after that impeachment is voted can his conduct be tried. . . .

Representative Sabath also spoke for the bill,[49] but its chief proponent was its sponsor, the chairman of the House Judiciary Committee, Representative Sumners, who undertook to explain and defend it at length:[50]

> This bill does not at all rest upon the provision of the Constitution dealing with impeachment. The thing which we are attempting to do here has absolutely no relationship to the impeachment power. The last part of article II deals with impeachment. . . .
>
> . . . [It] is the good behavior clause which this bill seeks to have recognized; that is, "good behavior" as a justiciable issue. When we read that provision we find that judges are not appointed for life, but are appointed during good behavior. It is a condition attached to their right to hold office. When they violate that condition they not only bring disgrace upon the giver of their commission but they forfeit their right to hold office. If we get that in our mind, we then have the second proposition.
>
> . . . .
>
> If the Senate cannot make vital the "good behavior" provision in the judicial tenure clause, and clearly it cannot do it, what agency of government can do it? The historical background precludes any notion that the President can effectuate those words, because those words went into the framework of the English constitution, from which we appropriated them, in order to prevent the Executive from having

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[49] *Id.* at 6161-2.

[50] *Id.* at 6163-6.

anything to do with it. So, by the process of elimination we come to a court as the only agency of government that can keep those words from being dead words in the Constitution. I think everybody must agree with that. . . .

Mr. Mott. I do not agree and I want to tell the gentleman my interpretation just in a word and ask him what is the matter with it. It has always been my opinion that the reason why "good behavior" was inserted in that clause of the Constitution was so that judges appointed for life could be impeached. In other words, if this provided that judges should hold their terms for life, then the language would be repugnant to section 4 of article II, and it is doubtful if you could impeach, and I think it is for that reason that section 1 specified the term during good behavior instead of life. What is wrong with that?

Mr. Sumners of Texas. I say with all respect that is the expression of an immature judgment which is found in nine-tenths of American lawyers. I went through the same process or rather from the same starting point. We all start with the notion that we can only remove a judge by impeachment. This is what is wrong with it. All civil officers are subject to removal by impeachment. The length of the terms of office has nothing to do with it. Whether for 4 years, during good behavior, or for life, it is all the same. If they commit "high crimes and misdemeanors" and so forth they bring themselves within the powers of the Senate to remove by impeachment.

"Good behavior" by its nature is a justiciable issue. By its use it is made a condition in the right of every judge to hold office. It is a triable issue. There is no court to try it. This bill provides the court. If there is no court there is no agency to make effective that important condition in this particular section of the Constitution. . . .

Unquestionably it is a fact as everybody will agree that we took the provision of our Constitution under consideration from the English Constitution. Everybody knows that. I have in my hand a recognized authority as a commentator on the English Constitution, Todd. He says that "good behavior" in the English Constitution has always been recognized as a justiciable issue, triable in their courts by scire facias, a proceeding similar to our quo warranto. . . .

It was recognized in England, when we brought this provision into our Constitution, that there were four methods of getting rid of judges: By impeachment; by joint address of the two Houses; by conviction for an offense; and by writ of scire facias, which is exactly the process that we expect to institute under this provision. . . .

> It is a queer thing that the notion is so deeply rooted that because we may remove a judge by impeachment we may not remove him by court action in a suit brought to enforce a clear condition attached to his right to hold office. . . .

A constitutional challenge came from Mr. Gwynne.[51] But the main spokesman for the opposition was Mr. Celler:[52]

> Mr. Chairman, from my review of the cases, the Constitution itself, the authorities, and the debates in the original Constitutional Convention, I am firmly of the conviction that we have no authority whatsoever to pass this bill. I sympathize fully with the objectives sought; I believe that the trial of an accused judge by impeachment is highly unsatisfactory; nevertheless, despite my sympathy with the objectives of the bill, I do not believe that it can be accomplished legally or constitutionally. There is no short cut. If we want to change the method of trial of judges accused, we must follow the Constitution. To do it in the way that our distinguished chairman wishes to do it would require, beyond peradventure of doubt, a constitutional amendment.
>
> We often grow impatient with our judiciary, and especially so when they decide against us or when they in their decisions or opinions develop economic or political views differently than we would, or when we do not agree with the results generally, even though it does not affect us materially; but when sensible men viewing in retrospect what our district courts, our circuit courts, and our Supreme Court have done they will have naught but praise for our courts. . . .
>
> I want to maintain as much independence for our judiciary as is possible, and the only way that we can maintain an independent judiciary is to make attack upon them difficult, not too easy; otherwise the judges will no longer be independent, but will truckle to this influence and that influence, to this personage and that personage, and we would, therefore, strike a decided blow at the judiciary and destroy their independence. [Applause.] Now, insofar as you make these attacks upon the judiciary easier I am against it. . . .

I may say with all due deference to the author of the bill that the best argument against its validity is its novelty. I said this in the minority report and I am going to repeat it:

> It scarcely can be believed that the framers intended vesting Congress with an important power and then

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[51] *Id.* at 6169-70.

[52] *Id.* at 6170-3; 6187.

> so skillfully concealed it[,] it could not be discovered save after 150 years.
>
> . . . I have before me the Federalist, volume 2, numbers 65 and 66, with contributions by Hamilton, Madison, and Jay. It covers the matter of impeachment. There is a clear indication that the framers of the Constitution wished to limit beyond any question the right to impeach and try judges, to limit the right of removal, to the Congress of the United States. Particularly we are told that efforts were made to set up a different tribunal. An effort was made to set up the Supreme Court as a tribunal to try these recreant judges. We are told by these savants that the framers in the Constitutional Convention rejected every solitary one of the proposals other than the one we find in the Constitution.
>
> Now, that is the best argument in the world. They rejected every single proposal, except that the House shall impeach and the Senate shall try the cause. The House shall be the sole entity to bring impeachment charges. We are told in article I, section 2:
>
> > And the House of Representatives shall have the sole power of impeachment.
>
> We are told in article I, section 3:
>
> > The Senate shall have the sole power to try all impeachments.
>
> The use of the word "sole" in those two particulars undoubtedly is most significant, particularly in the light of the history of the Constitutional Convention, which we are told rejected all alternatives except the one we have followed for 150 years. Therefore, I cannot lay too great emphasis on the use of the word "sole" in two instances. To my mind the conclusion is inescapable that the only way you can try these judges is by the method that the Constitution allows us to use, and I do not care what you call the trial, whether impeachment, ouster, removal, or by any other name. . . .
>
> The gentleman from Alabama [Mr. Hobbs], my very dear friend who sits next to me, has issued a challenge to me, and has asked me to show by reference to the Constitution or by reference to the debates in the Constitutional Convention, that there was any argument on any basis for this additional method of removal. I refer the gentleman to the debate in the Constitutional Convention held as of Monday, August 27, 1787, which clearly indicates, to my mind, that the framers of the Constitution intended only one method of ouster of judges, namely, impeachment. . . .

Reed of Illinois and Tolan of California, Hobbs of Alabama, and Robinson of Kentucky all spoke at length in favor of the constitution-

48-202 O - 79 - 27

ality of the bill.[53] Hancock of New York, Michener of Michigan, and Sauthoss of Wisconsin were all vigorous opponents.[54]

The bill passed the House of Representatives by a vote of 221 to 125. (In the majority were Congressmen Lyndon B. Johnson and Fred M. Vinson; among the dissenters was Congressman Everett M. Dirksen.) It was referred to the Senate Judiciary Committee[55] and appears to have died there.

The issue was revived in the first session of the 76th Congress by Congressman Sumners. This time courts of appeals judges were also placed under the Damoclean sword.[56] But not until the third session did debate again occur. This time Hobbs led off the fight with an extensive constitutional defense of the proposal.[57] Sumners again waxed long and eloquent on behalf of his bill.[58] Mr. Michener organized the attack on constitutional grounds and was supported by Lewis of Ohio and Rees of Kansas.[59] Mr. Guyer of Kansas, Mr. Hancock of New York, and others argued at length in defense of this bill.[60] The battle was long, but the bill was defeated, 236 Nays to 104 Yeas.

The war, however, was not quite over. A similar bill was introduced in the 77th Congress by Sumners and this time he squeezed it past the House by a vote of 124 to 122.[61] Nothing more came of this bill or of similar bills offered by Sumners in the House in the 78th and 79th Congresses. But the Senate Judiciary Committee did hold hearings on the Sumners bill for the 77th Congress and evoked testimony from Mr. Justice Jackson in favor of the principle of the bill and the need therefor if not in favor of its constitutionality.[62] This ended, temporarily at least, the movement for judicial removal by means other than impeachment.

III. Executive Opinions

The views of the executive branch of the Government on this subject are more elusive. But the isolated examples that I have uncovered

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53 *Id.* at 6173-5; 6176-9; 6181-4.

54 *Id.* at 6166-7; 6179-81; 6181.

55 *Id.* at 6207.

56 *See* 84 Cong. Rec. 25, 4638, 5096 (1939); H.R. Rep. No. 537, 76th Cong., 1st Sess. (1939).

57 86 Cong. Rec. 4197-4200 (1940).

58 *Id.* at 4202-6.

59 *Id.* at 4200-1; 4201; 4202.

60 *Id.* at 4206-12.

61 87 Cong. Rec. 8168 (1941).

62 *See* note 10 *supra*. For further, if repetitive, exegesis on the constitutional question, see H.R. Rep. No. 814, 75th Cong., 1st Sess. (1937); H.R. Rep. No. 537, 76th Cong., 1st Sess. (1939).

indicate an understanding little different from the views of the other branches.

Thus, Thomas Jefferson, prior to his Presidency, thought that appointments with life tenure was the appropriate term for judicial office: "The judges . . . should not be dependent upon any man or body of men. To these ends they should hold their estates for life in their offices, or in other words, their commissions should be during good behavior."[63] That he had lost the taste for this protection of the independence of the judiciary by the time of his Presidency is common knowledge. It was he who sponsored the successful attack on the 1801 Judiciary Act. It was he who sponsored the impeachment attacks on the federal judiciary. It was he, when he found that impeachment was not a successful method for removal of Federalists from the bench, who resorted to proposed constitutional change of the life tenure and good behavior provisions.

Dean Leonard Levy describes Jefferson's reactions to his political frustrations:[64]

> Since impeachment was a "farce," he wrote, an amendment was needed to rebuke the judiciary for extending "immunity to that class of offenders which endeavors to overturn the Constitution, and are themselves protected in it by the Constitution . . . If their protection of Burr produces this amendment, it will do more good than his condemnation would have done."
>
> . . . After Burr's acquittal Jefferson declared once again that the result was "equivalent to a proclamation of impunity to every traitorous combination which may be formed to destroy the Union," but an amendment to the Constitution would make the judiciary dependent on the "nation."
>
> . . . The amendment recommended by Jefferson throughout 1807 had originally been proposed by John Randolph, first in 1805 and again in 1806. It made federal judges removable by the President on the joint address of both houses of Congress. A few days after Jefferson's Seventh Annual Address, Senator Edward Tiffin of Ohio offered the same amendments, with the additional provision that the judges' tenure be limited to a specified number of years. The proposed amendment however was not reported out of committee. Jefferson's goal of checking the judiciary failed. His advocacy in 1789 of an independent judiciary as a means of enforcing civil liberties against the government better comports with the image of him as the apostle of freedom. . . .

63 Quoted in E. Haynes, Selection and Tenure of Judges 93 (1944).

64 L. Levy, Jefferson and Civil Liberties 79-81 (1963).

Perhaps the most interesting aspect of the Jeffersonian position is that he did think it necessary to resort to constitutional, not merely legislative, changes to effect his objectives.

In 1868, President Johnson, who showed more prescience than he has been given credit for, proposed several amendments to the Constitution, again including one that would limit the tenure of the judicial office:[65]

> It is strongly impressed on my mind that the tenure of office by the judiciary of the United States during good behavior for life is incompatible with the spirit of republican government, and in this opinion I am surely sustained by the evidence of popular judgment upon this subject in the different States of the Union.
>
> I therefore deem it my duty to recommend an amendment to the Constitution by which the terms of the judicial officers would be limited to a period of years, and I herewith present it in the hope that Congress will submit it to the people for their decision. . . .

His other proposals for constitutional amendment included direct election of the President and Vice-President, provision for succession to the office of the President, and direct election of Senators. Two of his recommendations for constitutional change have been effected, one—relating to the electoral college—may be on its way to effectuation, and the fourth is again the subject of serious consideration by Congress.

At the time of the Commerce Court debates referred to at length above, the courts of the country were subject to severe attack, with ex-President Theodore Roosevelt the leader of the battle for judicial recall while the defenders of the judiciary were led by President Taft. Taft, like Jefferson, was of different minds at different times on the subject of retirement of the judiciary upon reaching a specified age. While President he favored such a retirement plan; after the became Chief Justice he was opposed to it.

Attorney General Cummings relied on Taft's position as the basis for a suggested constitutional amendment in 1938. His belief in the need for constitutional amendment to effect an age limit on the office is emphasized by the fact that he suggested a legislative remedy for voluntary retirement with compensation:[66]

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[65] 6 MESSAGES AND PAPERS OF THE PRESIDENTS 643, 691 (Richardson ed. 1900).

[66] 1938 ATT'Y GEN. ANN. REP. 5.

> Former President Taft asserted that the failure of the Constitution to provide for the compulsory retirement of Federal judges at the age of 70 was a defect which should be remedied. This view is held by a large number of eminent jurists and lawyers. It is also, I believe, in accord with the majority opinion of our people. So many disadvantages have resulted from the existing system that I do not pause to enumerate them. Of course, provision should be made for full pay upon such retirement. I, therefore, recommend the adoption of a constitutional amendment to accomplish the desired result. By its express terms such an amendment should be made applicable only to those appointed after its adoption.
>
> In addition, some statutory provision (presumably on a pro rata basis) should be made for voluntary retirement of Federal judges who have become disabled prior to reaching the age of 70. Not infrequently instances of this kind have occurred. Such a situation is unfair to the incapacitated judge and detrimental to the public interest.

The limitations on legislative power to control the judiciary were also revealed in the choice of remedies made by President Franklin D. Roosevelt in his famous—or infamous—court-packing plan. It was thought that the plan derived from Attorney General McReynolds' report for 1913. McReynolds' recommendation had stated:[67]

> Judges of the United States Courts, at the age of 70, after having served 10 years, may retire upon full pay. In the past, many judges have availed themselves of this privilege. Some, however, have remained upon the bench long beyond the time when they were capable of adequately discharging their duties, and in consequence the administration of justice has suffered. . . . I suggest an act providing that when any judge of a Federal court below the Supreme Court fails to avail himself of the privilege of retiring now granted by law, that the President be required, with the advice and consent of the Senate, to appoint another judge, who would preside over the affairs of the court and have precedence over the older one. This will insure at all times the presence of a judge sufficiently active to discharge promptly and adequately the duties of the court.

As I have already pointed out, the Reconstruction Congress had anticipated McReynolds. There is some irony in the fact that this propo-

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67 1913 Att'y Gen. Ann. Rep. 5.

sal, so roundly defeated in Congress when it related to the Supreme Court, was later revived with regard to lower court judges in the Attorney General's Reports for 1956 and 1958 and was enacted into law by Congress and is now to be found in 28 U.S.C. § 372(b).

My final reference to the position taken by the executive on the questions before the Tydings Committee is Attorney General Biddle's support of the constitutionality of the Sumners bills that were treated above.[68]

IV. Conclusion

Largely on the basis of the materials set out or referred to herein, I am quite convinced that it would be unconstitutional for the Congress to attempt, by legislation, to establish a fixed term of office for judges of the federal constitutional courts. I am also of the opinion that the greater weight of authority lies on the side of lack of power to establish a mode of trial other than by impeachment for the removal of federal judges. And, for me, it follows that legislative action spelling out the content of "good behavior" for such trials would also be invalid, for the content of those words are either (1) to be derived from the definition of high crimes and misdemeanors, or (2) to be left to the discretion of the Senate when sitting as a court of impeachment. But on these latter questions, no one should claim certainty. And it must be conceded that a determination by Congress that legislation on one or both of these latter points is constitutional should weigh heavily in favor of its validity if the issue comes to judicial scrutiny. My understanding about the need for constitutional amendment to effect a change in life tenure is buttressed by the repeated introduction in both Houses of Congress of amendments to that end.[69]

Especially in the absence of a weighty factual demonstration of the need for legislation providing for removal of federal judges by means other than impeachment—a case that has not been made and, I think, cannot be made—I should favor treatment of the alleged problems of judicial tenure by constitutional amendment. This was the choice made for resolution of the problem of presidental succession. This is the choice being made for cure of the alleged evils of the electoral college against claims for judicial revision. This should be

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[68] *Hearings Before a Subcomm. of the Comm. on the Judiciary of the United States Senate on H.R. 146*, 77th Cong., 1st Sess. 31-39 (1941).

[69] The policy arguments on this issue are extensively set out in *Hearings on S.J. Res. 44, H.R. J. Res. 194, and H.R. J. Res. 91, Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 83rd Cong., 2d Sess., ser. 11 (1954); *Hearings on S.J. Res. 44 Before a Subcomm. of the Senate Comm. on the Judiciary*, 83rd Cong., 2d Sess., ser. 11 (1954).

the means for dealing with the issue of judicial removal. We have here no threat of majority imposition on the rights of minorities through constitutional amendment. We have here, instead, a proposal to effect a change in the structure of government that most people would, with some reason, regard as a fundamental revision of our constitutional system. If a case can be made for it, I can see no reason for failing to take the issue to the people.

It should be kept in mind that the provisions for securing the independence of the judiciary were not created for the benefit of the judges, but for the benefit of the judged. It is not in the keeping of the judges to surrender this independence under pressure or voluntarily to give it away. Judicial independence is held in trust for the people and only they should determine whether they would like to exchange some judicial independence for more judicial efficiency.

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JUDICIAL CONDUCT

By Gerald Stern

Judicial Rights and the Rise Of State Conduct Commissions

CONDUCT of judges on the bench has come under increasingly closer scrutiny by the news media over the past few years. Intense and sometimes irreverent criticism, apparently unlike any in former years, have appeared in news articles, commentaries, cartoons, magazines and on television and radio. Newspapers have even reported allegations of judicial misconduct from other parts of the country. This growing media interest may be due either to Watergate-era sensitivities about the ethics of lawyers and public officials, or the paradox of judges being judged, or both. This local and national publicity appears to have contributed to a demand for higher standards of conduct and better methods of identifying misconduct

Stories given *national* news coverage have covered a wide range of conduct. A county judge in Wisconsin refused to institutionalize a 15-year-old rapist because the youth in committing the rape had reacted "normally" to the dress habits of women and the general state of permissiveness.[1] The chief justice of the Massachusetts Superior Court attended a fund raising party for defendants who were scheduled to appear in the Court.[2] A California Supreme Court justice slept in court, reported to his colleagues on the wrong cases, and showed numerous signs of senility including loss of memory.[3] A federal district court judge in Utah convened court and chose cases to try in accordance with his personal predilections, expressed deep hostility to the prosecution in all criminal cases, impounded transcripts of embarrassing statements he made, and, in many respects, indicated that he did not feel bound by precedent or administrative direction.[4]

In New York, a district court judge disliked the taste of a cup of coffee so much that he had the vendor arrested and brought into court in handcuffs.[5] A California municipal court judge presided over court at various times while displaying a holstered gun, holding her pet dog, and listening to the sound of a chirping, mechanical canary coming from her open chambers; this judge also routinely threatened attorneys and others with contempt, and, after being cautioned in her car by a police officer about a traffic infraction, she ordered him brought into court for a "38 [calibre] vasectomy."[6]

A Texas Supreme Court justice was indicted for perjury and forgery, and reportedly plotted to kill a witness against him.[7] A city judge in Louisiana flipped a coin as he ruled on cases.[8] A Florida circuit court judge was accused of conspiracy to sell 1500 pounds of marijuana.[9] A devoutly religious municipal court judge in California gave convicted defendants the option of being sent to jail or attending church, and he publicly stated his doubt that defendants not of his religion would "get anything out of" religious services.[10] An Oklahoma municipal court judge advised defendants that they were guilty unless they could prove their innocence by an independent witness; the judge never conducted a single trial.[11] Two circuit judges in Florida were indicted for paying bribes to protect a flourishing gambling and prostitution business.[12]

Ethical standards have been in effect for many years. The American Bar Association recommended in 1909 the adoption of the Canons of Judicial Ethics and, in 1972, the Code of Judicial Conduct, which is in force in nearly all states and embodies a variety of prohibitions — both general and specific. Judges traditionally have been cautioned to avoid any conduct which creates an appearance of impropriety, is unbecoming a judge or demeans the judiciary. These and other ethical standards have been interpreted as constituting a high level of conduct expected of judges. It has been accepted dictum that because of their unique positions, judges must conduct themselves on and off the bench in a manner that promotes confidence in themselves and is beyond reproach.

The procedures used to enforce these ethical standards have changed

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A Texas Supreme Court justice was indicted for perjury and forgery, and reportedly plotted to kill a witness before him.

dramatically in recent years. The traditional procedure of impeachment has been recognized as so cumbersome and wasteful that it has been rarely invoked. Generally, impeachment charges are brought by vote of one legislative chamber and heard by the other chamber; in New York State, for example, if a judge is impeached, a majority of the members of the State Senate and the Court of Appeals must preside.[12] It seems fair to speculate that if impeachment were the only method to remove state judges, few if any removal proceedings would be commenced; if they were, state government would be adversely affected.

BECAUSE of the growing concern of the public, the heightened sensitivity to ethical standards of public officials generally, and skepticism towards older methods of investigating judges, disciplinary procedures have been sought which would be more effective and give the public greater confidence in the integrity of the investigations.

