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Judicial Discipline: A Legislative Perspective

By Robert W Kastenmeier* and Michael J Remington**

In 1980 the Congress adopted public law 96-458, the Judicial Tenure and Disability Act. This act has been largely ignored by the Federal judiciary [1]

In the long run, Mr President, it seems to me that some hard questions should be posed as to whether impeachment by the Congress is appropriate for Federal judges.[2]

I believe that the citizens of our country will agree that those who have been convicted of felonies should not occupy positions of trust and responsibility in our Government.[3]

I feel that the current procedure for impeaching Federal judges is unworkable.[4]

Introduction

These statements, made by Senators in anticipation of or in response to the removal of Judge Harry T Claiborne from office, signal a clear congressional concern about the health of

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[1] 132 Cong. Rec. S8746 (daily ed. June 26, 1986) (statement of Sen. DeConcini).

[2] *Id.* at S16,789 (daily ed. Oct. 16, 1986) (statement of Sen. Dole).

[3] *Id.* at S7867 (daily ed. June 18, 1986) (statement of Sen. Thurmond).

[4] 133 Cong. Rec. 4990 (daily ed. Apr. 9, 1987) (statement of Sen. Heflin); *see* Heflin, *The Impeachment Process: Modernizing an Archaic System*, 71 Judicature 123 (1987) ("I have concluded that our current impeachment rules were written for an era that has passed and a Congress that has changed.").

judicial discipline law, both that rooted in constitutional text and that contained in the statute books.[5] The impeachment conviction of a sitting federal judge in 1986, the first in almost fifty years, rightfully magnified attention on the general subject of judicial discipline.

Impeachment proceedings bring heavy political armaments into action and only occur rarely Since the drafting of the United States Constitution two centuries ago, the House of Representatives has conducted only fifteen impeachments.[6] Following on the heels of these impeachments, the Senate has conducted twelve impeachment trials. Only five have resulted in convictions and removals from office.[7] 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.

In 1987, the Constitutional Bicentennial year, we rightfully celebrated the written document that serves as the charter of our government, noting the resiliency and flexibility of the text. We not only feted the past, but looked to the future. We applauded what was right about the Constitution and not what was wrong.

The Claiborne impeachment and the Bicentennial, considered together, bring into focus both the resiliency and the fragility of our government charter. They lead us not into complacency, but to search for answers about what makes our system work. Our mission should be to reassess and not to react. If we are serious about preserving our democratic system of government, we should ask some tough questions. We should not ignore defects in the constitutional text in light of present day problems. Nowhere

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[5] The Chairman of the House Managers in the Claiborne impeachment feels that the system worked well. Chairman Peter W Rodino, Jr., observed: "the proceeding reaffirmed both the delicacy and durability—as well as the wisdom—of existing constitutional procedures." Rodino, *The Compact with the People*, 27 SANTA CLARA L. REV. 471, 480 (1987).

[6] Two civil officers—Judge Mark Delahay and President Richard Nixon—resigned from office before the full House adopted articles of impeachment but after proceedings had started. Of the 15, 11 have been federal judges.

In this Article, "impeachment" is used in the broadest sense to include the House power to engage in an impeachment inquiry and not merely the Senate trial and potential removal from office power.

[7] *See* STAFF OF HOUSE COMM. ON THE JUDICIARY, 93D CONG., 1ST SESS., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 17 n.84 (1974).

are the questions more difficult than in the area of separation of powers and the accountability of high-ranking public officials.

The debate about judicial discipline and ethics is not exactly a new one. Nor are proposals for legislative change and constitutional amendments. The very first Congress provided that a judge convicted of accepting a bribe "shall forever be disqualified to hold any office of honour, trust or profit under the United States."[8] Heated debate arose in Congress during the impeachment proceedings of federal Judge John Pickering in 1803. The first constitutional amendment to establish a removal mechanism as an alternative to impeachment was introduced in 1791, and between 1807 and 1812 nine more constitutional amendments were proposed as a result of the impeachment and attempted removal of Supreme Court Justice Samuel Chase.[9] In reaction to the last impeachment and removal from office of a federal judge (Judge Halsted Ritter) prior to the impeachment and conviction of Judge Claiborne, a number of constitutional amendments and statutory changes were proposed.[10] Significant among these were the bills introduced by the Chairman of the House Committee on the Judiciary, Hatton Summers.[11] Proposals to amend the Constitution have been short-lived, but they should be taken seriously as political barometers. Today, in the wake of the Claiborne proceedings, amendments and cries for congressional vigilance are again on the rise.[12] Proposals for change key into a loss of public confidence about the trustworthiness of all public officials, with that confidence thought to have eroded badly in the recent past.[13]

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[8] Section 21 of the Act for the Punishment of certain Crimes against the United States of April 30, 1790.

[9] *See The Judicial Tenure Act: Hearings on S. 1423 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 32 (1977).

[10] *See* AMERICAN ENTERPRISE INSTITUTE JUDICIAL DISCIPLINE AND TENURE PROPOSALS (1979), *reprinted in Judicial Tenure and Discipline 1979-80: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 507, 511-12 (1980) [hereinafter *1979-80 House Hearings*].

[11] *Id.* at 512; *see, e.g.*, 81 CONG. REC. 6164 (1937).

[12] *See* S.J. Res. 113, 100th Cong., 1st Sess. (1987) (Heflin); H.R.J. Res. 364, 100th Cong., 1st Sess. (1987) (Klescka).

[13] As was aptly observed by one of the sponsors of judicial discipline legislation

During the post-Watergate era, Congress enacted a variety of statutory schemes to promote high ethical standards by public servants. That the national interest requires the very best judges has always been true but never more so than today To ensure the delivery of quality justice, judges are subject to canons of judicial ethics, financial disclosure requirements, judicial disqualification standards, and a judicial discipline statute.[14] Members of Congress and high ranking executive branch officials are similarly treated.

In 1980, Congress enacted judicial discipline legislation by building on the pre-existing structure of the judicial councils of the circuits and the Judicial Conference of the United States, and by creating a mechanism and procedures within the judicial branch to consider and respond to complaints against federal judges. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980[15] (1980 Act), in considerable detail, restructured the councils to include district judge representation and set forth the process to be followed in resolving complaints against judges. The Act contemplated that most complaints would be dismissed or resolved at a regional level, but that the most important would be processed to the Judicial Conference and perhaps ultimately to the Congress. The Act was the result of several years of cooperation and good communications among the three branches of government.[16]

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during Senate floor debate,

> We all must recognize the unfortunate fact that public confidence in Government has been eroded over the past few years for many reasons, and it will continue to decline unless affirmative steps are taken, in each branch of Government, to stimulate renewed trust in public officials and institutions.

124 CONG. REC. S14,748 (daily ed. Oct. 7, 1978) (statement of Sen. Nunn).

[14] *See* ABA CODE OF JUDICIAL CONDUCT (1972); 28 U.S.C. §§ 301 *et seq.*, 455; and 372(c).

[15] Pub. L. No. 96-458, 94 Stat. 2035 (1980). The Act's circuit council reform is codified at 28 U.S.C. § 332, and the Act's disciplinary procedures are codified at 28 U.S.C. § 372(c).

[16] For a comprehensive review of the 1980 Act, including its contents and history, see Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV 283 (1982) (on the discipline provisions); Remington, *Circuit Council Reform: A Boat Hook for Judges and Court Administrators*, 1981 B.Y.U. L. REV 695 (on the federal judicial circuit council reform).

The purpose of this Article is to discuss the general topic of judicial discipline. Discussion will occur under five general subject headings: (1) separation of powers and the resulting tensions; (2) reflections about enactment of the 1980 judicial discipline legislation; (3) an analysis of what has occurred since 1980; and (4) an examination of several amendments that could be made not only to the 1980 Act but also to other sections in the United States Code. The Article concludes that the current system is working tolerably well; that some statutory changes to the 1980 Act are needed and that a study commission on judicial impeachment and removal is appropriate, but that constitutional amendments are not necessary; and that all three branches of government need to be more vigilant in providing for the care and well-being of the Constitution. A copy of proposed legislation is included.

