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## The Hazards of Proposals to Limit the Tenure of Federal Judges and to Permit Judicial Removal without Impeachment

William G. Ross

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1990]

**THE HAZARDS OF PROPOSALS TO LIMIT THE TENURE  
OF FEDERAL JUDGES AND TO PERMIT JUDICIAL  
REMOVAL WITHOUT IMPEACHMENT**

**WILLIAM G. ROSS\***

**TABLE OF CONTENTS**

<b>I. INTRODUCTION</b> .....	<b>1064</b>
<b>II. PROPOSALS FOR LIMITATION OF TENURE AND ELECTION OF JUDGES</b> .....	<b>1066</b>
A. <i>Historical Background</i> .....	1066
B. <i>The Perils of an Elective Federal Judiciary</i> .....	1077
C. <i>The Perils of Abrogating Lifetime Tenure</i> .....	1079
1. <i>General Considerations</i> .....	1079
2. <i>Limitations upon Tenure of Supreme Court Justices</i>	1080
a. <i>Limitation of Tenure Would Have Only                 Modest Benefits</i> .....	1081
b. <i>Limitation of Tenure Would Have Severe                 Disadvantages</i> .....	1089
3. <i>Limitations on the Tenure of Other Federal Judges</i> .	1092
<b>III. THE DANGERS OF ALTERNATIVE PROCEDURES FOR REMOVAL</b> .....	<b>1095</b>
A. <i>Background of Recent Proposals</i> .....	1095
B. <i>Recent Proposals for Legislation</i> .....	1096
C. <i>Constitutional Interpretation</i> .....	1099
D. <i>Policy Considerations</i> .....	1105
<b>IV. THE VIABILITY OF LESS DRASTIC ALTERNATIVES TO ABROGATION OF LIFETIME TENURE OR DILUTION OF THE REMOVAL PROCESS</b> .....	<b>1110</b>
A. <i>General Considerations</i> .....	1110
B. <i>The Viability of the Impeachment Process</i> .....	1110
C. <i>The Viability of Judicial Self-Regulation</i> .....	1116
1. <i>Historical Considerations</i> .....	1116
2. <i>The Judicial Conduct and Disability Act</i> .....	1119
a. <i>The Act Does Not Go Too Far</i> .....	1122
(1) <i>The Act Does Not Threaten Judicial                     Independence</i> .....	1123

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(2) The Act Does Not Intrude upon Congress's Impeachment Power . . . . .	1126
(3) The Act Does Not Violate Due Process . . . . .	1129
b. The Act Goes Far Enough . . . . .	1129
D. <i>Other Means of Insuring Judicial Integrity</i> . . . . .	1135
V. CONCLUSION . . . . .	1137

## I. INTRODUCTION

THE secure tenure of federal judges, who receive lifetime appointments and who have been removed only through the rare and cumbersome process of impeachment, has vexed hostile critics of the federal judiciary since the earliest days of the Republic. During recent years, even proponents of lifetime tenure have worried that judicial infirmity, corruption and incompetence may become increasingly common as the number of federal judges expands.<sup>1</sup> The recent impeachment and conviction of three federal judges<sup>2</sup> has intensified a perennial controversy about whether the impeachment process should remain the sole procedure for the removal of federal judges.<sup>3</sup> Meanwhile, the controversies over recent Supreme Court nominations and the ongoing polemic concerning the role of the federal judiciary have renewed debate about whether federal judges should enjoy life tenure.<sup>4</sup> The Judi-

1. See Kastenmeier & Remington, *Judicial Discipline: A Legislative Perspective*, 76 KY. L.J. 763, 780 (1988) (expressing concern over possibility of future federal judiciary consisting of more than 1500 judges with lifetime tenure.)

2. In 1986, United States District Judge Harry E. Claiborne of Nevada was removed from office after the Senate convicted him of filing false tax returns, betraying the trust of the people and bringing the judiciary into disrepute. 42 CONG. Q. ALMANAC 75 (1986). In 1989, the Senate convicted United States District Judge Alcee Hastings of Florida of various charges arising out of allegations that he had conspired to obtain a bribe. 45 CONG. Q. ALMANAC 229 (1989). Two weeks later, the Senate convicted United States District Judge Walter L. Nixon, Jr. of Mississippi of perjuring himself in denying that he had tried to influence law enforcement officers in a drug case involving the son of a business associate. *Id.* The conviction of these judges during so short a period of time was particularly dramatic because only four other federal judges ever had been convicted and removed from office. See *infra* note 192.

3. See, e.g., Heflin, *The Impeachment Process: Modernizing an Archaic System*, 71 JUDICATURE 123 (1987); *Impeachment: Time to Change the System?*, N.Y. Times, Aug. 11, 1989, at A12, col. 1; Roberts, *Some in Congress Question Utility of Impeachment*, L.A. Daily J., June 3, 1988, at 1, col. 6. For an explanation of why impeachment presently is the sole procedure for removal, see *infra* notes 141-65 and accompanying text.

4. See, e.g., T. BAKER, THE GOOD JUDGE 84-86 (1989) (report of Twentieth Century Fund Task Force on Federal Judicial Responsibility); Fleming, *Is Life Tenure on the Supreme Court Good for the Country?*, 70 JUDICATURE 322 (1987); Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202,

cial Councils Reform and Judicial Conduct and Disability Act of 1980 (the Act), which subjects federal judges to various disciplinary procedures and sanctions by federal judicial councils and the Judicial Conference of the United States,<sup>5</sup> is designed to prevent and remedy judicial misconduct. The Act has been attacked, however, for subverting judicial independence, for violating the doctrine of separation of powers,<sup>6</sup> and for failing to provide an effective means of judicial discipline.<sup>7</sup> Controversy over the Act continues even though it has survived constitutional challenges,<sup>8</sup> and its defenders have contended that it ameliorates problems of judicial misconduct.<sup>9</sup>

Congressional concern about judicial discipline is reflected in several measures that are pending in the present session of Congress. Perhaps the most significant bill would establish a national commission to study whether Congress should remain responsible for removing corrupt federal judges from the bench.<sup>10</sup> Even if

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1211-12 (1988) (suggesting that life tenure may not be beneficial); Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799 (1986); Bandow, *End Life Tenure for Judges*, N.Y. Times, Sept. 6, 1986, at 27, col. 4. For a list of recent bills to limit lifetime tenure, see *infra* notes 106-08.

5. See 28 U.S.C. § 372(c) (1988). For a discussion of the Act, see *infra* notes 234-311 and accompanying text.

6. See Edwards, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges*, 87 MICH. L. REV. 765 (1989); Comment, *Judicial Misconduct and Politics in the Federal System: A Proposal for Revising the Judicial Councils Act*, 75 CALIF. L. REV. 1071 (1987); Note, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 YALE L.J. 1117 (1985).

7. See Rieger, *The Judicial Councils Reform and Judicial Conduct and Disability Act: Will Judges Judge Judges?*, 37 EMORY L.J. 45, 93-95 (1988).

8. See *Williams v. Mercer*, 783 F.2d 1488, 1502-15 (11th Cir.), *cert. denied*, 485 U.S. 1014 (1986); *Hastings v. Judicial Conference of the United States*, 593 F. Supp. 1371, 1378-84 (D.D.C. 1984), *aff'd in part, vacated in part*, 770 F.2d 1093 (D.C. Cir. 1985), *cert. denied*, 477 U.S. 904 (1986).

9. See, e.g., Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 KY. L.J. 643, 660-65 (1987).

10. H.R. 1620, 101st Cong., 1st Sess. (1989). The House approved the bill on June 5, 1990. H.R. REP. NO. 512, 101st Cong., 2d Sess. (1990). For excerpts from the hearings held on the bill, see *infra* notes 194-201, 294-313 and accompanying text. The bill is currently pending in the Senate.

[*Editor's note*: While this article was at press, Senator Herb Kohl of Wisconsin introduced legislation "identical" to H.R. 1620 as an amendment to S.2648, the Judicial Improvements Act of 1990. See 136 CONG. REC. S17576 (daily ed. Oct. 27, 1990). But see *Editor's note, infra* notes 135, 310 (slight discrepancies between the two bills). Senator Kohl's amendment added Title IV to the act, which was approved on December 1, 1990. See Pub. L. No. 101-650, §§ 401-418, 104 Stat. 5089, 5122-27 (1990). Title IV consists of two parts, the Judicial Discipline and Removal Reform Act of 1990 and the National Commission on Judicial Discipline and Removal Act. These developments affect the following notes in this article: 10, 134-40, 212, 240, 243-44, 246, 248-49, 265-66, 300, 308, and 310.]

this bill is not enacted, it is likely to provoke significant re-appraisal of the impeachment and judicial discipline processes. Careful examination of these processes also is likely to be engendered by proposed constitutional amendments that would permit judicial panels to remove federal judges from office.<sup>11</sup> Other measures, including a proposed constitutional amendment to require Senate reconfirmation of federal judges at ten-year intervals<sup>12</sup> and a bill for the establishment of a Court of the Judiciary to try cases involving alleged judicial misconduct,<sup>13</sup> also reflect profound concern about judicial integrity, discipline and accountability.

This article argues that existing constitutional and statutory provisions concerning judicial tenure and removal are adequate to maintain a high level of judicial competence and probity and are necessary to assure continued judicial independence. Although criticism of impeachment as the sole method for removal presently is more widespread than is criticism of lifetime tenure, the article discusses both selection and tenure since they are closely related. The first part of the article explains why proposals to limit the tenure of federal judges would interfere with judicial independence and effectiveness without producing any countervailing benefits. The second part of the article demonstrates that lifetime tenure is not likely to shelter judicial misconduct since impeachment pursuant to the Constitution and judicial discipline pursuant to the Act provide effective means of investigating and remedying judicial misconduct. Finally, the article argues that proposals for removal of judges by means other than impeachment and for limitations on tenure are unnecessary, would impair judicial independence and would be unconstitutional if enacted by ordinary legislation.

## II. PROPOSALS FOR LIMITATION OF TENURE AND ELECTION OF JUDGES

### A. *Historical Background*

The Constitution does not explicitly provide that Supreme

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11. S.J. Res. 232, 101st Cong., 1st Sess. (1989); S.J. Res. 233, 101st Cong., 1st Sess. (1989).

12. H.R.J. Res. 99, 101st Cong., 1st Sess. (1989).

13. S.J. Res. 232, *supra* note 11. In March 1990, the Committee on the Judiciary conducted hearings on this measure. For a discussion of the hearings, see *infra* notes 171-85 and accompanying text. As of the date of this article's publication, the subcommittee had taken no action on the measure.

Court Justices or judges of the lower federal courts are to enjoy lifetime tenure. Lifetime tenure is implied, however, in the provision that the "Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour."<sup>14</sup> The framers appear to have borrowed the concept and language of "good Behaviour" from English law. The Act of Settlement in 1700 provided that judges should serve during good behavior ("*Quandiu se bene gesserint*").<sup>15</sup> This statute also provided that judges were subject to removal by the Crown upon address of both houses of Parliament, but it provided a more secure tenure for judges insofar as they previously had served at the Crown's pleasure ("*durante bene placito domino Rege*").<sup>16</sup>

During the ratification period, some antifederalists and other critics decried the provision for lifetime tenure of federal judges. For example, the town meeting of Preston, Connecticut instructed its delegates to the state ratifying convention that the terms of Supreme Court Justices and the lower federal judges should be limited to two years. The instructions concluded that "any longer term of holding the judicial powers are [sic] inconsistent in a free country."<sup>17</sup> Proponents of lifetime tenure contended, however, that it would help to achieve the Constitution's goal of securing the "blessings of liberty."<sup>18</sup> In *The Federalist*, Alexander Hamilton argued that security of tenure would not produce judicial despotism and that lifetime tenure was essential to judicial independence. Arguing that the judiciary would be the weakest of the three branches of government, Hamilton contended that it could never endanger "the general liberty of the people," since it has "no influence over either the sword or the

14. U.S. CONST. art. III, § 1.

15. Act of Settlement 1700, 12 & 13 Will. 3 ch. 2, § 3. The provision for service during good behavior did not take effect until the House of Hanover replaced the House of Stuart in 1714. F. MATTLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 313 (1931).

16. See ROSS, "*Good Behavior*" of Federal Judges, 12 U. KAN. CITY L. REV. 119, 120 (1944).

17. 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 440 (M. Jensen ed. 1978). It is not clear from the instructions whether the town meeting believed that Justices should be eligible for reappointment. Since the instructions averred that appointments "ought to take place as often as the new elections of the representative body of the legislative [sic]," it is possible that the town meeting believed that judges, like members of the U.S. House of Representatives, should be eligible for additional terms of office. Despite its misgivings concerning the tenure of judges and several other aspects of the Constitution, the town meeting accorded its two delegates discretion in deciding whether to vote in favor of ratification.

18. U.S. CONST. preamble.

purse” of the community. The “natural feebleness of the judiciary” places it “in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches.” Hamilton concluded that, “as nothing can contribute so much to [the judiciary’s] firmness and independence as permanency in office, this quality may, therefore, be justly regarded as an indispensable ingredient in its constitution, and in a great measure, as the citadel of the public justice and the public security.”<sup>19</sup>

Hamilton’s writings probably did not assuage the fears of antifederalists who opposed lifetime tenure. The decisions of the federal judiciary during the early years of the Republic only intensified hostility toward life tenure among the opponents of a strong centralized government. Secure in their tenure from the wrath of their critics, federal judges forged a jurisprudence that nurtured nationalism and fostered corporate economic development. These decisions, which Jeffersonian republicans perceived as permitting federalists to exercise power from their political grave, inspired proposals for limitations upon the tenure of federal judges.

As early as 1807 and 1808, three proposed amendments were introduced in Congress to limit the number of years that federal judges would serve.<sup>20</sup> During the early 1820s, Thomas Jefferson advocated a constitutional amendment to limit federal judicial terms to six years, renewable by presidential appointment and the approbation of both houses of Congress.<sup>21</sup> Proposals for limitation of judicial tenure continued to be made throughout the antebellum period and during the years immediately following the Civil War. During the early 1830s, three measures were introduced in Congress to limit the tenure of the federal judiciary.<sup>22</sup> Senator Tappan of Ohio introduced four amendments between 1839 and 1844 that would have limited judicial tenure to seven years.<sup>23</sup> A Mississippi congressman introduced a similar measure in 1848.<sup>24</sup> Andrew Johnson also urged the limitation of judicial tenure. During his years as a Representative and Senator from

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19. THE FEDERALIST No. 78, at 465-66 (A. Hamilton) (C. Rossiter ed. 1961).

20. H. AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY 151-52 (1970) (reprint of 1896 ed.).

21. I C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 656-57 (1922).

22. See H. AMES, *supra* note 20, at 152.

23. *Id.*

24. *Id.* at 152 n.4.

Tennessee, he proposed legislation to limit federal judges to twelve-year terms, with one-third of the federal judiciary retiring every four years. As President, Johnson, in a special message to Congress in 1868, again urged a twelve-year limitation on judicial tenure.<sup>25</sup> During the late 1860s, five measures to limit judicial tenure were introduced in Congress. Two of the measures called for an eight-year term, two proposed a ten-year term, and one would have created a twenty-year term.<sup>26</sup> Two bills introduced by Representative Finley of Ohio in 1879 would have limited judicial tenure to twelve years. The preambles of Finley's resolutions disparaged life tenure as "a relic of the Old World and incompatible with the genius and spirit of our republican form of government, placing public functionaries above a due sense of responsibility to the people."<sup>27</sup> During the half-century prior to the enactment of a federal pension in 1869, a number of congressmen proposed amendments that would have prohibited judges from continuing in office past the age of sixty-five.<sup>28</sup> Altogether, during the first century following the adoption of the Constitution, a score of measures were introduced in Congress for the limitation of federal judicial tenure.<sup>29</sup>

One of the most sustained movements for altering judicial selection and tenure occurred during the late nineteenth and early twentieth centuries, when many federal judicial decisions dismayed populists and progressives. Some critics of the judiciary called for the election of federal judges,<sup>30</sup> while others favored the retention of the appointment procedure but advocated limitation of judicial terms. Advocates of an elective federal judiciary argued that the system of appointing judges insured the perpetuation of corporate domination of the judiciary<sup>31</sup> and that

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25. *Id.*

26. *Id.*

27. *Id.* at 152-53.

28. *Id.* at 151.

29. See H.R. Doc. No. 551, 70th Cong., 2d Sess. 82-92 (1929).

30. No bills for the popular election of federal judges were introduced in Congress prior to the 1880s. H. AMES, *supra* note 20, at 146; 1 CONGRESS AND THE COURTS: A LEGISLATIVE HISTORY 248-51 (B. Reams and C. Hayworth eds. 1978). The first bills proposing popular election of federal judges were introduced by Senator Vorhees of Indiana and Senator Geoge of Indiana. S.J. Res. 24, 48th Cong., 1st Sess. (1883); S.J. Res. 25, 47th Cong., 1st Sess. (1882); S.J. Res. 14, 47th Cong., 1st Sess. (1881).

31. Chief Justice Walter Clark of North Carolina complained that appointed judges were drawn from the ranks of successful corporate practitioners who had absorbed the outlook of their clients. Clark, *Is the Supreme Court Constitutional?*, 63 INDEPENDENT 723, 726 (1907). Similarly, in 1906, Ernest Crosby argued that appointed judges inevitably were leaders of the bar who were "totally



election of judges or limitations on terms would loosen the corporations' grip on the judiciary.<sup>32</sup> They also contended that the appointment of judges was inconsistent with contemporary notions of popular democracy<sup>33</sup> and that election of federal judges was consistent with the steady extension of the franchise that had characterized the history of the Republic.<sup>34</sup>

Many progressives further argued that an elected judiciary was the natural corollary of the federal courts' acquisition of more power than the framers had envisioned. Critics of judicial review, who often advocated quixotic measures for its abrogation or curtailment, were among the most fervent supporters of federal judicial election. "We must recognize the force of the demand that if judges are to act as legislators, they must be elected by the people, and easily be displaced or recalled," declared one critic of the courts in 1914. "Otherwise democracy is replaced by absolutism."<sup>35</sup> Even some moderates and conservatives came to regard federal judicial election as a means of ameliorating popular discontent over judicial decisions.<sup>36</sup>

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out of touch with true democracy" and who represented "plutocratic ideals." Crosby, *Jerome and the Judges*, 13 AM. FEDERATIONIST 81-82 (1906). Echoing the opinions of many critics of an appointive judiciary, Crosby contended that it was impossible for appointed judges "to change the habits or thoughts of a lifetime, and they naturally continue to serve the money power which created them." *Id.*

32. In recommending a proposed constitutional amendment for 10-year terms for federal judges, the House Committee on the Judiciary in 1894 declared that the measure would help to restore popular confidence in a judiciary that was "frequently suspected of having no sympathy" with the people and was seen as "exhibiting partiality toward corporations and personal favorites." HOUSE COMM. ON THE JUDICIARY, H.R. REP. NO. 466, 53d Cong., 2d Sess. 2 (1894).

33. Writing in 1903, Clark denounced the appointment of judges as "an anomaly in a country whose government is based upon the principle that it exists only by the consent of the governed." Clark, *Law and Human Progress*, 37 AM. L. REV. 512, 517 (1903). Four years later, he declared that "[i]f the people are to be trusted to select the Executive and Legislature they are also fit to select the judges." Clark, *supra* note 31, at 726.

34. Clark pointed out, for example, that one state at the time of the Constitution's adoption had permitted the popular election of the governor and that most of the states had selected at least one branch of the legislature on the basis of restricted suffrage. "The schoolmaster was not abroad in the land, the masses were illiterate and government by the people was a new experiment of which property holders were afraid," Clark wrote. "The danger to property rights did not then as now come from the other direction—from corporations." Clark, *supra* note 31, at 725-26.

35. Henderson, *The Progressive Movement and Constitutional Reform*, 3 YALE REV. 78, 87 (1914).

36. Advocating the establishment of 10-year terms for the lower federal judiciary as a condition for increased judicial salaries, the *Central Law Journal* acknowledged that lifetime tenure "frequently promotes disregard of proper criticism" and "keeps on a bench men who become subsequently unfit for ser-

During this period, members of Congress introduced numerous proposals for the election of federal judges for limited terms. Many of these measures were merely enabling laws that would have permitted Congress to establish terms of office for federal judges.<sup>37</sup> Others were more specific and provided for election of judges and limited their tenure of office for periods that ranged from six to fifteen years.<sup>38</sup> For example, Walter Clark, an associate justice of the North Carolina Supreme Court, proposed a plan in 1896 whereby the Chief Justice of the United States would be elected in the same manner as the President, and the nation would be divided into election districts for the selection of associ-

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vice." 70 CENT. L.J. 266 (1910). The *Journal* believed that lifetime tenure had "aroused a suspicion of unloyalty to the people's interest and thus impaired public confidence" in the courts. *Id.* It also contended that the lifetime tenure of judges had "promoted an insolent disrespect of state sovereignty, and thus antagonized state courts and legislatures, promoting unnecessary ruptures." *Id.* at 267.

37. For example, in 1899, 1901, 1903 and 1907, Representative Cooper of Texas introduced bills to amend the Constitution to permit Congress to determine the method of electing or appointing all federal judges for a tenure prescribed by Congress. H.R.J. Res. 27, 60th Cong., 1st Sess. (1907); H.R.J. Res. 38, 58th Cong., 1st Sess. (1903); H.R.J. Res. 77, 57th Cong., 1st Sess. (1901); H.R.J. Res. 101, 55th Cong., 2d Sess. (1897). Representative Russell of Texas introduced a similar measure at the two congresses that sat during 1907. H.R.J. Res. 15, 60th Cong., 1st Sess. (1907); H.R.J. Res. 249, 59th Cong., 2d Sess. (1907) (district judges chosen by popular election in manner provided by state legislatures). The bills would have permitted Congress to provide for the popular election of district and circuit court judges and to prescribe the length of their terms.

