Constitutional Judicial Tenure Legislation?—The Words May Be New, But the Song Sounds the Same

*By C. Randolph Fishburn**

Introduction

Congressional attempts to control the federal judiciary have been as regular and predictable as shifts in public attitude toward the activities of Congress. For many congressmen, it has been a frustrating realization that the Constitution mentions only impeachment, a lengthy and cumbersome ordeal, as the means of removing federal judges from office. Over the years, Congress has been asked to consider alternative methods of removal, but the mandate of the Constitution has impeded attempts to legislate control of the federal judiciary.

These removal proposals failed because many of the important constitutional questions were not satisfactorily resolved. Among these questions were the Framers' intent in providing specifically for impeachment, the meaning and extent of judicial tenure and of the "good behavior" limitation, the ambigious language of the Constitution itself, and most significantly, the importance of judicial independence.

Recently, however, Public Law No. 96-458, The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, was signed into law to create the first federal judicial disciplinary body in the history of the United States. This Act places the responsibility of disciplining federal judges in the hands of other federal judges by legislatively redefining the functions of the judicial councils of each circuit and of the Judicial Conference of the United States. These judicial bodies are now empowered to impose various disciplinary sanctions, *short* of actual removal.

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The current proposal was designed to circumvent the difficult constitutional issues. Unfortunately, most of the constitutional problems remain. This note will explore this recent congressional victory, which seeks to impose a greater measure of control over federal judges. The desirability or need for this disciplinary mechanism will be seriously questioned, as will the likelihood that this proposal could realistically achieve its stated goals. This note will conclude that, even at the possible expense of an occasional unredressed abuse, the disciplinary mechanism of impeachment should be, as this author believes the Framers intended it to be, exclusive.

I. Attempts to Limit Judicial Tenure

It has been said that federal judges never retire, and leave office only when they die. In addition to these two methods of removal, the Constitution provides for an impeachment mechanism.[1]

From its inception, when Thomas Jefferson described this mechanism as "not even a scarecrow,"[2] legislators and chief executives have advanced proposals designed to avoid the time-consuming and formidable impeachment process. In the course of nearly 200 years, this impatience with the impeachment mechanism has taken many forms, yet surprisingly, the proposed alternate methods of removal have been extraordinarily similar.

The proposals have taken two general forms: historical removal by abolition and modern removal by judicial tribunal. Removal by abolition seeks to remove a judge by simply doing away with the judicial post he or she occupies.[3] Removal by judicial tribunal envisions a panel appointed to investigate and recommend the removal of a particular judge on the basis of that individual's capacity to occupy the position.[4] Public Law No. 96-458 is a hybrid of these alternatives. It provides for a judicial tribunal with the authority to rule on the fitness of a particular judge, but without the power to actually remove a jurist from the bench. Although this provision was signed into law on October 15, 1980, similar pro-

1. U.S. CONST. art. I, § 2, cl. 5; U.S. CONST. art. I, § 3, cl. 6; U.S. CONST. art. II, § 4.

2. Letter from Thomas Jefferson to Judge Spencer Roane, Sept. 6, 1819, in XV THE WRITINGS OF THOMAS JEFFERSON 213 (A. Bergh ed. 1907). Viscount James Bryce compared impeachment to, "a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at." V. BRYCE, THE AMERICAN COMMONWEALTH 233 (1908).

3. *See* notes 6-16 and accompanying text *infra*.

4. *See* notes 17-37 and accompanying text *infra*.

posals have been unable to pass constitutional muster.[5]

Each of these three types of proposals will be discussed in turn and will be examined for constitutional infirmities.

A. Removal by Abolition

The first assault of the judiciary was the repeal of the Judiciary Act of 1801,[6] by which the incoming administration of President Thomas Jefferson sought to eliminate several judgeships created in the twilight of John Adams' administration.

By the end of John Adams' term in 1800, the Federalist party, which had been the majority party since Washington's presidency, was losing ground to the increasingly popular Jeffersonians. Having previously gained control of the executive and legislative branches, the Federalists turned to the judiciary to complete their trilogy of political influence.[7]

Adams sought to institutionalize Federalist political thought beyond the tenancy of his administration by creating several new Federalist-appointed federal judgeships. To achieve this end, Adams signed into law the Judiciary Act of 1801.[8] The Act was passed by Congress at the last moment, and many "midnight" appointments were hastily executed. This less-than-subtle maneuver to leave a legacy of Federalist politics in the judiciary did not go unchallenged by the Jeffersonians.

Jefferson, soon after taking office, sponsored the repeal of the Judiciary Act. The effect of such an enactment was the removal of the newly appointed federal judges without impeachment. Jefferson argued that Congress' power to create inferior courts, by implication, included the ability to abolish those courts.[9]

The debate, however, focused on the real issue: the constitutionality of abolishing newly created judgeships and thereby extinguishing by legislative action other than impeachment the tenure, albeit only hours old, of the judges.[10] The Jeffersonians ultimately

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5. *Id.*

6. Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (1801).

7. The Federalists' success was inevitably accompanied by criticism from the minority party, especially since the new republic had been founded on principles of decentralization of power. The Jeffersonian minority had come to regard the federal courts as "a political adjunct of the hated Federalists." F. FRANKFURTER & J. LANDIS, BUSINESS OF THE SUPREME COURT 20-21, 23-25 (1927), *quoted in* Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 670 (1969).

8. Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (1801).

9. U.S. CONST. art. I, § 8, cl. 9.

10. For a full discussion of the various arguments, see Kurland, *supra* note 7, at 670-78.

prevailed, and the courts which were created by the Judiciary Act were abolished.[11]

The repeal of the Judiciary Act is significant, not only because it was the first attempt to control the growing power of the judiciary, but also because it underscores the political motivation which typically characterizes attempts to remove federal judges.[12]

Typical of the political pressure exerted in attempted judicial removal is Congressman Bingham's proposals to the Civil War Reconstruction Congress to retire federal judges at a specified age, or upon evidence of incompetency, and to allow the President to nominate and appoint, with the advice and consent of the Senate, an additional judge to "hold" the court until the other stepped down.[13] Bingham, recognizing the constitutional tenure of federal judges, attempted to do indirectly what could not be done directly. In response, his colleague, Congressman Kerr, pointed out:

> [I]f it is competent for Congress to enact such a provision as this, then it is equally competent for Congress to say that after a judge shall have attained the age of sixty years or fifty years or forty years, he may in like manner be retired or superseded or may be aided by the appointment of another judge who shall sit with him, dividing with him his jurisdiction—dividing with him every

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11. Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (1801). The Federalists would claim the lasting victory, however. Federalist Chief Justice Marshall's precedential opinion in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), through upholding Jefferson's repeal of the Judiciary Act, at the same time established the doctrine of judicial review. This doctrine assured that the Federalist-dominated Supreme Court would have the last word on federal legislation.

12. It is noteworthy that having succeeded in the repeal of the Judiciary Act of 1801, Jefferson attempted to remove the Federalist judges who remained by virtue of the earlier Judiciary Act of 1789 via the conventional impeachment process. Although Jefferson was successful in the impeachment of District Judge John Pickering of New Hampshire, he became quite frustrated with the impeachment process when his attempt to oust associate Justice Samuel Chase from the Supreme Court failed. *See* Holloman, *The Judicial Reform Act: History, Analysis, and Comment,* 35 LAW & CONTEMP. PROB. 128, 130 (1970). "The failure to convict Chase on even one count was a major setback to the political plans of the Republicans." Dillard, *Samuel Chase,* in I THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969. "Everyone recognized that if the impeachment of Chase resulted in his removal, this trial would be but the curtain-raiser to the trial of Chief Justice Marshall, whose recent decision in Marbury v. Madison had greatly affronted Jefferson." II G. HAYNES, THE SENATE OF THE UNITED STATES 849, 851 n.10 (1938).

13. This "additional judge" would "have the same power and perform the same duties and receive the same compensation as the judge then acting in such court, or who shall be retired and excused from so acting, and shall, in connection with or in the absence of his senior associate, hold the courts prescribed by law for said senior or retired judge . . . and upon his ceasing for any cause to hold said office, the said additional judge appointed under the provisions of this act shall be and become the judge of such court." CONG. GLOBE, 41st Cong., 1st Sess. 337 (1869).

> one of the functions of his office, until, if this process be continued, the court, so far as this new organization is concerned, will become a mockery of a judicial tribunal.[14]

This legislation failed, and the question of the tenure of federal judges lay dormant until President Wilson tried to abolish the Commerce Court in 1912. Predictably, the tenure of federal judges was touted as a secondary consideration in the elimination of the court. The real issue, the proponents of the measure claimed, was the existence of a court established for the sole purpose of reviewing the decisions of the Interstate Commerce Commission. Again, the proposal was of a highly political nature and was controversial from its inception. President Wilson ultimately won. A year after the court's creation it "was already on its death bed,"[15] and a year later it was put to rest.

Although an initial version of the bill sought to abolish the judgeships as well as the court—invoking the specter of the 1801 repeal—the final version abolished only the court. The tough question of the constitutionality of judicial removal was thus subsequently avoided.[16]

B. Removal by Judicial Tribunal

The next attempt to exert political control over the tenure of federal judges came to fruition in the tension-charged atmosphere of New Deal Washington when President Franklin Roosevelt, frustrated by the Supreme Court's repeated rulings against his economic recovery legislation, proposed his "court packing" plan.[17]

President Roosevelt's plan would have required federal judges and justices with ten years of service to retire upon reaching the age of seventy. If a judge refused to retire, the legislation required the President to appoint another judge to preside over the affairs of the court and to have precedence over the older judge. With three of the nine Roosevelt-era Justices over seventy years old, had the court-packing plan been enacted, Roosevelt would have been assured of a pro-New Deal majority.[18] Whether coincidentally or

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14. *Id.* at 341-42.

15. Kurland, *supra* note 7, at 683.

16. The debate over the abolition of the Commerce Court rekindled the larger issue of political control over the Judiciary. *See, e.g.*, S. Doc. Nos. 292, 302, 348, 406, 408, 451, 452, 472, 473, 892, 941, 62d Cong., 2d Sess. (1912); S. Doc. Nos. 1075, 1106, 1108, 62d Cong., 3d Sess. (1913).

17. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 390.