I. SEPARATION OF POWERS AND RESULTING TENSIONS

The 1980 Act[17] would never have been passed if the proponents and the authors of the legislation had not been able to navigate the rocky shoals of separation of powers. It took almost fifty years to chart the path. The legislative delegation of power to the judicial branch of government to discipline judges does raise delicate constitutional questions, but do not forget that the judiciary itself implemented much of the contemplated reform, by rule and in reliance on a different statute,[18] prior to enactment. The judiciary had and continues to have inherent power to establish internal operating procedures in a broad variety of areas, including discipline.

Ours is truly a constitutional system of government based on a separation of powers among the legislative, executive, and judicial branches. Montesquieu's theory that the powers of government should be strictly separated, one from the other, certainly had great meaning among our forefathers and has continuing validity today In the modern age of the telephone and shrinking geographic distances, however, the crystalline edges of separation of powers may have become a bit dulled.

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[17] *See supra* note 15 and accompanying text.

[18] 28 U.S.C. § 332 (1948).

Although the Supreme Court has made pronouncements that ascribe great rigidity to the constitutional scheme of separation that plainly does not exist,[19] the more considered opinions discuss the elasticity of the concept.[20] Before ratification of the Constitution, Madison observed that the proposed scheme sought a "balance of powers and interests."[21] Responding to criticism about the blending of powers, he explained that Montesquieu "did not mean that these departments ought to have no *partial agency* in, or no *controul* over the acts of each other."[22]

We know that instead of concentrating power in a single institution, the founding fathers chose to disperse authority among three independent and autonomous branches of government, empowering the leaders of each branch with the "necessary constitutional means and personal motives to resist encroachments of the others."[23]

As befits this system of separated and interdependent powers with checks and balances, there is a counterweight to the congressional authority to oversee and to legislate for the federal judiciary The framers promoted the autonomy of the judicial branch by providing lifetime tenure for judges,[24] erecting a bar against the diminution of salary while in office,[25] and equipping the federal judiciary with the power to review congressional enactments.[26] In turn, the framers provided another counterweight to the lifetime tenure clause by providing that federal judges could be impeached and removed from office.[27] The

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[19] Kilbourn v. Thompson, 103 U.S. 168, 190-91 (1881) ("[T]he perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined.").

[20] Buckley v. Valeo, 424 U.S. 1, 121 (1976); Springer v. Philippine Islands, 277 U.S. 189, 201-02 (1928); Myers v. United States, 272 U.S. 52, 116-27 (1926).

[21] 2 *The Records of the Federal Convention of 1787* (M. Farrand rev. ed. 1937) at 77.

[22] THE FEDERALIST Nos. 47-48, at 337-38 (J. Madison) (B. Wright ed. 1961) (emphasis in original).

[23] *Id.* at No. 51, at 356 (J. Madison).

[24] U.S. CONST. art. III, § 1 ("The Judges shall hold their Offices during good Behaviour. ").

[25] *Id.*

[26] *Id.* at § 2, cl. 1.

[27] *Id.* at art. II, § 4 ("[A]ll 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.").

founding fathers did not guarantee the independence of officeholders in such an absolute way as to threaten the orderly functioning of the officeholder's branch of government. The whole purpose of the Constitution was to avoid despotism. As has been constantly recognized during this nation's history, the independence, autonomy, and integrity of a branch of government must take precedence over the independence of an individual officeholder.[28]

This blending of powers and principles provides our country with institutionalized tension between and within the branches of government and places it at the very heart of American polity The level of tension, like a child's temperature, need only concern us when it is too high or too low

During the past year, as we celebrated the two hundredth anniversary of the United States Constitution, our focus has been not so much on changing the Constitution but on finding ways to improve its workings for the next century We have studied the evolving nature of our charter and have not ignored its weaknesses. As Justice Thurgood Marshall noted, we see "that the true miracle was not the birth of the Constitution but its life, a life nurtured through two turbulent centuries of our own making, and a life embodying much good fortune that was not."[29]

One of the critical weaknesses between the branches is their inability to communicate effectively with each other. In the most recent Federalist Paper, Publius (a/k/a Judge Frank Coffin) observes: "The Judiciary and the Congress not only do not communicate with each other on their most basic concerns; they do not know how they may properly do so."[30] Lack of understanding among the three coordinate branches is a "chronic, debilitating fever"[31] that affects the entire body politic. Admittedly, the weakest branch, the judiciary, needs protection; but

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[28] *See, e.g.,* Nixon v. Administrator of General Servs, 433 U.S. 425, 441 (1977); United States v. Nixon, 418 U.S. 683 (1974); United States v. Brewster, 408 U.S. 501 (1972).

[29] Remarks of Thurgood Marshall, San Francisco Patent and Trademark Law Association Annual Seminar (May 6, 1987).

[30] Coffin, *The Federalist No. LXXXVI on Relations Between the Judiciary and Congress*, BROOKINGS REV., Winter-Spring 1986, at 27.

[31] *Id.*

it also needs accountability and ethics. Judicial independence and accountability are like oil and vinegar; they mix with shaking, and the result is better than either part alone.

In discussing the subject of judicial discipline and impeachment, we witness first-hand institutionalized tension, a tension that, when properly harnessed, can be constructive. An understanding of this tension leads us to the inescapable conclusion that any statutory solution to the "discipline" problem must involve all three branches of government. The only alternative is by way of constitutional amendment and a reallocation of respective powers between the branches. At present, this alternative, fraught with risks, is not necessary

II. REFLECTIONS ON THE JUDICIAL DISCIPLINE ACT OF 1980

An analysis of the 1980 Act[32] reminds us of three basic facts: the Act was the product of consensus and compromise; a serious effort was made to ensure the Act's constitutionality; and the Act was passed with the understanding that congressional oversight would be vigilant.

In 1980, Congress was importuned to "measure the need for the legislation and then to craft a logical, economical and fair solution to the problem."[33] In response, a policy objective was identified: "[T]o improve judicial accountability and ethics, to promote respect for the principle that the appearance of justice is an integral element of this country's system of justice, and, at the same time, to maintain the independence and autonomy of the judicial branch of government."[34] With the cooperation of the three branches of government,[35] a compromise-consensus piece of legislation was developed to meet these policy needs. In this regard, a reading of the House and Senate hearings held on judicial discipline legislation reveals the fingerprints of each of the three branches.[36]

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[32] *See supra* note 15 and accompanying text.

[33] 126 CONG. REC. H8785 (daily ed. Sept. 15, 1980) (statement of Rep. Kastenmeier).

[34] *Id.* at S13,858 (daily ed. Sept. 30, 1980) (statement of Sen. DeConcini).

[35] The three branches of government worked together at the highest level. Chief Justice Burger was personally involved as was Attorney General Benjamin Civiletti.

[36] *See 1979-80 House Hearings, supra* note 10, at 53-106 (statements of Judges

The judicial branch itself was especially active. Since 1940, the Judicial Conference and its subcommittees have devoted enormous time and energy to this difficult subject. In 1979, after a full year of sustained study, the Conference concluded that judicial discipline legislation could be supported if it respected several principles.[37] To achieve this end, the Conference prepared a draft bill. The bill was refined by staff and ultimately introduced in the House.[38] Even before final enactment of a public law, a majority of the circuits' judicial councils implemented the resolution of the Judicial Conference, creating their own complaint mechanisms.[39]

The drafters took utmost care to ensure the bill's constitutionality The admonition that conscientious legislators have an independent obligation to identify and resolve constitutional

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Browning, Wallace, and Hunter (for the judiciary)); *id.* at 159-83 (statement of Assistant Attorney General Rosenberg (for the executive)); *id.* at 126-45 (statements of Chairman Rodino and Ranking Minority Member McClory (legislative perspectives)).

