

Notes

Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980

The Framers of our Constitution established a scheme to ensure the strictest scrutiny of the official actions of Article III judges that they thought consistent with an independent judiciary: They specified the House of Representatives as the sole body to accuse,¹ and the Senate as the sole body to try,² Article III judges for non-criminal malfeasance.³ Criminal malfeasance by judges could be reached with this impeachment power, but was also subject to prosecution in the common courts of law.⁴

Fearing its own power of impeachment,⁵ Congress in 1980 created a non-congressional procedure for accusing, trying, and punishing Article

1. "The House of Representatives . . . shall have the sole Power of Impeachment." U.S. CONST. art. I, § 2, cl. 5.

2. "The Senate shall have the sole Power to try all Impeachments." *Id.* art. I, § 3, cl. 6.

3. The scope of "Treason, Bribery, or other high Crimes and Misdemeanors," *id.* art. II, § 4, has been the subject of much dispute. For an annotated bibliography of some of the important works in this debate, see C. BLACK, *IMPEACHMENT: A HANDBOOK* 71-76 (1974).

4. Since bribery, for example, is both an impeachable offense, *see* U.S. CONST. art II, § 4, and a federal crime, *see* 18 U.S.C. §§ 201-224 (1982), a judge suspected of bribery may be both tried in courts of law and impeached for the same offense: "[T]he Party convicted [upon impeachment] shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." U.S. CONST. art. I, § 3, cl. 7. Not all crimes are impeachable offenses, however. *See, e.g.*, R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 193-214 (1973). Nor are impeachable offenses restricted to crimes cognizable in courts of law. *See infra* note 77.

5. *See, e.g., Judicial Tenure and Discipline—1979-80: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st & 2d Sess. 135 (1979-80) (statement of Rep. Robert McClory) ("Our problem as Members of Congress is that something fairly egregious has to occur before impeachment is resorted to."); *id.* at 136 (testimony of Rep. Peter W. Rodino, Jr.) (impeachment "the ultimate and the last resort"); S. REP. NO. 362, 96th Cong., 1st Sess. 5 (1979), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4315, 4319 ("Clearly, the founding fathers did not intend for the members of the federal bench to be threatened with removal by impeachment except in the rarest of circumstances.") [hereinafter cited as S. REP. NO. 362]; H.R. REP. NO. 1313, 96th Cong., 2d Sess. 2 (1980) ("framers wanted impeachment to be used as a last resort, only to solve the most egregious cases") [hereinafter cited as H.R. REP. NO. 1313].

III judges⁶ for “administrative” lapses,⁷ and quietly transformed the judicial councils⁸ and the Judicial Conference⁹ from administrative bodies into administrative-adjudicative hybrids. This Note argues that the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980¹⁰ (“the Act”) is unconstitutional.¹¹ The Act violates the Constitution’s allocation of powers by requiring the judicial councils and the Judicial Conference to exercise a power of scrutiny over their Article III colleagues which the Constitution promises that only Congress will exercise. In addition, the procedures set out in the Act deny Article III judges proper judicial process.

I. THE DANGEROUS AMBIGUITY OF JUDICIAL “ADMINISTRATION”

The judicial councils of the circuits and the Judicial Conference of the United States are the central administrators of the modern judicial bureaucracy.¹² Each federal circuit has a judicial council consisting of the

6. Article III judges are those judges of the “one supreme Court” and “such inferior Courts as the Congress may from time to time ordain and establish” in whom the Constitution vests the “judicial Power of the United States.” U.S. CONST. art. III, § 1. The independence of these judges is protected by Article III’s mandate that they “shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.” *Id.*

7. “The purpose of the [Act] is to establish a procedure for investigating and resolving allegations that a member of the Federal judiciary . . . has engaged in conduct which has been inconsistent with the effective and expeditious administration of the business of the courts.” S. REP. NO. 362, *supra* note 5, at 1. Congress was aware that the offenses punishable under the Act included “impeachable behavior [and] violations of the criminal laws.” H.R. REP. NO. 1313, *supra* note 5, at 10.

8. The 12 judicial councils—one in each of the 12 federal judicial circuits—are each comprised of a small number of judges responsible for the “administration of justice” within a particular circuit. 28 U.S.C. § 332(d)(1) (1982). *See infra* text accompanying notes 12–30.

9. The Judicial Conference of the United States consists of a small number of federal judges from each judicial circuit, who are responsible for coordinating the operation of the entire federal judiciary. *See infra* text accompanying notes 12–30.

10. Pub. L. No. 96-458, 94 Stat. 2035 (1980) (codified at 28 U.S.C. §§ 331, 332, 372, 604 (1982)). This Note shall be concerned only with the Act’s disciplinary provisions codified at 28 U.S.C. § 372(c) (1982).

11. There has been surprisingly little discussion of the Act in the academic literature: Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283 (1982); Fishburn, *Constitutional Judicial Tenure Legislation?—The Words May Be New, But the Song Sounds the Same*, 8 HAST. CONST. L.Q. 843 (1981); Freedman, *Removal and Discipline of Federal Judges*, 31 MERCER L. REV. 681 (1980); Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681 (1979); Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671 (1980); Re, *Judicial Independence and Accountability: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 8 N. KY. L. REV. 221 (1981).

12. It is interesting and disturbing that recent commentators on the bureaucratization of the judiciary have expressed little unease at the growth—in both size and powers—of such “administrative” bodies through which small numbers of Article III judges exert direct control over their colleagues. These discussions have instead focused on the relationships between the Article III judge and non-Article III employees of the judicial system, such as magistrates and law clerks. *See, e.g.*, R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 94–119 (1985); Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983); Merritt, *Owen Fiss on Paradise Lost: The Judicial Bureaucracy in the Administrative State*, 92 YALE L.J. 1469 (1983); Wald, *Bureaucracy and the Courts*, 92

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chief judge of the circuit court of appeals and a subset of circuit and district judges. The number of circuit and district judges on each council is determined in every circuit by majority vote of all circuit judges in regular active service within that circuit.¹³ Meeting at least twice a year,¹⁴ the members of each council serve for limited terms set by a majority vote of all judges of the circuit in regular active service.¹⁵ The Judicial Conference of the United States, which convenes annually,¹⁶ is comprised of the Chief Justice of the United States as well as the chief judge and a district judge of each circuit; the district judge is chosen by the circuit and district judges of the circuit.¹⁷

Although their statutorily mandated concern is improving the administration of justice,¹⁸ neither the Judicial Conference nor any of the judicial councils is, since the passage of the Act, a purely administrative body. In

YALE L.J. 1478 (1983).

It is particularly troubling that one commentator, Professor Fiss, has asserted that “[j]udicial independence is not threatened by bureaucratization . . .” Fiss, *supra*, at 1443. His speculation that “today the independence of the judiciary from the political branches might depend on its capacity to develop the organizational resources usually associated with a bureaucracy,” *id.* at 1443, ignores the concurrent threat to the independence of the individual judge posed by legislation such as the 1980 Act—one product of Congress’ attempt to help the judiciary develop such “organizational resources.” In sharp contrast to Professor Fiss’ claim that the 1980 Act “stands as a symbol of the weakness of the controls of one judge over another,” *id.* at 1445, this Note argues that the ever-increasing powers of administrative bodies within the judiciary—powers granted (however unconstitutionally) by legislation such as the 1980 Act—pose intolerable threats to the independence of the individual judge within the bureaucracy.

13. 28 U.S.C. § 332(a)(1) (1982). If there are fewer than 6 circuit judges on the council, at least 2 district judges must also serve; if 6 or more circuit judges serve, at least 3 district judges must be on the council. The statute does not specify how the members of each council are to be selected, or whether “all circuit judges in regular active service” refers only to judges of the circuit sitting on the court of appeals, or to all judges of the circuit.

14. *Id.* The meetings are called by the chief judge of each circuit. *Id.*

15. *Id.* § 332(a)(2).

16. *Id.* § 331. The annual meeting is called by the Chief Justice of the United States who may also call special sessions of the Conference. *Id.*

17. *Id.* The district judge from each circuit is to be chosen at the annual judicial conference of each circuit, held pursuant to *id.* § 333.

18. Each judge summoned to the Judicial Conference of the U.S. is to advise the Conference “as to any matters in respect of which the administration of justice in the courts of the United States may be improved.” *Id.* § 331. The judicial *council* of each circuit is to “make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit,” *id.* § 332(d)(1); the judicial *conference* of each circuit meets to advise the chief judge of each circuit of “means of improving the administration of justice within such circuit,” *id.* § 333. .

It should be noted that § 332(d)(1), which pre-existed the Act, could easily be construed as authorizing the sort of proceedings that take place under the Act. One cannot conclude from the fact that § 332(d)(1) has long existed, however, that the procedures under the Act must therefore be constitutional. Rather, one should question the constitutionality of § 332(d)(1). *See* Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970); Chandler v. Judicial Council of the Tenth Circuit, 382 U.S. 1003, 1004–06 (1966) (Black, J., dissenting from denial of stay) (discussed *infra* at text accompanying notes 27–30).

addition to various housekeeping duties,¹⁹ each also conducts proceedings under the Act that are adjudicative in both nature and effect.²⁰

A. Judicial "Administration" Before the Act

In the early 1900's, largely to facilitate communication among the various levels of the increasingly-large judicial bureaucracy, the judges of each circuit began to meet informally once a year.²¹ In 1939, the Administrative Office Act institutionalized the meetings,²² officially establishing the judicial councils of each circuit as part of the general transfer of the administration of the federal courts from the Department of Justice to the judiciary itself.²³ The 1939 Act set no real limits on the scope of the councils' administrative activities,²⁴ empowering them to take "such action . . . as

19. The various statutorily-mandated housekeeping duties of the judicial councils include: administering the budget and the personnel system of the courts of appeals, maintaining a modern accounting system and property control records, and compiling statistical data on the business of the courts within each circuit. 28 U.S.C. § 332(e) (1982). The circuit councils each have the power to delegate these housekeeping duties to the circuit executive of their respective circuit. *Id.*

The housekeeping duties of the Judicial Conference of the United States are set out at *id.* § 331:

The Conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary. It shall also submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business.