In 1961, California established the first commission in the country to receive complaints against judges in a state court system, conduct investigations and hearings, and make specific recommendations to the state's Supreme Court for discipline or mandatory retirement. The commission's membership was composed of five judges, two lawyers and two lay people, and assisted by a full-time executive officer.[14]

Five years later, six other states created similar agencies, and by 1974, 38 states had established state commissions on judicial conduct. Today, according to the American Judicature Society, there are commissions in 48 states, the District of Columbia and Puerto Rico.[15]

Functions. All commissions are empowered to receive complaints, dismiss those which are without merit or do not state grounds for discipline or retirement, and investigate those which allege misconduct or disability. In 38 states, commissions have authority to investigate complaints, conduct due process hearings, and make recommendations for discipline (i.e., removal from office, suspension, or censure) or mandatory retirement. This combined set of functions has been described as a one-tier system.

In the few states that use a two-tier system, the role of the commission ceases after the investigation is completed and a finding is made that a judge should be served with charges.[16] Hearings are then conducted by special courts which render final determinations and discipline.

Judicial independence occasionally presents difficult problems.

In New York, a recent amendment to the state constitution significantly expanded the authority of the State Commission on Judicial Conduct and brought New York into line with most other states.[17] Prior to April 1, 1978, the New York commission investigated complaints, had limited disciplinary authority, and, when it believed removal to be an appropriate sanction, recommended charges to a special court on the judiciary. Hearings were conducted by referees appointed by the court, which had authority to impose disciplinary sanctions. Under the new constitutional amendment, the New York commission is authorized to conduct all hearings and determinations of admonition, censure and removal subject to review by the Court of Appeals upon request of the respondent judge.

Composition of Memberships. In most jurisdictions, judges, lawyers and public members serve on commissions. In some states, the membership is divided by law equally among these three groups. In Illinois, only two of nine members may be judges. In New York, no more or less than four of eleven members may be judges. Other states provide for judges to be in the majority; the Ohio agency (which handles complaints against judges and lawyers) has a membership of all lawyers, and three other states (South Carolina, Tennessee and Utah) do not provide for public members.

Funding. The funding of commissions varies greatly and determines to a large extent the thoroughness of investigations and the degree to which these agencies act on their own motion without receiving complaints. Most commissions receive less than $50,000 per year and depend upon already busy, court administrative staff to screen complaints and conduct inquiries. Only eight commissions have annual budgets exceeding $100,000.[18] Some commissions, such as the one in California, draw upon staff of the State Attorney General's office to investigate complaints and present evidence at hearings. Approximately half of the commissions retain attorneys in private practice to present evidence at hearings; the others either rely upon attorneys assigned by the State Attorney General's office or their own full-time staff.[19]

Complaints Last year, the Hawaii and Ohio commissions each received one complaint.[20] During the same period, the New York commission considered 950 complaints, including those initiated by the commission.[21] Quite obviously, the number of complaints received against judges is not related to the quality, performance or ethical conduct of the judiciary in any particular state. Complaints are submitted to commissions that are visible to the public. If the public is unaware of a commission's existence, it follows that few complaints will be made.

Moreover, some commissions seem to be more receptive than others to receiving complaints. Procedures vary. Some commissions accept only formal complaints (i.e., by use of special forms and the requirement that a complaint be sworn, written, or both), while others permit complaints to be made in any reasonable manner. Obviously, making it more difficult to submit complaints will result in fewer complaints being made.

The American Judicature Society has reported that approximately 80 percent of the commissions each received less than 100 complaints last year.[22] It has also been estimated by AJS that approximately 60 percent of all complaints are made by litigants, eight percent by lawyers and two percent by judges. The majority of all complaints received are dismissed either upon initial review or after investigation.

THE GROWTH of commissions to investigate judges has not been without controversy. Judges have been in the forefront, but not alone, in expressing the view that commissions on judicial conduct violate the rights of judges and impinge upon the exercise of judicial discretion. The experience over the past few years does not bear out this criticism.

Judges' Rights. Basic due process rights have been applied by the courts over the past few decades in proceedings involving attorney grievances and the disciplining of teachers, members of the uniformed services and other civil servants. The right to written, detailed charges, counsel, a hearing, and cross-examination have long been recognized as essential procedures in disciplinary proceedings. Thus, there is ample precedent for procedures employed for judges' disciplinary proceedings.

Ethics Standards Tighten For Nation's Judiciary

Although analogies have sometimes been drawn to the criminal law, there is no dispute that public officers facing disciplinary charges have fewer procedural rights and privileges than defendants in criminal proceedings.[19] It is generally accepted that although judges should have *some* of the same procedural rights as defendants in criminal proceedings, there is no justification for respondents to have greater rights in disciplinary proceedings than defendants have in criminal proceedings.

One valid measure of whether judges' rights have been denied in disciplinary proceedings is the body of reported court decisions which have considered challenges to commission procedures brought by judges under investigation or charges. Such challenges have been distinctly unsuccessful.

The "one tier" system, in which the same agency investigates and adjudicates, has been upheld despite criticism by respondent judges that commission members who participate in investigations are biased and should not sit in an adjudicative capacity. In upholding the constitutionality of the same agency performing functions of investigation and adjudication, the courts have relied upon the traditional administrative agency model. The Michigan Supreme Court observed in *Matter of Del Rio*[20] "[T]he authority is legion in support of the proposition that combining the investigative and adjudicative roles in a single agency does not necessarily violate due process in administrative adjudications such as judicial fitness hearings."

The New York State Court of Appeals in *Friedman v. State*[21], also upheld the dual function given to a Court on the Judiciary to prefer charges and adjudicate those charges: "[L]ike an administrative agency which may remove an employee for cause, where a combination of functions is traditional, so too that combination of functions may, consonant with due process, exist in the Court on the Judiciary." (24 N.Y.2d at 543-44.)

Charges based upon broad ethical standards (i.e., the appearance of impropriety, conduct unbecoming a judge) have been challenged as being unconstitutionally vague. These challenges have failed. Obviously, ethical standards cannot possibly be as detailed as a penal code. In *Sarisohn v. Appellate Division*[22] a federal district court reasoned, "It would be impossible to enumerate in any statute all the possible grounds and circumstances justifying the removal of a judicial officer. Guidelines may be found in the Canons of Ethics, applicable to both attorneys and judges ... and also in the general moral and ethical standards expected of judicial officers by the community."

Judges charged with fixing traffic tickets in New York State argued recently that because the Code of Judicial Ethics does not specifically prohibit such conduct these judges were not on notice that the conduct was improper. The Court on the Judiciary rejected the argument, stating: "It is wrong and has always been wrong."[23]

Demeanor during trial may result in disciplinary action.

A fact-finding hearing "in the substantial sense," without "technical" requirements, has been recognized as meeting due process standards.[24] Commissions, however, have provided substantive and procedural protections beyond those guaranteed by the federal constitution and statutes.[25] Although technical rules of evidence generally may be waived by a referee, the evidence generally is presented in conformity with courtroom standards. Pretrial discovery is provided and factual allegations are detailed so that a respondent knows precisely what he is charged with.

In New York, numerous, wide ranging challenges to commission procedures have been rejected in the courts. In every instance where lack of due process or unfairness has been alleged, the commission's procedures have been upheld in the courts. Invariably, it has been demonstrated that those who challenged existing procedures were seeking a significant expansion of rights unavailable to respondents in similar proceedings and, in many instances, even to defendants in criminal proceedings.

The courts have refused to provide rights to judges under investigation where no precedent exists for such rights. Some of the relief sought which has been denied included: the right to a hearing prior to a decision to serve charges;[26] the right to be notified of an investigation before it commences;[27] the right to discovery during investigations and prior to receiving charges;[28] and the right to subpoena witnesses and take testimony prior to a hearing.[29]

Concerns about procedures employed by commissions prompted the Appellate Judges Conference of the American Bar Association to establish a committee to consider procedures used in the investigation and discipline of judges. In February, 1978, the ABA House of Delegates approved the committee's standards which, if adopted by the states, would govern commission procedures and the rights extended to judges under investigation and charges.[30] In the main, these standards set forth balanced procedures from the receipt of a complaint to the making of a recommendation to the state's highest court.

Regrettably, the final ABA product is marred by the addition of two unprecedented procedures which would have an adverse impact on the effec-

A judge has broad discretion to act and in doing so within reason and good faith should have no apprehension of being disciplined.

tiveness of commissions. The first is the right of a judge to subpoena witnesses and records *piror to a commission decision to serve charges.*[35] Thus, under the label of "discovery," an undefined right to subpoena would be made available. No further refinements or limitations are offered, including where, when and before whom the subpoena is returnable. Nor is it clear what purpose is served by such a grant of power to a person under investigation since no "accusatory" instrument has been filed and no adjudicative proceeding has been commenced. (Of course, every jurisdiction provides subpoena power for purposes of presenting testimony at an adversary hearing on stated charges.)

The second unprecedented procedure suggested, entirely apart from the power of a respondent to issue subpoenas during the investigation, is a "hearing" to enable the respondent judge to persuade the commission that charges should not be filed.[36] Apparently, under such a plan, two adversary hearings would be necessary: a pre-hearing hearing and a hearing on stated charges

The effect of giving full subpoena power to the person under investigation and allowing a hearing prior to the fact-finding hearing on stated charges would be to delay significantly the ultimate hearing and decision. Moreover, witnesses could be intimidated and a fair result would be more difficult to obtain.

Neither the ABA Committee nor the standards offer any explanation why the rights of judges should be so greatly enlarged over the rights of others in similar situations. These controversial provisions are not likely to be adopted in view of their deleterious effect upon the functioning of a balanced disciplinary system.

SOME JUDGES have suggested that commission impair judicial "independence." A definition of the term seems necessary to understand the concerns expressed. Certainly, an active commission will present some check on the conduct of judges. Educating judges, making them more cognizant both of their ethical obligations and what constitutes misconduct, should be a goal of every commission. Judges do not have complete independence, free of all restraints, notwithstanding the view expressed by Chief Justice John Marshall (in approximately 1830) that a (federal) judge is "completely independent" and answerable only to "God and his conscience."[37]

The Canons of Judicial Ethics and the Code of Judicial Conduct have represented, for nearly 70 years, some impingement on the right of a judge to act. No judge expects to have the right to do anything he wishes, and no reasonable person will suggest that a judge should have the independence or discretion to engage in violations of the *judicially-approved* ethical standards. Commissions have come under criticism largely because they enforce the standards, and judges may not be accustomed to this relatively new enforcement effort.

There is no issue of judicial independence presented with respect to most matters for which judges are disciplined or asked to explain their conduct. There is a clear distinction in most instances between alleged misconduct and a judge's discretion and authority. A judge who is not courteous or patient violates a specific canon of the Code of Judicial Conduct and may be disciplined for his misconduct, assuming appropriate findings are made by the commission in accordance with approved procedures. The same holds true, for example, for a judge who engages in inappropriate financial or business dealings, presides over cases when his disqualification is mandated by the applicable ethical standards, or participates in political affairs which are specifically prohibited.

The claim of judicial independence occasionally is raised to justify the most flagrant misconduct, as in the case of judges in New York State charged with fixing traffic tickets — making requests for favorable dispositions on their judicial stationery for friends and relatives and acceding to such requests. They argued that such conduct was "plea bargaining" and, therefore, had been sanctioned by the courts. Obviously, their claims were rejected by New York's courts,[38] but the defense of "judicial independence" raised to rebut ticket fixing charges demonstrates the absurd extent to which some would use this claim to avoid responsibility for misconduct.

With respect to a small percentage of complaints investigated by commissions, it may be necessary to assess a judge's decision or his conduct in applying the law. When some improper influence is apparent, or alleged with sufficient details, an investigation should be conducted. This, apparently, is a source of irritation to judges. A judge who has not been improperly influenced may especially resent such an inquiry, notwithstanding the existence of a sufficient basis for the commission to inquire.

A judge has broad discretion to act and in doing so within reason and in good faith should have no apprehension of being investigated or disciplined. Commissions do not investigate judges for the correctness of their rulings or decisions and do not purport to act as an appellate court. Most complaints are dismissed precisely because they fail to raise issues of misconduct. Thus, commissions uphold the judiciary's independence. In fact, when a highly unpopular ruling, decision or exercise of discretion gives rise to a complaint or adverse publicity, a commission's refusal to take action promotes the cause of judicial independence.

Commissions must and, presumably, do exercise great caution in conducting inquiries. A litigant up-

set with the result of a judge's ruling may frame a complaint in the language of an ethical standard. The fact that the majority of complaints received are dismissed reflect the awareness by commissions that the thrust of most complaints concern the proper exercise of judicial discretion.

A judge who allegedly "ignored" certain testimony a routine complaint — obviously made the type of judgment that is supposed to be made. Similarly, unsupported allegations of corruption or bias are not, and should not be, investigated in the absence of some available evidence or, at the very least, a specific set of identifiable circumstances which can be examined. Similarly, alleged incompetence is usually nothing more than an allegation that a judge's ruling or decision was wrong. Commissions become expert in assessing complaints and they reject out of hand any request for an inquiry which is more properly the basis of an appeal.

On the other hand, an investigation should not automatically be barred simply because an allegation of misconduct may also form the basis of an appeal.

A judge's demeanor during a trial may result in a reversal of a judgment as well as a disciplinary sanction. Even the most serious misconduct (i.e., corruption) may be a proper basis of both reversal by an appellate court and a disciplinary proceeding by a judicial conduct commission. Similarly, failure to disqualify may give a commission and an appellate court jurisdiction over a judge's conduct. Both statutory law and ethical

Repeated violations of law constitute judicial misconduct.

standards may be applicable. Whether a commission should take jurisdiction may depend in part on how clear a violation it was for the judge to preside. Surely, there would be cause for both complaint to a commission and further judicial review or an appeal when a litigant discovers that a judge had a financial interest in a case, was related to the other party or one of the attorneys, or was entertained by the other party shortly before the trial.

THE SUBJECT of judicial independence occasionally presents difficult problems. The Code of Judicial Conduct provides that a judge must "comply with the law." No commission would employ this language to discipline a judge simply for a wrong decision, a misapplication of the law or abuse of discretion.

A Court on the Judiciary censured a judge for his failure to comply with the law when he compelled defendants in criminal proceedings to contribute to the judge's favorite charities.[39] The Oklahoma judge who declared that all defendants are guilty unless proven innocent by their independent witnesses would have given a commission jurisdiction to investigate him if he had not resigned from office.[40] When a judge renders a judicial decision which grossly distorts the law, the conduct may suggest lack of fitness to serve as a judge. Admittedly, the line may be difficult to draw in every case, but surely, within the range of misapplications of the law and abuses of discretion, there are a relatively few that constitute misconduct. Among the many judges who serve are some who have not been trained in the law, and among these people are a few who render decisions and apply procedures which, sometimes, are foreign to American jurisprudence.

The same judge who compelled charitable contributions from defendants in his courtroom also sentenced to jail terms three defendants *in his law office* without advising either the district attorney or their attorney to be present.[41] He subsequently testified that he was not aware of their absence. The New York commission recommended that he be charged in a disciplinary proceeding for this and other alleged misconduct concerning the events in his law office. Following a hearing, a Court on the Judiciary disagreed with the commission in part and ruled that the sentencing procedure did not constitute misconduct, although the judge was censured for other misconduct that occurred during the sentencing.

Judges have traditionally been subject to discipline for refusing to comply with the law. In *Matter of Bolte*,[42] the New York Appellate Division, First Judicial Department, in 1904 set forth the distinction between making an erroneous decision and misconduct. That court, in removing a judge, stated; "A judicial officer may not be removed for merely making an erroneous decision or ruling, but he may be removed for *willfully* making a wrong decision or an erroneous ruling or for a reckless exercise of his judicial functions without regard to the rights of litigants . . ."

Similarly, in *Matter of Quigley*,[43] a police justice was removed for intentionally disregarding evidence that striking employees had engaged in acts of violence. The court viewed the police justice's conduct as an intention to violate his official duties.

In finding insufficient basis to remove a judge, the New York Appellate Division, Second Judicial Department, in 1904 held that the evidence failed to establish an intention to violate the law or a persistent and apparently intentional disregard of well-known legal rules.[44] In 1977, the New York Appellate Division, Second Judicial Department, removed a judge whose conduct demonstrated either "an unwillingness or inability . . . to diligently discharge his adjudicative and administrative responsibilities."[45] The Florida Supreme Court recently censured a judge who refused to comply with certain laws with which he disagreed.[46]

Thus, intentional disregard of law or a reckless exercise of judicial functions has always been a basis for discipline.

A controversial ruling in Illinois revealed some difference of opinion on the authority of commissions. The Illinois commission brought charges before a Board of Judges (in a two-tier system) against a judge who compelled defendants in his courtroom to have haircuts. Both the commission *and* the Board of Judges deemed such conduct to violate ethical standards and to constitute a gross distortion of judicial power. The board, in finding that respondent had engaged in misconduct, reasoned that an applicable Illinois statute did not permit such conditions to be imposed upon defendants by trial judges.

The Illinois Supreme Court, in *Harrod v. Illinois Courts Commission*,[47] set aside the one-month suspension on the grounds that the Board of Judges that suspended the respondent exceeded *its* authority when it evaluated the respondent's conduct "in light of its own statutory interpretation." The court noted that the board, in making its determination, interpreted an Illinois statute that had not been interpreted by the appellate courts and, in doing so, took upon itself a power limited solely to the judiciary. The Illinois Supreme Court distinguished between law which is "clear on its face" and law which is not clear and has not yet been interpreted by the courts.

Significantly, the Illinois court stated that under different circumstances, the respondent might have been subject to discipline. The court said, ". . . where the law is clear on its face, a judge who repeatedly imposes punishment not provided for by law is subject to discipline by the commission . . . regardless of whether he believes the form of punishment will have a beneficial corrective influence."[48]

Thus, the *Harrod* case reinforces the principle that repeated violations of law (that is "clear on its face") constitutes misconduct.

Among the concerns raised by judges, surely the most valid in theory is the possible effect of commission overreach on the independence of the judiciary. A closer assessment, however, of commission procedures, the limitations on the authority of commissions and the record to date, provides no reasonable basis for such apprehension.

There are gray areas about which reasonable people will disagree as to a commission's jurisdiction. In the final analysis, since judges serve on commissions, and sanctions must be approved or implemented by a state's highest court or a special court of appellate judges, the judiciary itself plays an important role in the process.

Eight commissions have budgets exceeding $100,000.

and this should ensure that judicial independence is preserved.

Applying due process standards to judicial disciplinary proceedings helps protect judicial independence and is designed to avoid unfairness to a judge under charges. The concepts of fairness and due process are not inflexible, however. A judge found guilty of misconduct is not in danger of losing his freedom, and, hence, should not receive all of the protections guaranteed to defendants in criminal proceedings.

In assessing a judge's conduct, it should not be necessary to establish criminal intent or venality as in the case of a criminal trial. Commissions on judicial conduct have not been established solely to identify *criminal* conduct. An entire range of non-criminal misconduct is addressed by the applicable ethical standards. Indeed, if convictions for criminal offenses were intended to be the only standard for unacceptable judicial conduct, it would have been wiser and more economical to have relied on established prosecuting agencies and the criminal forum generally.

The primary responsibility of commissions is to balance flexible due process standards with the public's need and demand to have men and women as judges who can abide by the established ethical standards. In striking this balance, more must be done to consider whether individual judges are fit to serve in this exalted position of public trust and exercise the awesome power of a judge.

A judge may be properly acquitted of a crime but the nature of the underlying misconduct involved may not be fit to serve as a judge. Obviously, applying criminal law standards and rationale to disciplinary proceedings would violate the letter, spirit and intent of the ideals set forth in the Code of Judicial Conduct.

Too often in considering the seriousness of judicial misconduct the rubric has been used that there was no "venality." Recently, courts on the judiciary, in assessing the seriousness of fixing of traffic tickets — conduct that is anathema to the ideal of impartiality in deciding cases — stressed that the respondents had not received money for their judicial decisions.[49] Other courts have also justified the retention in office of judges on the grounds that there was no venality established.[50]

Obviously, if there is evidence that a judge receives money for a decision, a classic corruption case is established. The absence of corruption should not enure to the respondent's benefit in a removal proceeding. The public deserves and requires more

A Louisiana judge flipped a coin to decide cases.

from judges than an unwillingness to be corrupt in the classic sense. Judges must also be ethical, and *serious* violations of ethics should result in loss of their judicial positions. Both the courts and commissions should give greater weight to the public's interest in disciplinary proceedings.

In some of the reported cases in which judges have been disciplined or retired for disability, the records are so replete with conduct inimical to standards of ethics and good taste, that the question may fairly be raised whether disciplinary action should have been taken sooner. In several cases there is revealed a substantial pattern of serious misconduct or mental disability which must have been known, and should have come to light, years earlier.

In *Matter of Del Rio*, [51] several categories of serious misconduct are set forth to justify a five-year suspension. Each category is supported by numerous instances of established misconduct. A reading of the court's decision is apt to suggest that such a litany of incidents should not be required to justify the result. It may reasonably be argued, in fact, that the proof adduced in that case of any single category should have been sufficient to remove the judge from office.

A similar conclusion may be drawn with respect to reported mental disability cases In the highly-publicized *McComb*[52] case, the record reveals that the judge's conduct should have led to disability proceedings several years earlier. In fact, the judge was declared mentally incompetent in court proceedings brought by his wife several months before he was found to be disabled as a judge and retired for disability.

Similarly, in proceedings brought in Ohio,[53] a judge was retired for mental disability following several years of unusual conduct. His psychiatrist testified that three years prior to the commission hearing, and during the period that he was a judge, he believed he was the President of the United States and a four-star general.

Surely, these and other cases indicate that commissions may be laboring under too great a burden in establishing that a judge should be removed or retired.

The establishment of a commission with a representative membership is an excellent beginning, but it should be given the resources to be effective. Moreover, it should be committed to identify serious misconduct, through fair and balanced procedures, and take appropriate action, with the support of the court that has final jurisdiction over the discipline of judges, to protect the judiciary, the bar and the public from those relatively few individuals who have demonstrated a lack of fitness to be judges.