[37] *Id.* at 57. The principles were stated as follows:

> (a) Removal of an Article III judge from office by any method other than impeachment as provided in Article I of the Constitution would raise grave constitutional questions which should be avoided.
>
> (b) The primary responsibility for dealing with a complaint against a United States judge should rest initially with the chief judge of the circuit as presiding judge of the Judicial Council, who may dismiss the complaint if it is frivolous or relates to the merits of a decision or procedural ruling, or may close the complaint after assuring himself that appropriate corrective action has been taken.
>
> (c) Any complaint not dismissed or closed by the presiding judge should be referred to a committee appointed by the presiding judge, consisting of an equal number of circuit and district judges and the presiding judge.
>
> (d) The joint committee should report its findings and recommendations to the Judicial Council, which should take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit.
>
> (e) The Judicial Council may, in its discretion, refer a complaint and the Council's recommended action to the Judicial Conference of the United States.
>
> (f) If the Judicial Council concludes that grounds for impeachment may exist, it should transmit the record upon which its conclusion is based to the Judicial Conference of the United States; the Judicial Conference shall then determine whether, in all the circumstances, the matter should be referred to the House of Representatives.

[38] *See* H.R. 6330, 96th Cong., 2d Sess. (1980).

[39] *See 1979-80 House Hearings, supra* note 10, at 57, 67, 70-72.

questions[40] was taken seriously The House Committee on the Judiciary reviewed its own documents on the constitutional grounds for impeachment that the Nixon impeachment inquiry staff prepared, received extensive testimony on the issue, and requested and reviewed a study that the American Law Division of the Library of Congress prepared addressing the constitutional questions.[41] The House Report[42] has a special section on constitutionality The Senate requested its own constitutional analysis of the proposed legislation.[43] Then, the issue was debated at some length on the Senate floor.[44]

From a policy perspective, while the judicial discipline legislation was being drafted, several Members of Congress were doubtful about whether the Act would work. Promises that vigilant congressional oversight would occur were heard during floor debate in both Houses. Senator DeConcini called for the exercise of a "vigorous oversight responsibility,"[45] and Representative Butler impressed on his colleagues the "importance of conducting congressional oversight in this most sensitive area."[46] To facilitate this congressional oversight, the Act contains a

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[40] Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV 585, 587 (1975).

[41] AMERICAN LAW DIVISION OF THE LIBRARY OF CONGRESS, CONSTITUTIONAL ISSUES RAISED BY THE PROPOSED JUDICIAL CONDUCT AND DISABILITY ACT OF 1979 (J. Killian 1979), *reprinted in 1979-80 House Hearings, supra* note 10, at 697-730.

[42] H.R. REP. No. 1313, 96th Cong., 2d Sess. (1980).

[43] Johnny H. Killian, a highly respected specialist in American public law and the author of the House analysis, prepared the constitutional analysis, which is *reprinted in* 125 CONG. REC. S15,380 (daily ed. Oct. 30, 1979).

[44] *Id.* at S15,389 (statement of Sen. Mathias); *id.* at S15,393 (statement of Sen. Heflin); *id.* at S15,412 (statement of Sen. Hatch).

During the Senate debate, the following interchange occurred:

> Senator Heflin: "[W]hen an issue of constitutionality comes before the Congress, which affects the judiciary, should there not be a higher standard of care on the part of Congress in looking at the constitutionality of proposed legislation when we realize that if it affects the branch that would have to consider and determine whether or not it is constitutional? It would seem to me to place a higher degree of care on Congress "
>
> Senator Mathias: "The Senator is correct. There is a much higher standard of care required here."

Id. at S15,391.

[45] 126 CONG. REC. S13,858 (daily ed. Sept. 30, 1980).

[46] *Id.* at H8788 (daily ed. Sept. 15, 1980).

statistical report provision requiring the Director of the Administrative Office of United States Courts to include in his annual report a summary of judicial discipline and disability complaints.[47] In addition to the need for oversight, it was observed that "there should be a continuing dialog between the legislative and judicial branches. "[48]

III. DEVELOPMENTS SINCE ENACTMENT OF THE 1980 ACT

Much has transpired since President Carter signed Public Law 96-458 on October 15, 1980.[49] Seven years of experience under the Act can be distilled to the following observations and propositions: (1) the judiciary was generously allowed a one-year grace period to prepare for implementation of the Act (which became effective on October 1, 1981); (2) since 1981 more than a thousand complaints have been processed, and the Judicial Conference has recommended implementation of illustrative rules; (3) challenged on constitutional grounds, to date the Act has withstood judicial scrutiny; (4) the Act has not disrupted the autonomy of the judicial branch; and (5) the promised congressional oversight has occurred but has been somewhat sporadic. The judicial discipline mechanism does not exist in a vacuum, and, therefore, several outside factors have affected it during its short lifespan. Since 1980, the United States Department of Justice has prosecuted three federal judges, convicting two of felony offenses. In 1986, the House Committee on the Judiciary created an important precedent for impeachment, deciding that a judge cannot be impeached for the act of judicial decisionmaking. Finally, as the size of the federal judiciary has continued to grow, the problems of ethics and discipline have increased proportionally Each of these items deserves separate discussion.

Implementation. Despite the fact that most of the circuit councils had promulgated discipline rules prior to enactment of the 1980 Act, Congress manifested its respect for the judicial

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[47] Pub. L. No. 96-458, § 5, 94 Stat. 2035, 2040-41 (1980) (codified as 28 U.S.C. § 604(h)(2)(1980)).

[48] 126 CONG. REC. H10,191 (daily ed. Oct. 1, 1980) (statement of Rep. Kastenmeier).

[49] The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980) (codified at 28 U.S.C. §§ 332, 372 (1980)).

branch by allowing an inordinately long transition period. Signed by President Jimmy Carter on October 15, 1980, the Act became effective on October 1, 1981.[50] In the context of legislation affecting the structure of the judicial or executive branches, a one-year delayed effective date is an inordinately long period of time to allow for implementation, especially when the governmental entity has promoted the legislation in advance. At the very least, the long transition period is another palpable sign of congressional respect for the autonomy and independence of the judiciary When the Act finally became effective on October 1, 1981, eleven circuit councils had promulgated revised rules to implement the Act; the recalcitrant Tenth Circuit continued to rely on rules that were first issued in 1978.

The initial set of post-Act rules was criticized as not meeting the purposes and goals that Congress clearly contemplated.[51] Among the criticisms were the following: the rules did little more than track the provisions of the Act; the rules were not uniform on a number of subjects requiring uniform treatment; some rules conflicted with the Act's specific procedural guidelines; and rule-making and reporting under the Act were not faithful to the Act's goal of public accountability [52] Finally, it was recommended that the Judicial Conference use its powers to fashion model rules to serve congressional dictates more effectively [53]

Illustrative Rules. Recently, the Judicial Conference recommended that model rules, developed by a special committee of the Conference of Chief Judges of the United States Courts of Appeals, be substantially adopted by the circuit councils on an experimental basis.[54] The model rules provide answers to many unresolved procedural questions. Already accepted in major part by all but one of the circuit councils, these rules will serve to create uniformity and reduce internal tensions within the federal judiciary caused by the clash between localism (the regional circuit councils) and centralization (the Judicial Conference).

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[50] *Id.* at § 7.

[51] *See* Burbank, *supra* note 16, at 289.

[52] *Id.* at 290.

[53] *Id.* at 290-91.

[54] FEDERAL JUDICIAL CENTER, ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY, viii (1986) [hereinafter ILLUSTRATIVE RULES].

One respected commentator has aptly observed that both the process of formulating the rules and the final work-product "represent major advances in the federal judiciary's effort to engage in responsible self-regulation that adequately respects the legitimate interests of Congress and the public."[55] The judicial branch deserves much credit for its illustrative rulemaking endeavor.