18. *Id.* at 373. Like President Jefferson before him, Roosevelt, during his 1932 presi-

through concern about self-preservation, the Supreme Court began to uphold New Deal legislation soon after the announcement of Roosevelt's plan, and the power of popular appeal to reform the Supreme Court was never tested.[19]

However, the episode left its mark in the form of substitute proposals to remove judges by challenging their competency before judicial tribunals. Senate Bill 4527 was the first legislation introduced to create a judicial disciplinary body.[20]

Though Senate Bill 4527 failed to generate the expected controversy, House Resolution 2271, known as the Sumners Bill because it had been introduced by Hatton Sumners,[21] Chairman of the House Judiciary Committee, received a great deal of attention.[22] The Bill provided for a judicial court which would determine the merits of a claim accusing a federal district judge of activities "other than good behavior within the meaning of that term as used in section 1 of article III of the Constitution."[23] Upon a

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dential campaign, had criticized Republican control of "all branches of the government—the Legislature, with the Senate and Congress; and the executive departments; and I may add, for full measure, to make it complete, the United States Supreme Court as well." 1 FRANKLIN D. ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 837 (1941).

19. Widespread public contempt for the Supreme Court during the early Roosevelt years has since been unparalleled. The Court became known as "that body of nine old hasbeens, half-deaf, half-blind, full-of-palsy men." Leuchtenburg, *supra* note 17, at 366. The snowballing support for the Court-packing scheme has been discussed by several commentators. *See, e.g.*, Ervin, *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROB. 108, 131 (1970); Kurland, *supra* note 7, at 687; Ross, *"Good Behavior" of Federal Judges*, 12 U. KAN. CITY L. REV. 119 (1944).

20. Although S.B. 4527 was the first congresional proposal to suggest a judicial disciplinary body, the concept is credited by Professor Ross, *supra* note 19, at 119, to Professor Burke Shartel. *See* Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870 (1930). Beginning with the premise that impeachment is an ineffective means of removing misfit judges, Shartel, noting similar mechanisms in other countries, particularly France and Germany, *id.* at 876, submitted the proposition that impeachment was designed to restrict the power of Congress over judges, but did not preclude judicial removal of their own members. This proposition initiated a forty-year debate on whether or not impeachment is the sole method of removal for federal judges. The foremost opponent of the Shartel theory and its resulting legislation was federal District Judge and legal scholar Merrill E. Otis, who entered the fray in his frequently cited article. *See* Otis, *A Proposed Tribunal: Is It Constitutional?*, 7 U. KAN. CITY L. REV. 3 (1938). The paper debate between Shartel and Otis could have been dismissed as a mere academic exercise had it not been for the resulting deluge of legislation which continually revived the issue.

21. Democrat, Texas, 1913-1947.

22. It was the Sumners Bill which preoccupied Judge Otis in his well-regarded commentary. Otis, *supra* note 20, at 6.

23. H.R. 2271, 75th Cong., 1st Sess. (1937). The text also appears in Otis, *supra* note 20, at 11-12.

determination that the judge had been "misbehaving," the court was authorized to have the judge removed. Appeal was permitted to the Supreme Court. The distinctive features of this bill were its utilization of the "good behavior" standard as a measuring stick for removal[24] and its limitation to district judges.[25] The bill passed the House of Representatives 221 to 125 but died when it was referred to the Senate Judiciary Committee.[26]

By 1965, when Senator Joseph D. Tydings of Maryland was appointed Chairman of the Judiciary Subcommittee on Improvements in Judicial Machinery, the fires of judicial reform were again well stoked. Both California and New York had by constitutional amendment[27] created mechanisms within their judiciaries to remove judges, and other states were not far behind.[28] In 1962, Joseph Borkin published *The Corrupt Judge,*[29] which examined the problems of arresting judicial misbehavior within the confines of an increasingly cumbersome impeachment process. A year later, a revealing article in the *Wall Street Journal*[30] focused public attention on the conflict of interest which existed between federal judges who served on boards of directors of banks and corporations while regularly presiding over cases involving those corporations.

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24. The good behavior standard proved to be as vexatious and controversial as was the concept of impeachment for the exclusive means of removal. *See* notes 76-99 and accompanying text *infra.*

25. Later bills would extend to circuit judges and ultimately to Supreme Court Justices. Public Law No. 96-458 extends both to circuit and district judges as well as to bankruptcy judges and United States magistrates. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980).

26. Kurland, *supra* note 7, at 693. The bill had garnered the support both of the Assembly of the American Bar Association, Holloman, *supra* note 12, at 132, and of the Judicial Conference of the United States. The support from the Judicial Conference avoided the difficult issues upon its recommendation, which stated: "*Assuming its constitutionality,* as to which we express no opinion, we are in accord with the general purpose and approve in principle the provisions embodied in H.R. 9160." *Judicial Conference of the United States, Proc.* 23 (1940) (emphasis added). Although philosophical support was growing, constitutional opposition was snowballing. *See Editorials,* 27 A.B.A.J. 163, 552 (1941); Letter from Francis Biddle to Congressman Hatton W. Sumners, June 24, 1941, in *Hearings on H.R. 146 of the Senate Comm. on the Judiciary,* 77th Cong., 1st Sess. 5-6 (1941). Justice Jackson supported the bill in theory but declined to express an opinion as to its constitutionality. *Id.* at 25-31.

27. CAL. CONST. art. VI; N.Y. CONST. art. VI, § 9, renumbered Sept. 1, 1962, as art. VI, § 22.

28. Forty-nine jurisdictions (fifty-one if the District of Columbia and Puerto Rico are included) have some form of judicial conduct commission. Cameron, *The California Supreme Court Hearings—A Tragedy That Should and Could Have Been Avoided,* 8 HASTINGS CONST. L.Q. 11, 12 (1980).

29. J. BORKIN, THE CORRUPT JUDGE (1962).

30. Landauer, *Extra-Judicial Activity,* Wall Street Journal, May 2, 1963, at 1, col. 1.

Similar questions of ethics also were raised in Congress.[31]

Senator Tydings subsequently announced the initiation of a study on suggested judicial reform, including a proposed constitutional amendment, to satisfy the growing public sentiment against an apparently abusive, yet unaccountable, judiciary. Within the next four years, the Judicial Reform Act[32] was introduced in the Ninety-first Congress. Title I of the Act proposed the establishment of a Commission on Judicial Disabilities and Tenure whose function would be to recommend removal of federal judges from office for misbehavior or disability. Extensive hearings were conducted on both the desirability and the constitutionality of this proposal.[33]

Notwithstanding the support of numerous legal scholars,[34] the

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31. For a discussion of the Bobby Baker case with the resulting creation of an Ethics Committee and Code of Ethics in Congress, see Holloman, *supra* note 12, at 133-34.

32. The Judicial Reform Act, S. 1506, 91st Cong., 1st Sess. (1969).

33. *Hearings on S. 1506 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 91st Cong., 1st Sess. (1969); *Hearings on the Independence of Federal Judges Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 91st Cong., 1st Sess. (1969).

34. During this period, three future Supreme Court Justices, Warren E. Burger, William Rehnquist and Harry A. Blackmun, suggested in extrajudicial statements that no constitutional prohibitions stood in the way of Senator Tydings' Judicial Reform Act.

Testifying at hearings on the confirmation of his nomination, Chief Justice (then Circuit Judge) Burger indicated, in response to a question from Senator Tydings, sponsor of S. 1506, that a conflict had "never occurred to me" between the separation-of-power concept of the Constitution and the provision in Tydings' legislation for judicial discipline of judges. *Hearings on the Nomination of Warren E. Burger to be Chief Justice of the United States Before the Senate Comm. on the Judiciary,* 91st Cong., 1st Sess. 11 (1969), *quoted in* Holloman, *supra* note 12, at 138 n.70. It is unclear, however, whether these remarks reflect a view of the constitutionality of such legislation generally or merely reflect the view that it would not infringe the separation-of-powers theory. More recently, Chief Justice Burger seemed to adopt a different position: "This explains why the Constitution expressly provided that all Federal Judges would hold office during good behaviour, subject to removal only by impeachment processes in the House and Senate." *The Chief Justice on the Bicentennial,* 48 N.Y.S.B.J. 280, 282-83 (1976).

Then Assistant Attorney General Rehnquist, testifying on behalf of the Department of Justice in 1970, indicated the belief of the Department that the provisions of the Tydings bill relating to "a new judicial commission to remove judges in case of failure to conform with the good behavior standards of the Constitution are constitutionally permissible." *Hearings on the Independence of Federal Judges Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 91st Cong., 2d Sess. 330 (1970). Mr. Rehnquist discussed the Justice Department's views at some length at the hearings. *Id.* at 350-51.

Justice Blackmun had expressed his view during his confirmation hearings, *Hearings on Nomination of Harry A. Blackmun to be Associate Justice Before the Senate Comm. on the Judiciary,* 91st Cong., 2d Sess. 52 (1970), *quoted in part in* Holloman, *supra* note 12, at 142. Blackmun's statement does not address the constitutionality of Tydings' legislation but relates only to the threat to judicial independence generally and seems to focus primarily on

bill met vigorous opposition. Senator Tydings' defeat in 1970 once again relegated the judicial tenure concept to obscurity, until a new congressman appeared to take up the cause[35] —Senator Sam Nunn of Georgia. Motivated by the Watergate scandal, Nunn introduced new judicial tenure legislation in both the Ninety-third and the Ninety-fourth Congresses. The 1976 version of the Judicial Tenure Act[36] was virtually identical to its predecessors, except that the proposal encompassed *all* federal judges, including Supreme Court Justices.[37]

The constitutional objections to passage of the new legislation were fundamentally the same as those which confronted Thomas Jefferson when he sought to repeal the Judiciary Act of 1801. Stumbling blocks to the bill's passage included the constitutional hurdle of the seeming exclusivity of the impeachment mechanism, the difficulties involved in defining "good behavior," and the potential encroachment upon the constitutional mandate of an independent judiciary.

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 sought to avoid these problems by more carefully framing the issues to be addressed. The result was a different hybrid approach, which borrowed the least objectionable features of previous proposals in an effort to pass constitutional muster.

C. A Hybrid Approach

Public Law No. 96-458, The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980,[38] is the first judicial ten-

existing means of discipline such as 28 U.S.C. § 332 (1970).

35. Boyd, *Federal Judges: To Whom Must They Answer?*, 61 A.B.A.J. 324, 325 (1975).

36. The Judicial Tenure Act, S. 1110, 94th Cong., 2d Sess. (1976). Extensive hearings were held on this second round of modern judicial tenure legislation, but the debates did not resolve the important issues, and S. 1110 did not pass. With the constitutional issues still unresolved, the bill was reincarnated in the 95th Congress as S. 1423 and in the 96th Congress as S. 295. Neither bill survived committee approval.