(1) "Judge faces censure for rape case comment," Rochester Democrat and Chronicle, June 5, 1977, p.6A, c.2-3; "4000 Sign Petition for Recall of Judge Who Said Women Provoke Sexual Assault," Buffalo Evening News, June 16, 1977, p.14, c.1-4. Recent stories carried over the wire services also concerned statements by two judges impugning women victims of sexual attacks. "Chief of Utah Bar Backs Rape Sentence Rejection," N.Y. Times, Dec. 31, 1978, p.20, c.4; "Women denounce judge," The White Plains (N.Y.) Reporter Dispatch, Jan. 13, 1979, p.1, c.1.

(2) "Leading Judge in Massachusetts Suspended in Inquiry on Conduct," N.Y. Times, April 14, 1978, p.A12, c.1; "Massachusetts Panel Urges Ouster of Chief Justice," N.Y. Times, Aug. 1, 1978, p.A10, c.4; "Censured Judge in the Bay State Resigning Post," N.Y. Times, Aug. 4, 1978, p.A15.

(3) "California Justice Fights Retirement," N.Y. Times, p.53, c.1; "California Judicial Panel Recommends Removal of State Supreme Court Judge Because of Senility," N.Y. Times, Jan. 8, 1977, p.8, c.3; "California Justice, Called Senile, Is Ordered by Tribunal to Retire," N.Y. Times, May 3, 1977, p.26, c.3-4.

(4) "78 Year Old Judge Persists Despite Opposition by Government," N.Y. Times, Oct. 13, 1977, p.A18, c.4.

(5) "Now, the States Crack Down on Bad Judges," U.S. News & World Report, March 13, 1978, p.63.

(6) "Woman Judge (& Lap Dog) Are Bounced," N.Y. Daily News, July 11, 1975, p.26, c.1; N.Y. Times, July 11, 1975, p.8, c.1-2; Student Lawyer Magazine, March 1977, p.19.

(7) "Texas High Court Justice Indicted On Counts of Perjury and Forgery," N.Y. Times, July 1, 1977, p.A8, c.1-2. "Now, the States Crack Down on Bad Judges," U.S. News & World Report, March 13, 1978, p.63.

(8) "Flip-a-coin justice criticized," Albany Knickerbocker News, June 16, 1976, p.2-A,c.1-2.

(9) "Florida judge ousted," Rochester Democrat and Chronicle, Sept. 16, 1978, p.5A, c.1-2

(10) "Bible-toting Fresno judge seeks to merge God and government," The White Plains (N.Y.) Reporter Dispatch, June 18, 1977, p.A13, c.1.

(11) "Judge Who Curbed Trials Forced Out," N.Y. Times, May 4, 1975, p.49, c.1.

(12) "2 judges accused of racke'eering," Syracuse Herald Journal, Nov. 12, 1977, p.3, c.1.

(13) N.Y. Constitution, Art. 6, Section 23 (McKinney Supp. 1978-79).

(14) The establishment of the California Commission has been described in several articles by its Executive Officer, Jack Frankel. See, Frankel, "Judicial Conduct & Removal of Judges For Cause in California," 36 So.Cal. L.Rev.72 (1962); Frankel, "Removal of Judges: California Tackles an Old Problem," 49 A.B.A.J. 166 (1963); "The Case for Judicial Disciplinary Measures," 49 J.Am.Jud. Soc. 218 (1966).

(15) The American Judicature Society has been actively involved in the development of judicial conduct commissions. It has sponsored national conferences and provided information and assistance to states interested in establishing a commission. Based upon responses to a questionnaire submitted to all commissions, the American Judicature Society recently distributed a publication, "Judicial Conduct Organizations," by Irene A. Tesitor. Data with respect to the commissions is provided in Ms. Tesitor's valuable compilations.

(16) Two-tier systems have been established in Alabama, Delaware, Hawaii, Illinois, New Jersey, Oklahoma, West Virginia, and Wisconsin. Tesitor, "Judicial Conduct Organizations," American Judicature Society, 2 (Oct. 1978). Ohio also has a two-tier system, although it may not meet the definition of a commission-system because the investigating authority is vested in a bar association committee of lawyers which investigates lawyers and judges.

(17) N.Y. Constitution, Art.6, Section 22 (McKinney Supp. 1978-79).

(18) Information obtained from American Judicature Society.

(19) "Judicial Conduct Organizations," *supra note 16, at 9 n. 16.*

(20) Id. at 5.

(21) *Id* See generally, 1978 Annual Report, New York State Commission on Judicial Conduct (Jan. 1978).

(22) "Judicial Conduct Organizations," *supra* note 16, at 5.

(23) *Matter of Kane v. Rudich*, 256 A.D. 586, 10 N.Y.S.2d 929 (2nd Dept., 1939).

(24) 400 Mich. 665, 690, 256 N.W.2d 727 (1977).

(25) 24 N.Y.2d (1969).

(26) 29 A.D.2d 91 (2d Dept. 1967), aff'd 22 N.Y.2d 808 (1968).

(27) *Matter of Byrne*, 179 N.Y.L.J. 5, April 20, 1978, (Ct. on the Judiciary 1978).

(28) *Matter of Waltemade*, 37 N.Y.2d(a), (nn) (Ct. on the Judiciary 1975).

(29) The New York State Commission on Judicial Conduct, for example, has provided broader pre-charge discovery and notice (prior to requiring a judge's explanation) than guaranteed by law. A Commission rule provides that the rules of evidence shall be those applicable in a civil, non-jury proceeding despite the fact that the statute is less restrictive. The New York Commission has never proceeded to charges without hearing a judge's explanation prior to the decision to serve charges, and in New York, the governing statute does not provide such a right. In *Matter of Del Rio*, supra note 24, the Court pointed to various procedural rights provided by the Michigan Commission that were not granted by law.

(30) *Polonsky v. Commission*, Sup. Ct., 3d Jud. Dist., Jan. 11, 1978 (unreported).

(31) *Id.*

(32) *Matter of Lips*, 178 N.Y.L.J. 10, May 9, 1978 (Ct. on the Judiciary 1978).

(33) *Matter of Vaccaro*, 42 N.Y.2d (a) (Ct. on the Judiciary 1977); motion unreported July 28, 1976

(34) "Tentative Draft, Standards Relating to Judicial Discipline and Disability Retirement," Joint Committee on Professional Discipline, American Bar Association (Dec. 1977) (hereinafter, "ABA Standards").

(35) ABA Standards, Section 4.16.

(36) ABA Standards, Section 4.14. Two members of the ABA Joint Committee reported on November 11, 1978, to the Sixth National Conference for Judicial Conduct Organizations, sponsored by the American Judicature Society, that the language in this section providing for a "hearing" is a typographical error. The A.B.A. House of Delegates approved that controversial section with the typographical error. Thus, the status of this recommended procedure is in great doubt. Significantly, the Joint Committee is in the process of promulgating rules to supplement the proposed standards. The draft rules dated Nov. 9, 1978, eliminate the term "hearing," but describe a procedure (called a "meeting") which seems to be a hearing. The "meeting" is based upon a confrontation with the complainant, testimony is contemplated, the judge is represented by counsel, and witnesses may be subpoenaed. Obviously, changing the term "hearing" to "meeting" is not a change in substance. Hopefully, an attempt will be made to seek a change in substance in the controversial provisions of the ABA Standards.

(37) Parker, "The Judicial Office in the United States," 20 Tenn L.Rev. 703, 706 (1949).

(38) *Supra* note 30; *O'Connor v. Commission*, Sup. Ct., 3d Jud. Dist., March 28, 1978 (unreported).

(39) *Matter of Richter*, 42 N.Y.2d (aa) (1977).

(40) *Supra* note 11.

(41) *Supra* note 35.

(42) 97 A.D. 551, 90 N.Y.S. 499 (1st Dept. 1904).

(43) 32 N.Y.S. 828 (Sup. Ct. 1895).

(44) *Matter of Tighe*, 97 A.D. 28, 89 N.Y.S 719 (2d Dept. 1904).

(45) *Matter of MacDowell*, 57 A.D. 2d 169, 393 N.Y.S 2d 748 (2d Dept. 1977)

(46) *In re Inquiry Concerning a Judge (Taunton)*, 357 So.2d 172 (Fla. 1978).

(47) *People ex. rel. Harrod v. Illinois Courts Commission*, 372 N.E.2d 53 (Ill. 1977).

(48) *Id.* at 65.

(49) *Matter of Kuehnel et al*, N.Y.2d (Ct. on the Judiciary 1978).

(50) *Matter of Richter*, *supra* note 39; *Matter of Vaccaro*, *Supra* note 32.

(51) *Supra* note 24.

(52) *Supra* note 3; *McComb v. Superior Court*, 68 Cal. App.3d 89 (1st Dist. 1977).

(53) *Ohio St. Bar Assn v. Mayer* 54 Ohio St 2d 431, 377 N.E.2d 770, cert. denied, 47 L.W. 3408 (1978). The brief in opposition (p. 10), in the United States Supreme Court, sets forth the judge's mental history, including a finding by the judge's medical witnesses that he has a permanent manic depressive psychosis for which he was hospitalized, five years earlier, during the time he was a judge.

MISCELLANEOUS

CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES

Approved by the
Judicial Conference of the United States

PART I. CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES 1/

CANON 1

A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

1/ By resolution of the Judicial Conference of the United States this Code has been made applicable to Bankruptcy Judges and to United States Magistrates.

CANON 2

A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITES

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

COMMENTARY

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The testimony of a judge as a character witness injects the prestige of his office into the proceeding in which he testifies and may be misunderstood to be an official testimonial. This Canon, however, does not afford him a privilege against testifying in response to an official summons.

CANON 3

A JUDGE SHOULD PERFORM THE DUTIES OF HIS OFFICE IMPARTIALLY AND DILIGENTLY

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

COMMENTARY

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex-parte or other

communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

COMMENTARY

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite him to file a brief amicus-curiae.

(5) A judge should dispose promptly of the business of the court.

COMMENTARY

Prompt disposition of the court's business requires a judge to devote adequate time to his duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with him to that end.

(6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

COMMENTARY

"Court personnel" does not include the lawyers in a proceeding before a judge. The conduct of lawyers is governed by DR7-107 of the Code of Professional Responsibility.

(7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions. A judge may authorize the use of electronic or photographic means for the presentation of evidence, or for the perpetuation of a record.

B. Administrative Responsibilities

(1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilites of other judges and court officials.

(2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

COMMENTARY

Disciplinary measures may include reporting a lawyer's misconduct to an appropriate disciplinary body.

(4) A judge should not make unnecessary appointments. He should excercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.

COMMENTARY

Appointees of the judge include officials such as referees, commissioners, special masters, receivers, guardians, and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

C. Disqualification

(1) A judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;
(ii) is acting as a lawyer in the proceeding.

COMMENTARY

The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "his impartiality might reasonably be questioned" under Canon 3C(1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii) may require his disqualification.

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding;

(e) he has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system;

COMMENTARY

According to the civil law system, the third degree of relationship test would, for example, disqualify the judge if his or his spouse's father, grandfather, uncle, brother, or niece's husband were a party or lawyer in the proceeding, but would not disqualify him if a cousin were a party or lawyer in the proceeding.

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(d) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

D. (This provision which permitted a remittal of disqualification was deleted from the Code by the Judicial Conference in March 1975. Since that date a remittal of disqualification is not permitted under any circumstances.)

CANON 4

A JUDGE MAY ENGAGE IN ACTIVITIES TO IMPROVE THE LAW, THE LEGAL SYSTEM, AND THE ADMINISTRATION OF JUSTICE

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

A. He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

C. He may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund-raising activities. He may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

COMMENTARY

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement

of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that his time permits, he is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

Extra-judicial activities are governed by Canon 5.

CANON 5

A JUDGE SHOULD REGULATE HIS EXTRA-JUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH HIS JUDICIAL DUTIES

A. Avocational Activities. A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.

COMMENTARY

Complete separation of a judge from extra-judicial activities is neither possible nor wise; he should not become isolated from the society in which he lives.

B. Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or will be regularly engaged in adversary proceedings in any court.

COMMENTARY

The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which he is affiliated to determine if it is proper for him to continue his relationship with it. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

(2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of his office for that purpose, but he may be listed as an officer, director, or trustee of such an organization. He should not be a speaker or the guest of honor at an organization's fund-raising events, but he may attend such events.

(3) A judge should not give investment advice to such an organization, but he may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

COMMENTARY

A judge's participation in an organization devoted to quasi-judicial activities is governed by Canon 4.

C. Financial Activities

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as an officer, director, active partner, manager, advisor, or employee of any business other than a business wholly owned by members of the judge's family all of whom are related to the judge or his or her spouse within the third degree of relationship calculated according to the civil law system.

(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.

(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or

other person whose interests have come or are likely to come before him, and, if its value exceeds $100, the judge reports it in the same manner as he reports compensation in Canon 6C.

(5) For the purposes of this section "members of his family residing in his household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of his family, who resides in his household.

(6) A judge is not required by this Code to disclose his income, debts, or investments, except as provided in this Canon and Canons 3 and 6.

COMMENTARY

Canon 3 requires a judge to disqualify himself in any proceeding in which he has a financial interest, however small; Canon 5 requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of his judicial duties; Canon 6 requires him to report all compensation he receives for activities outside his judicial office. A judge has the rights of an ordinary citizen, including the right to privacy of his financial affairs, except to the extent that limitations thereon are required to safeguard the proper performance of his duties. Owning and receiving income from investments do not as such affect the performance of a judge's duties.

(7) Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.

D. Fiduciary Activities. A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of his family, and then only if such service will not interfere with the proper performance of his judicial duties. "Member of his family" means any relative of a judge by

blood, adoption, or marriage or any other person treated by a judge as a member of his family who resides, or has resided, in his household.

COMMENTARY

Mere residence in the household of a judge is insufficient for a person to be considered a member of the judge's family for purposes of this canon. The person must not only be treated by a judge as a member of his family but must have resided in the judge's household for a sufficient length of time and under such circumstances as to make it apparent that it was his principal place of abode.

As a family fiduciary a judge is subject to the following restrictions:

(1) He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which he serves or one under its appellate jurisdiction.

COMMENTARY

The Effective Date of Compliance provision of this Code qualifies this subsection with regard to a judge who is an executor, administrator, trustee, or other fiduciary at the time this Code becomes effective.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.

Rev. 4/78

COMMENTARY

A judge's obligation under this Canon and his obligation as a fiduciary may come into conflict. For example, a judge should resign as trustee if it would result in detriment to the trust to divest it of holdings whose retention would place the judge in violation of Canon 5C(3).

E. Arbitration. A judge should not act as an arbitrator or mediator.

F. Practice of Law. A judge should not practice law.

G. Extra-Judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice, unless appointment of a judge is required by Act of Congress. A judge should not, in any event, accept such an appointment if his governmental duties would interfere with the performance of his judicial duties or tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary. A judge may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

COMMENTARY

Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extra-judicial assignments. The appropriateness of conferring these assignments on judges must be reassessed, however, in light of the demands on judicial manpower created by today's crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary.

Rev. 4/78

The dangers attendant upon acceptance of extra-judicial governmental assignments are ordinarily less serious where the appointment of a judge is required by legislation. Such assignments ordinarily do not involve excessive commitments of time, and they typically do not pose a serious threat to the independence of the judiciary. Moreover, it is hardly the function of a Code of Judicial Conduct to compel judges to refuse, without careful regard to the circumstances, tasks Congress has seen fit to authorize as appropriate in the public interest. Accordingly, although legislatively prescribed extra-judicial assignments should be discouraged, where Congress requires the appointment of a judge to perform extra-judicial duties, the judge may accept the appointment provided that his services would not interfere with the performance of his judicial responsibilities or tend to undermine public confidence in the judiciary.

CANON 6

A JUDGE SHOULD REGULARLY FILE REPORTS OF COMPENSATION RECEIVED FOR QUASI-JUDICIAL AND EXTRA-JUDICIAL ACTIVITIES

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

A. Compensation. Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

B. Expense Reimbursement. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

C. Public Reports. A judge should report the date, place, and nature of any activity for which he received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. His report should be made at least annually and should be filed as a public document in the office of the clerk of the court on which he serves or other office designated by rule of court.

48-202 O - 79 - 29

CANON 7

A JUDGE SHOULD REFRAIN FROM POLITICAL ACTIVITY

A. Political Conduct in General

(1) A judge should not:

(a) act as a leader or hold any office in a political organization;

(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;

(c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions.

(2) A judge should resign his office when he becomes a candidate either in a primary or in a general election for any office.

(3) A judge should not engage in any other political activity; provided, however, this should not prevent a judge from engaging in the activities described in Canon 4.

COMPLIANCE WITH THE CODE OF JUDICIAL CONDUCT

Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a bankruptcy judge, special master, court commissioner, or magistrate, is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. Part-time Judge. A part-time judge is a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

(1) is not required to comply with Canon 5C(2), D, E, F, and G, and Canon 6C;
(2) should not practice law in the court on which he serves or in any court subject to the appellate jurisdiction of the court on which he serves, or act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

B. Judge Pro Tempore. A judge pro tempore is a person who is appointed to act temporarily as a judge.

(1) While acting as such, a judge pro tempore is not required to comply with Canon 5C(2), (3), D, E, F, and G, and Canon 6C.
(2) A person who has been a judge pro tempore should not act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

C. Retired Judge. A retired judge who receives the same compensation as a full-time judge on the court from which he retired and is eligible for recall to judicial service should comply with all the provisions of this Code except Canon 5G, but he should refrain from judicial service during the period of an extra-judicial appointment not sanctioned by Canon 5G. All other retired judges eligible for recall to judicial service should comply with the provisions of this Code governing part-time judges.

EFFECTIVE DATE OF COMPLIANCE

A person to whom this Code becomes applicable should arrange his affairs as soon as reasonably possible to comply with it and should do so in any event within the period of one year. If, however, the demands on his time and the possibility of conflicts of interest are not substantial, such a person may continue to act, without compensation, as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of his family, if terminating such relationship would unnecessarily jeopardize any substantial interest of the estate or person and the judicial council of the circuit approves.

Rev. 3/77

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SYMPOSIUM

Problems of the Federal Judiciary: A View from the Bench

Introduction: A View from the Bench — *Judge Jesse E. Eschbach*

Must We Have the Nunn Bill? — *Judge J. Clifford Wallace*

The Proposed National Court of Appeals: A Threat to Judicial Symmetry — *Judge Luther M. Swygert*

Diversity Jurisdiction—An Idea Whose Time Has Passed — *Judge Howard C. Bratton*

Sentence Review by the Trial Court: A Proposal to Amend Rule 35 — *Judge Charles B. Renfrew*

The Seventh Circuit Plan for Publication of Opinions—A Continuing Experiment — *Judge John S. Hastings*

Patent Cases in the District Courts—Who Should Hear Them? — *Judge Abraham L. Marovitz*

The Threat to Judicial Independence — *Judge Robert A. Sprecher*

WINTER 1976

EXHIBIT A

Must We Have the Nunn Bill? The Alternative of Judicial Councils of the Circuits

JUDGE J. CLIFFORD WALLACE*

INTRODUCTION

On March 7, 1975, Senator Nunn of Georgia introduced Senate Bill No. 1110 to the 94th Congress. S. 1110 proposes

> a procedure in addition to impeachment for the retirement of disabled Justices and judges of the United States, and the removal of Justices and judges of the United States whose conduct is or has been inconsistent with the good behavior required by article III, section 1 of the Constitution . . . .[1]

The Nunn bill is the latest in a series of proposals for legislative creation of a mechanism for removal and discipline of problem judges by the judiciary itself.[2] These proposals and two fairly recent cases involving the extent of the judiciary's power to govern itself[3] have generated substantial interest—and written material—within the legal community and, to a lesser extent, the public generally.[4] While much of the literature will be cited, it is my purpose neither to suggest a solution to the concerns that have been expressed by both proponents and opponents of the Nunn bill nor to judge other attempts to regulate judicial conduct and the administration of the courts. Rather, I hope to refute the argument that, assuming the need for some type of added control of the judiciary has been demonstrated and that Congress will act in response thereto, the Nunn bill must be accepted as the sole available control method.[5] The Judicial Councils of the circuits[6] (frequently referred to as circuit councils), though they have come under fire in the *Chandler* and *Imperial* cases, provide another mechanism—one that has been tried for

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* United States Court of Appeals for the Ninth Circuit.

[1] S. 1110, 94th Cong., 1st Sess. § 1 (1975) [hereinafter referred to as the Nunn bill or S. 1110].

[2] For a discussion of earlier proposals, *see* notes 33–45 *infra* & text accompanying.

[3] Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970); *In re* Imperial "400" National, Inc., 481 F.2d 41 (3d Cir. 1973), *cert. denied*, 414 U.S. 880 (1973). These two cases will be referred to as the *Chandler* and *Imperial* cases.

[4] *See, e.g.*, Kilpatrick, *Seeking a Remedy for Misconduct by Judges*, Washington Star, Mar. 25, 1975, at A-9, col. 1.

[5] The author has heard proponents of the Nunn bill argue on three separate occasions before Judicial Conferences of Circuits that judges must accept S. 1110 or the alternative will be a procedure for dealing with problems of judicial administration and misconduct from outside the judiciary.

[6] *See* notes 61–76 *infra* & text accompanying.

more than thirty years with considerable success and one that may strike a better balance between the need for an independent judiciary and the need for a court system that provides due process for all litigants.

Conceding my potential biases, I believe that the federal judiciary is composed by and large of dedicated, competent, and reasonable men and women who hold very powerful and difficult positions, perform remarkably well, and generate little controversy or publicity. This is as it should be. However, it is difficult to deny that from time to time there have also been numbered among the federal judges those who have not fit this description—the judge whose mental, emotional, or physical condition is such that his judicial capacities are seriously impaired. Though rare, one sometimes hears of questionable conduct in or out of the courtroom, as well as cases, though very infrequent, of questionable actions by out-and-out corrupt judges. Publicity, probably rightly, is focused upon such instances.[7] A claim that a litigant appearing before such a judge is denied due process might very well prove non-frivolous and a strong argument can be made that the public ought to be protected from such judges.[8] On the other hand, the framers of the Constitution provided for an independent judiciary and that independence extends to the individual judges, not just to the body of judges as a whole.[9] Thus, any mechanism which purports to regulate a judge's conduct in court runs into the compelling argument that the occasional problem judge is the price we pay for an independent judiciary.