...

The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended from time to time to the Supreme Court for its consideration

For a historical perspective on the housekeeping duties of both the councils and the Conference, see P. FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* (1973).

20. See 28 U.S.C. § 372(c) (1982). See also *infra* text accompanying notes 97-109, 118-19 (discussing judicial nature of proceedings under the Act).

21. See, e.g., *Administration of United States Courts: Hearings Before the House Comm. on the Judiciary*, 66th Cong., 1st Sess. 23-24 (1939) (testimony of Hon. John J. Parker, Senior Judge, Fourth Circuit Court of Appeals); P. FISH, *supra* note 19, at 145-52.

22. Act of Aug. 7, 1939 (Administrative Office Act of 1939), ch. 501, §§ 306-07, 53 Stat. 1223, 1224-25 (codified as amended at 28 U.S.C. § 332 (1982)). The 1939 Act established both the circuit conferences, composed of all of the circuit and district judges of each circuit, and the circuit councils, composed only of the circuit judges of each circuit.

23. Act of Aug. 7, 1939, ch. 501, 53 Stat. 1223. Although the establishing of the Judicial Conference in 1922, see Act of Sept. 14, 1922, ch. 306, § 2, 42 Stat. 838 (codified as amended at 28 U.S.C. § 331 (1982)), added an in-house dimension to judicial administration, it did not seriously diminish the extensive direct control over the judiciary possessed by the Attorney General of the United States and the Department of Justice. Not surprisingly, tension developed between the chief attorney for the government and the judges he was to administer, a tension only heightened by President Roosevelt's 1937 "court packing" bill. For an account of the events leading up to the 1939 Act, see P. FISH, *supra* note 19, at 40-165.

24. This fact was noted by Congress in its discussions of the 1980 Act, see H.R. REP. NO. 1313, *supra* note 5, at 7, as if the fact that this broad grant of powers to the councils in 1939 was not quickly held to be unconstitutional somehow now renders the powers necessarily constitutional and

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may be necessary” to ensure “that the work of the district courts shall be effectively and expeditiously transacted.”²⁵ The councils early construed this language to mean that their administrative power under the 1939 Act extended to taking any action necessary to maintain public confidence in the federal courts.²⁶

*Chandler v. Judicial Council of the Tenth Circuit*²⁷ was the only pre-1980 attempt to test whether this broad sense of administering the judiciary could constitutionally include disciplining an Article III judge by eliminating his docket, thereby effectively removing him from office.²⁸ The *Chandler* Court implied that the Tenth Circuit council’s disciplinary actions had been merely “administrative” and not “judicial,”²⁹ but avoided ruling on the constitutionality of such disciplinary measures on the ground that Judge Chandler had voluntarily acquiesced in his sanctioning, and had thereby waived any right to challenge the constitutionality of the 1939

unchallengeable. Of course, no such “statute of limitations” exists.

25. Act of Aug. 7, 1939, ch. 501, § 306, 53 Stat. 1223, 1224. The 1939 Act granted the circuit councils the authority to issue “directions,” but only to the district judges within each circuit: “It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts.” *Id.*

26. The councils assumed that:

their responsibilities and power extend, not merely to dealing with the questions of the handling and dispatching of a trial court’s business in its technical sense, but also to dealing with the business of the judiciary in its broader or institutional sense, such as the preventing of any stigma, disrepute, or other element of loss of public confidence occurring as to the Federal courts or to the administration of justice by them

H.R. Doc. No. 201, 87th Cong., 1st Sess. 7 (1961) (Report on the Powers and Responsibilities of the Judicial Councils as adopted by the Judicial Conference of the U.S., Mar. 13-14, 1961).

27. 398 U.S. 74 (1970); *see also* 382 U.S. 1003 (1966) (denying Judge Chandler’s application for stay of Tenth Circuit Judicial Council’s order barring him from hearing cases until further order of Council).

28. The Judicial Council of the Tenth Circuit, finding that Judge Chandler was “unable, or unwilling, to discharge efficiently the duties of his office,” ordered that he could “take no action whatsoever in any case or proceeding now or hereafter pending” in his court, until further order of the Council. 398 U.S. at 77-78. Judge Chandler petitioned the Court for an order under the All Writs Act to have the council “cease acting [in] violation of its powers and in violation of [his] rights as a federal judge and an American citizen.” *Id.* at 76-77. The Court denied the petition. *Id.* at 89.

29. The majority in *Chandler* wrote in a footnote:

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.

398 U.S. at 86 n.7. In a later footnote, the Court added: “[T]he action of the Judicial Council here complained of has few of the characteristics of traditional judicial action and much of what we think of as administrative action.” *Id.* at 88 n.10. *But see id.* at 110 (Harlan, J., concurring in denial of writ) (“[T]he Council, when performing its central responsibilities under 28 U.S.C. § 332, exercises judicial power granted under Article III.”); *id.* at 133 (Douglas & Black, JJ., dissenting) (“A judicial council is only the court of appeals for a named circuit sitting *en banc*.”).

Act.³⁰ *Chandler* thus left unresolved both the definition of “administrative” action in the judicial context, and the constitutional powers of purportedly administrative bodies comprised of Article III judges.

B. *Judicial “Administration” Under the Act*

With the 1980 Act, Congress provided detailed procedures for the judicial councils and the Judicial Conference to discipline Article III judges in the name of improved judicial administration.³¹ The Act provides that “[a]ny person” may file a written complaint with the clerk of the court of appeals for the relevant circuit,³² alleging that a judge “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts”³³

After “expeditiously reviewing” a complaint, the chief judge “may”—but need not—dismiss it if it does not allege “conduct prejudicial to the effective and expeditious administration of the business of the courts,” if it is “frivolous,” or if it is “directly related to the merits of a decision or procedural ruling.”³⁴ If the chief judge does not dismiss the

30. The judicial council had revoked its initial order forbidding Judge Chandler to hear any case “now or hereafter pending,” *id.* at 78, and had ordered that he could hear pending cases but that no new cases would be assigned him. *Id.* at 80. Because Judge Chandler did not appear at the hearing on the new order, the council concluded that Judge Chandler had acquiesced in the order. *Id.* at 80-81. The Court noted that Judge Chandler had not sought any relief from the council subsequent to the new order and prior to bringing this action for a writ of prohibition or mandamus, *id.* at 87, and thus denied the writ without ruling on the constitutionality of the council’s actions. *Id.* at 89.

31. The Act applies to circuit, district, and bankruptcy judges, and magistrates, *see* 28 U.S.C. § 372(c)(1) (1982), but this Note is concerned only with the application of the Act to Article III judges.

It is interesting that one category of Article III judge is specifically excluded from scrutiny under the Act: Justices of the Supreme Court. In its report on the Act, the House gave two reasons for this: First, high public visibility of Supreme Court Justices makes it for [sic] more likely that impeachment can and should be used to cure egregious situations. Second, it would be unwise to empower an institution such as the Judicial Conference, which actually is chaired by the Chief Justice of the United States, to sit on cases involving the highest ranking judges in our judicial system. The independence and importance of the Supreme Court within our justice system should not be diluted in this fashion.

H.R. REP. NO. 1313, *supra* note 5, at 10 n.28. Unfortunately, the report does not explain why it is permissible for the Act to dilute the “independence and importance” of other Article III courts.

32. 28 U.S.C. § 372(c)(1) (1982). There is no “standing” requirement for filing a complaint under the Act. Indeed, complaints have been filed by “persons” as diverse as two citizens who disapproved of the comments made by a district judge during the sentencing of two anti-war protesters, *see* Order of Judicial Council of the Eighth Circuit (JCP 84-012 & JCP 84-014) (Jan. 24, 1985), and two district court judges who considered one of their circuit colleagues to have engaged in conduct forbidden under the Act, *see* Complaint Before the Judicial Council of the Eleventh Judicial Circuit (*In re: Alcee L. Hastings*) (Mar. 17, 1983).

In addition to the 12 circuits, the U.S. Claims Court, the Court of International Trade, and the Court of Appeals for the Federal Circuit are mandated by the Act to establish “procedures for the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints.” 28 U.S.C. § 372(c)(17) (1982).

33. 28 U.S.C. § 372(c)(1) (1982). The complaint is to contain “a brief statement of the facts constituting such conduct.” *Id.*

34. *Id.* § 372(c)(3). The dismissal must be by written order with a statement of reasons. *Id.*

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complaint, or conclude the proceeding on the ground that “appropriate corrective action has been taken,”³⁵ she must appoint a special committee consisting of herself and equal numbers of circuit and district judges from the circuit to investigate the complaint and file a written report of findings and recommendations with the judicial council of the circuit.³⁶

After conducting any further investigations it deems necessary,³⁷ the circuit council “shall take such action as is appropriate.”³⁸ This may include ordering that “on a temporary basis for a time certain” no new cases be

The use of “may” rather than “shall” in § 372(c)(3) of the Act has created a procedure for a type of collateral attack on judicial decisions that operates at the discretion of the chief judge. It is interesting that in the final stages of amendments and counter-amendments to the Act by the House and Senate, the Senate, without explanation, accepted the House’s substitution of the present § 372(c)(3) for its earlier version at section 2(a) of Senate Bill 1873. *See* 126 CONG. REC. 28086-98 (1980). The bill, S. 1873, 96th Cong., 1st Sess. § 2(a), 125 CONG. REC. 30100 (1979), originally explicitly forbade such collateral attacks:

Complaints which are outside the jurisdiction of the judicial council include, but are not limited to, complaints relating to the merits of any decisional or procedural ruling of a judge, or any matter reviewable under any other provision of law on the record. The judicial council *shall* dismiss any complaint which is outside its jurisdiction. (emphasis added). It is further puzzling that one sponsor in the Senate of the amended House bill, Senator DeConcini, seemingly misrepresented this key section of the Act, implying the existence of “shall” where in fact “may” is used:

There has been some concern expressed regarding the filing of frivolous complaints by dissatisfied litigants for the sole purpose of harassing judges. The proposed legislation *will* stop complaints in the first stages of the proceedings not only if they are frivolous, but also if they are inconsistent with the standard prescribed in the statute, or are related to the merits of a decision or procedural ruling.