37. This inclusion of the Supreme Court interjected a new element of controversy. A strong contingent, led by the Judicial Council of the United States, rejected the concept of removal for either judges or Justices. *Hearings on S. 1110, The Judicial Tenure Act, Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 35 (1976) at 73 (statement of Hon. Robert A. Ainsworth, Jr., 5th Cir. Judge) [hereinafter cited as *1976 Hearings*]. The other side, led by Professor Raoul Berger, felt that the Justices of the Supreme Court must be included, based on philosophical equalitarianism. "I don't for a minute admit that Justices are beyond criticism. . . . Bear in mind, what they [the proponents of exclusion] are really talking about is sort of an Emily Post etiquette; they are not talking about constitutional barriers." *Id.* at 104-05 (statement of Raoul Berger).

38. Pub. L. No. 96-458, 94 Stat. 2035 (1980).

ure act to provide for discipline, short of removal, predicated on a standard of conduct other than good behavior.[39]

The primary purpose of the Act is to create a mechanism and procedures within the judicial branch of government to consider and respond to complaints against federal judges.[40] Secondarily, however, the Act has redefined the functions and powers of the judicial councils of the federal judicial circuits to vest in these bodies the responsibility for judicial discipline and disability.

Procedurally, the Act provides that any person can file a written complaint against any federal judge except Supreme Court Justices.[41] The complaint must allege that a judge is or has been unable to discharge efficiently the duties of his or her office by reason of mental or physical disability, or that he or she is engaging or has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.[42]

The required basis for a complaint is intended to discourage a disgruntled litigant who is unhappy with the result of a particular case from challenging the fitness of the presiding judge.[43] The effective and expeditious administration standard can include, but is not limited to, willful misconduct in office, willful and persistent failure to perform duties of the office, habitual intemperance, or other conduct prejudicial to the administration of justice which brings the judicial office into disrepute. Further, a complaint may incorporate impeachable behavior or violations of the criminal laws

39. The constitutional barriers posed by the grant of good behavior tenure are acknowledged by the proponents of Pub. L. No. 96-458. "There is at this time, little evidence in the Constitution or in the debates on its framing and adoption which supports a thesis that the Framers intended 'good Behaviour' to be a vessel into which future Congresses could pour substantive and changing definitions and undermine the integrity of tenure which clearly was regarded by the Framers as essential to protecting the independence of judges and disinterestedness of judicial review." 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. 17-18 (1980) (fn. omitted).

40. HOUSE COMM. ON THE JUDICIARY, *supra* note 39.

41. "It should be noted that the proposed legislation does not provide for the disciplining of Supreme Court Justices. There are two reasons for this intentional exclusion. First, high public visibility of Supreme Court Justices makes it [far] more likely that impeachment can and should be used to cure egregious situations. Second, it would be unwise to empower an institution such as the Judicial Conference, which actually is chaired by the Chief Justice of the United States, to sit on cases involving the highest ranking judges in our judicial system. The independence and importance of the Supreme Court within our justice system should not be diluted in this fashion." *Id.* at 10, n.28.

42. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458 § 3(a)(c)(1), 94 Stat. 2035 (1980).

43. S. REP. No. 362, 96th Cong., 1st Sess. 3 (1979).

of any state or of the United States.[44]

The complaint is filed directly with the judicial council of the circuit to which the accused judge belongs and is then transmitted to the chief judge of the circuit. A copy of the complaint is also transmitted to the judge or magistrate whose conduct is the subject of the complaint.[45] The chief judge then may dismiss the complaint or may determine that the allegations meet the standards for misconduct or disability. In the latter case, the chief judge shall refer the complaint to a committee appointed by himself, consisting of an equal number of circuit and district judges and the chief judge.[46]

This committee is empowered to conduct an investigation "as extensive as it considers necessary,"[47] and then must submit a report of its findings and recommendations to the judicial council of the circuit. The council then will conduct any necessary additional investigation, and is empowered to take such action to assure the "effective and expeditious administration of the business of the courts," including, but not limited to, certifying disability or requesting voluntary retirement. Further, the council can temporarily prevent cases from being assigned to the judge involved. The council also can censure or reprimand the judge, publicly or privately. Finally, the council can "order such actions as it considers appropriate under the circumstances, except that . . . in no circumstances may the council order removal from office."[48]

If either the complainant or the judge or magistrate involved wishes to challenge the final order of the chief judge, he or she may do so by petitioning the judicial council. If a party is dissatisfied with the decision of the judicial council, it may petition the Judicial Conference of the United States for review. All determinations of the Judicial Conference are final and conclusive. No further review is available.[49]

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44. *Id.* at 9.

45. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, § 3(a)(2), 94 Stat. 2035 (1980).

46. *Id.* at § 3(a)(4).

47. *Id.* at § 3(a)(5).

48. *Id.* at § 3(a)(6)(B)(vii). U.S. magistrates and judges not appointed to hold office with good behavior tenure, such as a Court of Claims judge, nevertheless may be removed under this provision.

49. S. 1873 originally would have established a new Court on Judicial Conduct and Disability, a court of record composed of district and circuit judges, to pass judgment on the action of the judicial council and to dismiss, affirm, modify or reverse its orders as it saw fit. During the House hearings, this provision was dropped in order to emphasize that primary administrative responsibillity was to be placed within the judicial branch. Further, such a

If the Judicial Conference determines that a judge's conduct warrants impeachment, it must submit its findings to the House of Representatives for further action.[50]

The Act provides that all proceedings and complaints before the committee are to be kept strictly confidential unless the accused judge expressly consents to their release, or unless the judicial council, the Judicial Conference or Congress releases any material which is believed necessary to an impeachment investigation.[51]

Public Law No. 96-458, by creating sanctions short of removal, has sought to avoid the issue of whether the constitutional impeachment mechanism is the only permissible manner of removing judges from the federal bench. Several questions remain, however, which will be discussed in turn. Are the sanctions permitted by the Act precluded by the Constitution as well? If the impeachment mechanism is exclusive, then it may preclude lesser sanctions as well as sanctions having the equivalent effect of removing the judge from the bench. Further, there are serious constitutional problems with regard to judicial independence in empowering the judicial councils with the responsibility for disciplining federal judges. Finally, the implications of judicial self-discipline with respect to the integrity of the system as a whole must be examined—the recent experience of the California Judicial Commission investigations provides a telling reference.

II. Constitutional Issues

A. Impeachment as the Sole Method of Removal

The United States Constitution specifies that removal of civil officers of the United States is to be accomplished by impeachment.[52] The House of Representatives is granted the "sole power of impeachment,"[53] and the Senate is granted "the sole power to try all impeachments."[54] Whether or not the constitutional provisions concerning removal by impeachment preclude removal or dis-

court, which envisioned a formal adversarial proceeding, was seen as raising the dangers of a substantial chilling effect on judicial independence as well as inflicting harm and disruption on the administration of justice. *See* H.R. REP. No. 1313, *supra* note 39, at 4, 18.

50. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, § 3(a)(8), 94 Stat. 2035 (1980).

51. *Id.* at § 3(a)(14).

52. U.S. CONST. art. II, § 4.

53. U.S. CONST. art. I, § 2, cl. 5.

54. U.S. CONST. art. I, § 3, cl. 6.

cipline short of removal has been the subject of considerable debate.

Judge Merrill E. Otis, an ardent proponent of the exclusivist view, concluded that "he who has the text alone has enough to make it clear that Congress does not have the power to create a court for the trial of judges for misconduct, with the jurisdiction to remove them. By necessary implication the Constitution prohibits the exercise of such power by Congress."[55]

Two additional arguments in favor of impeachment as the sole means of discipline have traditionally been advanced. The first is that the constitutional maxim of construction, *expressio unius est exclusio alterius*,[56] limits judicial removal to impeachment since impeachment is the only removal mechanism for which the Constitution provides. The second is that the word "sole," used only in the impeachment provisions, precludes other means of removal.[57]

In support of these arguments, the exclusivists rely heavily on the perceived intentions of the Framers of the Constitution. The most direct historical support for the exclusivist view is found in Alexander Hamilton's *Federalist Paper No. 79:*

> The precautions for their [judges'] responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives, and tried by the Senate; and, if convicted, may be dismissed from office, and disqualified for holding any other. This is the *only provision on the point* which is consistent with the necessary indepen-

55. Otis, *supra* note 20, at 21. Many commentators have agreed. *See, e.g.*, Battisti, *The Independence of the Federal Judiciary*, 13 B.C. IND. & COM. L. REV. 421 (1972) [hereinafter cited as *Independence of the Federal Judiciary*]; Battisti, *An Independent Judiciary or an Evanescent Dream*, 25 CASE W. RES. L. REV. 711 (1975); Boyd, *supra* note 35; Ervin, *supra* note 19; Holloman, *supra* note 12; Kramer & Barron, *The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of "During Good Behaviour,"* 35 GEO. WASH. L. REV. 455 (1967); Kurland, *supra* note 7; Ross, *supra* note 19; Stolz, *Disciplining Federal Judges: Is Impeachment Hopeless?*, 57 CALIF. L. REV. 659 (1969); Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135; Note, *The Exclusiveness of the Impeachment Power Under the Constitution*, 51 HARV. L. REV. 330 (1937); Note, *Disability as Grounds for Impeachment*, 85 YALE L.J. 706 (1976); Comment, *Judicial Responsibility—Statutory and Constitutional Problems Relating to Methods for Removal or Discipline of Judges*, 21 RUTGERS L. REV. 153 (1966); Comment, *The Chandler Incident and Problems of Judicial Removal*, 19 STAN. L. REV. 448 (1967).

56. The expression of one thing is the exclusion of another. BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

57. "It is well known, and often has it been said by the highest courts, that every word of the Constitution was intended to have significance. If that is true of any word, it is especially true of the strong word—'sole' . . . used twice only in the Constitution." Otis, *supra* note 20, at 25.

> dence of the judicial character, and is the *only one which we find in our own Constitution* in respect to our own judges.
>
> The want of a provision for removing the judges on account of inability has been a subject of complaint. But all considerate men will be sensible that such a provision would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose.[58]

In addition, the records of the debates of the various state ratification conventions do not suggest that the Constitution authorized Congress to provide an alternate means of removal other than impeachment.[59]

The nonexclusivist school of thought contends that impeachment is only *one* means of removal. Proponents of this view discount the "intentions of the Framers" argument by pointing out inconsistencies in the constitutional debate commentaries.[60] Additionally, the nonexclusivists point to the First Congress' Act of 1790[61] which provided that, upon a conviction in a court for bribery, a judge shall be "forever . . . disqualified to hold any office."[62] The nonexclusivists argue that disqualification is tantamount to removal in the sense that it limits judicial tenure.[63] Because this limitation is by a means other than impeachment, this early congressional act is said to provide an alternate method of judicial removal.[64]

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58. THE FEDERALIST No. 79 (A. Hamilton) 473-74 (Rossiter ed. 1961) (emphasis added). Hamilton was a strong proponent of removal by impeachment alone, *see* III M. FARRAUD, THE RECORD OF THE FEDERAL CONVENTION OF 1787, at 625 (1934), a position which has subjected his commentary to the criticism that it is unfounded. Shartel, *supra* note 20, at 896 n.71.