This article will focus upon these two requirements, due process for litigants and judicial independence, as they are balanced first by the Nunn bill and then by Judicial Councils. It will first look briefly at the premises, the legislative history, and the provisions of the Nunn bill. It will then turn to an analysis of the purpose and powers of the Judicial Councils, necessarily focusing upon the *Chandler* and *Imperial* cases. The conclusion will suggest some alternatives from which Congress could select, if it becomes convinced that some additional type of judge control is necessary.

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[7] Three fairly recent works have dealt with alleged judicial misfeasance and nonfeasance. See C. ASHMAN, THE FINEST JUDGES MONEY CAN BUY (1973); J. BORKIN, THE CORRUPT JUDGE (1962); J. GOULDEN, THE BENCHWARMERS (1974).

[8] *See* Comment, *Removal of Federal Judges—New Alternatives to an Old Problem: Chandler v. Judicial Council of the Tenth Circuit*, 13 U.C.L.A.L. REV. 1385, 1397–98 (1966).

[9] An independent judiciary is one of this Nation's outstanding characteristics. Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge. He commonly works with other federal judges who are likewise sovereign. But neither one alone nor any number banded together can act as censor and place sanctions on him.
Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 136 (1970) (Douglas, J., dissenting).

The Nunn Bill

The Premises

The Nunn bill is premised upon the constitutionality of the removal of judges by a method other than impeachment. That question has been debated at considerable length[10] and it is not my intention to detail the arguments; a brief review will suffice.

The following provisions of the Constitution are relevant to removal of federal judges:

> Art. I, sec. 2. "The House of Representatives . . . shall have the sole Power of Impeachment."
>
> Art. I, sec. 3. "The Senate shall have the sole Power to try all Impeachments."
>
> Art. II, sec. 4. "The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."
>
> Art. III, sec. 1. "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior . . . ."

By adopting the English term of art "good behavior,"[11] a springboard for arguments in favor of removal by methods other than impeachment has been provided. Since acceptance of the Act of Settlement in 1701, English judges have held office "during good behavior." They were, however, removable by means other than impeachment—including *scire facias* and address by both houses of Parliament—and removal could occur for actions that probably would not qualify as high crimes or misdemeanors.[12] The argument follows that by adopting the English term of art "during good behavior," the framers also intended to adopt

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[10] The debate appears to have begun in earnest in the 1930's between Professor Shartel and Judge Otis. *See* Otis, *A Proposed Tribunal: Is It Constitutional?*, 7 U. KAN. CITY L. REV. 1 (1938); Otis, *McAdoo vs. The Judges*, 5 U. KAN. CITY L. REV. 1 (1936); Shartel, *Federal Judges-Appointment, Supervision, and Removal—Some Possibilities under the Constitution* (3 parts), 28 MICH. L. REV. 485, 723, 870 (1930). While Professor Stolz states that much of the recent scholarship "poach[es]" on those articles, *see* Stolz, *Disciplining Federal Judges: Is Impeachment Hopeless?*, 57 CAL. L. REV. 659, 660 (1969), several excellent discussions of the question have appeared. *See, e.g.*, R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973); Ervin, *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROB. 108 (1970); Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1 (1970); Kramer & Barron, *The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of "During Good Behavior,"* 35 GEO. WASH. L. REV. 455 (1967); Kurland, *The Constitution and the Tenure of Federal Judges*, 36 U. CHI. L. REV. 665 (1969); Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135.

[11] *See* R. BERGER, *supra* note 10, at 125–35.

[12] *See generally* R. BERGER, *supra* note 10, at 53–73, 125–53; Shartel, *supra* note 10, at 880–98. *But cf.* Ziskind, *supra* note 10, at 137–47.

the English methods and thus impeachment would not be the sole means of removing judges. Even disregarding its English derivation, the use of this language in the Constitution suggests that good behavior is something different from "Treason, Bribery, or other high Crimes and Misdemeanors." Indeed, it may be argued that a plain sense reading of the language suggests that there is at least some conduct (and arguably the bulk of the kind of conduct proponents of judicial removal wish to eliminate) which would not be "good behavior" but which would also fall short of the "high Crimes and Misdemeanors" standard of the Constitution. Because it is the high crimes language that is tied into the impeachment remedy and the good conduct language is in a separate article with no specified remedy, there is an unclarity and apparent gap in the Constitution. From this position, proponents of judicial removal without impeachment argue that the framers intended not to preclude methods other than impeachment when breach of good conduct is charged.[13] Professor Shartel states this theoretical interpretation: article I limits Congress' removal powers to impeachment. Article II limits removal of certain officers (presumably including judges) only by impeachment. He not only interprets article III as preventing the executive branch from removing judges but also concludes that article III provides power to the judiciary for trying the fitness of its own. Thus, removal by a means other than impeachment must be a power of the judiciary itself. This, it is argued, is wholly consonant with the independence of the judiciary. He contends that while Congress is limited to removal by impeachment, it is empowered under the "necessary and proper clause" to enact legislation establishing a mechanism for removal of judges by the judiciary.[14]

The premises, then, are two: judges may be removed for non-good behavior falling short of "high Crimes and Misdemeanors"; and, judges may be removed by methods other than impeachment. The first has a certain amount of historical validity. Hamilton, while arguing that

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[13] Professor Stolz offers some interesting speculations on the reason for the apparent ambiguity on the exclusivity of impeachment:

> [T]he explanation may lie in a subtle shift in attitude towards judges and courts; our willingness to perceive judges as subject to human frailties has created a problem out of something that an earlier time may well have regarded as essentially unthinkable. Current writing on judicial discipline is full of ghoulish anecdotes about judges who were lazy, or drank too much, or who had lost some of their powers through illness or age. A hundred or even fifty years ago such talk would probably have been regarded as in bad taste if not contemptuous—as tending to encourage disrespect for the courts. It may also be that we are more ready today than before to distinguish between the stupid judge and the judge whose incompetence is rooted in illness or age.

Stolz, *supra* note 10, at 663 n.22.

[14] Shartel, *supra* note 10, at 891–909; Stolz, *supra* note 10, at 661–62.

48-202 O - 79 - 30

impeachment was the sole means of removal, nonetheless stated that "insanity, without any formal or express provision, may be safely pronounced to be a virtual disqualification" for a judge.[15] The first federal judge impeached and convicted, Judge Pickering, was certainly inebriate, probably insane or senile, but was not charged with treason, bribery, or high crimes and misdemeanors.[16] Justice Chase, an outspoken Federalist guilty only of blatant political activity while serving on the Court, was impeached but not convicted by Jefferson's Republicans.[17] In this century, four federal judges have been impeached and while indictable crimes have been charged in at least two cases, neither of the two judges actually removed from office was convicted on a count charging criminal conduct.[18]

There is considerably less historical support for removal by a method other than impeachment. Hamilton,[19] Story,[20] Kent,[21] and Marshall[22] all argued that impeachment was the sole means of removal of judges. As much as he was annoyed by the Federalist-packed judiciary, Jefferson conceded that a constitutional amendment providing an alternative method of removal was the only way to avoid using the impeachment process to rid himself of them.[23] Immediately after the Civil War, a procedure for forced retirement of federal judges was presented to Congress; it failed, apparently because some equated it with removal without impeachment.[24] The failure of the Summers[25] and Tydings[26] bills may well be due more to their provisions for non-impeachment removal than to their adoption of a lack of good behavior standard for removal.[27] Only the repeal of the Judiciary Act of 1801 stands as

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15 THE FEDERALIST No. 79, at 498–99 (B.F. Wright ed. 1961) (A. Hamilton).

16 *See* R. BERGER, *supra* note 10, at 57 n.15, 183–84. The impeachment of Judge Pickering is discussed in detail in Turner, *The Impeachment of John Pickering*, 54 AM. HIST. REV. 485 (1949).

17 *See* R. BERGER, *supra* note 10, at 224–51.

18 The two judges convicted by the Senate were Judge Archbald (1913) and Judge Halstead Ritter (1936). For a detailed analysis of the four judicial impeachments in this century, *see* ten Broek, *Partisan Politics and Federal Judgeship Impeachment Since 1903*, 23 MINN. L. REV. 185 (1938).

19 THE FEDERALIST Nos. 78, 79, 81 (B.F. Wright ed. 1961) (A. Hamilton).

20 3 J. STORY, COMMENTARIES ON THE CONSTITUTION §§ 1599–1635 (1833).

21 1 J. KENT, COMMENTARIES ON AMERICAN LAW XIV (1826 ed.).

22 O'Donoghue v. United States, 289 U.S. 516, 532–33 (1933), *quoting from* the debates of the Virginia State Convention of 1829–1830 at 616, 619.

23 Kurland, *supra* note 10, at 694. Professor Kurland points out that Jefferson was a great supporter of judicial independence until he became president. Despite distaste for the impeachment process, he declined to adopt any removal mechanism without constitutional amendment. President Andrew Johnson took the same stand in 1868. *Id.* at 695.

24 *Id.* at 678–83.

25 *See* notes 34–40 *infra* & text accompanying.

26 *See* notes 41–45 *infra* & text accompanying.

27 In response to the hearings being conducted in Senator Tydings' subcommittee, Senator Ervin's subcommittee on the Separation of Powers held hearings in which the

real support for non-impeachment removal. After long debate, the new Republican-controlled Congress repealed this controversial piece of Federalist legislation, "un-creating" several federal judgeships. The argument that repeal would violate the constitutional assurance that judges would hold office during good behavior failed to carry the day.[28] However, a century later the same argument saved the jobs of the judges on the Commerce Court; though the court itself was abolished, its judges were moved into other federal courts.[29]

The premises upon which the Nunn bill rests, again, are that a judge can be removed for conduct which is less than a high crime and misdemeanor and that the removal does not require impeachment. These premises raise substantial constitutional questions. The issue has been before the Supreme Court twice but never squarely enough that the Court was forced to reach it.[30] Professor Stolz suggests that the constitutional issue will not be resolved finally until Congress enacts a bill such as the Nunn bill and the Supreme Court is forced to face the difficult question.[31] Professor Kurland, himself a strong supporter of the exclusivity of impeachment as a removal mechanism, concedes that there are no firm answers and that the passage of such a bill by Congress would add substantial weight to the argument for its constitutionality.[32] Thus, while the premises may be open to question, they are certainly not to be lightly dismissed.

The Legislative History

The Nunn bill itself was first introduced as S. 4153 in 1974.[33] It was resubmitted without substantial change to the first session of the 94th Congress. As of December 15, 1975, no hearings had been scheduled. However, Congress has, from time to time, wrestled with similar legislation since the late 1930's when efforts were spearheaded by Congressman Hatton Sumners.

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chairman emphasized the exclusivity of impeachment as a removal means. *See Hearings on the Independence of the Federal Judges Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970); Ervin, *supra* note 10, at 122–27.

28 Kurland, *supra* note 10, at 671–78.

29 *Id.* at 683–87.

30 The issue was first presented in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); the Court might have reached the very issue Congress avoided in repealing the Judiciary Act of 1801, *see* note 28 *supra*, but did not do so. *Chandler* represents the second time the issue was raised; *see* notes 89–106 *infra* & text accompanying.

31 Stolz, *supra* note 10, at 663–64.

32 Kurland, *supra* note 10, at 697–98.

33 S. 4153, 93d Cong., 2d Sess. (Oct. 17, 1974).

Sumners, chairman of the judiciary committee, introduced proposals for creation of a removal mechanism within the judiciary in five different Congresses.[34] In its earliest form, the Sumners proposal provided for the removal of any district judge[35] upon a finding by a court, composed of three circuit judges from the accused judge's circuit, that he was guilty of non-good behavior. Such three-judge courts were to be convened by the Chief Justice upon receipt of a House resolution that "in the opinion of the House there is reasonable ground for believing that the behavior of a judge . . . has been other than good behavior . . . ."[36] The Attorney General was empowered to institute these civil actions on behalf of the United States. Either party could appeal the decision of the three-judge court to the Supreme Court; however, if the panel entered judgment for the government, the judge was immediately removed from office and remained so unless the judgment were reversed by the Supreme Court. Hearings on Sumners' judicial removal bills were held in the 75th, 76th and 77th Congresses but, despite a fairly general discontent with the federal judiciary at that particular time,[37] the bills never left Congress, although twice they were passed by the House.[38] A similar piece of legislation in the Senate, sponsored by William G. McAdoo beginning with the 74th Congress,[39] never received Senate approval.[40]

The more recent precursor of the Nunn bill is the legislation drafted and sponsored by Senator Tydings, then chairman of the Subcommittee on Improvements in Judicial Machinery. Prompted by several incidents in the early 1960's involving alleged judicial misconduct,[41] Senator Tydings began a study of proposals for judicial reform in 1966.[42] Two years later, S. 3055, the Judicial Reform Act, was introduced in the 90th Congress. In 1969, it was reintroduced as S. 1506. Title I, the portion of the bill dealing with judicial removal, provided for the establishment of a Commission on Judicial Disabilities and

[34] H.R. 2271, 75th Cong., 1st Sess. (1937); H.R. 5939, 76th Cong., 1st Sess. (1939); H.R. 9160, 76th Cong., 3d Sess. (1940); H.R. 146, 77th Cong., 1st Sess. (1941); H.R. 1197, 78th Cong., 1st Sess. (1943); H.R. 1201, 79th Cong., 1st Sess. (1945).

[35] The bill was later amended to apply to circuit judges as well. Kurland, *supra* note 10, at 688.

[36] H.R. 2271, 75th Cong., 1st Sess. § 1 (1937).

[37] *See* notes 65–67 *infra* & text accompanying.

[38] Kurland, *supra* note 10, at 693.

[39] S. 4527, 74th Cong., 2d Sess. (1936); S. 476, 75th Cong., 1st Sess. (1937).

[40] Kurland, *supra* note 10, at 693.

[41] For a description of some of the motivation factors, see Holloman, *The Judicial Reform Act: History, Analysis, and Comment*, 35 LAW & CONTEMP. PROB. 128, 133–38 (1970).

[42] *Hearings on Judicial Fitness Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966).

Tenure empowered to investigate, charge, try, and recommend removal of any federal judge (other than Supreme Court Justices) for "willful misconduct in office or willful and persistent failure to perform his official duties." If the Commission, composed of five federal judges appointed by the Chief Justice, recommended removal, to the Judicial Conference of the United States, the judge would be suspended pending review by that body. Conference certification of the recommendation to the President would remove the judge. The conference certification would be reviewable by the Supreme Court on writ of certiorari. Thus, the Tydings proposal differed from the Sumners mechanism in that the entire process remained within the judiciary—neither congressional resolution nor executive prosecution was suggested—and in the use of an established body (the Judicial Conference of the United States) as a sort of intermediate appellate court.

Despite these differences and the fact that judicial misconduct was very much in the public eye, Senator Tydings' proposal did not receive congressional approval. Lengthy hearings assembled an impressive collection of testimony on both the need for any judicial removal mechanism and the constitutionality of the suggested procedure.[43] Endorsements (sometimes less than emphatic) were also received.[44] But in the end the combination of Senator Ervin's skilled exclusivist argument, the apparent vagueness in the bill's standards of conduct, and a questionable need for the mechanism[45] produced the demise of Title I of the Judicial Reform Act.

The Provisions of the Nunn Bill

The Nunn proposal draws quite heavily upon the Tydings bill. Like its predecessor, S. 1110 suggests a removal mechanism confined entirely to the judiciary itself and an intermediate appeal through the Judicial Council of the circuit. There are, however, several substantive refinements.

The bill provides for the creation of a Council on Judicial Tenure. This council is to be composed of one judge from each of the circuits, the Court of Claims, the Court of Customs and Patent Appeals, and the

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[43] Both Senators Tydings and Ervin held hearings on the concept in their subcommittees. See *Hearings on S. 1506, The Judicial Reform Act, and Related Bills Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969) (Tydings); *Hearings on Independence of Federal Judges, supra* note 27 (Ervin).

[44] *See, e.g.*, the response of Judge Warren E. Burger in *Hearings on the Nomination of Warren E. Burger to the Chief Justice of the United States Before the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 8–12 (1969).

[45] Holloman, *supra* note 41, at 144–50.

Customs Court. Selection to serve on the council is to be by election: a delegate from each of the circuits by a vote of the district and circuit judges at a Judicial Conference of the circuit, and a delegate from each of the special courts by a vote of the judges of the court. Members are elected to three-year terms.

The Council on Judicial Tenure is required to receive all complaints about misconduct by any judge or justice and to make a preliminary inquiry to determine whether the complaint has any merit. If the complaint is "frivolous, unwarranted, or insufficient in law or fact," it is to be dismissed. If, however, the council determines that grounds for removal, censure, or involuntary retirement[46] exist, a panel of five members of the council—four of whom must be circuit or district judges and none from the accused judge's court or circuit—is appointed to hear the case. The panel is empowered to hold hearings, take testimony, subpoena witnesses and records, administer oaths and affirmances, and invoke the aid of any district court of the United States to effect compliance with its subpoenae and orders. To promote full disclosure, a broad immunity is granted all witnesses. A judge or justice whose case is referred to a panel is to be given thirty days' notice of any hearings. He is entitled to appear and make a statement. Within ninety days of the hearing, the panel must make findings of fact and a determination of the justice's or judge's fitness. These findings and the record of the proceedings are to be transmitted to the Judicial Conference of the United States, as is any recommendation. A recommendation for removal, censure, or involuntary retirement requires the concurrence of four members of the panel.

The Judicial Conference of the United States, under the direction of one of its members elected at the annual meeting to preside on any such matter and without the participation of the Chief Justice of the United States, is empowered to sit as a court to hear any cause relating to removal, censure, or involuntary retirement.[47] The proceedings before the conference are de novo. The council on Judicial Tenure is required to appear and present evidence in support of its recommendations. The accused justice or judge is to be given adequate notice and may appear, be represented by counsel, offer evidence, and cross-examine any witness against him. Again, broad immunity is granted all witnesses. During the pendency of the proceeding, the judge involved shall

[46] These are the various disciplinary measures available under the proposal. *See* notes 48–51 *infra* & text accompanying.

[47] With the approval of the majority of its members, a panel of nine members of the conference (again, none of whom is from the accused judge's court and one of whom is the presiding officer) may be designated to hear the case.

cease all of his judicial duties; the Judicial Conference of the United States is empowered to order reassignment of his cases after consultation with the Chief Judge of his court. The Judicial Conference of the United States may order censure, removal, involuntary retirement, or may dismiss or remand any case brought before it.[48] An order for removal of a judge or for removal, censure, or involuntary retirement of a Supreme Court justice is stayed pending review by the Supreme Court. Only the judge or justice is allowed to petition for review and must do so within ten days of written notification of the conference's order.

Throughout proceedings before the council and the conference, a strict confidentiality is to be maintained. If the Judicial Conference of the United States dismisses a complaint, the judge or justice may request that the conference make public portions of the proceedings not privileged, confidential, or prejudicial to other parties. Upon petition for review to the Supreme Court, the proceedings lose their confidentiality.

The ground for censure or removal from office through this rather elaborate procedure is "conduct . . . inconsistent with the good behavior required by article III section 1 of the Constitution,"[49] thus avoiding the vague standards of the Tydings bill.[50] S. 1110 would also amend 28 U.S.C. § 372(b)[51] to allow the Judicial Conference of the United States to certify a judge who declines to retire as mentally or physically incapable of carrying out his judicial function, thus forcing an involuntary retirement. Such certification can occur only after hearings before

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48 The bill is not specific in describing the sanctions of removal and censure. Presumably removal has the same effect as impeachment and precludes any pension. *See* Kramer & Barron, *supra* note 10, at 458. Involuntary retirement is described in some detail in the bill and by reference to 28 U.S.C. § 372(b)(19) (1970). *See* note 51 *infra*.

50 *See* note 41 *supra*.

51 Section 372 provides in pertinent part:

(a) Any justice or judge . . . who becomes permanently disabled from performing his duties may retire from active service . . . .

(b) Whenever any judge . . . who is eligible to retire under this section does not do so and a certificate of his disability signed by a majority of the members of the Judicial Council of his circuit . . . is presented to the President and the President finds that such judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability and that the appointment of an additional judge is necessary for the efficient dispatch of business, the President may make such appointment . . . .

It is not at all clear what effect this substitution procedure has upon the judge who is certified as disabled. Section 372(b) does not suggest that there is any power to remove cases pending before him or to cease assigning cases to him. Apparently the process has never been used; were it employed, a case such as Judge Chandler's would not be at all unlikely. The proposed amended section 372(b) specifies that the disabled judge would be designated as "involuntarily retired from regular active service." S. 1110, 94th Cong., 1st Sess. 15 (1975).

the Council on Judicial Tenure and the Judicial Conference of the United States. The proposed amendment would expand the involuntary retirement powers by deeming "[h]abitual intemperance that seriously interferes with the performance of any one of the critical duties of a justice or judge" a permanent disability constituting grounds for certification of disability to the President.[52] A judge retired involuntarily would be assignable by the Chief Judge of his court to perform such duties as he is willing and able to undertake; if he is not assigned any duties, and feels able to perform some, he may bring his case before the Council on Judicial Tenure and the Judicial Conference of the United States, which is empowered to order the Chief Judge to assign work to the retired judge.[53]

Possible Advantages and Disadvantages of the Bill

The Nunn bill is an improvement over the several prior proposals for a judicial removal mechanism which have been submitted to Congress. It eliminates the involvement of the legislative and executive branches which might tend to politicize the removal process and jeopardize the independence of the judiciary as a whole. Adoption of the good behavior standard avoids compounding the problems of evaluating judicial conduct by adding a vague standard—"willful misconduct or willful and persistent failure to perform . . . official duties"—to the already elusive "good behavior" standard. By specifically providing both a method and a standard for review by an article III court, the provisions for review of recommendations of the Council on Judicial Tenture—apparently an administrative body without traditional judicial powers—avoid the review dilemma posed for the Judicial Councils of the circuits by *Chandler* and *Imperial*. Due process is assured judges who are investigated by the council, an assurance lacking in the Sumners bills. By minimizing publicity, the confidentiality requirements, if strictly maintained, would assist in deterring those who might use the process to remove an unsympathetic yet competent judge and, hopefully, in avoiding tarnishing the reputation of a judge whose behavior does not merit disciplinary action and in helping to preserve public confidence in the judiciary.