126 CONG. REC. 28086, 28091 (1980) (emphasis added).

Even if the Act had used “shall” instead of “may” in this provision, however, further problems would remain: What are the “merits” of a decision or ruling? How is a judge to tell a complaint “directly related to the merits of a decision or procedural ruling” from a complaint related to any other aspect of a decision? In short, the chief judge would seemingly still have sufficient discretion to provide a route for collateral attack under the pretense of evaluating complaints about “administrative inefficiency.”

35. 28 U.S.C. § 372(c)(3)(B) (1982).

36. *Id.* §§ 372(c)(4)-(5). The Act grants both the judicial councils and the Judicial Conference “full subpoena powers” in conducting investigations. *Id.* § 372(c)(9)(A)-(B). The Act’s only provision addressing procedures to be followed in council and Conference investigations sets out only a very few requirements:

(11) Each judicial council and the Judicial Conference may prescribe such rules for the conduct of proceedings under this subsection, including the processing of petitions for review, as each considers to be appropriate. Such rules shall contain provisions requiring that—

(A) adequate prior notice of any investigation be given in writing to the judge . . . whose conduct is the subject of the complaint;

(B) the judge . . . whose conduct is the subject of the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing; and

(C) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

Id. § 372(c)(11).

37. *Id.* § 372(c)(6)(A).

38. *Id.* § 372(c)(6)(B).

assigned the accused judge.³⁹ The judicial council may also refer any complaint to the Judicial Conference of the United States.⁴⁰ If the council determines that the judge has engaged in conduct that "might constitute" grounds for impeachment, or conduct that "in the interest of justice, is not amenable to resolution by the judicial council," the council must certify such a finding to the Judicial Conference, together with any complaint and a record of any associated proceedings.⁴¹

The Judicial Conference may further investigate any matters referred to it by the judicial councils, and may impose any of the sanctions available to the councils.⁴² Should the Judicial Conference determine that "consideration of impeachment may be warranted," it must send that finding to the House of Representatives along with the record of any proceedings.⁴³

Both the complainant and the accused judge may petition the judicial council to review any order of the chief judge, and may petition the Judicial Conference to review any action of a judicial council.⁴⁴ All determinations, however, including denials of petitions for review, are final.⁴⁵

The Act has not gone unnoticed by the legal world. At least 412 complaints have been filed in the first three years since the Act went into effect.⁴⁶ These complaints have included allegations against 223 appeals court judges and 350 district court judges.⁴⁷ At least 95 complaints have

39. *Id.* § 372(c)(6)(B)(iv). Other sanctions authorized by the Act include: certifying the disability of a judge, requesting that a judge voluntarily retire, censuring or reprimanding a judge either publicly or privately, and ordering any other action the judicial council considers appropriate. *Id.* § 372(c)(6)(B). Although the Act states that "in no circumstances may the council order removal from office of any judge appointed to hold office during good behavior," *id.* § 372(c)(6)(B)(vii), one sanction available under the Act—not assigning a judge further cases, *see id.* § 372(c)(6)(B)(4)—constitutes de facto removal. *See infra* text accompanying notes 89–92.

40. *Id.* § 372(c)(7)(A).

41. *Id.* § 372(c)(7)(B).

42. *Id.* § 372(c)(8). For the available sanctions, *see supra* note 39 and accompanying text.

43. *Id.* § 372(c)(8).

44. *Id.* § 372(c)(10).

45. *Id.* "Final" here explicitly means that judicial review, "on appeal or otherwise," is prohibited.

46. These figures are compiled from DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1982 ANNUAL REPORT 66 (1982) [hereinafter cited as 1982 ANNUAL REPORT]; DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1983 ANNUAL REPORT 78 (1983) [hereinafter cited as 1983 ANNUAL REPORT]; and DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1984 ANNUAL REPORT 70 (1984) [hereinafter cited as 1984 ANNUAL REPORT]. The three annual reports cover complaints filed in the 33 months between Oct. 1, 1981 and June 30, 1984. The combined statistics presented reflect that a single complaint may contain allegations against more than one judge, and the same judge may be complained about in more than one year.

47. Figures compiled from 1982 ANNUAL REPORT, *supra* note 46, at 66; 1983 ANNUAL REPORT, *supra* note 46, at 78; 1984 ANNUAL REPORT, *supra* note 46, at 70. Use of the Act's procedures has steadily increased, from an average of 10 complaints per month filed in 1981, to 12.3 per month in 1982, and 14.6 per month in 1983.

resulted in final orders by judicial councils.⁴⁸ And, in at least two instances, a council has sanctioned the accused judge.⁴⁹ In addition, one law suit addressing the constitutionality of the Act is pending.⁵⁰

II. THE ACT AND THE ALLOCATION OF POWERS

By mandating a new type of scrutiny of the official actions of judges, the Act upsets the precarious balance, established by the Framers,⁵¹ between the independence and accountability of Article III judges. The Framers were conscious that the power to sanction a judge for any form of insufficiency posed the greatest threat to her independence.⁵² Moreover, they recognized that the independence of the judicial branch could be ensured only if it were comprised of autonomous individuals, each uncoerced in her exercise of the judicial power.⁵³ Consistent with this conception of

48. Figures compiled from 1982 ANNUAL REPORT, *supra* note 46, at 66; 1983 ANNUAL REPORT, *supra* note 46, at 78; 1984 ANNUAL REPORT, *supra* note 46, at 70.

49. One judge was privately censured, 1984 ANNUAL REPORT, *supra* note 46, at 70; one council requested that a judge retire, 1982 ANNUAL REPORT, *supra* note 46, at 66. No complaints have yet been referred to the Judicial Conference.

50. *Hastings v. Judicial Conference of the United States*, 593 F. Supp. 1371 (D.D.C. 1984), *appeal docketed*, No. 84-5576 (D.C. Cir. Aug. 24, 1984).

51. The concepts of "the Framers" and of "the Framers' intent" have been particularly controversial in recent years and have generated an interesting corpus of scholarship, *see, e.g.*, Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981); Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. (1985) (forthcoming). The phrases are used in this Note, however, simply as a shorthand for attributing the recorded opinion of more than one of the men assembled at the Constitutional Convention.

52. *See, e.g.*, THE FEDERALIST NO. 79, at 474 (A. Hamilton) (Mentor ed. 1961):

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.

53. The distinction between a judiciary independent from the other branches of government and a judiciary comprised of independent judges is an important one that is often obscured. The Framers were concerned to guarantee both types of judicial independence: "The separation of powers concept 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, *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROBS. 108, 121 (1970) (providing historical analysis of judicial independence).

Taking a different approach, but arriving at the same conclusion, Justice Rehnquist has written that both types of judicial independence are necessary and are part of "the unwritten constitutional law surrounding Article III." Rehnquist, *Political Battles for Judicial Independence*, 50 WASH. L. REV. 835, 842 (1975).

During Senate discussions of the Act, one proponent provided a sterling example of how these two types of judicial independence may be incoherently conflated:

It has also been argued that the utilization of any other method short of impeachment to discipline judges, even within the judicial branch itself, would ignore the concerns of the framers of the Constitution that *members* of the judiciary should be unconstrained from public pressures or threats from the other branches of Government.

This legislation protects the fragile independence of the judiciary since the creation of a

the individual judge, of the judiciary, and of the judicial function, the Constitution commands that only Congress may investigate and try a judge for non-criminal malfeasance, only Congress may remove a judge from office, and not even Congress may ever suspend a judge.

A. *Investigating and Trying Judges for Non-Criminal Malfeasance*

The Framers intended the official actions of Article III judges to be subject to only two complementary⁵⁴ types of scrutiny: the criminal trial and the impeachment proceeding. Judges, no less than other persons, are to stand trial for suspected violations of the criminal law.⁵⁵ The further scrutiny of impeachment is mandated by the Constitution, in part to reach offenses not recognized by the criminal law,⁵⁶ and in part because it was feared that the "extraordinary influence" of "high and potent offenders" might enable them to escape punishment in "ordinary tribunals."⁵⁷

The impeachment procedure is designed to track criminal proceedings

measure to investigate and discipline judges does not interfere with the doctrine of separation of powers, nor the theory of judicial independence, if the judicial *branch* has sole control over the proceedings.

126 CONG. REC. 28086, 28092 (1980) (statement of Sen. DeConcini) (emphasis added).

Judge Gesell was equally confused in his opinion in *Hastings v. Judicial Conference of the United States*, 593 F. Supp. 1371, 1379 (D.D.C. 1984), *appeal docketed*, 84-5576 (D.C. Cir. Aug. 24, 1984):

[I]n establishing a government of separated and interdependent powers, the Framers never intended that the independence of any officeholder, including judges, be so absolute as to threaten the integrity and orderly functioning of that officeholder's branch of government. The Framers, after all, feared nothing more than the tyranny of megalomaniacal despots. Thus the Constitution established, and the cases have repeatedly recognized, that the integrity and independence of the branch must take precedence over the independence of the individual officeholder.

Judge Gesell provided no historical evidence for his version of the Framers' intent, nor did he cite to any provision of the Constitution. And, in a footnote at the end of these unsupported statements, he in fact contradicted himself with a quotation from *United States v. Brewster*, 408 U.S. 501 (1972), asserting that the integrity of the legislative process can be protected only by ensuring the independence of individual legislators, *id.* at 1379 n.17. Judge Gesell's reasoning in footnote 17 is exactly analogous to the reasoning of the Framers on judicial independence: The judiciary can only be as independent as the individual judges of which it is comprised. See *infra* notes 53-94 and accompanying text.

54. The complementary nature of the two types of scrutiny is captured nicely by article I, section 3, clause 7 of the Constitution:

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

55. This is true even if the criminal trial follows an impeachment proceeding. *Id.*

56. "Treason, Bribery, or other high Crimes and Misdemeanors," *id.* art. II, § 4, was not intended to restrict impeachable offenses to those also recognized by the criminal law. See *infra* text accompanying notes 77-78.

57. 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION § 688, at 497 (4th ed. Boston 1873) (1st ed. Boston 1833). See also THE FEDERALIST NO. 65, *supra* note 52, at 398 (A. Hamilton) (Senate chosen to try impeachments because likely to be "unawed and uninfluenced").