59. Otis, *supra* note 20, at 7.

60. Nonexclusivists point also to *The Federalist Papers No. 79*, where Hamilton appears, despite his previously "absolute" stance, to believe that judges may be removed for insanity. "[In response to providing removal for inability], [t]he measuration of the faculties of the mind has, I believe, no place in the catelogue [*sic*] of known acts. An attempt to fix the boundary between the regions of ability and inability, would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good. The result, *except in the case of insanity*, must for the most part be arbitrary; and insanity, without any formal or express provision, may be safely pronounced to be a virtual disqualification." THE FEDERALIST No. 79, *supra* note 50, at 474.

61. Act of 1790, ch. 9, § 21, I Stat. 117 (1790).

62. *Id.*

63. "Judgment in Cases of Impeachment shall not extend further than to removal from office, and disqualification to hold any office." U.S. CONST. art. I, § 3, cl. 7.

64. R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 156 (1973). The exclusivists rebut this argument with two objections. First, they dispute the assumption that disqualification is indeed equivalent to removal. Second, they question the validity of the statute which has never been enforced. *See Hearings on the Independence of Federal Judges Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judici-*

Further, the nonexclusivists point out that the language of the Constitution does not explicitly provide that impeachment is to be an exclusive device and caution against excessive reliance on *expressio unius est exclusio alterius,* as such maxims are merely rules of construction and are not binding rules of law.[65]

Finally, the nonexclusivists rely on the existence of a separate power to remove judicial officers for less than impeachable conduct. That power is said to be the English common-law writ of *scire facias.*

Scire facias came into use in England after 1701 when the Act of Settlement eliminated judicial tenure at the pleasure of the King and provided judges with tenure "during good behavior."[66] This English common-law writ was a judicial method of removal the bases of which were misconduct in office, neglect of duties, acceptance of an incompatible office, or conviction of a serious crime.[67]

The nonexclusivists contend that article III, section 1 of the Constitution specifically grants good behavior tenure to federal judges.[68] That section is argued to have its origin in the English historical concept of good behavior tenure and therefore to include

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ary, 91st Cong., 2d Sess. (1970) (statements of Peter G. Fish), *quoted in* Ervin, *supra* note 19, at 118.

65. R. BERGER, *supra* note 64, at 138. The most common example cited where *expressio unius* is not recognized is in the allowance of jury trials for civil cases. The Constitution does not expressly provide for jury trials in civil cases, yet it does expressly provide for jury trials in criminal cases. If *expressio unius* were to be strictly applied, then the express mention of criminal jury trials would therefore exclude any other type of jury trials. It is agreed that the Framers did not intend this result; therefore, the "existing powers" argument has been advanced to overcome the *expressio unius* maxim.

66. By the time of the Norman Conquest in England, the once "communal" courts had been linked to the offices of the King so that the King became, in a sense, the "fountain of justice." McIlwain, *The Tenure of English Judges,* 7 AM. POL. SCI. REV. 217, 218 (1913). At this time, Judges, as did other royal officials, held their commissions in one of two forms. The most common form was *durante bene placito domino Rege* (during the King's pleasure), a purely executive power of removal. The power derived from patents issued on the holder of the office. The King was the issuer of all patents and possessed the ability to revoke them at will.

The second form, *quamdiu se bene gesserit*—"during good behavior"—was not extensively utilized until the Act of Settlement in 1701 which provided that "Judges' commissions be made *quamdiu se bene gesserit* and their salaries ascertained and established but upon Address of both Houses of Parliament it may be lawful to remove them." 12 & 13 Will. III, c. 2, § 3 (1700).

67. *See* Shartel, *supra* note 20, at 900 n.82.

68. A detailed discussion of the separate standard for good behavior appears at notes 76-99 and accompanying text *infra.*

the ancient writ of *scire facias*.[69]

The nonexclusivists argue that the availability of *scire facias* removal is a pre-existing power—first, it was not expressly eliminated by the Framers themselves; second, although impeachment was expressly provided for in the Constitution for high crimes and misdemeanors, *scire facias* was intended to be the appropriate remedy for that judicial misconduct which was in violation of the good behavior standard but did not rise to an impeachable offense; finally, *scire facias* was the basis of good behavior tenure at common law. As good behavior is expressly provided for by the Constitution, the nonexclusivists argue, Congress can, through the necessary and proper clause, provide a remedy to terminate a judge for misbehavior.[70]

The major objection of the exclusivists to the *scire facias* argument is that even if it can be said to exist, it is irrelevant in the discussion of removal of federal judges. At no time in English history was a judge comparable to an American federal judge removed by a writ of *scire facias*.[71] Further, at no time during the constitutional convention, was the writ of *scire facias* mentioned, whereas impeachment was explicitly (and, they contend, solely) delineated. The other known English legislative means of removal were specifi-

69. *Scire facias*, however, was not an innovation of the Act of Settlement; rather it had existed prior to the Act as a method of removal for judges and other civil officers holding good behavior tenure. It did not become significant, however, until after the Act, since most appointments were for "the King's pleasure," a tenure for which *scire facias* was not available. Good behavior tenure proceeded on the theory that an officer had been issued a patent, similar to a property interest in land, which imparted an estate for life terminable only upon death or "breach of good behavior." R. BERGER, *supra* note 64, at 125-26. A writ of *scire facias* constituted a forfeiture of the patent. The writ brought by the issuer of the patent, was determined in a judicial proceeding, and was predicated upon misbehavior. Literally, a Lord bringing a writ of *scire facias* would say to the court, "I beg to have a declaration that this office be forfeited." Judges and other officers holding a good behavior patent from the King were removable on *scire facias* in the King's Bench. An additional writ, *quo warranto*, was conceptually identical to a writ of *scire facias* yet was available only for persons in lower positions not holding a patent from the King. *Cf.* Comment, *Removal of Federal Judges—New Alternatives to an Old Problem: Chandler v. Judicial Council of the Tenth Circuit*, 13 U.C.L.A. L. REV. 1385, 1396 n.43 (1966) [hereinafter cited as *Removal of Federal Judges*] (suggesting that *quo warranto* has replaced *scire facias*).

70. R. BERGER, *supra* note 64, at 132-33.

71. Otis, *supra* note 20, at 49. The nonexclusivists acknowledge this point but submit that it has no bearing on the judicial power to remove judges, an argument which is pivotal as to the availability of judicial discipline. R. BERGER, *supra* note 64, at 127-28. Additionally, the nonexclusivists cite in rebuttal two occasions when high English judges refused to be removed without a *scire facias* proceeding; yet in neither instance was the writ actually exercised. These incidents involved Sir John Walter, Chief Barron of the Exchequer in 1628 and Sir John Archer, Justice of the Common Pleas in 1672. R. BERGER, *supra* note 64, at 128-29.

cally rejected.[72]

In addition to the question of viability of *scire facias* at the time of the constitutional convention, there is a legitimate question of the Framers' knowledge of the writ.[73] Even if their knowledge is assumed, a legitimate question arises as to its conspicuous absence in the debates. Ultimately, however, *scire facias* is in direct conflict with the specific provision for the admittedly cumbersome removal by impeachment.[74] It is incongruous that such a difficult and circumscribed method of removal could be circumvented by the ad-

72. Although the ability of the executive to remove a judicial officer unconditionally had been eliminated, four alternate methods were still available in the English constitutional system. Three were legislative and one judicial. The three legislative forms of removal were Bill of Attainder (Bill of Pains and Penalties), removal by Address to the King (a joint resolution by Parliament for which cause need not be shown), and removal by impeachment. The writ of *scire facias* was the judicial method of removal.

Removal by Address was rejected at the Constitutional Convention. II M. FARRAND, THE RECORD OF THE FEDERAL CONVENTION OF 1787, at 428-29 (1934). Bills of Attainder are expressly prohibited by the Constitution. U.S. CONST. art. I, § 9. The nonexclusivist response, however, is that rejection of legislative methods of removal does not imply rejection of judicial methods of removal. R. BERGER, *supra* note 64, at 152-53.

73. It is acknowledged that the Framers were sophisticated and learned men, but even if they can be said to have been aware of the writ, there is no evidence of their intent that it be extended to judges to whom it had never been applied. Although John Adams suggested the general ignorance of his colleagues even of the impeachment process, Berger suggests that it was not ignorance of impeachments but lack of power to impeach in the colonies which would account for Adams' statement. R. BERGER, *supra* note 64, at 143.

Scire facias is considered by some to be available in England even today. *See* R. BERGER, *supra* note 64, at 130; Ross, *supra* note 19, at 122. The fact nonetheless remains that there has been no instance of *scire facias* removal in England since the 17th Century. Moreover, all the Framers, among the three who have been considered to be the most knowledgeable in terms of legal practice and scholarship, Jefferson, Hamilton and John Adams, each believed impeachment to be the exclusive method of removal. *See* Otis, *supra* note 20, at 9 n.5 (Jefferson). *But see* R. BERGER, *supra* note 64, at 155 n.150, wherein he offers a quotation from which he suggests Jefferson took a contrary view. Jefferson wrote that judges had been made "independent of the nation itself. They are irremovable, *but by their own body*, for any depravities of conduct." *Id.* The original of the letter, however, makes it clear that in this statement Jefferson was referring to the judges of Virginia, the constitution of which explicitly provided for removal of lower court judges by superior court judges. *Letter from Thomas Jefferson to Samuel Kercheval, July 12, 1816*, 15 THE WRITINGS OF THOMAS JEFFERSON 34 (Memorial ed. 1903). *Accord*, Note, *Disability as Grounds for Impeachment*, *supra* note 55, at 713. *See also* THE FEDERALIST No. 79, *supra* note 58, at 474 (Hamilton); *Thoughts on Government, January 1776*, SELECTED WRITINGS OF JOHN AND JOHN QUINCY ADAMS, 50, 55-56 (Koch & Peden ed. 1946) (Adams).