S. 1110, however, is far from flawless. By subjecting the entire federal judiciary to discipline, it responds to the frequent complaint by district judges that they are the only judges ever deemed unworthy

[52] S. 1110, 94th Cong., 1st Sess. 14 (1975).

[53] *Id.* at 11–12.

enough to warrant Big Brother's watchful eye;[54] however, including justices within the purview of the bill creates constitutional as well as logical problems. Because Supreme Court justices are mandated by the Constitution while other federal judgeships are left to the discretion of Congress, a constitutional challenge might be raised to the procedure.[55] Other serious challenges in reference to justices pertain to both the internal inconsistency of the bill and the special nature of the Supreme Court.

The bill provides that no judge who sits on the same court or circuit as a judge whose conduct is under investigation shall participate in proceedings of either the Council on Judicial Tenture or the Judicial Conference of the United States. The same principle, if extended to the final review by the Supreme Court, either would deny a justice final appeal or would assume that Supreme Court justices alone among the federal judiciary can raise themselves above feelings of camaraderie and render an unbiased decision in a case involving a brother or sister. If one makes the latter assumption, it is not a long step back to the hypothesis that Supreme Court justices are somehow incapable of misconduct—an argument that belies both the reason for including them within the bill and common sense.[56]

Other lesser problems appear in the bill. There is no indication whether senior judges are to participate in election of members of the Council on Judicial Tenure. Terms of council members are not staggered, thus lessening the potential for continuity within the council. The role of the council in its preliminary screening and investigating functions needs further definition. If the confidentiality provisions are to be effective, some sanctions should be considered for those who violate that confidentiality. Further, the bill's drafters would do well to learn from *Chandler* and specify that the council is an administrative body composed of judges who are not exercising their judicial powers, if that is in fact the intent of the drafters.

Even setting aside the very real question as to the constitutionality of the mechanism proposed by the Nunn bill, some other policy matters ought to be considered before adopting S. 1110. The first question is

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54 *See, e.g.*, Battisti, *An Independent Judiciary or an Evanescent Dream*, 25 CASE W. RES. L. REV. 711, 720–21, 735 (1975).

55 Comment, *The Limitations of Article III on the Proposed Judicial Removal Machinery: S. 1506*, 118 U. PA. L. REV. 118, 118 n.4 (1970).

56 Another author has suggested as a possible explanation for the exclusion of justices from the coverage of Senator Tydings' removal mechanism that "removal of a Justice of the Supreme Court is of such political significance that it should be accomplished only through impeachment by Congress . . . ." *Id.*

the extent of the problem S. 1110 is designed to solve. One author has stated that a convincing case for the establishment of a judicial removal scheme has not been made.[57] Though the fact of problem judges cannot be denied, neither should it be exaggerated. If there is a serious problem, enactment of the Nunn bill or similar legislation might be justified. But unless there is a real need, creating this elaborate and potentially powerful tool is tantamount to buying a piledriver to kill an ant.[58]

A closely related consideration is the potential for creation of a problem by creation of a solution. Even assuming that the confidentiality requirements of S. 1110 eliminate most of the potential for abuse, the danger is still real that the mere existence of the Council on Judicial Tenure, with its supporting personnel and potent sanctions, will tempt some to test the mechanism in instances where a judge's idiosyncracies might otherwise have been tolerated in the name of judicial independence. Because the controls are vested in the judiciary itself and considerable deference to brother and sister judges is probable, this danger may be less than it might otherwise be. However, too frequently it appears that an agency's motivation may be its will for survival and potential for proliferation. That the agency's continued existence rests in part upon executive and legislative control of pursestrings is somewhat threatening to judicial independence; there is no assurance that the council's appropriation will not be increased or reduced based upon political considerations. This must be kept in mind in considering the establishment of any mechanism that deals with so sensitive an area as judicial independence and responsibility.

One must also consider competing policies in centralizing the disciplinary powers in one body instead of leaving those powers with local authorities. Local judges are generally better informed of the particular problem. In addition, they are in a better position to use informal methods in dealing with a problem judge because of their more intimate knowledge of the circumstances of his case and, frequently, be-

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[57] Kurland, *supra* note 10, at 697. Indeed, Professor Kurland contends that such a case cannot be made. Professor Goulden, while emphasizing the problems in the federal judiciary, still manages to suggest at most a dozen judges whose presence on the bench presents possible due process problems. *See* J. GOULDEN, *supra* note 7.

[58] The same argument, however, has been made with regard to the use of impeachment for removal of judges. Lord Bryce said, "Impeachment . . . is the heaviest piece of artillery in the congressional arsenal, but because it is so heavy it is unfit for ordinary use. It is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at." 1 J. BRYCE, THE AMERICAN COMMONWEALTH 211 (1901). And Professor Berger has stated: "Once employed to topple giants . . . impeachment has sunk in this country to the ouster of dreary little judges for squalid misconduct." R. BERGER, *supra* note 10, at 3.

cause of a reasonably close working relationship with him. On the other hand, when informal methods fail, formal proceedings may be difficult because of that very same close relationship to the judge and his problem. In this regard, a national body may be in a better position to proceed formally but, on the other hand, may tend to ignore the possibility of dealing with the judge informally. This difficulty will be considered further when the Judicial Councils of the circuits are specifically discussed.

Several other questions bear consideration. The cost of implementing the procedure is important, though it should not be determinative. A more important question is whether, with a presently over-taxed court system, judicial time should be allocated to disciplinary proceedings of the Council on Judicial Tenure and Judicial Conference of the United States. Finally, consideration must be given to the potential danger that a more accessible removal mechanism may result in the homogenizing of the federal judiciary in the name of uniform justice for all.[59] All certainly seek the latter goal but the cost of attaining it need not and should not be the elimination of every flamboyant, controversial, or politically unpopular judge from the judiciary.

Thus, some serious policy questions can be raised concerning the necessity for, and the wisdom of, the Nunn bill. In addition, the constitutional issue is a major stumbling block. On its merits, the Nunn bill, nevertheless, probably stands a better chance of receiving congressional approval than either of its predecessors. Passage is, however, far from certain.[60] With all of its problems, certainly the proponents

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[59] The mood of some federal judges is opposed [to the view that judges are powerless to censor or discipline their brothers and sisters] and they are active in attempting to make all federal judges walk in some uniform step . . . . The result is that the nonconformist has suffered greatly at the hands of his fellow judges . . . . The power to keep a particular judge from sitting on a racial case, a church-and-state case, a free-press case, a search-and-seizure case, a railroad case, an antitrust case, or a union case may have profound consequences. Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like . . . . These are subtle, imponderable factors which other judges should not be allowed to manipulate to further their own concept of the public good. That is the crucial issue at the heart of the present controversy.

Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 137 (1970) (Douglas, J., dissenting).

[60] The bill has received some support in recent literature. Andrews, *Judicial Removal of Federal Judges*, 11 GA. ST. B.J. 157 (1975); Boyd, *Federal Judges: To Whom Must They Answer*, 61 A.B.A.J. 324 (1975). Judge Battisti is considerably less enthusiastic about the bill's merits. Battisti, *supra* note 54, at 730–32. The Judicial Conference of the United States has given the bill its "qualified" approval; the qualifications, however, are so substantial as to eliminate most of the teeth from the bill. The Conference suggests that applicability to justices be eliminated, that removal be eliminated as a sanction, and that mandatory or involuntary retirement and censure be retained as less severe sanctions. *See*

of the Nunn bill must be required to adequately demonstrate an overriding need for its adoption. Assuming problems exist which require attention, is there an alternative to the Nunn bill which would not result in the potential judicial upheaval and yet would still reasonably meet the basic problems which have motivated its proposal? This question brings me to a brief examination of the Judicial Councils of the circuits.

The Judicial Council of the Circuit

Creation and Purpose

The Administrative Office Act of 1939[61] was the second half of a major judicial administration reform movement that had begun with the creation of the Judicial Conference of Senior Circuit Judges[62] (now called the Judicial Conference of the United States) in 1922. Prior to 1922, the lower federal courts had been without any formal administrative structure.[63] The Judicial Conference of the United States was created as a more or less informal body to encourage communication within the federal judiciary and to allow the assignment of judges to jurisdictions where a particularly heavy caseload had created a backlog. Passage of the bill was obtained with great difficulty, with the bill's opponents arguing that this centralized agency would encroach upon the independence of the judiciary.[64] The Judicial Conference of the United States performed its rather limited duties well, but by the late 1930's a movement was underway for expanding the reform. There were several motivational factors. One was the impeachment and conviction of Judge Halstead Ritter, which had thoroughly disrupted the 1936 Congress.[65] The "court-packing plan," which had finally died in 1936, had also brought the judiciary very much into the public eye.[66] The Sumners and McAdoo proposals were under congressional consideration from 1935 until 1944.[67] The Administrative Office Act[68] was the result of all these pressures.

Resolution of the Judicial Conference of the United States, Mar. 7, 1975, reported in *Third Branch*, April 1975, at 2, col. 1.

[61] Act of Aug. 7, 1939, ch. 501, 53 Stat. 1223.

[62] Act of Sept. 14, 1922, ch. 306, § 2, 42 Stat. 838. The conference now includes not only "senior," or chief judges, but also representatives of the district courts, *see* Act of Aug. 28, 1951, 71 Stat. 476, the Court of Claims, *see* Act of July 9, 1956, ch. 517, 70 Stat. 497, and the Court of Customs and Patent Appeals, *see* Act of Sept. 19, 1961, 75 Stat. 521.

[63] Lumbard, *The Place of the Federal Judicial Councils in the Administration of the Courts*, 47 A.B.A.J. 169, 170 (1961).

[64] P. Fish, The Politics of Federal Judicial Administration 30–39 (1973).

[65] *Id.* at 154.

[66] *Id.* at 112–24; Comment, *The Authority of the Circuit Judicial Councils: Separation of Powers in the Courts of Appeal*, 5 Seton Hall L. Rev. 815, 822 n.35 (1974).

[67] *See* notes 34–36 *supra*.

[68] *See* note 61 *supra*.

The Act was an overall plan of judicial administration. The power of the Judicial Conference of the United States was increased by adding certain supervisory responsibility over the newly-created Administrative Office. The Administrative Office took over from the Justice Department the functions of administration within the courts, including paying salaries and allocating funds.[69] The Administrative Office was also to assemble data concerning the business of the courts. Also included within the Act was the formalization of the requirements for Judicial Conferences of the circuits, a practice apparently begun prior to 1939 in several circuits. These conferences annually brought together all of the circuit and district judges of the circuit, along with members of the bar, to discuss the business of the courts and to advise means to improve the administration of justice. Finally, the Act created the Judicial Councils of the circuits (sometimes referred to as circuit councils).

The Judicial Council of the circuit is composed of the active circuit judges of the circuit. It is presided over by the Chief Judge of the circuit and is required to meet at least twice annually. Its duties as specified in the Act are the consideration of the quarterly reports[70] of the Administrative Office and the following general proviso:

> Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.[71]

This grant of power and responsibility provides the basis for all of the countil's actions, except those few specific grants appearing elsewhere in the Judicial Code.[72] The second sentence of that part of section 332(d) quoted above also provides the sole basis of enforcement.[73]

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69 Tension had developed between the judiciary and the Department of Justice over this point during the court-packing fight. *See generally* P. FISH, *supra* note 64, at 91–124.

70 28 U.S.C. § 332(c) (1971).

71 28 U.S.C. § 332(d) (1971). This wording, adopted in the recodification of Title 28 in 1948, varies somewhat from the language of the 1939 Act but represents the substance of the original enactment. *See, e.g.*, Comment, *Courts—Judicial Responsibility—Statutory and Constitutional Problems Relating to Methods of Removal or Discipline of Judges*, 21 RUTGERS L. REV. 153, 161–62 (1966). A 1971 amendment designated subsections (a)-(d) of the then-existing law and added subsections (e) and (f) dealing with the office of circuit executive.

72 Powers granted to the Judicial Councils by statute include:

(1) the power to order a district judge to reside in a particular part of the district, 28 U.S.C. § 134(c);

(2) the power to make necessary orders regarding distribution of cases when the district judges cannot agree on a distribution, 28 U.S.C. § 137;

(3) the power to consent to pretermission of any regularly scheduled district court session for lack of business, 28 U.S.C. § 140(a);

(4) the power to approve court accommodations provided by the General Services Administration, 28 U.S.C. § 142;

There seems to be little doubt that Congress intended a broad grant of power under section 332(d).[74] The disagreement centers upon the nature of those powers. Some view the councils as purely administrative bodies without any judicial powers whose role is to deal with the problems of administering the courts. Others see the council as a body with certain judicial powers, including the power to determine the fitness of a judge to hear cases. The legislative history is subject to both interpretations. But it should be noted that the creation of the councils was part of an Act, the overall purpose of which was to speed up the administration of justice.[75] While the possibility of disciplining problem judges through the councils' tools was considered, that was not the Act's primary purpose. Indeed, two bills aimed specifically at tampering with the make-up of the judiciary had been expressly rejected by Congress within the three years prior to its passage.[76] This certainly adds credence to the less expansive view of the scope of section 332(d) and it is a view that has received some judicial approval.

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(5) the power to consent to special assignment of judges to courts other than their own, 28 U.S.C. § 295;

(6) the power to designate storage facilities for court records, 28 U.S.C. § 457;

(7) the power to approve plans for representation of indigent criminals, 18 U.S.C. § 3006A(a);

(8) certain powers with regard to approval of the appointment and removal of bankruptcy judges, 11 U.S.C. §§ 62(b), 65(a), (b), 68(a), (b), (c), 71(b), (c);

(9) certain powers with regard to approval of jury plans adopted by district courts, 28 U.S.C. § 1863(a); and

(10) the power to certify the disability of a judge who refuses to retire, 28 U.S.C. § 372(b).

See note 51 *supra*.

[73] *See* notes 122–25 *infra*.

[74] The legislative history of section 332(d) is replete with statements of the broad intent of the framers. Good discussions of that history are found in P. FISH, *supra* note 64, at 152–65, 391–92; Comment, *Judicial Councils*, *supra* note 66, at 818–26; Battisti, *supra* note 54, at 718–21. More recent commentators have also viewed the Judicial Councils' powers as very broad:

> This statute [section 332] vests all power, and therefore full responsibility, in the circuit courts for the management of the federal judicial system.

Burger, *The Courts on Trial: A Call for Action Against Delay*, 44 A.B.A.J. 738, 739 (1958). *See also* Brennan, *The Continuing Education of the Judiciary in Improved Procedures*, 28 F.R.D. 42, 44 (1962); Lumbard, *supra* note 63, at 169.

[75] Perhaps the most influential witness before the committee was Chief Justice Groner of the District of Columbia Circuit. His testimony makes it clear that delay in the courts and the lack of any mechanism for dealing with that delay were the main problems at which the Judicial Councils' powers were to be aimed. *See Hearings on S. 188 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 1st Sess. 9, 11 (1939). Arthur Vanderbilt, who was president of the American Bar Association at the time and a strong backer of the act, commented later: "They [the Judicial Councils] are principally concerned with matters of calendar control." A. VANDERBILT, CASES AND MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION 1250 (1952).

[76] These efforts at tampering were the court-packing plan, rejected in 1937, and the Sumners and McAdoo proposals, discussed at notes 33–45 *supra* & text accompanying.

Pre-Chandler History

Between 1939 and 1965, the Judicial Councils of the circuits maintained a remarkably low profile. As the civil backlog again became a particularly hot issue in the late 1950's, the councils were criticized because, despite their broad powers, it was contended that they had done practically nothing in twenty years.[77] This assertion is far from correct. Professor Fish has documented some of the actions taken by the councils and their presiding officers, the Chief Judges, from their inception until 1969. His description suggests that the councils were at least moderately active in generating general rules and in handling informally specific problem cases and judges. Informal action—*i.e.*, judge to judge discussion—certainly constituted the bulk of the accomplishments. Judges have expressed a certain amount of dislike for this type of work, consisting as it must of friendly persuasion and veiled threats, but seemed to concur that it was quite effective.[78]

An exercise of power by the councils had reached the official reports only once during that period. In *In re Rodebaugh*,[79] a resolution required that a court reporter in the Eastern District of Pennsylvania report details of his unauthorized private reporting practice to the Justice Department and the Administrative Office for investigation. Determining that this action fell within the grant of power in section 332(d) for "effective and expeditious administration of justice," the Judicial Council of the Third Circuit justified its actions with the following statement:

> The Council is the administrative agency empowered by Congress to investigate and determine the facts and fashion the appropriate administrative remedy. Having acted as thus authorized, its orders have the force of law.[80]

Thus, as early as 1950, this council adopted the view that it was an administrative body. Its opinion and order, however, were not entirely consistent with that view. Section 332(d) requires only that the district judges comply with council orders. The order here was directed to the court reporter himself, who had no duty to comply with what was said to be an administrative agency order. Apparently, however, he complied voluntarily, thus leaving for another court the question of enforceability of council orders.[81]

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77 *See* Brennan, *supra* note 74, at 44; Lumbard, *supra* note 63, at 169.

78 *See generally* P. FISH, *supra* note 64, at 397–426.

79 10 F.R.D. 207 (Judicial Council of the 3d Cir. 1950).

80 *Id.* at 216.

81 The council suggested three alternative means of enforcement, none of which is satisfactory. *See* Comment, *Judicial Councils*, *supra* note 66, at 837–39.

Only one other action of the councils received much publicity. In 1965, Judge Mell G. Underwood of the Southern District of Ohio was the subject of a Judicial Council of the Sixth Circuit resolution that declared him incompetent and asked him to retire. Judge Underwood was told of the resolution privately and asked to comply; he declined to do so, denying the power of the council to take such action. Thereafter, news of the resolution leaked to the media and Judge Underwood was "humiliated" into retirement.[82]

Chandler v. Judicial Council of the Tenth Circuit[83]

Judge Stephen Chandler, Chief Judge of the Western District of Oklahoma, had, by 1965, established his reputation as one of the more colorful and controversial judges in the federal judiciary.[84] He was at that time involved in two lawsuits, one criminal and one civil. The Tenth Circuit had twice ordered him to remove himself from hearing cases involving major oil companies.[85] On December 13, 1965, the Judicial Council of the Tenth Circuit, invoking its powers under section 332(d) and 28 U.S.C. § 137,[86] found that Judge Chandler was "unable or unwilling to discharge efficiently" his judicial duties and that a change in assignment of cases in his district was thus necessitated. The council ordered that Judge Chandler take no further action on any case pending before him and that no new cases be assigned to him until further order. This meeting occurred without notice to Judge Chandler. The order became effective on December 28, 1965. On January 6, 1966, Judge Chandler petitioned the Supreme Court for a stay of the order and leave to file a writ of prohibition and/or mandamus directed at the council. The Supreme Court denied both requests, stating that the council's order was wholly interlocutory and would be followed by "prompt further proceedings" at which Judge Chandler would be permitted to appear with counsel.[87] Taking this rather broad hint, the council scheduled a hearing for February 10, 1966. In the meantime, however, Judge Chandler had informed the council that he objected

[82] This incident is related by Battisti, *supra* note 54, at 743–44; and P. FISH, *supra* note 64, at 412, 416. When told of the council resolution, Judge Underwood allegedly said, "They have no authority to remove me . . . . I told them to go to hell."

[83] 398 U.S. 74 (1970).

[84] J. GOULDEN, *supra* note 7, at 206–49, describes in some detail, and not altogether unsympathetically, Judge Chandler's career. Judge Chandler assumed senior status in 1969 and retired in 1975; *see* 44 U.S.L.W. 2239 (Nov. 25, 1975).

[85] Occidental Petroleum Corp. v. Chandler, 303 F.2d 55 (10th Cir. 1962) (*en banc*), *cert. denied*, 372 U.S. 915 (1973); Texaco, Inc. v. Chandler, 354 F.2d 655 (10th Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 936 (1966).

[86] *See* note 72 *supra*.

[87] 382 U.S. 1003 (1966). Justices Black and Douglas dissented. *Id.* at 1004.

only to that portion of the order barring him from further action in pending cases and that he did not disagree with assignment of all new cases to other judges. When the judges in Judge Chandler's district informed the council that no one intended to attend the February 10 hearing, it was cancelled and a new order was entered modifying the December 13 order. Under the February 4 order, Judge Chandler was permitted to keep those cases assigned to him prior to December 28, 1965. Immediately thereafter, Solicitor General Marshall suggested by memorandum that the issue was mooted by Judge Chandler's acquiescence in the order. Judge Chandler argued that his acquiescence was only strategy to avoid further encroachments upon his rights as a judge. Efforts were made in July 1967, to reassign cases to Judge Chandler; these too were rejected as further illegal exercises of nonexistent powers. The February 4 order was accordingly left in effect.

The Supreme Court handed down its decision in *Chandler* on June 1, 1970, four and one-half years after the council acted against Judge Chandler. Four opinions were filed, three of which at least suggest entirely different views of the councils' powers. Justice Marshall took no part in the decision.[88]

The Chief Justice, writing for the majority, identified several of the "knotty" problems posed by the case: original jurisdiction of the Supreme Court to review this allegedly administrative action; whether the council's action was administrative or judicial; and the various methods of enforcing the limited powers granted the council; but declined to reach those issues. Pointing out that "Judge Chandler has never once since giving his written acquiescence in the division of business sought any relief from either the Council or some other tribunal,"[89] the majority held that Judge Chandler had therefore failed to make a case for the extraordinary relief sought.

The majority's footnotes, though dicta, do suggest some answers to the difficult questions posed by the case. Here the legislative history of section 332 was viewed as manifesting the intent to create "an administrative body functioning in a very limited area in a narrow sense as a 'board of directors' for the circuit"[90] without vesting any traditional judicial powers in the council.[91] The majority saw no constitutional barrier to vesting section 332(d)'s powers in an administrative body. This is essentially the same view taken by the Judicial Council

88 Presumably Justice Marshall did not participate because of his earlier involvement in the case in his position as Solicitor General.