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in two key respects: The accused is provided procedural safeguards, and there is a standard for punishable offenses. Although the Framers thought that “the strictness of the forms of proceeding in cases of offences at common law is ill adapted to impeachments,”⁵⁸ they nonetheless wanted a process that would “guard public men from being sacrificed to the immediate impulses of popular resentment or party predominance.”⁵⁹ Thus the Framers arrived at three elements of due process in impeachments: There must be separate bodies to accuse and to try impeachments; the court of impeachments must be as impartial as possible; and a two-thirds majority is needed to convict.

The Constitution declares that the two branches of the legislature are the sole proper repository of the impeachment power.⁶⁰ The House was chosen to share impeachment duties with the Senate in order to “avoid[] the inconvenience of making the same persons both accusers and judges; and [to] guard[] against the danger of persecution, from the prevalency of a factious spirit in either of those [legislative] branches.”⁶¹

Although the Framers considered giving the power to try impeachments to the Supreme Court,⁶² or to a combination of the Supreme Court and the Senate,⁶³ they concluded that the Senate must have “the sole Power to try all Impeachments.”⁶⁴ This decision to establish but one “court” for the trial of all impeachments was logically consistent with the Framers’ conception of impeachment as a single process (“a method of national inquest”⁶⁵) to which a single type of person (“all Civil Officers”⁶⁶) was to be subjected for a single kind of offense (“the abuse or violation of some public trust”⁶⁷). Underlying the Framers’ choice of the Senate as the body to try impeachments was their belief that only the Senate “would be likely

58. 1 J. STORY, *supra* note 57, § 765, at 541. *See also id.* § 765, at 542:

[A] tribunal of a liberal and comprehensive character, confined as little as possible to strict forms, enabled to continue its session as long as the nature of the law may require, qualified to view the charge in all its bearings and dependencies, . . . seems indispensable to the value of the [impeachment] trial.

59. *Id.* § 779, at 551. *See also* THE FEDERALIST NO. 65, *supra* note 52, at 396–97 (A. Hamilton): “[I]n [impeachment] cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt.”

60. *See supra* notes 1 & 2.

61. THE FEDERALIST NO. 66, *supra* note 52, at 402 (A. Hamilton). “Inconvenience” hardly seems the proper term, at least today.

62. THE FEDERALIST NO. 65, *supra* note 52, at 398–99 (A. Hamilton); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 46, 145, 185–86, 551 (M. Farrand ed.) (rev. ed. 1937) [hereinafter cited as FARRAND].

63. THE FEDERALIST NO. 65, *supra* note 52, at 399–400 (A. Hamilton).

64. U.S. CONST. art. I, § 3, cl. 6.

65. THE FEDERALIST NO. 65, *supra* note 52, at 397 (A. Hamilton) (capitals in original deleted).

66. U.S. CONST. art. II, § 4. *See also* THE FEDERALIST NO. 65, *supra* note 52, at 396 (A. Hamilton) (“public men”).

67. THE FEDERALIST NO. 65, *supra* note 52, at 396 (A. Hamilton).

to feel confidence enough in its own situation to preserve, unawed and uninfluenced, the necessary impartiality between an individual accused and the representatives of the people, his accusers."⁶⁸ Moreover, they thought that the large membership of the Senate would provide greater assurance of both justice and "public tranquillity,"⁶⁹ especially given the necessarily discretionary aspects of impeachment proceedings.⁷⁰ Finally, the Senate was considered a more impartial court of impeachments than either the judiciary alone, or a combination of the judiciary and the Senate, because a criminal trial in an Article III court could supplement impeachment in appropriate situations: Having the same body conduct both the criminal trial and the impeachment proceeding would deprive the accused of "the double security intended [him] by a double trial."⁷¹

68. THE FEDERALIST NO. 65, *supra* note 52, at 398 (A. Hamilton) (emphasis in original deleted). "[T]he power of trying impeachments was lodged with [the Senate] as more likely to be governed by cool and candid investigation, than by those heats that too often inflame and influence more populous Assemblies." 3 FARRAND, *supra* note 62, at 148 (James McHenry to Maryland House of Delegates on Nov. 29, 1787, explaining principles underlying proposed Constitution of U.S.).

69. THE FEDERALIST NO. 65, *supra* note 52, at 398 (A. Hamilton):

It is much to be doubted whether the members of [the Supreme Court] would at all times be endowed with so eminent a portion of fortitude as would be called for in the execution of so difficult a task; and it is still more to be doubted whether they would possess the degree of credit and authority which might, on certain occasions, be indispensable towards reconciling the people to a decision that should happen to clash with an accusation brought by their immediate representatives. A deficiency in the first would be fatal to the accused; in the last, dangerous to the public tranquillity. The hazard, in both these respects, could only be avoided, if at all, by rendering that tribunal more numerous than would consist with a reasonable attention to economy.

See also 2 FARRAND, *supra* note 62, at 551 ("Mr Govr Morris thought no other tribunal than the Senate could be trusted. The Supreme Court were too few in number and might be warped or corrupted.").

70. As Hamilton explained:

The necessity of a numerous court for the trial of impeachments is equally dictated by the nature of the proceeding. This can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security. There will be no jury to stand between the judges who are to pronounce the sentence of the law and the party who is to receive or suffer it. The 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 forbids the commitment of the trust to a small number of persons.

THE FEDERALIST NO. 65, *supra* note 52, at 398.

71. *Id.* at 399. Hamilton argued that:

[T]he punishment which may be the consequence of conviction upon impeachment is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. . . . [B]y making the same persons judges in both cases, those who might happen to be the objects of prosecution would, in a great measure, be deprived of the double security intended them by a double trial. The loss of life and estate would often be virtually included in a sentence which, in its terms, imported nothing more than dismissal from a present and disqualification for a future office.

Would it have been an improvement of the plan to have united the Supreme Court with the Senate in the formation of the court of impeachments? This union would certainly have been attended with several advantages; but would they not have been overbalanced by the signal

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As a check against purely partisan impeachments, the Constitution requires that “no Person shall be convicted without the Concurrence of two thirds of the Members present.”⁷² Although this two-thirds requirement was not debated at the Constitutional Convention,⁷³ Joseph Story’s explanation of the requirement is highly plausible: “If a mere majority were sufficient to convict, there would be danger in times of high popular commotion or party spirit, that the influence of the House of Representatives would be found irresistible.”⁷⁴

The “Treason, Bribery, or other high Crimes and Misdemeanors” standard for impeachable offenses was also intended to diminish the likelihood of purely partisan impeachments. Although the Framers believed impeachable offenses to be “so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law,”⁷⁵ they nonetheless wanted a standard that would make impeachment something more than a mere vote of “no confidence” in an official.⁷⁶ Simultaneously, however, the Framers did intend the scope of the standard for impeachable offenses to be broad. There is, for example, substantial evidence that the Framers did not intend “high Crimes and Misdemeanors” to limit impeachable offenses to

disadvantage, already stated, arising from the agency of the same judges in the double prosecution to which the offender would be liable?

Id. at 398–99. Another reason the Framers decided against the Supreme Court as the court of impeachments is that it could not properly try the President, since the Justices of the Court would have been appointed by him. *See* 2 FARRAND, *supra* note 62, at 551.

72. U.S. CONST. art. I, § 3, cl. 6.

73. The provision was merely reported by the Committee of Eleven, *see* 2 FARRAND, *supra* note 62, at 497, and approved, *see id.* at 547. For an interesting historical discussion of the two-thirds requirement as “part of the revolutionary republican compromise between representative assemblies and deliberative councils,” P. HOFFER & N. HULL, *IMPEACHMENT IN AMERICA, 1635–1805*, at 102 (1984), *see id.* at 102–06.

74. 1 J. STORY, *supra* note 57, at 551. “The only practicable check [on partisan impeachments] seemed to be the introduction of the clause of two thirds, which would thus require an union of opinion and interest, rare, except in cases where guilt was manifest and innocence scarcely presumable.” *Id.*

75. 1 J. STORY, *supra* note 57, at 541; THE FEDERALIST NO. 65, *supra* note 52, at 398 (“[The impeachment proceeding] can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors or in the construction of it by the judges . . .”). A further reason for having the legislature impeach and try all impeachments was, thus, that impeachable offenses

must be examined upon very broad and comprehensive principles of public policy and duty.

They must be judged of by the habits and rules and principles of diplomacy of departmental operations and arrangements, . . . and, in short, by a great variety of circumstances, as well those which aggravate as those which extenuate or justify the offensive acts which do not properly belong to the judicial character in the ordinary administration of justice . . . They are duties which are easily understood by statesmen, and are rarely known to judges.

1 J. STORY, *supra* note 57, at 541.

76. In discussing the wording of the clause specifying impeachable offenses, Madison argued that adding “or maladministration” to “Treason [and] bribery” was impermissible: “So vague a term will be equivalent to a tenure during pleasure of the Senate.” “[O]ther high crimes [and] misdemeanors” was ultimately substituted. 2 FARRAND, *supra* note 62, at 550.

crimes cognizable in courts of law:⁷⁷ Various forms of non-criminal misbehavior in office, such as neglect of duty and malpractice, were mentioned repeatedly throughout the Constitutional Convention as typical impeachable offenses.⁷⁸ Given the intended broad scope of the "high Crimes and Misdemeanors" standard, there is no difference between a judge serving until impeached and convicted under this standard and his holding office "for good behavior."⁷⁹

The dual scrutiny of the criminal trial and impeachment—the only types of scrutiny to which the official behavior of judges is constitutionally to be subject—means that any action punishable under the Act's standard of "conduct prejudicial to the effective and expeditious administration of the business of the courts"⁸⁰ necessarily falls under one of three categories. Criminal acts are punishable under the criminal law and, in some cases, are also impeachable under the "Treason, Bribery, or other high Crimes and Misdemeanors" standard. Non-criminal malfeasances that meet the standard for impeachable offenses are punishable only by impeachment.

77. For general discussions of this point, see, e.g., R. BERGER, *supra* note 4, at 53-78, 86-93; P. HOFFER & N. HULL, *supra* note 73, at 97-102, 119, 182, 189, 198-99, 217, 252-53.