38. Prompted by Clark, Senator Butler of North Carolina introduced a bill in 1899 for a constitutional amendment that would have required the election of all federal judges, including Supreme Court Justices, for terms of eight years. The bill provided for the election of the Chief Justice by voters in all states. S. Res. 47, 56th Cong., 1st Sess. (1899). The bill was reported adversely. Similarly, two bills introduced in 1907 by Representative Lamar of Florida called for an amendment under which all federal judges would have been elected for terms of eight years. H.R.J. Res. 226, 59th Cong., 2d Sess. (1907); H.R.J. Res. 50, 60th Cong., 1st Sess. (1907). A measure introduced by Representative Neeley of Kansas in 1913 provided for election to six-year terms. H.R.J. Res. 17, 63rd Cong., 1st Sess. (1913). A 1912 proposal by Representative Lafferty of Oregon provided for election of all federal judges to 12-year terms, subject to recall every four years. H.R.J. Res. 227, 62nd Cong., 2d Sess. (1912). In 1915 and 1917, Representative Moon of Tennessee proposed an amendment that would have required the election of lower federal judges and limited their tenure to 15 years. H.R.J. Res. 50, 65th Cong., 1st Sess. (1917); H.R.J. Res. 43, 64th Cong., 1st Sess. (1915). Senator Dill of Washington favored an amendment that would have required the election of inferior federal judges by popular vote and the appointment of Supreme Court Justices from among the elected inferior judiciary. S.J. Res. 52, 72d Cong., 1st Sess. (1931); S.J. Res. 126, 71st Cong., 2d Sess. (1930); S.J. Res. 103, 69th Cong., 1st Sess. (1926); S.J. Res. 93, 68th Cong., 1st Sess. (1924).

ate Justices.<sup>39</sup> In 1891, Judge Seymour Thompson predicted that “[i]f the proposition . . . to make the Federal judiciary elective instead of appointive, is once seriously discussed before the people, nothing can stay the growth of that sentiment; and it is almost certain that every session of the Federal Supreme Court will furnish material to stimulate its growth.”<sup>40</sup>

Thompson’s prediction, of course, was overly optimistic. Despite mounting criticism of the federal courts by progressives and trade unionists, no measure to change judicial selection procedures or tenure came even close to enactment. Even the most ardent proponents of reform recognized that the obstacles of the constitutional amendment process made such changes impracticable. Moreover, widespread public support for the status quo created political perils for advocates of reform. William Jennings Bryan, for example, privately expressed support for the election of judges, but told Justice Clark of the North Carolina Supreme Court in 1902 that it would “be inopportune to push this question upon which the people have not had time to think.”<sup>41</sup>

The more viable option of retaining an appointive judiciary but imposing limitations on judicial tenure inspired many proposals for legislation. A bill for an amendment to impose a ten-year limitation upon the tenure of federal judges, including Supreme Court Justices, was favorably reported by the House Judiciary Committee in 1894.<sup>42</sup> Most of the bills, however, sunk with scarcely a trace.<sup>43</sup> Critics of the judiciary explored other means of

39. Windmüller & Clark, *If Silver Wins*, 163 N. AM. REV. 456, 464-65 (1896) (from part two, “Inevitable Constitutional Changes,” authored solely by Clark). Clark, who later served as North Carolina’s chief justice for more than 20 years, continued to advocate an elected federal judiciary until his death in 1924.

40. Thompson, *Elective and Appointive Judges*, 25 AM. L. REV. 288, 289 (1891).

41. Letter from William Jennings Bryan to Walter Clark (Apr. 7, 1902), reprinted in *THE PAPERS OF WALTER CLARK* 9 (A. Brooks & H. Leflar eds. 1950).

42. H.R. Res. 109, 53d Cong., 2d Sess. (1894).

43. For example, Representative Russell of Texas favored an amendment that provided for appointment of Supreme Court Justices for 12-year terms, appointment of circuit court judges for eight-year terms, and election of district court judges for six-year terms. H.R.J. Res. 80, 61st Cong., 2d Sess. (1909); H.R.J. Res. 15, 60th Cong., 1st Sess. (1907). In 1913, Senator Reed of Missouri introduced a measure providing for a term of 12 years for all federal judges, with eligibility for reappointment. S.J. Res. 6, 63d Cong., 1st Sess. (1913). A 1914 measure sponsored by Representative Reilly of Wisconsin provided a maximum 10-year term of office for all federal judges. H.R.J. Res. 349, 63d Cong., 2d Sess. (1913). Representative Vinson of Georgia advocated an amendment to limit all federal judges to six-year terms. H.R.J. Res. 387, 63d Cong., 3d Sess. (1914).

Many other proposals would have limited the terms only of the lower fed-

curbing the alleged abuses of lifetime tenure. While the judicial recall movement of the early 1910s was primarily directed against state judges, Senator Owen of Oklahoma in 1911 introduced legislation to permit the recall of federal judges, including Supreme Court Justices.<sup>44</sup> The following year, Senator Ashurst of Arizona proposed an amendment to permit the recall of lower federal judges.<sup>45</sup> Meanwhile, Representative Hull of Tennessee proposed an amendment that would have permitted the removal of lower federal judges by concurrent resolution of both houses of Congress.<sup>46</sup>

The proposals during the early twentieth century for election of federal judges and for the imposition of limitations on their tenure encountered widespread opposition. Opponents of an elective judiciary argued that election of judges would politicize the judicial selection process and endanger the personal and economic liberties enjoyed by Americans.<sup>47</sup> Similarly, the opponents

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eral judiciary. Several measures provided for 10-year terms for judges of lower federal courts. S.J. Res. 19, 63d Cong., 1st Sess. (1913); H.R.J. Res. 214, 62d Cong., 2d Sess. (1912); S.J. Res. 109, 62d Cong., 2d Sess. (1912); H.R.J. Res. 149, 62d Cong., 1st Sess. (1911). In 1918, Senator Myers of Montana proposed an amendment that would have limited judges of lower federal courts to terms not exceeding six years. S.J. Res. 137, 65th Cong., 2d Sess. (1918). Representative Neeley of Kansas would have limited lower federal judges to eight-year terms. H.R.J. Res. 270, 62d Cong., 2d Sess. (1912).

Other proposed amendments were enabling laws that would have permitted Congress to establish the length of terms for federal judges. Senator Sheppard of Texas favored a measure to allow Congress to establish terms of the lower federal judiciary for terms of not less than 10 years. S.J. Res. 94, 67th Cong., 1st Sess. (1921); S.J. Res. 58, 66th Cong., 1st Sess. (1919); S.J. Res. 79, 65th Cong., 1st Sess. (1917); *see also* S.J. Res. 168, 64th Cong., 1st Sess. (1916) (giving Congress discretion to determine tenure). Representative Welty of Ohio introduced amendments that would have permitted Congress to establish terms of office for all federal judges. H.R.J. Res. 58, 66th Cong., 1st Sess. (1919); H.R.J. Res. 264, 65th Cong., 2d Sess. (1918).

44. Owen's bill provided that a judge's tenure would terminate whenever Congress passed a resolution requesting the President to nominate a successor to the judge. Under Owen's bill, Congress would not have needed to vouchsafe any reason for the judge's removal. S. 3112, 62d Cong., 1st Sess. (1911). Introducing the legislation, Owen explained that to "assign reasons is to discredit the incumbent, while removal without assignment of reasons is the mildest methods of dealing with a public servant whose service is no longer desired." 47 CONG. REC. 3359 (1911). Arguing that a free people should "govern themselves without apology," Owen declared that "[t]he mere fact that people do not like a judge and do not desire him to serve them justifies recall. He has no function, no public office, or public dignity except as it is bestowed upon him by the people themselves." *Id.*

45. S.J. Res. 130, 62d Cong., 2d Sess. (1912).

46. H.R.J. Res. 371, 62d Cong., 3d Sess. (1912); H.R.J. Res. 345, 62d Cong., 2d Sess. (1912).

47. *See, e.g.,* Greer, *Elective Judiciary and Democracy*, 43 AM. L. REV. 516, 523-

of limitations on the tenure of federal judges warned that this change would undermine precedent and threaten judicial independence by encouraging judges to make popular decisions.<sup>48</sup> They further predicted that the election of federal judges would diminish the quality of the bench by depriving it of experienced jurists, and that judicial election would lead to a loss of control over lawyers since judges would be beholden to the opinion of lawyers for their continuation in office.<sup>49</sup> The election of judges, which had attracted strong support among populists, was much more controversial within the ranks of the progressive movement. Many advocated election but others feared that voters would be unable to make intelligent choices, and that the elective process was likely to fall under the domination of the political machines that the progressives loathed.<sup>50</sup> Progressives were especially cog-

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24 (1909) (expressing fear of socialistic courts abrogating private ownership of property and freedom of speech, religion and opinion).

48. See, e.g., HOUSE COMM. ON THE JUDICIARY, *supra* note 32, pt. 2, at 4. The members of the House Judiciary Committee who opposed the 1894 measure to limit federal judicial tenure to 10 years warned that "judges of the courts holding office for ten years would strive for popularity, and might improve their opportunity to make popular decisions with a view of becoming candidates for office and we would have what is now unknown in this country—the whole Federal judiciary actively engaged in party politics." *Id.* This spectacle, the report warned, "would destroy the dignity of the judiciary and the confidence of the people in its adjudications." *Id.*

49. See Bausman, *Election of Federal Judges*, 37 AM. L. REV. 886, 887 (1903). Additionally, Professor William S. Carpenter of the University of Wisconsin observed:

The burden thrown upon the electorate in choosing among a host of candidates those best fitted for office has been so great that the system has broken down. It has been fully recognized for some time that the voter is not a free agent in the selection of the officers of government but has come to rely upon the advice of the professional politician who really determines the choice and calls upon the electorate to ratify his work.

W. CARPENTER, JUDICIAL TENURE IN THE UNITED STATES 209 (1918).

50. See Hirschhorn, *Richard Spencer Childs: The Political Reformer and His Influence on the Work of the American Judicature Society*, 73 JUDICATURE 184, 187 (1989-90). Many studies of the progressives have emphasized that their advocacy of greater popular participation in government was tempered by a strong undercurrent of elitism, motivated by their desire to circumvent political machines that were controlled by urban bosses and immigrants whose political and cultural visions differed from their own. See, e.g., J. CHAMBERS, *THE TYRANNY OF CHANGE: AMERICA IN THE PROGRESSIVE ERA, 1900-1917*, at 139 (1980); S. HAYS, *THE RESPONSE TO INDUSTRIALISM, 1885-1914*, at 154 (1957); J. KLOPPENBERG, *UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870-1920*, at 106 (1986). As Otis Graham has pointed out, the goal of most progressives was the rationalization rather than the democratization of society; democratization was a means to an end rather than an end in itself. O. GRAHAM, *THE GREAT CAMPAIGNS: REFORM AND WAR IN AMERICA, 1900-1918*, at 135, 157-58 (1971). The more sophisticated and honest progres-

nizant of the perils of an elected federal judiciary since political machines controlled the election of state judges, who generally were less receptive to reform than were the federal judges. With some exaggeration, Roscoe Pound observed in 1921 that "the illiberal decisions of which complaint was made so widely at the beginning of the twentieth century were largely, one might say almost wholly, the work of popularly-elected judges."<sup>51</sup>

The courts' growing receptivity toward progressive reform during the 1910s helped to diminish public support for measures to curb the power of the federal judiciary.<sup>52</sup> Although a recrudescence of political activism in the Supreme Court during the late 1910s and early 1920s led to the revival of proposals for judicial election and limited terms of office for judges,<sup>53</sup> no such measure received serious consideration. Proposals for limited judicial terms and the election of federal judges were heard again shortly

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sives acknowledged this goal. See H. CROLY, *PROGRESSIVE DEMOCRACY* 213-14 (1914).

51. R. POUND, *THE SPIRIT OF THE COMMON LAW* 7 (1921). Dean Pound's observation unduly minimized the impact of the small, but significant, number of federal court decisions that had struck down economic regulations and social reform legislation. As Felix Frankfurter pointed out in 1924, "[A] numerical tally of the cases does not tell the tale," since not all laws were of the same importance and a federal decision that invalidated one state law often had the effect of nullifying similar reforms in other states. Frankfurter, *The Red Terror of Judicial Reform*, in FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION 164 (P. Kurland ed. 1970). Dean Pound also failed to acknowledge the progressivism of many of the elected state judges. As Professor Carpenter pointed out, not all popularly elected tribunals disfavored progressive legislation. Indeed, the courts of Carpenter's home state of Wisconsin had reflected the progressivism that pervaded the state. W. CARPENTER, *supra* note 49, at 211-12.

52. While the courts during the period from the 1880s until 1937 carefully scrutinized the constitutionality of social and economic legislation and invalidated many important measures, they actually upheld the constitutionality of most of the progressive reforms that they had occasion to review. See L. BETH, *THE DEVELOPMENT OF THE AMERICAN CONSTITUTION, 1877-1917*, at 141 (1971); W. WIECEK, *LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE* 129 (1988); Urofsky, *State Courts and Protective Legislation in the Progressive Era: A Re-evaluation*, 72 J. AM. HIST. 63-91 (1985); Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, Y.B. SUP. CT. HIST. SOC'Y (1983). See generally J. SEMONCHE, *CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920* (1978).

53. In 1924, the presidential platform of Senator Robert M. LaFollette and the Committee for Progressive Political Action (CPPA), which endorsed LaFollette's independent candidacy, called for the election of federal judges. LaFollette's personal platform called for a 10-year term and the CPPA platform advocated "limited terms." 1 NATIONAL PARTY PLATFORMS 255-56 (D. Johnson ed. 1978). These proposals continued into the 1930s through bills introduced by Senator Dill of Washington and Representative Cannon of Wisconsin. H.R.J. 109, 75th Cong., 1st Sess. (1937); H.R.J. 574, 74th Cong., 2d Sess. (1936); S.J. Res. 58, 73d Cong., 1st Sess. (1933).

before the Judicial Revolution of 1937,<sup>54</sup> but the Court's abandonment of economic due process doomed these proposals. Another spate of proposals for altering judicial tenure and selection procedures were made during the Warren Court era,<sup>55</sup> when a large number of vocal Americans were disaffected by the Court's decisions on issues involving race, political representation, religion and criminal justice. Proposals for limitation of judicial tenure continued to be advanced during the 1970s<sup>56</sup> and throughout the 1980s.<sup>57</sup>

The persistent failure of the movements for an elected federal judiciary and for the establishment of limited terms for federal judges illustrates the impracticability of proposals for altering the time-honored and constitutionally-ordained provisions for ju-

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54. 81 CONG. REC. 2144 (1937) (remarks of Sen. George W. Norris, proposing terms of unspecified length for federal judges); Catledge, *Robinson Cordial to an Amendment*, N.Y. Times, Mar. 16, 1937, at 1, col. 2 (amendment by Sen. Norris proposed nine-year terms of office for all federal judges, including Supreme Court Justices); see H.R.J. 109, *supra* note 53; H.R.J. 574, *supra* note 53.

55. In 1968, for example, when controversy over Warren Court decisions was intense, several bills were introduced to amend the Constitution to permit election or to limit tenure. For examples of those providing for election, see H.R.J. Res. 1428, 90th Cong., 2d Sess. (1968); H.R.J. Res. 1427, 90th Cong., 2d Sess. (1968); H.R.J. Res. 1426, 90th Cong., 2d Sess. (1968); H.R.J. Res. 1418, 90th Cong., 2d Sess. (1968); H.R.J. Res. 1282, 90th Cong., 2d Sess. (1968); H.R.J. Res. 1279, 90th Cong., 2d Sess. (1968); H.R.J. Res. 1038, 90th Cong., 2d Sess. (1968). For examples of those providing for limitations on tenure, see H.R.J. Res. 1470, 90th Cong., 2d Sess. (1968); H.R.J. Res. 1467, 90th Cong., 2d Sess. (1968); H.R.J. Res. 1456, 90th Cong., 2d Sess. (1968); H.R.J. Res. 1448, 90th Cong., 2d Sess. (1968); H.R.J. Res. 1409, 90th Cong., 2d Sess. (1968); H.R.J. Res. 1401, 90th Cong., 2d Sess. (1968); H.R.J. Res. 1373, 90th Cong., 2d Sess. (1968); H.R.J. Res. 1220, 90th Cong., 2d Sess. (1968); H.R.J. Res. 997, 90th Cong., 2d Sess. (1968).

56. In 1975, Senator Byrd, Jr. sponsored a constitutional amendment providing that federal judges would serve for eight-year terms. After each term, they automatically would be nominated for another eight-year term and subject to reconfirmation by the Senate. S.J. Res. 16, 94th Cong., 1st Sess. (1975); see Byrd, *Has Life Tenure Outlived Its Time?*, 59 JUDICATURE 266, 266-67 (1976). Representative Quayle proposed an amendment to limit all federal judges to 15-year terms. H.J. Res. 160, 96th Cong., 1st Sess. (1979); see also S.J. Res. 110, 96th Cong., 1st Sess. (1979) (proposal for 10-year terms for all federal judges, renewable upon nomination by President and confirmation by Senate); H.J. Res. 418, 96th Cong., 1st Sess. (1979) (same); H.J. Res. 315, 96th Cong., 1st Sess. (1979) (proposal by Rep. Jacobs of Indiana that federal judges could not serve more than 10 years during any 12-year period); H.J. Res. 296, 96th Cong., 1st Sess. (1979) (proposal for 10-year terms for all federal judges, renewable upon nomination by President and confirmation by Senate); H.J. Res. 191, 96th Cong., 1st Sess. (1979) (proposal by Rep. Applegate of Ohio for 12-year terms for all federal judges); H.J. Res. 77, 96th Cong., 1st Sess. (1979) (proposal for 10-year terms for all federal judges, renewable upon nomination by President and confirmation by Senate).

57. For a sampling of the bills introduced during the 1980s, see *infra* notes 106-08.

dicial selection and retention. Although measures to change judicial selection and tenure procedures may continue to be discussed and embodied in quixotic legislation,<sup>58</sup> the status quo seems likely to prevail. Unless a wave of egregious scandals involving the competence or character of federal judges devastates public confidence in judicial integrity or the judiciary hands down a long series of decisions with which a decided majority of Americans intensely disagree, support for lifetime appointment of federal judges will remain firm. The procedures for judicial selection and tenure have withstood many periods of widespread political controversy over federal judicial decisions and the public discontent necessary for their alteration is not foreseeable.

### B. *The Perils of an Elective Federal Judiciary*

Despite the persistence of proposals for limitation of federal judicial tenure, even the most sedulous critics of the federal judiciary do not advocate any change in the process by which judges are selected. Virtually no one actively opposes the existing constitutional procedure for the appointment of federal judges by the President with the advice and consent of the Senate. The failure of the judiciary's present critics to advocate the election of federal judges is surprising, since selection of judges was widely advocated during earlier periods of American history.<sup>59</sup> The dearth of proposals for election of federal judges also is surprising since election of judges is widespread among the states.<sup>60</sup> Since the election of judges is no alien or novel concept, one would expect critics of the judiciary to advocate at least some form of federal judicial election. The relative dearth of proposals for an elected federal judiciary during recent years is particularly surprising since the retention of judicial appointment contravenes the trend toward the growth of participatory democracy that has characterized the nation's history.

The failure of the judiciary's critics to advocate election of federal judges is attributable to a number of factors. The first is the apparent impracticability of any such proposal. Any change in the method of judicial selection could be effected only through

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58. *Id.*

59. For a discussion of proposals for election of federal judges, see *supra* notes 37-39 and accompanying text.

60. See L. BERKSON, S. BELLER & M. GRIMALDI, *JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS* (1980); M. COMISKEY & P. PATTERSON, *THE JUDICIARY—SELECTION, COMPENSATION, ETHICS AND DISCIPLINE* (1987).



the arduous process of a constitutional amendment. While many critics of the judiciary do not shrink from the prospect of seeking a constitutional amendment to limit judicial tenure, they may recognize that an amendment for the election of federal judges is a more radical proposal that would encounter more intense opposition. Moreover, the dearth of proposals for an elected federal judiciary also may demonstrate an acknowledgement of the inherent unsoundness of such a selection procedure. The popular selection of judges has not always produced a high quality bench. While many fine judges have emerged from state electoral processes, judicial corruption and incompetence may have been more widespread among state judges than among federal judges.<sup>61</sup> Disparities between the quality of the state and federal benches are not necessarily related to differences in the methods of judicial selection, but the threat of undue politicization of the judiciary is greater when judges are elected. Of course, the process of federal judicial selection is anything but apolitical, and federal judges never are immune from political pressures, but the isolation of the selection process from the exigencies and pressures of electoral politics helps to assure a higher measure of judicial independence. As Harold Lasky noted, election of judges "introduces the need of habits which ought consistently to be absent from the judicial mind."<sup>62</sup> Lasky observed that "the method of election, if it is for a short term, means insecurity of tenure; and that position is fatal to a proper judicial habit of mind."<sup>63</sup>

Recognizing that judicial elections imperil judicial independence and often are not truly responsive to the popular will,<sup>64</sup>

61. See, e.g., Fed. Jud. Center, *Judicial Discipline and Removal in the United States* 24-25, 28 (1987) (staff paper).

62. Lasky, *The Technique of Judicial Employment*, 24 MICH. L. REV. 529, 531 (1926).

63. *Id.* at 532.

64. Critics of judicial elections have expressed concern that the electoral process often fails to reflect the popular will because voter interest in judicial elections usually is low. See New York Commission on Government Integrity, *Becoming a Judge: Report on the Failings of Judicial Elections in New York State*, 9 PACE L. REV. 199, 225 (1989) [hereinafter *Becoming a Judge*]. In their foreword to this report, Dean Feerick, of Fordham Law School, and Cyrus Vance, former United States Secretary of State, flatly stated: "We must stop perpetuating the myth that judicial elections give us a democratic choice. They do not and will not. We firmly believe that a merit-based appointive system . . . will hold judicial ability—not political party service—paramount, and will give us the finest judiciary possible." *Id.* at 201.

More publicity about judicial elections would ameliorate public ignorance, yet the need to raise campaign funds to educate and persuade the voters would impose onerous political pressure on judges. Many critics of the judicial electoral process have already expressed concern that the electoral process exposes

many states recently have abandoned simple judicial elections in favor of a more complex system in which at least some judges initially are appointed and later are subject to voter approval and uncontested retention elections.<sup>65</sup> A New York commission on government integrity recently recommended that New York's system of judicial elections be supplanted by a practice in which the governor would appoint the majority of judges subsequent to a nominating commission's recommendations.<sup>66</sup>

In addition to threatening an erosion of judicial independence, the election of federal judges also would raise troubling issues of federalism. Neither the election of federal judges by the nation as a whole nor election by circuits would be wholly satisfactory. The former would be impracticable since the large number of judgeships vacated between biennial federal elections would present voters with a bewildering array of candidates. In the absence of any method for matching candidates with regions of the country, national election also would deprive individual district and circuit residents of the opportunity to select judges familiar with local substantive laws and conditions. Election of judges by circuit or district, however, would encourage judicial parochialism. Since the interpretation of federal law is one of the principal duties of federal judges, it is desirable that they be selected in a national forum.<sup>67</sup>

### C. *The Perils of Abrogating Lifetime Tenure*

#### 1. *General Considerations*

In contrast to the reluctance of critics of the federal judiciary to advocate the election of judges, they have not hesitated to urge

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judges to political pressures. *Id.* at 221. This is especially true since the demands of modern politics increasingly require that judges raise large sums of money for campaigns. See *For Want of Recognition, Chief Justices Ousted*, N.Y. Times, Sept. 28, 1990, at B16, col.3. See generally Shotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J. LAW & POL. 57 (1985); *Becoming a Judge*, *supra*, at 222-23.

65. S. CARBON & L. BURKSON, *JUDICIAL RETENTION ELECTIONS IN THE UNITED STATES* 1-10 (1980).

66. See *Becoming a Judge*, *supra* note 64, at 204-05.

67. As James M. Gray, a prominent Brooklyn attorney, explained in 1908: [I]t is desirable that Federal officials should owe their selection as far as possible to the national authority—that they should have no divided allegiance, and derive no authority from any but a national source. As they cannot well be elected by the whole nation, appointment by the President is the only practicable method.

Gray, *How to Bring the Federal Courts Closer to the Common People*, 42 AM. L. REV. 500, 502 (1908).

the imposition of limitations upon judicial tenure. During the past decade, members of Congress have introduced a plethora of bills for constitutional amendments to establish limited terms for federal judges.<sup>68</sup> Like most earlier measures to circumscribe judicial tenure, these proposals have failed to receive any serious consideration by the judiciary committees of either house of Congress. These bills remain significant, however, as they gauge the degree of public misgivings concerning the federal judiciary. Moreover, they provide a reminder that limitation of judicial tenure is a potential means of curbing abuses by the federal judiciary.