89 398 U.S. at 87.

90 *Id.* at 86 n.7.

91 *Id.*

of the Third Circuit in *Rodebaugh*. The possibility that Judge Chandler might have sought review under 28 U.S.C. § 1361 was raised, though no forum was suggested.[92] Pointing out the lack of provision for enforcement of the council's orders and of proof of intent that that implementation be by regulations, the majority concluded:

> Standing alone, § 332 is not a model of clarity in terms of the scope of the judicial councils' powers or the procedures to give effect to the final sentence of § 332. Legislative clarification of enforcement provisions of this statute and definition of review of Council orders are called for.[93]

Justice Harlan concurred[94] in the denial of the writ but on entirely different grounds. He performed the "feat" the majority declined to perform in holding that the Supreme Court had jurisdiction to entertain Judge Chandler's petition.[95] He found jurisdiction by reading the legislative history of section 332 as mandating a body with both judicial and administrative functions. Justice Harlan argued that the council's exercise of power in "the issuance of orders to district judges to regulate the exercise of their official duties"[96] was an exercise of judicial powers. The council is, at least in this circumstance, an inferior federal court and may be within the appellate jurisdiction of the Supreme Court. Justice Harlan then argued, citing *Marbury v. Madison*,[97] that jurisdiction is proper under the All Writs Act.[98] "[T]he actions challenged by Judge Chandler sufficiently affect matters within this Court's appellate jurisdiction to bring his application for an extraordinary writ within our authority under § 1651(a) . . . ."[99] However, having found jurisdiction, Justice Harlan concluded that the action by the council was within its statutorily-prescribed powers and that Congress' grant of those powers was not unconstitutional. It is clear, how-

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[92] *Id.* at 87 n.5.

[93] *Id.* at 85 n.6.

[94] *Id.* at 89.

[95] As the concurring and dissenting opinions amply demonstrate, finding the prerequisites to support a conclusion that we do have appellate jurisdiction in this case would be no mean feat. It is an exercise we decline to perform since we conclude that in the present posture of the case other avenues of relief on the merits may yet be open to Judge Chandler.

Id. at 86. One author has described the majority's opinion as "of waning sensibility" because of its failure to reach this issue and that of enforcement. Comment, *Little Ado About Much: Jurisdiction of the Supreme Court to Issue Mandamus*, 51 B.U.L. Rev. 106, 110 (1971).

[96] 398 U.S. at 102.

[97] 5 U.S. (1 Cranch) 137 (1803).

[98] 28 U.S.C. § 1651 (1966).

[99] 398 U.S. at 117.

ever, that he was referring only to the February 4 order, not the December 13 order.[100]

Thus even Justice Harlan's expansive view of the councils' powers does not specifically include the power to remove a judge's entire caseload. Justice Harlan's interpretation of the legislative history is plausible. His development of statutory jurisdiction under section 1651 is both creative and thoroughly reasoned. The fact that it attracted no support from his colleagues may suggest that the dicta in the majority opinion would have been the holding had they found jurisdiction.[101] However, with the footnote comments only persuasive rather than binding authority and with subsequent changes in the membership of the Court, it seems safer to wait for a new case for the final determination as to whether the dicta will become law.

In separate dissenting opinions, Justices Black and Douglas renewed the arguments they made at the time Judge Chandler's original request for stay was denied. They agreed with Justice Harlan that the Court had jurisdiction and even conceded that "[e]xpediting the flow of cases to the dockets of district judges is wholly in line with the judicial function"[102] that Congress intended the councils to perform. However, the December 13 order, "qualified but . . . not . . . erased"[103] by the February 4 order, effectively removed Judge Chandler from office, a power which, they contended, was reserved to Congress through impeachment.

> [T]here is no power under our Constitution for one group of federal judges to censor or discipline any federal judge and no power to declare him inefficient and strip him of his power to act as a judge.[104]

Chandler prompted considerable comment in legal periodicals, all of which agreed that the power of the Judicial Councils was a thoroughly unresolved issue. Discussions following the 1966 denial of Judge Chandler's request for stay focus on the judicial removal problem;[105] later writing concentrates more on the problem of review and enforce-

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100 *Id.* at 118–19.

101 The lack of support is particularly noteworthy considering the interpretations of section 332 powers previously made by Chief Justice Burger and Justice Brennan; *see* note 74 *supra*.

102 398 U.S. at 134.

103 *Id.* at 135.

104 *Id.* at 137.

105 *See, e.g.*, Kramer & Barron, *supra* note 10; Kurland, *supra* note 10; Stolz, *supra* note 10; Comment, *The Chandler Incident and Problems of Judicial Removal*, 19 STAN. L. REV. 448 (1967); Comment, *Judicial Responsibility*, *supra* note 71; Comment, *Removal of Federal Judges*, *supra* note 8; Comment, *Removal of Federal Judges—Alternatives to Impeachment*, 20 VAND. L. REV. 723 (1967).

ment of council orders.[106] Congress failed to respond to the majority's request for clarification and definition and the courts were left to their own devices in dealing with council orders.

The Second Circuit was the next court to deal with the problem.[107] The Judicial Council for that circuit had issued some general rules of practice requiring, among other things, dismissal of indictments in cases where the government is not ready for trial within six months of the arrest. Hilbert's indictment was dismissed when the government was unprepared for trial on February 5, 1972. On May 30, 1972, Hilbert was reindicted for the same offense. Judge Dooling denied Hilbert's motion to dismiss the indictment, holding that a new six-month period began on May 30. Hilbert petitioned the Second Circuit for a writ of mandamus. The court, sitting en banc because of the importance of the case, held that the clear intent of its speedy trial rules was to mandate dismissal with prejudice. Further, promulgation of such rules was a proper exercise of the council's powers under section 332. The court found that Congress intended to confer broad powers upon the councils but appeared to restrict those powers to administrative functions.[108] It also concluded, as did Justice Harlan, that mandamus was a proper remedy.[109] Judge Friendly dissented,[110] arguing that the council's rules went beyond a mere exercise of administrative power in removing the trial judges' discretion in determining whether dismissal ought to be with prejudice.

As was the case in *Rodebaugh,* no problems developed because there was compliance with the court's order. No question was raised regarding the propriety of the circuit judges sitting in review of orders they themselves had promulgated.[111] That very question was dealt with in the *Imperial* case.

In re Imperial "400" National, Inc.[112]

As in *Chandler,* the situation which gave rise to the order of the Judicial Council of the Third Circuit in *Imperial* had fomented over an extended period of time. Attorney Nolan had been appointed counsel for the trustee in bankruptcy of the Imperial "400" motel chain. During

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[106] *See, e.g.,* Battisti, *supra* note 54; Comment, *Jurisdiction, supra* note 95; Comment, *Federal Courts—Procedure—Review of the Actions of the Judicial Council of the Circuit,* 42 FORDHAM L. REV. 477 (1973); Comment, *Judicial Councils, supra* note 66.

[107] Hilbert v. Dooling, 476 F.2d 355 (2d Cir. 1973), *cert. denied,* 414 U.S. 878 (1973).

[108] *Id.* at 359–62.

[109] *Id.* at 362.

[110] *Id.*

[111] *Cf.* Comment, *Judicial Councils, supra* note 66, at 816–17.

[112] 481 F.2d 41 (3d Cir. 1973), *cert. denied,* 414 U.S. 880 (1973).

the bankruptcy proceedings, rather heated and pointed arguments had arisen between Nolan and counsel for one of the motel's major creditors over the fees Nolan and his firm were collecting. In the meantime, a construction company represented by Nolan's firm had proposed a reorganization plan. The plan was greeted with approval by all concerned parties but some concern was expressed at Nolan's potential conflict of interest. After examining the problem closely, the district judge decided that Nolan could remain as counsel to the trustee but must avoid all involvement in the reorganization proposal. News of this decision came to the attention of the Judicial Council of the Third Circuit which issued a general resolution[113] to all district courts within the circuit. This "general order" led the district judge, albeit reluctantly, to remove Nolan as counsel for the trustee. Nolan, unlike Rodebaugh and Dooling, challenged the order by appealing and by petitioning the district court for a writ of mandamus. A senior district judge from the Fourth Circuit was designated to hear the mandamus action, which he dismissed, holding that Nolan had an adequate remedy by way of appeal to the circuit and that the district court lacked jurisdiction to entertain the petition for mandamus. The appeals were consolidated. All members of the Third Circuit recused themselves, however, and the Judicial Conference of the United States designated Senior Circuit Judges Aldrich of the First Circuit and Lumbard and Smith of the Second Circuit to hear the cases.

Judge Aldrich, writing for the majority, argued first that the circuit had jurisdiction to hear the appeals, even though in doing so it was indirectly reviewing its own councils' orders. He argued that the council is solely an administrative body and review of the district court's order drawing upon the council's resolution is analogous to review of an order drawing its substance from a statute. In any event, the Supreme Court had declined leave to file the petition for mandamus, indicating that review was not to come from that Court. Moving to the merits, Judge Aldrich found that the councils were administrative bodies denied traditional judicial functions, citing the legislative history and *Chandler*.

Some question exists, however, as to whether the council overstepped its powers to issue general administrative orders in these cases.

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113 RESOLVED that in all bankruptcy proceedings this Council holds as incompatible the continued representation as attorney for the trustee by any lawyer or his firm who represents a third party who submits a plan for reorganization in the bankruptcy; and that recusal by the attorney only from commenting on proposed reorganization plans is not an adequate immunization from the appearance of a conflict of interest.

481 F.2d at 42.

Two items particularly trouble the majority. The first is the apparent personal and individual nature of the order. Allegedly directed at all district judges, it addresses a very specific problem. Indeed, the Solicitor for the Securities and Exchange Commission informed the court that this was the only instance in which he had seen the particular circumstance arise. The problem was compounded by the circuit judges' exposure to "highly defamatory accusations"[114] against Nolan by opposing counsel. The second aspect of the order troubling the majority was its denial of any discretion in the district judge. Assuming that an order was necessary, the council should have allowed Nolan a hearing and allowed the district judge the discretion to determine whether a conflict in fact existed or was threatened.[115] The court affirmed the dismissal of the mandamus action but remanded the original removal order for a hearing on the possibility of reemploying Nolan. The majority thus upheld the councils' powers as an administrative body to issue general orders and established a method of review for those cases where a district court order is issued as a result of a council resolution.

Judge Lumbard dissented.[116] He would have affirmed both the dismissal of the petition for mandamus—on the grounds that the district court was "powerless to entertain a petition to mandamus the circuit council"[117]—and the order removing Nolan as counsel for the trustee in bankruptcy. Agreeing with Justice Harlan, Judge Lumbard stated that Nolan had but two recourses: to petition the council itself for review[118] and to petition the Supreme Court for leave to file a mandamus petition.[119] On the merits, Judge Lumbard argued that control of conflicts of interest is within the powers of section 332 and that the order in question, issued to resolve a specific problem and provide guidance in future cases, was well within the council's statutory powers. He did not address the question whether the council was an administrative or a judicial body.

What occurred following issuance of the opinions in *Imperial* only added more confusion. Petitions for rehearing and rehearing en banc were presented and, as per Third Circuit rules, were to be voted upon by both the panel and the active circuit judges. The panel voted to deny rehearing but could not vote on whether there should be a rehearing en banc since it consisted of senior judges from other circuits who

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114 *Id.* at 47.
115 *Id.* at 47–49.
116 *Id.* at 49.
117 *Id.*
118 *Id.* at 50.
119 *Id.* Judge Lumbard himself noted, however, that the Supreme Court had already denied Nolan's petition for leave to file a writ. 409 U.S. 822 (1972).

could not vote with the Third Circuit judges on that part of the petition. The six active circuit judges voted that the issues were of such significance as to merit an en banc hearing. However, despite Judge Lumbard's urgings, they decided that they must continue to recuse themselves. They concluded:

> [W]e are hopeful that the Supreme Court will see fit to review this important matter, especially since we are impelled to recuse ourselves from sitting in banc on these petitions.[120]

The Supreme Court denied certiorari.[121]

The Post-Imperial Judicial Council

Primarily because the Supreme Court did not decide the basic issues in *Chandler,* we are left with a picture of the powers of the Judicial Councils which is very tentative. It appears that most interpret the legislative history as mandating a body with administrative powers only, though those powers are allegedly very broad. Nothing has been said by the courts to suggest that the informal actions taken by the councils, usually through the Chief Judges, is in any way an abuse of those powers. From *Hilbert v. Dooling,* we can surmise that the issuance of general orders applicable to all district judges in the circuit is also permissible, though Judge Friendly's dissent, together with the majority opinion in *Imperial,* suggest some problem when the orders impinge on a judge's discretion . The majority in *Imperial* finds a method of review in those circumstances where a district court order is promulgated to compel compliance with a council order. Beyond that, it is difficult to identify the extent of the power of the Judicial Council.

Evaluating the four reported cases dealing with the Judicial Council's powers, one writer has developed some guidelines for future councils' actions.[122] He contends that informal actions and general orders directed at all district judges are still permissible. The third type of activity which he deems safe is the issuance of "specific orders, directed to individual judges, and limited to the correction of a specific situation for which that judge can be held directly responsible."[123] Under these guidelines, the orders in *Rodebaugh* and *Imperial* should not have issued, since the specific situations—alleged improper conduct by a court officer other than the judge—were beyond the enforcement scope of the statute. Due to section 332(d), only the district judge is compelled to comply

120 481 F.2d at 57.
121 414 U.S. 880 (1973).
122 *See* Comment, *Judicial Councils, supra* note 66, at 859–63.
123 *Id.* at 860.

with council orders; any attempt to expand those enforcement powers is inviting a problem such as that in *Imperial.* He suggests that there are other avenues open for dealing with this problem. The council might simply have brought Rodebaugh's misconduct to the attention of the district judge; if the judge himself made the same order and the reporter failed to obey, he could be fired without involving the Judicial Council at all.[124] In *Imperial,* the circuit might simply have reversed the district judge's decision allowing Nolan to continue as counsel for the trustee when the case was appealed.[125] That author concedes, however, that the *Chandler* order would have been issued under his third guideline. When a judge refuses to comply with an order, some problems are created. However, he contends that judicial restraint might also have solved this problem. The argument is that if the initial order had merely restricted the assignment of new cases until the judge's backlog was reduced, the situation might not have gotten out of hand. Alternatively, the author suggests that the circuit judges might have refrained from all action as a Judicial Council and continued to deal with Judge Chandler on a case-by-case basis.

Enforcement and review remain the big problems. Perhaps by emphasizing the informal tools and general resolutions, confrontation with those problems can be minimized or even avoided. Adopting that approach is a concession that certain problem judges simply cannot be dealt with by the Judicial Councils. That is exactly as many would have it; whether, however, that is the role Congress foresaw when it granted the supposedly broad powers to the Judicial Councils is a question Congress itself must answer. Adoption of the Nunn bill would be one way to negate the intent the courts have seen in the legislative history of section 332. On the other hand, Congress could demonstrate a contrary intent by making any necessary amendments to section 332.

Conclusion

In comparing the Nunn bill with the Judicial Councils, some may well argue that comparison has been made between apples and oranges.

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[124] As a court reporter, Rodebaugh was subject to removal by the district court [citing 28 U.S.C. § 753(c) (1970)]. If he failed to carry out a directive of the Administrative Office, that court should have removed him. *Id.* at 861.

[125] Indeed, the case came before a three-judge panel of the Third Circuit, from which it was referred to the council. 481 F.2d at 44. The case-by-case approach appears to have been adopted by the Tenth Circuit in dealing with Judge Willis Ritter. *See, e.g.,* United States v. Ritter, 273 F.2d 30 (10th Cir. 1959), *cert. denied,* 362 U.S. 950 (1960); United States v. Hatahley, 220 F.2d 666 (10th Cir. 1955), *rev'd,* 351 U.S. 173 (1956), *on remand,* 257 F.2d 920 (10th Cir. 1958), *cert. denied,* 358 U.S. 899 (1958).

While conceding a certain validity to that point, this article is primarily concerned with a larger problem: identification of some of the options on the spectrum of alternative infringements upon the independence of the judiciary. We hear too often that Congress is certain to act in controlling the judiciary and that the Nunn bill must be accepted and endorsed by the judiciary lest some more lethal method be adopted. The primary purpose of this article is only to refute such an argument and to indicate that there is a reasonable and acceptable alternative to the Nunn bill.

But an important threshold consideration has been only tangentially mentioned in discussing alternatives; that is, should there be any additional controls placed upon the federal judiciary? There is a substantial portion—perhaps a majority—of federal judges who would argue that no control at all is the only constitutionally mandated position. The best recent statement of this view is made by Judge Battisti.[126] His article merits consideration by anyone interested in the problem under discussion here. Judge Battisti argues that even the power assigned to the Judicial Council to attempt to speed up the disposition of cases in the federal courts, conceded by Justices Black and Douglas,[127] is an unconstitutional foray by Congress into the independence of the judiciary.

However, assuming some control is constitutionally allowed, the cases discussed here suggest several alternatives. Justices Black and Douglas would apparently allow some administrative controls aimed only at expediting the flow of cases through the district courts. However, they would reject any attempts—arguably either formal or informal—at censure, removal, or other forms of discipline of judges by judges.

The next alternative on the spectrum is probably the Judicial Council of the Circuit with the powers it may have after the developments of *Chandler* and *Imperial*. Even without congressional clarification, the council has powers to deal with a fairly wide variety of problems. Within the limits of reasonable restraint, the council can be effective, as demonstrated in Professor Fish's book.[128] Indeed, even now section 372 remains available to the council if a judge is physically or mentally unable to carry out his duties.[129]

The mere existence of the Judicial Council allows informal correction of unfortunate practices without the spotlight of more formal action. Without applause or publicity, the Chief Judges of the circuits

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126 Battisti, *supra* note 54.

127 *See* the dissents in *Chandler*, 382 U.S. 1004 (1966), 398 U.S. 129 (1970).

128 P. FISH, *supra* note 64.

129 *See* note 51 *supra*.

have effectively used their persuasive powers to eradicate problems which might otherwise have caused serious difficulties in our judicial system.

The next alternative would be congressional modification of section 332 to provide more definition of, if not an increase in, the power of the Judicial Council, as suggested by the majority in *Chandler*. In fairness, at least an amendment is necessary so that the circuit judges would be brought within the scope of the councils' rulemaking and persuasive powers. Further, while it seems unlikely that the courts will adopt the positions taken by Justice Harlan and Judge Lumbard, Congress might amend section 332 in any number of ways to give the councils more power than they appear currently to possess. By specifying a standard of review and a reviewing court—possibly a designated panel such as used in *Imperial*, the circuit court itself (as suggested in *Imperial*), or the Supreme Court—Congress could expand the councils' powers to include those actions approved by Justice Harlan and Judge Lumbard, possibly without even specifying whether the Judicial Councils are to act as administrative bodies or as courts. Congress might also enumerate the powers of the councils and rescind the general power of section 332. Such an approach is probably a more difficult one than Congress might wish to undertake but it may well end debate on the subject more effectively than any of the alternatives other than that propounded by Judge Battisti.

Judicial removal, such as proposed in the Nunn bill, is the last alternative on the continuum. As discussed earlier, its constitutionality is suspect. Strong policy arguments also militate against its adoption. On the other hand, it would remove from the scope of section 332 most of the problems that have plagued the Judicial Councils and would provide a powerful tool for dealing with errant judges.

Perhaps what should be done can be determined only when horizons are expanded beyond the individualized problem being considered. It would be unfortunate indeed for overreaction to bring about a "solution" which cures a malady but kills or cripples the patient. That horizon expansion occurs when we inject the basic premise that the separation of powers is not only a basic concept of our form of government, but its continuing vitality is the only method available to check and to prevent imbalance and possible tyranny. That separation of power is effective only so long as there is an independence of the judiciary, not merely as one of the three branches of government, but such that each judge can carry out his responsibility unfettered by political pressure. Thus, even assuming a case can be made for some form of control, Professor Kurland's caveat should be kept in mind:

> When dealing with so fundamental and fragile a notion as the independence of the judiciary, one ought to treat warily lest the ultimate cost far outweigh the immediate gain.[130]

If a case for reform has been made, the necessary control mechanisms should be carefully devised and implemented. Unless that case has been made, it would be imprudent to tinker with a system that has functioned with only minor difficulties for nearly two centuries.

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130 Kurland, *supra* note 10, at 666.

The Nunn bill

an unneeded compromise of judicial independence

by J. Clifford Wallace

In 1976, we gratefully celebrated the 200th anniversary of the founding of our Republic. These two centuries were marked by America's dedication to the enhancement of human rights and the preservation of a just and constitutional political system. In retrospect, it cannot be gainsaid that the independent and dedicated federal judiciary performed an inestimably important role in the accomplishment of these noble goals. Whether or not the contemporaries of our nation's quadra-centennial will also be able proudly to proclaim the preservation of human rights and an equitable society will, in my view, depend directly upon the continued integrity and *independence* of the federal judiciary.

It is against this somber backdrop that any proposed inroad on the independence of Article III judges must be considered. I have arrived at the conclusion that S.1423 (the Nunn bill) is a particularly objectionable proposal. My disagreement with it is both specific and general. That is, I believe the specific provisions of the measure are ill-advised; it is a bad bill. More broadly, I quarrel with both the bill's constitutional and political premises; it is, in my view, both unconstitutional and unwise.