74. Exclusivists and nonexclusivists alike recognize the cumbersome nature of impeachment. *See* R. BERGER, *supra* note 64, at 122-25, 157; Shartel, *supra* note 20, at 870-73; Note, *The Exclusiveness of the Impeachment Power Under the Constitution*, *supra* note 55, at 332 n.10 (citing sources); Comment, *Removal of Federal Judges*, *supra* note 69, at 1389.

mittedly simple writ of *scire facias*.[75] The resolution of this conflict, however, requires a much more fundamental determination: What did the Framers intend when they used the words "good behavior"?

B. Good Behavior as a Separate Standard

Probably the most problematic and irreconcilable constitutional issue in defining the limits of federal judicial tenure is the meaning of the words "good behavior" in article III, section 1 of the Constitution. That section states that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . ."[76]

Legislation which has provided for judicial removal other than impeachment for conduct "inconsistent with the good behavior provision of Article III"[77] has faced the problem of defining "good behavior." The authors of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, recognizing the difficulty of defining the parameters of a historically nebulous standard, sought to avoid it altogether by seeking to discipline judges for conduct "prejudicial to the effective and expeditious administration of the business of the courts"[78]—conduct never adequately defined.[79] Regardless of the new label, the intent of Public Law No. 96-458 is to discipline precisely the same class of conduct which the good behavior standard did not protect: conduct other than good behavior, "which for the most part fall[s] short of being subject to impeachment."[80]

Conduct of this nature, thought to be unimpeachable, is said

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75. "It scarcely can be believed that the Framers intended vesting Congress with an important power [to provide for removal other than impeachment] and then so skillfully concealed it [so] it could not be discovered save after 150 years." 81 CONG. REC. 6171 (1937) (remarks of Emanuel Celler).

76. U.S. CONST. art. III, § 1.

77. *See, e.g.*, S. 295, 96th Cong., 1st Sess. (1979); S. 1423, 95th Cong., 2d Sess. (1977); S. 1110, 94th Cong., 2d Sess. (1976); S. 1506, 91st Cong., 1st Sess. (1969); S. 3055, 90th Cong., 2d Sess. (1968); H.R. 7423, 81st Cong., 2d Sess. (1950); H.R. 17, 81st Cong., 1st Sess. (1947); H.R. 1201, 79th Cong., 1st Sess. (1945); H.R. 1197, 78th Cong., 1st Sess. (1941); H.R. 111 76th Cong., 1st Sess. (1939); H.R. 5939, 76th Cong., 1st Sess. (1939); S. 476 75th Cong., 1st Sess. (1937); H.R. 2271, 75th Cong., 1st Sess. (1937); S. 4527, 74th Cong., 2d Sess. (1936).

78. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, § 3(a), (c)(1), 94 Stat. 2035 (1980).

79. The vagueness of the standard puts it into the same category as good behavior tenure which, it has been suggested, could constitute a denial of due process. *See* Holloman, *supra* note 12, at 145; Comment, *Removal of Federal Judges, supra* note 69, at 1405-06.

80. THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1979, S. REP. No. 362, 96th Cong., 1st Sess. 4 (1979) [hereinafter cited as JUDICIAL CONDUCT ACT REPORT].

to fall into a gap between what should constitute good behavior and what the Constitution sets forth as a high crime or misdemeanor. That certain forms of inappropriate behavior appear to be immune from punishment is the strongest argument in favor of alternative means of discipline.[81]

Whereas exclusivists view federal judges as possessing constitutionally guaranteed life tenure, *conditioned* on good behavior and subject to termination only by impeachment, nonexclusivists stress a common-law interpretation of good behavior, distinct in character from impeachable offenses. The discrepancy becomes relevant even in light of Public Law No. 96-458 which, while not utilizing the good behavior standard, would permit judicial discipline for conduct which does "not rise to the level of impeachable offenses."[82] Regardless of semantics, both standards are based on the fundamental assumption that judicial discipline short of impeachment is permissible under the Constitution.

The nonexclusivists' major premise is based upon the constitutional provision for two separate standards of conduct for federal judges. The first, "impeachable conduct," consists of the commission of "high Crimes and Misdemeanors."[83] The second is that conduct which falls short of impeachment, yet constitutes a departure from good behavior. The common-law definition of good behavior is relied upon for this second standard. A violation of good behavior at common law demanded a writ of *scire facias* as a remedy.[84]

The nonexclusivists constitutionally justify the existence of good behavior tenure, and its corresponding remedy of *scire facias,* in two ways. First, without a specific remedy, the words "good behavior" are useless.[85] A compelling rule of construction is that

81. One of the leading nonexclusivists, Professor Raoul Berger, has focused extensively on the good behavior "gap." In his work on federal impeachments, Berger begins his analysis by distinguishing impeachment, a legislative trial strictly circumscribed, from good behavior as a judicial forfeiture proceeding unrelated to impeachment. R. BERGER, *supra* note 64 at 124-25.

82. JUDICIAL CONDUCT ACT REPORT, *supra* note 80, at 3.

83. U.S. CONST. art. II, § 4.

84. *See* notes 66 & 69 *supra.*

85. Good behavior tenure became viable with the passage of the Act of Settlement in 1701. The purpose of the Act of Settlement was to make judges independent of the King of England. Good behavior tenure was a restriction on the King's power over the judiciary and was not intended as a substantive guarantee of tenure. Further, good behavior tenure was not to limit a judge's commission by providing additional grounds of removal, but to protect against arbitrary termination from the King. Breckenridge Mss., Nov. 21, 1801, *quoted in* Carpenter, *Repeal of the Judiciary Act of 1801,* 9 AM. POL. SCI. REV. 519, 523-26 (1915). By the time the concept of good behavior tenure reached America, the Framers had developed

there are no dead words in the Constitution.[86] Second, if the impeachment mechanism is seen as exclusive, no remedy for "gap" conduct may be fashioned. The practical effect of this would be to render federal judges immune from punishment for unacceptable but unimpeachable behavior.[87]

Did the Framers mean impeachment to be the sole remedy for judicial misconduct in the Constitution, so that only "treason, bribery and other high crimes and misdemeanors" could result in loss of tenure? Raoul Berger provides an exhaustive study of this issue and concludes that the statutory meaning of "high crimes and misdemeanors" does not include the common-law definition of misbehavior[88] and that a "gap yawns" between the two.[89] Berger acknowledges that the Framers did not intend impeachment for slight offenses as was the case in England.[90] He contends, however, that this lack of intent does not by implication preclude a less onerous method of discipline or removal of unimpeachable, yet still objectionable, offenses.[91]

The exclusivists promote an alternate explanation. They con-

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such a strong desire for full judicial independence that Address and Bill of Attainder were specifically rejected and, the exclusivists contend, only impeachment as the least arbitrary means of the three was left as the check for judicial abuse. *See* JUDICIAL CONDUCT ACT REPORT, *supra* note 80, at 21.

86. R. BERGER, *supra* note 64, at 131-32. It is not absolute, and therefore, the exclusivists contend, not controlling, that every clause in the Constitution can be enforced. Specifically, art. I, § 6, cl. 2, § 9, cl. 7 and art. IV, § 4 are not susceptible of enforcement.

87. Although Berger presents a strong analytical case for the distinction between the two standards, it appears that his primary justification for an alternative remedy lies not in constitutional considerations but in pragmatic ones. With reference to trials for judicial misconduct, he writes: "Common sense counsels against freezing countless officials into lifetime appointments, for it would be utterly impracticable to require congressional trials for such a multitude . . . weighed against the crucial and tormenting national interests which occupy the Congressional stage, such issues are really too picayune. We are no less free than Judge Otis to read another 'necessarily implied exception' into the allegedly exclusive word 'sole,' for such a reading does not turn on the demands of remorseless logic but on practical considerations to which others may attach more weight than did Otis." R. BERGER, *supra* note 64, at 137.

88. Good behavior had a rather well-defined meaning at common law, "[good] behaviour means behaviour in matters concerning the office, except in the case of conviction upon an indictment for any infamous offence of such a nature as to render the person unfit to exercise the office, which amounts legally to misbehaviour though not committed in connection with the office. 'Misbehaviour' as to the office itself means improper exercise of the functions appertaining to the office, or non-attendance, or neglect of or refusal to perform the duties of the office." 8 E. HALSBURY, LAWS OF ENGLAND 1107 (4th ed. 1974).

89. R. BERGER, *supra* note 64, at 162.

90. *See id.* at 124-25, 132; *Independence of the Federal Judiciary*, *supra* note 55, at 447; Shartel, *supra* note 20, at 871 n.3, 879 n.22, 894 n.70.

91. R. BERGER, *supra* note 64 at 132-35, 174-80.

tend that the Framers included the grant of good behavior tenure in order to distinguish the judges' term of office from that of other civil officers. Unlike other civil officers, federal judges have a term of office which is fixed by the Constitution[92] and which is conditioned on good behavior. This distinction confers not only the obvious ability to remove civil officers by means other than impeachment, but is subtle evidence that good behavior tenure can only be tried in the impeachment forum.[93] Therefore, there exists a higher standard of removal for a judge than for his fellow officials.[94] That this higher standard is created by and justifies the good behavior distinction is reflected in the case law.[95]

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92. Otis, *supra* note 20, at 48.

93. *See Independence of the Federal Judiciary, supra* note 55, at 442; Lawrence, *The Law of Impeachment,* 15 A. L. REG. 641, 653 (1867).

94. "The Constitution declares that the judges shall hold their offices during good behavior. This implies that other officers shall hold their offices during a limited time, or according to the will of some person; *because if all persons are to hold their offices during good behavior,* and to be removed only by impeachment, *then this particular declaration in favor of judges will be useless."* 1 ANNALS OF CONG. 482 (Lawrence ed. 1834) (emphasis added).

95. *In re* Hennen, 38 U.S. (13 Pet.) 230 (1839), allowed removal of a civil officer before expiration of his term, where the tenure was "not fixed" by the Constitution. *Id.* at 258. *See also* Parsons v. United States, 167 U.S. 324 (1897), wherein President Cleveland sought to remove a United States attorney prior to the expiration of his four-year term. Parsons sued to recover the deficiency in salary which resulted from his untimely dismissal. Relying on *In re Hennen,* the United States Supreme Court held that a President has the power to remove a civil officer prior to the expiration of his appointment. Justice Peckham distinguished an earlier case, United States v. Guthrie, 58 U.S. (17 How.) 284 (1854), which involved the successful removal of a federal judge by the President on the ground that Chief Judge Goodrich, being a territorial judge (Territory of Minnesota), was an article I judge and did not fall within the tenure afforded article III judges. With regard to article III judges, the Court said: "The judges of this class, by the express terms of the constitution, hold their offices during good behavior. It comprehends the judges of the supreme court, and of the various judicial circuits and districts to which the United States are [*sic*] subdivided." *Id.* at 289.