Constitutionality Every court that has adjudicated cases challenging the Act has found that it passes constitutional muster.[56] Several lawsuits have attacked the Act as an impermissible method of circumventing the only constitutional mechanism for disciplining federal judges: impeachment. The Supreme Court has not made a definitive statement, but several courts have upheld the Act's constitutionality In 1986, the Eleventh Circuit found that the statute, far from being an unconstitutional encroachment on the autonomy of the federal judiciary, strengthened the independence of the judicial branch as a whole.[57] Finding that the judiciary has a direct interest in keeping its own house in order, the Eleventh Circuit observed that "a credible internal complaint procedure can be viewed as essential to maintaining the institutional independence of the courts."[58] In 1984, the District Court for the District of Columbia rejected a frontal attack on the Act's constitutionality, finding that it represented a legitimate exercise of Congress' "necessary and proper" authority·

> By redefining the composition of the Judicial Councils and enhancing and perfecting their inherent authority, Congress was in no respect intruding upon judicial independence. Rather, it was simply recognizing the need to give the courts reasonable means to put the judiciary's own house in order.[59]

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[55] Burbank, *Politics and Progress in Implementing the Federal Judicial Discipline Act*, 71 JUDICATURE 13, 16 (1987).

[56] *In re* Certain Complaints Under Investigation, 783 F.2d 1488, 1502-15 (11th Cir. 1986), *cert. denied,* 106 S. Ct. 3273 (1986); Hastings v. Judicial Conference of the United States, 770 F.2d 1093, 1103 (D.C. Cir. 1985), *cert. denied,* 106 S. Ct. 3272 (1986); Hastings v. Judicial Conference of the United States, 593 F Supp. 1371, 1379-84 (D.D.C. 1984) (upholding constitutionality), *cert. denied,* 106 S. Ct. 3272 (1986).

[57] *In re Certain Complaints Under Investigation,* 783 F.2d at 1507.

[58] *Id.*

[59] *Hastings,* 593 F Supp. at 1380.

Perhaps, in the near future, the Supreme Court will consider a constitutional challenge to the statute and lay to rest all doubts about any infirmities.

Judicial autonomy From a policy perspective, the 1980 Act certainly has neither disrupted the autonomy of the judicial branch nor affected its ability to function. The original cost-estimate of the Congressional Budget Office on the Act, prepared in reliance on data provided by the Administrative Office of the United States Courts, stated that the federal judicial branch would need fifteen additional staff positions to "process 2,300 complaints per year."[60] From October of 1981—when the Act became effective—until June 30, 1987, 1153 complaints were filed.[61] As was expected, the chief judges dismissed most of these complaints. During 1986-87 there were 232 complaints filed against judicial officers, a decrease of approximately twenty-six percent from the previous reporting year, when 312 complaints were filed.[62] The 1987 statistics show that the allegation most often cited in complaints was that the officer had acted in a prejudicial or biased manner[63] and that most complaints were resolved by the chief judges.[64] To date, the judicial branch has not requested augmented staffing to meet the demands of the Act. If a budgetary need arises, Congress would most likely favorably treat a request for more resources.

By way of comparison, the House Committee on the Judiciary received sixty-five complaints against judicial officers—more than any single circuit.[65] Although the Committee does not act and is not required to act on every complaint, this large volume of complaints represents a substantial amount of work. Disgruntled litigants, dissatisfied with judicial decision-making and furious that their judicial discipline complaints were dismissed as being related to the merits of a decision, formulated many of the complaints. Nonetheless, the inverse relationship

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[60] H.R. REP. No. 1313, *supra* note 42, at 21.

[61] Report of Complaints Filed and Action Taken Under Title 28 U.S.C. Section 372(c), 1987 DIR. AD. OFF. U.S. CTS. ANN. REP 56 table 26.

[62] *Id.*

[63] *Id.* at 57 table 27

[64] *Id.* at 56 table 26.

[65] *See* HOUSE COMM. ON THE JUDICIARY SUMMARY OF ACTIVITIES, 100th Cong., 1st Sess. (1987).

between the rising number of complaints filed with the House Committee and the decreasing number of complaints filed with the councils warrants close scrutiny in the years ahead.

Statistics about the number of misconduct complaints filed against judges can be somewhat misleading. Many serious judicial problems have not been processed under the complaint mechanism but rather have informally been referred to the attention of the circuit chief judges. One knowledgeable commentator reports that "often, problems are solved without a complaint ever being filed."[66]

Oversight. The congressional oversight demanded in both the House and the Senate has been sporadic. During the 99th Congress, the House Courts Subcommittee[67] and the Senate Constitution Subcommittee held oversight hearings.[68] Key staffers have attended meetings held by the judicial branch. A significant amount of correspondence between members of Congress and representatives of the judiciary has occurred.

Other external factors have had an impact on the functioning of the Act. Since 1980, three federal judges have been prosecuted for having committed federal felonies: two were convicted by juries of their peers; and the third was acquitted. In 1986, Judge Harry Claiborne was impeached and removed from office by the United States Senate for having violated three (of four) articles of impeachment. Judge Walter Nixon has been convicted. Having exhausted all direct appeals, he presently is the subject of an impeachment inquiry by a House Judiciary subcommittee. Although Judge Alcee Hastings was acquitted, the Judicial Conference found that grounds for impeachment may be warranted and transmitted this determination to the House of Representatives. An impeachment inquiry by another House Judiciary subcommittee is ongoing.

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[66] Fitzpatrick, *Misconduct and Disability of Federal Judges: The Unreported Federal Responses*, 71 JUDICATURE 282, 283 (1988).

[67] *See Federal Judicial Branch: Oversight Hearing Before the House Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985).

[68] *See Judicial Discipline: Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986) [hereinafter *Senate Hearing on Judicial Discipline*].

The lessons of the Claiborne impeachment are instructive. The major message is that the framers crafted a process that has proved to be efficacious, durable, and flexible: efficacious in that impeachment works; durable in that the process withstands the test of time; and flexible in that a modern day impeachment can be molded to meet current procedural and institutional pressures. But, students of the Congress and of impeachment also must recognize that the process was exceedingly difficult to implement and then to operate in a timely and fair fashion. The Claiborne impeachment, which occurred at the very end of a busy Congress, caused members of the House and Senate to expend countless hours. The actual record reflects that the Senate devoted ten days of time (in the Committee of twelve)[69] and approximately eighteen hours of actual floor consideration.[70] According to the Senate Majority Leader, the floor proceedings took more time than all but the most major issues that the 98th Congress considered.[71] In other words, the message about the Claiborne impeachment is a mixed one: the good news is that the system works; the bad news is that it is hard work.

Under closer scrutiny, other lessons become apparent. Reliance on current constitutional provisions and parliamentary procedures in the future will make it difficult to create anything other than a case-by-case impeachment process. "Each case of impeachment necessarily must stand on the facts and findings adduced by the House of Representatives with respect to the case before it."[72] The House, in drafting articles of impeachment against a convicted judge, may be able to take "judicial notice" in a legislative setting of factual findings made by a unanimous jury beyond a reasonable doubt. The Senate, however, by rejecting the third article of impeachment (which sought to impeach Judge Claiborne based on his felony conviction and the jury verdict), manifested an unwillingness to establish a fast-

[69] 132 CONG. REC. S15,482 (daily ed. Oct. 7, 1986) (statement of Sen. Dole); one day was for an organizational meeting; two days for pretrial argument; and seven days to hear testimony.

The transcript of the hearings held by the Committee totals more than 3,500 pages. Heflin, *supra* note 4, at 124.

[70] *See* 132 CONG. REC. S15,481 (daily ed. Oct. 9, 1986); *id.* at S15,759.

[71] *Id.* at S16,788 (daily ed. Oct. 16, 1986) (statement of Sen. Dole).