78. See, e.g., 1 FARRAND, *supra* note 62, at 90 ("malconduct or neglect in the execution of his office") (emphasis in original deleted), 226 ("mal-practice, or neglect of duty"), 230 ("mal practice or neglect of duty"), 236 ("malpractices or neglect of duty"), 292 ("mal — and corrupt conduct"); 2 FARRAND, *supra* note 62, at 61 ("malpractice or neglect of duty"), 65 ("incapacity, negligence or perfidy"), 116 ("malpractice or neglect of duty"), 121 ("mal-practice or neglect of duty"), 132 ("mal Practice or Neglect of Duty"), 134 ("malpractice or neglect of duty"), 145 ("malpractice or neglect of duty"), 337 ("neglect of duty, malversation, or corruption"), 344 ("neglect of duty malversation, or corruption").

That the Convention ultimately agreed to exclude "maladministration" from the standard for impeachable offenses, see 2 FARRAND, *supra* note 62, at 550, does not mean that the Framers intended that an official not be impeachable for non-criminal malfeasance. First, Madison, who proposed the exclusion, had earlier in the Convention argued for impeachment as a check against the non-criminal offenses of "incapacity, negligence or perfidy . . ." *Id.* at 65. And, in a congressional debate two years later, Madison used "maladministration" in describing an impeachable offense: "[The President] will be impeachable . . . for such an act of maladministration; for I contend that the wanton removal of meritorious officers would subject [the President] to Impeachment . . ." 12 THE PAPERS OF JAMES MADISON 235 (C. Hobson & R. Rutland eds. 1979) (congressional debate of June 17, 1789).

Second, Mason, who ultimately provided the substitute standard of "other high crimes [and] misdemeanors," had proposed "maladministration" as a standard because he was concerned that "[t]reason as defined in the Constitution will not reach many great and dangerous offences." *Id.* at 550. This indicates both that he was concerned with "offences" and not necessarily with cognizable "crimes," and that he took "maladministration," "other high crimes and misdemeanors," and "great and dangerous offences" all to be broad synonyms.

Further evidence that impeachable offenses were to include non-criminal malfeasance comes from Hamilton in 1788: "[Judges] are liable to be impeached for malconduct . . ." THE FEDERALIST No. 79, *supra* note 52, at 474.

79. For other discussions of whether holding office for "good behavior" means that a judge can be removed other than by impeachment, and for offenses other than "treason, bribery or other high crimes and misdemeanors," see, e.g., R. BERGER, *supra* note 4, at 122-80; Kramer & Baron, *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: Some Notes from History,* 36 U. CHI. L. REV. 665 (1969).

80. 28 U.S.C. § 372(c)(1) (1982).

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And any malfeasance that the legislature deems insufficiently serious to be grounds for impeachment is to be borne as an irradicable cost of an independent judiciary.

B. *Removing Judges from Office*

Although impeachment is the only constitutional method for removing federal judges from office, the Act authorizes de facto removal of Article III judges by their colleagues. Constitutional impeachment of a judge in the House, followed by conviction in the Senate, requires the judge to leave office: “all civil Officers of the United States, shall be removed from Office” on impeachment and conviction.⁸¹ The Framers deliberately used “shall” instead of “may” when they intended to “leave no discretion to Congress”.⁸² Their use of “shall” not only mandated certain behavior, but simultaneously prohibited all relevant alternatives.⁸³ This clause thus prescribes both that an official be removed from office if convicted upon impeachment, and that conviction following impeachment is the exclusive means to effect removal.

The Convention considered additional methods of removal, such as address by the legislature to the Executive⁸⁴ and bills of attainder⁸⁵—and it explicitly rejected them. Any remaining doubt that impeachment is the exclusive means of removing Article III judges from office⁸⁶ is dispelled by

81. U.S. CONST. art. II, § 4.

82. 1 ANNALS OF CONG. 850 (J. Gales ed. 1834) (statement of Rep. Smith of S.C., Aug. 29, 1789).

83. The most authoritative discussion of the Framers’ use of “shall” and “may” occurred in the debates over federal court jurisdiction during the First Congress in 1789. There Representative Smith stated:

It is declared by [the Constitution] that the judicial power of the United States shall be vested in one supreme, and in such inferior courts as Congress shall from time to time establish. Here is no discretion, then, in Congress to vest the judicial power of the United States in any other tribunal than in the Supreme Court and the inferior courts of the United States.

Id. at 831–32. By Smith’s interpretation, “shall” not only mandated a particular outcome, but excluded or prohibited other alternatives. Thus the provision Smith refers to would be read as meaning that the judicial power of the U.S. is not to be vested in any bodies other than the one Supreme Court and such inferior courts as Congress might designate. For a comprehensive analysis of the Framers’ use of “shall” and “may” in the context of Article III, see Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984).

84. 2 FARRAND, *supra* note 62, at 428–29.

85. *Id.* at 375–76.

86. Those who argue that impeachment is not the sole constitutional method for removing judges have often cited as evidence the bribery statute enacted by the First Congress, Act of April 30, 1790, ch. IX, § 21, 1 Stat. 117 (codified as amended at 18 U.S.C. §§ 201(a), 201(e), 201(e) (1982)). The Act provides that judges convicted of taking bribes “shall forever be disqualified to hold any office of honour, trust or profit under the United States.” *Id.* Raoul Berger, for example, argues that this means that “the impeachment clause does not constitute the ‘only’ means for the disqualification of judges. As with ‘disqualification’ so with ‘removal,’ for the two stand on a par in the impeachment provision [U.S. CONST. art. I, § 3, cl. 7: “Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or

the unambiguous reaffirmations of that fact by several of the Framers. Madison, for example, reported to the Virginia ratifying convention that "The judges are to be removed only on impeachment, and conviction before Congress."⁸⁷ And Rutledge concurred that "the intention of the Convention . . . was . . . to have judges removable only by impeachment."⁸⁸

In defiance of the Constitution's scheme for removing federal judges from office, the Act empowers judicial councils to order "that, on a temporary basis for a time certain, no further cases be assigned" a judge complained of.⁸⁹ This language seemingly permits a council to order, for example, that no further cases be assigned a fifty-year-old judge for a temporary and certain period of forty years.⁹⁰ The judge whose future cases are thus taken away does retain her desk, her robe, her clerks, and even her pay.⁹¹ No other judge is appointed to take her place. But insofar as she has lost, and may never regain, the power to hear and decide cases—the essence of "holding office" under Article III of the Constitution⁹²—the judge has been unconstitutionally removed from office.

Profit under the United States"]" R. BERGER, *supra* note 4, at 150.

Professor Berger mistakenly conflates several matters. First, the issue is removal and not disqualification. It does not matter whether impeachment is the only intended constitutional means for *disqualifying* judges. In any case, the Constitution states only that "[j]udgment in cases of impeachment shall not extend further than" removal and disqualification, thus simply limiting the range of permissible sanctions in cases of impeachment to these two. U.S. CONST. art. I, § 3, cl. 7. The Constitution does not say that civil Officers "shall be removed from Office *and* disqualified from holding any office," a provision whose intended meaning would be that both removal and disqualification may occur solely at conviction upon impeachment. See *supra* note 83. Thus, Berger's assertion that disqualification and removal "stand on a par in the impeachment provision," R. BERGER, *supra* note 4, at 150, is patently false.

Moreover, since bribery is explicitly mentioned in the Constitution as an impeachable offense, the statute may also be interpreted simply as "indicat[ing] that impeachable offenses are additionally punishable as crimes." Shipley, *Legislative Control of Judicial Behavior*, 35 LAW & CONTEMP. PROBS. 178, 200 (1970).

87. 11 ANNALS OF CONG. 738 (1802) (quoted by Rep. Rutledge of S.C., Feb. 24, 1802).

88. 11 ANNALS OF CONG. 737 (1802) (statement of Rep. Rutledge of S.C., Feb. 24, 1802). See also 1 ANNALS OF CONG. 828 (J. Gales ed. 1834) ("The judges are to hold their commissions during good behavior, and after they are appointed, they are only removable by impeachment") (statement of Rep. Smith of S.C., Aug. 29, 1789); THE FEDERALIST No. 79, *supra* note 52, at 474 (A. Hamilton) ("[Judges] are liable to be impeached for misconduct by the House . . . 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").

89. 28 U.S.C. § 372(c)(6)(B)(iv) (1982).

90. The Act neither states a maximum "temporary" period that a judge may go without being assigned cases, nor provides any way for the judge to trigger a "parole" review once such a "temporary" and "certain" sentence has been ordered.

91. The judge who must leave office after conviction upon impeachment *may* suffer penalties that the judge removed under the Act does not: The latter continues to receive a salary, retains the potential to sit again, and is not disqualified from holding other high office. But these differences in sanctions cannot obscure the fact that the judge removed under the Act loses the opportunity to exercise the powers granted her under Article III.

92. Unfortunately, neither the Constitution nor any of the Records of the Convention provides a

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Even if the Act is read as authorizing only the suspension, rather than the removal, of Article III judges, it is no more constitutional. During the last days of the Convention, a proposal “that persons impeached be suspended from their office until they be tried and acquitted” was immediately and soundly defeated on the ground that suspension would give the accusing body too much power: “[The House could] at any moment, in order to make way for the functions of another who will be more favorable to their views, vote a temporary removal of the existing [civil officer.]”⁹³ By authorizing the judicial councils and the Judicial Conference to order that no new cases be assigned a judge, the Act contravenes this explicit decision of the Framers not to permit so much as the temporary removal of an official, even if already impeached, until convicted by the Senate.⁹⁴

III. THE ACT AND THE REQUIREMENTS OF PROPER JUDICIAL PROCESS

Due process protections are deeply embedded in the Constitution’s scheme for scrutinizing the official actions of Article III judges.⁹⁵ Even if this scheme were somehow construed also to permit Article III judges to investigate, try, and punish one another for non-criminal malfeasance, the accused judges would still be entitled to due process under the Fifth Amendment.⁹⁶ The Act’s procedures, however, deny the accused judge fair and proper judicial process by merging the prosecutorial and adjudicative functions, and by requiring the Judicial Conference to render advisory opinions.