Parsons was followed in a similar removal case, Shurtleff v. United States, 189 U.S. 311 (1903), in which the Court upheld President McKinley's revocation of Shurtleff's appointment as a customs agent. Shurtleff claimed that the President lacked authority, under either the Constitution or the relevant statute, to remove him. The Court held against Shurtleff, distinguishing removal of judicial officers from that of other civil servants. "The tenure of the judicial officers of the United States is provided for by the Constitution, *but with that exception* no civil officer has ever held office by a life tenure since the foundation of the government." *Id.* at 316 (emphasis added).

Myers v. United States, 272 U.S. 52 (1926), involved the premature removal of a postmaster. In *Myers,* the act which established the position of postmaster was held to be unconstitutional given that it predicated the President's power of removal upon the senate's consent. *Myers,* which firmly established the ability of the executive branch to discipline its own members, reinforced the position that lesser civil officers are not to be treated like federal judges on the issue of removal. In dicta, the Court suggested that federal judges

Even granting that judges possess a "life" or "constitutional" tenure, the exclusivists argue that this tenure is conditioned upon good behavior.[96] Impeachment charges, moreover, can be brought for misbehavior which does not attain a level of high crimes and high misdemeanors.[97]

The Senate has twice convicted judges under articles of impeachment that did not charge indictable crimes. The first federal impeachment was for habitual drunkenness and insanity; the most recent conviction, the 1936 impeachment of Judge Halsted L. Ritter, was based on behavior which brought the "court into scandal and disrepute to the prejudice of the said court and public confidence."[98]

The gap between "bad conduct" and impeachable behavior has created an insurmountable hurdle for judicial tenure acts which provide for removal by means other than impeachment.[99]

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could be removed only by impeachment. "[Regarding] the removal of judges, whose tenure is not fixed by Article III of the Constitution, and who are not strictly United States Judges under that article . . . [the] argument is that, *as there is no express constitutional restriction as to the removal of such judges,* they come within the same class as executive officers, and that statutes and practice in respect of them may properly be used to refute the authority of the legislative decision of 1789 and acquiescence therein. The fact seems to be that judicial removals were not considered in the discussion in the First Congress, and that the First Congress . . . and succeeding Congresses until 1804, assimilated the judges appointed for the territories to those appointed under Article III, and provided life tenure for them, while other officers of those territories were appointed for a term of years unless sooner removed." *Id.* at 154-55 (emphasis added).

Humphrey's Executor v. United States, 295 U.S. 602 (1935), involved removal of a Federal Trade Commissioner appointed for a fixed term. *Myers* and its predecessors were distinguished only to the extent that those cases involved purely executive officers who could be removed at will, whereas a commissioner of the Federal Trade Commission, a "non-partisan . . . , quasi-judicial and quasi-legislative" body, could only be removed upon a showing of inefficiency, neglect of duty or malfeasance in office. *Id.* at 624. The distinction acknowledged, Justice Sutherland reaffirmed the constitutional tenure of federal judges. "In the face of the unbroken precedent against life tenure, *except in the case of the judiciary,* the conclusion that Congress intended that, from among all other civil officers, appraisers alone should be selected to hold office for life was so extreme as to forbid, in the opinion of the court, any ruling which would produce that result if it reasonably could be avoided." *Id.* at 623 (emphasis added).

96. This view has also been expressed by the Supreme Court in McAllister v. United States, 141 U.S. 174 (1891), in which Mr. Justice Harlan suggests for the Court that life tenure and good behavior are not synonymous. Mr. Justice Field elucidated the conditional nature of good behavior tenure in his dissent. "In my judgment good behavior during the term of [an article III judge's] . . . appointment is the only lawful and constitutional condition to the retention of his office." *Id.* at 195 (Field, J., dissenting).

97. *See, e.g.,* 28 U.S.C. § 454 (1976), prohibiting a federal judge from practicing law.

98. Note, *The Exclusiveness of the Impeachment Power Under the Constitution, supra* note 55, at 335 n.39.

99. *See generally* Simpson, *Federal Impeachments,* 64 U. PENN. L. REV. 803 (1916).

The avoidance of explicit removal provisions and the "good behavior" language in the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 does not remove these constitutional barriers. That the Act provides a mechanism for judicial discipline other than impeachment raises the specter of constitutional objections. As long as the central constitutional issues remain unresolved, the legislation is constitutionally unacceptable.

Public Law No. 96-458 has not resolved the basic conflict between good behavior tenure and removal by impeachment—a discrepancy that cannot be reconciled without addressing the difficult issues of judicial independence.

C. Judicial Independence and the Separation of Powers

A major objective of the Framers of the United States Constitution was to distribute power among the branches of government. This objective was accomplished by a system of separate powers and of checks and balances. Apart from these checks, each branch was conceived as independent. What was meant by independence, however, is subject to two interpretations.

The nonexclusivists posit a corporate concept of independence. They believe that each branch need only be protected from interference by the other two branches, but not from itself. A tribunal of judges acting as a disciplinary body for fellow members of the judiciary is compatible with this interpretation.

The exclusivists take the view that a corporate concept of independence does violence to what is seen as the most compelling characteristic of the American judiciary: *absolute* independence. Absolute independence stresses *total* independence which is not limited to separation of powers. From an exclusivist point of view, therefore, the most offensive element of any type of judicial discipline legislation, whether or not an express provision for actual removal is included, is the element of judicial self-discipline.

The potential dangers of judicial self-discipline cannot be ig-

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Article II, section 4 indicates removal from office *on* impeachment, as opposed to *by* impeachment. It has been contended that removal is only a *result* of impeachment, and in fact impeachment proceedings have occurred after actual removal. *See* 3 A. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENATATIVES § 2006 (1907), a majority, but not two-thirds of the Senate held that the resignation and its acceptance of William Belknap, Secretary of War, after all the testimony on the question of his impeachment had been taken by a committee of the House of Representatives, only a few hours before the Articles of Impeachment were actually adopted, was inefficacious. *See* 1 J. STORY, COMMENTARIES ON THE CONSTITUTION § 790 (3d ed. 1858) which indicates that the entire impeachment episode was inappropriate.

nored. Both "understanding indulgence [and] self-righteous condemnation" are unattractive possibilities in judging one's peers.[100] Public Law No. 96-458, by vesting the judicial councils and the Judicial Conference of the United States with the responsibility and authority to discipline the federal judiciary, invites these dangerous alternatives. Further, the vague disciplinary standard of "conduct prejudicial to the effective and expeditious administration of the business of the courts,"[101] provided in Public Law No. 96-458, is fertile ground for inequitable application.[102]

The case for absolute judicial independence is further buttressed since, given the historical experience of conflicts within the judiciary in England and in the colonies,[103] the Framers may have sought to protect judges from other judges, as well as from the legislative and executive branches:

> The wise authors of our Constitution provided for judicial independence because they were familiar with history; they knew that judges of the past—good, patriotic judges—had occasionally lost not only their offices but had also sometimes lost their freedom and their heads because of the actions and decrees of other judges.[104]

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100. Justice Story indicated in his *Commentaries* that if courts were to try offenses of a judicial character, they might suffer from that "immediate sympathy with the accused" arising from that "common professional, or corporation spirit, which is apt to pervade those, who are engaged in similiar pursuits and duties." 1 J. STORY, *supra* note 99, § 677, at 521-22, *quoted in* Kramer & Barron, *supra* note 55, at 466. Kramer and Barron suggest that the California Commission on Judicial Performance, discussed at notes 127-42 and accompanying text *infra*, has fallen prey to just such sympathy. "In the only case in which the Commission recommended a judge's removal, however, the California Supreme Court refused to follow the unamimous Commisson recommendations." *Id.*

101. Judicial Council Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, § 3(c)(1), 94 Stat. 2035 (1980).

102. The Framers were aware of the danger a vague standard could pose, which, as Professor Berger points out is why they specifically rejected "maladministration" as a standard for impeachment. R. BERGER, *supra* note 64, at 163. In addition to the Framers' concerns, it is suggested that the proposed standards of conduct would be so vague "as to violate fundamental concepts of due process." Holloman, *supra* note 12, at 145.

103. Infringement by the King and Parliament was not the only threat to independence with which history had provided the Framers. Intrusion by the King on the tenure of judges in colonies had produced conflict among the members themselves as to the entitlement to office. Such an instance was the battle for chief justiceship in colonial New Jersey as described in Smith, *An Independent Judiciary: The Colonial Background,* 124 U. PENN. L. REV. 1104, 1125-30 (1976). Moreover, various periods in English history had borne witness to internal conflict within the judiciary, such as the battle of writs between Coke and Bacon, T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 241-45 (5th ed. 1956); and frequent inconsistencies between the Courts of Equity and Law. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 246-51 (1908).

104. Chandler v. Judicial Council, 398 U.S. 74, 143 (1970) (Black, J., dissenting).

This view is further substantiated by the unique make-up given the judicial branch, compared with the other two.

The Constitution provides that the executive branch is organized as a hierarchy, with authority flowing from the chief executive to lesser civil officers appointed by him. In order to preserve the system and to promote efficiency, the power to appoint has been held to include the power to remove.[105] Accordingly, the executive branch maintains a very simple system of self-discipline, although subject to checks from the other two branches.

The legislative branch is composed of a confluence of individuals with coordinate responsibilities. Given the equality of membership, it would be entirely inappropriate to allow some of these members to remove or to discipline others absent express authorization from the Constitution. Hence, the Framers provided article I, section 4, the clear intention of which was to allow Congress to remove its own members.[106]

The judicial branch, like the legislative, is composed of equals. It differs from the legislative branch, however, in that no provision is provided for one group to discipline any other. The Constitution left it to Congress, *acting as a court,*[107] to impeach a jurist. The establishment of an extrajudicial court indicates that the Framers may not have wished the judges to have their own mechanism with which to discipline their own members.

Moreover, internal mechanisms do exist in the judiciary to assure that justice will be done, whether or not any particular judge cooperates. Higher courts have the ability to overrule lower courts or to issue writs of mandamus to judges who continue to ignore the law. The purpose of these checks is to redress any errors or misjudgments which may occur. Appeals and writs enable judges to correct what could be viewed as substantive error or abuse. The success of this system, however, depends upon the exercise of independent judgment by each judge. As one commentator has noted: "It should be kept in mind that the provisions for securing the independence of the judiciary were not created for the benefit of the judges, but for the benefit of the judged."[108]

The Framers were not unaware of this aspect of total indepen-

105. Myers v. United States, 272 U.S. 52 (1926).

106. Article I, section 4 of the United States Constitution provides: "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue writs of election to fill such vacancies." U.S. CONST. art. I, § 4.