## 2. *Limitations upon Tenure of Supreme Court Justices*

Advocates of limitations upon judicial tenure disagree about whether to impose such restrictions upon both Supreme Court Justices and the lower federal judiciary or whether to limit such restrictions to one or the other. Most recent bills to limit the tenure of federal judges would have affected both,<sup>69</sup> but at least two bills have applied only to Supreme Court Justices.<sup>70</sup> During the past five years, Professor Philip D. Oliver and Macklin Fleming, an attorney and retired justice of the California Court of Appeal, have argued that terms of office should be prescribed for Supreme Court Justices, but not necessarily for other federal judges.<sup>71</sup> Cognizant of the importance of promoting institutional continuity and sheltering the Justices from political pressures, Professor Oliver and Justice Fleming agree that Justices should serve for long terms—eighteen years and sixteen years, respectively—but that they should not be eligible for reappointment. Similarly, Professor Henry J. Monaghan recently made the tentative suggestion that Supreme Court Justices should serve fixed and nonrenewable terms of fifteen or twenty years.<sup>72</sup> The bills for tenure limitation that have applied only to Supreme Court Justices likewise have prescribed a lengthy term—fifteen years—but

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68. For references to these recent bills, see *infra* notes 70 & 106-08.

69. For references to the bills applicable to all federal judges, see *infra* notes 106-08.

70. H.R.J. Res. 177, 100th Cong., 1st Sess. (1987); H.R.J. Res. 557, 99th Cong., 2d Sess. (1986). Representative Dorgan of North Dakota introduced both measures.

71. Oliver, *supra* note 4, at 832-34 (arguing that benefits of abolishing life tenure for lower federal court judges are not as compelling); Fleming, *supra* note 4, at 322 (proposing constitutional amendment to limit only Supreme Court Justices' terms).

72. Monaghan, *supra* note 4, at 1212.

have provided that they would be eligible for reappointment.<sup>73</sup> The bills that would limit the tenure of Supreme Court Justices and other federal judges provide for terms of six to ten years, but usually provide for reappointment.<sup>74</sup> A careful examination of these provocative proposals suggests that their advantages are highly speculative and do not warrant a constitutional amendment to overturn the practice of two centuries.

a. Limitation of Tenure Would Have Only Modest Benefits

Critics of lifetime tenure for Supreme Court Justices contend that unrestricted terms are inherently undemocratic. As Justice Fleming has remarked, unrestricted life tenure has largely disappeared from other spheres of public activity during the past two centuries and now "is generally limited to popes, constitutional monarchs, and poet laureates."<sup>75</sup> Contending that limited executive tenure has been one of the great strengths of the Republic and perhaps the principal secret of its survival, Justice Fleming has pointed out that the twenty-second amendment was premised upon the theory that no one person should exercise the executive power of the presidency for too long a time.<sup>76</sup> It is a mistake, however, to equate judicial tenure with executive tenure. Although Supreme Court Justices exercise a profound and far-reaching power, the diffusion of that power among nine persons obviously dilutes the power of individual Justices.<sup>77</sup> Moreover, since the Justices are "possessed of the power of neither the purse nor the sword," the potential for abuse of power is far less among them than it is in the executive.

Critics of lifetime tenure also allege that long service in office unduly isolates Justices from changes in the world beyond the Marble Palace. Justice Fleming, for example, has contended that a Justice "enters a paper world, largely cut off from personal contacts, and experience becomes secondhand. For the justice, time

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73. See *supra* note 70.

74. See *infra* notes 106-08.

75. Fleming, *supra* note 4, at 322.

76. *Id.* at 374. In recent years, there have been a number of proposals to limit legislative tenure as well. See, e.g., Oreskes, *Bush Backs Move for Limiting Terms of U.S. Lawmakers*, N.Y. Times, Dec. 12, 1990, at A1, col. 6.

77. Justice Fleming acknowledges that "it is true that the power of the Supreme Court is collegial rather than individual," but he nevertheless contends that the Court's power to "create, vacate and modify the law in critical respects makes the Court, in Jefferson's words, an oligarchical body." Fleming, *supra* note 4, at 374.

stands still.”<sup>78</sup> Far from encouraging intellectual isolation, however, service on the Supreme Court may facilitate intellectual growth and stimulate awareness of the social, political and economic changes that guide the growth of the law. The Justices’ workloads may be heavy, but they enjoy the benefits of superior support services and long recesses that should afford them ample leisure to read and think about broad legal issues. The Justices’ associations with their bright young law clerks also help to refresh and rejuvenate their thinking. Most Justices also undertake widespread travel throughout the nation that exposes them to a wide variety of persons, problems and ideas. While it is true that they are not exposed on a daily basis to fundamental problems at the grassroots of society, most Justices breathed rarified air even before their ascension to the Court. The perspective afforded by service on the Supreme Court may actually provide the Justices with a more catholic view of American society than they had an opportunity to obtain in their previous careers as judges of lower appellate courts, as attorneys for corporate law firms, or as law professors. In short, the Marble Palace is no cloister, but rather an aerie from which the Justices may observe the panorama of the nation.

Since service on the Court can broaden rather than constrict the Justices’ intellectual horizons, there is no reason to fear that they will espouse an antiquated jurisprudence. As an illustration of the dangers of long tenure, Justice Fleming has argued that the constitutional crisis of the 1930s was precipitated by Justices whose maturation during the 1890s, in a frontier society, precluded them from comprehending the exigencies created by the Great Depression.<sup>79</sup> An examination of the Court’s composition during Franklin Roosevelt’s first term, however, belies the assumption that longevity of tenure or age necessarily explains why the Court invalidated so many New Deal measures. Many of the Justices may have reached intellectual or political maturity during the 1890s, but none of them had served on the Court prior to 1914. Moreover, the industrial problems that vexed the nation during the 1930s were already acute during the 1890s, itself a decade of economic depression and political ferment. Justice Louis D. Brandeis, then the Court’s oldest and second-longest serving member, was the most reliable supporter of the constitu-

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78. *Id.* at 323.

79. *Id.*

tionality of New Deal legislation.<sup>80</sup> In contrast, four of the five Justices who most consistently opposed New Deal legislation had served on the Court for relatively short periods of time.<sup>81</sup>

An examination of the work of other long-serving Justices likewise suggests that long tenures do not tend to produce closed minds. Justice Holmes, for example, wrote dissents that articulated innovative ideas concerning freedom of speech when he had served on the Court for nearly twenty years and was approaching the age of eighty. Similarly, Justice Douglas, after more than thirty years on the High Bench, remained so acutely sensitive to social and political developments that his critics accused him of jurisprudential trendiness.

Generational conflicts on the Court do not necessarily demonstrate that the views of the older Justices are antiquated. At present, for example, the two oldest Justices—Marshall and Blackmun—espouse judicial philosophies that differ in many important respects from those of their junior colleagues. Prior to Justice Brennan's recent retirement, the same could be said of Brennan. Although these Justices' views may indeed be out of step with the political conservatism that gathered momentum during the 1970s and dominated the 1980s, their views have not lost fashion with the very considerable number of Americans who cling to the old liberal faith. Time may prove Justices Brennan and Marshall to have been harbingers of the future rather than relics of the past.

Critics of lifetime tenure suggest that the legitimacy of the Court's opinions is attenuated to the extent that they depend upon the support of long-serving Justices who were appointed by Presidents elected by majorities that have long since evaporated. This argument, however, exaggerates both the empirical and normative correlation between the electorate's selection of Presidents and the composition and decisions of the Court. The empirical connection is tenuous because so many Justices have espoused constitutional views that surprised or even outraged the Presidents who nominated them. Moreover, a long-serving Justice inevitably will encounter legal issues that did not exist at the

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80. When the constitutional crisis reached its denouement in 1937, Justice Brandeis was 81 years old and had served for 21 years. Only Justices McReynolds and Van Devanter had served for a longer period.

81. Justices Sutherland and Butler had served on the Court for 14 years, and Justice Roberts had served for only seven years. The remaining two of the "Four Horsemen," Justices Van Devanter and McReynolds, had served for 26 and 22 years, respectively.

time of her appointment. The empirical connection also is weak because judicial issues rarely are important in presidential elections and it is most difficult to discern that any President has received a mandate to nominate any particular type of Supreme Court Justice. This does not mean, of course, that presidential elections do not profoundly influence the future of the Court or that a voter who cares about judicial issues cannot generally discern which candidate is more likely to nominate the type of Justices who would be most likely to favor the judicial philosophies of the voter. In a very rough sense, public opinion concerning constitutional issues therefore may find expression in the polling booth. Public discontent over the criminal justice decisions of the Warren Court, for example, probably helped in 1968 to elect Richard Nixon, who honored his campaign pledges to nominate "conservative" Justices. In most instances, however, public opinion is simply too diverse and too inchoate to permit the conclusion that a presidential election represents a mandate for the selection of a particular type of Supreme Court Justice or support for a particular ruling on any specific legal issue.

Even if such a mandate could be demonstrated, it would be most inappropriate for any Justice appointed as a result to allow that mandate to influence her work on the Court. To be sure, Justices should not be oblivious to popular opinion; nevertheless, they are bound to dispense justice under law without reference to the views of the majority that elected the President who appointed them. While the Justices appointed by Nixon, for example, generally were more conservative than were their predecessors in interpreting the scope of criminal defendants' rights, there is no reason to suppose that their rulings were influenced by any sense that they were duty-bound to reflect Nixon's mandate.<sup>82</sup>

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82. The tenuous connection between a President's mandate and his Supreme Court appointments weakens the merit of recent proposals to permit every President to nominate a Supreme Court Justice. Under Professor Oliver's proposal for 18-year Supreme Court terms, for example, terms would be staggered in order that an appointment would be made every two years. If a Justice died in office or resigned, the President would name a successor to fill out the unexpired term; if the term of the successor Justice expired while that President remained in office, the Justice would automatically be eligible to serve for an additional 18 years. See Oliver, *supra* note 4, at 801.

Under another recent proposal, which would permit the number of the Court's members to fluctuate, a President could make a nomination to the Court if there had been no appointment prior to December 31 of the third year of the President's term. Comment, *Court Packing Revisited: A Proposal for Rationalizing the Timing of Appointments to the Supreme Court*, 134 U. PA. L. REV. 967, 994 (1986).

Far from being "undemocratic," lifetime tenure may foster democratic values. To the limited extent that the Justices reflect the political or judicial philosophies of the Presidents who named them to the Court, lifetime tenure helps the Court to better serve its countermajoritarian function<sup>83</sup> by assuring the continued service of Justices who espouse judicial philosophies that differ from those propounded by nominees of any recent President.

The need for a sixteen- or eighteen-year term for Supreme Court Justices is further questionable since most Justices have not served for so long a period and very few have served for substantially longer periods. Of the forty Justices who have begun and ended their tenure on the Supreme Court during the twentieth century, only seventeen served for more than the sixteen years favored by Justice Fleming and only twelve served for more than the eighteen years favored by Professor Oliver.<sup>84</sup> Only six served for more than twenty-four years. Although the last category includes Justices McReynolds and Van Devanter, it also includes Justices Holmes, Black, Douglas and Brennan. While three of the present Justices have served for longer than eighteen years, only Justice White has served for an appreciably longer period.

Sundry other arguments in favor of limited tenure for Supreme Court Justices likewise fail to justify the enactment of a constitutional amendment. For example, Professor Oliver has ar-

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Although these proposals are elegantly crafted and their authors are understandably concerned that the present system creates irrational disparities in the numbers of Justices that Presidents are able to nominate, the benefits of the proposed constitutional amendments are highly questionable. While the character of the Court is undeniably influenced by the political complexion of the Presidents who named the Justices, the ultimate correlation between the decisions of the Court and the political and judicial philosophies of the President who made the appointment is tenuous.

83. See generally J. ELY, *DEMOCRACY AND DISTRUST* (1980).

84. The twentieth century Justices who served for longer than 16 years are, in order of appointment: Oliver Wendell Holmes, Jr. (29 years and one month); William R. Day (19 years and eight months); Charles Evans Hughes (non-consecutive tenure as associate Justice and Chief Justice totalling 17 years and five months); Willis Van Devanter (26 years and five months); James McReynolds (26 years and five months); Louis D. Brandeis (22 years and eight months); Pierce Butler (16 years and 10 months); Harlan F. Stone (tenure as associate Justice and Chief Justice totalling 21 years and two months); Hugo Black (34 years and one month); Stanley F. Reed (19 years and one month); Felix Frankfurter (23 years and seven months); William O. Douglas (36 years and seven months); Tom C. Clark (17 years and nine months); John Marshall Harlan (16 years and six months); William J. Brennan, Jr. (33 years and three months); Potter Stewart (22 years and two months); and Warren E. Burger (17 years). These figures are based upon the time between a Justice's confirmation by the Senate and his departure from the Court, and do not include any time served during recess appointments.



gued that limited tenure reduces Presidents' temptation to prefer young appointees over older and more experienced persons. As Professor Oliver acknowledges, however, this is a relatively minor benefit, since "very few wunderkinder have been appointed."<sup>85</sup> Indeed, only six of the Justices appointed during the twentieth century have been less than fifty years old.<sup>86</sup>

A more substantial benefit of limited tenure would be the prevention of Justices timing their resignations in a manner calculated to influence the character of their successors. As Professor Oliver has pointed out, it is inappropriate for a Justice to contrive to resign at a time when there is a President who is likely to nominate a successor who is sympathetic—or at least not unsympathetic—to the Justice's view of the Constitution; this allows the departing Justice "an unchecked power entirely unnecessary to protect his independence of action while on the bench."<sup>87</sup> Oliver's proposal would reduce substantially the incidence of such resignations by providing that a Justice appointed to succeed a Justice whose term had not expired could serve only until the expiration of that term. Here again, however, the magnitude of the remedy is disproportionate to the danger. The extent to which Justices have succeeded in exercising much control over the selection of their successors is problematical. Professor Oliver cites Chief Justice Warren's alleged attempt to ensure his successor's selection while President Johnson remained in office as one of the more infamous examples of a strategically-timed retirement announcement.<sup>88</sup> Yet that attempt not only failed but backfired. The Senate's failure to confirm Johnson's nomination of Abe Fortas to succeed Warren was attributable in part to senatorial resentment over Warren's apparent maneuver, and his successor was selected by Richard Nixon, Warren's old nemesis.<sup>89</sup> Similarly, the ailing Justice Douglas was unable to cling to his office until a Democratic President was elected, and ill health also

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85. Oliver, *supra* note 4, at 804.

86. When appointed, William O. Douglas was 40 years old, Frank Murphy was 49, Wiley Rutledge was 48, Potter Stewart was 43, Byron White was 44 and William H. Rehnquist was 47.

87. Oliver, *supra* note 4, at 805.

88. *See id.* at 805-06.

89. *See* B. MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE 269-88 (1988); E. WHITE, EARL WARREN: A PUBLIC LIFE 307-13 (1982); *Hearings Before the Comm. on the Judiciary, United States Senate, on the Nomination of Abe Fortas, of Tennessee, to Be Chief Justice of the United States and Homer Thornberry, of Texas, to Be an Associate Justice of the Supreme Court of the United States*, 90th Cong., 2d Sess. 46, 55 (1968) (remarks of Sen. Robert P. Griffin).

forced Justice Brennan to resign during the term of a President unlikely to select a like-minded successor. Chief Justice Burger and Justice Powell may have resigned during the waning years of the Reagan Administration in order to assure that a Republican President would nominate their successors. Yet the election of President Bush in 1988 proved that a Republican would have chosen their replacements even if they had remained in office into the next presidential term. Accordingly, the timing of their resignations ultimately may have made little or no difference in the character of their successors. The resignation of Justice Stewart in 1981, shortly after Reagan succeeded Carter, is one of the very few instances in which a resignation that may have been strategically timed actually may have made a significant difference in the character of an appointment.

Another argument propounded by advocates of limited tenure is that lifetime service encourages judicial arrogance. Personal or jurisprudential arrogance is always a threat, but there is little empirical evidence that lifetime tenure has bred either among Supreme Court Justices. The present Justices display remarkably few public signs of personal arrogance. While the Court during recent years has been criticized as arrogant for being too "result-oriented" and for failing to accord sufficient deference to its own precedents, to the rulings of lower courts and to individual rights, there is no reason to suppose that the rulings that have inspired these criticisms would have been any different if the Justices served for limited terms. Indeed, lifetime tenure may actually inspire humility rather than arrogance, as a Justice entrusted with the privilege of lifetime service in so powerful a position is likely to feel keenly the need to exercise that power in a responsible manner. Answerable to no one, he may probe more deeply the depths of his own conscience.

Similarly, there is little empirical evidence to support the argument that mandatory retirement ages or limited tenure are needed to ameliorate the danger that physically or mentally incapacitated Justices will remain on the bench. As Bruce Fein aptly has observed in criticizing Professor Monaghan's proposals, "judging is not an assembly-line job. It is an art in which longevity is advantageous."<sup>90</sup> Although limited tenure would reduce the

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90. Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672, 679 (1989). Mr. Fein points out that Hamilton, in denouncing a 60-year age limit for judges in New York, observed that "[t]he deliberating and comparing faculties generally preserve their strength much beyond that period." *Id.* (citing THE FEDERALIST No. 79, at 474 (A. Hamilton) (C. Rossiter ed. 1961)).

likelihood of infirm Justices serving on the Court, there is no evidence that incapacitated Justices have in recent years served on the Court for any substantial period of time. While stories about senile Justices are part of the lore of constitutional history, the principal examples are drawn from the late nineteenth and early twentieth centuries.<sup>91</sup> Severe infirmities today are unlikely to escape the bright light of publicity increasingly cast upon the Court. Moreover, liberal statutory provisions for judicial retirement are likely to provide a financial incentive to Justices to leave the bench.<sup>92</sup>

The recent example of judicial infirmity most often cited by critics of lifetime tenure—Justice Douglas's condition after he suffered a severe stroke—actually belies the argument that lifetime tenure creates the danger that an incapacitated Justice will cling to his seat. While Douglas continued in office for more than ten months after a stroke greatly impaired his physical and mental powers, he had good reason to suppose during much of that time that he would recover; recovery by stroke victims is not unusual, he was a relatively youthful seventy-six, and he had demonstrated remarkable recuperative abilities in the past.<sup>93</sup> Douglas expressed an intention to remain on the Court even after his prospects for recovery dimmed, and he resigned only in response to considerable pressure from friends and colleagues.<sup>94</sup> The fact that he resigned within weeks or months after the bleakness of his prognosis became fully apparent is, however, more significant than the fact that he was reluctant to resign. If the strong-willed Douglas could be persuaded to resign within a reasonable period of time, surely most other Justices would be less recalcitrant and would leave the bench with even greater dispatch. When the eighty-four-year-old Justice Brennan suffered a mild stroke in July 1990, he quickly resigned, without any apparent prompting from his colleagues.

The Court is unlikely to suffer any great harm if incapacitated members serve for short periods of time, since the Court's work is

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91. See Goff, *Old Age and the Supreme Court*, in JUDICIAL DISCIPLINE AND REMOVAL 30-39 (G. Winters ed. 1973); Pusey, *The Court Copes with Disability*, 4 Y.B. SUP. CT. HIST. SOC'Y. 63-69, 100 (1979); see also Atkinson, *The Problems of Disabled Justices: Supreme Court Deaths and Resignations 1865-1900*, 38 DRAKE L. REV. 903 (1988-89).

92. See 28 U.S.C. §§ 371-372(a) (1988).

93. For an account of Justice Douglas's physical condition during his final year on the bench, see J. SIMON, *INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS* 446-51 (1980).

94. See *id.* at 450-51.

dispersed among nine members. A greater danger to the Court is presented by the continued service of aged Justices whose physical and mental powers have dimmed, but not to such a great extent as to attract the attention of the news media or to give their colleagues the courage to gently suggest their resignation.<sup>95</sup> Limitation of tenure obviously would ameliorate this danger. For the reasons discussed below, however, this danger is not so great as to justify the abrogation of lifetime tenure.

In addition to the possibility that lifetime tenure might burden the Court with infirm members, there is an even more remote possibility that lifetime tenure might permit incompetent or corrupt Justices to remain in office. Once again, however, the danger is very slight. The harsh glare of publicity from the news media is likely to make protracted service in office unbearable for even the most cynical Justice whose corruption is great enough to attract public attention but not great enough to result in removal by Congress.

#### b. Limitation of Tenure Would Have Severe Disadvantages

The disadvantages of limited tenure for Supreme Court Justices are as considerable as its benefits are slight. The most obvious danger is the threat to judicial independence. Although Professor Oliver, Justice Fleming and other proponents of limited tenure have correctly pointed out that long terms would significantly ameliorate any erosion of judicial independence, any limitation on tenure necessarily diminishes judicial independence. Since most Justices would be at least fifty years old at the time of their appointment and could look forward to generous retirement benefits, it may be unlikely that many Justices appointed for sixteen- or eighteen-year terms would plan to embark on any major new career after their retirement from the Court. Accordingly, it is likely that few Justices would feel any temptation to alter their opinions in order to help secure employment after the expiration of their terms. There is a danger, however, that some of the younger or more ambitious Justices might experience such temptations to the extent that they intended to continue their legal or

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95. Expressing astonishment that a majority of the members of the Court were nearly 80 years old before the retirement of Chief Justice Burger and Justice Powell, Professor Monaghan has pointed out that the "Court's workload is very heavy, and it is doubtful that many octogenarians would be able to devote the energy necessary to the task . . . . The graying of the Court can only work to ensure even greater delegation of responsibility to law clerks." Monaghan, *supra* note 4, at 1212.

political careers after their retirement from the Court.<sup>96</sup>

The danger of political aspiration probably is greater than is the threat of pecuniary avarice. A Justice who aspired to a lucrative partnership in a private firm probably would not need to trim significantly the judicial philosophy that he espoused on the High Bench. Although an anti-regulatory attitude in corporate cases might prove helpful, corporate law firms seem very forgiving of politically prominent prospective partners whose public records have not favored corporations. A Justice who aspired to public office after service on the Court, however, might well alter her views in order to make herself more attractive to the constituencies from which she would need to draw support. The temptation of a reasonably youthful former Justice to seek a public position might prove formidable, for his prestige, experience and prominence would provide political assets that make him a highly attractive candidate for an elective or appointive post.<sup>97</sup>

The infrequency of resignations from the Court by relatively youthful Justices makes this hypothesis difficult to test. Yet its validity is underscored in part by the frequency with which even sitting Justices have been mentioned as potential presidential or vice-presidential nominees. Although some such Justices, such as Chief Justice Earl Warren,<sup>98</sup> already were prominent in national electoral politics before their ascension to the Court, others—notably William O. Douglas and Sandra Day O'Connor—probably would not have been considered as possible candidates for na-

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96. In order to avert this danger, Professor Oliver has suggested the possibility of prohibiting the appointment of any person younger than 47. Oliver, *supra* note 4, at 830. Although Professor Oliver has correctly pointed out that only three Justices younger than 47 have been nominated during the twentieth century, this restriction nevertheless might deprive the Court of potential talent and would unduly restrict the President's power of appointment. Professor Oliver himself acknowledges that "[i]t is a close question whether the resulting increased protection of the Court's independence merits such a degree of restriction on a President's freedom of action in filling a vacancy on the Court." *Id.* at 831. Professor Oliver also has suggested that judicial independence could be protected by assuring former Justices a life-tenured position on the Court of Appeals. *Id.* Although this surely might ameliorate the threat to judicial independence, a position on a lower court might not satisfy a highly ambitious former Justice.