The Framers explicitly considered the trying and punishing of public

definition of “holding office.” The following attempt at one, however, seems quite near the mark: “The office of a federal . . . judge is not his office space, his desk, his robe hanging in a closet. The judicial powers—the authority to take action in cases and proceedings in his court—are a judge’s office.” Petitioner’s Motion for Leave to File Petition for Writ of Prohibition and/or Mandamus, and Petition for Writ of Prohibition and/or Mandamus at 17, *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970).

93. 2 FARRAND, *supra* note 62, at 612 (proposal of Rutledge & Morris; statement of Madison).

94. That the Act specifies the judicial councils and the Judicial Conference, rather than the House, as the bodies possessing such powers of suspension only makes the Act more obviously unconstitutional.

95. *See supra* text accompanying notes 54–94.

96. “No person shall be . . . deprived of life, liberty, or property, without due process of law” U.S. CONST. amend. V. The Court has held that many types of government employees have neither constitutional property nor liberty interests in their jobs. *See Arnett v. Kennedy*, 416 U.S. 134 (1974) (3-3-3 decision); *Bishop v. Wood*, 426 U.S. 341 (1976) (5-4 decision). Article III judges, however, have a job security based in Article III of the Constitution, and are therefore easily distinguished from the city policeman with “permanent employee” status in *Bishop*, 426 U.S. at 343, and the government employee with statutorily-created job security in *Arnett*, 416 U.S. at 140–41.

officers for non-criminal malfeasance to be a form of adjudication, an exercise of the judicial power.⁹⁷ Hamilton, for example, wrote in *The Federalist* that the "powers which the plan of the convention allots to the Senate" include acting "in their [sic] judicial character as a court for the trial of impeachments."⁹⁸ In addition, the very language of the Constitution is evidence of the Framers' conception of impeachment as a judicial proceeding: Each provision of the Constitution addressing impeachment employs the vocabulary of adjudication.⁹⁹

Relevant Supreme Court decisions also suggest that the proceedings of the councils under the Act must be considered judicial proceedings.¹⁰⁰ The Court has found two elements, taken together, to be necessary and sufficient for a proceeding to be considered judicial.¹⁰¹ First, there must be a "claim of a present right . . . and a denial of that right . . ." ¹⁰² Second, the tribunal must proceed by "investigat[ing], declar[ing], and enforc[ing] liabilities as they stand on present or past facts and under laws supposed already to exist." ¹⁰³

These two elements of adjudication underscore the importance of the substance, rather than the form, of the proceeding. Non-rulemaking administrative proceedings, even if sometimes adjudicative in form,¹⁰⁴ are not concerned either with enforcing liabilities or with claims of right. Rather,

97. The Framers vested the "judicial" power of impeachment in the legislature, conscious that they were thereby violating their own doctrine of the separation of powers. They reasoned that so "confound[ing] legislative and judiciary authorities in the same body . . . is even, in some cases, not only proper but necessary to the mutual defense of the several members of the government against each other." THE FEDERALIST NO. 66, *supra* note 52, at 401-02 (A. Hamilton).

98. THE FEDERALIST NO. 65, *supra* note 52, at 396 (A. Hamilton).

99. The Senate is empowered to "try all Impeachments," U.S. CONST. art. I, § 3, cl. 6; removal occurs on "Impeachment for, and Conviction of . . .," *id.* art. II, § 4; "Judgment in Cases of Impeachment," *id.* art. I, § 3, cl. 7; "The trial of all Crimes, except in Cases of Impeachment," *id.* art. III, § 2, cl. 3; when sitting for impeachments, the Senate "shall be on Oath or Affirmative," *id.* art. I, § 3, cl. 6.

In addition, the record of the impeachment of Senator Blount in 1798 notes that "the Senate formed itself into a High Court of Impeachment, in the manner directed by the constitution . . ." STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS WITH REFERENCES, HISTORICAL AND PROFESSIONAL, AND PRELIMINARY NOTES ON THE POLITICS OF THE TIMES 257 (F. Wharton ed. Philadelphia 1849).

100. Although "[t]here is no established formula for deciding whether a certain proceeding or function is, by its nature, judicial . . .," C. WRIGHT, THE LAW OF FEDERAL COURTS 82 (4th ed. 1983), the Court recently has articulated and applied a threshold test. See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

101. See, e.g., *Feldman*, 460 U.S. 462.

102. *Id.* at 479 (quoting *In re Summers*, 325 U.S. 561, 568 (1945)).

103. 460 U.S. at 479 (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908)).

104. The Food and Drug Administration, for example, conducts a variety of trial-type proceedings. See 21 C.F.R. §§ 12.1-16.120 (1984). The Office of Administrative Law Judges of the Department of Labor also conducts adjudicatory proceedings. See 29 C.F.R. §§ 18.1-18.59 (1984).

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they are forward-looking proceedings to confer or withhold favors or privileges according to existing rules.¹⁰⁵

In controversies arising under the Act, however, a right and not a privilege is at stake: The Article III judge under review claims the right to hear cases, to continue to perform the duties of his office.¹⁰⁶ The relevant judicial council (and, when complaints are passed on to it, the Judicial Conference) then investigates and adjudicates that claim in light of the facts and the existing law, and declares and enforces a judgment under the Act.¹⁰⁷ Proceedings under the Act thus have the two characteristics¹⁰⁸ required of judicial proceedings, and bear no resemblance to administrative proceedings.

Even the Congress responsible for the Act agreed that proceedings of the judicial councils under the Act are judicial proceedings: “When performing its central responsibilities under 28 U.S.C. § 332 and the [Act], the judicial councils exercise the judicial power granted under Article III of the Constitution.”¹⁰⁹

As a judicial proceeding, an investigation under the Act of the conduct of a judge must meet a higher due process standard than an administrative

105. See, e.g., *Tutun v. United States*, 270 U.S. 568, 578 (1926). In determining that naturalization proceedings were judicial rather than administrative proceedings, the Court noted that there is a statutory, if not a constitutional, right to naturalization: There is no “right to naturalization unless all statutory requirements are complied with,” *id.* (quoting *United States v. Ginsberg*, 243 U.S. 472, 475 (1917)). The Court then distinguished naturalization proceedings, in which “the court exercises judicial judgment,” *id.* at 578, from non-judicial proceedings in which the decisional body rules on privileges or favors rather than rights. *Id.*

106. The judicial councils and the Judicial Conference are authorized by the Act to sanction Article III judges in a variety of ways: requesting that a judge voluntarily retire; publicly or privately reprimanding a judge; ordering that, temporarily, no further cases be assigned a judge. 28 U.S.C. § 372(c)(6)(B) (1982). Only cases involving the last type of sanction are relevant here, since Article III judges, of course, have no right to immunity from criticism, see *Hastings v. Judicial Conference of the United States*, 593 F. Supp. 1371, 1381 (D.D.C. 1984), *appeal docketed*, No. 84-5576 (D.C. Cir. Aug. 24, 1984), and since a judge may ignore a request that he retire.

The judge with a relevant claim of right, then, is the one who no longer has cases assigned to him, and who asserts a right to exercise the judicial power granted him under Article III. Unlike in *Tutun v. United States*, 270 U.S. 568 (1926), the right claimed by such judges is constitutional rather than statutory.

107. See 28 U.S.C. § 372(c) (1982).

108. The word “characteristics” refers to the two prongs of the *Feldman* test for determining when a proceeding is judicial. See *supra* notes 101-03 and accompanying text. Similar terms such as “form,” “nature,” and “character” have become incoherent terms of art in cases attempting resolution of the issue of when a proceeding is judicial. See, e.g., *Prentis v. Atlantic Coast Line*, 211 U.S. 210, 234 (1908) (whether a proceeding is judicial “depends not upon the character of the body but upon the character of the proceedings”); *In re Summers*, 325 U.S. 561, 567 (1945) (“The form of the proceeding is not significant. It is the nature and effect which is controlling.” Unfortunately, the Supreme Court has yet to explain how one is to tell a proceeding’s “form” from its “nature” or its “character.”

109. H.R. REP. NO. 1313, *supra* note 5, at 15 n.35.

proceeding. Although a merging of the prosecutorial/investigative and adjudicative functions is sometimes acceptable in administrative proceedings,¹¹⁰ due process requires a separation of those functions in judicial proceedings.¹¹¹ Indeed, it was precisely to ensure a separation of these functions that the Framers instituted one body to impeach and another body to try public officials for malfeasance.¹¹² The Act, however, merges these functions in violation of due process.¹¹³

110. The separation of the investigatory and decisionmaking functions is a particularly confused area of administrative law, because the issue arises at the level of the individual agency as well as of the individual agency official. The Supreme Court has held, for example, that a combination of these two functions *in the same agency is not* a denial of due process. See *Withrow v. Larkin*, 421 U.S. 35, 53 (1975) (“[*In re Murchison*, 349 U.S. 133 (1955),] has not been understood to stand for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications.”).

In addition, although the Administrative Procedure Act states that “[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision . . .,” 5 U.S.C. § 554(d) (1982), the Court has held that it is *not* a denial of due process for a social security hearing examiner both to develop the facts and to decide the claim. *Richardson v. Perales*, 402 U.S. 389, 410 (1971). In fact, “[a]bout half the adjudications by all federal agencies involve decisions by investigators . . .” 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 18.1, at 342 (1980). For good examinations of this problem of “separation of functions” in administrative agencies, see *id.* §§ 18.1–18.8; J. MASHAW & R. MERRILL, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM: CASES AND MATERIALS* 232–39 (2d ed. 1985).

111. See, e.g., *In re Murchison*, 349 U.S. 133, 136–37 (1955):

A fair trial in a fair tribunal is a basic requirement of due process. . . . “[E]very procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.” *Tumey v. Ohio*, 273 U.S. 510, 532 [(1927)]. . . .

It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. Perhaps no State has ever forced a defendant to accept grand jurors as proper trial jurors to pass on charges growing out of their hearings. A single “judge-grand jury” is even more a part of the accusatory process than an ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.

(footnotes omitted).