Turning first to the bill's specifics, I shall forebear attempting to do more than highlight a few of the measure's more imprudent provisions. S.1423 provides for four discrete factual inquiries into the merits of a complaint concerning the conduct of a federal judge. These inquiries include a "preliminary investigation" by both the Judicial Conduct and Disability *(continues on p. 478)*

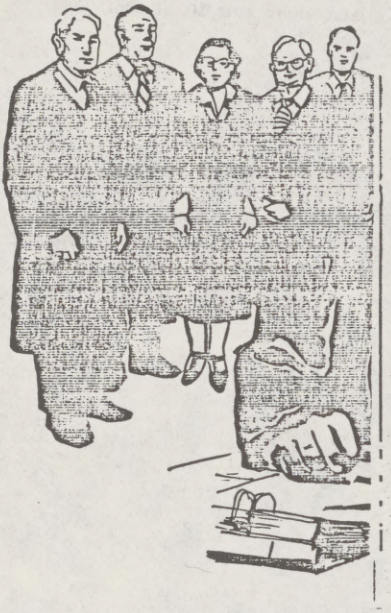

EXHIBIT B

fact that district judges have special concerns and insights which would make their presence in the circuit council particularly advantageous. The second effect of the proposed amendment is the explicit statement contained in subsection (d) that circuit as well as district judges are responsible for carrying out the orders of the circuit council.

In keeping with this enhancement of circuit council responsibility, the council should be given the opportunity, in the first instance, to review all complaints concerning the conduct of a judge within that circuit. Thus, complaints received by the Administrative Office of the United States Courts, members of Congress and others should be referred immediately to the appropriate circuit council. This council, acting pursuant to its power to make all orders necessary for the expeditious administration of justice, would be able effectively to resolve the great majority of questions of judicial conduct coming before it.[10]

In addition, there may be rare cases where the alleged conduct represents corruption or other misdeeds which are so grave as to justify removal from the bench.[11] In these few cases, the circuit council should transmit a report of the matter to the Judicial Conference of the United States. If, after reviewing the matter, the judicial conference is of the opinion that the problem cannot be resolved by the circuit council and that the conduct is sufficiently grave, the judicial conference should transmit its report to the House of Representatives for initiation of the appropriate constitutional procedure, impeachment.

This procedure would enable the circuit councils to deal effectively with virtually all instances of misconduct. Additionally, those rare cases deserving removal would be handled as the Framers intended and the Constitution requires. This simple procedure would add a modest, yet effective, element to the impeachment process: the Judicial Conference, by formally reporting to the House those cases warranting official investigation, would give great impetus to focusing congressional attention on the rare case which truly justifies impeachment.

The benefits of this alternative

The benefits of this proposed procedure over the Nunn bill are significant and, in my judgment, compelling. First, the Nunn bill does not allow for meeting local needs initially by a local machinery. Sending complaints to a bureaucrat on the Potomac whose salary and staff positions depend upon drumming up at least a minimal amount of business is fraught with dangers.

Second, the bill does not provide the flexibility of informal resolution. Every complaint must be filed in Washington and start the complicated machinery. In contrast, under the present system, the chief judges of the circuits can quietly and effectively deal with almost all valid complaints.

Third, my proposal provides a structure tailored to meet the perceived needs with only minimal intrusions upon the crucial independence of our federal judiciary.

Finally, my proposal does not supersede or eliminate the internal corrective machinery of the circuit council and thus leaves unimpaired an existing force which, in many instances, can be of immeasurable assistance in a variety of areas of judicial administration beyond the concerns to which the Nunn bill is addressed.

As I see it, the Nunn bill is probably unconstitutional, embodies a wrong principle, and is administratively bad. The existing system, with minor adjustments, provides a better and more flexible procedure which will not result in greater damage than the hoped-for cure. Should we not say: "We don't need Nunn"? □

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10. The extent of the circuit council's authority to discipline judges is, of course, not a settled question. Yet, more than one circuit council has been willing to exercise its powers to do so. *See* Wallace, *supra* n. 1 at 311–323. Although uncertainty as to the council's authority currently exists, that problem can be remedied by developments in the case law or even by amendments to section 332 in addition to those proposed here. Unresolved questions notwithstanding, I believe that using the circuit council model for judicial discipline is still far preferable to that of the bureaucratic machinery of the Nunn bill.

11. It should be noted that I am dealing only with judicial misconduct. Congress has already enacted a statutory procedure for dealing with cases of mental and physical disability. *See* 28 U.S.C. § 372.

problem, I also concede the need for a solution. The solution, however, should be cautiously structured and responsive to its demonstrated need. As a related consideration, our solution should be lean and efficient, avoiding repetitious and complex procedures. Finally, in light of the overwhelming importance of the institution with which we are dealing, the solution must be as clearly constitutional as possible. With an eye to these considerations, I respectfully offer the following alternative to S.1423.

An alternative to S.1423

The great majority of judicial "disciplinary" problems are now being fully resolved through the efforts of the chief judge of the appropriate circuit.[8] There are, however, cases in which the conduct is too grave or habitual to be resolved by the encouragement and exhortation of the chief judge. These cases, which I reiterate are very few, should be dealt with initially by the judicial council of the appropriate circuit (called the circuit council). 28 U.S.C. § 332(d) empowers the circuit council to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." Although the reaches of this power have not been finally determined, it appears that the circuit council can take strong action vis-a-vis a judge whose conduct adversely affects the administration of justice.[9]

In order to enhance the ability of the circuit council to deal with these kinds of problems, I propose an amendment to section 332 (see below). This amendment would have two essential effects. First, it would radically alter the composition of the circuit council to include equal numbers of district and circuit judges. This change is proposed not only as a matter of fundamental fairness, but also in recognition of the

8. *See id.* at 314. *See generally* Peter Fish, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 397-426. Princeton: Princeton University Press, 1973.

9. See Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 84-85 (1970); *see generally* Wallace, *supra* n. 1 at 311-26.

Strengthening the judicial councils

Here is how Judge Wallace suggests that section 332 might be amended to strengthen the Judicial Council's ability to deal with misconduct:

Be it enacted . . . [etc]. . . that section 332 title 28 of the United States Code, as amended, be further amended to read in part as follows:

§ 332. *Judicial councils*

(a) The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit, consisting of:

(i) the chief judge of the circuit, who shall preside;

(ii) such number of circuit judges of the circuit, in regular active service, as shall be fixed by vote of a majority of all such judges, to be chosen by like vote; and

(iii) a number of district judges of the circuit, in regular active service, equal to the number of circuit judges fixed as provided in (ii), above, to be chosen by vote of a majority of all such district judges.

The members shall serve for a term of one year next following the adjournment of the Judicial Conference of the circuit and until their successors shall have been chosen and taken office. In the event of the death, resignation, retirement or inability of a member, a replacement shall be chosen in like fashion, to hold office for the remainder of the term.

Each member thereof, unless excused by the chief judge, shall attend all sessions of the council.

(b) The council shall be known as the Judicial Council of the circuit.

(c) The chief judge shall submit to the council the quarterly reports of the Director of the Administrative Office of the United States Courts. The council shall take such action thereon as may be necessary.

(d) Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The circuit and district judges shall promptly carry into effect all orders of the judicial council.

Keeping in mind that there are only about 500 full-time Article III judges, it is absurd to create a complex new machine of very questionable constitutionality to deal with the extraordinarily few who deserve disciplinary attention. It is a manifestly more prudent course to take a cautiously circumscribed and much more likely constitutional step which nevertheless is adequate to deal effectively with any judicial misconduct requiring official attention, though not necessarily warranting impeachment. I will later propose such a step.

The threat to independence

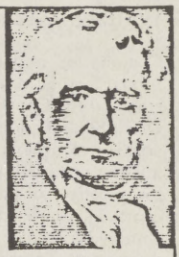
Putting aside for the moment the issue of the Nunn Bill's constitutionality and taking a purely policy standpoint, I believe the bill is unwise and unnecessary. Thus, even were the bill not violative of our fundamental charter, I would nevertheless argue tenaciously for the preservation of the independence of Article III judges.[5] This deeply-held conviction was expressed most eloquently by Chief Justice John Marshall:

> The judicial department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not to the last degree important, that he (the judge) should be rendered perfectly and completely independent, with nothing to influence and control him but God and his conscience? . . . I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary.[6]

Our constitutional system seeks to prevent each of the conditions Chief Justice Marshall feared: executive appointment and legislative confirmation avoids the ignorant judge, the impeachment process rids us of the corrupt judge, and finally, appointment for life, subject only to impeachment, guarantees all Americans that their judges will be independent. Thus, laying aside the constitutional questions, the Nunn bill's frontal attack on the independence of federal judges is patently objectionable.

Before passing from the policy considerations of S.1423, I reiterate my belief that there are very few federal judges whose conduct has truly been so outrageous as to justify removal. Although even one such judge is unfortunate, does this problem merit the creation of a full-fledged bureaucracy consisting of a new governmental commission, a new Article III court and additional duties for the critically backlogged panels of the courts of appeals? In my estimation, the Nunn bill represents the proverbial use of a sledge hammer to eradicate the irritating gnat.

I do acknowledge, as any student of history must, that there occasionally exists the corrupt, tyrannical or habitually intemperate judge.[7] In conceding the existence of this



John Marshall on independence

A judge, said Chief Justice John Marshall, "should be rendered perfectly and completely independent, with nothing to influence him but God and his conscience. . . . the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, corrupt, or a dependent Judiciary."

5. One of my brother judges recently related this graphic illustration of the importance of an independent federal bench: "We had a classic case of this precise type of threat in two different courts in our . . . community. Both courts were confronted with a problem of desegregation of local schools; both courts handed down decisions compelling desegregation. The federal judge is still in office and doing his work objectively and conscientiously; the state court judge was voted out of office . . . after his desegregation decision and the sole issue in the campaign was that decision." Letter from Hon. Laughlin E. Waters to Hon. William J. Jameson (Jan. 6, 1978).

6. Chief Justice Marshall's comments were addressed to the Virginia Convention during its debate on the ratification of the Constitution. Parker, *The Judicial Office in the United States*, 20 TENN. L. REV. 703, 706 (1949).

7. *See* Wallace, *supra*. n. 1 at 298 & n. 7.

Wallace (cont'd from p. 476)

Commission and the circuit panel, plus a formal factual inquiry by both the commission and the Court on Judicial Conduct and Disability. In addition, S.1423 proposes the creation of a new, Washington-based commission complete with permanent staff and the creation of an additional Article III court. This new administrative-judicial machinery is patently excessive in terms of any demonstrated need. In addition, the wasteful and duplicative procedural quagmire proposed by the act is grossly out of step with current, prudent efforts to streamline and focus governmental resources.

Constitutional questions

The question of the bill's constitutionality has been sharply delineated and contested by many scholars from both the bench and academia.[1] Although that analysis need not be repeated here, it is significant that many of our most distinguished scholars have concluded that impeachment is the *exclusive* constitutional means of removing a federal judge.[2] In addition, virtually all objective observers have conceded that a proposal of extra-impeachment removal is at least of dubious constitutionality. I concur with those individuals, from Alexander Hamilton and Thomas Jefferson to Senator Sam Ervin and Professor Philip Kurland, who have concluded that impeachment is the exclusive constitutional method of removal. I am persuaded by the language and history of the Constitution that the Framers fully perceived the evils of a dependent judiciary and therefore expressly made Article III judges independent from all but their consciences and impeachment.[3]

It has been argued that Congress has enacted legislation such as the National Labor Relations Act and the Federal Election Campaign Act in the face of constitutional doubts, relying wholly upon the Supreme Court as the proper and final arbiter of constitutional questions. But I believe Congress itself should, in the first instance, carefully consider the validity of legislation it enacts. In this case, where the potential harm to an essential mainstay of our society is so great, the mere presence of grave constitutional doubts weighs heavily in favor of caution. Any action must be carefully meted to respond to a demonstrated problem.[4]

1. See the authorities cited in J. Clifford Wallace, *Must We Have the Nunn Bill?*, 51 INDIANA L. J. 297, 299 at n.10 (1976), and The Committee on Federal Legislation of The Association of the Bar of the City of New York, *The Removal of Federal Judges Other Than by Impeachment*, FED. LEGIS. REPORT 27 at n.27 (April 1, 1977).

2. Apparently, the early American scholars who believed that impeachment is the sole constitutional method of removing federal judges included Jefferson, Merrill Otis, *A Proposed Tribunal: Is It Constitutional?*, 7 U. KAN. CITY L. REV. 3, 9 at n.5 (1938), and Alexander Hamilton, THE FEDERALIST PAPERS NO. 79. Contemporary scholars reaching this conclusion include Senator Sam Ervin, Ervin, *Separation of Powers: Judicial Independence*, 35 L. & CONTEMP. PROB. 108, 125–26 (1970), and Professor Philip Kurland, Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665 (1969).

3. It has been argued, most notably by Professor Raoul Berger, that the concept of judicial independence is collective rather than individual. That is, the Constitution provides for the independence of the judiciary as a whole rather than individual judges. Thus, argues Professor Berger, a removal procedure which is wholly intra-judiciary does not impinge upon judicial independence. *See Hearings on S.1423 (Judicial Tenure Act) Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 42 (Sept. 14, 1977).

In my view, this argument misconceives the fundamental nature and importance of judicial independence. The purpose of this constitutional check is to guarantee that no judge will be influenced by an external force in the exercise of his duties. Our preconstitutional history teaches that judges who are dependent upon the executive branch may be less than impartial and dispassionate in performing their duties. Is it not equally conceivable that a similar, albeit more subtle, influence could be exerted by a power block within the judiciary? For example, if we create a court with the power to remove, as S.1423 proposes, can we be assured that all our judges will render decisions without regard to the views of their fellow judges who wield the removal power?

I agree fully with the conclusions of former Senator Ervin on this subject: "The separation of powers concepts as understood by the founding fathers assumed the existence of a judicial system free from outside influence of whatever kind and from whatever source, and further assumed that each individual judge would be free from coercion even from his own brethren." Ervin, *supra* n. 2 at 121.

4. Professor Kurland has similarly expressed this sense of caution when tampering with the federal judiciary: "When dealing with so fundamental and so fragile a notion as the independence of the judiciary, one ought to tread warily lest the ultimate cost far outweigh the immediate gains." Kurland, *supra* n. 2 at 666.

Judicial Council of the Ninth Circuit

APR 13 1979

PROCEDURES FOR PROCESSING
COMPLAINTS OF JUDICIAL MISCONDUCT
As Amended April 12, 1979

The following procedures are established by the Judicial Council of the Ninth Circuit for the receipt and consideration of complaints against federal judges in the circuit:

1. All complaints shall be directed to the chief judge of the circuit.

2. The chief judge may

(a) reject a complaint that is frivolous, relates to the merits of any decision or procedural ruling of a judge, or relates to conduct of a judge not connected with his judicial office ~~-or-~~ which does not prejudice the administration of justice by bringing the judicial office into disrepute;

(b) close a complaint, after assuring himself that appropriate corrective action has been taken.

3. If a complaint is rejected or closed by the chief judge, he shall inform the judge complained against, and the complainant, of the rejection or closing of the complaint and the reasons therefor.

EXHIBIT C

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4. If the chief judge does not reject a claim and is unable to assure himself that appropriate action has been taken, he shall so certify to the council, and shall refer the complaint to a committee consisting of himself and an equal number of circuit and district judges, appointed by him to consider the complaint.

5. If the chief judge refers a complaint to a committee, the committee shall inform the judge complained against and conduct such inquiry as the committee considers appropriate. As a part of said inquiry the judge complained against shall be afforded an opportunity to respond to the complaint either in writing or by a personal appearance before the committee, with counsel if desired, or both in writing and by personal appearance. Upon completion of its inquiry, the committee shall submit a report with recommendations to the circuit council and to the judge complained against, setting forth the administrative action that it feels would be appropriate under the circumstances. All papers received by, and proceedings and reports of, the committee shall remain confidential.

6. The council shall take such action upon the recommendation of the committee as the council deems appropriate for the effective and expeditious administration of the business of the courts within its circuit; however, the council shall take no action other than rejecting or closing a complaint without first affording the judge complained against an opportunity to be heard and to present evidence on his behalf.

7. The council may, in its discretion, refer a complaint and its recommended action to the Judicial Conference of the United States.

8. If the council concludes that grounds for impeachment may exist, the record upon which this conclusion is based shall be referred to the Judicial Conference of the United States.

9. The council shall advise the judge complained against of the disposition and the action taken. The council shall also notify the complainant in a manner it deems appropriate about the disposition of the complaint.

10. Where a judge complained against is the chief judge of the circuit, the complaint shall be referred to the next most senior judge in active service on the Court of Appeals, who shall proceed according to paragraphs 2, 3 and 4 above.

11. A copy of these procedures shall be filed in the office of the clerk of the Court of Appeals and the clerks of each of the district courts of the Ninth Circuit.

RESOLUTION I

1. The Judicial Conference of the United States expresses its approval of the following principles to be reflected in any legislation dealing with procedures for inquiries into the conduct of Federal judges:

(a) Removal of an Article III judge from office by any method other than impeachment as provided in Article I of the Constitution would raise grave constitutional questions which should be avoided.

(b) The primary responsibility for dealing with a complaint against a United States judge should rest initially with the chief judge of the circuit as presiding judge of the Judicial Council, who may dismiss the complaint if it is frivolous or relates to the merits of a decision or procedural ruling, or may close the complaint after assuring himself that appropriate corrective action has been taken.

(c) Any complaint not dismissed or closed by the presiding judge should be referred to a committee appointed by the presiding judge, consisting of an equal number of circuit and district judges and the presiding judge.

(d) The joint committee should report its findings and recommendations to the Judicial Council, which should take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit.

(e) The Judicial Council may, in its discretion, refer a complaint and the Council's recommended action to the Judicial Conference of the United States.

(f) If the Judicial Council concludes that grounds for impeachment may exist, it should transmit the record upon which its conclusion is based to the Judicial Conference of the United States; the Judicial Conference shall then determine whether, in all the circumstances, the matter should be referred to the House of Representatives.

EXHIBIT D

RESOLUTION I (continued)

2. The Judicial Conference recommends that the Judicial Councils of the several circuits, at their earliest opportunity, consider the formulation and promulgation of rules of procedure for the receipt and processing of complaints against judges in accordance with the principles expressed in paragraph 1; such rules and regulations should be announced in such manner as to assure that the public and the bar will be informed.

3. The Chairman of the Court Administration Committee and the members of the Executive Committee of the Conference are directed (1) to review and revise, in accordance with the principles stated in paragraph 1, the Court Administration Committee's proposed amendments to 28 U.S.C. § 332, and (2) to transmit the revised proposed amendments to all members of the Conference for their approval. Following approval by the Conference, the Chairman of the Court Administration Committee, if called upon by the Congress to testify upon pending legislation, is authorized to inform the Congress that, if legislative action is to be taken, the Conference recommends amendments to 28 U.S.C. § 332 as approved by the Conference in accordance with this paragraph.

4. All previous Judicial Conference resolutions or comments upon legislation dealing with the conduct of Federal judges are superseded by this resolution.

FEB 12 1979

EXPLANATORY NOTE

Although the following pages present existing statutory provisions on pages facing "proposed amended provisions", only subsections (a) and (d) of the existing statute have actually been rewritten.

No changes have been made in subsections (b) and (c) of the existing statute.

A new subsection (e) has been added.

Subsections (e) and (f) of the existing statute have been redesignated as (f) and (g), without textual change.

Appendix A

EXHIBIT E

§ 332. Judicial councils

(a) The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit judges for the circuit, in regular active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall attend all sessions of the council.

(b) The council shall be known as the Judicial Council of the circuit.

(c) The chief judge shall submit to the council the quarterly reports of the Director of the Administrative Office of the United States Courts. The council shall take such action thereon as may be necessary.

Proposed Amended Provisions
Approved by the Committee on
Court Administration -- Jan. 29, 1979

§ 332. Judicial councils

(a) The chief judge of each court of appeals of a circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit, consisting of:

(1) the chief judge of the court of appeals for the circuit, who shall preside; and

(2) such number, not to exceed seven, of courts of appeals judges of the circuit, in regular active service, as shall be fixed by vote of a majority of all such judges, to be chosen by seniority; and

(3) a number of district court judges of the circuit, in regular active service, equal to the number of courts of appeals judges fixed in paragraph (2), to be chosen by seniority; provided, however, that no more than one district court judge from a given district shall serve simultaneously on the council unless such simultaneous service shall be necessary to attain the number of district court judges required by this paragraph.

Each member shall serve for a term of three years, and shall be succeeded by regular active judges next in seniority, unless there are no regular active judges who have not yet served. In the event of the death, resignation, retirement or disability of a member, a replacement shall be chosen by seniority, to hold office for the remainder of the term.

Each member thereof, unless excused by the chief judge of the circuit, shall attend all sessions of the council.

(b) The council shall be known as the Judicial Council of the circuit.

(c) The chief judge shall submit to the council the quarterly report of the Director of the Administrative Office of the United States Courts. The council shall take such action thereon as may be necessary.

Appendix A

(d) Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.

Proposed Amended Provisions
Approved by the Committee on
Court Administration -- Jan. 29, 1979

(d) Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit. Unless an impediment to justice is involved, regular business of the courts need not be referred to the council. Each council is authorized to hold hearings, to take sworn testimony, and to issue subpeonas and subpoenas duces tecum therefore. Subpeonas shall be issued by the clerk of the court by direction of the chief judge of the court of appeals or his designee, under the seal of the court, and served in the manner provided in Rule 45(c) of the Federal Rules of Civil Procedures for subpeonas issued on behalf of the United States or an office or agency thereof.

All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council.

(e)(1) Any person claiming that a district court [,] or circuit court of appeals [or bankruptcy] judge has engaged or is engaging in conduct prejudicial to the administration of justice by bringing the judicial office into disrepute (other than conduct relating to the merits of a decision or ~~prejudicial~~ PROCEDURAL ruling) may file with the clerk of the court of appeals for the circuit a written complaint containing a short and plain statement of the facts constituting such conduct.

(2) Upon receipt of a complaint, the clerk shall promptly transmit it to the chief judge of the court of appeals for the circuit, or, if the conduct complained of is that of the chief judge, to the court of appeals judge in regular active service next senior in date of commission, who is hereafter referred to, for purposes of this subsection only, as "the chief judge," and a copy thereof to the judge complained against.

(3) The chief judge, by written order stating the reasons, may

(A) dismiss the complaint as frivolous or not in conformity with paragraph (1), or

(B) close a complaint after assuring himself that appropriate corrective action has been taken.

The chief judge shall trasmit copies of the order to the complainant and the judge complained against.