97. Arthur Goldberg's service on the Court, for example, may have helped him to win the 1970 New York Democratic gubernatorial nomination.

98. Warren, the 1948 Republican candidate for Vice-President and a candidate for the Republican nomination for President in 1948 and 1952, became Chief Justice in 1953 and was widely mentioned during late 1955 and early 1956 as a possible successor to the ailing President Eisenhower. See J. POLLOCK, EARL WARREN: THE JUDGE WHO CHANGED AMERICA 183 (1979).

tional office if they had not served on the Court.<sup>99</sup> Professor Oliver's suggestion, to bar former Justices from public office for a significant period following their tenure on the Court,<sup>100</sup> would unduly circumscribe the basic liberty of any person to seek elective office. It might, in at least a few instances, discourage qualified individuals from accepting a nomination to the Court.

Even though limitations on judicial tenure might not significantly erode judicial independence, any innovation that diminishes the Justices' insulation from outside influences is alarming. The work of the Supreme Court is so important that its independence should zealously be maintained. Nearly as important as actual judicial independence, moreover, is public faith in judicial independence. Limited terms for Supreme Court Justices would evoke public suspicions that the Justices trimmed their judicial opinions in order to foster their post-bench careers. The almost inevitable attempts by at least some former Justices to obtain significant offices, particularly public offices, would deepen such suspicions, even if the Justices' conduct had in fact been beyond reproach.

Limitations on the tenure of Supreme Court Justices also would weaken the historical continuity of the Court and would deprive the Court of the service of distinguished elders. John Marshall, for example, handed down three of his most important decisions—*McCulloch v. Maryland*,<sup>101</sup> *Dartmouth College v. Woodward*<sup>102</sup> and *Sturges v. Crowninshield*<sup>103</sup>—shortly after completing his eighteenth year as Chief Justice. As mentioned above, some of Justice Holmes's most significant contributions to the Court were made after he had served more than eighteen years. Similarly, Justice Black made major contributions to the development of constitutional law during the final decade of his thirty-four years

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99. William O. Douglas was widely mentioned as a possible running mate for Franklin Roosevelt in 1940 and 1944. J. SIMON, *supra* note 93, at 259-66; see also W. DOUGLAS, *THE COURT YEARS, 1939-1975*, at 283 (1980). In 1948 Douglas was widely mentioned as a possible presidential candidate and he later declined Harry Truman's invitation to become the Democratic nominee for Vice-President. J. SIMON, *supra*, at 270-75.

Sandra Day O'Connor was mentioned as a possible Republican vice-presidential candidate in 1988, but she categorically quashed the boom for her candidacy by stating that she was "not considering any other position in or out of government." See *Demotion Denied*, N.Y. Times, May 30, 1988, at 22, col. 1; *O'Connor Doesn't Want Job*, N.Y. Times, May 27, 1988, at D18, col. 6.

100. Oliver, *supra* note 4, at 830.

101. 17 U.S. (4 Wheat.) 316 (1819).

102. 17 U.S. (4 Wheat.) 518 (1819).

103. 17 U.S. (4 Wheat.) 122 (1819).

on the Court. As Justice Brennan has observed, no prior experience prepares a Justice for her duties on the Court,<sup>104</sup> and most Justices undergo a lengthy period of adjustment after they take their places on the Court. Even a sixteen- or eighteen-year term for Justices would deprive the Court of expertise and make it a less stable institution. These consequences are unjustified absent a significant danger that some Justices will remain on the Court into senescence or that unrestricted tenure will protect incompetent or corrupt Justices.

### 3. *Limitations on the Tenure of Other Federal Judges*

Proposals for limitations on the tenure of the lower federal judiciary suffer from many of the same debilities that discredit plans for limiting Supreme Court Justices' tenure. Such limitations would detract from judicial independence and tend to deprive the bench of able and dedicated jurists.

Some proponents of limited terms for Supreme Court Justices have argued that there are better reasons for abolishing the life tenure of the Justices than for restricting the tenure of the lower judiciary. Professor Oliver, for example, has suggested that limitations on the tenure of the lower federal judiciary may be less justifiable because inferior federal judges are less significant political actors who exercise less discretion than Supreme Court Justices and whose decisions are subject to appeal.<sup>105</sup> Comparisons of the powers of the lower federal judiciary and Supreme Court Justices, however, invite the opposite conclusion about tenure restrictions. To the extent that Supreme Court Justices occupy a more significant political position than do lower court judges, there is more justification for providing lifetime tenure to Supreme Court Justices, since any innovation that might impair either their independence or public confidence in their independence would have particularly baneful effects on the constitutional system. In contrast to the thoroughness of the Supreme Court appointment process, the nomination and confirmation process for the inferior judiciary is necessarily more abbreviated and offers much less assurance of the fitness of lower federal court judges. Similarly, the high degree of publicity to which the Supreme Court is subjected assures that incompetence, infirmity

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104. See Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 484 (1973); Hentoff, *Profiles: The Constitutionalist*, THE NEW YORKER, Mar. 12, 1990, at 45, 54.

105. Oliver, *supra* note 4, at 832.

or corruption among sitting Justices is much less likely to remain undetected than are such problems among lower federal judges. Finally, the large and increasing number of lower federal judges creates a high degree of likelihood that at least some of them will be incapacitated.

Accordingly, there is at least some merit in proposals that would require the Senate to reconfirm judges after they had served in office for a certain number of years.<sup>106</sup> If the standard of scrutiny by the Senate in reconfirmation hearings were the same as the standard in confirmation hearings, judges would continue to enjoy a high degree of security in their tenure. Judges who suffered from patent defects of health, character or competence, however, could be removed from office without suffering the stigma of impeachment or subjecting Congress to the burdens of the impeachment process.

A plan for reconfirmation by the Senate offers marked advantages over recent proposals for absolute limitations on the number of years that a judge could serve<sup>107</sup> and proposals to require lower federal judges to face both periodic renomination by the President and reconfirmation by the Senate.<sup>108</sup> In contrast to

106. A number of such measures have been introduced in Congress during recent years. Representative Fields has periodically proposed an amendment that would require all federal judges to obtain reconfirmation by the Senate every 10 years. *See* H.R.J. Res. 99, 101st Cong., 1st Sess. (1989); H.R.J. Res. 168, 100th Cong., 1st Sess. (1987); H.R.J. Res. 184, 99th Cong., 1st Sess. (1985); H.R.J. Res. 264, 98th Cong., 1st Sess. (1983). Representative Dickenson sponsored measures that would require all federal judges to obtain reconfirmation by the Senate at six-year intervals. *See* H.R.J. Res. 628, 98th Cong., 2d Sess. (1984); H.R.J. Res. 427, 97th Cong., 2d Sess. (1982). Representative Fuqua introduced a similar measure providing that the Senate would have the power at 10-year intervals to vote to remove a federal judge from office at the end of the judge's decennial anniversary in office. H.R.J. Res. 56, 99th Cong., 1st Sess. (1985); H.R.J. Res. 17, 98th Cong., 1st Sess. (1983).

107. At least two measures have provided for six-year terms for all federal judicial offices, with a limit of 12 years of service as a Supreme Court Justice or lower federal court judge. *See* H.R.J. Res. 325, 100th Cong., 1st Sess. (1987); H.R.J. Res. 8, 97th Cong., 1st Sess. (1981). Other measures would have limited judicial tenure to 10 years during any 12-year period. *See* H.R.J. Res. 71, 100th Cong., 1st Sess. (1987); H.R.J. Res. 30, 99th Cong., 1st Sess. (1985); H.R.J. Res. 144, 98th Cong., 1st Sess. (1983); H.R.J. Res. 51, 97th Cong., 1st Sess. (1981). At least one bill would have limited the tenure of judges to eight years. H.R.J. Res. 90, 98th Cong., 1st Sess. (1983). Another would have limited tenure to 10 years but permitted reappointment to another court. *See* S.J. Res. 24, 97th Cong., 1st Sess. (1981).

108. Most of these proposals would have required renomination and reconfirmation of certain federal judges after 10 years. *See* H.R.J. Res. 103, 99th Cong., 1st Sess. (1985) (applicable only to lower federal court judges); S.J. Res. 30, 99th Cong., 1st Sess. (1985) (applicable to all federal court judges); H.R.J. Res. 374, 98th Cong., 1st Sess. (1983) (applicable only to lower federal court



plans for absolute limitations on terms, a plan that permitted the reconfirmation of judges would neither deprive the bench of seasoned jurists' expertise nor threaten judicial independence by forcing judges to worry about their post-judicial careers.

In contrast to proposals for renomination by the President, reconfirmation without renomination would not present any significant danger of politicizing the reappointment process. Senators presumably would continue to approve the overwhelming majority of judicial candidates, without regard to party label and without any careful scrutiny of their political views. Renomination by the President, in contrast, would raise serious problems since every President has selected the overwhelming majority of his judicial nominees from the ranks of his own political party. Unless Presidents were willing to eschew partisanship in renominating judges, judges who lacked membership in the President's party could not expect to have any significant chance of renomination. Even if Presidents were willing in theory to renominate judges on a nonpartisan basis, they surely would face temptation to subject members of the opposition party to a higher level of scrutiny. This danger would erode judicial independence since a judge could not, at least at the outset of her term, predict the politics of the President who would be serving when her term expired. It also would deprive the bench of the expertise of experienced judges who might be removed for partisan reasons.

But while proposals to require periodic reconfirmation of lower federal court judges offer some advantages, those advantages are outweighed by many of the same disadvantages that inhere in plans to impose absolute limitations upon the tenure of lower court judges or Supreme Court Justices. Once again, the principal danger is erosion of judicial independence. Even if the Senate reconfirmed judges in a nonpartisan and relatively nonpolitical manner, judges nevertheless might perceive that they enjoyed less independence. Public faith in judicial independence might be weakened. As Professor Oliver has pointed out, insecurity of tenure presents a special threat to the independence of district court judges, who frequently preside over proceedings involving attorneys with whom they might need to establish professional associations if they were forced to leave the bench.<sup>109</sup>

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judges); H.R.J. Res. 252, 98th Cong., 1st Sess. (1983); S.J. Res. 39, 98th Cong., 1st Sess. (1983) (applicable to all federal court judges); H.R.J. Res. 60, 97th Cong., 1st Sess. (1981); S.J. Res. 21, 97th Cong., 1st Sess. (1981).

109. Oliver, *supra* note 4, at 834.

Moreover, lower federal judges probably would be more likely than Supreme Court Justices to seek other political office at the end of their terms. The prospect of future elective office might affect the judge's work on the bench, or at least create the public perception that her work was thus affected.

### III. THE DANGERS OF ALTERNATIVE PROCEDURES FOR REMOVAL

#### A. *Background of Recent Proposals*

The conviction of Judge Claiborne in 1986 and the convictions of Judges Nixon and Hasting within a two-week period in 1989 intensified concerns about the adequacy of existing remedies for the removal of federal judges. The impeachment and conviction of Judge Claiborne particularly inspired questions and criticisms concerning the process, since Claiborne had already served five months in a federal penitentiary for tax fraud before he was removed from office.<sup>110</sup> Although Judge Claiborne was the first sitting judge in history to serve time in federal prison and the first to be impeached only after conviction for a crime, the spectacle of a federal judge behind bars was so bizarre and distasteful that criticisms of the process and calls for reform were inevitable.

Judge Claiborne himself initiated criticism of the process by challenging the constitutionality of civil prosecution prior to impeachment.<sup>111</sup> As Judges Otto Kerner and Hastings had done when they were criminally prosecuted during their judicial tenure,<sup>112</sup> Judge Claiborne relied in part upon the constitutional provision that a party convicted after impeachment shall nevertheless be liable to indictment, trial, judgement and punishment according to law.<sup>113</sup> According to Judge Claiborne, this language presupposes that impeachment will precede prosecution. Relying upon the reasoning of the courts in the Kerner and Hastings tri-

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110. See Greenhouse, *U.S. Judge Ousted by Impeachment, First in 50 Years*, N.Y. Times, Oct. 10, 1986, at A1, col. 6; *Federal Judge Begins Serving Prison Term*, N.Y. Times, May 17, 1986, at 6, col. 6.

111. See *United States v. Claiborne*, 790 F.2d 1355 (9th Cir. 1986) (denying stay of execution and denying hearing en banc); *United States v. Claiborne*, 765 F.2d 784 (9th Cir. 1985) (affirming conviction), *cert. denied*, 475 U.S. 1120 (1986); *United States v. Claiborne*, 727 F.2d 842 (9th Cir.) (denying motion to quash indictment), *cert. denied*, 469 U.S. 829 (1984).

112. See *United States v. Hastings*, 681 F.2d 706, 709-11 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983); *United States v. Isaacs*, 493 F.2d 1124, 1141-44 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

113. U.S. CONST. art. I, § 3, cl. 7.

als,<sup>114</sup> the court rejected what it described as “this tortured interpretation” on the ground that the provision was designed to assure that double jeopardy principles would not preclude a criminal trial after impeachment.<sup>115</sup> Like the court in *Hastings*,<sup>116</sup> the district court in *Claiborne* also refused to accept the premise that criminal prosecution is the equivalent of removal from office.<sup>117</sup> The *Claiborne* court also followed the *Hastings* decision in rejecting the argument that prosecution of active federal judges would violate the salutary separation of powers by subjecting the judiciary to intolerable pressures from the executive branch. The court explained that the procedural safeguards of the criminal justice system would protect judicial defendants from unfair prosecution and that the executive branch would lack the power to routinely force acquitted judges to recuse themselves in cases involving the executive branch.<sup>118</sup> The court stated that “Article III protections, though deserving utmost fidelity, should not be expanded to insulate federal judges from punishment for their criminal wrongdoing.”<sup>119</sup>

#### B. *Recent Proposals for Legislation*

To avert future spectacles of imprisoned federal judges, Senators Thurmond and DeConcini in 1986 sponsored legislation to provide for automatic removal of federal judges upon conviction of a felony and exhaustion of all direct appeals.<sup>120</sup> The DeConcini measure gave Congress the power to legislate standards and

114. See *supra* note 112.

115. *Claiborne*, 727 F.2d at 846.

116. *Hastings*, 681 F.2d at 710 n.10.

117. *Claiborne*, 727 F.2d at 846.

118. *Id.* at 847-49.

119. *Id.* at 847. Similarly, the court in *Hastings* declared that the “miniscule” benefit of increased judicial independence that might derive from insulating judges from criminal prosecution could not justify placing them “above the law.” *Hastings*, 681 F.2d at 711.

120. S.J. Res. 370, 99th Cong., 2d Sess. (1986); S.J. Res. 364, 99th Cong., 2d Sess. (1986). The former bill, introduced by Senator DeConcini, provided that a “judge appointed to pursuant to Article III shall, upon conviction of a felony and exhaustion of all direct appeals, forfeit office and benefits thereof.” 132 CONG. REC. S8746 (daily ed. June 26, 1986). Senator Thurmond’s measure provided that “[a]ny officer of the United States appointed by the President with the advice and consent of the Senate, upon conviction of a felony and exhaustion of all direct appeals, shall forfeit office and all prerogatives, benefits, or compensation thereof.” *Id.* at S7867 (daily ed. June 18, 1986). Although Senator Thurmond’s bill applied to all federal officers and his remarks in introducing the legislation did not directly refer to *Claiborne*, the timing of legislation seems to suggest that it was motivated by the *Claiborne* incident. Senator DeConcini forthrightly stated that the “impetus for this resolution clearly stems from the

guidelines by which the Supreme Court could discipline judges "who bring disrepute on the Federal courts or the administration of justice by the courts," and provided that such discipline could include removal from office and diminution of compensation.<sup>121</sup> The legislation died in committee after Judge J. Clifford Wallace of the Ninth Circuit and Professor Stephen H. Burbank of the University of Pennsylvania Law School roundly denounced the measures at a Senate hearing.<sup>122</sup> Both Judge Wallace and Professor Burbank testified that the proposed statutes were overbroad in requiring the removal of a judge who had committed an offense that did not call into question her fitness to serve on the bench.<sup>123</sup> Professor Burbank warned that the statute might endanger judicial independence by encouraging local prosecutors to initiate criminal actions against unpopular judges for crimes such as consensual fornication with a member of the opposite sex.<sup>124</sup> Judge Wallace also expressed concern that automatic removal would violate the due process rights of judges who had not exhausted their rights to collateral appeals.<sup>125</sup> Burbank and Wallace agreed that the provision in the DeConcini measure for the discipline of judges was unduly vague and that it created serious threats to judicial independence and the separation of powers. Burbank denounced the provision as "an invitation to the domination of one branch of government by another."<sup>126</sup>

Although Senator DeConcini's measure died what Professor Burbank has described as a "quiet death,"<sup>127</sup> various Senators have continued to make proposals for changes in the impeachment process. In 1987, Senator Heflin introduced enabling legislation to authorize Congress to establish an alternative to the

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stunning state of events that surround . . . Judge Claiborne." *Id.* at S8746 (daily ed. June 26, 1986).

121. S.J. Res. 370, *supra* note 120.

122. *Hearing on S.J. Res. 364 and S.J. Res. 370 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986) [hereinafter *Hearing on S.J. Res. 364 and S.J. Res. 370*].

123. *Id.* at 9 (statement of J. Wallace); *id.* at 27 (statement of Prof. Burbank). Professor Burbank expressed particular concern about the prosecution of judges for offenses not defined as crimes in all jurisdictions. He explained that "we are giving a very powerful tool to local prosecutors not only to exercise discretion, but to do so using criminal laws about which there is no national consensus." *Id.* at 27.

124. *Id.* at 27, 35.

125. *Id.* at 17.

126. *Id.* at 28 (statement of Prof. Burbank).

127. Burbank, *Politics and Progress in Implementing the Federal Judicial Discipline Act*, 71 JUDICATURE 13, 22 (1987).

current impeachment process.<sup>128</sup> During the same session of Congress, Representative Gerald Kleczka introduced a bill to relieve Congress of its judicial impeachment duty and to assign it to the Judicial Conference.<sup>129</sup> During the present Congress, Senator Thurmond has reintroduced an amendment to require a judge's removal from office upon conviction of a felony.<sup>130</sup> Senator Heflin has proposed two more amendments that would affect the impeachment process. One is an enabling measure to permit Congress to prescribe alternative procedures for impeachment.<sup>131</sup> The other is much more specific. It would establish a Judicial Inquiry Commission that would function as a grand jury, and a Court of the Judiciary to try cases involving alleged judicial misconduct.<sup>132</sup> Both the commission and the court would have seven members.<sup>133</sup> The commission would have subpoena power and the authority to appoint and direct its staff. It would be permanently convened with authority to receive and investigate complaints concerning any judge in the federal system and would be required to file a complaint with the Court of the Judiciary if at least five of its members decided that a reasonable basis existed: (1) to charge a judge with violation of any canon of judicial ethics, misconduct in office or failure to perform his duties; or (2) to charge that a judge was physically or mentally unable to perform his duties. Upon the concurrence of six of its seven members, the court would have authority to remove a judge from office after notice and a public hearing. With the concurrence of four members, the court could censure a judge or suspend a judge for a

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128. S.J. Res. 113, 100th Cong., 1st Sess. (1987). Senator Heflin's bill stated that "Congress shall have the power to provide procedures for the removal from office of Federal judges serving pursuant to Article III of the Constitution, found to have committed treason, bribery, or other high crimes and misdemeanors." *Id.*

129. H.R.J. Res. 364, 100th Cong., 1st Sess. (1987).

130. S.J. Res. 11, 101st Cong., 1st Sess. (1989).

131. S.J. Res. 233, *supra* note 11. The bill provides that Congress would have the discipline and power to provide procedures for the removal from office of federal judges "found to be guilty of misconduct in office, inability to physically or mentally perform the duties of office, and for violating judicial ethics canons [sic]." The bill also would permit Congress to provide for the suspension of federal judges, with or without pay, upon indictment or conviction for a felony.

132. S.J. Res. 232, *supra* note 11.

133. The Supreme Court would appoint two members from among district court judges and one from among the judges of the courts of appeals. The Speaker of the House and the President *pro tempore* of the Senate would each appoint a lawyer. The other two members would be nonlawyers appointed by the President. *Id.*

period not exceeding two years, with or without pay. The court also would have the power to suspend with pay or to place on senior status any judge who was physically or mentally unable to perform the duties of office. A judge aggrieved by the court's decision could appeal to the Supreme Court.

Congressional concern about remedies for judicial misconduct also is embodied in a bill introduced by Representative Kastenmeier for the creation of a National Commission on Judicial Impeachment.<sup>134</sup> The commission would be charged with investigating and studying the problems and issues involved in the appointment and tenure (including discipline and removal) of federal judges.<sup>135</sup> It would evaluate the advisability of proposing alternatives to current arrangements with respect to such problems and issues.<sup>136</sup> The thirteen member commission<sup>137</sup> would conduct hearings<sup>138</sup> and would have a budget of \$750,000.<sup>139</sup>

### C. *Constitutional Interpretation*

Any proposal to permit the removal of federal judges through a procedure other than impeachment raises the question whether impeachment is the sole means of removal permitted by the Constitution. Senator Heflin's proposal for the creation of judicial removal tribunals wisely tries to avoid constitutional difficulties by calling for a constitutional amendment. Similarly, Representative Kastenmeier's bill tacitly recognizes that novel

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134. H.R. 1620, *supra* note 10, § 202. [Editor's note: The bill has been enacted. See *supra* note 10. The commission is known as the National Commission on Judicial Discipline and Removal.] During the previous Congress, Representative Kastenmeier had introduced a similar measure for the establishment of a commission to study the constitutional questions related to judicial removal and to make appropriate recommendations. H.R. 4393, 100th Cong., 1st Sess. (1987).

135. H.R. 1620, *supra* note 10, § 203(1). [Editor's note: See Pub. L. No. 101-650, § 410(1), 104 Stat. 5089, 5124 (1990) ("appointment and" deleted); *supra* note 10.]

136. *Id.* § 203(2). [Editor's note: See Pub. L. No. 101-650, § 410(2), 104 Stat. 5089, 5124; *supra* note 10.]

137. *Id.* § 204(a). [Editor's note: See Pub. L. No. 101-650, § 411(a), 104 Stat. 5089, 5125; *supra* note 10.] The President, the President pro tempore of the Senate, the Speaker of the House, and the Chief Justice would each appoint three members to the Commission. The Conference of Chief Justices of the States of the United States would appoint the thirteenth member.

138. *Id.* § 207(a). [Editor's note: See Pub. L. No. 101-650, § 414(a), 104 Stat. 5089, 5126; *supra* note 10.]