[72] H. REP. No. 688, 98th Cong., 2d Sess. 24 (1986).

track process.[73] Simultaneously, the Senate confirmed past precedents by determining that a felony conviction is not necessary for impeachment. The fourth article of impeachment levelled against Judge Claiborne, for which he was found guilty,[74] makes clear that the constitutional standard for impeachment exacts of judges the highest standards of public and private rectitude. The Code of Judicial Conduct and the oath of office serve as guides for defining an impeachable offense. If a judge does not "discharge and perform all duties incumbent on him," the judge may be impeached for "high Crimes and Misdemeanors" as those terms are used in the Constitution.[75]

In 1986, the House Committee on the Judiciary was presented with an impeachment question of first impression. A member of Congress delivered thousands of form petitions and miscellaneous letters calling for the impeachment of three judges of the United States Court of Appeals for the Eleventh Circuit for rendering a judicial opinion in the famous Alday murder case.[76] None of the petitions alleged unethical or criminal activity; they merely requested an impeachment inquiry based on the allegedly irresponsible granting of a new trial on the basis of unfair pretrial publicity to three defendants previously convicted of murder. After a review of the petitions and the facts, a determination was made that federal judges should not be impeached for judicial decisionmaking—even if the decision is an erroneous one. A judicial decision (standing alone) does not rise to the level of a "high crime or misdemeanor." If this were otherwise, the impeachment remedy would become merely another avenue for judicial review.[77]

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[73] The Senate rejected the "impeachment based on prior felony conviction" approach incorporated in the third article of impeachment by 46 Senators voting "guilty," 17 Senators voting "not guilty," and 35 voting "present." The necessary two-thirds vote therefore was not obtained. *See* 132 CONG. REC. S15,761 (daily ed. Oct. 9, 1986).

[74] The Senate voted to convict Judge Claiborne on the fourth article—a "high misdemeanor" count—by a vote of 89 "guilty," 8 "not guilty," and 1 "present." *Id.* at S15,762.

[75] U.S. CONST. art. II, § 4.

[76] *Petitions Circulate to Impeach Judges After Alday Ruling*, Atlanta Const., Jan. 3, 1986, at 15A, col. 4.

[77] Findings and Conclusions of Robert W. Kastenmeier on Citizen Petitions to Impeach Three Federal Judges (Sept. 25, 1986) [hereinafter Findings and Conclusions];

Since enactment of the 1980 discipline Act, the federal court system has continued to grow by leaps and bounds.[78] Today, it is not farfetched to envision a future judiciary with more than 1,500 lifetime tenured judges. With an attrition rate of approximately ten percent, as is currently the case, the Senate would have to confirm approximately 150 judges a year—or close to one judge each legislative working day Having experienced three criminal prosecutions against federal judges in the recent past, a growing number of felony cases brought against sitting judges can be expected as judgeships are added to the judicial system.

IV PROPOSED LEGISLATION

Seven years of operational experience under the 1980 Act reveal that the discipline mechanism basically sails smoothly, but to increase both effectiveness and efficiency, its jibs need tightening. Congress should seriously consider twelve changes. The proposed amendments, even considered collectively, will not amount to a total redesign of the Act. Eight of the proposed changes are refinements or clarifications of current statutory text. Four further amendments would be made to other sections of the United States Code, the first granting contempt power in discipline cases to circuit councils, the second amending the oath of office for federal judges, the third modifying the Ethics in Government Act,[79] and the fourth increasing the authority of the circuit advisory committees of the circuit to assist in drafting discipline rules. Finally, Congress should create a national commission on judicial impeachment.

Ouster of Judges for Rulings Denied, N.Y. Times, Oct. 26, 1986, at 31, col. 1. Chairman Peter W Rodino, Jr., concurred with this determination. Letter from Honorable Peter W Rodino, Jr., to Honorable Charles Hatcher (Oct. 14, 1986).

[78] In 1984, Congress created 79 new federal judgeships, making a total of 752 lifetime tenured judges (counting the United States Supreme Court). Of the new judges, 55 were for the district courts for a total of 575 district judgeships, and 24 were circuit judgeships for a total of 168. *See* Pub. L. No. 98-353, 98 Stat. 346, 348 (1984) (codified at 28 U.S.C. § 44 (1984) (circuit judgeships) & 28 U.S.C. § 133 (1984) (district judgeships)).

[79] Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified in scattered sections of 2, 5, 18, 28, and 39 of U.S.C.).

A. *Amendments to the Judicial Discipline Act*

The proposed amendments[80] to the 1980 Act fall into the following eight subject headings: (1) identifications of complaints by circuit chief judges; (2) membership of the special investigative committees; (3) public availability of discipline recommendations; (4) impeachment referrals with respect to convicted judges; (5) rules by the Judicial Conference and the circuit councils; (6) dismissal of complaints; (7) reimbursement of reasonable expenses, including attorneys' fees; and (8) several technical amendments.

1. *Identification of Complaints by Circuit Chief Judges*

The 1980 Act, by creating a discipline mechanism based on the filing of complaints with the circuit council, accomplished the dual objective of both augmenting the powers of the circuit councils and increasing the authority of the circuit chief judges. Under the statute, any person (including a judge, attorney, member of Congress, prosecutor, or journalist) can file a complaint. Two questions have arisen about the written complaint requirement: first, what are the residual powers of the chief judge and the council absent the filing of a complaint? And second, can a newspaper editorial or letter be considered as a complaint?[81] A policy split among the circuits exists on the latter question.[82]

These questions boiled to the surface during the Claiborne impeachment. After Judge Claiborne had been convicted and all his direct appeals had been exhausted, and indeed after he had commenced serving his prison sentence, not a single written complaint was filed with the circuit against him. It was the initial position of the Ninth Circuit that nothing could be done.[83]

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[80] The amendments are incorporated in H.R. 4393, 100th Cong., 2d Sess. (1988).

[81] *See* Burbank, *supra* note 16, at 332 & n.203 (1982).

[82] The ILLUSTRATIVE RULES, *supra* note 54, accurately reflect that the availability of a complaint procedure does not preclude the chief judge from considering any information that might be brought to the judge's attention. *See id.* at Rule 20.

[83] As Ninth Circuit Judge Charles E. Wiggins observed, "there was general perception that the act was triggered by a citizen complaint." *See Conduct of Harry E. Claiborne, U.S. District Judge, District of Nevada: Hearing Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 31 (1986) [hereinafter *House Hearings on Judge Clai-*

Aware through numerous news reports that a federal judge had started serving a prison sentence, interested citizens could not understand this bureaucratic inertia. Ultimately, public confidence in the discipline process plummeted.

In response, the first amendment to the 1980 Act—paragraph (1) of section 372(c)—would clarify that in the interests of the effective and expeditious business of the courts and based on information available to the chief judge of the circuit, the chief judge may identify a complaint for purposes of judicial discipline, thereby dispensing with the requirement of filing a written complaint. In exercising this discretion, the chief judge must enter a written order explaining the reasons for waiving the written complaint requirement.[84]

The structure of the 1980 Act would not be deleteriously affected by this modest increase in the authority of the chief judges of the circuits. On the contrary, this clarification merely reinforces the historic functions of the chief judge to respond to problems that come to his or her attention, a function that existed prior to the Act.[85]

2. *Membership of Special Investigative Committees*

A second change to the 1980 Act would provide statutory clarification regarding the membership of judges who serve on special investigative committees. Under current law, if a chief judge is unable to resolve a complaint, the judge appoints himself or herself and an equal number of circuit and district judges of the circuit to a special committee to investigate the facts and allegations in the complaint.[86] The law is silent on what happens if the membership of a special committee changes during an investigation.

An amendment to paragraph (4) of section 372(c) would accomplish two important objectives. First, any judge appointed

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borne]. *But see* 28 U.S.C. § 372(c)(7)(B) (1984) (In any case in which the judicial council determines, on the basis of a complaint or other information, that a judge has engaged in conduct that might constitute grounds for impeachment, the council shall promptly certify such determination to the Judicial Conference of the United States.).

[84] H.R. 4393, *supra* note 80, at § 101.

[85] *See* ILLUSTRATIVE RULES, *supra* note 54, at Rule 20 comment.