(4) If the chief judge does not enter such an order, he shall certify the complaint and any other documents pertaining thereto to the council, refer the matter to a committee of court of appeals and district judges appointed by him and notify the complainant and the judge complained against of his action.

(5) The committee shall conduct such investigation as it deems appropriate. Upon completion of its investigation, it shall transmit a written report to the council, with a copy to the judge complained against, setting forth its findings and recommendations as to the action it deems appropriate.

(6) The council shall consider the report, conduct any additional investigation it deems appropriate, take such action, by majority vote, as it deems appropriate, and advise the complainant and the judge complained against of the action taken. If the council determines that the conduct complained of may constitute one or more grounds for impeachment of the judge complained against under the Constitution of the United States, it shall certify such determination and the record of all proceedings to the Judicial Conference of the United States, with a copy to the judge complained against.

(7) The Conference, after consideration of the prior proceedings and such additional investigation as it deems appropriate, shall take such action as it deems appropriate by majority vote. If it concurs in the determination of the council, or makes its own determination, that impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives.

(8) (A) A complainant aggrieved by a final order of the chief judge under paragraph (3) may petition the council for review thereof.

(B) A judge aggrieved by a final order of the council under paragraph (6) may petition the Conference for review thereof.

Except as expressly provided herein, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be reviewable on appeal or otherwise.

(9) In conducting any investigation provided for herein, the committee, the council and the Conference shall have the power of subpena provided by subsection (d).

(e) The judicial council of each circuit may appoint a circuit executive from among persons who shall be certified by the Board of certification. The circuit executive shall exercise such administrative powers and perform such duties as may be delegated to him by the circuit council. The duties delegated to the circuit executive of each circuit may include but need not be limited to:

(1) Exercising administrative control of all nonjudicial activities of the court of appeals of the circuit in which he is appointed.

Proposed Amended Provisions
Approved by the Committee on
Court Administration -- Jan. 29, 1979

The council and the Conference may prescribe such rules for the conduct or proceedings hereunder, including petitions for review, as may be deemed appropriate; provided, however, that

(A) adequate prior notice of any investigation shall be given to the judge complained against in writing;

(B) the judge complained against shall be afforded the opportunity to appear at the investigation in person or by counsel, to present oral and documentary evidence, and, upon proper application, to compel attendance of witnesses and production of documents, to cross-examine witnesses and to present argument orally or in writing.

The judge complained against shall take no part in the deliberations of the council or Conference.

(10) Except as expressly provided herein, nothing in this subsection shall be construed to affect in any way any other provision of this title, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure or the Federal Rules of Evidence.

(11) All papers, proceedings, documents and records, and investigations conducted, under this subsection shall be confidential and privileged against disclosure by any person in any proceeding, except by the council or Conference, and except as the Congress may otherwise provide with respect to an impeachment or trial of the judge complained against in accordance with the Constitution of the United States.

(f) The judicial council of each circuit may appoint a circuit executive from among persons who shall be certified by the Board of certification. The circuit executive shall exercise such administrative powers and perform such duties as may be delegated to him by the circuit council. The duties delegated to the circuit executive of each circuit may include but need not be limited to:

(1) Exercising administrative control of all nonjudicial activities of the court of appeals of the circuit in which he is appointed.

(2) Administering the personnel system of the court of appeals of the circuit.

(3) Administering the budget of the court of appeals of the circuit.

(4) Maintaining a modern accounting system.

(5) Establishing and maintaining property control records and undertaking a space management program.

(6) Conducting studies relating to the business and administration of the courts within the circuit and preparing appropriate recommendations and reports to the chief judge, the circuit council, and the Judicial Conference.

(7) Collecting, compiling, and analyzing statistical data with a view to the preparation and presentation of reports based on such data as may be directed by the chief judge, the circuit council, and the Administrative Office of the United States Courts.

(8) Representing the circuit as its liaison to the courts of the various States in which the circuit is located, the marshal's office, State and local bar associations, civic groups, news media, and other private and public groups having a reasonable interest in the administration of the circuit.

(9) Arranging and attending meetings of the judges of the circuit and of the circuit council, including preparing the agenda and serving as secretary in all such meetings.

(10) Preparing an annual report to the circuit and to the Administrative Office of the United States Courts for the preceding calendar year, including recommendations for more expeditious disposition of the business of the circuit.

All duties delegated to the circuit executive shall be subject to the general supervision of the chief judge of the circuit.

Proposed Amended Provisions
Approved by the Committee on
Court Administration -- Jan. 29, 1979

(2) Administering the personnel system of the court of appeals of the circuit.

(3) Administering the budget of the court of appeals of the circuit.

(4) Maintaining a modern accounting system.

(5) Establishing and maintaining property control records and undertaking a space management program.

(6) Conducting studies relating to the business and administration of the courts within the circuit and preparing appropriate recommendations and reports to the chief judge, the circuit council, and the Judicial Conference.

(7) Collecting, compiling, and analyzing statistical data with a view to the preparation and presentation of reports based on such data as may be directed by the chief judge, the circuit council, and the Administrative Office of the United States Courts.

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All duties delegated to the circuit executive shall be subject to the general supervision of the chief judge of the circuit.

(f) The standards for certification as qualified to be a circuit executive shall be set by a Board of Certification. These standards shall take into account experience in administrative and executive positions, familiarity with court procedures, and special training. The Board of Certification shall consist of five members, three of whom shall be elected by the Judicial Conference of the United States, and at least one of these three shall be selected from among persons experienced in executive recruitment and selection. The additional two members shall be the Director of the Administrative Office of the United States Courts and the Director of the Federal Judicial Center. The members of the Board elected by the Judicial Conference shall each serve for three years except that upon appointment of the first members, one member shall serve for one year, one for two years, and one for three years. The Board shall consider all applicants who apply for certification, shall certify qualified applicants, shall maintain a roster of all persons certified, and shall publish the standards for certification. A person's name shall be removed from the roster after three years unless he is recertified. Three members of the Board shall constitute a quorum for purposes of fixing standards and for certifying applicants, but no action of the Board shall be taken unless three of the members are in agreement. The Director of the Administrative Office of the United States Courts shall provide staff assistance in support of the operation of the Board. Expenses of the Board of Certification shall be borne by the travel and miscellaneous expense funds appropriated to the Federal judiciary. Any member of the Board who is an officer or employee of the United States shall serve without compensation. Other members shall receive the daily equivalent of the rate provided for GS–18 of the General Schedule contained in section 5332 of title 5, United States Code, when actually engaged in service for the Board.

Each circuit executive shall be paid at a salary to be established by the Judicial Conference of the United States not to exceed the annual rate of level V of the Executive Schedule pay rates (5 U.S.C. 5316).

The circuit executive shall serve at the pleasure of the judicial council of the circuit.

The circuit executive may appoint, with the approval of the council, necessary employees in such number as may be approved by the Director of the Administrative Office of the United States Courts.

Proposed Amended Provisions
Approved by the Committee on
Court Administration -- Jan. 29, 1979

(g) The standards for certification as qualified to be a circuit executive shall be set by a Board of Certification. These standards shall take into account experience in administrative and executive positions, familiarity with court procedures, and special training. The Board of Certification shall consist of five members, three of whom shall be elected by the Judicial Conference of the United States, and at least one of these three shall be selected from among persons experienced in executive recruitment and selection. The additional two members shall be the Director of the Administrative Office of the United States Courts and the Director of the Federal Judicial Center. The members of the Board elected by the Judicial Conference shall each serve for three years except that upon appointment of the first members, one member shall serve for one year, one for two years, and one for three years. The Board shall consider all applicants who apply for certification, shall certify qualified applicants, shall maintain a roster of all persons certified, and shall publish the standards for certification. A person's name shall be removed from the roster after three years unless he is recertified. Three members of the Board shall constitute a quorum for purposes of fixing standards and for certifying applicants, but no action of the Board shall be taken unless three of the members are in agreement. The Director of the Administrative Office of the United States Courts shall provide staff assistance in support of the operations of the Board. Expenses of the Board of Certification shall be borne by the travel and miscellaneous expense funds appropriated to the Federal judiciary. Any member of the Board who is an officer or employee of the United States shall serve without compensation. Other members shall receive the daily equivalent of the rate provided for GS-18 of the General Schedule contained in section 5332 of title 5, United States Code, when actually engaged in service for the Board.

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48-202 O - 79 - 33

The circuit executive and his staff shall be deemed to be officers and employees of the judicial branch of the United States Government within the meaning of subchapter III of chapter 83 (relating to civil service retirement), chapter 87 (relating to Federal employees' life insurance program), and chapter 89 (relating to Federal employees' health benefits program) of title 5, United States Code.

As amended Nov. 13, 1963, Pub.L. 88–176, § 3, 77 Stat. 331; Jan. 5, 1971, Pub.L. 91–647, 84 Stat. 1907.

Proposed Amended Provisions
Approved by the Committee on
Court Administration -- Jan. 29, 1979

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RESOLUTION II

The Judicial Conference of the United States expresses its approval of the following principles to be reflected in any legislation dealing with the membership of the Judicial Councils of the circuits:

Any Judicial Council having less than six circuit judges as members shall have, as members, not less than two district judges in regular active service.

Any Circuit Council having six or more circuit judges as members shall have, as members, not less than three district judges in regular active service.

The number of district judge members of a Judicial Council, fixed in accordance with the above principles, shall be fixed by majority vote of the active circuit judges of the Council.

District judges shall serve as members of a Judicial Council in the order of their seniority, for terms of three years.

No more than one district judge from any one district shall serve simultaneously on the Circuit Council, unless there is already a representative on the Council from each district in the circuit.

EXHIBIT F

PROPOSED AMENDMENTS TO 28 U.S.C.

§§ 372 and 332

Suggested amendments to 28 U.S.C. §§ 372 to provide for restructuring of the judicial council of the circuit when considering complaints against judges and involuntary disability retirement, and an amendment to § 332 to clarify who is to respond to orders of the council.

EXHIBIT G

Be it enacted . . . [etc.] . . . that section 332 of title 28 of the United States Code, as amended, be further amended to read in part as follows:

§ 332. Judicial councils

(a) The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit, consisting of:

(i) the chief judge of the circuit, who shall preside;

(ii) such number of circuit judges of the circuit, in regular active service who are not eligible to retire, as shall be fixed by vote of a majority of all such judges, to be chosen by like vote; and

(iii) a number of district judges of the circuit, in regular active service who are not eligible to retire, equal to the number of circuit judges fixed as provided in (ii), above, to be chosen by vote of a majority of all such district judges.

The members shall serve for a term of one year next following the adjournment of the Judicial Conference of the circuit and until their successors shall have been chosen and taken office. In the event of the death, resignation, eligibility for or retirement or disability of a member, a replacement shall be chosen in like fashion, to hold office for the remainder of the term.

Each member thereof, unless excused by the chief judge, shall attend all sessions of the council.

[No change to subsections (b) or (c).]

(d) Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. Each council is authorized to hold hearings, to require by subpena the attendance of such witnesses and the production of such correspondence, books, papers, documents and other tangible things specified in the subpena and to take sworn testimony as it deems desirable. Subpenas shall be issued by the clerk of the court by direction of the chief judge

or his designee, under the seal of the court, and served in the manner provided in Rule 45(c) of the Federal Rules of Civil Procedure for subpenas issued on behalf of the United States or an officer or agency thereof.

All courts and judges in the circuit shall promptly carry into effect all orders of the judicial council.

(e)(1) Any person claiming that a district or circuit judge has engaged or is engaging in conduct prejudicial to the administration of justice by bringing the judicial office into disrepute (other than conduct relating to the merits of a decision or procedural ruling) may file with the clerk of the court of appeals of the circuit a written complaint containing a short and plain statement of the facts constituting such conduct.

(2) Upon receipt of a complaint, the clerk shall promptly transmit it to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to the judge of the circuit in regular active service next senior in date of commission, who is hereafter referred to, for purposes of this subsection only, as "the chief judge," and a copy thereof to the judge complained against.

(3) The chief judge, by written order stating the reasons, may

(A) dismiss the complaint as frivolous or not in conformity with paragraph (1), or

(B) close a complaint after assuring himself that appropriate corrective action has been taken.

The chief judge shall transmit copies of the order to the complainant and the judge complained against.

(4) If the chief judge does not enter such an order, he shall certify the complaint and any other documents pertaining thereto to the council, refer the matter to a committee of circuit and district judges

appointed by him and notify the complainant and the judge complained against of his action.

(5) The committee shall conduct such investigation as it deems appropriate. Upon completion of its investigation, it shall transmit a written report to the council, with a copy to the judge complained against, setting forth its findings and recommendations as to the action it deems appropriate.

(6) The council shall consider the report, conduct any additional investigation it deems appropriate, take such action, by majority vote, as it deems appropriate, and advise the complainant and the judge complained against of the action taken. If the council determines that the conduct complained of may constitute one or more grounds for impeachment of the judge complained against under the Constitution of the United States, it shall certify such determination and the record of all proceedings to the Judicial Conference of the United States, with a copy to the judge complained against.

(7) The Conference, after consideration of the prior proceedings and such additional investigation as it deems appropriate, shall take such action, by majority vote, as it deems appropriate. If it concurs in the determination of the council, or makes its own determination, that impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives.

(8)(A) When a final order of the chief judge is entered pursuant to paragraph (3), the complainant may, within a reasonable time, petition the council for review thereof.

(B) When a final order of the council is entered pursuant to paragraph (6), the judge complained against may, within a reasonable time, petition the Conference for review thereof.

Except as expressly provided herein, all orders

and determinations, including denials of petitions for review, shall be final and conclusive and shall not be reviewable on appeal or otherwise.

(9) In conducting any investigation provided for herein, the committee, the council and the Conference shall have the power of subpena provided by paragraph (d).

The council and the Conference may prescribe such rules for the conduct of proceedings hereunder, including petitions for review, as may be deemed appropriate; provided, however, that

(A) adequate prior notice of any investigation shall be given to the judge complained against in writing, and

(B) the judge complained against shall be afforded the opportunity to appear in person or by counsel, at hearings held pursuant to paragraphs (4), (6) or (7) and to present oral and documentary evidence, and, upon proper application, to compel attendance of witnesses and production of documents, to cross-examine witnesses and to present argument orally or in writing.

The judge complained against shall take no part in the deliberations of the committee appointed pursuant to paragraph (4), the council or the Conference.

(10) Except as expressly provided herein, nothing in this subsection shall be construed to affect in any way any other provision of this title, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure or the Federal Rules of Evidence.

(11) All papers, proceedings, documents and records, and investigations conducted, under this subsection shall be confidential and privileged against disclosure by any person in any proceeding, except by order of the council or the Conference or as the Congress may otherwise provide with respect to an impeachment or trial of the judge complained against in accordance with the

The Nunn bill: an unneeded compromise of judicial independence

by J. Clifford Wallace

In 1976, we gratefully celebrated the 200th anniversary of the founding of our Republic. These two centuries were marked by America's dedication to the enhancement of human rights and the preservation of a just and constitutional political system. In retrospect, it cannot be gainsaid that the independent and dedicated federal judiciary performed an inestimably important role in the accomplishment of these noble goals. Whether or not the contemporaries of our nation's quadra-centennial will also be able proudly to proclaim the preservation of human rights and an equitable society will, in my view, depend directly upon the continued integrity and *independence* of the federal judiciary.

It is against this somber backdrop that any proposed inroad on the independence of Article III judges must be considered. I have arrived at the conclusion that S.1423 (the Nunn bill) is a particularly objectionable proposal. My disagreement with it is both specific and general. That is, I believe the specific provisions of the measure are ill-advised; it is a bad bill. More broadly, I quarrel with both the bill's constitutional and political premises; it is, in my view, both unconstitutional and unwise.

Turning first to the bill's specifics, I shall forebear attempting to do more than highlight a few of the measure's more imprudent provisions. S.1423 provides for four discrete factual inquiries into the merits of a complaint concerning the conduct of a federal judge. These inquiries include a "preliminary investigation" by both the Judicial Conduct and Disability *(continues on p. 478)*

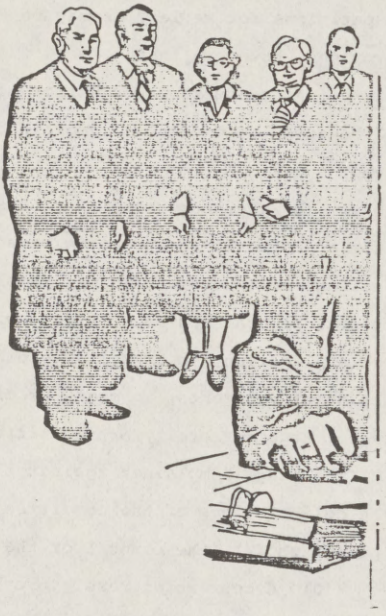

EXHIBIT B

Constitution of the United States.

[No change to subsections (e) and (f) and they are relettered (f) and (g), respectively.]

CONGRESSIONAL BUDGET OFFICE
U.S. CONGRESS
WASHINGTON, D.C. 20515

Alice M. Rivlin
Director

August 3, 1979

The Honorable Edward M. Kennedy
Chairman
Committee on the Judiciary
United States Senate
2226 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 1477, the Federal Courts Improvement Act of 1979, as ordered reported by the Senate Committee on the Judiciary, July 31, 1979.

This bill, one of a series of court reform bills designed to improve the quality of the federal court system, creates two new federal courts of appeals, and a new United States Court of Tax Appeals. One of the new courts of appeals is called the United States Court of Appeals for the Federal Circuit. It is established by a merger of the Court of Claims and the Court of Customs and Patent Appeals. This court differs from other federal courts of appeals in that its jurisdiction is defined in terms of subject matter rather than geography. It inherits all of the jurisdiction of the two courts abolished in the merger as well as appeals in suits against the government and appeals from the Customs Court, the Patent and Trademark Office and other statutorily defined agencies. The new United States Court of Tax Appeals would have exclusive appellate jurisdiction over all civil tax appeals, but should not be viewed as a "tax specialty" court. Judges reassigned to this court will have generalist backgrounds and, depending on the workload of the court, will be able to participate in other types of cases in their home circuits. This bill also creates a new article I trial forum known as the United States Claims Court which would inherit the trial jurisdiction of the Court of Claims. The court is composed of 16 article I judges who will be appointed by the President for a term of 15 years. In organization and procedure it resembles the United States Tax Court.

Based on information from the Administrative Office of the United States Courts, it is estimated that implementation of this bill will cost approximately $2 million per year in fiscal years 1982 through 1984. The

expenditures will primarily be for expenses of the advisory committees for the courts of appeals and additional personnel and overhead costs for the new courts.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

Robert D. Reischauer

for Alice M. Rivlin
Director

cc: The Honorable Strom Thurmond
Ranking Minority Member

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MARYLAND
BALTIMORE, MARYLAND 21201

FRANK A. KAUFMAN
UNITED STATES DISTRICT JUDGE

June 20, 1979

The Honorable Edward M. Kennedy
United States Senate
Washington, D. C. 20510

The Honorable Birch Bayh
United States Senate
Washington, D. C. 20510

The Honorable Charles McC. Mathias, Jr.
United States Senate
Washington, D. C. 20510

Dear Senators Kennedy, Bayh and Mathias:

We have been informed by Judges Kaufman and Noland of their discussions with you recently about pending judicial improvements legislation. All of us appreciate your deep interest in this subject. We write as five individual federal district judges who have been active in the affairs of the district judges associations of our own circuits and have also been active in the National Conference of Federal Trial Judges in the Judicial Administration Division of the American Bar Association. We believe that the views we are stating are held by a very large number of federal district judges. However, we speak only in our own individual capacities and not officially on behalf of any organization.

Our views are almost entirely in accord with those which have been expressed previously to you by Judge Elmo B. Hunter as Chairman of the Judicial Conference's Committee on Court Administration and Judge J. Clifford Wallace of the Ninth Circuit. We, as district judges, however, do have a few specific comments we desire to stress, if only for purposes of emphasis.

(1) We do not believe any procedures with regard to discipline, other than impeachment, are needed or are in any way desirable. There have been few instances during our history of misconduct by federal judges.

(2) As Judge Wallace has pointed out, there is sufficient leeway pursuant to existing legislation for the Circuit Judicial Councils to restructure themselves, if some

restructuring is required, as we think it is. For one thing, there should be equal district judge representation upon the Circuit Councils, particularly if those Councils are given the duty to consider complaints of misconduct concerning district as well as circuit judges.

(3) If provision is going to be made in the legislation with regard to processing of complaints of misconduct by federal judges, we urge the approach suggested by Judge Wallace, namely, that the Circuit Councils remain as they are today, administrative bodies rather than becoming judicial bodies. We strongly oppose as unconstitutional and as a serious threat to judicial independence removal by any procedure other than by impeachment by the House of Representatives. If any new legislation does provide for processing of complaints, the standard which should govern is whether the judge's conduct interferes with or impairs "the effective and expeditious administration of the business of the courts" for the just determination of litigation. See 28 U.S.C. § 332(d). Additionally, all complaints should be acted upon initially and, hopefully in most instances, informally by the Chief Judge of the Circuit, and if they cannot be fairly handled by the Chief Judge, then at the Circuit Council level, and finally by the Judicial Conference. If both a Circuit Council and the Conference conclude that a complaint embodies grounds for impeachment, that complaint should be forwarded to the House of Representatives.

(4) The independence of the federal judiciary is a vital and intricate part of our tripartite system of government. We are sorely concerned about any chipping away of that independence. We stand ready to express any further views about these questions and about any other questions which are related to pending judicial improvements legislation which you are considering. Again, we thank you for your deep interest in the subject and for affording us the opportunity to state our position.

In the interest of time, Judge Kaufman has been authorized by each of us to sign this letter on behalf of each of us.

Very truly yours,

James Harvey
United States District Judge
for the Eastern District of Michigan

James E. Noland
United States District Judge
for the Southern District of Indiana

Earl E. O'Connor
United States District Judge
for the District of Kansas

Robert F. Peckham
Chief Judge, U. S. District Court
for the Northern District of California

Frank A. Kaufman
United States District Judge
for the District of Maryland

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