139. *Id.* § 210. [Editor's note: See Pub. L. No. 101-650, § 417, 104 Stat. 5089, 5127; *supra* note 10.]

removal procedures may require an amendment; the bill specifically states that the National Commission on Judicial Impeachment may consider alternative methods of judicial removal that would require an amendment to the Constitution.<sup>140</sup> Even though any measure for alteration of the removal process probably would be embodied in a constitutional amendment, some supporters of alteration of the removal procedure may propose ordinary legislation that would provide for circumvention of the impeachment process. Accordingly, it is useful to consider the constitutional aspects of the present removal process. The issue of whether impeachment is presently the sole means of removal also facilitates an evaluation of the merits of any proposal for change in the removal process. Proposed amendments to alter the judicial removal process should be scrutinized with the utmost care, for they are likely to have a profound impact upon judicial independence. While an exhaustive discussion of the constitutional dimensions of impeachment is beyond the scope of this article, a brief examination of the text of the Constitution, the intent of the framers, judicial interpretations and policy issues will help to demonstrate that a constitutional amendment would be required and that such an amendment would be ill-advised.

The text of the Constitution is ambiguous. The only part of the Constitution that specifically mentions judicial tenure is section one of article III, which provides that the judges of both the Supreme Court and inferior courts "shall hold their Offices during good Behaviour."<sup>141</sup> The bases for removal of judges by impeachment are article I, sections two and three,<sup>142</sup> and article II, section four. Article II, section four, does not specifically mention judges. It simply provides that "[t]he President, Vice-President and all *civil Officers* of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."<sup>143</sup> Although

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140. *Id.* § 203(2). [Editor's note: See Pub. L. No. 101-650, § 410(2), 104 Stat. 5089, 5124; *supra* notes 10 & 134.]

141. U.S. CONST. art. III, § 1.

142. See THE FEDERALIST NO. 79, at 498 (A. Hamilton) (C. Rossiter ed. 1961) ("[Judges] are liable to be impeached for malconduct by the House of Representatives and tried by the Senate . . ."); *cf.* U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment."); *id.* art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments."). Thus, while impeachment is not mentioned in article III, Hamilton contemplated that judges would be subject to impeachment under article I.

143. U.S. CONST. art. II, § 4 (emphasis added).

judges appear to be "civil Officers" within the meaning of article II,<sup>144</sup> the Constitution leaves open two interrelated questions: whether impeachment is the exclusive remedy for removal of judges, and whether "Treason, Bribery or other high Crimes and Misdemeanors" are the sole grounds upon which a judge may be removed from office.

According to the so-called "exclusivists," impeachment is the sole constitutional means of judicial removal.<sup>145</sup> While many exclusivists acknowledge the "hiatus" between the impeachable behavior of high crimes and misdemeanors and conduct that is not "good Behaviour," they deny that the two standards are necessarily different,<sup>146</sup> even though "good Behaviour" is difficult to define.<sup>147</sup> Since Congress appears to have construed high crimes

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144. Judges and scholars have agreed that judges are "civil Officers" within the meaning of article II. See CONG. RES. SERV., LIBR. OF CONG., *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION* 603-04 (1982).

145. See generally Battisti, *An Independent Judiciary or an Evanescent Dream*, 25 CASE W. RES. L. REV. 711 (1975); Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681 (1979); Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665 (1969); Otis, *A Proposed Tribunal: Is It Constitutional?*, 7 U. KAN. CITY L. REV. 3 (1938); Note, *The Exclusiveness of the Impeachment Power Under the Constitution*, 51 HARV. L. REV. 330 (1938).

146. At least a few federal judges have been impeached for conduct that does not constitute an indictable offense. For a discussion of three recent impeachments, see *supra* note 2. For a discussion of pre-1980 impeachments, see *infra* note 192. See also Broek, *Partisan Politics and Federal Judgeship Impeachment Since 1903*, 23 MINN. L. REV. 185, 193-94 (1938); Kaufman, *supra* note 145, at 705-06; Yankwich, *Impeachment of Civil Officers Under the Federal Constitution*, 26 GEO. L. J. 849, 856-57 (1938). Judge Ritter, who was impeached and convicted in 1936, argued that Congress could not properly impeach him because the charges made in the article of impeachment did not constitute the high crimes and misdemeanors within the meaning of the Constitution. The court held, however, that it had no jurisdiction to review or set aside the Senate proceedings because Congress's power over impeachment is exclusive. *Ritter v. United States*, 84 Ct. Cl. 293, 294-95, 298-300 (1936), *cert. denied*, 300 U.S. 668 (1937).

147. As Judge Edwards has observed, "The standard does not admit an easy definition, and scholarly attempts have been all but futile." Edwards, *supra* note 6, at 773; see also Fishburn, *Constitutional Judicial Tenure Legislation?—The Words May Be New, but the Song Sounds the Same*, 8 HASTINGS CONST. L.Q. 843, 860 (1981) ("Probably the most problematic and irreconcilable constitutional issue in defining the limits of federal judicial tenure is the meaning of the words 'good Behavior' . . ."). At the Constitutional Convention the delegates substituted the phrase "high crimes and misdemeanors" for the word "maladministration" at the suggestion of George Mason, who explained that the phrase would include attempts to subvert the Constitution and other dangerous offenses. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 550 (M. Farrand ed. 1911) [hereinafter FARRAND]. Professor Rotunda has argued:

[T]o limit impeachment to the commission of crimes is bad policy; such a limitation is both too broad and too narrow. It is too broad because some crimes have no functional relationship to the problem of malfeasance or abuse of office. . . .



and misdemeanors to embrace more than indictable offenses, exclusivists argue that the scope of impeachment extends to all conduct that is not "good Behaviour."<sup>148</sup> Proponents of the exclusivity of impeachment argue, however, that the "good Behaviour" clause merely establishes the terms of judicial tenure, distinguishing the tenure of federal judges from those of the other "civil officers" included in the impeachment clause, who are removable at will by the President.<sup>149</sup> Applying the principle of *expressio unius est exclusio alterius*, they contend that the Constitution's express reference to impeachment precludes the existence of any other remedy.<sup>150</sup>

According to the non-exclusivists, the exclusivity of impeachment as a procedure for judicial removal would nullify the "good Behaviour" clause. The existence of separate clauses, therefore, is said to presuppose the existence of alternatives to impeachment.<sup>151</sup> Professor Shartel attempted to turn the *exclusio* maxim on its head by arguing that the Constitution's express reference to impeachment was not intended to exclude the possibility of other forms of judicial removal, but rather to provide for an additional form of removal that otherwise would have been impliedly prohibited by the doctrine of separation of powers.<sup>152</sup>

The debates on the adoption and ratification of the Constitution provide no clear guidance as to whether "good Behaviour" is subsumed within the impeachment clause or whether it offers an

[It is] too narrow, for the "civil officer" might engage in many activities which amount to abuse of office and yet not commit any crimes. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 Ky. L.J. 707, 725-26 (1988); see also Underwood, *Comments on Professor Rotunda's Essay*, 76 Ky. L.J. 733, 734-35 (1988) (contending that phrase "high crimes and misdemeanors" allows for impeachment).

148. See *supra* note 146.

149. See, e.g., Edwards, *supra* note 6, at 776-77.

150. Similarly, Judge Kaufman has stated:

The very absence of a removal provision in Article III indicates that the Framers must have implied a reference to the impeachment clauses and thereby intended that bad behavior be dealt with exclusively by impeachment. Otherwise the silence of Article III would leave no restrictions whatsoever on the identity of the persons to whom Congress might delegate the power of removal.

Kaufman, *supra* note 145, at 692.

151. A seminal analysis of the non-exclusivist theory was presented in 1930 by Professor Bruce Shartel. See Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870, 897-900 (1930). The most outspoken recent proponent of this view has been Raoul Berger. See R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 122-80 (1973).

152. See Shartel, *supra* note 151, at 893.

independent basis for removal. In trying to divine the framers' intent, judges and constitutional scholars have examined the forms of judicial removal that the framers knew existed in England under common law and at the time of the American Constitutional Convention. At the time of the Constitution's adoption, English judges could be removed by Parliament through impeachment, address to the sovereign or bill of attainder. The Constitutional Convention followed English practice for judicial removal by the legislative branch only insofar as it adopted the impeachment clause. The Convention rejected by a vote of seven to one a proposal by John Dickenson of Delaware for removal by the executive upon application by Congress,<sup>153</sup> and it adopted a provision prohibiting bills of attainder.<sup>154</sup> The rejection of Dickenson's proposal and the adoption of the "good Behaviour" clause demonstrate that the Convention opposed any form of executive removal of judges.<sup>155</sup> The Convention's position was consistent with the law of England, which had not permitted removal by the Crown, other than upon conviction of some offenses or address of Parliament, since the Act of Settlement.<sup>156</sup>

Constitutional scholars sharply disagree, however, about whether the framers intended to countenance the removal of judges by the judiciary. Proponents of the non-exclusivist theory contend that the adoption of the good behavior clause presupposed adoption of the English writ of *scire facias*, which had permitted the judiciary to remove officials who had forfeited their office through misconduct.<sup>157</sup> The non-exclusivists, however, are

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153. FARRAND, *supra* note 147, at 428-29. Dickenson stated that he perceived no danger that a legislature composed of two branches would improperly unite for the purpose of displacing a judge. *Id.* Roger Sherman, who supported the amendment, pointed out that a similar provision was contained in British statutes. *Id.* James Wilson, however, considered the British provision less dangerous because he believed that the House of Lords and the House of Commons were less likely to concur on the same occasions. *Id.* In opposing the provision, John Rutledge declared that the Supreme Court's jurisdiction over controversies between the United States and particular states alone would provide an insuperable objection to the motion. *Id.* Gouverneur Morris stated that it was fundamentally wrong to subject the judges to so arbitrary an authority and that it would be a contradiction to allow the judges to serve during good behavior and yet to subject them to removal without trial. *Id.* Similarly, John Randolph opposed the motion because he believed that it too greatly weakened the independence of the judges. *Id.*

154. U.S. CONST. art I, § 9, cl. 3; see FARRAND, *supra* note 147, at 375-76.

155. Even non-exclusivists such as Professor Shartel have agreed that the framers did not contemplate removal of judges by the executive. See Shartel, *supra* note 151, at 882.

156. See F. MAITLAND, *supra* note 15, at 313.

157. See, e.g., R. BERGER, *supra* note 151, at 129-30; Shartel, *supra* note 151,

unable to demonstrate that the framers, who said nothing at the Convention about the writ, contemplated any such procedure. In particular, the non-exclusivists have failed to produce any relevant examples of the use of the writ to remove English judges. Since most judges prior to the Act of Settlement served at the Crown's pleasure rather than during good behavior, it is not surprising that there is no record of any English judge having been removed by the writ prior to the Act of Settlement.<sup>158</sup> Although the Act of Settlement accorded all judges tenure during good behavior, there likewise is no record of judicial removal on a writ of *scire facias* after the Act of Settlement, perhaps because its provision for removal of judges upon address of Parliament was intended to be an exclusive remedy.<sup>159</sup> While the writ theoretically might have been available for the removal of judges after the Act of Settlement, the framers cannot be expected to have presupposed the active use of a procedure that never was used in England.<sup>160</sup> As Martha Ziskind has observed in refuting the non-exclusivist argument, "Even in the unreformed common law, there was a distinction between precedents and fossils."<sup>161</sup> Moreover, it is unlikely that the framers were mindful of the writ since no colonial or state constitution provided for it.<sup>162</sup>

In contrast to the Constitution's ambiguity and the uncertainty about the framers' intention, there is no doubt about the actual practice of judicial removal in America during the past two centuries. Impeachment always has been the sole procedure for removal of judges. Although scholars continue to debate the issue, the courts routinely have presupposed that the remedy of impeachment is exclusive. The Supreme Court stated in *dictum* in 1955 that article III courts are "presided over by judges ap-

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at 891-92. The writ of *scire facias* was used to revoke a patent to hold public office after a judge determined that the office holder had breached a condition, such as good conduct, upon which he held the patent. See Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 *FORDHAM L. REV.* 1, 11 n.54 (1970) (citing 3 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 256 (Christian & Arnold ed. 1825)).

158. Berger notes that, in two instances prior to the Act of Settlement and in one instance after its enactment, judges claimed that their offices could not be forfeited without *scire facias* proceedings. R. BERGER, *supra* note 151, at 127. Judge Kaufman, however, has pointed out that all three made the argument only because they were attempting to fend off removal by another procedure. See Kaufman, *supra* note 145, at 695.

159. See Note, *supra* note 145, at 335.

160. See Fishburn, *supra* note 147, at 859 n.73.

161. Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 *SUP. CT. REV.* 135, 138.

162. *Id.*

pointed for life, subject only to removal by impeachment,"<sup>163</sup> and this assumption was implicit in the Court's 1970 decision, *Chandler v. Judicial Council of the Tenth Circuit*.<sup>164</sup> Similarly, lower courts frequently have stated that impeachment is the sole procedure for removal of federal judges.<sup>165</sup>

#### D. Policy Considerations

The unwavering, if tacit, support for the exclusivity doctrine in the decided cases and the strong support for the doctrine among scholars have provided a solid foundation for judicial independence. Judges have felt free to mete out justice according to the dictates of their consciences, secure in their knowledge that no judge has ever been removed by any method other than impeachment, and then only for the most egregious conduct. The enactment of measures to permit removal by agencies other than Congress initially would erode the judiciary's confidence in its independence by creating uncertainties about the extent to which the new procedures would respect judicial independence. The long-term impact on judicial independence is less problematical, but the prognosis is not good.

Theoretically, there is no reason why alternative mechanisms for judicial removal should be any less respectful of judicial independence than is the impeachment process. Indeed, a superficial comparison of the impeachment procedure with various alternatives that have been proposed<sup>166</sup> might suggest the reverse. While the judicial impeachment process generally has lacked partisan overtones ever since the acquittal of Justice Samuel Chase in

163. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955).

164. 398 U.S. 74 (1970) (denying Judge Chandler's motion for leave to file petition for writ of prohibition and/or mandamus). In his dissent, Justice Douglas stated that impeachment was the sole basis for removal of a federal judge. *Id.* at 136 (Douglas, J., dissenting); *see also* *Chandler v. Judicial Council of the Tenth Circuit of the United States*, 382 U.S. 1003, 1004-06 (1966) (Black, J., dissenting from Miscellaneous Order denying Judge Chandler's application for stay of order). For a discussion of *Chandler*, *see infra* notes 221-29 and accompanying text.

165. *See, e.g.*, *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093, 1106-07 (D.C. Cir. 1985) (Edwards, J., concurring), *cert. denied*, 447 U.S. 904 (1986); *Bergen v. Edenfield*, 701 F.2d 906, 908 (11th Cir. 1983); *Clark v. United States*, 72 F. Supp. 594, 597 (Ct. Cl. 1947).

166. *See supra* notes 11 & 120; *infra* notes 214, 231 & 233 (measures proposed in 1936, 1937, 1969, 1978, 1986 and 1989).

1805,<sup>167</sup> it never has entirely shed its political character.<sup>168</sup> The most recent reminder of the political possibilities of judicial impeachment occurred in 1970, when Gerald Ford, then the House Minority Leader, called for the impeachment of Justice Douglas.<sup>169</sup> Ford's effort fizzled, but it demonstrates the danger that judicial impeachment might someday re-emerge as the partisan weapon that the Jeffersonians of the early nineteenth century temporarily molded. In contrast, a commission and court composed in part of federal judges and selected by members of the three branches of government would seem unlikely to indulge in the sort of partisanship that might creep into congressional impeachment proceedings. Most of the states already have commissions that are permitted to remove judges from office, and those commissions appear to have functioned effectively, without unduly impairing judicial independence.<sup>170</sup>

While proposals for allowing a federal commission to remove judges do not lack merit and deserve consideration, they also raise many troubling questions. The nonpartisanship of such bodies would not be assured, since the appointing authorities might select members on the basis of their partisanship. Moreover, the small size of the bodies would create dangers of unfairness and partisanship against which the large and diffuse membership of Congress helps to guard. Another hazard is that this new independent bureaucracy would be excessively zealous in fulfilling its mission. At the March 1990 hearings on the amendments, Judge Walter K. Stapleton of the Third Circuit warned that "[s]ince we all need to feel that our existence is justified, one can confidently predict that the creation of such a bureaucracy would be followed by disciplinary proceedings." Judge Stapleton believes that "the prospect of such investigations and proceedings would have a very chilling effect on judicial independence without any meaningful contribution to judicial accountability."<sup>171</sup>

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167. See P. HOFFER & N. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 262-63 (1984). Judge Edwards has stated that "history has shown that Congress rarely if ever has been inclined to abuse its power in defining 'high crimes and misdemeanors' or in acting to impeach." Edwards, *supra* note 6, at 773.

168. See, e.g., R. BERGER, *supra* note 151, at 298-99 (primarily citing advocates of presidential impeachment).

169. See, e.g., Feerick, *supra* note 157, at 1-2.

170. See Fed. Jud. Center, *supra* note 61, at 20-27.

171. *Hearings on S.J. Res. 232 and S.J. Res. 233 Before the Subcomm. on the Constitution of the Comm. on the Judiciary, United States Senate, 101st Cong., 2d Sess. (1990)* [hereinafter *Senate Hearings*] (statement of J. Stapleton, at 4). The hear-

A greater risk than the threat of partisanship is the danger that the new procedures would permit removal on grounds much less rigorous than those that the Constitution now requires.<sup>172</sup> Resolution 232,<sup>173</sup> for example, would permit removal for "violation of any canon of judicial ethic, misconduct in office [and] failure to perform . . . duties."<sup>174</sup> This language certainly anticipates a far lower threshold of misconduct than is comprehended by "Treason, Bribery, or other high Crimes and Misdemeanors," or even by the more amorphous "good Behaviour" clause. Similarly, Resolution 233<sup>175</sup> would permit removal of judicial officers "found to be guilty of misconduct in office [and for] failure to perform the duties of office" as well as for "violating judicial ethics canons [sic]."<sup>176</sup> This provision would give Congress an excessively broad basis for removing judges.

The proposed amendments offer no clue regarding the meaning of the vague phrases "misconduct in office" and "failure to perform duties." As Judge Stapleton stated at the hearings, the standards are "so vague as to be essentially meaningless. They constitute an open invitation to exactly the kind of retaliation against which the Founding Fathers sought to erect a shield."<sup>177</sup> The provisions in the proposed amendments for removal for failure to physically or mentally discharge the duties of office also suffer from vagueness.

Similarly, Resolution 232's provision for removal for violation of *any* canon of judicial ethics, and the analogous language of Resolution 233,<sup>178</sup> would permit removal for trivial offenses, thereby inviting political retaliation against judges. Since most of the canons of the recently revised American Bar Association

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ings have not yet appeared in an official publication. All page references are to the hearing transcript, a copy of which is on file with *Villanova Law Review*. Each witness's testimony is separately paginated.

172. The proposed amendments' standards for removal also radically depart from present understandings of what constitutes an impeachable offense by permitting removal for offenses that are unrelated to official conduct in office.

173. S.J. Res. 232, *supra* note 11. This proposal would establish a Judicial Inquiry Commission and a Court of the Judiciary. For a description of removal procedures under the proposal, see *supra* notes 132-33 and accompanying text.

174. *Id.* § 2(4)(a).

175. S.J. Res. 233, *supra* note 11.

176. *Id.* § 1.

177. *Senate Hearings*, *supra* note 171 (statement of J. Stapleton, at 3).

178. S.J. Res. 233, *supra* note 11. It is unclear whether the omission of the word "any" in S.J. Res. 233 is intended to permit a more rigorous standard for judicial removal.

Model Code of Judicial Conduct<sup>179</sup> are very broad, the Court of the Judiciary would have the power to remove a judge for virtually any reason. For example, Canon 3A(8) provides in part that a judge should “promptly dispose of all judicial matters.”<sup>180</sup> Under Resolution 232, the court would appear to have the power to remove a judge who had temporarily fallen behind on his docket. The potential for partisan mischief would be even greater in connection with those parts of the Model Code that restrict political and partisan activities.<sup>181</sup> Perhaps the proposed amendment’s provision that the “Supreme Court shall adopt canons of ethics binding on all” federal judges is an attempt to respond to these dangers.<sup>182</sup> These new canons might be more specific than are the present canons, but that feature would come at a price. As Judge Stapleton pointed out, “[C]anons that set very high and comprehensive standards and use language subject to differing interpretations are essential to the maintenance of public confidence in the federal judicial system.”<sup>183</sup>

John O. McGinnis remarked during the March 1990 hearings that the amendments “would treat federal judges as another bureaucracy by providing for the establishment of essentially administrative standards for removal and discipline that may change over time according to political exigencies.”<sup>184</sup> The establishment of such standards, McGinnis warned, “would send a profoundly disturbing message about the status of Article III judges that would make it more difficult to attract men and women of the caliber essential to make the Judiciary function effectively. The difficulty of attracting qualified judges might actually exacerbate disciplinary problems . . . .”<sup>185</sup>

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179. MODEL CODE OF JUDICIAL CONDUCT (1990) [hereinafter MODEL CODE] (replacing 1972 code). The ABA House of Delegates adopted the new model code in August 1990. See DeBenedictis, *House Approves Judicial Code*, A.B.A. J., Oct. 1990, at 130.

180. MODEL CODE, *supra* note 179, Canon 3A(8).

181. *See id.* Canon 5 (“A judge or judicial candidate should refrain from inappropriate political activity.”).

182. *See* S.J. Res. 232, *supra* note 11, § 2(4)(b). The language of the proposed amendment does not make clear whether these new canons are the only ones relevant for purposes of the amendment’s removal procedures.

183. *Senate Hearings*, *supra* note 171 (statement of J. Stapleton, at 4).

184. *Id.* (statement of John O. McGinnis, Deputy Asst. Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, at 6). Mr. McGinnis recognized that while the proponents of the present amendments obviously do not wish to erode the judiciary’s independence, the motives of future congresses and Presidents are impossible to predict.

185. *Id.*

The possibility of any interference with judicial independence is cause for the deepest concern. Judicial independence is not unlimited and certain restraints surely must be imposed upon the actions of individual judges, but a high degree of judicial independence is integral to the separation of powers among the branches of government. The independence of the judiciary was one of the principal goals of the framers of the Constitution,<sup>186</sup> and it has been one of the most abiding and distinctive characteristics of the American form of government. In order to protect judicial independence, the framers deliberately made the impeachment process cumbersome.<sup>187</sup> The difficulty of removal through impeachment sometimes may serve to shield judicial misconduct as well as to promote judicial independence, yet this danger alone does not justify liberalization of the judicial removal process. As Judge Kaufman has observed:

We must tolerate some judges without whom the system would be better off, because the dangers are greater on the side of an overly potent removal power. The possibility of judicial removal for vague grounds of dissatisfaction would create a dragnet that would inevitably sweep into its grasp the maverick, the dissenter, the innovator, the reformer—in a word, the unpopular.<sup>188</sup>

Similarly, a commentator has correctly pointed out that the increased efficiency of an alternative system is not worth the threat to judicial independence.<sup>189</sup>

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186. See, e.g., T. BAKER, *supra* note 4, at 28-29 (citing Wilson and Randolph's opposition to Dickenson's motion discussed *supra* note 153); THE FEDERALIST No. 81, at 482-84 (A. Hamilton) (C. Rossiter ed. 1961) (discussing independence of judicial branch).