[86] *See* The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, *supra* note 15, at § 3(c)(4)(A).

to a special committee may continue to serve on the committee after becoming a senior judge or, in the case of the chief judge of the circuit, after his or her term of office expires.[87] Second, if a judge on a special committee dies or retires from the bench while serving on the committee, then the chief judge is authorized to appoint a replacement.[88]

Experience under the Act reveals that the resolution of most complaints takes very little time. Nonetheless, the difficult cases, which may raise allegations of impeachable activities and which may result in sanctions, can take a special committee a significant amount of time, perhaps months and even years. In lengthy inquiries, the possibility of member turnover becomes infinitely greater. Moreover, under a recent statutory change, chief judges of the circuits serve for terms of office not to exceed seven years.[89] It would be a gross waste of judicial resources to require that a circuit recommence an investigation if a chief judge leaves office, voluntarily or involuntarily By the same token, it could be grossly unjust to a judge facing a complaint if an investigation were accelerated to fit within a term of office.

Such council membership imbroglios have not yet occurred. In the interest of fairness to these judges and also in deference to judicial efficiency, statutory ambiguity in the membership requirements of special committees should now be resolved with the proposed amendment.

3. *Public Availability of Impeachment Recommendations*

Under present law when a determination is made by the Conference that "consideration of impeachment may be warranted,"[90] the Conference certifies and transmits the determination to the House of Representatives for whatever action the House considers appropriate. Normally, the Conference's order will be accompanied by written reasons explaining the decision.[91]

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[87] H.R. 4393, *supra* note 80, at § 101.

[88] *Id.*

[89] *See* Pub. L. No. 97-164 (codified at 28 U.S.C. § 45(a)(3)(A) (1982)) (Chief judges of the circuits serve for seven year terms, and no chief judge may act in that capacity after attaining the age of seventy.).

[90] 28 U.S.C. § 372(c)(8) (1984).

[91] *Id.*

The Conference, relying on its broad discretion, will make its written order and the reasons for the order available to the public through the appropriate clerk's office.[92] Nevertheless, all papers, documents, and records of the proceedings referred to the House of Representatives are confidential.[93]

It makes little sense, especially to members of the press corps and to the public, that the Conference's determinations of possible grounds for impeachment are publicly available at the Supreme Court yet are confidential in the office of the House Clerk. Admittedly, inquiring parties can be instructed to walk across Capitol Hill to the Supreme Court Clerk's Office. However, a better recourse is a permanent fix in the statute books, specifying that upon receipt of a Conference determination and the record of proceedings, the Clerk of the House shall make the written order and any reasons for the order available to the public. Under the proposed modification, background materials, including a record of the proceedings and documents related to the investigation, will remain confidential unless the appropriate council, the Conference or the House or Senate (by resolution) release any materials that are believed necessary to an impeachment proceeding.[94]

Further, in serious cases that might result in the imposition of a sanction on a judge, a circuit council should be granted discretion to release a copy of the report of a special investigative committee to both the complainant whose complaint ignited the discipline mechanism and the judge whose conduct is implicated.[95] Under current law, the confidentiality rule is so ironclad that disclosure of information to the complainant, complained about judge, or the public is probably foreclosed. A good case can be made for disclosing information to the complainant or judge that may be relevant to an impending order to sanction. Such information, especially if it relates to a potential prosecution for criminal activity or perjury, would also ultimately be of great interest to law enforcement officials.[96]

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[92] *Id.*

[93] *Id.* at § 372(c)(14).

[94] *Id.*

[95] *See* Burbank, *supra* note 55, at 20.

[96] The circuit judges who prepared the Illustrative Rules were similarly bothered

4. *Impeachment Recommendations with Respect to Convicted Judges*

If a judge has been convicted of a felony and all direct appeals have been exhausted without success, the Judicial Conference should be statutorily authorized to transmit a declaration directly to the Congress (bypassing the need for circuit council action), stating that "impeachment may be warranted."

Currently, the Judicial Conference lacks authority to act on any matter not referred by a circuit council.[97] In the case of a judge convicted of a felony who has unsuccessfully exhausted all direct appeals, to require the Conference to wait for a council certification that impeachable activity may have occurred is of questionable merit. One does not have to be a judge or legislator to identify a better course. An amendment charts this course by authorizing the Conference, by majority vote and without council action, to transmit to the House of Representatives a determination and appropriate court records indicating that consideration of impeachment may be warranted for whatever action the House considers necessary This amendment would not strip the circuit councils of their own authority; ideally, there would still be a council action upon which the Conference could base its own determination. But, if a council balks at acting, the matter would proceed expeditiously through the judicial branch to the Congress for appropriate action.

The proposed amendment to paragraph (8) of section 372(c) would simply authorize the Conference to exercise its discretion by majority vote and without a referral or certification from a circuit council. The Conference would transmit to the House of Representatives a determination that consideration of impeachment may be warranted, and the House could take whatever action it deems necessary.

5. *Rules by the Judicial Conference and the Circuit Judicial Councils*

Paragraph (11) of section 372(c) currently confers rulemaking authority on each judicial council and the Judicial Conference

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by the lack of flexibility in the confidentiality rule. *See* ILLUSTRATIVE RULES, *supra* note 54, at Rule 16 comment.

[97] 28 U.S.C. at § 372(c)(8).

of the United States.[98] The statutory text, in addition to mandating rules that contain provisions for notice and the right to appear at a proceeding, requires that rules be made public and that the Conference can modify any council rule.[99]

Two amendments would fortify this statutory framework. The first would clarify that any new rules or amendments to rules by the councils or the Conference would occur only after appropriate notice is made to the public and opportunity is given for comment. The first would ensure a modicum of public participation in the rulemaking process. Presumably, the public comments received after notice would contribute to a better work-product. The second amendment would circumscribe the rule-making power of the circuit councils so that a council could not create a statute of limitations. As to the latter, the rulemaking authorization of the 1980 Act extends to "rules for the conduct of proceedings . . . including the processing of petitions for review . . . ."[100] This procedural grant that Congress confers on courts or agencies ordinarily would not allow the making of rules of substantive content. A statute of limitations does have a procedural aspect, but it is so intertwined with substance that rulemaking entities should not merge the two.[101] Because the 1980 Act was ambiguous about whether circuit rules could provide for a statute of limitations, the text should be clarified on this point: statutes of limitations are for the Congress to make and not for the rulemakers. In appropriate cases, complaints can be dismissed for unreasonable delay in filing, by analogy to the equitable doctrine of laches.

6. *Dismissal of Complaints*

The 1980 Act includes a comprehensive laundry list of circuit council powers relating to the disposition of discipline complaints.[102] Among the enumerated powers are the ability to conduct an additional investigation, certify disability, order a

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[98] *Id.* at § 372(c)(11).

[99] *Id.*

[100] *See id.*

[101] *See* Burbank, *supra* note 16, at 338-39.

[102] *See* 28 U.S.C. at § 372(c)(6).

voluntary retirement, temporarily remove cases, and censure or reprimand either by private communication or by public announcement. A search for explicit statutory authority to dismiss, however, is doomed to fail. Because the entire statutory scheme turns on the ability to dismiss, lack of clarity on this point ordinarily would not be significant. The power clearly exists.

A drafting improvement to the Act could be made by adding a provision in a new section 372(c)(6)(C) stating that the councils have dismissal authority Because the Act elsewhere requires that the judicial branch keep statistics on the general nature and disposition of all complaints,[103] a specific reference to dismissal on the list of council powers would contribute to statistical consistency among the circuits and also would further understanding of the Act.[104]

7 *Reimbursement of Reasonable Expenses, Including Attorneys' Fees*

The Act should state clearly whether a judge, particularly one who is not sanctioned and indeed is vindicated by the proceedings, can receive recompense for expenses, including attorneys' fees in defending against a complaint. The text of the 1980 Act was silent on this issue, and the legislative history is sparse. Support for the power to pay attorneys' fees is derived from a statement of the Congressional Budget Office (CBO) to the House Committee on the Judiciary [105] The Administrative Office of the United States Courts provided the information for the CBO cost-estimate, so the assumption that the Act authorizes the payment of attorneys' fees emanates from the judicial branch of government, and not from the Congress.

In any event, an ambiguity exists that needs clarification. A proposed amendment creating a new section (16) of section 372(c) of the United States Code would confer authority on the circuit councils to recommend to the Director of the Adminis-

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[103] *Id.* at § 604(h)(2).