107. *Id.*

108. Kurland, *supra* note 7, at 698.

dence of the judiciary. Achieving judicial independence had been historically elusive[109] and was hard fought for in England.[110] In the colonies, once judicial independence began to compete with executive power, it was the former which was sharply curtailed.[111] Nor were the Framers unaware that they had selected a very cumbersome mechanism in impeachment;[112] indeed, such awareness may have been a significant factor in its selection. Apparently, the Framers were willing to accept the risk of potentially unimpeachable behavior which could produce an occasional incompetent or eccentric judge, given the benefits of judicial independence.

1. The Impact of Public Law No. 96-458 on Judicial Independence

In its report on the Judicial Conduct and Disability Act of 1979[113], ultimately passed as Public Law No. 96-458, the Senate Judiciary Committee claimed to have devised legislation which dodged the constitutional issues that plagued earlier judicial tenure legislation, thus avowedly achieving the desired goals of the

109. *See* notes 66-69 and accompanying text *supra.*

110. The struggle for independence by the judiciary had been ongoing in England, and judges there, at the time the Constitution was being formulated, had only recently been freed from the shackles of commission at the pleasure of the King.

111. In the English colonies, royal governors were instructed not to issue commissions with good behavior tenure to colonial judges. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions,* 39 FORD. L. REV. 1, 11 (1970); Smith, *An Independent Judiciary: The Colonial Background,* 124 U. PENN. L. REV. 1104, 1112 (1976). The ostensible purpose for such exclusion was that "the state of learning in the colonies was so low that it was with difficulty that men could be found competent to administer the judicial offices." Ervin, *supra* note 19, at 112. The colonists were fully aware of the impact which British-appointed and immediately removable judges would have on resulting court decisions. This potential became clear when the limitations on colonial judges' commissions came as a response to the ever-loosening grip held by the King over the restless colonies.

Finally in 1772, in a move to assure total dependence on the Crown, King George III established a fixed salary for superior court judges in Massachusetts. This action, which prevented judges from receiving their usual grants from the Colonial House of Representatives, Council and Governor, exposed the delicate nature of judicial independence over which control could be so immediately and completely exerted. The obvious implictions, which by then had been institutionalized, prompted the outrage reflected in the Declaration of Independence: "[h]e [George III] has made judges dependent upon his will alone for the payment of their salaries." THE DECLARATION OF INDEPENDENCE 1776. *See also* R. BERGER, *supra* note 64, at 142. Berger interprets this grievance as support for the reason that no colonial constitution provided for *scire facias* removal.

112. *See* note 74 *supra.*

113. S. 1873, 96th Cong., 1st Sess. (1979), amended to include revisions to the judicial councils, was originally known as the Judicial Conduct and Disability Act of 1979. The amended version ultimately became the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. *See* note 38 *supra.*

prior legislation while preserving valued judicial independence.[114] Despite these claims, the disciplinary provisions of the Act contravene the Constitution. Further, this legislation threatens to undermine the vitality and independence of the American judiciary.

Public Law No. 96-458 strikes at the very heart of judicial independence, giving the heretofore strictly administrative judicial councils the power to discipline judges.[115] One need only review the famous *Chandler* case to recognize the serious ramifications of investing judicial bodies with disciplinary authority over their brethren.

Chandler v. Judicial Council[116] involved "political and personal hatreds of three decades"[117] between District Judge Stephen S. Chandler and his principle adversary Alfred P. Murrah, Chief Judge of the Tenth Circuit Court of Appeals. Chandler's activities, both on and off the bench, were undoubtedly egregious examples of judicial abuse;[118] however, the most alarming aspect of this case was the decision of the Judicial Council, headed by Murrah, which took matters into its own hands.

Proceeding on the very language which is the essence of Public Law No. 96-458,[119] the Judicial Council attempted to strip Judge Chandler of his judicial powers, primarily by relieving him of cases already assigned to him and refusing to assign him additional cases. Chandler appealed to the Supreme Court and challenged the authority of the Judicial Council. However, before the Supreme

114. "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." JUDICIAL CONDUCT ACT REPORT, *supra* note 80, at 4.

115. The purpose of the judicial councils, as indicated by their legislative history, was to act as mere housekeeping bodies, specifically to facilitate the correction of problems revealed in the quarterly reports of the Administrative Office of the United States Courts. *See Removal of Federal Judges, supra* note 69, at 1406 n.75. It is well established that the judicial councils were at no time given "[any] power whatsoever to discipline any federal judge for the omission or commission of any act." Ervin, *supra* note 19, at 125. *See also* Holloman, *supra* note 12, at 138; *Removal of Federal Judges, supra* note 69 at 1406.

116. 398 U.S. 74 (1970).

117. J. GOULDEN, THE BENCHWARMERS 189 (1974).

118. For example, Chandler had been a defendant in both civil and criminal litigation as well as the subject of various disqualification battles for conflicts of interest. For a colorful narrative of these incidents as well as of Chandler's courtroom presence, see *id.* at 184-224.

119. "Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within the circuit. The district judges and bankruptcy judges shall promptly carry into effect all orders of the judicial council." 28 U.S.C. § 332(d) (1981) (*as amended by* Pub. L. No. 96-458).

Court made its determination, the Judicial Council backed down and restored Judge Chandler's judicial power.

Although the Supreme Court declined to rule on the substantive issues posed by *Chandler,* on the grounds of lack of jurisdiction,[120] Justices Black and Douglas both issued strong dissents. Douglas declared the "case ripe for decision [with] no excuse for declining to decide it"[121] and called the order of the Judicial Council a *de facto* impeachment without constitutional power.[122] Beyond the constitutional limitation, Douglas recognized the inherent danger of compromising judicial independence:

> The mood of some federal judges is opposed to this view and they are active to make all federal judges walk in some uniform step. What happened to [Chandler] is not a rare instance; it has happened to other federal judges who have had perhaps a more libertarian approach to the Bill of Rights than their brethren . . . . All power is a heady thing as evident by the increasing effort of groups of federal judges to act as referees over other federal judges.[123]

Public Law No. 96-458 institutionalizes the mechanism for abuse which alarmed the dissent in *Chandler,* and which they found unconstitutionally tantamount to impeachment.[124] The Act

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120. The Court held that Judge Chandler had failed to make a case for the extraordinary relief of mandamus or prohibition. 398 U.S. at 89.

121. *Id.* at 133 (Douglas, J., dissenting).

122. *Id.* at 137 (Douglas, J., dissenting). Justice Douglas' concerns were echoed by Senator Helfin in considering legislation which would become Public Law No. 96-458: "I consider it a serious mistake to merely gloss over the phrase . . . 'shall hold their offices . . . .' It would seem that any bill creating a court that has the power to take away a judge's caseload, even on a temporary basis, would certainly indirectly violate this provision of the Constitution. I think it important to remember that a federal judge is a civil officer serving in the public interest. I do not feel that any judge who has been stripped of his duties and responsibilities is 'holding office . . . .'" JUDICIAL CONDUCT ACT REPORT, *supra* note 80, at 22 (statement of Senator Howell Helfin).

123. 398 U.S. at 137 (Douglas, J., dissenting).

124. After the Supreme Court dismissed the *Chandler* case, pressure developed in Congress to conduct an investigation to determine if Chandler's behavior constituted an impeachable offense. After a two-year investigation, the Judiciary Committee exonerated Chandler and additionally noted that the Judicial Council's action in stripping Judge Chandler of his power to hear cases "was equivalent to his removal as a judge . . . [and] completely beyond the legal authority of the council . . . . Confronted with seemingly complete opposition and exasperated by intemperate, if not unreasoning, attacks on their judgment and integrity, the circuit judges let themselves be goaded into action that was not within their power to undertake." J. GOULDEN, *supra* note 117, at 242. The report also noted that "the *Chandler* Case underscored the need for a new mechanism, other than the impeachment process, to resolve questions of judicial behavior and fitness to continue to hold judicial office." *Id.* The report found, however, that "the bitterness and animosity" between Judges Murrah, Bohanon and Chandler "impaired their future usefulness and brought dis-

alleges safeguards against such abuse;[125] however, when judges are allowed to judge their own, these safeguards may prove inadequate.[126] A related threat is revealed by the recent experience with the California Judicial Commission.

2. *The California Experience*

California has had a judicial discipline commission since 1966.[127] The California Commission on Judicial Performance differs from the federal system under Public Law No. 96-458, however, in that it is intended to be an independent[128] constitutionally created[129] agency rather than part of the judiciary. Yet the California system illustrates the hazards to public confidence in the judiciary that even a quasi-in-house commission can produce.

The Commission was recently asked to investigate an allegation that two California Supreme Court decisions[130] were held back

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credit upon their courts." *Id.* Further, the report found that many of the actions against Judge Chandler were "vindictive" and "motivated more by malice than by merit. . . . The plotting and intrigue among the participants in this feud ultimately resulted in a political cabal which does no credit to any of the parties involved." *Id.* at 243. This finding suggests that judicial self-discipline may not be the proper mechanism, short of impeachment, to discipline judges.

125. Referral of a complaint to the Judicial Conference of the United States is fashioned as a safeguard to prevent *Chandler*-type abuses where two or more judges within a circuit are pitted against each other in what may be personal rivalry or an ethical conflict. HOUSE COMM. ON THE JUCIDIARY, *supra* note 39, at 12. It seems an unrealistic safeguard, however, given that although Chandler was a judge "virtually unknown publicly outside his own state [of Oklahoma], he had both admirers and detractors throughout the federal judiciary." J. GOULDEN, *supra* note 117, at 188-89, 219.

126. *See* notes 104-12 and accompanying text *supra*. The federal judiciary is in some respects an intimate club, and referral of a problem complaint regarding one member to other members of this club might invite judges to take sides.

127. Frankel, *What's in a Name?—California Sets the Style*, 41 L.A.B. BULL. 189 (1966).

128. Whereas the California Commission is slated as independent, this independence becomes suspect given that all but two members (who are named by the State Bar of California) are gubernatorial and California Supreme Court appointees.

129. Even absent the historical emphasis on impeachment and judicial independence, California, like every other state which has enacted a judiciary disciplinary system, has seen fit to do so by constitutional amendment. JUDICIAL CONDUCT ACT REPORT, *supra* note 80, at 22 (statement of Senator Howell Helfin).