187. See, e.g., Edwards, *supra* note 6, at 767; Kaufman, *supra* note 145, at 683; Note, *In Defense of the Constitution's Judicial Impeachment Standard*, 86 MICH. L. REV. 420, 447-48 & n.153 (1987) ("The Framers affirmatively chose to err on the side of potential inefficiency, for the greater good of an unthreatened judiciary." (emphasis in original)).

188. Kaufman, *supra* note 145, at 703. Judge Kaufman likewise has warned that "[o]ur judicial system can better survive the much discussed but rarely existent senile or inebriate judge than it can withstand the loss of judicial independence that would ensue if removal of judges could be effected by a procedure too facile or a standard too malleable." *Id.* at 715-16.

189. See Note, *supra* note 187, at 446-54.



#### IV. THE VIABILITY OF LESS DRASTIC ALTERNATIVES TO ABROGATION OF LIFETIME TENURE OR DILUTION OF THE REMOVAL PROCESS

##### A. *General Considerations*

Constitutional amendments to impose limitations on the tenure of federal judiciary or to make judges removable by a procedure other than impeachment would be justifiable only if the remedy of impeachment and existing procedures for judicial discipline are inadequate to effectively prevent, palliate and punish various forms of judicial malfeasance and nonfeasance. Accordingly, a constitutional amendment is inappropriate absent a compelling showing that present constitutional procedures do not adequately assure judicial integrity. At the 1986 hearings on the Thurmond and DeConcini measures, Judge Wallace warned that the amendment process should be treated with "extreme caution" and that an amendment in response to the *Claiborne* case would trivialize the Constitution since felony convictions of judges are very rare.<sup>190</sup> Similarly, there is no compelling reason for an amendment concerning judicial tenure and removal, since existing constitutional provisions and statutes adequately protect against judicial infirmity, incompetence and corruption.

##### B. *The Viability of the Impeachment Process*

The impeachment process presently provides an adequate means for investigating and punishing the most arrant forms of judicial misconduct. The impeachment and conviction of three federal judges between 1986 and 1989, while creating widespread fears that the impeachment process imposed an undue burden on Congress,<sup>191</sup> illustrate the exception, not the rule. Impeachment of federal judges has been very rare; prior to Judge Claiborne's impeachment in 1986, the previous impeachment of a federal judge occurred in 1936. Before 1986, only nine federal judges had been impeached and only four had been convicted.<sup>192</sup> This

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190. *Hearing on S.J. Res. 364 and S.J. Res. 370, supra* note 122, at 16 (statement of J. Wallace). Similarly, Professor Burbank contended that the occurrence of judicial convictions for felonies was likely to continue to be so rare that the extraordinary remedy of an amendment was not justified. *Id.* at 27 (statement of Prof. Burbank).

191. *See Impeachment: Time to Change the System?, supra* note 3.

192. The judges were: United States District Judge John J. Pickering (impeached and convicted in 1803 on three counts of misconduct committed during trial in contravention of act of Congress and one count of intoxication); Associate Justice Samuel Chase (impeached in 1804 on six counts involving conduct

does not mean, however, that the impeachment process is an ineffective means of disciplining federal judges, since many federal judges have resigned as a result of investigations by the House.<sup>193</sup>

The refusal of Judges Claiborne, Hastings and Nixon to resign from office has led to expressions of fear that the threat of impeachment no longer encourages resignation by wayward judges.<sup>194</sup> Yet, there is little likelihood that an increasing number of dishonest judges will force Congress to invoke the full panoply of the impeachment process.<sup>195</sup> Once again, it is premature to

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that was allegedly unfair to defendant in treason and sedition trial and two counts involving inflammatory addresses delivered to grand jury); United States District Judge James Peck (impeached in 1830 for misuse of contempt powers); United States District Judge West H. Humphreys (impeached and convicted in 1862 on seven counts arising out of his support for confederates); United States District Judge Charles Swayne (impeached in 1903 on 12 counts involving alleged offenses including padding of expense accounts, use of railroad property in receivership for personal benefit, and misuse of contempt power); United States Customs Court Judge Robert Archibald (impeached and convicted in 1912 on charges of having used judicial office and influence for personal financial gain); United States District Judge George W. English (impeached in 1926 on five counts involving gross abuse of power, profane and abusive conduct in courtroom, collusion and partiality and favoritism in bankruptcy proceedings); United States District Judge Harold Louderback (impeached in 1933 on five counts involving appointment of incompetent receivers and allowance of excessive receivership fees); United States District Judge Halsted L. Ritter (impeached on seven counts and convicted in 1936 on one count for impairing public confidence in judiciary, for various conduct including participation in champertous proceedings brought before him for cash consideration, practice of law while serving as federal judge, and filing false income tax returns). Of the five judges who were impeached but not convicted, all except English were tried and acquitted by the Senate. English resigned before the commencement of trial. See Feerick, *supra* note 157, at 26-32, 37-47; Thompson & Pollitt, *Impeachment of Federal Judges: An Historical Overview*, 49 N.C.L. REV. 87, 92-107 (1970).

193. See, e.g., Thompson & Pollitt, *supra* note 192, at 108.

194. Representative Kastenmeier stated at the recent hearings on H.R. 1620 that "we may have a phenomenon wherein judges for whatever reason will not resign until the playing out of the impeachment process. I am not sure why this is." *Hearings on H.R. 1620, H.R. 1930, and H.R. 2181 Before the Subcomm. on Courts, Intellectual Property and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 348 (1989) [hereinafter *Hearings on H.R. 1620*]. At the same hearings, Judge Mikva suggested the need for study "of why people are not resigning now." *Id.* at 379. Judge Mikva recalled that Otto Kerner had resigned from the Seventh Circuit after his colleagues "pointed out to him that there was still something to be said for trying to maintain enough of his reputation to not go through the whole complicated and very, very painful impeachment process." *Id.* Kerner had been convicted in 1973 of various crimes, including tax evasion and perjury. See *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). Mikva stated, "I do not understand what motivated some of the current judges who insisted on taking it all the way to the wall." *Hearings on H.R. 1620, supra*, at 379.

195. Dr. Frances Kahn Zemans, Executive Vice-President of the American Judicature Society, testified at the hearings on H.R. 1620 that she was not sure that judges have not resigned in the face of possible impeachment proceedings.

suppose that the recent triad of impeachments is the harbinger of a trend that will impose undue burdens upon Congress. Nevertheless, it would be naive to conclude that serious misconduct among the nation's federal judges is so uncommon that another half-century will pass before any other judges deserve impeachment. Even though the overwhelming majority of federal judges appear capable and honest,<sup>196</sup> some incompetence and corruption is almost inevitable in any group of several hundred individuals. As Robert W. Kastenmeier and Michael J. Remington have observed, "[The] impeachment of a federal judge is the jagged tip of an iceberg; under the water and out of sight lies the larger mass of judicial discipline and ethics."<sup>197</sup> The number of federal judges is expected to increase substantially during the next decade, and problems of judicial discipline are likely to increase along with it. As Dr. Zemans has warned, "Just as a statistical matter, you are going to get greater variation in behavior [when there are more judges.]"<sup>198</sup> Since the presence of even a few

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She observed that "resignations may take place relatively early in the process. It does not have to become a public issue of whether there will be impeachment or not before that is an option that a judge may exercise." *Hearings on H.R. 1620*, *supra* note 194, at 349. In response to Representative Kastenmeier's expression of concern that the impeachment process no longer served to encourage errant judges to resign, Dr. Zemans acknowledged that "[i]t is in some ways unbelievable that a convicted felon would remain on the bench and continue receiving a Federal salary . . . . If someone had suggested to us 10 years ago that such an occurrence would take place, many of us would have said impossible." *Id.*

196. Judges have regularly defended the general probity of their colleagues. In a widely quoted speech in 1983, Justice Stevens remarked, for example, that he had no doubt that virtually all of the nation's 1000 federal and 26,000 state judges were "rendering judicial service that is entitled to the highest respect." Stevens, *Reflections on the Removal of Sitting Judges*, 13 *STETSON L. REV.* 215, 220 (1983). More recently, Judge Edwards stated that "[a]lthough recent events (involving Judges Claiborne, Nixon, and Hastings) have focused attention on unfortunate instances of alleged judicial misconduct, I have no reason to doubt the integrity of the federal judiciary as a whole." Edwards, *supra* note 6, at 771. Although these and similar pronouncements appear to be sincere and are reassuring, their credibility is limited. While judges obviously are in a better position to evaluate the probity of their colleagues than is the general public, the relative autonomy of judges would enable any judge easily to conceal most forms of official corruption from his colleagues. Purely private misdeeds are even more easily concealed. A number of studies of the judiciary have indicated that corruption and incompetence among federal judges have been more widespread than most judges would care to admit. See J. BORKIN, *THE CORRUPT JUDGE* (1962); J. GOULDEN, *THE BENCHWARMERS* (1972). Ultimately, however, the number of documented instances of judicial incompetence or dishonesty is relatively small in comparison to the total number of federal judges.

197. Kastenmeier & Remington, *supra* note 1, at 764.

198. *Hearings on H.R. 1620*, *supra* note 194, at 350. Similarly, Representative Robert W. Kastenmeier of Wisconsin has stated that "just out of mathematical chance those that might be guilty of conduct which rises to the level of

knaves in the ranks of the judiciary impairs the integrity of the judicial system and undermines public faith in justice, it is clearly imperative to try to prevent corruption and incompetence. Moreover, the growing public sensitivity about the need for a high standard of judicial rectitude also is likely to stimulate investigations into judicial conduct and increase the frequency of judicial disciplinary proceedings, if not impeachment. The growing concern for judicial ethics should, however, have the effect of ameliorating judicial misconduct and, therefore, eliminate the need for proceedings that might have occurred in an earlier day.

Even if impeachment proceedings become more frequent during the next decade, there is not yet any indication that the House and Senate are unequal to the task. Congressional investigations might regularly uncover instances of judicial misconduct, but there is no reason to suppose that the House would become preoccupied with perpetual impeachment proceedings or that the Senate would continually hold trials. As we have seen, a substantial number of judges in the past have resigned from office on account of pre-impeachment investigations.<sup>199</sup>

Impeachment proceedings, uncommon or not, do consume much congressional time. As Representative Kastenmeier and Michael J. Remington have observed about the lesson of the Claiborne impeachment, "[T]he good news is that they system works; the bad news is that it is hard work."<sup>200</sup> Similarly, Representative Moorhead observed at the hearings on Representative Kastenmeier's bill:

Impeachment totally ties up a good chunk of the Judiciary Committee for long periods of time and it ties up the Senate for a remarkable period of time while these trials are going on. I don't know whether we can afford that time in our complicated society just for one person.<sup>201</sup>

To the extent that impeachments may become more common, however, there are various means by which Congress may expedite the process. In 1935, for example, the Senate adopted Senate Rule XI, which permits the Senate to appoint an impeach-

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impeachment will increase and the Congress, including the Senate, would have to hold many trials." *Id.* at 378.

199. See *supra* notes 184-86 and accompanying text.

200. Kastenmeier & Remington, *supra* note 1, at 778.

201. *Hearings on H.R. 1620, supra* note 194, at 388.

ment committee to receive evidence prior to the trial on the Senate floor.<sup>202</sup> Other procedures for relieving members of the strain of frequent impeachment proceedings might include the formation of a bipartisan House Committee on Judicial Fitness, the creation of a professional staff as an adjunct to the committee, and the use of special masters to conduct evidentiary hearings for the Senate and to prepare proposed findings of fact and law.<sup>203</sup> Preliminary work by professional staffs or committees may help to organize and distill information in order to make it more comprehensible to the many Representatives and Senators who have only a passing interest in the matter.

Critics of these methods of expediting impeachment proceedings acknowledge that they may save time but contend that they raise troubling questions about fairness to accused judges.<sup>204</sup> In addition to complaining about the burdens upon Congress that impeachment proceedings create, Senator Heflin and other proponents of an alternative removal procedure have rightly expressed concern about the fairness of the three recent impeachment proceedings, in which the bulk of the work in the Senate was performed by a twelve-member trial committee. Streamlined proceedings may save time, but the price of such efficiency may be the failure of most Senators to be fully informed about the facts of a case.<sup>205</sup>

Moreover, the complexity of virtually any impeachment pro-

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202. See *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials XI*, 132 CONG. REC. S11, 902 (daily ed. Aug. 15, 1986). Rule XI provides that the Senate's presiding officer may appoint a committee to receive testimony and other evidence. The committee provides the Senate with a transcript of its proceedings. The Senate as a whole may exclude any aspect of that evidence from consideration in its final deliberations and is free to receive additional evidence. The committee does not make a recommendation as to guilt or innocence. See *Impeaching Federal Judges: Where Are We and Where Are We Going?*, 72 JUDICATURE 359, 362 (1989) (statement of Michael Davidson, Counsel, United States Senate). The Senate first employed Rule XI in connection with Judge Claiborne's impeachment, when a 12-member impeachment committee was formed. See Heflin, *supra* note 3, at 132.

203. Stolz, *Disciplining Federal Judges: Is Impeachment Hopeless?*, 57 CALIF. L. REV. 659, 667-70 (1969).

204. See Burbank, *supra* note 9, at 686-87; Heflin, *supra* note 3, at 123-24.

205. Heflin, *supra* note 3, at 124. Senator Heflin observed that while the 12 Senators who comprised the Impeachment Committee were well aware of the facts and issues in the *Claiborne* case, the other 88 members of the Senate did not have the advantage of hearing the testimony and arguments by counsel. Since the transcript of the hearing exceeded 3500 pages, Heflin concluded that it was "highly improbable that any Senator had the time to thoroughly review this material" and that the few Senators who did not serve on the committee were familiar with all of the elements of the case.

ceeding creates a danger that many members of both the House and the Senate will not take the time to fully inform themselves about the issues in a case.<sup>206</sup> For example, one Congressman who helped to manage the impeachment proceedings against Judge Louderbach decried the case as a "farce" since "[a]t one time only three Senators were present and for ten days we presented evidence to what was practically an empty chamber."<sup>207</sup> In explaining his bill for the creation of a judicial removal commission and court, Senator Heflin compared uninformed Senators in an impeachment trial to sleeping jurors and he expressed concern that most Senators are too busy to devote full attention to impeachment proceedings.<sup>208</sup> Similarly, David O. Stewart, who represented Judge Nixon in impeachment proceedings, has argued that Claiborne, Hastings and Nixon were deprived of a fair trial because the eighty-eight Senators who do not serve on the trial committee in an impeachment proceeding "ha[d] only a glancing exposure to the case."<sup>209</sup> Stewart has pointed out that the percentage of Senators voting in favor of the sixteen articles of impeachment that were involved in the three trials was higher than was the percentage of committee members who voted in favor of the articles.<sup>210</sup> He also has observed that if the prosecution had to carry two-thirds of the Senators who actually heard the evidence, Hastings would have been acquitted and Nixon would have been convicted of only one charge rather than two.<sup>211</sup>

Since senatorial inattention to an impeachment trial certainly raises troubling questions about the fairness of an impeachment proceeding, the present procedure in the Senate deserves additional study. This would be a fitting subject for research by the commission that the Kastenmeier bill would establish.<sup>212</sup>

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206. As Berger pointed out in his study of impeachment in 1973, attendance at an impeachment trial is likely to be sporadic and the Senators cannot be expected "to study and digest the bulky record." R. BERGER, *supra* note 151, at 156.

207. Frankel, *Removal of Judges—Federal and State*, 49 JUDICATURE 176, 180 (1965).

208. 135 CONG. REC. S16,817-18 (daily ed. Nov. 21, 1989).

209. Stewart, *Impeachment by Ignorance*, A.B.A. J., June 1990, at 52, 54. According to Stewart, "By preventing the accused from effectively presenting his case to all senators, the committee trial denies the accused a fair opportunity to defend himself." *Id.*

210. *Id.* at 54-55.

211. *Id.* at 54.

212. See H.R. 1620, *supra* note 10, § 202. [Editor's note: The commission has been established. See *supra* note 10.]

Even if present impeachment proceedings are adequately thorough, the impeachment process itself may do little to prevent, expose or punish most instances of judicial misconduct. Since there are likely to be many instances of judicial misconduct that will not warrant impeachment proceedings, the impeachment process alone is not sufficient to assure judicial integrity. There are, however, various other procedures that provide for investigation and discipline of judicial misconduct. As demonstrated below, these procedures relieve Congress of much of the burden of monitoring judicial conduct, while preserving the exclusivity of Congress's power to remove judges.

### C. *The Viability of Judicial Self-Regulation*

#### 1. *Historical Considerations*

Discipline of judges by other judges is a highly sensitive issue. As Professor Provine has pointed out, "Judges are reluctant to exercise authority over each other outside the realm of appeals; they value decentralization, local autonomy, and ample room for individual initiative in the organization of their work."<sup>213</sup> At the same time, judges generally have attempted to encourage deviant colleagues to reform. Judges have hoped that private admonitions would spare their colleagues, themselves and the judicial system the embarrassment of public revelations of misconduct. During the late 1930s, in the wake of the impeachment and conviction of Judge Ritter, Congress considered two measures that would have permitted removal of judges without impeachment.<sup>214</sup> These measures failed, but continuing concern about judicial misconduct and infirmity led to the enactment of the Administration of the United States Courts Act of 1939<sup>215</sup> which formalized procedures for judicial self-discipline.<sup>216</sup> Section 232 of

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213. Provine, *Judicial Government*, 51 LAW & CONTEMP. PROBS. 83, 83 (1988).

214. H.R. 2271, 75th Cong., 1st Sess. (1937); S. 4527, 74th Cong., 2d Sess. (1936). The first measure would have permitted the House of Representatives to authorize the Chief Justice to convene a special court of circuit judges to try cases involving alleged misconduct by federal judges other than circuit court judges and Supreme Court justices. The second bill would have created a court composed of the senior judges of the 10 circuit courts of appeals and the chief judge of the Court of Appeals for the District of Columbia. This special court would have had the power to try and convict lower federal judges of charges of misbehavior.

215. Administration of the United States Courts Act of 1939, Pub. L. No. 76-299, 53 Stat. 1223 (1939) (codified as amended at 28 U.S.C. § 332 (1988)).

216. *Id.* The act suggested that newly-created judicial councils comprised of the judges of each circuit would have the power to discipline district court judges.

Title 28 of the United States Code provides that each "judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit."<sup>217</sup> One of the councils' principal powers is to make necessary orders for the distribution of caseloads if the district judges in any circuit are unable to agree upon the division of judicial business.<sup>218</sup> The legislative history of the statute suggests that Congress intended to confer broad powers upon the councils.<sup>219</sup> The councils, however, rarely have used their power to redistribute caseloads to circumscribe the activities of a wayward judge. Writing in 1970, one commentator disparaged the judicial councils as "rusty hinges of federal judicial administration."<sup>220</sup>

In one of the few instances in which a judicial council has invoked the statute to interfere with a judge's docket, the Tenth Circuit in 1965 deprived Judge Stephen S. Chandler of the power to adjudicate any presently pending or subsequent cases.<sup>221</sup> The council subsequently restored Chandler's pending docket, but prohibited him from receiving any new cases.<sup>222</sup> In 1970, the United States Supreme Court denied Judge Chandler's petition for a writ of mandamus to restore his docket, on the grounds that he had not exhausted alternative remedies.<sup>223</sup> The majority thereby sidestepped the questions whether the judicial council's action was tantamount to Judge Chandler's removal from office and whether such removal would be constitutional. In dicta, however, the Court acknowledged the need for a balance between independence and the need for reasonable standards to facilitate the effective operation of a complex judicial system.<sup>224</sup>

Several Justices discussed the merits of the case in separate opinions. In dissent, Justice Douglas argued that the judicial

217. 28 U.S.C. § 332(d)(1) (1988).

218. *Id.* § 137.

219. Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration*, 37 U. CHI. L. REV. 203, 206 (1970) (citing *Hearings on H.R. 2973, H.R. 5999 Before the House Comm. on the Judiciary, 76th Cong., 1st Sess. 22* (1939)).

220. *Id.* at 203.

221. *See Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 77-79 (1970).

222. *See id.* at 80.

223. *Id.* at 88-89.

224. The Court observed that the legislative history of § 332 makes clear that "some management power was both needed and granted." *Id.* at 85. At the same time, however, the Court also noted that "nothing in the legislative history . . . suggest[ed] 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." *Id.* at 86 n.7.



council's order carried "all of the sting and much of the stigma" of an impeachment.<sup>225</sup> In his view, "there is no power under our Constitution for one group of federal judges to censor or discipline any federal judge and no power to declare him inefficient and strip him of his power to act as a judge."<sup>226</sup> Similarly, Justice Black contended that the council had virtually removed Chandler from office and that the Constitution provided no warrant for removal without impeachment.<sup>227</sup> Justice Black expressed fear for the survival of judicial independence.<sup>228</sup> Despite such warnings, Justice Harlan saw a need for judges to discipline other judges. In his concurring opinion, he declared that the judicial council's order was "a permissible interim step toward exploration and solution of the problem presented" and that the "circumstances, taken as a whole, established a prima facie basis for the Council's conclusion that some action was appropriate to alleviate what the Council members perceived as a threat to public confidence in the administration of justice."<sup>229</sup> In subsequent cases, many courts have taken a similarly broad view of the judicial councils' powers.<sup>230</sup>

The controversy over Judge Chandler and the growing concern about the extent of incompetence and corruption on the fed-

225. *Id.* at 135 (Douglas, J., dissenting).

226. *Id.* at 137 (Douglas, J., dissenting).

227. *Id.* at 142 (Black, J., dissenting).

228. *Id.* at 143 (Black, J., dissenting). The councils' power over judges' dockets likewise has worried a number of other judges, who agree with Justices Black and Douglas that it tends to chill judicial independence. *See, e.g., Battisti, supra* note 145, at 745. United States District Judge Frank J. Battisti complained that council action ordering a judge to hear no new cases is a power that easily is abused. According to Battisti, the power was not likely to be used against corrupt judges but rather against suspected incompetence or impropriety. Judge Battisti argued that the power would "discourage nonconformity and imbue a district judge with the feeling that someone is always looking over his shoulder. Corruption will not be eliminated, but nonconformists and worthy opponents will be." *Id.*

229. *Chandler*, 398 U.S. at 125 (Harlan, J., concurring).

230. *See Hilbert v. Dooling*, 476 F.2d 355, 360 (2d Cir.) (statutory language's breadth demonstrates that "there is no doubt that Congress meant to give to the councils the power to do *whatever might be necessary* more efficiently to manage the courts and administer justice"), *cert. denied*, 414 U.S. 878 (1973); *Utah-Idaho Sugar Co. v. Ritter*, 461 F.2d 1100, 1103 (10th Cir. 1972) (judicial councils have power to ensure that "the district court's business is conducted effectively, expeditiously and in a manner that inspires public confidence"); *cf. Hastings v. Judicial Conference of the United States*, 770 F.2d 1093, 1106-07 (D.C. Cir. 1985) (Edwards, J., concurring) (discussing debate over whether judiciary may discipline itself), *cert. denied*, 477 U.S. 904 (1986); Shipley, *Legislative Control of Judicial Behavior*, 35 LAW & CONTEMP. PROBS. 178, 194-200 (1970) (discussing legislative efforts to control judges' behavior).

eral bench inspired a congressional study of judicial reform. The study culminated in a 1969 proposal by Senator Tydings of Maryland to establish a procedure to permit the removal of judges without impeachment.<sup>231</sup> During extensive hearings on this measure in 1969 and 1970, judges and legal scholars sharply disagreed over the constitutionality of the measure.<sup>232</sup> In the wake of the renewed concerns about public probity that the Watergate scandal inspired, new proposals for removal of federal judges were introduced in the Senate during the 1970s. In 1978, the Senate approved a measure to permit a special court to discipline and remove inferior federal judges.<sup>233</sup> The measure died in the House.