[104] As a drafting proposition, the power to dismiss could be placed in § 372(c)(6)(B), but then all dismissal orders would become public under § 372(c)(15). That publicity is not necessary.

[105] *See* H.R. REP. No. 1313, *supra* note 42, at 21-22.

trative Office of the United States Courts that reimbursement of reasonable expenses, including attorneys' fees, be awarded to a judge for those expenses that would not have otherwise been incurred but for the investigation. Reasonable expenses may be awarded, however, only when a complaint is finally dismissed. The proposed amendment would implicitly confer similar authority on the Judicial Conference, which could order the awarding of reasonable expenses through the appropriate council. During the legislative process, Congress may well want to consider broadening the amendment to allow the award of attorneys' fees in circumstances other than dismissals.

8. *Several Technical Amendments*

A recent circuit court decision contained extensive discussion of the importance of the phrase "impeachment may be warranted," which permits a certification by the Judicial Conference to the House of Representatives.[106] The court postulated that "weighty constitutional issues would arise if certification by the Conference to the House were mandatory"[107] and reaffirmed, from a plain reading of the statute, that any certification by both the councils and the Conference is entirely discretionary.[108] Under the 1980 Act, neither the circuit councils nor the Judicial Conference is required to determine whether a judge may have committed an impeachable offense. The same language should be used when referring to the powers of the circuit councils and the Conference because of the need to promote drafting consistency. A technical amendment to the statutory text could easily accomplish this objective.

Under present law, the circuit council has the power to refer a matter, either based on a complaint together with the record of associated proceedings or on the basis of information otherwise available, to the Judicial Conference if the judge has engaged in conduct that "might constitute one or more grounds for impeachment under article I of the Constitution. . . ."[109] The

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[106] Hastings v. Judicial Conference of the United States, 770 F.2d 1093 (D.C. Cir. 1985), *cert. denied,* 106 S. Ct. 3272 (1986).

[107] *Id.* at 1100.

[108] *Id.*

[109] 28 U.S.C. at § 372(c)(7)(B)(i).

statutory reference to article I is technically correct insofar as congressional authority to impeach resides therein. The grounds for impeachment are, however, located in article II of the Constitution[110] and therefore the reference is defective.[111] The Act should be amended by striking the reference to article I and referring to article II of the Constitution.

B. Amendments to Other Sections of Title 28, United States Code

The following four provisions, found elsewhere in the Judicial Code, should also be amended.

1. *Contempt Power*

The circuit councils should be granted power to institute contempt proceedings to enforce orders not obeyed by court officers or employees. The granting of authority to the circuit councils to pursue contempt citations, specifically in discipline cases, would be a logical and a natural outgrowth of the 1980 Act.

In 1980, the councils' powers were substantially augmented by a general grant of authority to "make all necessary and appropriate orders for the effective administration of justice within [the] circuit."[112] This overall responsibility was bolstered by a specific delegation of authority to hold hearings, take sworn testimony, and issue subpoenas and subpoenas duces tecum. Additionally, all judicial officers and employees of the circuit and district courts in the circuit were required to obey all council orders.[113]

Prior to 1980, several federal judges had indicated to Congress that lack of subpoena authority had created difficulties in

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[110] U.S. CONST. art. II, § 4, provides: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

[111] This drafting error was first pointed out to the Committee by Charles E. Wiggins, a former Member of the Committee and present federal judge. *See House Hearings on Judge Claiborne, supra* note 83, at 36 n.1.

[112] Pub. L. No. 96-458, 94 Stat. 2035 (codified at 28 U.S.C. § 332(d)(1) (1980)).

[113] *See* Remington, *supra* note 16, at 724-27.

obtaining necessary information.[114] By conferring subpoena authority on the councils, and by requiring all court employees to obey council orders, it was widely perceived that, given the proper circumstances, the information gathering abilities of the councils would be adequate. With the passage of time, there have been few problems in this regard.

Nevertheless, a small loophole, involving court employees who refuse to obey subpoenas or council orders, still remains. The gap could be filled by adding contempt power to the list of statutory powers delegated to the circuit councils. Limited in scope, the proposed amendment would specify that, in the instance of a failure to comply with a council order, the appropriate council or special committee of the council may institute a contempt proceeding in any district court to show cause as to why the judicial officer, or court employee, who fails to obey the order should not be held in contempt.

2. *Oath of Office*

The statutory oath of office for federal judges[115] should be amended to eliminate a phrase that qualifies their duties. Originally established by the Judiciary Act of 1789, and reenacted several times since then, the language of the statutory oath has remained largely unchanged over time.[116]

The phraseology and substance of the statutory oath have been the subject of debate during several impeachment proceed-

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[114] *Hearings on Judicial Fitness Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 11 (1965) (statement of John Biggs, Jr.); *Judicial Discipline and Tenure: Hearings on S. 295, S. 522, and S. 678 Before the Subcommittees on Judicial Machinery and Constitution of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 100-17 (1979) (statement of J. Edward Lumbard).

[115] 28 U.S.C. § 453 (1948). Federal judges are also required to take an oath mandated by the Constitution of the United States. U.S. CONST. art. VI, cl. 3.

[116] The oath is as follows:

> I, A.B., do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ____, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God.

Id.

ings. In 1804, during the Senate trial of Samuel Chase, the Chairman of the House Managers argued that Chase's conduct was a violation of his oath of office, which required him to "dispense justice faithfully and impartially, and without respect to persons."[117] Chase was acquitted. Some commentators have argued that his acquittal stood for the proposition that a violation of the oath of office, unless willful, could not amount to a high crime or misdemeanor.[118] In the successful impeachment and removal from office of Judge West H. Humphreys, the Senate voted on the ground, among others, that he had violated his oath of office by failing to faithfully and impartially discharge all the duties incumbent on him.[119]

Debate about the scope and meaning of the oath again surfaced during the recent Claiborne impeachment. As drafted, the fourth article of impeachment initiated against Judge Claiborne alleged, in part, that by willfully falsifying his federal income tax forms he violated his oath of office and reduced confidence in the integrity and impartiality of the federal judiciary The fourth article charged Judge Claiborne with violation of a "misdemeanor" and not a "high crime." In the House subcommittee, several Representatives expressed concern about making reference to the oath of office at all. Congressman Mike DeWine observed: "when you look at the oath of office, I think it may create some evidentiary problems."[120] Congressman Barney Frank inquired: "I was wondering if we might be setting a precedent for people who don't do equal justice to the rich and the poor."[121] An attempt to delete the reference to the oath failed narrowly by a seven-to-seven vote.[122] From that point on,

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[117] I. BRANT, IMPEACHMENT - TRIALS AND ERRORS 81 (1972). *But see* R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 249-51 (1973).

[118] I. BRANT, *supra* note 117, at 83.

[119] Extracts from the *Journal of the United States Senate in all Cases of Impeachment Presented by the House of Representatives: 1798-1908*, 62d Cong., 2d Sess. 153-54 (1912).

[120] MARKUP OF H. RES. 461, IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE, SUBCOMM. OF COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, 99th Cong., 2d Sess. 26 (1986).

[121] *Id.* at 28.

[122] *Id.* at 31.

very little debate occurred concerning the oath, and ultimately Judge Claiborne was convicted on the fourth count.[123]

Nonetheless, the issue remains. It may be commonly accepted that violation of an oath of office can be used to impeach a federal judge. But that proposition does not signify that the oath packs a powerful bite or that it is as artfully drafted, in light of present circumstances, as it might be. At the very least, the qualifying phrase "to the best of my abilities and understanding" should be deleted. A judge who violates the oath should certainly not have a defense of weakness, of ability, or of mind.

Admittedly, amending any aspect of the historic Judiciary Act of 1789 should be done only after reflection and study By proposing to amend the Act at all, such analysis should follow as a matter of inevitable course. By the same token, it is entirely possible that, after congressional study, the proposal to only delete eight words will be deemed inadequate. This proposal might be met with efforts to add language to the oath requiring judges to obey the laws of the United States and the canons of judicial ethics, although the latter are not congressionally created.