112. Joseph Story remarked:

[B]y what tribunal shall an impeachment be tried? It is obviously incorrect in theory, and against the general principles of justice, that the same tribunal should at once be the accusers and the judges; that they should first decide upon the verity of the accusation and then try the offenders. The first object in the administration of justice is, or ought to be, to secure an impartial trial.

1 J. STORY, *supra* note 57, at 527; see *supra* text accompanying notes 59–60.

113. The combination of powers possessed by the judicial councils also violates notions of due process under Continental inquisitorial systems, a fact of particular significance since the legislative history of the Act indicates that Congress consciously emulated the inquisitorial model: “[T]he legislation creates much more of an ‘inquisitorial-administrative’ model than an ‘accusatorial-adversary one.’” H.R. REP. NO. 1313, *supra* note 5, at 14. Under inquisitorial systems, the judge “is responsible for determining the subject matter of the proceedings, and for securing all evidence needed for the ascertainment of the truth. During the proceedings, he not only presides over the taking of proof, but also originates the bulk of questions.” Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 525 (1975) (footnotes omitted). But as a check on that merging of powers, the right to appeal is a constitutional guarantee. *Id.* at 490. Under the Act, there is no

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Under the Act, the chief judge acts as prosecutor in deciding which complaints to pursue.¹¹⁴ She then selects the “jury” of judges from the circuit—a jury that necessarily includes herself¹¹⁵—who will sit as the special committee that both investigates the complaint and renders judgment.¹¹⁶ Likewise, the circuit councils and the Judicial Conference serve as both prosecutors and judges. They actively investigate the complaints referred to them, and then adjudicate those same complaints.¹¹⁷

No less than the judicial councils, the Judicial Conference sits as a court comprised of Article III judges¹¹⁸ engaged in adjudication when it proceeds under the Act.¹¹⁹ But the Act requires the Judicial Conference to play a further, unconstitutional role: If the Conference determines that “consideration of impeachment [of a judge] may be warranted,”¹²⁰ it *must* “so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action [it] considers to be necessary.”¹²¹ This provision unconstitutionally requires the Judicial Conference to render opinions that can only be considered advisory.

By requiring the Judicial Conference—a court of Article III judges engaged in adjudication—to transmit to the House of Representatives a purely non-binding opinion¹²² as to the impeachability of a judge’s official actions,¹²³ the Act contravenes the Supreme Court’s long-standing determination that Article III courts cannot issue advisory opinions.¹²⁴ Since the 1790’s, the Court has held that “no decision of any court of the United States can, under any circumstances, . . . agreeable to the Constitution,

analogous right to appeal. See 28 U.S.C. § 372(c)(10) (1982).

114. 28 U.S.C. §§ 372(c)(3)-(4) (1982).

115. *Id.* § 372(c)(4)(A).

116. *Id.* §§ 372(c)(4)(A), 372(c)(5).

117. *Id.* §§ 372(c)(6)-(c)(8).

118. See *supra* note 17 and accompanying text.

119. The Judicial Conference tries and punishes Article III judges for malfeasance, a process that is a clear exercise of the judicial power. See *supra* text accompanying notes 97–109. And, as is true of the judicial councils, the Judicial Conference is confronted with a “claim of a present right . . . and a denial of that right,” see *supra* notes 102 & 106–07 and accompanying text, when it holds proceedings under the Act, proceedings in which it “investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist,” see *supra* notes 103 & 107 and accompanying text.

120. See 28 U.S.C. § 372(c)(8) (1982).

121. See *id.*

122. Insofar as the House of Representatives may take “whatever action [it] considers to be necessary,” *id.*, it is in no way bound by the determination of the Judicial Conference.

123. Although the Act requires the Judicial Conference to judge whether “consideration of impeachment may be warranted,” *id.* (emphasis added), such a standard does not seem to be substantively different from one requiring the Conference to determine whether “impeachment may be warranted.” Both standards require an assessment of the impeachability of a judge’s official actions.

124. It is important to distinguish the type of advisory opinion at issue here, which involves a violation of the separation--of-powers, from the more commonly referred to type in which the “case or controversy” requirement has not been met. For a discussion of the various types of “advisory opinions,” see G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1607–14 (10th ed. 1980).

be liable to a reversion, or even suspension, by the Legislature,"¹²⁵ reasoning that such "revision and controul [have been] deemed radically inconsistent with the independence of that judicial power which is vested in the courts" ¹²⁶ It has therefore "been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties" ¹²⁷

If the opinions rendered by the Judicial Conference to the House of Representatives are interpreted as binding Congress to some degree, they are no more constitutional. The Framers considered impeachment to be "a method of national inquest" in which the two branches of the legislature were to serve as "inquisitors for the nation."¹²⁸ As the Framers' word choice indicates, both the decision to impeach and the trial of any impeachment were understood to necessitate investigations of the accused. And these investigations were to be the sole province of the House and the Senate.¹²⁹ By requiring the Conference to certify and transmit a record of its proceedings whenever it determines that "consideration of impeachment" may be warranted,¹³⁰ Congress indicates its intention to be bound—to some indeterminate degree—by the findings of this investigatory committee of Article III judges. This provision of the Act thus results in de facto delegation, to a non-congressional body, of some portion of the investigatory power that the Constitution vests exclusively in Congress.

IV. THE ARGUMENT FROM "NECESSITY"

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 should be repealed or declared unconstitutional on its face, leaving the official actions of the judiciary once again subject only to the scrutiny of impeachment and of the criminal law.¹³¹ Waiting for the courts to adjudicate the constitutionality of the Act on a case-by-case, provision-by-

125. *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 413 (1792).

126. *Id.* at 411.

127. *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948).

128. THE FEDERALIST NO. 65, *supra* note 52, at 397 (A. Hamilton) (capitals in original deleted).

129. "The House of Representatives . . . shall have the sole Power of Impeachment." U.S. CONST. art. I, § 2, cl. 5. "The Senate shall have the sole Power to try all impeachments." *Id.* art. I, § 3, cl. 6.

130. 28 U.S.C. § 372(c)(8) (1982).

131. If Congress believes that its expressed goals of a judiciary more accountable to the public, more efficient court administration, and a less cumbersome and time-consuming procedure for disciplining Article III judges, *see* S. REP. NO. 362, *supra* note 5, at 5, 1, 4; H.R. REP. NO. 1313, *supra* note 5, at 3, 10, 2-3, are best met by having the judiciary "keep its own house," it should propose an amendment to the impeachment provisions of the Constitution so that the judiciary—either alone, or together with the legislature—has the power to try and punish Article III judges for malfeasance. Any such amendment would have to remedy the remaining due process problems with the Act's procedures by separating the prosecutorial-investigative and adjudicatory functions in such impeachment proceedings.

provision basis will only delay the inevitable. Moreover, such procrastination creates the danger that proceedings under the Act will become so familiar a part of the functioning of the federal courts that the now-obvious unconstitutionality of the Act will become increasingly difficult to perceive.¹³²

There is no reason to believe that Congress was motivated by malice toward the federal judiciary when it established this unconstitutional form of scrutiny of the official actions of Article III judges. Rather, as various members of Congress have indicated, the eagerness of Congress to have the judiciary “keep its own house” largely stems from its deeply felt reluctance to exercise its constitutionally assigned power of impeachment.¹³³

This congressional reluctance to impeach has numerous roots. Since a central aim of individual legislators is to be reelected,¹³⁴ Congress is unlikely to spend its time on a lengthy impeachment proceeding unless enough members of Congress perceive a particular inquest as politically profitable. In addition, since Congress has little experience holding trials, upon impeachment¹³⁵ or otherwise, and since adjudication is the essence of another branch of government, Congress may justifiably be reluctant to conduct trial-like impeachment proceedings. Moreover, the fact that the legislature’s norms of cooperation and coordination¹³⁶ are not the combative norms of the adversarial process, should make Congress further reluctant to undertake impeachment proceedings.¹³⁷ Finally, the deep desire of Congress to avoid impeachments may simply reflect a willingness—consistent with the scheme established by the Framers for scrutinizing the official actions of judges—to have the nation suffer inefficiency

132. Indeed, this perceptual phenomenon seems to account for the present invoking, by proponents of the Act, of 28 U.S.C. § 332 as somehow innately constitutional merely because it has not yet been directly challenged and ruled unconstitutional. *See supra* notes 18 & 24 and accompanying text.

133. *See supra* note 5.

134. “All members of Congress have a primary interest in being reelected. Some members have no other interest.” M. GREEN, *WHO RUNS CONGRESS?* 266 (3d ed. 1979) (quoting former Rep. Frank E. Smith). *See also* R. FENNO, *CONGRESSMEN IN COMMITTEES* 1, 139 (1973) (reelection basic goal of members of Congress); D. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 13 (1974) (same).

135. There have been only 13 impeachments by the House, and only 4 of the subsequent trials in the Senate have resulted in conviction. *See CONGRESSIONAL QUARTERLY INC., IMPEACHMENT AND THE U.S. CONGRESS* 8–9 (1974).

136. *See, e.g.*, D. MATTHEWS, *U.S. SENATORS AND THEIR WORLD* 103 (1973) (norms “encourage senators to become ‘compromisers’ and ‘bargainers’ and to use their substantial powers with caution and restraint”); R. RIPLEY, *CONGRESS: PROCESS AND POLICY* 124–25 (2d ed. 1978) (“Reciprocity and Accommodation” predominant norms in Congress).

137. The interesting—and as yet unexplored—question here is one for social scientists: Why are otherwise power-aggregating members of Congress so reluctant to exercise the non-reviewable power of impeachment granted them by the Constitution? For classic discussions of the underlying questions—What are “norms?” How do they constrain the individual?—*see, e.g.*, A. GOULDNER, *PATTERNS OF INDUSTRIAL BUREAUCRACY* (1954); W. WHYTE, *STREETCORNER SOCIETY: THE SOCIAL STRUCTURE OF AN ITALIAN SLUM* (3d ed. 1981).

and other "lesser" types of malfeasance by Article III judges in order to preserve the essential independence of the individual federal judge.