130. People v. Tanner, 23 Cal. 3d 16, 587 P.2d 1112, 151 Cal. Rptr. 299 (1978), *rehearing granted*, 24 Cal. 3d 514, 596 P.2d 328, 156 Cal. Rptr. 450 (1979); Fox v. City of Los Angeles, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978). *Tanner* involved the California "use a gun, go to prison" statute, popular with law enforcement groups, but which was overruled by the California Supreme Court. *Fox* concerned the legality of the City of Los Angeles placing a lighted cross atop city hall during the Christmas season. The California Supreme Court held that the city could not display the cross.

pending the retention election of four California justices, including that of the California chief justice.[131] There were accusations that the decisions had been purposely held back because their controversial nature could result in a protest vote at the polls.[132] The subsequent investigation embroiled the Commission, as well as the California Supreme Court itself, in the controversy.

California constitutional provisions require that any preliminary or probable-cause hearings be strictly confidential.[133] In an effort to overcome the public perception of misconduct generated by the election day media blitz, however, a special rule was promulgated to overcome the constitutional restriction of confidentiality and open the hearings to the press and public.[134] This decision shifted the focus of media coverage from the issues at hand to the "[i]nternal operating procedures of the . . . Court . . . and personal opinions, habits and prejudices of the members. . . . The minutiae of the deliberative process were unveiled and discussed, [with the result that] the public [was] entertained and titillated, and the California Supreme Court extensively damaged."[135]

The situation was exacerbated when, after it had piqued the media's "prurient interest,"[136] Associate Justice Stanley Mosk brought suit to have the hearings closed.[137] Mosk was successful, and on October 18, 1979, the hearings were closed. A month later, the Commission reported that the investigation had been terminated and that "no formal charges [would] be filed against any Supreme Court justice."[138]

It came as no surprise that the Commission Hearings, designed to enhance public confidence in the California Supreme Court, were seen as a "whitewash . . . investigation by an in-house

131. Under California law, appellate court justices must be confirmed every 12 years by voters in order to remain on the bench.

132. "In the election, the chief justice was retained by only fifty-two percent of the vote, the smallest margin by which any justice in California has ever won retention. It is not over-speculative to conclude that had the court decided and released the *Tanner* and *Fox* opinions before the election, Chief Justice Bird could well have been defeated." Cameron, *The California Supreme Court Hearings—A Tragedy That Should and Could Have Been Avoided,* 8 HASTINGS CONST. L.Q. 11, 13 (1980) (footnote omitted).

133. CAL. CONST. art. VI, § 18(f) (1849, amended 1976).

134. CAL. RULES OF COURT, Rule 902.5 (West 1981).

135. Cameron, *supra* note 132, at 18.

136. Remarks of Associate Justice Stanley Mosk, Administrative Law Judges Symposium (Feb. 15, 1980).

137. Mosk v. Superior Ct., 25 Cal. 3d 474, 601 P.2d 1030, 159 Cal. Rptr. 494 (1979).

138. CAL. COMM'N ON JUDICIAL PERFORMANCE, REPORT ON STATUS AND ANNOUNCEMENT OF RESULTS (Nov. 5, 1979).

group."[139] As a result, the public viewed the system with contempt and suspicion, which tainted its perception of individual judges and the judiciary as a whole.

The judiciary relies on trust for its strength.[140] Accountability must be forced from without, not from within. If judges, or a select group appointed by the judges, are allowed to judge their own, public trust is shaken. To overcome this mistrust, the disciplinary body must open up its proceedings; but the price of this action is to expose the entire judiciary to unprecedented influence in the form of public approval or disapproval, which may eventually be reflected in its decisions.[141]

The authors of Public Law No. 96-458 were well aware that public disapproval could influence and harm the overall functioning of the judiciary. They recognized that disgruntled litigants might bring vexatious complaints against particular judges. The authors of the Act thus built into the system the same sorts of insular safeguards of confidentiality[142] which cost the California system its credibility. The root of the problem, however, is not confidentiality; it is the very structure of a system which requires judges to judge their own.

Conclusion

Traditionally, judicial reform measures follow closely on the heels of political necessity. Consistent with this phenomenon, the proposal recently approved by Congress has been said to have been induced by the public's "crisis of confidence"[143] in government. Public demand for governmental accountability has produced a condition which the Act attempts to address by requiring judges, like other public officials, to be responsive to public sentiment.

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139. 65 A.B.A.J. 1796, 1797 (1979).

140. *Id.* at 1798.

141. "Appellate lawyers say the [California Supreme Court] is no longer a collegial body and lawyers must look to each individual justice for a decision. As if to bear that out, court opinions since the hearings have lineups of dissents and concurrences that mock all past experience. The decisions themselves have a decidedly more conservative tinge than those issued prior to the hearings." *Id.*

142. The presiding judicial council is provided with discretion to dismiss any complaints which it views as nonmeritorious. A complainant can ask for a review of the dismissal of a complaint at this stage, yet the reviewing body is again a strictly internal one: there is no appellate review of its actions. Conceivably, a definitionally well-founded complaint could be avoided by subsequent dismissals. Tight internal control is facilitated by strict confidentiality. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, § 3(a)(14), 94 Stat. 2035 (1980).

143. Holloman, *supra* note 12, at 135.

There have been previous efforts to remove judges for various reasons, but this recent trend toward strict accountability reflects a modern perception of the judiciary. The proponents of the judicial tenure legislation do not view the judiciary as sacred and would not absolutely "immunize them in any way."[144]

It has been suggested that the words of the Constitution concerning good behavior, tenure, impeachment and removal, which have been the source of much recent debate, had a clear meaning for the Framers. The Framers exalted the judiciary as a vital element of a strong democracy, an element which should be free from the ongoing scrutiny and periodic votes of confidence which are typical of other governmental bodies.[145] This perception is consistent with the view that impeachment is the sole method of removal. The practical result of Public Law No. 96-458 is to create a system of constructive impeachment by "vest[ing] exactly the same power . . . by a different name."[146] The ultimate result will be to render the impeachment process a dead-letter. There will be neither incentive nor purpose to turn to the admittedly cumbersome process, the very nature of which has acted as the catalyst to this "supplemental" process.

Were the Framers shortsighted in fashioning only an impeachment device? The system produced a federal bench with a high level of competence and integrity.[147] The nonexclusivists argue that the small number of judges impeached reflects the cumbersome nature of the impeachment process and demonstrates the need for a supplemental mechanism, but there is certainly no guarantee that the recent passage of Public Law No. 96-458 will achieve the end of insuring greater public confidence in the judiciary and, by implication, improve the quality of justice generally. Even assuming that the Act will effectively do so, the ultimate costs may outweigh the short-term benefits.

There is, at present, a sense that the members of the federal judiciary are competent, conscientious and dedicated individuals. The Act threatens to change this public perception and to subject

144. *1976 Hearings, supra* note 37, at 106 (statement of Prof. Raoul Berger).

145. Stolz, *supra* note 55, at 663 n.22.

146. Otis, *supra* note 20, at 27.

147. The numbers corroborate this quality in that of the more than 2000 persons who have served as federal judges, fifty-five have been subjected to formal investigation, and of these, only eight have been impeached by the House of Representatives. Only four of the eight were convicted by the Senate and thrown from office. R. BERGER, *supra* note 64, at 166; Thompson & Politt, *Impeachment of Federal Judges: An Historical Overview*, 49 N.C. L. REV. 87, 92 (1970). *See generally* JUDICIAL CONDUCT ACT REPORT, *supra* note 80, at 5.

the judiciary to the same investigatory rigor which has characterized legislative and executive investigations. Additionally, the Act risks sacrificing the Framers' efforts to ensure a constitutionally guaranteed independent judiciary in the name of public pressure for judicial accountability.

Ultimately, public confidence will not be engendered, but eroded. Aggrieved litigants will be given the opportunity to lodge personal complaints against individual judges or against the disciplinary body itself. For the legitimate complaints, the publicity which inevitably will be attached to the discipline of a few "bad" judges, will disproportionately diminish the reputation of the judiciary as a whole.

Constant public scrutiny is foreign to the judiciary and could well discourage qualified lawyers from serving on the federal bench. The necessity of attracting top-quality jurists to assure a strong judiciary outweighs the danger of permitting a corrupt, incompetent or eccentric judge to preside, given the checks which already exist within the judiciary. The tremendous prestige and honor associated with the federal bench have traditionally compensated jurists for the strenuous demands of the job and for the economic sacrifices they made in leaving private practice to assume a judgeship. Subjecting individual jurists to investigations could well discourage qualified people from making these sacrifices.

A concern with accountability to one's peers might also encourage conformity with the views of the current power block and discourage the type of creative thinking that characteristically gives the common law the flexibility it needs in order to meet changing conditions.[148]

Finally, the most dangerous aspect of disciplinary legislation is the intrusion of politics into a traditionally politically immune body.[149] The origins of judicial tenure legislation are rooted in po-

148. This was Justice Douglas' concern in his dissent in *Chandler*. *See* note 123 and accompanying text *supra*.

149. It has been suggested that total independence of judges is the only effective way to cleanse them from the political process from which their appointments arose. "But certainly there is no point in tinkering with the independence of federal judges by subjecting their tenure to control of other federal judges appointed by the same defective process. Without their independence, the federal judges will have lost all that separates them from total subordination to the political processes from which they ought to be aloof." Kurland, *supra* note 7, at 667. *See also* J. GOULDEN, *supra* note 117, at 21-74 (1974).

Preserving this vital forum of free expression from political influence was a matter of continuing concern to Justice Douglas when he declared, "It is time that an end be put to these efforts of federal judges to ride herd on other federal judges. . . . Federal judges are entitled, like other people, to the full freedom of the First Amendment . . . . I search the

litical concerns. In times of national crisis, the courts conceivably could be purged for political purposes.[150] The judiciary must be able to withstand the change in political winds, for "[i]f there is any lesson to be drawn from the political turmoil of recent years, it is the indispensable need for a judiciary able to serve, in the words of Edmund Burke, as a 'safe asylum' during times of crisis."[151]

Concerns change from generation to generation, but the continuity and independence of the federal judiciary, once lost, may be gone forever.

Constitution in vain for any power of surveillance that other federal judges have over those aberrations. Some of the idiosyncrasies may be displeasing to those who walk in more measured, conservative steps. But those idiosyncrasies can be of no possible *constitutional* concern to other federal judges." Chandler v. Judicial Council, 398 U.S. 74, 140-41 (1970) (Douglas, J., dissenting) (emphasis added).

150. *See* Holloman, *supra* note 12, at 150.

151. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681 (1979).