## 2. *The Judicial Conduct and Disability Act*

Finally, in 1980, Congress enacted a statute that provided the judiciary with broad powers to police itself but that stopped short

231. S. 1506, 91st Cong., 1st Sess. (1969). The legislation provided for the creation of a Commission on Judicial Disabilities and Tenure, which would have had the power to investigate the official conduct of any district or circuit court judge in order to determine whether the judge's conduct had been consistent with the good behavior required by article III. *Id.* § 357. If, after a hearing, the judge's conduct was found to have been improper, the commission would have notified the Judicial Conference, which would review the record and could conduct additional hearings. *Id.* § 379(b). If the conference accepted the commission's recommendation, the judge could have petitioned the Supreme Court for a review of the conference's determination. *Id.* If the Court affirmed the conference's determination to certify a judge for removal, or if the judge failed to seek the Court's review of the determination, the conference would notify the President of the certification and the judge would be removed from office. *Id.* § 379(e).

232. *Compare Hearings on Judicial Independence Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary, United States Senate, 91st Cong., 2d Sess. 8-9 (1970) (testimony of Sen. Sam Erwin, Jr.) (questioning constitutionality of proposed legislation) with id. at 330 (testimony of William H. Rehnquist, Asst. Att'y Gen.) (support of the constitutionality of Tydings bill provisions relating to "a new judicial commission to revoke judges in case of failure to conform with the good behavior provisions of the constitution") and Hearings on S. 1506 Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary, United States Senate, 91st Cong., 1st Sess. 161 (1969) (testimony of J. John Biggs, Jr., of the Third Circuit) (proposed legislation constitutional).*

233. S. 1423, 95th Cong., 2d Sess. (1978); 124 CONG. REC. S28, 284 (daily ed. Sept. 7, 1978). The bill provided for the creation of a 12-judge Judicial Conduct and Disability Commission and a seven-judge Court on Judicial Conduct and Disability. The bill would have required the commission to investigate any person's complaint that a judge violated the good behavior standard of article III, § 1. 124 CONG. REC. at S28, 285. The bill quite broadly defined the conduct that would violate this standard. Under the bill's definition, it would include "willful misconduct in office, willful and persistent failure to perform duties of the office, habitual intemperance, or other conduct prejudicial to the administration of justice that brings the judicial office into disrepute." S. 1423, *supra*, § 382(b).

of permitting the actual removal of judges without impeachment.<sup>234</sup> The statute, the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980,<sup>235</sup> provides detailed procedures for review and investigation of complaints concerning judicial misconduct and disability. It also permits the judiciary to impose numerous sanctions on deficient judges. The Act applies to all federal judges except Supreme Court Justices, whom Congress intentionally exempted.<sup>236</sup> In enacting the statute, Congress sought "to improve judicial accountability and ethics, to promote respect for the principle that the appearance of justice is an integral element of this country's justice system and, at the same time, to maintain the independence and autonomy of the judicial branch of government."<sup>237</sup> Congress specifically refused to consider any proposal that would supplant the impeachment process.<sup>238</sup> Nevertheless, the Senate report on the measure stated that "the impeachment process has become unduly cumbersome and ineffective" and that there was a need "to fill the void which currently exists in the law between the impeachable offenses and doing nothing at all."<sup>239</sup>

Under the Act, any person may initiate the review and disciplinary process by filing with a circuit court a complaint containing a brief statement alleging that a judge "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or suffers from a mental or physical disability that precludes the discharge of "all the duties

234. 28 U.S.C. §§ 331-332, 372, 604 (1988).

235. Pub. L. No. 96-458, 94 Stat. 2035 (1980) (effective Oct. 1, 1981).

236. *House Comm. on the Judiciary, Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, H.R. REP. NO. 1313, 96th Cong., 2d Sess. 10 n.28 (1980). The House committee explained that there were two reasons for exempting Supreme Court Justices from the Act. First, the committee believed that the Justices' high visibility made impeachment a viable remedy for egregious situations. *Id.* Second, the drafters concluded that "it would be unwise to empower an institution such as the Judicial Conference, which is actually chaired by the Chief Justice of the United States, to sit on cases involving the highest ranking judges in our judicial system." *Id.* The committee report explained that the "independence and importance of the Supreme Court within our justice system should not be diluted in this fashion." *Id.*

237. *Id.* at 1.

238. S. REP. NO. 362, 96th Cong., 1st Sess. 4 (1979) ("Although the question has never been finally settled, the Committee has respected the position that removal of federal judges by any means other than impeachment is arguably unconstitutional. Therefore, the proposed legislation is designed to avoid this important issue, and removal of federal judges short of impeachment.") (report on Judicial Conduct and Disability Act of 1979), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 4315, 4318.

239. *Id.* at 4-5; 1980 U.S. CODE CONG. & ADMIN. NEWS at 4318.

of office.”<sup>240</sup> The complaint is then reviewed by the chief judge of the circuit,<sup>241</sup> who may either dismiss the complaint<sup>242</sup> or convene a special committee of circuit and district court judges to investigate the charges.<sup>243</sup> Following its investigation, the committee must file a report with the judicial council of the circuit, which in turn may conduct an additional investigation.<sup>244</sup> The Act authorizes the judicial council to take any appropriate action to assure the effective and expeditious administration of judicial business other than removing the judge from office.<sup>245</sup> The Act specifies that such action may include: (1) directing the chief judge of the district of the judicial officer whose conduct is the subject of the complaint to take such action as the judicial council considers appropriate; (2) certification of the judge’s disability; (3) a request to the judge to voluntarily retire at full pay; (4) a temporary order for a time certain precluding the assignment of any more cases to the judge; or (5) a public or private censure or reprimand.<sup>246</sup> The judicial council may refer any complaint and its recommendations to the Judicial Conference of the United States.<sup>247</sup> If the council determines that the judge has committed an impeachable offense, such referral is mandatory.<sup>248</sup> In the

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240. 28 U.S.C. § 372(c)(1) (1988). [*Editor’s note*: Amended by Pub. L. No. 101-650, § 402(a), 104 Stat. 5089, 5122 (1990) (adding text); *see supra* note 10.]

241. If the chief judge is the subject of the complaint, it is sent to the next most senior circuit judge. *Id.* § 372(c)(2).

242. *Id.* § 372(c)(3)(A). The chief judge may conclude the proceeding if he finds that corrective action has been taken, or he may dismiss the complaint if it fails to conform to the statute’s jurisdictional requirements, is directly related to the merits of a decision or procedural ruling, or is frivolous.

243. *Id.* § 372(c)(4). [*Editor’s note*: Amended by Pub. L. No. 101-650, § 402(b), 104 Stat. 5089, 5122 (adding text); *see supra* note 10.]

244. *Id.* § 372(c)(5)-(6). [*Editor’s note*: Paragraph (6) amended by Pub. L. No. 101-650, § 402(g), 104 Stat. 5089, 5122 (adding text and redesignating subparagraphs); *see supra* note 10.]

245. Doubtful about the constitutionality of permitting the judicial council to remove a judge, Congress specifically omitted the power of removal from the sanctions available to the judicial councils. *Id.* § 372(c)(6)(B)(vii).

246. *Id.* § 372(c)(6)(B). [*Editor’s note*: Amended by Pub. L. No. 101-650, § 402(g), 104 Stat. 5089, 5123 (adding text); *see supra* note 10.] Whenever any judge is certified as disabled and the President finds “that such judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability and that the appointment of an additional judge is necessary for the efficient dispatch of business,” the President shall appoint another judge with the advice and consent of the Senate. *Id.* § 372(b). Whenever any such additional judge is appointed, the vacancy caused by the subsequent departure of the disabled judge is not filled.

247. *Id.* § 372(c)(7)(A).

248. *Id.* § 372(c)(7)(B). [*Editor’s note*: Amended by Pub. L. No. 101-650, § 402(i), 104 Stat. 5089, 5123 (changing “has engaged” to “may have engaged”); *see supra* note 10.]

event of such referral, the conference may take any action short of removing the judge from office. If the conference concurs in the council's determination or makes its own determination that impeachment may be warranted, it must transmit its determination and the record of its proceedings to the House of Representatives for whatever action the House considers necessary.<sup>249</sup>

The Act was the product of a compromise between opponents of any change and proponents of a proposal to allow the judiciary to remove offending judges. Both the Act itself and the judiciary's implementation of it have generated considerable controversy. Some persons have attacked the Act for going too far, while others have attacked it for not going far enough. Logically, of course, these two groups cannot both be right. In fact, neither of them is.

#### a. The Act Does Not Go Too Far

Those who argue that the Act goes too far echo the dissents of Justices Black and Douglas in *Chandler*<sup>250</sup> and advance three principal arguments. First, they contend that the Act, by permitting judges to exercise over their colleagues a control that the Constitution reserves to Congress, threatens judicial independence and upsets the constitutional allocation of powers between Congress and the judiciary.<sup>251</sup> Critics of the Act allege that it authorizes *de facto* removal of article III judges by their colleagues by empowering judicial councils to suspend assignments to offending judges.<sup>252</sup> The Act's provision that such suspension is to be "on a temporary basis for a time certain" does not placate its critics, who point out that it fails to state a maximum "temporary" period or to provide for review of the suspension.<sup>253</sup> Second, Judge Edwards has suggested that the Act breaches the separation of powers because Congress lacks the power to delegate judicial discipline duties to the courts. In his opinion, this spurious delegation endangers constitutional doctrine by making the judiciary's continued jurisdiction over judicial discipline dependent

249. *Id.* § 372(c)(8). [Editor's note: Amended by Pub. L. No. 101-650, § 402(d), 104 Stat. 5089, 5123 (redesignating (8) as (8)(A) and adding text as (8)(B)); see *supra* note 10.]

250. For a discussion of *Chandler*, see *supra* notes 221-29 and accompanying text.

251. See Edwards, *supra* note 6, at 766 (concedes power of self-regulation to judiciary for all but impeachable offenses); Comment, *supra* note 6, at 1087-88; Note, *supra* note 6, at 143.

252. Comment, *supra* note 6, at 1083-84; Note, *supra* note 6, at 1132.

253. Note, *supra* note 6, at 1132 n.90.

on Congress's continued consent.<sup>254</sup> Finally, the Act has been criticized for denying 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.<sup>255</sup>

Despite these vigorous attacks on the Act, the Eleventh Circuit and the District Court for the District of Columbia have held it constitutional.<sup>256</sup> The Supreme Court, which denied certiorari in both cases, has not yet had occasion to review the Act's constitutionality. If the Court were to entertain the issue, it too should hold the Act constitutional. To be sure, the Act raises sensitive questions of separation of powers, judicial independence and due process. These questions are resolvable, however, in favor of the Act's constitutionality.

#### (1) The Act Does Not Threaten Judicial Independence

In considering whether the Act unconstitutionally intrudes upon judicial independence, one must first draw a distinction between the independence of the judiciary and the independence of individual judges. Circumscription of individual judges' independence does not invalidate the Act, for the independence of judges is not unlimited. As Judge Gesell observed in upholding the Act, it would be "naive and irresponsible" to "suggest that the judicial branch consists only of individual judges free to work or not work, cooperate or obstruct, uphold or demean court processes, acting however personal whim may dictate checked only by the remote chance of loss of office through impeachment."<sup>257</sup> The independence of judges is not an end in itself; it is a means to the end of justice. If judges are allowed so much independence that they may frustrate justice through myriad actions that do not constitute impeachable offenses, the principle of judicial independence defeats itself. Even Judge Edwards, who indicates that the Act is unconstitutional, has acknowledged that "individual judges are subject to some measure of control by their peers with respect to behavior or infirmity that adversely affects the work of the

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254. Edwards, *supra* note 6, at 787-88.

255. Note, *supra* note 6, at 1133-38.

256. Williams v. Mercer, 783 F.2d 1488 (11th Cir.), *cert. denied*, 485 U.S. 1014 (1986); Hastings v. Judicial Conference of the United States, 593 F. Supp. 1371 (D.D.C. 1984), *aff'd in part, vacated in part*, 770 F.2d 1093 (D.C. Cir. 1985), *cert. denied*, 477 U.S. 904 (1986).

257. Hastings, 593 F. Supp. at 1380.

court and does not rise to the level of impeachable conduct."<sup>258</sup>

Likewise, there is no indication that the Act has interfered with the independence of the judiciary. Although Congress through the Act has prescribed procedures for judicial discipline, it has given the judiciary itself the sole power to execute those procedures. Theoretically, of course, it would be better for the judiciary to develop its own procedures for discipline. But Congress, in assessing the need for the Act, concluded that the judiciary's own procedures were inadequate. By improving those procedures, the Act may have enhanced judicial independence. As Judge Campbell of the Eleventh Circuit observed in upholding the Act, "If judges cannot or will not keep their own houses in order, pressures from the public and legislature might result in withdrawal of needed financial support or in the creation of investigatory mechanisms outside the judicial branch which, to a greater degree than the Act, would threaten judicial independence."<sup>259</sup>

The Act has created the potential for real dangers. Judges could discipline their colleagues under the Act for political reasons; the mere threat of a complaint by a disappointed litigant might influence a judge's decision; or a judge might waste much time and money in defending himself against an unfair complaint. Yet the likelihood of such dangers does not seem particularly great. Judge Campbell noted that the threat of misuse of the complaint process to influence a judge's decision-making process was "extremely remote."<sup>260</sup> The court stated that it was "most unlikely that the members of an investigating committee and judicial council would be afflicted by any sort of parochialism and bias that would lead them to impose sanctions simply because a colleague was a 'maverick' or a member of a minority group."<sup>261</sup> The court concluded that the sanctions imposed by judges under the Act "would be impotent to do more than such judges could do on their own by snubbing the 'maverick' or publicly or privately criticizing him."<sup>262</sup>

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258. Edwards, *supra* note 6, at 785.

259. Williams, 783 F.2d at 1507. Similarly, in *Hastings*, Judge Gesell's opinion stated that judicial independence depends in part upon the public perception that the judiciary is "fair, impartial and efficient." *Hastings*, 593 F. Supp. at 1380.

260. Williams, 783 F.2d at 1510.

261. *Id.* at 1508.

262. *Id.* at 1509. The court correctly assessed the likelihood of misuse of the Act, but perhaps was unduly sanguine about the consequences of such abuse. The court did acknowledge, however, that "the personal pressures (and

The danger of political abuse created by the Act must be balanced against the need to maintain the competency and probity of the judiciary. After careful consideration of the need for such a measure, Congress decided that the Act was worth the risks that it presented. The Act has now been operative for nearly a decade and allegations of abuses and inequities arising under it have been few and far between. Aside from the controversial investigation of Judge Lord, only the investigation of Judge Hastings has inspired charges that the Act has been used for political purposes.<sup>263</sup> While possible that the investigations of Judges Lord and Hastings have had a chilling effect on other judges, there is little empirical evidence that this has occurred.

Any chilling effect that the Act might presently have may be ameliorated by reimbursing an exonerated judge for his reasonable expenses. The Administrative Office of the United States Courts already has interpreted existing law to authorize reimbursement,<sup>264</sup> and Representative Kastenmeier's bill specifically provides for it.<sup>265</sup> Under the terms of the proposed amendment to the Act, the judicial council would have the power to recommend that the director of the Administrative Office reimburse reasonable expenses, including attorneys' fees, incurred by a judge or magistrate during the investigation of a complaint.<sup>266</sup> The Department of Justice has endorsed this proposal,<sup>267</sup> as has

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sometimes the expense) of an investigation upon the complained-against judge may be great." *Id.* Several studies of the Act have pointed out that former District Court Judge Miles Lord, a controversial and outspoken jurist, was forced to spend \$70,000 to defend himself against charges of improper conduct, ultimately dismissed, arising out of his castigation of corporate officers of A.H. Robins for their alleged irresponsibility in marketing a defective intrauterine device. *See* Comment, *supra* note 6, at 1080-81; Note, *supra* note 6, at 1142. These authors suggest that the investigation of Judge Lord was politically motivated. *But see* Rieger, *supra* note 7, at 60-93. Professor Rieger contends that the investigation of Judge Lord did not represent an abuse of the Act. *Id.* at 92-93.

263. *See* Comment, *supra* note 6, at 1081-82.

264. *Hearings on H.R. 1620, supra* note 194, at 101 (statement of J. John C. Godbold). Judge Godbold testified that the Director of the Administrative Office, acting under 28 U.S.C. § 604(h), has interpreted existing law as authorizing him to respond affirmatively to recommendations by circuit councils to reimburse judges or judicial officers for attorneys' fees and other reasonable expenses in instances in which a complaint has been dismissed.

265. *See* H.R. 1620, *supra* note 10, § 101(g). [*Editor's note:* This amendment has been adopted. *See* Pub. L. No. 101-650, § 402(h), 104 Stat. 5089, 5123 (1990); *supra* note 10.]

266. *Id.* The money would come from funds appropriated to the federal judiciary. [*Editor's note:* This amendment has been adopted. *See* Pub. L. No. 101-650, § 402(h), 104 Stat. 5089, 5123; *supra* note 10.]

267. *Hearings on H.R. 1620, supra* note 194, at 313 (statement of Thomas M. Boyd, Director, Office of Policy Development, U.S. Dep't of Justice). Mr. Boyd



John C. Godbold, the director of the Federal Judicial Center and the former chief judge of the Eleventh Circuit.<sup>268</sup> Some groups have advocated that complainants should be reimbursed as well.<sup>269</sup> Ordinarily, their needs are not likely to be great, since judicial agencies undertake most of the investigatory work and prosecution.<sup>270</sup> Where, however, an individual or organization undertakes a substantial investigation of a judge prior to filing a successful complaint, reimbursement for reasonable expenses might be appropriate.<sup>271</sup>

## (2) The Act Does Not Intrude upon Congress's Impeachment Power

Just as the Act does not represent an undue intrusion by Congress upon the affairs of the judiciary, so too it does not generally interfere with Congress's exclusive power to remove federal judges. The language, the legislative history,<sup>272</sup> and the actual operation of the Act during the past decade make clear that the it does not supplant or supplement the impeachment process

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stated that some 37 cases would have qualified for such reimbursement during the 1987-88 reporting year. *Id.* at 315.

268. *Id.* at 101 (testimony of J. Godbold).

269. *Id.* at 366 (testimony of Janice Kamenir-Reznik, President of California Women Lawyers). At the hearings, Ms. Kamenir-Reznik stated:

[I]t is unclear to me why an exonerated judge should be entitled to reimbursement of his or her expenses, including legal fees, unless a prevailing complainant is also awarded the same benefit. Clearly, an individual or public interest organization who successfully pursues enforcement of the 1980 Act against an errant judge is as entitled as an exonerated judge to reimbursement of fees and expenses incurred. I would therefore propose a broadening of that provision to include reciprocal recovery rights.

*Id.*

270. *See id.* at 353 (testimony of Frances Kahn Zemans, Executive Vice-President of the American Judicature Society). Dr. Zemans explained that the American Judicature Society had not considered this issue. She suggested, however, that complainants' expenses might be less than the expenses incurred by judges insofar as the investigation is undertaken by the disciplinary body rather than the complainant. *Id.*

271. *See id.* (testimony of Rep. Berman). Representative Berman acknowledged that the courts might often undertake most of the investigation, but he stated that he also could "envision a situation where an organization concludes that some judicial conduct is worthy of complaint and spends a great deal of time and effort to develop an entire case, an examination of the whole judicial career of that judge and examination of many transcripts." *Id.*

272. *See, e.g.*, S. REP. NO. 362, *supra* note 238, at 4 ("[T]he purpose and goal of these new provisions is to establish a mechanism which deals with matters which for the most part fall short of being subject to impeachment. And, where impeachment may be appropriate, traditional constitutional procedures continue to govern.").

by permitting the removal of federal judges. As Judge Gesell stated, “[E]ven if one accepts the much-debated proposition that impeachment is the sole means of removing an Article III judge from office, it simply does not follow that other forms of discipline are foreclosed.”<sup>273</sup> Indeed, as Judge Gesell pointed out, Congress has “scrupulously observed the separation of powers by simply strengthening the judiciary’s ability to monitor its own performance.”<sup>274</sup>

Moreover, as the Eleventh Circuit pointed out, the Constitution’s impeachment provisions do not require the House itself to perform all preliminary investigatory functions that may influence its decision concerning whether to impeach. The court explained that it was unaware of any authority “that the House’s sole power to impeach necessarily entails the sole power to investigate.”<sup>275</sup> Since “[n]othing in the Act effects any change in the impeachment procedures or standards to be followed by the House,” the court properly concluded that “formally authorizing the judiciary to assume some initial fact-gathering responsibility with respect to complaints that may lead to impeachment does not intrude upon the House’s sole power of decision whether or not to impeach.”<sup>276</sup>

One portion of the Act deserves its critics’ concerns over separation of powers. The Act’s vague provision that a judicial council may refuse to assign any cases to a judge “on a temporary basis for a time certain” accords too much discretion to the judicial councils. The Senate Report cautioned that this sanction should be used only sparingly, in circumstances in which a judge is unable to handle her caseload.<sup>277</sup> The language of the statute potentially allows them to effect a *de facto* removal of a judge. In response to a hypothetical question from the *Hastings* court during oral argument, counsel for the appellees had stated that a ju-

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273. *Hastings*, 593 F. Supp. at 1371.

274. *Id.*

275. *Williams*, 783 F.2d at 1511.

276. *Id.* The court stated:

It seems clear that, even apart from the Act, any person—including an individual judge, a judicial council, or the Judicial Conference—may call the House’s attention to what he believes to be a potentially impeachable offense and to forward to the House any relevant evidence that he has obtained. The House is free to act upon this information or ignore it, as it chooses.

*Id.*

277. S. REP. NO. 362, *supra* note 238 at 9-10. The report indicated that a judge’s calendar should be suspended if the judge is under treatment for alcoholism or has an excessive backlog of cases. *Id.*

dicial council could properly suspend a judge for fifteen years. Judge Edwards stated in his concurring opinion that “[s]uspension for a fifteen year period strikes me as being the functional equivalent of removal. Should effective removal be available through council and Conference proceedings, Congress would retain little incentive to put itself through the cumbersome, time-consuming and painful process of impeachment.”<sup>278</sup> Similarly, one commentator has observed that the language of the Act

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. The judge whose future cases are thus taken away does retain her desk, her robe, her clerks and even her pay. 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 Constitution—the judge has been unconstitutionally removed from office.<sup>279</sup>

Similarly, another commentator has concluded that the judicial council’s ability to suspend a judge’s calendar violates the separation of powers doctrine because it “serves as the functional equivalent to removal from office.”<sup>280</sup> Reasoning that six months should provide adequate time for the members of a judicial council to fully investigate and evaluate any alleged malfeasance, another commentator has suggested an amendment that would limit suspension to six months.<sup>281</sup> It is not clear, however, that the purpose of the provision is to allow the council to complete its investigation, especially since the suspension is supposed to occur only after an initial investigation. A limitation of one year would allow ample time for a judge to reflect upon his misconduct and also would provide sufficient time for Congress to complete impeachment proceedings.<sup>282</sup>

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278. *Hastings*, 770 F.2d at 1109 (Edwards, J., concurring).