The reluctance of Congress to impeach also arises from its false conception of impeachment as the most cumbersome of all possible proceedings.¹³⁸ Although impeachment is adjudication, with all of the time-consuming detail inherent in that form of proceeding, the impeachment process can be—and has been—significantly streamlined as easily as other congressional proceedings whose form has been altered in response to the ever-increasing size and complexity of Congress' workload.¹³⁹

Like the rest of Congress' work, much that causes the traditional impeachment process to appear time-consuming can be appropriately and routinely performed by a subcommittee¹⁴⁰ subject to approval by the Senate or House, rather than being performed in the first instance by the full Senate or full House. In fact, the existing impeachment procedure, as set out in the rules of the Senate and of the House of Representatives, envisions this use of the committee system.¹⁴¹ The House could further streamline the process by establishing a subcommittee staff responsible for receiving and preliminarily investigating complaints on the behavior of Article III judges similar to those now filed with the judicial councils of each circuit. And, if Congress is still not satisfied that the general quality and efficiency of the judiciary is ensured, it should expand, and give greater import to, its own role in the judicial appointment and confirmation process.¹⁴²

138. See S. REP. NO. 362, *supra* note 5, at 4-6; H.R. REP. NO. 1313, *supra* note 5, at 2-3.

139. For discussions of the evolution of Congress' methods of conducting its business, see, e.g., R. RIPLEY, *supra* note 136; D. VOGLER, *THE POLITICS OF CONGRESS* (2d ed. 1977).

140. For arguments supporting the constitutionality of such intra-congressional delegation in impeachment proceedings, see Williams, *The Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials*, 50 N.Y.U. L. REV. 512 (1975).

141. Resolutions introduced in the House that directly call for the impeachment of a federal civil officer are referred for investigation to the House Committee on the Judiciary. H.R. DOC. NO. 398, 96th Cong., 2d Sess. 279 (1981) (Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States; Jefferson's Manual § 605). When it completes its investigations, the Committee reports to the House, which then debates and votes on the charges presented. *Id.* at 279-80 (Jefferson's Manual § 607). If an impeachment is voted by a majority of the House, the proceedings pass to the Senate. *Id.* (Jefferson's Manual § 607).

Although the Senate may order that the entire trial be held in open Senate, see S. DOC. NO. 1, 96th Cong., 1st Sess. § 110, at 175 (1979) (Senate Manual), it amended its rules in 1935 to require "[t]hat in the trial of any impeachment the Presiding Officer of the Senate, upon the order of the Senate, shall appoint a committee of twelve Senators to receive evidence and take testimony at such times and places as the committee may determine . . ." *Id.* § 110, at 174. This committee must provide the Senate a certified copy of the transcript of the proceedings. *Id.* § 110, at 175. It is left to the Senate to determine the "competency, relevancy, and materiality" of the evidence and testimony contained in the transcript and to call any further witnesses. *Id.* Upon completion of the trial, the Senate votes, with two-thirds necessary for conviction. *Id.* § 122, at 176; U.S. CONST. art I, § 3, cl. 6.

142. For a discussion of the judicial appointment and nomination process, see H. CHASE, *FEDERAL JUDGES: THE APPOINTING PROCESS* (1972).

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Those proponents of the Act concerned that traditional procedures require Congress to spend precious time and resources scrutinizing the official actions of judges¹⁴³ seemingly do not notice that the Act has merely shifted and increased the burden. Under the Act, it is the chief judge of each circuit and a subset of the federal judiciary, rather than Congress, that must allocate precious time to the sorting, investigating, and adjudicating of complaints about Article III judges. Indeed, the Act requires that the chief judge write an order in response to each complaint filed, no matter how frivolous or outside the scope of the Act.¹⁴⁴

In this era of efficiency and convenience, Congress easily becomes impatient with many of the procedures set out in the Constitution. This impatience led Congress to find it “necessary and proper”¹⁴⁵ to create a substitute, short-cut procedure for impeaching federal judges,¹⁴⁶ a procedure as alluring—and as unconstitutional—as the one-House veto.¹⁴⁷ This modern tendency of Congress toward impatience makes it all the more imperative that it heed the reminder of the Supreme Court when it invalidated the legislative veto: “Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government [P]olicy arguments supporting even useful ‘political inventions’ are subject to the demands of the Constitution which defines powers and . . . sets out just how those powers are to be exercised.”¹⁴⁸

143. One party so concerned is, not surprisingly, Congress:

[T]he impeachment process has become unduly cumbersome and ineffective. It requires more time than either the House of Representatives or the Senate may realistically be able to provide. The average Senate impeachment trial lasted 16 days and some have taken as long as six weeks. The impeachment process has fallen into disuse because the legislature cannot divert time from their ever increasing and relatively more important legislative assignments.

S. REP. NO. 362, *supra* note 5, at 4.

144. See 28 U.S.C. § 372(c)(3) (1982).

145. U.S. CONST. art. I, § 8, cl. 1 & 18 (“The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

146. In its report on the Act, the Senate asserted that “The ‘necessary and proper’ clause provides an ample basis for congressional action to implement the inherent power of the courts. Just as the legislative and executive branches have the means to discipline their respective officials, it is imperative that the judiciary implement its own disciplinary procedure.” S. REP. NO. 362, *supra* note 5, at 7. There is a large gap in this reasoning by the Senate. It is not within “the inherent power of the courts” for Article III judges to try other Article III judges for non-criminal malfeasance, to remove an Article III judge from office, or to suspend an Article III judge. Since the “necessary and proper” clause authorizes the exercise only of implied powers that are constitutional, see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819); *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805), the clause cannot be the basis for the Act.

In holding the Act to “withstand[] close constitutional scrutiny,” *Hastings v. Judicial Conference of the United States*, 593 F. Supp. 1371, 1385 (D.D.C. 1984), *appeal docketed*, No. 84-5576 (D.C. Cir. Aug. 24, 1984), Judge Gesell similarly asserted that the Act “represents a legitimate exercise of Congress’s ‘necessary and proper’ power” since “it was simply recognizing the need to give the courts reasonable means to put the judiciary’s own house in order.” *Id.* at 1380.

147. See *INS v. Chadha*, 103 S. Ct. 2764 (1983).

148. *Id.* at 2781.

CONCLUSION

In March 1984, Judge Miles Lord of Minnesota publicly reprimanded three officers of the A.H. Robins Company for "corporate irresponsibility at its meanest."¹⁴⁹ The A.H. Robins Company had manufactured and sold the Dalkon Shield intrauterine contraceptive device until more than 9,000 women claimed that infections caused by use of the shield led to sterility.¹⁵⁰ In reprimanding the three officers, Judge Lord emphasized that the A.H. Robins Company had failed to notify women that the shield should be removed, even though it had evidence that the shield caused infections and other problems.¹⁵¹

In April 1984, the three Robins officers filed a complaint under the Act accusing Judge Lord of "bringing the courts into disrepute and prejudicing the administration of justice"¹⁵² with his reprimand. In May 1984, the Eighth Circuit Judicial Council began proceedings under the Act against Judge Lord based on this complaint.¹⁵³ In December 1984, the Council dismissed the complaint.¹⁵⁴

Judge Lord makes \$72,000 a year as a federal judge.¹⁵⁵ He spent "considerably in excess of \$70,000" on lawyers' fees during the course of this one proceeding under the Act.¹⁵⁶ According to Judge Lord, however, the most costly aspect of the proceeding was the way it "made me feel like a criminal. It reflects on your career, personality and family in a way that having a decision reversed cannot."¹⁵⁷ Judge Lord, who has often been

149. *Judge Lambastes Company In Suit on Intrauterine Device*, N.Y. Times, Mar. 2, 1984, at B16, col. 1. Judge Lord added:

"Your company, without warning to women, invaded their bodies by the millions and caused them injuries by the thousands . . . Your company in the face of overwhelming evidence denies its guilt and continues its monstrous mischief. You have taken the bottom line as your guiding beacon and the low road as your route."

Id.

150. Mintz, *U.S. Judge Assails Officers of Dalkon Shield Maker*, Wash. Post, Mar. 2, 1984, at A4, col. 1.

151. "'Under your direction,' he told the officials, 'your company has . . . continued to allow women, tens of thousands of them, to wear this device—a deadly depth charge in their wombs, ready to explode at any time.'" *Id.*

152. Complaint at 3 (back of page), *In re*: Complaint of Judicial Misconduct by E. Claiborne Robins, Jr., JCP 84-002 (8th Cir. Apr. 24, 1984).

153. See Order, *In re* Complaint of E. Claiborne [Robins], Jr., JCP 84-002 (8th Cir. May 1, 1984); Order, *In re* Complaint of A.H. Robins Co., JCP 84-001 (8th Cir. May 1, 1984).

154. Order, *In re* Complaint of A.H. Robins Co. & *In re* Complaint of E. Claiborne Robins, Jr., JCP 84-001 & JCP 84-002 (8th Cir. Judicial Council Dec. 26, 1984).

155. Siegel, *Miles Lord: Champion or Zealot?*, L.A. Times, June 28, 1984, at A20, col. 6.

156. Telephone interview with Judge Miles W. Lord, U.S. Dist. Ct., Minneapolis, Minn. (Mar. 14, 1985).

157. *Id.*

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called “the last breath of frontier populist justice,”¹⁵⁸ is now contemplating “the possibility, even the attraction, of leaving the federal bench.”¹⁵⁹

Issues of substance are easily disguised as mere housekeeping details, matters of judicial administration. The “administrative” power to investigate, try, and punish Article III judges for “conduct prejudicial to the effective and expeditious administration of the business of the courts”¹⁶⁰ all too readily becomes a license for disgruntled litigants and fellow judges to harass the judicial maverick. The case of Judge Lord may be an example. A return to impeachment as the sole method for investigating, trying, and punishing Article III judges for non-criminal misbehavior in office may not eliminate this problem altogether. But it would restore the delicate balance, deliberately achieved by the Framers, between the independence and accountability of Article III judges.

—Lynn A. Baker

158. Siegel, *Judge Seeking Product Accountability Faces Misconduct Charge*, Wash. Post, July 7, 1984, at A2, col. 1.

159. Siegel, *supra* note 155, at A20, col. 6.

160. 28 U.S.C. § 372(e)(1) (1982).