3. *Ethics in Government Act*

The Ethics in Government Act of 1978[124] should be amended to further coordination between the executive branch, which has statutory authority to enforce the law, and the judicial branch, which of course administers the judicial discipline mechanism. All federal judges are required, under the Act, to file personal financial reports containing a full statement of assets, income, and liabilities (for themselves as well as spouses and dependent children). The Act additionally mandates that the Judicial Conference establish a Judicial Ethics Committee responsible for administering the legislative scheme. With the approval of the Conference, the Committee can submit recommendations for legislative change directly to the Congress.

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[123] *See supra* notes 69-74 and accompanying text.

[124] Pub. L. No. 95-521, 92 Stat. 1824 (codified in scattered sections of 2, 5, 18, 28, and 39 of U.S.C.).

Currently, the Judicial Ethics Committee will refer the name of any judge who has willfully failed to file a financial disclosure report or has willfully falsified a report to the Attorney General for potential prosecution. The Committee is not required to notify the appropriate circuit council nor the chief judge of the circuit. Under the Ethics Act, referral to the law enforcement branch is certainly warranted as is a notification to the judicial branch. At the very least, the need for collegiality in the judiciary dictates that a Conference Committee keep the regional administrative entity, the judicial council of the circuit and its chief judge, apprised of serious ethical breaches by circuit judges. At the most, perhaps certain ethical problems could be resolved administratively, thereby avoiding the need for a prosecution. A proposed amendment to the Ethics in Government Act would require that whenever the Attorney General is referred a serious ethical problem involving a federal judge, the circuit council of the circuit where the judge resides should also be notified.

4. *Advisory Committees*

Several years ago the Congress created the Advisory Committees of the Circuits and charged them with the responsibility to study the rules of practice and internal operating procedures for the courts of appeals, and further, to make recommendations concerning such rules and procedures.[125] The advisory committees have been successful, in large part because the circuit courts have appointed highly qualified lawyers to those committees. It would be an efficient use of their expertise and experience in other rule-making areas to enlarge the powers of the committees to participate in the drafting of discipline rules. An amendment therefore is proposed, augmenting the role of the advisory committees of the circuits to assist in the drafting of judicial discipline rules.

C. *Creation of a National Commission on Judicial Impeachment*

The suggested changes to current law relating to judicial discipline and ethics, considered together, proceed with caution

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[125] *See* Pub. L. No. 97-164, tit. II, 96 Stat. 55 (codified at 28 U.S.C. § 2077(b) (1982)).

through the intersection of separation of powers. None of these changes impinges on the autonomy and independence of the judicial branch, nor do they weaken the constitutional prerogatives of the legislative branch.

Even assuming enactment of the entire package, something is missing. Although several amendments improve the channels of communication between the judicial and legislative branches, when a federal judge may have committed an impeachable offense, the proposal refrains from initiating any constitutional or institutional changes as to how Congress responds to the impeachment.

Realistically, an easy path through the constitutional thicket does not exist. The avenues may be numerous, but each has certain attractive features coupled with particular dangers lurking close to the beaten track. The Constitution can be amended to create a "fast-track" impeachment process. Through another amendment, lifetime tenure could be abolished altogether by judges being appointed to terms of office or possibly by being elected and subjected to recall. Alternatively, the current judicial discipline mechanism could be completely overhauled to permit the removal of those judges guilty of transgressions by the judiciary itself or through an independent commission.

Each of the proposals, however, potentially raises as many serious policy and constitutional questions as it resolves. A wiser and more moderate step, at this time, would be to create a commission, as Senator Dole proposed during the 99th Congress,[126] to examine the scope of the problem of judicial discipline and impeachment and then to report to Congress on its findings.

Because national study commissions often raise expectations that they will provide answers, they can actually do more harm than good if they fail to satisfy their mandate. Ordinarily, Congress should create a commission only if a compelling need for a study and a report can be shown,[127] if existing governmental

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[126] *See* S. 2934, 99th Cong., 2d Sess. (1986).

[127] *See* Pub. L. No. 89-801, 89th Cong., 2d Sess. (1966) (creating the National Commission on Reform of Federal Criminal Laws); S. REP. No. 1862, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S. CODE CONG. & ADM. NEWS 4379, 4383; *see also* Pub. L. No. 92-489, 92nd Cong., 2d Sess. (1972) (creating the Commission on Revision

entities are not institutionally capable of tackling the problem,[128] and if reasonable expectations exist that the commission can satisfy its entire statutory assignment.

These three standards can be shown to exist, compelling creation of a National Commission on Judicial Impeachment. First, there is a serious need for a full and fair investigation of the total ecology of judicial discipline and impeachment. Never having occurred before in the history of this country, such a study is long overdue. Second, no single entity within the federal government is equipped to conduct the study and to draft a report, primarily because the problem to be analyzed is one shared by the three branches of government. An entity that has neither built-in bias nor loyalty to one of the branches must be relied upon. Third, it can be assumed that studying judicial appointments, discipline, and impeachment, a relatively limited assignment, will allow the commission to focus its energies and expertise and successfully satisfy its statutory mandate.

Let us examine that mandate. The duties of the commission would be threefold. First, it would investigate and study the problems and issues involved in the appointment and tenure (including discipline and removal from office) of lifetime tenured federal judges. Second, the commission would evaluate the merits of proposing alternatives to the current statutory and constitutional scheme, including possible amendments to the Constitution. Third, the commission would prepare and submit a report to the three branches of government. The results of the commission's work incorporated in the report would reflect concrete and practical proposals that would certainly be useful to the policy-making branch.

The commission would be composed of thirteen members: three appointed by the President pro tempore of the Senate;

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of the Federal Court Appellate System); S. REP. No. 930, 92nd Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. CODE CONG. & ADM. NEWS 3602.

[128] During House floor debate on the proposal to create a commission to study appellate court problems, the following exchange took place:

> Mr. Snyder. "[M]y only query is why did not the Committee on the Judiciary do this?"
>
> Mr. Brooks. "I would be perfectly willing to do that except for the fact that I have spent the last 20 years of my life in Congress, and not practiced law in the circuit courts."

118 CONG. REC. 17,276 (1972).

three by the speaker of the House of Representatives; three by the chief justice of the United States; three by the president; and one by the Conference of Chief Justices. It is contemplated that there will be a bipartisan mix of private citizens, attorneys, academics, and high-ranking representatives of the three branches. Because the states are reservoirs of information and, to a certain extent, laboratories of experimentation in the area of judicial discipline, at least one commission member is likely to be experienced in state-administered programs. Provisions are made to ensure the hiring of a top-flight staff and to procure experts and consultants. The commission is authorized an adequate budget.

As the focus of the commission's inquiry would be relatively narrow, the final report would come due not later than one year after the date of the first meeting. The report to be submitted to each branch of Congress, the Chief Justice, and the President, must contain a detailed statement of the findings and conclusions of the commission, together with its concrete recommendations for any justifiable legislative or administrative actions.

CONCLUSION

Congressional authority to legislate federal judicial discipline legislation poses delicate separation of powers problems. The need for a cooperative working relationship among the branches of government is of paramount importance.

During a critical stage in the Constitutional Convention, Benjamin Franklin—then a very old man—took the floor and spoke of the need for consensus and compromise:

> When a broad table is to be made, he explained, and the edges of the planks do not fit, the artist takes a little from both, and makes a good joint. In like manner here both sides must part with some of their demands in order that they may join in some accommodating proposition.

What we need today between the branches of government is Franklin's "good joint."

To develop that joint, the most responsible course would be to rely upon the solid lumber found in the Judicial Conduct and Disability Act of 1980. Moreover, a National Commission on Judicial Impeachment to study current problems and to recom-

mend any solutions thereto, including constitutional amendments, should be created. As we enter the third century of our system of government, we should be both cognizant of our problems and confident about the future. Our approach to the subject of judicial appointments, discipline, and impeachment, as it is to other weighty questions, should be one of continual reassessment and reflection and not one of reaction.