279. Note, *supra* note 6, at 1132.

280. Note, *Judicial Disciplining of Federal Judges Is Constitutional*, 62 S. CALIF. L. REV. 1263, 1287 (1989). Accordingly, the commentator has included that this sanction is unconstitutional. *Id.*

281. Comment, *supra* note 6, at 1090.

282. One commentator has proposed a maximum suspension of one year to be invoked only if the judge is found to have a physical or mental disability. See Note, *supra* note 280, at 1290.

**(3) The Act Does Not Violate Due Process**

The constitutionality of the Act also has been challenged on grounds of vagueness and overbreadth. Although the phrase "conduct prejudicial to the effective and expeditious administration of the business of the courts" is certainly broad, it would be difficult to frame a more specific provision. Indeed, this phrase cuts to heart of the Act's purpose. The Act's legislative history reveals that the standard was "intended to include willful misconduct in office, willful and persistent failure to perform duties of the office, habitual intemperance, and other conduct prejudicial to the administration of justice that brings the judicial office into disrepute."<sup>283</sup> Rejecting vagueness and overbreadth challenges to the Act, the Eleventh Circuit stated that the Act's language "certainly is clear enough" to put a judge "on notice that criminal misconduct, potentially impeachable offenses (such as the bribery charge against Judge Hastings), and violations of the Code of Judicial Conduct fall within its ambit."<sup>284</sup> Moreover, as Judge Gesell pointed out, the language indicates that administrative investigations will not be commenced unless there is a clear pattern of unethical judicial conduct.<sup>285</sup>

**b. The Act Goes Far Enough**

A second group of the Act's critics has denounced it as ineffective for not going far enough to eradicate judicial mischief. Professor Alan Dershowitz, who filed a complaint against a district judge who banished him from his courtroom, has denounced the Act's procedures as a "Kafkaesque charade."<sup>286</sup> He has charged that "[t]his is not a system to sanction judges, but to protect judges against complaints, and one that only the blind or the foolhardy would use."<sup>287</sup> Another lawyer who brought a com-

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283. S. REP. NO. 362, *supra* note 238, at 9.

284. *Williams*, 783 F.2d at 1513.

285. *Hastings*, 593 F. Supp. at 1382-83.

286. Margolick, *A Glimpse at the Secrets of Penalizing Judges*, N.Y. Times, July 14, 1989, at A1, col. 1. In 1987 Professor Dershowitz filed a complaint under the Act against a federal district judge in Rhode Island after the judge allegedly made derogatory comments about Dershowitz in a judicial opinion and banned Dershowitz from his courtroom. The judge's antipathy toward Dershowitz appears to have arisen out of critical remarks that Dershowitz had made concerning the Rhode Island judiciary. *Id.* Although a three-judge panel reprimanded the judge for the ban, its opinion was kept confidential and Dershowitz was warned that he could face contempt sanctions if he made public its contents. *Id.* at B8, col. 1.

287. *Id.*; see *Hearings on H.R. 1620*, *supra* note 194, at 406-53 (correspondence concerning Dershowitz complaint).

plaint under the Act has alleged that its procedures are “cloaked in mystery. Everything was sealed this and sealed that, and the judge you’re complaining about belongs to the same country club as the people hearing the complaint.”<sup>288</sup>

This group of critics points out that the large majority of complaints under the Act have been dismissed and that rarely have any resulted in action against judges.<sup>289</sup> For example, during the year ending June 30, 1989, only three of the 272 complaints that were concluded resulted in action against a judge.<sup>290</sup> Similarly, during the previous year, only three of the 222 complaints that were concluded resulted in action against a judge.<sup>291</sup> Professor Carol T. Rieger has stated that “the judiciary’s response to the Act raises serious questions about judges’ willingness to judge other judges.”<sup>292</sup> According to Professor Rieger, Congress perhaps left the judiciary with too much flexibility. “If the present trend continues,” she has suggested, “Congress should recognize that the Act may not only be useless but counterproductive,” since the summary dismissal of so many complaints causes public “frustration and resentment.”<sup>293</sup>

Although most complaints are dismissed, there is reason to suppose that such dismissals usually have been justified. The

288. Margolick, *supra* note 286, at B8, col. 2 (quoting Margie J. Phelps of Topeka, Kansas).

289. *See, e.g.*, Rieger, *supra* note 7, at 93-95.

290. Of the 214 complaints concluded by the chief judges, 167 were dismissed because they were found to directly relate to a decision or procedural ruling. Twenty-one were dismissed for failure to conform to the statute, 16 were dismissed as frivolous, five were dismissed because appropriate action already had been taken, and five were withdrawn. The judicial councils dismissed 55 of the 58 complaints that were sent to them. In two cases, the judicial council certified that the judicial officer had a physical or mental disability and recommended that the judge voluntarily retire. In the only other case, the council ordered that the judge be publicly censured. *Reports of the Proceedings of the Judicial Conference of the United States* 93-96 (1989). In the complaints pending during 1988-89, the principal allegations were prejudice or bias (114); abuse of judicial power (106); undue decisional delay (30); bribery or corruption (19); incompetence or neglect (19); and conflict of interest (17). Nine alleged mental disability, six complained about demeanor and three alleged physical disability. *Id.* at 95.

291. *Id.* at 96-99. Of the 182 complaints concluded by chief judges, 144 were dismissed because they were directly related to a decision or procedural ruling; 11 were dismissed because they were not in conformity with the Act; and 18 were dismissed as frivolous. Appropriate action was deemed to already have been taken on four matters, and five complaints were withdrawn. The judicial councils dismissed 37 of the 40 complaints that were sent to them. In one case, a judge was privately censured and in two others the councils ordered “appropriate action.” *Id.* at 98-99.

292. Rieger, *supra* note 7, at 94.

293. *Id.*

large majority of the complaints must be dismissed because they are directly related to a judicial decision or order.<sup>294</sup> Complaints that do not concern specific judicial action also may lack merit, such as complaints based on spurious rumors concerning a judge's private life.<sup>295</sup> Moreover, statistics concerning disposition of complaints under the Act may not reflect the full extent of the Act's effectiveness. The Act may have encouraged informal resolution of disciplinary problems that previously would have been ignored. As the circuit executive for the federal courts of the Seventh Circuit has stated, "The cold statistics do not report the extent of the problems on the bench, nor do they report the extent of the judiciary's corrective actions in dealing with these problems."<sup>296</sup> Judge Godbold has observed:

The administrative complaint procedure gives to a circuit chief judge and to a judicial council a platform, a tool if you will, for amelioration of complaints that come to them informally or are not properly filed. It opens channels of communication within the judiciary itself that, prior to section 372(c), both chief judges and councils were reluctant to open or employ because of doubt as to their power and responsibility with respect to the subject matter. Conversely, the act serves as a trigger to a judicial officer whose conduct is unofficially complained of that may bring him to address the problem voluntarily and to solve it informally. Others must speak for themselves, but in my own experience I found myself talking freely to judges whose non-decisional actions or conduct were troubling to some persons or constituen-

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294. See *supra* note 242. At the hearings on H.R. 1620, Judge Godbold, on the basis of his experience as chief judge of the Eleventh Circuit, explained: Disappointed litigants who did not understand the judicial system, having been faced with an adverse ruling of some kind, simply filed a complaint under section 372(c), and those complaints were dismissed by me with an order going to the complaining party saying this is not an alternative route of appeal nor is it a means to object to a judicial action or order that you do not like; you must address those through normal judicial procedures.

*Hearings on H.R. 1620, supra* note 194, at 86-87 (statement of J. Godbold).

295. *Hearings on H.R. 1620, supra* note 194, at 87.

296. Fitzpatrick, *Misconduct and Disability of Federal Judges: The Unreported and Informal Responses*, 71 JUDICATURE 282, 282 (1988). Mr. Fitzpatrick has noted that in recent years there have been "at least nine federal judicial officers who retired after a judicial misconduct complaint was filed or was looming in the background." *Id.* at 283. He concluded that resolution would have been unlikely in most of these cases "if the statutory judicial misconduct complaint procedure and remedies were not available." *Id.*

cies, when prior to section 372(c) I would not have felt at liberty to do so. And I found the judges almost unanimously responsive. There was no threat involved, express or implied. The statute simply had made judicial conduct that was unrelated to ruling and decisions a matter of shared concern that we could address without constraint or embarrassment. Discussions that had been viewed as almost taboo became a matter of courteous discourse between independent and highly motivated persons.<sup>297</sup>

According to Judge Edwards, “[I]t does *not* appear that the Act has resulted in the processing of charges that would have escaped scrutiny in the past.”<sup>298</sup> By permitting judges to initiate actions, the Act would enable the judiciary to take the initiative to ferret out, investigate and sanction misconduct about which only judges might have knowledge or which persons outside the judiciary might be loathe to complain.

Although Judge Edwards has contended that the formal procedures prescribed by the Act may discourage informal attempts by judges to resolve problems of judicial misconduct,<sup>299</sup> one of the amendments proposed in the Kastenmeier bill would ameliorate this danger by permitting the chief judge of a circuit to initiate proceedings.<sup>300</sup>

Although these proceedings would, of course, be formal

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297. *Hearings on H.R. 1620*, *supra* note 194, at 96-97.

298. Edwards, *supra* note 6, at 789 (emphasis in original).

299. *See id.* at 791-92; Letter from Judge Edwards to Representative Kastenmeier (April 18, 1989), *reprinted in Hearings on H.R. 1620*, *supra* note 194, at 183. Judge Edwards has stated that the Act may function as “a ‘security blanket’ under which a circuit can justify its disregard of a claim of misconduct . . . . By virtue of the passage of the Act, judges now focus on Congress’ prescription instead of the mechanisms that will best resolve serious problems of misconduct.” Edwards, *supra* note 6, at 791-92. Accordingly, Judge Edwards has expressed fear that the Act “may encourage the judiciary to ignore cases that fall between the cracks of the statute, but that would have been addressed before the Act was passed. It does not matter that the Act neither explicitly preempts the area . . . . The effect is the same as if it did.” *Id.* at 791.

300. H.R. 1620, *supra* note 10, § 101(a). The proposed amendment provides:

In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefore, identify a complaint for purposes of this subsection and thereby dispense with filing of a written complaint.

*Id.* [Editor’s note: This amendment has been adopted. *See* Pub. L. No. 101-650, § 402(a), 104 Stat. 5089, 5122 (1990); *supra* note 10.]

rather than informal, they would permit the investigation of misconduct that is unlikely to become known outside judicial circles or be the subject of complaints brought under the Act. Therefore, this reform would help to remedy the most serious deficiency of the Act—namely, that it is not calculated to lead to formal investigations of the sort of serious judicial misconduct that is likely to remain unknown to the lawyers and members of the general public who are the principal complainants under the Act.

Reports issued by a number of circuits in 1987 state that the Act is helping to prevent and remedy problems of judicial conduct and that the Act has helped to increase public confidence in the integrity of the judiciary. The Seventh Circuit, for example, declared that the mere existence of the remedy “provides a restraint to judicial misconduct and, most importantly, provides the Bar and litigants with the belief that they have recourse for alleged misconduct.”<sup>301</sup> The reports also emphasize that the Act has not eroded judicial independence.<sup>302</sup> Professor Stephen H. Burbank, who has carefully studied the implementation of the Act, has concluded that it has effectively accomplished the purposes for which it was enacted.<sup>303</sup> Moreover, the procedures for which the Act provides appear to be widely used. Through June 30, 1989, 1643 complaints had been filed, and 1573 had been resolved.<sup>304</sup>

Although the Act appears to be functioning effectively, various reforms might enhance its efficacy and fairness. These include the already mentioned suggestions to provide for initiation of proceedings by chief judges,<sup>305</sup> to permit successful judges and

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301. Burbank, *Is it Time for a National Commission on Judicial Independence and Accountability?* 73 JUDICATURE 176, 227 (1990). Similarly, Judge Pierce Lively of the Sixth Circuit testified in 1985 that the Act

gives the public a more visible and definite avenue for complaints against judicial officers of the United States as opposed to the condition before the passage of the act, when there was only a rather vague, undefined approach available to any attempt by a member of the public to register a complaint.

I think that the act adds to the public perception that Federal judges are accountable, and are in no sense above the law.

*Hearings Before the Judiciary Oversight Comm. of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 2 (1985).

302. Burbank, *supra* note 301, at 227.

303. *See id.* at 226-27; *Hearings Before the Subcomm. on the Constitution of the Comm. on the Judiciary United States Senate*, 99th Cong., 2d Sess. 28 (1986) (statement of Prof. Burbank).

304. Burbank, *supra* note 301, at 176.

305. *See supra* note 300 and accompanying text.



complainants to recover reasonable expenses,<sup>306</sup> and to provide a limit upon the period during which a judge may be suspended from office.<sup>307</sup> The Act should also be amended to permit greater public disclosure concerning investigations and actions under the Act<sup>308</sup> and to provide that the panel evaluating a judge's conduct should be composed of judges from other circuits.<sup>309</sup> Moreover, a judicial council or a special committee appointed under the Act should have the power to institute contempt proceedings against any judge or court employee who fails to comply with an order issued pursuant to the Act.<sup>310</sup> The Act also would function more

306. See *supra* notes 264-71 and accompanying text.

307. See *supra* note 282 and accompanying text.

308. The Kastenmeier bill would amend the Act to permit the judicial council in its discretion to release a copy of a report of a special investigative committee to the complainant and the judge who was the subject of the investigation. H.R. 1620, *supra* note 10, § 101(c)(2)(E). Under the existing law, records of a proceeding may be released only under two circumstances. Under § 14(A) of the Act, records in connection with impeachment proceedings may be released. Under § 14(B), records may be released when authorized in writing by the judge who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee. The bill also would amend the Act to require the House of Representatives to make publicly available the determination and reasons for determination of any judicial council that impeachment is warranted. *Id.* § 101(c)(1). These amendments would preserve a proper balance between any need for confidentiality and the needs of judges, complainants and the public to be informed about disciplinary proceedings. The amendments received widespread approbation. See, e.g., *Hearings on H.R. 1620*, *supra* note 194, at 90 (statement of J. Godbold); *id.* at 240 (statement of Prof. Burbank). The American Judicature Society has aptly concluded that the additional publicity accorded by the discretionary release of special investigatory committees' reports would alleviate "public frustration with enforcement mechanisms" and would enhance "public confidence in federal judicial discipline procedures." *Id.* at 336 (statement of Dr. Zemans). Representative F. James Sensenbrenner, Jr., of Wisconsin has expressed his hope that the provision for publicizing the information transmitted to the House might persuade a wayward judge to resign. *Id.* at 383. Commenting on the same provision, Judge Abner Mikva has properly noted that "[i]t is one thing to protect a judge from scurrilous or frivolous charges that are made, but if a judge is found guilty of some wrongdoing, that is no longer a private matter; that is a matter of the greatest public concern and interest." *Id.* [Editor's note: These amendments have been adopted. See Pub. L. No. 101-650, § 402(c), 104 Stat. 5089, 5122 (1990); *supra* note 10.]

309. See, e.g., Comment, *supra* note 6, at 1089. In making this recommendation, one commentator has aptly observed:

Judges from other circuits probably would not be as politically motivated as those from the accused judge's own judicial circuit. The panels would be more politically diverse due to the random rotation of the panel positions among judges of all circuits. A panel of judges from other circuits would not know the accused judge so well as—and presumably would have fewer personal biases than—the judges from the accused judge's own circuit.

*Id.*

310. This reform was embodied in the Kastenmeier bill, except that the bill

effectively if there were greater public awareness of its existence. At the recent hearings on H.R. 1620, the President of California Women Lawyers testified that "one of the most shocking aspects of the arena of federal judicial discipline is the almost uniform ignorance which prevails in the legal and lay communities with respect to the existence of the 1980 Act. . . . [T]he vast preponderance of the public is ignorant of its very existence."<sup>311</sup>

#### D. *Other Means of Insuring Judicial Integrity*

In addition to the protections afforded by the impeachment process and the Act, there are a number of means other than limitations on judicial tenure or dilution of the removal process by which the competence and integrity of the judiciary may be guarded. Preventative attempts to assure judicial integrity should begin with the judicial appointment process. As Professor Burbank has pointed out, there is no excuse for the President to nominate or the Senate to confirm any person whose background has not been thoroughly investigated to uncover evidence of misconduct or unacceptable disabilities.<sup>312</sup>

The Senate's growing recognition of the need for careful scrutiny of nominees is reflected in the increasing time and attention that it devotes to reviewing judicial nominees' records. While much of this additional attention is devoted to examination of the nominees' judicial philosophies, at least some of it concerns character and fitness. The Senate might further contribute to the development of judicial integrity if its members were more willing to facilitate the nomination of more individuals whose qualifications for judicial office were based more upon individual merit and less upon political connections. Professor Kurland has correctly contended that the essential problem of judicial disci-

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would not have permitted the institution of contempt proceedings for failure to comply with a subpoena issued under the Act. See H.R. 1620, *supra* note 10, § 102. The American Judicature Society concluded that the bill's provision for the contempt power "would certainly facilitate federal judicial discipline proceedings. This should prove to be particularly useful. . . . It may often be difficult to obtain information voluntarily because those in the best position to know the accused judge's behavior may be legitimately concerned about future appearances before that judge." *Hearings on H.R. 1620, supra* note 194, at 338 (statement of Dr. Zemans). [*Editor's note:* This reform, including the power to institute contempt proceedings for failure to comply with a subpoena, has been adopted. See Pub. L. No. 101-650, § 403, 104 Stat. 5089, 5124; *supra* note 10.]

311. *Hearings on H.R. 1620, supra* note 194, at 359 (statement of Janice Kamenir-Reznik); see also *id.* at 360, 365; *id.* at 354-55 (testimony of Janice Kamenir-Reznik).

312. Burbank, *supra* note 9, at 651-52, 658-59.

pline is not the removal procedure but rather "the process that has made federal judicial appointments prime patronage plums to be awarded by Senators in acknowledgement of party or personal loyalty."<sup>313</sup> While the selection of judges whose professional qualifications are more outstanding will not itself assure the eradication of judicial corruption, sloth or even incompetence, it is likely to decrease the incidence of those vices.

In addition to the selection of more qualified judges, there are many other means of encouraging judicial honesty and competence. One means of assuring a high caliber bench, for example, may be to increase judicial salaries.<sup>314</sup> The often neglected remedy of mandamus also may provide a means of encouraging proper judicial conduct.<sup>315</sup> The liberal statutory provisions for retirement likewise offer a safety valve.<sup>316</sup> The provisions for appointment of additional judges to supplement the services of disabled judges also guard against the dangers of lifetime tenure and the limitations of the impeachment process.<sup>317</sup> Finally, there is no substitute for awareness and sensitivity among judges to the need for ethical behavior. Just as the construction of more prisons fails to attack the roots of crime in society, so the improvement of measures for judicial removal and discipline does little to preclude the commission of acts and attitudes that necessitate those procedures. Fortunately, judges, lawyers, legislators and citizens are increasingly cognizant of the need for clearer standards and rules for judicial ethics. Accordingly, a task force on judicial responsibility has aptly recommended "that attention to ethical issues and to the interpersonal skills commonly described as judicial temperament be a continuing part of judicial education, for newly appointed and experienced judges alike."<sup>318</sup> The

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313. Kurland, *supra* note 145, at 666. Similarly, Representative Thompson and Professor Pollitt have argued that "[t]he answer lies not in 'impeachment' after the fact, but in curing the initial appointive processes." Thompson & Pollitt, *supra* note 192, at 120. Janice Kamenir-Reznik, president of California Women Lawyers, contends that a more "thorough and open appointments process" would tend to ameliorate problems of judicial discipline. *Hearings on H.R. 1620*, *supra* note 194, at 356.

314. See Burbank, *supra* note 301, at 226.

315. See Ward, *Can the Federal Courts Keep Order in Their Own House? Appellate Supervision Through Mandamus and Orders of Judicial Councils*, 1980 B.Y.U. L. REV. 233, 238-47; see also Battisti, *supra* note 145, at 722.

316. 28 U.S.C. §§ 371-372(a) (1988).

317. *Id.* § 372(b).

318. *Hearings on H.R. 1620*, *supra* note 194, at 396 (joint statement of Prof. A. Leo Levin, chairman, and J. Abner J. Mikva, member of the Task Force on Judicial Responsibility of the Twentieth Century Fund).

adoption of the revised Model Code of Judicial Conduct<sup>319</sup> by the ABA in August 1990 is the most recent manifestation of a growing awareness of the need to continue to define and refine rules and aspirations for judicial conduct.

## V. CONCLUSION

Recent proposals to limit the tenure of federal judges and to provide alternatives to the impeachment process are unnecessary and potentially pernicious. Despite the recent gust of judicial impeachments, there is not yet any reason to suppose that judicial corruption is flourishing or that impeachments will become so common as to intolerably burden Congress. While the continued increase in the number of federal judges and the growing public demand for higher judicial standards has magnified the need for means to promote judicial competence and probity and to discipline judicial misconduct, these means already exist and function effectively.

In addition to the impeachment process and the informal relations among judges that have helped to assure the integrity of the judicial process during the past two centuries, the Judicial Conduct and Disability Act of 1980 provides a means of preventing, investigating, correcting and disciplining judicial misconduct. Contrary to the allegations of some of its critics, the Act neither unduly intrudes upon judicial independence nor violates the doctrine of separation of powers. Although the Act increases judicial accountability and represents a largely unprecedented regulation by Congress of the internal affairs of the judiciary, the Act was necessary to assure judicial competence and integrity. There is no empirical evidence to suggest that it has chilled judicial independence.

In addition to being superfluous, any constitutional amendments concerning judicial tenure or removal would be dangerous insofar as they would have a tendency to erode the quality and the independence of the judiciary. Abrogation of life tenure would deprive the courts of the skills of seasoned jurists and would create the danger that judges would permit professional prospects to influence their decisions. While the public perception of this danger might be greater than its reality, any proposal that would diminish public confidence in judicial impartiality and independence is itself cause for alarm. Proposals for limitations

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319. See MODEL CODE, *supra* note 179.

on the tenure of Supreme Court Justices are particularly unwise because the need for public confidence in the probity of the Justices is especially compelling. The rigors of the appointment process should help to assure the appointment of qualified and honest Justices, and the intense scrutiny of the news media should help to assure the continued integrity of the Justices.

Encroachment on Congress's exclusive power to remove Justices likewise would be ill-advised. Although the impeachment process is cumbersome and may permit the continued service of some inept or venal jurists, the rigors of the present removal process guard against arbitrary or politically-inspired ouster of judges. The creation of a court for removal of federal judges would invite politicization of the removal process and erosion of judicial independence since such a court would lack public accountability and could operate with precipitous efficiency. Proposals for such a court are also dangerous to the extent that they would permit removal of Justices for lesser offenses than the impeachment process has required. The commission of actual crimes and the worst derelictions of integrity should remain the standards for removal. Any other standard would subject judges to the caprices of popular passions and partisan intrigues and would deprive judges of the high measure of independence that enables them to serve as the balance wheel of democracy.